

An analysis of economic integration in Africa with specific reference to the African Union and the African Economic Community

*Amos Saurombe**

1 Introduction

Economic integration in Africa is set within a legal and institutional framework that still inspires contemplation on how African countries can best employ the inherent underlying reasons for regional integration on the continent. The discussion on regional economic integration in Africa will expose the ambiguity of the legal framework; how the various regional trade agreements (RTAs) are in operation on the continent, but still fail to implement their stated objectives and also evidence the lack of rules to bind regional economic communities' (RECs) integration agendas to those of the continent. African countries sign agreements or treaties with alacrity, but are much less enthusiastic about the implementation of their commitments.¹ Regional integration in Africa is supported by the African Union (AU), which has prescribed step-by-step processes that aim for the highest level of integration, resulting in the African Economic Union by 2028.² On 12 June 2011, in line with continental integration objectives, African leaders from 26 African countries signed an agreement to launch talks on the continent's biggest free trade bloc that aimed to create a single, continent-wide market potentially

*LLB (Fort Hare) LLM (UWC/Amsterdam Law School), LLD (NWU-Pukke). Senior Lecturer, Mercantile Law Department, University of South Africa. This paper is derived from part of the author's LLD thesis.

¹Bosl, Erasmus, and Hartzenberg 'Monitoring regional integration' (2010) *Southern Africa Yearbook 2010* 201.

²The Lagos Plan of Action was adopted by the OAU Summit in 1980; See Samir Amin's contributions to Amin, Faire, Hussein, and Massiah *La crise de l'impérialisme* (1975); Amin, Arrighi, Frank and Wallerstein *Dynamics of global crisis* (1982); Amin and Frank *N'attendons pas 1984* (1985).

worth US\$1 trillion by 2013.³ Closely related to this renewed hope for African economic integration is the discussion of the role of equally influential but non-legally binding initiatives of the AU like the African Peer Review Mechanism (APRM) and New Partnership for African Development (NEPAD) in the continental regional integration paradigm. The scope of this paper is limited to AU and AEC with some comparative perspectives being drawn from NEPAD and the APRM. There is also no attempt to examine the respective legal frameworks for specific regional integration schemes operating in Africa.

2 Background

The AU is Africa's primary continental organisation. It formally replaced the Organisation of African Unity (OAU) in 2002. The AU has set itself important objectives that include economic integration. The OAU was established on 25 May 1963 in Addis Ababa upon the signature of the OAU Charter by representatives of 32 governments.⁴ A further number of states gradually joined over the years. As early as 1979, however, it had become evident that a need existed to amend the OAU Charter in order to streamline the organisation to gear it more accurately for the challenges of a changing world. This was accepted when the Committee on the Review of the Charter was established. According to Isaksen,⁵ as a way of expediting the process of economic and political integration on the continent, members of the OAU decided in the year 2000 to transform the OAU into the AU for a number of reasons. It had for some time been widely recognised that the organisation needed change. *Firstly*, the need for greater organisational efficiency had become very clear; *secondly*, there had been an emerging consensus that conflicts and undemocratic regimes constitute important blockages to development and that it was a country's right to be concerned about the internal affairs of another. This made it necessary to reconsider the OAU principle of non-interference. *Thirdly*, the criticism that the OAU kept undemocratic and dictatorial heads of state in power was widely accepted.

According to Mayall:

From the start, the existence of the OAU had been far more important to African Statesmen and politicians than any functional role it may perform in promoting economic cooperation or even the alignment of foreign policy by merely being there, the OAU was only indeed performing one vital role on African diplomacy -

³See Communiqué of the Second COMESA-EAC-SADC TRIPARTITE SUMMIT Ref: T/TS/II/6 at http://programmes.comesa.int/attachments/article/6/Tripartite_Summit_2_Communique_English_12.06.2011.pdf (accessed 2011-09-20). The Tripartite FTA includes the SADC, the EAC and the COMESA.

⁴See *OAU Charter* (1963) at http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf (accessed 2012-07-27) See also Mays *Africa's first peacekeeping operation* (2002); Beyani and Stringer *African exodus* (1995).

⁵Isaksen *Restructuring SADC: Progress and prospects* (2002) at <http://hdl.handle.net/10202/198> (accessed 2011-10-08).

it bestowed legitimacy on its members and on the movements and causes which they chose to recognise It has always been the OAU's main task to set the tone of legitimacy on both the distribution of power within African states and on those liberation movements, mainly in Southern Africa, which were contesting power with colonial regimes or minority regimes.⁶

Additionally Cervenka laments that:

... compared with the progress made by the OAU on decolonisation and the success of its international campaign against apartheid, its performance in the economic field had been disappointing. After so many years, the real struggle for the liberation of the continent of Africa from economic domination by outside powers had hardly begun.⁷

Around 1980, analysts were voicing their concern as to how the OAU in its existing form could survive.⁸ Assessments around the time of its twentieth anniversary evinced an unsatisfactory record and pessimism about the future.⁹ The economic crisis in the region had now become literally a matter of life and death and had to be dealt with as such.¹⁰ By that time the persistence of conflict on the African continent was deeply rooted in the underdevelopment of African states, political and economic underdevelopment being a major cause of international conflict in Africa.¹¹ This led to the devising of the African economic recovery programme of 1977 to 1980. By 1988, after twenty-five years of OAU history, hardly any analysis of the organisation was made without suggestions of reform, particularly because the contemporary challenges faced by the continent were no longer the same as those of 1963.

The OAU also adhered rigidly to the old principle of non-interference in the domestic affairs of a country and had been criticised in the face of genocide, crimes against humanity and other horrendous aggressions perpetrated by governments against their citizens.¹² Consequently, the OAU failed to provide the framework for either political stability or economic growth.¹³ This resulted in the

⁶Mayall 'The OAU and the African crisis' (1977) 27/2 *Optima* 86.

⁷Shaw 'The Organisation of African Unity: Prospects for the second decade' (1973) Sep/Oct *International Perspectives* 31-34. See also Shaw 'Inequalities and conflict in contemporary Africa' (1978) *International Perspectives* 44-49.

⁸Parker and Rukare 'The new African Union and its Constitutive Act' (2002) *AJIL* 365-379.

⁹Legum 'The OAU after twenty years: The record of failures and successes' (1983-1984) 16 *Afr Contemp Rec Ann Surv and Docs* 61.

¹⁰See, generally, Tokarev *Organisation of African Unity: 25 years of struggle* (1989); see also Asobie 'The OAU in the year 2000: Some informed projections' (1988) 14/1 *Nigerian Journal of International Affairs* 259-287. See also Olusanya 'Reflections on the first twenty-five years of the Organisation of African Unity' (1988) 14/1 *Nigerian Journal of International Affairs* 67-72; Tekle 'The Organisation of African Unity at twenty-five years: Retrospect and prospect' (1988) 34/3,4 *Africa Today* 7-20.

¹¹Nyerere *Tanzania rejects Western domination of Africa: Statement by President Julius K Nyerere* (1978).

¹²Gavin and Van Langenhove 'Trade in the World of regions' in Sampson and Woolcock (eds) *Regionalism, multilateralism and economic integration: The recent experience* (2003).

¹³*Ibid.*

forward-looking Lagos Plan of Action adopted in April 1980. The plan was to be implemented over the ensuing twenty years and represented a significant OAU initiative for the radical review of African development. The main objective was to promote development within African States, as well as between them. This was to be done through progressive integration, in particular at the sub-regional level. Ultimately, integration was to be achieved by establishing a common market for the region in the form of the African Economic Community (AEC), which will be discussed later in this paper.

The OAU's Pan-Africanist agenda, not supported by economic development, was always going to be difficult to maintain. According to Diaku,¹⁴ the promotion of economic growth and development, the raising of the living standards of the people and the maintenance of political stability became the dominant concern of young African states. In addition Ndulo notes that the early years of independence saw African countries successfully expanding their basic infrastructure and social services, but after this period of growth, most economies faltered and went into decline.¹⁵

Ndulo goes on to mention that in the face of increased hunger and accelerating ecological degradation, the earlier progress made in social development was being eroded. According to Mazrui,¹⁶ the Plan of Action, in different circumstances, has adduced evidence to show that the continent of Africa is the most 'brutalised' by poverty and ignorance and yet is one of the wealthiest in natural resources. This scenario has not changed for the better, indeed, in many instances the situation has worsened. Over the past decades, the outcome of regional integration in Africa has been disappointing.¹⁷ Overall, Africans are said to be almost as poor today as thirty years ago.¹⁸ Econometric analysis confirms that regional integration has not been successful in Africa¹⁹ and that no regional integration scheme has been successful in elevating intra-Africa trade beyond a negligible portion of total trade.²⁰ The severe economic crisis in Africa has inspired many African governments and institutions to review their strategies for development, with a view to taking measures to address the ever-

¹⁴Diaku 'African Development Bank/African Development Fund: Problems and prospects' in Onwuka and Sesay (eds) *The future of regionalism in Africa* (1985).

¹⁵See generally World Bank *Sub-Saharan Africa* (1981) for a detailed study of the condition of sub-Saharan African economies. See also *African Alternative Framework to Structural Adjustment Programmes for Social-Economic Recovery and Transformation* E/ECA/CM15/6/Rev 3 (1989).

¹⁶Mazrui *African condition* (1980). See also Amin 'A critique of the World Bank report entitled "Accelerated Development in Sub-Saharan Africa"' (1982) *Africa Development* 23-42.

¹⁷Longo and Sekkat 'Economic obstacles to expanding intra-Africa trade' (2004) 32/8 *World Development* 1309-1321.

¹⁸World Bank *World Bank Report: Sub-Saharan Africa* (1994) 16.

¹⁹Elbadawi *The impact of regional trade / Monetary scheme on intra Sub-Saharan African trade* (1997) at <http://mpr.ub.uni-muenchen.de/15894> (accessed 2010-06-20).

²⁰Foroutan 'Does membership in a Regional Preferential Trade Agreement make a country more or less protectionist?' (1998) 21/3 *World Economy* 305-336.

worsening crisis.²¹ The first steps towards change were brought about by the establishment of the AU, based on the unanimous will of Member States at the 5th Extraordinary OAU/AEC Summit held in Sirte, Libya from 1 to 2 March 2001.²² In the decision, Heads of State and Government specified that the legal requirements for the Union would have been completed upon the deposit of the 36th instrument of ratification of the Constitutive Act of the African Union. South Africa deposited its instrument of ratification of the Constitutive Act of the African Union on 23 April 2001 with the OAU General Secretariat and became the 35th Member State to do so. South Africa's ratification as one of these 36 Member States means that it is a founding member of the African Union. On 26 April 2001, Nigeria became the 36th Member State to deposit its instrument of ratification. This concluded the two-thirds requirement and the Act entered into force. The inaugural meeting was held in Durban, South Africa. The OAU's former General Secretariat served as the AU Commission for an interim period of one year.²³

3 The Constitutive Act of the African Union²⁴

The discussion of the AU as an integral part of regional integration in Africa cannot be complete without a discussion of the Constitutive Act. The AU Constitutive Act entered into force on 26 May 2001.²⁵ In practical terms, the entry into force of the Constitutive Act marked the end of the OAU, which had united all African States since 1963. The Constitutive Act came into being because the OAU and its Charter were judged to be inadequate for the region and reform was inevitable. This marked the start of the new political, judicial and economic organisation of Africa. According to Mbeki, the Constitutive Act is the supreme law of the continent which has been approved by all our parliaments, and it is for the parliaments of the people of Africa to meet the challenges facing Africa today.²⁶

Thus if the Constitutive Act is the supreme law of the continent, its endorsement of regional economic integration is paramount. In the Preamble of the AU Constitutive Act, African Heads of State and Government undertook to 'promote and protect human and peoples' rights, consolidate democratic institutions and ensure good governance and the rule of law'. These are all important catalysts for regional economic integration. Articles 3(a) to 3(n) advocate for greater unity and

²¹Damiba, Muhith and Bihute *Development strategies: Lessons from experience* (1988).

²²See Sirte Declaration: 4th Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya. EAHG/Draft/Decl (IV) Rev 1.

²³*Ibid.*

²⁴See Constitutive Act of the African Union (2000) para 10. The Constitutive Act comprises 33 articles. See also Mangu 'The African Peer-review mechanism and the promotion of democracy and good political governance in Africa' (2007) 32 *SAYL* 2-24.

²⁵See the official web site of the Organization of African Unity at www.oua.org (accessed 2011-06-21).

²⁶Babarinde 'The EU as a model for the African Union: The limits of imitation' (2007) at <http://aei-dev.library.pitt.edu/8185/> (accessed 2011-06-21).

solidarity between the peoples of Africa and for the economic integration of the continent. Articles 4(a) to 4(p) list 16 principles to guide the activities of the Union and especially the participation of African peoples in those activities. The AU as an organisation now comprises, among other institutions, the Pan-African Parliament, the Court of Justice and the Central Bank. The role of the AU in continental integration is evident in the treaty establishing the AEC as will now be discussed.

4 The African Economic Community (AEC)

The Treaty establishing the AEC was signed in Abuja, Nigeria in 1991. The AEC offers a framework for continental integration. The RECs are mere building blocks towards the full realisation of the AEC. The AEC ambition is to integrate the various economies into sub-regional markets that will eventually combine and form an Africa-wide economic union. This was formulated in terms of the vision of the OAU and AU. It is for this reason that 32 African countries signed a Charter establishing the OAU as mentioned earlier. The Lagos Plan of Action adopted in 1980 by African Heads of State and Government was the first step towards increased integration on the African continent. It set the target of achieving the African Common Market by the year 2000.²⁷ It is clear now that this target was not achieved, although the Lagos Plan of Action advocated regional integration central to the socioeconomic development of the continent. The AEC designated CEMAC/Economic Community of Central African States, COMESA and the EAC, ECOWAS, IGAD, SADC and the Arab Magrab Union as pillars in an effort to achieve Africa-wide economic integration.²⁸

The Treaty establishing the AEC set out the following key regional integration objectives in article 4 of the Treaty. These are as follows:

- (a) to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and indigenous and self-sustained development;
- (b) to establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve self-reliant development;
- (c) to promote cooperation in all fields of human endeavour in order to raise the standards of living of African peoples and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to progress, development and the economic integration of the continent; and
- (d) to coordinate and harmonise policies among existing economic communities in order to foster the gradual establishment of the community

²⁷Onwuka 'An African Common Market or Africa Free Trade Area: Which way Africa?' in Onwuka and Sesay (eds) *The future of regionalism in Africa* (1985).

²⁸Sampson and Woolcock (eds) *Regionalism, multilateralism and economic integration: The recent experience* (2003).

The AEC is an attempt to create an economic community covering the whole of Africa's 53 countries; if successful the AEC will be the largest such community in the world.²⁹ The community, as can be seen from the goals it seeks to achieve, is more than a trading arrangement or a mechanism for promoting cooperation in production based on the creation of a common market. In addition, it seeks to integrate national markets and cooperation in production. The states joining the community also undertake to cooperate with each other in certain functional areas, for example social, political, and economic matters. Central to this agenda is the improvement of the lives of African citizens.

Article 4(2) of the AEC provides several ways in which the objectives of the Treaty are to be achieved. Among them are the liberalisation of trade and the abolition of non-tariff barriers among Member States in order to establish an FTA. The objective of the relaxation and eventual abolition of qualitative and administrative restrictions and the evolution of a common trade policy are central. The continent, through the AEC Treaty, seeks to gradually remove from Member States obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment.³⁰ These are critical developments necessary for integration.

The diverse legal systems on the continent are a major non-tariff barrier (NTB). The membership of the community represents at least four main legal systems, namely, those of common law, Roman-Dutch law, Islamic law and civil law. Each, in turn, comprises many different systems of law, including traditional customary law. Every country has its own legal traditions, its own system of legal thought, and its own method of law-making and its own process of judicial determination of disputes.³¹ This is a major obstacle to integration, especially cross-border trade where traders need to conclude mutual transactions for both goods and services.

In trying to address the above, articles 29 to 34 of the Treaty establishing the AEC require Member States to take measures to eliminate customs duties, quotas, other restrictions or prohibitions, administrative trade barriers and other NTBs. They also require adoption by Member States of a common external customs tariff.³² This will be in preparation for the African Customs Union.

However, the absence of the institutional framework to implement these important treaty provisions is a major challenge. This task is left to RECs without a clear mandate or capacity to undertake the complex task of harmonising Community trade laws. The RECs are expected to spearhead the creation of a

²⁹Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a complex web' (2010) 18 *African Journal of International and Comparative Law* 92-103.

³⁰See *Treaty establishing the African Economic Community* (1991).

³¹Ndulo 'The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area' (1987) 3/2 *Lesotho LJ* 127-158.

³²See arts 30, 31 and 32 of the *Treaty Establishing the African Economic Community* (1991).

physical, technical and legal infrastructure that would support regional exchanges in goods, services, labour and capital. In trying to solve this problem the AU should establish a proper implementation mechanism for its treaty provisions. The discussion will now focus on how RECs will contribute to continental integration.

5 Modalities for the establishment of the AEC

The Abuja Treaty requires the RECs mentioned earlier to have the establishment of the AEC as one of their final objectives,³³ with the idea of eventually establishing an African Economic Union. Article 6 of the Treaty sets out the modalities for the establishment of the AEC, which would cover a period of 34 years. The six stages are highlighted below. An immediate analysis of each stage follows its brief introduction.

Stage 1³⁴ consists of the strengthening of existing RECs and the creation of new ones where needed and was given a time frame not exceeding five years. This stage has been fulfilled on the continent since there are a variety of RECs already in existence. The availability of many RECs has actually led to multiple memberships.

Stage 2³⁵ focuses on the stabilisation of the economies and the strengthening of sectoral integration, particularly in the field of trade, agriculture, finance, transport and communication, industry and energy, as well as coordination and harmonisation of the activities of the RECs, and should be undertaken in eight years. By way of application of this stage, the SADC has used the period between the years 2000 to 2008 to prepare for the FTA that was launched on 17 August 2008.

In stage 3,³⁶ the RECs have to establish FTAs followed by customs unions (CUs) over a period of 10 years. During this period, a common external tariff is expected to be adopted in preparation for the customs union. However, the SADC's launch of the FTA will soon be followed by a CU in 2010.

Stage 4³⁷ calls for the formation of a continental CU through the coordination and harmonisation of tariff and non-tariff systems among RECs within two years. As already indicated under stage 3, the SADC is at this critical stage and has already failed to establish the CU planned for 2010.

In stage 5,³⁸ a further four years is given for the establishment of an African Common Market and the adoption of common policies.

Stage 6³⁹ is the final stage that envisages the integration of all sectors, the establishment of an African Central Bank and a single African currency, the establishment of an African Economic and Monetary Union and the creation of the

³³ Article 88 of the *Treaty Establishing the African Economic Community* (1991).

³⁴ *Id* art 28.1.

³⁵ *Id* art 28.2.

³⁶ *Id* arts 29 and 32.

³⁷ *Id* art 32.

³⁸ *Id* art 33.

³⁹ *Id* art 44.

first Pan-African Parliament within five years.⁴⁰ However, the Pan-African Parliament has already been established with its seat in Midrand, South Africa. It is a fully functional Parliament with a President.⁴¹

All these stages have been allocated specific time periods. There is, however, provision in the Treaty for the Assembly of Heads of State and Government to determine at the end of each stage whether expectations have been sufficiently fulfilled to enable a transition to the next stage. In short, a particular stage may be extended beyond the period specified by article 6(2), provided that the entire six transitional periods do not exceed a period of forty years.

6 The Protocol on the relations between the AEC and RECs

To emphasise the importance of these RECs in the establishment of the AEC, a Protocol was concluded in 1998 on the relations between the AEC and RECs.⁴² This Protocol is significant because it stands ready to drive regional integration in Africa through the harmonisation of conflicting policies. This Protocol serves as a framework for the harmonisation of integration between the RECs on one hand and the AEC on the other. This Protocol demonstrates to what extent the African Union formalises its support for regional integration at continental level. Evidence of this important relationship will be demonstrated by reference to the relevant articles of the Protocol. Article 2 of the Protocol deals with the scope of application that includes the implementation of economic measures for mutual benefit. Article 3(a) lists the objective of formalisation, consolidation and promotion of closer cooperation among the RECs and between them and the Union through the coordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors. Under the provisions of article 3(b) the Protocol aims to establish a framework for co-ordination of the activities of the Constitutive Act and the Treaty. It is also the objective of article 3(c) to strengthen the RECs in accordance with the provisions of the Treaty and decisions of the Union. Under article 3(g), the aim is to establish a co-ordination mechanism of regional and continental efforts for the development of common positions by its members in negotiations at multilateral level. Article 3(h) encourages the sharing of regional integration experiences in all fields among RECs. Article 4(d) calls for parties to support each other in their respective integration endeavours and agree to attend and participate effectively in all meetings

⁴⁰The Pan-African Parliament (PAP) has already been established with its seat in Midrand, South Africa.

⁴¹See art 2 of the *Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament* (2001).

⁴²Article 88 para 1 and 3 of the *Treaty Establishing the African Economic Community* (1991). Details of cooperation among RECs in particular, through the coordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors. See also Oppong (n 29) 110.

of each other and in the activities required to be implemented under this Protocol. Under article 5(d) of the African Union undertakes to discharge fully its responsibility of strengthening the RECs as well as coordinate and harmonise their activities.

The institutional framework for the implementation of the Protocol is laid out in chapter 2 of the Protocol. Article 6 establishes the Institutional Organs to facilitate this implementation. Article 7 to 10 lists the role players and their functions in the relationship on the AU and the RECs. Article 15 of the Protocol deals with joint programmes and closer cooperation between the two entities, while article 18 establishes the status of RECs at Union meetings. Article 20 also deals with the status of the Commission at meetings of the RECs and article 22 empowers the Union to make decisions binding on the RECs.

7 Analysis of the role played by the Protocol on Relations

The Abuja Treaty clearly adopts an economic integration strategy that depends on the RECs. Accordingly article 88(1) of the Abuja Treaty states that: 'the Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of the RECs'.

Thus, the RECs play a pivotal role of building blocks for African continental economic integration. However there exist some gaps in the legal and institutional relations of the RECs and Abuja Treaty. The most apparent challenge is that the RECs are not bound by the Abuja Treaty.⁴³ It is only Member States that are signatories to the Abuja Treaty. The RECs have their own separate legal personalities that are separate from their Member States. Thus, Member States cannot individually enter into international agreements with the intention of binding the RECs they represent. It is therefore clear that the interests of the RECs were not taken into consideration during the drafting of the Abuja Treaty. This should have been possible since the RECs existed before the signing of the Abuja Treaty.⁴⁴

The Protocol on Relations only tries to legitimise the relations between the RECs and the AU but does not create the basis for a binding obligation on the part of the RECs. Article 2 of the Protocol referred to earlier only lays down the scope of the application of the protocol. This is just a mere stipulation of the application of the protocol in order to fulfil the responsibilities placed on the RECs by articles 6 and 88 of the Abuja Treaty. One can easily conclude that this article was drafted on the assumption that articles 6 and 88 of the Abuja Treaty create a binding obligation on the RECs. Accordingly, Oppong is right in suggesting that there is no legal basis to assume that the RECs will integrate to form the AEC as

⁴³Oppong *Legal aspects of economic integration in Africa* (2011).

⁴⁴See Bensah *Why 'Africa' is lost in the 'Ajuba Treaty' translation* (2011) at <http://www.panafricanistinternational.org/?p=1316> (accessed 2011-10-27).

provided for in article 88(1) of the Abuja Treaty. On the contrary, one may argue that this creates third party rights as provided for in article 36 of the Vienna Convention on the Law of Treaties 1969. In the final analysis this grey area may be further proof of the ambiguity of the existing legal framework.

8 Related legal and institutional framework weaknesses

The Abuja Treaty has failed to give a clear understanding on how to prevent Member States from belonging to more than one REC. According to Mattli⁴⁵ records show that 95% of the African states belong to more than one REC, making it difficult for them to honour the regional economic integration obligation.⁴⁶ While it is recognised that most RECs predate the Abuja Treaty, the legal framework of the treaty would have been strengthened if the drafters of the treaty or of subsequent protocols expressly prohibited overlapping memberships.

The AEC also does not have a separate identity from the AU.⁴⁷ In reality, the functions of the organ of the AEC are also carried out by the organs of the AU. Mutai⁴⁸ and Ng'ong'ola⁴⁹ have criticised the AU institutions within the AEC. Mutai's criticism focuses on the large size of the AU, pointing to the difficulties surrounding the amount of time consumed in seeking consensus. He also cites high transaction costs. Ng'ong'ola criticises the political nature of the AU which cannot handle the technical responsibilities that the Abuja Treaty might require. Under these circumstances, the institutions of the AEC may not be able to effectively enforce their supranational authority within the structures of the AU. This may be so notwithstanding the provision of article 3(e) of the Abuja Treaty that advocates for the observance of the legal system of the Community. This may not be practically possible within the AU structures that are political in nature. Evidence shows that one of the AU's main Organ; the Commission is not given sufficient powers to ensure compliance in driving the process of economic integration. Thus, the AEC needs its own Secretariat which will be mandated to drive economic integration separate from the AU Commission.

⁴⁵Mattli *The logic of regional integration: Europe and beyond* (1999).

⁴⁶Maruping 'Challenges for regional integration in sub-Saharan Africa: Macroeconomic convergence and monetary coordination' in Teunissen and Akkerman (eds) *Africa in the world economy: The national, regional and international challenges* (2005).

⁴⁷Thomson 'Economic integration in Africa: A milestone – The Abuja Treaty' (1993) 5/4 *African Journal of International Comparative Law* 743.

⁴⁸Mutai *Compliance with international trade obligations: The common market for eastern and southern Africa* (2007).

⁴⁹Ng'ong'ola 'Regional integration and trade liberalisation in Africa: The Treaty for the Establishment of an African Economic Community revisited in the context of the WTO system' (1999) 33/1 *Journal of World Trade* 145.

The Abuja Treaty also lacks an enforcement mechanism. A systematic approach to regional economic integration will require an enforcement mechanism, thus it is important to create a Court that will handle disputes that arise from the Abuja Treaty. A criticism has been levelled against the proposed African Court of Justice and Human Rights. This criticism is based on the Court's lack of jurisdiction.⁵⁰ This is because the Protocol to the African Court of Justice permits only State Parties to the Protocol, the Assembly, the African Union Parliament, organs of the African Union authorised by the Assembly and staff of the African Union to bring disputes before the Court.⁵¹

9 Recommendations

The weaknesses of the legal and institutional framework for the process of African economic integration need to be addressed. The rules to guide the process of economic integration need to be clearly defined and fully implemented. There is need to put in place competent and functional institutions to oversee the integration process. This can be done by amending the current legal instruments to empower supranational institutions to have power to spearhead the integration process. Thus, the African Union is urged to amend the Abuja Treaty to reflect a robust framework for regional economic integration. The Commission or the Union Secretariat can be empowered to lead the process of economic integration as opposed to the current role that is mostly administrative in terms of article 22 of the Abuja Treaty.

The RECs should also be made signatories to the Abuja Treaty. This will require that RECs be allowed to negotiate terms that reflect their various stages of development and the rate at which they can afford to move. Within this set up, there is also need to create a mandatory reporting mechanism which will enable the legal framework to take stock and evaluation of the integration processes of all RECs. This is necessary so that Member States and RECs can be held accountable for failure to honour their Abuja Treaty obligations.⁵²

The terms of this amended agreement should also clearly prohibit Member States from belonging to more than one REC.

There is need to speed up the process of transforming the African Union Commission into the African Union Authority. The transformation is aimed at improving the mandate of the Commission to reflect increased powers to monitor economic integration.⁵³ Furthermore, the proposed African Court of Justice and Human Rights needs to be given jurisdiction that covers matters of economic

⁵⁰See Opong (n 43) 13.

⁵¹See art 29 of the *Protocol on the Statute of the African Court of Justice and Human Rights* (2008).

⁵²Parallels can be drawn from the European Experience; see art 226 of the *Treaty Establishing the European Community* (1998) (consolidated version).

⁵³See Decision on the Transformation of the African Union Commission into the African Union Authority *AU Doc Assembly/AU/Dec 341 (XVI) - Assembly/AU/10(XVI)* (2011)

integration. The current set up in terms of article 29 of the Protocol on The Statute of The Court of Justice and Human Rights limits the jurisdiction of the Court to only State parties to the Protocol, the Assembly, the African Union Parliament, organs of the AU authorised by the Assembly and staff of the African Union. The amendment needs to include RECs, natural and juristic persons. These amendments can only be done by the Assembly. The fact that the Assembly is dominated by politicians means that a lot of political goodwill needs to be lobbied for in order to speed up the process.

Outside the legal framework of the AU and its related instruments, a number of initiatives promoting regional integration on the African continent cannot be ignored. These will now be discussed.

10 The New Partnership for Africa's Development (NEPAD)

10.1 Historical background

Support for regional economic integration on the African continent is also provided by the New Partnership for African Development.⁵⁴ In an effort to foster the economic development of the continent, OAU Heads of State and Government adopted the Strategic Policy Framework and a new vision for the revival and development of Africa. During the 37th and last session of the OAU Assembly of Heads of State and Government held in July 2001 in Lusaka, Zambia, they adopted the New Africa Initiative (NAI).⁵⁵ The NAI later became the NEPAD.⁵⁶ A better understanding of NEPAD can only be realised by visiting its origins. NEPAD is the culmination of the merger of the Millennium Partnership for the African Recovery Program (MAP) and the OMEGA Plan which were finalised on 3 July 2001. This was an initiative by the founding states of South Africa, Nigeria, Egypt, Senegal and Algeria,⁵⁷ the idea for which began in 1999 when former Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria agreed that Africa had been reacting for too long to ideas and offers of support from the rest of the world, without developing its own plan. These Presidents identified a number of reasons why African plans had historically failed. These included timing, a lack of capacity and resources, a lack of political

⁵⁴ Hereafter 'NEPAD'.

⁵⁵ The New Partnership for Africa's Development (NEPAD) (NEPAD 2010 www.nepad.org – hereafter NEPAD Framework Document). At its adoption the NEPAD was known as the New African Initiative (NAI). See *Declaration on the New Common Initiative AHG/Decl 1 (XXXVII)* (2001). The name was changed to the New Partnership for Africa's Development at the first meeting of the Implementation Committee in October 2001. For full details on the origins of NEPAD, see Taylor *NEPAD: Towards Africa's development* (2005).

⁵⁶ Mangu *Road to constitutionalism* 108. See also *Declaration on the New Common Initiative AHG/Decl 1 (XXXVII)* (2001).

⁵⁷ Gavin and Van Langenhove 'Trade in the world of regions' in Sampson and Woolcock (eds) *Regionalism, multilateralism and economic integration: The recent experience* (2003).

will and the interference of outside interests. The AU's institutional framework has been the implementation vehicle for the plan, while NEPAD Heads of State were required to report to the AU annually. NEPAD has combined the goals of MAP and OMEGA into four main objectives. These include the promotion of accelerated and sustainable development; the eradication of widespread and severe poverty; stopping the marginalisation of Africa in globalisation and accelerating the empowerment of women.

In so doing, NEPAD has not departed from its commitment to using a people-centred, sustainable development plan based on democratic values.⁵⁸ According to Mangu,⁵⁹ democracy is a precondition for the African Renaissance Project. NEPAD requires a democratic environment for it to thrive. This is a widely shared view by other scholars like Kabongo,⁶⁰ Nzongola-Ntalaja,⁶¹ Ake,⁶² Hinden⁶³ and Kaba.⁶⁴ Democracy and good governance also belong to Africa and are feasible in Africa.⁶⁵ Hoffman argues that democracy remains one of the most discussed and contested notions of political theory.⁶⁶ According to Nwabueze, 'no word is more susceptible of a variety of tendentious interpretations than democracy'.⁶⁷ This is the most recent African development initiative and has been hailed as one of the key mechanisms to solving Africa's problems. Democratic governments in Africa have reaped and will continue to benefit from regional integration, since the attraction of FDI in democratic states also guarantees the rule of law.

NEPAD is very relevant to the SADC integration process since one of its strongest supporters is South Africa. South Africa's political and economic leadership in both the SADC and Africa is of critical importance to regional integration. Former South African president, Thabo Mbeki, was instrumental to the formation of NEPAD and presided over the inaugural Summit held in July

⁵⁸Nabudere 'NEPAD: Historical background and its prospects' (Paper presented at the *African Forum for Envisioning Africa*, 26-29 April 2002, Nairobi, Kenya).

⁵⁹Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) (LLD thesis, Unisa).

⁶⁰Kabongo 'Democracy in Africa: Hopes and prospects' in Ronen (ed) *Democracy and pluralism in Africa* (1986)

⁶¹Nzongola-Ntalaja 'The state and democracy in Africa' in Nzongola-Ntalaja and Lee (eds) *The state and democracy in Africa* (1997).

⁶²Ake *Democracy and development in Africa* (1996).

⁶³Hinden *Africa and democracy* (1963).

⁶⁴Kaba 'Power and democracy in African tradition: The case of Songhay, 1464-1591' in Ronen (ed) *Democracy and pluralism in Africa* (1986).

⁶⁵See Mangu (n 59) above.

⁶⁶Hoffmann *State, power, and democracy: Contentious concepts in practical political theory* (1998) See also Schochet 'Introduction: Constitutionalism, liberalism and the study of politics' in Pennock and Chapman (eds) *Constitutionalism* (1979)

⁶⁷Nwabueze *Constitutionalism in the emergent states* (1973)

2002 in Durban, South Africa.⁶⁸ Jacob Zuma, the current South African President has indicated his willingness to continue supporting NEPAD as a strategy for the economic development of Africa.⁶⁹ NEPAD was integrated into the AU structures by a decision of the participating states during the Summit held in Libya in March 2007.⁷⁰ These strong links were initiated by former President Mbeki in line with his ideology of the African renaissance.⁷¹ NEPAD recognises that after many decades of economic and political planning, Africa has not made much progress in the implementation of earlier development plans. The use of such phrases as the 'African Renaissance' and the 'African Century' are just some of the innovative ways used to attempt to change the negative perceptions about Africa's future. Various meetings held between the NEPAD crafters and the IMF, the World Bank, the EU and the G8 were meant to deal with changing this negative perception.⁷²

10.2 The role of NEPAD in African regional economic integration

Under NEPAD, the plan is to rebuild the African continent by attracting Foreign Direct Investment (FDI) from industrialised countries.⁷³ Additionally, NEPAD is a plan by Africans to redevelop the African continent.⁷⁴ NEPAD is considered the last chance for Africa to rescue itself from continuous underdevelopment⁷⁵ and has received the support of the G8 Countries at their Summit meeting in Canada in June 2002. When it was unveiled, Africa's economic decline was reflected in the fact that 34 African countries are ranked among the world's least developed countries compared with 27 in 1996. Overseas development aid to Africa had fallen from US\$24.2 billion in 1989 to US\$14.2 billion in 1999 and, according to the United Nations, FDI was set to fall by 40% in 2001, even before the terrorist events of 11 September in the United States.⁷⁶ NEPAD is a programme that was

⁶⁸Akokpali 'The AU, NEPAD and the Promotion of Good Governance in Africa' (2004) *Nordic Journal of African Studies*.

⁶⁹See the official web site of the NEPAD at www.nepad.org.

⁷⁰Mangu 'The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for African Development and the African Court' (2005) *NQHR*.

⁷¹See Mbeki (1998) www.unu.edu. See also Mbeki (2002) www.dfa.gov.za.

⁷²See the official web site of the IMF at www.un.org (accessed 2011-07-25)

⁷³*Ibid.*

⁷⁴Startup 'Origins of New Partnership for Africa's Development (NEPAD)' (sd) at <http://www.uiowa.edu/ifdebook/faq/NEPAD.SHTML> (accessed 2011-07-25).

⁷⁵Cornwell 'The new partnership for Africa's development: Last chance for Africa?' in Melbe H *et al* *The new partnership for Africa's development: African perspectives* (2002).

⁷⁶Gavin and Van Langenhove 'Trade in the world of regions' in Sampson and Woolcock (eds) *Regionalism, multilateralism and economic integration: The recent experience* (2003).

initiated prior to the AU, but has now been adapted into the AU by resolution.⁷⁷ This means that NEPAD has become part of the AU's institutional organs.

What distinguishes NEPAD from other African development plans in many respects is that it was designed with a view to fostering partnerships between North-South and South-South as fundamental to achieving much needed socioeconomic progress on the continent. South-South partnerships call for the poor countries to join hands in the fight against underdevelopment. Thus, regional integration among African countries is well envisaged in NEPAD's purpose.

Under NEPAD, regional integration is seen as one of the fundamental ways of terminating Africa's exclusion from 'the malaise of underdevelopment and exclusion in the globalising world'.⁷⁸ NEPAD's expected outcomes are growth in development and increased employment; reduction in poverty and inequalities; diversification of product activities; enhanced competitiveness in the international market by increased exports and, most importantly, increased African integration.

The NEPAD document also states that 'the objective is to bridge existing gaps between Africa and the developed world so as to improve the continent's international competitiveness and to enable them to participate in the globalising processes'. NEPAD at various points touches on many of these aims and the motivations for African cooperation and integration outlined above. These include the observation that 'most African countries are small both in terms of population and per capita income'.⁷⁹ Therefore, there is a need for Africans 'to pool their resources and enhance regional development ...',⁸⁰ and the importance of 'the provision of essential regional public goods such as transport, energy, water, environmental preservation, disease eradication and regional research capacity ...'.⁸¹ All these aspects are essential to the success of regional integration in Africa. Thus, the goals of regional integration in Africa are intertwined with those of NEPAD.

African states are always on guard against outside interference by rich countries from beyond the continent. Rather, the emphasis should be on African economic cooperation and integration, in keeping with the spirit of the Lagos Plan of Action and the Abuja Treaty, both of which emphasised the primacy of these goals. In this regard, it is vital that NEPAD should not evolve as an initiative that concerns only African Heads of States and top bureaucrats, as such a development would doom the whole effort to failure. Instead, civil society, intellectuals and the broad masses of the people, most of whom are far more

⁷⁷ See NEPAD official website, NEPAD 22nd NEPAD Heads of State and Government Implementation Committee, Addis Ababa, Ethiopia (2010-01-30) at www.africa-union.org (accessed 2011-10-03).

⁷⁸ Paragraph 1; see also Makgetlaneng *Continental political governance and regional integration: From the Lagos Plan of Action to the New Partnership for Africa's Development* (2003).

⁷⁹ Paragraph 93.

⁸⁰ Paragraph 94.

⁸¹ Paragraph 95.

committed to African economic and political cooperation and integration than their leaders, should be closely associated with and play an active role in this effort.⁸² Only in this way will NEPAD be provided with the solid base of broad social support it needs for it to succeed.

NEPAD is called upon to come up with programmes that are aimed at addressing Africa's core development challenges. In the short- to medium-term a Western-style market-led approach is viewed as being inappropriate to tackle such development problems. Already there is evidence that the condition of the poor has deteriorated further as governments across Africa are compelled to cut public expenditure and restrict necessary imports to conserve foreign exchange as part of the IMF and World Bank economic restructuring programmes, thereby curtailing investment in productive sectors.⁸³ Access to basic services, such as education, health, potable water, electricity and food, has decreased as a result of the Economic Structural Adjustment Programme (ESAPs).⁸⁴ NEPAD is thus challenged to avoid taking doctrinaire and dogmatic approaches to issues such as privatisation and limiting the role of the state in development. The provision of agricultural subsidies by the EU and the USA shows that government intervention in the economy can be a necessary measure to protect the economy and population against the harmful effects of global trade. This phenomenon has continued with the current financial crisis that has affected all economies in the world. The US government has been at the forefront of bailing out its domestic struggling industries; however, this state of affairs is bound to impact negatively on the regional economies of the SADC where countries are not able to provide such bailout mechanisms, as has already been discussed.⁸⁵

In the sub-Saharan region, the markets have thus far had limited success in providing basic needs and services to the poor. The role of NEPAD should therefore be the promotion of access to basic services for the poor. Conditions in Africa demand that the states should be strengthened and regional blocs empowered. The promotion of sustainable domestic and regional policies is critical if NEPAD is to produce desirable results on the continent. For instance, development cannot occur without regional trade and cross-border industrialisation. At the core of the development strategy in Africa should be the need to promote coordinated trade development and regional industrial policy in a regional integration framework with a stable and predictable policy environment.

Many of the past African development plans invariably failed to indicate a well-integrated and coordinated approach. Most of them discussed the progress

⁸²Bond *Fanon's warning: A civil society reader on the New Partnership for Africa's Development* (2002).

⁸³Ikeme *Sustainable development, globalisation and Africa: Plugging the holes* (1999).

⁸⁴Kawewe and Dibia 'Impact of ESAPs on women and children: Implication for social welfare in Zimbabwe' (2000) 27/4 *Journal of Sociology and Social Welfare* 79-82.

⁸⁵*World Trade Organisation (WTO) Official Document WT/MIN(09)/ST/137* (2009).

of individual countries in a disjointed fashion, apparently ignoring the fact that most industries are interrelated and interdependent. These development plans tended to be inward looking and to refer to measures for increasing economic growth within the country concerned. Consequently, none of the development programmes initiated during the early 1960s attempted to coordinate industrial development in one country with the industrial growth of the neighbouring country.⁸⁶ Cognisant of the challenges and opportunities deriving from NEPAD, among others, SADC adopted the RISDP as a SADC response to the implementation of NEPAD at regional and national levels.

10.3 Analysing the influence of NEPAD on regional integration

The positive implications of NEPAD on regional integration and trade liberalisation are clearly evident. Underpinning NEPAD is the idea that Africans themselves and the resources of their continent hold the key to their development. Therefore, the plan calls for the partnerships between the peoples of Africa and the acceleration of continental integration. The SADC agreement, as well as its integration agenda, is in harmony with NEPAD. The NEPAD plan also provides a single platform for Africa to engage the rest of the world. Subsequently, the SADC has become a building block for the AU, as well as a critical organ for establishing and regulating relations with the outside world, for example, the role the SADC is playing in the EPAs and WTO negotiations.⁸⁷

It has long been conceded that Africa's problem of poor infrastructure hinders regional integration. One of NEPAD's top priorities is the creation of short-term regional infrastructure to work on transport, energy, water and sanitation, and information and communication technology. These are critical areas that need urgent attention as they will complement the RISDP. NEPAD also has a plan for the implementation of sub-regional food security and development programmes and is also supposed to come up with a coordinated strategy for debt relief, market access and official development assistance reforms. All of these programmes complement the efforts of the SADC towards deeper regional integration. Finally, NEPAD has been hailed as not just a plan but an implementation strategy. This means that efforts are being harnessed for Africa's progress to find fruition as opposed to the long-held idea of African aspirations and plans that cannot materialise. Among the main issues NEPAD is trying to address is the poor economic governance in Africa. NEPAD can therefore be the blueprint for sustainable development for the AU.⁸⁸ In the long run, if NEPAD

⁸⁶Asante *Regionalism and Africa's development: Expectations, reality and challenges* (1997).

⁸⁷Page 'Developing countries in GATT/WTO Negotiations' (2002) at <http://www.acp-eu-trade.org/library/files/Page%20Developing%20Countries%20in%20GATT-WTO%20Negotiations.pdf> (accessed 2011-06-21).

⁸⁸Taylor 'Zimbabwe's debacle, Africa's response and implication for the Partnership for Africa's Development (NEPAD)' in Melber (ed) *Zimbabwe's presidential elections 2002: Evidence, lessons*

succeeds and since it is based on the EU model, the success of the SADC's integration agenda is possible.

11 The African Peer Review Mechanism (APRM)

Another very important initiative launched by African leaders is the African Peer Review Mechanism (APRM).⁸⁹ The APRM is a shared and agreed non-legal instrument, voluntarily acceded to by the members of the AU. It is a self-monitoring mechanism founded in 2003,⁹⁰ with the aim of encouraging conformity with regard to political, economic and corporate governance values, codes and standards, among African countries and the objectives in socioeconomic development within NEPAD. Heyns and Killander⁹¹ developed the country self-assessment APRM questionnaire that was formally adopted by the APR Secretariat in February 2004, in Kigali, Rwanda, by the first meeting of the APR Forum, made up of representatives of the Heads of State or Governments of all states participating in the APRM. This list is used to assess whether an AU Member State participating in NEPAD complies with the standards as listed. These standards are divided into four sections, namely, democracy and political governance, economic governance and management, corporate governance, and socioeconomic development. Ghana, Rwanda and Kenya were the first three countries to be subjected to the APRM. This was done by an African Review Panel using APRM codes and standards on one hand and with NEPAD's nine objectives on the other. According to Mangu,⁹² these codes, standards and objectives are international-law-friendly. This is so because the questions to be addressed in the codes and standards are designed to assess each state's compliance with a wide range of African and international human rights treaties and standards.

11.1 The APRM's relevance to regional integration in Africa

Although broad objectives have been set for the APRM, for the purpose of this paper it is important to focus only on those affecting regional integration on the

and implications (2002).

⁸⁹Hereafter APRM. Cilliers *Peace and security through good governance: A guide to the NEPAD African Peer Review Mechanism* (2003).

⁹⁰See *MOU on the APRM NEPAD/HSGIC/03-2003/APRM/MOU* (2003) adopted in Abuja, Nigeria. This MOU effectively operates as a treaty. It came into effect immediately with the agreement of six countries that they be subject to its terms. However, those countries that do not accede to the document are not subject to review. The March 2003 meeting also adopted a set of 'objectives, standards, criteria and indicators' for the APRM. The meeting also agreed to the establishment of a secretariat for the APRM and the appointment of a seven person 'panel of eminent persons' to oversee the conduct of the APRM process to ensure its integrity. At the end of 2010, 30 countries had formally joined the APRM by signing the MOU on the APRM.

⁹¹See generally Killander 'The African Peer Review Mechanism and human rights: The first review and the way forward' (2008) 30/1 *Human Rights Quarterly* 41-75.

⁹²See Mangu (n 59) 18.

continent. These will now be discussed. In brief, the APR Panel found that Ghana,⁹³ Rwanda and Kenya had signed or ratified several international treaties that have a bearing on democracy and good political governance, for example, the Constitutive Act as discussed earlier. However, where such ratification occurred, it was not always followed by the incorporation of these legal instruments into domestic law. Furthermore, treaties were not always enforced when they had been domesticated and the states concerned seldom complied with their reporting obligations upon their ratification of some instruments. This kind of assessment is necessary for regional economic integration treaties. Since almost all African countries are signatories to several regional economic agreements, the same process for their ratification should be followed by incorporating such instruments into domestic law. As already discussed, most African states are not complying with this process. Instead, some of the signed legal instruments for continental integration have not been implemented. This does not bode well for economic integration in Africa. Thus, the APRM, as an instrument, may be able to accelerate the process of continental integration if it can be used to put pressure on African states to implement treaty obligations timeously. Through the APRM, participating Member States are supposed to implement the findings of the process.

Recommendations made to the three countries mentioned above may also be applicable to the rest of Africa in solving similar problems. One of the most important recommendations is the one that calls for Member States to be time conscious when acceding to treaties and protocols. In addition, there is a need for timely reporting on the implementation of such instruments as enshrined in NEPAD.

The need to improve on democracy and political governance is also critical for integration, as regional integration should be anchored in democracy, that is, the notion of procedural or institutional democracy.⁹⁴ Healthy democracy promotes full and equal participation of all citizens and the private sector in a country. Private citizens are key stakeholders in regional integration as they account for a huge percentage of intra-regional trade. The involvement of the private sector in cross border business is as a result of a sound institutional democracy that allows the courts and public offices to function in a way that promotes regional integration. However, the intention here is not to enter the contentious debate about democracy, as there is no universally accepted definition of the concept. It is highly contested in analytical and ideological discourse.⁹⁵ However, most African scholars, such as Ake, Shivji⁹⁶ and Amin, have embraced the substantive popular and people-driven democracy based on

⁹³See the official web site of the APR Secretariat at www.eisa.org.za.

⁹⁴Dahl *Participation and opposition* (1971) 53-81. See also Sorensen 'Democracy and the developmental state' in Nyang'oro JE (ed) *Discourses on democracy: Africa in comparative perspective* (1996).

⁹⁵Wiseman *The new struggle for democracy in Africa* (1998).

⁹⁶Shivji 'Contradictory class perspectives in the debate on democracy' (2009) *Journal of African Law* 1.

values, constitutionalism and respect for all human rights, and not civil and political rights only. This democratic right is important even in economic integration because the right to economic, social and cultural development is provided for in the African Charter of Human and Peoples' Rights.⁹⁷ This provision, which provides African countries with the instruments to monitor their own behaviour, can play an effective role in reducing external intervention in the affairs of African countries.⁹⁸ Care should be taken, however, that it does not end up becoming a mechanism for doing what outside forces are unable to do or are reluctant to do through direct intervention.

Under the APRM, governance is defined as 'the art and skill of utilising political or collective power for the management of society at all levels'.⁹⁹ In terms of this mechanism African leaders acknowledge that development is impossible in the absence of true democracy, respect for human rights, peace and good governance.¹⁰⁰ According to Mangu:¹⁰¹

From an African perspective, good political governance is therefore democratic governance, based on respect for the rule of law, the separation of powers, the supremacy of the constitution, the independence of the judiciary and the promotion of human and people's rights.

Therefore if signatories to the treaty establishing the AU embrace good governance and the rule of law in their respective countries, it is most likely that they will also do the same at the continental level where the implementation of the AEC integration provisions of treaties is paramount.

11.2 Analysis of the challenges of the APRM

The discussion on the APRM and its purpose cannot be complete without a discussion of its challenges. This will be done in brief. Such an exercise is important if the SADC intends to benefit fruitfully from the APRM experience. Firstly, compliance with codes and standards is not exhaustive. The APRM merely lists the international conventions, agreements or treaties that have been or should have been signed, ratified and domesticated, without paying attention to their actual enforcement in domestic law. The other problem pertains to

⁹⁷ Article 22 of the *African Charter on Human and Peoples' Rights* (1981). It was adopted on 1981-06-27 in Nairobi, Kenya and came into force on 1986-10-21. It was complemented by the Protocol establishing the African Court of Human and Peoples' Rights, which came into operation in January 2004.

⁹⁸ The APRM requires each country to perform a self-evaluation in the areas of democracy, governance and socioeconomic development. The APRM is designed to increase a country's attractiveness to foreign investors, with each country's rating acting as an indicator of that country's potential. The G8, the African Development Bank and bilateral donors have indicated their aid may be tied to a country's APRM score.

⁹⁹ See Country Review Report (CRR) of the Republic of Ghana.

¹⁰⁰ See NEPAD Declaration para 71.

¹⁰¹ Mangu *Road to constitutionalism* 108.

inclusiveness and the broad scope of the process. The APRM is a state and cabinet-driven showcase. Nevertheless, the procedure for the selection of stakeholders to the seats on the National Governing Council (NGC)¹⁰² is unclear. This will definitely compromise the results of the exercise since in many of the occasions civil society organisations and other stakeholders who are sympathetic to the governments of those states being peer reviewed are selected to participate.

The other problem pertains to public ownership of the whole process. NGCs are cabinet centred and even exclude other branches of state authority such as the parliament and the judiciary. Instead, the self-assessment process is conducted by the cabinet, which chairs the NGC, establishes a Focal Point, controls the APRM National Secretariat and claims responsibility for the drafting of the country self-assessment report (CSAR).

The other challenge concerns the independence of the APR panel, as well as its integrity. As discussed above, by dominating the process the cabinet is often tempted to manipulate the work and undermine the independence of the members of the APR Panel. The cabinet can also engage in disputes over the accuracy of information, which puts pressure on the APR Panel and at times forces them to make concessions where they might have reached a decision to the contrary. As the government of the participating country is the one that appoints panel members, it can also dismiss them at any particular time. Thus, the APR panel can be subjected to undue influence that will ultimately compromise its work.

According to Mangu,¹⁰³ the most serious problem with the APRM is that 'it has no teeth'. That is to say, there are no effective sanctions that can be applied for a persistent lack of democracy and good political governance in a country. Lack of democracy and good political governance is widely encountered in African leaders, who support each other blindly in the face of bad governance and democracy. This situation is exacerbated when such support comes from the initiators of NEPAD and the APRM. A case in point is the support offered to Robert Mugabe's leadership by President Mbeki of South Africa in spite of the endless Zimbabwean crisis. The same state of affairs used to prevail under the OAU, which was considered to be a 'club' of authoritarians and dictators.

12 Conclusion

The continent of Africa finds itself playing the economic integration game, where the possibility of success and failure depends on how role players manipulate the inherent conditions to their advantage. Africa's unique history, current manifestations and future prospects of economic integration can help bring

¹⁰²Hereafter 'NGC'.

¹⁰³Mangu (n 59) 18.

development to the continent. Hence, to continue blaming the legacy of colonialism without harnessing the current continental prospects being provided for by economic integration would be missing the point. Pan-Africanism has gained new momentum under the AU and NEPAD leading to the realisation that African challenges are better resolved by Africans themselves is timeous. This paper has revealed that the use of RECs as building blocks in the AEC is producing positive results. The Protocol on relations between RECs and the AEC requires legal precision. African countries just have to implement the economic integration commitments as set out in the treaties they signed. The launch of negotiations for the SADC, COMESA and EAC tripartite FTA is a clear example of this phenomenon. The AU has also taken direct control of these developments.

NEPAD is not just a plan but an implementation formula for African development and its incorporation into the AU institutions is an achievement. Thus, the implementation plans for NEPAD are a step away from being legally enforceable. The modalities for the establishment of the AEC are clear and the step-by-step approaches are achievable even though some stages are falling behind schedule. However, the goal for an AEC is feasible and the AEC presents a great opportunity for continental integration.