

Corruption and the right to vote in free and fair elections in Africa: is the will of the people on auction?

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ABSTRACT: This article examines the extent to which corrupt practices in electoral processes in Africa have hindered realisation of human rights generally and the right to vote in free and fair elections specifically. It demonstrates that corruption has had a deleterious effect on enjoyment of socio-economic rights, civil and political rights. The authors posit that there is an established pattern of widespread voter bribery, misuse of state resources and absence of effective regulations on campaign and political party financing in many African countries. The net effect of this pattern has been to render the genuineness of most elections questionable and free expression of the will of electors doubtful. The authors propose, inter alia, that African judiciaries should abandon their fixation with quantitative assessments in electoral disputes where mathematical questions of whether there is a clear 'winner' take precedence. This, at the expense of failure to interrogate the qualitative aspects of electoral processes and which interrogation would invalidate electoral outcomes tainted by corruption. To demonstrate commitment to safeguarding the right to vote in free and fair elections, we argue that political and judicial organs of the AU should understand corruption in electoral processes as attempts at unconstitutional change of government or retention of power.

TITRE ET RÉSUMÉ EN FRANCAIS:

Corruption et le droit de vote dans élections libres et équitables en Afrique: la volonté du peuple à vendre

RÉSUMÉ: Cet article examine la mesure dans laquelle la corruption dans les processus électoraux en Afrique a entravé la réalisation des droits de l'homme en général et du droit de vote lors d'élections libres et équitables en particulier. L'article démontre que la corruption a eu un effet préjudiciable sur la jouissance des droits socio-économiques, civils et politiques. Les auteurs estiment qu'il existe un schéma établi de corruption généralisée, d'utilisation abusive des ressources de l'État et d'absence de réglementation efficace sur le financement des campagnes et des partis politiques dans de nombreux pays africains. Ce schéma a mis en doute la sincérité de la plupart des élections. Il a également remis en question la libre expression de la volonté de l'électeur. Les auteurs proposent, entre autres, que les cours et tribunaux africains abandonnent leur fixation sur les évaluations quantitatives lors des contentieux électoraux où la question mathématique qui prime est celle de savoir si un « gagnant » se dégage clairement. Ceci, au détriment de l'échec de l'examen des aspects qualitatifs des processus électoraux qui pourrait conduire à l'invalidation des

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résultats électoraux dont le processus a été entaché d'actes de corruption. Afin de démontrer leur volonté de préserver le droit de vote lors d'élections libres et équitables, nous soutenons que les organes politiques et judiciaires de l'Union africaine doivent comprendre la corruption dans les processus électoraux comme une tentative de changement anticonstitutionnel de gouvernement ou de maintien du pouvoir.

KEY WORDS: corruption, right to vote, free and fair elections, African Democracy Charter, election observation mission

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1 INTRODUCTION

Corruption is a cancer: a cancer that eats away at a citizen's faith in democracy.
 Joe Biden¹

The subject of corruption has been interrogated extensively and the theoretical and empirical research on corruption is said to have produced ‘a bewildering array of alternative explanations, typologies and remedies’.² Scrutiny of the subject by various academic disciplines has resulted in differences on causes, definitions, forms and consequences of corruption. However, there is unanimity that corruption is a longstanding, pervasive problem and a phenomenon that countries across the globe have had to grapple with.³

The corruption challenge, however, is particularly complex to tackle in Africa. According to the Corruption Perceptions Index 2017 by Transparency International, Africa is overall the worst performing region.⁴ Huge investments have been made in the war on corruption by, among others, governments, development agencies and civil society organisations. At the African Union (AU) level, 2018 was declared the African Anti-Corruption Year, one of the aims being to lift the continent

1 Remarks by then United States Vice-President Joe Biden to Romanian civil society groups and students, Cotroceni Palace, Bucharest, Romania, 21 May 2014. Full text of the speech is available at <https://obamawhitehouse.archives.gov/the-press-office/2014/05/21/remarks-vice-president-joe-biden-romanian-civil-society-groups-and-stude> (accessed 23 August 2018).

2 I Amundsen ‘Political corruption: an introduction to the issues’ (1999) 7 *Chr Michelsen Institute Development Studies and Human Rights* 1.

3 BA Gebeye ‘Corruption and human rights: exploring the relations’ (2012) 70 *Human Rights and Human Welfare Working Papers* 5.

4 See https://www.transparency.org/news/feature/a_redefining_moment_for_afri_ca (accessed 23 August 2018).

out of the burden of corruption and to contribute to the attainment of Agenda 2063, Africa's development roadmap.⁵ At the United Nations (UN) level, reference to the subject of corruption is made in the UN 2030 Agenda for Sustainable Development and Sustainable Development Goals. Goal 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. One of the targets under this goal is to 'substantially reduce corruption and bribery in all their forms'.⁶ However, owing to the acknowledged complex nature of corruption with no quick-fix solutions to it, addressing corruption is a long-term process. Transparency International suggests a multi-pronged approach in anti-corruption efforts, including through public programmes, government reorganisation, law enforcement, public awareness and the creation of institutions to prevent corruption as well as attitude changes at all levels.⁷ Others have proposed institutional and societal reforms where institutional reforms entail limiting authority, improving accountability and realigning incentives. Societal reforms include mobilising political will for sustained anti-corruption efforts and changing societal attitudes that foster corruption such as allegiance to personal loyalties over objective rules.⁸

The list of negative implications of corruption on the continent and elsewhere is a long one. This vice has been identified as a factor that negatively impacts on economies through losses of revenue because, among other reasons, governments cannot tax money hidden in bribes. Corruption also discourages investment and breeds inefficient delivery of public services as money and services are redirected from the general population.⁹ Additionally, corruption is blamed for economic inefficiency as it inflates business costs such as in the case when bribes are demanded in order to obtain public works contracts. Bribery also leads to increased transaction costs because of the need for increased secrecy and anti-bribery policing.¹⁰ When it occurs in the judiciary, corruption undermines the rule of law, while in public administration it results in inequality in providing services.¹¹

5 Concept Note on the African Anti-Corruption Year 2, <http://www.aga-platform.org/sites/default/files/2018-04/African%20Anti-Corruption%20Year%20-Concept%20No%20te1.pdf> (accessed 23 August 2018).

6 Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed 28 August 2018).

7 Cited in J Andvig et al 'Research on corruption: a policy-oriented survey' (2000) *Chr Michelsen Institute (CMI) & Norwegian Institute of International Affairs (NUPI)* 9.

8 P Dininio 'A handbook on fighting corruption' (1999) *Technical Publication Series, Centre for Democracy and Governance* 1, http://www.au.af.mil/au/awc/awcgate/usaid/fighting_corruption.pdf (accessed 23 August 2018).

9 D Stockemer 'Bribes and ballots: the impact of corruption on voter turn-out in 75 democracies' (2014) 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1452312 (accessed 23 August 2018).

10 BC Smith Good governance and development (2007) 182.

11 Dininio (n 8) 5.

Human rights are equally adversely affected by the prevalence of corruption, and it is this interplay between human rights and corruption that will be the preoccupation of this article, with a particular focus on political participation rights in Africa. Four reasons have been advanced as to why it is relevant to link corruption and human rights.¹² First, clarity on the impact of corruption on human rights paves the way for the use of existing human rights mechanisms to combat corruption. Second, a perception of corruption as a violation of human rights raises awareness among the public about the consequences of corruption on individual interests which may result in greater public support for the fight against corruption. Third, a human rights approach to corruption may assist in circumventing legal technicalities that permit certain acts as technically lawful, but which constitute human rights violations. An example here is where judicial systems do not strictly forbid nepotism as unlawful, but such acts may be challenged as human rights violations of, say, equal rights to political participation or the right to equal access to public services. Fourth, given that it is widely accepted that corruption has the potential to undermine the full enjoyment and realisation of human rights, anti-corruption efforts are necessary ingredients of promoting and protecting human rights.¹³

Politically, it has been suggested that corruption undermines good governance and democracy as a whole by subverting formal processes.¹⁴ Corruption has fuelled the rise of state and institutional capture which in turn breeds illiberal democracies. In the context of elections and civic processes, corruption reduces accountability and representation in policy making. Given that contested elections have become a major trigger of instability in Africa, corruption also increasingly is a key driver of systemic governance deficits and violent conflict on the continent. The 2007-2008 post-election violence in Kenya where 1 300 people lost their lives, the loss of 3 000 lives in Côte d'Ivoire after the 2010 presidential elections and the death of 800 people in Nigeria after the 2011 presidential voting are illustrations of how deadly electoral disputes are on the continent. At the heart of the causes of these violent elections are allegations of vote rigging by corrupt politicians.¹⁵

This article will focus on the nexus between corruption and the right to vote in free and fair elections. While existing literature has largely focused on corruption and its relationship with human rights in general, the article narrows down on the right to vote specifically. This specific attention to the right to vote is informed by an appreciation of the centrality of this right in facilitating African citizens to participate

12 JB Terracino 'Corruption as a violation of human rights' (2008) 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107918 (accessed 23 August 2018).

13 As above.

14 Dininio (n 8) 5.

15 SM Burchard *Electoral violence in sub-Saharan Africa: causes and consequences* (2015) 1 3; Human Rights Watch 'Nigeria: post-election violence killed 800' 16 May 2011, <https://www.hrw.org/news/2011/05/16/nigeria-post-election-violence-killed-800> (accessed 15 October 2018).

in affairs of their governments, and peaceful transitions of power on the continent. The article thus aims to elaborate on how the right to vote can be protected from corrupt practices in the African context. It further aims to contribute to the growing body of knowledge that is advocating a shift to qualitative and not merely the quantitative assessment of elections in Africa. Qualitative assessments give primacy, beyond numbers, to issues such as corruption in determining whether elections are free and fair, while quantitative assessments are preoccupied with mathematical questions of whether there is a clear winner according to the vote count. The article is divided into five sections. Part 2 defines the concept of corruption in Africa. Part 3 details the negative impact of corruption on human rights. Part 4 examines corruption in elections generally and specific implications for the right to vote. Part 5 examines the AU anti-corruption normative framework. Part 6 outlines proposals for enhancing the right to vote and integrity of elections in the continent, while part 7 contains concluding observations.

2 WHAT IS CORRUPTION AND WHY IS IT PERCEIVED AS BEING PERVASIVE IN AFRICA?

Many definitions and categorisations of corruption exist. Andvig et al have referred to the variety as a 'battery of definitions' that only leave the option of choosing a set of definitions to work with. However, this may still be done in an 'infinite number of ways'.¹⁶ Even the attempt to understand and define corruption as one phenomenon has been faulted on the grounds that in reality there are different forms of corruption and corruption levels may be perceived differently in one location depending on the form of corruption being considered.¹⁷ Some authors have categorised corruption as either petty or low-level corruption or grand or high-level corruption, where the former includes all corruption that involves citizens making small graft payments to government officials in return for favours, while the latter entails bribery by interest groups to gain influence in the decision-making processes of government.¹⁸ While adopting the petty versus grand categorization, Githongo posits that there is yet a third category of corruption which he calls 'looting'. According to his argument, this involves 'the kind of scams whose figures are so huge that when they are successfully concluded they have macroeconomic implications fairly quickly – they cause banks to collapse, inflation to rise, the exchange

16 Andvig (n 7) 10.

17 T Søreide 'Drivers of corruption. a brief review' (2014) *World Bank Studies*. Washington, DC: World Bank 5.

18 NS Neudorfer 'Development, democracy and corruption: how poverty and lack of political rights encourage corruption' (2015) 35 *Journal of Public Policy* 423.

rate to decline'.¹⁹ Other broad analytical categorisations include political corruption versus bureaucratic corruption.²⁰ In this regard political corruption, on the one hand, is understood as occurring where high-ranking politicians and political decision makers take advantage of their positions to extract huge bribes from national and transnational corporations and embezzle large sums of money from public coffers into their private bank accounts. Bureaucratic corruption, on the other hand, is corruption in public administration experienced by citizens on a daily basis in their interaction with public administration and services such as hospitals, schools and licensing authorities.²¹

Zeroing in on specific definitions, several definitions have been widely adopted and will be highlighted. The World Bank has adopted what it refers to as a 'straightforward' definition of corruption – the abuse of public office for private gain.²² Transparency International defines corruption as 'the abuse of entrusted power for private gain', perhaps the most widely-used definition.²³ Another common definition is that it is a 'transaction between private and public sector actors through which collective goods are illegitimately converted into private-regarding payoffs'.²⁴ Narrow or strict definitions of corruption, often captured in legal instruments, also exist and these tend to describe corruption in terms of particular agents, sectors or transactions.²⁵ The United Nations Convention against Corruption (UNCAC), while not providing an express definition of corruption, outlines a number of acts that state parties are required to establish as criminal offences. These include bribery; trading in influence; the abuse of functions; illicit enrichment; embezzlement; and laundering the proceeds of crime.²⁶ Similarly, the African Union Convention on Preventing and Combating Corruption contains a generic definition of corruption that includes all acts and practices proscribed in the Convention.²⁷ Important to note for purposes of this article, however, is the fact that corruption in various contexts will have both legal and socio-cultural definitions and these are not always congruent.

19 J Githongo 'The culture of corruption in Kenya' Presentation made at the Annual General Meeting of the German Development Service in Kenya, Trisan Hotel, 1 December 2000, <http://www1.worldbank.org/publicsector/anticorrupt/politicaconomy/Githongo/The%20Culture%20of%20Corruption%20in%20Kenya.doc> (accessed 24 August 2018).

20 Andvig et al (n 7) 18.

21 As above.

22 The World Bank 'Helping countries combat corruption: the role of the World Bank' (1997) 8, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf> (accessed 24 August 2018).

23 See <https://www.transparency.org/what-is-corruption#define> (accessed 24 August 2018); Dininio (n 8) 3.

24 Andvig et al (n 7) 11.

25 As above.

26 See ch III of the Convention.

27 Art 1.

Nonetheless, it has been observed that anti-corruption efforts need to target both types of corruption.²⁸ The article does not seek to problematise the analytical conceptions of corruption but rather delves into the practical implications of the vice on human rights generally, and specifically on the right to vote in free and fair elections. The bottom line for the authors and, in the words of Justice Potter Stewart of the Supreme Court of the United States, is that we know it (corruption) when we see it.

We now briefly turn to the question of why corruption is perceived as being so prevalent on the African continent in relation to other regions of the world. Søreide identifies five factors that create opportunities for corruption and, therefore, are the drivers of corruption.²⁹ These factors, we submit, are applicable to the African context. The first driver is the idea of creating shortage. As an example, civil servants that have a discretionary authority create shortages in order to make corruption more rewarding by controlling supply. Examples include teachers who create shortages of good grades by reserving top grades for students who bribe, regardless of their abilities, or public officers that create shortages of public contracts by excluding suppliers that are unwilling to offer bribes. Second, Søreide contends that the manner in which state authority and bureaucracy are structured contributes to creating opportunities for corruption. In fragile, post-conflict countries and those where state authority is imposed, state authority becomes a tool for corruption. The misuse of this authority is further enabled by illiteracy, citizens that are uninformed of what to expect and generally weakened control functions. Third, corporate structures can drive corruption when the private sector is organised for corruption. This is exemplified by companies that are registered in tax havens to avoid paying taxes and other structures established to facilitate financial secrecy. Fourth, exclusive access to information is another driver of corruption as different actors exploit asymmetric information. Within the private sector, the motivation to create obstacles to competition is identified as another driver of corruption. Lastly, access to revenue from abroad in the form of revenues from export of natural resources and development aid is another key driver of corruption, this being particularly applicable to African countries. The argument here is that while such revenues can spur development, they are often detrimental. Actors attempt to benefit from these revenues with the help of corruption, and this entails high competition for influencing positions with incumbent politicians doing everything it takes to stay in power. In the process, such politicians undermine democratic processes to avoid being replaced by another network of allies.³⁰

While discussing the challenge of corruption in Nigeria, Achebe contends that endemic corruption in the country is primarily driven by

28 BI Spector et al *Corruption assessment handbook: draft final report (2006)* 7, <http://www1.worldbank.org/publicsector/anticorrupt/USAIDCorAsmtHandbook.pdf> (accessed 24 August 2018).

29 Søreide (n 17) 9-20.

30 Søreide (n 17) 17.

‘a complete failure of leadership that has made corruption easy and profitable’.³¹ Achebe asserts that to control corruption there is a need for checks and balances ‘that will make corruption ‘inconvenient’ – with appropriate jail sentences and penalties to punish those that steal from the state’.³² We observe that corruption in Africa is driven by a myriad of factors that do not uniformly apply to all African countries and not in the same degree. Generally, we are in agreement with the summation of the causes of corruption in the continent as described by Lumumba as follows:³³

In Africa, some of the identifiable causes of corruption include the negative colonial legacy, poor leadership, politics of the belly, omnipotent state, greed and selfishness, clientelism and patronage, nepotism, absence of popular participation of the public in government, weak institutions of governance, lack of accountability and transparency, lack of political will, weak ethical values, centralist nature of the state and concentration of state power, weak judicial system and constant insecurity and conflicts.

With the above overview of corruption as a concept and its drivers on the African continent, the next section will demonstrate the link between corruption and human rights generally. The subsequent section will zero in on the impact of corruption on the right of African citizens to vote in free and fair elections.

3 NEXUS BETWEEN CORRUPTION AND HUMAN RIGHTS IN AFRICA

While the relationship between corruption and economic performance is now well understood, the nexus between corruption and human rights is yet to be fully appreciated, and serious research on this relationship is in its early stages.³⁴ Viljoen observes that the links between corruption and human rights ‘are manifold’; that all potential gains of human rights may be lost if the vice stifles entrepreneurship, economic development and ultimately breeds political dissent.³⁵ There is a warning, however, against a generalisation of this link and that not all acts of corruption imply a human rights violation.³⁶ Overstretching this logic, it is argued, will ‘banalise and overextend the application of human rights principles’.³⁷ It is to this end that the United Nations

31 S Baldauf ‘Chinua Achebe on corruption and hope in Nigeria’ 22 March 2013, <https://www.csmonitor.com/World/Africa/2013/0322/Chinua-Achebe-on-corruption-and-hope-in-Nigeria> (accessed 26 August 2018).

32 As above.

33 PLO Lumumba ‘Corruption: the bane of Africa’ in E Nduku & J Tenamwenye (eds) *Corruption in Africa: a threat to justice and sustainable peace* (2014) 22.

34 JT Gathii ‘Defining the relationship between human rights and corruption’ (2009) 31 *University of Pennsylvania Journal of International Law* 126.

35 F Viljoen *International human rights law in Africa* (2012) 272-273.

36 The International Council on Human Rights Policy ‘Corruption and human rights: making the connection’ (2009) 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 (accessed 26 August 2018).

37 The International Council on Human Rights Policy (n 36) 4.

Human Rights Council has been working on assessing the negative impact of corruption on the enjoyment of human rights.³⁸

Existing conventions on corruption and human rights have not made this connection any clearer as it is observed that international conventions on corruption rarely mention human rights and, conversely, key human rights conventions hardly refer to corruption.³⁹ However, there are exceptions, and the AU Convention on Preventing and Combating Corruption is an example. The Preamble to the Convention recognises the negative effects of corruption and impunity on the political, economic, social and cultural stability of African states and its devastating effects on the economic and social development of African peoples. It further recognises that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent. Article 2(4) of the Convention lists one of the objectives of the Convention as being 'to promote socio-economic development by removing obstacles to enjoyment of economic, social and cultural rights as well as civil and political rights'. Further, article 3(3) of the Convention establishes as one of the principles of the Convention the respect for human rights in accordance with the African Charter on Human and Peoples' Rights (African Charter). Even though these provisions are 'not framed in the language of a human rights instrument', as Viljoen observes, the Convention recognises the indivisibility between corruption, human rights and development.⁴⁰

Judicial interpretation in national and regional courts suggests that courts are not in doubt as to the linkages between corruption and human rights. The South African Constitutional Court on several occasions has determined that corruption negatively impacts on human rights. The Court has found that corruption and maladministration 'undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms'.⁴¹ The Constitutional Court has further ruled that 'corruption has a deleterious impact on a number of rights in the Bill of Rights'; in addition, that 'the state's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms'.⁴² The African Court on Human and Peoples' Rights (African Court) has also made a determination that buttresses the relationship between corruption and human rights. Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) provides for the jurisdiction of the Court which

38 Resolution A/HRC/RES/35/25 of the United Nations Human Rights Council, 23 June 2017.

39 The International Council on Human Rights Policy (n 36) 4.

40 Viljoen (n 35) 273.

41 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC).

42 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC).

extends to interpretation of the African Charter, the African Court Protocol and 'any other relevant human rights instrument ratified by the state concerned'. In the case of *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire* the African Court determined that the African Charter on Democracy, Elections and Governance (African Democracy Charter) is a human rights instrument for purposes of article 3 of the African Court Protocol.⁴³ This means that the African Court can interpret and apply the African Democracy Charter. There are numerous provisions in the Democracy Charter that address corruption,⁴⁴ and the argument can therefore be made that for the African Court to clothe itself with jurisdiction to interpret such provisions is an acknowledgment of the link between human rights (the primary preoccupation of the Court) and subjects covered in the African Democracy Charter such as corruption.

3.1 Negative impact of corruption on selected human rights

The impact of corruption on specific human rights is well captured in existing literature and particularly with regard to socio-economic rights. This impact will be illustrated below, albeit non-exhaustively, as the emphasis will be on four rights, namely, the rights to equality and non-discrimination; the right to a fair trial; the right to adequate housing; and the right to health.

The African Charter guarantees every individual an entitlement to the rights and freedoms in the Charter 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.⁴⁵ In addition, every individual is guaranteed equality before the law and equal protection of the law⁴⁶ as well as the right of equal access to public service.⁴⁷ It has been suggested that 'corrupt acts intrinsically distinguish, exclude or prefer ... in ways that impede individuals from exercising one or more rights'.⁴⁸ Public officials are required to treat all individuals equally, but corruption often leads to some being privileged over others. When similar cases in public service are treated differently as a result of corruption, the principle of equality and non-discrimination is infringed as corruption is not an objective or reasonable justification for the differential treatment.⁴⁹ The Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights has noted that corruption leads to discriminatory access to public services and

43 Application 1/2014 Judgment of 18 November 2016 para 65.

44 See arts 2(9), 3(9), 27(5) & 33(3).

45 Art 2.

46 Art 3.

47 Art 13(2).

48 The International Council on Human Rights Policy (n 36) 32.

49 The International Council on Human Rights Policy (n 36) 33.

particularly excludes the poor from access to goods and services offered by the administration. The Committee further observed that corruption offends the principle of non-discrimination and in the process affects other human rights when, for instance, it motivates discriminatory access requirements that negatively impact on the right to education.⁵⁰

Corruption also negatively affects the right to a fair trial. The various components of this right are guaranteed in article 7 of the African Charter. Corruption in the judiciary has been identified as a 'very concrete example that illustrates the negative impact of corruption on the enjoyment of human rights' as it directly affects the right to a fair trial by an independent and impartial tribunal.⁵¹ Corruption in the judiciary has been described as entailing

acts or omissions that constitute the use of public authority for the private benefit of court personnel, and results in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain.⁵²

In Uganda, for example, the Uganda Law Society has complained that court files are deliberately misplaced in what has been termed as files 'developing feet'. This is one of the ways of extorting bribes from accused persons who after having paid bribes are then informed that their files have been found.⁵³ Besides members of the bench, other actors in the judicial system, such as the police when they tamper with evidence or prosecutors who deliberately fail to act competently in dealing with evidence generated by the police, can all contribute to judicial corruption.⁵⁴ All the above illustrations of corruption in the judicial system can directly contribute to a violation of the right to a fair trial.

Socio-economic rights such as the right to adequate housing, health and education can equally be negatively affected by corrupt practices. The right to adequate housing is not expressly provided for in the African Charter, but the African Commission on Human and Peoples' Rights (African Commission) has inferred the right from other rights in the Charter. The Commission has determined that the combined effect of the right to property, health and protection of the family 'reads into the Charter a right to shelter or housing'.⁵⁵ The Committee on Economic, Social and Cultural Rights (ESCR Committee), the treaty body under the International Covenant on Economic, Social and Cultural Rights (ICESCR), has issued a General Comment elaborating on the right to adequate housing. The ESCR Committee clarified that

50 Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, A/HRC/28/73, 5 January 2015 7.

51 As above.

52 MN Pepys 'Corruption within the judiciary: causes and remedies' in Transparency International *Global Corruption Report 2007: corruption in judicial systems* (2007) 3.

53 Economic Commission for Africa 'Deepening the judiciary effectiveness in combating corruption' (2009) ECA/GPAD/TP/06/3,16.

54 Transparency International (n 52) xxi.

55 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60.

factors determining adequacy of housing included legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.⁵⁶ Corruption undermines these factors in various ways, and examples include the bribery of officials to grant leases on land that is already occupied, thus undermining security of tenure. The embezzlement of funds meant for housing or construction of substandard houses occasioned by the fraudulent selection of contractors impairs habitability.⁵⁷ A 2010 presidential housing project in South Africa that was intended to provide plots of land for slum dwellers south of Johannesburg illustrates how corruption can undermine the right to adequate housing. Officials responsible for this project were accused of having collected monies from local residents, the intended beneficiaries, later either allocating the land to non-residents or illegally receiving money from several residents for single plots. Many were therefore left without land intended for better housing after having lost money corruptly demanded by officials.⁵⁸

Corrupt practices also directly and indirectly contribute to a violation of the right to health. Dainius Puras, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, has submitted a report to the UN General Assembly that focuses on the implications of corruption on the right to health.⁵⁹ The report notes that 'most common forms of corruption in the health sector are selling government posts, absenteeism, bribes, procurement corruption, theft or misuse of property, fraud, and embezzlement of user fee revenue, as well as informal payments to health-care providers'. Corruption scandals in Kenya's Ministry of Health illustrate the extensive nature of procurement corruption in the health sector, in the process undermining the right to health. Kenya's Auditor-General confirmed that the Ministry could not account for US \$10 million because of unavailable payment vouchers and related supporting documents. Recently, the same Ministry allegedly occasioned the loss of US \$70 million through the purchase of CAT scanners at inflated costs.⁶⁰ Besides these direct ways in which corruption can negatively impact on the right to health, corrupt practices can indirectly occasion a negative

56 Committee on Economic, Social and Cultural Rights General Comment 4: The right to adequate housing adopted at its 6th session, 13 December 1991 (E/1992/23).

57 The International Council on Human Rights Policy (n 36) 51.

58 C Ryan 'Presidential housing project bogged down in corruption and fraud' 10 January 2017, <https://www.groundup.org.za/article/presidential-housing-project-bogged-down-corruption-and-fraud/> (accessed 17 October 2018).

59 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN General Assembly, A/72/137, 14 July 2017.

60 F Olick 'New audit confirms Sh5 billion Afya House scandal' The Star 6 March 2018, https://www.the-star.co.ke/news/2018/03/06/new-audit-confirms-sh5-billion-afya-house-scandal_c1725045 (accessed 17 October 2018); I Oruko 'Sh7bn scandal hits health ministry' Daily Nation 19 June 2018, <https://www.nation.co.ke/news/Sh7bn-scandal-hits-Health-ministry/1056-4619498-hs9tysz/index.html> (accessed 17 October 2018).

impact on the right to health. For example, where public officers corruptly permit unlawful and unregulated waste disposal, the negative implications on health are an indirect effect of the corrupt act.

As seen from the above examples, corruption can, broadly, have a negative impact on various human rights. Narrowly and technically, corrupt acts can occasion violations of human rights, which violations can withstand judicial scrutiny and legal criteria for establishing human rights violations. The next section and the rest of the article focus on the link between corruption and political rights. The spotlight will specifically be on the right to vote in free and fair elections.

4 ELECTIONS IN AFRICA AND THE CHALLENGE OF CORRUPTION

Emphasising the importance of the right to vote, Justice Albie Sachs of the South African Constitutional Court has described this as follows:⁶¹

The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation.

However, in many African countries the right to vote all too often is not respected and the voices of voters are muzzled, courtesy of electoral fraud manifested in various acts that could rightly be described as corrupt acts. Three reports from the European Union Election Observation Missions (EU-EOM) on elections in three African states paint a general picture of the way in which corruption plays out in the period before and during elections on the continent. In Eastern Africa, Uganda held presidential elections in 2016 and the EU-EOM final report on the elections outlined several corrupt practices, including the distribution of cash during campaigns, camouflaged as the reimbursement of participants' transport costs. During campaigns large sums of money were given to religious and community leaders. In addition, party representatives would leave money at gas stations for voters to obtain free fuel. As voting day drew nearer, the report notes that parliamentary candidates for the ruling party received 'facilitation cash' of up to 20 million Uganda shillings (about USD 5 400) for parliamentary candidates and 15 million Uganda shillings (about USD 4 100) for local election candidates.⁶²

In Southern Africa, Zambia held its general elections in August 2016 and the EU-EOM similarly observed incidents of corruption in the electoral process. The final report noted that the ruling party, the Patriotic Front, used state resources to offer incentives to voters. These included allocations of land to former miners; the cancellation of water accounts in the Copperbelt province; and the distribution of subsidised

61 *August & Another v Electoral Commission & Others* 1999 (3) SA (CC) 1 para 17.

62 *European Union Election Observation Mission Final Report Uganda Presidential, Parliamentary and Local Council Elections*, 18 February 2016 19, https://eeas.europa.eu/sites/eeas/files/uganda-fr-forprint-14-04-2016_en_o.pdf (accessed 30 August 2018).

fertiliser in Central Province. Further, in the absence of regulations on campaign finance and any limits on campaign spending, the Mission observed that ‘resources available to political parties and candidates varied considerably and there was no transparency or accountability in both the sources of funding and how funds were spent’.⁶³

The third illustration is from West Africa where Sierra Leone held general elections in March 2018. The final report by EU-EOM noted that ‘a feature of the campaign was the abuse of incumbency’ and this was characterised by giving money to attendees of events organised by the ruling party. Notably, other political parties also handed out money. There were also instances of government officials working for the ruling party. An example was the head of a parastatal who was also the Chairperson for the ruling party in one of the districts.⁶⁴ Election observation missions of the AU have also established a lack of integrity on the part of election officials. Zanzibar conducted re-run elections in March 2016, and the AU Technical Election Observation Mission noted fraudulent counting processes. In one instance the presiding officer ‘simply counted the number of invalid ballot papers, deducted them from the total number of cast ballot papers and concluded that the rest were for CCM without physically counting the ballots’. In another incidence of electoral fraud, the presiding officer counted the votes alone and then announced the results to the party agents and observers.⁶⁵ International IDEA has observed that a lack of transparency on the part of the electoral management body in electoral processes leads to a suspicion that fraud is taking place. Examples of such absence of transparency according to the institution include cases where observers and members of the public cannot access a progressive vote count and aggregation data or where there is an undue delay in announcing and validating results.⁶⁶

The above examples demonstrate the negative role of money in Africa’s politics and particularly in electoral processes, the absence of effective regulations on campaign and political party financing compounding the situation. A number of factors have been identified to explain why such regulations, even where they exist, have not impacted the behaviour of different actors in the political process, including political parties, candidates and financiers. Some of these factors include (a) the existence of a largely poor electorate that the state and political elite treat as dependents or clients; (b) illicit financial flows

63 European Union Election Observation Mission *Final Report Republic of Zambia General Elections and Referendum* 11 August 2016 21, https://eeas.europa.eu/sites/eeas/files/final_report_eu_eom_zambia_3.pdf (accessed 30 August 2018).

64 European Union Election Observation Mission *Final Report Republic of Sierra Leone Presidential, Parliamentary and Local Council Elections 2018*, 21 June 2018, https://eeas.europa.eu/sites/eeas/files/eu_eom_sl_2018_final_report_4.pdf (accessed 30 August 2018).

65 African Union Commission *African Union Technical Election Observation Mission to the 20 March 2016 Re-Run Elections In Zanzibar, Tanzania*, June 2016 9, <https://au.int/en/documents/20160620-0> (accessed 30 August 2018).

66 International Institute for Democracy and Electoral Assistance ‘Electoral management design’ (2014) 23, <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> (accessed 3 September 2018).

and proceeds of crime that are used to finance political activities; (c) weak oversight and poorly-conceptualised penalties for violations of political financing regulations; and (d) the behaviour and attitudes of party members and leaders.⁶⁷

It is evident from the above that most corrupt acts are perpetrated by incumbents and the use of money in the abuse of state resources is a defining aspect. Important to note, however, is the fact that the abuse of state resources does not only involve the spending of money. Other ways include state media favourably covering the incumbent party or using civil servants in campaigns while they are still on duty.⁶⁸ The preliminary statement issued by the EU-EOM following the 30 July 2018 harmonised elections in Zimbabwe noted that there was biased coverage by the state-owned media with the ruling party receiving 84,9 per cent and 81,8 per cent air time on state television and radio respectively. The ruling party, ZANU-PF, and its presidential candidate 'benefited from extensive additional coverage on ZBC through news on government achievements and live broadcasting of activities conducted by Emmerson Mnangagwa as Head of State'.⁶⁹ There are suggestions that the way in which corruption plays out in the financing of campaigns and political parties influences the outcome of elections and the political decisions made afterwards. The special interests behind the political financing, which can be in the form of legal and illegal businesses, have been blamed for the phenomenon referred to as 'state capture'. State capture has been described as a situation in a country where 'the policy and legal environment of the state is shaped to the captor's advantage at the expense of the rest of the population'.⁷⁰ South Africa's Chief Justice Mogoeng aptly captures this threat as follows:⁷¹

The reality is that private funders do not just thoughtlessly throw their resources around. They do so for a reason and quite strategically. Some pour in their resources because the policies of a particular party or independent candidate resonate with their world-outlook or ideology. Others do so hoping to influence the policy-direction of those they support to advance personal or sectional interests. Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally.

From the above examples, which are only illustrative of what is occurring in many other African countries, the authors observe that the overall integrity of elections is questionable when these acts are

67 International Institute for Democracy and Electoral Assistance 'Southern Africa policy dialogue: money in electoral processes' International IDEA Policy Dialogue, 15-16 August 2016, Namibia 16.

68 M Ohman 'Africa' in International IDEA *Funding of political parties and election campaigns: handbook on political finance* (2014) 55.

69 European Union Election Observation Mission Republic of Zimbabwe Harmonised Elections 2018 Preliminary Statement, 1 August 2018 10, https://eeas.europa.eu/sites/eeas/files/010818ps_-_eu_eom_zimbabwe.pdf (accessed 31 August 2018).

70 International Council on Human Rights Policy 'Integrating human rights in the anti-corruption agenda: challenges, possibilities and opportunities' (2010) 46, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705396 (accessed 2 September 2018).

71 *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* 2018 (8) BCLR 893 (CC) para 40.

observed in electoral processes. Broadly speaking, the prevalence of such practices on the continent seriously dents the quality and legitimacy of the ‘democracies’ on the continent. Instead of the vote of every citizen counting, these acts disenfranchise the African electorate, and the political elite essentially put a price on the voice of the citizen through the various forms of undue influence and blatant bribery. The net effect is that the right to vote in free and fair elections faces the risk of becoming a theoretical right as the practice is in such great contrast to the normative elements of this right.

The next section examines the content of the right to vote in free and fair elections and the enabling legal framework and how incompatible the elements of this right are with corruption. It further examines duties of states to protect, respect and promote this right as interpreted by treaty bodies, regional and national courts.

4.1 Legal framework on the right to vote and its interplay with corruption

The right to vote in free and fair elections is guaranteed in several international, regional and national legal instruments. A brief overview of these instruments and their relationship with African states is outlined below.

The Universal Declaration of Human Rights (Universal Declaration) provides for every person’s right and opportunity to take part in the conduct of public affairs, directly or through freely-chosen representatives, and the right of equal access to public service. It further provides that the will of the people shall be the basis of the authority of government and this will shall be expressed in periodic and genuine elections.⁷² A similar provision is provided for in article 25 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by all African UN member states except South Sudan.⁷³ Specifically, article 25(b) of ICCPR provides for the right and opportunity of every citizen ‘to vote and to be elected at *genuine* periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the *free expression of the will of the electors*’.⁷⁴ The obligations of state parties to ICCPR are therefore applicable to all African states, with the abovementioned exception. The right to vote is also found in other international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁷⁵ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁷⁶ and the Convention on the Political Rights of

72 Art 21.

73 See the list of ratifications at <http://indicators.ohchr.org/> (accessed 2 September 2018).

74 Our emphasis.

75 Art 5.

76 Art 7.

Women.⁷⁷ Importantly, in order to have meaningful elections, the protection of some other fundamental rights and freedoms is critical. These rights are the right to freedom of expression; freedom of information; freedom of assembly; freedom of association; and freedom of movement.⁷⁸ The language used in article 25 of ICCPR makes it clear that incidences of undue influence in African states' elections as illustrated above raise the question of whether such elections are genuine and whether the results of such elections are a free expression of the voters.

The Human Rights Committee, the treaty body charged with monitoring the implementation of ICCPR, has issued General Comment 25 to elaborate on article 25 of ICCPR.⁷⁹ In elaborating paragraph 25(b), the Committee stated that elections must be conducted freely and fairly and that persons entitled to vote must be free to vote for any candidate for election and be free to support or oppose government. This should be permitted 'without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will'. The Committee further clarified that conformity with the right to vote requires that voters are able to 'form opinions independently, free of violence or threat of violence, compulsion, *inducement or manipulative interference* of any kind'.⁸⁰ As discussed earlier, campaign and political party financing, if not regulated, can unduly influence the course of an election, often in favour of the ruling parties. In an apparent recognition of this, the Committee elaborated that reasonable limitations on expenditure during campaigns can be justified especially where these are meant to ensure that 'the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party'.⁸¹ In addition to the above, state parties to ICCPR are required to indicate in state reports measures adopted to 'guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors'.⁸²

At the regional level, article 13 of the African Charter provides for every citizen's right to participate in her country's government directly or through freely-chosen representatives in accordance with the law. Article 17 of the African Democracy Charter in provides that 'State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa'. This entails

77 Arts I, II & III.

78 Centre for Human Rights 'Human rights and elections: a handbook on the legal, technical and human rights aspects of elections' (1994) 5, <https://www.ohchr.org/Documents/Publications/training2en.pdf> (accessed 2 September 2018).

79 Human Rights Committee General Comment 25 Article 25 The right to participate in public affairs, voting rights and the right of equal access to public service, adopted at the 57th session of the Human Rights Committee on 12 July 1996, CCPR/C/21/Rev.1/Add.7.

80 Human Rights Committee General Comment 25 (n 80) para 19 (our emphasis).

81 As above.

82 Human Rights Committee General Comment 25 (n 80) para 22.

having independent and impartial national election bodies, national mechanisms to resolve election disputes in a timely manner, fair and equitable access to state-controlled media during elections and a binding code of conduct governing all political actors.

In the case of *Actions pour la Protection des Droits de l'Homme v The Republic of Côte d'Ivoire* the African Court made a determination that an imbalance in the composition of the Ivorian electoral body (eight government representatives and four opposition representatives) meant that it could not meet the conditions of independence and impartiality.⁸³ In an interesting joint interpretation of the African Democracy Charter and the African Charter, the African Court ruled that this imbalance in the composition of the electoral body and the law enabling the same constituted a violation of article 17 of the Democracy Charter, which in turn affected 'the right of every Ivorian citizen to participate freely in the conduct of the public affairs in his country as guaranteed by article 13 of the Charter on Human Rights'.⁸⁴ The authors submit that in line with the above logic, corrupt activities in electoral processes that go against the implementation principles of the African Democracy Charter which include a 'condemnation and rejection of acts of corruption, related offenses and impunity'⁸⁵ would also be a violation of the right to vote in free and fair elections that can be read into article 13 of the African Charter.

It is useful to note that the African Court, while deciding on an alleged violation of article 13 of the African Charter, has endorsed the interpretation of article 25 of ICCPR by the Human Rights Committee in General Comment 25. In the case of *Rev Christopher R Mtikila v United Republic of Tanzania*⁸⁶ the African Court stated:

The Court agrees with this General Comment, as it is an authoritative statement of interpretation of Article 25 of ICCPR, which reflects the spirit of article 13 of the Charter and which, in accordance with Article 60 of the Charter, is an 'instrument adopted by the United Nations on human and peoples' rights' that the Court can 'draw inspiration from' in its interpretation of the Charter.

At the national level, the right to vote is provided for in most national constitutions on the continent.⁸⁷ National courts have had occasion to interpret the relationship between corruption and the right to vote in free and fair elections, and three decisions of the Supreme Court of Uganda and Kenya and the Constitutional Court of South Africa are highlighted. In *Rtd Col Dr Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni*⁸⁸ the Supreme Court of Uganda found that there was evidence of a deletion of voters' names from the voters' register, wrongful counting and tallying of results, bribery,

83 Application 1/2014 (n 43) paras 129-133.

84 Application 1/2014 (n 43) para 136.

85 Art 3(9) African Democracy Charter.

86 Application 11/2011 para 107.

87 Examples include art 38 of the Constitution of Kenya; sec 19 of the South African Constitution; art 54 of the Angolan Constitution; and art 40 of the Malawian Constitution.

88 Election Petition 1 of 2006 [2007] UGSC 24 (30 January 2007).

intimidation, violence, multiple voting and ballot stuffing.⁸⁹ However, the Court still dismissed the petition on the grounds that the irregularities and malpractices did not substantially affect the overall outcome of the elections.⁹⁰ We observe that the Court placed more importance on the numbers, essentially endorsing the approach that quantity will trump quality.

The decision of the Ugandan courts can be contrasted with the unprecedented decision in the region where the Supreme Court of Kenya in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others*⁹¹ the Court nullified the election of Uhuru Kenyatta as President. Although the Court found that the allegations of bribery, undue influence and inducement had not been proven, it still nullified the elections on the grounds of other ‘illegalities and irregularities’. Importantly, and in contrast with the decision in the *Kizza Besigye* case, the Court underscored that quantity was as important as quality in elections. The Court held:⁹²

Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? ... It is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless.

The South African Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*⁹³ had to interpret the interplay between the right to vote, the right of access to information and the threat of corruption in the context of failure to disclose information on private funding for political parties and independent candidates. In underlining the importance of transparency in electoral processes, the Court observed:⁹⁴

The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.

The Court further held that a ‘lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters’.⁹⁵ In conclusion, the Court made the determination that whereas every citizen has a right to free and fair elections, there can

89 As discussed in OB Kaaba ‘The challenges of adjudicating presidential election disputes in domestic courts in Africa’ (2015) 15 *African Human Rights Law Journal* 346.

90 As above.

91 Presidential Petition 1 of 2017, <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 4 September 2018).

92 At paras 378-379 of the majority decision.

93 *My Vote Counts* (n 71).

94 *My Vote Counts* (n 71) para 32.

95 *My Vote Counts* (n 71) para 48.

be no free and fair elections when the media and civil society as a whole have no access to information about private political funding.⁹⁶

From the above it is observed that the right to vote in free and fair elections is directly violated when corruption taints the electoral process. The free expression of the electors cannot be ascertained when they are compromised by bribes, when governments compromise the independence of national electoral bodies or when sources of campaign or political party funding are shrouded in secrecy, as discussed above. African states are obligated under international and regional human rights instruments to take legislative and other measures to ensure that their citizens enjoy the right to vote. The challenge, however, remains walking the talk as most African states have anchored the right to vote at the highest level – in national constitutions – and therefore the problem is not necessarily the absence of norms.

In the next section we examine the AU anti-corruption legal framework, its sufficiency or lack thereof to protect the right to vote, and subsequently interrogate what role the AU and regional economic communities can play to utilise the existing normative framework for the practical realisation of the right of African citizens to vote in free and fair elections.

5 AFRICAN UNION ANTI-CORRUPTION NORMATIVE FRAMEWORK

Various AU instruments address the issue of corruption, albeit with varying degrees of detail. Article 12 of the AU Convention on Values and Principles of Public Service and Administration obligates state parties to, *inter alia*, enact laws and adopt strategies to fight corruption through the establishment of independent anti-corruption institutions. Articles 2(9), 3(9), 27(5), 33(3) of the African Democracy Charter mandate state parties to promote the fight against corruption, to condemn and reject acts of corruption and to prevent and combat corruption and related offences. Paragraph 83 of the New Partnership for Africa's Development (NEPAD) Declaration (2001) highlights the adoption of effective measures to combat corruption and embezzlement as one of the focus areas for institutional reforms under NEPAD's capacity-building initiatives. In the AU Declaration on the Principles Governing Democratic Elections in Africa (2002) AU member states commit themselves to 'take all necessary measures and precautions to prevent the perpetration of fraud, rigging and any other illegal practices throughout the electoral process'.⁹⁷ The objectives, standards, criteria and indicators for the African Peer Review Mechanism (APRM), adopted in March 2003 by the NEPAD Implementation Committee, lists 'fighting corruption in the political sphere' as one of the key objectives for democracy and political governance. At the regional level, anti-corruption instruments include

96 *My Vote Counts* (n 71) para 95.

97 Para III (g) of the Declaration.

the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption⁹⁸ and the Southern African Development Community (SADC) Protocol against Corruption.⁹⁹ The most comprehensive anti-corruption instrument by the AU is the Convention on Preventing and Combating Corruption which is discussed in greater detail below.

In response to the corruption pandemic, on 11 July 2003 the Assembly of Heads of State and Government of the AU adopted the African Union Convention on Preventing and Combating Corruption.¹⁰⁰ This Convention has five primary aims, namely, to promote and strengthen mechanisms required to prevent, detect, punish and eradicate corruption; to promote, facilitate and regulate state cooperation on corruption matters; to coordinate and harmonise corruption policies and legislation; to promote the free enjoyment of economic, social and cultural rights as well as civil and political rights; and to foster transparency and accountability in the management of public affairs.¹⁰¹ The Convention further requires state parties to adopt administrative, legislative and supplementary measures to prevent and combat corruption.¹⁰² The Convention currently has 49 signatories and 38 ratifications out of the total of 55 member states of the AU.¹⁰³ This makes it one of the most widely-ratified AU instruments, indicative, at least on paper, of the overwhelming political support to tackle graft on the continent. The Convention is one of the AU's shared values instruments that anchor the African Governance Architecture (AGA), the overall political and institutional framework of the AU, in the promotion of democracy, human rights and good governance on the continent.¹⁰⁴ The Convention therefore adopts a multidisciplinary approach to the problem of corruption.

The Convention generally recognises the need to combat corruption as a means to foster civil and political rights. It defines as one of its objectives under article 2(5) the requirement of state parties to establish the necessary conditions to foster transparency and accountability in the management of public affairs. With respect to civic processes, the Convention in article 10(a) proscribes the use of funds acquired through illegal and corrupt practices to finance political parties, and in article 10(b) requires state parties to incorporate the principle of transparency in the funding of political parties.

98 See https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf (accessed 15 September 2018).

99 http://www.eods.eu/library/SADC_Protocol%20Against%20Corruption_2001_EN.pdf (accessed 15 September 2018).

100 The list of countries that have signed, ratified or acceded to the Convention is available at <http://www.au.int/en/sites/default/files/corruption.pdf> (accessed 22 August 2018).

101 Art 2 African Union Convention on Preventing and Combating Corruption.

102 K Olaniyan 'The African Union Convention on Preventing and Combating Corruption: a critical appraisal' (2004) 4 *African Human Rights Law Journal* 75.

103 n 99.

104 See an overview of AGA at <http://www.aga-platform.org/about> (accessed 1 November 2018).

The Convention, notably, does not explicitly make reference to corruption in the context of the right to vote. On the one hand, this may not be deemed problematic as the right to vote may be hampered by offences covered in the Convention, such as simple bribery. On the other hand, the narrow scope within which corruption and elections are discussed in the Convention creates challenges for fully curbing the vice. The requirement for regulating political parties ignores the reality that individual actors, conduits and independent candidates play a major role in electoral processes and can also engage in corrupt practices that impact the right to vote. Limiting the monitoring of funding to only political parties ignores these realities. Further, the Convention does not make reference to other forms of electoral corruption such as promises to voters that may in other contexts be deemed as peddling in influence or compensation to opposing candidates to withdraw from elections which in the context of commercial transactions can be considered collusion. These are some of the few areas that are not considered by the Convention but that have a significant impact in undermining the right to vote.

6 ENHANCING THE RIGHT TO VOTE AND INTEGRITY OF ELECTIONS IN AFRICA

We propose that the AU Advisory Board on Corruption, pursuant to articles 22(5)(a) and (b) of the AU Convention on Preventing and Combating Corruption, in collaboration with relevant anti-corruption actors at regional and national levels, spearheads further research and dialogue on the relationship between corruption and the right to vote. Such initiative should broadly focus on interrogation of the structural challenges in addressing corruption in elections and narrowly to propose standards to protect, promote and fulfil the right to vote in free and fair elections in an environment devoid of corruption. This would additionally contribute to the integration of human rights principles and norms in the war on corruption and enhancing strategies in this war with a human rights framework.

As the article has discussed, the legitimacy of any government is based on the free expression of the will of the voters. Article 30 of the AU Constitutive Act bars the participation in activities of AU governments that come to power through unconstitutional means. The African Democracy Charter in article 23 and the Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government have prescriptively defined what constitutes unconstitutional changes. These include replacing a democratically-elected government through a military *coup d'état*; interventions by mercenaries, armed dissident groups and rebel movements; the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections; and constitutional and legal amendments infringing on democratic changes of government. We propose that, in examining whether amendments or revisions of constitutions or legal instruments may amount to unconstitutional changes, AU policy organs examine whether such amendments have

been procured through corrupt means. In addition, given that there are growing calls to amend the African Democracy Charter, it is also proposed that an amendment be included to consider widespread corruption in electoral processes as an act giving rise to attempts at unconstitutional changes of government or retention of power.

The proposed African Court of Justice and Human and Peoples' Rights (Merged African Court) has been vested with the power to prosecute international and transnational crimes including the crime of unconstitutional changes of government.¹⁰⁵ The Court has been widely viewed as a unique African response to the peculiar challenges of the continent. Despite the existence of prohibitions against corruption in general and election offences in particular that may hamper the right to vote, not much is done to the perpetrators of these acts. Vesting the Merged African Court with jurisdiction to prosecute election offences at a future date may serve as suitable deterrent at the regional level if perpetrators operate with impunity domestically.

Within the confines of existing legislative frameworks, greater attention needs to be paid to political financing. While the AU Convention on Preventing and Combating Corruption makes reference to the financing of political parties, all political actors, whether individuals or parties, must be subject to rules that ensure transparency, accountability and the creation of a level playing field. Member states, regional economic communities and the AU need to ensure that political actors document the source of the funds and how they are utilised. Where discrepancies are noted, sanctions must be imposed, including disbarment from elections.

Effective election monitoring can be a catalyst in promoting the integrity of elections on the continent. For the AU election observation missions to realise this potential, a number of reforms are required to address the practical and political constraints they face. In theory, the AU has committed to deploying long-term observer missions in member states to ensure that the focus on elections is not preoccupied by occurrences on voting day. However, in practice, resource constraints have meant that the number of monitors and the length of time spent in the pre-election, election and post-election phases are inadequate. We propose that the AU should develop long-term modalities of collaboration between the AU's election observation missions and domestic observers. We submit that domestic observers would be more effective in detecting corruption in the different stages of the electoral cycle and less costly to deploy.¹⁰⁶

To this end, the AU should develop specific criteria that will assess the impact of corruption in the entire civic process. Such criteria should be both qualitative and quantitative and should cumulatively

105 See art 28(a) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

106 This proposal has been put in practice elsewhere. Between 2001 and 2012 the European Commission supported the Network for Enhanced Electoral and Democracy Support (NEEDS) project. This project was designed to enhance the quality and capacity of European Union election observation missions and to support domestic observer organisations around the world.

contribute to thresholds that would lead to a finding that an electoral process was significantly prejudiced by corruption that it can no longer be deemed free and fair. Developing such criteria can assist states to make the appropriate arrangements preceding a final vote. In addition, the AU should develop follow-up criteria of observed elections as we note that there is no structured follow-up on recommendations after the issuance of final reports. As the article has discussed, there are no quick-fix solutions to the challenge of corruption, and ridding electoral processes of corruption favours not only long-term observation methodologies but meaningful and sustained follow-up on identified areas of improvement. We submit that the less focus there is on previous reports and recommendations by AU observation missions, the less credible the missions are in the next elections they observe in the same country.

We agree with existing proposals¹⁰⁷ on utilising modern technology in election observation. Africa has seen an exponential growth in the number of mobile phone and internet users, and this development has the potential to significantly influence the integrity of elections on the continent. Ushahidi, a crowd-sourcing technology company in Kenya, has successfully used its platform to monitor elections in Kenya.¹⁰⁸ We propose that the AU embeds similar crowd-sourcing technologies in election observation to, inter alia, collect evidence of corruption in electoral processes. We submit that the effective use of such technologies would not only address the practical challenge that observers face of not being able to be in most parts of the country holding elections, but it would also act to deter corruption because of the risk of exposure.

Finally, much more needs to be done to ensure that civic education is widespread to ensure that citizens are not susceptible to bribes. Such education could include graphically detailing how corruption undermines development and social service delivery.

7 CONCLUSION

The article has demonstrated that corruption on the continent negatively affects economies, leads to violations of human rights and undermines good governance and democracy, with deadly consequences when elections influenced by corruption breed violence. The main drivers of corruption include the misuse of state authority; a lack of transparency in the private sector; a lack of access to information; the absence of public participation; weak institutions of governance; and what Achebe called a complete failure of leadership that has made corruption easy and profitable, among other factors. As

107 H Lyngue-Mangueira 'Why "professionalizing" international election observation might not be enough to ensure effective election observation' (2012) 17, <https://www.idea.int/.../why-professionalizing-international-election-observation-might-not-be-enough.pdf> (accessed 11 September 2018).

108 See <https://www.usahidi.com/blog/2017/08/04/usahidi-monitors-kenyan-elections-with-uchaguzi-partnership> (accessed 11 September 2018).

the article has shown, of concern is the deleterious effect of corruption on fundamental rights and freedoms. We have established that corruption in practice is seriously undermining the realisation and enjoyment of civil and political rights as well as socio-economic rights. We have analysed how the scourge of corruption particularly violates the right to vote in free and fair elections, a fundamental right from where authority to govern springs. There are disturbing trends in different African states where corruption during elections is rampant, often perpetrated by the incumbents. From handing out cash during political rallies camouflaged as transport reimbursement, distributing subsidised fertiliser days before elections, cancelling utility bills to seek the support of voters to government officials working for ruling parties while on duty, it is not in doubt that the integrity of most elections on the continent is questionable. The content of the right to vote has been authoritatively expounded on by treaty bodies at the UN and AU levels. The consensus is that conformity with the right entails the ability of voters to form opinions independently, free of violence or threat of violence, compulsion, inducement and any other form of manipulative interference. However, domestic jurisprudence has given varying importance to allegations of corruption in electoral processes. On the one hand, some courts are reluctant to nullify election results even where corrupt practices during elections are proven as long as these do not substantively affect the overall outcome, such as in the *Kizza Besigye* case. On the other hand, the *Raila Odinga* case concluded that quality is just as important as quantity and that a court should rightly nullify an election result if tainted by substantive illegalities and irregularities, regardless of numbers and margins of victory. We submit that this is progressive jurisprudence. The array of existing anti-corruption normative frameworks at the continental level is commendable but the challenge remains effective implementation at state level. Even then, there are clear weaknesses in instruments such as the AU Convention on Preventing and Combating Corruption as exemplified by provisions on regulating funding of political parties while ignoring the role of individual actors in corruptly influencing electoral processes. To safeguard the right to vote in free and fair elections, we have made some suggestions for reform. We hope that these proposals will halt the current subversion of the will of the people through fraudulent elections and considerably improve the prospects of African voters to speak clearly and independently through the ballot. Eliminating corruption from electoral processes and therefore protecting the right to vote will go a long way towards ensuring that the will of the people is not auctioned to the highest bidder.