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AFRICAN REGIONAL INTEGRATION TRACK: CHALLENGES AND PROSPECTS

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
ABSTRACT	vi
DEDICATION	viii
ACKNOWLEDGEMENT.....	ix
PLAGIARISM.....	x
ACCRONYMS.....	xi
CHAPTER 1	
THE CONCEPT OF REGIONAL INTEGRATION IN AFRICA	
1.1 INTRODUCTION	1
1.2. THE CONCEPT OF REGIONAL INTEGRATION.....	2
1.3 DEFINITION OF REGIONAL INTEGRATION.....	3
1.4 RATIONALE BEHIND AFRICAN INTEGRATION.....	4
1.5 HISTORY.....	4
1.6 NATURE OF AFRICAN INTEGRATION.....	5
1.7 STATUS OF AFRICAN REGIONAL INTEGRATION.....	11
1.8 MODELS OF REGIONAL INTEGRATION.....	11
1.8.1 ECONOMIC INTEGRATION.....	11
1.8.2 POLITICAL INTEGRATION.....	14
1.8.3 DEVELOPMENTAL INTEGRATION.....	15
1.8.4 NEO FUNCTIONALISM.....	16
1.9 BENEFITS OF REGIONAL INTEGRATION.....	18
1.10 CONCLUSION.....	20

CHAPTER 2

AFRICAN REGIONAL INTEGRATION LEGAL AND INSTITUTIONAL FRAMEWORK

2.1. INTRODUCTION.....	22
2.2 FROM ORGANISATION OF AFRICAN UNITY TO AFRICAN UNION.....	24
2.3 BACKGROUND TO THE AFRICA UNION.....	26
2.4 AU LEGAL AND INSTITUTIONAL FRAMEWORK.....	27
2.4.1 AFRICAN CONSTITUTIVE ACT.....	27
2.4.2 THE AFRICAN UNION ASSEMBLY.....	28
2.4.3. CRITICISM OF THE AU.....	29
2.4.4 AFRICAN ECONOMIC COMMUNITY TREATY AND RECS.....	30
2.4.5 NEW ECONOMIC PARTNERSHIP FOR AFRICA'S DEVELOPMENT.....	33
2.4.6 CRITICISM OF NEPAD.....	34
2.4.7 PAN AFRICAN PARLIAMENT (PAP).....	39
2.4.8 AFRICAN PEER REVIEW MECHANISM (APRM).....	43
2.4.9 CHALLENGES TO APRM.....	44
2.4.10 CONCLUSION.....	46

CHAPTER 3

MAJOR CHALLENGES FACING AFRICAN REGIONAL INTEGRATION

3.1 OVERLAPPING MEMBERSHIPS.....	48
3.1.1. BENEFITS OF MULTIPLE MEMBERSHIP.....	49
3.1.2 CRITICISMS OF MULTIPLE MEMBERSHIPS.....	49

3.2. REFUSAL BY AFRICAN LEADERS TO CEDE ASPECTS OF THEIR SOVEREIGNTY.....	51
3.3 LACK OF POLITICAL COMMITMENT.....	52
3.4 LACK OF POPULAR SUPPORT.....	54
3.5 OTHER CHALLENGES TO AFRICAN REGIONAL INTEGRATION RELATED TO TRADE.....	55
3.5.1 POOR INFRASTRUCTURE AND HIGH TRANSACTION COSTS.....	56
3.5.2 TARIFFS AND NON TARIFF BARRIERS (NTBS).....	58
3.6 CONCLUSION	59

CHAPTER 4

REGIONAL ECONOMIC COMMUNITIES (RECs) IN AFRICA

4.1 INTRODUCTION.....	60
4.2 STATUS OF REGIONAL LAW IN MEMBER STATES.....	60
4.3 STATUS OF INDIVIDUALS IN REGIONAL COURTS.....	62
4.4 ENFORCEMENT AND RECOGNITION OF JUDGEMENT FROM COMMUNITY COURTS.....	65
4.5 ENFORCEMENT AND RECOGNITION OF CIVIL JUDGEMENTS FROM OTHER AFRICAN COURTS.....	68
4.6 DIFFERENT SPEEDS AND CAPABILITIES.....	70
4.7. CONCLUSION.....	70

CHAPTER 5

5. CONCLUSION AND RECOMMENDATIONS

5. INTRODUCTION.....	73
5.1 DEVELOP A NEW ECONOMIC MODEL OF INTEGRATION.....	73
5.2 TRANSFORM THE EXISTING INSTITUTIONS AND LAWS TO REFLECT AFRICAN REALITIES.....	74
5.3 IMPLEMENT REGIONAL AGREEMENTS.....	74
5.4 ESTABLISH AN AFRICAN CONVENTION FOR THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS.....	74
BIBLIOGRAPHY	76

ABSTRACT

Africa has been very slow in effectively implementing regional integration and trade agreements and has made little progress to achieve its stated objectives, especially the goal of eradicating poverty and promoting development. In addition, the economic integration model currently being pursued in Africa suffers from several challenges and has not achieved its goals, because of among other things, weak legal and institutional frameworks, and lack of support from ordinary African citizens and the private sector. In light of the above, this research investigate the appropriateness of this model.

This research begins with the theoretical discussions of integration and identifies the existing gaps within the African regional integration process. This reveals that there are not only foundational and definitional disparities within the African regional integration process but also that Africa lacks the necessary prerequisite for any successful regional integration. In particular, this research reveals that the institutions that are mandated to accelerate regional integration process lack the necessary capacity to achieve regional integration process.

The discussions of theories behind regional economic integration reveals that the understanding of regional integration in Africa are rooted in the economic understanding of regionalism with insufficient attention given to the importance of strong institutional and legal frameworks and a human centred development. Importantly, these discussions reveal that the European integration economic model that was a success in European Community has been adopted in Africa without reviewing its appropriateness for the continent.

The debates of the history of African regional integration in Africa demonstrate that regional integration process is not a new phenomenon in Africa and that African leaders have always embraced integration and have perceived it as a way of addressing Africa's social and economic challenges. Importantly, the discussions of the history demonstrate the role African leaders played in fighting colonialism and dismantling the apartheid system in South Africa. Unfortunately, these discussions also show that after independence Africa was a continent faced with many challenges. In particular, history shows that after independence African leaders gave little support to Pan Africanism which had been driving force behind decolonisation and became oppressive and in many instances, committed human rights violations against their own people. This state of affairs has led to economic development being sacrificed.

The discussions of the benefits of economic integration shows that while there are benefits linked to economic integration such as the reduction of poverty and development in countries such as China, India and Thailand, for Africa is unable to deal with the challenge of poverty and underdevelopment . African countries continue to witness increasing levels of poverty and poor development while few businesses and political elites remain the main beneficiaries of the economic integration model.

The analyses of the institutional and legal structures reveal that the institutions mandated with regional integration and the laws governing regional integration process are either weak or non-existence. This is demonstrated by the slow implementation of regional projects. Even though Africa has made significant steps to facilitate its regional integration, it has been unable to deal with the challenges confronting the continent, especially the rising levels of poverty and underdevelopment. While this this research supports and approves the steps that have been adopted to facilitate regional integration and trade, nevertheless this research observes that institutions that are mandated to drive regional integration have been unable to promote African regional integration. Africa lacks the necessary infrastructure and human capacity to achieve regional integration.

The research question therefore is whether the economic integration model currently being pursued in Africa under its existing framework is the appropriate model for African regional integration since it is not supported by a proper legal system and the African people and does not directly address the issues that confront ordinary African citizens?

While the author observes that Africa has considerably improved its trade and strengthened its integration process, the author nevertheless concludes that the economic integration model currently being pursued in Africa is unlikely to succeed, because it does not take into account African realities and lacks the necessary prerequisites for successful economic integration,

DEDICATION

This dissertation is dedicated to my mother, 'Thobeka Evelyn Madala and my sister Sindiswa Madala for their unconditional love and support.

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I am grateful to everyone who played a positive role in my life.

Thanks to Every one of you!

PLAGIARISM DECLARATION

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I have used the South Africa Law Journal convention for citation and referencing. Each contribution to, and quotation in, this Dissertation from the work(s) of other people has been attributed, and has been cited and referenced.

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Signature _____

LIST OF ACRONYMS

African Economic Community AEC

African Union AU

African National Congress ANC

African Regional Trade Agreements (RTA)

African Growth and Opportunity Act (AGOA)

African Parliament (PAP)

African Peer Review Mechanism (APRM)

African Union Commission (AUC)

African Court of Justice and Human Rights (ACJ&HR)

Common Market for East and Southern Africa COMESA

Central African Economic Monetary Community CEMAC

Customs Union CU

Common External Tariff (CET)

Continental Free Trade Area (CFTA)

Conference of African Ministers in Charge of Integration (COMAI)

Committee of Participating Heads of State and Government (APR Forum).

Country Self-Assessment Report (CSAR)

Democratic Alliance (DA)

East African Community EAC

European Commission EC

European Economic Community EEC

European Union E FTA U

Free Trade Area FTA

Foreign Direct Investment (FDI).

Final Act of Lagos (FLA)

Generalised System of Preferences GSP

International Monetary Fund (IMF)

Least Developed Country LDC

Lagos Plan Action LPA

Millennium Development Goals MGD

Movement for Popular Participation in Development (MPPD)

National Tariff Barrier NTB

National Programme of Actions (NPOAs)

New Partnership for African Development (NEPAD)

One Stop Border Post (OSBP)

Organisation of African Unity OAU

Preferential Trade Agreement (PTA)

Panel of Eminent Persons (APR Panel),

Regional Infrastructure Development Master Plan (RIDMP)

Regional Indicative Strategic Development Plan RISDP

Regional Economic Community REC

Rules of Origin ROO

Southern African Development Community SADC

Southern African Custom Union SACU

Sanitary And Phytosanitary measures (SPS)

Tripartite Free Trade Area TFTA

The Country Review Report (CRR)

World Trade Organisation WTO

Yamoussoukro Decision (YD)

CHAPTER 1: THE CONCEPT OF REGIONAL INTEGRATION IN AFRICA

1.1 INTRODUCTION

Africa has been very slow in effectively implementing regional integration and trade agreements and has made slight progress to achieve its stated objectives, especially the goal of eradicating poverty and promoting development. While Africa contains six of the fastest growing economies in the world, it has been unable to transform such growth to deal with the unprecedented level of poverty that seeks to undermine human existence. For instance, the latest report by social justice organisation, Oxfam, paints a bleak picture of Africa in its fight to eradicate poverty and deal effectively with the challenge of inequality that continue to torment continent. The report pinpoints challenges facing Africa's poor and observes that the economic growth that has been experienced in Africa over the last 20 years has only benefited the rich, at the exclusion of the poor. The report proposes to African leaders to develop new economic models that are pro-poor.¹

In view of the above conditions and the fact that African integration is characterised by weak legal systems and institutions mandated to drive regional integration lack the necessary capacity to carry out regional integration,² the author doubts the appropriateness of economic models of integration that have been adopted in Africa.

The research question therefore is whether the economic integration model currently being pursued in Africa under its existing framework is the appropriate model for African regional integration since it is not supported by a proper legal system and the African people and does not directly address the issues that confront ordinary African citizens?

The main purpose of this study is to examine the appropriateness of the economic integration model for African regional integration since this model is perceived as the only way in which Africa can address its complex challenges. The study further identifies the main causes for Africa's slow progress in fully implementing African regional integration policies and factors behind its poor performance in regional

¹ " *Starting with People*": "A Human Economy Approach to Inclusive Growth in Africa" Oxfam Briefing Paper – Executive Summary 2 MAY 2017 www.oxfam.org at 1-8.

² Trudi Hartzenberg, "Regional integration in Africa." Available at SSRN 1941742 (2011) at 18.

integration, especially the failure to eradicate poverty and promote development. This research further investigates the reasons why African leaders are reluctant to implement the same agreements which they have endorsed. Finally, this dissertation offers recommendations on how the continent can improve its integration prospects.

It is the argument of this dissertation that for Africa to successfully realise its aspiration for deeper regional integration, it is important that it develops its own model of integration that not only embraces law as an essential component for a successful regional integration but a model that reflects African realities and the unique nature of Africa. Africa must develop a new economic model that is beneficial not only to the few business and multinational corporations and political elites but which makes provision for the poor since poverty is still the biggest challenge facing Africa. The economic integration model currently being pursued in Africa is unlikely to succeed, because it does not take into account African realities and lacks the necessary prerequisites for successful economic integration.

While numerous studies have examined the challenges and prospects of African regional integration, they have rarely provided an all-inclusive approach that views African integration beyond the narrow economic understanding of regionalism. Therefore, this research offers a comprehensive approach that places prominence on an integration model driven by strong legal and institutional frameworks and a model that is human-centred.

Of course, the challenges facing African regional integration are not only legal. In fact, several challenges facing Africa integration are structural and economic. For instance, political instabilities, poor infrastructure, and trade related problems and behind the border challenges are main impediments to African regional integration.³

1.2 Concept of Regional Integration

According to Biswano the concept of 'integration' is one of the most difficult concepts to understand as many scholars have grappled to find one definitive meaning to the concept. Biswano quoting 'Puchala' who summed up this problem of definition as

³ Amal Nagah Elbeshbishi *"Trade Facilitation in Africa: Challenges, Opportunities and Progress"* Organization of Islamic Cooperation (OIC) High Level Forum on Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation, Casablanca- Morocco, 25- 26 February 2013 at 10.

follows: “He compared this difficulty of definition of integration to a blind man confronted with the task of defining an elephant.”⁴

Biswaro notes that lack of a clear and acceptable definition poses important questions. For instance, ‘is integration an economic or a political phenomenon?’ ‘What does it mean to be fully integrated?’⁵ According to this author, to fully understand the regional integration debate it is important that one familiarises oneself with the concepts and theories behind integration. He submits that economists prefer to use the term ‘economic integration’ while lawyers prefer the term ‘regional integration’. According to him, ‘these distinctions no longer have any significance on the term itself as the term covers all elements of integration.’⁶ Accordingly, regional integration is much broader and includes politics, economics, law and policies, regional security, human rights, education, health, technology and other elements.

1.3 Definition of Regional Integration

Biswaro describes regional integration as a:

‘... Process and an end state in which intergovernmental organisations, between three or more countries, which involves them pooling their resources with a view to cover larger and a more open economic integration that is beneficial to Member States.’⁷

Haarlov submits that regional integration is a:

“... Process by which a group of nation states voluntarily and in various degrees have access to each other’s markets and establish mechanisms and techniques that minimise conflicts and maximise internal and external economic, political, social and cultural benefits of their interaction.”⁸

The above definitions reflect the economic understanding of regionalism which places importance on economics, markets, and trade liberalisation with the assumption that it will ultimately result in the formation of a political union. This narrow conception may

⁴ Joram Mukama Biswaro *“The Quest for Regional Integration in Africa, Latin America and Beyond in the Twenty first century: Experience, Progress And Prospects”* A Comparative Study 2011 page 20 Fundacao Alexandre de Gusmao Foundation at 57 and 58.

⁵ Ibid at 68.

⁶ Ibid.

⁷ Ibid at 17.

⁸ Margaret Lee *“Regionalism in Africa: A part of problem or a part of solution.”* Polis/RCSP/CPSR 9 (2002) at 4.

have been successful in other parts of the world but certainly it has failed in Africa and therefore it is important that its appropriateness be reviewed.

1.4 Rationale Behind African Integration

Africa is the only region in the world in which almost every country belongs to more than two regional economic communities. For instance, Saurombe citing Mattli notes that 95 percent of African countries belong to at least more than one regional economic community (REC).⁹ In Africa it is believed that economic integration and free trade can help Africa reduce poverty and promote development. For example, this notion is often supported and motivated by the success of the European Union integration project which managed to reduce barriers to trade significantly. Most recently, the speedy economic growth of Asian countries such as China, India, and Thailand has further strengthened this view.¹⁰ However, Salami submits that the European Community (EC) regional integration agenda was successful because it was supported by a stronger legal system with an enforcement mechanism in the form of the European Court of Justice.¹¹

Dirar submits, in relation to SADC, that solidarity, human rights, democracy and rule of law are some of the main principles governing the organisation.¹² However, there is no mechanism and no guidance on how to interpret these principles.¹³ For Dirar, the decision to dissolve the tribunal and the refusal to sanction SADC tribunal decisions is an indication that SADC members consider the principle of solidarity more important than other principles of the organisation.¹⁴ Dirar submits that SADC leaders interpret solidarity to mean uniting and supporting each other's actions even if it is a transgression of their governing principles.¹⁵

1.5 History of African Integration

⁹ Amos Saurombe: "An analysis of economic integration in Africa with specific reference to the Africa Union and the African Economic Community" in Southern African Public Law Vol 27 issue 1 at 302.

¹⁰ Biswaro op cit at 20.

¹¹ Iwa Salami: "Legal and Institutional challenges of Economic integration in Africa" European Law Journal Vol 17 No 5, at 669.

¹² Luwam G Dirar: "Rethinking and Theorizing Integration in Southern Africa," Emory International Law Review, 28 Emory Int'l L. Rev 123 at 3.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

According to Shaw, the regional integration agenda is not a new phenomenon in Africa since African regional integration agenda dates back as early as the 20th century.¹⁶ He notes that the doctrine of Pan Africanism influenced African regional integration. According to Shaw this doctrine recognised the importance of unity in economic, social, and political progress and was aimed at uniting and improving the living standards of people of African descent.¹⁷ He submits that this ideology later became important in the fight against colonialism in Africa and therefore laid the foundation for the Pan Africanism Movement and paved the way for the establishment of the Organisation of African Unity.¹⁸

Since then, there has been a growing number of African regional economic communities (REC) being formed across the African continent, each with the intention to drive economic development. Africa is the only region in which one country belongs to more than two sub-regional communities. For instance, since 2010, out of 53 countries, 27 belonged to more than two regional economic communities and 18 belonged to three with the Democratic Republic of Congo belonging to four.¹⁹

1.6 Nature of African Regional Integration

Kiplagat observes that economic analysis dominates regional integration discourses with insufficient attention given to institutional structures.²⁰ He argues that since economic integration is viewed as the solution to developing countries' economic challenges, the success or failure of integration attempts has depended upon and been measured by economic results.²¹ Consequently, the long-established classical example of the failure of regional integration in developing countries has tended to be an economic one.²²

¹⁶ Shaw, A. (2009). "The OAU, institutional leadership and the quest for African co-operation: from hope to despair." *AFFRIKA Journal of Politics, Economics and Society: Leadership and Governance in Africa* 1(1) at 45.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Rodrigo Tavares and Vanessa Tang 2011: "Regional economic integration in Africa: impediment to progress?" *South Africa Journal of International Affairs*, 18:2, 217-233, DOI: [1080/10220461.102011.588826](https://doi.org/10.1080/10220461.2011.588826) link <http://dx.doi.org/10.1080/10220461.2011.588826> at 224.

²⁰ P. Kenneth Kiplagat *An Institutional and Structural Model for Successful Economic Integration in Developing Countries* Texas International Law Journal Winter, 1994 29 Tex. Int'l L.J. 39 at 5.

²¹ Ibid.

²² Ibid.

Kiplagat submits that this is demonstrated by most analyses on regional integration that reflect the analytical modes of economists and political discipline.²³ Kiplagat argues that the economic approach has prevented the development of other models and this is demonstrated by the lack of study of institutional and legal arrangements.²⁴

Indeed, regional integration in developing countries, especially in Africa is largely influenced by the economic model that fails to consider the nature of Africa, its history and level of development. This model continues to be the main motive for African regional integration even though its prospects of success remain doubtful. For instance, the Africa Regional Economic Communities (RECs) have adopted and embraced the economic model of integration without evaluating its feasibility and prospects of success.²⁵ The author supports Kiplagat's view that the dominance of economists and political scientists in regional integration debates have led to the understatement of the importance of having strong institutional and legal arrangements.

According to Gibb, despite the movement towards regionalism here in Africa and throughout the world, Africa has been neglected in the theoretical discussion on regionalism.²⁶ Gibb submits that the understanding of regional integration in Africa is based on a Eurocentric conception of regionalism which fails to consider the nature, character, and culture of the African continent. Gibb concludes that this may explain why Africa has performed poorly in its regional integration aspirations.²⁷

Again, the understanding of regional integration through the lenses of European integration processes fails to appreciate that in Africa, regional integration is broader than the economist understanding of regionalism and include cooperation in social, political, cultural and socio-economic issues such as education.

Draper argues that African economic integration modelled on the European understanding of regionalism is not suited to regional capacities and may be

²³ Ibid.

²⁴ Ibid.

²⁵ The African RECs follow the gradual process laid down by AEC Treaty that seeks to achieve integration through 34-year period in six defined stages.

²⁶ Richard Gibb (2009) : "*Regional integration and Africa's Development Trajectory: meta -theories, expectations and reality*," Third World Quarterly, 30:4, 701-721 Link <http://dx.doi.org/1080/01436590902867136> accessed on 26 April 2016, at: 03:02 see at 702.

²⁷ Ibid.

detrimental to its aspirations.²⁸ He argues that this gap may be aggravated by the technical and theoretical analyses that are done through the lenses of economics or international relations.²⁹ He submits that even though there is huge support for economic integration in Africa through the establishment of initiatives aimed at achieving economic integration, 'often the rhetoric does not match the reality.'³⁰

Draper submits that Africa's economic integration 'suffers from a litany of problems, overlapping membership, unfulfilled commitments, unrealistic expectations and concludes that it is important that Africa reconsider its understanding of regionalism which stems from European foundations.'³¹ However, he argues that this does not mean that Africa cannot learn one or two things from other models being used in other regions.

Certainly, the argument here does not advocate for total abolition of the economic model of integration as found in Europe or other parts of the world, but calls for review of its appropriateness for Africa's integration in view of the continental realities. This view is supported by this research.

Asante questions the economic integration model and its appropriateness for Africa, considering that the continent lacks the prerequisites and characteristics that are essential for economic integration to materialise and submits that market-led approach is appropriate for the developed regions and was a success in the European Union because of their advanced industries.³²

Considering that economic integration has failed to increase intra-African trade and integrate African trade with the rest of the world, Hartzenberg questions the economic model of integration in Africa, particularly its suitability to address the real problems that retard Africa's regional and international trade performance.³³

²⁸ Peter Draper: *"Rethinking the (European) Foundations of sub-Saharan African Regional Economic Integration: A Political Economy Essay"* September 2010 OECD Development Centre Working Paper No 293 Link at 6 <http://www.oecd.org/dev/wp> .

²⁹ Ibid.

³⁰ Ibid at 7.

³¹ Ibid.

³² Asante, S. K: *"Regionalism and Africa's Development: expectations, realities and challenges"* New York: St Martin Press, 1997 at 63.

³³ Cited in Hartzenberg at 12.

Dirar submits that legal scholars when confronted with the study or question of integration, their investigation reflects the analytical models that are concerned with the implementation and the enforcement of policies or treaties. Dirar observes that for lawyers, law is neutral and they believe that the socio-economic and political circumstances of member states do not affect the legality or binding nature of a treaty agreement.³⁴

Dirar's argument here is disputed since it fails to acknowledge that laws generally are developed in view of the prevailing social and political environment. For instance, the widely accepted principles of 'variable geometry' and 'asymmetry' in Africa were designed in view of the fact that African countries are at different stages of development and therefore have different capabilities.³⁵ These principles recognise that some countries may fall behind in implementing regional agreements because of their existing socio-economic and political challenges, hence it gives poor members of the community more time to implement agreed trade and other commitments, and to advance integration at different paces and at different stages.³⁶

Nevertheless, Dirar further submits that to legal scholars, the realisation of integration depends on the legal design of the integration project and member states' compliance with it. Dirar observes that legal scholars are merely focused on understanding the status of community law at the domestic level of member states and its consistence with the laws of community and other international obligations.³⁷ Dirar concludes that this narrow approach of understanding integration in Africa is problematic because from Africa's viewpoint, integration is broader than law and therefore it may be important to rethink the idea of law as a 'freestanding enterprise in integration.'³⁸

However, Oppong submits that even if socio-economic and political challenges are successfully addressed, African economic integration agenda depends on how committed African leaders and member states take seriously their legal issues.³⁹ He

³⁴ Cited in Dirar at 9.

³⁵ Henry Kibet Mutai *Regional trade integration strategies under SADC and the EAC: A comparative analysis*, SADC Law Journal, Volume 1, 2011 at 83.

³⁶ Ibid.

³⁷ Cited in Dirar at 2.

³⁸ Ibid.

³⁹ Olabisi D. Akinkugbe Book Review *Journal of International Economic Law*, 2015, Legal Aspects of Economic Integration in Africa. By RICHARD FRIMPONG OPPONG, Cambridge: Cambridge University Press 2011 at 936.

submits that "... there is so much in the realm of law which, if unaddressed, will still hinder the success and effectiveness of economic integration in Africa."⁴⁰

For Oppong, one of the reasons why Africa's economic integration has been unsuccessful is the fact that "no legal framework currently exists in Africa to manage relations between the community and Member States legal systems on the one hand, and among the various communities and Member States legal systems on the other."⁴¹

The author supports the broader interpretation of Africa regional integration to include cooperation in many areas such as trade, management of borders, fighting terrorism, sharing information and technology. However, as observed by Oppong, law as part of the broader structure of integration, plays an important role in governing the relations between the different structures and in ensuring a ruled based system. Without such system to govern the relations between these different structures, it becomes difficult to uphold the rule based system. A system that is regulated by loose cooperation is vulnerable and open to abuse as members are not legally obliged to apply and implement regional agreements.

Hartzenberg submits that African regional integration agenda is characterised by poor implementation, missed deadlines, delays in the ratification and domestic incorporation of regional legal instruments and lack of enforcement mechanisms.⁴² Hartzenberg concludes that regional integration programmes and the regional institutions established to contribute to the implementation of these agreements, 'do not play a robust role as an external anchor or agency to ensure national compliance and domestic policy, legal and institutional development as may be required by the regional integration agreements.'⁴³

Oppong submits that 'true integration does not occur without a strong legal framework and an attendant legal system.'⁴⁴ Oppong notes that one of the striking features of African economic integration is the inactivity or non-existence of regional courts established under various regional economic integration treaties. He submits that they

⁴⁰ Ibid.

⁴¹ Akinkugbe at 936.

⁴² Cited in Hartzenberg at 18.

⁴³ Ibid.

⁴⁴ a Richard Frimpong Oppong *"Integration through law: an examination of the jurisprudence of regional economic integration judicial bodies in Africa"* *Monitoring Regional Integration in Southern Africa Yearbook Volume 7 (2007)* at t 203.

do not have settled cases or in most instances tackle issues not directly associated with economic integration processes.⁴⁵

In contrast, while Gathii acknowledges that the African Regional Trade Agreements (RTA) judicial bodies have decided insufficient number of dispute settlement cases related to trade, noting that in Africa there has been an increasing use of these judicial bodies without much acknowledgement in the academic literature.⁴⁶

For Kiplagat, the gradual approach adopted by developing countries cannot resist the political pressures of disintegration and is thus impracticable. Although the gradual approach has dominated regional integration study, developing countries can only achieve economic integration when they attempt progressive forms of integration.⁴⁷

It must be pointed out that Kiplagat's view does not consider the demands that economic integration imposes on poor countries and the difficulty that they may encounter in pursuing regional integration. For example, Wolff observed that the structural adjustment by the Bretton Woods institutions and particularly the loan conditionality by the World Bank on poor countries places enormous difficulties on these countries' already limited administrative resources to achieve economic integration.⁴⁸ For instance, when Bangladesh received credit from the World Bank in 2005, of the 53 conditions added to the loan, 18 required that Bangladesh privatise its banks, electricity, and telecommunications sectors despite the fact that half of its population lives below poverty line.⁴⁹ Furthermore, even though these conditions proved to be impractical and failed to address the challenge of poverty facing poor countries, the average amount of conditions imposed on poor countries increased remarkably between 2002 and 2005.⁵⁰

Therefore, while it is important to fast-track African regional integration and integrate Africa with the rest of the world, one must acknowledge the difficulties that advanced

⁴⁵ Ibid.

⁴⁶ James T. Gathii *The Under-Appreciated Jurisprudence of African Regional Trade Judiciaries*, 12 Or. Rev. Int'l L. 245 (2010) at 1.

⁴⁷ Cited in Kiplagat at 8.

⁴⁸ Mark J. Wolff: "*Failure Of The International Monetary Fund & World Bank To Achieve Integral Development: A Critical Historical Assessment Of Bretton Woods Institutions' Policies, Structures & Governance*" 2013 Syracuse Journal of International Law and Commerce Syracuse Journal of International Law and Commerce 41 Syracuse J. Int'l L. & Com. 71 at 10.

⁴⁹ Ibid.

⁵⁰ Ibid.

forms of integration have on the economy of poor countries, particularly the demand it places on administrative resources, the infrastructure and generally, its impact on socio-economic issues of these countries.

According to Kiplagat, the gradual approach decelerates implementation of regional agreements and equally theorises long-lasting investment and economic decisions, hence increasing risks and discouraging investment. Because the weak legal status of cooperation arrangements cannot assure foreign investors' doubts about the permanence of regional integration in developing countries, heavy regional investment will not occur in a systematic process.⁵¹

It is submitted that while the view that gradual approach does slow down implementation of regional agreements and projects may be correct, the step by step approach in the African context allows poorer countries more time to implement those agreed projects. Therefore, although such approach may slow down integration , in Africa it remains a motivating factor because even poor members of the community are valued and considered important members.

1.7 Status of African integration

Presently, politicians and African leaders are the main drivers of regional integration and all of them have embraced African integration. For instance, Olowu notes that the transformation of the Organisation of Africa Unity (OAU) to the African Union (AU) received massive support from all 53 African countries except for one. Olowu notes that this was a much-celebrated event but only among political elites.⁵²

1.8 Models of Regional Integration:

1.8.1 Economic integration

Biswaro notes that the earliest theoretical work on regional integration was found on Ricardo's theory of comparative advantage in international trade and in the interest of economists in promoting the reduction of tariff and non-tariff barriers to trade.⁵³ According to this theory trade is beneficial as it allows each country to specialise in

⁵¹ Cited in Kiplagat at 8.

⁵² Dejo Olowu: *"the African Union and The New Pan Africanism: Rushing to Organize or Timely Shift: Regional Integration, Development, and the African Union Agenda: Challenges, Gaps, and Opportunities"* Spring 2003, 13 *Transnat'l L. & Contemp. Probs* 2011 at 2.

⁵³ Biswaro op cit at 59.

those products in which it has a comparative advantage and import those goods for which they have a comparative disadvantage.

Lee submits that economic integration involves in linear sequence the creation of stage process of economic integration beginning with the formation of Preferential Trade Agreement (PTA) to formation of Economic Community.⁵⁴ Accordingly, this process includes the formation of a Free Trade Area (FTA) where tariffs are removed among Member States, and is followed by a Customs Union (CU) where the FTA remains in place and Member States impose a common external tariff against members who are not constituent to the FTA.⁵⁵ The formation of common market follows where the customs union remains in place along with the free flow of the factors of production.⁵⁶ Further, an economic union is introduced which consists of a common market along with the harmonisation of monetary and fiscal policies. Finally, the formation of total economic integration, which consists of a common market along with the unification of monetary and fiscal policies.

However, the theory of comparative advantage has been criticised and it has been argued that free trade argument lacks legitimacy in a globally integrated world because it does not assume capital mobility. For instance, Daly submits that:

“... free capital mobility totally undercuts Ricardo’s comparative theory argument for free trade goods because that argument is premised on capital (and other factors) being immobile across nations. Under the new globalised world, capital tends to flow, moving to wherever returns are high as compared to risks, in that way pursuing absolute advantage.”⁵⁷

In addition, Ha-Joon Chang submits that:

“The principle has been used by developed industrialised countries to ensure that underdeveloped nations continue to specialise in agricultural production, instead of developing their own manufacturing industries which would make them competitive with industrialised countries” The industrialised nations prefer free ‘trade’ between

⁵⁴ Lee op cit at 4.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Cited in Biswaro at 59.

countries, to maintain the underdeveloped world's pattern of dependency on developed countries."⁵⁸

One of the biggest criticisms of this theory is that the conditions under article XXIV do not consider the effect of the establishment of a customs union or free trade area on the distribution of world resources.⁵⁹ In addition, because Africa's developing countries lack the necessary prerequisites for trade creation, regional integration is likely to have immaterial impact on the trade system and its design in Africa.⁶⁰ Regional integration has failed in Africa because intra-African trade between African countries occurs at a lower scale and therefore under the current conditions the theory is impractical and harmful for African integration process.⁶¹

Viner observed that "regional economic integration would lead to either trade creation or trade diversion."⁶² He argued that by reducing barriers to trade, customs unions and free trade areas could result in expensive domestic products in a member state being substituted by a much more efficient producer at lower-cost imports from another member country. However, he also contended that such could result in lower cost imports being substituted by higher priced imports by an inefficient producer of a member of such customs union and leading to trade 'diversion', if the most efficient producer of that product is not a member of customs union⁶³. While economic integration can help reduce poverty and has been credited for much reduction of poverty in the world in countries such as China, India, and Brazil, it can also have devastating effects on the national economy of a country which could result in job losses and huge income losses.⁶⁴

Furthermore, this theory fails to consider the lack of efficient administrative systems and infrastructural facilities as important elements of a successful economic integration, particularly the cost involved in pursuing market-led integration. For instance, Bisworo submits that with the world advancing in technology and with

⁵⁸ Cited in Bisworo at 60.

⁵⁹ Henry Kibet Mutai: "*Regionalism, Multilateralism and Free Trade – Theoretical Perspectives*", *Compliance with International Trade Obligations The Common Market for Eastern and Southern Africa* (Kluwer Law International, 2007) pp 29 – 54, book by Henry Kibet Mutai chapter 2 at 36.

⁶⁰ Ibid.

⁶¹ Ibid at 37.

⁶² Cited in Bisworo op cit at 60-61.

⁶³ Ibid.

⁶⁴ For example, Bisworo observes that economic integration was a cause of the 1997/1998 Asian economic crisis and it is the main cause of the current global financial crisis.

barriers being lowered, it has been difficult for governments to monitor and to control border problems such as terrorism, human trafficking, money laundering and other challenges.⁶⁵

This theory totally ignores the fact that tariffs are not the only barriers to trade. For instance, Elbeshbishi submits that even though tariffs have been substantially reduced across the world, complying with customs formalities has been a challenge. This Author observes that customs procedure and administration in Africa is characterised by excessive documentary requirements, outdated procedures, lack of automation and insignificant use of information technology, lack of transparency, predictability, and consistency, as well as lack of cooperation with other government agencies.⁶⁶ Delays at the customs are very common in the region. This approach is clearly unsuitable and out of touch with African realities.⁶⁷

1.8.2 Political integration

Saurombe submits that this model requires members to cooperate with one another and to have similar issues and challenges which lead to a sharing of resources and interests.⁶⁸ For Biswaro, regional cooperation does not necessarily require members to cede some of their sovereignty to the central institutions. It is aimed at ensuring that there is a peaceful co-existence, friendship and solidarity and respect for national borders and national sovereignty.⁶⁹ Saurombe submits that political integration implies that state-led projects of cooperation that emerge are the result of diplomatic interacting.⁷⁰ He submits further that in the international arena, the members can galvanise each other and form one interest group in the form of a coalition to take a joint stand against the rest of the world.⁷¹ Regional cooperation may help describe steps along the way to regional integration.⁷²

This theory informed the establishment of the OAU and its governing principles of sovereignty and non-interference and respect for national borders. In general, most

⁶⁵ Ibid.

⁶⁶ Cited in Elbeshbishi at 10.

⁶⁷ Ibid.

⁶⁸ A. Saurombe *“Regionalisation through Economic Integration in the Southern African Development Community SADC”* (published PhD thesis, North West University, November 2011) at 31.

⁶⁹ Cited in Biswaro at 72.

⁷⁰ Saurombe op cit note 66 at at 31.

⁷¹ Ibid at 32.

⁷² Ibid.

African states had just gained independence and greater number of African governments were very protective of their sovereignty. Therefore, OAU was formed as a loose cooperation aimed at decolonising the African continent. Saurombe submits that regional cooperation needs to be supported by a proper legal system.⁷³

1.8.3 Development integration

This theory is defined as a ‘combination of market integration, with its focus on the removal of tariff and non-tariff barriers to trade, and the production integration which focuses on cooperation in the planning and implementing of productive activities.’⁷⁴ This model was developed as an alternative approach to the limitations of economic integration. According to this theory, the objectives of regional co-operation and integration for poor countries are not to be found in “marginal change and economic efficiency”⁷⁵ but in the transfer of economic resources and increased production volume, increased investment, and trade. Accordingly, the market does not dictate scope of co-operation or the sector.⁷⁶ Saurombe submits that in order to achieve the specified goals, this theory acknowledges the importance of creating supranational institutions.⁷⁷

Lee observes that development integration requires more state intervention than market integration.⁷⁸ Accordingly states must not seem to promote integration but must make a political commitment to integration, since such commitment is the basis for cooperation.⁷⁹ Lee submits that it is anticipated that this will help member states work towards implementing policies that will help with problems created as a result of unequal benefits.⁸⁰ With a view to providing a remedy for the unequal distribution of benefits, policies that are of a compensatory and corrective nature are to be implemented. For instance, Southern African Customs Union (SACU) is engaged in both non-financial and financial redistribution.⁸¹ Non-financial redistributive programmes include the allocation of important industries to disadvantaged member

⁷³ Ibid at 42.

⁷⁴ Mutai op cit note 57 at 37.

⁷⁵ Cited in Biswaro at 89.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Lee op cit at 4.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ James Thuo Gathii *African Regional Trade Agreements as flexible legal regimes*, North Carolina Journal of International Law & Commercial Regulation, 35 N.C.J. Inte'l & Com. Reg 571 Spring 2010 at 11.

countries in order to counter the tendency of investors to move towards those already well established industrial countries such as South Africa.⁸²

According to Gathii, these measures aimed at equalising benefits and allocation of industries, undermine the purpose of integration under a market based model of free competition among the most efficient producers.⁸³ A study of East African Community and SACU reveal that compensatory mechanisms are sometimes ineffective and countries being compensated still fail to attract investment.⁸⁴ These challenges can be attributed to the problem of implementation. Although designed to correct the problems of market integration, development integration has proven more difficult to implement than market integration.⁸⁵

1.8.4 Neo Functionalism

Haas developed what is now known as 'neo-functionalism' and believed that modern democratic states need sound management of the economy and centralised institutions. Haas theory was concerned with civil society and political organisations promoting their economic interests.⁸⁶ He believed that the decision to integrate economically would create economic and political spill overs unintended or unwanted consequences of earlier decisions which are the major force driving regional integration further forward.⁸⁷ Steps towards integration at any given time tend to generate unexpected pressures for further integration which he referred as 'spill overs.' This theory argues that decisions in favour of integration cannot be explained as responses to external shocks and trends as such but instead grow or originate within prior integration.⁸⁸

According to Biswaro, the theory encourages cooperation and aims to convince national leaders to cede some of their sovereignty to the benefit of regional integration.⁸⁹ Furthermore, it presumes that there is a strong civil society and that although civil society organisations may have a different agenda, they recognise

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Mutai op cit note 57 at 36-37

⁸⁵ Saurombe op cit note 66 at 42.

⁸⁶ Cited in Biswaro at 76.

⁸⁷ Andrew Moravcsik "The European Constitutional Compromise and the neofunctionalist legacy" *Journal of European Public Policy* 12:2 April 2005: 349–386 at 352.

⁸⁸ Ibid.

⁸⁹ Cited in Biswaro at 76.

cooperation as the only way which could accelerate regional integration.⁹⁰ In other words, this theory assumes that the economy is driven by technicians, planners, industrialists, and trade union movements and not politicians. Proponents of this theory are of the view that people working for the supranational institutions will develop loyalty to the regional organisation. This theory has lost its relevance and Haas himself acknowledged that neo-functionalism assumptions were wrong and that there are not only spill overs but also spillbacks.⁹¹

Furthermore, even though there are those who are enthusiastic about deeper integration, there are also those who are opposed to such integration. For instance, Biswaro observes that in Africa there are age-old diverging views between the extremists and the moderates about the formation of an African government.⁹² He submits that the issue which has been hindering the process is the principle of non-interference.⁹³ He further submits that the neo-functionalists assume that economic and other social issues are far more important than long established concerns such as national security and interstate rivalry.⁹⁴ Moreover, neo-functionalism ignores state power and the important role it plays in decision making and fails to acknowledge that decisions are taken by politicians.⁹⁵

For Welz, lack of resources and financial support to engage deeper into regional agreements may discourage members, especially countries suffering from post-conflict trauma. For such countries, domestic policies aimed at recovery are far more important than regional integration policies.⁹⁶

As demonstrated, these models of integration are western led models that are suitable for European integration hence they have failed to address the unique challenges that confront Africa, especially the challenge of poverty and inequality across the continent. Therefore, their appropriateness should be reviewed and a contextualised model of

⁹⁰ Ibid.

⁹¹ Tom Ostergaard: *Classical Models of Regional Integration-what Relevance for Southern Africa? Bertil Oden (ed) Southern Africa After Apartheid, Regional Integration and External resources (1993) at 41.*

⁹² Cited in Biswaro at 77.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Martin Welz: *A Culture Of Conservatism: "How And Why African Union Member States Obstruct The Deepening Of The Integration"* Strategic Review For Southern Africa, Vol 36, No1 at 14.

African integration be developed with a view to promoting the development and wellbeing of ordinary African citizens.

1.9 Benefits of Regional Integration

Economic integration has been credited for much of the reduction in world poverty and it is believed that free trade can help reduce poverty. According to Biswaro there is evidence that countries that have embraced free trade have successfully managed to reduce their poverty levels.⁹⁷ The speedy economic growth of Asian countries has significantly reduced poverty in countries such as China, India, and Thailand.⁹⁸

Udombana submits that in Africa, economic integration is viewed as a means to promote the economic and social development of the continent.⁹⁹ Furthermore, it provides an opportunity for Africa to participate in the world economy.¹⁰⁰ Integration also promotes development on a 'complementary and sustained basis'¹⁰¹ of the member countries. This is done through the strengthening of existing infrastructure, the development of an efficient payment mechanism, greater access to credit, greater awareness of each other's products etc.¹⁰²

Likewise, Mutai observe that the motives for pursuing regional integration is the desire to achieve economies of scale connected to a larger market size. However, he submits that this could be achieved through a multilateral trading system and an open domestic economy.¹⁰³ According to Mutai, for developing countries, regional integration provides an opportunity for these countries to overcome their small economic size as it allows them to pool their limited economic resources together.¹⁰⁴ Regional integration can fast track in facilitating members to multilateralism, it can provide a more efficient way of negotiating agreements and can enable the majority in the community to put pressure on non-cooperative members to comply with trade rules.¹⁰⁵

⁹⁷ Cited in Biswaro at 20.

⁹⁸ Ibid.

⁹⁹ Nsongurua J Udombana: *"A Harmony or cacophony? The Music of the integration in the African union treaty and the new partnership for Africa's development"* (2002) 13 Ind. Int'l & Comp. L. Rev. 185 at 188.

¹⁰⁰ Ibid.

¹⁰¹ Ibid at 189.

¹⁰² Ibid.

¹⁰³ Mutai op cit note 57 at 38.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at 46.

In addition, free trade results in goods and services being sold to the public at cheaper prices and attributes this to the fact that there are no tariffs added to the products.¹⁰⁶ Countries belonging to RECs have access to large markets, such as EU and USA. In addition, they also enjoy preferences such as the Generalised System of Preferences or the United States of America's African Growth and Opportunity Act (AGOA).¹⁰⁷ In the Southern African region alone, AGOA has been the major factor in poverty reduction when one considers the benefits members to this agreement enjoy.¹⁰⁸

Cited in Mwasha Park and Park argue that economic integration can also serve as a motivation for investment and the attraction of foreign direct investment (FDI). General improvements such as stabilisation, market liberalisation, and privatisation adopted under regional arrangements can increase revenues to all factors and at best, can increase private investment.¹⁰⁹

Saurombe also notes that regional agreements can help address specific logistical issues such as "border controls, transit, migration and movement of labour."¹¹⁰ He submits that countries understand that these barriers can equally distort trade same as with tariffs and therefore, regional agreements deal with these issues which are best addressed at regional level.¹¹¹ Regional economic integration can serve a useful economic purpose beyond the direct gains from trade liberalisation, by reducing uncertainties and improving credibility and thus making it easier for the private sector to plan and invest.¹¹²

Muthai observes that integration and economic interdependence promote political cooperation in various ways. It provides a more efficient and friendly method to acquire benefits and resources.¹¹³ According to Biswano, integration helps to strengthen good governance and he submits that poor governance has been the major factor in the dismal economic growth of many countries in the world. He submits that integration

¹⁰⁶ Saurombe op cit note 66 at 43.

¹⁰⁷ Ibid at 44.

¹⁰⁸ Ibid.

¹⁰⁹ Ombeni N. Mwasha "The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC)" Korea Review of International Studies at 75.

¹¹⁰ Saurombe op cit note 66 at 45.

¹¹¹ Ibid.

¹¹² Cited in Ombeni N. Mwasha at 74-75.

¹¹³ Muthai op cit note 57 at 50.

places emphasis on good governance because the rapidly competitive global marketplace does not accommodate corruption, which adds to business costs.¹¹⁴

However, those who are opposed to integration often argue that it is used to exploit poor people in the developing world. Biswaro notes that the critics contend that because the poor do not have the means of production, it only benefits those who have resources and the poor are side-lined¹¹⁵. They conclude that integration is the main reason for the income inequalities in the world.¹¹⁶

Wolff observes that strict loan conditions by the World Bank are generally aimed at cutting budget on socio-economic issues and rather, redirecting the funds towards market liberalisation to cover the lost revenues that is a direct result of lowering export barriers.¹¹⁷ The consequences of these conditions are lower salaries, impoverishment for Africans, and cheaper raw materials for multinational companies.¹¹⁸

According to Mwasha, disproportionate distribution of benefits among members leads to the exploitation of economically weaker countries and thus these smaller countries are left behind which results in these countries withdrawing from the economic trade union.¹¹⁹

Biswaro argues that “integration only provides job security to the portion of society which has the skills and mobility to utilise the opportunities afforded by global markets, whereas at the same time unskilled workers are left out due to labour intensive imports from minimum wage countries or imports manipulated overseas by multinational corporations to reduce costs.”¹²⁰

1.10 Conclusion

The theoretical discussions of African regional integration are embedded in the economic understanding of regionalism without giving much attention to the unique nature of Africa. The economic model of integration understates the importance of strong institutional and legal frameworks and a human centred development.

¹¹⁴ Cited in Biswaro 20.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 21-22.

¹¹⁷ Cited in Wolff at 10.

¹¹⁸ Ibid.

¹¹⁹ Ombeni N. Mwasha op cit at 76-77.

¹²⁰ Cited in Biswaro at 21-22.

Therefore, the endorsement of economic integration policies without questioning their appropriateness for Africa is baffling. Even though this model has proven to be detrimental to the African continent and its people, this model is still viewed as the suitable approach for African regional integration.

The failure of most regional arrangements that follow the economic model necessitates that an investigation be conducted on the appropriateness of this model and a new approach be developed. Such a model should reflect African realities and be governed by the rule of law.

As shown above, the motives for joining regional integration groupings vary and depends on each country or region. While there are benefits associated with economic integration such as the reduction of poverty and development in some countries of the world, for Africa such benefits are yet to be seen. African countries continue to witness increasing levels of poverty and poor development while foreign businesses and multinational companies remain the main beneficiaries of the economic integration model.

CHAPTER 2

African Regional Integration: Legal and Institutional Framework

2.1. INTRODUCTION:

With the transformation of the OAU to AU, there was joy in Africa and beyond that finally Africa would move towards peace, stability, and socio-economic development.¹²¹ In strengthening the African integration process, the AU has made progress in reinforcing institutional development and has adopted a number of non-binding initiatives such as Pan African Parliament (PAP), New Partnership for African Development (NEPAD) and African Peer Review Mechanism (APRM) to promote *inter alia*, regional integration; good governance; rule of law; improve Africa's trade; participate in the global economy; and eradicate poverty while improving living conditions.¹²²

The adoption of these non-binding initiatives by the AU are informed by the understanding that institutions are an important aspect of development and that institutions play an important role in providing the right frameworks for regional integration. For instance, cited in Fagbayibo, Rodrick, Subramanian, and Trebbi's view that "the quality of institutions trumps everything else"¹²³ should inform the foundational basis of the institution building process in Africa. The movement towards institutionalism is centered around the Eurocentric understanding that strong institutions result in higher efficiency and qualitative output.¹²⁴ However, African leaders ignore the fact that strong legal systems supported European institutions.¹²⁵

Formal institutions in Africa have been met with skepticism and resistance. For instance, Fagbayibo observes that the operational processes of the AU have been mainly intergovernmental.¹²⁶ According to Fagbayibo, member countries, through the

¹²¹ See Welz at 6- this was informed by article 4 (h) of the AU Constitutive Act which allows AU to intervene in member countries in cases of war crimes, genocide and crimes against humanity in order to restore peace and stability.

¹²² See the preamble and objectives of the respective initiatives.

¹²³ Babatunde Fagbayibo: "*Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union*" 2011 36 SAYIL at 209.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Babatunde Fagbayibo (2013) *Looking back, thinking forward: understanding the feasibility of normative supranationalism in the African Union*, South African Journal of International Affairs, 20:3 411-426, DOI 10.1080/10220461.2013.841801 link : <http://dx.doi.org/10.1080/10220461.2013.841801> at 414.

AU Assembly, continue to be leading role players in the decision- making processes of the body.¹²⁷ As such, the institutions mandated to exercise supranational powers over member states are yet to be given legislative powers.

Fagbayibo opines that the AU Assembly has displayed little commitment in exercising the political will for supranationalism to thrive.¹²⁸ This is demonstrated in the assembly's refusal to cede partial or full legislative powers to the Pan African Parliament (PAP), the failure to practically transform the African Union Commission (AUC), to create a framework for harmonisation of RECs, or to make African Peer Review Mechanism (APRM) process compulsory, as well as in the delayed operationalisation of the African Court of Justice and Human Rights (ACJ&HR).¹²⁹

Olivier observes that the merger of the African Court of Justice (ACJ) with the African Court on Human and People's Rights to form one single court, namely, African Court of Justice and Human Rights (ACJ&HR) is not in force yet. As of February 2015, only 30 countries had signed the protocol and only five had ratified the protocol establishing the court.¹³⁰ Olivier submits that the refusal to ratify the protocol is an indication of African leaders' hesitancy to achieve strong human rights enforcement by supranational institutions that might overstep on their sovereignty.

Olivier notes that in the EU, the European Court of Justice (ECJ) expanded its case law approving the direct effect as a permanent feature of EU law.¹³¹ The Organisation of African Unity (OAU) is silent on the issue of community law and its application in relation to national laws but only calls for member states to harmonise their national policies in order to attain their stated goals as provided under OAU.¹³² With the OAU principles of non-interference, territorial integrity and sovereignty, the charter ensures that no community law or supranational law applies to national laws of member countries.¹³³

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Olivier, Michèle E. "The role of African Union law in integrating Africa." *South African Journal of International Affairs* 22.4 (2015): 513-533 at 524. To link to this article: <http://dx.doi.org/10.1080/10220461.2015.1119718>

¹³¹ Ibid.

¹³² Ibid at 518.

¹³³ Ibid.

African leaders remain hesitant in granting supranational status to central institutions and this is not only directly linked to the deep-rooted principle of state sovereignty that govern African affairs but also in most African countries, power is concentrated in a few powerful government officials. While it is important to acknowledge, and appreciate the minimum role that has been played by these different institutions under the difficult circumstances, they have been unable to promote African regional integration. Under such circumstances, their capacity is extremely limited. In other words, the decision making remains the prerogative of Heads of States.

2.2 From Organisation of African Unity to African Union

Extreme mismanagement of the economies, high levels of political and bureaucratic corruption, political turmoil, and poor economic performance were some of the challenges confronted by Africa throughout mid-to-late twentieth century.¹³⁴

Nevertheless, African leaders have always embraced integration and have perceived it as a means of addressing Africa's problems. For instance, African leaders such as Nkrumah and Nyerere called for unity among Africans in the fight against colonialism. Nkrumah believed that political integration was important and a necessity for Africa's development. He argued that "African Unity, is above all, a political kingdom which can be gained by political means. The social and economic development of Africa will come only within the political kingdom, not the other way around."¹³⁵

Nkrumah asserted that integration was not confined to the liberation of African people but also meant being able to attract foreign direct investment and peaceful co-existence.¹³⁶ According to him, unity was a necessity based on cooperation in defence, foreign affairs, diplomacy, common citizenships and African economic and monetary union.¹³⁷ He rejected Nyerere's theory to integration, calling it "balkanisation that is susceptible to the promotion of neo-colonial agenda."¹³⁸ He argued that Nyerere's call for gradual integration ignored the link and complexity of problems facing African countries. In contrast, Nyerere believed that as the liberation of Africa is a gradual

¹³⁴ John Mukum Mbaku: "Providing A Foundation For Wealth Creation And Development In Africa: The Role Of The Rule Of Law" 2013 Brooklyn Journal of International Law, 38 Brooklyn J. Int'l L. 959 at 2.

¹³⁵ Cited in Dirar at 3.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

process, so is unity.¹³⁹ Following independence, coups and political conflicts confronted the continent. The assassinations and overthrow of African leaders who were regarded as 'hostile to the vested economic and strategic interest'¹⁴⁰ of the former colonial powers was common.

Murithi observes that after independence, African leaders gave little support to the doctrine of Pan-Africanism.¹⁴¹ Under the guise of sovereignty, non-intervention and territorial integrity most African leaders, majority of whom were dictators, committed human rights violations against their own people.¹⁴² For instance, Murithi observes that the Rwandan genocide occurred under the leadership of the OAU.¹⁴³

Mbaku observes that after independence, corruption and rent seeking had become prevalent in nearly all African countries.¹⁴⁴ Mbaku submits that independence provided an opportunity for ruling political elites to undermine national laws to enrich themselves at the expense of their people.¹⁴⁵ Because these political leaders viewed decolonisation and independence as an opportunity for them to capture the structures of colonial power, and use them to redistribute income and wealth in their favour, they failed to transform the former colonialist structures in crucial areas and promote democratic constitution-making either in the pre- or post-independence period.¹⁴⁶ Mbaku attributes this political background to the fact that the legal and institutional frameworks that developed in these countries after independence were unable to sufficiently restrain the government, allowing the ruling elites to act with impunity.¹⁴⁷

Matlosa observes that former Ugandan leader Idi Amin was one of the most brutal and autocratic governments in Africa and committed atrocities not only to his own people.¹⁴⁸ This ranged from arbitrary killings to extreme human rights violations. Matlosa observes that the OAU, adhering to the principles of sovereignty and non-

¹³⁹ Ibid.

¹⁴⁰ Ibid at 34.

¹⁴¹ Murithi op cit at 3.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Mbaku op cit at 6.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Khabele Matlosa " *Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance: What Does the Future Hold?*" Occasional Paper No 190 The South African Institute of International Affairs (SAIIA) June 2014 at 8.

interference, failed to intervene, and in so doing allowed impunity free rein in Uganda. This situation was further worsened when Amin became the Chairperson of the OAU.¹⁴⁹ According to Matlosa this was the most clear demonstration of the OAU's disregard for human rights abuses by its member countries, protected under the guise of non-interference in national matters.¹⁵⁰

Aka credits the prevailing condition at that time to the failure of political elites to transform their countries in accordance with the democratic wishes of their political groups after gaining independence.¹⁵¹ These leaders opted to inherit the former colonial structures and systems without transforming them to reflect the change to independence. Eventually, these leaders lost the popular support of their disgruntled followers and became cruel. Thus, deeds committed by African leaders to remain in power hindered the development of Africa.¹⁵²

According to Aka, African leaders opted to retain and strengthen their political power over economic development thereby neglecting development, which led them to embrace dependent development and external aid, while they were insincerely committed to development.¹⁵³ Aka submits that in relinquishing policy direction to others and permitting outsiders to design and oversee development, African leaders disregarded their role in development.¹⁵⁴

Africa was a continent facing a variety of challenges, especially political turmoil that resulted in assassinations of African leaders by the west and human rights violations by African leaders against their own people. This resulted in economic development being sacrificed. The biggest achievement of the OAU remains the successful decolonisation of the entire African continent and the dismantling of the apartheid system. Nevertheless, the OAU has failed to promote economic development and eradicate poverty.

2.3 Background to the African Union

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Phillip C. Aka: "NEPAD and The Movement For Popular Participation In Development (MPPD) In Africa Human Rights & Globalization Law Review 3 Hum. Rts. & Global. L. Rev. 79 Fall, 2009/ Spring, 2010 at 6.

¹⁵² Ibid.

¹⁵³ Ibid at 7.

¹⁵⁴ Ibid at 7.

The decision to transform OAU to AU was applauded and was hailed as the beginning of a new era for Africa. The AU launch received enormous support from almost all African leaders and was a widely-celebrated ceremony among bureaucracies in Africa and beyond.¹⁵⁵ The AU was formally launched in 2002 in Durban, South Africa. The OAU was considered inadequate to address the 21st century challenges facing the continent.¹⁵⁶ According to the former president of South Africa, Thabo Mbeki, “the Constitutive Act establishing the AU is the supreme law of the continent that has been approved by all our parliaments and it is for the parliament of the African people to meet the challenges facing Africa today.”¹⁵⁷

2.4 AU Legal and Institutional Framework

2.4.1 African Constitutive Act

In terms of the AU Constitutive Act, African leaders and their governments committed themselves to ‘promote and protect human and peoples’ rights, ‘consolidate democratic institutions and ensure good governance and rule of law’.¹⁵⁸ The Constitutive Act is the supreme law of the AU.¹⁵⁹ The objectives of the AU are found in article 3 and include, among others, ‘the achievement of greater unity and solidarity between the African countries and the peoples of Africa;’¹⁶⁰ ‘the political and socio-economic integration of the continent,’¹⁶¹ ‘peace, security, and stability on the continent,’¹⁶² democratic principles and institutions, popular participation and good governance,¹⁶³ human rights and people’s rights,¹⁶⁴ to play a role in global economy and international negotiations.’¹⁶⁵

The Act further sets the goals of ‘sustainable development at the economic, social and cultural levels, as well as integration of African economies,’¹⁶⁶ ‘cooperating in all fields

¹⁵⁵ Cited in Olowu op. cit. at 2.

¹⁵⁶ Saurombe op cit note 9 at 293.

¹⁵⁷ Ibid at 296.

¹⁵⁸ AU Constitutive Act Preamble

¹⁵⁹ Saurombe op cit note 9 at 296.

¹⁶⁰ Article 3 (a).

¹⁶¹ Article 3 (c).

¹⁶² Article 3 (f).

¹⁶³ Article 3 (g).

¹⁶⁴ Article 3 (h).

¹⁶⁵ Article 3 (i).

¹⁶⁶ Article 3 (j).

of human activities to raise living standards of African peoples'¹⁶⁷ and the 'harmonisation between existing and future regional economic communities for the gradual attainment of the objectives of the African Union.'¹⁶⁸

The principles governing the AU are the participation of the African people in the activities of the African union, the right of the union to intervene in cases of political instability and restore peace, respect for democratic principles, human rights, the rule of law and good governance, and social justice to ensure economic development.¹⁶⁹

The Act further condemns and rejects unconstitutional change of governments.¹⁷⁰ Notably, article 4 (h) of the AU Constitutive Act allows the AU to intervene in Member States in cases of political instability to restore peace and stability in countries involved in conflicts. Nevertheless, Fagbayibo observe that this provision is not without its problems. This author notes that there are a number of challenges that persist and hamper the effectiveness of the intervention processes such as inadequate operational capacity.¹⁷¹ For example, he opines that even when clear violations occur, the AU has limited budget and insufficient human capacity for the speedy and sustainable deployment to deal with such hostility or warfare¹⁷²

2.4.2 The African Union Assembly

In terms of article 6 (1), the AU Assembly is composed of heads of Heads of State and government. It is authorised to take several decisions. In terms of Article 6(2) of the Constitutive Act, the Assembly is the supreme body of the AU. Olivier submits that despite the lack of clarity on the meaning of 'supreme organ', it may be inferred that it enjoys the highest position in the hierarchy of AU organs or that its decisions cannot be challenged by any other organs including the Court of Justice.¹⁷³ AU Assembly determines and monitors the policies of the Union and ensures their implementation by the Member States, considers and decides on reports and recommendations from

¹⁶⁷ Article 3 (k).

¹⁶⁸ Article 3 (l).

¹⁶⁹ Article 4.

¹⁷⁰ Article 4 (p).

¹⁷¹ Fagbayibo op cit note 124 at 415.

¹⁷² Ibid.

¹⁷³ Cited in Olivier at 519.

other organs, considers requests for membership and establishes any organ of the Union.¹⁷⁴

Moreover, any failure to comply with decisions or policies of the AU Assembly may be dealt with by sanctions and such sanctions are regarded as binding on member states.¹⁷⁵ Furthermore, a failure to pay or make financial contribution to the AU may be dealt with by a denial of the right to speak at meetings or to vote or to elect a candidate for a position.¹⁷⁶ In addition, in terms of article 30, unconstitutional change of government or governments who came through coups may be suspended or denied a right to participate in AU activities. For instance, the AU has previously suspended Central African Republic, Egypt, Madagascar, and Mali after coups in these countries.

More recently, the AU took a stand against one of the leading pioneers of African integration agenda, the late Libyan leader Gaddafi and condemned his government.¹⁷⁷ Nevertheless, AU's approach on the Zimbabwean government showed some inconsistencies as it failed to address the Zimbabwe crisis decisively and followed a different approach when confronted with Zimbabwe.¹⁷⁸

2.4.3 Criticism of the AU

The AU and its leadership have failed to include the African people or to gain popular support for regional integration.¹⁷⁹ Furthermore, questions have been raised about the capacity of the AU to "meet the economic effects of its policy objectives,"¹⁸⁰ since most of the objectives are seen by some critics as being the representation of the western agenda to maintain their advantages in global trade.¹⁸¹ Additionally, the AU has neglected to give clarity on the status of some of the subsisting organs of the discontinued OAU such as the African Court on Human and Peoples' Rights.¹⁸²

Welz submits that even though the AU has managed to address some of the challenges facing the organisation, it cannot be expected that these challenges can

¹⁷⁴ Udombana NJ *"The institutional structure of the African Union: A legal analysis"* 33 California Western International Law Journal (2002) at 8-11. See also Article 9.

¹⁷⁵ Article 23 (2).

¹⁷⁶ Article 23 (1).

¹⁷⁷ Welz op cit at 6.

¹⁷⁸ Ibid.

¹⁷⁹ Cited in Olowu at 2.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

be addressed within a year or even years, as most of the challenges are structural and will take many years to address.¹⁸³ He concludes that the AU standard of success must be judged on the approach and the attitude the AU takes in dealing with these challenges and not the outcome of its policies.¹⁸⁴

Nevertheless, it remains doubtful whether the AU can address the 21st century challenges facing the African continent, especially the rising inequality and poverty that threatens the well-being of ordinary Africans, since the AU politicises policies that seek to address these challenges.

The AU has been unable to deal with the political instabilities, human rights violations, and lack of respect for the rule of law in Africa since these challenges continue to torment the continent. Judging from the previous experiences with the AU, the AU has been inconsistent and selective in dealing with continental issues. This affects the credibility of the AU and raises questions about its commitment to rule of law.

2.4.4 African Economic Community Treaty (AEC Treaty) and RECs

Regional economic communities (RECs) are intergovernmental organisations established by groups of states to promote economic relations and cooperation.¹⁸⁵ The objective of the African AEC Treaty is to strengthen the existing RECs, promote harmonisation and coordination of policies and activities of RECs with a view to creating a single African Economic Community.¹⁸⁶ While the RECs are not a new phenomenon in Africa, they began to take shape with the adoption of the Lagos Plan of Action (LPA) of 1980 and the Final Act of Lagos (FLA). The plan called for member states to strengthen the existing RECs and establish in the future, an African Economic Community (AEC).¹⁸⁷

The AEC Treaty set in motion a gradual process that would be achieved through coordination, harmonisation and progressive integration through a 34-year period in six defined stages.¹⁸⁸ The AEC uses eight recognised REC as the building blocks for

¹⁸³ Cited in Welz at 7.

¹⁸⁴ Ibid.

¹⁸⁵ Cited in Tavares and Tang at 221.

¹⁸⁶ Article 3 (a) and (b).

¹⁸⁷ Cited in Tavares and Tang at 221.

¹⁸⁸ Stage 1: Strengthening existing RECs and creating new ones where needed (5 years);

the attainment of African Economic Community.¹⁸⁹ The final goal is to achieve an economic community by 2028 and with 53 countries it will be the largest economic community in the world.¹⁹⁰ The community aims to integrate national markets and cooperate in production. Member states also pledge themselves to cooperate with each other in social, political, and economic issues.¹⁹¹

The Objectives of the AEC are the harmonisation of national policies, particularly in the fields of trade, currency and finance, the adoption of a common trade policy regarding third-party states; the establishment and maintenance of a common external tariff; the establishment of a common market; the gradual removal of obstacles among member states, to the free movement of persons, goods, services, capital and other factors.¹⁹²

The major challenges confronting the RECs is the lack of an enforcement mechanism and missed deadlines. This situation is further worsened by multiple membership within the RECs which makes it difficult for them to attain their regional economic integration objectives.¹⁹³ To address these challenges, a protocol on the Relationship between the AEC and REC was signed in 1998 with a view to harmonising these contradictory policies. It aimed to bring the RECs under the supervision of the AEC.¹⁹⁴ The protocol will also serve as an efficient instrument and framework for close cooperation, program harmonisation and coordination of RECs.¹⁹⁵ The stated goals of the protocol are the formalisation, consolidation, and promotion of closer cooperation

Stage 2: Stabilisation of tariff and other barriers to regional trade and the strengthening of sectoral integration, particularly in the field of trade, agriculture, finance, transport and communication, industry and energy, as well as coordination and harmonisation of the activities of the RECs (8 years);

Stage 3: Establishment of a free trade area and a Customs Union at the level of each REC (10 years);

Stage 4: Coordination and harmonisation of tariff and non-tariff systems among RECs, with a view to establishing a Continental Customs Union (2 years);

Stage 5: Establishment of an African Common Market and the adoption of common policies (4 years); and

Stage 6: Integration of all sectors, establishment of an African Central Bank and a single African currency, setting up of an African Economic and Monetary Union and creating and electing the first Pan-African Parliament (5 years).

¹⁸⁹ Cited in Tavares and Tang at 222.

¹⁹⁰ Cited in Saurombe note 9 at 298.

¹⁹¹ Ibid.

¹⁹² Article 4 (2) (e) of the AEC Treaty.

¹⁹³ Saurombe op cit note 9 at 303.

¹⁹⁴ Ibid at 300.

¹⁹⁵ Ibid.

between the RECs and the African Union. It also aims to coordinate the projects of the Constitutive Act and the AEC treaty.¹⁹⁶

Oppong observes that even though RECs are regarded as building blocks of the AEC, they are not parties in the AEC Treaty.¹⁹⁷ Consequently, decisions of the AEC do not bind RECs and only the member countries that are parties to the AEC treaty are obliged to comply with decisions of the AEC.¹⁹⁸ The RECs enjoy their own legal status separately from member states.¹⁹⁹ In other words, member countries cannot sign international treaties or agreements with a view to bind the RECs they belong to. Similarly, the protocol does not have a binding obligation on the RECs.²⁰⁰

Therefore, the status of RECs within the AEC is not clear and their future after the establishment of the AEC is also uncertain.²⁰¹ Oppong recommends the negotiation of a merger protocol to tackle, among other things, issues concerning the legal status of the RECs after the establishment of the AEC; the assets and liabilities of the RECs after the merger; whether the merger is compulsory or voluntary and when the merger is to occur, namely, whether it will take place simultaneously for all RECs or incrementally after each REC attains the needed stage of integration; the status of their personnel and status of active RECs such as SACU which are not recognised as building blocks.²⁰² For Oppong, it was expected that the treaty would address these issues after the establishment of the AEC since the RECs were already in existence before the AEC treaty.²⁰³

Additionally, with the establishment of a Continental Free Trade Area (CFTA) now at an advanced stage and the formation of the AEC seemingly difficult to achieve, it is important to reconsider the issue of the status of the RECs in case the CFTA is fully realised.²⁰⁴ Importantly, such deliberations should clarify the status of RECs after the creation of the CFTA, in particular, whether the RECs will need to be halted or proceed

¹⁹⁶ Article 3 (a) of the AEC Treaty.

¹⁹⁷ Richard Frimpong Oppong *'The African Union, The African Economic Community And Africa's Regional Economic Communities: Untangling A Complex Web at 94*

¹⁹⁸ Ibid.

¹⁹⁹ Saurombe op cit note 9 at 301.

²⁰⁰ Ibid.

²⁰¹ Oppong op cit note 197 at 94.

²⁰² Oppong op cit note 197 at 95.

²⁰³ Ibid.

²⁰⁴ Author unknown, *Towards a Continental Free Trade Area: time to revisit the legal and institutional challenges to regional integration in Africa?* <http://www.afdb.org/uploads> at 8.

with the creation of their customs union after the CFTA is successfully launched or whether the discussions around the formation of the customs union will be done at the continental level.²⁰⁵ Also important to clarify is the status of the RECs after the establishment of the AEC, in other words, whether the RECs will dissolve completely or would continue to function in the current manner.²⁰⁶

Furthermore, the AEC treaty does not have a distinct legal status from the AU. The AU also performs the activities of the AEC.²⁰⁷ Mutai observes that this arrangement has been slammed as impractical since the institutions of the former OAU (now AU) are characterised by its political nature and therefore may be unable to take on additional technical responsibility required by the AEC.²⁰⁸ Mutai also notes that there is no mention of enforcement of decisions or procedure for settling disputes regarding the implementation of the Treaty.²⁰⁹ Cited in Saurombe, Ng'ong'ola submit that the political nature of the AU cannot handle the technical responsibilities that the Abuja Treaty might require.²¹⁰ AU attempts at rationalisation of REC undertakings are found in the work of the annual Conference of African Ministers in Charge of Integration (COMAI).²¹¹ The institution has met on several occasions and each conference acknowledged the significant role played by RECs as a vital support system for achieving continental integration. In addition, it emphasised the need to streamline and harmonise the activities and programmes of RECs, with the aim of fast-tracking the African integration project.²¹²

2.4.5 New Economic Partnership for Africa's Development (NEPAD)

The adoption of New Economic Partnership for Africa's Development (NEPAD) in 2001 was a direct response to both political and economic challenges facing the continent and with the establishment of NEPAD, there were expectations that Africa will promote good governance, human rights, eradicate poverty, and increase

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Mutai op cit note 57 at 107.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Saurombe op cit note 9 at 302.

²¹¹ Cited in Tavares and Tang at 223.

²¹² Ibid.

economic growth.²¹³ NEPAD was inspired by former Presidents of South Africa, Thabo Mbeki, Olusegun Obasanjo of Nigeria, Abdelaziz Bouteflika of Algeria and Hosni Mubarak of Egypt, as well as President Abdoulaye Wade of Senegal.²¹⁴

Gathii observes that NEPAD begins with reviewing Africa's place and plight in the global economy²¹⁵, as well as issues of mismanagement and bad governance that still continue to torment Africa while acknowledging the new political will of African leaders to redress these problems.²¹⁶ It also calls on African people and encourages them to "take up the challenge of mobilising in support of the implementation"²¹⁷ of NEPAD with the aim of ending Africa's marginalisation and to "ensure its development by linking with the developed countries."²¹⁸

2.4.6 Criticism of NEPAD

The critics of NEPAD disapprove of the theoretical framework of the plan and view it as an obsession with neoliberalism, and believe it is another western driven agenda, only designed to benefit foreign capital, the urban economies and a small number of privileged indigenous leaders at the exclusion of the poor.²¹⁹ These critics argue that further integration of Africa into the international system under the existing environment will worsen the continent's already gloomy economic position and downgrade it further to the control of the global economic system.²²⁰

²¹³ Reflections on 10 Years of NEPAD A joint publication of the NEPAD Planning and Co-ordinating Agency, the Economic Commission for Africa and the office of the Special Advisor on Africa at ix.

www.un.org/en/africa/osaa/pdf/pubs/2013decadeofchange.pdf

²¹⁴ Udombana op cit note at 214.

²¹⁵ James Gathii *The African Union and The New Pan-Africanism: Rushing to Organize or Timely Shift? A Critical Appraisal Of The NEPAD Agenda In Light Of Africa's Place In The World Trade Regime in an era of Market Centered Development*, 13 *Transnat'l L. & Contemp. Probs.* 179 at 3. See also NEPAD document Para 9.

²¹⁶ See NEPAD Para 49.

²¹⁷ Para 56.

²¹⁸ Para 55.

²¹⁹ Cited in Aka at 15.

²²⁰ For instance, the International Forum on Globalisation (IFG) criticised NEPAD as a "foothold for corporate globalisation in Africa." It explained that one of NEPAD's main founders former South African President Thabo Mbeki, started constructing a development plan for South Africa to attract both foreign aid and foreign investment in 1999. Similarly, the African Social Forum (ASF) declined neo-liberal globalisation and further integration of Africa into an unfair system as a foundation for its growth and development. It measured NEPAD and related economic recovery programs in Africa to be "strictures on governance borrowed from the practices of western countries" that are "not rooted in the culture and history of the peoples of Africa." See Aka at 15.

While Africa's growing economies may be attributed to NEPAD's neoliberal policies, the plan is yet to transform itself as an agent of social change, especially for the poor African citizens. Consequently, 16 years since its establishment, it has been unable to deal with the rising inequality and poverty in Africa. As previously noted, the neoliberal policies that have been adopted in Africa (including NEPAD) are the direct results of the rising inequality and poverty between the rich and poor ordinary citizens. Therefore, the criticism is justified and well founded.

Nevertheless, Akokpari observes that the criticism is strengthened by the fact that there is generally lack of visible contacts between NEPAD and Africa's previous domestic development programmes such as Lagos Plan of Action (LPA) and the unexplained change of name strongly gives some credibility to this view. Furthermore, NEPAD's partnership with international creditors [and questions about its ownership and origin] further strengthens the perception that it is a western driven plan.²²¹

Ndayi argues that while NEPAD theoretical framework clearly follow neoliberal policies, 'its embedded liberalism is par to excellence.'²²² Ndayi observes that the entrenched liberal viewpoint of the NEPAD is concealed behind the plan's social policy that advocates for, among other things, wealth redistribution, social protection etc.²²³ Accordingly, this embedded liberalism advancing social policy is revealed within the NEPAD document that shows a policy change from narrow economic policy that is centered around economic outcomes to broader social development policy system in Africa.²²⁴ Ndayi observes that the plan openly criticises economic growth that does not place importance on socio-economic development and demands active involvement of government in the delivery of basic social services at domestic level.²²⁵ Ndayi notes that this entrenched liberalism is demonstrated in South Africa through campaigns such as 'Proudly South African' and 'Buy South African' aimed at encouraging the private

²²¹ John K. Akokpari *The AU, NEPAD and the Promotion of Good Governance in Africa* Nordic Journal of African Studies 13(3): 243–263 (2004), University of Cape Town, South Africa at 247.

²²² Ndayi, Zoleka. "In quest of regional integration in Africa: Can the AU/NEPAD reconcile economic plurilateralism with developmental regionalism?." *International Journal of African Renaissance Studies-Multi-, Inter-and Transdisciplinary* 6.1 (2011): 78-93 at 83.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

sector and consumers to make use of local services and buy locally produced goods.²²⁶

While Ndayi reveals important provisions of the plan that seek to address the social issues facing the continent, these plans will remain paper based as long as Africa does not challenge the unfair trading practices by the developed countries that further contribute to Africa's impoverishment and marginalisation. For instance, even if government encourages citizens to buy locally produced goods, local producers still find it difficult to compete with the cheap subsidised goods of the Western countries. Therefore, it may be important to rather protect certain key domestic industries against adverse competition from the western countries in order to not only to save jobs but also protect the economic welfare of poor African citizens.

Akokpari observes that with respect to good governance, the setup of NEPAD is positive. This author notes that new global governance emphasises good governance and human rights. A country rejecting this call risks isolation, western aid, and investments.²²⁷ Akokpari argues that it was this global disregard for undemocratic practices that encouraged African civil societies to advocate for democratic reforms.²²⁸ Consequently, under the new international order, advocacy groups across the continent can challenge the state, to pressure the state and prevent government from acting with impunity.²²⁹ . Akokpari observes that this has led to and encouraged the widespread demand for an accountable and transparent government across the continent.²³⁰

Keet submits that NEPAD ignores the fact that there are challenges facing the poor developing countries, particularly in Africa, in applying the legal and institutional requirements of the World Trade Organisation (WTO).²³¹ NEPAD overlooks the fact that it is the most dominant western countries that have deliberately avoided implementing Uruguay Round Agreements (URA) terms that they regard as hostile to

²²⁶ Ibid at 84.

²²⁷ Akokpari at 247.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid at 248.

²³¹ Dot Keet: *"Proposals on the Role of Trade within the New Partnership for Africa's Development (NEPAD) Challenges and Questions,"* - Presentation at workshop of African trade unions organised by the National Labour and Economic Development Institute (NALEDI), 22-23 May 2003, in Johannesburg, South Africa at 11.

their interests.²³² Keet observes that predominantly, the US is guilty of sidetracking its Uruguay Round commitments to eliminate its tariff and quota restrictions on textile and clothing exports from developing countries.²³³

Gathii submits that NEPAD does not sufficiently deal with unfair international trade and commerce rules that are devised, applied, and accepted in a manner that is detrimental to Africa.²³⁴ Gathii contends that although NEPAD contains provisions that acknowledge these unfair rules and their devastating impact on Africa, it does not sufficiently address the World Trade Organisation's (WTO) agricultural rules, which cause African governments to lose billions in revenue.²³⁵

Keet notes that despite evidence of inequalities in the global trading system, NEPAD welcomes the new trading opportunities that are offered by the multilateral trading system. She notes that NEPAD embraced the multilateral trading system despite the fact that in the last stages of the Uruguay Round, the United Nations Conference on Trade and Development (UNCTAD) had calculated and warned that Africa would lose out billions of dollars in the following years.²³⁶

Gathii observes that while NEPAD does also call for recognition of Africa's special concerns, needs and interests in future WTO rules, it does not refer to past rules.²³⁷ For example, Gathii submits that subsidies to cotton production by Western countries have reduced the commodity prices for cotton that it is no longer worthwhile for West African farmers to continue to grow cotton.²³⁸ African cotton producers have a comparative advantage in cotton production but are unable to realise the benefits of such advantage.²³⁹

According to Keet, it may be possible that the policy makers and political drivers of NEPAD are unaware of such outrageous abuses. Keet submits that if they are

²³² Ibid.

²³³ Ibid.

²³⁴ Cited in Gathii note 214 at 7.

²³⁵ Ibid.

²³⁶ Keet op cit at 10.

²³⁷ Gathii op cit note 214 at 10.

²³⁸ Ibid.

²³⁹ Ibid.

unaware, then it must be said that they do not have the skill, ability, and capacity to develop a holistic approach for the African continent.²⁴⁰

For Gathii, a mere attempt to work within the current legal rules without opposing them or to have them revised and amended is to downplay the problems facing African products in developed countries markets²⁴¹ He submits that instead of challenging WTO rules that are hostile to Africa, NEPAD merely calls for assistance in capacity building to strengthen negotiating teams as well as the implementation of WTO rules by African countries.²⁴²

Ndayi citing a significant number of data, observes that NEPAD is achieving its goal of ensuring that Africa participates in the global economy through economic plurilateralism. Ndayi attributes this success to, among other things, NEPAD's friendly environment for investment, including progress in Africa's trade policy, which has discouraged protectionism and has increased market access to developed countries.²⁴³ Ndayi further observes that Africa has increased its trade and intra-regional African trade continues to grow while external trade has been increasing. Ndayi attributes this growth to the economic plurilateral nature of NEPAD.²⁴⁴

While these developments are encouraging, they are yet to produce material benefits to the lives of ordinary African citizens. Transforming this economic growth from economic data to social issues and improving the wellbeing of the poor is a major problem facing the continent. Despite Africa contains six of the fastest growing economies in the world, these countries and Africa in general continue to face high levels of inequality and extreme poverty.

Gathii concludes that NEPAD's adoption of a market based development strategy is no more than an attempt to secure new aid, credit, and investment from the West.²⁴⁵ He submits that this may explain why the International Monetary Fund (IMF) has applauded and welcomed the NEPAD agenda.²⁴⁶ Wolff argues that endorsement of the Bretton Woods institutions policies and their structural reforms programmes

²⁴⁰ Cited in Keet at 11.

²⁴¹ Gathii op cit note 214 at 7.

²⁴² Ibid.

²⁴³ Cited in Ndayi at 85.

²⁴⁴ Ibid at 86.

²⁴⁵ Gathii op cit note 214 at 6-7.

²⁴⁶ Ibid at 7.

without challenging the unfair international trading rules and commerce downplays the fact that these neoliberal policies have proven that they are not suitable for the African continent and are detrimental to the people of Sub-Saharan Africa.²⁴⁷

Ndayi submits that despite the theoretical framework of the plan being neo-liberal, NEPAD should not be assessed in terms of ideological design only, but on conditions that led to the adoption of neoliberal policies in NEPAD.²⁴⁸ Ndayi observes that issues such as poor intra-African trade and abundant extra-regional opportunities, as well as the need to avoid self-imposed marginalisation are some of the conditions that led to the adoption of neo-liberal policies.²⁴⁹

The author is of the view that the successes and failures of NEPAD must be judged not on macro-economic outcomes but on its ability to effect real change on the poor. After all, poverty and inequality are the biggest challenges facing the African continent. Nevertheless, NEPAD plan seems to be over-ambitious and gives the impression that it was hastily drafted and endorsed without really considering African realities and the challenges that African countries encounter especially on the international stage. Even though it has managed to address some of the challenges hampering the continent, most of the challenges that have been identified still persist. It is necessary that the NEPAD document be reviewed and modified to place prominence on poverty alleviation programmes and address the income gap between the rich and poor.

2.4.7 Pan African Parliament (PAP)

In 2001, the Pan African Parliament (PAP) Protocol was adopted and its vision is to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage.²⁵⁰ The main objectives of the PAP are primarily to facilitate the effective implementation of the policies and objectives of the then OAU/AEC and ultimately those of the AU.²⁵¹

Its objectives are further to educate the peoples of Africa about the objectives and policies aimed at integrating the African continent within the larger framework of the

²⁴⁷ Wolff op cit at 10.

²⁴⁸ Cited in Ndayi at 87.

²⁴⁹ Ibid.

²⁵⁰ Article 2 of the Pan African Parliament (PAP) protocol.

²⁵¹ Article 3 (1).

AU,²⁵² to promote self-reliance,²⁵³ co-operation,²⁵⁴ peace and security in Africa.²⁵⁵ Most importantly, the objective of the PAP is to encourage good governance²⁵⁶ and to promote the principles of human rights and democracy in Africa.²⁵⁷ Its advisory and consultative powers include efforts aimed at the legal harmonisation or coordination between member countries.²⁵⁸

After 15 years since PAP was established, it is yet to acquire supranational status. Udombana is of the view that this is because the African leaders do not want to subject the AU authority and control to any other political organ in relation to policy formulation and the creation of binding decisions.²⁵⁹ For Mpanyane, this means that its 'decisions', primarily its resolutions and recommendations, are merely advisory to the AU and its structures are mandated to make policy decisions on behalf of the continent.²⁶⁰ Mpanyane submits that the problem with this is that the recommendations, opinions or submissions are not mandatory; the AU policy-making institutions are not compelled to consult with the PAP or seek its opinion in their decision-making processes.²⁶¹ Mpanyane opines that PAP recommendations and opinions therefore, by their very nature, have no binding force.²⁶²

Olivier observes that PAP can only achieve its full legislative powers if members agree to amend the protocol and argues that a separate agreement will be required.²⁶³ Olivier notes that in 2009, a review of the protocol was requested by the AU commission and a draft amendment was approved with reservation, and in 2013 the Commission felt that more in depth consultation was necessary.²⁶⁴ However, nothing

²⁵² Article 3 (4).

²⁵³ Article 3 (6)

²⁵⁴ Article 3 (7)

²⁵⁵ Article 3 (5)

²⁵⁶ Article 3 (3)

²⁵⁷ Article 3 (2)

²⁵⁸ Cited in Olivier at 520.

²⁵⁹ Udombana NJ *"The institutional structure of the African Union: A legal analysis"* 33 California Western International Law Journal (2002) at 13.

²⁶⁰ Saki Mpanyane: *"Transformation of the Pan-African Parliament: A path to a legislative body?"* PA Parliament ISS Paper 181 March 2009 - issafrica.org at 4.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Olivier op. cit. at 520.

²⁶⁴ Ibid at 521.

really came out of that and as things stand, PAP still does not have legislative powers and enforcement mechanisms.²⁶⁵

According to Mpanyane, any review or assessment towards the transformation of the PAP must necessarily include the review and transformation of other related AU governance institutions too.²⁶⁶ This means that if the PAP is transformed into a legislative body, there will be a need for an executive and a judiciary to complement the PAP.²⁶⁷ Furthermore, the parliamentarians are not elected by vote as was envisioned by the protocol and currently each member country has five representatives in parliament.²⁶⁸ Consequently, the independence and impartiality of the PAP is compromised and raises questions about its credibility and ability to achieve its mandate. This view is supported by the possibility that those parliamentarians elected might have overriding loyalty to their own countries.²⁶⁹

Cilliers and Mashele observe that Article 2 also states that the parliamentarians are the representatives of all African people and that the five MPs chosen from each country must “reflect the variety of political opinions in each National Parliament or deliberative organ.”²⁷⁰ Cilliers and Mashele are of the view that the principle to guide the appointment of the five parliamentarians to the PAP is an important attempt to force a minimum political diversity from the constraints of domestic politics.²⁷¹ They submit that the decision by the South African government to exclude the official opposition, the Democratic Alliance (DA) from its five MPs was disappointing and sent a wrong signal to a continent that had entrusted South Africa with the honour of hosting PAP on the basis of the quality of its strong constitution and working democracy.²⁷²

In addition, PAP aims to ensure that African people are involved in the development and economic integration of the continent. According to Cilliers and Mashele, PAP will only succeed in realising its ambition towards popular participation through direct elections which is unlikely to happen.²⁷³ Additionally, Chilufya notes that the

²⁶⁵ Ibid.

²⁶⁶ Cited in Mpanyane at 4.

²⁶⁷ Ibid. at 5.

²⁶⁸ Cited in Welz at 7.

²⁶⁹ Ibid.

²⁷⁰ Cilliers, Jakkie, and Prince Mashele. "The Pan-African Parliament: a plenary of parliamentarians." *African Security Studies* 13.4 (2004): 72-83 at 76.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid at 80.

information on the PAP website or on the print media offers very little information about the organisation.²⁷⁴ Chilufya submits that PAP needs to develop its own means of publicising its role and informing the people about its mandate and objectives since there is absence of television coverage, limited press coverage, and almost no radio coverage.²⁷⁵

Olivier observes that the lack of legislative powers and the fact that members are not directly elected but nominated at national level, are two key issues hindering the transformation of the organisation.²⁷⁶ Cillier and Mashele submit that the biggest challenge for PAP would be finding a technical and legal consensus amongst Francophone, Anglophone, Lusophone and those African countries with Islamist legal systems.²⁷⁷

However, even though PAP is facing major challenges it has played an important role in the African continent. For instance, PAP condemned Zimbabwean pre-elections and the entire electoral process of 2008 and was also very critical of the Sudanese government during its observation missions.²⁷⁸ Nevertheless, PAP has very limited powers and therefore their work is just advisory and has little impact on the decisions of the Assembly. African leaders in 2009, instead of increasing the budget of PAP decided to cut its budget which made it difficult for PAP to continue with its work.²⁷⁹

According to Welz, this move may have been motivated by the fact that some African leaders may not be happy with the reports from the observer missions, particularly the work and discussions of PAP, including its critique of the observance of democracy, human rights and the rule of law.²⁸⁰ For Welz, it is possible that African leaders never intended PAP to have supranational powers and had there been such an intention, leading countries such as South Africa and Nigeria would have sought to gain more seats in their favour, instead of the proportional distribution of seats among member states.²⁸¹ Olivier argues that in order for PAP to become a true democracy parliament,

²⁷⁴ Precious N T Chilufya *Evolving Pan-African Parliament: An assessment of its role, constraints and prospects in African politics* www.academia.edu at 60.

²⁷⁵ Ibid.

²⁷⁶ Cited in Olivier at 521.

²⁷⁷ Cited in Collier and Mashele at 79.

²⁷⁸ For example, the report stated that the prevailing environment in Zimbabwe before election did not give rise to the conduct of free, fair and credible elections. See Welz at 7.

²⁷⁹ Ibid at 8.

²⁸⁰ Ibid.

²⁸¹ Ibid.

it is important that its evolving law making powers include the infringement of sovereignty of member countries similar to the EU system.²⁸²

2.4.8 African Peer Review Mechanism (APRM)

The African Peer Review Mechanism (APRM) was established in 2003 in Abuja, Nigeria. The APRM is a voluntary self-assessment mechanism for African states aimed at improving democratic governance.²⁸³ It is aimed at promoting the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration.²⁸⁴ APRM is headed by the Committee of Participating Heads of State and Government (APR Forum). The general task of the APRM falls on the Panel of Eminent Persons (APR Panel), who are documented specialists in one of the four thematic areas of APRM appointed by the APR Forum.²⁸⁵ These specialists are persons of high moral standing who have displayed a commitment to the doctrine of Pan-Africanism.²⁸⁶

A country that accedes to the APRM commits itself to being reviewed from time to time in terms of its policy frameworks, institutional architecture, systemic set-up and practices around four thematic areas of governance.²⁸⁷ Upon acceding to the APRM, a state commits itself to periodic reviews that are meant to take place every two to four years.²⁸⁸ Equally, in certain cases, participating NEPAD heads of state and government could be propelled by signs of an imminent socio-economic and or political turmoil to call for a review in a given country to assist the country in question.²⁸⁹

So far, 34 African countries have acceded to the APRM by signing the memorandum of understanding. However, not all of the 54 AU member states have acceded to the APRM which may be an indication of low commitment to democratic governance in

²⁸² Cited in Olivier at 521.

²⁸³ Andre Mbata B Mangu: *“Assessing the effectiveness of African Peer Review Mechanism and its impact on the promotion of democracy and good political governance”* African Human Rights Law Journal (2007) 7 at 355.

²⁸⁴ Para 3.

²⁸⁵ Mangu op cit at 363.

²⁸⁶ Ibid.

²⁸⁷ Cited in Matlosa at 15.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

Africa.²⁹⁰ Mangu observes that it was expected that Algeria, Egypt, Nigeria, Senegal and South Africa, whose leaders initiated NEPAD, would be at the forefront and become the first countries to be reviewed, however, they did not, and this meant that even those who are the most vocal about NEPAD and APRM may not be very committed to the process.²⁹¹ Instead, Ghana started the process and was followed by Rwanda and Kenya.

The APR Panel discovered that these three countries had signed or ratified several international treaties with a bearing on democracy and good political governance. However, where ratification occurred, they are not always followed by the incorporation of these instruments into domestic law.²⁹² On the other hand, treaties were not always enforced when they had been accepted as national laws and the countries concerned hardly complied with their reporting obligations on ratification of some instruments.²⁹³

The Country Review Report (CRR) found that Ghana had been keen in acceding to, and ratifying some regional and international standards and codes, but the country had yet to adopt a binding time-frame to accede to, or ratify, outstanding universal and regional instruments such as the African Charter on the Rights and Welfare of the Child (African Children's Charter) (1990) etc.²⁹⁴ It was recommended that Ghana must implement a thoughtful plan to deal with outstanding issues and set up a mechanism for automatic compliance with its reporting obligations, to develop a plan and programme to incorporate into Ghana's domestic law the ratified covenants and conventions, so as to make them an integral part of the country's own enforceable standards.²⁹⁵

2.4.9 APRM challenges

Akokpari observes that there are fears of the possibility of African leaders being unwilling to criticise other countries even in the unlikely event of the Independent

²⁹⁰ Ibid.

²⁹¹ Mangu op cit at 367.

²⁹² Ibid at 368.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

Panel of Eminent Persons (IPEP) producing critical reports.²⁹⁶ The continental silence on human rights violations in countries such as Sudan, Swaziland, and the absence of direct criticism of the outrageous and systematic human rights abuses under the Zimbabwean government, have sufficiently demonstrated African leaders' lack of moral courage to criticise fellow members.²⁹⁷

Welz expressed the view that with the appointment of a new chairperson for APRM in May 2013, it was hoped that the institution would be more legitimate and truthful in its review processes. Yet, African leaders have adopted the practice of reviewing and discussing the final reports among themselves before they are available to the public, with some of these leaders ignoring the shortcomings in other countries, in the hope that they would be treated in the same manner.²⁹⁸

According to Mangu, when measuring compliance with codes and standards, the peer review process contains only a record of the listing of international conventions, agreements or treaties that have been or should have been signed, ratified and domesticated, with less emphasis on their actual enforcement in national law.²⁹⁹ For Mangu, the fact that not all the AU member states have acceded to the APRM is a demonstration of low commitment to democratic governance in Africa.³⁰⁰ In addition, low commitment to democratic governance is further demonstrated by the slow implementation process of APRM.³⁰¹

Matlosa submits that the implementation of the National Programme of Actions (NPOAs) is another challenge facing the APRM. Reviewed countries have generally performed poorly in ensuring effective implementation of NPOAs.³⁰² In most cases governments do not allocate financial resources for NPOA implementation in their

²⁹⁶ Cited in Akokpari at 255.

²⁹⁷ Ibid.

²⁹⁸ For instance, in 2006, an APRM report was leaked to the media and it revealed among other things, warnings about the high crime rate in South Africa, poverty, unemployment and the political domination of African National Congress (ANC) as threats to stability of South African democracy. Mbeki administration appeared to be unhappy with the initial draft report and attempted to cover up before it could be published. Consequently, the report was substantially modified and reduced with most of the recommendations removed without any justification. The revised version only acknowledged crime as the main challenge to South African democracy. This meant that the President Mbeki administration undermined his own initiative. See Welz at 9-10.

²⁹⁹ Mangu op cit at 381.

³⁰⁰ Ibid.

³⁰¹ For example, when measured against UN Universal Peer Review (UPR), the (UPR) within its first four-years of existence, all 192 UN member states had been reviewed. This is remarkable considering that after 11 years since the formation of APRM, only 17 countries managed to complete their reviews. See Matlosa at 16.

³⁰² Cited in Matlosa at 16.

national budgets, assuming that external donors will provide the requisite resources.³⁰³ According to Matlosa, it is important that African countries depend only on their own national budgets for the implementation of NPoAs. This not only protects their national sovereignty and reduces their dependence on international aid, but also helps ensure national ownership of the APRM.³⁰⁴

Mangu observes that another difficulty relates to the integrity and independence of the APR Panel. Cabinet may have been persuaded to influence the work and to compromise the independence of members of the APR Panel.³⁰⁵ Once they receive unfavourable findings and recommendations from the APR Panel, cabinets promptly question the accuracy of the information, causing inconvenience on APR Panel members who then feel constrained to make decisions favourable to the government where Country Self-Assessment Report (CSARs) may have concluded on bad political governance.³⁰⁶

Akokpari notes that the (IPEP) comprises of between five and seven members with at least one member from the AU's major sub-regions.³⁰⁷ Akokpari further observes that back in 2003, there was uneasiness about the democratic credentials of nearly all the appointees of IPEP. Six of the seven members selected at that time into the IPEP were personnel who at one point in their careers had various relations with the leaders of their countries.³⁰⁸

2.4.10 Conclusion

This chapter has shown that African leaders have always embraced African integration and that there is a political will at least on paper to pursue regional integration in order to address Africa's complex challenges. However, the challenge is to effectively implement agreed policies and creates an environment that will enable the economic integration process to succeed and provide material benefits to people of Africa. Over the years African Union has made significant strides in supporting the regional integration process by setting up a number of institutions and adopting a number of

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Cited in Mangu at 383.

³⁰⁶ Ibid.

³⁰⁷ Cited in Akokpari at 254.

³⁰⁸ Ibid.

non-binding initiatives to strengthen the African regional integration. While this chapter applauds and appreciate these new developments, particularly the minimum role that has been played by these institutions, nevertheless this chapter observed that these institutions have been unable to promote African regional integration. The next chapter will evaluate the effects of weak legal and institutional system in African regional integration and generally lack of human capacity to accelerate African regional integration.

CHAPTER 3

3. Major challenges facing African Regional Integration

3.1 Overlapping Memberships

Muthai argues that the long-established challenge facing trade liberalisation in the eastern and southern African region is the lack of a clear, pragmatic policy to guide the regional integration process.³⁰⁹ According to Muthai this situation has resulted in multiple overlapping regional trade agreements. Even though both the Lagos Plan of Action (LPA) and the African Economic Community (AEC) treaty overall goal envisioned a united Africa, they unfortunately led to a multiplicity of regional trade agreements.³¹⁰ Although all the regional economic communities (RECs) contain similar overall objectives, this did not deter each respective African country from joining more than one economic to show solidarity with fellow neighbours³¹¹

African integration suffers from overlapping memberships. Africa is the only region in the world in which almost every country belongs to at least more than one regional economic community (REC). For instance, the difficulties of multiple membership are found in the case of Zambia which has been a member of both the SADC and the COMESA. Under the SADC Trade Protocol Zambia had agreed to remove tariffs for SADC members to zero. Thus, since South Africa is a member of SADC, Zambia had agreed to remove tariffs to South Africa to zero. On the other hand, Zambia being a member of the COMESA Customs Union, had agreed to a common external tariff regime for countries that are not members of the COMESA. Because South Africa is not a member of the COMESA, this did not apply to South Africa. This means that Zambia had agreed to reduce tariffs for South Africa (under the SADC conditions) but to maintain tariffs for South Africa (under the COMESA provisions). This situation leaves Zambia in a dilemma.³¹²

Muthai reasons that possibly the best attempt to address this challenge of multiple membership is found in the tripartite COMESA-EAC-SADC which aims to harmonise

³⁰⁹ Henry Kibet Mutai op. cit. note 34 at 95.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Jephias Mapuva, Loveness Muyengwa-Mapuva: *The SADC Regional Bloc: What Challenges and Prospects of Regional Integration. Law, democracy and development Volume 18 (2014) DOI: <http://dx.doi.org/10.4314/idd.v18i1.2>*.

the trade rules of these different communities. According to Muthai, this is encouraging but because of the diverging objectives of these three communities, such discussions are unlikely to yield any positive outcomes.³¹³ Yet, African leaders continue to commit themselves to multiple intra and sub-regional organisations despite the conflicting interests and objectives.

3.1.1 Benefits of Multiple Membership

Gathii submits that multiple memberships demonstrate the aspiration of member countries to choose from several options presented by competing Regional Trade Agreements (RTAs). He argues that RTAs offer benefits beyond the reduction or elimination of tariff barriers and the harmonisation of trade policies.³¹⁴

3.1.2 Criticisms of Multiple Memberships

For Gathii, African trade treaties are flexible by design and practice.³¹⁵ He submits that these agreements are not designed to commit their signatories to ‘scrupulous and rigorous adherence but are designed as flexible regimes of co-operation.’³¹⁶ He notes that these regimes set a framework on a range of issues and aspirations, including trade liberalisation and expressly build on the principle of ‘variable geometry’, giving poorer members more time to implement agreed trade and other commitments.³¹⁷ Accordingly, countries that have multiple membership regard these treaties as a framework for cooperation and not as legally binding instruments.³¹⁸

Muthai observes that members who are signatories to multiple treaties will encounter difficulties in fulfilling their treaty commitments found within the different regional communities and this difficulty is attributed to the nature of the founding treaties.³¹⁹ For instance, Muthai points out that some of the provisions found in these treaties set out ambiguous obligations, and the period required to meet these obligations are unrealistic.³²⁰

³¹³ Henry Kibet Mutai op cit note 34 at 95.

³¹⁴ Gathi op cit note 79 at 20.

³¹⁵ Ibid at 2.

³¹⁶ Ibid at 26.

³¹⁷ Ibid at 10.

³¹⁸ Ibid.

³¹⁹ Henry Kibet Mutai op cit note 34 at 12.

³²⁰ Ibid.

Fagbayibo argues that as long as African integration is characterised by the presence of multiple RECs with overlapping and duplicated membership, integration will remain an illusion.³²¹ Fagbayibo submits that integration cannot be achieved under its current arrangement in which member countries are pulling in different directions. Fagbayibo further maintains that to effectively proceed with the rationalisation process, it is important to firstly determine the feasibility and workability of each REC and their role in advancing the regional integration process.³²² This detailed investigation should establish, among other things, issues such as how far each REC's activity is contributing to the achievement of the six defined stages outlined by the AEC treaty, the possibility of limiting the membership of states to one REC, the harmonisation of their policies, and the effects of narrowing down the number of the RECs to five.³²³

Cited in Gathii, Jagdish Bhagwati refers to this surge of bilateral and regional trade agreements as the 'spaghetti bowl', submits that multiple regional and bilateral trade agreements are stumbling blocks for multilateral trade rules rather than building blocks.³²⁴ Since the key objective of these trade agreements is to liberalise trade within these communities, Bhagwati argues that these agreements have discriminatory effects for trade facilitation. Bhagwati submits that lack of harmonisation caused by difficult sets of inconsistent rules of origin found in multiple RTAs results in high transaction costs for business and hampers trade flows.³²⁵

Tavares and Tang note that the task of applying different rules of origin (RoOs) for each regional agreement becomes unmanageable, taking away the benefits from trade liberalisation and delaying the deepening of regional trade relations.³²⁶ In addition, these difficult sets of conflicting rules also prevent trade creation as the partners are forced to accept the products of an inefficient domestic producer, since the countries bound by these rules are required to purchase their products from the less efficient producer.³²⁷

³²¹ B Fagbayibo *Common Problems Affecting Supranational Attempts In Africa: An Analytical Overview* P.E.R Journal 2013 Volume 16 No 1/ 2013(16)1 PER / PELJ <http://dx.doi.org/10.4314/pej.v16i1.3> at 53.

³²² Ibid.

³²³ Ibid.

³²⁴ Gathii op cit note 79 at 22.

³²⁵ Ibid at 22-23.

³²⁶ Cited in Tavares and Tang 224.

³²⁷ Gathii op cit note at 23.

Hartzenberg, Erasmus, and Kingombe observe that companies doing business in these countries must comply with diverging and conflicting rules and procedures; increasing the cost of doing business in these countries and causing repetition.³²⁸ Since the African integration model foresees that all RECs will ultimately become Customs Unions (CUs), countries belonging to more than one CU will encounter unforeseen problem because of their multiple and conflicting memberships.³²⁹

Gathii submit that the incidence of multiple memberships in African RTAs is influenced by historical circumstances, as well as political and ideological debates such as the need to share natural resources³³⁰ He submits that in Africa, RTAs are not regarded as trade regimes but rather serve multiple purposes as frameworks for coordination of development projects.³³¹

3.2 Refusal by African leaders to cede aspects of their sovereignty.

According to Uzodike, effective regional integration requires a measure of shared sovereignty which means that countries must surrender aspects of their sovereignty to supranational institutions.³³² Uzodike submits that the evidence indicates that most African governments are unwilling to cede their control over fiscal and monetary issues to RECs.³³³ Uzodike argues that long-term regional objectives have continued to be paper goals because African governments have been reluctant to subordinate their national decision-making to the commands of RECs and this is demonstrated in the little or no national support for RECs.³³⁴

Kiplagat submits that state sovereignty in Africa is used by African leaders to concentrate political control. African leaders support state sovereignty to preserve their power and increase their wealth.³³⁵ These leaders have realised that regional integration would take their political power away from them, hence the culture of conservatism.³³⁶ Consequently, disintegration and slow implementation of regional

³²⁸ Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe: *"Institutions for inclusive regional integration"* February 2014 <http://www.academia.edu/12699283/> at 2.

³²⁹ Ibid.

³³⁰ Gathii op cit note 79 at 25.

³³¹ Ibid.

³³² Ufo Okeke Uzodike *the Role of Regional Economic Communities in Africa's Economic integration: Prospects and Constraints* AFRICA INSIGHT VOL 39 (2)- September 2009 at 36.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Kiplagat op cit at 2.

³³⁶ Ibid.

agreements in Africa is attributed to adherence to the state sovereignty principle and to the fact that regional institutions mandated to enforce these regional agreements are either weak or non-existent.³³⁷

In the opinion of Hartzenberg, Erasmus, and Kingombe, African regional institutions such as RECs lack supranational status. The REC institutions are characterised by unclear mandates and unclear powers. The monitoring of compliance with community rules is weak and the communal voice is silent.³³⁸ According to them, sovereignty is best understood as a legal concept which safeguards territorial integrity and jurisdiction; but which also involves state action to comply with international commitments.³³⁹

Hartzenberg, Erasmus, and Kingombe submit that African governments must understand that sovereignty requires that international agreements be implemented and are extremely important to guide the regional processes.³⁴⁰ Importantly, courts that are established will make judgements not only against private parties who approach them in which they enjoy jurisdiction but also against the same government or institution that created such courts.³⁴¹ These issues should be considered before they are expressed as provisions governing international agreements.³⁴²

3.3 Lack of political commitment

Asante observes that the lack of commitment to regionalism has displayed itself in member states individually progressing their own strategies, plans, and priorities, with little attention given to regional co-operation reflected in them.³⁴³ Asante opines that although African countries continue to speak of collective action for regional integration, no single state has yet designed its national plans to be consistent with the promotion of effective integration for development.³⁴⁴ According to Asante, if political commitment is lacking from the national government, then the government

³³⁷ Ibid.

³³⁸ Cited in Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 4.

³³⁹ Ibid.

³⁴⁰ Ibid at 3.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Cited in Asante at 73.

³⁴⁴ Ibid.

itself can be considered a barrier to development or a central cause of failure of policy direction.³⁴⁵

However, Gathii submits that African regional trade agreements are not based on a detailed approach that focuses on whether member states are complying with regional treaty commitments. Equally, regionalism can be realised not only out of formal institutions but outside of such formal structures.³⁴⁶

Hartzenberg, Erasmus, and Kingombe note that the SADC Treaty does envisage sanctions against members that continuously fail to meet its integration and trade commitments taken up under the Treaty, or when they implement measures which undermine the principles and goals of SADC.³⁴⁷ Hartzenberg, Erasmus, and Kingombe submit that the suspension of the SADC Tribunal demonstrates the difficulties encountered regarding ensuring rules-based governance through regional organisations.³⁴⁸

The difficulty and influence of politics in regional integration is found in the existing institutions established in support of African regional arrangements. Regional projects are completely undermined before they even begin due to the limited legislative powers afforded to regional institutions.³⁴⁹ African governments have been unwilling to empower regional institutions and this can be attributed to the importance of state sovereignty and the complex nature of economic issues.³⁵⁰ Consequently, African regional secretariats have been weak organisations that lack the necessary legislative powers. In most instances, supreme decision making bodies follow the top-down approach with decisions only the prerogatives of the ruling political elites.³⁵¹

Muthai argues that the implementation challenges are closely linked and mainly revolve around capacity. According to Muthai, lack of capacity has delayed regional integration both at the national and the regional level.³⁵² This incapacity is

³⁴⁵ Ibid.

³⁴⁶ Gathii op cit note 79 at 4.

³⁴⁷ Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 14.

³⁴⁸ Ibid.

³⁴⁹ John Ravenhill (1979) *Regional integration and development in Africa: Lessons from the East African Community* The Journal of Commonwealth & Comparative Politics, 17:3, 227-246, DOI: 10.1080/14662047908447336 :To link to this article: <http://dx.doi.org/10.1080/14662047908447336> at 229.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Henry Kibet Mutai op cit note 34 at 95.

demonstrated by weak financial and human resources. In respect of financial limitations, member states sometimes encounter difficulties in meeting their financial obligations. From the human resources perspective, there is a severe lack of expertise in both the legal and economic sectors.³⁵³ The small number of experts find themselves overstretched when dealing with the demands at either multilateral, regional or bilateral levels.³⁵⁴

Lack of political commitment has slowed down regional integration and demonstrates the inability of regional laws and institutions to effectively hold member countries to account. On the other hand, poor implementation may be prompted by genuine national policy considerations or circumstances.

3.4 Lack of Popular Support

Uzodike observes that African regional integration agenda lacks popular support from ordinary African citizens, civil society, and private sector and submits that African leaders have failed to galvanise popular support for the integration project.³⁵⁵ Hartzenberg, Erasmus, and Kingombe note that African regional integration is a state-centric attempt, with a top-down approach which differs significantly with that of other regions.³⁵⁶ For instance, in East Asia the private sector to a larger extent than in Africa is actively involved in the integration project, while regional production networks promote the establishment of deep regional integration arrangements that go further than reducing tariffs.³⁵⁷

Fagbayibo submits that the difficulty with the integration process in Africa is that the people are left out from issues concerning the integration project.³⁵⁸ Decisions and policies coming from regional integration are neither subjected to referendums nor to open discussion with the general public affected by those decisions or policies. As a result the general public either know very little or are not really aware about the

³⁵³ Ibid at 95-96.

³⁵⁴ Ibid at 96.

³⁵⁵ Uzodike op cit at 36.

³⁵⁶ Cited in Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 1.

³⁵⁷ Ibid.

³⁵⁸ Fagbayibo op cit note 320 at 57 / 536.

integration process and hence add little or no significance to the regional institutions.³⁵⁹

Cited in Aka, according to the movement for popular participation in development (MPPD) in Africa, it is important that ordinary African citizens and the private sector be involved in formulating, building, and designing the public policies aimed at improving their own economic welfare and fully and effectively participate in the decisions which affect their daily lives at all sectors of government and society.³⁶⁰ Development is sustained when its direction is outlined by the people and consists of risks and sacrifices that they can accept.³⁶¹

Indeed, integration without the support of ordinary people and private sector becomes hollow. It is important that ordinary African citizens and private sector be at the forefront of African integration and to formulate its direction.

3.5 Other Challenges to African Regional Integration Related to Trade

World Trade Organisation (WTO) Director-General Roberto Azevêdo observed *inter alia* that intra-African trade remains just a tenth of Africa's total trade, cost of moving goods within Africa is double the global average, and that an African company faces an average tariff of 8.7 percent when selling within Africa, against 2.5 percent elsewhere.³⁶² Azevêdo argued that addressing these barriers would assist in driving African integration at the international stage. He observes that with the introduction of the Trade Facilitation Agreement in 2013, it is expected that when it is fully implemented, the Agreement could reduce trade costs by an average of 14.5 percent.³⁶³

Elbeshbishi submits that trade facilitation reforms increase trade performance by improving the quality of the regulatory framework, basic transport, and

³⁵⁹ Ibid.

³⁶⁰ See Philip C Aka at 5. See para 11.

³⁶¹ Ibid.

³⁶² Roberto Azevêdo "The future of the WTO Doha Round of Trade Negotiations and the implications for Africa's Regional Integration." Speech delivered at University of Cape Town seminar on 17 march 2016.

³⁶³ Ibid.

communications infrastructure.³⁶⁴ Elbeshbishi further submits that the... 'quality of coordination can have a major influence on a company's decisions about which country to locate to, which suppliers to buy from, and which consumer markets to enter.'³⁶⁵

While African countries have recognised the significance of trade facilitation as shown by the various agreements signed at bilateral, sub-regional and regional levels as well as attempts made at country level, most of these initiatives have so far produced few benefits.³⁶⁶ Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra observe that beyond these trade facilitation arrangements, the challenge of implementation of trade facilitation agreements remains a daunting task.³⁶⁷ Transforming these expressed policy provisions in Africa's regional trade agreements from paper and implementing them towards trade facilitation continues to be a major problem.³⁶⁸

3.5.1 Poor infrastructure and high transaction costs

The quality of infrastructure in Africa is a major problem as most roads are deteriorating due to lack of proper maintenance. The situation is more visible in landlocked countries as these countries suffer high transaction costs not only from their own poor infrastructure but also from that of their transit neighbours.³⁶⁹ Road transport continues to be the most leading method of transport within the continent and only a quarter is paved.³⁷⁰ The rural area in the continent is inadequately served in terms of transport infrastructure and services. Africa has only 34 per cent rural road access as compared to 90 per cent in the rest of the world.³⁷¹

For Hartzenberg, not only are most Sub Saharan African economies small and poor, but 15 are also landlocked, a major factor to high trade transaction costs, and more

³⁶⁴ Elbeshbishi op cit at 1.

³⁶⁵ Ibid at 4.

³⁶⁶ Ibid at 8.

³⁶⁷ Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese and Max Mendez-Parra: *"Trade Facilitation And Economic Transformation In Africa"* Papers Prepared Jointly By ACET And ODI's Supporting Economic Transformation Programme, African Transformation Forum in Kigali 14-15 March 2016, African Centre For Economic Transformation at v.

³⁶⁸ Ibid.

³⁶⁹ Elbeshbishi op cit at 8.

³⁷⁰ Ibid.

³⁷¹ Ibid.

generally to the high costs of doing business in Africa.³⁷² Furthermore many other blockades exist, escalating the transaction costs of trade. The inadequately and ill developed cross-country connections has resulted in transport costs in Africa being the highest and most expensive in the world.³⁷³

Elbeshbishi observes that shipping costs from African countries to major world markets are extremely high. Poor infrastructure is a huge factor to high transport costs and is an impediment to trade expansion.³⁷⁴ Elbeshbishi submits that challenges such as delays to pass through borders, many roadblocks and checkpoints on African highways appears to be the pattern in many African countries, which results in unnecessary delays and huge increase in transport costs.³⁷⁵

Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra, observe that in the SADC region, discussions around developing the necessary trans-boundary infrastructure to facilitate transit trade in SADC has been initiated, with the adoption of SADC Regional Infrastructure Development Master Plan (RIDMP) of 2012 offering a comprehensive framework through which to facilitate transit trade.³⁷⁶ Numerous strategic trade routes within the region have been linked (via connectivity along roads, rail, and ports) through development corridor plans such as the Trans-Kalahari Corridor, the Maputo Development Corridor, and the North–South Corridor.³⁷⁷

Elbeshbishi notes that African air transport has made significant strides to connect the continent with the rest of the world. Currently, most African capital cities are connected worldwide.³⁷⁸ In particular, after the implementation of the Yamoussoukro Decision (YD), there has been a remarkable improvement in air traffic movement in Africa, with a growing number of African capitals served by major African airlines such as Egypt Air, Ethiopian Airlines etc.³⁷⁹

³⁷² Hartzenberg op cit note 1 at 3.

³⁷³ Ibid.

³⁷⁴ Cited in Elbeshbishi at 9.

³⁷⁵ Ibid.

³⁷⁶ Cited in Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra at 5.

³⁷⁷ Ibid.

³⁷⁸ Cited in Elbeshbishi at 9.

³⁷⁹ Ibid.

3.5.2 Tariffs and Non Tariff Barriers (NTBs)

Africa's integration into the global economy has been slowed down by the persistence of Non Tariff Barriers (NTBs). These barriers have not only hindered the export competitiveness of African countries, but have also destabilised their attempts to attract Foreign Direct Investment (FDI).³⁸⁰ While tariffs have progressively been reduced around the world, the cost of meeting customs procedures has in certain instances exceeded tariff duties.³⁸¹ For instance, Muthai observes that the problem of the use of sanitary and phytosanitary (SPS) measures as NTBs to trade, is a long established source of contention and frustration for members of the EAC.³⁸² For example, Uganda has maintained a ban on the import of Kenyan beef for a number of years. It only lifted a ban on the import of Kenyan bull semen after Kenya lifted a ban on the import of Ugandan chicks into the Kenyan market.³⁸³

Within the SADC region, since the establishment of Chirundu One Stop Border Post (OSBP) the average crossing time between Zambia and Zimbabwe is less than 30 hours. This has considerably reduced the costs associated with clearing goods at the border, thus improving competitiveness.³⁸⁴ Viljoen cited in Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra notes that ever since the introduction of Chirundu OSBP system, there has been reduction in the numbers of fraudulent activities committed by both importers and clearing agents.³⁸⁵

Viljoen notes that the implementation of a simplified trade regime at the border post has significantly improved trading environment for small traders with a number of these small traders benefiting from duty-free access on certain goods and gaining from being able to use simplified documents. This has led to higher levels of legal cross-border trade and revenue generation, and lower transit times for small traders crossing the border on foot or by bus.³⁸⁶

Similarly, in the East African Community (EAC) region, use of electronic platforms for customs procedures ensures there are proper recording data of trade movements and

³⁸⁰ Ibid at 10.

³⁸¹ Ibid.

³⁸² Muthai op cit note 34 at 88.

³⁸³ Ibid.

³⁸⁴ Cited in Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra at 7.

³⁸⁵ Ibid.

³⁸⁶ Ibid at 7.

revenue streams on an electronic system.³⁸⁷ The use of these electronic devices ensures faster and better record-keeping for both businesses and the government as they reduce cargo processing times, eliminate the possibility of errors and of corruption and guarantee better management of customs duties.³⁸⁸

3.6 Conclusion

While African countries have made significant strides to improve trade through trade facilitation agreements, however these initiatives are yet to produce material benefits to the people of Africa. The challenge confronting African countries is the lack of implementation of these trade facilitation agreements and lack of human capacity to drive regional integration process.

³⁸⁷ Ibid at 10.

³⁸⁸ Ibid.

CHAPTER 4

REGIONAL ECONOMIC COMMUNITIES (RECs) IN AFRICA

4.1 INTRODUCTION

Hartzenberg, Erasmus, and Kingombe observed that the economic integration model currently being pursued in Africa requires a specific institutional model that is governed by the rule of law.³⁸⁹ According to them, deeper integration demands extra legal arrangements and institutions to achieve uniformity in standards, comprehensible regulatory regimes, legal remedies for private parties etc.³⁹⁰

Certainly, the success of regional integration depends on both strong institutional and legal frameworks. Such an arrangement will not only ensure that community laws enjoys supreme status but also that individuals and non-State entities play a meaningful role in the economic integration process. This arrangement would also allow private litigants to directly access dispute settlement bodies and would also ensure that a reputable judicial system is accessible to protect their rights and interests.

4.2 Status of Regional Law in Member States

Salami observes that in contrast to EC provisions, most of the REC treaties neglect to provide for the status of REC legal instruments in Member States. For instance, Salami notes that the majority of REC treaties have a general provision on adherence to their treaty commitment and most REC treaties do not provide for the status of REC secondary law or legal instruments in Member States, which is in contrast with EC treaties.³⁹¹ These treaties do not mention any secondary law nor do they provide for the treatment of such law in Member States.³⁹²

For Oppong, such provisions, which have neither a period for the legislation to be enacted nor a sanction for non-compliance are vulnerable to abuse and violations.³⁹³ Oppong argues that REC member states have been bizarrely cautious about giving

³⁸⁹ Cited in Hartzenberg, Erasmus, and Kingombe at 1.

³⁹⁰ Ibid.

³⁹¹ Cited in Salami at 670.

³⁹² Ibid at 671.

³⁹³ RF Oppong :*making regional economic community laws enforceable in national legal systems- constitutional and judicial challenges*: monitoring regional integration yearbook 2008 chapter 7, at 5.

force of law to regional instruments in their national legal systems.³⁹⁴ According to Salami, it can be inferred from this ambiguity of most of the REC Treaty provisions that treaty drafters, as well as the ratifying states, had not prepared themselves for complying with the treaties.³⁹⁵ It is therefore not alarming that none of these RECs has failed to obtain or fully meet their stated objectives.³⁹⁶

Salami observes that the RECs that provide for legal instruments to have binding effect but neglect to spell out the method of their implementation in Member States places the implementation of these instruments at the command of national parliaments to decide.³⁹⁷ The failure of most Member States to give a supreme status to REC provisions over national law suggests that these REC legal instruments would not be accepted in most Member Countries.³⁹⁸

In respect to the SADC region, Bartels observes that the SADC norms that are not implemented give the impression that, within domestic legal systems, they are treated at best no different from domestic legislation, and at worst as a nullity.³⁹⁹ Bartels proposes that Article 6(5) be amended to state the superiority of SADC norms in relation to domestic norms in national legal systems.⁴⁰⁰ Bartels is of the view that this needs to go further, and include a hierarchy over constitutional norms as well.⁴⁰¹ Bartels argues that the domestication of the principle of supremacy will ensure that national courts participate in the process of applying SADC law, by allowing them not to implement inconsistent national laws.⁴⁰²

Oppong observes that there are provisions in the community treaties that may be construed as suggesting direct applicability of community law.⁴⁰³ For instance, article 9(6) of the ECOWAS Treaty may be viewed as applicable directly.⁴⁰⁴ However, Salami notes that even in circumstances where the REC Treaty seems to provide for

³⁹⁴ Ibid.

³⁹⁵ Cited in Salami at 673.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid at 673-674.

³⁹⁹ Lorand Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* Draft Report Faculty of Law, University of Cambridge United Kingdom 14 February 2011 WTI Advisors at 16.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Cited in Oppong note 392 at 5.

⁴⁰⁴ Ibid.

supremacy of community law, the failure of Member States to give a supreme status to REC provisions makes the declaration on the supremacy of such legal instruments in the REC Treaty superfluous.⁴⁰⁵ According to Salami, the reason for this is that African states, irrespective of the types of legal system in place, generally continue to defy REC treaties and legal instruments.⁴⁰⁶

Oppong argues that the dependence on national constitutional measures to give effect to community law is one of the main causes for the failure of Africa's economic integration process since community laws are not immediately applicable at the national level.⁴⁰⁷ Oppong argues that though it is important that these founding treaties be scrutinised under national procedure, it makes no sense that previously accepted laws derived from legally constituted institutions under the treaty, using the correct legislative procedure, should not be instantly or directly applicable in the national legal system of countries that have already recognised such instruments as binding.⁴⁰⁸

Fagbayibo argues that in order for laws emerging from transnational institutions to have power and be obeyed by the people, it is essential that they either possess equal legal status with national laws or in some cases have supreme status.⁴⁰⁹ For Fagbayibo, the issue is not the legal framework, whether monist or dualist, but rather the lack of political will from domestic level to implement transnational laws.⁴¹⁰

4.3 Status of individuals in regional courts

Kiplagat notes that in the past, international law as well as national legal systems did not distinguish between the legal concepts of international personality and national sovereignty, distinct from international public law affairs that were resolved through diplomacy. Because of the development of private international law, particularly since international commercial transactions were increasingly conducted through non-state entities, a system to make provision for any disputes that may arise from international transactions had to be created, thus giving rise to the need to accommodate non-governmental entities under private international law.⁴¹¹

⁴⁰⁵ Salami op cit at 674.

⁴⁰⁶ Ibid.

⁴⁰⁷ Oppong op cit note 392 at 6.

⁴⁰⁸ Ibid.

⁴⁰⁹ Fagbayibo op cit note 320 at 50.

⁴¹⁰ Ibid at 51.

⁴¹¹ Cited in Kiplagat at 3.

According to Oppong, access and transparency are important to the legitimacy of international courts. Oppong submits that access to a court is dictated by its founding instrument, which would normally describe the types of persons who are allowed to litigate before the court and the causes of action they may bring to such courts.⁴¹² These are then further developed through case law by the court. Oppong opines that it is encouraging to see that in all the regional courts except the SADC Tribunal, non state entities have a standing before these courts⁴¹³

Sang YK observes that the liberal provisions of locus standi and access to the sub-regional trade judicial bodies in Africa are a new phenomenon and have only been used moderately of late. Sang YK views these developments as rather strange, but nevertheless thought-provoking, as some of these sub-regional trade communities have been in existence for over three decades.⁴¹⁴ An examination of the history of the different judicial bodies of sub-regional trade entities in Africa shows a slow institutional start-up. For example, the adoption of the Protocol establishing the SADC Tribunal and its applicable rules of procedure only took off in 2000 - ten years after the adoption of the constitutive treaty.⁴¹⁵

Likewise, Gathii submits that the growth of jurisdiction over human rights in a sub-regional trade court in Africa is surprising, because national courts are under the authority or control of powerful officials.⁴¹⁶ Consequently, the growing number of sub-regional African courts that repeatedly hand out judgments that are against government is strange.⁴¹⁷ Gathii attributes this to the increasing presence of strong civil society groups as well as the rise of a group of judges with a normative commitment to the rule of law, human rights, and good governance.⁴¹⁸

⁴¹² Richard Frimpong Oppong "Legitimacy of Regional Economic Integration Courts in Africa" *African Journal of Legal Studies* 7 (2014) 61–85 at 71.

⁴¹³ *Ibid* at 72.

⁴¹⁴ Brian Sang YK: "Friends, Persons, Citizens: Comparative Perspectives on Locus Standi and the Access of Private Applicants to Sub-Regional Trade Judiciaries in Africa" *Oregon Review of International Law* 13 *Or. Rev. Int'l L.* 355 2011 at 3.

⁴¹⁵ Sang YK observe that the SADC Tribunal only received its first case in 2007. Equally, the ECOWAS Court had its first judges appointed in January 2001--ten years after its formation under a protocol--and received its first reference only in 2004. The EAC Court was launched in December 2001, its rules of procedure were adopted in 2004, while its first reference was received in 2005. For its part, the COMESA Court had its first judges appointed in June 1998 and heard its first cases in 2002.

⁴¹⁶ James Thuo Gathii *Saving the Serengeti: Africa's New International Judicial Environmentalism* The University of Chicago, *Chicago Journal of International Law*, Winter, 2016 16 *Chi. J. Int'l L.* 386 at 3.

⁴¹⁷ *Ibid*.

⁴¹⁸ *Ibid*.

However, Oppong cautions that a court not expressly empowered to adjudicate human rights claims must always be careful in assuming jurisdiction over such claims.⁴¹⁹ He notes that these courts were established in the context of attempts to promote economic integration in their respective regions.⁴²⁰ According to Oppong, human rights litigation is also expected to cause displeasure between the courts and already established forums mandated to protect human rights, such as national courts, which should be working in hand-in-hand with the court in promoting economic integration.⁴²¹ For Oppong, turning these regional courts into 'human rights courts' is pointless and should be discouraged.⁴²²

Gathii observes that not all of Africa's international courts have reprocessed their commitments and their mandates for a new purpose to include deciding human rights or environmental cases as those in East, West and Southern Africa have.⁴²³ For instance, he notes that the COMESA Court of Justice has largely remained a labour tribunal. Its case law has primarily developed from its employees and this court has not decided human rights cases.⁴²⁴ For Oppong, the constitutive treaties of the courts set several limitations on individual standing.⁴²⁵ The decision of SADC leaders that the jurisdiction of the SADC Tribunal should be limited to disputes between member states further exacerbated this situation.⁴²⁶

Oppong submits that notwithstanding these limitations, in general, the courts' jurisprudence on standing reveals a progressive approach in respect of interpretation of the rules on standing. Oppong observes that the EACJ and ECOWAS Court have been open to public interest litigation, to ensure the observance of the treaties in the interest of community citizens.⁴²⁷ Furthermore, the EACJ and ECOWAS courts have held that a person who alleges a breach of the EAC Treaty and, in respect of

⁴¹⁹ Oppong op cit note 411 at 78.

⁴²⁰ Ibid.

⁴²¹ Ibid at 79.

⁴²² Ibid.

⁴²³ Gathii op cit note 415 at 4.

⁴²⁴ Ibid.

⁴²⁵ See article 30 of the EAC Treaty, article 26 of the COMESA Treaty and Oppong op cit note at 72.

⁴²⁶ Elisa Tino *The role of regional judiciaries in eastern and southern Africa chapter 7 at 152*. Monitoring Regional Integration in Southern Africa Yearbook 2012 TRALAC Trade Law Centre.

⁴²⁷ See *East African Law Society v Attorney General of Kenya (2008) 1 EA 95; SERAP v Federal Republic of Nigeria, Judgment No. ECW/CCJ/JUD/18/12 (ECOWAS Court of Justice, 2012)*.

ECOWAS, a violation of human rights need not exhaust local remedies, or show a right or interest infringed, or damage suffered because of the alleged breach.⁴²⁸

4.4 Enforcement and Recognition Of Judgments From Community Courts

Oppong observes that in economic integration, the recognition and enforcement of state and community normative Acts facilitates their effective implementation and improves cross-border economic transactions.⁴²⁹ Therefore, a rule for the recognition and enforcement of foreign normative acts should be an integral part of a community's legal framework on both community–national and regional level.⁴³⁰

In terms of international law, a state may not rely on its national laws as a defence to a violation of an international obligation.⁴³¹ Therefore, it is expected that when a member country's national law violates a community law that Member State must bring that law into line with the community law and any failure to do so will result in the courts making adverse findings against the national government.⁴³²

In the SADC region, tribunal 'decisions' on matters within its jurisdiction are final and binding.⁴³³ Therefore, the SADC Tribunal is empowered to make decisions on any issue or violation under its jurisdiction.⁴³⁴ Bartels observes that under the long-established principle of international law, tribunals have the power to order remedies even when this is not clearly expressed in their founding instruments.⁴³⁵ Moreover, both SADC provisions obligating member states to take all necessary steps to apply the tribunal decisions and the one that explicitly states that such decisions include those that are normally enforceable by individuals under national law.⁴³⁶ Clearly, the tribunal has the power to make any orders similar to those found in international tribunals.⁴³⁷

⁴²⁸ See *Anyang' Nyong'o v. Attorney General (2008) 3 K.L.R. 397*; *Attorney General of the Republic of Rwanda v Plaxeda Rugumba (Appeal No. 1 of 2012)*; *Ocean King Nigeria Ltd v. Republic of Senegal, Judgment No. ECW/CCJ/JUD/07/11 (ECOWAS Court of Justice, 2011)*.

⁴²⁹ Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa*, Cambridge: Cambridge University Press 2011 at 58.

⁴³⁰ *Ibid.*

⁴³¹ Cited in Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 4.

⁴³² *Ibid.*

⁴³³ Cited in Bartels at 37.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ See Article 32(2) of the SADC Tribunal Protocol and Articles 32(1) and (3). See also Bartels at 37.

⁴³⁷ Cited in Bartels at 37.

However, Saurombe observes that unlike the European Community (EC), currently there is no single African country that has guaranteed enforcement of legal decisions in its national systems.⁴³⁸ Saurombe observes that the European Court of Justice (ECJ) has wide-ranging powers and may order a Member State found in breach of EC law to take action to remedy the breach and can issue heavy fines if a state fails to remedy such breach. If the defaulting party is one of the EU institutions, the Community institution concerned is called on to act and where the failure to act is held to be unlawful, it is for the institution in question to rectify the failure by appropriate measures.⁴³⁹

As demonstrated, the question here is not so much about the powers of the Tribunal but is more about African countries' willingness to guarantee and enforce community judgment. The SADC Tribunal is empowered to make any order that it deems necessary and this may include a demand for a defaulting member state or SADC institution to comply with any law or rectify any failure to act.

According to Afademeh-Adeyemi and Kalula, lack of judgment enforcement mechanisms creates a *lacuna* in the enforcement of the Tribunal's decision because it subjects the enforcement of Tribunal decisions to the domestic law that governs the enforcement of foreign judgments in member states.⁴⁴⁰ This was evident in the case of *Gramara*,⁴⁴¹ in which the high court of Zimbabwe refused to register and enforce a judgment of the Tribunal on the grounds that the decision of the SADC Tribunal was against public policy in Zimbabwe.⁴⁴²

Oppong submits that using national courts to enforce international judgments is possibly the most potentially effective way of ensuring compliance with decisions of international courts and improving the effectiveness of international judgments.⁴⁴³

⁴³⁸ Saurombe op cit note 66 at 288.

⁴³⁹ Ibid.

⁴⁴⁰ Ashimizo Afadameh-Adeyemi and Evance Kalula: *SADC AT 30: Monitoring Regional Integration in Southern African Development Community Yearbook Volume 10* (2010 chapter 1 at 17.

⁴⁴¹ *Gramara and Another v The Government of Zimbabwe*.

⁴⁴² Ibid.

⁴⁴³ Richard Frimpong Oppong *Enforcing Judgements of The SADC Tribunal in the domestic courts of member states* at : *Monitoring Regional Integration in Southern African Development Community Yearbook Volume 10* (2010 chapter 7 at 121.

According to Oppong, national law supports international rule of law and strengthens the status of international law in national legal systems.⁴⁴⁴

Nevertheless, Oppong admits that the use of national courts to enforce international judgements has its own challenges and many of these challenges have not been dealt with adequately.⁴⁴⁵ For Oppong, the conflicting judgments from Zimbabwean and South African courts in *Mike Campbell and Others v Republic of Zimbabwe* as well as the case of *Government of the Republic of Zimbabwe v Louis Karel Fick* demonstrate some of the challenges which individuals who obtain judgments from community courts can expect to face when they seek to enforce the judgment.⁴⁴⁶

Afademeh-Adeyemi and Kalula opine that refusal to sanction tribunal decisions by the Zimbabwean government clearly show that member states can undermine regional initiatives or fail to honour their commitments under the relevant regional protocol. Afademeh-Adeyemi and Kalula argue that if regional integration is to be firmly rooted in SADC, the SADC Tribunal must be allowed to develop its own legal processes.⁴⁴⁷

Saurombe submits that if SADC was employing the EU system, this possibly might have meant that Tribunal decisions are easily enforced by the Summit or any other Treaty- empowered organ which would have called upon Zimbabwe to set aside the land reform programme immediately.⁴⁴⁸ Failure to comply would have led to the imposition of economic sanctions.⁴⁴⁹ Bartels proposes that the SADC Tribunal Protocol be amended to state the types of orders that may be made by the SADC Tribunal.⁴⁵⁰ In addition, he urges for the amendment of the SADC Tribunal Protocol to empower the Tribunal to make orders for noncompliance with its decisions.⁴⁵¹

Indeed, it is necessary not only to amend the existing treaty relating to enforcement and recognition of judgments emanating from community courts but to state that community court judgments are binding on national courts subject to certain defined exceptions.

⁴⁴⁴ Ibid.

⁴⁴⁵ ibid at 130.

⁴⁴⁶ Ibid 122-123.

⁴⁴⁷ Cited in Afademeh-Adeyemi and Kalula at 17.

⁴⁴⁸ Saurombe op cit note 66 at 288.

⁴⁴⁹ Ibid.

⁴⁵⁰ Cited in Bartels at 38.

⁴⁵¹ Ibid.

4.5 Enforcement and Recognition Of Civil Judgments From Other African Courts

Tiba observes that national courts continue to be the most important forum for the resolution of cross border commercial disputes.⁴⁵² National courts rely on rules of private international law to address transnational and foreign elements of disputes before them.⁴⁵³ Private international law rules are the direct rules for solving cross-border disputes including commercial disputes. Where there is nonexistence of international rules setting out common principles, there is bound to exist divergent positions among countries in any of these key areas of private international law.⁴⁵⁴

Oppong notes that there is an emerging academic interest in private international law. He opines that as academic interest in private international law intensifies, the challenge for African scholars will be to produce a “genuinely African-based and African-influenced work on the conflict of laws.”⁴⁵⁵ According to Oppong, academic scholars will have to develop a unique model of private international law with specific rules that take into account Africa’s realities.⁴⁵⁶

Indeed, it is imperative that the convention embodying such a model considers the unique nature of African legal systems as practised by different African communities, before its regulatory framework is accepted as regional law. In other words, it is important that such convention not only make provisions for already well established businesses but also accommodate small business and informal businesses and traders.

Bartels notes that in the SADC region, the legislation governing the recognition and enforcement of civil judgments in the common law SADC Member States only applies to foreign judgments from designated countries or, in one case, also decisions of designated ‘international tribunals’.⁴⁵⁷ None of the SADC Member States has

⁴⁵² Firew Tiba *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial dispute Resolution in Asia* Loyola University Chicago International Law Review 14 Loy. U. Chi. Int’l L. Rev. 31 Fall, 2016 at 5.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Richard Frimpong Oppong *Private International Law in Africa: The Past, Present and Future* at 24.

⁴⁵⁶ Ibid.

⁴⁵⁷ Cited in Bartels at 41.

redesigned their national laws to ensure that such national recognition and enforcement legislation would apply to decisions of the SADC Tribunal.⁴⁵⁸

The recognition and enforcement of foreign judgments is to some extent different for the civil law SADC Member States. In civil law countries, foreign judgments are enforceable by national courts. It is likely also that decisions of the SADC Tribunal would, in principle, be enforceable as 'foreign judgments' on this basis.⁴⁵⁹

Oppong argues that the cases in which judgments from African courts were refused registration in other national courts demonstrate a bigger problem, that is under the statutes on the registration of foreign judgments, few African countries have been designated as beneficiaries.⁴⁶⁰ For instance, the challenge of relying on national laws of recognition and enforcement of SADC tribunal decisions for their enforcement is found in the *Gramara case*, where the High Court of Zimbabwe considered the relevant Zimbabwe legislation on the recognition and enforcement of foreign judgments to be inapplicable, firstly because the SADC Tribunal had not been designated under the legislation, and secondly because the decision was for declaratory and injunctive relief.⁴⁶¹

According to Oppong, after years of promoting economic integration this is disturbing as 'it was expected that African governments, in their determination to promote unity, solidarity, cohesion, and cooperation among the peoples of Africa and African States, would make the procedure available to African judgments.'⁴⁶² It is only between the founding members of the EAC that judgments can be registered in each other's countries.⁴⁶³

Oppong observes that in Africa, the common law rules for the enforcement of foreign judgments is flawed with technical and conceptual challenges.⁴⁶⁴ A civil suit to enforce a foreign judgment may take years. According to Oppong, this can hinder the free movement of persons, goods, capital, and services within the envisaged economic

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid at 42.

⁴⁶⁰ Oppong op cit note 428 at 278.

⁴⁶¹ Bartels at 41.

⁴⁶² Oppong op cit note 428 at 278.

⁴⁶³ Ibid at 278-279.

⁴⁶⁴ Oppong op cit note 454 at 26.

community.⁴⁶⁵ The AEC Treaty does not contain express provisions that could be used as the basis for the establishment of an African negotiated international convention on the enforcement of foreign judgments.⁴⁶⁶ However, there are provisions in the EAC Treaty and ECOWAS respectively that could be applied as the legal basis for the establishment of a regional convention.⁴⁶⁷

Therefore, to address the divergent rules of recognition and enforcement, each African state should designate many more African states as beneficiaries of its statutory regime for the registration of foreign judgments. Importantly, Africa must establish an African foreign judgment enforcement convention.⁴⁶⁸ This convention should aim at unifying and easing the procedures for enforcement, as well as limiting the grounds on which enforcement can be denied.⁴⁶⁹

4.6 Different speeds and capabilities

The AEC treaty aims to achieve the African Economic Community (AEC) by 2028 in six defined stages. However, the speed of implementation varies across the different communities. For example, the establishment of a free trade area and a customs union at the level of each REC is to be completed in 2017. While many RECs have managed to successfully launch their FTA and customs union, others are lagging. For instance, since January 2015, ECOWAS has made progress in shifting from a FTA to a customs union.⁴⁷⁰

In contrast, ECCAS has fallen behind significantly for a number of reasons including succession of wars in the Great Lakes region, multiple memberships; etc.⁴⁷¹ In 2004, ECCAS set up a free trade area with the hope of transforming it into a customs union by 2008. This, nevertheless, never materialised. Implementation of the FTA in the ECCAS regions is still to secure broader support from all member states as hindrances still continue in some member states.⁴⁷² In addition, EAC partner states have agreed

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid at 27.

⁴⁶⁷ Ibid.

⁴⁶⁸ Oppong op cit note 428 at 279.

⁴⁶⁹ Oppong op cit note 454 at 27.

⁴⁷⁰ Cited in Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra at 14.

⁴⁷¹ Ibid at 16.

⁴⁷² Ibid.

to remove Non-Tariff Barriers (NTBs) by December 2012, and without the presence of a legally binding framework and the necessary monitoring and implementation mechanisms, compliance among the member states varies across members depending on their political commitment.⁴⁷³

Muthai observes that although the EAC has made remarkable progress since its formation, these gains have been unstable and disproportionate. Developments on the ground have not always reflected the rhetoric of the politicians and the obligations contained in the constitutive documents.⁴⁷⁴ The EAC is governed by principles of variable geometry and asymmetry.⁴⁷⁵ The provisions were included in the Treaty primarily to dispel the fears of Tanzania and Uganda, which feared that, because of their lower levels of development, their economies ran the risk of being flooded by Kenyan goods if they were obliged to liberalise at the same pace.⁴⁷⁶

Hartzenberg, Erasmus, and Kingombe argue that the use of special and differential treatment and asymmetry provides some interim relief and is found in all the RECs. This allows Least Developed Country (LDC) member states to implement their obligations over longer periods and at a different pace.⁴⁷⁷ Eventually they must, however, comply with their scheduled tariff obligations in order to comply with the requirement to liberalise substantially all trade between the members.⁴⁷⁸

The Common External Tariff (CET) and the ECOWAS Trade Liberalisation Scheme (ETLS) comprise the most important parts of the customs union and form an important first step towards the creation of a common market.⁴⁷⁹ At present, eight signatories to ECOWAS have implemented the CET. Combining the customs union by ensuring member countries fully implement the provisions of the CET remains a challenge that needs to be resolved in order for ECOWAS to establish the next stage of a common market. Four decades on, ECOWAS is only in the early days of its customs union.⁴⁸⁰

⁴⁷³ Cited in Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 18.

⁴⁷⁴ Henry Kibet Mutai op cit note 34 at 82.

⁴⁷⁵ Ibid at 83.

⁴⁷⁶ Ibid.

⁴⁷⁷ Cited in Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 1.

⁴⁷⁸ Ibid.

⁴⁷⁹ Cited Amoako-Tuffour, Balchin, Calabrese and Mendez-Parra at 14.

⁴⁸⁰ Ibid.

The lack of progress is not for the lack of policies, but is owing to the lack of implementation of agreed policies at the national level.⁴⁸¹

In addition, the common market protocol was operational in July 2010. It was supposed to be fully implemented by December 2015. Seemingly, Rwanda is the only country to have complied so far with agreed deadlines, which seems to meet with the broader developmental policies and implementation arrangements that the leaders in Rwanda have adopted.⁴⁸²

4.7 Conclusion

This chapter has highlighted not only the disparities within the laws governing rules of recognition and enforcement of regional and national court judgment in Africa in the context of African regional integration but also demonstrated that African countries are at different speeds and level of development hence the varying degrees of implementation.

There are divergent rules of recognition and enforcement in regional and national court judgment in Africa and national courts continue to be the most important forum for resolution of cross border commercial disputes. This chapter observed that there is generally inactivity of individuals and non-state entities in the development of rules of recognition and enforcement in disputes with international elements.

In addition, this part of this research also observed lack of legally binding instruments and the necessary monitoring and implementation mechanisms, political turmoil and economic factors have further contributed to this situation. The following chapter concludes by summarising the entire research and provide recommendations not only to policy directors but those who seek to do further research on this area of law.

⁴⁸¹ Ibid at 14-15.

⁴⁸² Trudi Hartzenberg, Gerhard Erasmus, and Christian K.M. Kingombe at 18.

Chapter 5

5. Conclusion and Recommendations

Introduction

This research has shown that while Africa has made significant strides to achieve its stated objectives and has improved its economic growth and trade, it has been unable to translate these developments to demonstrable socio-economic benefits, especially dealing with the rising poverty and inequality levels in Africa. In addition, the economic integration model suffers from several challenges and has not achieved its goals, because of among other things, weak legal and institutional frameworks, and lack of support from ordinary African citizens and the private sector. Nevertheless, the economic model of integration remains the driving force of African regional integration. This was interrogated in terms of its appropriateness and suitability for Africa under its existing arrangements.

The study concluded that despite African countries embracing the economic model of integration and despite the policy drive to facilitate trade and investment, African regional integration is unlikely to succeed with this model because it does not consider African realities and lacks the necessary prerequisites for successful economic integration.

To support this view, the research employed a significant number of scholarly discussions, first-hand studies, and case law to illustrate the existing gaps in African regional integration. This study found that there are not only foundational, definitional, institutional, and legal gaps within the African regional integration structure but that there are also existing disparities between African realities and regional policies. Nevertheless, this study demonstrated that with the right model, Africa has the potential to successfully realise its integration aspirations, and has considerably improved its trade and demonstrated a strong policy framework and has taken important steps to improve trade. To address these challenges and improve African regional integration, the research recommends the following:

5.1 Develop a new economic model of integration

African regional integration studies have been dominated by the economists who are concerned with economic outcomes. Thus, economic understanding of integration

understates the interplay between law, politics and most importantly in the African context, socio-economic issues. It is important that Africa reconsiders the narrow economic understanding of integration and broadens it to include not only other disciplines but also to place prominence on socio-economic issues and the role of law in addressing issues such as poverty and inequality.

Africa must develop a new economic model that highlight Africa's socio-economic and political challenges. This should then be accompanied by the active involvement of both private sector and ordinary people in shaping its direction.

5.2 Transform the existing institutions and law to reflect African realities

African governments must transform the existing institutions and laws to reflect African realities. While it is important to acknowledge and appreciate the minimum role that has been played by these institutions mandated to drive regional integration, they have been unable to promote African regional integration. It remains doubtful whether the AU under the current institutional framework is capable of successfully promoting regional integration and addressing the 21st century challenges affecting the African continent since these challenges continue to torment the continent. Without a doubt, the success of regional integration depends on both strong institutional and legal frameworks that are governed by the rule of law.

5.3 Implement regional agreements

The issue confronting Africa's integration process is that regional policies remain unimplemented or suffer from poor implementation. Under such circumstances, it is difficult for Africa to achieve its stated integration goals. Consequently, policies that are designed to address these challenges remain unimplemented and where they are put into operation, member countries depart and sidetrack from their intended purpose. This thwarts the regional integration process and makes it difficult to proceed to the next level of integration.

5.4 Establish an African Convention for Recognition and Enforcement

It would be useful to establish an African convention to deal with the diverging rules of enforcement and recognition in view of the different African legal systems as practised by different African countries and economic communities, before such convention is

accepted as regional law. This convention must state clearly the supremacy of community courts subject to certain defined exceptions.

A detailed research should be conducted to determine whether or not it would be beneficial for Africa to develop its own model of rules regulating the recognition and enforcement of judgement by way of a single convention distinct from the laws created and designed by their colonial powers.

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