Introduction

> The piercing of national borders by transnational norms finds its strongest expression in the formation of regional communities of states which seek to develop a common fund of legal rules, concepts and principles among their members (Ulrich Scheuner, forward to C. J. Mann, *The Function of Judicial Decision in European Integration* (1971))

African states that have, for decades since their independence, held on to the idea of nation-state and national sovereignty appear to be on the path towards rejecting both. The immediate post-independence era saw a zealous assertion of national sovereignty by African states and attempts to develop stronger and more stable national institutions. In recent times, and with the resurgence of 'African consciousness' – African renaissance – calls have been made for the transfer of sovereignty away from the state to regional and continental institutions. National separatism is being abandoned in favour of regional and continental integration. Through numerous treaties, African states have positioned themselves on a path to economic integration. The route is complex, tortuous and fraught with social, economic, political and legal challenges. The ultimate goal is to create an African Economic Community (AEC). To get there, eight regional economic communities (communities) have been recognized by the African Union (AU) and given the mandate to progress gradually, ultimately with the view to merging to form the AEC.

The idea of integrating Africa, economically and politically, has a long history. But successive attempts have been largely ineffective and unsuccessful. As Hazlewood once observed, 'studies of economic and political integration between African states have as much or more to say about the weakening of existing ties than about the coming together of those who were apart. . . . Economic integration, however, has fared little better than political integration, and from the viewpoint of economic

development this is greatly to be regretted.'[1] These views were expressed in 1967. It is gratifying to report that, unlike the previous attempts at economic integration, the current efforts are making significant progress, albeit slowly.[2]

At present, the need for African states to integrate their economies to enhance their growth and development is widely accepted. How it should be pursued, however, remains contested and well debated. The economic, social and political significance and dimensions of the endeavour are far-reaching. They have been well explored in many treatises. This book does not attempt to rehearse these issues; rather, its focus is a much neglected aspect – the *legal* aspects of Africa's economic integration processes. It uses a relational framework as the medium of analysis. It examines how what I have characterized as relational issues of law in economic integration are being approached in Africa. At their core, relational issues deal with the legal interactions among community, national, regional and international legal systems within the context of economic integration. The theory is that effective economic integration is the product of properly structuring and managing – within well-defined legal frameworks – vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. Put differently, an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness.

This book expounds this theory and applies it to Africa's economic integration processes. It uses four of the AU recognized communities – the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) – as its principal focus. These communities, which are at varying stages of development, have many aims; but they all aim to create regions in Africa, and ultimately a continent, in which goods, services, labour and capital are able to and will circulate freely. These objectives are to be achieved in successive stages largely consistent with a linear model of economic integration – free trade area, customs union, common market and economic union.

The first chapter sets the stage for the discussion in the subsequent chapters. It defines some of the key concepts that are used in the book,

[1] Hazlewood (1967), pp. 3–4.
[2] United Nations Economic Commission for Africa (2010), pp. 7–35.

introduces the various communities which are the focus of this study, and provides a brief overview of the socio-economic and political context within which the current economic integration efforts are being pursued in Africa. Chapter 2 develops the thesis that effective economic integration is the product of properly structuring and managing, within well-defined legal frameworks, vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. The chapter draws on the comparative jurisprudence, treaties and experiences of various economic communities, including some in Africa. It takes on board perspectives from constitutional, public and private international law. From these, the chapter distils and examines principles that are used by economic communities to manage relational issues. The extent to which these principles are reflected in community laws in Africa, their limitations and the factors that condition their effective use are the subject of subsequent chapters.

Chapter 3 addresses the complex and perplexing problem of the relationships between the AU, AEC and Africa's communities, as well as those between the Regional Economic Communities (RECs). Untangling and understanding this complex web of relations is essential to appreciate some of the institutional deficiencies that currently bedevil Africa's integration processes, especially at the continental level. The chapter draws on the emerging scholarship on international regime complexity and argues, to an extent, the character of international institutional density in Africa's economic integration is unique and presents its own challenges. The legal framework for regulating this institutional density is examined. The examination exposes a number of issues – present and future – that could undermine attaining the AEC's objectives. Some of these issues, especially regarding enforcement of AEC law, are further explored in Chapter 6.

Chapter 4 continues with the focus on the AEC. It examines aspects of the AEC Treaty with an eye on issues such as the nature of the AEC's legal system, supremacy of community law and harmonization of national laws. Although the discussion focuses on the AEC, it is equally relevant and applicable to the other communities. Without underplaying the importance of the issues examined in Chapters 3 and 4, it must be cautioned that, given the state of development of the AEC – it is still in formation and its own development is largely contingent on that of the constituent RECs – many of the issues examined in both chapters are likely to become more concrete in the future.

Chapter 5 shifts the focus to the COMESA, EAC, ECOWAS and SADC by drawing on their concrete experiences with relational issues. It uses their constitutive treaties and the jurisprudence of their respective community courts or tribunals as the basis of the analysis. Although the jurisprudence is comparatively scant (albeit expanding) and has mainly dealt with issues not directly related to economic integration, the few cases that have been decided offer very useful insights into how the courts can help to address some of the relational issues and limitations on their work. With the experiences of COMESA, EAC, ECOWAS and SADC in mind, and against the background of the theory that structured relations between community and national institutions are important for effective economic integration, Chapter 6 re-focuses on the AEC. The chapter examines the adequacy of the executive, legislative and judicial institutions of the AEC in meeting the demands of effective economic integration. It devotes particular attention to the structure and jurisdiction of the African Court of Justice and Human Rights. This court will ultimately be responsible for adjudicating economic integration issues in Africa. The chapter examines whether the court is adequately designed to meet the needs of economic integration, especially as regards its subject matter and personal jurisdiction, and its relationship with national courts.

Individuals play a central role in economic integration. Like institutions, they also serve as media for creating relations between legal systems. Their actions, especially through litigation, are important for the enforcement of community law. But their actions, which are aimed at ensuring the effectiveness of community law, can often be hampered by existing national legal infrastructure. These provide the background to Chapter 7, which assesses the implementation of community law within member states. This is an issue of direct concern to individuals who seek to benefit from community law in those member states. The chapter examines how national implementation of community law is approached within Africa's communities and member states. It also assesses how national constitutions and jurisprudence may constrain or enhance the communities' vision of the place of their laws in member states and, concomitantly, the ability of individuals to benefit from such laws.

Community–state and interstate relations are often discussed using perspectives from public international law and national constitutional law. The preceding chapters are situated within that discourse. However, as Chapter 2 demonstrates, a place exists for private international law in

dealing with the relationship between legal systems in the context of economic integration. For example, effective economic integration demands strengthened interstate relations that create an enabling climate for economic transactions. Chapters 8 and 9 examine the role of private international law in managing interstate and community–state relations in Africa's economic integration processes. Chapter 8 examines some relational issues arising from the communities' constitutive treaties and laws on which public and private international law principles may have an impact. The chapter examines the impact that public and private international law may have on the effective operation of community institutions, especially the community courts. Among the issues examined are the arbitral jurisdiction of community courts, enforcement of their judgments, conflict of jurisdiction between community courts and judicial cooperation between community and national courts.

Chapter 9 uses private international law as a barometer to measure the extent to which African national legal systems are integrated. Private international law principles coordinate or regulate relations between legal systems. They can aid or constrain economic integration processes and economic transactions which take place within them. A principal issue addressed in the chapter is the recognition and enforcement of foreign judgments. Enforcing foreign judgments is, perhaps, the best manifestation of how sovereign legal systems relate to each other; they validate and give effect to each other's norms. The chapter examines existing foreign judgment enforcement regimes and their suitability for the demands of economic integration. It also provides a general assessment of private international law in Africa and suggests values that should inform the development of a regime that can meet the needs of economic integration. Chapter 10 provides the conclusion.

A common thread running through the chapters is that Africa's economic integration processes have not paid the necessary attention to relational issues: the issues have not been properly addressed. At present, there is no solid or carefully thought through framework to manage relations between community and member states' legal systems, among the various communities, as well as among member states' legal systems. Attempts to provide such a legal framework have been incomplete, unsatisfactory or grounded on questionable assumptions. This book argues that such shortfalls should be remedied to ensure the effectiveness of Africa's economic integration. To that end, the book, in various sections, proposes amendments to community and national laws.

1

Africa's economic integration – an introductory overview

1.1 Introduction

Economic integration is defined 'as the elimination of economic frontiers between two or more economies'.[1] In this regard, an economic frontier represents a demarcation – often the geographical boundaries of a state – into which the flow of goods, labour and capital is restricted. Economic integration involves the removal of obstacles to trans-boundary economic activities which occur in the fields of trade, movement of labour, services and the flow of capital. Economists have identified various stages in the process of economic integration. According to Bela Balassa, economic integration passes through five stages, namely: 'a free trade area, a customs union, a common market, an economic union, and complete economic integration'.[2] In a free-trade area, tariffs and quantitative restrictions on trade between the participating countries are abolished, but each country retains its own tariffs against non-members. 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 non-member countries. A common market is a higher form of economic integration. In a common market, both restrictions on trade and factor movements are abolished. An economic union combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies to remove discrimination due to the 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 supranational authority, the decisions of which are binding on member states.

The first three stages involve negative integration. The stages entail the removal of discrimination in national economic rules and policies under

[1] Pelkmans (1986), p. 318. [2] Balassa (1962), p. 2.

joint and authoritative surveillance and, generally, placing limitations on national economic decision-making.[3] These are difficult stages in integration. They entail restrictions on countries' sovereign rights to take decisions affecting the socio-economic well-being of their residents. An economic union and complete economic integration are characterized as positive integration. They involve 'the transfer of public market-rule-making and policy-making powers from the participating polities to the union level'.[4] Balassa's linear model of economic integration has been criticized,[5] but it is still widely followed by economists.[6] It has shaped many economic integration initiatives, including some in Africa.

Economic integration is important to Africa and is currently being pursued at regional and continental levels. The urgency with which it must be pursued was expressed by the United Nations Economic Commission for Africa (UNECA) in these words: 'This shift [the global move to integrate economies] is nowhere more urgent than in Africa, where the combined impact of our relatively small economies, international terms of trade, and the legacy of colonialism, mis-rule, and conflict has meant that we have not yet assumed our global market share – despite our significant market size.'[7] It is envisaged that uniting African economies will permit economies of scale, make them more competitive, provide access to wider trading and investment environments, promote exports to regional markets, provide the requisite experience to enter global markets and provide a framework for them to cooperate in developing common services for finance, transportation and communication.[8] The economic philosophy that underlies these visions is neo-liberal economic thinking that emphasizes, among others, free trade and the removal of obstacles to investment.

The need to integrate African economies is widely accepted. But its nature, scope, focus and theoretical underpinning remain contested.[9] Some have questioned the state-centred formal economy focus of Africa's economic integration processes and advocated a re-focus on informal trading structures that exist within and among African countries. Others have advocated cooperation on specific projects in areas such

[3] Pelkmans (1986), p. 321. [4] Balassa (1962), p. 2.
[5] McCarthy (2008), pp. 24–40. [6] Pelkmans (1986), pp. 324–6.
[7] United Nations Economic Commission for Africa (2004), p. ix; and United Nations Conference on Trade and Development (2009).
[8] United Nations Economic Commission for Africa (2002), pp. 2–11.
[9] Boas (2001), p. 27; Meagher (2001), p. 41; Lesser and Moise-Leeman (2008); Mazzeo (1984), p. 165; and Senghor (1990), p. 17.

as agriculture, infrastructure and technology. Similarly, while some advocate regionalism, others emphasize the need for immediate, continent-wide integration. This debate in Africa can be seen as part of the wider international economic law debate on regionalism and multilateralism. Regionalism in Africa has benefits.[10] It will allow for region-specific initiatives. The relatively small size of RECs, in terms of the number of countries engaged, also makes for easy management and decision-making. Africa consists of fifty-three sovereign countries. Thus, perhaps, regionalism is the only manageable option. Competition among RECs may also be an avenue for development through efficiency gains. Regionalism in Africa also has disadvantages. It can reduce member states' commitment to ensuring the emergence of continent-wide integration. Multiple commitments given by states to RECs, resulting from multiple memberships of such organizations, can lead to non-compliance and jurisdictional conflicts. Additionally, countries with relatively large and developed economies may benefit at the expense of the smaller regional members.

While the above discussions are interesting, very little has been discussed about the legal issues arising from Africa's economic integration processes.[11] A difficult problem in economic integration is what I characterize as relational issues of law in economic integration (hereafter relational issues), which take on various forms, including: the relations between the laws of a community (community law[12]), its institutions and those of its member states; mechanisms for normative exchange or communication between a community and its member states and member states *inter se*; jurisdictional conflicts between a community and its member states; the allocation of competences between a community and its member states; individuals' access to community institutions; and the recognition and enforcement of member state and community normative acts.

These issues become more prominent especially when the economic integration process progresses through the various stages of integration. A free-trade area may exist without well-structured and managed relations between the community and national legal systems, but a customs

[10] Mulat (1998). [11] Kulusika (2000), p. 20; Salami (2008); and Akinrinsola (2004).
[12] Community law takes the form of treaty provisions, protocols, regulations and judicial decisions. Although not laws as such, the objectives, principles and undertakings of member states as outlined in the communities' treaties are of legal consequence. Like laws, they are meant to guide conduct and are enforceable.

union, common market or economic union cannot operate effectively without attention to relational issues. This is because the interactions between legal systems deepen as economic integration progresses through the various stages of integration. In Africa, relational issues are further complicated by Africa's unique approach to achieving continental integration. The approach uses pre-existing RECs as building blocks for a continent-wide economic community called the African Economic Community (AEC).[13] Other RECs have adopted an approach that involves expansion through the addition of new states to a core of founding members.

The emphasis on relational issues is meant to bring to the fore the importance of law as an instrument for economic integration. A purely economic or socio-political approach to, or analysis of, economic integration should be viewed with caution, as it fails to appreciate the important fact that obstacles to trans-boundary economic activity are not only economic or socio-political, but are also sometimes legal. National and international laws limit the movement of persons, goods, services and capital. These limitations may be informed by economic and socio-political considerations, but it is through the medium of law that the limitations are realized. An understanding of economic integration that envisages laws as an instrument for integration should immediately position law at the forefront of the process. As Pescatore has observed: 'The process of integration can have no real consistency and, above all, no real stability or lasting force unless we succeed in giving it a sufficiently solid institutional and legal framework.'[14] Attention to relational issues is an important aspect of this endeavour. The role of law in economic integration can be discussed from multiple perspectives. This book focuses mainly on legal and institutional structures, law-making processes, interactions between different legal systems, and implementation and enforcement of laws. One could argue that law should not be given any role or a major role to play in economic integration; rather, the emphasis should be placed on informal institutional structures, cooperation, voluntary compliance and the good faith of politicians to implement agreed objectives.[15] This is neither a view to which I subscribe, nor which the book advances.

[13] Treaty Establishing the African Economic Community, 3 June 1991, 30 ILM 1241 (hereafter, AEC Treaty).
[14] Pescatore (1974), p. 2. [15] Gathii (2009–2010).

Contrary to that view, the relational framework used in this book, in essence, presupposes, or creates, a very high degree of legal integration and expectation of it. As Michael Ewing-Chow has observed, 'weak legalization . . . is perhaps an unusual basis for a regional integration project'.[16] At present, this degree of legal integration is a feat only achieved within the European integration experience. However, the fact that to date that degree of legal integration has been achieved only within Europe does not mean that it cannot be achieved in Africa or elsewhere.[17] It is worth remembering that the high degree of legal integration that currently exists in Europe was not achieved in a day. It is the result of a process that dates back to the 1950s, during which time many African countries were still under colonial rule. The economic integration processes in Africa which are dealt with in this book are of recent origins. They date back to the middle and late 1990s. Accordingly, one should not expect to see today in Africa the same level of legal integration as that achieved by Europe over a period of more than half a century. However, this should not be a reason to despair or argue that only Europe can do it. This book advocates the existence of such a high degree of legal integration as a necessary – but not a sufficient – condition for the effectiveness of economic integration in Africa.

The notion of effectiveness[18] is used in the book to measure the extent to which the communities are, and will be, able to achieve the objectives that they have clearly outlined in their respective treaties. From a legal perspective an effective community should demonstrate: the free flow of goods, services, person, capital and property, including judgments within the community consistent with the stage of economic integration it has reached; the existence and development of a significant body of community laws including judicial decisions to regulate the integration process; integration of community law into the laws of member states; the existence of a carefully structured legal framework for addressing and managing the multiple relationships (for example, community–state, interstate, inter-community, inter-institutional) created by economic integration; the existence of institutions adequately designed, mandated and resourced to ensure the application of community law; the existence of well-outlined

[16] Ewing-Chow (2008), p. 237.
[17] See generally Winters (1997). Comparatively, some writers have argued for greater legalization within the Association of South East Asian Nations. See Ewing-Chow (2008); and Davidson (2008).
[18] Ingram (1983).