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**THE ROLE OF HUMAN RIGHTS IN DEMOCRATIZING GOVERNANCE IN
AFRICA: CASE STUDY OF KENYA AND BOTSWANA**

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R50/87620/2016

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**A RESEARCH PROPOSAL SUBMITTED IN PARTIAL FULFILMENT FOR THE
DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES**

DECEMBER 2018

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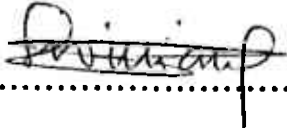
Declaration

Declaration by Student

I, William Sila, declare that this project paper is my original research work and has not been submitted to any other institution for an academic award

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Date:
5/12/2018

Dedication

This research paper is dedicated to my wife Faith Munini Sila for her wonderful support during the research. In addition, I wish to dedicate this paper to the champions of human rights across Africa who continue to tell the good stories of courage and positivity in promotion of human rights. Finally, I wish to dedicate this paper to those whose rights have been violated in one way or another. The fight continues until all rights are realized.

Acknowledgement

I wish to acknowledge the wonderful support from my family and friends during the research process. Special mention goes to Prof. Maria Nzomo for her excellent guidance during the writing of this paper. I wish to acknowledge Prof. David Ndi, Managing Director, Africa Economics, Prof. Ada Ordor, Centre for Comparative Law in Africa, University of Cape Town, South Africa, Dr. Martin Ouma, Institute of Diplomacy and International Studies, University of Nairobi, Ms. Sheila Masinde, Transparency International Kenya, Ms. Tina Alai, Advocate, Physicians for Human Rights Kenya (P4HR), Ms. Agnes Odhiambo, Human Rights Watch, Kenya and Mr. Houghton Irungu Amnesty International who shared very insightful information during the preparation of this thesis paper. I wish to acknowledge the University of Nairobi for the opportunity to continue sharing in the body of knowledge.

Abstract

Human rights play a key role in democratizing governance. The OAU and later the AU have developed key democratic governance frameworks. However, despite these efforts, democratic governance seems to fledge across the continent. Key issues among them corruption, abuse of power, poverty, economic stagnation, globalized diseases including Ebola and HIV, climate change, mutilation of constitutions to extend presidential term limits, blatant violations of basic human rights, facades in the name of elections among other key issues continue to challenge each crop of leader in Africa.

The main objective of this study was the assess and examine the role of human rights in democratizing governance in Africa with a case study of Kenya and Botswana. Specific objectives focused on an analysis of the democratic governance frameworks in Africa, Kenya and Botswana with successes and failures of these frameworks. The study combined both primary and secondary data to assess and examine the aspects of democratic governance.

The study findings indicate that despite the numerous frameworks, there has not been much progress in addressing some of the key issues. Challenges like corruption continue to be raised, the external debt continues to rise, elections continue to be contested, Africa continues to suffer from the scourge of HIV and Ebola as well as poverty related infections, use of currency as a political tool which has affected the prospects for a truly integrated Africa, Africa's odious debt which has been compounded by weak economies across different member states and climate change among other issues. To a large extend, African leadership lacks the political will to implement key democratic governance ideals. This is compounded by a lack of a shared sovereignty. However, there remains hope in countries like Botswana and Mauritius which have been a democracy since independence.

The pervasive environment compounded by unrest has hampered efforts to truly democratize. In the 1980s and 90s, Africa's democratic governance was manifested through the abandonment of multi-party to single party states, the weakening of political systems including political parties and other key institutions of governance such as those vested with powers to address key issues like

corruption, the vicious suppression of any dissidents including forced exiles and vulnerability of power through coups.

The study concludes that there is need to enhance the democratization process in Africa by promotion of human rights. Key human rights frameworks must be promoted and their provisions upheld. In addition, the study recommends the need for political will to ensure that human rights are enhanced which will promote democratic governance.

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Abbreviations & Acronyms

ACDEG - The African Charter on Democracy, Elections and Governance

ACEC – Anti Corruption and Economic Crimes Act

AGA - The African Governance Architecture

AGP – African Governance Platform

APRM – African Peer Review Mechanism

AU – African Union

NEPAD – New Partnership for Africa’s Development

NHRI – National Human Right Institutions

OAU – Organization of Africa Union

SAPs – Structural Adjustment Programs

UDHR – Universal Declaration of Human Rights

UN – United Nations

1.0 Chapter One

1.1 Introduction

The first chapter of this thesis paper contains the background of the research study. In addition, it contains the statement of the problem of research, key research questions, the objectives for study, the research design and methodology and a chapter outline contain the layout of the other chapters.

1.2 Background of the Study

The term Governance has its roots in the Latin term “*gubernare*”. The Greeks on the other hand had the word “*Kubernaein*” which means “to steer.” The Oxford Dictionary describes governance as the manner of governing a state or organization¹. In 1997, the United Nation Development Program (UNDP) defined governance noted that governance processes entail a complex process of the management of political, economic and sociocultural values of a nation².

In defining governance, the World Bank defined governance highlighting the key role as that of the management of the social, economic and political pillars³. The report further highlighted the background of the structural adjustment programs in Africa, noting that the crises of leadership and governance in Africa was responsible for the dismal performance of economies across Africa thus necessitated the implementation of the Structural Adjustment Plans (SAPs). A key focus of the SAPs was transparency, accountability and judicial reforms which are all key pillars of good governance.

Naomi Chazan defines governance as the capacity to create a working relationship between different actors to promote a collective goal⁴. Galadima, in defining governance, highlights key issues including the process of handling power through direct representation of being entrusted with power by citizens. He further points that for one to ensure the provision of basic needs, the

¹ Oxford Learners Dictionary

² Bureau for Program Support, United Nations Development Program, Re-conceptualizing Governance, Discussion Paper No. 2, New York, 1997

³ World Bank, Governance, Washington, D.C., 1993

⁴ Chazan, N. Liberalization, Governance and Political Space in Ghana, in the Journal of Modern African Studies, Cambridge University Press, Vol. 31, No. 3, 1993

rule of the law must be applied to protect human rights. This, he notes is key to guarantee the welfare of the people and the pursuit for happiness⁵. Sliratha defines governance as the act and manner of managing public affairs. Sliratha further notes that essential links between the civil society and state including the constitution and key legal frameworks are developed through governance shaping decision making processes⁶. For a long time, studies on governance focused on governments as the main actors. However, from the 1980s, analysts broadened their focus to include other actors as part of governance which gave rise to discourse on human rights and their influence in the democratization of governance.

Studies around the democratization of governance have largely focused on the process which entails decision making and implementation. For citizens to benefit from the governance, several key issues must be fulfilled including making the process meaningful and participatory, upholding the rule of law, creating an effective and efficient structures of administration, operating transparently and with accountability, guaranteeing equitability, equality and inclusiveness in sharing of resources and accountability.

For democratization of governance to succeed, human rights must play a key role. The world adopted the 1948 Declaration of Human Rights as an assurance that the mistakes of that period would never be repeated again. The UDHR set out fundamental human rights to be protected, upheld as well as promoted universally. The rights called for the respect of inherent dignity as the basic underpinning of self-determination, justice, peace and development⁷. During this period, advocacy in lieu of promotion of human rights gained prominence across the world. These issues remain core to United Nation's agenda alongside development and security. Over the years, different frameworks and tools have been developed to enrich the advancement for democratic governance.

During the 20th century, Africa for a large part, failed on her quest for democratic governance and remained marginal in international relations affairs. Indeed, Hans Morgenthau once stated that

⁵ Galadima, H.S, Militarism and Governance in Nigeria, Journal of the Institute of Governance and Social Research, Vol 1, No 1, 1998.

⁶ Srilatha, P. Governance in India: The Issue of Corruption, New Delhi: Prentice- Hall of India. 2003

⁷ United Nations, General Assembly, Universal Declaration of Human Rights, Pallais, Paris, 1948

Africa was an empty space before the first World War⁸. In reflecting on the state of Africa's marginality in international relations, Kennedy Waltz said it would be ridiculous to try and construct a theory of international relations in Africa⁹. The 1990s saw the end of two important events namely the Cold War and the Fall of the Berlin Wall. Whereas the world powers played a key role in global events, Africa played a marginal role during this period and was instead the centre of proxy wars between the world powers.

However, Africa was still faced by numerous challenges including intra and interstate conflicts, poverty, climate change and global warming, the challenge of identity and globalized security challenges including globalized diseases like HIV, Ebola and Malaria. The scourge of HIV, which has ravaged Africa for three decades has negatively impacted on food security, labor and productivity. Feely, while writing on the changing landscape of HIV noted that HIV has impacted on the fundamental rights to development¹⁰. As at 2018, HIV continues to be an unprecedented human catastrophe. In the 20th century, there was a drop in the efforts to uphold and safeguard the fundamental rights of susceptible groups like women, children, adolescents, young people and key populations.

There was deliberate criminalization of certain groups including key populations, the limited access to harm reduction measures and lack of sufficient funding for health financing also affected the response to comprehensive care, treatment and support which impacted on issues of equality and access to the highest standards of physical and psychological health. This is despite the right to the utmost standards of mental and physical health being inalienable. These issues impacted on human development as Peter Piot noted in the journal *Squaring the Circle: AIDS, Poverty and Human Development*¹¹. The 21st Century has seen Africa steadily move up in the right direction with adherence to constitutionalism getting stronger across the continent. In addition, human rights continue to create opportunities for the democratization of governance with democratic and

⁸ Hans Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 1948

⁹ Kennedy Waltz, *Theory of International Politics*, 1979

¹⁰ Feeley, F. G. III, S. Rosen, and P. J. Connelly. 2009. *The private sector and HIV/AIDS in Africa: Recent developments and implications for policy*. In *The changing HIV/AIDS landscape: Selected papers for the World Bank's agenda for action in Africa, 2007-2011*, edited by E. L. Lule, R. M. Seifman, and A. C. David. Washington, DC: The World Bank. Pp. 267-293.

¹¹ Peter Piot, Robert Greener and Sarah Russell, *Squaring the Circle: AIDS, Poverty, and Human Development*, 2007

multiparty elections becoming the acceptable way of exchange of power in governments. The adoption of Article 30 on unconstitutional change of governments by the OAU in 1999 and the reaffirmation of the same by the AU in 2002 was a key step towards solidifying gains made in democratizing governance in Africa¹². In addition, civil society organizations have become stronger and more engaged in governance issues¹³.

The OAU as well as the AU have taken steps to address the fledgling democratic governance by establishing key frameworks. One such framework is the African Court on Human and People's Rights. In the 2000s, key developments included the creation of the Peace and Security Council and the Peer Review Mechanism for Africa. In 2004, states in the Great lakes region signed a treaty committing to respect the constitutional principles. The treaty further highlighted key issues that continue to plague Africa including bad political, economic and social governance systems, violations of human rights, massive disparities between the rights vested upon men and women, poverty and marginalization of communities, all resulting from bad governance was an important step towards solidifying gains made in democratic governance¹⁴.

Such is the important role of human rights that it featured prominently during the 2005 World Summit. The outcomes of the 2005 World Summit reaffirmed the UNs commitment to the respect for civil, political and economic rights. The outcome of the meeting was the commitment to uphold the rights of women and children, an issue that has often not been given the attention it deserves¹⁵. Human rights issues are key to Africa's 50-year Vision (Agenda 2063). Human rights are seen as the solution to global crises that continue to plague the world including governance crises. In 2015, 16 and 17, the AU dedicated the three years to the commemoration of human rights issues.

¹² African Charter on Democracy, Elections and Governance, 2007

¹³ United Nations Economic Commission for Africa (UNECA), *Striving for Good Governance in Africa*, African Governance Report, 2005

¹⁴ International Conference on the Great Lakes Region, *Regional Program of Action for the Promotion of Democracy and Good Governance, Project No. 2.1.1*, Regional Center on Democracy, Good Governance, Human Rights and Civic Education, September 2006

¹⁵ United Nations, General Assembly, *Sixtieth session Agenda items 46 and 120* Pg 26 - 31

1.3 Statement of the Research Problem

Despite Africa developing, adopting and accenting to different international and regional legal policies and frameworks on democratic governance, the continent continues to be rated poorly in the last five decades on democratic governance. Meaningful democratic governance must focus on all rights vested upon a human being. Indeed, over half a century after independence in many African states, the question of interpretation of rights and the circumstances under which those rights can be curtailed continues to be a subject of philosophical debate and continues to evoke strong emotions. Further, the skepticism about the form, nature and interpretation of the democratic rights in legal and social practices continues to evoke strong emotions for many states.

The lack of viable institutions, scarce training, lack of human resource and underdeveloped economies are some of the challenges that faced the first crop of African leaders and continues to challenge Africa five decades later. The challenge of political instability across several African countries and the lack of proper conceptual frameworks to address those challenges were a result of poor governance. A major challenge across Africa for a long time has been the lack of critical requirements including self-sustaining constitutional rules for sustaining democratic governance systems. With the AU, there are clear guideline on entrenching democratic governance in Africa.

However, there still exists challenges on the role that human rights must play to achieve the democratization of governance agenda in Africa. According to Lydia Polgreen, in 2007, evidence suggested that a large percentage of the African population had started to lose hope in any democratic process due to lack of strong political will to uphold and institute democratic governance across the continent. Challenges like corruption continue to make headline news across many African states, impoverishing the communities¹⁶. African countries have failed to learn from efforts of other regions like Hong Kong and Singapore. In both countries, the reduction of corruption was largely due to the establishment of independent offices. This process went hand in hand with key reforms to address corruption. However, across Africa, such institutions have more often than not been used to oppress anyone who goes against the government, thus watering down

¹⁶ Lydia Polgreen, Africa's Crisis of Democracy, New York Times, 2007

the fight against corruption¹⁷. This study therefore seeks to assess and examine the role of human rights in democratizing governance in Africa with a case study of Kenya and Botswana.

1.4 Research Questions

The following questions will guide the research;

- i. What is the status of democratic governance frameworks in Africa?
- ii. What is the correlation between human rights and the status of democratic governance in Kenya?
- iii. What is the relationship between human rights and the status of democratic governance in Botswana?

1.5 Objectives of the study

1.5.1. Main Objective

The core objective will be to assess and examine the role of human rights in democratizing governance in Africa with the case study of Kenya and Botswana

1.5.2. Specific Objectives

- i. To examine and assess democratic governance framework in Africa
- ii. To assess and examine democratic governance framework as principles of human rights in Kenya.
- iii. To assess and examine democratic governance framework as principles of human rights in Botswana

1.6 Literature Review

This section will explore the literature relevant to this study. The works of other scholars will be critiqued and analyzed in this section.

¹⁷ Jakob Svensson, Eight Questions about Corruption, *Journal of Economic Perspectives*, Vol. 19, Number 3, 2005

1.6.1 The Democratic Governance Framework in Africa

The African Union is not short on democratic governance frameworks. There are key frameworks on fundamental issues including corrupting, elections and economic development among other key frameworks¹⁸. When the Cold war ended, the attention was shifted to Africa, which had developed the non-aligned movement to deal with development issues, while reaching out to both East and west, however, a precondition to aid in the name of austerity measures was imposed on African states.

However, a key question, that raised a lot of opposition from African leaders was whether democratic governance is a prerequisite for development. In remarking about development without human rights, first Tanzania president Julius Nyerere was quoted as saying that development would be considered first. He further reiterated that the key question in the mind of many African leaders was with regards to matters of development versus fundamental freedoms was whether promotion of human rights would in any way impede development, in which case, development would take precedence.

Decades later, UN Secretary General would be quoted saying that peace and development must exist in complementarity, further adding that both can't exist without respect to human rights.

Over this period, scholars tried to explain and theorize the factors that militated against democratic governance in Africa. However, the efficacy of the democratic governance foisted upon African states to fit in an African system is still the subject of great debate. The adoption of African Governance Architecture (AGA) by the AU in 2011 was a key step towards democratizing governance.

The challenges of the efficacy of the different initiatives created to promote democratic governance led to creation of AGA which was set up to help consolidate the gains made and implement the values of the AU Act and the Charter on Democracy, Elections and Governance (ACDEG)¹⁹. Mumo Nzau notes that the level of democratic governance is likely to increase following the

¹⁸ NEPAD Secretariat, NEPAD at work, Summary of NEPAD Action Plans, Ed, Pretoria, 2002

¹⁹ African Charter on Democracy, Elections and Governance, Addis Ababa, Ethiopia, 2007

ratification of an instrument of human rights, which enhances the process of democratization²⁰. Across Africa, different states have democratized at different rates including differences in the number of ratified treaties hence the reason why the African governance framework is still a challenge. A major challenge facing Africa today remains the implementation of instruments of human rights.

Despite Article 30 on unconstitutional change of governments being in place, there have been attempts at circumventing justice including the attempted refusal by President Yahya Jammeh of the Islamic Republic of the Gambia to step down (2017), the re-emergence of coups and military leadership including Mali (2012) and Zimbabwe (2018) and as well as attempts to change or amend the constitutions and extend or scrap off Presidential Term limits to reintroduce life presidents. Between 1952 and 2014, there have been 91 successful coup d'état which entrenched bad governance which have been inimical to the development of democratic governance.

The question of whether elections by themselves can satisfy the conditions for democratic governance continues to elicit strong debates. The lack of institutionalization of political parties has perpetuated the politics of tribe and ethnicity. In Kenya for instance, since 1992, new political parties have been formed every election cycle. The parties are bereft of any sound ideology or clear cultural value and are merely used as vehicles to propel candidates to political seats based on ethnic grounds.

According to Charles Manga, the challenges of globalization have affected the prospects for democratization of governance across Africa²¹. The globalization of diseases including Ebola and HIV, which have impacted negatively across Africa, famine and poverty, climate change and civil strife have all resulted in poor democratization of governance. The 2000 AU Act is a key democratic governance framework within the AU. It was developed as a successor of the OAU Charter which had several shortcomings. The AU has clear guidelines on entrenching democratic governance in Africa. Article 3 (g) and (h) states *inter alia*, the goal as the advancement of

²⁰ Mumo Nzau, *Reassessing the Impact of International Human Rights Regimes on Democratization*, *International Journal of Scientific Research and Innovative Technology*, no 10, 2016, pp 57

²¹ Charles Manga, *The African Union, Democracy and Good Governance*, 2012

democratic governance principles in accordance with the ACHPR²². However, Article 4 (g) has watered down these gains as it limits the ability by AU member states to intervene in case of violations of human rights. This perhaps explains why states did not intervene immediately when the Rwanda genocide broke out despite the availability of such a provision under Article 4 (h) and (j). In addition, Article 4 (m) to (p) may contain key provisions including issues of democratic governance and the denunciation of undemocratic change of regimes which forms the core of the democratic governance agenda in present day AU. However, these provisions seem to be watered down by Article 4 (g) whose wording creates loopholes in the enforcement mechanism.

However, these actions are mere guiding principles whose implementation is dependent on the political will within the AU member states. For instance, during the 1994 Rwanda genocide and the 2014 - 2016 Ebola Crisis in West Africa, the AU failed to act decisively and immediately despite the issues being of international humanitarian and health concerns. The tinkering of the AU exposed her soft underbelly on addressing serious issues of human rights violations. Michael Barnett notes that despite the UN being aware of the impending humanitarian crisis in Rwanda, bordering on crimes against humanity, nothing much was done.

The choices cradled by moral decisions were part of the reason why the UN and the AU tinkered with the decision to address the crisis²³. Decades after the failure to act decisively and swiftly in Rwanda, the AU continues to act indecisively on key violations of human rights including human trafficking, intra and interstate conflicts among other key human rights violations. The colossal traumas occasioned by ignorance, blatant violations and contempt of human rights in the 20th century has been transferred to the 21st century. However, the unanimous adoption of Responsibility to Protect (R2P) was seen as a step to address human rights abuses

Little has been achieved using this framework. The AU's weak implementation and enforcement mechanism continues to be a theme of discussion. In 2015, the AU failed to intervene immediately in South Sudan crisis and the Burundi Crisis. The AU is often accused of moving from non-

²² African Union, Constitutive Act, 2000

²³ Michael N. Barnett, *Eyewitness to a Genocide, The United Nations and Rwanda*, Cornell University Press, 2012

interference to non-indifference in her approach such violations²⁴. The declaration by the AU on unconstitutional change of governments as outlined under Article 4 (p) remains vague as there are still debates on what constitutes an illegitimate change of administration. For instance, does amending a constitution to scrape or extend the presidential term limit amount to an undemocratic change of power or is it limited to a coup? There have also been questions on the implementation mechanisms within the AU to ensure there are no unconstitutional change of governments within Africa.

Key issues around separation of power within the arms of government, promotion of political pluralism within political systems, promotion and enhancing of the role of the civil society, promotion of gender balance, promotion of the press freedom rights²⁵ are issues that have been discussed within Africa as they have a direct bearing on the democratization of governance.

Another key democratic governance framework is the 2002 Duran declaration. This declaration was adopted to ensure there is accountability and mandate in any elected government as the representative of the people. Among its key principles is that any voting process must be free and fair.

The issue of fairness in an election was raised during the 2017 Kenyan General Elections, where the Supreme Court in Presidential Petition No 1. of 2017 between *Raila A. Odinga & another vs the Independent Electoral and Boundaries Commission & four others and Attorney General & Another* ruled that the elections were not held according to the Constitution and the applicable laws²⁶. In 2007, The AU adopted a charter focusing on key areas of democracy and elections. Following the requisite number of ratifications needed, the charter started operations in 2012, as a normative framework to steer democratic governance including addressing the perennial challenge of undemocratic change of régimes.

²⁴ International Refugee Rights Initiative, *From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect*, 2017

²⁵ African Charter on Human and People's Rights, 1981

²⁶ Kenya Law, *In the Supreme Court of Kenya at Nairobi, Presidential Petition No. 1 of 2017, Raila A. Odinga & another vs the Independent Electoral and Boundaries Commission & four others and Attorney General & Another* (Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki and Lenaola, SCJJ), 2017

Despite Article 23 (5) of this charter declaring that an undemocratic change of régime constitutes any alteration of the applicable laws²⁷, such amendments have since been done in several countries including Uganda (Constitution Amendment Bill No. 2 of 2017), Chad in 2017, Cameroon, Gabon and proposals to change the constitution in South Sudan in 2018 and Burundi, where a poll was conducted to extend the term limit. The AU seems to be constrained by the ambiguous nature of policies and frameworks in addressing these issues. More often than not, there have been spurious reasons to explain the need for such amendments and mutilations to the constitutions.

However, this challenge is not merely an African problem. In Russia, President Putin was voted in for a fourth term in March 2018 while in China, the Communist Part voted to abolish Presidential Term Limits which made President Xi Jinping a life President, and the most powerful political figure in China²⁸. The situation is not all grim as countries in West Africa have by a large part adhered to constitutionalism. One such leader was Liberia President Hellen Johnson Sirleaf who handed over power peacefully after serving her two terms to George Weah.

Other organs for democratizing governance within Africa include the 2002 African Peer Review Mechanism established as Africa's democratic governance self-assessment framework and the 2004 Pan African Parliament, the 2010 New Partnership for African Development (NEPAD) and the Peace and Security Council (PSC) which was created to replace the defunct Central Organ of the Mechanism for Conflict Prevention, Management and Resolution.

1.6.2 The democratic governance framework as principles of human rights in Kenya

The creation of key legislative frameworks under which governments can operate is subject to democratic governance which influences how human rights are protected and vice versa. In societies where power has been concentrated among the elites, there have been documented cases of abuse of human rights. The 1948 UDHR forms the basis under which laws are built.

“The will of the people shall be the basis of the authority of government; this will shall be

²⁷ African charter on Democracy, Elections and Good Governance, Article 23 (5), 2007

²⁸ Cherly Hendricks and Gabriel N. Kiven, Presidential Term Limits: Slippery Slope Back to Authoritarianism in Africa, University of Johannesburg, May 2018

expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²⁹”

However, despite these provisions, Kenya’s democratic gains have not been fully consolidated. Successive elections have been contested in court. In Kenya, one of the darkest periods happened after the disputed election results in 2007 saw over 1000 people killed. At the turn of the Millennium, in Kenya, there was renewed hope in consolidating democratic gains. What was seen as a period for change turned to be a period where democratic space was stifled. Graft deepened, the opposition parties were scuttled and stifled and the hold around the presidency became stronger.

Major graft cases rocked Kenya in the 90s and 2000s including the Goldenberg Scandal which saw Kenya lose an estimated \$1 billion shillings lost through the export compensation scheme.

One of Africa’s plans is to create a continent where democratic government takes precedence³⁰, however, there is yet to be concrete efforts to achieve this aspiration. In Kenya, which is a signatory of Agenda 2063, the Truth, Justice and Reconciliation Commission Report, as at 2018 November, is yet to be implemented several years after it was published. Kenya promulgated the new Constitution in 2010 putting in place a new constitutional order, which resulted in the devolved system of governance.

Over the years after that, there have been attempts to consolidate gains made. The Constitution gave rise to a newly restructured judiciary and has maintained checks on the executive. The concept of democratic governance including claims to equality before the law, judicial independence, electoral integrity and freedom of expressions are all hall marks of mature democracy which is a product of democratic governance. Indeed, the commitment to democratic and accountable systems of governance was affirmed during the 2005 United Nations General Assembly World Summit in 2005 and during the 2010 Summit³¹. The democratization of governance in Kenya has taken place largely without institutionalization of key components including political parties. This has perpetuated the politics of ethnicity, regionalism and tribe,

²⁹ Universal Declaration of Human Rights, Article 21 (3), 1948

³⁰ Africa Union, Agenda 2063, The Africa We Want, Aspiration No. 3, 2015

³¹ General Assembly Resolution 59/201

which has polarized the country deeply. The Kenyan politics have for a long period been characterized by gerrymandering and delineation of constituencies to benefit a select group of political elite³². The constitution has empowered and emboldened the judicial arm of government which has on several occasions, intervened when there was an affront to the Bill of Rights. There have been rulings that have showed that Kenya can live up to the great ideals of the rule of law. However, the challenge remains the implementations of such policies. Despite orders being issued by the courts, there has been slow implementation of certain orders.

To address leadership and integrity issues, the High Court in a ruling on matters of integrity, noted that Chapter Six of the Constitution of Kenya is not a mere suggestion or an ornamental chapter. The ruling had been filed by the Trusted Society of Human Rights questioning the choice of Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission. The three judge bench comprising of Justices Mumbi Ngugi, Justice George V. Odunga and Justice Joel Ngugi, ruled that the appointment was null and void as the procedure did not fulfil all the eligibility criteria set for state officers.

In a 2013 ruling on Misc. Civil Case filed by the International Centre for Policy and Conflict, Judge Justice Odunga noted that the courts must remain as the last frontier in the rule of law. He further noted that the judicial system must remain steadfast as the temple of justice³³. In the Petition No. 628 and 630 of 2014 between the *Coalition for Reforms and Democracy (CORD) & Another*, the judge ruled that the constitutional provisions must be adhered to in exercising the will of the people. In addition, the judge directed that should there be any affront to the Bill of Rights, the courts would have no choice but to issue conservatory orders to suspend the enactment of any provisions that violate the Bill of Rights and fundamental freedoms.

The courts have also been an avenue to protect the rights of sexual minorities. In Petition No. 308A of 2013 in the case of the *Republic v Non-Governmental Organization Coordination Board & another ex-parte Transgender Education and Advocacy & 3 Others*, the judge issued a ruling that

³² Kivuva J, Kenya's Benefit-less Democratization, Great Insights Magazine, Vol. 4, Issue 3, 2015

³³ Kenya Law Report, Misc. Civil Case No. 226 of 2013, International Centre for Policy and Conflict v. Attorney General & 2 Others, in the High Court of Kenya, Milimani, [2013] eKLR

the NGO Coordination Board should register the Transgender Education Advocacy body. In a similar ruling in Petition filed by activist Eric Gitari, the High Court Judge directed the NGO Coordination Board to register the National Gay and Lesbian Human Rights Commission as it their constitutional right as espoused Article 27 and 36 which guarantees the right to form an association of any kind regardless of their sexual orientation. In their ruling, the Court directed the Board to strictly comply with its statutory responsibility and other relevant laws applicable in Kenya³⁴.

In 2014, High Court Judge Justice Mumbi Ngugi, sitting in the Milimani High Court, ruled that the action of incarcerating patients in prison for refusing to take TB drugs was ill advised as it was a violation of the provisions of the Public Health Act and was clearly counterproductive. She therefore directed the ministry of Health to develop a TB Isolation Policy which was adopted into law in 2018³⁵. In another case, Petition No. 51 of 2015, *C O L & Another v Resident Magistrate - Kwale Court & 4 Others [2016] eKLR* ruling by the High Court of Kenya, Mombasa, High Court Judge declared that anal examination for suspected gay persons is illegal. In their submission, the petitioners argued that in the process of examination conducted by the police had violated their rights under Articles 25(a), 27, 28, 29, 31, 33, 36, 49 (1) (d), 50 and 51 of the Constitution³⁶.

The High Court has also issued orders to protect the right to public participation. In the Petition No. 532 of 2013 between *Robert Gakuru & Others v Kiambu County Governor & 3 Others*, the judge ruled that County Government had acted in contravention of the applicable laws thus declared the Finance Act of 2013 null and void. In the ruling, the High Court Judge noted that public participation must be practical and not a mere illusionary show to fulfil some formalities. The universality of human rights and the key role they play in democratizing governance must never be lost to the conversations in Kenya. The CoK is the key legislative framework for democratic governance. Indeed, the key democratic governance frameworks in Kenya must all be built around human rights. A fundamental part of the CoK is Chapter Four on the Bill of Rights,

³⁴ Kenya Law Report, *Petition No. 440 of 2013, Eric Gitari v Non- Governmental Organizations Co-ordination Board & 4 others [2015] eKLR*

³⁵ Republic of Kenya, in the High Court of Kenya at Nairobi Milimani Law Courts, Constitutional and Human Rights Division *Petition No. 329 of 2014*

³⁶ Kenya Law Report, *Petition No. 51 of 2015, C O L & Another v Resident Magistrate - Kwale Court & 4 Others [2016] eKLR*

which is considered as progressive as it lays the foundation for the framework for social, economic cultural rights.

1.6.3 The democratic governance framework as principles of human rights in Botswana

In the 80s, Botswana was one of the few existing democracies in Africa, with the rest of the states being under authoritarian rule. Botswana is considered one of Africa's miracle and success story largely due to her strong democratic governance. Botswana has held the title for Africa's success story due to her long standing socioeconomic and political development in the region. Botswana's story is exceptional, she started as one of the least developed in the world with a pitiable economy to rise to a middle upper income economy in less than 60 years³⁷.

Democracy, development, unity and self-reliance for the four pillars of Botswana's founding principles.

Key findings from surveys conducted by Afro-barometer, Transparency International and Freedom House indicated that public opinion about Botswana's democratic state was standing at 63% in 2014. The demand for and institutionalization of democracy in Botswana has been near equilibrium over the years. The CSOs have played a significant role in democratizing governance in Botswana. This coupled with the role of the media has increased the opportunity for Botswana to consolidate the gains made in democratization. Despite the huge limitations facing the media including challenges against public order, public morality and defense of the state interests, the media continues to play a key role as a public watchdog.

In the 90s, several corruption scandals rocked the country relating to the purchase of books, land distribution among other key issues which undermined efforts on democratization of good governance. In 1994, the government adopted an Act of Parliament which resulted in the creation of the Directorate responsible for addressing both economic and corruption related crimes.³⁸ By 1996, 536 cases had been addressed with 141 prosecutions and 59 convictions in different cases including some involving members of the Directorate itself. The focus on economic and corruption

³⁷ Michael Lewin, *Botswana's Success: Good Governance, Good Policies and Good Luck*,

³⁸ Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights*, 2007

related crimes and their effect on democratization of governance led to the prosecutions³⁹. These government efforts have been rewarded consistently as Botswana continues to be rated positively by Transparency International in addressing corruption. Botswana has also managed to turn the tide against HIV, through universal health coverage. In the 90s, Botswana was ravaged by HIV. In 2001, former Botswana President Festus Mogae, in a speech to the United Nations, while mobilizing for support for anti-retroviral medication for people living with HIV in Africa, told the United Nations General Assembly (UNGA) that his people were faced with extinction unless something was done. He christened the crisis as one of monumental proportions due to the frighteningly high number of deaths⁴⁰

Despite this huddle, Botswana has emerged as a stable economy with sustainable economic opportunities for generations due to her sound fiscal policies. The ruling by High Court Judge T. T. Rannowane directing the Registrar of Societies to register an LGBTIQ group named LEGABIBO has been seen as a step towards upholding the right to equal protection before the law, enjoyment of the freedom of association and non - discrimination based on sexual orientation (Sections 3, 12, 13 and 15 of the Constitution, Laws of Botswana respectively).

In his ruling, the judge relied on similar cases, *Raphethela v Attorney General (2013) 1 BLR 591*, *Home Defenders Sporting Club v Botswana Football Association (2005) 1 BLR 400 AT 403 C-E* and *Autlwetse v Botswana Democratic Party & Others (2004) 1 BLR 230* noting that the doctrine of *stare decisis* fully bound his decisions. The Office of the Registrar of Societies, in their defense, argued that they had denied LEGABIBO the opportunity to register based on Section 6 (1) and 7 (2) (a) of Societies Act CAP 1801 of the Laws of Botswana⁴¹. In the *Attorney General vs Unity Dow 1992 (CA)* case, the Court of Appeal of Botswana ruled in a case that was discriminatory to women, allowing only men to pass on citizenship status to their children. This case was particularly important as it highlighted the issue of women's rights which is a huge challenge in Africa⁴².

³⁹ Charles Manga, *Curbing Corruption in Africa: Some Lessons from Botswana's Experience*, International Social Science Journal, Vol 51, 1999

⁴⁰ Duncan Green, *From Poverty to Power, How Active Citizens and Effective States Can Change the World*, Oxfam International, 2008

⁴¹ Thuto Rammoge & 19 Others v The Attorney General of Botswana, MAHGB-000175-13, BLR, 2012

⁴² Republic of Botswana, in the Court of Appeal, *Attorney-General v. Dow BLR 119 (CA) 1992*

Women continue to suffer from domestic violence while few women hold political positions, a key area of development. In 2008, only seven women were elected as members of parliament in the sixty-one-member house, while the 20-member cabinet had only five women. In addition, of the thirteen judges of the High Court, only three were women⁴³. In 2014, a major milestone in the protection of sexual minority rights was reached when the High Court in Botswana ruled that a transgender man should be issued with official identification documents with his identity. The man had sued the National Registration Bureau of Botswana for refusing to register him arguing that he had been born as a female. This case among several others continue to form the jurisprudence for Africa on the protection of rights for sexual minorities, this is due to the sensitivity of the issue around sexual minority rights in Africa⁴⁴.

Across the world, sexual minority rights are gaining prominence. In 2018, the Supreme Court of India announced its decision to reexamine Section 377 of the Penal Code. This announcement was particularly celebrated because it followed the 2013 ruling by a 2 judge bench from the SCI that overturned the 2009 ruling by the High Court in New Delhi, India, that had declared Section 377 as illegal. Human rights activists in Botswana have remained vocal in calling out any violations of human rights. The close correlation between HIV and sexual rights have galvanized rights activists to call for repealing of laws that criminalize same sex unions, in order to address the burgeoning problem of HIV across Sub Saharan Africa.

One of the key response mechanisms to address HIV has been to address stigma and discrimination occasioned among same sex unions in order to create avenues for such people to access treatment services. In a region characterized by blatant violations of human rights including in Zimbabwe where President Robert Mugabe presided over the collapse of the countries' economy to Namibia where Sam Nujoma presided over violations of the rights of sexual minorities, Botswana has tried to address these challenges. Gender inequality in Africa continues to fuel human rights abuses which is detrimental to the wellbeing of women and girls.

⁴³ Amelia Cook and Jeremy Sarkin, *Botswana the Miracle, Democracy, the Rule of Law and Human Rights Versus Economic Development*, 2012

⁴⁴ Graeme Reid, *Human Rights Watch, Victory for Gender Identity in Botswana*, 2017

1.7 Gaps in the Literature

From the literature available, the impetus for democratization of governance has gone through different phases. Whereas Botswana has maintained an almost perfect record, Kenya has gone through turbulent times, rising through the Third Wave of Democracy to the Fourth Wave. However, there isn't enough empirical data to analyze key emerging issues like cybercrime, terrorism, globalized diseases, gender and social identity and threats of climate change between Kenya and Botswana.

After the promulgation of the Constitution in 2010, Kenya started on a new path of devolved government system. There is no much data to compare between Kenya and Botswana as the process is still in its early phases in Kenya, having only been eight years since the promulgation of the constitution. This research will therefore seek to assess and analyze the role of human rights in democratizing governance in Africa, with a case study of Kenya and Botswana

1.8 Justification of the Study

This study should be beneficial to the governments of Kenya and Botswana. The study should help the governments to redefine their policies to enhance the role of human rights in democratizing governance. The study will particularly emphasis the role of human rights in democratizing governance in Africa, with a case study of Kenya and Botswana.

1.8.1 Policy Justification

The research should be very beneficial to policy makers as it will add knowledge to the policy suggestions and agenda across nationally and regionally thus help in the institutionalization and democratization of governance. The study will help Kenya to refine her policies to align to international standards. In concurring with the sentiments of Justice George Odunga, this research will enhance the protection of human rights in Kenya as the key to the democratization of governance. In addition, the study will enhance the respect to constitutionalism, good governance and the protection of fundamental human rights as key cornerstones of the rule of law. The study will also serve to enhance and elaborate the values contained and spelt out in the Constitution. In

Botswana, the study will help to enhance the continued promotion of democratic governance. It will add to the paradigm changing studies conducted over Botswana and will help, where necessary, to make amends, governance failures and shortcomings and will enhance the promotion of Botswana's values.

1.8.2 Academic Justification

The research should add empirical data and literature to the field of research and will contribute to adding knowledge in governance, human rights, policy making and orientation in international relations. In addition, the research provided critical areas for further studies and collaborated existing literature for academic studies. The study will also seek to plug in the literature gaps identified in the analysis including providing data on emerging issues of global concern to the states under study in Kenya and Botswana.

1.9 Theoretical Framework

This study focused on liberalism to assess the role of human rights in democratizing governance in Africa with a case study of Kenya and Botswana.

1.9.1 Liberalism Theory

International Relations Theories are concerned with explaining issues related to IR. The scope of IR theories covers areas such as economic development, terrorism, foreign relations, human rights and security. The Treaty of Westphalia of 1648 marks the start of the development of the modern state⁴⁵. Liberalism can be traced to the works of Emmanuel Kant and J. Rousseau. However, it is John Locke who offered the first tangible accounts on human rights basing his arguments on entitlement based on humanity. One of his greatest arguments is that men are by nature free and equal⁴⁶. The one thing that scholars can concur on is that there are no permutations on what constitutes a violation or abuse of human rights. Across the world, for decades now, there has been

⁴⁵ Gautam Sen, *International Relations and International Security in the 21st Century: The World in Transition*, KW Publishers Pvt Ltd, New Delhi, 2014

⁴⁶ John Locke, Peter Laslett, eds., *The Second Treatise of Government in Two Treatises of Government*, Cambridge: Cambridge University Press, 1689.

debate on when state interests should trump accountability over violations and abuses of human rights. This debate was ignited in 1979 when Jeane Kirkpatrick discussed what constitutes an authoritarian and totalitarian government⁴⁷. As this study will underscore, states often violate human rights in the guise of state interests. This argument is often fronted by realists who believe that states act in their own interests. Mark Lagon argues that in the case that a state was to choose between security, economic growth and human rights, it is human rights that would end us as the casualty to guarantee security and economic development⁴⁸. The need to promote democracy across the world has seen desecrations of human rights, an issue that liberals have always argued should never be the case. For human rights to be promoted, democracy must be an inevitable requirement.

The liberal theory is grounded on normative principles and has a heavy emphasis on matters of democracy and human rights. This theory heavily stresses the importance of state liberalization noting this is the prerequisite to the respect to human rights. The approach has become the defining feature of modern democracy. Liberals often rely on international law including the international instruments such as treaties and conventions for standard setting to achieve sustainable peace, security and development. A key part of liberalism is the advocacy for democracy as a tool for achieving world peace and promoting human rights. This theory identifies war as the greatest threat to world peace and security.

Liberal theorists argue that liberal states have more peace hence believe that global peace and promotion of human rights can be achieved. They push for democratization as a tool for solving conflicts, arguing that legitimately voted leaders are more answerable to their people. According to Doyle, when citizens exercise their rights and elect a leader, it becomes impossible to have war, as the representative of the people works to avert such. This theory is based on the moral argument that ensuring the respect of the rights of individuals is the highest goal of administrations. This argument is buttressed by the statistic that entrenching human rights values in state based institutions offers the best status due to the inextricable link between promotion of human rights,

⁴⁷ Jeane Kirkpatrick, *Dictatorships and Double Standards*, Commentary Essay, 1979

⁴⁸ Mark P. Lagon and William Schulz, *Conservatives, Liberals and Human Rights*, 2012

democracy and governance⁴⁹. Liberalism theory is premised on the promise of freedom. The basis of liberalism is to construct institutions that protect and uphold individual freedoms. Liberalism is opposed to militaristic tendencies, proposed by realists, due to the believe that war can be used against both domestic and foreign spaces.

The emergence of actors to compliment states in the 70s underscored the value for human rights. These INGOs played a key role in the East-West diplomatic overtures to engage human rights concerns after the Cold War⁵⁰. Liberalists are concerned with how to protect a state from foreign powers without oppressing its own citizens. Liberals believe that the primary institutional check on a government is hallmarked by free and fair elections via the people in a democratic state. Liberals also believe that a democratic state operates within principles of respect to the different arms of government.

A key part of liberalist theory is the how different actors integrate their work to check the excesses if the government. The formation of the United Nations was seen as a great step towards world peace. States understand that causing war is likely to lock them out from international benefits including international trade, diplomatic recognition. This has seen the rise of the R2P. This has become a key pillar in the promotion of human rights⁵¹. Liberalists also believe a free world is a prerequisite for international order. In such a system, international organizations like the World Trade Organization and the Bretton Wood Institutions have an important role in the promotion of human rights through ensuring there is international cooperation in trade which makes war less likely.

The rise of new challenges in the 21st Century reinforce the need for liberal ideas. This has given rise to the push for the rise of humanitarian interventions in the 21st Century to entrench a human rights based culture. Ronald Dworkin in his work, argues that states and governments must learn to treat all human beings with equal concern and respect which forms the basis of liberalism⁵².

⁴⁹ Tim Dunne and Marianne Hanson, *Human Rights in International Relations*, Cambridge: Cambridge University Press

⁵⁰ *Supra* note 46

⁵¹ Weiss, T. G. *Humanitarian Intervention: Ideas in Action*, Cambridge, Polity Press, 2007.

⁵² Dworkin Ronald, *Taking Rights Seriously*, Cambridge, Harvard University Press, 1977, in Rhoda E. Howard and

Andrew Moravcsik argues that liberal states are more likely to uphold human rights compared to their realist counterparts. Moravcsik further argues that issues such as sanctions, shaming and cooperation are some of the international actions liberals including civil society organizations employ to increase the protection of human rights⁵³. In understanding liberalism and democratic governance, Makau Mutua quotes the works of Samuel Huntington who notes that political democracy is underscored by two key factors namely contestations and participations⁵⁴. These, Makau notes, form the basis for democratic rights comprising the rights to free and fair elections based on universal adult suffrage, thus, in quoting the words of Huntington, says, just elections are the unavoidable prerequisite which form the foundations for democracy⁵⁵.

1.10 Hypotheses of the Study

1. African Union's democratic governance institutions and frameworks have not promoted democratic governance
2. Kenyan democratic governance institutions and frameworks have not promoted democratic governance
3. Botswana democratic governance institutions and frameworks have promoted democratic governance

1.11 Research Methodology

1.11.1 Scope of the Study

The study will focus on the role of human rights in democratizing governance in Africa, case study of Kenya and Botswana. The target population will be policy makers, implementers and selected respondents. The study will take place between August – December 2018.

Jack Donnelly, *Human Dignity, Human Rights and Political Regimes*, American Political Science Association, 1986

⁵³ Andrew Moravcsik, *Explaining International Human Rights Regime, Liberal Theory and Western Europe*, Harvard University, 1995

⁵⁴ Makau Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, New York City, 2007

⁵⁵ Huntington Samuel, *The Third Wave: Democratization in the Twentieth Century*, Norman, University of Oklahoma Press, in Makau Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, New York City, 2007

1.11.2 Limitations to the study

The research will be limited by the following factors

- i. The potential ability to make statistical inferences from the sample selected has a certain degree of affecting the final quality of data findings
- ii. Sampling techniques used may have an impact on the generalization component of research findings due to bias
- iii. Access to research samples may be a limitation due to sensitivity of matter

1.11.3 Research Design

Research design is defined as the collection and arrangement of the conditions of analysis of data in a manner that the economy of procedure of data analysis to the relevance of the research⁵⁶. Researchers use the research design to show the nexus between all the parts of the research and how they combine to help one draw conclusions on the key research questions⁵⁷. This research project will employ the mixed method of research using the quantitative and qualitative research methods.

1.11.4 Target Population

Mugenda defines the target population refers to the group to whom the researcher will infer his conclusions from⁵⁸. In this research, the target population will be policy makers, implementers and selected citizens. The target population is shown in table below.

1.11.5 Sample and Sampling Techniques

A sample is a sub-group drawn from the selected population with relevant characteristics for study⁵⁹. Sampling is a process of selecting entities for a study while paying attention to ensure

⁵⁶ Kothari, *Research Methodology: Methods and Techniques*, 2006

⁵⁷ Tromp, *Proposal and Thesis Writing, an Introduction*, 2006

⁵⁸ Mugenda, *Social science research: Theory and principles*, 2008

⁵⁹ Tromp, *Proposal and Thesis Writing, an Introduction*, 2006

the selected sample can infer to the general population⁶⁰. In this paper, snow bawling and purposive sampling will be used since the need is very specific

The minimum sample size can be calculated using the following formula by Mugenda,

$$N = \frac{Z^2pq}{a^2}$$

Where n is the preferred sample size

Z is the standard deviation

P is the fraction in the target

Q is 1-p

A is the level of statistical significance

$$n = \frac{(1.96)^2(50)(50)}{(0.5)^2}$$

= 384 respondents

Constituency	Kenya	Botswana
Policy Makers and implementers	10	10
Human rights activists and scholars	10	10
Sample citizens	172	172
Total	192	192

⁶⁰ Mugenda, Social science research: Theory and principles, 2008

1.11.6 Data Collection Methods and Instruments

For collecting quality data, there will be deliberate qualitative and quantitative data collection methods. The study will employ both the quantitative and qualitative data collection methods. For quantitative data, self-administered questionnaires with structured closed ended questions will be administered while for qualitative data collection, an in-depth focus group interview will be administered. Relevant secondary data will also be analyzed to inform the findings of the research

1.11.7 In-depth Interviews

The use of in depth interviews will be used to understand how compliance with human rights contributes to democratic governance in Kenya and Botswana. This will be conducted by use of an interview guide to get detailed insights through key informant interviews and focus group discussions as well as analysis of key relevant secondary data from both countries.

1.11.8 Data Analysis and Presentation

Once the questionnaires are received, they will be checked for accuracy to determine whether they have been answered satisfactorily. This is to ensure that all the answers given are within the context required⁶¹. Once the answers are verified, a coding system will be used to organize the data which will thus be analyzed. The researcher will use descriptive statistics in form of means, standard deviations and percentages to analyze the data.

The interview results will be analyzed using thematic and narrative analysis. The analyzed data will then be presented thematically to draw conclusions on whether human rights play a role in democratizing governance in Africa, with specific focus on Kenya and Botswana.

1.12 Chapter Outline

Chapter One – Introduction.

The first chapter of this thesis paper contains the background of the research study. In addition, it contains the statement of the problem of research, key research questions, the objectives for study, the research design and methodology and a chapter outline contain the layout of the other chapters.

⁶¹ Tromp, Proposal and Thesis Writing, an Introduction, 2006

Chapter Two: Democratic governance framework in Africa

This chapter will focus on literature review analysis of the democratic framework within the African continent covered under objective number one. The chapter will focus on an analysis of the status of the democratic governance frameworks in Africa including their failures and successes in democratization of governance in Africa.

Chapter Three: The Democratic Governance Framework in Kenya

This chapter will focus on an in-depth analysis of the democratic governance framework within Kenya which will be covered under objective number two. Key highlights will include the successes and failures of the democratic governance frameworks.

Chapter Four: The Democratic Governance Framework in Botswana

This chapter will focus on an in-depth analysis of the democratic governance framework within Botswana which will be covered under objective number three. The chapter will focus on an analysis of the status of the democratic governance frameworks in Botswana including their failures and successes in democratization of governance in Botswana.

Chapter Five: Summary and Data Analysis

This chapter will present the summary of data findings

Chapter Six: Conclusion and Recommendation

This chapter will present the conclusions and key recommendations of study as well as areas for further study

Chapter Two

2.1 The Democratic Governance Framework in Africa

According to Jérôme Bachelard, the concept of governance is broad and multidimensional hence difficult to give an exact assessment in a single country at a given time. The specific measure of governance is highly dependent on the research conducted by experts, the sensitivity of respondents as well as the country of reference⁶². Bachelard further argues that even though a leader is not expected to achieve all aspects of governance in a single season, there must be observable results within the broad aspects of democratic governance, including the promotion of human rights.

To study aspects of governance of a given country, there are some widely accepted recognized standards of governance. These are the World Wide Governance Indicators by the World Bank Institute, the privately owned Freedom House originated in the United States in 1941, Corruption Perception Index by Transparency International and the privately owned International Country Risk Guide developed in 1980 following the devastating financial shock occasioned by the fall of the Shah of Iraq in 1979 which has continued to provide key data on the quality of governance, through an assessment of key risks in any given country. These aspects focus on the *de facto* changes occurring over time relating to the democratization of governance⁶³.

Over the preceding 15 years, scholars have developed keen attention on key aspects of democratic governance especially in developing countries, with specific focus on countries in Africa. The demand for improvements in democratic governance systems through upholding and promoting human rights has seen countries align their focus to human rights⁶⁴. Democratic governance indicators have become a standard way of estimating a country's quality of democratic governance at any particular point. Surveys like Afro barometer, conducted in Africa have empirical data on the eminence of democratic governance in select countries, the respect to the rule of law among

⁶² Jérôme Bachelard, *Governance Reform in Africa, International and Domestic Pressure and Counter-pressure*, Routledge, New York, 2014

⁶³ Christiane Arndt and Charles Oman, *Uses and Abuses of Governance Indicators*, Development Centre Studies, 2006

⁶⁴ Charles Oman, *Policy Competition for Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI*, Development Centre Studies, Paris, 2000

other key indicators. The conditions under which a country can achieve genuine democratic governance reforms in any given time has always been contested. In Africa, there are key frameworks on democratic governance relating to elections, prevention of corruption, economic growth and development among other key frameworks. According to Abdalla Bujra and Said Adejumobi, Africa has started to emerge from a dark past.

Countries like Liberia and Sierra Leone have started the rebuilding process, with Liberia holding the first democratic elections in 2005, leading to the election of the Helen Johnson Sirleaf She was later awarded the Nobel Peace Prize in recognition of the work she did to champion the rights of women in peace building following the devastation civil war that destroyed the country. In 2007, Ernest Bai Koroma, the then opposition leader in Sierra Leone, was elected as the President of the West African state and went on to declare a policy of zero tolerance to corruption.

2.2 The 1963 OAU Charter

The dream and desire for a united Africa saw 32 African Heads of States gather in 1963 to clamor for independence. In a speech by Kwame Nkrumah, he challenged the 32 Heads of States and Governments to push for independence, noting that it was time for Africans to be freed from the tag of "*hewers of woods and drawers of water for the developed world*". In calling for African unity, President Nkrumah added that whereas the industrialized west was preoccupied with the minerals from Africa, there was need to ensure a united Africa to guard African resources for Africa.

"We must unite now or perish" – Kwame Nkrumah, First President of Ghana, speaking in Addis Ababa in 1963 during a conference for the 32 African Heads of States and Governments conference.

President Nkrumah further added that a united Africa would offer a greater chance for attracting foreign aid, which would go into development. Further to his proposal was the establishment of a permanent body of officials which would be set up by the Committee of Foreign Ministers. President Nkrumah called for the establishment of a commission to develop the constitution for United Africa. he laid out elaborate plans that would united the continent and included continent-wide plans for common economic programs including a single market, one legal tender, a fiscal

zone, an African Central Bank, a continent based communications system, shared foreign policy and diplomacy agenda, a mutual defense system for Africa and African citizenship. Ahmed Sekou Touré emphasized the need for African unity. These ideas, fronted during the conference in Addis Ababa gave the Pan Africanist idea a great impetus. However, the institutional framework of the OAU was different from what Kwame Nkrumah had envisioned. A key issue noted during this period was the balkanization of African states into their erstwhile colonial powers namely the Francophone, the Anglophones and the Lusophone which continues today.

The OAU set in motion steps to achieve the goals envisioned by the founding fathers. In 1973, the Addis Ababa Declaration was crafted to help Africa develop indigenous and self-supporting systems for the continent to spur economic growth⁶⁵. During the 3rd Economic Commission for Africa meeting held in 1975 in Nairobi and the 1976 meeting held in Kinshasa in 1976, there was strong commitment for economic growth in Africa.

In 1977, during the OAU Summit in Libreville, Gabon, the Kinshasa Declaration and the Revised Master Plan were adopted. In 1980, the LPA detailing principles, objectives as well as priorities aimed at the African Economic Community. The two plans reaffirmed the continent's commitment to be independent by the turn of the Millennium.

2.3 The 1981 African Charter on Human and People's Rights

This charter was created in 1981 to guide the OAU as the underpinning of Africa's human rights' system⁶⁶. Prof. Makau Mutua notes that even though the charter is a good document, it has attracted criticism due to its collation of rights, with specific mention of the contentious notion of people's rights⁶⁷. Makau further notes that certain arguments about liberal democracies as the answer to human rights challenges in Africa is skewed⁶⁸. Further, Makau, in alluding to John Locke, notes

⁶⁵ Council of Ministers, Twenty-First Ordinary Session, Resolution 316, Addis Ababa, Ethiopia, 17 – 24 May, 1973

⁶⁶ African (Banjul) Charter on Human and People's Rights

http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed on Friday 5th October 2018 at 11:55 am

⁶⁷ Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, Journal Articles, University of Buffalo School of Law, 1995.

⁶⁸ *Supra* note 89

that a government can be rendered illegitimate if it systematically and perpetually abuses and violates key provisions of human rights⁶⁹. Despite the adoption of the ACHPR in 1981, Africa has experienced vile violations of human rights including the 1994 Rwanda genocide, armed conflicts in Liberia, Somalia, Darfur, Chad among others, where millions of people lost their lives, the worst HIV epidemic. Africa has suffered the greatest loss incurred due to HIV with unacceptably high levels of maternal deaths.

A key success of the campaigns for access to justice in Africa was the trial and conviction of Hissène Habré who was convicted of crimes against humanity committed in Chad between 1982 to 1990 when he was overthrown by Idriss Déby. The case was highly praised as a milestone for access to justice in Africa. In remarking about the case, New York Times columnist Thierry Cruvellier noted that there has never been a trial where the voice of the survivors was so amplified⁷⁰.

There are vital lessons from the Habré trial including the role of political will in achieving justice for survivors of injustices. Over time, it has been difficult to try high level cases due to the unwillingness to effect the arrest of the perpetrators. In 1998, the Austria government chose to respect diplomatic ties with the Iraqi government over access to justice and international human rights obligations when it refused to arrest Izzat Ibrahim al-Duri, a top aide of former Iraqi leader Saddam Hussein, who was indicted for crimes committed against the Kurdish people⁷¹.

In 1999, the South African government refused to arrest former Ethiopian Leader Minister Mengistu Haile Mariam who has been in exile in Zimbabwe since 1991. Mariam was tried and convicted in absentia of perpetrating a genocide. In 2008, his life sentence was commuted to a death sentence. Despite this, the Zimbabwean authorities, where Mariam has been in exile refused to extradite him citing his role in their struggle for independence and his status as an asylum seeker. In 2015, the South African government faced criticism after they failed to arrest Omar al-Bashir,

⁶⁹ Supra note 89

⁷⁰ <https://www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html> accessed on Friday 5th October 2018 at 2:22pm

⁷¹ <https://www.independent.co.uk/news/world/saddam-deputy-escapes-arrest-in-austria-for-torture-crimes-1113610.html> accessed on Friday 5th October 2018 at 2:59pm

who is wanted to trial for injustices perpetuated in Darfur region⁷². The propensity to violate human rights has a great impact on democratization of governance. Over time, there has been debate whether human rights regimes have aided in the democratization of governance in Africa, given the continued blatant violation of such rights by states in the guise of protecting state interests and sovereignty.

Nascent democracies in Africa have a long way to go to realize the ideals spelt out in international human rights regimes of upholding fundamental human rights. Scholars and analysts continue to explore the factors that guide a state when it chooses to ascend to a certain human rights regime. Alberto Moncada and Judith Blau conjecture that a key part of the reason why states ascend to human rights regimes is to create a prophylactic measure against replication of human rights abuses and violations by successive regimes⁷³. Blau and Moncada further argue that the only way to ensure there are no violations is to constitutionalize human rights regimes. This claim is backed by Bryan Turner who posits that without institutionalization of human rights within state sovereignty programs, human rights will remain as mere abstract claims that have no enforceability⁷⁴.

2.5 1993 National Human Rights Institutions (NHRIs) as Frameworks for Governance

The adoption of the 1993 Paris Principles, which contained the mandate for National Human Rights Institutions (NHRIs) at the local levels set the state for protection of human rights by other actors alongside the state. 25 years after the Paris Principles were adopted, scholars continue to examine their effectiveness in the democratization of governance in Africa. According to a 2017 article published by Ryan Welch, the NHRIs have substantially contributed in democratization of governance as they play a key oversight role⁷⁵. In understanding the role of such institutions in the larger democratic framework within Africa, one needs to be cognizant of the duality of their

⁷² <https://www.news24.com/SouthAfrica/News/sa-to-defend-failure-to-arrest-bashir-at-icc-20170405> accessed on Friday 5th October 2018 at 3:15pm

⁷³ Judith Blau and Alberto Moncada, It Ought to Be a Crime: Criminalizing Human Rights Violations, Sociological Forum, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1573-7861.2007.00025.x> accessed on Monday 8th October 2018 at 12:11 pm

⁷⁴ Bryan S. Turner, *Vulnerability and Human Rights*, Essays on Human Rights, Penn State University Press, 2006

⁷⁵ Ryan Welch, *National Human Rights Institutions: Domestic implementation of international human rights law* 2017

effectiveness and the political will within a state. According to Tom Pogram, NHRIs play a key oversight role in democratic regimes within the framework of rights⁷⁶. Tom posits that an empowered office of the Ombudsman plays a leading role in promotion of such rights.

2.6 2001 New Partnership for Africa's Development (NEPAD)

NEPAD was launched in 2001 in Lusaka Zambia as a program for accelerating regional and continental integration. Key areas of focus for the development of NEPAD was to address Africa's international marginality, address poverty related issues, foster regional integration and address empowerment. Human development issues remain key to the AU agenda.

The AU has 14 main objectives, with five of those focusing on integration. The failure to achieve economic growth coupled with the failure to achieve the new international financial order predicted in the 1970s as well as 80s by the OAU necessitated the establishment of regional integration to achieve these aspirations. NEPAD was created as a merger between the OMEGA Plan which was initiated by President A. Wade of Senegal and the Millennium Partnership of African Recovery (MARF) which was initiated by the President Thabo Mbeki, Olusegun Obasanjo and Abdelaziz Bouteflika⁷⁷.

NEPAD is based on key pillars which include the strengthening of democratic governance and the creation of Africa's s implementation space. In 2008, the 63rd United Nations General Assembly approved UNGA Resolution A/Res/63/1 and emphasized the eradication of poverty and underdevelopment as universal challenges which threatens the achievement of the then MDGs, now turned SDGs. The assembly further committed to support the consolidation of democratic governance in Africa which are key to an Africa with sustainable peace, economic growth and sustainable development⁷⁸. Since its development and incorporation, NEPAD has propelled the

⁷⁶ <http://tompegram.com/research/national-human-rights-institutions/what-is-a-national-human-rights-institution/> accessed on Wednesday September 19th at 5:34pm

⁷⁷ United Nations Economic and Social Council, Economic Commission for Africa, twentieth meeting of the Technical Preparatory Committee of the Whole/Ninth meeting of the Intergovernmental Group of Experts, Operationalizing the Millennium Partnership for the African Recovery Program, Algiers, Algeria, 2001

⁷⁸ United Nations General Assembly, Resolution A/Res/63/1 adopted by the General Assembly on September 2008, <https://undocs.org/A/RES/63/1> accessed on Monday 8th October 2018, at 12:54 pm

AU to achieve some tangible results. There has been the push to ensure that Africa develops a Continental Free Trade Area. By March 2018, 44, 47 and 30 states had signed the AfCFTA, the Kigali Declaration and the protocols to Free Movement of Persons, Right to Residence and Right to Establishment documents respectively⁷⁹. The African Union hopes that when the AfCFTA is implemented, it will intensify intra-African business and vocation by 52% by the year 2022 as well as eliminate charges on 90% of the merchandises traded in Africa.

Another key milestone has been the start of the construction of the 45,000-kilometer-long undersea Uhurunet Cable and the Umojanet terrestrial able to connect the entire African continent. NEPAD has also steered the country towards sustainable food security through the development of the Comprehensive Africa Agricultural Development Program. By 2015, 41 states had signed the CAADP Compacts with 33 adopting the compacts into their medium term expenditure frameworks for agriculture. At the sub regional level, four sub regional economic blocs had signed the compacts with three among the four RECs developing complete investment plans on agriculture⁸⁰.

NEPAD has also played an important part in the formation of the African Peer Review Mechanism (APRM). In addition to the APRM, NEPAD has also been critical in the establishment of Program for Infrastructure Development in Africa (PIDA)⁸¹. By 2018, it is estimated that Africa requires to invest up to \$93 billion to meet her infrastructure requirements with the bulk of the money going to investments for energy at \$40 billion, \$21 billion being for water, \$18 billion going to transport, \$9.3 billion going to information and communication technology development and \$2.7 billion going to irrigation investment⁸².

The move to invest in infrastructure in Africa continues to rank top in AUs agenda as it has been noted that intra-regional economic exchange in Africa has been slow due to Africa being the least

⁷⁹ African Union, Indications of Legal Instruments to be Signed at the 10th Extraordinary Session of the Assembly of the launch of AfCTA <https://au.int/sites/default/files/pressreleases/34033-pr-indication20of20signing20authority20-20updated20final20final20docx.pdf> held in Kigali, Rwanda, accessed on 8th October 2018 at 2:22 pm

⁸⁰ <http://www.un.org/en/africa/osaa/peace/caadp.shtml> accessed on Monday 8th October at 3:12 pm

⁸¹ <http://www.nepad.org/programme/programme-infrastructure-development-africa-pida> accessed on Monday 8th October at 4:25 pm

⁸² Supra note 104

integrated region which continues to lead to loss of billions of dollars in revenue as well as underdevelopment. By 2018, PIDA had developed a 51-point Priority Action Plan targeting energy, transboundary water, information, communication and technology (ICT) and transport. By 2020, the program will evaluate its short term goals with the medium term goals being evaluated by 2030 and long term goals of raising Africa's economic competitiveness in the global economy being evaluated by 2040.

A PIDA evaluation exercise conducted in 2017 made key recommendations including strengthening the linkage between PIDA activities in the African Continent and noted that the Central region is behind in implementation of PIDA projects. Additionally, it was recommended that PIDA projects must be leveraged on the youthful generation as well as engaging women as part of achieving the greater AU Vision 2063⁸³.

2.7 The 2002 African Peer Review Mechanism (APRM)

The APRM is a key implementation mechanism within the AU which was initiated in 2002 and established in 2003 as a platform for sharing proficiencies and underpinning working practices, pigeonholing paucities and gauging prospects to foster political constancy, democratic governance, extraordinary fiscal development, viable growth and regional amalgamation⁸⁴.

In 2013, C Lopez, the Administrator of the UN Economic Commission for Africa (UNECA) described APRM as a uniquely African initiative without any other precedence in the world. In particular, Mr. Lopez hailed APRM's critical role in shaping the discussion around development within Africa, particular singling out the critical role that leadership plays in development.

“APRM has contributed to a paradigm shift about how we think about and do development. The mechanism of self-assessment as well as policy dialogues and civil society engagement among others have sought to promote a model of governance that will foster socio-economic development in Africa” - Carlos Lopez, Executive Secretary, United Nations Economic Commission for Africa

⁸³ NEPAD, PIDA Progress Report, 2017 <http://www.au-pida.org/download/pida-progress-report-2017/> accessed on Tuesday 9th October 2018 at 12:13 pm

⁸⁴ <https://au.int/en/organs/aprm> accessed on Monday 8th October 2018 at 4:04 pm

As at October 2018, 38 AU member states had joined the APRM, signaling the critical need to ensure all member states join in to enhance governance within Africa⁸⁵. In 2013, the then United Nations SG Ban Ki Moon lauded the African Union for establishing the APRM. Ki Moon further noted that the APRM had deepened the democratic culture including meaningful citizen participation in decision making processes within AU member states and praised the 17 AU member states which had finished the first self-assessment.

The UN Secretary General further called on the AU to ensure the recommendations made on prudent resource management, eradication of corruption and plans to address youth unemployment are acted upon. A key emphasis was placed on the AU to guarantee the implementation instruments are in place to address issues related to unlawful and undemocratic change of régimes in Africa⁸⁶.

The APRM has faced budget constraints which has impacted its work. This coupled with the lack of technical capacity in some states means that the APRM is not able to implement key recommendations raised during the reviews.

2.8 The 2002 Constitutive Act of the African Union

In July 2002, Africa transitioned, a move that saw key governance organs and institutions constituted to guide Africa in the 21st Century. The 2002 Act heralded a new beginning for Africa. The OAU was largely blamed for failing to tame serious intra-state conflicts that flared across Africa. Despite some positive changes in political leadership happening in the 70s and 80s including the fall of the oppressive regimes of leaders there was pessimism about the overall role of the OAU. The development of the LPA to spur economic growth seemed to bring little relief about OAU.

The end apartheid in South Africa left OAU struggling as the organization and Africa was unable to compete with the changing global systems in the world. The led to a new marginalization of the continent which denied Africa an opportunity to contribute to the world stage in international

⁸⁵ Supra note 107

⁸⁶ <https://www.un.org/press/en/2013/sgsm15409.doc.htm> accessed on 9th October 2018 at 1:48 pm

relations. Scholars continue to argue that despite Africa's geopolitical centrality, she has failed to exploit this positioning to her advantage. These failures led to the need to establish a new body that would create the essential circumstances in Africa to facilitate her role in the universal stage. Despite Africa coining the "African solutions to African problems" the 1994 genocide, the wars in Angola, Somalia, Ethiopia, the Western Sahara, Chad, Sudan among other regions went on unabated due to OAU's policy of noninterference in domestic affairs due to territorial integrity.

The adoption of the agreement detailing the creation of the Economic Community of Africa was key as it was a guide for the AU Act. There is skepticism as to whether the AU will achieve the aspirations of the AEC by 2025 which mandated the AU to have established an African common market⁸⁷. The plans to transition from OAU to AU were initiated when the OAU met in Libya in 1999 and adopted the declaration that led to the establishment of the AU Act. The Constitutive Act highlighted democratic governance and access to the highest standards of physical and psychological health as key agendas.

The following key organs and other instruments were established under the AU, the AU Assembly (Article 5(1)), the AU Executive Council (Article 5(2)), the Court of Justice (Article 5(4)) among other key organs⁸⁸. The preamble of the Constitutive Act notes and affirms AU's commitment to human rights, amalgamate democratic institutions to enhance good governance. A key part of the Act spelt *inter alia*, the promotion of democratic governance, meaningful public engagement and the promotion of human dignity as key⁸⁹. Based on the pernicious acts that were committed by erstwhile colonizers, the OAU expressed reluctance to address internal conflicts. The AU Act seems to have carried over OAU's acts of non-interference in internal affairs of member states.

However, the AU has been given credence to intervene in instances that are of grave concern to the stability of Africa, including crimes against humanity and genocide. To realize and promote democratic governance therefore, key organs within the AU must therefore take concrete action as the AU Act only lends a broad framework. The AU Act also contains a statement of value under

⁸⁷ African Union, Treaty Establishing the African Economic Community, Abuja, Nigeria, 1991

⁸⁸ African Union, Constitutive Act, Article 5, Organs of the AU, 2000

⁸⁹ African Union Constitutive Act, Art 3 (g) & (h), 2000

Article 4 (p) which ostensibly notes that undemocratic change of governments will not be tolerated. The AU has however been challenged as there have been instances where leaders have refused to obey this article including Gambia's Yayah Jameh. Across the world, there are clear directives on what constitutes the values for democratic governance.

2.9 2002 African Union Peace and Security Architecture (APSA)

The Peace and Security Architecture is AU's guiding principle on the advancement of armistice and security in Africa. Within, APSA there is an organ called the Peace and Security Council (PSC), which is the principle pillar responsible for conducting preventive diplomacy, enhancing the peace-making processes and in special circumstances, recommending intervention activities within AU member states. The PSC Protocol was adopted in 2002 in South Africa and started being implemented in 2003⁹⁰.

In 2013, the AU Assembly adopted a momentous declaration to silence the guns by 2020 and ensure that future generations are not bequeathed the burden of conflict. The continues violence across some parts of Africa including South Sudan where an estimated 382,000 have been killed since 2013 as well as increased number of refugees fleeing conflict in AU member states, the proliferation of arms despite UN treaties against such acts have impacted negatively on the fiscal development of AU member states. In 2017, the AU developed and adopted the a roadmap to end gun violence by 2020⁹¹.

Despite new globalized security challenges emerging across Africa, the APSA has managed to contain a huge proportion of violence. Africa continues to face governance and leadership crises, land and territorial disputes, weak state governance issues, blatant violations and abuses of human rights, socio-economic issues including inequalities and poverty, emerging security threats in the 21st century including climate change, globalized diseases, neo-colonialism, cyber security and transnational terrorism and the rapid rise in demand for accountability have all continued challenge the maintenance of amity and security.

⁹⁰ <https://au.int/en/organs/psc> accessed on Monday 8th October 2018 at 4:30 pm

⁹¹ <https://au.int/en/pressreleases/20170127/main-successes-au-peace-and-security-challenges-and-mitigation-measures-place> accessed on Tuesday 9th October at 2:30 pm

A key flaw included in OAU Security framework was the insistence on the respect to state independence and the policy of non-interference. The lack of strong institutions of governance in Africa continues to hamper plans to attain peace and security. The failure as well as the inability of the OAU to deal with internal security threats was fully exposed when the OAU failed to contain the Rwanda genocide in 1994. The withdrawal of the US in Somalia led to the downfall of the Siad Barre regime which led to the collapse of the Somali state⁹².

The Commission on Human Security in 2003 noted that security has come to be associated with the basic issues facing humanity including the threats of climate change, pollution, food insecurity, ill health and other challenges. Indeed, the violation of the provisions of the Universal Declaration of Human Rights as well as the two International Treaties of 1966 constitutes a violation of human rights. The legality of the advancement of human rights in Africa is key in ensuring human security is enhanced. The core business of security is to protect humanity. Globally, the world continues to grapple with three key security concerns which are also key human rights issues which include globalized disease including HIV which has become an unrepresented health catastrophe, climate change which has enhanced poverty related issues, terrorism and violent extremism.

All these form the basis of violations of human rights⁹³. Another key failure on the part of the OAU and AU has been the insistence on addressing conflicts instead of using the Continental Early Warning System to prevent conflicts. Key violations of human rights continue to be witnessed as Africa has increasingly become a major route for human trafficking to Europe. Thousands of people have perished in the Mediterranean waters as they attempt to flee persecutions and human rights violations. In 2018, the Aquarius ship carrying over 500 immigrants became the face of immigration when it was denied entry by Italy and later docked at Spain. Major focus lies on development in Africa to achieve sustainable development is now an integral part of the AU program plans.

The original design of the RECs was for economic development, with analysts later focusing on security to ensure economic growth. The ECOWAS for instance has now fully integrated peace

⁹² Supra note 118

⁹³ United Nations, Commission on Human Security, Human Security Now, New York, 2003

and security to ensure it can guarantee development. SADC has also been involved in combating the proliferation of small arms in member states. Within the East Africa and Horn of Africa region, IGAD has been key in the advancement of peace and security. In 1994, UNDP focused on human safety in its report on human development noted that food, economic, well-being, ecological, individual and societal security form the 21st century security threats⁹⁴. Mahbub ul Haq, writing in 1994 notes that focusing on equity and sustainability is key to achieving human security in the 21st century⁹⁵. The 1990s saw a shift in global order in human rights.

This shift marked the start of the end of constitutions without constitutionalism and the end of imperial presidents without term limits. The 90s saw a shift and improvement across Africa in political freedoms and promotion of human rights. These continental frameworks on governance play key part in the advancement of sustainable development as well as fundamental human dignity. However, they continue to face challenges due to the “big man syndrome” and territorial integrity and state sovereignty which continues to impede regionalization of African affairs. These frameworks continue to shape the international relations among states in Africa as well as Africa and the rest of the world. Africa has not lacked in good policies on governance, she has fallen short in the implementation of the same policies.

2.10 The 2003 AU Convention on Preventing and Combating Corruption

Fraud is regarded among the key indicators of economic and political mis-failures. For a long period, Africa has been bedeviled by issues of economic crimes due to weak institutional capacities to address the challenges. To address these issues, the AU adopted a convention in 2003 and entered into force in 2006 with the last signature being appended in 2017. The convention was developed as a response mechanism to the damaging effects of corruption in and across Africa. It is estimated that Africa loses approximately \$148 billion which is about 25% of Africa’s GDP to corruption in both private and public sectors.

⁹⁴ United Nations Development Program, Human Development Report, 1994

⁹⁵ Mahbub ul Haq, *New Imperatives of Human Security*, RGCIS paper No 17, New Delhi, Rajiv Gadhi Foundation, 1994

The convention was developed to help in the establishment, strengthening and promotion of anti-corruption mechanisms across Africa, promote cooperation among AU member states, eradicate barriers to the enjoyment and promotion of socioeconomic and cultural rights and strengthen public sector transparency and accountability⁹⁶. However, despite the adoption of the AUCPCC, corruption remains a big threat to economic development across Africa. For instance, despite Sierra Leone and Liberia being regarded as case studies for post-war reconstruction and governance reforms, there still exists gaps in addressing key governance issues including corruption, money laundering, drug trafficking, violations of human rights and wide spread poverty.

A 2018 report by Transparency International Corruption Perception Index ranked Sierra Leone position 130/180 with a score of 30/100 while Liberia was ranked 122/180 with a score of 31/100. This report forms a worthy basis for anti-corruption efforts in Africa in line with the 2018 theme "*Winning the Fight Against Corruption, A Sustainable Path to Africa's Transformation.*" Fragile nature of governments accompanied by other extraneous factors continue to hamper the fight against corruption in some African states. There is however hope in countries like Botswana which continues to score better in governance scores⁹⁷.

Joseph Nye, defines corruption as a conduct that departs from recognized and prescribed obligations for personal gains. Corruption is therefore one of the signs of a weak governance system, where human rights are not respected. There has been debate as to whether human rights are a western phenomenon, however, Moss notes that the debates on the non-universality nature of human rights has no basis. Although scholars have attempted to use democracy and governance synonymously, the two terms operate almost independently. For instance, a country may hold regular elections making it a democracy due to its respect to civil liberties yet fail in key democratic governance issues including public participation and fairness. As Bayart notes, issues of human rights and their role in democratization in Africa have been more rhetorical than practical⁹⁸.

⁹⁶ African Union, African Union Convention on Preventing and Combating Corruption, Addis Ababa, 2003

⁹⁷ Transparency International, Corruption Perception Index, 2018

⁹⁸ Jean-François Bayart, Africa in the World: A history of Extraversion, African Affairs, 2000

According to a 1989 World Bank Report, bad governance constitutes the underlying litany of Africa's challenges⁹⁹. Corruption, a key governance issue, was highlighted in 2009 by Elena Ianchovichina and Susana Lundstrom. The two noted that corruption is borne when states start working on strategies to maintain economic growth, without proper democratic governance systems and structures¹⁰⁰.

Following years of abuse of human rights occasioned by runaway corruption and high level pilfering of public resources in Africa, the OAU, during its 34th Ordinary Session, in 1998, adopted Decision AHG-Dec 126 (XXXIV), which paved way for the establishment of a convention to address impunity and corruption in Africa¹⁰¹. Despite ushering some novelties in addressing corruption especially through linking corruption, wastage of public resources and their effects, the convention falls short on a specific framework to remedy the damage inflicted on individuals whose rights are violated as a result of corruption. Large scale corruption across Africa continues to hamper governments' efforts to uphold human rights.

The convention has serious claw-back clauses and lacks an effective mechanism for holding states accountable especially when corruption occurs within the public sector. Tom Burgis, in his book posits African states have been blighted by avaricious multinationals whose deals are often characterized by runaway corruption and lack of accountability¹⁰². This is in clear contravention of the guidelines for operations by multinational corporations which mandates all operations by MNCs to be carried out in conformity with the advancement of human rights. Burgis continues to argue that the capacity to address corruption and related crimes varies among Lusophone, Francophone and Anglophone speaking countries.

⁹⁹ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long - Term Perspective Study*, Washington D.C, 1989, pg. 60.

¹⁰⁰ Elena Ianchovichina and Susanna Lundstrom, *Inclusive Growth Analytics: Framework and Application*, Policy Paper, 2009

¹⁰¹ Assembly of Heads of State and Government, *Thirty-Fourth Ordinary Session/Second Ordinary Session of the African Economic Community, Declaration and Decisions Adopted by the Thirty-Fourth Ordinary Session of the Assembly of Heads of State and Government*, Ouagadougou, Burkina Faso, 1998

¹⁰² Tom Burgis, *The Looting Machine, Warlords, Tycoons, Smugglers and the Systemic Theft of Africa's Wealth*,

In Katanga Province, DR Congo, it is estimated that about \$5 billion worth of state owned assets were transferred to the private sector with no benefits to the state treasury between 1999 – 2002 by the then President Laurent Kabila. In 2004 when a group of civilians invaded the Australian owned Anvil Mining Company, the military of the DRC led by colonel Ilunga Ademars intervened and killed at least 100 people, with most dying through execution¹⁰³. Burgis notes that the issues in the DR Congo have been replicated across Africa. with resource rich countries suffering the same “resource curse”.

The issue of corruption has been exacerbated by the foreign AID received by African states. Despite Africa being considered one of the most aided continents in the world, it continues to rank poorly in economic development largely due to her debt crisis. Zambian scholar Dambisa Moyo, in her book *Dead Aid* notes that over the last five decades, Africa benefited with over \$1 trillion in development aid. This cycle of dependency seems not to have waned and has continued to elicit mixed feelings. Despite Africa receiving more than \$1 trillion for development, little has changed.

“The state of Africa is a scar on the conscience of the world” – Tony Blair, speaking during the Labor Conference in 2001¹⁰⁴

James Boyce notes that African elites have continued to pilfer resources which has left the continent with an odious debt. Of interest is the fact that between the 1970s and 2012, approximately \$700 billion in capital flight left Africa. in Angola alone, it is estimated that \$32 billion was lost between 2007 and 2010, which reflects a bigger problem across the continent¹⁰⁵. Central to the foreign aids agenda of the 1990s was the key question of governance, which led to a policy shift, with keen focus on political leadership and institutions of governance in Africa. at this time, there was general consensus that the challenge facing Africa was the lack of governance, much to the chagrin of African leaders.

¹⁰³ Nations Unies, Mission de l’Organisation des Nations Unies, en République Démocratique du Congo, Report on the conclusions of the Special Investigation concerning allegations of summary executions and other human rights violations perpetrated by the Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa (Katanga Province) on 15 October 2004.

¹⁰⁴ Dambisa Moyo, *Dead Aid, Why Aid Makes Things Worse and How There is Another Way for Africa*,

¹⁰⁵ James Boyce, *Elites Loot Africa while our Foreign Debt Mounts*, 2012

Over time, there has been a farcical narrative labelling Africa as a rising continent. In 2010, a report by McKinsey labelled Africa as the “Lion on the Move”. The report further projected that revenue generated from industries like agriculture, manufacturing and infrastructure development could hit approximately \$2.6 trillion by 2020. By 2008, Africa’s GDP was standing at \$1.6 trillion with 27 out of the 30 largest economies in Africa projected to accelerate growth. The report attributed the growth to macroeconomic policies and microeconomic stability within these economies¹⁰⁶.

The World Bank in 2012 declared that Sub Saharan Africa had unprecedented potential for growth. This was despite the lag in the global economic activities due to uncertainties in policy levels. The vote from the World Bank was supported by improved macro and microeconomic policies and political stability in Sub Saharan Africa¹⁰⁷. In 2012, the World Economic Forum declared that Africa was on the threshold of a major transformation, capitalizing on the continent’s zeal and drive to address challenges while seizing growth opportunities. The report further noted that Africa was home to seven of the ten fastest growing economies, which were projected to grow at 6% in 2012¹⁰⁸.

This claim that was immediately supported by the Times Magazine which noted that Africa was on the verge of breaking the status quo based on a surge in political stability, growth in democracies, with a majority of African states holding regular democratic elections, and economic growth¹⁰⁹. In 2013, the Economist, in a special report, labelled Africa as the “Hopeful Continent”¹¹⁰. This was shocking as the same paper had branded Africa as a “Hopeless Continent” in 2000. This assertion was based on unfortunate disasters that had raved Africa including the worst floods to happen in Mozambique in more than five decades, killing over 700 people and over 20,000 herds of cattle, the 1984 famine in Ethiopia and wars that ravaged the continent in different

¹⁰⁶ Charles Roxburgh et al, Lions on the move: The progress and potential of African Economies, McKinsey Global Institute, 2010

¹⁰⁷ Office of the Chief Economist for the African Region, World Bank, Africa’s Pulse, An Analysis of Issues shaping Africa’s Economic Future, 2012

¹⁰⁸ World Economic Forum on Africa, Shaping Africa’s Transformation, Addis Ababa, Ethiopia, 2012

¹⁰⁹ Johanna Mcgeary and Marguerite Michaels, Africa Rising, Time Magazine, 2001.

¹¹⁰ The Economist, Special Report, Africa Rising, A Hopeful Continent, March 2013

regions¹¹¹. All reports, though hopeful, were misleading as Africa is yet to recover her lost resources, and continues to lose more money to corruption each year. Dambisa Moyo concurs and notes that the biggest challenge lies with Africa itself, adding that perhaps the deceptive view that Africans are unable to embrace development without foreign aid is perhaps true. She further add that at a time when Africa was receiving financial aid, the levels of poverty rose by 55% to hit 66% by 1998¹¹².

The debate around financial aid and debt has not waned. There are new concerns that China could be stacking up debts for African states. During the 2018 Sino – African Summit held in Beijing, where Chinese President Xi Jinping guaranteed loans amounting to \$60 billion and refuted claims of handing Africa loans with string attached and engaging in “debt trap diplomacy”, the debate around Chinese loans and debt traps among African states was a major concern. Chinese Reuters Correspondent Christian Shepherd noted that some African states like Djibouti and Zambia were under huge stress from Chinese debts.

The World Economic Forum in 2017 noted that for Africa to grow, achieve the 2030 Agenda and become the next global economic powerhouse, it must industrialize. The report further indicated industrializing Africa had gained momentum as it was part of the agenda during the 2016 TICAD VI conference hosted by the Kenyan and Japanese Governments held in Kenya and the 2016 G20 Summit held in Hangzhou, China, where industrializing Africa and all the Least Developed Countries was placed as a key agenda¹¹³.

2.11 The 2007 African Charter of Democracy, Elections and Governance

In 2007, the AU adopted a charter to guide in elections, democracy and governance (ACDEG) to underpin the commitment towards the promotion of democratic governance and advancement of human dignity. The charter was inspired by key conventions. One of the conventions was the 1990 declaration that focused on the socioeconomic status in Africa at that time, which noted OAU’s progress in pushing for decolonization in the continent and the precarious socio-economic position

¹¹¹ The Economist, Hopeless Africa, May 2000

¹¹² Supra note 62

¹¹³ World Economic Forum, Africa has the potential to be an economic powerhouse. This is how, 2017

of the African continent despite adopting the LPA in 1980. Despite the push by the OAU to secure the economic status of Africa, there was deterioration in the value of life as well as the disquieting escalation of Africa's debts to the world which rose up by approximately \$197 billion to stand at \$257 billion at 1989 from \$60 billion in 1980 which saw the list of least developed countries rise from 21 to 28 in the same period¹¹⁴. In 1995, the OAU launched an agenda in Cairo to relaunch Africa's status in economic, social and political pillars.

In 1999, as the OAU prepared to transition to the AU, four key conventions were adopted. The first was the 1999 decision on undemocratic change of power in Africa, which was followed by the 2000 Lomé affirmation on the Framework¹¹⁵ for an OAU reaction to unlawful change of governments. In 2002, the AU adopted a declaration that would guide the continent in electoral management. In 2003, a protocol on the establishment of a peace and security council was adopted.

A meeting on unconstitutional change of Governments detailing the challenges as well as lessons learnt in Africa was hosted by the AU Peace and Security Council in 2014. It was noted that despite the many instruments adopted by the AU including normative frameworks, there existed a lacuna on addressing issues of "unconstitutional change of governments"¹¹⁶. The creation and adoption of ACDEG was meant to eliminate blatant violations of fundamental basic rights which are core to achieving an Africa of good governance. However, scholars are yet to concur whether the ACDEG is enough to propel Africa to achieve democracy and good governance.

There are fears that the mere adoption of conventions and legal instruments alone is not enough to ensure democracy and good governance. A majority of conventions adopted in Africa by the AU have failed to contain a clear and effective enforcement strategy. The failure of the OAU to achieve peace within the continent is one of the key failures the body. The OAU failed to address civil war

¹¹⁴ OAU, Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl.1 (XXVI) 1990
http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201%20XXVI_E.pdf accessed on Wednesday 3rd October at 1:45 pm

¹¹⁵ Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)) https://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm accessed on Wednesday 3rd October at 2:15 pm

¹¹⁶ <http://www.peaceau.org/en/article/press-statement-of-the-432nd-meeting-on-unconstitutional-changes-of-governments-and-popular-uprisings-in-africa> accessed on Wednesday 3rd October at 2:20 pm

in Sudan, Sierra Leone, Liberia and the genocide that almost obliterated Rwanda. The OAU also failed to reign in on leaders who tore up constitutions and violated the very core of human rights. During this period, dictators like Paul Biya of Cameroon, Hisene Habre of Chad, Robert Mugabe of Zimbabwe, Omar al – Bashir of Sudan among others have been in power for so long. The OAU failed to reign in on unconstitutional change of governments.

The ACDEG was established to respond to prior failures by instruments of the OAU including the African Charter that lacked clear strategies for guaranteeing free, fair and credible elections, democracy and good governance. A critical oversight by the African Charter which has since been addressed by the ACDEG was the stress on the importance of one man one vote policy as a means to ensure free and fair elections as well as democratic governance¹¹⁷.

Africa continues to face challenges towards the establishment of democratic governance. The AU through normative frameworks must actively engage member states to guarantee the provisions in the different conventions are adhered to deliver an Africa of good governance. A key outcome of the ACDEG is the development of the African Governance Architecture (AGA) which continues to play a significant role in strengthening democratic governance and the advancement of human rights across Africa. Another key outcome of the ACDGEG was the institutionalization of the APRM and NHRIs which are key organs in the promotion of democracy, good governance and constitutional order¹¹⁸.

Eleven years after its adoption, there remains critical areas that have hampered the full operationalization of ACDEG. Of critical importance is strengthening the relationship of the AU and all regional economic blocs to enhance implementation of ACDEG as well as strengthening state reporting mechanisms as established under article 49. ACDEG continues to encounter challenges include one of ratification. As at 2018, only ten states have signed and endorsed the treaty while twenty-eight states have only signed and are yet to ratify. The rest have neither signed nor ratified as at October 2018¹¹⁹.

¹¹⁷ Stacy-Ann Elvy, *Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance*, Emory International Law Review,

¹¹⁸ AU African Charter on Democracy, Elections and Governance, Article 15

¹¹⁹ www.achpr.org/instruments/charter-democracy/ratification/ accessed on Wednesday 3rd October 2018 at 5:14

Other key issues include the challenge of “undemocratic change of governments” which is not limited to coups alone but also encompasses the deliberate mutilation of constitutional provisions including changing presidential term limits or removal of the same altogether as has happened in several African states and dearth of promotion of human rights including understanding of the role of entities and institutions in promotion of human rights as key instruments for democratization¹²⁰.

2.12 2010 African Governance Architecture (AGA)

This framework was adopted in 2010 by the 15th AU Assembly of Heads of States and Governments held in 2010. During the 16th Ordinary Session of the AU Assembly of Heads of States and Governments held in 2011, it was agreed to establish a Pan African Architecture on Governance.

The main objectives of AGA are as follows:

- i. To fast-track the endorsement, subjugation, enactment and monitoring of African shared values
- ii. To extend collaboration, synchronization, teamwork and harmonization of collective standards including governance, advancement of human rights and social equality
- iii. Coordinate the reporting mechanism of the governance values espoused under articles 44, 45 and 49 of the ACDEG
- iv. Facilitate the strengthening of mechanisms to enhance preventative diplomacy, prevention of conflict and development through the Peace and Security Architecture¹²¹

As Africa continued to review her performance on matters of governance within the existing frameworks, key weaknesses were identified. The need for a stronger framework to coordinate the governance architecture to facilitate the work of existing frameworks was initiated. The development of the AGA framework is premised on key instruments and normative frameworks adopted and ratified by AU members' states including the AU Act, ACDEG, the ACHPR, Protocol on the Statute of the ACJHR, the Protocol Relating to the Establishment of the Peace and Security

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¹²⁰ Chika Charles Aniekwe et al, The 10th Anniversary of the African Charter on Democracy, Elections and Governance, Policy Brief, Institute of Development Policy, University of Antwerp, Belgium, 2017

¹²¹ African Union, African Governance Architecture Framework, 15th AU Assembly of Heads of States and Governments, Addis Ababa, Ethiopia, 2010

Council among other key frameworks¹²². The establishment of AGA, as with ACDEG was at a time when the AU was grappling with a rise in the unconstitutional change of governments, especially where sitting heads of states attempted to extend their stay in power through amending certain provisions of the constitution to either scrap off or change the presidential term limits. More importantly, AGA was established to bring balance to a myriad of instruments, which, instead of aiding Africa in attaining good governance, seemed to create a problem of efficiency and effectiveness.

Within the AGA framework is the African Governance Platform (AGP) which works to create convergence and synergy in democratic governance, human rights and impermanent justice, constitutionalism and the statute of law and altruistic assistance¹²³. As at 2017, there was need for close collaborations between AGA, APSA and APRM to ensure coordinated response to the needs to democratize. As at 2018, there is no adequate information to assess and examine the performance of the AGA. To achieve success for AGA, it will be important to understand the role that states and not state actors continue to play in democratizing governance.

2.13 Governance in Health Systems in Africa

HIV is closely related to development which is a basic human right. Across Africa, especially in high HIV burden countries, HIV has impacted negatively on development. The long terms effects of HIV are felt due to the deaths occasioned early on by HIV and AIDS. According to Feely, there is a direct co-relation between the impacts of HIV and food security, labour and productivity which affects economic growth. All these have a direct bearing on human rights.¹²⁴

The focus on palliative rather than curative medicines have seen Africa hit hard by globalized diseases. According to data by the World Health Organization, Africa had and continues to hold

¹²² Supra note 85

¹²³ Faten Aggad and Philomena Apiko, *Understanding the African Union and its Governance Agenda, African Governance Architecture and the Charter for Democracy, Elections and Good Governance*, European Centre for Development Policy Management, 2017

¹²⁴ Feeley, F. G. III, S. Rosen, and P. J. Connelly. 2009. *The private sector and HIV/AIDS in Africa: Recent developments and implications for policy*. In *The changing HIV/AIDS landscape: Selected papers for the World Bank's agenda for action in Africa, 2007-2011*, edited by E. L. Lule, R. M. Seifman, and A. C. David. Washington, DC: The World Bank. Pp. 267-293.

close to 70% of the total number of people living with HIV, as well as those who are personally affected by HIV¹²⁵. Since its discovery in the 80s, HIV continues to be an unprecedented human catastrophe across the world and poses a great threat to the promotion of human rights in Africa and across the world. Vulnerable groups like women, children, adolescents, young people and key populations are less likely to realize their political, economic and sociocultural rights due to their vulnerability to HIV, which is a key violation of their fundamental right.

These groups have also faced stigma and discrimination which translates to gender based violence. This affects their right to treatment and health, a clear abuse of their right to the highest standard of psychological and bodily health as outlined in the Constitution of the World Health Organization¹²⁶. Criminalization of certain groups including key populations, the limited access to harm reduction measures like clean syringes for Injecting Drug Users (IDUs), lack of access to opioid medications for palliative care affects the response to comprehensive care, treatment and support. All these link directly to issues of equality as HIV is strongly linked to with sociocultural, political, economic and gender equality issues. This greatly affects human development as Peter Piot noted in his journal on HIV and its impacts on human beings specially on areas of poverty¹²⁷.

In 2007, the Joint UN Taskforce on HIV (UNAIDS) noted that lack of promotion of human rights exposes people to the risks of HIV. Further, the statement noted that the lack of promotion of human dignity for people living with HIV leads to amplified disgrace, shame, denial, discrimination, in action and mis-action which results in the undoing of years of development gains¹²⁸. HIV is closely linked with gender inequality, which is a major source of mortality for women in the procreative stage in life. In the Sub Saharan Africa region, despite about 75% of all women living with HIV being in this region, there has not been enough resource allocation to tackle the scourge.

Unequal access to property, especially land has increased the risk of exposure to women and girls, which is a violation of their rights. In addition, gender imbalances in sexual and reproductive health

¹²⁵ http://www.who.int/hiv/data/epi_plhiv_2016_regions.png?ua=1 accessed on Thursday July 26th at 13:18 hours

¹²⁶ World Health Organization, *the Constitution, Forty-fifth edition, Supplement*, October 2006

¹²⁷ Peter Piot, Robert Greener and Sarah Russell, *Squaring the Circle: AIDS, Poverty, and Human Development*, 2007

¹²⁸ UNAIDS & OHCHR, *Handbook on HIV and Human Rights for National Human Rights Institutions*, 2007

have also exposed women to risks of HIV. The lack of advancement of human dignity specifically the right to universal access to health, especially reproductive health has exposed women and girls to HIV. This is despite research showing that integrating advancement of human rights in the HIV response is key to upholding the dignity of PLHIV.

The rights of vulnerable groups and sexual minorities including key populations have also been exposed to greater risks of HIV due to poor policies and laws on HIV. In Kenya for instance, a recent directive on the collection of biometrics for key populations during HIV services was termed as a violation of their fundamental rights. Human Rights NGO KELIN outlined clear violations that would occur should the proposal be implemented¹²⁹. There has not been enough progress on the response to pediatric HIV and TB with orphans and vulnerable children bearing the greatest brunt of the HIV scourge.

The commercialization of medicines has also affected treatment as the fight for industrial property rights intensifies with the production of generic medicines. During the 19th Universal AIDS Meeting held in Washington DC in 2012, research findings presented indicated that patents and intellectual property rights continued to hinder access to antiretroviral medicines. In 1994, the creation of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement led to key concerns access to crucial medications in developing countries. In 2001, during the World Trade Organization's Doha meeting, WTO members agreed that developing countries would not be obligated to implement the patent laws especially on pharmaceuticals until January 1st, 2016¹³⁰.

The region has also been hard hit by Ebola. In 2014 – 2016, the West African states of Liberia, Sierra Leone and Equatorial Guinea were hit by the worst Ebola outbreak, which led to over 10,000 deaths. This was attributed to broken health systems, poverty and poor infrastructure system. The three countries had just emerged from civil war which had destroyed all basic infrastructures. According to the World Health Organization (WHO), it took several months for health care workers in Equatorial Guinea to finally identify Ebola as the disease that was killing people.

¹²⁹ KELIN, Kenya Key Populations Consortium, "Everyone said no" Biometrics, HIV and Human Rights: A Kenya Case Study, 2018

¹³⁰ World Trade Organization, *TRIPS: Agreement on trade-related aspects of intellectual property rights*, 1994.

Child mortality in Sub Saharan Africa from Malaria and other issues remains high. According to data from WHO, by end of 2016, the trend for infant mortality per 1000 live births was still unacceptably high. By 2011, data shows that one in nine children died before their fifth birthday in Sub Saharan Africa. Despite child mortality and morbidity reducing across Africa, the data shows that it was insufficient to attain Millennium Development Goal no 4.

The dictates of global capitalism, changing climate and unfair trading regimes across the world have affected Africa's agricultural capacity. This has overwhelmed Africa's food security which has huge impact on health.

2.14 Conclusion

Africa continues to struggle in key areas of democratic governance. Issues of freedom continue to raise serious concerns. A report titled Freedom in the World released in 2015 notes that press freedom and by extend the freedom of civil societies continues to deteriorate over time. The AU needs to review Article 12 of ACDEG to include press freedom and ensure a free press is part of the democratic governance system in Africa.

There are also concerns on the return of constitutional amendments to extend or scrap off Presidential Term Limits in and across Africa. the AU must begin to publicly condemn and reject any attempts to change constitutions to extend term limits. The immunity clauses contained in African states should also be reviewed to ensure that impunity is punished by law. The enforcement mechanism within the AU has severely impaired the African Court on Human and People's Rights which is mandated with enforcing ACHPR.

The AU continues to face challenges in economic integration due to state sovereignty and idiosyncratic differences. There is need to ensure that Africa harmonizes policies to enhance institutional effectiveness.

Chapter Three

3.1 The Democratic Governance Framework in Kenya

Democratic governance is informed by the advancement of human rights. The development of key legislative frameworks under which governments can operate is subject to good governance which influences how human rights are protected. Both work intricately. In societies where power has been concentrated among the elites, there have been documented cases of abuse of human dignity. In Kenya, there are key democratic and governance frameworks that are responsible for the advancement and fortification of human rights.

3.2 Constitution of Kenya, 2010

In 2010, Kenya promulgated the Constitution which ushered in creation of devolved system of governance. This study will assess the role of human rights in democratizing governance with a specific focus on national reconciliation and healing, electoral and judicial reforms, access to justice and the promotion of economic, cultural and social rights and accountability.

Article 1 (1) of the CoK, 2010 states *inter alia* that the sovereign power is vested upon the people and must be exercised in accordance to the applicable laws of the country¹³¹. Article 4 (1) and (2) state that Kenya is a sovereign state and shall be a democracy which is guided on Kenyan values of the nation as outlined in the CoK¹³². The CoK 2010 contains an expansive chapter on the Bill of Rights which protect the five most fundamental liberties vested upon a human being.

The chapter is considered as the vital part of Kenya's egalitarianism and a fundamental part of the background for societal, financial and cultural policies in the country. The Bill of Rights also mandates Kenya to implement all international conventions and obligations to aid in the achievement and promotion of fundamental human rights for all¹³³. The CoK Article 2010

¹³¹ Laws of Kenya, The Constitution of Kenya, 2010, Article 1 (1), published by the National Council of Law Reporting with the Authority of the Attorney General, 2010

¹³² *Supra* note 122 Article 4 (1) and (2)

¹³³ <http://www.klrc.go.ke/index.php/constitution-of-kenya/111-chapter-four-the-bill-of-rights/part-1-general-provisions-relating-to-the-bill-of-rights/187-2.1-implementation-of-rights-and-fundamental-freedoms> accessed on Thursday 11th October 2018 at 12:50 pm

contains a statement of principles for good governance and national values which include democracy and meaningful engagement of the citizens, good governance, veracity and accountability, sustainable development and patriotism, human dignity, equity, equality and social justice, defense and advancement of human rights including the protection of the rights of the marginalized in the community¹³⁴.

The President, under CoK Art. 132 (1) (C) (i) and (ii) is obligated, in an annual address, to outline the progress made in the realization of national values as well as publish the details in the Kenya Gazette¹³⁵. In 2013, the government, published Sessional Paper on state ethics and values of governance. The paper outlines the historical background as well as key recommendations to all actors to remedy the situation to achieve and promote national values and good governance¹³⁶.

As part of the execution of the new Constitution, 2010, the government reviewed the act responsible for the promotion national unity¹³⁷. Despite the enactment of this act, there still remains several challenges. Other key Acts have been enacted including the Inter-Governmental Relations Act of 2012 which activated Article 6 of the CoK and the devolved government's Act 2012. In addition, the Leadership and Integrity Act which was enacted pursuant to Article 80 (d) on the advancement of the values of leadership and integrity¹³⁸ and the Ethics and Anti-Corruption Act of 2011 to address issues of corruption within the government.

In 2015, the Presidency issued Executive Order No. 6 of 2015 which focused on the fight against corruption in government ministries and state corporations¹³⁹. However, these legislations seem to have done little to address corruption at county and national government levels. According to a 2015 National Ethics and Corruption Survey, 93.7% of respondents across 46 counties reported

¹³⁴ Laws of Kenya, The Constitution of Kenya, 2010, Article 10 (2), published by the National Council of Law Reporting with the Authority of the Attorney General, 2010

¹³⁵ Article 132 (1) (C) (i) and (ii), supra note 122

¹³⁶ Republic of Kenya, the Presidency, Ministry of Interior and Coordination of National Government, Inuka, Sessional Paper No. 8 of 2013 on National Values and Principles of Governance, September 2013

¹³⁷ Laws of Kenya, National Cohesion and Integration Act No. 12 of 2008, date of ascent 24th December 2008, date of commencement 9th March 2009

¹³⁸ Article 80 (d), supra note 122

¹³⁹ Republic of Kenya, Office of the President, Executive Order No. 6, Ethics and Integrity in the Public Service, Printed by the Government Printer, Nairobi <https://www.embuni.ac.ke/images/Docs/executiveorder.pdf> accessed on Thursday 11th October 2018 at 4:05pm

that corruption exists with 74% of the respondents citing the levels of corruption as unacceptably high¹⁴⁰. In 2016, Philip Kinisu, the EACC Chairperson, while addressing Reuters, revealed that Kenya loses close to 608 billion shillings annually to corruption, which translates to almost a third of Kenya's annual budget. In the same year, corruption was ranked as the third problem facing Kenyans. However, in 2018, corruption ranked first at 43.6% followed by poverty at 37%, both of which are key governance issues¹⁴¹.

Corruption still remains a huge challenge. In 2017, Kenya scored 28 out of 100 in the Transparency International Corruption Perception Index coming in at position 143 out of 180 countries. This was the highest score since 1996¹⁴². According to a 2018 survey by the EACC, the Kenya Police Service was ranked as the most corrupt followed by the National Police Service, public hospitals, Kenya Revenue Authority, the National Transport and Safety Authority and the Department of Immigration Services.

In addition, the Interior and Coordination of National Government Ministry under whose directorate is the Department of Immigration, was voted fraudulent followed by the Ministry of health, where over 5 billion shillings are said to have been lost in a corruption scandal in 2018¹⁴³.

3.3 International and Regional Instruments of Human Rights as Frameworks of Governance

Kenya's governance score is often benchmarked against international standards including the Human Development Index (HDI), the Corruption Perception Index (CPI), the Ease of Doing Business Index (EDBI) and the Global Competitiveness Index (GCI). The latest Corruption Perception Index report released by TI in 2017 rated Kenya poorly with a score of 28¹⁴⁴. International and regional instruments of human rights are key in achieving human development, reducing corruption and creating the favorable environment for doing business.

¹⁴⁰ <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf> accessed on Thursday 11th October 2018 at 3:51pm

¹⁴¹ Supra note 122

¹⁴² <https://www.transparency.org/country/KEN#> accessed on Friday 12th October at 10:00 am

¹⁴³ Ethics and Anti-Corruption Commission, National Ethics and Corruption Survey 2017, Nairobi, 2018

¹⁴⁴ Supra note 133

In 1990, Kenya scored 0.468 on HDI scale and was ranked 109¹⁴⁵. In 2014, Kenya scored 0.535 on the HDI scale and was ranked 147 out of the 195 countries assessed that year. In the 2018 UNDP HDI score, Kenya was ranked 142 with a score of 0.590¹⁴⁶. In 2014, Kenya was ranked 129 out of 189 countries in the EDBI¹⁴⁷ and 96 with a score of 3.93 in the global competitiveness index¹⁴⁸. During the 2017 – 2018 period, Kenya improved slightly and was ranked at position 91 with a score of 3.98 in the global competitiveness¹⁴⁹.

A 2016 Human Development Report released by UNDP asserts that merely identifying issues affecting human development is not enough, adding that there is need to ensure that addressing such issues including human rights and obligations is key to achieving human development¹⁵⁰. In order to achieve these targets, Kenya has signed, ratified, ascended and domesticated international and regional human rights instruments to promote human development, eradicate corruption, create the favorable environment for doing business and become a globally competitive country. Indeed, Kenya's vision 2030 launched in 2008 aims to transform Kenya into an industrialized middle economy and globally competitive state¹⁵¹.

To achieve these ambitious goals, Kenya, courtesy of Article 2 (5) and (6) which state that the rubrics of transnational edict including treaties that Kenya ratifies, shall form part of the laws of Kenya¹⁵², ratified key international human rights instruments which include the UDHR in 1990¹⁵³, the ACHPR in 1992¹⁵⁴, the AU Resolution on Preventing and Combating Corruption ratified in

¹⁴⁵ <https://countryeconomy.com/hdi> accessed on Tuesday October 16, 2018, at 3:47 pm

¹⁴⁶ <http://hdr.undp.org/en/countries/profiles/KEN#> accessed on Tuesday 16, 2018 at 3:49 pm

¹⁴⁷ The World Bank and International Finance Corporation, Doing Business 2014, Understanding Regulations for Small and Medium – Size Enterprise, 2013

¹⁴⁸ <http://reports.weforum.org/global-competitiveness-report-2014-2015/report-highlights/> accessed on October 16, 2018, at 4:09 pm

¹⁴⁹ <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf> accessed on October 16, 2018, at 4:13 pm

¹⁵⁰ Selim Jahan, Human Development Report, Human Development for Everyone, United Nations Development Programme, 2016

¹⁵¹ Government of Kenya, Kenya Vision 2030, A Globally Competitive and Prosperous Kenya, October 2007

¹⁵² Supra note 122, Article 2 (5) and (6)

¹⁵³ <http://kenyalaw.org/treaties/treaties/164/Universal-Declaration-of-Human-Rights> accessed on Wednesday 17th October 2018 at 6:14 am

¹⁵⁴ <http://www.achpr.org/instruments/achpr/ratification/> accessed on Wednesday 17th October 2018 at 6:21 am

2007¹⁵⁵, and the two International Treaties of 1966 ratified in 1972 among others. Despite ratifying these international and regional instruments, there remains key gaps in the implementation of such instruments hence the challenges that continue to face the country. In addition to the annual Presidential speech to the nation as per the requirements of Art. 132 (1) (C) (iii), which mandates the President to address and report to the National Assembly on the progress in meeting international obligations¹⁵⁶, there is need to implement key recommendations to ensure Kenya achieves these goals.

Despite the UN General Assembly's Universal Periodic Review Mechanism report making 150 key recommendations to Kenya in 2010, the Head of state, in his annual speech in 2014, 2015 and 2016 did not table an account to the Parliament on the progress of execution and enactment of Kenya's international obligations as required under law.

3.4 National Human Rights Institutions in Kenya as Frameworks of Governance

The Constitution under Article 59 created the Kenya National Commission on Human Rights (KNCHR) to guarantee compliance with international, regional and national government responsibilities and commitments as relates to the advancement and defense of human rights¹⁵⁷. NHRIs are recognized internationally since they form part of the Paris Principles and were adopted in 1993. Subsequently NHRIs have continued to support the advancement and defense of human rights, which are key in the democratization of governance. The study will focus on two critical NHRIs in Kenya namely the Kenya National Commission on Human Rights and the Ombudsman

3.5 The Kenya National Commission on Human Rights

This commission exists as a "Category A" accredited NHRI under the Paris Principles and was established under Art. 59 of the CoK 2010. It was operationalized under Section 3 of the KNCHR

¹⁵⁵ [https://au.int/sites/default/files/treaties/7786-sl-](https://au.int/sites/default/files/treaties/7786-sl-african%20union%20convention%20on%20preventing%20and%20combating%20corruption%204.pdf)

[african union convention on preventing and combating corruption 4.pdf](https://au.int/sites/default/files/treaties/7786-sl-african%20union%20convention%20on%20preventing%20and%20combating%20corruption%204.pdf) accessed on Wednesday 17th October 2018 at 6:42 am

¹⁵⁶ Supra note 122, Article 132 (1) (C) (iii)

¹⁵⁷ Supra note 122, Article 59

Act No. 14 of 2011¹⁵⁸. KNCHR plays a critical role in the advancement and defense of human rights which are important in the democratization of governance. The commission also plays an important role as an advisory body to the government and other actors on issues of the state obligations as relates to the implementation of international, regional and national human rights agreements and conventions¹⁵⁹.

Section 8 of the KNCHR Act spells out functions of the commission including the advancement of the reverence for and compliance with human rights, the investigative role of complaints on violations and abuse of human rights and act as the chief structure to ensure obedience with international, regional and national human rights obligations¹⁶⁰. Following the 2007 – 08 Post election chaos that started after the disputed general elections in 2007, KNCHR initiated a PEV documentation project to identify the perpetrators of the violence. The end result was the production of the “On the Brink of Precipice: A Human Rights Account of the Post-2007 Election Violence”.

The report documented forced evictions and ethnically instigated killings. The report further revealed that violence related to gender, including rape, penile amputations and involuntary genital mutilations were used as tools of war. Key finding of the report pointed to the ineffective action by the government to end the terror and restore law and order. The report highlighted the duties of NHRIs in enhancing the fortification of human rights. The report further indicated that NHRIs must continue to understand the working of organized criminal networks that continue to perpetrate crimes. The report indicated the underlying need for security organs to address human rights violations committed by organized criminal gangs. The report pointed on the need to respond to early warning signs including hate speech during elections.

Lessons from the report continue to influence change. Subsequent to the promulgation of the Constitution in 2010, there have been major changes in key sectors including the establishment of

¹⁵⁸ Kenya National Commission on Human Rights, 2007, Reflections in the Mirror, An Introspection of the KNCHR 2007 – 2008 Experience, Reflections 10 Years After the 2007 Post- Election Violence, 2017

¹⁵⁹ Supra note 144

¹⁶⁰ Laws of Kenya, National Council for Law Reporting, Kenya Law Report, Kenya National Commission on Human Rights Act No. 14 of 2011, Section 8, 2011 Revised Edition 2012 (2011)

an independent judiciary, the transformation of the National Police Service to respond more effectively to address human dignity abuses as well as violations, the creation of a national cohesion body to foster healing and national cohesion (NCIC) and legislation of an act to address crimes of international status including genocide¹⁶¹. The report called for continued advocacy to ensure where human rights have been violated and abused, there are restitutions and accountability¹⁶².

In 2017, KNCHR conducted a survey titled “The Fallacious Vote” to evaluate political party primaries as part of monitoring electoral reforms. The findings of the report indicate that there was general unpreparedness in different parties which affected the integrity of the whole process as this was a violation of the Elections Offenses Act of 2016. The report further pointed that there were key violations of human rights including voter bribery and intimidations.

The clamor for electoral reforms resulted in enactment of amended Election Laws’ Act of 2016 as well as the Elections Offenses’ Act of 2016 and key reforms in the leadership of the Independent Electoral and Boundaries Commission (IEBC). KNCHR was key in calling for the government to ensure the amendments in the Elections Law which was passed controversially in January 2017 were not applied to ensure the country is not polarized along tribal lines. Towards the 2017 elections, there were integrity issues on the authenticity of the voter register, delays in electoral timelines including the procurement of ballot boxes and election technology including the biometric voter registration (BVR) kits¹⁶³.

The irregularities noted in 2017 were also noted in the 2013 election cycle. In a report titled “Break from the Past?”, KNCHR monitored the 2013 election cycle, a first in the new constitutional order. The report indicates that despite hopes of a new dawn in party primaries, there was a lack of organized process in the entire process. Issues including lack of participation by vulnerable groups like women was widely reported¹⁶⁴. The report recommended that political parties must have fully

¹⁶¹ <http://www.kenyalaw.org/lex/actview.xhtml?actid=No.%2016%20of%202008> accessed on Wednesday 27th October 2018 at 6:54 am

¹⁶² Supra note 144

¹⁶³ Kenya National Commission on Human Rights, The Fallacious Vote, April 2018

¹⁶⁴ Kenya National Commission on Human Rights, Break from the Past? A Monitoring Report of the 2013 Political Part Nominations, 2013

disaggregated membership lists including the mechanisms to identify members. Further the report called on the registrar of parties to ensure full adherence with the Political Parties' Act, including sanctions on entities that violate the Act¹⁶⁵. KNCHR further called on the IEBC to participate fully in political party nominations as per Article 88 (4) (d) of the Constitution of Kenya 2010¹⁶⁶. A key recommendation by the KNCHR is for the ratification of the ACDEG to enhance respect of rights including the right to participate in elections and elect a government and the free manifestation of determination as per Art. 38 (2) (a) (b) (3) (b) of the Laws of Kenya 2010¹⁶⁷. Political parties hold a key role in the advancement of democratic governance. However, the lack of institutionalization of political parties continues to hamper efforts for democratization.

Despite Section 7 (f) (i) of the Political Parties Act No. 11 of 2011¹⁶⁸ mandating every political party to have a fully desegregated membership list, this has not been the case in several election cycles. Further, all political parties must uphold the Constitution, democracy and good governance in their undertakings. The "Fallacious Vote" report calls for the full implementation of electoral laws in Kenya to enhance democratic governance and the defense of fundamental rights.

3.6 Civil Societies as Frameworks of Governance

Democratic governance and human dignity works in buttress. In lacking one the other cannot be guaranteed. To guarantee the attainment of these goals, state and non-state actors must work together. In a democracy where reverence to human dignity and democratic governance are to be guaranteed, the media and other actors must be free and without state interference.

The AU, in recognizing the significant role of the other actors in democratic governance in promotion of human rights and realization of peace and security, operationalized the Livingstone Formula, a mechanism established to facilitate the engagement of the AU PSC and CSOs. The Formula in particular listed key areas of focus including conflict prevention by undertaking early warnings analysis, peacemaking and mediation, peacekeeping in a complementary manner,

¹⁶⁵ Supra note 150

¹⁶⁶ Supra note 122, Article 88 (4) (d)

¹⁶⁷ Article 38 (2) (a) (b) (3) (b), supra note 122

¹⁶⁸ Laws of Kenya, National Council for Law Reporting, Kenya Law Report, Political Parties Act No. 11 of 2011, Section 7 (f) (i), 2011

humanitarian assistance especially in post-conflict reconstruction and advocacy¹⁶⁹. In Kenya, CSOs have operated for a long time. In the 1970s and 80s, owing to weak governance structures, there was an explosion in the number of CSOs in Kenya. However, due to the huge numbers of CSOs, there was suspicion on their activities, with some being branded a national security threat¹⁷⁰.

In defining what constitutes a CSO, Ostrom defined CSOs as a conglomeration of community structures as well as traditional religious organizations¹⁷¹. Another scholar, Maria Nzomo notes that a CSO does not include political associations¹⁷². This argument seems to counter the state narrative that CSOs were a threat to national security. Governance issues including corruption and embezzlement of public resources have continued to be witnessed in Kenya. CSOs in Kenya in the 80s were critical in the push for multi-party democracy.

However, despite the push for structural reforms in governance, including interventions by the Bretton Wood Institutions, key gaps in addressing governance issues, including high level corruption scandals being unresolved for long periods continue to exist. Kanyinga attributes this challenge to the failure to institute serious governance changes in government¹⁷³. CSOs continue to fall short of their goals to enhance democratic governance. Draconian laws continue to claw back the gains made. CSOs also face challenges including corruption within the institutions and a lack of capacity to address serious issues due to donor overreliance. In 2015, during the First Civil Society Organization Reference Group Annual General Assembly meeting, US ambassador to Kenya Bob Godec noted that despite the new wave of change sweeping across the continent, there remains serious challenges including poor governance, abuse and violations of human rights, insecurity including challenges of globalized diseases like Ebola and HIV, climate change, cyber

¹⁶⁹ AU, *The Livingstone Formula, Conclusion on a Mechanism for Interaction Between the Peace and Security Council of the African Union and Civil Society Organizations in the Promotion of Peace, Security and Stability in Africa*, Livingstone, Zambia, 2008

¹⁷⁰ P Kameri Mbote, *The Operational Environment and Constraints for NGOs in Kenya, Strategies for Good Policy and Practice*, IELRC Working Paper, Geneva, Switzerland, 2002

¹⁷¹ Ostrom E., *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, Cambridge, UK, 1990

¹⁷² Maria Nzomo, *Civil Society in the Kenyan Political Transition: 1992 – 2002*, in W. Oyugi, *The Politics of Transition from KANU to NARC*, a Publication of the Heinrich Böll Stiftung Foundation, 2003

¹⁷³ Kanyinga K, *Political Change In Kenya*, in P. Wanyande, M. Omosa & C. Ludeki (Eds), *Governance and Transition Politics in Kenya*, (Vol 4. Pp 81 – 97), University of Nairobi Press, Nairobi, Kenya

security, terrorism and high profile pillaging of public resources among other challenges¹⁷⁴. Ambassador Godec reiterated the words of President Obama who noted that strong countries need strong civil society organizations and further branded the CSOs the conscience of a country and the catalysts for a better change in the society¹⁷⁵.

Ambassador Godec challenged the administration to fast-track the adoption of the Public Organizations Act No. 18 of 2013¹⁷⁶ which he noted is critical in enhancing good governance among CSOs while enhancing accountability. There have been attempts by the government to introduce restrictive amendments to the Act including introducing a 15% capping for funding from external donors while at the same time refusing to enact the legislation. The culture of governance in Kenya is a key hindrance in addressing democratic governance.

The Miscellaneous Amendment Bill of 2013 which had been published by the Attorney General in the Kenya Gazette in October 2013 also sought to restructure the funding system such that donors would channel their support through the Public Benefits Organizations Federations, a move that CSOs feared would impact on their work and infringe on their constitutional rights. By 2017, despite two High Court Orders by Justice Louis Onguto (2016) and Justice Mativo (2017) the government has failed to enact the legislation. Other actors in democratic governance in Kenya include self-generating groups within communities and societies. Some CSOs have failed to establish key links with actors in governance.

3.7 The Ethics and Anti-Corruption Commission

The EACC is a statutory government institution established and authorized to function under Section 3 (1) the EACC Act No 22 of 2011¹⁷⁷ read together with Chapter Fifteen Article 252¹⁷⁸,

¹⁷⁴ <https://ke.usembassy.gov/remarks-by-ambassador-robert-f-godec-at-the-first-cso-reference-group-annual-general-assembly/> accessed on 19th October 2018 at 9:14 am

¹⁷⁵ Remarks at a Civil Society Forum in Panama City, Panama, 2015, <http://www.presidency.ucsb.edu/ws/?pid=109954> accessed on 19th October 2018 at 9:25 am

¹⁷⁶ The Republic of Kenya, Laws of Kenya, Public Benefits Organizations Act No. 18 of 2013, Revised Edition 2014 [2013], Published by the National Council for Law Reporting with the Authority of the Attorney-General

¹⁷⁷ Directorate of Preventive Services, Ethics and Anti-Corruption Commission, Ethics and Anti-Corruption Act No. 22 of 2011

¹⁷⁸ Supra note 122

the ACEC Act of 2003¹⁷⁹ and the Integrity Act of 2012. The Commission is critical in the implementation of Chapter Six of the Constitution on Integrity. The office is mandated under the EACC Act of 2011 to provide *inter alia* reports on the status of the fight against corruption as well as unethical conduct and practices in the public service.

Despite making significant strides towards democratization, corruption remains one of the biggest challenge facing successive governments. As Inge Amundsen opines, the process of democratizing good governance may inadvertently open channels for corruption¹⁸⁰. Corruption is indicative of institutional failure at deeper levels. Corruption often denigrates societies and condemns them in many ways. However, in spite of the availability of several regulations and the eventual promulgation of the Constitution of Kenya 2010, there still remains challenges in the democratization of good governance.

Almost all corruption scandals have been perpetuated ostensibly for public good. High profile scandals have rocked the country over time, including the Goldenberg scandal which resulted in violation of the Export Compensation Act of 1974. Another mega scandal to rock Kenya was the Anglo-Leasing scandal, the Maize scandal, the Triton Oil scandal, the National Youth Service scandal, the Ministry of health scandal among others.

In 2003, a report by Kroll, a Consulting Company was released documenting alleged embezzlement of public resources to the tune of \$2 billion by the then retired President Moi, his sons Philip, his private Secretary Joshua Kulei and Nicholas Biwott. The assignment which was managed by John Githongo elicited mixed reactions. Although the government rejected the report terming it hearsay, the report revealed a serious deficiency by the administration to tackle graft. Over the years, the EACC, a successor of the defunct KACC continues to monitor and regularly update reports on the status of corruption. A 2016 Ethics and Corruption Survey released in 2017 noted that there was a 5.4% perceived increase in the levels of corruption as compared to 2015¹⁸¹.

¹⁷⁹ The Republic of Kenya, Laws of Kenya, Anti-Corruption and Economic Crimes Act No. 3 of 2003, Revised Edition 2016 [2014], Published by the National Council for Law Reporting with the Authority of the Attorney-General

¹⁸⁰ Inge Amundsen, Political Corruption: An Introduction to the Issues, Chr Michelsen Inst, Working Paper No. 7, 1999

¹⁸¹ Research and Transformation Department, Ethics and Anti-Corruption Survey, National Ethics and Corruption Survey, 2016, EACC Research Report No. 3 of January 2017

Key challenges remain in the fight against corruption and unethical conduct including abuse of office. Some of the recommendations include developing a working formula to engage actors on civic programs to address knowledge gaps as well as enhance the fight against corruption. In addition, a review of all anti-corruption laws to develop a clear national policy to address theft of public resources is critical to address corruption.

3.8 The Electoral Systems and Political Parties as Frameworks for Governance

The right to meaningful engagement in decision creation and implementation is a fundamental basic right guaranteed upon all humans. Different international instruments recognize the importance of public engagement. The UDHR of 1948¹⁸² has vested such rights upon humanity. The ICCPR¹⁸³ has also assured such right. In Africa, ACHPR¹⁸⁴ as well as ACDEG¹⁸⁵ have also mandated AU members to ensure there is public participation as an inalienable right.

Article 10 (2) (a) of the CoK 2010 recognizes such engagement as part of the values of Kenya¹⁸⁶. Article 1 (2) of the CoK directs the manner under which people can exercise such powers, including through popularly and legitimately elected officials¹⁸⁷. It is at the basis of these two provisions that political parties and the electoral system has become a fundamental part of good governance in Kenya and across the world. After the botched 2007 elections, the Independent Review Commission (Kriegler Commission) noted that the electoral system in Kenya barred institutionalization of political parties as vehicles for good governance. The report further found that the political parties were built on the strength of ethnic grounds with lots of gerrymandering¹⁸⁸.

Despite proposals for the introduction of the Mixed Member Proportional Representation, members of parliament, afraid that this would cost some their elective posts, as this system would eradicate the ethnic mobilization, shot down the idea. Despite the proposal being a grand idea to

¹⁸² Article 21 of the Universal Declaration of Human Rights of 1948

¹⁸³ Article 25 of the International Covenant on Civil and Political Rights, 1966

¹⁸⁴ African Union, African Charter on Human and People's Rights, Article 13, 1981

¹⁸⁵ African Union, African Charter on Democracy, Elections and Governance, Article 3 (7), 2007

¹⁸⁶ Supra note 122, Article 10 (2) (a)

¹⁸⁷ Supra note 122, Article 1 (2)

¹⁸⁸ Nairobi Government Printers, the Kriegler Report, 2008

strengthen political parties, there was opposition towards it. The requirement to win by a simple majority for elective posts in the legislature has continued the politics along the ethno-political lines. This has rendered political parties as vehicles to win elections instead of institutions of governance.

As the country prepared for the elections in 2007, the Political Parties Bill of 2007 was passed and signed into law a couple of months before the elections to be held in December of that year. However, the political parties did not receive funding that year which affected the integrity of the parties. The lack of legal frameworks and institutionalization of political parties in Kenya since independence has severely weakened the role of the parties as institutions of democratization of good governance¹⁸⁹. Mwangi further opines that due to the poor legal frameworks, political parties often contain parochial constitutions and manifestos¹⁹⁰.

The Democratic space in Kenya is more and enhanced the accountability among the political elite and political parties¹⁹¹. However, Kanyiga, Okello and Akech posit that the project nation building in Kenya has failed largely due to the lack of institutionalization of political parties and the fragility of the democratic transition¹⁹². The creation of the Registrar of Political Parties through the Political Parties Act of 2011 was seen a step to address the need to institutionalize parties. The creation of the IEBC as a successor of the defunct Electoral Commission of Kenya, which oversaw the botched 2007 elections, is an important step towards sustaining the gains made in institutionalizing political parties.

The IEBC is mandated under Article 81 to conduct *inter alia*, elections based on the universal suffrage. Elections are a key yardstick for democracy and good governance. Challenges however remain as most political parties lack sound ideologies. In a review of the role of political parties in

¹⁸⁹ Oscar G. Mwangi, Political Corruption, Party Financing and Democracy in Kenya, The Journal of Modern African Studies, Vol. 46, No. 2, Cambridge University Press, 2008

¹⁹⁰ Supra note 175

¹⁹¹ Frank Holmquist and Mwangi wa Githinji, Reform and Political Impunity in Kenya: Transparency Without Accountability, African Studies Review, Vol. 55 No. 1, Cambridge University Press, 2012

¹⁹² Kanyiga Karuti, Duncan Okello and Akoko Akech, Contradictions of Transition to Democracy in Fragmented Societies: The Kenya 2007 General Elections in Perspective, In *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, edited by Karuti Kanyiga and Duncan Okello, 1-28, Institute for Development Studies, University of Nairobi, 2010

the 2013 general elections, Cornell and D'Arcy note that found these institutions play a very limited part in enhancing the democratic space¹⁹³. The report further found that nomination exercises were marred with irregularities due to the lack of internal checks for political parties. A key part of the political parties was the balkanization of communities into ethnical groups. As Akoth opines, political parties in Kenya have been balkanized into ethnic groups which mirrors colonial "tribal homelands"¹⁹⁴

Political party financing is an integral part of the development of political parties which are key instruments of democratization of governance. Austin and Tjernstrom opine that for sustainable democratic governance, precise thought must be paid to political party financing, as political parties have become conduits for corruption and abuse of office. To enhance good governance in Kenya, there is need to address the majoritarian electoral system, implement laws and regulations relating to political parties, specifically on their institutionalization and ethnic and identity politics

3.9 Conclusion

Kenya continues to face challenges in democratic governance. There have been attempts to institute democratic governance, but this has taken a slow pace. The lack of institutionalization of political parties has perpetuated the politics of tribe. Key challenges including corruption, stifling of the democratic space for civil societies, excessive use of power by the disciplined forces, failure by the government to respect court orders, a political system that continues to be challenged among other challenges continue to face the country.

¹⁹³ Agnes Cornell and Michelle D'Arcy, *Devolution, Democracy and Development in Kenya*, Research Report No. 5, Swedish International Centre for Local Democracy (ICLD), 2016

¹⁹⁴ Akoth S. O., *Challenges of Nationhood, Identities, Citizenship and Belonging under Kenya's New Constitution*, Constitution Working Paper No. 10, Society for International Development, Washington, 2011

Chapter Four

4.0 The Democratic Governance Framework as Principles of Human Rights in Botswana

Good governance has become a standard measure of a state's credibility in the international markets. Botswana alongside Mauritius are among the states in Africa with great economic stability buoyed a higher threshold of upholding human rights. This has sustained the economy and promoted development in different quarters. Botswana is considered a stable and sustainable economy in Africa, as was noted during the 2008 Mo Ibrahim awards for achievements in African Leadership. In awarding Botswana's President Festus Mogae, the Mo Ibrahim Foundation noted among other things that;

“Botswana's democracy was strong, stable and was rooted in the rule of law which made the country one of the more effective countries to combat corruption. President Mogae was further commented for his leadership in the face of the HIV and AIDS crisis that threatened to wipe out an entire population. The Mo Ibrahim Foundation further noted Botswana's peace and stability, the respect to the rule of law and the respect for human rights.¹⁹⁵”

The rise in the growth of democratic governance in Botswana is attributed to several factors. The veneration for human dignity and the role they play in democratizing governance cannot be underscored in the 21st century. The need for economic development, while ignoring the respect to human dignity, has long been the foci for many governments in Africa, but in Botswana, there has been a critical focus on promoting such rights to ensure the country can develop. To enhance the advancement of democratic governance in Botswana, the country established strong government institutions that have been charged with protecting human rights¹⁹⁶. Botswana's national principles of self-reliance, democracy, unity and development underpinned in its blue print (vision 2016) have guided the state to achieve and sustain democratic and good governance gains. One of Botswana's seven pillars is the establishment of a democratic and accountable nation, which a critical pillars of good governance¹⁹⁷.

¹⁹⁵ Amelia Cook and Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development*, 2012

¹⁹⁶ James A. Robinson, *Botswana as a Role Model for Country Success*, Research Paper No. 2009/40, United Nations University, World Institute for Development Economic Research, June 2009

¹⁹⁷ Jonathan Mayuyuka Kaunda, *The Progress of Good Governance in Botswana in 2008*, Final Report of the UNECA

4.1 Botswana's Nation Building and Leadership

The focus on sustainability in Botswana, a reliance on sound macroeconomic policies and stable leadership has been key in democratization. The First President of Botswana Sir Seretse Khama laid a foundation under which Botswana built on in areas of peace and nation building. Since independence, Botswana has never experienced any undemocratic change of government or civil wars despite being one of the world largest diamond producers¹⁹⁸. To address the "*resource-curse*" that has blighted many resource-rich states in Africa, Botswana developed value addition industries to address these challenges. Across Africa, countries with mineral deposits have more often than not been involved in intra and interstate conflicts¹⁹⁹.

The Democratic Republic of Congo, despite having mineral deposits worth trillions of dollars, has never enjoyed long periods of peace, signifying the importance of sound leadership in addressing the "*resource curse*". Part of the system to address this issue in Botswana was the continuation of the Tswana *Kgotla* tradition, which has enhanced community-government confidence, thus reducing chances of flare ups over resources. When Botswana gained independence, it had a per capita income of \$70 per annum. The growth from a third world to country to a middle economy state in less than six decades has been nothing short of miraculous. The country invested heavily in infrastructure development to record a huge growth from 12 kilometers of paved roads in 1966 to pave more than 7000 kilometers of roads by the end of 2007.

The country also grew the economy to post per-capita income of approximately \$6,100 estimated at \$12,000 purchasing power parity. Life expectancy has also improved from 36 years in 1966 to 60 years by 1990, and recording an impressive decline in under five mortality and morbidity rate²⁰⁰. Establishment of strong democratic institutions, the adherence of universal rights and sound leadership form the core economic development and prosperity as has been the case in

Project Measuring and Monitoring Progress Towards Good Governance in Africa, The African Governance Report II, Botswana Institute for Development Policy Analysis, 2008

¹⁹⁸ Supra note 188

¹⁹⁹ Collier P. and A. Hoeffler, Greed and Grievance in Civil War, Oxford Economic Papers 56, Oxford University Press, Oxford, United Kingdom, 2004

²⁰⁰ Acemoglu D., Johnson S and J. A. Robinson, An African Success: Botswana, In Search of Prosperity, Analytical Narratives on Economic Growth, ed, D. Rodrik, Princeton, NJ, Princeton University Press, 2003

Botswana for a long period²⁰¹. Over the years, the government capitalized on key areas of human development including expanding funding for basic education and health care. A key factor that initiated the democratization of governance in Botswana was the national identity that was fostered by the Tswana communities. Whereas in other Sub-Saharan Africa countries societies were balkanized into ethnic units which resulted in divided communities without a national identity, Botswana started off with national identity. In a continent where sound leadership has often lacked, Botswana has always remained as a positive example.

Botswana continues to invest in sound macroeconomic policies that continue to spur her growth as noted by Kaufman in 1999 who opines that an integral part of democratic governance is the ability to articulate sound macroeconomic strategies for the economic good of a state²⁰². Consistent engagement of the public through the *Kgotla* has enhanced public participation thus enhanced democratic governance in Botswana. The Southern region had traditional institutions, yet it is only in Botswana where these institutions played a key role in establishing a lasting legacy of democratic governance. Across Africa, linguistic fragmentations have been blamed for the violence often witnessed across Africa. In Cameroon, there has been violence pitting the English speaking Cameroonians against the French speaking Cameroonians²⁰³.

As Professor P. L. O. Lumumba once opined in a speech, it is only in Africa where the continent is divided and is often referred to in the former colonial powers namely the Francophone, the Anglophones and the Lusophone²⁰⁴. Botswana has also benefitted from the influence of political leadership. The need to focus on establishing and strengthening state institutions cannot be underscored in Africa. For African states to truly achieve democratic governance, institutions of governance must be strengthened and empowered to achieve these results.

²⁰¹ Barro R, Determinants of Economic Growth, A Cross-Country Empirical Study, Cambridge, MA, MIT Press, 1997

²⁰² Kaufman D, A. Kraay and P. Zoldo-Lobatón, Governance Matters, World Bank, Washington DC, 1999, In ²⁰² James A. Robinson, Botswana as a Role Model for Country Success, Research Paper No. 2009/40, United Nations University, World Institute for Development Economic Research, June 2009

²⁰³ https://www-bloomberg-com.cdn.ampproject.org/v/s/www.bloomberg.com/amp/news/articles/2018-07-24/anglophone-rebellion-seen-raising-risk-of-civil-war-in-cameroon?usqp=mq331AQECAFYAQ%3D%3D&is_v=0.1#aoh=15408872761177&ct=1540887508270&csi=1&referrer=https%3A%2F%2Fwww.google.com&tf=From%20%251%24s&share=https%3A%2F%2Fwww.bloomberg.com%2Fnews%2Farticles%2F2018-07-24%2Fanglophone-rebellion-seen-raising-risk-of-civil-war-in-cameroon accessed on Tuesday 30th October 2018 at 11:30 am

²⁰⁴ National Security Symposium 2018, Speech by P. L. O. Lumumba, Kigali, Rwanda, 2018

4.2 The Constitution of Botswana of 1966

The Constitution of Botswana 1966 is the ultimate decree and a guiding principle upon which all other laws are contained. Section 89 of the Constitution of Botswana contains the clause on alterations which can only be revised by the Parliament of Botswana. The Constitution contains guarantees for key freedoms including derogation from Fundamental Rights and Freedoms under Section 16 among other key rights. It is on the basis of these rights that Botswana has grown to become a model democracy where law is applicable and human rights are protected to promote democratic governance.

The Constitution has also espoused Public Participation, which is a good governance marker as an integral part of government processes. Under Section 89 of the Constitution, before any bill can become law, it must be published for not less than 30 days in the Government Gazette before it can be tabled in Parliament for debate. Key constitutional amendments have been conducted since 1966 including the 1997 amendment which reduced the voting age from 21 to 18 years as well as allowing Batswana living in diaspora to vote²⁰⁵.

Another key amendment to the Constitution saw the law changed under Sections 65 to 67 regarding the appointment of the Independent Electoral Commission, which is a key framework for governance as it steers all elections in a state²⁰⁶. Other areas that have been amended include Section 77 to 79 of the Constitution which sought to end discrimination based on tribe as well as introducing the *Ntlo ya Dikgosi*²⁰⁷. These amendments were aimed at enhancing good governance in Botswana. The inclusion of the *Ntlo ya Dikgosi* in governance matters in Botswana is credited with enhancing democratic governance in the country as it has increased public participation among the Batswana.

²⁰⁵ Republic of Botswana, Constitution of Botswana, Constitutional Amendment Act of 1997

²⁰⁶ Republic of Botswana, Constitution of Botswana, Constitutional Amendment Act No. 15 of 1997

²⁰⁷ Ntlo ya Dikgosi – this is the Traditional House of Chiefs in Botswana. It is made up of 35 members, among them eight Kgosi Hereditary Chiefs. The President of Botswana usually appoints five members to the Ntlo while thirty members are elected by senior tribal authorities.

4.3 International and Regional Instruments of Human Rights as Frameworks of Governance

Whereas Botswana has not faced a challenge in the endorsement of frameworks of human dignity and conventions, it has faced a challenge in the domestication and implementation of such laws in to its national laws. This is due to a caveat in the Laws of Botswana that stipulates that Parliament has to domesticate any international Law through an Act of Parliament. However, despite this challenge, the Interpretation Act, which was enacted by the government has lessened the burden. The Industrial Court of Botswana, while ruling in the *Amadou Oury Bah v Libyan Embassy Case*, noted that Customary International Law is applicable in Botswana, so long as, it is in tandem with the state law.

By 2018, the country has assented to, among others, on conventions to address issues of refugees in Africa²⁰⁸, the ACHPR²⁰⁹ and the Protocol to the ACEACHPR²¹⁰, charters on the welfare on children and the AU Act. Botswana continues to maintain good standards of democratic governance despite failing to sign the ACDEG.As at November 2018, only 10 countries in Africa have ratified ACDEG²¹¹.

4.4. National Human Rights Institutions in Botswana as Frameworks of Governance

Management and advancement of human dignity issues remain as complex challenges in the world. The United Nations continues to pay special regard to the role that NHRIs play in the advancement of human dignity. To enhance the works of NHRIs, different networks based in the different regions have been created. In 2007, the Network of NHRIs was established in Africa, in conformity with the founding principles²¹².

In 2010, only 15 NHRIs in Africa had attained the “A Status” according to the Paris Principles. This number has since grown to 21 as at 2017. The continent also has 9 B status NHRIs and 2 C

²⁰⁸ <http://www.achpr.org/instruments/refugee-convention/ratification/> accessed on November 1st 2018 at 4:00

pm

²⁰⁹ <http://www.achpr.org/instruments/achpr/ratification/> accessed on November 1st 2018 at 4:10 pm

²¹⁰ <http://www.achpr.org/instruments/court-establishment/ratification/> accessed on November 1st 2018 at 4:13pm

²¹¹ <http://www.achpr.org/instruments/charter-democracy/ratification/> accessed on November 1st 2018 at 4:51 pm

²¹² Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions, History, Principles, Roles and Responsibilities, United Nations, New York and Geneva, 2010

status NHRIs²¹³. A study of the status of NHRIs in Africa revealed that some NHRIs still face deficiencies including executive regulations that curtail the work of such NHRIs to operate freely. In addition, the study revealed that some NHRIs have faced structural limitations and restrictive mandates in their work. Threats on human dignity defenders including interference on the autonomy of NHRIs were considered factors that have impeded the work of the NHRIs.

A key focus was also the work of NHRIs in mainstreaming human rights based approaches to their work to ensure the work meets international standards²¹⁴. As opposed to modern cultures and constitutionalism where National Human Rights Commissions form part the existing law, the laws in Botswana have not guaranteed the creation of an NHRI as the laws are perceived by the government to be sufficient to protect human rights. As at 2018, a draft Cabinet Memorandum Bill has been submitted to the Cabinet for discussions on the establishment of an NHRI in Botswana.

4.5 Civil Societies as Frameworks of Governance

Civil societies across Africa play a fundamental role as the watchmen to check the government against abuse and violations of human rights. Shabbir Cheema opine that CSOs have an important duty of checking the excesses within governments, monitoring social abuses and offering an opportunity for the society to grow²¹⁵. CSOs are considered as critical anchors of democracy. Different scholars continue to underscore the role that CSOs continue to play in Africa in the democratization process²¹⁶.

Despite CSOs facing challenges across Africa, with government instituted influence, CSOs in Botswana seem to be faring better. According to John D. Patrick Molutsi and Gloria Somolekae, CSOs in Botswana have significantly moved from the intermittent activities to institutionalization with a strong basis on participation in public policy making processes²¹⁷. Kenneth Good noted that

²¹³ Global Alliance of National Human Rights Institutions, Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions as at 26th May 2017

²¹⁴ United Nations Development Programme and Network of African National Human Rights Institutions, Study of the State of National Human Rights Institutions (NHRIs) in Africa, produced by Blandford Consulting, 2016

²¹⁵ Shabbir Cheema, Building of Democratic Institutions: Reform in Developing Country, Kumarian Press, Inc., 2005

²¹⁶ Puthem Jugenshor Singh, Process of Democratization in Botswana: The Role of Civil Society, Research Scholar, Centre for African Studies, School of International Studies, Jawaharlal Nehru University,

²¹⁷ Holm, John D. Patrick P. Molutsi, Gloria Somolekae, The Development of Civil Society in a Democratic State: The

a key part of Botswana's success was the institutionalization of effective systems of control, including the civil service²¹⁸. CSOs in Botswana played a key role in civic education in Botswana, engaging the communities to address issues of voter apathy. Before the 1999 elections, civic education was not emphasized. However, after constitutional amendments lowering the age of voting from 21 to 18 as well as instituting reforms in the IEC, CSOs were engaged to conduct civic education. By the end of 1999, there were approximately 223 indigenous, community based and trade union CSOs in Botswana which have helped to define national issues of interest as well as ensuring that public policies are accessible to the public.

CSOs like Emang Basadi and Ditshwanelo have continue to highlight key issues of concern in the consolidation of democratic gains²¹⁹. In particular, women led CSOs like Emang Basadi continue to highlight important issues in the democratization of governance by enhancing public participation. Their campaign on policy issues as regards the participation of women in elective politics has borne fruit as more women are being elected into the parliament²²⁰. CSOs in Botswana have also been critical in the promotion of the rights of the marginalized communities. After the forced eviction of the Baswara (San) community which is considered their family home, Ditshwanelo, a local CSO has campaigned for the restoration of the land rights. In addition, the CSO has been critical in promoting the rights around HIV.

4.6 Institutions for Combating Corruption.

Despite being predominantly ruled by one party since independence, Botswana has not experienced wide spread corruption scandals as has been the case in many African states. The discovery and exploitation of diamonds boosted by sound macroeconomic policies boosted Botswana's growth and development. In a continent full of challenges, Botswana remains as the hope of democratic governance in addressing corruption. The first reported corruption case in Botswana occurred in 1975 when Mr. Kunz, an engineer with the Ministry of Works and

Botswana Model Source, *African Studies Review*, 1996

²¹⁸ Kenneth Good, *Interpreting the Exceptionality of Botswana*, *Journal of Modern African Studies*, 1992

²¹⁹ Maundeni, Dorothy Mpabanga et al, *Consolidating Democratic Governance in Southern Africa: Botswana*, Johannesburg, South Africa, 2007

²²⁰ Gloria Somolekae, *Democracy, Civil Society and Governance in Africa, The Case of Botswana*, Gaborone, Botswana, 1998

Communications was indicted in a corruption scandal. Mr. Kunz was sentenced to serve eighteen months for the two counts of corruption. In the 80s, while other countries struggled with economic stagnation occasioned by wide spread theft of resources, Botswana was faced with a major scandal that threatened to collapse the meat industry²²¹. In 1991, the International Project Managers Company was involved in major corruption scandal involving the supply of textbook supplies to primary schools. The corruption scandal cost the government in excess of Pula 1.4 million while Pula 27 million couldn't be properly accounted for. In the same year, another corruption scandal erupted, this time relating to land issues in Gaborone involving high profile personalities in government. In 1992, the most damaging corruption scandal involving the Botswana National Housing Corporation erupted.

The Vice President Mr. Peter Mmusi was implicated in this corruption scandal as well as the previous one involving land in Gaborone area. Although the report of the commission tasked to investigate the scandal absolved the Vice President of any personal wrong doing, it recommended that should take political responsibility as the in charge²²². To address economic crimes including corruption and restore public confidence which had suffered credibility following high profile personalities entangles in corruption cases, the country created a special office to address economic crimes in 1994 under the Corruption and Economic Crime Act of 1994²²³. Other legislations to address economic crimes have been enacted and include the Serious Crimes Act No. 19 of 1990, the Banking Act No. 13 of 1995 and the Anti-Money Laundering Regulations of 2003.

In 2001, the government of Botswana ratified the Protocol Against Corruption of the Southern African Development Community (SADC). One of the most sensationalized cases in Botswana was the trial of John Stoneham case who was the Acting Permanent Secretary in the government. The Chief Magistrate Leonard Sechele called an embarrassment to the public office and sentenced Mr. Stoneham to one year with an additional suspension for a further two years following a successful conviction.

²²¹ David Sebudubudu, *Corruption and Its Controls in Botswana*, Botswana Society, Botswana Notes and Records, VI. 35, 2003

²²² *Supra* note 209

²²³ Republic of Botswana, *Economic Crime Act of 1994*

Botswana has continually ranked well in Africa and the world on the World Corruption Perception Index, with the country ranked position 34 globally with a score of 61 in the 2018 report released by Transparency International²²⁴.

4.7 The Electoral Systems and Political Parties as Frameworks for Governance

In 1965, Botswana held her first elections in the backdrop of an electoral system that was considered as one void of any future. The second elections were set to be held in 1970 but were held in 1969. Following the defeat of Quett Masire, Botswana's Vice President, the government instituted electoral reforms to streamline the electoral process. Over the years, the electoral system in Botswana has been sustained and shaped to deliver credible elections.

The Botswana electoral system has delivered free and credible elections since independence. The Botswana electoral process is often considered fair, an issue that is considered a hall mark of democracy. Indeed, during the 2017 General Elections in Kenya, it was noted by the Supreme Court that the entire process of an election including the system must be free, fair and credible²²⁵.

The 1994 Botswana elections are considered as the turning point of the electoral system. During those particular elections, the main opposition party, the BNF won almost half of the seats won by the ruling party BDP. Since this time, the BNF won significant elective posts, which has enhanced vibrancy within the opposition party, which is a key aspect of democratic governance²²⁶. As Reynolds and Reilly reckon, the basic infrastructure of the democratic governance system is the electoral system, without which, no democratic governance can be achieved²²⁷. The decision to adopt this electoral system as well as the Constitution stayed influenced by her former colonies, the British.

²²⁴ https://www.transparencv.org/news/feature/corruption_perceptions_index_2017 accessed on Tuesday 23rd October 2018 at 10:00 am

²²⁵ Supra note 26

²²⁶ Mpho Molomo, *Electoral Systems and Democracy in Botswana, 2005*, In *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

²²⁷ Reynolds A and Reilly B, *The International IDEA Handbook of Electoral System Design*, Stockholm, Sweden, 1997, in *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

However, the electoral system had some inadequacies which were addressed during the 1997 referendum. Key issues included the revision of the minimum age to cast a vote from 21 to 18 years, the establishment of a commission to manage elections (IEC) and creation of election ballot paper, which replaced the voting disc. The institutional framework of the electoral system in Botswana has experienced significant changes.

A few years after independence, the responsibility of conducting elections fell on the Permanent Secretary to the President, an issue that brought credibility queries on the independence of such an office as well as the credibility of the election results. To address this concern, the Constitution was amended under Section 66 (1) to allow for the creation of the Supervisor of Elections. However, the appointment to this office led to more consternation among opposition parties as Section 66 (2) of the Constitution of Botswana was amended to give the President the sole mandate to appoint the Supervisor of Elections, who would report directly to the president directly without reporting to other authority in the country²²⁸.

The issue of interference by the state in appointments of state officers was also queried in relation to the Chief Justice, who chairs the Judicial Service Commission, which is mandated by law to appoint members of the IEC commission²²⁹. Across Africa, the independence of the judiciary has often been queried, with fears that the executive could interfere. In Kenya, after the nullification of the 2017 elections, a visibly miffed presidential candidate was quoted to say after the repeat elections, the issue of the judiciary would be “revisited and fixed”. Africa has also suffered when the judiciary was headed by “executive minded judges”. The abolition of the office of the Supervisor of Elections and the creation of the Independent Electoral Commission (IEC) prior to the 1999 elections was seen as a step to reform the system to guarantee free and fair elections.

In 1997, there were major changes which saw the government repeal section 66 and replace it with 66A. Section 66A led to the creation of the IEC. The responsibility of appointing the Chairperson

²²⁸ Mogopodi Lokorwe and Onkemetse Tshosa, *The Organization of Elections and Institutional Reforms, 2005*, in *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

²²⁹ Quansah, *The Independence of the Judiciary in Botswana, The Law and the Reality*, ASICL, 1997, in *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

and Commissioners of the IEC was delegated to the Judicial Service Commission as per Section 103 (1) and (2) and Constitutional Amendment Act Section 65A (1) (a), (b) and (c) of the Constitution of Botswana²³⁰.

To ensure impartiality and total independence in execution of their duties, the members of the IEC are also guaranteed the security of tenure lasting two lives of parliament totaling ten years as per Section 65A (4) of the Constitution of Botswana. A key part of the electoral system is election monitoring which is also part of the wider AU system on electoral governance. In the latter years of independence for many African states, election monitoring became a touch issue due to the introduction of caveats to the linking financial aid to political reforms.

The United Nations has issued guidelines on what entails election observation and monitoring on processes of the electoral management. To ensure confidence in an electoral process, election monitoring and observation has become a standard feature especially in young democracies across the world²³¹. Election observation and monitoring played a critical role in easing tensions in Zambia during the 1991 elections²³². World over, election monitors and observers play a critical role of entrenching stability, accountability and openness in an election process as well as broadening the democratic principles while strengthening democratic governance. In a continent characterized by violence associated with elections, Botswana continues to shine due to her standards of elections. Election monitoring and observation groups were never interested in Botswana up to about 2004 due to the absence of any election related violence as well as the ability by both government and opposition parties to come to amicable solutions immediately.

During the 2004 elections in Botswana elections monitors were deployed from the Catholic Commission, the University of Botswana and SADC Electoral Commissions Forum observed and

²³⁰ Supra note 209

²³¹ Dugard J., *Current Issues in Election Management*, in Dundas C. W. (ed) *Discussion of Election Issues in Commonwealth Africa*, London, Commonwealth Secretariat, 1998, in *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

²³² Ramadhani S. L., *The Role of Monitors and Observers During Elections*, in *SADC/EU Conference Proceedings: Strengthening and Consolidating Democracy in SADC Through Electoral Process*, Gaborone, 20th – 22nd June, 1999, in *40 Years of Democracy in Botswana*, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

monitored the elections. In a report titled the Dandus Report, the independence of the IEC as well as the demarcations of the constituency boundaries were queried, a move which helped to deepen the democratic governance in Botswana²³³. The judicial system in Botswana has an important duty in enhancing democratic governance. The High Court of Botswana is mandated by the Electoral Act Part X and Section 69 (1) of the Constitution to address electoral petitions. In a petition filed in the High Court in 1989 by James Pilane (BNF Party), the High Court ruled in his favor, citing irregularities in the polling times as stipulated under law.

As part of the electoral system, Botswana has also joined regional bodies to enhance electoral democracy including the Electoral Institute of Southern Africa and the SADC Electoral Commissioners Forum. It is important to note that elections alone are not the panacea to bad governance, but constitute a sure path towards finding a lasting solution.

4.7 Conclusion

Whereas many countries struggled in democratic governance issues, Botswana's leadership laid the platform for establishing proper leadership. Botswana is regarded as a success story due to her sound macroeconomic policies. In analyzing the role of the political leadership, David Sebudubudu reckons that political leadership is critical in influencing the direction of a country's development plans. The important role that public participation plays in the enhancing of democratic governance cannot be underscored. The role of CSOs in Botswana has also be critical in enhancing democratic governance.

²³³ Dandus C. W. et al, Audit of the IEC, Preparedness to Conduct Legitimate and Credible Elections in October 2004, Gaborone, Botswana, in 40 Years of Democracy in Botswana, edited by Zibani Maundeni, 1965 – 2005, Mmegi Publishing House, Gaborone, Botswana, 2005

Chapter Five

Data Presentation and Analysis

5.0 Introduction

This chapter contains a summary of the findings on of the research on the role of human rights in democratizing governance in Africa: Case study of Kenya and Botswana. In total, 7 respondents were interviewed using key informant interviews and focus group discussions. In addition, relevant data drawn from the EACC, the Transparency International, Amnesty International and the World Bank was analyzed as part of secondary data.

The chart below shows the respondents for the focus group discussions.

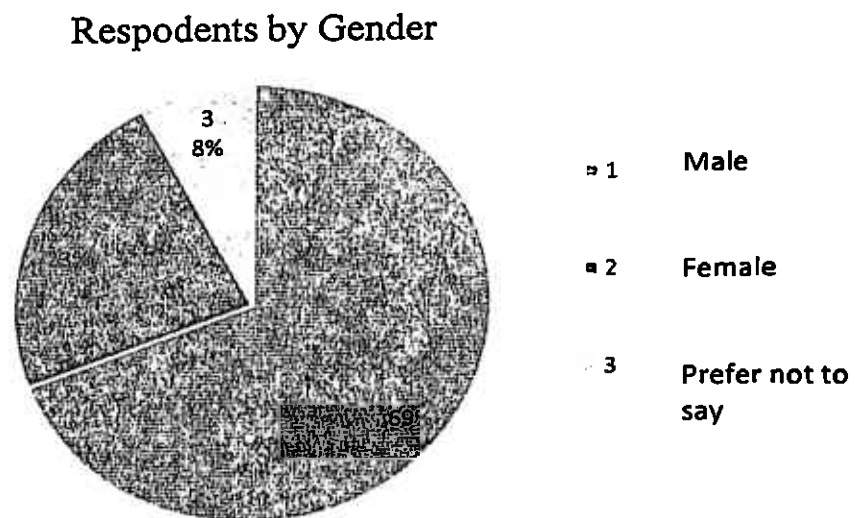


Fig 1. Data from participants by gender

5.1 Status of Democratic Governance in Africa

The existence of many institutions has posed a challenge on implementation of democratic ideals in Africa. The founding principle of the OAU was premised on the philosophy and spirit of Pan-

Africanism. The struggle for independence galvanized the voice of Heads of States and Governments to call for an end in colonialism. However, tensions between the philosophies of different states threatened the OAU unity calls and affected the goals to integrate. State sovereignty continues to impact on Africa's desire for unity. Another major challenge that affected the OAU was the idiosyncratic differences.

A November 2018 report released by a High Level Committee constituted by the African Union Chairperson noted that corruption, discrimination based on gender and sexual harassment, impunity and governance issues are among the key challenges facing the AU and its member states. More often than not, the AU has been seen as weak, with redundant bureaucracies and unable to address major issues. The AU is often seen as indecisive on matters of violations of human rights, often leaving such matters to be addressed by other bodies like the United Nations. Issues of state sovereignty continue to hamper the work of the AU.

Africa continues to grapple with globalized security threats including climate change, terrorism and violent extremism. In 2014, AU heads of states issued a statement linking violent extremism and its damning effects to democratic governance institutions which has a serious effect on sustainable peace and development. Indeed, efforts to address terrorism in Africa has been a long process which started with the adoption of the resolution to strengthen the cooperation and coordination among AU member states which was adapted in 1992 in Senegal. Africa needs a strong support system to address the growing concern of violent extremism and terrorism²³⁴.

The study further revealed that Africa continues to face challenges of regional integration due to the different currencies as they are used as political tools to achieve political mileage rather than a fundamental tool to achieve a set goal. The differences in the strengths of the currencies, the lack of political will seems to be impacting on the goal to have a single currency in Africa by 2025. It remains to be seen whether that goal will be achieved. The challenge of one-stop border points and clearing houses is also a major challenge. Indeed, Africa's richest man complained in 2018 that it takes him more than 30 visas to access Africa states, yet with a Schengen visa, one is able to access

²³⁴ Boniface Njiru, Advocate of the High Court of Kenya, Combating Terrorism in Africa, What Role Can the International Criminal Court Play? In The Platform for Law, Justice and Society No. 3 of 2015

the European union member states easier. The need to open and ease travel within Africa remains a challenge in 2018. The failure to scrap off visa requirements for AU member states by 2018 is another missed opportunity. In 2013, the AU adopted a roadmap for the next five decades. However, as at 2018, Seychelles is the only African state to truly be visa free. Analysts feel that travel in and around Africa is way complicated and often too expensive²³⁵.

The expensive flights across Africa have also impacted negatively on travel.

This map, created by Nigerian entrepreneur Funmi Oyatogun shows how challenging it is to travel across Africa for citizens from Nigeria. The case is replicated almost across all African states. The map was created using key factors such as the requirements, process and time for visa application, availability of connecting flights and the layover times due to connecting flights. As at 2018, Africans can travel to 20% of the African states visa free. At the same time, Africans can now get eVisas on arrival in 24% of the AU Member States. However, the number of countries requiring visas before travel still stands at 54%²³⁶.



Fig 2. Map on the ease of travel for Nigeria Citizens. Map courtesy of Funmi Oyatogun, Nigeria Entrepreneur.

²³⁵ <https://www.bbc.com/news/world-africa-45677447> accessed on Wednesday 7th November 2018 at 12:20pm

²³⁶ African Development Bank and the African Union, Africa Visa Openness Report 2017, Visa Openness Index, 2017

As Africa prepares to take a leap into the future by investing in the blue economy, there is need for caution. The United Nations has joined in the fray of describing Africa positively, this time noting African waterways are the new frontier of the continent's renaissance. The 2018 blue economy conference will be held in Kenya focusing on key areas of addressing climate change, sustainability and improvement of the basic living standards to alleviate poverty. With the African maritime industry being valued at \$1 trillion annually, there is need for caution as the continent takes the challenge. Africa has been prone to the resource curse, and analysts warn that abundance of caution must be applied to ensure the new frontier doesn't become a curse to Africa.

Data shows that Africa has overexploited some resources including overfishing which has led to the loss of an estimated \$1.3 billion annually in revenue²³⁷. In addition, pollution continues to wreak havoc on the waterways leading to estimated loss of \$13 billion annually. Africa has also been the among the worst hit by changing climate. Towards this end, the AU has established a commission to address climate change. These two panels have been influential in global matters of climate²³⁸. As at November 2018, 183 parties including Kenya and Botswana have ratified the Paris Agreement on climate change showing their intent on handling climate change²³⁹.

5.3 Development Aid and Corruption

Analysts feel that Africa runs the risk of a major debt crisis from China. In 2018, the Overseas Development Instituted issued a warning that close to 40% of African states were on the verge of a serious debt crisis with China. The World Bank has classified 18 countries as those facing a high debt crisis while the IMF has warned that Africa is on the verge of a new debt crisis, collaborating the report by the Overseas Development Instituted²⁴⁰. Of the estimated \$417 billion debt, Africa owes close to 20% of that debt to China, signaling the need for a review of the strategy to address Africa's debt crisis. Three countries in Africa face a critical debt crisis including Djibouti. Zambia

²³⁷ Toshitsugu Uesawa and Siddharth Chatterjee, Why Africa Must Tap its Giant Blue Economy Potential, Nov 2018, published by the www.star.co.ke in November 06th, 2018

²³⁸ <https://au.int/en/pressreleases/31625/africa-day-cop22-african-leaders-demonstrate-commitment-and-action-address-climate-change> accessed on 6th November, 2018 at 12:00 pm

²³⁹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en accessed on 6th November 2018 at 1:04 pm

has raked in an external debt of \$8.7 billion, out of which, \$6.4 billion is owed to China as at end of 2017. This has seen Zambia cede the Kenneth Kaunda International Airport to the Chinese government for management as part of the concessions to cushion the debts. The rising levels of debt in Africa means that money meant for development is channeled to repay debts which leaves the countries poorer. A report by the IMF advises countries under high debt crisis to invest more in human development to ensure increased productivity²⁴¹.

Just how realistic is the Africa rising narrative? Will this narrative of an economic boom in Africa propel the continent to pull millions of people out of poverty? To achieve this, Africa needs to begin to reject the text book definition of the “rising phenomena” and instead invest in structural economic transformation agenda²⁴². The annual Ibrahim African Governance Index report indicates that many African countries have suffered blows to their quest for governance due to soaring rates of youth unemployment, which has increased issues like corruption and insecurity²⁴³.

5.4 Elections and Democratic Governance

The management of elections across the world continues to receive special attention due to the critical role that elections play in the governance processes. Institutions such as the UN as well as regional organizations such as the AU among other regional organizations have all instituted policies and frameworks to address election management. In Africa, following years of abuse of the electoral process, the AU adopted the ACDEG in 2007. However, as at November 2018, 10 states have signed and ratified the charter, 28 have signed but are yet to ratify while 16 are yet to sign. The framework provides a clear platform for managing elections and enhancing democratic governance²⁴⁴. One then would wonder, without signing to or ratifying the ACDEG, how are states expected to achieve these ideals? There remain key questions about AUs enforcement mechanism as relates to such key frameworks. In Kenya, as is other countries in Africa, public confidence on the national body responsible for election management is relatively low. In a survey on the fairness

²⁴¹ The IMF Fiscal Monitor: Capitalizing on Good Times, April 2018

²⁴² Africa Affairs, The Journal of the Royal African Society, Volume 117, No. 469, Oxford University Press, October 2018

²⁴³ <http://mo.ibrahim.foundation/iiag/> accessed on Wednesday 7th November, 2018 at 2:25 pm

²⁴⁴ <http://www.achpr.org/instruments/charter-democracy/ratification/> accessed on Wednesday 7th November, 2018 at 3:25 pm

of elections in Africa, a poll conducted across 36 countries shows that there is little trust in the freeness of electoral processes. Some of the key areas under review include ensuring peace during elections, fairness of coverage by the media houses on all candidates without bias, freedom for multiparty democracy to exist without suppression, voter bribery and influence and the fairness of vote tallying. These processes are often hinged on the electoral bodies mandated with the management of elections²⁴⁵.

To truly assure free and fair elections in Africa, there is need for real reforms and enforcement of laws on elections. The entire process of elections from the institutionalization of political parties, to the registration of voters and general voting process must inculcate transparency to ensure it is above board.

²⁴⁵ Peter Penar, Rose Aiko et al, Election Quality, Public Trust Are Central Issues for Africa's Upcoming Contests, Afrobarometer Policy Paper No. 35, 2016

Freeness and Fairness of Elections in Africa

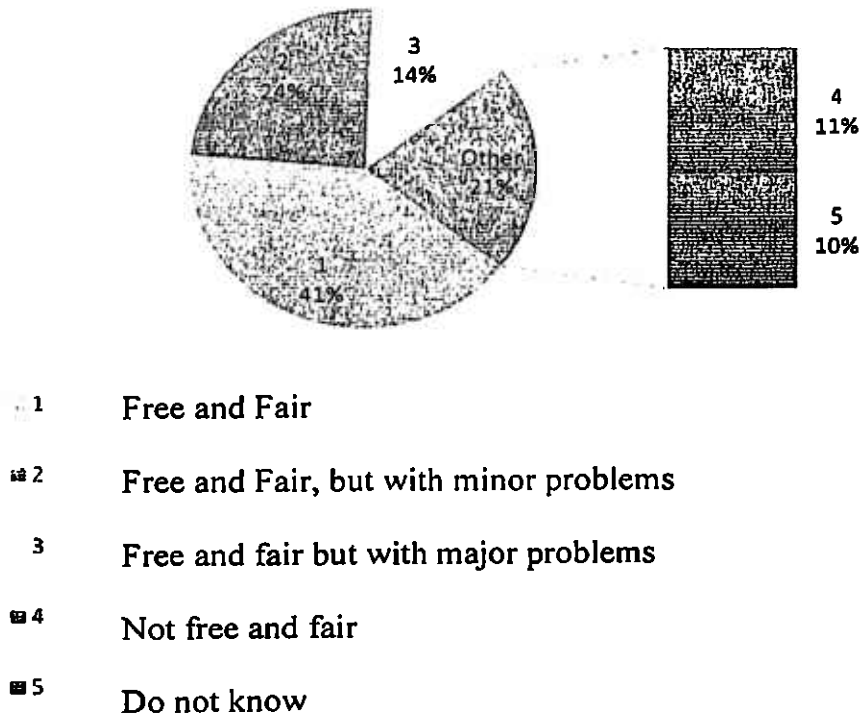


Fig 3. Fairness and freeness of elections in Africa

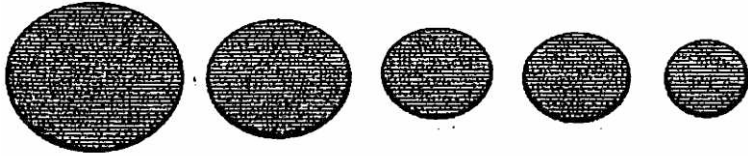
Across Africa, there remains concerns whether democratic governance is a façade. Elections continue to be manipulated, the rule of law continues to be violated and constitutionalism continues to be a challenge. Despite these challenges, 67% of respondents believe that democracy is the most preferred form of governance. In countries like Botswana and Mauritius, support for democratic governance remains high²⁴⁶. The push for democratic governance as the popular form of governance is expected to continue, as Africa strives to achieve the aspirations of Agenda 2063.

5.5 Status of Democratic Governance as Principles of Human Rights in Kenya

Despite H. E. President Kenyatta reporting a robust economic growth in his annual speech to the

²⁴⁶ Robert Mattes and Michael Bratton, Do Africans Still Want Democracy? Afrobarometer Policy Paper No. 36, 2016

Key



Top Priority

Least Priority

In his speech in 2015, President Kenyatta alluded to the entrenchment of the democratic space including institutionalization of public participation in governance issues. Two key issues stand out during the speech, one was the issue of the establishment of a Kshs10 billion restorative fund for restorative justice for victims of violence and the second was the adoption of the TJRC Report by the National Assembly. As at 2018, that fund is yet to be established, neither has the National Assembly adopted the TJRC Report despite the President directing that it be adopted, which has derailed the process of restoration for survivors of the PEV.

The President offered an apology on behalf of the Government, for all the past wrongs, including the Wagalla Massacre. According to Tina Alai, the underlying historical issues continue to be a scar in the lives of many Kenyans. Alai notes that such issues as the fight for meagre natural resources, poverty and inequalities continue to marginalize communities²⁴⁹. Over the years since the Wagalla Massacre, there have been close to 2500 armed conflicts in Kenya cutting across Kenya, from the Northern Frontier to Mt. Elgon and Baringo. Houghton Irungu feels that the truth about victims of violence in Kenya has been politicized for political expedience. He calls for a review of the gender perspectives to understand the impact of sexual crimes in war²⁵⁰.

Agnes Odhiambo notes that of the documented cases of sexual violence during elections since 2007, over 60% of the cases have been perpetrated by police officers. She further notes that there have been serious undesirable effects on the women raped including the lack of access to SRHR

²⁴⁹ William Sila, Key Informant Interview with Tina Alai, Advocate for just, fair and free society, Physicians for Human Rights Kenya (P4HR) in November 2018

²⁵⁰ William Sila, Key Informant Interview with Houghton Irungu, Amnesty International in November 2018

services²⁵¹. In analyzing *Scarred*, a film written and directed by Judy Kibinge, reflecting on the Wagalla Massacre, one is left to wonder the damage the killings in Wagalla had on the society. The community is majorly patriarchal in nature, the killing of close to 3000 men left many women widowed, with no source of upkeep. There are key questions for one to seek for answers including questioning the “Building Bridges Initiative” that was started off by President Kenyatta and H. E. Raila Odinga in 2018. Key questions that remain unanswered are: Have we moved beyond the contested truth? are the lives of the survivors of Wagalla any better?

What can be done to address violence and impunity by the police? What would justice for Wagalla’s look like? Alai notes that for survivors of violence, the need for acknowledgement is top of the list. Acknowledging that survivors went through a violent period is important as a first step towards addressing access to justice. Alai poses key questions, do women and girls who are often the target for rape during violence feel like they belong in Kenya? Do they feel the duty to build the nation? She notes that there still remains a huge need to address issues like access to health. Lack of proper health infrastructure condemned the women who had developed fistula out of rape, denying them an opportunity for treatment, condemning them to years of shame and stigma, which is a violation of their fundamental right to access to the highest standards of physical and psychological health.

The Indemnity Act of 1970 which offers blanket immunity to perpetrators of violence, such as those responsible for the Wagalla Massacre and other acts of crimes still exists within the Kenyan Laws. There is need to have this repealed to ensure anyone found culpable of any abuse of rights is tried under the law. The nature of Kenya pre-2003 was a dangerous place. The new Constitution has emboldened the society and opened up the democratic space. There is need to petition the national assembly to adopt the TJRC report to ensure that it is implemented. There is also need for the perpetrators of the violence to be brought to book as their actions amounted to crimes against humanity. It must be remembered that during the hearings by the TJRC, former Provincial Commissioner Benson Kaaria, told the commission that he would not apologize for his role. He further said, “if the people are not grateful for the work I did for them, there is nothing else I can do for them” while calling the operation a success.

²⁵¹ William Sila, Key Informant Interview with Agnes Odhiambo, Human Rights Watch, Kenya in November 2018

During the screening of *Watatu*, a film written by Nick Redding, Sheila Masinde noted that corruption has been identified as one of the factors leading especially young people to violent extremism as well as terrorism. Increased radicalization, Ms. Masinde noted, has roots in increased corruption among other key factors²⁵². Poor governance systems were also blamed for the increasing corruption, which breeds other issues. The need to establish safe spaces to address violent extremism and radicalization was underscored during the film, which follows the story of a young man who is radicalized following the mysterious disappearance of his friends at the hands of the police.

The failure to implement laws that address factors fueling corruption has been identified as one of the key failures. The need for each member of the society to inculcate the national values as underscored in Article 10 was also raised as an important step to address the challenges facing Kenya. The failure by the AU to reign in on corruption has left Africa at a precarious position. It is estimated that close to \$203 billion leaves Africa annually including some \$68 billion through dodges taxes. The process of policy development and implementation in Kenya has also been flagged. In 2018, the parliament voted to water down Section 23 of the Privatization Act No. 2 of 2005. Such an act is bound to open avenues for corruption. The National Assembly in its sitting in 2018 amended several statute laws including the Privatization Act. Under the Privatization Act No. 2 of 2005, the National Assembly scrapped off the requirement for the process of privatization to be scrutinized by the National Assembly, instead requiring the Cabinet Secretary to table a post-privatization report²⁵³.

Following this vote, the government has set plans in motion to privatize key institutions including KenGen, the Kenya Pipeline Company, the Kenya Meat Commission, the East African Portland Company as well as several sugar companies. It must not be lost to the conversation that sugar procession in Kenya has been a challenge following the mismanagement of sugar factories especially in Western Kenya. A contextual analysis of the consistency of policy development and implementation in Kenya paints a picture of lack of seriousness. In trying to reign in on road

²⁵² William Sila, Key Informant Interview with Sheila Masinde, Transparency International, Kenya in October 2018

²⁵³ The Republic of Kenya, Kenya Gazette Supplement, National Assembly Bills, 2018, The Statute Law (Miscellaneous Amendment Bill), 2018

carnage, the National Safety and Transport Authority (NTSA) has issued guidelines on traffic management. It must not be lost to the conversation that in 2014, it was the same government that lifted the ban on graffiti in matatus which inadvertently conflicted with the traffic regulations. The challenge of making declarations which are not backed by research continues to affect the implementation of these policies. To address policy issues and gaps, there is need to anchor such policy development and implementation on existing laws.

Kenya's external debt continues to balloon and is projected to hit the 7 trillion-shilling mark by end of June 2022 having passed the 5 trillion-shilling mark in 2018. Despite concerns about the record at which the government has borrowed money in the last five years, President Kenyatta in 2018 reiterated that Kenya will continue to borrow for development, as long as the money is not directed to corruption avenues. As at 2018, close to 2.3 trillion shillings has been lost to corruption, pilfered, mismanaged or cannot be accounted for in both county and national governments.

However, there are concerns that due diligence is not being followed, with key ministries investing in mega projects that are being abandoned mid-way due to poor planning. In November 2018, the Cabinet Secretary in charge of Mining reported that the government will be forced to pay 2 billion shillings to Geological Exploration Technology Institute (GETI), a Chinese company which had signed a deal with the Kenyan Government to explore minerals since 2014, and whose deal, the government has since cancelled in favor of Kenyan companies.

In addition to this project, the government has also been forced to pay 4.3 billion shillings to Anhui Construction Company Limited following the cancellation of the Greenfield Terminal at the Jomo Kenyatta International Airport. The government is also likely to lose another 9 billion to China Jiangxi International following the stalled construction of the Hazina Towers and Nyayo Estate Housing Projects. The government has also lost money following the damages awarded to construction companies doing the Turkana Wind Power Project where the government will pay an estimated 14 billion shillings as well as an additional 1 billion shillings in compensation due to the standoff caused by locals demanding a share of the revenue from oil.

Dr. Martin Ouma, a University of Nairobi scholar notes that Africa lacks the good will to establish the infrastructure for academic research. Ouma notes that many African countries continue to struggle due to a lack of alignment on innovations and research. He adds that systems of governance are extremely key in ensuring that research findings are implemented for the benefit of the economy. Ouma notes that Africa faces a challenge in establishing the right frameworks for research due to the differences in the types of governance in place²⁵⁴. Ouma notes that for Kenya to achieve the big four agenda, including food security, there is need to link research and agriculture. Countries that has developed their economies have always implemented the research gaps identified. The need for strategic funding of universities to advance research cannot be underscored.

Kenya continues to face huge challenges in electoral management. During a conference hosted by the Konrad Adenauer Stiftung, the need for measured efforts to address electoral reforms was emphasized. Kenya continues to face significant challenges in the electoral processes, financing of political parties and campaigns, meaningful engagement of young people, gender mainstreaming and equality which continue to disadvantage and seclude people from electoral processes. The failure to fully implement the recommendations of the Kriegler Commission report continue to pose a challenge in the electoral management as noted by former IEBC Commissioner Thomas Letangule. As Dr. Ouma notes, without engaging academics in addressing issues facing Kenya, there is bound to be little progress in finding solutions.

5.6 Status of Democratic Governance in Botswana

Data from Afrobarometer indicates that Botswana continues to exhibit high levels of openness and accountability in government matters. As at end of 2016, 83% of the citizens reported that they were completely free to express their political opinions, displaying how Botswana continues to promote democratic governance²⁵⁵. The report further revealed that 74% of the citizens gave a positive approval towards access to basic health, demonstrating Botswana's desire to truly achieve

²⁵⁴ William Sila, Key Informant Interview with Dr. Martin Ouma, University of Nairobi

²⁵⁵ Afrobarometer Data, Botswana, Round 6, 2016, available at <http://www.afrobarometer.org>; Rorisang Lekalake, Evaluating Botswana's Performance on National Vision 2016, Public Opinion on Development Pillars, Afrobarometer Policy paper No. 33, 2016

Dr. Martin Ouma, a University of Nairobi scholar notes that Africa lacks the good will to establish the infrastructure for academic research. Ouma notes that many African countries continue to struggle due to a lack of alignment on innovations and research. He adds that systems of governance are extremely key in ensuring that research findings are implemented for the benefit of the economy. Ouma notes that Africa faces a challenge in establishing the right frameworks for research due to the differences in the types of governance in place²⁵⁴. Ouma notes that for Kenya to achieve the big four agenda, including food security, there is need to link research and agriculture. Countries that has developed their economies have always implemented the research gaps identified. The need for strategic funding of universities to advance research cannot be underscored.

Kenya continues to face huge challenges in electoral management. During a conference hosted by the Konrad Adenauer Stiftung, the need for measured efforts to address electoral reforms was emphasized. Kenya continues to face significant challenges in the electoral processes, financing of political parties and campaigns, meaningful engagement of young people, gender mainstreaming and equality which continue to disadvantage and seclude people from electoral processes. The failure to fully implement the recommendations of the Kriegler Commission report continue to pose a challenge in the electoral management as noted by former IEBC Commissioner Thomas Letangule. As Dr. Ouma notes, without engaging academics in addressing issues facing Kenya, there is bound to be little progress in finding solutions.

5.6 Status of Democratic Governance in Botswana

Data from Afrobarometer indicates that Botswana continues to exhibit high levels of openness and accountability in government matters. As at end of 2016, 83% of the citizens reported that they were completely free to express their political opinions, displaying how Botswana continues to promote democratic governance²⁵⁵. The report further revealed that 74% of the citizens gave a positive approval towards access to basic health, demonstrating Botswana's desire to truly achieve

²⁵⁴ William Sila, Key Informant Interview with Dr. Martin Ouma, University of Nairobi

²⁵⁵ Afrobarometer Data, Botswana, Round 6, 2016, available at <http://www.afrobarometer.org>: Rorisang Lekalake, Evaluating Botswana's Performance on National Vision 2016, Public Opinion on Development Pillars, Afrobarometer Policy paper No. 33, 2016

universal health care. Challenges still remain in reducing inequalities, especially for people in rural areas, with only 45% of the sampled citizens reporting their confidence towards government's efforts to address inequalities²⁵⁶. Botswana has also done well to address its national identity, with 89% of the sampled citizens reporting their pride in their national values. This is based on Botswana's institutionalization of the Tswana traditions. A key part of Botswana's success is tied to the new National Vision 2036 which replaced Vision 2016.

5.7 Botswana's Economic Transformation

Scholars including Sebudubudu, Molutsi and Acemoglu continue to highlight Botswana's transformation to a middle income economy. The transformation is often credited to sound leadership which was initiated by Sir Seretse Khama. Botswana has also benefited from strict macroeconomic policies. Data from Afrobarometer shows that at least 63% rate Botswana as fairly good in economic transformation. Transparency International continues to rank Botswana as one of the least corrupt nations in the world. In 2016, Freedom House classified Botswana alongside eleven other states as free in its report on freedom. Botswana is also rated as highly efficient in accountability. At least 71% of the participants responded that the President respects the rule of law²⁵⁷. The preservation of values within the society are key in enhancing democratic governance.

Ada Ordor notes that unlike Kenya, Botswana has established the infrastructure for research, which has enabled it implement research findings. She however notes that different countries in Africa are at different stages of implementing their infrastructure, which remains as one of the biggest challenge that scholars continue to grapple with²⁵⁸. The enactment of constitutions that guaranteed civil and economic rights in Africa was touted to guide Africa in the right path. However, implementation has remained a challenge in Africa. the level of support to these rights, which form the core of human rights, is different across Africa²⁵⁹.

²⁵⁶ Supra note 268

²⁵⁷ Supra note 268

²⁵⁸ William Sila, Key Informant Interview with Ada Ordor, Centre for Comparative Law in Africa, University of Cape Town, South Africa

²⁵⁹ Danwood Chirwa and Lillian Chenwi (Eds), *The Protection of Economic, Social and Cultural Rights in Africa*, Cambridge University Press, 2016

Botswana continues to be rated well on upholding the rule of law. Whereas there has been an increasing wave among heads of states and governments to pull out from the statute which established the International Criminals Court, Botswana incorporated the Rome Statute into its domestic law²⁶⁰.

²⁶⁰ Amnesty International Report 2017/18, The State of the World's Human Rights, 2018, London

Chapter Six

Conclusions and Recommendations

6.0 Introduction

This chapter presents the conclusion, the recommendation for both academic and policy orientation and areas for further research.

6.1 Conclusion

The research was guided by three objectives and sought to assess the role of human rights in democratizing governance in Africa with a case study of Kenya and Botswana. The research findings indicate that Africa is still grappling with challenges of democratic governance. Major issues include blatant violations of human rights including lack of access to fundamental human rights issues, corruption and electoral mismanagement. The attempts by some heads of states to extend their term limits through the deliberate scrapping of the same provisions from the constitutions is a new phenomenon that has been rising since 2014.

There is an urgent need for African leaders to evaluate their response on the democratization of governance. In order to realistically achieve Agenda 2063 and attain prosperous Africa of good governance, the African Union must address key issues raised in this research. Africa continues to struggle in her quest for economic integration due to state sovereignty and idiosyncratic difference. Ozzy Ezechukwunyere notes that the only way for Africa to realize meaningful development is to invest in democratic governance²⁶¹.

6.2 Recommendations for Policy

To address key policy gaps realized in the research, there is need for organizations, both official and traditional, responsible for the implementation of the different frameworks to work together to address key policy gaps. The ratification of treaties and other key frameworks is at different

²⁶¹ Ozzy Ezechukwunyere Nwebo, *The African Union Agenda 2063 and the Imperative Democratic Governance*, Published online in 2018

stages. The AU needs to reformulate its implementation plans to ensure that key democratic frameworks are implemented without delay. To address the growing concerns about the growing China's debt in Africa, the AU needs to evaluate its priorities to address issues including development of infrastructure, addressing corruption and wastage of public resources.

According to the 2017 Africa Visa Openness report, there is need to integrate the free movement of people through improving on visa requirements. The desire to create intra-African trade can only be boosted if and when the continent's 1.2 billion people are able to access the markets without any hindrances. To achieve Aspiration No. 2 of Agenda 2063 of an integrated continent, there must be the implementation of requirements for travel.

In Kenya and Botswana, there is the continued need to guarantee the respect to law. The right to fair practices under the law must be maintained under all circumstances.

6.3 Recommendations for Academic Research

There is need for governments to increase funding for research and implementation. In many Universities, there are departments for research and extension, however, there is often little or no funding for research. Researchers are often forced to either rely on external funding or use their own resources, which not only compromises the quality of work, it also affects the implementation of research findings.

In addition, there is to publicize the academic work being done by scholars in Africa. Governments must reevaluate their priorities to ensure the right resources are allocated for research. There is also an urgent need to align policies on research in the continent to ensure the economies are driven through research based opinions. Countries need to establish the necessary infrastructure for research to ensure that researchers and academics have room for carrying out research.

There is need for both Kenya and Botswana to invest in technology transfers especially with international donors to enhance the role of research in addressing key issues of democratic governance.

6.4 Areas for Further Research

In order to enhance this research on democratic governance further, there remains key areas for further research. These include research in;

- i. Projected trajectories in democratic governance in Africa in the 21st century
- ii. The nexus between gender inequality and democratic governance development
- iii. The nexus between Economic Partnership Agreements and democratic governance in Africa

Annex 1 - Research Tools, Research Questionnaire

Resp ID:	
----------	--

Introduction:

Good morning/afternoon/evening. My name is Mawia William Sila, Reg. No R50/87620/2016. I am from the University of Nairobi, Kenya, undertaking a post graduate degree in International Studies. As part of the degree requirements, students are required to carry out a field research on a topic of choice, which is then evaluated by a panel of examiners.

This research paper will focus on the Role of Human Rights in Democratizing Governance in Africa: Case Study of Kenya and Botswana. Please note that the responses you give will be strictly used for the research purpose where a final report will be generated and shared with the University for examination purposes. This interview will take approximately 40 minutes of your time. May I ask you a few questions?

Respondent's Name	
Physical Address	
Cell phone Number	
Interviewer name	Mawia William Sila
Interviewer No.	R50/87620/2016
Supervisor name	Prof. Amb Maria Nzomo

Male	1
Female	2

Interviewer: If respondent agrees to participate continue, otherwise thank & close

Agreement form for interview participant

I agree to participate in the research study by providing information on the Role of Human Rights in Democratizing Governance in Africa: Case Study of Kenya and Botswana, which is being carried out by Mawia William Sila, a student from the University of Nairobi, Kenya, Reg. No. R50/87620/2016 onfrom.....am/pm.

Signature

No	Question	Time
1	What are the barriers to the full realization of fundamental human rights and how can the gaps be bridged?	5 Mins
2	What is the extent of the respect to and promotion of human rights for democratic governance in Africa?	5 Mins
3	What should governments do to consolidate the protection and promotion of human rights to enhance democratic governance?	5 Mins
4	<p>In your own view, how can we classify Kenya/Botswana?</p> <ul style="list-style-type: none"> a. A democracy b. A democracy with minor problems c. A democracy with major problems 	3 Mins
5	<p>Are you satisfied with the way governance works in Kenya?</p> <ul style="list-style-type: none"> a. Yes b. Maybe c. No 	3 Mins
6	<p>In Kenya/Botswana, is the electoral system including the IEBC and political parties credible to assure free and fair elections based on the universal suffrage to promote democratic governance?</p> <ul style="list-style-type: none"> a. Strongly disagree b. Strong agree c. Disagree d. Agree 	3 Mins
7	<p>Have Kenya's /Botswana's macro and microeconomic policies contributed to her odious external debt? Have these policies directed or mis directed the country?</p> <ul style="list-style-type: none"> a) Yes b) No 	3 Mins

8	What are the current issues pressing Kenyans/Batswana? And what are their priorities?	5 Mins
9	What is the status of Kenya's compliance with the African Union's commitments to promote democratic principles and institutions, human rights, popular participation and good governance?	5 Mins
10	<p>Have regional and sub-regional organizations in Africa helped to promote human rights and democratic governance in Africa?</p> <p>a. Yes</p> <p>b. No</p>	3 Mins

Annex 2 - University Permit Letter

Annex 3 – NACOSTI Research Permit

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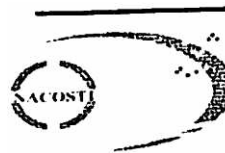
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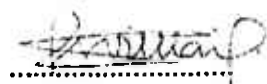
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

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