

**THE ROLE OF LAW IN DEEPENING REGIONAL INTEGRATION IN
SOUTHERN AFRICA – A COMPARATIVE ANALYSIS OF SADC AND
COMESA**

RAISA NYIRONGO (NYRRAI001)

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Supervisor: Professor Evance Kalula

(University of Cape Town)

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ABSTRACT

Regional integration is not a new phenomenon in Africa. It can be traced back to the creation of the Southern African Customs Union (SACU) in 1917, which was the world's first customs union. Upon gaining independence, states formed the Organization of African Unity (OAU). At that time, Heads of States viewed regional integration as a protectionist measure against colonialism and as a way of forming a self-sustaining continent. However, the additional challenges facing Africa over time prompted various initiatives by Heads of States which were aimed at deepening integration on the continent. Notable actions include the signing of the Abuja Treaty, which established the African Economic Community (AEC), and the replacement of the OAU by the African Union (AU). Further, the continent experienced an increase in the number of Regional Economic Communities (RECs) and there are now fourteen RECs.

Despite the steps taken to further integration, the success of such regional integration on the continent has been minimal and Africa has become even more marginalized on the global market. This lack in progression can be attributed to challenges such as inadequate resources, overlapping memberships in multiple RECs and duplicated programmes and efforts. Another challenge that is not readily recognized is the lack of attention to the role of law in economic integration. RECs have largely focused on the economic and political aspects of regional integration but have given minimal attention to the necessity of a strong legal foundation. RECs develop community law and these laws should be enforceable within Member States. However, due to the weak legal systems of RECs in Africa that do not make community law supreme, enforceability of this law has proven challenging. Comparatively, other RECs such as the European Union, have achieved deeper levels of integration and this can partly be attributed to the strong legal systems that have been developed. It is on the basis of this challenge that this study is conducted. The study aims to provide an in-depth analysis of the weaknesses of existing legal systems of the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). The study further analyses the manner in which other RECs, such as the European Union and the Economic Community of West African States, have successfully integrated through law, with the aim of identifying solutions for the existing weaknesses in Southern Africa.

Key words: regional integration, regional economic communities, regional trade agreements, SADC, COMESA.

ABBREVIATIONS

AEC	African Economic Community
AMU	Arab Maghreb Union
AU	African Union
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
FTA	Free Trade Area
IGAD	Inter-Governmental Authority on Development
OAU	Organization of African Unity
REC	Regional Economic Community
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

1. CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

States have long been engaged in the trade of goods, services and capital. Various reasons can be put forward for interstate trade such as the benefits gained from access to materials and services of other states, increased investment opportunities, creation of job opportunities and increased product variety and competition.

Interstate trade must be regulated and this can be done through either the multilateral trading system or through regional integration initiatives. This Chapter looks to provide a brief background on both of these mechanisms of regulation.

1.1.1 The History of the Multilateral Trading System and The Proliferation of Regional Trade Agreements

The multilateral trading system is regulated by the World Trade Organization (WTO), the only global international organization dealing with the rules of trade between states.¹ Although the multilateral trading system as it exists today appears to be functional and effective, the development of such a system was a complex task. The history of the WTO can be traced back to negotiations between the United Kingdom and the United States of America which lead to political and economic conferences being held between allied governments. Through these conferences, a number of international organizations such as the International Monetary Fund and the World Bank were established.

However, the most relevant conference in the current context was the United Nations Conference on Trade and Employment, which was held in Havana, Cuba in 1947. This conference saw the adoption of the Havana Charter for an International Trade Organization, the purpose of which was to establish a multilateral trading organization.²

Unfortunately, the entry into force of the Havana Charter took longer than was anticipated and states were in need of some form of regulation of the trading system. Thus, pending the entry into force of the Havana Charter, twenty-three contracting parties signed the General Agreement on Tariffs and Trade.³ The purpose of this was to provide an interim mechanism to protect and implement concessions that had been

¹ What is the WTO?, available at https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, accessed on 24 August 2016.

² Pre-WTO Legal Texts, available at https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm, accessed on 24 August 2016.

³ Ibid.

negotiated at the conference in Havana.⁴ The contracting parties then adopted a Protocol of Provisional Application, and this led to the creation of an unofficial, *de facto* international organization known as the GATT.⁵ The contracting parties intended the GATT to be a provisional organisation operating until the Havana Charter took effect. However, the Havana Charter was not ratified by some states which meant the envisaged International Trade Organization could not be established. As a result, the multilateral trading system was regulated by the GATT for decades to come.⁶

Over the years, GATT evolved through several rounds of negotiations, the most significant of which was the Uruguay Round.⁷ The Uruguay round, which took place between 1986 and 1994, transformed the nature of the multilateral trading system and resulted in the creation of the World Trade Organization, which replaced the GATT. The establishment of the WTO meant that there was now a permanent institution regulating the multilateral trading system rather than a provisional organization. Other changes brought about by the Uruguay Round included an increase in the matters covered by the WTO agreements,⁸ the single undertaking principle,⁹ and a stronger dispute settlement mechanism.¹⁰

Since its establishment, the WTO has grown in membership with 164 states currently being members. However, despite the progress made in the multilateral trading system, the trading system has also seen an increase in the number of Regional Trade Agreements (RTAs). As of 1 September 2016, 424 notifications of RTAs had been made to the WTO, of which 267 were in force.¹¹ RTAs are defined as groupings of states which are formed with the objective of reducing barriers to trade between the member states, but these groupings are not restricted to countries within the same geographic region.¹²

⁴ Ibid.

⁵ World Trade Organization 'Understanding the WTO' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf, accessed on 18 February 2017.

⁶ Craig VanGrasstek 'The History and Future of the World Trade Organization' available at https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf, accessed on 20 February 2016.

⁷ Understanding the WTO op cit note 5.

⁸ GATT dealt mainly with trade in goods, but the WTO and its agreements now additionally cover trade in services and intellectual property.

⁹ In terms of this principle, every item of a negotiation is part of a whole and indivisible package and cannot be agreed to separately.

¹⁰ The Dispute Settlement Understanding entails a more structured process.

¹¹ See Regional Trade Agreements available at https://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed on 18 February 2017.

¹² Parthapratim Pal 'Regional Trade Agreements in a Multilateral Trade Regime: An Overview' available at http://www.networkideas.org/feathm/may2004/survey_paper_RTAs.pdf, accessed on 14 August 2016.

States conclude RTAs for various reasons. First, RTAs enable access to larger markets which may be easier to obtain by way of regional or bilateral agreements especially if there is an unwillingness among WTO members for further trade liberalization.¹³ Second, RTAs are viewed as a way of deepening integration of economies in areas that are not available through the WTO.¹⁴ Third, discriminatory liberalization may be an attractive defensive measure to smaller economies which cannot compete internationally.¹⁵ In addition to these reasons, RTAs also have the benefit of increasing the bargaining power of the member states at the multilateral level.¹⁶ These reasons very easily relate to developing countries that experience challenges in negotiations with developed countries at the multilateral level. It therefore does not come as a surprise that Africa has also experienced an increase in the number of RTAs.

1.1.2 Regional Trade Agreements in Africa

For decades, African states have come together to address common challenges and achieve common objectives. Regional integration initiatives in Africa can be traced back to the creation of the Southern African Customs Union (SACU), which is the world's oldest customs union, in 1910 and the first East African Community (EAC) in 1917.¹⁷ Regional integration was embraced even more by African states upon gaining independence which led to the establishment of organizations such as the Organization of African Unity (OAU), which was later replaced by the African Union (AU), and the African Economic Community (AEC).

The main reason behind economic integration between states in Africa is the benefits such integration has to offer. These benefits include increases in competition, increases in the variety of products available and a reduction in internal inefficiencies.¹⁸

Considering that Africa is characterised by small countries, small economies and small markets, the use of regional integration to address developmental challenges makes

¹³ Jo-Ann Crawford and Roberto V. Fiorentino 'The Changing Landscape of Regional Trade Agreements' available at https://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf, accessed on 24 August 2016.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Manone Regina Madyo *The Importance of Regional Economic Integration in Africa* (unpublished MCom thesis, University of South Africa, 2008) 49.

¹⁷ Jonathan Bashi Rudahindwa 'The Role of integration through law in African FTAs', available at <http://giftaproject.org/wp-content/uploads/2015/07/Rudahindwa-2015-paper.pdf>, accessed on 6 July 2016.

¹⁸ Henry Mutai, *Compliance with International Trade Obligations the Common Market for Eastern and Southern Africa* (2007) Kluwer Law International.

sense¹⁹ and it is no surprise that the number of Regional Economic Communities (RECs)²⁰ within the continent has increased. RECs have been recognized as key components towards the establishment of the African Economic Community and although there are now fourteen RECs in Africa, only eight are recognized as such building blocks (key components) of the AEC. The recognized eight are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Inter-Governmental Authority on Development (IGAD) and the Southern African Development Community (SADC).²¹

The general approach to regional integration adopted by RECs within Africa is the linear market integration approach. This approach entails communities gradually progressing from a Free Trade Area (FTA) to complete economic integration.²² The linear mode of integration is the mode adopted by the European Union (EU) and it is advanced that African RECs have followed the same approach due to the success of the EU.

However, despite the long-lasting efforts towards the integration of Africa's major economic regions, success of these efforts has been minimal. Without discounting the progress achieved within Africa in areas such as trade, transport, energy and free movement of people,²³ Africa has become even more marginalized on the global market instead of gaining strength as a competitor. This lack in progression has been attributed to challenges that have hindered the promotion of integration. Such challenges include inadequate funding of the communities, multiplicity of memberships in RECs, and poor implementation of community commitments by member states, to name a few.²⁴ In addition to these challenges, regional integration initiatives in Africa have given little attention to the role of law in effective integration.

¹⁹ Trudi Hartzenberg 'Regional Integration in Africa' (2011) Staff Working Paper ERSD-2011-14, Economic Research and Statistics Division, World Trade Organization 3.

²⁰ Regional Trade Agreements in Africa are generally referred to as Regional Economic Communities.

²¹ United Nations Economic Commission for Africa 'African Union (AU) and Regional Economic Communities (RECs) in Africa', available at <http://www.uneca.org/oria/pages/african-union-au-regional-economic-communities-recs-africa>, accessed on 2 May 2016.

²² Ibid.

²³ Economic Commission for Africa and the African Union *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (2006) 8.

²⁴ Ibid.

1.2 PROBLEM STATEMENT

Existing regional integration initiatives in Africa have focused more on the economic and political aspects of integration and have placed minimal emphasis on the legal aspect of it. Not to say that the economic and political aspects are not important, but it is also important to recognize that law also has a role to play within these initiatives. In analysing the functioning of RECs it is important to understand that since RECs have law-making and enforcement powers, they constitute legal systems. At the same time, the states that become members of RECs also have legal systems of their own and develop laws that are applicable within their jurisdictions. As a result, there are two of legal systems, namely the community legal system and the national legal systems of Member States, existing concurrently in a community.

The lack of attention to the role of law in integration has resulted in a disjunction between community legal systems and the national legal systems of Member States.²⁵ The main issue that arises is the status of community law at the national level. RECs develop what is referred to as ‘community law’. Community law can be defined as the binding legal instruments of a regional economic community and it is binding on the Member States of that community.²⁶ Community law may take the form of treaties, protocols, regulations, decisions, principles, objectives and general undertakings.²⁷ However, due to the disjunction, questions such as “is community law supreme?” and “can individuals rely on community laws at national level?”, arise.

Ordinarily, the founding treaties of RECs should define the relationship between the community law and national law but that if that is not the case, reference must be made to national constitutions and jurisprudence to determine the relationship.²⁸ Preliminary research on African RECs indicates that founding treaties do not define the relationship between community law and national law. The same can be said for the two prominent regional integration initiatives in Southern Africa; namely the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). Established in 1992 and 1994 respectively, neither of the founding

²⁵ Richard Frimpong Oppong ‘Making Regional Economic Community Laws Enforceable in National Legal Systems – Constitutional and Judicial Challenges’ (2008) 8 *Monitoring Regional Integration in Southern Africa*.

²⁶ Gerhard Erasmus ‘The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?’ (2012) 12 *Monitoring Regional Integration in Southern Africa*.

²⁷ Ibid.

²⁸ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (2011) 189.

treaties of these RECs make provision for the status of community law *vis-à-vis* national legal systems. This has resulted in the enforcement of community laws in Member States being a challenging task. This challenge is illustrated by the *Mike Campbell (PVT) Limited v Republic of Zimbabwe*²⁹ case which will be discussed in more detail in a later chapter.

This lack of attention to the role of law in economic integration is arguably one of the major challenges faced by African RECs. An effective legal system would not only ensure compliance and uniformity, it would also provide protection to member states and private parties. Thus, there is a need for a defined relationship between community law and national laws, and for effective judicial organs. This study aims to evaluate the current situation in Southern Africa with specific focus on the SADC and the COMESA communities.

1.3 LITERATURE REVIEW

The literature review is statute based and as such focuses on the treaties and protocols of the SADC and COMESA. The review highlights the relevant provisions of the SADC and the COMESA treaties in relation to the role of law and identifies the existing gaps.

Both the SADC and COMESA treaties require Member States to take steps towards realising community law. Article 6(5) of the SADC Treaty stipulates that Member States must take necessary steps to accord the Treaty the force of national law, and Article 5(2) of the COMESA Treaty provides that Member States must take necessary steps to ensure the enactment and continuation of legislation to give effect to the Treaty. However, neither of the treaties make provision for the supremacy of community law *vis-a-vis* national law.

As with any other form of law, there are primary and secondary sources of community law. Treaties are the primary source of community law and secondary sources are developed by the organs of the community. In SADC, the Summit is the supreme policy making institution and it is also tasked with adopting legal instruments for the implementation of the SADC Treaty,³⁰ thus it develops community law. The Summit is

²⁹ SADC (T) Case No.2/2007.

³⁰ Article 10(3) of the SADC Treaty.

the only organ of SADC that has the authority to develop legal instruments but it may delegate this authority to the Council or any other institution of SADC.³¹

In COMESA, community law is developed by the Authority and the Council of Ministers. The Authority is the supreme policy organ of COMESA and its directions and decisions are binding.³² The Council of Ministers is the organ responsible for making regulations, issuing directives and taking decisions, among other things.³³ These are considered secondary sources of community law, each having different effects on the Member States. In terms of Article 10 of the COMESA Treaty, regulations of the Council are binding on all Member States;³⁴ directives are binding on each Member State to which they are addressed but only with regard to the result to be achieved and not the means of achieving it;³⁵ and decisions of the Council are binding upon the Member States on whom they are addressed.³⁶ This is similar to what is provided for under Article 288 of the Treaty on the Functioning of the European Union (TFEU).

Regarding enforcement, within the SADC, the SADC Tribunal is the organ responsible for ensuring adherence to and the proper interpretation of the Treaty and subsidiary instruments.³⁷ The decisions of the Tribunal are final and binding.³⁸ In terms of Article 44(1) of the new SADC Protocol on the Tribunal, Member States must take the necessary measures to ensure execution of decisions of the Tribunal. In the instance the Tribunal has made a judgment against a party and that party fails to comply, any Member State affected by the decision may refer such a failure to the Tribunal.³⁹ The Tribunal, upon establishing such a failure, must then refer the matter to the Summit to take appropriate action.⁴⁰ In COMESA, the COMESA Court of Justice (COMESA CoJ) is the organ that is entrusted with ensuring adherence to the law in the interpretation and application of the COMESA Treaty.⁴¹ The judgments of the COMESA CoJ are final and conclusive and may not be appealed.⁴² The COMESA Treaty, however, is

³¹ Ibid.

³² Article 8(3) of the COMESA Treaty.

³³ Article 10(1) of the COMESA Treaty.

³⁴ Article 10(2) of the COMESA Treaty.

³⁵ Article 10(3) of the COMESA Treaty.

³⁶ Article 10(4) of the COMESA Treaty.

³⁷ Article 16(1) of the SADC Treaty.

³⁸ Article 16(5) of the SADC Treaty.

³⁹ Article 44(3) of the Protocol on the Tribunal in SADC, 2014.

⁴⁰ Article 44(4) of the Protocol on the Tribunal in SADC, 2014.

⁴¹ Article 19 of the COMESA Treaty.

⁴² Article 31 of the COMESA Treaty.

silent on the procedure to be followed in the instance a party fails to comply with the judgment of the court.

The abovementioned provisions regarding enforcement can be compared to the manner in which failure to comply with judgments is dealt with in the EU. Under Article 260(2) of the TFEU, the European Commission may bring a case to the European Court of Justice (EU Court of Justice) if the Commission considers that a Member State has failed to comply with the judgment of the EU Court of Justice. It is then within the power of the court to impose a penalty on the Member State if it finds that the Member State has not complied with its judgment.⁴³

Other than the judicial organs of the communities, some provision is made for the involvement of administrative organs in the enforcement of community law. In Article 17 of the COMESA Treaty, the COMESA Secretariat is given the authority to investigate a presumed breach of the provisions of the COMESA Treaty and report this to the Council of Ministers. This is similar to the role of the European Commission under Article 17(1) of the Treaty on the European Union (TEU), which provides that the European Commission has a responsibility to oversee the application of Union law.

It is important to mention that the SADC Treaty does not make provision for reference by national courts to the Tribunal as regards interpretation of SADC Treaty provisions. The COMESA Treaty, on the other hand, does make provision for this and stipulates that where a question is raised before a national court concerning the application or interpretation of the Treaty, the court shall request the COMESA CoJ to give a preliminary ruling on this question.⁴⁴

1.4 HYPOTHESIS, RESEARCH QUESTION AND OBJECTIVES

The assumption investigated in this research is that the establishment of an effective and supreme community legal system will deepen integration and contribute to the success of economic integration.

The main research question this study seeks to address is whether an effective community legal system contributes to the success of economic integration. To this end, the study has the following objectives:

- (a) Analyse the status of community law in SADC and COMESA;

⁴³ Article 260(2) of the TFEU.

⁴⁴ Article 30(1) of the COMESA Treaty.

- (b) Assess the role the courts have played in the enforcement of community laws of SADC and COMESA;
- (c) Assess the role that other organs of SADC and COMESA play in the enforcement of community law;
- (d) Determine what lessons can be learnt from the experiences of other communities such as the European Union, the East African Community and the Economic Community of West African States.

1.5 RESEARCH METHODOLOGY

This research will be literature based. First, primary resources will be relied upon, which include treaties, protocols and declarations of SADC and COMESA. Second, reference will be made to secondary resources including books, journal articles, publications by international and non-governmental organizations, as well as newspaper articles. Last, internet resources will be used to obtain additional information such as reports, academic articles and newspaper articles.

1.6 STRUCTURE OF THE STUDY

The following is the structure of the study:

Chapter One

Chapter One will provide an introduction to the paper. This chapter will provide a background into the multilateral trading system and the proliferation of regional trade agreements around the world. Further, the chapter will provide the background into the study, setting out the objectives of the paper and the methodology used.

Chapter Two

Chapter Two will provide an overview of the progress of regional integration in Southern Africa with specific focus on the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). In addition, this chapter will look at the earlier attempts to integration within Southern Africa and assesses the current institutional and legal framework of the SADC and COMESA communities.

Chapter Three

Chapter Three aims to analyse the enforcement of community law at the national level within SADC and COMESA. To this end, the chapter will look into the concepts of monism and dualism, direct effect of community law, direct applicability of community law and the preliminary reference procedure. In addition, the chapter will look at the role of national courts and the individual in the enforcement of community laws, which will include an evaluation of cases that have been dealt with by the respective judicial organs of these communities.

Chapter Four

Chapter Four analyses other regional economic communities and aims to draw on their experiences, as a means of identifying any lessons that can be adopted by Southern African economic integration communities to improve the effectiveness of regional integration. Focus will largely be given to the European Union due to its long standing history as a successful REC with an effective legal framework. However, the chapter will also consider other economic communities such as the East African Community.

Chapter Five

Chapter Five will provide the author's concluding remarks on the research conducted and recommendations.

2. CHAPTER TWO: AN OVERVIEW OF REGIONAL INTEGRATION IN SOUTHERN AFRICA

2.1 INTRODUCTION

Southern African states have pursued regional integration for some time now. This has led to the development of a number of economic communities such as the Southern African Customs Union, the Southern African Development Coordination Community and the Common Market for Eastern and Southern Africa. The purposes and methods, however, of such integration initiatives have evolved in order to keep up with changing times. Earlier integration initiatives were aimed more at strengthening the independence of states and developing collective self-sufficiency.⁴⁵ For instance, the Southern African Development Coordination Community (SADCC) was established with the aim of breaking the economic power South Africa held over its neighbours by focusing strongly on intraregional infrastructure and institutions.⁴⁶ Taking into consideration the challenges facing states at the time, the initiative was well suited for the time.

However, changes in society and developments in the world such as globalization, have required regional integration initiatives to adapt so as to deal with arising challenges. As such, some of the earlier initiatives have undergone transformative processes in an attempt to accommodate the needs of member states and have adopted different objectives and frameworks.

Chapter Two will provide an overview of the development and progress of regional integration in Southern Africa with specific focus on the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). This chapter looks at the earlier attempts to integration within Southern Africa and assesses the current institutional and legal framework of the SADC and COMESA communities.

2.2 THE HISTORY OF REGIONAL INTEGRATION IN SOUTHERN AFRICA

⁴⁵ Rene N'Guettia Kouassi 'The Itinerary of the African Integration Process: An Overview of the Historical Landmarks' (2007) 1 *African Integration Review* at 2.

⁴⁶ Christian Peters-Berries 'Regional Integration in Southern Africa – A Guidebook' available at https://www.iaj.org.za/wp-content/uploads/2011/08/sadc-_guidebook_for_regional_integration11.pdf, accessed on 1 June 2016.

Regional integration in Southern Africa dates back to the early 1900s when the Southern African Customs Union (SACU) was established. Over time regional integration initiatives have evolved and increased in number, which has resulted in most states in the region being a member of at least one community. The various initiatives are now discussed.

2.2.1 The Southern African Customs Union

The Southern African Customs Union (SACU) is one of the regional integration initiatives that can be traced back to the colonial era. It was established in 1910, by four states namely; the South African Union (South Africa), Basutoland (Lesotho), Bechuanaland (Botswana) and Swaziland.

Of the Member States, South Africa had the strongest economy and the other economies were highly dependent on it.⁴⁷ This dependence was largely influenced by the revenue distribution system established under the 1969 SACU Agreement.⁴⁸ The revenue distribution system allocated portions of the community's revenue to each Member State. The majority of the Union's revenue was contributed by South Africa and went to Botswana, Lesotho and Swaziland, and in most instances, this distributed revenue constituted a significant portion of the government revenue of these states. In exchange for the revenue received, Botswana, Lesotho and Swaziland essentially protected South Africa and were politically compliant with the Apartheid regime.⁴⁹

As the strongest economy in the Union, South Africa played a managerial role and managed the technical aspects of the Union. In terms of Article 5 of the 1969 SACU Agreement, South Africa alone had the authority to determine the external tariff policy of the Union. The effect of this provision was that South Africa managed the tariff levels in the interest of its own economy. South Africa was essentially in control of the Union.

The power dynamics of the Union, however, shifted when the Agreement was renegotiated in 1994. Although it took several years, the Member States signed the new SACU Agreement in 2002. One of the changes the 2002 SACU Agreement introduced was that the external trade policy is to be determined jointly by the Council of

⁴⁷ Stewart Payne 'SACU's uncertain future' available at <https://www.tralac.org/discussions/article/5350-sacu-s-uncertain-future.html>, accessed on 1 September 2016.

⁴⁸ Article 14 of the 1969 SACU Agreement.

⁴⁹ Ibid.

Ministers,⁵⁰ which consists of Ministers of Finance and Trade from all Member States. This provision has made the Union more democratic since all Member States, or their representatives, can partake in the decision making process.

SACU remains one of the more successful communities in Africa and has evolved since its establishment. However, as with all other regional economic communities, SACU faces challenges as well. One major challenge being the revenue distribution system, which was retained in the 1994 renegotiations. As South Africa continues to be the strongest economy in the Union, it continues to provide the largest share of the revenue and the other Member States continue to be dependent on the revenue they receive.⁵¹ However, the system is proving unsustainable for South Africa due to factors such as the global economic crisis and will have to be addressed.

2.2.2 The Southern African Development Coordination Conference

The Southern African Development Coordination Conference (SADCC) was formed in 1980.⁵² The SADCC was aimed at breaking the economic power that South Africa held over its neighbours by focusing strongly on intraregional infrastructure and institutions.

Unlike most regional integration initiatives in Southern Africa, the SADCC did not adopt the neo-classical economic theories of integration that focus on benefits from trade.⁵³ Rather, the Member States of SADCC chose a project coordinated approach. In terms of this approach, economic activities and development projects to be pursued by the community were specified and each Member State was allocated a specific sector for coordination.⁵⁴ As such, the SADCC did not pursue regional integration but rather regional cooperation, emphasising the role of individual states in areas of coordination.⁵⁵

The SADCC did not have a legally binding instrument but rather adopted a decentralised structure. The purpose of this was to protect the sovereignty of its Member States. This approach proved challenging because Member States were unwilling to place the interests of the community above their own.⁵⁶ Despite the decentralized structure, the SADCC did have institutions that were established by a

⁵⁰ Article 11 of the 2002 SACU Agreement.

⁵¹ Stewart Payne op cit note 47.

⁵² The states that formed the SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe.

⁵³ Kyu Deug Hwang 'The Historical Evolution of SADC(C) and Regionalism in Southern Africa' (2007) 10 *International Area Review* at 64.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid at 66.

Memorandum of Understanding. These institutions included the Summit, the Council of Ministers, the Sectoral Commissions, the Standing Committee and the Secretariat.

In the late 1980s, the SADCC leaders reassessed the approach of the SADCC to integration and increasingly placed greater importance on the role of the market in the development process.⁵⁷ As the Apartheid regime came to an end, the SADCC leaders realized the original objective of the SADCC would no longer be suitable to their needs.⁵⁸ The leaders further realized the importance of trade liberalization. As such, a decision was made to shift from the regional cooperation approach initially adopted to a trade based regional integration model.⁵⁹ This led to the transformation of the SADCC to the Southern African Development Community.⁶⁰

2.2.3 The Southern African Development Community

Considering the changes in the global market and factors such as increasingly competitive regional markets, the leaders of the SADCC realised the need to transform the informal association of states into a legally binding regional economic community. This transformation took the form of the Southern African Development Community⁶¹ (SADC), which was established in 1992.

The transformation to the SADC not only resulted in the adoption of legally binding instruments but also in the adoption of a centralized structure so as to meet the integration agenda of the community. This had the effect of binding Member States to observe the SADC objectives and principles⁶² and prevented them from freely placing national interests above those of the community.

The change in the institutional structure saw the establishment of new institutions and the restructuring of pre-existing institutions of the SADCC. A brief overview of these institutions is now discussed.

⁵⁷ Arigo Pallotti 'SADC: A development community without a development policy?' (2004) *Review of African Political Economy* at 516.

⁵⁸ Christian Peters-Berries op cit note 46.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Currently SADC has fifteen members. These are South Africa, Zimbabwe, Botswana, Mozambique, Lesotho, Namibia, Angola, Zambia, Tanzania, Swaziland, Democratic Republic of Congo, Malawi, Madagascar, Mauritius and Seychelles.

⁶² Article 6 of the SADC Treaty.

(a) The Summit

The supreme policy making organ of the SADC is the Summit. It comprises Heads of State or Government of SADC Member States.⁶³ The Summit is responsible for the overall policy direction of SADC⁶⁴ and for adopting legal instruments for the implementation of provisions of the SADC Treaty.⁶⁵ The Summit may, however, delegate the authority to adopt legal instruments to any other institution of the community that the it may deem fit.⁶⁶ Decisions of the Summit are taken by consensus and are binding.⁶⁷

(b) The Council of Ministers

The Council of Ministers (SADC Council) consists of one minister from each Member State.⁶⁸ The Chairperson and Deputy Chairperson of this institution are appointed by the Member State holding the Chairpersonship and Deputy Chairpersonship of SADC.⁶⁹

The functions of the SADC Council include overseeing the functioning and development of SADC;⁷⁰ overseeing the implementation of SADC policies;⁷¹ and directing, coordinating and supervising the operations of the institutions of SADC that are subordinate to it.⁷² In addition, the SADC Council, plays an advisory role to the Summit on matters of policy.⁷³ As such, the SADC Council serves as the engine room of SADC in that it develops and implements the common agenda of SADC.⁷⁴

(c) The Sectoral and Cluster Ministerial Committees

The Sectoral and Cluster Ministerial Committees consist of ministers from each Member State.⁷⁵ The purpose of the Committees is to ensure proper policy guidance,

⁶³ Ibid.

⁶⁴ Article 10(2) of the SADC Treaty.

⁶⁵ Article 10(3) of the SADC Treaty.

⁶⁶ Ibid.

⁶⁷ Article 10(9) of the SADC Treaty.

⁶⁸ Article 11(1) of the SADC Treaty.

⁶⁹ Article 11(3) of the SADC Treaty.

⁷⁰ Article 11(2)(a) of the SADC Treaty.

⁷¹ Article 11(2)(b) of the SADC Treaty.

⁷² Article 11(2)(e) of the SADC Treaty.

⁷³ Article 11(2)(c) of the SADC Treaty.

⁷⁴ Ashimizo Afadameh-Adeyemi & Evance Kalula 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' (2010) 10 *Monitoring Regional Integration in Southern Africa Yearbook* at 13.

⁷⁵ Article 12(1) of the SADC Treaty.

coordination and harmonisation of cross-sectoral activities⁷⁶. As such, the Committees oversee the activities of the core areas of integration including trade, industry, finance and investment;⁷⁷ infrastructure and services;⁷⁸ and food and agriculture.⁷⁹ Furthermore, the Committees also have decision making powers as a means of ensuring rapid implementation of programmes approved by the SADC Council.⁸⁰

(d) The Secretariat

The Secretariat is the principal executive institution of SADC.⁸¹ Headed by the Executive Secretary,⁸² this organ is responsible for planning and managing SADC programmes;⁸³ monitoring and evaluating the implementation of such programmes;⁸⁴ harmonizing the policies of Member States;⁸⁵ and general administration;⁸⁶ among others.

(e) The Tribunal

The SADC Tribunal is the institution entrusted with ensuring adherence to and proper interpretation of the provisions of the SADC Treaty.⁸⁷ The Tribunal consists of at least ten Judges, five of which are regular Judges who shall sit regularly on the Tribunal and the additional five shall constitute a pool from which the Judge President may select a judge to sit on the Tribunal in the absence of a regular judge.⁸⁸

In terms of the Protocol on the Tribunal adopted in 2000, the Tribunal had jurisdiction over the implementation of the SADC Treaty and Protocols relating to disputes between Member States.⁸⁹ The decisions of the Tribunal were to be final and binding,⁹⁰ and Member States and SADC institutions were required to take all measures necessary to ensure execution of decisions of the Tribunal.⁹¹ However, following the suspension

⁷⁶ A Saruombe 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 *Potchefstroom Electronic Law Journal* 454 at 466.

⁷⁷ Article 12(2)(a)(i) of the SADC Treaty.

⁷⁸ Article 12(2)(a)(ii) of the SADC Treaty.

⁷⁹ Article 12(2)(a)(iii) of the SADC Treaty.

⁸⁰ Article 12(3) of the SADC Treaty.

⁸¹ Article 14(1) of the SADC Treaty.

⁸² Article 14(2) of the SADC Treaty.

⁸³ Article 14(1)(a) of the SADC Treaty.

⁸⁴ Article 14(1)(i) of the SADC Treaty.

⁸⁵ Article 14(1)(f) of the SADC Treaty.

⁸⁶ Article 14(1)(d) of the SADC Treaty.

⁸⁷ Article 16(1) of the SADC Treaty.

⁸⁸ Article 13(2) of the Protocol on the Tribunal in SADC, 2000.

⁸⁹ Article 33 of the Protocol on the Tribunal in SADC, 2000.

⁹⁰ Article 38(3) of the Protocol on the Tribunal in SADC, 2000.

⁹¹ Article 44(1) of the Protocol on the Tribunal in SADC, 2000.

of the SADC Tribunal in 2010, a new Protocol on the Tribunal was adopted. The suspension of the Tribunal and the effect of this decision will be discussed in greater detail in a subsequent chapter.

(f) The SADC Parliamentary Forum

The parliamentary organ of SADC is the SADC Parliamentary Forum (SADC Forum) which was established in 1997. The Forum is an inter-parliamentary organ which was established as a mechanism to allow parliamentarians an opportunity to participate in the regions development and integration agenda.⁹² Through the Forum, the citizens of SADC Member States are able to know the aims and objectives of SADC, whilst the Forum informs the SADC of the views of the people on development issues.⁹³ As such, the Forum promotes good governance and democracy.⁹⁴

Despite the vision for the Forum to progress into a fully-fledged Regional Parliament, this is yet to happen. At the moment, the Forum is restricted to an advisory role and it does not exercise any legislative or oversight functions. This means the Forum is not in a position to oversee the executive organs, let alone to hold them accountable.

2.2.4 The Common Market for Eastern and Southern Africa

The Common Market for Eastern and Southern Africa (COMESA) was established in 1994 and was preceded by the Preferential Trade Area for Eastern and Southern Africa (PTA). The PTA was established in 1981 with the aim of creating a larger market for greater social and economic cooperation between the Members States.⁹⁵ However, the PTA Treaty envisaged the transformation of the PTA into a common market and in conformity with this, the Treaty establishing COMESA was signed in 1993 and ratified in 1994. Thus COMESA was established.

COMESA has 19⁹⁶ members and has adopted a trade development approach to integration, in terms of which the community is to progress in three stages. The first stage was the establishment of a Free Trade Area in which all tariff and non-tariff

⁹² Barney Karuuombe 'The role of parliament in regional integration – the missing link' (2008) *Monitoring Regional Integration in Southern Africa Yearbook* at 13.

⁹³ See SADC Parliamentary Forum available at http://www.sadcpf.org/index.php?option=com_content&view=article&id=71&Itemid=89, accessed on 9 February 2017.

⁹⁴ Ibid.

⁹⁵ James Thuo Gathii *African Regional Trade Agreements as Legal Regimes* (2011) at 165.

⁹⁶ Member States of COMESA are as follows: Burundi, Comoros, Djibouti, Ethiopia, Eritrea, Egypt, Kenya, Libya, Zimbabwe, Zambia, Swaziland, Sudan, Uganda, Rwanda, Democratic Republic of Congo, Malawi, Madagascar, Mauritius and Seychelles.

barriers between COMESA Member States were to be eliminated.⁹⁷ The FTA, which was launched in 2000 by 9 Member States, now has 16 Member States. The second stage was the formation of a customs union with the implementation of a Common External Tariff as stipulated in Article 47 of the COMESA Treaty. The COMESA Customs Union was launched in 2009. The third and final stage, which is yet to be implemented, is the formation of a Monetary Union. Article 4(4)(a) of the COMESA Treaty stipulates that Member States shall co-operate in monetary and financial matters and gradually establish convertibility of their currencies and a payments union as a basis for the eventual establishment of a monetary union. To this end, one of the strategies being pursued by the community is the monetary and financial programme which is aimed at creating a zone of monetary stability with an efficient exchange and payments system in order to facilitate the market integration of the region. The long-term goal is to attain a Monetary Union with a single currency.⁹⁸

COMESA has established eight institutions, which include executive and judicial organs. Below is an overview of some of the institutions that are relevant in the context of this paper.

(a) The Authority

The Authority is the supreme organ of COMESA and consists of Heads of State or Governments of the Member States.⁹⁹ Responsible for the executive functions of COMESA,¹⁰⁰ this organ has the power to give directions and make decisions which are binding on Member States and other organs of the Common Market except the COMESA Court of Justice.¹⁰¹

(b) The Council of Ministers

The Council of Ministers (COMESA Council) consists of Ministers designated by each Member State.¹⁰² The COMESA Council has various functions such as making recommendations to the Authority on policy matters, approving budgets of the Secretariat and the Court of Justice, and making recommendations to the Authority on

⁹⁷ James Thuo Gathii op cit note 95 at 166.

⁹⁸ See COMESA – Macroeconomic Policy Convergence available at <http://www.uneca.org/oria/pages/comesa-macroeconomic-policy-convergence>, accessed on 19 February 2017.

⁹⁹ Article 8(1) of the COMESA Treaty.

¹⁰⁰ Article 8(2) of the COMESA Treaty.

¹⁰¹ Article 8(3) of the COMESA Treaty.

¹⁰² Article 9(1) of the COMESA Treaty.

the designation of Least Developed Countries.¹⁰³ However, the most important function of the COMESA Council, with respect to this research project, is its authority to issue rulings that have the status of law within the community despite the Council not being a legislature.

The COMESA Council is empowered to make regulations, issue directives, take decisions, make recommendations and give opinions. Regulations of the COMESA Council are binding on all Member States in their entirety;¹⁰⁴ directives are binding on all Member States to which they are addressed but only regarding the results to be achieved, not the way they are to be achieved;¹⁰⁵ and decisions are binding on those to whom they are addressed.¹⁰⁶ Recommendations and opinions of the COMESA Council, however, are not binding in nature.¹⁰⁷

(c) The Technical Committees

COMESA has established various technical committees for each area of cooperation. The role of these committees is to develop and monitor the implementation of programmes in their respective areas of cooperation.¹⁰⁸

(d) The Secretariat

Headed by the Secretary General, the Secretariat is essentially the administrative organ of COMESA. The Secretary General is responsible for assisting the other organs in the performance of their functions; and for the administration and finances of the Common Market.¹⁰⁹ The Secretariat further has the task of ensuring that the objectives set out in the COMESA Treaty are attained and investigating any presumed breach of the Treaty.¹¹⁰

(e) The Court of Justice

COMESA established a Court of Justice (COMESA CoJ) which is tasked with ensuring adherence to the law in the interpretation and application of the COMESA Treaty.¹¹¹ It is composed of seven impartial and independent judges from Member States¹¹² and has

¹⁰³ Article 9(2) of the COMESA Treaty.

¹⁰⁴ Article 10(2) of the COMESA Treaty.

¹⁰⁵ Article 10(3) of the COMESA Treaty.

¹⁰⁶ Article 10(4) of the COMESA Treaty.

¹⁰⁷ Article 10(5) of the COMESA Treaty.

¹⁰⁸ Article 16 of the COMESA Treaty.

¹⁰⁹ Article 17(8) of the COMESA Treaty.

¹¹⁰ Ibid.

¹¹¹ Article 19 of the COMESA Treaty.

¹¹² Article 20(1) of the COMESA Treaty.

jurisdiction over all matters which may be referred to it, pursuant to the Treaty.¹¹³

Matters may be referred to the COMESA CoJ by Member States, the Secretary General and legal and natural persons.¹¹⁴

Decisions of the COMESA CoJ are final and conclusive and are not open to appeal.¹¹⁵

In addition to this, decisions on issues relating to the interpretation of the Treaty take precedence over decisions of the national courts.¹¹⁶

2.3 CONCLUSION

The existence of integration initiatives in Southern Africa for such a long time indicates the desire of Southern African states to work together to achieve common objectives. This is further reflected by the adaptation of these initiatives to meet the demands of the changing society. Regional economic communities in Southern Africa have made progress in areas such as trade, transport and freedom of movement of people. Regarding the legal and institutional framework of the communities, the establishment of judicial organs was imperative for the enforcement of community law. Therefore, the SADC Tribunal and the COMESA Court of Justice are essential organs within the communities.

On the downside, the communities in Southern Africa have neglected to establish legislative organs for purposes of developing community law and representing the people of the Member States. Instead, legislative functions are vested in other organs of the communities such as the SADC Summit. This has resulted in the slow development of community law and has negatively impacted its enforcement.

¹¹³ Article 23 of the COMESA Treaty.

¹¹⁴ This is provided for in Articles 24, 25 and 26 of the COMESA Treaty.

¹¹⁵ Article 31 of the COMESA Treaty.

¹¹⁶ Article 29 of the COMESA Treaty.

3. CHAPTER THREE: THE ENFORCEMENT OF COMMUNITY LAW IN SOUTHERN AFRICAN REGIONAL ECONOMIC COMMUNITIES

3.1 INTRODUCTION

Regional economic communities have two types of legal systems operating within them. On the one hand, there is the community legal system which makes and enforces laws that are applicable to Member States of the community. On the other hand, are the national legal systems which make and enforce laws applicable to persons within each respective Member States. The relationship between the community legal system and the national legal system is said to be of a vertical nature.¹¹⁷

Community law is viewed as an external source of law and is not readily received in national legal systems. Often conflicts arise regarding whether community law can be applied within Member States directly and whether residents of Member States can rely on the rights created by community law at the national level. The core of these conflicts is essentially the status of community law within national legal systems.

Chapter Three aims to analyse the enforcement of community law at the national level within SADC and COMESA. To this end, the chapter will look into the concepts of monism and dualism, direct effect and direct applicability of community law and the preliminary reference procedure, to explain the manner in which community law can be applied within Member States. In addition, the chapter will look at the role of national courts and the individual in the enforcement of community laws, which will include an evaluation of cases that have been dealt with by the respective judicial organs of these communities.

3.2 THE CONCEPT OF COMMUNITY LAW

The term ‘community law’ has not been explicitly defined as yet, however, various attempts have been made at defining it. Erasmus defines community law as the binding legal instruments of specific RECs.¹¹⁸ He advances that community law is a form of international law but it is viewed as a *sui generis* legal regime.¹¹⁹ This is because ordinarily, states are the parties to international agreements and as such only states have rights and

¹¹⁷ Richard Frimpong Oppong op cit note 28 at 92.

¹¹⁸ Gerhard Erasmus op cit note 26 at 11.

¹¹⁹ Gerhard Erasmus ‘The COMESA Court of Justice: Regional agreements do protect private parties’ available at <http://www.tralac.org/files/2013/10/S13TB092013-Erasmus-COMESA-Court-of-Justice-Legal-agreements-protect-private-parties-20131015-fin.pdf>, accessed on 29 June 2016.

can litigate in terms of these agreements.¹²⁰ However, regional economic community agreements have the ability to confer rights not only on states but also on individuals within Member States and these rights can be enforced either at the national level or regional level.¹²¹

Within the European Union, community law is given both narrow and broad definitions. Narrowly, community law is said to consist of the founding treaties and the provisions of the instruments enacted by the community institutions.¹²² In a broader sense, community law is said to include all the rules of the community legal order, that is, general principles of law, case law and supplementary law contained in conventions and agreements concluded between Member States in order to give effect to treaty provisions.¹²³

From these definitions it can be deduced that community law is a form of international law that creates rights and obligations within the community, that are applicable to both Member States and individuals. Community law can have various sources. The primary source is the founding treaty/treaties of the community. Whilst secondary sources include the laws made by the community institutions through the powers that have been conferred on them. As Oppong advances, community laws can also take the form of regulations, decisions, principles, objectives and general undertakings.¹²⁴

As the primary source of community law is a treaty, it is unquestionable that community law is a form of international law. Consequently, the question of the enforcement of community law falls under the wider scope of the relationship between international law and national law. It is with this in mind that this chapter briefly considers the various mechanisms that have been used to further understand the relationship between international law and national law.

¹²⁰ Ibid.

¹²¹ William Mwanza '*Polytol Paints v Mauritius*: Evidence of the existence and direct effect of community law in COMESA?' available at <http://paulroos.co.za/wp-content/blogs.dir/12/files/2014/01/S14TB012014-Mwanza-Polytol-Paints-v-Mauritius-community-law-in-COMESA-20140124-fin.pdf>, accessed on 30 June 2016.

¹²² Available at http://dictionary.babylon-software.com/community_law/, accessed on 13 December 2016.

¹²³ Ibid.

¹²⁴ Richard Frimpong Oppong op cit note 25.

3.3 OVERVIEW OF KEY CONCEPTS

Conflicts in the relationship between international law and national law have been in ongoing for decades. The main reason for the conflict is the unwillingness of states to relinquish their sovereignty. However, there are many mechanisms that have been developed in order to enable the reception of international law into national law. Some of these are now discussed.

3.3.1 The Concept of Supremacy of Community Law

The supremacy of community law is a key aspect of the vertical relationship that exists between the community legal system and legal systems of Member States. This is because supremacy to a large extent affects the reception and enforcement of community law in Member States.

The supremacy of community law is based on the premise that a community is an independent entity that has its own legal system with its own legal sources. By becoming members of a community, states bind themselves to observe the rights and obligations created by the community, and this has the effect of limiting national sovereignty.¹²⁵ It follows that in order for community law to be effective, a rule developed by the community legal system must not be capable of being overruled by a rule of national law.¹²⁶ Should this be the case, the attainment of the objectives set out in the community treaty would be at risk.¹²⁷ Thus, the supremacy of community law ensures community law will be the applicable law in instances of conflict with national laws. In addition, supremacy ensures the uniform application of community law in Member States.¹²⁸

A notable aspect of supremacy of community law is that the community legal system becomes an integral part of the legal system of Member States and national courts are under an obligation to apply it.¹²⁹ The concept of supremacy therefore has the effect of community law being treated differently to other forms of international law. If supremacy is provided for, the mechanisms of reception of international law that have been developed become unnecessary.

¹²⁵ Cornelia Koch 'The Doctrine of Supremacy of European Community Law As A Condition Precedent For The Doctrine of Direct Effect' (2005) 9 *International Trade & Business Law Review* 201 at 209.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Moses Retselisitsoe Phooko *The SADC Tribunal: Its Jurisdiction, Enforcement of Its Judgments and the Sovereignty of Its Member States* (unpublished LLM thesis, University of South Africa, 2016) 128.

¹²⁹ Cornelia Koch op cit note 125.

Ideally, provision for the supremacy of community law should be made in the founding treaties but it can also be made by other means. An example of this being the development of the doctrine of supremacy of community law by the European Court of Justice,¹³⁰ whilst the European Union treaties are silent on the matter. As it stands, neither the SADC nor the COMESA communities contain provisions regarding the supremacy of community law.

3.3.2 Monism and Dualism

The applicability of international law within states and the extent to which it can be applied is dependent on the nature of the legal system of each state. Scholars have, over the years, understood the applicability of international law in states by classifying states as either monist or dualist.

The monist theory is based on the idea that both international law and national law derive their validity from the same source.¹³¹ Law is understood as a unity and international law rules are considered part of national law.¹³² This means that a treaty becomes a part of national law once it has been concluded in accordance with the constitution of the relevant state and has entered into force for that state,¹³³ without requiring the enactment of national law to give it effect. This process, also referred to as the doctrine of automatic incorporation, may be provided for either in the states' constitution, statutory law or it may be an unwritten principle of law.¹³⁴

A key aspect of monism is that, although international law is incorporated into national law, it continues to be international law as part of the internal legal system¹³⁵ and does not become part of the national law. In cases of conflict, international law prevails over national law.¹³⁶ Of the states in Southern Africa, Mozambique is one of the few states that has a monist legal system and ratified regional treaties automatically become part of national law.¹³⁷

¹³⁰ The European Court of Justice dealt with the question of the supremacy of community law in the case of *Costa v ENEL* Case 6/64 [1964] ECR.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Anthony Aust *Modern Treaty Law and Practice* (2000) 146.

¹³⁴ David Thor Bjorgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (2015) 56.

¹³⁵ *Ibid.* at 61.

¹³⁶ *Ibid.*

¹³⁷ Article 18 of the Constitution of Mozambique states that “validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State”.

The dualist theory, on the other hand, is based on the idea that international law and national law are two distinct legal orders, each with its own characteristics.¹³⁸ As such, any rights and obligations created by a treaty have no force or effect within a state unless they are given effect by way of national legislation. Dualist states require international law to be recast or transformed into national law in order to have an effect in a national legal system.¹³⁹ The effect transformation has is that the relevant international law is no longer considered as part of international law but becomes a part of national law. Within Southern Africa, there are several states that have dualist legal systems, these include Malawi¹⁴⁰ and Zimbabwe¹⁴¹.

Having briefly considered these two theories, it is important to note that not all states can be characterized as being strictly monist or strictly dualist. As submitted by Tshosa, monist and dualist theories may, in practice, not purely determine the relationship between national and international law.¹⁴² Tshosa argues this on the basis that the applicability of treaties within a state is determined by the constitution of that state and that the practical approach of national courts regarding the application of a treaty may not effectively reflect what the constitution provides.¹⁴³ This can be illustrated by referring to the South African case of *Glenister v President of the Republic of South Africa*¹⁴⁴ (*Glenister case*). In the *Glenister case*, the Constitutional Court had to determine whether section 7(2) of the Constitution of South Africa (SA Constitution) and ratified treatise that have not been domesticated impose a positive obligation on the state to establish an independent anti-corruption unit.¹⁴⁵ In terms section 231(2) of the SA Constitution, an international agreement is binding on the Republic only after it has been approved by the resolution of the National Assembly and the National Council of

¹³⁸ David Thor Bjorgvinsson op cit note 134 at 31.

¹³⁹ Ibid.

¹⁴⁰ Section 211(1) of the Constitution of Malawi states that “any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement”.

¹⁴¹ Section 327(2) of the Constitution of Zimbabwe states that “an international treaty which has been concluded or executed by the President or under the President’s authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament”.

¹⁴² Onkemetse Tshosa ‘The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy’ available at http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf, accessed on 11 January 2017.

¹⁴³ Ibid.

¹⁴⁴ *Glenister v President of the Republic of South Africa* [2011] ZACC 6.

¹⁴⁵ Moses Retselisitsoe Phooko op cit note 128 at 117.

Assemblies. The SA Constitution, further, provides that an international agreement becomes law in the Republic when it is enacted into law by national legislation.

The minority judgment in this case argued that section 231(2) does not imply that an international agreement that is ratified by Parliament becomes law in the Republic upon such ratification.¹⁴⁶ Rather, the agreement is only binding at an international level and will only become a part of domestic law if it is incorporated into domestic law in terms of section 231(4) of the SA Constitution.¹⁴⁷ The majority judgment, however, took a different approach. Whilst confirming that section 231(2) of the SA Constitution has the effect that international agreements approved by Parliament become binding between the Republic and other states parties to such agreement at an international level, the majority judgment also advances that such an agreement has domestic effect.¹⁴⁸ The majority argued that the SA Constitution, which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights,¹⁴⁹ imposes a positive obligation on the state to take steps to give effect to the SA Constitution.¹⁵⁰ In this instance, the positive step to be taken was the establishment of an anti-corruption body, as required by a treaty that had not been incorporated into domestic law.

This case illustrates the issue regarding characterizing states as dualist or monist. The constitution of a state may make provision for the reception of international law into national legal systems but the courts may adopt an approach that diverts from this. Although these theories have been used to understand how international law may be applied within states, the theories rather provide a basic understanding of the relationship between international law and national law. In order to determine the method of reception of international law in states, it would therefore be necessary to analyse the constitutions as well as the case law of each state.

3.3.3 The Principles of Direct Applicability and Direct Effect

The principles of direct applicability and direct effect were developed to address the challenges faced in enforcing community law within Member States. The principle of direct applicability has its origins in the European Union. In terms of this principle, community law becomes a part of national law without intervening national

¹⁴⁶ *Glenister* supra note 144 para 92.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Glenister* supra note 144 para 182.

¹⁴⁹ *Glenister* supra note 144 para 189.

¹⁵⁰ *Ibid.*

implementation measures.¹⁵¹ This means that community law automatically becomes part of national law without the need of a national measure such as an Act of Parliament to give it effect. Community law is essentially binding and applicable in Member States immediately upon coming into operation.¹⁵²

Through direct application, community law bypasses the ordinary modes through which international law is incorporated into national law. As such, community law maintains its nature and is not transformed into national law. Since community law does not have to be translated into national law, direct applicability also results in community law not being subjected to the national laws on the hierarchy of laws.¹⁵³ Oppong advances that applying the national laws on hierarchy of laws would have the effect of upsetting the vertical relations between community and national legal systems.¹⁵⁴ This is an important feature in the context of regional integration because the community and its laws should be the supreme authority in order for regional integration to be effective and for there to be uniformity among Member States.

The principle of direct effect, in comparison to direct applicability, determines whether community law creates enforceable rights within national legal systems. It is through this measure that individuals are enabled to invoke community law before national courts.¹⁵⁵ As the importance of protecting the rights of individuals in the international sphere has increased over the years, this principle plays a crucial role in protecting rights created at the community level. However, neither the SADC nor the COMESA treaties make provision for the direct effect of community law.

Direct applicability and direct effect can be provided for in community treaties. The Treaty on European Union, for instance, makes provision for direct applicability as it states that a regulation shall be binding in its entirety and directly applicable in all Member States.¹⁵⁶ However, the exclusion of these rules in a community treaty does not mean that they cannot be provided for in a different manner. Direct effect in the European Union, for example, was developed by the European Court of Justice jurisprudence and is now an integral part of European Union Law. Upon examination, it

¹⁵¹ Richard Frimpong Oppong *Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law* (unpublished LLD thesis, University of British Columbia, 2009) 193.

¹⁵² Moses Retselisitsoe Phooko op cit note 128 at 130.

¹⁵³ Richard Frimpong Oppong op cit note 25 at 3.

¹⁵⁴ Ibid.

¹⁵⁵ Richard Frimpong Oppong op cit note 151 at 198.

¹⁵⁶ Article 288 of the Treaty on European Union.

has been found that the SADC and COMESA treaties fail to make provision for the direct applicability or direct effect of community law.

3.4 ENFORCEMENT OF COMMUNITY LAW IN SOUTHERN AFRICA

When states become parties to a REC, a relationship is created between the Community and the Member State. Through the founding treaties, Member States enjoy certain rights but they also have certain obligations that they must observe. Member States are required to nationally implement regional objectives in order for regional integration to be effective and for the realization of the benefits regional integration has to offer. As such, it is necessary for mechanisms must be put in place to ensure that Member States comply with their obligations. This section considers the current mechanisms in place for enforcement of community law in Southern Africa RECs.

3.4.1 The Role of Judicial Organs

Community treaties make provision for the enforcement of community law through various organs of the community. The community, more specifically its organs, must ensure compliance with the obligations created by the community. However, states are reluctant to surrender their sovereignty and this results in enforcement challenges.

Judicial organs are the primary enforcers of community law in most RECs and they are responsible for monitoring adherence. In the communities under consideration, however, the judicial organs appear to be the only organs with enforcement powers. Enforcement by the judicial organs of both the SADC and COMESA is now considered.

(a) The SADC Tribunal

Within the SADC Community, the judicial function is entrusted to the SADC Tribunal (the Tribunal). The Tribunal is tasked with ensuring that the provisions of the treaty and subsidiary instruments are adhered to, as well as adjudicating any disputes referred to it.¹⁵⁷ In addition, the Tribunal is responsible for the interpretation of the Treaty.¹⁵⁸ Any decisions made by the Tribunal are intended to be final and binding.¹⁵⁹

¹⁵⁷ Article 16(1) of the SADC Treaty.

¹⁵⁸ Ibid.

¹⁵⁹ Article 16(5) of the SADC Treaty.

Although established in 1992, through the SADC Treaty, the inauguration of the Tribunal and swearing in of members only took place in 2005. The Tribunal adopted the Protocol on the Tribunal (“2000 Protocol”) pursuant to Article 16(2), which makes provision for substantive and procedural matters of the Tribunal.

Unfortunately, the Tribunal was suspended by a decision of the Summit following the Tribunal’s decision in the case of *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe*.¹⁶⁰ The discussion on the Tribunal will therefore focus on two aspects; namely the case of *Campbell*¹⁶¹

case and the suspension of the Tribunal.

(i) The *Campbell* case

The case of *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe*¹⁶² is a landmark case not only for the SADC Tribunal but for economic integration in general. In 2007, Mike Campbell (Pvt) Limited and William Michael Campbell (the Applicants) filed an application with the Tribunal challenging the acquisition of land by the Republic of Zimbabwe (the Respondent).¹⁶³ At the time of the application, Zimbabwe was engaged in the acquisition of land and had enacted Section 16B of the Constitution of Zimbabwe (Amendment No. 17, 2005) (“Amendment 17”). Amendment 17 made provision for the acquisition of agricultural land by the government for purposes such as land reorganization and relocation. The acquired land was to be vested in the state and no compensation was to be paid except for any improvements effected on the land prior to acquisition.¹⁶⁴ In addition, Amendment 17 prohibited persons with any right or interest in the land from applying to any court to challenge the acquisition.

Prior to making the application to the Tribunal, the parties instituted an action in the Supreme Court of Zimbabwe to challenge the acquisition of their land. However, before the Supreme Court handed down its judgment, the parties approached the Tribunal. The Applicants simultaneously filed an application for an interim measure restraining the Respondent from removing the applicants from the land pending a decision by the Tribunal.¹⁶⁵ The Tribunal granted the interim measure sought.

¹⁶⁰ *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid at 4.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid

In their application, the Applicants argued that the Respondent had breached its obligations under the SADC Treaty. Firstly, the Applicants argued that Amendment 17 was in breach of Article 4(c) of the Treaty, which requires states to act in accordance with human rights, democracy, and the rule of law. The rule of law embraces two rights namely the right to access the courts and the right to a fair hearing.¹⁶⁶ Access of individuals to the courts is viewed as a fundamental right that states parties to treaties, especially human rights treaties, are obliged to uphold and protect. Case law holds that in a constitutional democracy founded on the rule of law, disputes between the state and its subjects should be adjudicated upon in court. In considering the facts before it, the Tribunal found that Amendment 17, which prohibits parties whose land has been acquired in terms of section 16B (2)(a)¹⁶⁷ from challenging the acquisition, deprives the parties of their right to protection of the law and to have a fair hearing. Thus, the Tribunal held that the Respondent was in breach of Article 4(c) of the SADC Treaty. Secondly, the Applicants argued that there was a breach of Article 6(2) of the Treaty which prohibits discrimination against persons by Member States. In their argument, the Applicants stated that the expropriation of land by the Zimbabwean Government was primarily based on considerations of race and ethnic origin, regardless of whether the farmers acquired the land during the colonial period or after independence.¹⁶⁸ The Tribunal, in considering all the facts, found that although Amendment 17 did not

¹⁶⁶ Ibid at 26.

¹⁶⁷ Section 16B(2)(a) read as follows:

“Notwithstanding anything contained in this Chapter –

(a) all agricultural land –

- (i) that was identified on or before the 8th July 2005, in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or*
- (ii) that is identified after the 8th July, 2005, but before the appointed day (i.e. 16th September, 2005), in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or*
- (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purposes, including, but not limited to –*
 - A. settlement for agricultural or other purposes; or*
 - B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or*
 - C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;*

is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is defined in the manner specified in that paragraph”

¹⁶⁸ Ibid at 42.

explicitly mention race or ethnicity, implementation of Amendment 17 only affected white farmers.¹⁶⁹ The Tribunal held that this constituted indirect discrimination¹⁷⁰ and as such, the Respondent was in violation of its obligations under Article 6(2) of the SADC Treaty.

In its final decision, the Tribunal ordered the Respondent to protect the possession, occupation and ownership of the land of the Applicants. The final and binding nature of decisions made by the Tribunal means a party cannot appeal decisions of the Tribunal. In addition, the binding nature of Tribunal decisions means that the party against whom the judgment has been made is under an obligation to comply with it.

Furthermore, Article 32 of the 2000 Protocol made provision for the enforcement and execution of decisions of the Tribunal. Although the Protocol did not provide for the manner in which such decisions are to be enforced, it stipulated that the enforcement of the decisions is to be governed by the law and rules of civil procedure of the relevant state.¹⁷¹ In this case, that would have been the law and rules of civil procedure in Zimbabwe. This provision was problematic because, firstly, the laws of states make provision for the enforcement of judgments made by foreign national courts, but not for judgments made by international courts.¹⁷² Secondly, Member States are obliged to take all the steps necessary to ensure the execution of the Tribunal's decisions,¹⁷³ the manner of enforcement is at their discretion. Thus it is unlikely to have decisions of regional courts enforced if the civil procedure rules do not provide for such enforcement.

Should a Member State fail to enforce a decision of the Tribunal, the 2000 Protocol provided that such non-compliance may be referred to the Tribunal.¹⁷⁴ Due to the Respondent's failure to uphold the Tribunal's decision, the applicants pursuant to Article 32(4), referred the non-compliance to the Tribunal. Upon investigation, the Tribunal found that the Respondent had in fact failed to comply with the order. Unfortunately, the Tribunal does not have the capacity to enforce its decisions. Rather,

¹⁶⁹ Ibid at 51.

¹⁷⁰ Ibid at 53.

¹⁷¹ Article 32(1) of the Protocol on the Tribunal in SADC, 2000.

¹⁷² Richard Frimpong Oppong 'Enforcing Judgments of the SADC Tribunal in the domestic courts of member states' (2010) 10 *Monitoring Regional Integration in Southern Africa* 116.

¹⁷³ Article 32(2) of the Protocol on the Tribunal in SADC, 2000.

¹⁷⁴ Article 32(4) of the Protocol on the Tribunal in SADC, 2000.

the mandate of the Tribunal is to adjudicate the disputes referred to it and once this is done, the Tribunal is considered to have fulfilled its function.¹⁷⁵

As such, upon a finding of non-compliance, the Tribunal must refer the failure to the Summit for appropriate action to be taken. This was done according to Article 32(5) of the 2000 Protocol. However, the 2000 Protocol failed to define what is meant by “appropriate action”. Additionally, although the SADC Treaty makes provision for the imposition of sanctions against a Member State that fails to fulfil its obligations,¹⁷⁶ it fails to stipulate the form these sanctions may take. The lack of provision results in the matter being at the discretion of the Summit which decides what appropriate action is, which may be no action at all.

The problem with the power of enforcement of Tribunal decisions being entrusted to the Summit rather than the Tribunal is that enforcement may be influenced by politics. The Summit is consisted of the Heads of State or Governments of the Members States of the SADC, and as such there are political interests at play. This is exemplified by the *Campbell* case. Rather than the Member States taking a stand on the protection of human rights, the Summit remained silent on the matter and went to the extent of suspending the operations of the Tribunal. The suspension of the Tribunal and the effect of this will be discussed further.

(ii) The Suspension of the SADC Tribunal and Its Implications

The decision of the SADC Tribunal in the *Campbell* case was a step in the right direction as it indicated the independence of the organ from political influences. The Tribunal’s decision, however, threatened the sovereignty of Member States as well as the control that the Heads of State or Government have over it. Following the decision in the *Campbell* case, the Summit was the organ responsible for imposing sanctions on the defaulting state. However, instead of the Summit imposing any sanctions, it called for the review of the Tribunal by the region’s Judges and Attorneys General.¹⁷⁷ The Tribunal was in effect suspended since it was not permitted to hear any cases, whether

¹⁷⁵ Moses Retselisitsoe Phooko op cit note 128 at 163.

¹⁷⁶ Article 33 of the SADC Treaty.

¹⁷⁷ James Majatame *Legal Analysis of the Challenges and Prospects of the SADC Tribunal* (Unpublished LLM thesis, University of Cape Town, 2014) 49.

pending or new cases; and the terms of the serving Judges were not renewed and new Judges were not appointed.¹⁷⁸

Although the Summit stated that the suspension would only be for a period of six months pending the conclusion of the review, the suspension has continued despite receiving the report on the conclusions and recommendations of the review. The suspension is to be maintained until the Tribunal's protocol has been reviewed and a new protocol takes effect.¹⁷⁹ However, it is important to note that the Tribunal still exists and will continue to exist until the entry into force of a new Tribunal protocol.

To this end, the Summit adopted and signed the new Protocol on the Tribunal in 2014 (2014 Protocol). In drafting and adopting the 2014 Protocol, the SADC leadership sought to establish a tightly controlled dispute settlement system with limited jurisdiction.¹⁸⁰ The will of the SADC leadership is reflected in the changes that were introduced in the 2014 Protocol in comparison to the 2000 Protocol. One significant change is that the jurisdiction of the Tribunal has been restricted compared to the jurisdiction it had under the 2000 Protocol. The 2014 Protocol stipulates that the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols.¹⁸¹ This provision brings about two changes. First, this provision restricts *locus standi* to Member States only, and excludes natural and legal persons from being able to bring matters before the Tribunal as they previously could under the 2000 Protocol. Second, the provision excludes the Tribunal's authority to hear disputes on the application or interpretation of legal instruments.¹⁸² This means the Tribunal may only make decisions regarding the interpretation of the SADC Treaty and Protocols. Furthermore, on the issue of jurisdiction, the 2014 Protocol gives Member States the option to opt out of the jurisdiction of the Tribunal.¹⁸³ Article 33(1) of the 2014 Protocol stipulates that a state party may withdraw from the Protocol twelve months after the state has given notice to this effect.

An aspect of the 2000 Protocol that has been retained is that in the instance of non-compliance with a Tribunal ruling, the matter is to be referred to the Summit which has

¹⁷⁸ Gerhard Erasmus 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' available at <https://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf>, accessed on 29 June 2016.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Article 33 of the Protocol on the Tribunal in SADC, 2014.

¹⁸² Gerhard Erasmus op cit note 178.

¹⁸³ Ibid.

the authority to take appropriate action. This essentially puts community law enforcement within SADC in the same position it was after the *Campbell* ruling. Entrusting this power with the Summit is even more problematic because the decisions by the Summit are taken by consensus.¹⁸⁴ The effect of this is that any Member State can block a decision from being made, including the state against which sanctions might be imposed.¹⁸⁵

(b) The COMESA Court of Justice

Within the COMESA, the Court of Justice (the COMESA Court) was established as the judicial organ of the community. Established pursuant to Article 19 of the COMESA Treaty, the Court is responsible for ensuring the law is adhered to with respect to the interpretation and application of the Treaty, and it has jurisdiction over all matters referred to it pursuant to the COMESA Treaty.

Regarding the issue of enforcement of community law, the COMESA Court has heard a few cases that have involved enforcement in Member States. One such case is the *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*¹⁸⁶ case. In this case, the Applicant, Polytol Paints and Adhesives Manufacturers Co. Ltd, was a company incorporated in Mauritius. The Applicant sought a declaration, by the Court, to the effect that the Republic of Mauritius, the Respondent, had infringed the COMESA Treaty. The application was based on the fact that the Respondent had introduced a customs duty against specific products that were imported from Egypt, contrary to the Article 46 of the COMESA Treaty. Article 46(1) of the COMESA Treaty requires Member States to reduce and ultimately eliminate customs duties and other charges of equivalent effect imposed on the importation of goods which are eligible for Common Market tariff treatment. Although the Respondent initially complied with the provision, it later introduced the customs duty in dispute due to an import surge of Egyptian products.

Prior to approaching the Court, the Applicant challenged the measures adopted by the Respondent at a national level. The Applicant instituted an action before the Supreme Court of Mauritius. The Supreme Court, however, found that it could take cognizance

¹⁸⁴ Precious N Ndlovu 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63 at 77.

¹⁸⁵ Ibid.

¹⁸⁶ *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* Reference No. 1 of 2012 available at <http://lawyersofafrica.org/wp-content/uploads/2013/11/JUDGEMENT-Polytol-v-Mauritius-August-31.08.2013-FINAL-20.40.doc>, accessed on 20 February 2017.

of provisions of the COMESA Treaty only to the extent that they have been incorporated into the municipal law. The Supreme Court stated that non-fulfilment by Mauritius was not enforceable in national courts in the absence of such incorporation.¹⁸⁷

The Applicant then sought relief from the COMESA Court. However, because the application was made after the Respondent had removed the customs duties, the Applicants sought to recover a refund for the duties it had paid which it claimed to have been unfairly and unlawfully levied, rather than for the customs to be removed. The Respondent filed an application to set aside the Applicants reference on the basis the applicant did not have *locus standii*.

In the *Polytol* case, the Court had to consider the question of whether or not individuals who reside in Member States can have an enforceable right under the COMESA Treaty. In other words, whether provisions of the COMESA Treaty are directly enforceable. The Respondents argued that provisions of the COMESA Treaty do not give individuals enforceable rights and are only enforceable by Member States. However, the COMESA Court held otherwise. The Court referred to Article 26 of the COMESA Treaty which provides that “any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty”. The Court viewed community law as not only creating obligations applicable against residents of Member States but also creating rights that can be enforced by the residents.¹⁸⁸ As such, the Court held that residents have a right before the Court if they establish that they have been prejudiced by an act of a Member State that contravenes the COMESA Treaty.¹⁸⁹

The decision in the *Polytol* case impacts both regional integration generally and the role of private parties in regional integration specifically. This decision reflects the importance of private parties in effective regional integration and reaffirms the position that regional integration not only creates rights for Member States but also for such private parties. Restricting access to regional courts to Member States would result in regional integration being driven by political motives. This is illustrated by the fact that in instances of trade disputes, rather than litigating against one another, Member States

¹⁸⁷ Ibid at 5.

¹⁸⁸ Ibid at 19.

¹⁸⁹ Ibid.

opt to deal with such disputes by way of political discussions and meetings.¹⁹⁰ This case sets a precedent that can be referred to in future cases to further strengthen the position of community law in national legal systems.

Another landmark case in the COMESA Court is the *Malawi Mobile Ltd v Government of Malawi and MACRA*. In this case, the Applicant was Malawi Mobile Ltd (MML), and the Respondents were the Government of the Republic of Malawi and Malawi Communications Regulatory Authority (MACRA). The case was brought on the basis of a Licence Agreement between MML and MACRA, in terms of which MML was to provide its network service within 12 months of the licence being granted. MML failed to meet the deadline and requested an extension from MACRA, which was granted.¹⁹¹ The issue in dispute arose when MACRA, allegedly induced by the Malawian government, revoked the licence before the lapse of the 12-month extension period. MML sued the Government of Malawi and MACRA for breach of the agreement in the High Court of Malawi which ruled in its favour.¹⁹² The Respondents appealed the ruling in the Supreme Court of Malawi, which overturned the ruling of the High Court.¹⁹³ The Applicant then brought the matter before the COMESA Court.

The Applicant sought to have the ruling of the Supreme Court of Appeal set aside. The Government of Malawi argued that the Court did not have jurisdiction because the alleged breach was not an unlawful act under the COMESA Treaty but was an issue that was dealt with under national laws of Malawi.¹⁹⁴ The Government of Malawi was of the opinion that the Court only had jurisdiction over matters relating to the Treaty and community law and not national laws of Member States.¹⁹⁵ In its decision on the matter, the Court held that on the basis of Article 26 of the COMESA Treaty, which provides access to the Court by natural and legal persons resident in Member States, MML had rightly brought the matter to the Court.¹⁹⁶

¹⁹⁰ Gerhard Erasmus 'The Polytol judgment of the COMESA Court of Justice: Implications for rules based on regional integration' available at <https://www.tralac.org/publications/article/7604-the-polytol-judgment-of-the-comesa-court-of-justice-implications-for-rules-based-regional-integration.html>, accessed on 28 January 2017.

¹⁹¹ William Mwanza 'Steady Progress of community law in COMESA: Malawi Mobile Ltd v Government of Malawi and MACRA' available at <https://www.tralac.org/discussions/article/8588-steady-progress-of-community-law-in-comesa-malawi-mobile-ltd-v-government-of-malawi-and-macra.html>, accessed on 28 January 2017.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

Regarding the contention by the Government of Malawi that the court did not have jurisdiction over matters relating to national laws of Member States, the court stated that adopting such a restrictive interpretation of the Court's jurisdiction would preclude the Court from determining the extent to which a Member State is complying with the COMESA Treaty.¹⁹⁷ As such the court held that it did have the necessary jurisdiction to hear the matter.

This decision is important for the development of community law in COMESA. Firstly, it further strengthens the role and rights of private parties in the community. Secondly, it broadens the scope of the Court's jurisdiction in that the Court is not restricted to only hearing matters concerning the Treaty or community law, but it can consider national laws in order to make its decisions. In addition to the authority of the COMESA Court to impose sanctions for non-compliance,¹⁹⁸ such rulings place the COMESA Court in a position of increasing strength.

3.4.2 The Role of National Courts

National courts play an essential role in the effectiveness of regional integration. It is through the courts that community law can be given effect without having to be incorporated through legislation. The courts act as guardians of economic integration and enforcers of the benefits that economic integration brings to individuals.¹⁹⁹

One way national courts may enforce community law is by making use of the preliminary reference procedure. The preliminary reference procedure enables national courts to refer to regional courts for interpretive guidance. Through this procedure, a national court which has to decide a case involving the interpretation of a treaty provision may seek guidance from the relevant regional court before it makes its final decision.

This procedure bridges the gap between community and national legal systems and avoids instances of national courts giving treaty provisions their own interpretations. In addition, it is a mechanism through which regional courts can give their opinion on the

¹⁹⁷ Ibid.

¹⁹⁸ Article 34(4) of the COMESA Treaty provides that the COMESA Court may impose sanctions on any Member State that has defaulted in implementing a decision of the court.

¹⁹⁹ Opong, RF. 'Integration through the law: an examination of the jurisprudence of regional economic integration judicial bodies in Africa' (2007) 7 *Monitoring Regional Integration in Southern Africa* 203 at 204.

application of community law and the status of community law within the legal systems of Member States.²⁰⁰

There are a number of community treaties that make provision for the preliminary reference procedure such as the Treaty on the Functioning of the European Union²⁰¹ and East African Community Treaty²⁰². With respect to SADC and COMESA, it is only the COMESA Treaty that makes provision for this procedure. Article 30 of the COMESA Treaty stipulates that where a question is raised before a court of a Member State concerning the application or interpretation of the COMESA Treaty, such a court may, if it considers that a ruling on the question is necessary to enable it to give judgment, request the COMESA Court to give a preliminary ruling on the matter.²⁰³ Thus referring to the COMESA Court is at the discretion of the court. However, referring a question to the COMESA Court is compulsory if the court is one against whose judgment there is no judicial remedy under the national law of the Member State.²⁰⁴ Unfortunately, the SADC Treaty does not contain a similar provision.

3.4.3 The Role of Individuals

Historically, access to regional courts by individuals has been restricted. However, in more recent times, economic treaties that have been adopted have granted individuals access to the courts. Considering the important role private parties play in effective economic integration, this is a welcome development.

Provisions that grant individuals access to the courts can be found in the COMESA Treaty.²⁰⁵ The access of individuals to the COMESA Court is considered wide because parties merely have to prove that they have a general interest in the granting of protection of the community legal order. Parties are not required to prove an interest or a violation of their right in order to justify the claim. Access is, however, considered limited by the requirement that the party must be a resident in a Member State.²⁰⁶ Additionally, parties are required to exhaust all local remedies first.²⁰⁷

²⁰⁰ Jonathan Bashi Rudahindwa op cit note 17 at 12.

²⁰¹ Article 267 of the TFEU.

²⁰² Article 34 of the Treaty for the Establishment of the East African Community.

²⁰³ Article 30(1) of the COMESA Treaty.

²⁰⁴ Article 30(2) of the COMESA Treaty.

²⁰⁵ Article 26 of the COMESA Treaty.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

Within the SADC community, individual access to the Tribunal was provided for in the 2000 Protocol. Article 18 of the 2000 Protocol empowered natural and legal persons to refer disputes with the Community to the Tribunal. However, the new Tribunal Protocol has done away with this provision and has restricted access to the Tribunal to Member States only.²⁰⁸ The importance of granting individuals access to regional courts cannot be understated in the context of economic integration. Through having access, individuals can bring cases to the community courts that may otherwise not have been brought if left in the hands of the Member State. Individual access shifts power from the Member States and strengthens private enforcement of community law.

3.5 CONCLUSION

In order for a community to achieve its objectives, Member States must comply with the rules developed by the community, that is community law. However, the leaders of Member States must be willing to comply with these laws and surrender their sovereignty to a certain degree. This, unfortunately, is not always the case. As such, strong mechanisms for the enforcement of community law are important for effective integration.

Unfortunately, enforcement of community law in Southern Africa is weak. The community judicial organs have been given restricted powers of monitoring enforcement and do not appear to have authority to enforce decisions when Member States do not comply with community law.

Regional Economic Communities in Southern Africa need to recognize the importance of community law and its effective enforcement in Member States. This recognition must then be translated into mechanisms for implementation and enforcement within Member States. Community courts need to be given more authority to enforce judgments and there is a need to stipulate what sanctions may be imposed in instances of non-compliance.

²⁰⁸ Article 33 of the Protocol on the Tribunal in SADC, 2014.

4. CHAPTER FOUR: EXPERIENCES OF OTHER REGIONAL ECONOMIC COMMUNITIES

4.1 INTRODUCTION

It is widely recognised that regional integration in Southern Africa is not as effective as it should be considering how long regional integration initiatives have existed in the region. Of the many challenges that hinder progress in this region, including multiple memberships in RECs, the poor implementation of community objectives is recognized as a major challenge. Within the challenge of poor implementation is the poor application of community law to further community objectives.

The poor application of community law, however, is not unique to economic communities in Southern Africa. The matter of application of community law in sovereign states runs deep in the history of integration worldwide. The main complication has always been the unwillingness of states to relinquish their sovereignty to the extent necessary. States want to control which international laws apply in their borders and which ones do not. Applying community law in Member States has, therefore, been a longstanding challenge for economic communities. The silver lining, however, is that over time, some communities have developed in a way that has enabled the application of such law within states.

This chapter, therefore, analyses other regional economic communities and aims to draw on their experiences, as a means of identifying any lessons that can be adopted by Southern African economic integration communities to improve the effectiveness of regional integration. Focus will largely be given to the European Union due to its long standing history as a successful REC with an effective legal framework. However, the chapter will also consider other economic communities such as the East African Community.

4.2 THE LEGAL AND INSTITUTIONAL FRAMEWORK OF REGIONAL ECONOMIC COMMUNITIES

As previously stated, regional economic communities are created by way of a treaty, which is a contract between the states parties. The contract provides for the legal framework of the community and can take one of two forms; it may either be a complete contract or an incomplete contract.

With regard to complete contracts, the agreement concluded between Member States explicitly sets out the rights and obligations of each party.²⁰⁹ Furthermore, to the extent possible, such a contract makes provision for contingencies that might arise in future, and provides for a strong dispute settlement mechanism.²¹⁰ In contrast, an incomplete contract, is much more flexible in that it does not make provision for all the aspects of the relationship between the states but merely acts as a starting point, providing for the basic aspects of the relationship.²¹¹ Thus such a contract does not have defined terms and conditions at the outset.

The success of RECs is largely affected by the nature of their legal and institutional frameworks and whether these frameworks complement one another. It is argued that a prerequisite for successful economic integration is the existence of strong, independent and strong community organs, as this ensures Member States comply with their obligations.²¹² The reason for this is that in order for a treaty to be observed, there must be institutions that monitor such observation and implementation.

Research has shown that a complete legal contract which has a strong dispute settlement mechanism works best with an intergovernmental institutional framework.²¹³ With an intergovernmental setup, the community institutions act as a forum for cooperation between Member States but the Member States are not bound by the decisions of the institutions.²¹⁴ On the other hand, a regional economic community established by an incomplete contract requires a strong and supranational institutional framework. In terms of supranationalism, Member States delegate authority to institutions which are superior and independent.²¹⁵ These institutions are empowered to make decisions and

²⁰⁹ Hendrik Spruyt 'Patterns of Regional Integration in Europe and North America: Insights from Incomplete Contracting Theory' available at <http://spectrumjournal.net/wp-content/uploads/2014/05/15-21-1-SM.pdf>, accessed on 4 February 2017.

²¹⁰ Ibid.

²¹¹ See 'Supporting the Implementation of the Regional Integration Agenda – Achieving Compliance in the Member States of EAC, ECOWAS and SADC' available at https://www.researchgate.net/publication/283622632_Supporting_the_Implementation_of_the_Regional_Integration_Agenda_-_EAC_ECOWAS_COMESA, accessed on 29 June 2016.

²¹² Henry Kibet Mutai 'Lessons from two recent decisions of the East African Court of Justice (EACJ) for Southern African Trade Blocs' (2007) 7 *Monitoring Regional Integration in Southern Africa* 178.

²¹³ Op cit note 211.

²¹⁴ Babatunde Fagbayibo 'Common Problems Affecting Supranational Attempts In Africa: An Analytical Overview' (2013) 16 *Potchefstroom Electronic Law Journal* 536 at 33/536.

²¹⁵ See 'Sovereignty, Intergovernmentalism and Supranationalism' available at <http://hum.port.ac.uk/europeanstudieshub/wp-content/uploads/2013/05/module-4-extract-2-Sovereignty-intergovernmentalism-and-supranationalism.pdf>, accessed on 4 February 2017.

laws which have a binding effect on Member States, as well as natural and legal persons within the community.²¹⁶

The function of the organ responsible for dispute settlement is not only limited to resolving disputes regarding an alleged breach of treaty obligations but also involves resolving disputes concerning interpretation of the treaty.²¹⁷ An incomplete contract cannot be served by a weak dispute settlement organ. Incomplete contracts ordinarily include terms that are so ambiguous that different meanings may be attached to them. The dispute settlement organ therefore provides an interpretation that applies in all Member States.²¹⁸ Should an REC have both an incomplete contract and a weak dispute settlement organ, then an intergovernmental structure will not ensure compliance with regional objectives. Rather Member States will pick and choose which obligations they wish to comply with as well as when. This is the situation that exists currently within SADC.

This has the effect of slowing down the progress of integration and further hinders in the uniform application of community law. The SADC Treaty is considered an incomplete contract which would have been better paired with a supranationalist approach. However, as can be seen from the previous chapters, the SADC institutions lack authority and power to enforce the SADC Treaty, thus the institutional framework is intergovernmental. The same can be said about the COMESA legal and institutional framework.

4.3 LESSONS FROM OTHER REGIONAL ECONOMIC COMMUNITIES

Over the years, numerous regional economic communities have been established, each with a unique legal and institutional framework that is designed to meet its needs. As has been observed by the United Nations Economic Commission for Africa (UNECA), there is no common set of institutions that all African communities can adopt. Rather African regional economic communities can learn from the successes of other regional economic communities and avoid their mistakes. UNECA recommends that African regional economic communities adopt a flexible approach to institutional design that will accommodate their socio-political and economic environments.

²¹⁶ Babatunde Fagbayibo op cit note 214.

²¹⁷ Ibid.

²¹⁸ Ibid.

It is with this in mind that the paper now turns to look at other economic integration initiatives and analyses their frameworks. This is done with the aim of gaining experiences that can be implemented in Southern African regional economic communities in order to improve their effectiveness.

4.3.1 The European Union

The European Union (EU) as we know it today is the result of gradual integration efforts by European states since the 1950s. The foundation of the EU can be found in the European Coal and Steel Community, established in 1952. Other economic integration efforts by European states include the European Economic Community and the European Atomic Energy Community. The signing of the Treaty of Maastricht was a further step towards the integration of European states and this gave birth to the European Union.²¹⁹ Since its establishment, the EU has grown significantly and now boasts a membership of 28 states. The EU has seen great success as an economic community and has gradually evolved to deal with the changing dynamics of the world. As a result of its success, the EU has become the model of regional integration. It is, therefore, not surprising that RECs in Africa have used the EU as the community from which to gain experience.

A number of RECs in Africa have adopted a market integration approach due to the influence of the EU. However, it is advance that, due to the different economic backgrounds and prevailing circumstances in Africa and Europe, the EU framework may not necessarily be the best model for Africa.²²⁰ Africa has been subjected to slavery and colonialism,²²¹ and is plagued by small, underdeveloped economies, but the same cannot be said for Europe. As such, RECs in Africa need to be modelled in a way that reflects the background and needs of the region if the full benefits of integration are to be yielded.

On the other hand, however, it is argued that, some elements can be imported from the EU model in order for RECs to become more effective and achieve their results.²²² The balance between these two arguments is to look at the EU as an example with caution. Due to its reputation as the most successful regional integration initiative, the EU must

²¹⁹ Amos Saurombe 'The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis' (2013) 17 *Law, Democracy & Development* at 461.

²²⁰ Ibid at 459.

²²¹ Ibid.

²²² Ibid at 463.

be referred to for other communities to learn from. However, the framework of each REC must be designed to meet the needs of the region it serves. Thus the EU model cannot be copied and pasted to African regional economic communities but it can provide a basic framework which can be adapted.

(a) The European Council and the EU Council²²³

As the European Council is composed of Heads of State or Government of Member States, it can be compared to the executive institutions of SADC and COMESA; namely the Summit and the Authority respectively. The European Council is the organ responsible for driving the general policy direction of the EU.²²⁴ This institution establishes general policy guidelines by taking decisions and issuing instructions and guidelines to the EU Council and the European Commission.²²⁵ The authority of the European Council, however, is limited to this function as is the COMESA Authority. The same, however, cannot be said of the SADC Summit, which has legislative powers in addition to its executive powers. As a matter of fact, the TEU explicitly stipulates that the European Council does not have legislative functions.²²⁶

Within the EU, the legislative function is allocated to two different institutions; namely the EU Council and the EU Parliament. Although the EU Council is also responsible for the coordination of economic policies of the Member States and drafting the preliminary budget, its primary function is the legislative function.²²⁷ This is contrary to the framework within the SADC and COMESA. In SADC, the legislative powers are exercised by the Summit whilst in the COMESA the function to create secondary community law is assigned to the Council of Ministers. Thus these communities do not have organs that have been established specifically to perform legislative functions. This in itself reflects the lack of understanding of the importance of law in the effective functioning of economic communities.

²²³ The European Council and the EU Council are two distinct organs. The European Council is composed of Heads of State or Government whilst the EU Council is composed of ministers from each Member State and has legislative and budgetary functions.

²²⁴ Article 15(1) of the Treaty on European Union.

²²⁵ Klaus-Dieter Borchardt 'The ABC of European Union Law' available at http://euicc-ks.com/wp-content/uploads/2016/03/abc_eng.pdf, accessed on 11 February 2017.

²²⁶ Ibid.

²²⁷ Ibid.

(b) The European Parliament

The other legislative institution in the EU is the European Parliament. The role of the Parliament at the regional level can be better understood by understanding its role within states. At the national level, Parliament essentially has three functions; namely legislation, representation and oversight. The classic role of Parliament is that of legislation, as it is responsible for making new laws and amending old ones.²²⁸ In addition to this, the Parliament is the institution that represents the people and their interests.²²⁹ Furthermore, Parliament is, in theory, responsible for overseeing the actions of the executive and holding the executive accountable.²³⁰

At the regional level, Parliament fulfils the same functions. A regional parliament is responsible for enacting community law; it is the organ that is constituted of representatives of the citizens of Member States and as such fulfils the representative function; and it oversees the exercise of power by the executive organs to ensure there is no abuse of power. As it stands, neither SADC nor COMESA have fully-fledged regional parliaments.

(c) The European Commission

The European Commission (EU Commission) plays a similar role as the Secretariats of the SADC and COMESA. Established pursuant to Article 13 of the Treaty on the European Union, the EU Commission is tasked with ensuring the application of the EU Treaties as well as overseeing the application of community law.²³¹ The EU Commission has the role of ensuring compliance with community law and it exercises this function in two stages; namely the pre-litigation and post-litigation stages.

Pre-litigation compliance occurs before a matter is taken to the European Court of Justice, and post-litigation compliance takes place after the European Court of Justice has made its decision regarding a matter.²³² In terms of Article 258 of the TFEU, should the EU Commission consider that a Member State has failed to fulfil its obligations under the Treaties, the EU Commission must deliver an opinion on the matter. Before

²²⁸ Economic Commission for Africa 'The Role of Parliament in Promoting Good Governance' available at <http://www.uneca.org/sites/default/files/PublicationFiles/role-of-parliament-in-promoting-good-governance.pdf>, accessed on 3 February 2017.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Article 17 of the Treaty on European Union.

²³² Anne Bonnie 'The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States' (2005) *Journal of Contemporary European Research* 39 at 40.

the EU Commission delivers its opinion, the Member State is given the opportunity to submit its observations on the claim of the EU Commission.²³³ In its opinion, the EU Commission gives the Member State a time period within which to comply with the opinion, failing which the EU Commission may bring the matter to the European Court of Justice. Through this provision, the EU Commission has the authority to monitor the observation by Member States of their treaty obligations. The EU Commission may initiate steps for compliance of its own initiative and does not have to wait for a Member State to allege non-compliance by another state. It is worth noting that the COMESA Secretariat has similar authority.

The functions of the Commission regarding pre-litigation and post-litigation apply even when a Member State initiates a complaint of non-compliance against another. Article 259 of the TFEU requires a Member State that considers that another Member State has failed to fulfil an obligation, to bring the matter before the EU Commission before bringing an action to the European Court of Justice.

If a matter has been brought before the European Court of Justice and a decision made, the EU Commission has powers to submit the matter to the Court if it is of the view that the Member State has failed to take the necessary steps to comply with the Court's judgment.²³⁴

(d) The European Court of Justice

The European Court of Justice (EU Court of Justice) is the judicial organ of the EU. Similar to the SADC Tribunal and the COMESA Court of Justice, the EU Court of Justice has the task of ensuring that the law is observed in the interpretation and application of the EU Treaties.²³⁵

In instances that a Member State considers another Member State to have committed a breach, the matter may be brought before the EU Court of Justice after the pre-litigation procedures with the EU Commission are concluded.²³⁶ The EU Court of Justice must then consider the matter and if it finds that the Member State has indeed failed to comply with its obligations in the Treaty, the EU Court of Justice will require the state to take measures to comply with its judgment.²³⁷ If it is found that the state has

²³³ Article 258 of the TFEU.

²³⁴ Article 260(2) of the TFEU.

²³⁵ Article 19(1) of the Treaty on European Union.

²³⁶ Article 259 of the TFEU.

²³⁷ Article 260(1) of the TFEU.

failed to comply with the court's ruling, the court is empowered to impose a penalty on that state.²³⁸ This is contrary to the position of the SADC Tribunal, which must refer non-compliance to the Summit for the imposition of sanctions, if any.

The EU Court of Justice has played a vital role in the success of the EU and in the strengthening of the legal framework of the EU. The EU Treaties do not make provision for the nature of the relationship between the community legal system and the national legal systems of Member States. Whether community law is applicable in Member States and whether it prevails over national law in cases of conflict is regrettably not set out in the EU Treaties. As such, this remained an area of uncertainty until the EU Court of Justice stepped in and filled the gap.

Through its decisions in a number of landmark cases, the questions of the status of community law have been settled. The first step in the evolution of community law was the recognition by the EU Court of Justice that the EU was a new and independent legal order which creates rights and obligations not only for the Member States but for the citizens of such states as well.²³⁹ The EU Court of Justice then went on to develop the principle of direct effect by holding that provisions of EU law can be invoked and relied on by individuals before national courts.²⁴⁰ This was the first step in the development of the principle of direct effect through the use of case law. The second step was the development of the principle of supremacy of community law by the EU Court of Justice. In various cases before it, the EU Court of Justice held that where there is a conflict between community law and national laws, community laws should prevail and national courts are obliged to apply it even if it is contrary to the constitution of such a state.²⁴¹ This had the effect of confirming the position that community law is supreme even over national constitutions of Member States.

The EU Court of Justice has gradually evolved into a supranational institution and is now recognised as one of the most successful international courts. It is evident from the

²³⁸ Article 260(2) of the TFEU stipulates that the penalty may take the form of a lump sum or penalty payment.

²³⁹ Klaus-Dieter Borchardt *op cit* note 225.

²⁴⁰ Christina Fanenbruck and Lenya Meißner 'Supranational Courts as Engines for Regional Integration? – A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice and the Andean Court of Justice' available at http://www.polsoz.fu-berlin.de/en/v/transforurope/publications/working_paper/wp/wp66/WP-66-Fanenbruck_Meissner_WEB.pdf, accessed on 27 June 2016.

²⁴¹ Hakan Kolcak 'The Sovereignty of the European Court of Justice and the EU's Supranational Legal System' available at <https://www.inquiriesjournal.com/articles/883/2/the-sovereignty-of-the-european-court-of-justice-and-the-eus-supranational-legal-system>, accessed on 11 February 2017.

aforementioned that the EU Court of Justice has authority over Member States. Member States in the EU cannot enact or apply laws that are contrary to community law and have had to implement legislative changes to comply with the decisions of the EU Court of Justice.

The same, unfortunately, cannot be said about the judicial organs of the SADC and the COMESA. The judicial organs of these communities are rather intergovernmental than supranational. Member States of these communities are unwilling to relinquish some of their sovereignty and as such, they do not uphold judgments of the courts. In addition, these organs have been given limited power to enforce non-compliance by Member States.

4.3.2 The East African Community

The current East African Community (EAC) was established in the year 2000 following the entry into force of the Treaty for the Establishment of the East African Community (EAC Treaty). This is the second EAC, as the first collapsed in 1977 due to a variety of challenges.²⁴² The revival of the community saw the establishment of a number of community institutions and introduced principles from which Southern African integration initiatives can gain lessons.

A notable feature of the EAC is that the EAC Treaty makes provision for the supremacy of community law. Article 8(4) of the EAC Treaty stipulates that community organs, institutions and laws will take precedence over similar national ones on matters pertaining to the implementation of the EAC Treaty. This provision is a step in the right direction as it signifies the recognition of the importance of superiority of community law in integration but also reflects the desire of Member States to achieve a deeper level of integration through community law. Through this provision, community law takes precedence in instances of conflict with national laws. Furthermore, Article 8(5) obliges Member States to take steps to adopt the necessary legal instruments to make community law supreme.

(a) The East African Legislative Assembly

The EAC has established a legislative organ; that is the East African Legislative Assembly (EALA). This institution performs legislative, representative and oversight

²⁴² Many reasons are cited for the fall of the EAC in 1977 but it is advanced that the demise was mainly due to political factors rather than economic factors.

functions. Regarding the legislative function, the EALA is authorised to enact community law by way of passing Bills.²⁴³ Any member of the Assembly is permitted to introduce a Bill to the EALA but the consideration of such Bills is subject to certain limitations such as the requirement that the Bill to be considered must not make provision for the imposition of any charge upon the Community.²⁴⁴ Bills passed by the EALA have to be assented to by the Heads of State before they can become community laws.²⁴⁵ Once Bills have been presented to the Assembly, they can only be withdrawn through the introduction of a motion to the Assembly.²⁴⁶ Once a Bill has been passed by the Assembly, it is submitted to the Heads of State for assent²⁴⁷ which can either assent or not assent to the Bill.²⁴⁸ In the instance the Heads of State do assent, the Assembly must publish the Act in the Gazette.²⁴⁹

Despite the constraint caused by the requirement that Bills must pass through the Heads of State before being enacted, the establishment of this organ remains notable. Considering the existing Parliamentary bodies in African RECs which do not have legislative powers, the establishment of the EALA is a progressive move by the EAC. It reflects the recognition of the need to have a legislative organ and the necessity of separation of powers at the regional level. Furthermore, the extensive provisions for the enactment of community law are a welcome development and this is a feature that is not provided for in the SADC and COMESA treaties. Comparatively, the SADC has established the SADC Parliamentary Forum. However, this body is not yet a regional parliament but a forum which provides advice.

(b) The East Africa Community Court of Justice

The East Africa Community Court of Justice (EAC Court) is the judicial organ of the EAC. The EAC Court has the task of ensuring adherence to law in the application and interpretation of, and compliance with the EAC Treaty.²⁵⁰ Its structure features a division of the court into the First Instance Division and the Appellate Division.²⁵¹ The First Instance Division has the authority to hear and determine any matter before the

²⁴³ Article 62 of the EAC Treaty.

²⁴⁴ Article 59 of the EAC Treaty.

²⁴⁵ Ibid.

²⁴⁶ Henry Kibet Mutai op cit note 212 at 188.

²⁴⁷ Article 62(2) of the EAC Treaty.

²⁴⁸ Article 63 of the EAC Treaty.

²⁴⁹ Article 64 of the EAC Treaty.

²⁵⁰ Article 23(1) of the EAC Treaty.

²⁵¹ Article 23(2) of the EAC Treaty.

court in accordance with the EAC Treaty. A matter may then be appealed to the Appellate Division.²⁵² The option of appeal is not provided for in the SADC and COMESA treaties, rather the decisions of the judicial organs in those communities are final and binding.

4.3.3 The Organization for the Harmonization of Business Law in Africa

The Organization for the Harmonization of Business Law in Africa (OHADA) is an organization that was established with the aim of uniting business laws of states parties. To date, the Port Louis Treaty on Harmonisation of Business laws in Africa has been ratified by 17 Western and Central African states. OHADA has been largely successful in the harmonization of business laws in Member States which in turn has promoted economic development within that region. OHADA boasts features that may serve as lessons for the SADC and COMESA.

One such feature of OHADA which has contributed to its growth and success is that the provisions relating to the Uniform Agreements of the community are self-executing and have precedence over business laws enacted within Member States.²⁵³ Uniform Acts are the instruments used to adopt common rules of the community.²⁵⁴ This means that, once a state ratifies the OHADA Treaty, that state is automatically bound by the provisions of the Treaty and the Uniform Agreements.²⁵⁵ Through this aspect of OHADA's legal framework, provisions of the Uniform Agreements do not have to be translated into national laws and states cannot avoid them. In other words, OHADA community law is directly applicable within Member States.

The institutional framework of OHADA is also a feature to be considered. In the adoption of the Uniform Acts, two institutions play a role. The Uniform Acts are, in the first place, drafted by the office of the Permanent Secretary in consultation with the governments of Member States.²⁵⁶ The Uniform Acts must then be submitted to the Council of Ministers which is then responsible for adopting them in consultation with

²⁵² Article 23(3) of the EAC Treaty.

²⁵³ Ngaundje Leno Doris 'Regionalism: Lessons the SADC may learn from OHADA' (2012) 75 *Journal of Contemporary Roman Dutch Law* 256 at 261.

²⁵⁴ Mohammed Baba Idris 'Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects' in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA* 2 ed (2012) 29.

²⁵⁵ Ibid.

²⁵⁶ Article 6 of the Treaty on the Harmonization of Business Law in Africa, available at <http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm>, accessed on 21 February 2017.

the OHADA Common Court of Justice and Arbitration.²⁵⁷ Through this two tier process, there is a degree of assurance that in passing the Uniform Acts there is transparency and involvement of interested parties. However, it must be noted that neither of these organs are legislative organs.

4.3.4 The Economic Community of West African States

The Economic Community of West African States (ECOWAS) is one of the RECs within Africa that has explicitly established executive, legislative and judicial organs. The principle executive organ is the ECOWAS Commission, previously named the ECOWAS Secretariat. The legislative organ is the Community Parliament and the judicial organ is the Community Court of Justice. The Community Parliament is designated the organ that represents the people.

The role of the Community Parliament is to function as a forum for dialogue, consultation and consensus for representatives of the peoples of the Community to effectively promote integration.²⁵⁸ The establishment of the Community Parliament is therefore the furtherance of the involvement of the people of the community in the regional integration process. However, the Community Parliament does not have legislative functions.

4.4 CONCLUSION

The legal and institutional frameworks of a regional economic community are an integral part of the community. The effective functioning of these communities is largely affected by the extent to which these two frameworks complement each other. Much can be gained through analysing other economic communities and the manner in which they have dealt with the challenges of enforcement.

The consideration of other economic communities has brought a few things to light. First, the other communities have developed ways for community law to be applicable within the borders of Member States, which indicates the importance of enforcing community laws. Second, there is a need for the clear separation of powers in the sense

²⁵⁷ Ibid.

²⁵⁸ Protocol A/P.2/8/94 Relating to the Community Parliament available at http://documentation.ecowas.int/download/en/legal_documents/protocols/Protocol%20Relating%20to%20the%20Community%20Parliament.pdf, accessed on 21 February 2017.

that the same organ must not perform executive, legislative and judicial functions, as this may lead to an abuse of power. Third, the other communities have highlighted the importance of a community parliament that is empowered to fulfil all three core functions of parliament.

5. CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY OF FINDINGS

The leaders of African states recognize regional integration as a necessity for the development and unity of the continent. At the continental level, the African Union and the African Economic Community both recognize the importance of RECs in economic integration and seek to strengthen them so as to achieve the objective of establishing a continental economic community. The Treaty establishing the African Economic Community established a programme for the consolidation of the African regional economic communities, which has been incorporated into the African Union.

Africa now boasts fourteen regional economic communities, although only eight are recognized as building blocs of the AEC. Within Southern Africa specifically, two of the most prominent communities are the Southern African Development Community and the Common Market for Eastern and Southern Africa. These communities were both established in the 1990s and are part of the post-colonialism wave of regional economic communities in Africa. The SADC and COMESA have each made progress towards the achievement of their objectives and have established organs to support the achievement of their objectives.

However, a common challenge encountered by both of these communities, and many others, is the implementation of community objectives within Member States. More specifically, these communities face challenges in enforcing community law within Member States. Community law consists of the rules that are developed by the community and are applicable to community members. Community law serves the purpose of providing Member States with a set of rules to abide by so as to further the achievement of community objectives. The challenge faced in enforcement of this form of international law relates to the fact that Member States are independent, sovereign states with their own legal systems. Member States are as such reluctant to apply community law within their borders as they view this to be a violation of their sovereignty. This results in Member States choosing to apply national law over community law.

This challenge is not unique to Southern African regional economic communities. All regional economic communities have had to develop mechanisms through which community law may be enforced within Member States. Some communities have made community law supreme over national law and the Member States are obliged to apply

it, whilst other communities have adopted the principles of direct effect and direct applicability.

It is important to realize that the effective application and enforcement of community law depends on a combination of factors. A community needs an organ that will develop the laws, an organ that will monitor the observance of the laws by Member States, and an organ that can enforce decisions in instances of non-compliance. In addition to this, a community needs clear rules on the status of community law *vis-à-vis* national law and on the sanctions to be imposed against a defaulting state. It is also crucial to the effective enforcement of community law that politics do not play a role.

5.2 RECOMMENDATIONS

Despite the challenges faced, there is great opportunity for growth and development within the SADC and COMESA communities. Through analysing the existing gaps in the communities and considering the experiences of other communities, the following recommendations are made:

5.2.1 Separation of Powers

As with nations, a community requires separation of powers between its various organs. The functions of organs can be divided into three categories; namely the executive function, the legislative function and the judicial function. In order to ensure transparency and accountability and to avoid the abuse of powers, there is a need to distinguish between the organs that are responsible for each function. Therefore, an organ such as the SADC Summit should not be responsible for developing community law and enforcing it as well. It is recommended that this framework be revised.

5.2.2 Independent Supranational Organs

It has been established that both the SADC and COMESA treaties are incomplete contracts. Incomplete contracts are most effective with community organs that are independent and have the authority to make binding decisions. This is especially true with respect to the dispute settlement organ. It is through the dispute settlement organ that community law can effectively be enforced but this effectiveness is negatively affected if the organ is not independent and politics influence enforcement.

Whilst the COMESA Court of Justice can be said to have the authority to enforce its judgments by imposing sanctions, the same cannot be said for the SADC Tribunal. The SADC Tribunal does not have the authority to enforce its judgments in instances of

default by a party, the power is instead vested in the Summit. The Summit is unquestionably subjected to political influence which means enforcement of judgments is also controlled by politics. It is therefore recommended that the power of enforcement be vested in the Tribunal.

5.2.3 Establishing Regional Legislative Organs

A regional parliament serves three functions; namely legislative, representative and oversight functions. Through the establishment of a functional regional parliament, it is advanced that the citizens of Member States will be able to contribute towards the development of community law and objectives. As the communities face challenges in the ratification of agreements and the implementation of its policies, the ordinary people of the communities do not see much of the benefits offered by integration nor do they participate in the process.

This is a challenge that can be alleviated by the establishment of a regional parliament. Through a regional parliament, an economic community would become more democratic as the people would have a mechanism through which to participate in the community activities. As has been recognized, the people are an essential part of an economic community and they have both rights and obligations. It is difficult to envisage people of the community benefiting fully from what economic integration has to offer if they are unable to contribute to the decisions made and the executive organs are essentially empowered to do as they wish.

Although it is recognised that developing into a regional parliament which can exercise legislative, representative and oversight powers is a process that takes time, it is recommended that the SADC and COMESA establish fully fledged regional parliaments.

5.2.4 Supremacy of Community Law

One of the most effective means of ensuring that Member States respect and observe community law is by making provision for the supremacy of community law. Through this there is clarity regarding whether community law or national law prevails in instances of conflict. Neither the SADC nor the COMESA make provision for the supremacy of community law and it is recommended that this feature be incorporated so as to ensure community objectives are furthered.

5.2.5 Direct Applicability and Direct Effect

Through the provision of direct applicability, community law will apply automatically within Member States without having to be subjected to national rules of hierarchy. This measure would, therefore, provide clarity regarding the question of status.

The principle of direct effect ensures that individuals rights are protected and can be enforced within Member States. This becomes even more important in communities that do not permit private parties to have access to community judicial organs as is the case within the SADC Tribunal, due to the provisions of the new Protocol on the Tribunal. It is therefore recommended that provision be made for these two principles within the frameworks of SADC and COMESA.

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