

**THE PAN-AFRICAN PARLIAMENT:ITS PROMISE FOR HUMAN RIGHTS  
AND DEMOCRACY IN AFRICA**

Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria



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## DECLARATION

I, HIRPO Sehen, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....



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Signature.....

Date.....

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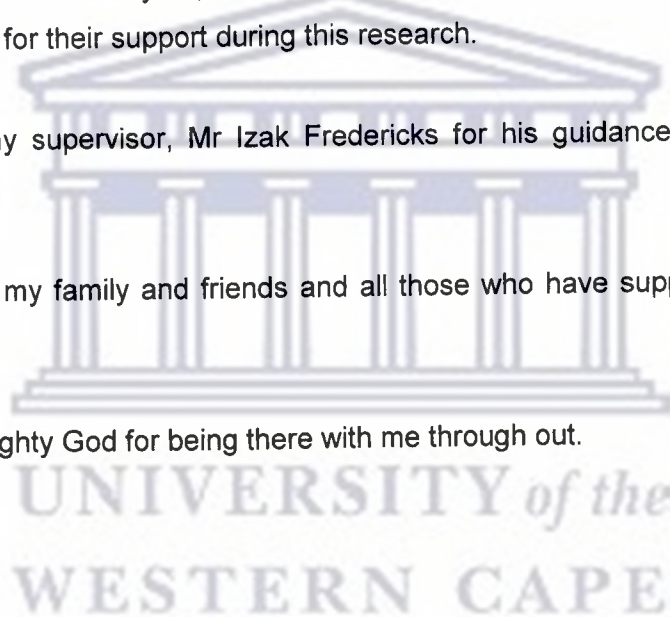
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## DEDICATION

To my family whose love and support inspire me to greater heights.



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## LIST OF ABBREVIATIONS

AEC	African Economic Community
ACHPR	African Charter on Human and Peoples' Rights (African Charter)
AU	African Union
ECOSOCC	Economic, Social and Cultural Council
EP	European Parliament
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
MPs	Members of Parliament (Parliamentarians)
NDI	National Democratic Institute
OAU	Organisation for African Unity
PAP	Pan-African Parliament
PSC	Peace and Security Council
RECs	Regional Economic Communities
SEA	Single European Act



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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

Since the transition of the Organisation for African Unity (OAU) to the African Union (AU) there has been a notable shift in the way the organisation addresses human rights and democratisation. Particularly the OAU had been known for setting aside human rights concerns to the under resourced African Commission on Human and Peoples' Rights (African Commission) to deal with in Banjul, far away from Addis Ababa its major organs conduct their day to day activities.<sup>1</sup> However, the coming into force of the Constitutive Act of the AU and establishment of the Union had brought, at least in theory, human rights and democratic concerns to the centre.

The Constitutive Act firmly and clearly provides as its objective the promotion of democratic principles and institutions, popular participation and good governance and promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments as provided for under articles 3(g) and 3(h) of the act. It further provides under article 4(m) respect for democratic principles, human right, rule of law and good governance as one of its principles.

With the establishment of the AU and mainstreaming of human rights into the work of the AU, a myriad of institutions were created that deal with human rights. Coupled with this a very broad and rather general mandate was given to these various institutions. This resulted in lack of clearly defined roles and responsibilities of these institutions in relation to the promotion and protection of human rights as well as their contribution to democratisation. This in addition to posing a challenge to the aspiration of an integrated and effective approach to human rights leaves room for overlap, duplication of efforts and thus waste of already meagre resources. Unfortunately, four years since the inauguration of the AU in 2002 the roles and

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<sup>1</sup> A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 2 *Journal of African Law* 167.

responsibilities of some of the major bodies tasked with promotion of human rights and democratic institutions are yet to be defined.

One such institution is the Pan African Parliament (PAP). PAP owes its conception as far back as the Treaty Establishing the African Economic Community (AEC or Abuja Treaty) of 3 June 1991. The Sirte Declaration of 1999 called for the establishment of the AU and also provided for the shortening of implementation of the Abuja Treaty and the immediate establishment of institutions under the African Economic Community (AEC) one of which was PAP.<sup>2</sup> PAP was finally established as an organ of the AU under article 5(c) and article 17 of the Constitutive Act. These provisions were further supplemented by a Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (Protocol establishing PAP), which was adopted in 2001 and came into force in 2003.

One of its objectives, as set out in the Protocol, relates to the promotion of the principles of human rights and democracy in Africa (Art 3(2)). However since its establishment it is unclear as to how it has been carrying out this mandate and how it intends to do so in the future.

## 1.2 Research question

What is the role of PAP in the promotion of human rights and democracy in Africa?

## 1.3 Literature survey

For reasons that could partially be explained by the newness of the institution if not the idea, not much literature exists in relation to PAP. Particularly no literature exists in relation to its role in the promotion of human rights and democracy. In discussing institutions that are entrusted with protection of human rights under the AU, Lloyd and Murray make no more than a general reference to PAP and its human rights mandate.<sup>3</sup> Baimu in an article entitled 'The African Union: Hope for better protection of human rights in Africa' makes a brief reference to the process of establishment of

<sup>2</sup> KD Magliveras & GJ Naldi 'The Pan African Parliament of the African Union: An Overview' (2003) 3 *African Human Rights Law Journal* 223.

<sup>3</sup> Lloyd & Murray (n 1 above) 165-186.

PAP and the opportunity of representation of the interest of the African people presented by it.<sup>4</sup> Furthermore Magliveras and Naldi in their article entitled 'The Pan-African Parliament of the African union: An overview' provide an outline of general objectives, functions, powers, composition, relationship with parliamentary organs of sub regional African organisations and the legal issues relating to the protocol.<sup>5</sup> They however conclude by mentioning the important role that the parliament could play towards democratising the AU itself as well as contributing to democratic reforms in some countries.

In an article entitled 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament', Demeke compares the PAP with the European Parliament (EP) in terms of evolution, history, powers, functions, appointment, composition, Immunity and multilingualism as the main themes of his study. Although briefly he refers to how EP deals with human rights issues and recommends that the PAP engages in human rights and democratic issues through issuance of resolutions and annual reports, through the parliamentary questions procedure which involves consultation with National Parliaments and the introduction of petitions procedure in which people could directly petition to the Parliament.<sup>6</sup>

While this could provide interesting insight through which the Parliament could contribute to the promotion and protection of human rights and democratisation on the continent, it does not provide a complete answer nor exhaustively provide the possible contributions that this body can make in this field. Furthermore it does not provided a detailed understanding of how the EP contributes to the protection of human rights both within Europe and outside. As the AU is loosely modelled on the European Union (EU), the experience of the EP is an interesting and possibly more insightful to look at.

#### 1.4 Research methodology

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<sup>4</sup> E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

<sup>5</sup> Magliveras & Naldi (n 2 above) 222.

<sup>6</sup> T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 61-66.

As the institution is new, not much exists by way of writings. Much of the analysis has been based on the Protocol establishing PAP. A Questionnaire has also been developed and used to gather information with limited success. Reports of activities of PAP have also been widely consulted. This study also largely draws lessons from the EPs experience by consulting secondary sources.

## **1.5 Limitations**

Examining the contribution of a regional parliament to the promotion of human rights and democracy is a challenging endeavour. Various approaches can be taken and mechanism of how it can address human rights and democracy abound. Further, multiple factors also affect how it can contribute to human rights and democracy. Thus the scope of this study is limited to power, composition, challenges and the potential possibilities that exist for the PAP to promote human rights and democracy within its existing powers while evolving into an institution that is more reflective of the true nature of parliaments. It largely focuses on the EP as a model on which PAP that also the only existing example of the parliament that PAP aspires to become. This study will be addressing an area that has not been explored as yet. It thus can only provide a starting point for further research and thus cannot be expected to be exhaustive.

## **1.6 Overview of Chapters**

This study attempts to provide a picture of how parliaments have been contributing to the protection of human rights and democracy and how the PAP can draw lessons from the different mechanisms adopted by these parliaments.

This study consists of five chapters. The first chapter sets out the problem that this study aims to address and reviews existing studies that have touched upon the issue. The second chapter discusses the dynamics that lead to the establishment of the continental parliament by putting it in the context of continental efforts towards better human right protection and democratic consolidation. It also discusses the objectives of the parliament and particularly its human rights and democratic mandate

The third chapter sets out a framework for analysis. This is done by examining how parliaments have been dealing with issues of human rights and democracy with particular focus on the EP. This chapter looks at the different structures and mechanisms that the parliaments have employed towards this end but also tries to look further into the powers and compositions of parliaments that has enabled them to use such mechanisms and effectively engage in the promotion of human rights and democracy.

The fourth chapter discusses in detail the powers, functions and their implications on how PAP promotes human rights and democracy. The activities so far carried out, institutional mechanisms adopted and the potentials role it could have and mechanisms it could employ by taking lessons from the design, internal workings, and mechanism discussed in the previous chapter is provided

Finally the relevant conclusions will be made with recommendations on the way forward for the continental institution in terms of organization, composition, structures and mechanisms it could adopt for towards promotion of human rights and democracy



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## CHAPTER TWO: THE ROAD TO THE PAN-AFRICAN PARLIAMENT: HISTORICAL AND CONTEXTUAL PERSPECTIVES

### 2.1 Introduction

Human rights have been on the agenda of African countries for sometime. The concern with human rights has been traced as far back as the 1950s prior to the establishment of the Organisation (OAU).<sup>7</sup> OAU expressed its commitment by issuing various instruments and declarations. Some of the standards that marked a milestone were the African Charter, African Charter on the Rights and Welfare of the Child (ACRWC). These instruments also provided monitoring mechanism for implementation.

Declarations and programmes of significance to human rights and democracy were also adopted. The adoption of the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World marked a step forward from the traditional understanding of human rights.<sup>8</sup>

Despite these efforts however with the end of the existence of the OAU, the sentiment was that it has failed to ensure adequate protection of human rights.<sup>9</sup> It is thus important that human rights and democracy are not once again sidelined and limited to commitment on paper within the AU. Towards this end, the organs of the AU have an important role to play. Particularly significant in this respect are institutions of the AU that are unique in character and are established with the aim of ensuring participation of African people in the AU.

### 2.2 Human rights and democracy under the AU

<sup>7</sup> R Murray *Human Rights in Africa From the OAU to the African Union* (2004) 2.

<sup>8</sup> Declaration on the Political and Socio-Economic Situation in Africa and Fundamental Changes Taking place in the world AHG/Decl.1 (XXVI) 1990 reprinted in CH Hynes *Human Rights Law in African* (2004) 233-235.

<sup>9</sup> GJ Naldi 'Future Trends in Human Rights in Africa: The Increased Role of the OAU' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights the System in Practice* (2002) 2,17

The coming into force of the Constitutive Act of the AU (Constitutive Act) marked an important step by placing greater emphasis on the principles of democracy and human rights.<sup>10</sup> The Constitutive Act from the outset reiterates its commitment to human rights and democracy by expressing its determination to promote and protect human and people's rights ... [and] consolidate democratic institutions'.<sup>11</sup>

Human rights were identified as one of the founding principles and core objectives of the AU.<sup>12</sup> Article 3(h) explicitly recognises human rights as the objective of the AU by stating that it will strive to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.' Article 4 of the Constitutive act further expressly adopted human rights as one of the principles according to which the Union will function.<sup>13</sup>

Greater attention to the consolidation of democracy is also given. The Constitutive Act starts by underlining the commitment of the organisation to the principle of democracy.<sup>14</sup> Democracy is also recognised as an objective and founding principle of the AU. Accordingly article 3 and 4 expressed commitment to democratic principles, and condemned unconstitutional change of government. The Constitutive Act also has strong provisions that make it possible to enforce its principles strongly such as the adoption of the principle of intervention.<sup>15</sup>

### **2.3 Organs mandated with the promotion of human rights and democratisation in the AU**

The commitment of the AU to human rights and democracy found expression in its institutional framework. Article 5 of the Constitutive Act and the Protocol relating to the Establishment of the Peace and Security Council of the AU established an additional organ. Various institutions were established under the new organisation,

<sup>10</sup> E Baimu Introduction to Africa's Continental Organisations in CH Heyns *Human Rights Law in Africa* (2004) 99

<sup>11</sup> Preamble Para 9 of the Constitutive Act.

<sup>12</sup> Art 3(h) & 4(m) of the Constitutive Act.

<sup>13</sup> Article 4(m) of the Constitutive Act

<sup>14</sup> Para 9 Preamble, Art 3(h) & 4(m) of the Constitutive Act.

<sup>15</sup> Art 4 (h) of the Constitutive Act.

some of them replacing the previous organs while others were only mere change in names.<sup>16</sup> The principal organs of the Union were thus:<sup>17</sup> the Assembly of the Union (the Assembly)<sup>18</sup>, The Executive Council,<sup>19</sup> the Specialised Technical Committees,<sup>20</sup> The Court of Justice,<sup>21</sup> the Financial institution,<sup>22</sup> the Commission of the Union,<sup>23</sup> The Permanent Representatives Committee,<sup>24</sup> The Economic, Social and Cultural Council (ECOSOCC),<sup>25</sup> and last but not least the Pan-African Parliament (PAP)<sup>26</sup> which is the focus of this study. It is important to note that this list is not exhaustive as the Assembly is empowered to establish other organs of the union should it see fit.<sup>27</sup> The Peace and Security Council was subsequently established.

In terms of the Grand Bay (Mauritius) Declaration<sup>28</sup> that called for an active engagement of the continental political body and the mainstreaming of human rights into its activities<sup>29</sup>, most of these organs were mandated with the promotion of the principles of human rights and democratic institutions in their respective roles. The Peace and Security Council also has as one of its objectives the promotion of democratic principles.<sup>30</sup> ECOSOCC is also an important body, which creates a forum for participation of the African people through social and professional groups.<sup>31</sup>

The preceding sections of the study seek to show how one of the organs of the Union, the PAP can play a significant role towards this end and ensure that the African Union shows significant change in the way it addresses human rights and democracy from its predecessor organisation.

## 2.4 The Pan-African Parliament in the new African architecture

<sup>16</sup> Murray (n 7 above) 7.

<sup>17</sup> Art 5 of the Constitutive Act.

<sup>18</sup> Art 6-9 of the Constitutive Act

<sup>19</sup> Art 10-13 of the Constitutive Act.

<sup>20</sup> Art 14-16 of the Constitutive Act.

<sup>21</sup> Art 18 Constitutive Act.

<sup>22</sup> Art 19 of the Constitutive Act.

<sup>23</sup> Art 20 of the Constitutive Act.

<sup>24</sup> Art 21 of the Constitutive Act.

<sup>25</sup> Art 22 of the Constitutive Act.

<sup>26</sup> Art 17 of the Constitutive Act.

<sup>27</sup> Art 5(2) & 9(d) of the Constitutive Act.

<sup>28</sup> Grand Bay (Mauritius) Declaration and Plan of Action was adopted by the first OAU Ministerial Conference on Human Rights in 1999, Grand Bay, Mauritius.

<sup>29</sup> Naldi (n 9 above) 17.

<sup>30</sup> Art 3(f) of the Protocol establishing the PSC.

<sup>31</sup> Art 22 of the Constitutive Act.



## 2.4.1 Historical background

The idea of establishing an African Parliament dates back to the Treaty Establishing the African Economic Community (AEC or Abuja treaty) of 1991 as part of the structure to be established for the economic integration of Africa.<sup>32</sup> The treaty came into force in 1994 and since then, jointly with the Charter of the OAU, formed the basis for the operation of the OAU.<sup>33</sup> The AEC during the period of coexistence with the OAU established seven organs in its treaty one of which was the PAP.<sup>34</sup>

The PAP was originally an AEC institution to be established in the final stages of the implementation treaty in approximately 2025.<sup>35</sup> The treaty envisaged the establishment of a Regional Economic Community (REC) through a process of gradual establishment of national, regional and sub regional institutions to take place in six phases.<sup>36</sup>

This can be seen as part of the initiative in the 1990s that realised that for a successful regional integration, political understanding as well as a people centred approach was needed.<sup>37</sup> The treaty merely provided that a protocol would be adopted to define the powers, functions and structure.<sup>38</sup>

The Sirte Declaration of 1999,<sup>39</sup> which called for transformation of the OAU to a Union, marked a turning point for the continental organisation. It called for the strengthening of the continental institution to meet the challenges of the 21<sup>st</sup> century

<sup>32</sup> Art 7(1)(c) & 14 of the AEC treaty.

<sup>33</sup> Baimu (n 10 above) 99.

<sup>34</sup> Art 7 lists seven organs AEC treaty.

<sup>35</sup> Report on meeting to discuss the Protocol on the Establishment of the Pan-African Parliament held in Pretoria 7-10 November 2000.

<sup>36</sup> Art 6 & 88 of the AEC Treaty.

<sup>37</sup> Ulf Terlinden African Regional Parliaments – Engines of Integration and Democratization?(2004)

<http://fesportal.fes.de/pls/portal30/docs/FOLDER/PRESSE/PRESSEARCHIV/2004/ANALYSEN2004/Parliaments.pdf> (accessed 24 August 2006) 1-2.

<sup>38</sup> Art 14(1) of the AEC treaty.

<sup>39</sup> Sirte Declaration (on the AU) Fourth Extraordinary Session of the Assembly in Sirte, Libya, 8-9 September 1999 EAHG/draft/Decl. (IV) Rev. 1 1999 reprinted in CH Heyns *Human Rights Law in Africa* (2004) 268-269

and the objectives set out in the OAU and the Abuja treaty of 1991.<sup>40</sup> The Declaration underlined the need for greater and stronger unity of the continent and the people and proposed the speedy establishment of institutions of the AEC giving particular emphasis to the establishment of the parliament.<sup>41</sup> The declaration envisaged the establishment of the parliament in the year 2000 with the aim of providing a common platform for Africans and grass-root organisations to be involved in discussions and decision-making regarding issues facing the continent.<sup>42</sup> The Sirte declaration was swiftly followed up by the adoption of the Constitutive Act of the African Union (Constitutive Act) in 2000.

With the establishment of the AU, the organs of the AEC were provided as organs of the Union.<sup>43</sup> Article 33 of the Constitutive Act made transitional provisions where by all OAU and AEC assets and liabilities are to devolve to the new organ<sup>44</sup> strongly indicating that any form of independent existence of the AEC ceases with the establishment of the new Union supporting the understanding that the AU fused the OAU and AEC that had dual existence for a long time.<sup>45</sup>

From a human rights and democracy perspective this is an important step as it entailed a shift in focus of the organisation from issues of stability and security as the OAU to a more holistic approach of socio-economic development as the driving agenda. Notwithstanding such developments, however, the Abuja treaty continues to exist along side the Constitutive Act. The Constitutive Act recognising this provides that the Act shall prevail should inconsistencies arise between the two.<sup>46</sup>

With regard to the PAP the Constitutive Act merely provided that a protocol would be adopted to define the specific objectives, functions and powers.<sup>47</sup> Unlike the situation

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<sup>40</sup> Para 5 & 6 of the Sirte Declaration.

<sup>41</sup> Para 8(ii) (b) stated that a decision has been reached to 'ensure the speedy establishment of all the institutions ... *in particular the Pan-African Parliament*' (my emphasis)

<sup>42</sup> Para 8 (ii)(b) of the Sirte declaration.

<sup>43</sup> Baimu (n 10 above) 99.

<sup>44</sup> Art 33 (1) of the Constitutive Act.

<sup>45</sup> Baimu (n 10 above) 99.

<sup>46</sup> Art 33(2) of the Constitutive Act.

<sup>47</sup> Art 5 (1) (c) & 17 of Constitutive Act.

under the AEC however, by the time the Constitutive Act was adopted, the Protocol to establish the parliament was at its advanced stages.<sup>48</sup>

#### **2.4.2 Protocol to the African Economic Community establishing the Pan-African Parliament**

It would seem that African heads of states have recognised the importance of inclusion of parliamentarians for a successful regional institution from the very outset. The Sirte Declaration thus not only emphasised the need for a parliament and its speedy establishment but also called for the active participation of parliamentarians in the implementation of the declaration and resultant establishment of a much stronger regional body.<sup>49</sup> African Parliamentarians took part in the deliberations aimed at implementing the declaration.<sup>50</sup> Experts were also involved in the discussion of the draft protocol establishing the parliament.<sup>51</sup> About 200 delegates from a 41 OAU member states were involved. The PAP seems to enjoy support and interest of the OAU. The Protocol establishing the Pan-African Parliament was thus among the first instruments to be adopted as soon as the AU came into being.<sup>52</sup>

Two important issues have marked the discussion of the draft protocol. The first relates to the fact that it was being discussed within the context of the AEC but with the understanding that with the coming into force of the Constitutive Act of the Union, it will be considered as a protocol of the Act.<sup>53</sup> This is important as it has implications on membership, withdrawal and other aspects in relation to the protocol.

The Protocol allowed membership to the instrument and thus a seat to the Pan-African Parliament upon condition that a state is a member to the Abuja treaty and has additionally ratified the protocol. Members of the African Union that are not members of the AEC treaty cannot sign the protocol and are excluded from being

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<sup>48</sup> Baimu (n 10 above) 101

<sup>49</sup> Para 8(iii) called upon African states 'To encourage the participation of Parliamentarians in that process' Sirte Declaration.

<sup>50</sup> Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

<sup>51</sup> As above.

<sup>52</sup> Protocol establishing PAP entered into force in 2003.

<sup>53</sup> Report on meeting to discuss draft Protocol establishing PAP (n 35 above).

represented in the parliament.<sup>54</sup> A perusal of the provisions of the protocol reveals that the Protocol very much reflects the thinking that the parliament was initially conceived as an AEC body rather than an AU body. This is further reaffirmed by the fact that the protocol entered into force with the deposition of the instrument of ratification of members of the AEC.<sup>55</sup>

Such position is again reflected in the provision of the protocol that governs withdrawal. Article 19 thus provides that a state that ceases to be a member of the Abuja treaty will automatically lose its seat in the Pan-African Parliament. The same however is not the case if a member of the AU withdraws from the Constitutive Act. Thus it would seem that a state that is no longer a member of the African Union could still hold a seat in the parliament, which is one of its organs, and take part in decision-making.<sup>56</sup>

This would seem to be inconsistent with the provision of the constitutive act that now makes the parliament an AU organ and no longer a separate entity to be established in the future under the AEC.<sup>57</sup> As a principal organ of the AU that is to engage in deliberation of issues that extend far beyond the scope and objective of the AEC, it is critical that membership to the protocol is not conditioned upon membership to the AEC.

During the discussion of the draft protocol, it was stated that instrument would be a protocol to the Constitutive Act once the AU becomes operational.<sup>58</sup> The protocol as it stands however does not fully take that into account and would result in a body that is a principal organ of the AU which will deliberate on issues and pass decisions that could affect members of the Union who have not ratified the Protocol.

Given the present record of membership to the AEC treaty and its Protocol, it would seem that this would not figure as a major concern as difference in membership of

<sup>54</sup> Art 1 of Protocol establishing PAP.

<sup>55</sup> Art 22 Protocol of the PAP.

<sup>56</sup> Magliveras & Naldi (n 2 above) 230.

<sup>57</sup> Currently 48 states have ratified the AEC treaty and 46 have ratified the Protocol of the Parliament <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 6 September 2006)

<sup>58</sup> Report on the meeting to discuss the Protocol establishing PAP (n 35 above).

AEC and AU are quite narrow with a difference of five countries.<sup>59</sup> Be that as it may this legal difficulty must be addressed. Furthermore, as an organ that is to create a forum for participation of African people, it is important that it adopt an all-inclusive approach where all interested should be welcomed without adding an extra layer of requirement. The active role that the Parliament could play in relation to human rights and democracy may also not always be palatable to states. In these instances it is important that non-membership should not be used as a block to limit the significant role it could play in improving the situation in African states. Thus there is a need to make the necessary amendments to the Protocol.

The Second issue relates to the term of the parliament. The protocol as it stands was said to only provide an operational text base on which the parliament can operate during its interim phase or first stage. Such an understanding resulted in a Parliament whose mandate is so limited that one would hesitate to call it one. This text it was underlined was to take into account practical realities of the continent.<sup>60</sup>

However the final version provided some elements that participants considered to be achieved at the 'ideal' stage. The main distinguishing feature of these two phases, as can be understood from the discussion is that the parliament during the 'interim phase' will only be a consultative forum. The 'ideal' stage was briefly described as the stage where the parliament becomes a full-fledged legislative body that is elected by universal suffrage.<sup>61</sup>

The Protocol of the parliament sets out the objectives, composition, functions and powers of the new institution and leaves the rest for the parliament to determine in its rule of procedure. Chapter four will discuss in detail the composition, function, powers, structure and other aspects of the parliament in terms of their implications to its objective of promoting human rights and the principles of democracy.

#### **2.4.3 Objectives of the PAP: Promoting human rights and democracy**

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<sup>59</sup> Magliveras & Naldi (n 2 above) 299.

<sup>60</sup> Report on the meeting to discuss the Protocol establishing PAP (n 35 above).

<sup>61</sup> As above.

In accordance with of the AU's objective to ensure the participation people in its activities,<sup>62</sup> the ultimate object of the parliament is enabling ordinary Africans and their grass-root organisations to fully participate in the discussion and decision making at the AU level.<sup>63</sup> In order to ensure that ordinary Africans can discuss and make decisions, the parliament is ultimately expected to evolve into an organ that is elected by the people and that is has legislative powers.<sup>64</sup>

The preamble of the Protocol provides in strong terms the need to promote popular participation and the promotion of principles of democracy and consolidation of institutions as well as the creation of a culture of good governance.<sup>65</sup> Furthermore, it underlines the need to promote human and peoples rights. An explicit reference to the African Charter on Human and Peoples' Rights (ACHPR) is made as a framework to be used for the promotion of human rights.<sup>66</sup>

Article 3 which sets out the objectives provides that PAP will work towards facilitating the implementation of policies of AU, creating awareness among Africans about the objectives of continental integration, promotion of peace, security and stability, strengthening continental solidarity, and coordination of Regional Economic Communities and their parliamentary assemblies among others.<sup>67</sup> Article 3(2) further emphasis that human rights and democracy one of the objective of the parliament. Further most of the objectives of the PAP are in one way or another related to human rights and democracy.

## 2.5 Conclusion

The foregoing discussion has shown how the AU has sought to make human rights and democracy one of its central themes of focus and interest. This attention has been expressed by mandating its different organs with promotion of human rights and democracy. The organs of the AU envisaged in the Constitutive Act are also

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<sup>62</sup> Art 4(c) of the Constitutive Act.

<sup>63</sup> Preamble Para 3 of the Protocol establishing PAP.

<sup>64</sup> Art 2(3) of the Protocol establishing PAP.

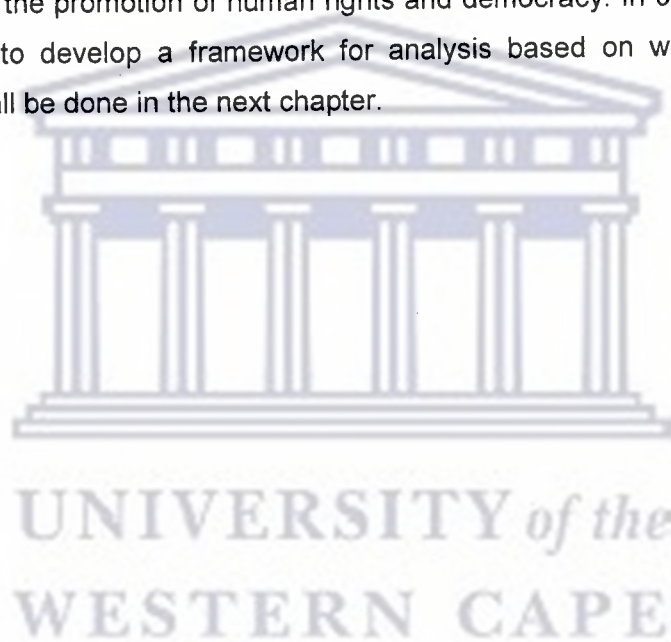
<sup>65</sup> Preamble Para 10 of the Protocol establishing the PAP.

<sup>66</sup> Preamble Para 11 of the Protocol establishing the PAP.

<sup>67</sup> Art 3 Protocol establishing the PAP.

unique and seem to have the potential to contribute towards the realisation of these ideals. One of the organs of the AU established with the objective of promotion of human rights and democracy is the PAP. If the content of the Constitutive act as well as the protocol were anything to go by, the AU and its organs will have to play a central role in the promotion of human rights and democracy with the PAP playing a key role in the new continental architecture.

The next task will be to evaluate the structure and practices of the PAP in relation to its effectiveness for the promotion of human rights and democracy. In order to do so however we need to develop a framework for analysis based on which we can evaluate it. This shall be done in the next chapter.



## CHAPTER 3: THE ROLE OF PARLIAMENTS IN THE PROMOTION OF HUMAN RIGHTS AND DEMOCRACY

### 3.1 Introduction

This chapter sets the framework for analysis by way of understanding the role that parliaments play in the promotion of human rights and democracy with particular focus on regional parliaments. In doing so, two observations must be made. Firstly, no two parliaments are the same. Parliaments differ in structure, function, internal organisation, composition, constituency linkages, power, roles and other respects.<sup>68</sup> Secondly, despite the variations, similarities exist among parliaments that enable one to tell them apart. A similarity that is so fundamental that Copeland and Patterson describe it as something that will give you a sense of 'if you have seen one, you have seen them all'.<sup>69</sup> Building on the similarities lessons for PAP will be drawn.

Accordingly it will examine defining features of parliaments by focusing on their composition, powers, functions, and role in the promotion of human rights and democracy. In so doing, it will largely draw lessons from the European Parliament, as it is a parallel institution of the EU to the PAP on which the African Union (AU) is loosely modelled.

### 3.2 Features, roles and functions of parliaments

The history of parliaments dates back to the 13<sup>th</sup> century when the British House of Commons begun its evolution and is now widely recognised as the 'mother of parliaments'.<sup>70</sup> Scholars remarked that we are currently living in the 'age of parliaments' where they are ubiquitous.<sup>71</sup> Although varying in design and development,<sup>72</sup> Copeland and Patterson note that parliaments exhibit substantial uniformity and generic features that distinguish them from other institutions.<sup>73</sup>

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<sup>68</sup> GW Copeland & SC Patterson 'Parliaments in the 21<sup>st</sup> Century' in GW Copeland & SC Patterson *Parliaments in the modern world: Changing institutions* (1994) 1.

<sup>69</sup> Copeland & Patterson (n 68 above) 5.

<sup>70</sup> Copeland & Patterson (n 68 above) 9.

<sup>71</sup> As above.

<sup>72</sup> U Liebert 'Parliament as a central site in democratic consolidation: A preliminary exploration' in U Liebert & M Cotta (eds) *Parliament and democratic consolidation in Southern Europe: Greece, Italy, Portugal, Spain, and Turkey* (1990) 3.



Among the functions that are said to define a parliament are legislation, education, interest articulation, intermediation, publication and others.<sup>74</sup> This functionalist approach found its classic expression in Walter Bagehot who stated<sup>75</sup>

that a house of commons may work well it must perform...five functions well : it must elect a Minister well, legislate well, teach the nation well , express the nation's will well , bring matters to the nations attention well

Other argue that parliaments do not have a specific, fixed set of roles but possess an intriguing 'all purpose flexibility' which allows them to carryout any function under differing circumstances.<sup>76</sup> This section looks at the central features of parliaments and those recognised as being important for effective protection of human rights and democracy keeping in mind the existing flexibility.

### 3.2.1 Legislation

The main feature that parliaments are identified with is law making. This feature is perceived as inherent to parliaments. It is a central aspect to the extent that the term 'parliament' is seen as synonymous and used interchangeably with 'legislature'.<sup>77</sup> It has thus been reiterated that it would be difficult to think of an institution or organisation as a parliament if it does not possess some form of legislative power.<sup>78</sup>

In the case of regional parliaments, the EP has had a central role in the decision making in the EU since 1987 with the coming into force of the Single European Act (SEA).<sup>79</sup> Since the 1990s, the EP emerged in the EU as part of the EP-Commission-Council decision-making triangle with a legislative and strong budgetary arm.<sup>80</sup> The EP uses these powers to shape policies.<sup>81</sup>

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<sup>73</sup> Copeland & Patterson (n 68 above) 5.

<sup>74</sup> Liebert (n 72 above) 13.

<sup>75</sup> Liebert (n 72 above) 13 cited from W Begehot *The English Constitution* (1867).

<sup>76</sup> Liebert (n 72 above) 13.

<sup>77</sup> J Paxton *World Legislatures* (1974) Introduction.

<sup>78</sup> Copeland & Patterson (n 68 above) 5.

<sup>79</sup> KH Neunreither 'The European Parliament' in L Cram, D Dinan & N Nugent (eds) *Developments in the European Union* (1999) 62.

<sup>80</sup> Neunreither (n 79 above) 80.

<sup>81</sup> NDI *Parliamentary Human Rights Mechanisms* A rule of law series paper <http://www.ipu.org/splz-e/h/r04/ndi.pdf> (accessed 28 August 2006) 27

<sup>81</sup> Neunreither (n 79 above) 62.

Initially it was established with only powers of consultation. The Commission or the Council could decide to either accept or reject its opinions. This however changed with the parliament currently exercising legislative powers. This was attained through a gradual process with the parliament exerting pressure on the Commission to include the opinions of the assembly.<sup>82</sup> However this power is not complete and exercised jointly with the Council of the European Union (Council) called co-legislative power.<sup>83</sup> Thus when the Council makes legislative proposals, the EP could either amend it or reject it. This is unlike the previously existing procedure where the Council could override it. The only avenue open for the Council to change EPs decisions is through a process of negotiation.<sup>84</sup> However there areas that are considered non-legislative where EP does not have final say.<sup>85</sup> However significant step has been made after years of exclusion particularly when compared with other similar institutions that are not state-centred.

### 3.2.2 Control and oversight

Parliaments also typically carry out control and oversight functions. They oversee the conduct of other organs of government. This often involves monitoring actions of the executive towards the implementation of standards and legislations they adopted in their legislative capacity. Parliaments are also the forum where policies of are discussed, debated and thoroughly examined before adoption.<sup>86</sup> They thus engage in directing and controlling of policies.<sup>87</sup>

Parliaments also involve in appointment of members of other political organs.<sup>88</sup> Particularly important is their role in the appointment of members of Human Rights Commissions, the Ombudsperson, the Anti-corruption commission, and the Auditor General office.<sup>89</sup> Thus the oversight function of parliaments extends to the conduct, policy as well as personnel of the other branches of government.<sup>90</sup> The most effective system of oversight is said to be through the committee system.<sup>91</sup> Parliaments in

<sup>82</sup> Neunreither (n 79 above) 63.

<sup>83</sup> As above.

<sup>84</sup> Neunreither (n 79 above) 65.

<sup>85</sup> Neunreither (n 79 above) 71.

<sup>86</sup> NDI (n 81 above) 7.

<sup>87</sup> Liebert (n 72 above) 20.

<sup>88</sup> Copeland & Patterson (n 68 above) 5.

<sup>89</sup> D Beetham *Parliament and democracy in the twenty-first century A guide to good practice* (2006) <http://www.ipu.org/dem-e/guide.htm> (Accessed 4 August 2006) 131.

<sup>90</sup> Beetham (89 above) 18.

<sup>91</sup> Beetham (89 above) 128.

exercising this role should without being obstructionist forge a collaborative relationship where solutions are actively sought to problems.<sup>92</sup>

The EP also has powers of control and oversight. The Council responds to the written and oral questions presented by parliament, takes part in parliamentary discussions and reports on the progress of programmes undertaken.<sup>93</sup> Ministers are also invited to take part in sessions of standing committees in drafting processes.<sup>94</sup>

The parliament has a particularly strong power of control over the EU Commission, which extends to dismissing the Commission by a motion of censure.<sup>95</sup> The parliament also adopted other mechanisms of oversight over the Commission by innovatively interpreting the powers formally given to it. Some of the mechanisms are: ensuring the Commission takes part in plenary and committees sessions relating to issues that have legislative or budgetary implications, requiring the Commission to present its policies and programmes and policies to it, and parliamentary questions to which the Commission is expected to respond. Parliament is also involved in the appointment of Commissioners and its president.<sup>96</sup> Thus the EP by using its democratic credentials has been innovatively expanded its powers.<sup>97</sup>

### 3.2.3 Budgetary powers

The power of parliaments over the budget has been considered to be the origin of parliamentarianism. The slogan 'no taxation without representation' has often been referred to to affirm this.<sup>98</sup> Parliaments are vested with the power to discuss and adopt the budget. Control over financial decisions is a powerful tool to stir the direction of governments and is a central function typically exercised by parliaments. This power includes overseeing how money is spent and calling public offices to account for spending.<sup>99</sup>

The EP also has wide budgetary powers over the common budget of the EU. It is empowered with adopting the budget. Due to the resistance of states, however, its

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<sup>92</sup> Beetham (89 above) 115.

<sup>93</sup> Neunreither (n 79 above) 68.

<sup>94</sup> As above.

<sup>95</sup> As above.

<sup>96</sup> Neunreither (n 79 above) 69.

<sup>97</sup> B Laffan 'Democracy and the European Union' in L Cram, D Dinan and N Nugent(eds)*Developments in the European Union* (1999) 337.

<sup>98</sup> Neunreither (n 79 above) 66.

<sup>99</sup> Beetham (89 above) 140.

power is restricted to certain sectors<sup>100</sup> based on whether it is classified as compulsory or non-compulsory expenditure.<sup>101</sup>

### 3.3 Parliaments, Human Rights and democracy

#### 3.3.1 Parliaments and Human Rights

Parliaments, themselves considered to be an embodiment of the human right to political participation, have a key role to play in the promotion of human rights.<sup>102</sup> Scholars advocating for a proactive parliamentary role in human rights regard them as guardians of human rights. It is argued that as the only democratically elected organ, they are key institutions that could play a central role in the protection of human rights and building of a society rooted in the values of democracy and respect for human rights.<sup>103</sup> As representative institutions, they are also considered to have a special duty to promote human rights and are uniquely placed with the opportunity to do so.<sup>104</sup>

The first visible contribution of parliaments relates to elections held for parliamentary seats. During elections citizens exercise a range of civil and political rights as candidates and electorate. This creates conditions that foster exercise of rights through mobilisation of civil society and interest groups<sup>105</sup> and the exercise of freedom of association and assembly, freedom of expression, opinion and media, to the exercise of the right to vote and to have access to judicial remedies when the results are contested.

Parliaments have a historic role as founders and codifiers of human rights standards.<sup>106</sup> Through their legislative capacities parliaments enact human rights laws. They also ratify international human rights documents signed by the executive.<sup>107</sup> Legislations incorporating international instruments are also adopted and existing legal framework synchronized.

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<sup>100</sup> Neunreither (n 79 above) 67.

<sup>101</sup> R Rack and S Lausegge 'The Role of the European Parliament: Past and future' in P Alston, M Bustelo & J Heenan(eds) *Human Rights in the EU* (1999) 823

<sup>102</sup> NDI (n 81 above) 7.

<sup>103</sup> IPU '*Parliament: Guardian of Human Rights*' <http://www.ipu.org/splz-e/budapest.htm> (accessed 19 September 2006).

<sup>104</sup> NDI (n 81 above) 7.

<sup>105</sup> Liebert (n 72 above) 15.

<sup>106</sup> IPU (n 103 above).

<sup>107</sup> NDI (n 81 above) 8.

Most problems of human rights are however less on standards and more on implementation and enforcement.<sup>108</sup> Parliament can monitor and follow up government action or inaction and impose sanctions such as a vote of no confidence if the relevant government officials do not comply.<sup>109</sup> Through oversight they can scrutinise actions of officials and organs whether they are human rights compliant.<sup>110</sup> Mechanisms often used are enquiries<sup>111</sup> formal parliamentary questioning of policies and government business, monitoring,<sup>112</sup> and establishing special investigative committee to look into matters of human rights concern.<sup>113</sup>

Control of budget can also enable parliament to direct more resources to human rights<sup>114</sup> and ensuring its prioritisation.<sup>115</sup> Other mechanisms that can also be used for the advancement of human rights are investigations into government institutions publicly denouncing human rights violations and advocating for adherence standards, providing human rights education, advocating for the inclusion of human rights education in schools. As opinion leaders, parliaments can also contribute to the creation of a culture of human rights.<sup>116</sup>

To effectively carry out their work parliaments establish committees.<sup>117</sup> Most of the work of parliaments takes place in committees considered as 'engine rooms' or 'miniature parliaments'.<sup>118</sup> Different parliaments either have all parliamentary committees dealing with human rights and understanding human rights as cross-cutting to be address in every committee, or to have a specifically mandated human rights committee to follow up and ensure that all committees mainstream human rights into their work. The third combines the two and establish a committee dealing with human rights but together with administration of justice.<sup>119</sup> Moreover, it could also appoint inquiry or ad hoc committees to carryout special investigation though

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<sup>108</sup> NDI (n 81 above) 7.

<sup>109</sup> IPU (n 103 above).

<sup>110</sup> NDI (n 81 above) 8.

<sup>111</sup> NDI (n 81 above) 18

<sup>112</sup> IPU (n 103 above).

<sup>113</sup> NDI (n 81 above) 41.

<sup>114</sup> IPU (n 103 above).

<sup>115</sup> NDI (n 81 above) 8.

<sup>116</sup> As above.

<sup>117</sup> IPU (n 103 above).

<sup>118</sup> NDI (n 81 above) 8.

<sup>119</sup> As above.

fact-finding and on-site visits.<sup>120</sup> This mechanism is a crucial tool for human rights protection.<sup>121</sup>

Committees dealing with human rights can have delegated legislative and oversight functions. If explicitly mandated they can oversee policies with reference to human rights standards.<sup>122</sup> Parliaments usually have petitions committee where complaints from the public are received.<sup>123</sup>

Another mechanism is the institution of the ombudsperson<sup>124</sup>, which although designed towards ensuring administrative justice in the public domain has a role to play through monitoring of government actions and reporting to parliament to which they are accountable.<sup>125</sup> Other informal mechanisms like parliamentary caucuses can also be used to address human rights concerns.<sup>126</sup>

The EP and the Parliamentary Assembly of the Council of Europe are considered to be the most significant human rights actors in Europe.<sup>127</sup> The EP as a democratically elected body considers promotion of human rights as its duty.<sup>128</sup> Human rights was not within its specific field of work at first. However it has brought human rights within its sphere of activity. This was also done to expand its powers and influence on matters that were not formally under its remit.<sup>129</sup>

The EP deals with human rights in Europe and in third countries. Adherence to the principles of human rights and democracy has been made prerequisite to be met by third states to enter into relations with the EU. States applying for EU membership have to also show a good human rights and democracy record. These requirements are strictly applied and monitored closely by the EP.<sup>130</sup>

The EP has established various structures that are relevant for the protection of human rights and democracy. Particularly relevant are the Committee on Foreign

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<sup>120</sup> NDI (n 81 above) 35.

<sup>121</sup> NDI (n 81 above) 11,14.

<sup>122</sup> NDI (n 81 above) 16

<sup>123</sup> For detailed discussion of history of petitions committees see NDI (n 81 above).

<sup>124</sup> IPU (103 above).

<sup>125</sup> NDI (n 81 above) 10.

<sup>126</sup> As above.

<sup>127</sup> NDI (n 81 above) 27.

<sup>128</sup> Rack & Lausegge (n 101 above) 801.

<sup>129</sup> As above.

<sup>130</sup> Rack & Lausegge (n 101 above) 803-804.

Affairs, Human Rights and Common Defence Policy, mandated to oversee human rights and democratisation in developing countries and the committee on Citizens Rights, justice and Home Affairs, dealing with human rights in EU countries. The various committees set up under the EP enjoy the same powers as national parliamentary committees.<sup>131</sup>

The right to petition parliament is considered to be a fundamental right that is as old as the institution of parliament.<sup>132</sup> The EP has a petitions committee, which is accessible to all members of the public, individually, or otherwise including non-citizen residents of member states of the EU.<sup>133</sup> The EP deals with issues brought to it that often pertain to the violations of human rights and ECHR.<sup>134</sup>

The EP issues annual human rights reports on human rights in the EU and in the world. These reports assist in setting priorities, issuing of resolutions and taking concrete actions.<sup>135</sup> Other mechanisms employed are undertaking studies, fact finding mission, putting forth oral or written questions to EU Commission and Council, issuing resolutions, discussing issues relating to serious human rights situation in a country with the EU Commission or Council.

The first reaction by the EP when it thinks that human rights have been threatened is the drawing up of resolutions. The EP in its first year of existence issued only five resolutions relating to human rights. This figure rose to 116 resolutions in 1988 most of which however, pertained to human rights in third countries.<sup>136</sup>

The EP also constantly employs questioning procedure against the Commission and the Council which to discuss issues of human rights which could be oral or written.<sup>137</sup> The questioning procedure could be oral or written. If written, the question as well as the response will be published in the Official Journal of the European Communities. Written questions have pertained to compliance with the European Charter on Human Rights (ECHR)<sup>138</sup>

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<sup>131</sup> NDI (n 81 above) 27.

<sup>132</sup> NDI (n 81 above) 10.

<sup>133</sup> Neunreither (n 79 above) 71.

<sup>134</sup> Rack & Lausegge (n 101 above) 807.

<sup>135</sup> As above.

<sup>136</sup> Rack & Lausegge (n 101 above) 810.

<sup>137</sup> Rack & Lausegge (n 101 above) 811.

<sup>138</sup> Rack & Lausegge (n 101 above) 811-812.

Another procedure is Public Hearings. Such hearings are designed to get information on a situation or thematic area in relation to human right. This usually involves experts and non-governmental organisation.<sup>139</sup>

The Parliament also in addition to its power of oversight and legislations also uses its budgetary powers to influence matters in the EU towards promotion of human rights and democracy.<sup>140</sup> Since 1976 parliament has constantly exerted this power to amend the budget proposed by the Commission by making specific amendments to budget lines that pertain to human rights and democracy. In areas where parliament has a final say on the budget this has been of considerable significance to human rights and democracy.<sup>141</sup>

### 3.3.2 Parliaments and Democracy

In order to understand the contribution of parliaments to democracy, the first step would be to understand what democracy is. This is however a challenging task. Democracy has been widely described as a contested concept.<sup>142</sup> There are many definitions that could be given. It has been described as 'an ideal as well as a set of institutions and practices.'<sup>143</sup> It has been defined as 'a system of political governance whose decision-making power is subjected to the controlling influence of citizens.'<sup>144</sup> This has often been achieved through a complex set of institution and practices. These are a framework for the guarantee of citizens' rights, institutions of representative accountable government, active civil society, political parties and the media.<sup>145</sup> Parliaments obviously fall within the category of institutions of government.

Despite the difference that exists among parliaments, there is a consensus that parliaments have a role to play in democracy.<sup>146</sup> They are the only elected political

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<sup>139</sup> Rack & Lausegge (n 101 above) 814.

<sup>140</sup> Rack & Lausegge (n 101 above) 823.

<sup>141</sup> Rack & Lausegge (n 101 above) 824

<sup>142</sup> Democracy Assessment <http://www.idea.int/democracy/index.cfm> (accessed 27 September 2006)

<sup>143</sup> Laffan (n 97 above) 331.

<sup>144</sup> Democracy Assessment (n 142 above).

<sup>145</sup> Beetham (89 above) 4-6.

<sup>146</sup> Liebert (n 72 above) 3.



organ and considered as agents of democratic consolidation.<sup>147</sup> This is so as they are the embodiment the will of the people.<sup>148</sup> Thus they contribute towards the realisation of the ideal of popular sovereignty,<sup>149</sup> which is one of the central principles of democracy.<sup>150</sup> They also play a key role by working with the different role players in democracy. The existence of a strong parliament has been recognised as being indicative of a healthy democracy.<sup>151</sup>

To contribute towards democracy, they should be representative, accountable, transparent, inclusive, participatory, and responsive to aspirations and expectations of citizens' in carrying out their functions.<sup>152</sup>

### **Representativeness**

In theory parliaments contribute to balancing power between the executive and the legislative<sup>153</sup> and to the fulfilment of 'government of the people, by the people, for the people'.<sup>154</sup> This creates link between the government and the governed and relates to composition and membership. According to John Stuart Mill and Walter Bagehot, 'the legislature is a mirror image of the population'.<sup>155</sup> Parliaments should reflect the plurality views in their communities. They advance organisation, articulation and representation of interests through participation of political parties representing various groups. This opens up democratic space and consolidates democracy while creating a culture of human rights.

Secondly it should reflect the different social groups in a society. This is usually along ethnicity, religion, gender, language, marginal, indigenous communities and any

<sup>147</sup> G Di Palma 'Parliaments, Consolidation, institutionalisation, a minimalist view' in U Liebert and M Cotta(eds) *Parliament and Democratic Consolidation in Southern Europe: Greece, Italy, Portugal, Spain, and Turkey* (1990) 42.

<sup>148</sup> Democracy Assessment (n 142 above).

<sup>149</sup> Beetham (89 above) 5.

<sup>150</sup> Liebert (n 72 above) 18.

<sup>151</sup> Beetham (89 above) viii.

<sup>152</sup> Democracy Assessment (n 142 above).

<sup>153</sup> Liebert (n 72 above) 10

<sup>154</sup> This is a simple yet powerful description of democracy by Abraham Lincoln in his famous Gettysburg Address in November 19, 1863 which to still informs American democratic thought. Introduction to Abraham Lincoln's Gettysburg Address <http://usinfo.state.gov/usa/infousa/facts/democrac/25.htm> (accessed 18,October, 2006)

<sup>155</sup> Liebert (n 72 above) 18.

other group that seeks participation.<sup>156</sup> Equal opportunities and protection should be given to them as MPs.<sup>157</sup>

The representativeness of a parliament can be guaranteed through the electoral system procedures and process that are inclusive of the all social groups.<sup>158</sup> This must be done through genuine and periodic elections. This is affirmed in article 21 of the Universal Declaration of Human Rights (Universal Declaration), article 25 of the International Covenant on Civil and Political Rights (ICCPR), article 13 of the African Charter on Human and Peoples' Rights and many other instruments. Representation of women in parliament is key aspect of representativeness.<sup>159</sup>

With regard to regional parliaments, the EP is the only organ of the EU that is directly elected by members of the public since 1979.<sup>160</sup> There are presently 626 members.<sup>161</sup> Seats are allocated in accordance with proportional representation.<sup>162</sup> The parliament is considered to be the representative and is the most publicly well known of all EU institutions.<sup>163</sup>

### **Transparency**

Parliaments by being open to the public in how they handle matters can contribute to democracy. They should allow for public engagement in discussions.<sup>164</sup> Although theoretically and legally physical access is required it is usually done through the media for security considerations.<sup>165</sup> This also determine the exercise of several rights such as the right of access to information, freedom of expression, freedom of the media and participation in the governance by being informed citizens. This is crucial as it would determine if and how citizens can engage with parliaments and ultimately exercise their right.<sup>166</sup>

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<sup>156</sup> IPU (n 103 above).

<sup>157</sup> Beetham (89 above) 7, 19.

<sup>158</sup> Beetham (89 above) 13, 19

<sup>159</sup> IPU (n 103 above).

<sup>160</sup> Neunreither (n 79 above) 72.

<sup>161</sup> Neunreither (n 79 above) 64.

<sup>162</sup> Neunreither (n 79 above) 73.

<sup>163</sup> Neunreither (n 79 above) 71.

<sup>164</sup> NDI 11

<sup>165</sup> Beetham (89 above) 43.

<sup>166</sup> As above.

## **Accountability**

Accountability of all public officials is a central element of democracy.<sup>167</sup> In the context of parliaments two roles are envisaged. Their role as representatives of the people who hold other public officials to account (oversight role) and their own duty to be held accountable to their electorate.<sup>168</sup> It is the second aspect that is referred to in this subheading. As individuals put in office by the people, it creates a relationship of accountability between members and the constituency.<sup>169</sup> Parliamentarians should be answerable to the public for their action.<sup>170</sup> They should account for their actions and face sanctions if they failed to conduct themselves in a manner that meets the standards required by their position.<sup>171</sup>

## **Accessibility**

In the age when direct democracy is not possible and is substituted by representative democracy, some means has to be devised to ensure that the people have some form of access to these institutions. Parliamentarians are expected to maintain constant contact and remain approachable to the people who have put them in office. This could be through creating mechanism where by electorate can approach their representatives or conversely where Parliamentarians could set aside time to consult with the electorate.<sup>172</sup> In addition to maintaining dialogue with representatives, parliaments should also establish mechanisms by which individuals with grievances could present their case for effective investigation and redress.<sup>173</sup> This is usually done through establishing petitions committees,<sup>174</sup> an ombudsperson that is accountable to the parliament,<sup>175</sup> Human Rights Committees.<sup>176</sup>

Citizens can participate in the parliamentary legislative process through making submissions to the parliament, participating in public hearing and committees sessions.<sup>177</sup> This is done by holding public sessions, by calling for public to take part

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<sup>167</sup> Beetham (89 above) 95.  
<sup>168</sup> As above.  
<sup>169</sup> Copeland & Patterson (n 68 above) 5  
<sup>170</sup> Beetham (89 above) 7.  
<sup>171</sup> Beetham (89 above) 95.  
<sup>172</sup> Beetham (89 above) 70  
<sup>173</sup> Beetham (89 above) 74.  
<sup>174</sup> As above 74.  
<sup>175</sup> Beetham (89 above) 76.  
<sup>176</sup> Beetham (89 above) 77.  
<sup>177</sup> Beetham (89 above) 79.

in its discussions, by allowing associations and members of the civil society to be able to engage with the parliament.<sup>178</sup>

### **Effectiveness**

This relates to the organisation and working of parliament in accordance with the values set above and in a manner that is responsive to the needs of the electorate.<sup>179</sup>

This is not necessarily a value of democracy, however it is an important prerequisite for a parliament to carry out its function of law making, oversight, budgetary powers and others in a manner that enables it to be democratic and contribute towards the consolidation of democracy.<sup>180</sup>

For a parliament to be effective two elements must be fulfilled. The first relates to capacity. A parliament must have the necessary legal mandate to carry out its functions effectively. Furthermore, it should also be well resourced.<sup>181</sup> The second aspect relates to its relationship with other organs of government particularly the executive. It must be sufficiently empowered and should be autonomous, independent from the influence of the executive.<sup>182</sup> To this end, it should have control over appointment of parliamentary staff, its own budget and the administration of its own business.<sup>183</sup> These two aspects are obviously interrelated, as a parliament that is weak and under resourced is much more likely to be dominated by the executive than a well resourced parliament with sufficient legal mandate to carry out its functions.<sup>184</sup>

As noted democracy is an essentially contested concept from a traditional nation-state perspective. This becomes even more challenging when one talks about conceptualising democracy in the context of the EU.<sup>185</sup> Robert Dahl, an influential scholar on democracy, likened this conceptual difficulty presented by changes in governance at the international level to the shift from city-state democracy in Greece to representative democracy in the nation-state.<sup>186</sup> This indicates the difficulty in

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<sup>178</sup> Beetham (89 above) 7.  
<sup>179</sup> As above.  
<sup>180</sup> Beetham (89 above) 115.  
<sup>181</sup> As above.  
<sup>182</sup> As above.  
<sup>183</sup> Beetham (89 above) 118.  
<sup>184</sup> Beetham (89 above) 115.

<sup>185</sup> Laffan (n 97 above) 330.  
<sup>186</sup> Laffan (n 97 above) 339.

measuring democratic nature of such organisations. However as argued by Laffan at the very least democracy at the regional level cannot be seen in isolation from consolidation of democracy in the member states that make up the system.<sup>187</sup> Due to the inextricable link between human rights and democracy<sup>188</sup> the EP has also been responding to issues of democratisation in much the same way as that of human rights.

### 3.4 Conclusion

It can be concluded that parliaments have a significant role to play in the promotion of human rights and democracy. Despite the uniqueness of regional parliaments, the inherent similarities with traditional parliaments ensure that they retain their significance and are uniquely positioned to effectively promote human rights and democracy. At the very least, these institutions can ensure that member states live up to these standards. The European Parliaments experience holds useful lessons for similarly positioned institutions.

This chapter however does not seek to evaluate the PAP with reference to its proximity or deviation from state-centred parliamentary models. Nor does it intend to call for the African institution to replicate the only presently existing relatively successful regional parliamentary model, the European Parliament. There are many reasons against such reproduction, but the most compelling ones are rooted in obvious and pragmatic considerations. The first one is the difference in institutional complexity, resources. Secondly, because of the differences between the regional organisations under which they operate and the peculiarities of the conditions of each of the continents.

Thus following chapter will discuss in detail the PAP in light of the experiences of EP and other benchmarks not so much to compare but to draw lessons on how parliaments can effectively engage in the human rights and democracy.

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<sup>187</sup> Laffan (n 97 above) 340.

<sup>188</sup> IPU (n 103 above).

## CHAPTER FOUR: THE PAN-AFRICAN PARLIAMENT: CHALLENGES AND OPPORTUNITIES FOR THE PROMOTION OF HUMAN RIGHTS AND DEMOCRACY

### 4.1 Introduction

The PAP, as discussed, has a mandate to promote human rights and democracy. It is to play a central role in the promotion of democratic principles, institutions, popular participation and good governance and to promote and protect human rights and gender equality.<sup>189</sup> The parliament is also expected to assist in the establishment and consolidation of effective democratic systems, by involving all actors of civil society. It will also ensure the implementation of policies and objectives of the AU, which include human rights and democracy. African states also urged for a parliament that would be a vehicle for the promotion of human rights and democracy on the continent.<sup>190</sup>

The objective was reflected by repeated reference to the principles throughout the protocol. The establishment of the parliament is in itself a recognition of the need for democratic consolidation both at the AU and among member states of Africa. It marks an important step towards the realisation of the right to political participation in of the peoples of Africa and the realisation of democratic governance at a regional level.

This mandate however is not complemented with the necessary powers that would enable it to carry out this role effectively. The parliament as conceived in the Protocol is very much state-centred and its powers constrained. Thus one can argue that it has created an institution with deformity. This chapter will first look at the powers that the parliament presently has and the limitations namely the lack of legislative and budgetary power and how far that can impact on its successful role in promotion of human rights and democracy.

The second part will look at practical measures taken by the parliament towards realisation of this objective. Institutional mechanisms and measures used will be examined.

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<sup>189</sup> Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

<sup>190</sup> As above.

The last part will examine the potential role PAP has in the promotion of human rights and democracy by taking lessons from the EP.

## 4.2 Powers and functions and legal limitations

### 4.2.1 Advisory and Consultative powers

Being a creature of legislation PAP can only work within the normative framework provided. Article 11 of the Protocol provides that it can only exercise advisory and consultative powers during its first term.<sup>191</sup> The means and scope of exercising this power is also defined. Accordingly PAP can itself select an issue to examine and advise the relevant bodies on. The scope within which PAP can exercise this power also broad where by it can also select any issue without restriction.<sup>192</sup>

The provision makes explicit reference to the parliament taking up issues pertaining to respect for human rights, the consolidation of democratic institutions and the creation of a culture of democracy. This gives it sufficient flexibility to set its own priorities and agenda according to the needs of the people and focus on human rights and democracy as stipulated.

The EP also started as a consultative body that was allowed to adopt resolutions and recommendations on any matter. This was done with the presumption that it would not have any real impact.<sup>193</sup> However EP by using its powers innovatively expanded its powers.<sup>194</sup> Thus PAP by taking lessons from EP can by innovatively interpreting its formally recognised powers, expand its powers in the long run.

In relation to human rights and democracy, PAP started from better position than EP as it were not recognised as part of EPs mandate which it only gradually brought under its remit by recognising that as cross cutting issues, it would empower it with influence over almost any matter.

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<sup>191</sup> Art 11 of the Protocol establishing PAP.

<sup>192</sup> Art 11(1) Protocol establishing PAP.

<sup>193</sup> Rack & Lausegge (n 101 above) 825.

<sup>194</sup> As above.

The PAP already has a legal recognition of this mandate. This scope alone is broad enough to allow parliamentarians to take up any matter they could think of. PAP is also mandated with making recommendations to ensure the attainment of objectives of the AU. As noted democracy and human rights are the objectives and founding principles of the AU.<sup>195</sup>

The power to consult is however not a strong power. The protocol makes no provisions how far AU organs have a duty to consult PAP or whether it is obligatory to take into account the advice of PAP in making decisions. The lack of clarification would serve to weaken the position and influence of the parliament and creates a danger of being consulted for formality or being ignored. The only need to consult relates to the budget where the parliament is to discuss and make recommendations prior to approval.<sup>196</sup>

PAP can use its power to take up issues and make recommendations of its own initiative to bring matters to the attention of the relevant AU bodies. It can lobby for its recommendations to be taken seriously. It can also attempt to reach an understanding AU bodies procedures for consultation, which include a requirement that outcomes of consultations are taken into account in making the final decision.<sup>197</sup>

Despite the limitations PAP has created an opportunity for African parliamentarians to consult and advise the AU. This is not an opening that should not be underestimated and should be utilised to highlight and direct the AU approach to human rights and democracy.

#### **4.2.2 Budgetary powers**

PAP does not have any form of budgetary control either on its own budget or on the budget of the AU. Its budget is part of the regular AU budget. It can however draw up for approval by the Assembly.<sup>198</sup> This would enable it to set priorities and insert budget lines relating to human rights and democracy although it can be altered.

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<sup>195</sup> Art 3(h) & 4(m) of the Constitutive Act.

<sup>196</sup> Art 11(2) Protocol establishing PAP.

<sup>197</sup> Rack & Laussegge (n 101 above) 830.

<sup>198</sup> Art 15(1) & 15 (2) Protocol establishing the PAP.



Article 11(2) however makes consultation with PAP necessary prior to the approval of the budget of the Community, referring to the AEC. As argued earlier as the AEC does not have practical independent existence from the AU and as the protocol was drafted with the intention of making it protocol of the Constitutive Act,<sup>199</sup> one can argue that the PAP has been given the power of prior consultation on the budget of the AU. PAP can use this to add pressure and ensure that human rights and democracy initiatives are given the necessary attention and financial support for their success. This is however subject to the approval of the Assembly.

Looking at the EPs experience it exercises wide budgetary powers even if jointly with the Council. This is significant as the EP has more say on most expenditure and uses it to set the policy priorities of the EU.<sup>200</sup> PAP needs to gain increased budgetary power but should take due care that it is not made a 'rubber-stamp institution'.<sup>201</sup> It should also not allow for a similarly budget categorization like the EP.

#### 4.2.3 Oversight Powers

The Protocol does not make any provisions with regard to PAP oversight powers. Article 11 which allow it to discussion and express an opinion on any matter and work towards the achievement of AU objectives can be construed as mandating it to be vigilant on how business is conducted and provide recommendations on the appropriate actions.

Article 11(9) provides a catch all provision allowing PAP to carry out any function it deems fit to meet its objectives. This is an important provision that gives it room to maneuver and assume any number of functions so long as it can demonstrate that it will enable it to meet the objectives as set out in article 3 of the protocol. Based on this PAP considers itself to have the power of oversight<sup>202</sup> and issued a resolution on oversight in 2004 by making an explicit reference to its article 11(9) of the protocol that allows it to 'empower itself as it deems fit'.<sup>203</sup> This resolution clarifies that PAP considers this power crucial to effectively carry out its mandate to promote principles

<sup>199</sup> Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

<sup>200</sup> Demeke (n 6 above) 58.

<sup>201</sup> Terlinden (n 37 above) 7.

<sup>202</sup> Response by Mr Glal Nassir Ibrahim Senior Clerk (Legislative Business) and Acting clerk for the Committee on Justice and Human Rights (16 October 2006)

<sup>203</sup> Para 1 Resolution on oversight PAP-Res 004/04 <http://pan-african-parliament.org>. (accessed 16 October 2006)

of the AU, human rights and democracy as well as encourage good governance, transparency and accountability of member states.<sup>204</sup> Despite this the Senior Clark at the PAP stated that PAP has so far not exercised this power in relation to the other organs of the union.<sup>205</sup>

PAP like the EP should be given wide supervisory authority over the AU Commission and the Executive Council. As it has a broad mandate it can exercise its powers by taking lessons from EP. It can use parliamentary questioning procedure and invite the members of the executive organs attend its sessions. This had been provided for in article 11(5) but does not obligate officials to accept. This should be made mandatory. PAP should also call members to take part not only in its session but Committees sessions also.

Other measures are active involvement of the PAP in the appointment of AU officials. This would ensure that the officials of the PAP, their measures as well as the personnel are committed to human rights and democracy. The power of censure over the AU Commission should be the ultimate tool that would consolidate PAPs influence in the AU. In the exercise of this power PAP should aim at achieving consensus and corporation with other institutions towards solution finding like the EP.<sup>206</sup>

#### 4.2.4 Legislative powers

PAP does not currently have legislative powers but will gain some at the end of its first term.<sup>207</sup> Legislation is the 'ultimate vision' towards which PAP is to evolve.<sup>208</sup>

The justification given by drafters was that 'reality of this stage of the continent's development' did not allow it.<sup>209</sup> This reality and how it could bar the PAP from legislating was unexplained. Legislating laws that harmonise the different legal traditions and national interests is admittedly difficult but progress can be made small strides over time through practice.

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<sup>204</sup>

As above.

<sup>205</sup>

Independent information exists that the PAP had called an AU official to question on the conduct of certain activities. However the researcher was unable to confirm the veracity of this information.

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Rack & Lausegge (n 101 above) 826.

<sup>207</sup>

Art 2(3) & 11 of the Protocol establishing PAP.

<sup>208</sup>

Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

<sup>209</sup>

Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

Taking lessons from EP, PAP can, through engaging in negotiation process during drafting can contribute to the law making process at the AU level. Like the EP it can expand its powers by ensuring that its comments are taken seriously and adopted in the final draft. The input of PAP will particularly be important in drafting regional human rights instruments as it could play a key role in ensuring that the instruments not only set good standard but have strong and effective enforcement mechanisms.

The time frame within which it is to evolve into a legislative body has not been clarified by the protocol. This point as Magliveras and Naldi argue is moot and no provision of the protocol can be understood as setting the timeframe.<sup>210</sup> The 'first term' of the PAP has been subject to different interpretations. Demeke argues that the first year of existence will end in 2007.<sup>211</sup> An official at the PAP expects the first term to end and the parliament to be a legislative organ by the year 2010.<sup>212</sup> Still other place the first term of the PAP between 2004-2009.<sup>213</sup> This confusion possibly flows from different interpretations lent to article 25, which provides for a compulsory review process of the protocol.<sup>214</sup> This does not however lead to necessary interpretation that the first term of the Parliament ends upon convening a review process of the protocol.

Ultimately the PAPs transition to a full legislative body is not automatic but subject to amendment or review of the protocol.<sup>215</sup> To this effect Mashele argues that this would be possible if PAP demonstrates that a legislative power would enable it to make a contribution.<sup>216</sup>

Gutto argues that the exercise of legislative power would complicate matters as it is linked to direct election of members with impact on the national electoral laws of member states.<sup>217</sup> Although electoral laws of states will have to be harmonised when considering making the PAP a directly elected body, it is still not clear as to why the PAP cannot exercise legislative power at the moment without necessarily being

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<sup>210</sup> Magliveras & Naldi P 233.

<sup>211</sup> Demeke(n 6 above) 58.

<sup>212</sup> Response by Mr Nassir to questionnaire(n 202 above).

<sup>213</sup> P Mashele 'The Pan African Parliament with legislative powers: What will happen?' *ISS today* <<http://www.issafrika.org>(9 October 2006).

<sup>214</sup> Art 25(1) &(2) of the Protocol establishing PAP.

<sup>215</sup> Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

<sup>216</sup> Mashele (n 213 above).

<sup>217</sup> As above

directly elected. During the first term of existence however, the PAP will have to use its powers to the extent possible while taking an active part in the legislative processes that takes place at the Assembly level.

#### **4.3 Measures taken by the Parliament for the promotion of human rights and democracy**

##### **4.3.1 Institutional mechanisms**

PAP to enhance its effectiveness and enable it to exercise its existing powers effectively established ten permanent committees in accordance with its rules of procedure one of which is the Committee on Justice and Human Rights.<sup>218</sup> Although its mandate was not yet elaborated, it is to contribute to 'respect for sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental rights with in Africa'.<sup>219</sup> As a established for this purpose, it should take a lead role in overseeing and coordinating human rights and the related issue of democracy with in the PAP.

Specific measures suggested for it to take up are strengthening the normative framework for human rights protection among member states by making calls for the ratification and domestication of human rights instruments<sup>220</sup> taking an active part in human rights monitoring with other similarly mandated organs of the AU,<sup>221</sup> developing a human right accountability index,<sup>222</sup> developing a common position in relation on human rights,<sup>223</sup> reporting on issues of human rights and making specific recommendations. With regard to consolidation of democracy the Committee could through its work also pay particular attention to enhancing peoples participation through the PAP, enhancing participation in the regional economic communities and encouraging civil society to take part in the PAP.<sup>224</sup> The PAP by providing the Committee with delegated power of oversight and consultation can allow it to contribute actively.

<sup>218</sup> Annual report of the PAP 2004-2005 <http://pan-african-parliament.org>. (accessed 05 August 2006)32-33

<sup>219</sup> Annual report(n 218 above) 32

<sup>220</sup> JO Ambani, G Mirugi-Mukundi & W Maindi *Suggestions on the Mandate of The justice and Human Rights Committee of the Pan-African Parliament* (2006) 2.

<sup>221</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 5.

<sup>222</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 6.

<sup>223</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 11.

<sup>224</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 14

### 4.3.2 Practical measures

#### **Consultations**

Perhaps the first achievement by the PAP is the creation of a forum when the voice of peoples representatives are heard.<sup>225</sup> Since establishment PAP held five sessions.<sup>226</sup> PAP is also engaging in issues that are directly or indirectly related to human rights and democracy. Some issues discussed were NEPAD, peace and security, protection environment, women's rights, corruption, HIV/AIDS, Children's Rights, elections to mention only a few.<sup>227</sup>

#### **Resolutions and recommendations**

The PAP has started its human rights and democracy work through recommendations. In the year 2004-2005 alone it has passed fourteen resolutions and thirteen recommendations.<sup>228</sup> This is suggestive of the seriousness with which PAP has taken its mandate.

Although that is positive, it is important that these resolutions and recommendations have impact. Determining their impact however is difficult. Mashele argues that with most recommendations have simply been ignored. Examples given relate to budget.

<sup>229</sup>

#### **Fact finding Missions**

Parliamentary missions have been sent that related to conflict, peace, governance and human rights.<sup>230</sup> The reports of these missions have been discussed and necessary recommendations to the relevant stakeholders have been made.<sup>231</sup> This is an important tool if used effectively.

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<sup>225</sup> Mashele (n 213 above).

<sup>226</sup> As above.

<sup>227</sup> See generally Annual report (n 218 above)

<sup>228</sup> Annual report(n 218 above)

<sup>229</sup> Mashele (n 213 above).

<sup>230</sup> Mashele (n 213 above).

<sup>231</sup> Mashele (n 213 above).

The first mission was sent to Darfur to investigate and report on the conflict. PAP made some recommendations based on the findings of the mission.<sup>232</sup> Resolutions were issued for missions to be sent to Côte d'Ivoire and the Democratic Republic of Congo (DRC).<sup>233</sup> The Senior Clark disclosed that the parliament is in the process of preparing to send a mission to Cote D'Ivoire.<sup>234</sup> Other countries to which missions were sent are Mauritania and Chad in 2006.<sup>235</sup>

These missions have yet again merely served as a stage for recommendation making. Further the recommendations were also limited to urging AU organs without identifying its role.<sup>236</sup> Recommendations of the PAP are also not binding. Owing to the inherent limitations on the powers of the parliament, if the AU organs or the parties concerned are not willing to listen, PAP will have to devise its own plan of intervention. Mashele argues that it is not clear whether the recommendations made by the PAP mission to Darfur have been implemented.

#### **4.4 Potential role of the PAP in the promotion of human rights and democracy**

The PAP can contribute to democracy and human rights at many levels and in many ways. These are at the level of the AU as a parliament of the Union, at the level of subregional parliamentary institutions in carrying out its function of coordinating and harmonising their policies and measures and finally at the level of national parliaments as a forum that involves all national parliamentarians. The following section will discuss some of the ways it could meet this objective.

##### **4.4.1 Promoting human rights and democracy at the AU**

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<sup>232</sup> The role of the Pan-African Parliament in Conflict resolution and peace making in Africa [http://www.chr.up.ac.za/academic\\_pro/llm1/pressdocs/The%20role%20of%20the%20Pan-African%20Parliament%20in%20Conflict%20Resolutions%20and%20Peace%20making%20in%20Africa.doc](http://www.chr.up.ac.za/academic_pro/llm1/pressdocs/The%20role%20of%20the%20Pan-African%20Parliament%20in%20Conflict%20Resolutions%20and%20Peace%20making%20in%20Africa.doc) (accessed 23 October 2006) 4.

<sup>233</sup> As above.

<sup>234</sup> Response by Mr Nassir to questionnaire(n 202 above).

<sup>235</sup> Mashele (n 213 above).

<sup>236</sup> The role of the Pan-African Parliament in Conflict resolution and peace making in Africa (232).

PAP can through the exercise of its consultative and advisory capacity guide the AU in developing a comprehensive policy to human rights and democracy. It can initiate a discussion on the mandates of the respective AU bodies how it can be effectively coordinated. A coordinating body can be setup under the PAP to oversee this process.

PAPs oversight role can be used to ensure that principles of human rights and democracy are mainstreamed in the work of the Union. PAP can follow up on activities of the executive bodies and organs of the AU and scrutinise their work from a human rights perspective. Parliamentary committees of inquiry can be used to investigate conduct of officials, oral or written questioning procedure and any other mechanism can be used to ensure that these issues are effectively dealt with by AU PAP can request AU officials to participate in its hearings, report to it and answer some questions. However AU bodies do not have an obligation to accept such an invitation. This needs to be strengthened through amendment of the protocol. The PAP can also simultaneously build a collaborative working relationship with the organs.

It can participate in the appointment of AU Commissioners and ensure that the eligibility criteria include knowledge, commitment and experience of human rights. PAP can participate in the nomination of judges for the various human rights monitoring mechanisms .It should also maintain a presence in AU summits.

Its evolution into a directly elected legislative body will enable it to contribute more to human rights and democracy. With in its existing powers it can contribute to human rights by strengthening the existing legal framework by participating in negotiations of human rights instruments. It can conduct studies and propose draft legislations, produce alternative drafts and actively lobby for adoption. By using its consultative powers and reaching agreements consultation procedure it can ensure that its comments on draft instruments are taken seriously.

As suggested by Ambani, Maindi and Mirugi-Mukundi, the PAP can also come up with benchmarks against which member states can be evaluated.<sup>237</sup>As remarked earlier however, rarely are standards the problem but adherence. PAP should devote much attention to the enforcement mechanisms and advocate for strengthening

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<sup>237</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 4.

them. PAP should also come up with guidelines on monitoring and follow up of implementation of human rights instruments by National Parliaments.

Moreover it can engage in the monitoring and implementation of standards. Many mechanisms exist such as reporting on the human rights and democracy in states. This could be done as suggested through the Committee on Justice and Human rights with reference to the standards in instruments as well as once that it has itself set.<sup>238</sup>

The PAP should also strengthen its own organisational capacity. To this end it should establish an effective committee system. This could be done by paying particular attention to the capacities and competences of committees and ensuring that there is sufficient inter-committee coordination. In relation to human rights and democracy, the Committee of Justice and Human rights can take the lead in coordinating the other nine committees.

The PAP should delegate sufficient powers of consultation and oversight to this lead Committee to enable it to work effectively. Committee members should be selected carefully and regularly trained. Until the PAP evolves into a directly elected body and so long as membership of MPs remains tied to their national parliaments, this becomes challenging. This is because the specialised expertise of committee members that are conversant with the issues will be lost when they lose their seats in the national parliaments. This has been identified as one of the major challenges in the work of the Committee.<sup>239</sup> Expectedly this would considerably weaken the Committee and consequently the work of the PAP in human rights and democracy.

Other institutional mechanism that PAP could consider adopting is the establishment of a petitions committee a separate committee or a subcommittee under the Committee on Justice and Human Rights for hearing complaints. The experience of EP suggests that such committee under the PAP could be instrumental in enabling it to reinforce the protection mechanism under the AU.

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<sup>238</sup> Ambani & Maindi & Mirugi-Mukundi (n 220 above) 5.

<sup>239</sup> Response by Mr Nassir to questionnaire(n 202 above).



Raising the awareness of MPs should also be emphasised although loss of seats stands to be a problem and requires the continued intervention till members are directly elected with a uniform tenure. Presently however PAP should make an effort to harmonise the electoral calendar of member states as part of its mandate to harmonise laws, and ensure that certain uniformity is maintained in the tenure of parliamentarians in the PAP as a first step towards strengthening its institutional capacity.

#### 4.4.2 PAP as a democratic parliament

In addition to measures to promote these principles PAP should itself meet the standards of a democratic parliament meeting the benchmarks set out in the previous chapter.

##### ***Representation of Africans***

Representation of the voice of Africans is the proclaimed vision of PAP. This vision and central feature of a parliament is denied to the PAP, which has been made an objective to be achieved sometime in the future.<sup>240</sup> Article 4 of the Protocol sets out the composition of parliament.<sup>241</sup> This article indicates how representative an institution PAP can be as the protocol stands. First membership to PAP is based on equality among member states with each member having five representatives.<sup>242</sup> This was contested during drafting where some argued that the parliament was not aimed at representing member states but African peoples and their grass root organizations. Proportional representation based on the population size of member states was proposed as a better alternative.<sup>243</sup>

<sup>240</sup> Art 2(3) of the Protocol provides 'The ultimate aim of the Pan-African Parliament shall be to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage. Until such time as the member states decide otherwise by an amendment to this protocol. ... (ii) The members of the Pan-African Parliament shall be appointed as provided for in art 4. Art 4(3) provides that representation of member states in PAP must represent diversity of political opinion of national parliaments. Art 5 which sets the procedure for election of members explicitly provides in 5(1) that members shall be elected or designated by the respective National Parliaments or any other deliberative Organ

<sup>241</sup> 1. Member states shall be represented in the Pan-African Parliament by an equal number of parliamentarians  
2. Each Member States shall be represented in the Pan-African Parliament by five (5) members, at least one of whom must be a women  
3. The representation of each Member States must reflect the diversity of political opinions in each National Parliament or other deliberative organ

<sup>242</sup> Art 4(1) & (2) of the Protocol establishing PAP.

<sup>243</sup> The states that supported this notion were Nigeria, Egypt, Ethiopia, Ghana and Mali. Report on the meeting to discuss the draft Protocol establishing PAP (n 35 above).

Furthermore, membership to PAP is closely tied to the national parliaments of member states. This is done in two respects. Firstly the members of parliament or assembly of member states to the Protocol elect members of PAP.<sup>244</sup> Secondly, only members of National Parliaments or assemblies are eligible to be elected for the parliament.<sup>245</sup> In both instances, members of public are excluded and the process is exclusively limited to the Parliament. This link is maintained through out the term of service of the Parliamentarians and is said to run concurrently with membership in the national parliament.<sup>246</sup> Thus loss of seat in National Parliament is one of the grounds for loss of seat in the PAP.<sup>247</sup>

Although this may be linked to loss of confidence and accountability, this is a serious limitation on the parliamentarians as it allows the sending state to maintain control over delegates in the parliament. This particularly becomes problematic in the work of parliamentarians in human rights and democracy, which are politically sensitive. This might make it for parliamentarians to independently represent the interest of the state and not the people in times when the two do not necessarily go together and are in tension.

No clear prescriptions as to how National Parliaments are to elect representatives to PAP exists. The protocol provides two benchmarks that should be met. These are gender composition and diversity of political views.<sup>248</sup> This is in line with the principle that parliaments have to be representative. The protocol provides that at least one of the five delegates has to be a woman. It also requires that all delegates should not be from one party but sufficiently represent the interests in the national assembly. The gender representation requirement seems to have been complied with by member states as evident from the list of parliamentarians and is fairly easy to ascertain.<sup>249</sup>

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<sup>244</sup> Art 5(1) Protocol establishing PAP.

<sup>245</sup> Art 5(l) of the protocol reads 'The Pan-African Parliamentarians shall be elected or designated by the respective National Parliaments or any other deliberative organs of the Member States, *from among their members*' (my emphasis)

<sup>246</sup> Art 5(3) Protocol establishing PAP.

<sup>247</sup> Art 5 (4) (e) of the Protocol establishing the PAP. Art 12(2) also provides the same rule of membership being tied to membership in National Assembly for the President and Vice-Presidents of the office

<sup>248</sup> Art 4(3) of the Protocol establishing PAP

<sup>249</sup> See [www.Pan-AfricanParliament.org](http://www.Pan-AfricanParliament.org) list of parliamentarians

How far the PAP has attempted to ensure that member states have complied with the second limb in selecting delegates is however not clear. Compliance with this criterion is crucial and needs the oversight of PAP to ensure that it is not yet another forum of representatives of government and not the people. This will also aid PAP to get a balanced and genuine human rights and democratic situation so as to enable it to intervene and contribute toward promoting or facilitating conditions for democracy and protection of human rights in member states.

The second key aspect of the composition of the parliament relates to the process of election of parliamentarians. The protocol provides that members of parliament are to be elected not directly by the people but rather indirectly by the members of the respective national assemblies. Magliveras and Naldi argue that although the basic requirement of representation is met, it is a cause for worry, as most of the elections held in African countries cannot be characterized as being 'free and fair'.<sup>250</sup> This provision is even more restrictive in that, candidates are also restricted to members within the assembly.

### ***Transparency***

The protocol provides that the sessions of the parliament should be generally open to the public unless required.<sup>251</sup> This is usually done by allowing the media to be present for its sessions. The PAP has also set up a website where its activities and reports are published. Through this website, it issues media alerts about upcoming activities. The PAP should ensure that the committee sessions are public.

### ***Accountability***

The accountability of MPs to the people should also be a goal that PAP should strive for. Currently this is done through the loss of seats in the PAP if members lose their seats in the national parliament. When it evolves into an elected body in the long run the public should have power to recall parliamentarians whom it thinks are not carrying out its will.

### ***Accessibility***

In line with the requirement that a parliament must be accessible MPs should be approachable or should approach the electorate. This could be done through

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<sup>250</sup> Magliveras and Naldi (n 2 above) 226

<sup>251</sup> Art 14(4) of the Protocol establishing the PAP.

petitions committee that hears grievances. Another is the establishment of a regional ombudsperson that is accountable to the PAP.

Members of public should be allowed to make submissions to the plenary and the concerned committees by televising sessions and allowing for submissions through hotlines, post or email. Parliamentarians should also set aside time to visit and discuss with their constituency issues relating to the continent. This could be organised under the Committee and implemented through the regional caucuses and in coordination with the subregional parliamentary bodies. PAP should also strive for CSO involvement in its plenary and committee work through the creation of CSO forum.

### ***Effectiveness***

PAPs power as seen from the previous sections is very much restricted to consultation and issuing recommendations, which could either be ignored or accepted by the AU organs. There is a serious need to enhance its powers at the very least by making its consultative mandate more forceful. It should also be autonomous from the AU in its finances as well as how it conducts its business and control over appointment of parliamentary staff, its own budget and the administration of its own business

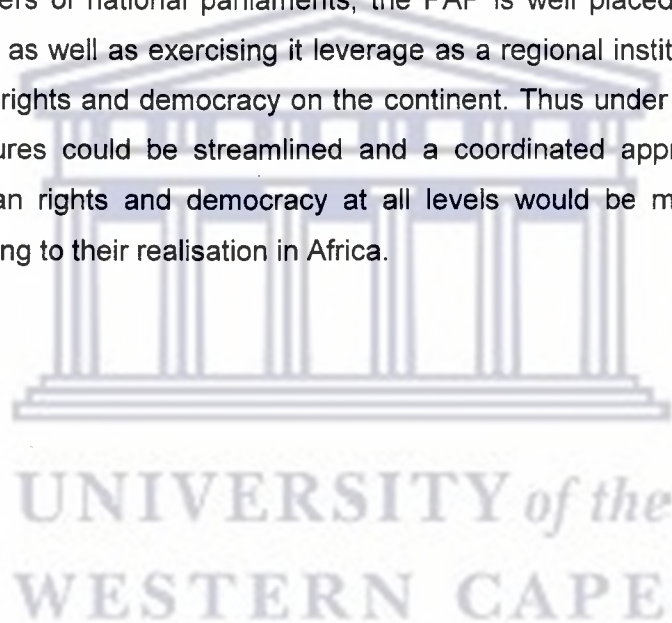
#### **4.4.3 Promotion of principles at subregional level and national levels**

The Protocol provides that the PAP will have the function of coordinating and harmonising the policies, measures and programmes and activities of the various regional economic communities (RECs) and their parliamentary assemblies.<sup>252</sup> The PAP could thus through this function contribute towards consistent and effective human rights policies and measures at the subregions. This can be done by encouraging the various parliaments to play their role by advocating for increased powers and capacities as well as by adopting various measures within their respective powers as recognised in their treaties.

<sup>252</sup> Art 11(1) of the Protocol establishing PAP.

The regional caucuses could be used as vehicles for the adoption of measures of relevance to human right and democracy that are taken by PAP under the coordination of the Committee of Justice and Human rights. The PAP should also aim at working closely with subregional parliaments as they have more experience and hold lessons for the PAP to learn from.

The Protocol also mandates the PAP with the function of coordinating and harmonising the laws of member states.<sup>253</sup> As a parliament whose membership is made up of members of national parliaments, the PAP is well placed to employ a mixture of lobbying as well as exercising its leverage as a regional institution in order to promote human rights and democracy on the continent. Thus under the guidance of the PAP measures could be streamlined and a coordinated approach for the promotion of human rights and democracy at all levels would be made possible ultimately contributing to their realisation in Africa.



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<sup>253</sup> Art 11(3) of the Protocol establishing PAP.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

International developments have driven states to more interdependence and the establishment of regional governance structures that are more or less drawing their inspiration from state structures. The Constitutive Act of the AU seems to have set the legal framework for the evolution of the continental body into a form of supranational *trias politicas* government structure.

The PAP is one of the organs that were established. In line with the objective of the AU, PAP has like the other organs the objective to promote human right and democracy in Africa. Its establishment is in itself and important step. It is a recognition of the importance of participation of people in decision-making within the AU framework. More than just a legitimating exercise, it is a commendable move towards ensuring that the AU itself is democratic in its organisation and decision making. As the parliamentary body of the Union, PAP can use its unique position to enhance human right and contribute to democracy at many levels.

However the powers of the PAP are severely constrained. It currently resembles and bears the name of a parliament but has neither the composition nor the power to live up to its name. It is currently composed of members of national parliaments elected by national parliaments from within the national assembly. Its powers are also limited to consultation and advice, issuing resolutions and recommendations and expressing opinions. Provisions have been made for it to make a transition to a fully elected legislative body that can ensure participation of the people. However this is not automatic and no timeframe has clearly been set for this purpose. Within its existing powers however, it still has great potentials which if used can greatly enhance its power and influence.

### 5.2 Recommendations

Taking lessons from the experience of the EP in its early years as well as its current position, the PAP can expand its powers by innovatively using them while contributing to human right and democracy in its present form. Some of these measures have already been taken but require improvement such as its fact-finding

missions, which require it to formulate solutions rather than urge other AU bodies to do so. Through its consultative powers it can also actively take part in the negotiation and drafting process of international human rights treaties. It can also come up with guidelines and codes of conduct detailing how they can be implemented at national levels. It can by reaching agreements with AU bodies on mechanism of consultation ensure that its advises are taken seriously. This would thus enhance its legislative as well as budgetary influence until such time as evolves into a elected legislative body.

PAP has already assumed an oversight role but has not so far actively engaged in scrutinizing the organs. Institutionally it can create a strong committee on human rights. It has already done so. However its work so far is not visible. It should also create petitions committee that would hear grievances of individuals. Through its function of coordinating the parliamentary assemblies of subregional bodies it can also work towards a uniform and coordinated approach to the protection of human rights and consolidation of democracy.

PAP should however begin doing so by itself reflecting the features of a democratic parliament to the extent that its peculiarities allow it. Thus it should aim being representative, transparent and accountable, accessible and effective.

This in general terms is a fraction of the sum total of criticism and recommendations that can be made regarding the role and functioning. Clearly PAP is limited by problems related to its composition, and modus operandi. Nevertheless it remains a potentially potent instrument for the fulfilment of the promise of human rights and consolidation of democracy at all levels.

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