Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems Under the African Economic Community Treaty

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Economic integration has been promoted as one of the keys to the economic development of Africa. The continent is plagued by under-development, conflicts, fragmented markets and insignificant cross-border commercial relationships. The benefits of integration in the form of expanded markets, enhanced competition, and factor mobility can potentially transform the continent. Currently there are efforts towards continent-wide economic integration through the African Economic Community (AEC). Law plays a significant role in any economic integration effort. An examination of the treaty and protocols of the Community, however, does not reveal a clear articulation of the role of law in the economic integration efforts of the Community even though the treaty establishing the Community enjoins member states to observe "the" legal system of the Community. Drawing on the legal positivist conception of a legal system and the experiences of the European Union, this Article examines the potential for this provision not only to situate law at the heart of the Community's activities, but also to empower the AEC in its relations with the member states. This Article discusses the implication of the existence of the AEC's legal system for the sovereignty of member states. It also explores ways to strengthen this legal system and examines the relationship that must exist between the legal system of the Community and the legal systems of member states.

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I. INTRODUCTION

A. *The Imperative of Economic Integration in Africa*

Economic integration has been defined "as the elimination of economic frontiers between two or more economies."[1] It involves the removal of obstacles to trans-boundary economic relationships in fields such as trade, movement of labour, services, and the flow of capital. Economic integration is expected to promote efficiency, enhance market access, and generally improve the welfare of the people in the participating economies. The success of the European Union and the North American Free Trade Agreement (NAFTA), while debated, is evidence of this. Various stages have been identified in the process of economic integration. According to Bela Balassa, economic integration passes through five stages.[2] These stages are "a free trade area, a

1. Jacques Pelkmans, *The Institutional Economics of European Integration*, *in* 1 INTEGRATION THROUGH LAW bk. 1, 318 (Mauro Cappelletti et al. eds., 1986).

2. BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 2 (1962). Balassa describes the stages thus:

> In a free-trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against nonmembers. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with nonmember countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove

customs union, a common market, an economic union, and complete economic integration."[3] Although this model has been criticised, it is still widely followed by economists[4] and has shaped many economic integration initiatives including that of the African Economic Community (AEC).

Economic integration may be characterised as negative or positive integration. "[*N*]*egative* integration denotes the removal of discrimination in national economic rules and policies under joint and authoritative surveillance."[5] It involves limiting national economic power and decision-making. This type of integration is prevalent in free trade areas, custom unions, and common markets. These are the "thou shall not" stages of integration. Positive integration, on the other hand, involves "the transfer of public market-rule-making and policy-making powers from the participating polities to the union level."[6] It is at this juncture that one can expect, for example, the unification of monetary and fiscal policies. The impact of negative integration on national sovereignty may be minimal, although it is not insignificant. Hence it is easily negotiable, but the same cannot be said for positive integration. For example, while the presence of supranational institutions significantly contributes to the success of negative integration efforts, they are indispensable in positive integration.

The importance of economic integration in Africa and the urgency with which it must be pursued have been well documented. In the words of the Economic Commission for Africa:

> It is reasonable to assume that the most significant trend in this new millennium is global competitiveness. . . . [N]ations are moving to integrate their economies with those of their neighbors. . . .
>
> This shift is nowhere more urgent than in Africa, where the combined impact of our relatively small economies, the international terms of trade, and the legacy of colonialism, mis-rule, and conflict has meant that we

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> discrimination that was due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supra-national authority whose decisions are binding for member states.

Id.

3. *Id.*
4. Pelkmans, *supra* note 1, at 323, 324-26.
5. *Id.* at 321.
6. *Id.*

> have not yet assumed our global market share—despite our significant market size.[7]

It is envisaged that uniting the economies of Africa will permit economies of scale. This union will make African economies more competitive, provide access to wider trading and investment environments, promote exports to regional markets, and provide the requisite experience to enter global markets. Integration will also provide a framework for African countries to cooperate in developing common services for finance, transportation, and communication.[8]

Although the need to integrate the economies of Africa is widely accepted, the nature of that integration remains contested. While some have advocated regionalism, others have emphasised the need for continent-wide integration. This debate in Africa could be seen as part of the larger debate between regionalism and multilateralism.[9] Regionalism has its benefits; it allows for region-specific initiatives. The relatively small size, in terms of the number of countries engaged, makes for easy management and decision-making in regionalism. Competition among regional economic communities may also be an avenue for development through efficiency gains.

Regionalism in Africa also has its disadvantages. It may reduce the commitment on the part of the member states to ensure the emergence of continent-wide integration. Multiple commitments to regional communities resulting from multiple memberships of such groupings may also lead to non-compliance. Additionally, countries with relatively large and developed economies may benefit at the expense of the smaller regional members. Africa comprises approximately fifty-three states. An attempt at continent-wide integration presents monumental challenges. It is not the purpose of this Article to assess the merits or demerits of a regional or continent-wide approach to economic integration in Africa. The compromise adopted has been to use the

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7. ECON. COMM'N FOR AFR., ASSESSING REGIONAL INTEGRATION IN AFRICA, at ix (2004), *available at* http://www.uneca.org/aria/ARIA%20English_full.pdf.

8. ECON. COMM'N FOR AFR., ECONOMIC REPORT ON AFRICA 2002: TRACKING PERFORMANCE AND PROGRESS 2-11 (2002), *available at* http://www.uneca.org/era2002/ERA2002.pdf.

9. *See generally* Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419 (2001); Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, *in* TRADING BLOCS, ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS 3 (Jagdish Bhagwati et al. eds., 1999); MAURICE SCHIFF & L. ALAN WINTERS, REGIONAL INTEGRATION AND DEVELOPMENT 209-59 (2003).

regional economic communities as building blocks for a continent-wide community.

From the legal perspective, the approach to economic integration adopted in Africa raises important issues which have yet to be addressed. These issues include the legal status of Community institutions and law within the legal systems of the member states and the enforcement of Community law. Integration also raises issues concerning the effectiveness of the institutions created to lead the integration efforts, the position and role of individuals in Africa's economic integration efforts, and the coordination and harmonisation of the laws of the member states. These issues form part of a more profound and broader legal question that bedevils all economic integration initiatives: What is, or should be, the legal relationship between the economic community and the member states? This Article suggests that the economic integration initiatives in Africa have not fully addressed all of these issues. The success of these integration initiatives partly depends on how well these issues are articulated and addressed.

B. The African Economic Community: An Introduction

The history of continent-wide economic integration in Africa dates back to the formation of the Organisation of Africa Unity (OAU) in 1963.[10] One purpose of the OAU was to coordinate and intensify cooperation efforts between the member states to improve the lives of their people.[11] To this end, member states were enjoined to "coordinate and harmonise their general policies" in economic and other fields.[12] It was not until 1980, however, that a major continent-wide step was taken towards economic integration. Before 1980, resolutions and declarations were made to promote integration, and various regional economic communities, operating at different levels of integration, emerged.[13] At its Extraordinary Summit in 1980, the OAU adopted the Lagos Plan of

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10. Charter of the Organization of Africa Unity, May 25, 1963, 2 I.L.M 766 [hereinafter Charter]. The OAU has been replaced with the African Union. *See* Constitutive Act of the African Union, July 11, 2002, *reprinted in* 12 AFR. J. INT'L COMP. L. 629-40 (2000) [hereinafter Constitutive Act]. For a discussion on the structure, characteristics, and workings of the African Union, see generally Konstantinos D. Magliveras & Gino J. Naldi, *The African Union—A New Dawn for Africa?*, 51 INT'L & COMP. L.Q. 415 (2002); Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT'L L.J. 69 (2002-2003); Symposium, *The African Union and the New Pan-Africanism: Rushing To Organize or Timely Shift?*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2003).

11. Charter, *supra* note 10, art. 2(1)(b).

12. *Id.* art. 2(2).

13. Examples are the Economic Community of West African State (ECOWAS), established in 1975, and the East African Community (EAC), established in 1967.

Action which culminated with the signing of the Treaty Establishing the African Economic Community (AEC Treaty).[14] The AEC Treaty came into force in May 1994. The Treaty envisages an integrated economic area covering all of Africa.[15] Following the establishment of the African Union (AU), the AEC became an integral part of the constitutional structure of the AU.[16]

The objectives of the AEC include the promotion of economic development and the integration of economies in order to increase self-sufficiency, the promotion of endogenous and self sustained development, and fostering the gradual establishment of the Community through coordination and harmonisation among existing and future economic communities.[17] To ensure the attainment of these objectives, the Community is enjoined to ensure: (1) the harmonisation of national policies, particularly in the fields of agriculture, industry, transport and communication, energy, natural resources, trade, money and finance, human resources education, culture, and technology; (2) the adoption of a common trade policy with regard to third-party states; (3) the establishment and maintenance of a common external tariff; (4) the establishment of a common market; (5) the gradual removal of obstacles among member states to the free movement of persons, goods, services, and capital; and (6) the right of residence and establishment.

The AEC Treaty provides for the gradual establishment of the Community through six stages over a period of thirty-four years.[18] The first stage involves the "[s]trengthening of existing regional economic communities."[19] The second involves the stabilisation of tariff and non-tariff barriers, custom duties and internal taxes at the level of the regional economic communities, and the strengthening of sectoral integration at the regional and continental level. The third stage envisions the establishment of a free trade area and a customs union at each regional level. The fourth focuses on the coordination and harmonisation of tariff and non-tariff systems among the regional economic communities with a

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14. Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 [hereinafter AEC Treaty].

15. *Id.* pmbl., at 1251.

16. *Id.* art. 98, at 1281. Constitutive Act, *supra* note 10, art. 33. In this Article, unless a contrary provision exists in the Constitutive Act, reference will be made to the institutional structures established under the AEC Treaty for consistency and clarity. On some of the difficulties of the merger, see generally Craig Jackson, *Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 139, 140 n.3 (2003).

17. AEC Treaty, *supra* note 14, art. 4, at 1253.

18. *Id.* art. 6(1), at 1254.

19. *Id.* art. 6(2), at 1254.

view to establishing a continental customs union. The fifth stages calls for the establishment of an African common market through the adoption of common policies, harmonisation of monetary, financial, and fiscal policies, and the application of the principles of free movement of persons and right of residence and establishment. Finally, the sixth stage focuses on the strengthening of the African common market; the application of free movement of people, goods, capital, and services; the integration of the social, economic, political, and cultural sectors; the establishment of a single domestic market; a Pan-African Economic and Monetary Union; a Pan-African Parliament; and a single African currency, among other things.[20] The above stages follow the Balassian model of economic integration.

A notable feature of the framework for integration under the AEC Treaty is the use of regional economic communities as building blocks for the continent-wide Community. With a membership of over fifty states, this approach ensures some measure of manageability in the initial development of the Community. There are about fourteen such regional economic communities at various stages of development in Africa.[21] These communities have their separate institutions, members, objectives, and legal personalities. It is not uncommon to find a state that is a member of more than one of these communities.[22] Sometimes one can also sense a level of intraregional suspicion among these communities. As examined below, these pose significant legal and jurisdictional challenges to the success of the AEC, not to mention the adverse impact they can have on economic decision-making by individuals.[23]

Another feature of note is the conspicuous absence of an emphasis on the role of law in the economic integration process. Indeed, throughout the sixty-five page treaty, the word "law" appears only three times.[24] Of the seven specialised technical committees established by the

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20. *Id.* art. 6, at 1254-55.

21. These include the ECOWAS, the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the EAC, the Economic Community of Central African States (ECCAS), and the Union de Maghreb Arabe (UMA).

22. *See* ECON. COMM'N FOR AFR, *supra* note 7, at x. The Economic Commission for Africa has noted that "of the 53 African countries, 26 are members of two regional economic communities, and 20 are members of three. One country belongs to four, while only six maintain membership in a single community." *Id.*

23. P. Kenneth Kiplagat, *Jurisdictional Uncertainties and Integration Process in Africa: The Need for Harmony*, 4 TUL. J. INT'L & COMP. L. 43 (1995-1996); Jackson, *supra* note 16, at 151-54.

24. *See* AEC Treaty, *supra* note 14, pmbl., arts. 18(2), 35(1)(a), at 1250, 1259, 1263. Harmonisation of law is only explicitly envisaged in the harmonisation of the "legal text" regulating existing stock exchanges. *Id.* art. 44(2)(d), at 1266. The AEC Treaty may generally be

AEC Treaty, none are specifically mandated to deal with the legal issues of integration.[25] Arguably, these committees may deal with legal issues in their separate departments, but such a fragmented approach may lead to unnecessary difficulties in the integration process and is not optimum. Such an approach fails to appreciate the need for a comprehensive legal framework. Unless there is proper coordination among the various specialised committees, it may lead to incomplete or contradictory solutions.

Assigning a minimal role to law is symptomatic of economic integration initiatives in Africa. This has been attributed to the overbearing influence of politicians and the dominance of economists in the process.[26] Economic integration initiatives have focused on economic analysis and paid little attention to the development of institutional, political, and legal arrangements.[27] If Africa is to realize a strong and successful economic community, this trend must change. It is encouraging that one of the principal responsibilities of the Committee on Coordination established under the Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities is to coordinate and harmonise "integration legislation."[28] It will subsequently be argued that the committee should interpret this function broadly to encompass an examination of the existing legal systems in Africa and determine how best to advance the goals of the AEC.

Notwithstanding its minimal emphasis on law, the AEC Treaty enjoins member states to "observ[e] . . . the legal system of the Community."[29] However, one cannot be certain of the true character of this legal system from the AEC Treaty; is it an aggregation of the legal systems of the member states, the regional economic communities, or a distinct legal system that pre-empts the others? With regard to the legal status of the AEC, all that is provided is that it forms an integral part of the OAU (now AU).[30] However, the Constitutive Act of the AU does not

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criticised for its lack of detail and the relegation of detail to protocols with the attendant negotiating and ratification problems.

25. *See id.* art. 25, at 1261.

26. P. Kenneth Kiplagat, *Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience*, 15 NW. J. INT'L L. & BUS. 437 (1995).

27. P. Kenneth Kiplagat, *An Institutional and Structural Model for Successful Economic Integration in Developing Countries*, 29 TEX. INT'L L.J. 39, 50-52 (1994).

28. Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities, art. 7(3)(b), *reprinted in* 10 AFR. J. INT'L & COMP. L. 157, 161 (1998) [hereinafter Protocol on the Relationship].

29. AEC Treaty, *supra* note 14, art. 3(e), at 1252.

30. *Id.* art. 98, at 1281.

purport to create a new legal order distinct from that of its members, which leaves many unanswered questions about the existence and character of the Community's legal system.[31] Affirming the notion that the AEC constitutes a "legal system" could have a potentially transformative and empowering effect; however, this does not appear to have captured the attention of AEC commentators. The focus of academic writings thus far has been on the legal personality or status of the AEC,[32] which is an inferior concept to that of a "legal system" both in terms of its scope and effect.

This Article attempts to fill the void in the discourse. It discusses the existence of the AEC as a legal system and examines the relationship between the Community's legal system, its law, and the domestic legal system and laws of the member states. Part I provided an introduction to the AEC. Part II examines the idea of the Community as a legal system and notes the challenges member states' sovereignty poses to the existence of the Community. Part III continues with a discussion of how the effectiveness of the Community's legal system can be strengthened through the grant of private right of action and the instrumental role of an activist court of justice. Part IV examines aspects of the relationship between the norms of the Community and those of member states. The supremacy of Community law, the need for harmonisation between national laws and Community law, the enforcement of Community law, the relationship between the Court of Justice of the African Union (AU Court of Justice) and the national courts of member states are addressed in Part IV. Part V examines the relationship between the Community and various regional economic communities. Part VI provides some concluding thoughts on the AEC. Throughout this Article, comparative lessons are drawn from the history of the European Union. The European experience offers invaluable lessons for the AEC, because the AEC is modelled after the European Union.[33] This comparative approach does not deny the differences in both the historical circumstances and the

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31. Although article 1 of the General Convention on the Privileges and Immunities of the Organisation of African Unity (1965) confers judicial personality on the organisation with the capacity to enter into contracts and institute legal proceedings, this is not enough to constitute a legal system. *See generally* M.A. Ajomo, *International Legal Status of the African Economic Community*, *in* AFRICAN ECONOMIC COMMUNITY TREATY, ISSUES, PROBLEMS AND PROSPECTS 40 (M.A. Ajomo & Omobolaji Adewale eds., 1993).

32. *See* Udombana, *supra* note 10, at 81-83; Tiyanjana Maluwa, *Reimagining African Unity: Preliminary Reflections on the Constitutive Act of the African Union*, 9 AFR. Y.B. INT'L L. 3, 32-33 (2001); Ajomo, *supra* note 31, at 40. *But see* Udombana, *supra* note 10, at 128-32 (discussing the relationship between legal systems of the AU and its members, and concluding that AU law will bind member states and that natural, legal persons are under their jurisdiction).

33. *See* Jackson, *supra* note 16, at 139-40.

extent of development between the two communities.[34] Indeed, the AEC is still in its formative stages. The goal is to identify and analyze mechanisms that led to success for the European Union and determine if and how they are reflected in the AEC Treaty and whether they can be adopted by the AEC.

II. THE AFRICAN ECONOMIC COMMUNITY'S LEGAL SYSTEM: DOES IT EXIST?

A. *Elements of a Legal System*

Four elements are generally considered necessary for the existence of a legal system or legal order.[35] First, rules for conduct must be present. Second, there must be entities to which the rules apply or relate. These are the subjects of the legal system. The legal system confers benefits and imposes burdens on the subjects. Third, there must be authority to identify the rules that form part of the legal system. The final element is an obligation to obey the norms of the legal system.[36] This obligation is enforceable through both public and private means.

These elements do not exhaust what may actually comprise a legal system. For example, Dworkin has ably demonstrated the importance of principles and policies in the operation of a legal system and how an undue emphasis on rules provides an inadequate account of what constitutes a legal system.[37] Additionally, the obligation to obey the laws of the legal system may be attributed to the legal subjects' appreciation of the benefits obedience brings, rather than any inherent force of the law. This suggests that cooperation and compromise are more effective methods for eliciting compliance with the legal system than any coercive method. These are important considerations especially when one tries to apply these models of legal systems to institutions consisting of sovereign states, such as the AEC.

Although philosophers differ on the characteristics of a legal system, there is near unanimity among legal positivists on the requirement of an ultimate and unrivalled source for the norms of the

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34. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811, 852-55 (2002-2003).

35. *See generally* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF THE LEGAL SYSTEM (1970); J.W. HARRIS, LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS OF *LEGAL RULE* AND *LEGAL SYSTEM* (1979); D.M. McRae, *Sovereignty and the International Legal Order*, 10 W. ONT. L. REV. 56, 67 (1971).

36. D.M. McRae, *supra* note 35, at 67.

37. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967-1968).

legal system. The norms from this source cannot be contradicted or made subordinate to any other norm. H.L.A. Hart, in *The Concept of Law*, described legal systems as a unity of primary and secondary rules, the latter consisting of the "rule of recognition."[38] The rule of recognition helps to identify other rules that are part of the legal system's set of norms.[39] John Austin wrote that the legal system must contain a determinate human superior, a "sovereign," who will issue commands to his subjects.[40] Hans Kelsen also conceived of legal systems as a series of hierarchical norms that rest on the "grundnorm," which is the ultimate source of authority.[41] The existence of an ultimate authority is not enough; however, its absence is fatal. For the legal system to exist, its subjects must generally adhere to its rules. Occasional infractions of specific rules do not necessarily negate the existence of the entire legal system.

B. The African Economic Community as a Legal System

The existence of rules and rule-making institutions is an essential component of a legal system. The AEC, like any domestic legal system, has these institutions. Three principal rule-making institutions constitute the AEC. They are the Assembly of Heads of State or Governments (Assembly), the Council of Ministers (Council), and the Court of Justice (AEC Court of Justice). The AEC Treaty and protocols constitute the basic source of law within the AEC. Decisions of the Assembly and regulations of the Council are also considered sources of law. The judgments of the AEC Court of Justice represent another source of Community law. As discussed below, their value as precedents remains debatable. The general principles of law recognised by member states as well as general principles of international law, are also important sources of Community law.

However, a legal system is more than a set of norms. There must be an ultimate authority whose acts directly bind its subjects and cannot be

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38. H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1994). The other secondary rules are the "rule of change" and the "rules of adjudication." *Id.* at 96-97.

39. *Id.* at 94-95. *See generally* David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444 (2000) (applying Hart's theory on the legal system to the World Trade Organization); Mark L. Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System*, 17 CORNELL INT'L L.J. 1 (1984); F.E. Dowrick, *A Model of the European Communities' Legal System*, 3 Y.B. EUR. L. 169 (1983).

40. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 212-13 (Wilfrid R. Rumble ed., 1995).

41. HANS KELSEN, GENERAL THEORY OF NORMS (Michael Hartney trans., Clarendon Press 1991) (1979).

contradicted or subordinated either by those subjects or any other external source. In the AEC, it may be said that the member states (and arguably, their nationals) are the subjects of the Community's laws. The absence of an ultimate authority represents a serious challenge to the effectiveness of a legal system and could even threaten its very existence. It is with regard to an ultimate authority that the AEC, as a community formed by sovereign states, faces an enormous challenge. This is the challenge of sovereignty of the member states.[42]

States are sovereign and have their own legal systems. They seldom surrender their sovereign power. The norms emanating from the sovereign, directly bind the subjects of the legal system and cannot be contradicted or subordinated by any other norm within the system. Surrendering sovereignty allows for the direct application and supremacy of norms generated by institutions external to the sovereign. Surrendering sovereignty is not merely a delegation or abdication of decision-making powers to external institutions. While a political association of states can exist without even a partial surrender of sovereignty, no strong economic community or union may exist under such circumstances. For example, it is impossible to envisage a common market in which member states have not ceded some measure of sovereignty and created a new legal order. Integrated economies like the European Union, Canada, and the United States exist because of the whole or partial surrender of sovereignty by the member states. Each economic community has a legal system, be it federal or federal-like, which enjoys supremacy over some of the member states' laws. Surrendering some measure of sovereignty by the member states is necessary to sustain the economic integration and provides legitimacy to the economic community's legal system.

The AEC Treaty is silent on the issue of member states' sovereignty and the supremacy of the Community's legal system. Indeed, the word "sovereignty" is not used in the AEC Treaty,[43] although "sovereign equality" is affirmed as one of the principles of the AU under its Constitutive Act.[44] Consequently, one can only draw inferences about the role of sovereignty from the text of the AEC Treaty. For example, one can infer that member states are required to cede some measure of

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42. Perhaps no concept defies definition more than sovereignty. In this Article, the term connotes the notion that a state's legal system is supreme and independent of other systems such that no norm outside of that state's legal system can claim to be directly applicable within or override norms generated by the state's legal system.

43. AEC Treaty, *supra* note 14.

44. Constitutive Act, *supra* note 10, art. 4.

sovereignty, because they are enjoined to observe the community's legal system. As noted above, the presence of an ultimate source of authority is an indispensable element of a legal system. By affirming and declaring that they will observe the legal system of the Community, therefore implicitly acknowledging that such a system exists, it is arguable that member states have accepted the Community as at least a partial sovereign. These characteristics include its ability to bind its subjects and to override the "private" norms of the subjects.

The European Court of Justice (ECJ) inferred from the text and purpose of the European Economic Community treaty (Treaty of Rome), the existence of the European Community as a legal order distinct from individual member states. Unlike the AEC Treaty, there was no express provision in the Treaty of Rome declaring the European Economic Community as a legal system. In *Van Gend en Loos*[45] the ECJ held:

> The purpose of the E.E.C. Treaty—to create a Common Market, the functioning of which directly affects the citizens of the Community—implies that this Treaty is more than an agreement creating only mutual obligations between the contracting parties. This interpretation is confirmed by the preamble to the Treaty which, in addition to mentioning governments, affects individuals.
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> The creation of organs institutionalising certain sovereign rights, the exercise of which affects member-States and citizens is a particular example. In addition, the nationals of the States, united into the Community, are required to collaborate in the functioning of that Community, by means of the European Parliament and the Economic and Social Council. . . . We must conclude from this that the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member-States but also their nationals.[46]

This judgment illustrates that even in the absence of the express mentioning of the AEC as a legal system, inferences can be drawn to support a claim that the AEC constitutes a new legal system with sovereign characteristics distinct from that of its members. The preamble to the AEC Treaty acknowledged the need to secure the well-being of the people.[47] Article 14 established a Pan-African Parliament to ensure that the people of Africa were fully involved in the economic development

45. Case 26/62, Van Gend en Loos v. Neder-Landse Tariefcommissie, 1963 C.M.L.R. 105 (1963).

46. *Id.* at 129.

47. *See* AEC Treaty, *supra* note 14, pmbl., at 1250.

and integration of the continent.[48] The AEC Treaty also established institutions with the power to make decisions which are binding on and enforceable automatically in the member states.[49] This implies that these decisions are enforceable without any national implementation measures such as incorporation by act of parliament. The existence of these institutions represents an implicit derogation from national sovereignty.

The existence of an economic community as a legal order has both legal and economic benefits. One legal benefit is that it reduces national government interference with the community. Consequently, this benefit performs a constitutionalising function by granting the community the autonomy and independence it needs to pursue its objectives. An economic benefit is that it stabilises the level of economic integration and reduces the risk and uncertainty associated with intra-community economic transactions. Economic activity within the community is subject to only one legal regime independent of national legal systems. Thus, it promotes economic interaction and development within the community.[50] Socially, the fact that all people are living under one legal order may foster a sense of belonging and unity among inhabitants of the community.

If these benefits are not to elude the AEC, not only must the integrity of its legal system be paramount, but its subject states, and arguably individuals, must respect the laws and institutions of the system. Without these, the success of the Community cannot be guaranteed. The goals envisaged by the AEC Treaty require a strong role for law and effective institutions. This can be facilitated by the surrender, or partial surrender, of sovereignty to the Community and its institutions. It has been noted:

> The depth of legislative coordination required to achieve these economic goals [the goals of a common market, including that of free movement of people, capital, and services] would appear to require the member states of a common market to cede large portions of sovereignty to an institutional structure capable of not only implementing such integration but also policing whether member states follow through with their obligations.

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48. *Id.* art 14, at 1258. *See also* Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, Mar. 2, 2001, *reprinted in* 13 AFR. J. INT'L & COMP. L. (2005); Konstantinos D. Magliveras & Gino J. Naldi, *The Pan-African Parliament of the African Union: An Overview*, 3 AFR. HUM. RTS. L.J. 222, 222-23 (2003). A recently released judgment of the East Africa Court of Justice reveals the crucial role these community parliaments can play in the integration process. *See* Mwatela v. East African Community, Application No. 1 (E. Afr. Ct. Justice 2005).

49. *See* AEC Treaty, *supra* note 14.

50. Pelkmans, *supra* note 1, at 350.

> Without a strong institutional structure a common market could only be created by countries capable of achieving a political consensus on the content and implementation of each common commercial policy.[51]

There are times when strong institutions, endowed with sovereign powers, are needed to break a political deadlock.

Some African governments are beginning to realise the need to relinquish sovereignty at times, in order to promote economic development. A case in point is the West African Gas Pipeline Project, which required cooperation between Ghana, Nigeria, Togo, Benin, and the West African Gas Pipeline Company Limited. Its aim is to provide access to natural gas for power generation. An examination of the powers and legal regime of the West African Gas Pipeline Authority, which manages the project, shows an unprecedented willingness of these governments to allow for a displacement of their separate legal systems.[52] Additionally, the 1999 Treaty Establishing the East African Community (EAC Treaty) grants sovereignty to East African Community (EAC) institutions and organizations. The EAC Treaty elevates community law above national laws.[53] This initiative by the EAC represents a great leap towards the collective exercise of sovereignty through a distinct institution. It is an approach worth emulating on the rest of the continent.[54] It also represents a significant advancement in the status of international law. Even within the European Union, where the principles of supremacy of community law and direct effect are accepted doctrines, these principles still have "the status of *unwritten principles of law*."[55] Article 10(1) of the Draft Treaty Establishing the Constitution of Europe, which provides: "The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States,"[56] awaits the adoption of the

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51. Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 867 (1996-1997).

52. West African Gas Pipeline Project International Project Agreement, cls. 7, 8, 9, 12 (May 22, 2003), http://wagpco.gap.chevrontexaco.com/pdf/English/IPA/WAGP%20Project%20International%20Project%20Agreement%20-%20English.pdf.

53. Treaty Establishing the East African Community, art. 8(4), *opened for signature* Nov. 30, 1999, *available at* http://www.eac.int/documents/EAC%20Treaty.pdf [hereinafter EAC Treaty]. *See generally* Wilbert T.K. Kaahwa, *The Treaty for the Establishment of the New East African Community: An Overview*, 7 AFR. Y.B. INT'L L. 61 (1999).

54. *See generally* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003).

55. Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 177, 194 (Paul Craig & Gráinne de Búrca eds., 1999).

56. European Convention, Draft Treaty Establishing a Constitution for Europe, art. 10 (July 18, 2003), http://european-convention.eu.int/docs/Treaty/CV00850.en03.pdf.

Constitution. The Treaty on the Organisation for the Harmonisation of Business Laws in Africa (OHADA Treaty)[57] represents another example of the willingness of African governments to relinquish sovereignty to promote economic development. Under this treaty, Organization for the Harmonisation of Business Laws in Africa (OHADA) member states have given up some degree of national sovereignty in order to establish a single cross-border regime of uniform business laws called the Uniform Acts. The "Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws."[58] Thus, these laws are automatically and immediately applicable within the domestic legal systems of each country and abrogate national laws that are contrary to the OHADA laws.[59] The OHADA Treaty also establishes the Common Court of Justice and Arbitration (Common Court) as the final authority on the interpretation and enforcement of the OHADA Treaty, regulations, and the Uniform Acts.[60] The Common Court hears appeals on referral from national courts or directly by aggrieved individuals.[61] The decisions of the Common Court are "final and conclusive" and are entitled to enforcement and execution within the territories of member states.[62]

Given the appalling underdevelopment and marginalisation of the continent, African governments should begin to realise the urgency with which they must put aside their national and personal interests to forge a common course through the AEC. Just as the threat of Communism and the devastations caused by World War II propelled Europe to unite, so too should the tragic conditions in Africa motivate leaders to work together. Africa's underdevelopment and marginalisation in the face of world prosperity should be enough, without any external force, to propel African governments to unite and pursue a common economic agenda. The benefits of economic integration elsewhere in the world should encourage leaders in Africa to approach the AEC integration initiative with zeal.

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57. Treaty on the Harmonisation of Business Law in Africa, Nov. 1, 1997, *available at* http://www.ohada.com/traite.php [hereinafter OHADA Treaty].

58. *Id.* art. 10.

59. *See* Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Case Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 55 n.151 (2005) (citing to decisions from the Court of Justice of OHADA).

60. OHADA Treaty, *supra* note 57, art. 14.

61. *Id.* art. 15.

62. *Id.* art. 20.

The existence of the AEC as a legal system or a new legal order, distinct from the legal systems of the member states, is evident from the text of the AEC Treaty and its institutional arrangements. The distinct legal system is necessary for the attainment of the purposes of the AEC. That member states of the AEC are enjoined to observe "the legal system of the Community," makes any claim that the Community does not have a distinct legal system untenable. Such a claim goes against the text of the AEC Treaty. It fails to appreciate the unique place community legal systems have in economic integration agreements.[63] As a legal system, with the member states as its primary subjects, the AEC should be the ultimate source of law in matters within its competence. Unlike individual subjects of a national legal system, states as subjects of the Community's legal system possess sovereign attributes and are the ultimate source of legal norms within their own legal systems. Defining the nature of the relationship between these two legal systems is paramount. This issue is discussed in Part IV of this Article.

III. STRENGTHENING THE AFRICAN ECONOMIC COMMUNITY'S LEGAL SYSTEM

A. *Introduction*

The existence of a legal system is not enough to guarantee its effectiveness. There must be mechanisms in place to strengthen it. The ultimate goal of these mechanisms is to ensure compliance with the norms of the system. In this Part, two such mechanisms are examined. These are private right of action and the role of the courts as ultimate arbiters in the event of a breach of norms.

B. *The Role of Private Right of Action*

Private right of action before international courts is increasingly advocated.[64] This is especially evident in the fields of international human rights law, environmental law, and international trade and investment law. For example, there is a considerable body of literature calling for private parties to be given *locus standi* before the dispute

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63. An examination of regional economic community agreements in Africa shows that status as a legal system is not explicitly given to the communities. This suggests that the characterization of the AEC as a legal system was deliberate and was meant to have effect.

64. Private participation can also be expressed by the submission of amicus curia briefs and observation.

settlement bodies of the World Trade Organisation.[65] Private rights of action are also available against governments under NAFTA[66] and some regional integration treaties in Africa.[67] This movement for reform draws on the fact that international law not only imposes burdens on individuals but also confers benefits on them.

Allowing private right of action increases the number of persons that may potentially bring cases before international tribunals. It avoids states litigating on behalf of their nationals. Such "proxy wars" can have adverse implications for international diplomatic relations and can be avoided if the "real litigant" is allowed to bring the claim.[68] Private right of action also performs the constitutional function of limiting the power of governments to decide which disputes are worth litigating and may guarantee greater governmental compliance with rules. Governments will have less control over which claims can be brought before the international court. It takes "[c]ommunity law out of the hands of politicians and bureaucrats and . . . give[s] it to the people."[69] This constitutionalising function is important since political motives may cause a government to act against the interest of the private party in a dispute with another government. Indeed, even when the government decides to litigate on behalf of the private party, the remedy belongs to the government and not to the private party. This gives the government control over the dispute. Private right of action also enhances the

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65. *See generally* Joel P. Trachtman & Philip M. Moremen, *Cost and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221 (2003); Glen T. Schleyer, *Power to the People: Allowing Private Parties To Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997).

66. North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 605.

67. Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, art. 26, 33 I.L.M. 1067 [hereinafter COMESA Treaty] ("Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision, or regulation is unlawful or an infringement of the provisions of this Treaty: Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State."); *see* Republic of Kenya v. Coastal Acquaculture, Reference No. 3 /2001, Judgment (COMESA Ct. of Justice, Apr. 26, 2002); *see also* Protocol on Tribunal and Rules of Procedure Thereof (SADC) art. 15(2), *available at* http://www.sadc.int/index.php?action=a1001&page_id=protocols_tribunal [hereinafter Protocol on Tribunal SADC] (last visited Aug. 27,2006); EAC Treaty, *supra* note 53, art. 30.

68. *See generally* GREGORY C. SCHAFFER, DEFENDING INTERESTS PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

69. G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 183 (1994).

legitimacy of the legal system by granting individuals a stake in the evolution of rules. In this way litigation performs a legislative function.[70]

The provisions of the court of justice under the AEC Treaty and the Protocol of the Court of Justice of the African Union[71] provide a very limited role for private parties. Individuals can bring an action before the AU Court of Justice only under conditions determined by the Assembly and with the consent of the state concerned.[72] This near absence of *locus standi* for individuals reduces the number of potential disputes that may be brought to the AU Court of Justice. More significantly, it makes the dispute settlement process unavailable to some of the most important players in the integration process including consumers, traders, corporate bodies, and investors. Understandably, no legal system grants individuals unlimited access to its judiciary. This is important to keep the pool of potential litigants down to a manageable size. However, every advanced legal system recognises the important role private litigation plays, not only in sustaining the system but also in its development and evolution. Every legal system has two principal means of enforcing its norms: public enforcement through the state and private enforcement. It is the combination of these two enforcement mechanisms that guarantees the legal system's effectiveness.

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70. Trachtman & Moremen, *supra* note 65, at 223.

71. Protocol of the Court of Justice of the African Union, July 11, 2003, *reprinted in* 13 AFR. J. INT'L & COMP. L. 115 (2005) [hereinafter Protocol of the Court of Justice]. There is uncertainty as to whether the AU Court of Justice will take over the work the AEC Court of Justice established under article 18 of the AEC Treaty. Given that the AEC is an integral part of the AU, that there is a trend towards having a single multi-purpose court, as evidenced by the merger of the African Court of Human and Peoples Rights with the AU Court of Justice, and that there is a need to cut down on cost, it is unlikely that any other court will be established. Indeed the jurisdiction of the AU Court of Justice, that covers "the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union," *id.* art. 19, is wide enough to encompass the work of the AEC Court of Justice. Unless this is the case, difficult questions of jurisdiction will arise and the potential for conflict between the two courts exist. The AU Court of Justice may, however, utilise the provisions of article 56 of the protocol and set up a special chamber to deal with AEC cases. *See* Udombana, *supra* note 10, at 108; Udombana, *supra* note 34. The Protocol of the Court of Justice is currently not in force. As of October 31, 2006, only twelve African countries (Comoros, Libya, Lesotho, Mali, Mozambique, Mauritius, Rwanda, South Africa, Egypt, Niger, Tanzania, and Sudan) ratified the protocol, leaving a shortfall of three before the protocol can come into full force. African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Protocol of the Court of Justice of the African Union (2006), http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Court%20of%20Justice.pdf.

72. Protocol of the Court of Justice, *supra* note 71, art. 18.

African governments, like other governments, have traditionally been reluctant to submit to binding international adjudication.[73] This suggests that in the absence of a private right of action, the AU Court of Justice might be underused and may be consigned to "abject inactivity and irrelevance."[74] Granting private right of action will ensure the use of the AU Court of Justice, and prevent its marginalisation. The experience of the European Community demonstrates that private litigants can be effective guardians of the integration process through their enforcement of community law.

C. Role of an Activist Court

A strong adjudicating body has an important role to play in the advancement of economic integration. The character of the dispute settlement institutions reflects the depth of integration desired and how much of a role is given to law in the integration process.[75] A limited role for an international court may reflect an unwillingness to relinquish sovereignty. Additionally, it may reflect a belief in the superiority of negotiation over adjudication.[76] A strong judiciary will evolve its own jurisprudence, ensure compliance with treaty obligations, check excesses on the part of the community's institutions, engender investor confidence, and may even nurture a sense of judicial discipline among domestic courts.[77] An activist court with broad subject matter and personal jurisdiction can push forward integration in the face of political inertia. Nowhere has this been more true than in the European Union.

The structure of a court is a significant factor in ensuring its effectiveness. Structural design often involves issues such as judicial independence, security of tenure, and financing. A number of provisions in the Protocol of the Court of Justice of the African Union seek to secure the independence and effectiveness of the court. Under article 13, the independence of the judges shall be fully ensured in accordance with international law. Judges are appointed by the Assembly for a period of six years. They cannot be removed from office except by the unanimous

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73. For an explanation of this reluctance, see generally Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002).

74. Tiyanjana Maluwa, *The Peaceful Settlement of Disputes Among African States, 1963-1983: Some Conceptual Issues and Practical Trends*, 38 INT'L & COMP. L.Q. 299, 307 (1989).

75. *See generally* Taylor, *supra* note 51.

76. It often suggested that in Africa there is a preference for non-litigious modes of settling disputes. *See generally* Maluwa, *supra* note 74.

77. Kiplagat, *supra* note 26, at 449-50 n.63.

recommendation of other judges that the judge no longer fulfils the requisite conditions of the position. The Assembly gives final approval to the removal recommendation.[78] Judges enjoy diplomatic immunity in accordance with international law. They are immune from legal proceeding, both during and after their term of service, for acts done in the discharge of their judicial functions.[79] The compensation of judges cannot be decreased during their term of office. The Assembly determines the salary based upon the recommendation of the Executive Council, "taking into account the workload of the Court."[80] Since the court does not solicit cases, the impact of this provision on the court remains to be seen. The budget of the court is submitted annually to the Assembly through the Executive Council and is funded by member states.[81] The Protocol of the Court of Justice of the African Union is silent on whether the Assembly can reduce the court's budget. The Assembly's control over the court's budget and the linking of judicial compensation to workload are potential threats to the independence of the court.

In developing structural mechanisms that guarantee the independence of the AU Court of Justice,[82] the AU could learn from the structure of the Caribbean Court of Justice under the Agreement Establishing the Caribbean Court of Justice.[83] This is the Court of Justice of the Caribbean Community (CARICOM).[84] Appointment of the judges is entrusted to the Regional Judicial and Legal Services Commission

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78. Protocol of the Court of Justice, *supra* note 71, arts. 7-8, 11, 13.

79. *Id.* art. 14.

80. *Id.* art. 17. A similar condition relating to remuneration of judges in other treaties on the continent could not be located. It may be an implicit acknowledgment that most of the international courts and, more generally, economic integration institutions on the continent do not do much or do not have much to do. Still, monies are spent on them nonetheless. Indeed it is suggested that one reason for the failure of integration efforts is that they have become employment generating centres for the educated on the continent. *See* Rasul Shams, *The Drive Towards Economic Integration in Africa* 6-7 (Hamburg Inst. of Int'l Econ., Discussion Paper No. 316, 2005).

81. Protocol of the Court of Justice, *supra* note 71, art. 54.

82. *See generally* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003).

83. Agreement Establishing the Caribbean Court of Justice (2001) (*entered into force* July 23, 2003), *available at* http://www.caricomlaw.org/docs/agreement_ccj.pdf [hereinafter Caribbean Court Agreement]; *see also* Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organisations*, 27 FORDHAM INT'L L.J. 930, 970-1015 (2004) (discussing this agreement and the working of the court).

84. For an introduction to the workings and institutional dimension of CARICOM, see generally Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C. J. INT'L L. & COM. REG. 145 (2005); P.K. Menon, *Regional Integration: A Case Study of the Caribbean Community [CARICOM]*, 24 KOREAN J. COMP. L. 197 (1996).

(Regional Commission) and not member states.[85] To isolate the Regional Commission from government interference, no government representative sits on the Commission nor do member governments appoint members of the Commission. Rather, the Regional Commission is comprised of representatives of the bar, Regional Commission, and nominations from specified faculties of law.[86] The Commission is also responsible for exercising "disciplinary control over Judges of the Court."[87] Additionally, the Agreement Establishing the Caribbean Court of Justice Trust Fund (Fund Agreement) created a trust fund in order to insulate the Caribbean Court of Justice from political interference or manipulation of its finances.[88] The purpose of the fund is to provide the resources necessary to finance the Caribbean Court of Justice's capital and operating budget and the Regional Commission.[89] The fund is financed by contributions of member states, income derived from operations of the fund, accruing interest, and third party contributions.[90] These third party contributions should not prejudice the independence or integrity of the Court.[91] Additionally, the fund shall not solicit or accept any grant, gift, or other material benefit from any source except with the consent of all the member states.[92] A board of trustees, on which there are no government representatives, manages this fund.[93] The system is too recently developed for its efficacy to be tested by empirical evidence, but it represents an interesting innovation in structuring international tribunals. The structure of the Caribbean Court of Justice is worth close study because it presents novel solutions to the problems of interference and under-funding, which are widespread accusations against the judiciary in Africa.

IV. THE RELATIONSHIP BETWEEN THE COMMUNITY AND NATIONAL LEGAL SYSTEMS

Economic integration creates vertical and horizontal relationships. A vertical relationship exists between a community's legal system and

85. Caribbean Court Agreement, *supra* note 83, art. 4(7).
86. *Id.* art. 5.
87. *Id.* art. 5(3)(2).
88. Revised Agreement Establishing the Caribbean Court of Justice Trust Fund, Jan. 12, 2004, *available at* http://www.caricomlaw.org/docs/revised%20agreement%20establishing%20the%20caribbean%20court%20of%20justice%20trust%20fund.pdf.
89. *Id.* art. 3.
90. *Id.* art. (4)(1).
91. *Id.* art. (4)(1)(c).
92. *Id.* art. 4(2).
93. *Id.* arts. 5-8.

those of the individual member states. A horizontal relationship exists among the individual member states. Establishing and defining the relationship between the community and states' legal systems, as well as the relationship between the member states, is important for the success of any economic integration initiative. If this is not done, there may be uncertainty, dissimilar application of community law, and ultimately, destabilisation of the community. This Part of the Article examines some aspects of these relationships from the perspective of the AEC.

A. Supremacy of Community Law

Conflicts between national and community laws can occur in any economic integration process. Such conflict can be considered part of the broader problem of the relationship between national laws and international law. There are different solutions to this problem in Africa.[94] While some countries adhere to monism, others are dualist. Whatever the solution adopted at the national level, the pursuit of economic integration in Africa demands rethinking the existing national constitutional arrangements.[95] The reception of international law and its relationship with national laws must be examined. The doctrines of sovereignty and supremacy of national constitutions and national laws may need re-examination.

The AEC Treaty does not contain a provision that explicitly states that Community law enjoys supremacy over national laws. However, some writers have attempted to infer the supremacy of Community law over national laws using the text, structures, and objectives of the AEC Treaty.[96] These writers cite the fact that the AEC Treaty requires the harmonisation of policies, that conflicting national laws may hinder the achievement of the Community's objectives, and that article 5 requires member states to refrain from unilateral activities that hinder the attainment of the Community's objectives to conclude logically that Community law is supreme. Proponents of Community law supremacy

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94. *See generally* Richard F. Oppong, *Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, 30 FORDHAM INT'L L.J. (forthcoming 2006); P.F. Gonidec, *The Relationship of International Law and National Law in Africa*, 10 AFR. J. INT'L & COMP. L. 244 (1998).

95. *See generally* Tiyanjana Maluwa, *The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Explanatory Survey*, 23 S. AFR. Y.B. INT'L L. 45 (1998); TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA 31-51 (1999).

96. *See* Gino J. Naldi & Konstantinos D. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?*, 24 N.C. J. INT'L L. & COM. REG. 601, 620-21 (1999).

also point to decisions and regulations of the Community that are automatically enforceable in member states and the Community's division of competence between itself and the member states.[97] While such an inference is easily made, it will take an activist court to assert this supremacy and strong political and judicial will on the part of domestic national courts to sustain it.

The experience of the European Community is worth an examination. The Treaty of Rome, like the AEC Treaty, was not explicit on whether community law enjoys supremacy over member states. Nonetheless, the ECJ has been able to constitutionalise the Treaty of Rome and elevate it above national laws. In *Van Gend en Loos*,[98] the ECJ moved closer to the idea of supremacy by holding that the European Community constituted a new legal order that was separate and distinct from that of its members. However, it took an additional year before the ECJ, relying on teleological arguments, finally elevated European Community law above national laws. In *Flaminio Costa*, the ECJ held:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. . . .
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> . . . .
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty. . . .
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> . . . .
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> The precedence of Community law is confirmed by Article 189, [now 249] whereby a regulation 'shall be binding' and 'directly applicable in all Member States.' . . .
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however

97. *Id.*

98. Case 26/62, Van Gend en Loos v. Neder-Landse Tariefcommissie, 1963 C.M.L.R. 105, 129 (1963).

framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[99]

Indeed, so firmly entrenched is European Community law supremacy that not even a fundamental rule of national constitutional law can be invoked to challenge a directly applicable European Community law.[100] In the words of Stephen Weatherill, in *Law and Integration in the European Union*, "Even the most minor piece of technical Community legislation ranks above the most cherished national constitution norm."[101] Members of the European Community did not universally accept the doctrine of community law supremacy because it challenged notions of national sovereignty and rested on "weak" textual arguments.[102] National courts initially had mixed responses,[103] but it cannot be denied that the supremacy of European Community law over national law is a legal fact within the European Community today. National courts have often explained their acceptance of the doctrine in terms of their national legal systems instead of the inherent power attributed to European Community law by the ECJ.[104] That national law is held to be in conflict with European Community law does not render national law inapplicable as regards matters in which the Community competence is not engaged.[105] In the words of the ECJ, "It cannot . . . be inferred . . . that the incompatibility with Community law of a subsequently adopted . . . national law has the effect of rendering that . . . national law non-existent."[106] This has the effect of limiting the scope of the supremacy doctrine, rendering it slightly more acceptable to member states.[107]

It remains to be seen whether the AU Court of Justice will use similar teleological and textual arguments to assert the precedence of AEC law over national laws. It is unclear how domestic courts in Africa will respond to an assertion of supremacy of Community law over

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99. Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 585, 592-93.

100. Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629, 3 C.M.L.R. 263.

101. STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 106 (1995).

102. PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 279 (3d ed. 2003). *See generally* De Witte, *supra* note 55, at 177.

103. CRAIG & DE BÚRCA, *supra* note 102, at 285-314; Mauro Cappelletti & David Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *in* 1 INTEGRATION THROUGH LAW, *supra* note 1, bk. 2, at 261, 311-15.

104. CRAIG & DE BÚRCA, *supra* note 102, at 285–314; Case C-213/89, Regina v. Sec'y of State for Transp. *ex parte* Factortame Ltd., [1991] 1 A.C. 603.

105. Case C-10/97, Ministero delle Finanze v. IN.CO.GE., 1998 E.C.R. 1-6307.

106. *Id.* para. 21.

107. There are also certain express limitations on the supremacy doctrine such as articles 301 and 297 of the Treaty of Rome. *See* CRAIG & DE BÚRCA, *supra* note 102, at 283.

national law by the AU Court of Justice. The effectiveness of any declaration of Community law supremacy will depend on the attitude of national courts and local authorities. The case of *Republic v. Okunda*,[108] illustrates the challenge of applying community law in national legal systems. Here, the question of the supremacy of EAC law over Kenyan law was in question. Two individuals were prosecuted under the EAC's Official Secrets Act of 1968 without the consent of the counsel for the EAC. Such consent was necessary under section 8(1) of the Act. The issue was whether the Attorney General of Kenya could institute the proceeding without such consent. Resolving this issue involved examining the relationship between the EAC law and section 26(8) of the Kenyan Constitution. The constitution provided that in performance of his duty, "the Attorney-General shall not be subject to the direction or control of any other person."[109] Counsel for the EAC submitted that the conflict between the two provisions should be resolved in favour of community law. The EAC's counsel argued that under the Treaty for East Africa Cooperation, members agreed to take all steps within their power to pass legislation to give effect to the treaty and to confer upon acts of the community the force of law within their territory. Further, under article 4 of the Treaty for East African Cooperation, the members were enjoined to "make every effort to plan and direct their policies with a view to creating conditions favourable for the development of the Common Market and the achievement of the aims of the Community."[110] Counsel argued that member states agreed to surrender part of their sovereignty by these provisions.[111]

The court found Kenya did nothing to breach these obligations and that the laws of the community are, under the Kenyan Constitution, part of the laws of Kenya. In the event of conflict, EAC laws are void to the extent they are inconsistent with the national constitution.[112] The constitution of a nation is the supreme law of the land. Although an appeal from this decision was subsequently dismissed by the Court of Appeal for East Africa, the court, recognised that the case raised an issue of fundamental importance.[113] It held *obiter* that "the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya,

108. (1969) 9 I.L.M. 556 (H.C.K.) (Kenya).
109. *Id.* at 556-57.
110. *Id.* at 557 (citing Treaty for East African Co-operation, art. 4, Dec. 1, 1967, 6 I.L.M. 932).
111. *Id.*
112. *Id.* at 558-60.
113. East African Cmty. v. Republic of Kenya, (1970) 9 I.L.M. 561 (C.A.K.) (Kenya).

which is in conflict with the Constitution is void to the extent of the conflict."[114] In a previous case that also involved a conflict between community and Kenyan law, the court affirmed the superiority of Kenyan law.[115]

To avoid similar judgments in the future, and in sharp contrast to the silence of the AEC Treaty on the supremacy of Community law, article 8(4) of the EAC Treaty provides, "Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty."[116] This provision represents a great advance in economic integration efforts on the continent and will potentially challenge all members of the AEC who are still burdened with traditional notions of sovereignty. In *Shah v. Manurama Ltd.*, a Ugandan court made reference to this supremacy clause when reaching its decision.[117] Perhaps, when the opportunity presents itself again, the courts will not hesitate to affirm the supremacy of AEC law. A judicial affirmation that AEC law takes precedence over a contrary national legislation will ensure uniformity in the application of Community law. This is important for the stability of the AEC because it creates a secure and certain legal framework for business decision-making. It will also ensure the equal treatment of all people affected by AEC law. Indeed, this need for uniformity is so important that the ECJ has often held that certain concepts have "autonomous" meaning independent of national laws. This ensures that the concepts have the same meaning irrespective of the jurisdiction.[118]

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114. *Id.* at 565-66. The arguments of counsel for the EAC in this case closely resembled similar teleological and textual arguments used by the ECJ to assert the supremacy of European Community law above the national laws of member states. Although both the trial and appellate courts may not have had the benefit of the ECJ's decisions, a great opportunity for the development of community law was lost in this case.

115. *See* Yash P. Ghai, *Reflections on Law and Economic Integration in East Africa* 34-35 (Scandinavian Inst. of African Studies, Research Report No. 36, 1976) (discussing *In re* Evan Maina Case No. 7 (1969)).

116. EAC Treaty, *supra* note 53, art. 8(4).

117. (2003) 1 E. Afr. L. Rep. 294, 298 (H.C.U.) (Uganda).

118. As the ECJ held in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*:

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law.

Case 11/70, 1970 E.C.R. 1125, 1134.

B. Harmonisation of Laws

Differences in national laws can pose an obstacle to economic integration.[119] These differences may exist both at the substantive level of law and in private international law. For example, in the realm of private international law, diverse approaches exist with regard to issues of enforcement of foreign judgments, jurisdiction, and choice-of-law in Africa.[120]

The doctrine of reciprocity lies at the heart of many statutory schemes for the enforcement of foreign judgments in Africa. However, the determination of benefits from reciprocal treatment differs from judgments. While some countries make benefit determination an executive decision,[121] others leave it to the judiciary,[122] and some do not demand reciprocity at all.[123] Additionally, most countries limit the enforcement of judgments to only foreign money judgments.[124]

There are differences in jurisdiction as well. Common law countries assume jurisdiction based on presence and residence and discredit domicile and nationality as basis of jurisdiction. This is not the case with the civil law countries. Some doctrines of common law jurisdiction are unavailable in some countries. For example, there is controversy as to the existence of the doctrine of forum non conveniens in the Roman-Dutch law of South Africa.[125]

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119. Bankole Thompson, *Legal Problems of Economic Integration in the West African Sub-Region*, 2 AFR. J. INT'L & COMP. L. 85, 99-100 (1990); Bankole Thompson & Richard S. Mukisa, *Legal Integration as a Key Component of African Economic Integration: A Study of Potential Legal Obstacles to the Implementation of the Abuja Treaty*, 20 COMMONWEALTH L. BULL. 1446, 1454 (1994); Yinka Omorogbe, *The Legal Framework for Economic Integration in the ECOWAS Region: An Analysis of the Trade Liberalisation Scheme*, 5 AFR. J. INT'L & COMP. L. 355, 364-65 (1993).

120. *See generally* Richard F. Oppong, *Private International Law in the African Economic Community: A Plea for Greater Attention*, 55 INT'L & COMP. L.Q. 911 (2006).

121. Courts Act 1993, pt. v (Ghana).

122. *See* Egyptian Civil and Commercial Procedure Law of 1968 art. 296; Tunisian Code of Civil and Commercial Procedure art. 319 (2000). *See generally* Samuel Teshale, *Reciprocity with Respect to Enforcement of Foreign Judgments in Ethiopia: A Critique of the Supreme Court's Decision in the* Paulos Papassinous Case, 12 AFR. J. INT'L & COMP. L. 569, 577 (2000).

123. *See, e.g.*, Enforcement of Foreign Civil Judgments Act 32 of 1988 (S. Afr.).

124. For example, section 3(1)(b) of the Foreign Judgments (Reciprocal Enforcement) Act (cap 43) of Kenya allows for the registration of an order or judgment from a designated court in civil proceedings where property is ordered to be delivered to any person. Regarding the enforcement of non-money foreign judgments, see generally Richard F. Oppong, *Enforcing of Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond*, 39 U. BRIT. COLUM. L. REV. 257 (2006).

125. H. Christian A.W. Schulze, *Forum Non Conveniens in Comparative Private International Law*, 118 S. AFR. L.J. 812, 827-28 (2001); CHRISTOPHER FORSYTH, PRIVATE INTERNATIONAL LAW: THE MODERN ROMAN DUTCH LAW INCLUDING THE JURISDICTION OF THE HIGH COURT 173-76 (4th ed. 2003).

In the area of choice-of-law, the extent to which parties are free to choose the governing law of their contract varies not only among jurisdictions but also by the character of the transaction. While it has been suggested that the concept of party autonomy in the Roman-Dutch law of South Africa is "equivocal,"[126] this cannot be said of the common law.[127] South Africa, presumably the country with the most developed regime of private international law on the continent, has no definite solution on choice-of-law in tort law.[128] In common law countries, it remains to be seen if they will do away with old common law rules on choice-of-law in tort, which have been abandoned in England.[129]

These differences in national laws can be attributed to the diversity of legal traditions in Africa, namely common law, civil law, Roman-Dutch law, customary law, and Islamic law. Indeed, legal systems on the African continent often display a mixture of these traditions giving rise to internal conflict of laws issues.[130] It cannot be denied that an examination of substantive law in areas such as contracts, corporate law, consumer protection, banking, and insurance, will reveal differences in approach across the continent. These differences will become significant as cross-border activities increase in Africa.

Differences in national laws complicate business decision-making. They may lead to the concentration of investments in countries with well-developed legal systems to the detriment of other members of an economic community. This can breed jealousy that can lead to the collapse of a community.[131] It also does not afford equal legal protection

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126. FORSYTH, *supra* note 125, at 298.

127. *See generally* Jonathan Harris, *Contractual Freedom in the Conflict of Laws*, 20 OXFORD J.L. STUD. 247 (2000); George Nnona, *Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach*, 44 J. AFR. L. 78 (2000).

128. *See* FORSYTH, *supra* note 125, at 325-27.

129. JOHN KIGGUNDU, PRIVATE INTERNATIONAL LAW IN BOTSWANA, CASES AND MATERIALS 281-83 (2002); OLUWOLE AGBEDE, THEMES ON CONFLICT OF LAWS 159-74 (1989); Signal Oil & Gas Co. v. Bristow Helicopters, (1974) 1 Ghana L. Rep. 371; Private International Law (Miscellaneous Provisions) Act 1995, ch. 42, § 11 (Eng.); John Kiggundu, *Choice of Law in Delict: The Rise and Rise of the Lex Loci Delicti Commissi*, 18 S. AFR. MERCANTILE L.J. 97 (2006).

130. *See generally* T.W. Bennett, *The Conflict of Laws*, *in* INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 19-33 (J.C. Bekker et al. eds., 2002); Akolda M. Tier, *Conflict of Laws and Legal Pluralism in the Sudan*, 39 INT'L & COMP. L.Q. 611 (1990); T.W. Bennett, *Conflict of Laws—The Application of Customary Law and the Common Law in Zimbabwe*, 30 INT'L & COMP. L.Q. 59 (1981).

131. The collapse of the EAC is often referenced in this regard. *See generally* Susan Fitzke, *The Treaty for East African Co-Operation: Can East Africa Successfully Revive One of Africa's Most Infamous Economic Groupings?*, 8 MINN. J. GLOBAL TRADE 127 (1999); Neil Orloff, *Economic Integration in East Africa: The Treaty for East-African Co-Operation*, 7 COLUM. J. TRANSNAT'L L. 302 (1968).

to citizens of a community since legal rights may vary between jurisdictions. There is a need for the harmonisation of laws in the member states to sustain the AEC, facilitate business, and ensure equal protection of individuals within it.[132] Harmonisation of trade laws and commercial practices is an important ingredient of regional integration. Without harmonization, meaningful integration cannot be achieved.[133] Unlike other regional economic treaties[134] in Africa, the AEC Treaty is not explicit on the importance of member states' harmonising laws. The AEC Treaty does, however, contain references to harmonisation of policies.[135] It is suggested that policy should be broadly interpreted to encompass the harmonization of law.

Two principal approaches to harmonisation are suggested. These are the harmonisation of substantive rules and the harmonisation of private international law rules. Harmonisation of substantive law involves ensuring a degree of uniformity in the substantive laws of the countries concerned. The private international law approach implies that the substantive laws of the states remain intact. It provides uniform choice-of-law and jurisdiction rules to ensure that parties transacting across national boundaries are aware of the governing law and jurisdiction for litigating disputed cases. Both approaches have merits and faults. Substantive harmonisation of laws brings certainty because people transacting across national boundaries will be subject to the same substantive law. To some, substantive harmonisation is preferred to the unification of private international law rules.[136] While substantive harmonisation of law reduces the scope of private international law, it requires a lot of effort to achieve, and even when successful, "private international law will remain of considerable importance in the resolution of cross border disputes."[137]

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132. *See generally* Muna Ndulo, *Harmonisation of Trade Laws in the African Economic Community*, 42 INT'L & COMP. L.Q. 101 (1993); JOHN ADEMOLA YAKUBU, HARMONISATION OF LAWS IN AFRICA (1999); 'Gbenga Bamodu, *Transnational Law, Unification and Harmonisation of International Commercial Law in Africa*, 38 J. AFR. L. 125 (1994); O. Anukpe Ovrawah, *Harmonisation of Laws Within the Economic Community of West African States (ECOWAS)*, 6 AFR. J. INT'L & COMP. L. 76 (1994); W.C. Whitford, *The Unification of Commercial Laws*, 1 E. AFR. L. REV. 115 (1968).

133. *See* Ndulo, *supra* note 132, at 107.

134. *See, e.g.*, Economic Community of West African States Revised Treaty, July 24, 1993, art. 57, *reprinted in* 8 AFR. J. INT'L & COMP. L. 187-227 (1996).

135. *See, e.g.*, AEC Treaty, *supra* note 14, arts. 3(c), 4(1)(d), 5(1), 77.

136. Peter Hay et al., *Conflict of Laws as a Technique for Legal Integration*, *in* 1 INTEGRATION THROUGH LAW, *supra* note 1, bk. 2, at 256.

137. Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 INT'L & COMP. L.Q. 539, 541 (2005).

The private international law approach, on the other hand, entails only a minimal disturbance in national legal systems. Private international law addresses only matters involving foreign elements. Consequently, it is more likely to appeal to the politician with an eye for preserving his country's unique or perceived superior legal system. The process is considered simpler because a whole branch of substantive law may be covered by a few choice-of-law clauses.[138] Given that no substantial attempt has previously been made toward a continent-wide harmonisation of substantive laws in Africa, the private international law approach may be easier to undertake. This may be especially so in the area of commercial law, where national values may not be too diverse and the subject is of immediate importance to the promotion of commercial activity in the Community. The Institute for Private International Law in South Africa,[139] which is part of the University of Johannesburg, could be given a lead role to play. Also, the efforts of OHADA[140] to harmonise substantive law can be adopted by the AEC and made a continent-wide initiative. This is consistent with the philosophy of using regional economic units as building blocks. OHADA aims at harmonising business laws in the member states.[141] It currently has sixteen members, most of whom are francophone states with the majority in the West African sub-region.[142]

The AEC should immediately embark upon the task of ensuring the harmonisation of both the substantive and private international laws of member states. The Assembly, in exercise of powers conferred on them by article 25(2) of the AEC Treaty, should establish a specialised technical committee on legal issues in integration. This committee would have a specific mandate to look into the implications of these issues for the success of the AEC. Additionally, one of the principle responsibilities of the Committee on Coordination is the coordination and harmonization of "integral legislation." This Committee was established by the Protocol on the Relationship Between the AEC and the Regional Economic Communities.[143] The Committee should interpret

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138. *See* Hay et al., *supra* note 136, at 170-74.

139. *See* Institute for Private International Law in South Africa, University of Johannesburg, http://general.rau.ac.za/law/English/ipr/ipr.htm (last visited Nov. 14, 2006).

140. *See generally* BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA, OHADA AND THE HARMONIZATION PROCESS (2002); Dickerson, *supra* note 59.

141. *See* MARTOR ET AL., *supra* note 140.

142. These countries include Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo.

143. Protocol on the Relationship, *supra* note 28, art. 7(3)(b).

this task broadly to include not only legislation but the impact of existing legal regimes in member states on the success of the community.

C. Enforcement of Community Law

1. Introduction

An integral part of any legal system, and a key to its effectiveness, is the enforcement mechanisms provided to ensure compliance with its norms. Indeed, for some legal theorists, enforcement of sanctions is the very essence of law.[144] Enforcement of community law should be approached both at the national and community level. Unless there is effective enforcement of community law at both levels, and a high level of coordination between the two levels, community law may not be effective and the success of the community will be endangered. This Part examines the mechanisms for ensuring compliance with law under the AEC Treaty.

2. Institutions for the Enforcement of Community Law

Under the AEC Treaty, the Assembly is the supreme organ of the Community.[145] It is the institution responsible for implementing the objectives of the treaty. Because it is an assembly of politicians and representatives of their countries, it is probable that political considerations, rather than the ultimate success of the AEC, will be paramount in their deliberations. A similar arrangement under the Treaty establishing the EAC was described as "negative" since it defeated the aim of achieving a "vigorous Community."[146] An assembly of politicians may seek compromises rather than strictly enforcing Community laws, thus ultimately diluting the integration process. An overbearing Assembly may dominate the agenda of other Community institutions. This is especially true because none of the major decision-making institutions of the Community, apart from the Court of Justice, are guaranteed independence under the AEC Treaty. The Council of Ministers is responsible for the "functioning and development of the Community;"[147] it is composed of ministers of state who hold their positions at the pleasure of their respective president, prime minister, or

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144. An example of this is John Austin's definition of law as a command backed by sanction. LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW BY THE LATE JOHN AUSTIN 12-13 (Robert Campbell ed., Jersey City, Frederick D. Linn & Co. 1875).
145. AEC Treaty, *supra* note 14, art. 8, at 1256.
146. Ghai, *supra* note 115, at 24.
147. AEC Treaty, *supra* note 14, art. 11, at 1257.

king. Although the Secretary-General and his staff are "accountable only to the Community," the Secretariat is not a decision-making institution and cannot push the integration agenda on its own.[148]

The absence of an independent force to push the agenda of integration leaves the process entirely in the hands of politicians who may delay the integration process, especially given the history of politics in Africa. Within the European Union, the European Commission has been described as Europe's "single most important political force for integration, ever seeking to press forward to attain the Community's objectives."[149] It is the motor of integration within the European Union. It is able to do this not only because it is comprised of technocrats, but also because members are required to be persons whose "independence is beyond doubt," and who do not "seek nor take instructions from any government or from any other body."[150] It is the European Commission's sole responsibility to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."[151] The executive, legislative, judicial, and administrative functions of the European Commission are not matched by any of the institutions of the AEC. Although it can be argued that its decision-making powers are minimal compared to the Council of Ministers of the European Union (Council of Ministers), such an argument understates the European Commission's role in shaping and developing the European Union. In contrast to the approach under the AEC Treaty, the European Council, which consists of heads of states of governments of the European Union countries, only recently became a formal part of the institutional structure of the European Union. While they remain responsible for providing the European Union with "the necessary impetus for its development and shall define the general political guidelines thereof,"[152] it is ultimately the members of the Council of Ministers that commit their governments. The effective combination of independent technocrats and politicians may partly account for the success of the European Union. The role strong institutions play in the success of economic integration efforts should not be underestimated. The absence of strong,

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148. *Id.* art. 24, at 1260.

149. CRAIG & DE BÚRCA, *supra* note 102, at 64.

150. Consolidated Version of the Treaty Establishing the European Community, art. 213, Dec. 24, 2002, 2002 O.J. (C 325) 33, 120 [hereinafter European Community Treaty].

151. *Id.* art. 211.

152. Consolidated Version of the Treaty on European Union, Dec. 12, 2002, 2002 O.J. (C 325) 5, 11.

independent institutions to counterbalance political inertia is one of the major reasons behind the slow pace of economic integration in Africa.[153]

The Court of Justice is an important institution for the enforcement of AEC law. It is independent of all the other Community institutions and "shall ensure the adherence to law in the interpretation and application of this Treaty and shall decide on disputes submitted thereto pursuant to this Treaty."[154] The details of the workings of the AU Court of Justice are set out in the Protocol of the Court of Justice of the African Union.[155] The court consists of eleven judges who must all be nationals of AEC member states and must be representative of the legal traditions in Africa.[156] The strength of a court depends not only on its independence but also on the scope of its subject matter and personal jurisdiction. Under article 18 of the Protocol of the Court of Justice of the African Union, the following entities are entitled to submit cases to the court: state parties to the protocol, the Assembly, the parliament and other organs of the AU authorised by the Assembly, the Commission or members of staff of the Commission in a dispute within the limits and under the conditions laid down in the Staff Rules and Regulation of the AU, and third parties under conditions determined by the Assembly and with the consent of the state party concerned. A state that is not a party to the protocol may not submit a case to the AU Court of Justice.[157] The court has no jurisdiction to hear a dispute involving such a party. The fact that the court has no jurisdiction over states that are not parties to the Protocol of the Court of Justice of the African Union, even though they may be parties to the AEC Treaty, poses a potential challenge to enforcing treaty obligations through judicial means. This jurisdictional gap will not result in uniform application and enforcement of community law. This potential jurisdictional gap is the result of a weakness of the AEC Treaty dubbed "protocolism."[158] Many details under the AEC

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153. In addition to strong institutions, there is need for sound domestic economic policies, political stability, good governance, and respect for fundamental rights. *See generally* 'Dejo Olowu, *Regional Integration, Development, and the African Union Agenda: Challenges, Gaps and Opportunities*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 211 (2003).

154. AEC Treaty, *supra* note 14, art. 18(2), at 1259. This provision bears striking resemblance to article 220 of the European Community Treaty, which enjoins the ECJ to ensure that in its interpretation and application of the European Community Treaty, the law is observed. European Community Treaty, *supra* note 150, art. 220. The ECJ has used this provision to extend the scope of its judicial review to matters not expressly listed in the European Community Treaty. It remains to be seen how the AU Court of Justice will utilise this power.

155. Protocol of the Court of Justice, *supra* note 71.

156. *Id.* art. 3.

157. *Id.* art. 18.

158. About twenty such protocols are envisaged under the AEC Treaty.

Treaty are reserved for protocols, which require negotiating time and a separate need for ratification. It is difficult to conceive of a stable community where the rules are not uniformly applicable within member states. Indeed, the very essence of integration will be defeated since "uniformity in the meaning of law is part of the constitutional glue that holds the Community together."[159]

The judgments of the AU Court of Justice are binding on the parties with respect to that particular case.[160] State parties "guarantee" execution of judgments and non-compliance may be referred to the Assembly which may impose sanctions.[161] There is also a general undertaking by the contracting parties to refrain from measures that will hinder the attainment of the objectives of the Community.[162] This expectation has been described as "naïve," given past experience with the enforcement of judgments from international courts in Africa.[163] Various reasons can be given for this non-compliance with international judgments including arguments about national sovereignty, absence of strong economic interdependence among countries on the continent, a preference for negotiation instead of adjudication, and the absence of private right of action before international tribunals in Africa.[164] The precedential value of judgments is limited because they bind only "in respect of that particular case."[165] Thus, the crucial role of precedents in the enforcement and development of law may be lost.[166]

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159. WEATHERILL, *supra* note 101, at 135.

160. AEC Treaty, *supra* note 14, art. 19, at 1259.

161. Protocol of the Court of Justice, *supra* note 71, arts. 51, 52.

162. AEC Treaty, *supra* note 14, art. 5, at 1254.

163. Naldi & Magliveras, *supra* note 96, at 614. The present difficulties over the implementation of the International Court of Justice's (ICJ) decision in a dispute between Nigeria and Cameroon illustrates this.

164. Kofi Oteng Kufuor, *Securing Compliance with the Judgments of the ECOWAS Court of Justice*, 8 AFR. J. INT'L & COMP. L. 1, 6-11 (1996).

165. Protocol of the Court of Justice, *supra* note 71, art. 37. Per article 38, this limitation does not apply to decisions relating to the interpretation and application of the Constitutive Act of the AU. *Id.* art. 38.

166. Similar provisions limiting the binding effect of decisions exist in statutes establishing other international courts. For example, article 59 of the Statute of the International Court of Justice provides that judgments are binding only "between the parties and in respect of that particular case." Statute of the International Court of Justice, 1945 ICJ Acts & Docs., art. 59 (1945). Similarly, there is no principle of binding precedent in WTO dispute settlement. Nonetheless, these courts consistently refer to their previous decisions and seldom depart from them. Thus, this limitation in the Protocol of the Court of Justice of the African Union may not be as limiting as once thought. *Compare* Protocol of the Court of Justice, *supra* note 71, art. 37 (providing that judgments are binding with respect to that particular case), *with* Caribbean Court Agreement, *supra* note 83, art. 22 (providing that the judgments of the Court of Justice CARICOM shall be legally binding precedents for parties in proceedings before the court).

The absence of private right of action represents a serious limitation on the jurisdiction of the AU Court of Justice, and potentially its role in the integration process. Although the option for third parties to bring an action before the AU Court of Justice is left open, the need for "the consent of the state party concerned" may render the right illusory. Indeed, this requirement of consent represents a more difficult hurdle than the traditional "exhaustion of local remedies" requirement in international law.[167] If consent is not given, the third party is effectively barred from seeking remedy. There is no opportunity for assessing or reviewing the reasonableness of the denial of consent. It is difficult to conceive of any reason for this limitation other than the desire of member states to control the AU Court of Justice, even if only indirectly. Arguably, the exhausting of local remedies formula was not used because the drafters envisaged that there would be no local remedies for breaches of Community law at the national level, and hence, no possibility of ever exhausting it. If the requirement of consent remains, then a formidable barrier to the effectiveness of AEC law is assured. Indeed, it will make the integration initiative merely cosmetic.

The limitation on private right of action may be an indirect attempt to shape the jurisprudence of the AU Court of Justice and reduce its potential role as a legislator of Community norms; "control over litigation entails a degree of control over the type of law that is made."[168] States can do this by shaping the type of arguments that come before the AU Court of Justice to suit particular ends. This unduly restrictive rule on private right of action also runs counter to developments in other regional economic treaties[169] and the recommendations of African legal scholars.[170] Subsequent revisions of the AEC Treaty will hopefully create a provision for a private right of action either directly or by reference from national courts.

3. Legal Techniques for the Enforcement of Community Law

Apart from the institutional dimensions of enforcement of Community law, it is also necessary to assess the legal techniques proposed by the AEC Treaty for the enforcement of the decisions of the Assembly. Under article 10, decisions of the Assembly are "automatically enforceable" thirty days after being signed by the

167. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472-81 (6th ed. 2003).

168. Trachtman & Moremen, *supra* note 65, at 223.

169. COMESA Treaty, *supra* note 67, art. 26; Protocol on Tribunal SADC, *supra* note 67, art. 15(2). Both allow for private right of action after the exhaustion of local remedies.

170. Udombana, *supra* note 34, at 842; Ndulo, *supra* note 132, at 107.

chairman of the Assembly. Under article 13, regulations of the Council must be approved by the Assembly and are also "automatically enforceable" thirty days after signature by the chairman of the Council.[171] This suggests the direct applicability of Assembly decisions and Council regulations to member states. This means Community decisions and regulations will not be subject to any further national implementation measure before they can become effective within the national legal system. Therefore, private parties can arguably rely on them in litigation. The doctrine of automatic enforceability is akin to the doctrine of direct effect within European Community law.[172] The doctrine of direct effect allows individuals to invoke European Community law in national courts and suggests that European Community law confers rights on individuals.[173] It is debatable if a similar effect will attach to the concept of automatic enforceability under the AEC. The implementation and success of the doctrine of direct effect, as EU law demonstrates, depends on the presence of a private right of action both at the national and community level. The national courts also must accept their role in the community's legal system.

The integration of community law into the legal systems of the member states is one of the surest ways of promoting integration. It remains to be seen whether private parties can rely on decisions and regulations of the AEC in litigation before national courts and how they will raise such arguments. Also unknown is how national courts are going to accommodate this in light of the fact that they are given no express role in the enforcement of Community law under the AEC Treaty. Unless there is a direct or indirect private right of action before the AU Court of Justice, and national courts are involved in the enforcement of Community law, an otherwise potent doctrine for enforcing Community law may be rendered useless. The danger of incomplete borrowing is evident in shortfalls of the AEC Treaty. While the doctrine of automatic enforceability appears to have been borrowed from Europe, it seems to have entered Africa without its safeguards and thus may be potentially dysfunctional.

In seeking to integrate AEC law into the legal systems of member states, the national courts may learn comparative lessons from the willingness of other national courts in Africa to rely on international human rights conventions, even in instances where, although ratified,

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171. AEC Treaty, *supra* note 14, arts. 10, 13, at 1257-58.

172. *See generally* P.P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEGAL STUD. 453 (1992); De Witte, *supra* note 55.

173. CRAIG & DE BÚRCA, *supra* note 102, at 178-228.

they have not been incorporated into domestic legislation.[174] In cases where Community issues are engaged, national courts may interpret statutes in light of Community law. This may entail interpreting domestic law to promote rather than undermine Community law. The courts may also afford remedies that enhance or facilitate rights envisaged by Community law, such as the free movement of persons, goods, and services. Arguably, the national courts, as organs of their respective states, are enjoined to observe "the legal system of the Community" and must also refrain from actions that may hinder the objectives of the Community.[175] The ECJ has held that national courts are also responsible for the fulfilment of the obligation imposed on member states by article 10 of the European Community Treaty to take measures necessary to attain the objectives of the European Community.[176] It is significant that article 10 of the European Community Treaty is strikingly similar in language and substance to article 5 of the AEC Treaty.[177] Aside from relying on human rights conventions, some national courts in Africa have demonstrated a willingness to rely on decisions of international tribunals when adjudicating domestic issues.[178] National

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174. *See* Unity Dow v. Attorney Gen., (1991) MISCA 124/90 (High Ct. Bots.), *cited in* 13 HUM. RTS. Q. 614, 623 (1991) (interpreting the relevant legislation by considering the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination, even though Botswana had not ratified it); Dow v. Attorney Gen., 103 I.L.R. 128, 159-62 (Ct. App. Bots. 1992) (affirming the High Court's reliance on international conventions which had not been ratified by Botswana); New Patriotic Party v. Inspector Gen. of Police, Accra, [1993-94] Ghana L. Rep. 459, 466 (Sup. Ct. Ghana) (holding that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and Peoples' Rights did not mean it could not be relied upon).

175. AEC Treaty, *supra* note 14, arts. 3(e), 5(1), at 1252, 1254.

176. Case 14/83, Von Colson v. Land Nordrhein-Westfalen, 1984 ECR 1891. This ruling has been an effective means of enforcing non-implemented or mis-implemented directives. *See generally* Sara Drake, *Twenty Years After* Van Colson*: The Impact of "Indirect Effect" on the Protection of Individual's Community Rights*, 30 EUR. L. REV. 329 (2005).

177. The European Community Treaty, *supra* note 150, art. 10, provides:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 5 of the AEC Treaty provides: "Member States undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonizing their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives." *See generally* John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990).

178. For example, an examination of the *Case Annotation: Foreign Cases* section of the South African Law Reports between 2000 and August 2005 reveals about fifty cases in which South African courts made use of decisions of international tribunals such as the ICJ, the

courts will hopefully extend this adjudicatory approach to decisions of the AU Court of Justice.

The technique of automatic enforceability is but one of a myriad of techniques available for the enforcement of AEC law.[179] There is a need for greater coordination both among national implementation agencies and between the AEC and national agencies. The AEC must build a strong relationship with these agencies by ensuring a mutual flow of information between them. An important first step is identifying these agencies, because they may vary, not only from country to country, but also in regard to the particular policy or issue. The presence of Community consciousness and an awareness of Community law on the part of these agencies can further the implementation of Community law. This consciousness must also exist among citizens of the AEC. Individuals are the direct beneficiaries of Community law. They serve as an effective means for monitoring compliance with Community law through their vigilance and reporting of breaches. Educating the citizens of the Community on the virtues of the AEC and creating an accessible means for filing complaints will strengthen the monitoring role of individuals. Implementation of Community law will also be greatly enhanced when Community law is "comprehensib[le], cl[ear] and coheren[t]."[180] Complex rules create difficulties for implementation and raise difficult interpretation questions. This may result in non-compliance or varied application of Community law. To ensure the effectiveness of the Community, it is important for the AEC to actively engage the people who are the beneficiaries of the Community's activities.

Permanent Court of International Justice, the European Court of Human Rights, the ECJ, the Inter-American Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia. This usage ranged from mere reference to direct application. One case made reference to decisions of the African Human Rights Commission, which is not even a court. Within the same period there were two reported cases of the Zimbabwe Supreme Court that relied on decisions of international tribunals. The absence of a reliance on international tribunal decisions is disheartening. Tribunals such the COMESA Court of Justice, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, or the African Commission have provided some instructive human rights jurisprudence. *See generally* Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT'L & COMP. L.Q. 193 (2006); Neville Botha & Michele Olivier, *Ten Years of International Law in South African Courts: Reviewing the Past and Assessing the Future*, 29 S. AFR. Y.B. INT'L L. 42 (2004) (summarizing some of the leading cases).

179. *See generally* Peter Van den Bossche, *In Search of Remedies for Non-Compliance: The Experience of the European Community*, 3 MAASTRICHT J. EUR. & COMP. L. 371 (1996) (discussing the various techniques).

180. *Id.* at 383.

D. The Relationship Between National Courts and the Court of Justice

The absence of an express provision for a relationship between national courts and the AU Court of Justice can seriously hamper the effectiveness of the Court in the enforcement of AEC law. Using national courts to enforce Community law is cheaper for litigants. National courts are also widely accessible and could significantly reduce the workload of the AU Court of Justice. The effective implementation of community law in Europe is enhanced by references to the ECJ for preliminary rulings by national courts,[181] the use of ECJ case law by national court as precedent, the use of the enforcement processes of national courts to enforce ECJ judgments, and regular interaction between the ECJ and national courts.[182] Through active support and use by national courts, European Community law has become less like international law and more like a federal legal system that governs the EU.[183]

It is recommended that a system of reference for preliminary rulings by national courts, similar to article 234 of the European Community Treaty, be introduced into the AEC legal system.[184] Indeed, some regional economic treaties in Africa allow national courts to seek preliminary rulings from their respective community courts.[185] In the

181. European Community Treaty, *supra* note 150, art. 234.

182. *See generally* Imelda Maher, *National Courts as European Community Courts*, 14 LEGAL STUD. 226 (1994); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276-337 (1997).

183. WEATHERILL, *supra* note 101, at 106.

184. The European Community Treaty, *supra* note 150, art. 234, provides:

> [T]he Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers it that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

185. For example, the EAC Treaty, *supra* note 53, art. 34, provides:

> [W]here a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.

Per article 35 of the EAC Treaty, the judgment is "final, binding and conclusive," subject to the possibility of review. *Id.* art. 35. Under article 33, the judgment has "precedence over decisions

absence of direct private right of action, allowing national courts to seek preliminary ruling from the Court of Justice may serve as an effective substitute. This system of reference should be matched by appropriate restrictions on the type of courts which can make a reference, so as to reduce the judicial workload. This is important due to the size of the Community and the fact that jurisdiction in human rights has been added to the AU Court of Justices' competence.[186]

It is also important that the AU Court of Justice cultivate a healthy relationship with national courts through consultations and workshops to help familiarise national judges with Community law. AU Court of Justice judges may be potentially drawn from national courts and may become an important means for forging relationships with national judges.[187] Another means of cultivating this relationship is for the AU Court of Justice to draw on the jurisprudence of national legal systems. International courts often make use of general principles of law developed in member states' national courts. For example, in the *Eurocontrol* case,[188] the ECJ held that the interpretation of the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter will be guided not only by the objectives of the scheme, but also the general principles which stem from the body of laws created by the national legal systems. For this purpose, it is significant that the Protocol of the Court of Justice of the African Union lists general principles of law as one of the sources of law the court can give weight to in deciding cases, so it will be universally recognised.[189] Indeed, in the absence of the AEC Treaty creating an express relationship between national courts and the AU Court of Justice, a cautious reliance by the court on general principles of law may encourage national courts to borrow from the jurisprudence of the AU Court of Justice. This will provide an indirect means of enforcing Community laws at the national level.

The absence of a direct relationship between national courts and the AU Court of Justice poses a challenge for the uniform application of

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of national courts." *Id.* art. 33. Additionally, the Protocol on Tribunal SADC, *supra* note 67, allows national courts to seek preliminary rulings from the tribunal.

186. Draft Protocol on the Integration of the African Court for Human and Peoples' Rights and the Court of Justice of the African Union, EX. CL/195 (VII), ann. i, *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/au/sirtejul05/protcourts.pdf (last visited Aug. 27, 2006). *See generally* Udombana, *supra* note 34; Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK J. INT'L L. 1 (2004).

187. *See* Protocol of the Court of Justice, *supra* note 71, art. 4.

188. Case 29/76, L.T.U. v. Eurocontrol, 1976 E.C.R. 1541, 1551.

189. Protocol of the Court of Justice, *supra* note 71, art. 20.

Community law. By incorporating domestic measures, treaty provisions are made part of the laws of member states. National courts may resort to these provisions in adjudication, and private parties may rely on them in litigation. Issues concerning the free movement of persons, capital and services; the right of establishment; taxation; transport; and communication are implicated by the AEC Treaty and are intrinsically bound to the national legal systems. The potential for conflict still exists. The absence of any relationship between the Court of Justice and national courts implies that there may not be uniform interpretation of relevant laws. Nothing could be more destabilising to the AEC than varied application of Community law.

Although national courts often rely on jurisprudence from other domestic courts, it is debatable whether they can, or will, equally rely on the judgments of the AU Court of Justice. The adjudicatory approach of relying on decisions of foreign courts as persuasive authority, especially prevalent in common law countries, ordinarily is not extended to international tribunals.[190] However, it is increasingly advocated that there must be interaction, dialogue, or transjudicial communication between national courts and international tribunals.[191] Arguably, the fact that a judgment of the AU Court of Justice is binding on member states[192] could be interpreted to imply that it binds the national courts of the member states as well.[193] It is important to distinguish between judgment as a remedy between parties and judgment as a principle of law. A foreign judgment remedy binds a state at the international level but does not make it automatically enforceable or recognisable by its courts in its domestic legal system. The existing legal regimes do not make room for automatic enforcement or recognition of foreign judgments.[194] No

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190. *See supra* note 178 and accompanying text.

191. *See generally* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 1 (1995-1996); INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996).

192. Protocol of the Court of Justice, *supra* note 71, art. 38.

193. A.O. Obilade, *The African Court of Justice: Jurisdictional, Procedural and Enforcement Problems*, *in* AFRICAN ECONOMIC COMMUNITY TREATY, ISSUES, PROBLEMS AND PROSPECTS, *supra* note 31, at 312, 317.

194. For a discussion of the regimes in Egypt, Nigeria, and Tunisia, see Wagdi Maher Bishara, *Egypt*, *in* 1 ENFORCEMENT OF FOREIGN JUDGMENTS, Egypt-9-10 (Louis Garb & Julian Lew eds., 2006); Ajumogobia & Okeke, *Nigeria*, *in* 1 ENFORCEMENT OF FOREIGN JUDGMENTS, *supra*, Nigeria-9; Habib Malouche & Slim Malouche, *Tunisia*, *in* 1 ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* Tunisia-10-11. For a discussion of the regime in Ghana, see Richard F. Oppong, *Recognition and Enforcement of Foreign Judgments in Ghana: A Second Look at a Colonial Inheritance*, C.L.B. No. 4, 2005, at 19. For a discussion of the regime in South Africa,

domestic court is bound to enforce a foreign judgment. It is suggested that member states of the AEC should be encouraged to enact domestic legislation that confers the same legal status to judgments from the AEC that domestic judgments enjoy especially in regard to enforcement procedures. This will facilitate the enforcement of AEC judgments. More difficult is the question of whether the principles of law developed by the AU Court of Justice bind the domestic courts. A court expands its authority by expanding the reach of its jurisprudence. The restrictions on the relationship between the AU Court of Justice and national courts will work against the authority of the former.

The Ugandan case of *Shah v. Manurama Ltd.*[195] illustrates the instrumental role national courts can play in securing the benefits of community law for individuals. In *Shah*, the defendant brought an application seeking an order to require the plaintiff to pay security for costs. The plaintiff was a resident in Kenya, and thus outside of the jurisdiction of the Uganda High Court. The defendant argued that because the plaintiff resided abroad, this was "a *prima facie* ground for ordering payment of costs."[196] The defendant relied on well-established common law principles to support his claim. In reply, the plaintiff argued that given the reestablishment of the EAC, the question of residence for the purpose of ordering security for cost should be re-examined.[197] In denying the application, the court held that in East Africa, "there can no longer be an automatic and inflexible presumption for the courts to order payment of security for costs with regard to a plaintiff who is a resident in the East African Community."[198] The court stated that the EAC's residence requirement "beg[ged] for a fresh re-evaluation of our judicial thinking" as regards the law requiring plaintiffs to pay security for costs.[199] Among the factors that influenced the court in declining the application were the following facts:

> (2) All the three countries of Uganda, Kenya and Tanzania are partner States in the East African Community ("EAC").
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> (3) The East African Community Treaty (like the European Community Treaty) seeks to establish a customs union, a common market, and a monetary union—as integral pillars of the community; and ultimately, a political union among the partner States. In particular,

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see FORSYTH, *supra* note 125, at 387-445. For a discussion of the regime in Botswana, see KIGGUNDU, *supra* note 129, at 434-65.

195. 2003 1 E. Afr. L. Rep. 294 (H.C.U.) (Uganda).

196. *Id.* at 296.

197. *Id.*

198. *Id.* at 298.

199. *Id.* at 297.

> the East Africa[n] Community Treaty makes express provision for the unification and harmonisation of the laws of the partner States, including "standardisation of the judgments of courts within the community" (article 126); and establishment of a common bar (that is cross-border legal practice) in the partner States. . . .
>
> (4) The underlying objective of undertaking all the initiatives described above and many more not discussed in this ruling—are stated in article 5 of the East African Community Treaty as being the need:
>
> > 'to develop policies and programmes aimed at *widening* and *deepening cooperation* among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit'. (emphasis added)
>
> . . . .
>
> (7) Article 104 of the East African Community Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The partner States are under obligation to ensure the enjoyment of these rights by their citizens within the community. In this regard, the court is mindful of the fact that the East African Community Treaty has the force of law in each partner State (article 8(2)(b)); and that this treaty law has precedence over national law (article 8(5)).[200]

This case demonstrates a clear appreciation on the part of the court of the importance of community law and its impact on existing national law. It is refreshing that individuals are enforcing their right to the benefits of community law. Investors, traders, workers, and corporate entities operating in Africa should begin to investigate the potential benefits the laws and goals of the AEC can provide them. There is a need for engagement between Community law, national courts, and individuals if integration efforts in Africa are to succeed. The existence of the AEC should begin to elicit a re-evaluation of our judicial thinking with regard to matters in which Community law and Community goals are involved. The AEC is still in its formative stages which suggests that national courts should adopt a teleological approach in cases where individuals seek the benefits of Community law and policy. National courts should draw on the goals of the Community and advance them.

200. *Id.* at 298.

V. THE AFRICAN ECONOMIC COMMUNITY'S LEGAL SYSTEM AND REGIONAL ECONOMIC COMMUNITIES

The AEC faces the added challenge of establishing a definite relationship between the laws of the Community and the various regional economic communities that are used as the building blocks of the AEC.[201] The size of the AEC makes such an approach to integration almost inevitable, but there is a price. There will probably be tension between member states' commitment to the goals of the regional economic communities and those of the AEC. Concurrent membership of regional economic communities creates a separate level of tension among member states and between the regional economic communities.[202] Some of the regional communities are in an advanced stage of development and it is difficult to envisage how they would merge with the AEC. Additionally, the provisions in some of the regional communities' treaties concerning jurisdiction, *locus standi* for private parties, supremacy of community law, and the relationship between community court and national courts are superior to those provided under the AEC Treaty. It is hard to conceive that all these advancements in economic integration in Africa may be lost when the regional communities merge with the AEC.

The Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities[203] provides the institutional framework for coordinating and harmonising the relationship between the AEC and the regional economic communities. While the protocol is replete with emphasis on the need to coordinate and harmonise activities at both levels, there is no definitive provision on the superiority of AEC law over that of the regional communities.[204] Regional communities, which have distinct legal personality, are not enjoined to observe the legal system of the AEC. This is disheartening because the protocol explicitly recognises that external and internal policies of the communities may conflict with the objectives of the AEC Treaty.[205]

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201. *See generally* Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185, 222-24 (2002).

202. Kiplagat, *supra* note 23; ECON. COMM'N FOR AFR., ASSESSING REGIONAL INTEGRATION IN AFRICA II: RATIONALIZING ECONOMIC COMMUNITIES (2006), *available at* http://www.uneca.org/aria2/full_version.pdf.

203. Protocol on the Relationship, *supra* note 28.

204. *Id.* art. 21. This article allows the Assembly or Council to give directives to the communities. Their decisions may include sanctions.

205. *Id.* art. 28.

Given that the communities constitute the key building blocks of the AEC, the absence of a definitive statement on their relationship with the AEC is problematic. This is especially true since some of these communities predate the AEC. They have their own separate institutions, distinct legal personality, and are in an advanced stage of development. Stronger communities have the potential to force their policy directions on the AEC. There may also be resistance from the other communities. A theme of this Article is that supremacy of Community law will allow for uniformity of application of Community law and thus eliminate potential disparities across jurisdictions within the Community. Like the AEC's approach, the European Union traces its origin to three separate communities, namely the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. Within these communities, common membership, common institutions, and supremacy of community law helped to solve problems of jurisdiction, conflicts, and coordination. The relationship between the communities and the AEC does not exhibit any of these conflict reduction features. It remains to be seen how potential conflicts will be solved.

VI. CONCLUSION

The initiative to integrate the economies of African states is laudable and must be encouraged. It is one of the surest paths to the development of Africa. The success of the AEC depends on the ability to overcome the demands and challenges of integration, be they economic, political, social, or legal. This Article has identified several legal issues that have largely been ignored in the process of integration but pose formidable challenges to the success of the Community. The current attitude of deemphasising law in the process of integration should be avoided. A committee should be established to look into the legal issues of integration in Africa. This committee should be charged with the responsibility of examining the existing laws on the continent to determine whether they meet the challenges of integration and facilitating commercial activity. It should also examine how Community law will impact and relate to the legal regimes of member states. Present initiatives on the continent such as those by OHADA and the Institute of Private International Law should be encouraged, potentially adopted, and enlarged to meet the goals of the Community.

It has also been noted that unless a clear and strong relationship is established between the Community legal system and national legal systems, the stability of the Community will be endangered by the varied

application of Community law in member states. Such a relationship can only develop with strong institutions, including an active judicial branch, supportive national courts, a bureaucracy committed to the goals of integration, and the existence of political will. Forging this relationship also demands a re-evaluation of our conception of sovereignty.

Private individuals also have a crucial role to play in the success of the Community. Experience from the European Union suggests that granting private right of action directly before the court of justice, or indirectly through a procedure for reference for preliminary ruling, can make individuals potent vessels for deepening the integration process. A true community cannot exist outside of its people.