Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union*

1 Background

The truism that 'the quality of institution trumps everything else'[1] continues to shape the mechanics of contemporary institution building. The bias for quality institutions stems from the understanding that they bring about high efficiency and qualitative output. The empirical reality of the centrality of strong institutions to growth and development in the post-1945 global order lends considerable weight to this belief. The economic recovery of western European nations after the Second World War, the rise of the 'Asian tiger' economies, the increasing relevance of the European Union (EU), and the Botswana phenomenon are some of the corollaries of quality institutions.

Be it at the national or transnational level, fundamentals underlining quality institutions have gained wide currency.[2] Concepts such as the rule of law, good governance, respect for fundamental rights, participatory governance, and accountability have all become an integral part of the lexicon of contemporary global politics. From a transnational perspective, the EU presents a model of democratic institution building. In this respect, the EU has in over five decades developed institutions that operate parallel to, or in some cases supersede, national structures. As Metz observes:

> Institutions and decision-making procedures have from the very beginning of integration proved very effective as a framework for shaping policies in an organisation that subsequently expanded its size and tasks. Especially the establishment of supranational institutions that can initiate and adopt binding legislation for the member states explains to a large extent the European success story.[3]

As the EU model continue to inspire regional initiatives elsewhere, it is important to move beyond the replication of EU institutions to the proper

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*This note is an abridged and edited version of the author's LLD thesis ('A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' 2010 (University of Pretoria)). Reference will be made to this thesis where necessary.

[1] Rodrik , Subraminian and Trebbi 'Institutions rule: The primacy of institutions over geography and integration in economic development' (2004) 9 *Journal of Economic Growth* 135.

[2] The EU is by no means a perfect organisation. Criticism includes limited public participation in the EU process, democratic deficits, and mismanagement in the EU institutions. See, eg, Cini 'The European Commission' in Warleigh (ed) *Understanding European Union institutions* (2002) 56.

[3] Metz 'Strengthening capacities for reform – perspectives of institutional building in the European Union' (2006) 4. Available at: http://www.cap-lmu.de/publikationen/2006/metz.php (accessed 20 April 2009).

grasp of the elements that have shaped its democratic development. The importance of understanding the foregoing is that it provides a clearer picture of the matrix for transnational institution building and its corollary of uniform adherence to democratic values in the national sphere. Put differently, it explains the nexus between the democratic nature of transnational institutions and their ability to ensure, through supervision, democratic values in member states. Thus, within the peculiar context of each region, the task that should confront transnational policymakers is how democratic principles can serve as the cornerstone of genuine institution building – at both transnational and national levels. This is particularly instructive for Africa, as it has in the past decade embarked on an unprecedented mission of changing the nature, structure and scope of continental institutions.

The transmutation of the Organisation of African Unity (OAU) into the African Union (AU) – and the subsequent establishment of organs charged with functions like judicial, parliamentary, security, development, and governance – lie at the heart of the institution-building project. On the surface, the creation of these institutions underlines the intention to engage in a serious attempt to redress the challenges facing the continent. However, an objective assessment of the situation so far reveals a serious deficiency of the much needed democratic anchor, necessary for the desired goal of an efficient AU. In the context of this article, an efficient AU is an organisation that not only has its institutional mechanism operating within a democratic framework, but is also capable of advancing the uniform practise of democracy in member states.[4]

This article is premised on the idea that the present politico-legal configuration of the AU is not suitable for the critical function of consolidating democratic practise. It finds that a fundamental obstacle is the unconditional membership of the AU, a situation that allows all territorial African states, irrespective of their democratic status, to be part of the organisation. In addressing this, this article suggests that the existing framework be replaced by a mechanism that hinges membership on strict adherence to a democratic ethos.

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[4]It is important to emphasise that in addition to the AU Constitutive Act, there are other AU legal instruments and policy frameworks that speak to continental integrative aspirations. These documents address a number of issues such as governance, economic development, trade, and peace and security. They include the Treaty on the African Economic Community (AEC), the African Charter on Democracy, Elections and Governance (ACDEG), the African Union Commission's Minimum Integration Programme (MIP), the Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament (PAP), the Protocol Relating to the Establishment of the AU Peace and Security Council, and the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism Framework Documents.

2 Transnationalism in a state-centric global order

In a world shaped and defined by multiple states – with different capacities and concerns – international organisations have been designed not only to regulate interstate action and cooperation but also to address issues which have 'attained a dimension stretching far beyond national boundaries'.[5] Operating within a state-centric global environment, international organisations are expected to fulfil such transnational functions within the ambit or framework of their stated objectives. These objectives are generally based on a prior agreement amongst interested states. This has been described as the 'functional finality' of international organisations.[6] Simply put, 'functional finality' denotes the circumscribed latitude of international organisations *vis-à-vis* matters that fall outside the scope of their duties.[7]

Traditional public international law is premised on the theory that nation states remain the basic structure of the international order. Therefore, any assertion that non-state actors should also share state-centric features seeks to expand the conceptual focus of the nature of international law and international relations. At the same time, the increasing clout of transnational institutions is indicative of a paradigm shift in the conceptualisation of sovereignty. 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.

The emphasis on the protection of human rights and global peace has raised a general consensus that interference in the domestic affairs of a state is justifiable under certain circumstances.[8] Also, the realisation that certain socio-economic needs require a transcendental, global approach has contributed significantly to the limitation of absolute sovereignty.

When the discourse of state sovereignty is located within the regional integration process, the question that arises is whether or not sovereignty is divisible. The effective operation of a regional organisation is dependent on the transfer of sovereignty by member states. If regional integration is understood as a process that sets in motion some form of transnational governance framework or multi-level governance, then the notion of divisibility of sovereignty becomes inevitable. To address the issue of divisibility, parallels have been drawn between the devolution of powers under

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[5]Blokker and Schermers *International institutional law: Unity within diversity* (1995) 1.
[6]*Id* at 16-19.
[7]*Id* at 17.
[8]See, eg, Brownlie *Principles of public international law* (2003) (6 ed) 293.

a federal system of government and the transfer of powers to regional organisations. As Hay indicates, a state owns the totality of sovereign powers (bundle of rights) and has the prerogative to share these with other states or institutions.[9] Hay's formulation regards external sovereignty as a direct function of internal sovereignty.[10] What this means is that when a state transfers part of its internal sovereignty or jurisdiction, for example in relation to making immigration laws, to an international organisation, there is also a corollary understanding that the organisation will have the power to represent such state(s) on the particular subject when dealing with third states.[11]

Lauterpacht agrees that the nation states possess a plenitude of powers, but that such powers terminate where international obligation begins.[12] The implication of this is that states have powers to exercise national sovereignty, for example the enactment of legislation, as long as this does not conflict with their obligations to the international community.[13] Mitrany states that 'it would indeed be sounder and wiser to speak not of surrender but of a sharing of sovereignty'.[14] This requires the pooling of sovereign authority for the joint performance of a particular task.[15] Mitrany sees sovereignty as a functional concept, that is, the transferral of sovereign powers should be based on the need to execute a certain task or function.[16] MacCormick's conception of sovereignty is rather different. He remarks that:

> We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it, Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.[17]

There is no doubt that the concept of absolute sovereignty has undergone radical reformulations over the years. The 'global village' narrative has ensured that states are continuously probed about the treatment of their citizens, natural resources, and the environment. Even when states have not explicitly or impliedly limited their sovereign powers, their actions are increasingly being measured by a 'universal or community values'[18]

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[9]Hay *Federalism and supranational organisation: Patterns of new legal structure* (1966) 70.
[10]*Id* at 71.
[11]*Id* at 70-74.
[12]Lauterpacht 'Sovereignty – myth or reality?' (1997) 73 *International Affairs* 149.
[13]*Id* at 149.
[14]Mitrany *A working peace system* (1966) 31.
[15]*Id* at 31-32.
[16]*Id* at 31.
[17]MacCormick 'Beyond the sovereign state' (1993) 56 *The Modern Law Review* 16.
[18]See eg Werner 'Constitutionalisation, fragmentation, politicisation, the constitutionalisation of international law as a Janus-faced phenomenon' (2007) 8 *Griffen's View* 17. See also Olivier 'International and regional requirements for good governance and the rule of law' (2007) 32 *SAYIL* 52.

barometer. The increasing competence of the EU, the influence of the Bretton Wood institutions (International Monetary Fund and the World Bank) on the monetary and fiscal policies of developing and developed countries, the United Nation's (UN), and the AU's right to intervene militarily in member states clearly indicate that the evolution of sovereignty is yet to reach its full potential.[19]

3 The African Union – an imperfect alchemy?

The continued inability of the OAU to respond to intra-African conflicts, curtail the deluge of gross human rights violations, and address contemporary challenges facing the continent, prompted a radical revamp of the organisation needed for the continent to move forward.[20] More importantly, the view was held that the organisation had completed its primary functions namely, eradicating colonialism, ending *apartheid* and establishing the independence of African states.[21] It was against this background that African leaders decided to replace the OAU in its entirety with a new organisation – the African Union.

Therefore, the AU was established to correct the deficiencies of its predecessor, especially by enhancing the relevance of Africa on the global stage and thus repositioning the continent for the realities of the 21st century.[22] Against this backdrop, the appropriate question to ask is to what extent has this objective been achieved? Put simply, what sets the AU apart from its predecessor, the OAU? In answering this question, one should distinguish between the form and substance of differences. In this respect, the form denotes the content of the normative instruments regulating the organisation and the nature of its institutional architecture, while the substance refers to the extent to which the form has translated into real achievements. Simply put, have the institutional objectives and goals been realised?

The Constitutive Act (CA) of the AU symbolises the necessary – and ambitious – plan to help solve continental problems and also the imperative of fast-tracking the process of integration. As Olowu rightly observes, the Constitutive Act is '[a] mere roadmap to the required regional understanding

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[19] As Jackson notes, '… there is no teleological terminus, no determinate and final destination, and no end of history in the evolution of sovereignty'. See Jackson *Sovereignty: Evolution of an idea* (2007) at. 112.

[20] Packer and Rukare 'The new African Union and its Constitutive Act' (2002) 96 *The American Journal of International Law* 366.

[21] *Id* at 366.

[22] African Union 'Strategic Plan of the African Union Commission, volume 1' (2004) 23-24. Available at: http://www.africa-union.org/AU%20summit%202004/VOLUM%201%20-%20STRATEGIC%20PLAN%20OF%20THE%20COMMISSION%20-%20last%20version-%E2%80%A6.pdf (accessed 30 May 2011).

for future continent-wide cooperation and integration in Africa'.[23] This is reflected in the objectives and institutional make-up of the organisation. In this respect, the CA, unlike the OAU Charter, espouses the ideals of good governance, promotion and protection of human rights, coordination and harmonisation of regional policies, and the promotion of democratic principles.[24] But the CA goes a step further by stipulating the right of the Union to intervene in member states under the following conditions: war crimes, genocide, and crime against humanity and, through a 2003 amendment, 'serious threat to legitimate order'.[25] In another marked departure from the OAU Charter, article 30 of the CA provides for the prohibition from the participation in the activities of the organisation where the government of a member state has come to power through unconstitutional means.[26]

The inability of the AU always to arrive at a common position with regard to the application of (military) pressure on illegitimate governments, is a serious limitation. The interventions by the French army and the North Atlantic Treaty Organisation (NATO) in the ousting of Laurent Gbagbo and Muammar Ghaddafi respectively, clearly illustrate the complications associated with the handling of illegitimate governments in Africa. They not only expose the dangers of non-intervention, but also highlight the irrelevance of the AU in dealing with serious African issues. Although the AU differs from its predecessor, the OAU, in terms of having a normative framework that supports military intervention, in practice, little has changed. The sharp division among the ranks of heads of state, the limited resources to activate military intervention, and the weakness of the AU machinery are major drawbacks. The opposition to foreign intervention in African affairs remains valid. This notwithstanding, the fact is that the AU's serial inaction in cases of serious

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[23]Olowu 'Regional integration, development and the African Union agenda: Challenges, gaps and opportunities' (2003) 13 *Transnational International Law and Comparative Problems* 222-223. See also Maluwa 'The Constitutive Act of the African Union and institutional building in postcolonial Africa' (2003) 16 *Leiden Journal of International law* 168.

[24]The Constitutive Act of the African Union (2000) arts 3 and 4.

[25]*Id* at art 4(h); see also art 4 of the Protocol on Amendments to the Constitutive Act of the African Union.

[26]In accordance with this provision, the AU in 2002 barred Madagascar from attending the inauguration of the organisation after a decision that the transfer of power to Marc Ravalomanana was unconstitutional. The organisation again in 2009 suspended Madagascar as a result of the unconstitutional ascendance to power of the opposition leader, Andry Rajoelina. This was after Marc Ravalomanana was pressured to step down and handed over power to the military, which in turn transferred power to Rajoelina. In 2005, the AU suspended Mauritania from all organisational activities after a military coup. Furthermore, it also suspended Togo and imposed travel and economic sanctions on its officials as a result of the unconstitutional change of leadership in February 2005. In December 2008, the AU suspended Guinea after a military coup. In December 2010, Cote d'Ivoire was suspended after the incumbent president, Laurent Gbagbo, refused to step down after losing the election to the opposition leader Alasane Ouattara.

violations creates a void (largely humanitarian) that makes such intervention valid and necessary.[27]

The institutional configuration of the AU is another indication of the determination to set the organisation apart from its predecessor. Key AU institutions include the AU Commission (to be known as the AU Authority);[28] the African Court of Justice and Human Rights (ACJ&HR);[29] the Pan-African Parliament (PAP);[30] the Assembly of the Union;[31] the Executive Council;[32] the Permanent Representative Committee (PRC);[33] the Economic, Social and Cultural Council (ECOSOCC);[34] the Specialized Technical Committee;[35] and

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[27]The United Nations' 'Responsibility to protect (R2P)' 2005 initiative has been instrumental in the forging of an international doctrine that the idea of sovereignty is not a privilege but a responsibility. This responsibility includes the responsibility of a state to protect its population from mass atrocities, the responsibility of the international community to assist such state if it is unable to protect its citizens, and the responsibility of the international community to intervene (with military intervention considered as a measure of last resort) if such a state fails to protect its citizens. The R2P is soft law but is widely gaining ground as a standard for intervention. NATO's intervention in Libya is a case in point. More information is available at: http://www.responsibilitytoprotect.org/ (accessed 12 March 2012).

[28]At the 12th AU Summit in Addis Ababa, 1-3 February 2009, African leaders agreed to transform the existing AU Commission into the AU Authority (AU/Dec 206 (XI). The Authority shall be headed by a President and assisted by a Vice President and 12 Union Secretaries dealing with the following portfolios: Defence, Peace and Security; Political Affairs and External Relations; International Trade and Co-operation; Continental and Regional Integration; Development, Finance and Economic Planning; Youth, Culture and Social Development; Education, Science and Technology; Agriculture and Water; Environment and Natural Resources; Continental Justice and Legal Affairs; Labour and Migration; and Health and Population. See AU/Dec.233(XII).

[29]The ACJ&HR is made up of two sections: General Affairs and Human Rights sections. Each of the sections is composed of 8 judges. The court is competent to hear the following cases: interpretation of the AU Constitutive Act and other AU treaties, any question of international law, decisions and directives of the organs of AU, breach of obligations by member states and the nature and extent of reparation. See generally the Protocol on the Statute of the African Court of Justice and Human Rights (2009). The court is yet to start operations.

[30]The PAP was established in 2004. It is composed of 265 representatives (5 representatives per country), elected by the legislature of the 53 AU member states. It, however, remains a consultative body. Its functions include the promotion of human rights, democracy, good governance, peace and security and the effective implementation of AU policies and objectives. See art 3 of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament (PAP) (2001).

[31]The Assembly comprises the 54 heads of state and government of the AU and is the supreme governing body of the AU.

[32]The Executive Council is made up of ministers designated by the member states (mainly Ministers of Foreign Affairs). It coordinates and takes decisions on common policies such as foreign trade, transport, communication and agriculture.

[33]The PRC consists of nominated permanent representatives of AU member states.

[34]ECOSOCC is an advisory organ composed of civil society organisations on the continent.

[35]The Specialized Technical Committee prepares the ground work on common policy projects such as education, science and technology, agriculture and health.

the financial institutions.[36] Other institutions include the New Partnership for Africa's Development (NEPAD) Planning and Coordinating Agency (NPCA),[37] and the African Peer Review Mechanism (APRM).[38] It is important to highlight that much controversy surrounded the relationship between the AU and NEPAD until the AU Assembly in 2008 confirmed that NEPAD should be integrated into the AU structure.[39] This includes the granting of legal personality to the NEPAD Secretariat in South Africa. The Assembly arrived at a similar conclusion in relation to the APRM.[40] These moves have, however, not resulted in the transformation of NEPAD and the APRM documents into treaties (the APRM position is discussed below).

An objective assessment of how the AU has fared thus far, however, shows a wide chasm between the formal template outlined above, and the attainment of stated objectives and goals. The disconnection between the normative structure of the AU and the substantial realisation of institutional goals is better understood when considered within the context of the politics of membership of the organisation.

Like its predecessor, the OAU, geography is the definitive criterion for membership of the AU. As long as a country is located within the territorial map of the African continent, regardless of its democratic credentials, it is eligible for membership of the AU. Even where some member states are outside the framework of the institutional process (eg the APRM and the ACJ&HR), the short, medium and long term goals remain the eventual inclusion of such states in the process. Hence the oft-stated appeal for ratification and adoption of AU legal instruments.

This not only contradicts the relevant provisions of articles 3 and 4 of the CA, it also shows a poor grasp of the fundamentals that have shaped the development of an organisation like the EU. While the membership of the EU is open to all European states, new member states are expected to fulfil three basic conditions as specified by the Copenhagen criteria.[41] These include strict

[36]The financial institutions are the African Central Bank, the African Monetary Fund and the African Investment Bank. These institutions are yet to take off.
[37]The NEPAD is a blueprint for Africa's development in the 21st century. Its primary objectives include the eradication of poverty, promotion of sustainable growth and development, integration of Africa into the global economy and the acceleration of the empowerment of women. Available at: http://www.au.int/en/NEPAD (accessed 29 May 2011).
[38]The APRM is a voluntary process of reviewing the standard and quality of governance in member states. The following standards are reviewed: democracy and political governance, economic governance, socio-economic development and corporate governance.
[39]Assembly/AU/Dec 205 (XI).
[40]Assembly/AU/Dec 198 (XI).
[41]Available at: http://europa.eu/scadplus/glossary/accession_criteria_copenhague_en.htm (accessed 2 June 2011).

adherence to the principles of democracy (political criteria); a functioning market economy (economic criteria); and an effective public administration (institutional criteria).[42] The reference to the EU is relevant to the extent that the AU is modelled, in terms of its institutional structure and integrative aspirations, on the EU.

Unlike the AU, the EU did not start as a mega-continental project. In 1951, six countries concluded the treaty establishing the European Coal and Steel Community (ECSC).[43] In 1952, the six countries further expanded on the ECSC by adopting the treaty establishing the European Economic Community (EEC).[44] The EEC created a number of supranational initiatives such as the common market of goods, persons, services and capital, and a common commercial policy, which applied to all economic sectors.[45] From its initial six members, the membership of the EU currently stands at twenty-seven. The accession of ten former communist Central and Eastern European countries (CEECs) in 2004, and the expansion to Bulgaria and Romania in 2007, prompted the development of conditions for membership.[46]

There was initial apprehension amongst member states as to the feasibility of allowing CEECs with little or no democratic institutions to join the organisation.[47] The eventual accession was then preceded by measures such as bilateral trade and cooperation agreements, aid programmes, and the creation of free trade areas.[48] In addition to these measures, was the four year development of a formalised accession procedure – the Copenhagen criteria – which was aimed at building critical democratic institutions in the CEECs.[49]

The importance of linking membership to the strict commitment to shared norms and values cannot be understated. As the Togolese president, Faure Gnassingbe, bluntly asserts:

> I'm wondering if we can ever get a political union when we have very different political systems at the moment ... [I]t is difficult because you have some countries adopting a democratic system and others not doing so, how could we have political unity? We do have a real problem there, because when you have a democratic system there are certain things you can do and others you can't do.

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[42] *Ibid*.
[43] The six countries include France, Germany, Italy and the three Benelux countries (Belgium, Netherlands and Luxembourg). Van Gerven *A polity of states and peoples* (2005) 7.
[44] *Ibid*.
[45] *Ibid*.
[46] Schrijver and De Ridder 'European Union accession policy' in Wunderlich and Bailey (eds) *The European Union and global governance: A handbook* (2011) 166
[47] *Id* at 169.
[48] *Ibid*.
[49] *Id* at 168-173.

> But if you have some countries being run on autocratic lines, how do you get political unity with all these different systems? We must set a standard of governance which we should respect and observe ... [I]f we want to have a political union, I think we should synchronise our political systems first.[50]

The uniformity of standards and practices is an essential ingredient for a successful regional integration process. The stipulation of criteria for membership is not only an indication of a purpose-driven agenda; it also minimises the possibility of non-compliance with institutional directives.[51] As the AU is composed of member states with varied understandings of democratic values and ideas, it is a virtually impossible mission to enforce its basic values. Research conducted on the effectiveness of pre-accession conditionality in the EU shows positive results. As Schrijver and De Ridder observe, the strategy of conditionality enhanced the process of democratic reforms in CEECs.[52] Underpinning the rigorous democratic conditionality of the EU to the CEECs is what Schimmelfennig and Sederlmeier refer to as a 'bargaining strategy of reinforcement by reward'.[53] In this sense, the credibility of membership, especially the incentives for encouraging democratic reform, is used as a 'carrot' for ensuring the transfer and entrenchment of rules of governance.[54] Even before joining the EU, many CEECs had unilaterally embarked on a process of democratic reform, as a strategy for eventually joining the organisation.[55] The effect of strengthening democratic institutions in member states, and potential member states, is thus closely associated with the symmetrical application of EU rules and regulations

4 Building a democratic African Union: What option?

If the principle of unconditional membership is identified as an obstacle to the optimal realisation of the objectives of the AU, the apt enquiry should be the extent to which this can be addressed. In this regard, two questions are imperative: should the AU be dissolved so that a new organisation founded on the ethos of democratic values and norms can emerge? Or rather, should the AU be retained while member states commit and surrender themselves to strict enforcement and compliance mechanisms?

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[50]Cited in (2010) March *New African Magazine* 20-21.
[51]See eg Pettit 'Institutional design and rational choice' in Goodin (ed) *The theory of institutional design* (1996) 78-87.
[52]Schrijver and De Ridder n 46 above at 173.
[53]Schimmelfennig and Sederlmeier 'Governance by conditionality: EU rule transfer to the candidate countries of central and eastern Europe' (2004) 11 *Journal of European Public Policy* 670.
[54]Ibid.
[55]Schrijver and De Ridder n 46 above at 173.

4.1 Option 1: Dissolution of the AU?

The first option, dissolution of the AU and starting afresh, would have been the appropriate step to take in 1999, when the process leading to the formation of the AU began. During that period, it would have been much easier to put in place a mechanism that ensured the conditional transition of membership from the OAU to the AU. In this regard, there should have been a clause that tied membership to the adherence to the norms articulated in articles 3 and 4 of the CA. The major reason behind the deviation from conditional membership at that time, can be linked to the fact that the major proponent of the transformation of the OAU, Muammar Ghaddafi, did not have particularly impressive democratic credentials. It was thus logical that his conception of the institutional transformation of the OAU would exclude the serious consideration of democratic ideals. Libya's extensive network of financial patronage across the continent heightened the importance of Ghaddafi in the calculus of African integration and ensured that any move to exclude him from the process would meet stiff resistance.[56] In addition, regional hegemons and other democratic states made no serious push for linking membership to democratic values.[57]

To call for the complete dissolution of the AU at this point is not pragmatic for three major reasons. The first is that the AU, like its predecessor, has assumed a symbolic status due mainly to the fact that it is composed of all the countries, except Morocco, on the continent. Despite its inefficiency, it has become the face of the desired integration of the continent. This point is alluded to in the 'African Union Commission Strategic Plan 2009-2012'.[58] The document highlights the following as some of the advantages of the organisation:[59]

- political integration (continental reach and mandate of 53 states to coordinate integration);
- scientific, economic, social and physical integration and development;
- governance (eg the establishment of the APRM);
- institutional capacity building for continental integration and development; and

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[56]Ghaddafi's death will not ensure a marked paradigm shift in the integration process. Although it will ensure that discussions are no longer dominated by Ghaddafi's theatrics on the creation of a 'United States of Africa', the symbolic essence of maintaining the current AU format will still be widely affirmed. This is mainly due to the fact that Ghaddafi and other AU leaders did not differ on the question of democratic governance; they only had divergent views on the modus of the integration process.

[57]The primary debate around this period was rather centred on the nature of the Constitutive Act especially the kind of powers to be conferred on the new organisation. See, eg, Maluwa, 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union' (2001) 9 *African Yearbook of International Law* 3-38.

[58]African Union Commission 'Strategic plan 2009-2012' (2009).

[59]*Id* at 17.

- peace and security (increased visibility in the arena of conflict prevention, resolution and management).

The second is the extent of institutional development within the AU. While this has not translated into the effectiveness of the organisation, it has provided a road-map for eventual continental integration. The institutionalisation of integrative aspirations, especially the continental spread of the composition of these institutions and the continued debate on reforms, provides a sense of optimism and the incentive to carry on with the AU project.

The third relates to the nature of African *realpolitik.* Much premium is placed on consensus and solidarity. In this respect, it is the exception, rather than the norm, for a member state(s) to criticise the undemocratic features of another member state. When this happens, such member states are usually in an isolated space since the 'wisdom' of the majority is to provide a consensus framework, which often protects the government in question. The fact that member states who are critical of the undemocratic tendencies of other member states have not at any point threatened to create an alternative framework for addressing their dissensions or completely pull out of the AU, is an indication of the primacy of the politics of African solidarity.

The points raised above all indicate that the AU provides a 'comfort-zone' framework that will be difficult to dismantle. It is essential to note that while the dissolution of the AU may be impossible; this does not prevent any member or a group of members from renouncing their membership of the organisation.[60] The points discussed above make the membership of the organisation an imperative exercise (or ritual) for African states, a critical point that has ensured the non-renunciation of membership since its inception. Taking this reality into account, it is important to consider an alternative which is not based on the dissolution of the Union or renunciation of membership, but built on working outside the broader AU structure. Such mechanism should be based on the attainment of common purpose through shared norms and values. This is discussed below.

4.2 Option 2: Variable geometry

As noted in the foregoing, any call for the dissolution of the AU is, at best, illusionary. However, the case for an enabling instrument aimed at strengthening and further developing the enforcement and compliance mechanisms of the AU is well founded. The reality is that not all the members of the AU are prepared to subscribe to a new and more stringent order – an

[60]In terms of art 31 of the AU CA, any state that wishes to renounce its membership of the AU shall forward its application to the Chairman of the Commission, who shall then inform member states.

order which places strong emphasis on the ethos of constitutional democracy and values. The growing number of ageing 'sit-tight' rulers and civilian dictators, coupled with electoral manipulation across the continent, lends credence to this view.

What then is the way out of this conundrum? A feasible strategy is to retain the current AU structure, but create a framework through which member states who subscribe to shared democratic norms and values will be required to undergo a compulsory and rigorous test in order to become part of the integration process (see diagram below). This is an expression of the principle of variable geometry. Dashwood *et al*, described this principle – in relation to the EU – as:

> [d]esignated legal arrangements under which it is recognised that one or more member states may, in principle, remain permanently outside certain activities or practices being pursued within the institutional framework of the Union, either because they choose to do so or because they do not meet the criteria for participation.[61]

Without detracting from the cardinal and cherished goal of African unity, this principle would allow member states with similar ideals to pursue deeper integration at an appreciable pace.[62] So far, continental integration has failed largely because of the sentimental urge to lump together 'the good, the bad and the ugly'. Often, African leaders have stood silently by on the sideline, watching their colleagues engage in ruinous policies and the subjugation of their people. The prevalence of impunity is further fuelled by the absence of an effective and coordinated continental response mechanism – strong enough to employ punitive economic, military and political measures against belligerent member states. Non-compliance with treaty provisions lies at the heart of the AU challenges.

The creation of an 'Axis of democratic African states' will require a regulatory membership tool. This is where the African Peer Review Mechanism (APRM) becomes relevant.[63] Before discussing how the APRM can be used as a regulatory tool, it is necessary to provide an overview of the process.

Described as 'the most ambitious piece of innovation to have come out of Africa since decolonisation',[64] the APRM provides a framework for enhancing

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[61]Arnull, Dashwood, Ross and Wyatt *European Union law* (2006) 112. See also Warleigh *Flexible integration: Which model for the European Union?* (2002) 1-3.
[62]Dashwood n 61 above at 113.
[63]For a detailed discussion on the potential of the APRM as a regulative framework, see Fagbayibo 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' (unpublished LLD thesis, University of Pretoria 2010) 151-166.
[64]Hansungule 'The role of APRM in strengthening governance in Africa: Opportunities and constraints in implementation' Prepared for the Office of the United Nations Special Adviser

the quality of governance standards in Africa. In 2002, African leaders, by giving effect to the principles enunciated in the NEPAD document, launched the APRM as a voluntary[65] process of periodically reviewing the following standards in member states:[66]

- Democracy and political governance;
- Economic governance;
- Socio-economic development; and
- Corporate governance.

Participating member states are expected to undergo four kinds of review.[67] The first review is the base review, which is carried out within eighteen months of a country becoming a member of the APRM process. The second review is a periodic review which takes place every two to four years. Thirdly, a member country can, for its own reasons, ask for a review that is not part of the periodically mandated reviews. And lastly, participating Heads of State and Government, on sensing signs of an impending political and economic crisis in a member country, can call for a review. Each of the review process has five stages.[68]

While the APRM process remains voluntary, it has so far proved to be a viable platform for addressing wide-ranging governance issues affecting participating member states.[69] By including civil society in the process, the APRM presents both national and regional frameworks for discussing national matters, especially the strengthening of national institutions, while at the same time

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on Africa (2007) 2, available at: http://www.un.org/africa/osaa/reports/overview%20APRM%20paper%20Dec%202007.pdf (accessed 20 June 2011). See also Herbert and Gruzd *The African peer review mechanism: Lessons from the pioneers* (2008) 4.

[65]While membership is open to all member states of the AU, interested member states are required to accede to a 'Memorandum of Understanding on the APRM and the Declaration on Democracy, Political, Economic and Corporate Governance'. See African Peer Review Mechanism, AHG/235/XXXV111 Annex 11 at par 13.

[66]See generally Herbert and Gruzd n 64 above. See also NEPAD/HSGIC-03-2003/APRM /Guideline/OSCI at par 1.12.

[67]AHG/235/XXXV111 Annex 11 at par 4.

[68]Firstly, the APRM Secretariat prepares a background research paper on the country to be reviewed. Secondly, based on the background report, a country review team of about 15-25 experts are dispatched to the country in question. Thirdly, after the visit, the team is expected to draft its findings, which is then sent to the government of the country under review for comment. Fourthly, the Secretariat submits the final country review report to participating heads of state and government for peer review. Lastly, six months after the peer review, the report is tabled before AU institutions such as PAP, ECOSOCC, African Commission for Human and Peoples' Rights, the Peace and Security Council, and Regional Economic Communities (RECs). See *id* at pars 18-25.

[69]For an assessment of the APRM process, see Herbert and Gruzd n 64 above. See also Akoth 'The APRM process in Kenya: A pathway to a new state?' (2007) available at http://www.afrimap.org/english/images/report/APRM_Kenya_EN.pdf (accessed 20 June, 2011).

highlighting the importance of public participation in national issues. As at June 2011, only fourteen countries,[70] out of the thirty-one countries that have acceded to the APRM by signing the Memorandum of Understanding (MoU),[71] have completed the review process.

Having discussed the APRM, the next question to consider is to what extent the APRM can serve as an effective politico-legal regulative framework. Any discussion on the role of the APRM in regulating AU membership must start with the discussion of the legal nature of the process. At the core of this discourse is the issue of the binding nature of the review process. As it is currently configured, the APRM is a voluntary process which lacks the legal teeth to ensure compliance. To illustrate: where any of the participating states fails to engage in a broad-based consultative process, there is no legal instrument to ensure that these provisions are complied with.[72] Although paragraph 24 of the Base Document sketches the possibility of imposing punitive measures against a defaulting participating country, it is at best vaguely written in that no specific punitive measures are listed.[73]

To address this, it is essential to condense of the APRM constitutive documents into a single treaty-like document to be ratified by participating countries. This 'APRM Treaty' must explicitly state, amongst other provisions, the legal consequences of non-compliance, effective enforcement mechanisms, the regulatory nature (compulsory qualification process) of the treaty, and the legal personality of the APRM institution. The efficacy of the APRM legal framework lies in the political will of member states to ensure its effective implementation. While the Heads of States and Government retain

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[70]Algeria, Benin, Burkina Faso, Ethiopia, Ghana, Kenya, Lesotho, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Africa, Uganda available at http://www.uneca.org/aprm/CountriesStatus.asp (accessed 31 July 2011).

[71]Algeria, Angola, Benin, Burkina Faso, Cameroon, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Republic of Congo, Kenya, Lesotho, Liberia, Mali, Malawi, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tanzania, Uganda, Zambia. See *id.*

[72]Hansungule n 64 above at 8.

[73]Paragraph 24 of the APRM Base Document states that: 'If the Government of the country in question shows a demonstrable will to rectify the identified shortcomings, then it will be incumbent upon participating Governments to provide what assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed. However, if the necessary political will is not forthcoming from the Government, the participating states should first do everything practicable to engage it in constructive dialogue, offering in the process technical and other appropriate assistance. If dialogue proves unavailing, the participating Heads of State and Government may wish to put the Government on notice of their collective intention to proceed with appropriate measures by a given date. The interval should concentrate the mind of the Government and provide a further opportunity for addressing the identified shortcomings under a process of constructive dialogue. All considered, such measures should always be utilised as a last resort.'

the role of ceremonial purveyor of the peer review process, efforts should be made to transfer the real powers to an independent body – for example the APR Panel. Such body should be empowered to make binding decisions on the necessary disciplinary measures for non-compliance.

It must be emphasised that the idea of an 'Axis of democratic African states' is not aimed at perpetually locking out certain African states from the integration project. Instead, it is geared towards entrenching a culture of democratic practice across the continent. It seeks to enthrone uniformity of standards and practice, an essential requirement for a successful regional integration process. Upon the fulfilment of laid down requirements, states which initially fail to meet the required criteria may then decide to join the process. The members of the proposed axis will remain part of the broader AU framework, but will be free to embark on projects of common interests.

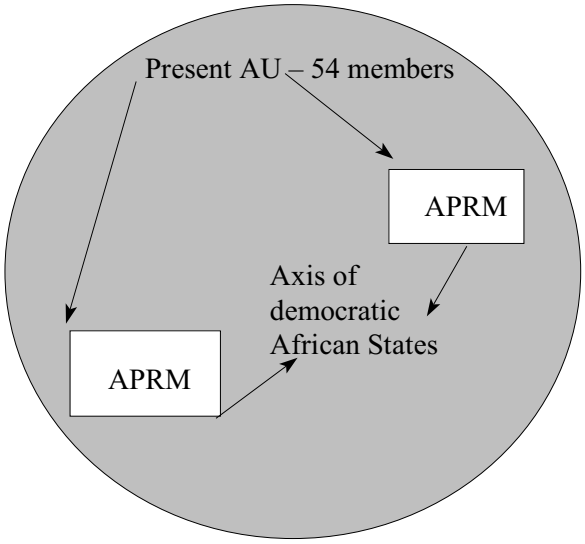

Diagram 1: 'Axis of democratic African states'
Source: Own construction[74]

The shaded area in the diagram represents the prevailing configuration of the AU. It shows that this framework will remain unchanged. However, the arrow pointing at the APRM box implies that member states will have to first conform to the compulsory APRM 'examination' before being allowed to be part of the proposed 'Axis of democratic African states'.

[74]Fagbayibo n 63 above at 161.

5 Conclusion

The current praxis of regional integration in Africa, at both sub-regional and continental levels, especially as it relates to membership has clearly proved unworkable. As member states are at varying levels of democratic development and thus have different understandings of institutional objectives, the disregard of salient transnational democratic values has become the norm rather than the exception.

At a symbolic level, the AU plays an important role, as it represents the institutionalisation of the much cherished goal of pan-African unity. Symbolism is, however, not enough for attaining concrete objectives. This is why the re-evaluation of the current framework is essential.

As the AU has assumed a significant place in African *realpolitik,* the key test is how to balance, on one hand, the importance of African unity, and, on the other, the realisation of key objectives. This is what this article has attempted to achieve. The suggestion that democratic African states should create an alternative framework for addressing common goals should be seen within the context of this balancing act. As Akonnor aptly puts it, 'it is better to have a united empowered and independent Africa, comprising some African states rather than have a united but weak and dependent Africa, comprising all African states'.[75]

A democratic AU is not a magic wand for solving all the problems facing the continent, it does, however, represent a serious attempt to reposition the continent for a sustainable and value-oriented integration agenda. An organisation built around shared democratic norms and values is better placed to ensure uniform compliance with stated goals and objectives. This includes the capacity to supervise the adherence to democratic norms at the national level.

Babatunde Fagbayibo[*]
Unisa

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[75] Akonnor 'Stuffing old wine in new bottles: The case of the African Union' in Mazama (ed) *Africa in the 21st Century: Towards a new future* (2007) 197.

[*] LLB (UNISA), LLM, LLD (Pretoria). Senior Lecturer, Department of Public, Constitutional and International Law, University of South Africa. fagbabo@unisa.ac.za.