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Diana Eunice Kawenda

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LEGAL INTEGRATION AS A MEANS TO REGIONAL ECONOMIC INTEGRATION: A SOUTHERN AFRICAN PERSPECTIVE

Diana Eunice Kawenda*

Abstract

It is a general truth that regional integration has been considered as a means to achieve rapid economic growth and alleviate other socio economic ills faced in Southern Africa. In Southern Africa a lot of information has been expounded from an economist and political perspective on how regional integration can be achieved. However not much emphasis has been placed on the role of the law in realising regional integration. This paper seeks to define the concept of regional integration and legal integration in International law considering the two concepts deal with interstate relations. Undoubtedly the most successful economic integration process has been fulfilled by the European Continent. In trying to ascertain if legal integration can be a means to achieve regional integration, the European Economic Community (EEC) will be examined. The role of the European Court of Justice (ECJ) will be discussed along with the landmark cases which set the law as the precursor to Europe's successful integration process. A continental shift will be made to assess if the African Union (AU) considers the law as a means to effective regional integration. Moving further inward in the African continent, this paper will examine the position of the Southern African Development Community (SADC) and the Common Market for East and Southern Africa (COMESA), and if the law is being used as a means to effective regional integration? Lastly recommendations will be made pertaining to the African scenario and particularly in Southern Africa thus leading to the conclusion. The research methods used for this paper will be a comparative analysis with the European Integration process, literature review and internet research.

Keywords : Regional Integration, legal Integration, Continental Shift.

I. INTRODUCTION

Following the post-colonial period there was need to remedy the adverse effects of colonialism which was the fragmentation of the continent. It is reported Sub Saharan Africa has 47 smaller economies with an average Gross Domestic Product of USD 4 billion when combined, which equates to the GDP of Belgium alone.¹ It was therefore founded that they was need to enlarge Africa's market so as to ensure it yields greater economic growth which saw the embracement of regional economic integration (REI).² Ever since REI was embraced as a solution to

* The author can be reached through email, 25320432@nwu.ac.za World bank country report regional integration.

¹ North West University.

² World Bank 2013 <http://go.worldbank.org/>.

Africa's economic problems there hasn't been much economic growth that has taken place. The rate at which the economic growth of Sub Saharan Africa takes place is rather slow. In the last decade growth has taken place at a rate of 2.4 %. It still proves to be difficult to realise REI in sub Saharan Africa.

On the flip side of things Europe has been able to realise REI. When one examines the European model, one realises that the law was used as a tool to effectively realise REI in Europe. This paper will examine the European context of Integration and how the law has been used to achieve REI. An African continental perspective to integration will be assessed to determine if the African continent considers the law as a means to achieve REI. Attention will be given to the Southern African region to determine if the law is being used a tool to realise REI. If indeed the law can effectively spearhead REI perhaps the state and condition which befalls the Sub –Saharan region would improve.

II. THE CONCEPTS OF REI AND LEGAL INTEGRATION IN INTERNATIONAL LAW

REI has been defined as:

The co-ordinating of economic activities, with the aim of enhancing the development of countries or regions. It involves elimination of tariff and non-tariff barriers to the flow of goods; services and factors of production between a group of nations, or different parts of the same nation.³

REI is a concept that developed post World war two, by means of clustering different member states within the same geographical area, to form a community that would work towards attaining economic and socio- political growth of that region.⁴ Balassa has considered economic integration as a process and as a state of affairs.⁵ He further considers

³ UNECA Report *Assessing Regional Integration in Africa*. ECA policy research report 2004.

⁴ Consider the Establishment of the ESCS and the EEC.

⁵ Economists such as Balassa in *The theory of Economic Integration* 1 define economic integration as: "We propose to define economic integration as a process and as a state of affairs. Regarded as a process, it encompasses measures designed to abolish discrimination between economic units belonging to different national states; viewed

the process to take place in the following stages:

- Stage 1- Free trade Area⁶
- Stage 2- Customs Union⁷
- Stage 3- Common Market⁸
- Stage 4- Economic Union⁹
- Stage 5- Complete Economic integration¹⁰

A. IS REI GOVERNED BY INTERNATIONAL LAW?

The process of REI is spearheaded by the signing of treaty agreements by member states which set out the norms and manner in which the community will function. These treaties have been described as constitutive treaties. Hartley asserts:

The constitutive treaties lay the foundations of the community, they may be regarded as the constitution of the community, and they set up the various organs of the community and grant them their powers. They also contain many provisions of a non-institutional nature which would not normally be found in a constitution.....Appended to many of these treaties there are certain supplementary instruments and annexures and

as a state of affairs, it can be represented by the absence of various forms of discrimination between national economies.

⁶ Balassa *The theory of Economic Integration 2*. "Tariffs and quantitative restrictions between the participating countries are abolished, but each country retains its own tariffs against non-member states."

⁷ Balassa *The Theory of Economic Integration 2*. "Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movement's within the union, the equalization of tariffs in trade with non-member countries."

⁸ Balassa *The theory of economic integration 2*. "A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished."

⁹ Balassa *The Theory of Economic Integration 2*. "An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to disparities in these policies."

¹⁰ Balassa *The Theory of Economic Integration 2*. "Finally total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting up of a supranational authority whose decisions are binding for the member states."

protocols are an integral part of the treaty to which they relate.¹¹

It is the signing of these constitutive treaties that has led to the emergence of community law. Community law is a form of international law which has a supranational character.¹² Fagoboyibe¹³ alludes:

Essentially supranationalism implies the existence of an organisation capable of exercising authoritative powers over its member states. This is the point where supranational organisations are different from inter-governmental institutions, since the latter are merely forums for inter-state cooperation.¹⁴

The supra national quality of community law has altered the general understanding of international law. There has been much debate amongst international law scholars whether community law must be considered as a form of international law, bearing in mind its *Sui generis* character that is distant from the general understanding of international law.¹⁵ Marquis has made the following observation:

¹¹ Hartley TC *The foundations of European Community Law* 93.

¹² Hay P 1965 U.III.L.F 733 ‘‘Economic integration in post-war Europe has created a new organizational form for the co-operation and association of states. Described as ‘‘supranational’’ these organisations possess both independence from and power over their constituent states to a degree which suggests the emergence of a new federal hierarchy and which goes far beyond traditional intergovernmental cooperation in the form of international organisations.’’733.

¹³ Fagabayibo *Common Problems affecting Supranational attempts in Africa*. 2013 PER 33.

¹⁴ Fagabayibo *Common Problems affecting Supranational attempts in Africa*.2013 PER 33; Pescatore in his book *The law of integration* defines supranationality as: ... the recognition by a group of member states of a complex of common interests, or more broadly, a complex of common values; the creation of an effective power placed at the service of these interests or values, finally, the autonomy of this power.’’ 50.; Sodipe and Osuntogun *The quest for a supranational entity in West Africa*, 2013 PER 271: ‘‘The reality is that even when an organisation possesses all of the elements of supranationalism, there are still some embedded features of inter-governmentalism.’’ ‘‘The EU however has exclusive competence over matters such as its customs union, economic and monetary policy, competition laws, common international trade policy, the common fisheries policy and the conclusion of some international agreements

¹⁵ Verdross 1949 Am.J.Int’L 435; Hartley Elivira and Pinedo *EC and EEA Law: A comparative study of Effectiveness of European law*. ‘‘Despite being based on treaties drawn up in accordance with international law, community law has increasingly distanced itself from international law. The fundamental reason for this evolution lies in the differing objectives of the two legal orders: whereas international law relates to

From a legal standpoint, the institutional structure of the community raises the question of whether the treaties should be interpreted narrowly, as classic international law, nor constitutional law, but rather a “new third legal order” not derivative from, but existing autonomously beside or between, the traditional national and international legal orders.¹⁶

Marquis alludes that the traditional approach of international law must be maintained and community law has created a new legal order. On the other hand Verdross is of the idea that, it is not viable for community law to be considered distinct from international law; rather it must be a component of international law.¹⁷

Either, we place the new concept of the internal law of a community of states apart from the concept of international law (If one was like Alf roos, to restrict the concept of international law exclusively to the rules regulating the relations between sovereign legal communities; or this by far better- one must adopt a wider concept of international law and then distinguish these two groups within the concept of international law. Such expansion, justified by the historical development of the traditional concept of international law, leads to the dissolution of the original mixed concept of international law. We therefore define international law as the law of the community of states.¹⁸

International law can never be given a narrow approach but must be

the resolution of conflicts in law between states, community law is designed to promote integration between its member states and furthermore to create direct effects by directly conferring rights and imposing obligations on individual and enterprises within the member states. For this reason EC law is frequently defined as sui-generis order distinct from, though closely linked to both international law and the laws of the various member states.”²⁷.

¹⁶ Marquis 1977 J.Int L &Com 210 “By permitting individuals and enterprises to appeal institution decisions, the EEC treaty makes a significant departure from traditional international law, which has generally permitted only states to sue.”210; Hay P 1965 UIIL.F 741 “Attempts to give content to the *sui generis* concept have resulted in new terms of art: that community law is the ‘internal law of the community of states(“*internes Staatengemeinschafts-recht*” –Verdross).

¹⁷ Verdross 1949 Am.J.Int’L 438.

¹⁸ Verdross 1949 Am.J.Int’L 439.”If one looks therefore, at international law from the point of view of its creation, there can be no doubt that it must be considered as the law of the community of states since, it is being created nearly exclusively by the co-operation of states.”

broad to suit the dynamics of change which takes place on the international legal landscape. Hartley also states:

The community legal system was created by a set of treaties. It depends for their validity on international law. Ultimately therefore community law is a subsystem of international law. However if a group of states conclude a set of treaties to govern their relations with each other in a given area, international law permits them to create a new system of law that is self-contained and separate from international law. The normalities of international law will not necessarily apply within that system.¹⁹

When REC's forge their relationships by means of a treaty they have entered into the arena of international law. The *Vienna convention on the law of treaties* defines a treaty as:²⁰

Treaty means international agreements concluded between states in written form and governed by international law whether embodied in a single instrument or in two or more instruments or in two or more related instruments and whatever its particular designation.

As long as a treaty is the basis for an agreement such treaty will be governed by international law despite its uniqueness. The unique feature of such a treaty does not render it impossible for one to assert it as international law. Community law is a form of international law although unique.

For the purposes of REI, international law of a supranational nature is the driving force which drives the REI agenda forward. Even economists such as Balassa state:

Finally total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting up of a supra-national authority whose decisions are binding for the member states.²¹

For the purposes of REI, it is essential to depart from the main understanding of international law and adopt a supra national authority

¹⁹ Hartley TC *The foundations of European Community law* 89.

²⁰ Article 2 *Vienna Convention on the law of treaties*. (1969).

²¹ Balassa *The Theory of Economic Integration*. 2.

so as to fully realise REI. However the fact that community law has adopted a different approach from the traditional understanding of international law must not per-se ultimately dismiss community law as international law. REI and international law can never be divorced from each other.

B. LEGAL INTEGRATION AS A MEANS TO ACHIEVE REI

Ideally, consistency in the application of treaties and all protocols relating to regional economic blocs lays the foundation for the successful realisation of REI in totality. To enable such a foundation to be laid there is need for the application of such laws emanating from these REC's to be uniformly applied by the member states in their own municipal laws.²²

The means to achieve uniformity is by means of legal integration. Mancuse defines legal integration as:

Legal integration is a legal technique aimed at eliminating differences between national provisions by replacing them with a unique and identical text for all states involved.²³

Political scholars have acknowledged that the process to achieve uniformity of the laws is through legal integration. Political scholars have defined legal integration as:

By legal integration, our dependant variable, we mean the gradual penetration of EC law into the domestic law of its member states. This process has two principal dimensions. First is the dimension of formal penetration, the expansion of the types of supranational legal acts, from treaty law to secondary community law, that take precedence over domestic law. Second is the dimension of substantive penetration, the spilling over of community legal regulation from the narrowing economic domain into areas dealing with issues such as occupational health, safety, social welfare, education and even political participation rights.²⁴

²² Mancuse 2011 J.Comp.L 146.

²³ Mancuse 2011 J.Comp.L 148.

²⁴ Barley and Mattli 1993 IO 41.

Oppong²⁵ further supports this points and explains the importance of legal integration for the purposes of regional economic integration as he states:

*.....effective economic integration is the product of properly structuring and managing, within well –defined legal frameworks, vertical, horizontal and vertico- horizontal relations among states, legal systems, laws and institutions. In other words a community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness.....*²⁶

Within the domain of interstate cooperation it is prudent for the legal foundations of the REC's to be consistent and portray a unison approach in the manner in which the policies, treaties and protocols are interpreted and applied. Pitarakis and Tridmas have suggested:

A reliable legal system adds credibility to private economic exchanges enforces contracts, protects economic freedoms and reigns in arbitrary state power. It secures that no individual, in either private or public capacity, places itself above the law, protects agents from arbitrary decisions and reduces economic uncertainty.²⁷

One can ascertain that uniform application of laws brings consistency and certainty to the REC's. Such is however made possible by means of legal integration which is made possible by the community operating at a supranational level. Consistency and certainty avails economic certainty which marks successful REI. Legal integration has proven to be the steer that directs the process of REI in full within the European context.

III. REI AND LEGAL INTEGRATION IN THE EUROPEAN CONTEXT

REI in Europe emerged when the European Coal and Steel and Community (hereinafter referred to as ESCS) was formed under the *Treaty establishing the European Coal and Steel and Community* (hereinafter

²⁵ Oppong *Legal Aspects of Economic Integration in Africa*.

²⁶ Oppong *Legal Aspects of Economic Integration in Africa*. 31.

²⁷ Pitarakis and Tridmas 2003 EJLE 360.

referred to as *Treaty of Paris*). After seven years it became the predecessor of the European Economic Community (hereinafter referred to as EEC) which was formed under the *Treaty establishing the European Economic Community* (hereinafter referred to as *Treaty of Rome*).²⁸ The treaty of Rome clearly outlined the REI process within the member states. Its main objective was to integrate the economy of the member states. Article 2 of the treaty reads:

The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, and an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.²⁹

The EEC was able to progress throughout the five stages of REI and it marked the completion of the REI process in the EEC. However the successful completion of the REI process within Europe, cannot be explained without addressing the role of the legal integration in ensuring REI within the EEC.

A. JUDICIAL ARMS AS THE DRIVING FORCE TO LEGAL INTEGRATION

The judicial arm can never be underestimated when it came to the realisation of REI in Europe. The ECJ was the main driving force that acted as the guardian of the Treaty of Rome.³⁰ It derived its powers from the Treaty of Rome which provided under article 164: “The court of justice shall ensure that in the interpretation and application of this trea-

²⁸ *Treaty of Rome* signed on the 25th of March 1957 and entered into force on the 1st of January 1958. Article 1 reads: “By this treaty, the high contracting parties establish among themselves EEC. Member states included: Belgium, Denmark, Germany, France, Ireland, Italy, Luxemburg, Netherlands, and United Kingdom.

²⁹ Article 2 treaty of Rome.

³⁰ Tam *The history of the court of justice of the EU* has stated: “For the historian, there is nothing surprising in the fact that the court actually took advantage of the legal possibilities offered by the European treaties to further the project once it was started on a less ambitious scale.” 12.

ty the law is observed.”³¹ Kelman and Schmidt have also stated “The European Court of Justice (ECJ) has played an indispensable role as a motor for European Integration.”³² It ensured that its decisions would lead to the uniform application and consistency of all protocols related to it so as to achieve REI.

Barley and Mattli³³ have stated:

*The European Court of Justice has been the dark horse of European integration, quietly transforming to Treaty of Rome into a European Community (EC) constitution and steadily increasing the impact and scope of EC law. While legal scholars have tended to take the court's power for granted, political scientists have over looked it entirely.*³⁴

Article 4 of the Treaty of Rome gave the ECJ the mandate to ensure that the member states implement and adhere to the provisions of the treaty.³⁵ Pescatore³⁶ considers this to be the doctrine of effective power whereby the ECJ would take decisions which were binding on the states.³⁷ The decisions of the ECJ pertaining to the Treaty of Rome reigned supreme over decisions made by the member states' municipal courts. This signalled that municipal courts no longer had absolute judicial sovereignty but instead yielded their decisions pertaining to the Treaty of Rome to a higher authority which was the ECJ.

The ECJ was empowered to interfere with the laws of member states by means of Article 177 of the Treaty of Rome which read:

The court of justice shall have jurisdiction to give preliminary rulings concerning:

a) The interpretation of this treaty.

³¹ Article 177 of the Treaty of Rome.

³² Kelemen and Schmidt 2011 J' E, P, P 1.

³³ Barley and Mattli 1993 IO 41.

³⁴ Barley and Mattli 1993 IO 41.

³⁵ Article 4 of the Treaty of Rome reads:” The task entrusted to the community shall be carried out by the following institutions: The court of justice. Europe before the court.”

³⁶ Pescatore *Law of Integration*.51.

³⁷ Pescatore *Law of Integration*: To take decisions which are binding on states, to lay down rules of law which they must respect, to pronounce judicial decisions, determining the law, these are the kind of powers which go into the making of a supranationality. 51.

- b) The validity and interpretation of acts of the institutions of the community
- c) The interpretation of the statutes bodies established by an act of the council where these statutes so provide.

Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the court of justice to give a ruling thereon.

In this regard the highest court of the member states' municipal laws had to consult with the ECJ before making any ruling that concerned the implementation of the treaty of Rome. In England I the courts stated in *R v Secretary of State of for transport Ex p Factortame*:

If we say that sovereignty means the ability to legislate independently of any other state, if it means that our domestic laws will prevail over all other external laws then the UK long gave up some of its sovereignty.³⁸

The negative effect of Article 177 of the treaty of Rome was that member states yielded their judicial sovereignty as a means of ensuring that Legal integration is achieved for REI to be realised. However it was necessary as Marquis points out:

Referral Jurisdiction is essential to achieve uniformity in the interpretation of community law. Lack of uniformity could well lead to community law being ignored, an occurrence which would undermine the viability of the community. The solution to the problem of the interrelationship between community law and municipal law depends in large measures upon referral jurisdiction.³⁹

The means to which the ECJ would ensure consistency of the law in the EEC was keeping track of the manner in which the laws would be interpreted within the municipal courts, so that a unison approach to all legal issues would be followed within the EEC. Pescatore⁴⁰ has provided:

³⁸ No (7) (2001).

³⁹ Marquis 1978 J.INT.L &Com 212.

⁴⁰ Pescatore *Interpretation of Community Law and the Doctrine of Acte Clair* 30.

Community law must have the same substantive meaning wherever they are applied. The procedure of preliminary rulings in the communities has proved to be the most practical means for setting controversies rapidly and eliminating distortions about the meaning of common rules.... what matters is not only unity of content but also uniformity of validity and efficacy. In fact the disturbance to the functioning of the communities would be much greater if the same rules did not have, in the different member countries the same kind of effect. The fact that certain rules would be effectively applied in some member countries, whereas in others their implementation would be hampered or even rendered impossible, would have a much more disruptive effect on the community system. This raises a problem of efficacy.⁴¹

For efficacy of the EEC to permeate the preliminary rulings ensured such and led to legal certainty which in turn resulted in economic certainty. There was however some resistance from some member states pertaining to the use of the preliminary rulings.⁴² It is this writer's opinion that Article 177 can be viewed as the carrier of other facets of legal integration such as the supremacy of community law and the transfer of sovereignty.

B. SUPREMACY OF THE EEC TREATY

Bearing in mind they are two different types of laws within the EEC, which are the municipal laws of the member states and the community laws, most times the municipal courts and the ECJ have had to answer the question pertaining to conflict between the two systems, which laws prevails over the other? In France the court of *cassation criminal chamber* in the *Ramel Case* provided: "The treaties and binding community acts have an authority superior to the French laws."⁴³ The Belgian courts also emphasized that the types of legal systems involved have different sources of law. In the case of *Minister of Economic Affairs v Fromagerie Franco Suisse* the court provided that a national law could never repeal a treaty provision. But a treaty provision can nullify a national law. It stated:

⁴¹ Pescatore Interpretation of Community Law and the Doctrine of Acte Clair 30.

⁴² Marquis 1978 J.Int.L&Com France, Italy and Germany.223.

⁴³ Case 80/1977.

*The rule that a statute repeals a previous statute in so far as there is a conflict between the two does not apply in the case of a conflict between a treaty and a statute. In the event of a conflict between a norm of domestic law and a norm of international law the rule established by the treaty shall prevail.*⁴⁴

From the above one can denote that the municipal legal order had to be subservient to the community legal order so as to fulfil the provisions of the Treaty of Rome, as a means to ensure uniform and consistent application of the law. In Britain, Lord Denning in the case of *McCarthy v Smith*⁴⁵ stated: “.....we are entitled to look to the treaty as an aid to its construction and even more, not only as an aid but as an overriding force. It is our bounden duty to give priority to community law.”⁴⁶ This position was also confirmed in the *Factorame Case*.⁴⁷

In Germany they was much resistance to the notion of community law being supreme over national law. The Frankfurt Administrative Court was against the idea of German basic law being subservient to community law.⁴⁸ This matter was referred to the *Internationale Handelsgesellschaft* which in turn referred the matter to the ECJ. The court of justice firmly maintained the supremacy of community law over municipal law. Oppong⁴⁹ alludes:

*The principle of supremacy should be distinguished from provisions often found in the founding treaties of communities that oblige member states to ensure the conformity of their laws with community law. In theory, such provisions are not conflict of laws resolution provisions. They look to the executive and legislature rather than the judiciary for action. Their violation will often be a breach of an international obligations remediable at the international rather than national level. What the principle of supremacy declares is that where national law is not in conformity with community law, national courts should give preference to and apply community law.*⁵⁰

⁴⁴ [1972] CMLR 330.

⁴⁵ [1980] Case 129/79.

⁴⁶ No (7) (2001).

⁴⁷ Lord Bridge stated: “The high court now has a duty to take account of and give effect to community law and where there is a conflict, to prefer community law to national law.”

⁴⁸ Marquis 1978 J.INT.L &Com222.

⁴⁹ Oppong *Legal Aspects of Economic Integration in Africa* 48.

⁵⁰ Oppong *Legal Aspects of Economic Integration in Africa* 48.

By maintaining the supremacy of the EEC laws over municipal laws it created certainty and uniformity within the REC's legal sphere thus enabling legal integration which was key to REI. Ultimately the various jurisdictions came to the understanding that EEC laws were supreme over their national laws. Marquis states: "The first ground was the necessity of preventing harm to the unity and efficacy of community law."⁵¹

C. LIMITED SOVEREIGNTY OF MEMBER STATES

The member states to the EEC by means of signing the treaty of Rome surrendered some of their powers and limited the sovereignty as a means to ensure that the set objectives of the EEC would be realised. Pescatore⁵² went on to describe the distinct nature of community law to which he provided that unlike an intergovernmental organisation where a member state retains full sovereignty, integration limits member state's sovereignty. He states: "The law of integration rests on a premise quite known to so-called classical "international law: that of the divisibility of sovereignty."⁵³

In *Costa v Enel* the court clearly stated:

*By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity, international standing and more particular real powers stemming from a limitation of competence, or a transfer of powers albeit within their limited spheres, have restricted their sovereign rights and thus created a body of law which binds both their nationals and themselves. The transfer by the states from their domestic legal order to the community legal order of their rights and obligations arising under the treaties carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of community cannot prevail.*⁵⁴

⁵¹ Marquis 1978 J.INT.L &Com 229.

⁵² Pescatore *Law of integration*.26.

⁵³ Pescatore *Law of integration* He further states "...the preconceived idea of indivisible sovereignty blinds men's minds to the phenomenon of integration." 31.

⁵⁴ *Costa v Enel* 15 July 1964; In *San Michele Case* 28 June 1965 the court stated: "A resort to rules or legal concepts of national law for the appraisal of the validity of acts of community institutions would have the effect of impairing the unity and efficacy of community law, the validity of such acts can be appraised only in relation

The *Pit face bonus judgement* justified piercing the national sovereignty of member states in community law by all means necessary so as to ensure that the objectives of the community are not diminished or compromised.⁵⁵ Limited sovereignty was a negative obligation set by the ECJ court so as to realise the efficacy of the REI in Europe. Had the member states maintained their prerogative of absolute sovereignty, some member states would hide behind the veil of sovereignty as a means of avoiding implementing the rules established by the EEC. As mentioned earlier on there was need for the uniform application of the treaty as a means to create consistency and certainty which are the key ingredients for effective REI. Pescatore⁵⁶ states:

*It signifies that community rules are endowed with the same kind of effectiveness as national legal rules. Community rules may be directly invokedIt thus turns out that through the doctrine of direct application the national judges have been entrusted with the task of implementing, each one in the field of his jurisdiction of the rules of community law.*⁵⁷

Limitation of sovereignty was key to realising legal integration which was a means to REI in the EEC. The role of the ECJ in this regard ensured uniformity of the laws pertaining to the EEC laws. In the course of making its decisions, it developed concepts such as the limitation of sovereignty and the supremacy of the EEC laws over municipal laws. Again the Treaty of Rome was ready made to ensure that the judicial sovereignty of the member states was also limited by way of preliminary rulings. Having established how the law was a means to effective REI, the writer of this research will examine how the African continent has embraced the above principles.

to community law, the law based on the treaty, an autonomous source of law, cannot by its nature be opposed by rules of national law of whatever kind without losing its character as community law and without the legal basis of the community itself being jeopardized; hence reliance on the impairment either of basic rights as formulated by the constitution of a member state or of the principles of a national constitutional structure cannot affect the validity of an act of the community or its effect within the territory of that state.

⁵⁵ Pescatore *Law of integration* 27. *Gezamenlijke Steenkolenmijnen in Limburg*.

⁵⁶ Pescatore *Interpretation of Community Law and the Doctrine of Acte Clair* 30.

⁵⁷ Pescatore *Interpretation of community law and the doctrine of Acte Clair* 29.

IV. AFRICA'S APPROACH TO REI

When it pertains to REI political and economic aspects relating to it have been greatly discussed at the expense of the legal aspects.⁵⁸ Although REI can be viewed through the lenses of politics and economics, the role that the law plays is very important. REI consists of political and economic co-operation by the African states.⁵⁹ However the foundation of the two would be the law. Oppong⁶⁰ postulates: A purely economic and socio political approach, to an analysis of economic integration should be viewed with caution, as it fails to appreciate the important fact that obstacles to trans boundary economic activity are not only or socio- political, but are also sometimes legal.⁶¹

It is rather unfortunate that when the African continent pursued REI, there was no legal framework that specifically addressed REI.⁶² Oppong has been able to synthesise why integrated legal frameworks in an economic community is essential. He points to the following reasons:

1. Rules for conduct must be present.⁶³
2. There must be defined entities to which the rules apply or relate.⁶⁴
3. There must be a source from which one can identify the rules that

⁵⁸ Oppong *Legal aspects of economic integration in Africa* “To emphasize the role of law is not to underestimate the importance of socio – economic and political factors in these processes.....many legal issues if unaddressed, would still hinder the effectiveness of Africa’s economic integration process”.11.

⁵⁹ Fagbayibo: *Exploring legal imperatives of regional integration in Africa*. “The obstacles confronting African Integration cut across disciplines such as politics, economics and law”.

⁶⁰ Oppong *Legal aspects of economic integration in Africa* .9.

⁶¹ Oppong *Legal aspects of economic integration in Africa*. 9 Oppong also refers to Pescatore who also states: “The process of integration can have no real consistency and above all, no real stability or lasting force unless we succeed in giving it a sufficient solid institute and legal framework”.9.

⁶² The primary legal frame work that was there mainly addressed the political concerns of the time. Such as the OAU charter and the Banjul Charter. REI was secondary to the above and hence not much legal attention was given to it.

⁶³ Oppong *Legal aspects of economic integration in Africa*. “These rules regulate behaviour and activities within the legal system” .37.

⁶⁴ Oppong *Legal aspects of economic integration in Africa*. “These are subjects of the legal system. The legal system confers benefits and imposes burdens on the subjects”. 37.

form part of the legal system.⁶⁵

4. Obligation to obey the norms of the legal system.⁶⁶

The 1979 Monrovia Declaration⁶⁷ beset the tone at which heads of states of the OAU vowed to effectively involve themselves in the process of REI. The OAU member states vowed to ensure effective REI at municipal level and continental level.⁶⁸ A close examination of the Monrovia Declaration highlights that the pan African leaders fully acknowledged the need for collective effort to realise economic growth for the good of the African people. The declaration opens up with the following:

*Determined to ensure that our member states individually and collectively restructure their economic and social strategies and programmes so as to achieve rapid socio- economic change and to establish a solid domestic and intra African base for a self-sustaining, self-reliant development and economic growth.*⁶⁹

Mere declaration was not sufficient enough to realise REI in Africa. The member states of the OAU set out a two decade plan on how economic development in Africa was to be realised. The Lagos Plan of Action for the Economic Development of Africa, 1980–2000(Lagos Plan of Action) detailed how the member states were to see to it that REI was achieved. 1980-1990 was declared the industrial development

⁶⁵ Oppong *Legal aspects of economic integration in Africa*. “It is not every norm that can claim a legitimate place within the legal system”.37.

⁶⁶ Oppong *Legal aspects of economic integration in Africa* “This obligation is enforceable through both public and private means. Reliance on both mechanisms facilitates the effective enforcement of norms.”37.

⁶⁷ Resolution NO:AHG/ST.3(XXI) Monrovia Declaration of commitment of the heads of state and Government of the Organisation of the African Unity on guidelines and measures for national and collective self –reliance in social and economic development for the establishment of a New international Economic Order.

⁶⁸ “The term declaration is used for various international instruments. However declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain obligations. <http://treaties.un.org/overview.aspx?pcth=overview/definition/page1-en.xml>.

⁶⁹ The first declaration reads: Hereby Declares(1)That we commit ourselves individually and collectively on behalf of our governments and peoples to promote the social and economic development and integration of our economies development and integration of our economies with a view of achieving and increasing measure of self-reliance and self-sustainment;”

decade in Africa.⁷⁰In relation to trade and finance, ⁷¹member states were required to eliminate any trade barriers or obstacles slowing the efficacy of REI.⁷²

The arm of the law was rather underestimated when the REI agenda came into play in the 1970's, primarily because the central role of the law with regards to REI in Africa, emerged a decade after the Lagos Plan of Action had been put in place. All along the member states were confirming their aspirations by means of declarations and drafting a plan of action without the legal means to affect all of the above. In this regard Oppong⁷³ has stated:

*.....effective economic integration is the product of properly structuring and managing, within well-defined legal frameworks, vertical, horizontal and vertical horizontal relations among states, legal systems, laws and institutions. In other words a community must have a well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness.....*⁷⁴

The absence of a legal framework goes to show that they were no rules in place to resolve conflicts emanating from the conflicting jurisdictions, laws and norms.⁷⁵ The absence of a legal framework for such a long period signals absence of legal integration which was a means to establish consistency and certainty which are key ingredients for effective REI.

⁷⁰ Chapter II of the Lagos Plan of Action: Industry reads: Member states accord, in their development plans, a major role to industrialisation, in view of its impact on meeting the basic needs of the popularity ensuring the integration of the economy and the modernisation of society....Member states proclaim the years 1980 to 1990: industrial development Decade in Africa.

⁷¹ Chapter IV II Trade and Finance

⁷² (e) Member states should endeavour to eliminate all obstacles which have the effect of curtailing trade among themselves by the year 1990;

⁷³ Oppong *Legal aspects of economic integration in Africa*.

⁷⁴ Oppong *Legal aspects of economic integration in Africa*. 31.

⁷⁵ Oppong *Legal aspects of economic integration in Africa*. "A legal framework that defines the relations between community and national laws, spells out the modalities for implementing community law in member states; defines the respective competences of the community and member states; defines the respective competence of the community and member state; and anticipates and provides rules for resolving conflicts of law, conflict of norms and conflict of jurisdiction".p31.

A. ABUJA TREATY: DELAYED RESPONSE TO REI?

The *Treaty Establishing the African Economic Community of 1991* (hereinafter referred to as Abuja Treaty) came into effect in 1990, ten years after the member states of the OAU had made declarations and plans to which they sought an African Economic Community (hereinafter referred to as AEC). The Abuja Treaty set the bounds to which every member states of the Organisation of African Unity (hereinafter referred to as OAU) was to see to it that the African community law would be respected.

The parties to the Abuja Treaty made an undertaking which bestowed upon them the mandate to do all in their power to ensure regional economic integration would succeed, as was provided under Article 5(1) of the Abuja Treaty.⁷⁶

A close examination of the principles⁷⁷ set out in the Abuja Treaty shows that the law was considered a means to effect the provisions of the Monrovia declarations and the Lagos Plan of Action.⁷⁸ However the mandate to integrate the legal framework was incumbent upon the regional economic communities (hereinafter referred to as REC's).⁷⁹ Ar-

⁷⁶ (1) Member states undertake to create favourable conditions for the development of the community and the attainment of its objectives, particularly by harmonising their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives.

(2) Each member state shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of this treaty.

⁷⁷ The preamble of the Abuja Treaty also reads: "Considering the Monrovia Declaration of commitment on the guidelines and measures for national and collective self-reliance in Economic and social development for the establishment of a New International Order and which inter alia, calls for the creation of an African Common Market as a prelude to an African Economic Community."

⁷⁸ Article 3 of the Abuja Treaty reads: "The high contracting parties, in pursuit of the objectives stated in Article 4, of this treaty solemnly affirm and declare their adherence to the following principles(c) Interstate co-operation, harmonisation of policies, integration of programmes;(d) Promotion of harmonious development of economic activities among member states.(e) Observance of the legal system of the community. (h) Accountability, economic justice and popular participation in Development."

⁷⁹ Article 88(3) of the Abuja Treaty further provides: "To this end, the community shall be entrusted, with the co-ordination, harmonisation and evaluation of the activities of existing and future regional economic communities."

title 88(1) of the Abuja Treaty clearly leaves the REC's to be the main building block of the REI process in Africa.⁸⁰

This is materially correct but however the signatories to the Abuja Treaty were not the REC's themselves but instead different member states of the REC's. Creating a mandate for the REC's which they are not party to, does not directly obligate them to ensure that REI is achieved at a sub-regional level, simply because they is no consent express or implied to such kind of a relationship.⁸¹ Saurombe⁸² states:

*The REC's should also be made signatories to the Abuja Treaty. This will require that the REC's be allowed to negotiate terms that reflect their various stages of development and the rate at which they can afford to move. This is necessary so that member states and REC'S can be held accountable for failure to honour the Abuja Treaty obligations.*⁸³

What Article 88 of the Abuja treaty does is to merely states an aspiration which is of no force and effect because there was no direct involvement of the REC's themselves. In this regard the need for legal integration is misdirected to the wrong parties who ought to see that continental economic integration is achieved.

B. RE-BIRTH OF THE MANDATE OF REGIONAL ECONOMIC INTEGRATION IN AFRICA

The African leaders realised that the OAU was ineffective in fulfilling the REI agenda.⁸⁴ The only tangible achievements made by the

⁸⁰ Article 88(1) of the Abuja Treaty reads: "The community shall be established mainly through the co-ordination, harmonisation, and progressive integration of the activities of regional economic communities".

⁸¹ Opong *Legal aspects of economic integration*: "In the absence of a definite agreement to that effect, it cannot be suggested that the REC's are members of the AEC. Nor can it be argued that the REC's are agents of the AEC. This is due to the absence of consent, express or implied to such a relationship..... It can however be argued from a purposive reading of the AEC Treaty, to which the REC's are not parties and the protocol on relations, to which they are parties, that REC's are subjects with a mandate to work towards the realisation of the AEC. To date no REC has objected to the idea that is evolving with an ultimate view to form an AEC".72.

⁸² Saurombe *An analysis of economic integration*. SAPL vol 27.

⁸³ Saurombe *An analysis of economic integration*. SAPL.308.

⁸⁴ Fagobayibe *Rethinking the African Integration process* SAYIL 2011 "The view

OAU permeate in the political circles where Africa was decolonised. A clean slate to which the member states would reconsider how they intended to achieve economic integration was crucial for the continent. This saw the emergence of the Sirte Declaration.⁸⁵

The member states in this regard had to reconsider the approach that had been followed to effect REI. A sense of urgency to implement the effective REI agenda can be noted, considering that after the Lagos Plan of Action established in 1980 the drive for REI became legally binding when the *Abuja Treaty* came into play. The decade waiting period stalled the economic integration process. The leaders declared:

(8) *Accelerate the process of implementing the treaty establishing the African Economic community in particular.*

(a) *Shorten the implementation period of the Abuja Treaty.*

Declarations such as the Sirte declaration can be seen as a formal admission to the aspirations to which the member states sought to fulfil. The member states concretised these aspirations by binding themselves and formally laying out the mandate for REI by signing the *Constitutive Act of the African Union (AU Constitutive Act)*.⁸⁶ The parties to the treaty saw the need to act speedily to see to it that the agenda for effective economic integration be realised as had been contemplated at the Sirte Declaration.⁸⁷

was held that the organisational had completed its primary functions namely, eradicating colonialism, ending apartheid and establishing the independence of African states".²¹³.

⁸⁵ Sirte Declaration of 1999 EAhg/Draft 1Dec (IV) Rex at the fourth extra ordinary session of the assembly of heads of states and governments. Declaration 6 reads: "It is also our conviction that our continental organisation needs to be revitalised in order to be able to play more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances. We are also determined to eliminate the scourge of conflicts, which constitutes a major impediment to the implementation of our development and integration agenda".

⁸⁶ The act opens up with: "Recalling the declaration which we adopted at the fourth Extra –ordinary session of our assembly in Sirte, the great socialists People's Libyan Arab Jamahiriya, on 9.9.99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the charter of our continental organization and the treaty establishing the African community

⁸⁷ Article 3 (c) reads: "accelerate the political and social economic integration of the continent".

AU further went on to obligate the existing REC's to ensure that they implement the economic integration plan. The *Protocol on relations between the African Union (AU) and the Regional Economic Communities (REC's)*⁸⁸ (hereinafter referred to as *Protocol on relations*) determined the mandate to which the REC's were to fulfil so as to ensure that REI takes place within the sub regional level eventually establishing the AEC.⁸⁹

The REC's now had the mandate to ensure that economic integration takes place within their sub regional communities. This followed the conciliatory approach that was set in the Sirte Declaration under the provision Article 8(c).⁹⁰ This provision shows that the REC's were considered the vehicles that would steer the African economic integration which perhaps was a rectification of excluding the REC's within the Abuja Treaty framework. Again the protocol's main objective was to urgently implement the provisions of the Sirte Declaration where the regional economic communities had to accelerate the integration process.⁹¹ The grass root level approach taken by the AU can be seen as a transfer of the mandate of REI to the REC's.

In as much as the AU Constitutive Act represents a rebirth of the REI agenda in Africa legal integration is far from being achieved. The AU is still operating as an intergovernmental organisation in all fronts whereas when it pertains to REI it must denote a supranational nature as highlighted earlier on in this chapter.⁹² The member states are still af-

⁸⁸ Protocol on relations between the African Union (AU) and the Regional Economic Communities (REC's).

⁸⁹ Article 2 of the protocol provided: "This protocol shall apply to the mechanisms established by the parties in the implementation of measures in the economic, social political and cultural fields including gender, peace and security, intended to fulfil the responsibilities placed on them the constitutive Act, Treaty and this protocol".

⁹⁰ Article 8(c) reads: "Strengthening and consolidating the REC'S as the pillars for achieving the objectives of the AEC and the realising the envisaged union.

⁹¹ Article 3(d) on the *protocol on relations between the African Union (AU) and the Regional Economic Communities (REC's)* reads: "Implement the Sirte Declaration with regard to the acceleration of integration process and shorten the periods provided for in Article 6 of the treaty".

⁹² Sodipe and Osuntogun *The quest for a supranational entity in West Africa*, 2013 PER "Intergovernmental approach to governance, creating a regional economic system based on national sovereignty and non-interference of member states." Supranationality occurs not when states come together to form an international organisation

forded sovereignty whereas legal integration limits the sovereignty of the member states.⁹³ Sovereignty will only be limited when it concerns war and conflict. Oppong⁹⁴ states:

However in the context of economic integration , this jurisdictional gap will not aid the uniform application and enforcement of community law in member states.....It is difficult to conceive of a stable community where community law is not uniformly applicable within and enforceable against member states. Indeed, the very essence of integration is defeated.⁹⁵

V. PROSPECTS OF LEGAL INTEGRATION IN SOUTHERN AFRICA

The SADC was formed under the *Treaty Establishing the Southern African Development Community* (SADC treaty) and one of its main objectives is to achieve development in all frontiers by means of REI.⁹⁶ The treaty has further provided legal integration as a means to fulfil its objectives.⁹⁷ On the Other hand, COMESA emerged as a result of the *Agreement establishing the Common Market for Eastern and Southern Africa* hereinafter referred to as (COMESA Treaty) whose main objectives was to realise harmonious development thus REI.⁹⁸ The COMESA treaty further provided that in the field of economic and social develop-

which is subject to their control but when states surrender part of their sovereignty to such an organisation to the extent that the organisation created by them is able to control them in the areas of its mandate".275.

⁹³ Principles of the A U Constitutive Act Article5 (a) sovereign equality and interdependence among member states of the Union.

⁹⁴ Oppong *Legal aspect of Economic Integration*.

⁹⁵ Oppong *Legal aspect of Economic Integration* .177.

⁹⁶ Article 5(a) of the SADC treaty reads: "Achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration".

⁹⁷ Article 5(2) reads: "In order to achieve the objective set out in paragraph 1 of this Article, SADC shall: (a) harmonise political and socio- economic policies and plans of member states.

⁹⁸ Article 3(a) of the COMESEA Treaty reads: "To attain sustainable growth and development of the member states by promoting a more balanced and harmonious development of its production and marketing structures."

ment there was needed to harmonise the laws and policies.⁹⁹

Southern Africa has two dominant legal cultures which includes the civil law culture and the common law culture. Countries that conform to the civil law culture follow the monist theory and common law countries follow the dualist theory.¹⁰⁰

Most Southern African Countries have adopted the legal cultures of their colonial masters. The dominant legal cultures in Southern Africa include roman Dutch law and the common law. Fullerton¹⁰¹ has stated: Without exception in Africa, colonies adopted the legal system of the metropole at independence. This occurred for two distinct reasons. First, throughout the entire colonial experience, indigenous people were forced to live with a particular system, either the continental civil codes or British common law. At independence, such experience of a national legal system as existed was of that designed by the continental European powers or the British. Therefore, just as newly independent colonies chose to keep the languages of the metropolises for the conduct of governmental activities, so too they retained the legal and other political institutions left behind.¹⁰²

Britain was the dominant colonial master in Southern Africa and by its nature, is a dualist country. Hartley¹⁰³ states, The UK has a largely unwritten constitution. Moreover the attitude of the United Kingdom towards international law is strictly dualistic: there is no general rule of law allowing treaties to take effect in the internal legal system. So this

⁹⁹ Article 4(6) (b) of the COMESA treaty provides: In the field of economic and social development: harmonise or approximate their laws to the extent required for the proper functioning of the common market.

¹⁰⁰ Killander and Ajolohoun "International law and domestic human rights Litigation."

¹⁰¹ Fullerton *Inherited legal systems and effective rule of law*.

¹⁰² Fullerton 2001 J. of MAS , 576; Diagnekova 2009 Fundamina 21 "Roman Dutch law imported by the Dutch colonists at the cape, dispersed over territories in Southern Africa, which eventually under the jurisdiction of the British crown. The further interpretation of English statute and common law principles has resulted in a legal system which allots the term Anglo-Roman Dutch law which is in many ways a bridge between the common and civil law worlds. Thus countries like south west Africa/ Namibia, Zimbabwe, Botswana, South Africa, Lesotho and Swaziland apply Roman Dutch law as influenced by English law." 21

¹⁰³ Hartley *The foundations of European Community law*.

route could not be used to give effect to the community treaties.”¹⁰⁴

It is because of the diverse legal cultures within the SADC that REI has never been fully realised.

A. INDEPENDENCE OF THE JUDICIARY IN SOUTHERN AFRICA'S REGION

There is a great disparity between the manner in which the judicial arm of the SADC and COMESA functions. The SADC created various institutions and one of them being the SADC tribunal, although it has indefinitely been suspended.¹⁰⁵ However when one closely examines the SADC treaty as a whole, one denotes that the SADC tribunal is not totally independent.¹⁰⁶ The summit is considered the supreme policy maker of the SADC and it has the powers to give orders to all other sub-ordinate institutions which also include the tribunal itself.¹⁰⁷ Sauroombe states:

¹⁰⁴ Hartley *The foundations of European Community law* 261.

¹⁰⁵ Erasmus *The new protocol for the SADC Tribunal: Jurisdictional changes and implication of SADC* “The 2008 decision by the tribunal in favour of the applicant, a private party, was never implemented. When the matter was referred to the SADC summit (which is responsible to take action in cases of non-compliance) it decided, instead to develop a new protocol for the SADC tribunal. The summit also decided not to renew the terms of the serving judges and not to appoint new judges; thereby effectively suspending the tribunal. Thus the tribunal despite, despite not being formally abolished, could not hear any new cases and could not finalize pending matters.”p1; Article 9(f) of the SADC treaty reads: The following institutions are hereby established :the tribunal; Article 16 (1) further states: The tribunal shall be constituted to ensure adherence and the proper interpretation of the provisions of this treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

¹⁰⁶ Becker in Ruppel and Bangamwabo *The SADC Tribunal: Judicial independence* has been defined as: “The degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role(in the interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.”179.

¹⁰⁷ Article 10 of the SADC Treaty provides: (1) The summit shall consist of the heads of state or Government of all member states and shall be the supreme policy making institution.(2) The summit shall be responsible for the overall policy direction and control of the functions of SADC. (3) The summit shall adapt legal instruments for

*....the European Council is an embodiment of controlled power while the SADC summit is an institution with too much power. This clearly will not work for regional integration in the SADC. There has to be a measure of control in the SADC as is exercised in the EU.*¹⁰⁸

Fagboyibe also alludes:

*A major impediment to the operationalising supranationalism in Africa is the fact that regional institutions are not independent enough to implement integration initiatives. These institutions are expected to operate in accordance with the whim of member states..... There is a strong nexus between the effective implementation of integration initiatives and the autonomy of regional institutions. The ability of these institutions to act where member states in respect of specific of common interest ensures that integration is firmly placed in capable and neutral hands and insulated from the vagaries of national politics.*¹⁰⁹

With such a framework the SADC tribunal when it attempts to ensure certainty of rules and provisions of all legal texts, there is the possibility that the Summit will trump on them and hence slowing legal integration which is a means to achieve REI within the economic bloc. However with COMESA the situation is rather different, the Court of justice was established as one of the institutions of the community which is independent from any other organ even from the highest the authority.¹¹⁰ In such light there is a possibility that the COMESA court of justice can ensure uniform application of the law and policies emanating from the COMESA treaty without being second guessed by a higher authority and eventually resulting to REI.

The *New Protocol on the Tribunal in SADC* now has limited the jurisdiction of the Tribunal in which the tribunal will have ‘material

the implementation of the provisions of this treaty; provided that the summit may delegate this authority to the council or any other institutions of SADC as the SADC may deem appropriate.(3) Unless otherwise provided in this treaty, the decisions of the summit shall be consensus and binding.

¹⁰⁸ Saurombe *European Integration as a model for Southern Africa* LDD P245.

¹⁰⁹ Fagboyibe *Common problems affecting supranational attempts* 2013 PER .19.

¹¹⁰ Article 8 of the COMESA treaty provides: “The direction and decisions of the Authority taken or given in pursuance of the provisions of this treaty, shall as the case maybe, be binding on the member states and on all organs of the common market other than the court in the exercise of its jurisdiction and on those to whom they may be addresses under this treaty”.

jurisdiction” impliedly suggesting it will have jurisdiction to the parties to the protocol and not to all member states of the SADC.¹¹¹ What is more disturbing is the fact that within the new protocol, member states have the opportunity to opt out and not be bound by the tribunal or any of its decisions.¹¹² Article 50 of the new protocol provides for voluntary withdrawal from being subjected to the SADC tribunal.¹¹³

What this provision does, is to give member states the privy not to be bound by the provisions or any decisions which the tribunal would have made, which is a loophole for inconsistencies. It also withdraws the opportunity for other member states to hold the opting out state accountable if it violates any other provisions after it has opted out. The arm of the law cannot touch the opting out party again; this is room for inconsistency and uncertainty thus making legal integration impossible.

Erasmus¹¹⁴ has argued that the protocol on the tribunal is an integral part of the SADC treaty and hence member states cannot opt out. He further states that the wording of the above provision has drawn confusion to the fundamental principle where the tribunal has jurisdiction over all member states.¹¹⁵

This signals the death of the judicial arm in the SADC region as such a move will guarantee inconsistency and uncertainties of how the treaty will apply.¹¹⁶ Pertaining to jurisdiction, COMESA is a different

¹¹¹ Article 33 of the New Protocol on the tribunal.

¹¹² Article 50 of the New Protocol.

¹¹³ (1) A state party may withdraw from this protocol upon the expiration of twelve (12) months from the date of giving written notice to that effect to the executive secretary.

(2) Such state party shall cease to enjoy all rights and benefits under this protocol upon the withdrawal becoming effective.

(3) Notwithstanding the provisions of paragraphs 1 & 2, such state party shall continue to be bound by obligations that arise of this protocol and are outstanding on the date of the withdrawal until such obligations are discharged.

¹¹⁴ Erasmus *The new protocol for the SADC Tribunal: Jurisdictional changes and implication of SADC*.

¹¹⁵ Erasmus *The new protocol for the SADC Tribunal: Jurisdictional changes and implication of SADC* “The tribunal exercises its jurisdiction over all member states but the wording of the new protocol casts doubt on this fundamental principle. Withdrawal should not be possible, the protocol is an integral part of the treaty. Article 16 of the treaty has not been amended and remains in force.”¹²

¹¹⁶ Erasmus *The new protocol for the SADC Tribunal: Jurisdictional changes and*

ball game all together. It has maintained compulsory jurisdiction to all parties and there is no protocol relating to the court of justice. The duties and all matters pertaining to the COMESA court of justice are included within the *COMESA treaty*.

B. USE OF PRELIMINARY HEARINGS

Legal integration entails the competence of the judicial wing to penetrate within the legal system of member states' municipal laws. As was highlighted earlier in Europe this was done by means of preliminary hearings. Credit should be given to the Southern African's REC'S for incorporating such a provision within its own treaties. However there is no case law which suggests that the member states have consulted with the Judiciary of these REC'S pertaining to any decisions they ought to make. There is scepticism from both REC member states to ward of some judicial sovereignty. Ruppel and Bangamwabo¹¹⁷ stated:

African states have historically resisted supranational judicial supervision of their sovereignty. The belief that a state is independent and free from any other exterior influence has stifled growth and the realisation of the independence among states has been rather slow.¹¹⁸

In light of the above, the preliminary rulings provided for by the SADC and COMESA only stand to be idle provisions that no member states yields to. Again it would be important to reiterate the words of Pescatore¹¹⁹ where he states:

Community law must have the same substantive meaning wherever they are applied. The procedure of preliminary rulings in the communities has proved to be the most practical means for setting controversies rapidly and eliminating distortions about the meaning of common rules... .. what matters is not only unity of content but also uniformity of validity and ef-

implication of SADC notes that the treaty has stated itself that the protocol on the Tribunal is expressly part of the treaty as provided in Article 16 which is also confirmed by Article 2 of the new protocol.

¹¹⁷ Ruppel and Bangamwabo *The SADC Tribunal: A legal analysis of its mandate and role in regional integration* 180.

¹¹⁸ *The SADC Tribunal: A legal analysis of its mandate and role in regional integration* 180.

¹¹⁹ Pescatore *Interpretation of Community law and the Doctrine of Acte Clair* 30

ficacy. In fact the disturbance to the functioning of the communities would be much greater if the same rules did not have, in the different member countries the same kind of effect. The fact that certain rules would be effectively applied in some member countries, whereas in others their implementation would be hampered or even rendered impossible, would have a much more disruptive effect on the community system. This raises a problem of efficacy.¹²⁰

To perceive an African state that is prepared to yield its sovereignty or judicial sovereignty is something that member states of the SADC and COMESA are not prepared to do. Fagboyibo has stated:

The corollary of establishing these organisations is the transfer of sovereignty or powers necessary for the fulfilment of tasks, while states continue to cling to sovereignty, there is also a realisation of the need to boost the functional abilities of these organisations. Divisibility of sovereignty becomes inevitable.¹²¹

The dualist approach also revolves around state sovereignty. The sovereignty of states requires state approval for another legal system to apply in its own jurisdiction. Oppong in this regard states:

Because states are sovereign, giving effect to or enforcing a law emanating from another system should often have the express or tacit approval of the state. Where the courts enforce or use foreign laws without this approval, they are accused of inappropriate judicial activism and of blurring the lines between executive, judicial and legislative functions.¹²²

However many states in Africa still grapple with understanding that sovereignty is not absolute, but it can be limited. Sovereignty is still embraced from the internal extent especially in common law countries that adhere to the dualist theory. Internal sovereignty is the measure of understanding that Southern African member states still embrace and measure as sovereignty.¹²³ Snyman¹²⁴ has defined internal sovereignty

¹²⁰ Pescatore *Interpretation of Community law and the Doctrine of Acte Clair* 30.

¹²¹ Fagoboyibo 2011 (36) 211.

¹²² Oppong *Making REC laws enforceable in national legal system* 157.

¹²³ Glednhuys *AI The AU and Sovereignty*.

¹²⁴ Snyman *The erosion of state sovereignty in Public International Law: Towards a world law*.

as “The competence and authority to exercise the function of a state within a national border and to regulate internal affairs freely.”¹²⁵ Sovereignty must be considered as a responsibility. This emanates from the findings made by the International commission on intervention and state sovereignty (hereinafter referred to as ICSS).

It is incumbent upon the judiciary of the member states to ensure that the provisions of international law are upheld. In Seychelles in the case of *Hans Hackl v Fiu*¹²⁶ and another the judge alluded to the fact that sovereignty is not absolute and it can be limited.

Twomey J stated:

*We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty. We find that there are. In this context we state that the rule of law and international human rights law may well override a state’s claim to sovereignty.....The present case concerns the export of components of nuclear warhead and the public , national and international interest far outweighs the principle of sovereignty.*¹²⁷

In issues where public, national and international interest far outweighs the states’ sovereignty then sovereignty of states ought to be limited. The intended purposes of the REC’s and the interest which its laws seeks to protect is of public ,national and international interest which far outweighs the principle of sovereignty which most member states hinge on as a means of resisting community law to be part of its municipal laws. A dualistic approach to integration is not permissible for the purposes of REI.

VI. CONCLUSION

The African continent has not fully embraced the use of the law as a means to fully achieve REI. The laws that are in place do not harness the supranational nature of communities especially in the SADC region.

¹²⁵ Snyman *The erosion of state sovereignty in Public International Law: Towards a world law.*

¹²⁶ (SCA 1 /2009).

¹²⁷ (SCA 1 /2009).

It is highly recommended that from the continental apex that the AU uses the law as a tool that ensures implementation and application of laws effectively for the realisation of REI. The member states to the AU and the SADC must now accept for the purposes of REI to yield their sovereignty and have REI laws reign supreme over their municipal laws. The role of the REC judiciary can never be under estimated as it has been clearly highlighted that the ECJ was the vehicle to realising REI so must be the SADC Tribunal. If the new protocol on the tribunal is implemented it would have signalled the death of the SADC.

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