

Chapter 1

**SADC at 30: Re-examining the Legal and Institutional Anatomy of the
Southern African Development Community**

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Introduction

The growing fear of Africa's marginalisation in an era of globalisation and the poor economic track record of most African states have partly paved way for regional integration in Africa (Chauvin and Gaulier 2002:10). In a bid to overcome these fears and improve the economic fortune of Africa, there have been concerted efforts both at the regional and sub-regional level to jointly harness resources for putting viable development policies in place. These policies are often implemented by regional institutions created by member states. In this regard, having in place effective regional institutions and adequate institutional machinery to oversee the implementation of these development policies becomes an essential condition for regional integration (Mutharika 1972:55).

In the Southern African Development Community (SADC), regional integration traces its origin to the Southern African Development Cooperation Conference (SADCC) which was created in 1980. SADCC was created to foster economic cooperation among its members. It also focused on reducing economic reliance on the then apartheid government of South Africa. Although SADCC was meant to promote economic cooperation among its members, it had a loose institutional structure. It had no binding legal framework and its institutions were decentralised. States took responsibility for the development of particular sectors without vesting powers in a centralised body. However, with the transformation of SADCC into SADC in August 1992, a treaty was adopted and the formerly decentralised institutions of SADCC were collapsed into centralised regional institutions. With the adoption of a treaty and the centralisation of institutions, it invariably meant that states now had a binding obligation to implement regional agreements and the institutions were to oversee the implementation.

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This paper examines the efficacy of these SADC institutions since the transformation from SADCC into SADC. The primary focus is to determine if the institutional shift from decentralised to centralised institutions has improved regional integration capacity in SADC. The ability of these centralised institutions to promote regional integration is gauged from the extent to which they make member states comply with their regional obligations. Also, the relevance of these centralised institutions would be doubtful if they are unwilling or unable to ensure that members seek to comply with their regional obligations.

This paper likewise examines the power dynamics between states and SADC institutions to determine if states have vested adequate powers in these institutions. To this end, the extent to which states comply with their regional obligations and the resultant implications of non-compliance are also examined.

SADC: a historical perspective

SADC as we know it today traces its origin to the Lusaka Declaration of 1980 which had founded SADCC.¹ The Lusaka Declaration was a culmination of efforts that had begun in the 1970s to improve the standard of living of the people of the Southern African region. At the Lusaka Summit where the Declaration was adopted, the Founding Fathers made a commitment to pursue policies aimed at liberating and developing the economies of the region. While developing the living standards of its members was on its agenda, SADCC also served as a defence mechanism against the economic influence of the South African apartheid government (Schoeman 2001:2). This defence mechanism was built in to shield the region from South Africa's strong economic influence. SADCC was conceived as a means to reduce economic dependence on South Africa, create equitable regional integration, promote the implementation of national, interstate and regional policies and secure international cooperation within the framework of the SADCC strategy for economic liberation (Mvungi 1994:79).²

¹ SADCC comprised nine Southern African countries: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The formation of SADCC was a result of a long process of consultations by the leaders of Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia, working together as the Frontline States. In May 1979 consultations were held between Ministers of Foreign Affairs and ministers responsible for Economic Development in Gaborone, Botswana. Subsequently a meeting was held in Arusha, Tanzania in July 1979 which led to the establishment of SADCC.

² See also the Preamble to Memorandum of Understanding on the Southern African Development Coordination Conference of 29 July 1981, available: <http://www.sadc.int/#> (28 December 2010).

The change in the political landscape in South Africa and the worldwide drive towards regional integration also necessitated a change in the ideological approach of SADCC towards improving the living standard of its people. With the demise of the apartheid in South Africa and the lifting of sanctions, it became obvious that the future of SADCC had to be reviewed to accommodate South Africa (Ndulo 1999:11). It also made economic sense to bring South Africa on board because it had the largest economy in the region. Also, by the end of the 1980s SADCC policy makers saw the need to have in place a binding legal document that would serve as the operational basis of SADCC.³ In 1992, the Heads of States or Government signed the SADC Treaty in Windhoek, Namibia which established the Southern African Development Community.⁴

In terms of the mission of the newly founded organisation, there was also a shift in policy given the change in the political landscape. Unlike the Memorandum of Understanding on SADCC which had as one of its objectives the reduction of economic dependency on South Africa, the SADC Treaty was geared more towards developing a robust community where there was interdependence among member states in terms of economic growth and socio-economic development (SADC Treaty 1992: Art 5). The aim of creating this spirit of interdependence among member states was to promote the furtherance of regional integration in various sectors of the region. In general, the transformation from SADCC to SADC brought about an institutional and ideological shift in the *modus operandi* of SADC.

The legal and institutional anatomy of SADC

A year after SADCC was formed, Heads of States of SADCC signed a Memorandum of Understanding establishing the institutions of SADCC (Mvungi 1994: 77).⁵ This memorandum did not create a formalistic body – rather it created a basis for loose cooperation among its members. There was no formal binding legal instrument to govern the affairs of SADCC but a more informal conference was created where member states relied on their discretion to propagate the objectives of SADCC.

In other words, the Memorandum of Understanding promoted the independence and sovereignty of member states and a minimum level of institutionalisation was permitted, this

³See <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/blokit/sadc.htm> (6 January 2010).

⁴ The Treaty of the Southern African Development Community, August 1992. Article 3, declared SADC to be an international organisation with legal capacity to enter into contracts, own property, sue and be sued.

⁵ The Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference of 29 July 1981.

leading to a decentralised institutional structure within SADCC (Schoeman 2001:3). Also, the Founding Fathers took notice of past attempts at regional cooperation in Africa and were of the view that the abysmal failure that had been recorded partly arose as a result of the sharing of costs and benefits of regional cooperation. To this end, they opted to adopt a decentralised structure where each member state took responsibility for the implementation of policy decisions. However, this did not mean that no institutions were created. Article I (a-e) of the Memorandum of Understanding on SADCC created a Summit, Council of Ministers, Sectoral Commissions, Standing Committee and a Secretariat.

The Summit, which was the supreme organ of SADCC, comprised Heads of States or Governments and it was vested with the responsibility of giving the general directions for the future of SADCC. The Council of Ministers comprised one minister appointed by each member state and was responsible for the overall policy implementation and coordination of SADCC. The Council also had the powers to appoint Ministerial Committees to execute specific programmes. Article IV of the Memorandum of Understanding on the SADCC vested Sectoral Commissions with the responsibility of coordinating development within the SADCC states. In line with this, each member state was allocated a sector to coordinate (Mvungi 1994:80). The role of the Secretariat was to provide a link between member states and the international community.

With the transformation from SADCC to SADC, came a change in the legal character of the organisation. While the operative document of SADCC was a Memorandum of Understanding which created no obligation on the part of member states, the adoption of the SADC Treaty in 1992 brought about a change in legal regime.⁶ The SADC Treaty laid down key fundamental principles which were to be the bedrock upon which member states were to relate with one another.⁷ The SADC Treaty also enlarged the objectives of the organisation to cater for areas that were hitherto not provided for under SADCC.⁸ Enlarging

⁶ A treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2 (I) (a) Vienna Convention on the Law of Treaties 1969).

⁷ The principles found in Article 4 of the SADC Treaty are sovereign equality of all member states, solidarity peace and security, human rights, democracy and the rule of law, equity balance, and mutual benefit and peaceful settlement of disputes.

⁸ Article 5 of the SADC Treaty lists the following as the objectives of the SADC: promoting sustainable and equitable economic growth and socio-economic development to alleviate poverty, consolidating, defending and maintaining democracy, peace, security and stability, promoting self-sustaining development on the basis of collective self-reliance and interdependence of member states, achieving complementarity between national and regional strategies and programmes, promoting and maximising productive employment and utilisation of resources of the region, achieving sustainable utilisation of natural resources and effective protection of the

the objectives of SADC was a policy response to the changing economic landscape around the world. It became apparent that for the region to remain competitive within the continent and beyond, cooperation was needed in more areas. In terms of institutions, the Summit also took necessary steps to restructure the institutions of SADC in order to avoid institutional constraints which would hamper the transformation process (Extra-Ordinary Summit March 9, 2001).

The signing of the SADC Treaty by necessary implication created rights and duties on the part of member states. The rights and duties created by the SADC Treaty were strengthened by member states giving an express undertaking to uphold the principles and objectives of the SADC Treaty (SADC Treaty 1992: Art. 6). Thus, the obligations undertaken by member states were no longer optional and non-binding; rather, legal obligations had been created, a breach of which would result in the accrual of international responsibility.⁹ To this end, the SADC Treaty also made provisions for the adoption of protocols to govern various sectors. Presently SADC has well over 20 protocols which cover various sectors such as trade, health, wildlife, culture, education, and so forth.¹⁰ The advantage of having protocols to regulate each of these sectors is that definite responsibility is placed on member states and a binding legal obligation is created.

Taking cognisance of the fact that a strong institutional base was needed to achieve the objectives of SADC, the SADC Treaty revised the existing institutional structure of SADCC and created more institutions. SADC retained the institution of the Summit of Heads of States or Governments, the Council of Ministers, the Standing Committee and the Secretariat.¹¹ In addition to these existing institutions, the SADC Treaty created the Organ on Politics, Defence and Security Cooperation, the Integrated Committee of Ministers, the Tribunal, and the SADC National Committees (SADC Treaty 1992: Art 9). The SADC Treaty also vested each of these institutions with the required authority necessary for carrying out their mandates.

environmen,; strengthening and consolidating the long-standing historical, social and cultural affinities and links among the people of the region, combating HIV/AIDS or other deadly and communicable diseases, ensuring that poverty eradication is addressed in all SADC activities and programmes and mainstream gender in the process of community building.

⁹ See Article 16 Draft Articles on State Responsibility.

¹⁰ For a detailed list of all SADC protocols, see <http://www.sadc-tribunal.org/pages/protocols.htm> [8 January 2011].

¹¹ The role of the Secretariat was enlarged from just providing links between member states and the international community. The Secretariat became the main institution that oversees the implementation of the activities of SADC.

Composition and functions of SADC institutions

When discussing regional integration, it is pertinent to always ascertain the nature of the specific regional institutions that carry the mandate to implement the integration agenda. This is because at this level, governance transcends individual member states within the region to a level where decision making is delegated to regional institutions that are in a way independent of member states. This is important because the nature and extent of powers vested in the regional institution determines the institution's ability to propagate the region's integration agenda. Generally, the position among scholars of regional integration is that the existence of supranational institutions within an integrating unit is essential for the propagation of the integration agenda. The importance of the existence of supranational institutions in promoting regional integration cannot be overemphasised. As Mutharika (1972:55) rightly notes, economic cooperation requires the delegation of power to a supranational body entrusted with the task of safeguarding the interest of both the multinational grouping as well as that of the individual member states.

Working from the above premise, one question that comes to mind is whether the transformation from SADCC to SADC brought about the creation of supranational institutions. Supranational institutions are largely independent of individual member states and they are vested with decision-making powers which bind member states (Tallberg 2002: 23). However, for these institutions to promote integration, their decision-making powers must be exercised in a manner that portrays the common agenda of the regional body. The key element that supranational institutions have is that they possess decision-making powers which are delegated to them by member states, yet they are independent of member states (Ibid). The European Court of Justice has viewed supranational institutions in terms of their independence from member states and their competence to make decisions that will bind member states and their subjects (Costa 1964: 585). Drawing from this brief illustration of supranational institutions, a regional body would be deemed supranational if it exhibits these elements.

Mvungi (1994:85) has argued that the institutions that existed within the era of SADCC did not qualify as supranational institutions because they had no authority separate from that of their member states. Mvungi points out that article IX of the Memorandum of Understanding on SADCC gave SADCC legal capacity to exercise its functions but made such capacity subject to its consistence with the laws of member states. In this regard, it is valid to argue

that since the legal capacity of SADCC to exercise its functions under the Memorandum of Understanding was made subject to the dictate of national laws, it was practically impossible for it to have supremacy over national laws or have the competence to make decisions that would bind member states. In other words, the institutions that existed under SADCC lacked the requisite features of a supranational institution.

However, while it is conceded that the institutions under SADCC lacked the requisite features of a supranational institution, one must bear in mind that when SADCC was established the political terrain was quite different in that the quest for independence of some southern African states was top on the agenda. And as such, creating an organisation which to an extent would limit the powers of its members would have been impracticable at that time. The focus at the time was to harness resources and to identify and develop the areas of strength and weakness of the region. Be that as it may, the SADCC institutions still worked hard towards the economic development and success of the region (Ndulo 1999:10).

With the emergence of a new legal regime under the auspices of the SADC Treaty, the mandate and nature of the institutions also changed. The SADC Treaty created institutions which have the semblance of supranational institutions. The transformation from SADCC into SADC not only entailed a legal transformation but it also amounted to an institutional change. The change brought about a difference in the manner in which member states handled issues of integration within the region. Although member states are still actively involved in the development of various sectors, the activities are coordinated at the regional level and as such the development of SADC became a common enterprise run by SADC institutions. The pertinent question that is being asked, however, is whether this transformation has helped to improve regional integration in SADC. Put differently, has the transformation from SADCC to SADC brought about the creation of *de jure* and *de facto* supranational institutions in SADC?

Article 9(1) of the SADC Treaty establishes eight institutions which are vested with the responsibility of running the affairs of SADC. The institutions are the Summit of Heads of State or Government, the Organ on Politics, Defence and Security Cooperation, the Council of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and SADC National Committees.

The Summit

The Summit is made up of all the Heads of States or Governments of SADC states. It is the supreme policy-making institution in SADC and is vested with the responsibility of controlling and giving policy directions for all SADC institutions and member states. The Summit is headed by a Chairperson and Deputy Chairperson who are elected from the members and they hold office for one year on a rotational basis. The Summit meets at least twice a year, appoints the Executive and Deputy Secretary of the Secretariat, admits new members into SADC, and may create committees and other institutions when necessary. The decisions of the Summit are taken by consensus and are binding (SADC Treaty: Art. 10).¹² However, the SADC Treaty does not state if these binding decisions of the Summit have a direct effect in the territory of member states.

Although the competence of the Summit to make binding decisions is not in dispute, for instance, it has exercised this power when it suspended Madagascar from SADC. But uncertainty remains over whether decisions of the Summit are of direct effect and take primacy over national laws. The silence on the part of the SADC Treaty creates a gap in the quest for regional integration in SADC because the manner in which decisions of the Summit are implemented is left to the discretion of member states. In principle, a regional institution whose decisions are not directly binding on member states may find it difficult to ensure the implementation of its decisions and this would inevitably tend to affect the process of integration.

The independence of the Summit as a supranational institution is also questionable in that it comprises the Heads of State or Government of member states. Ordinarily, the composition of the Summit should not raise an eyebrow, but given the fact that it is vested with the powers to make all policy decisions, it is doubtful if the Summit can make decisions that are not favourable to some member states but favourable to the region.¹³ The Summit's recent inability to direct the Republic of Zimbabwe to comply with a decision of the SADC Tribunal points to the fact that the identity of the Summit and that of its member states might be intrinsically linked. This also points to the fact that the Summit as an institution of SADC has

¹² It is important to also mention that save for the Tribunal, the SADC Treaty is silent on whether decisions of other SADC institutions such as the Council of Ministers are binding on member states.

¹³ This point is strengthened by the fact that the Summit reaches its decisions through consensus and as such a member state may decide to protect its interest by voting against a policy and by so doing denying the Summit of the required consensus.

not garnered enough political will to draw the line between the individual interest of member states and that of the region. If this kind of trend continues, the Summit could single-handedly put asunder all the efforts towards regional integration.

The Organ on Politics, Defence and Security Cooperation

The Organ on Politics, Defence and Security Co-operation is headed by a chairperson and a deputy. They are appointed by the Summit and the chairperson of the Summit is precluded from being appointed as the chairperson of the Organ. The Organ reports to the Summit and has a Ministerial Committee which is made up of ministers from member states responsible for foreign affairs, defence, public security or state security (SADC Treaty 1992: Art. 10A). The Organ has as its responsibility the promotion of peace and security, prevention of the breakdown of law and order, development of common foreign policies, enforcement of action in line with international law, promotion of the development of democratic institutions among member states, and so forth (Protocol on Politics 2001: Art. 2). The objectives of the Organ are meant to strengthen regional integration in the region. However, from the composition and reporting structure of this institution, it is evident that it is part and parcel of the Summit and there are no checks and balances in place to guarantee its independence as a distinct institution.

The Council of Ministers

The Council of Ministers consists of one minister from each of the member states and the chairperson and deputy are appointed by the member states holding the chairpersonship and deputy chairpersonship respectively. The Council of Ministers oversees the functioning and development of SADC, implements policies, ensures proper execution of projects, makes recommendations to the Summit, draws up terms of conditions of service for employees of SADC institutions, and develops and implements the SADC common agenda and strategic priorities. The Council meets at least four times a year and its decisions are by consensus. It reports to the Summit and recommends to the Summit applications for membership of SADC (SADC Treaty 1992: Art. 11). In general, the Council serves as the engine room of SADC in that it develops and implements the common agenda of SADC. One challenge which the Council faces is that it has no power to make binding decisions: it must report all its actions to the Summit. For an institution that oversees the implementation of SADC policies, it would have been vital to have the power to make binding decisions.

The Integrated Committee of Ministers

The Integrated Committee of Ministers is made up of at least two ministers from each member state and they meet at least once a year. The Chair and Deputy Chair are respectively appointed by the member states that hold the position of Chair and Deputy Chair of the Council. The Integrated Committee monitors the core areas of integration which include trade, industry, finance and investment, infrastructure and services, food, agriculture and natural resources, and social and human development. Decisions of the Integrated Committee are by consensus and are reported to the Council (SADC Treaty 1992: Art. 12).

The Standing Committee of Officials

The Standing Committee of Officials is a technical advisory committee to the Council. It consists of one permanent secretary from the ministry of the member state which serves as the SADC national contact point. The Standing Committee processes documentation from the Integrated Committee of Ministers and reports to the Council. The Standing Committee meets at least four times a year and its decisions are by consensus. The Chair and Deputy are respectively appointed from the member states that hold the position of Chair and Deputy Chair of the Council (SADC treaty 1992: Art. 13).

The Secretariat

The Secretariat serves as the principal executive institution of SADC. It is charged with the responsibility of organising, mobilising, coordinating, implementing and administering the policies and programmes of SADC (SADC Treaty 1992: Art. 14). The Secretariat is headed by an Executive Secretary who is responsible for consulting with governments and institutions of member states, running the affairs of the Secretariat, and fulfilling any other function that may be given to the Secretariat by the Council. The Executive Secretary is appointed for a term of four years which may be renewed for another period not exceeding four years (SADC Treaty 1992: Art. 15).

The fact that the Executive Secretary is appointed by the Summit may affect the Secretariat's ability to pursue member states that do not implement SADC policies. The situation is further complicated by the fact that the tenure of office of the Executive Secretary is not guaranteed. Although he/she is appointed for a term of four years, there is nothing in the

SADC Treaty which precludes the Summit from removing him/her from office before the end of their tenure.

The SADC Secretariat does not have the powers to compel member states to implement SADC policies or programmes. One would expect that an institution like the Secretariat which has the responsibility of implementing SADC programmes would also be given the power to take action against member states who fail to implement the agreed policies.

The Secretariat merely serves as an administrative body which runs the affairs of SADC. The SADC Secretariat has been largely ineffective in ensuring regional integration because it has no real powers assigned to it. Drawing from the example of the European Union, it may be beneficial to SADC if the Secretariat like the European Commission (Consolidated EC Treaty: Art. 226) is expressly granted powers to institute action against a member states who fails to fulfil its obligation under the SADC Treaty or other relevant SADC legislation.

The SADC Tribunal

The SADC Tribunal is a cornerstone to regional integration in SADC. This is because it plays a vital role in ensuring compliance with SADC rules. It ensures that the provisions of the SADC Treaty and its subsidiary legislations are properly interpreted and adhered to. It also adjudicates disputes that are referred to it and its decisions are final and binding. In addition, the Tribunal also gives advisory opinions to the Summit and Council (SADC Treaty 1992: Art. 16). The composition, powers, rules and procedure of the Tribunal are set out in a separate protocol. The Protocol on the Tribunal gives the Tribunal the jurisdiction over all disputes that relate to the interpretation, validity and application of the SADC Treaty and its protocols (Protocol on Tribunal: Art. 14). The scope of the Tribunal includes all disputes between member states and between natural or legal persons and member states (Protocol on Tribunal: Art. 15). The Tribunal has the jurisdiction to entertain disputes between SADC and the member states. Also, an institution of SADC can bring an action against a member state (Protocol on Tribunal: Art. 17).¹⁴ The Tribunal consists of ten judges and is headed by a President. Of the ten judges, five are regular members and the other five are called upon by the President when the need arises (Protocol on Tribunal: Art. 3). The judges are appointed

¹⁴ One would expect that the Secretariat which is vested with the responsibility of ensuring that programmes of SADC are implemented would take advantage of this provision when member states do not comply with the regional obligation. Until now no suit has been initiated against a member state at the instance of any of the SADC institutions.

for a term of five years and may be re-appointed for another term of five years (Protocol on Tribunal: Art. 6).

Recently, doubts have been cast on the competence of the SADC Tribunal and its ability to promote regional integration. These doubts stem from the fact that in August 2010 in Windhoek, the SADC Summit reached a decision to suspend the activities of the SADC Tribunal and directed the Secretariat to commission a study which would review the mandate of the Tribunal. The study would review the operations of the Tribunal, its role and responsibility, the jurisdiction of the Tribunal, its power to review decisions of domestic courts, and so forth.

The Summit's decision to suspend the Tribunal from hearing new cases traces its origin to the displeasure expressed by the Republic of Zimbabwe on the Tribunal's decision in the case of *Mike Campbell & others v Republic of Zimbabwe* (2007). In the Campbell case, the SADC Tribunal found in favour of the applicants and held that the Republic of Zimbabwe was in breach of Article 6 (2) of the SADC Treaty.

The Republic of Zimbabwe refused to recognise the decision of the Tribunal and openly criticised the Tribunal. The applicants drew the attention of the Tribunal to the fact that Zimbabwe refused to comply with the Tribunal's decision and urged the Tribunal to take necessary action (*Campbell v Zimbabwe* 2008, *Fick v Zimbabwe* 2010). The Tribunal, in line with Article 32(5) of the Protocol on the Tribunal, reported Zimbabwe's failure to comply with its decision to the Summit for appropriate action.

The Summit, rather than compel Zimbabwe to comply with the decision of the Tribunal decided to stop the SADC Tribunal from taking new cases for a period of six months in order to review the mandate of the Tribunal and other sundry issues. While the suspension was in effect, the Tribunal would be unable to entertain new cases but would continue to hear cases that had been commenced before the suspension was imposed.

The decision of the Summit to suspend the activities of the Tribunal has caused a crisis for the Tribunal. The suspension has put a question mark on the credibility and independence of the SADC Tribunal. While it is acknowledged that the Summit has the capacity to review the mandate of the Tribunal, suspending the activities of the Tribunal as a result of a member state's dissatisfaction with the decision of the Tribunal casts doubt on the acceptability of decisions of supranational institutions by SADC member states. This is because the Tribunal

like national courts is meant to act as the watchdog in the governance scheme. Where the Tribunal is suspended at a point in time when there is a hot debate on the compliance of its decision by a member state, a suspension of its activities automatically whittles down the Tribunal's efficacy and integrity. This in turn becomes a dangerous precedent for an institution that is entrusted with developing the jurisprudence of the region.

Another challenge facing the SADC Tribunal is its ability to make decisions which are binding and have direct effect in the territory of member states. The SADC Tribunal does not have its own judgement enforcement mechanism; it relies on member states to enforce its decisions. Article 32(1) of the Protocol on the Tribunal requires the decisions of the Tribunal to be registered and enforced by member states as foreign judgements. This creates a gap in the enforcement of the Tribunals' decisions because it subjects the enforcement of the Tribunal's decisions to the domestic laws that govern the enforcement of foreign judgements in member states. This scenario recently played out when the Zimbabwe High Court in the case of *Gramara (Pvt) Ltd & Another v The Government of Zimbabwe (2009)* refused to register and enforce a judgement of the SADC Tribunal on the grounds that the decision of the SADC Tribunal was contrary to public policy in the Republic of Zimbabwe. Actions like this one are clearly in contrast to the spirit of regional integration and send out a signal that member states can undermine regional jurisprudence or fail to honour their obligations under the relevant regional instruments. If regional integration is to be firmly rooted within SADC, the SADC Tribunal must be allowed to develop the jurisprudence of SADC law as was the case with the European Court of Justice in the formative years of the European Union (Arnull 1999).

The SADC National Committees

The last SADC institution established in terms of Article 9(1) is the SADC National Committees. Each member state is expected to create a National Committee which is made up of stakeholders in the member state. These stakeholders include the: government, private sector, civil society, non-governmental organisations and workers' and employers' organisations. The function of the National Committee is to provide input into the SADC agenda at a national level. It also serves as a starting point for formulating SADC policies and helps to coordinate and oversee at the national level the implementation of a SADC programme of action (SADC Treaty 1992: Art. 16A). The National Committees are relatively important in that through this institution SADC is able to adopt a bottom-up

approach to regional integration, and stakeholders at the national level are able to make inputs in the decisions that are adopted at the regional level.

The SADC Parliamentary Forum

The SADC Parliamentary Forum, though not expressly listed in Article 9 (1) of the SADC Treaty, is also an institution of SADC. It was created by the Summit in 1997 on the basis of Article 9 (2).¹⁵ Among the objectives of the Parliamentary Forum are strengthening the implementation of SADC policies through the involvement of parliamentarians (SADCPF Constitution 2004: Art. 5). Membership of the Parliamentary Forum is open to national parliamentarians of SADC member states (SADCPF Constitution 2004: Art. 6). The SADC Parliamentary Forum does not have legislative powers and does not pass SADC legislation. As part of the Parliamentary Forum's quest to enhance regional integration in the region, it strives to increase awareness and knowledge of SADC protocols, declarations and objectives at the national level (SADCPF Strategic Plan 2006-2010). At the moment, the ability of the Parliamentary Forum to significantly contribute to regional integration in SADC seems to be in doubt as there are still a large number of important SADC protocols that are yet to be ratified by member states. If SADC Parliamentarians are serious about regional integration, they would take the necessary steps to ensure that SADC protocols are ratified by the member states and as such give individuals the right to claim under those protocols in national courts.

The Troika and Subsidiary Institutions

These are two other important concepts in the institutional structure of SADC that are worth mentioning. The first is the Troika system provided for in Article 9A of the SADC Treaty and the other is the concept of subsidiarity. The Troika applies to the Summit, the Organ, the Council, the Integrated Committee of Ministers and the Standing Committee of Officials. The Troika of each of these institutions consists of a chair, the incoming chair and the outgoing chair. They are responsible for decision making, facilitating the implementation of decisions and providing policy directions in-between the meetings of the institution. This invariably makes the Troika the coordinator of the affairs of these institutions. While this concept is commendable in that it ensures that decisions can be reached promptly on

¹⁵ See *Bookie Monica Kethusegile-Juru v The Southern African Development Community Parliamentary Forum*, Case No. SADC (T) 02/2009. In this case, the SADC Tribunal confirmed that the SADC Parliamentary Forum was an institution of SADC created: see Article 9(2).

important issues that cannot wait until a meeting of the institution is convened, it might also serve as an instrument to perpetrate the self-interest of a tiny cabal.

In implementing programmes under the SADC common agenda, SADC makes use of Subsidiary Institutions. These institutions are created through the principle of subsidiarity and under the notion that 'all programmes and activities are undertaken at levels where they can be best handled. This means that the involvement of institutions, authorities, and agencies outside SADC structures to initiate and implement regional programmes using their own generated resources should be promoted and encouraged' (SADC RISDP 2003: 84). These institutions are not created under Article 9 of the SADC Treaty and they are established by stakeholders in the region with the aim of helping to achieve the objectives of SADC. Though these institutions are housed under the umbrella of SADC, they are not funded by SADC. Examples of these kinds of institutions are the SADC Development Finance Resource Centre¹⁶ and the various structures created under SADC Standardisation, Quality Assurance, Accreditation and Metrology¹⁷.

Conclusion

The role of supranational institutions has long been the subject of discourse for countries involved in regional integration (Best 2005:1). This paper has worked from a premise that prior to the transformation of SADCC to SADC, there were not in existence any central institutions within SADCC to coordinate integration efforts. However, with the adoption of the SADC Treaty in 1992, the new legal landscape paved way for the creation of central institutions which were vested with the responsibility of implementing the regional integration process in SADC. The focus of the paper was to determine if the central institutions have been able to ensure regional integration in SADC. The ability of the central institutions to ensure regional integration was measured by the extent to which they have compelled member states to comply with their regional obligation.

To achieve this goal, the paper outlined the transformation from SADCC to SADC by taking a cursory look at the origins of SADC and briefly discussed the political and economic underpinnings for the creation of SADC. The scope, mandate and functions of SADC institutions were also discussed. From the analysis of the institutions of SADC it is clear that

¹⁶ See <http://www.sadc-dfrc.org/index.php?id=13> [10 February, 2011].

¹⁷ See <http://www.sadc.int/index/browse/page/168#article9> and <http://www.sadcmnet.org/> [10 February, 2011].

while in principle there seems to be a shift towards adopting an integration regime which is governed by central institutions, the reality remains that the interest of individual member states still reigns supreme. Put differently, a bulk of the institutions of SADC is controlled by direct representatives of member states and as such it raises doubts as to the independence of these institutions. While one might argue that the presence of direct representatives of member states in the SADC institutions does not necessarily affect the ability of these institutions to reach decisions that would be beneficial to the region, the recent development regarding Zimbabwe casts doubts on the ability of these institutions to ensure that SADC rules are complied with. If this trend continues, doubts would be cast on the efficacy of these central institutions to govern the integration process.

For regional integration to succeed in SADC, the Summit must be ready to exert its political will to sustain the integration process. This can be expressed in the form of empowering the Secretariat and the Tribunal to have the authority to sanction erring member states. These sanctions do not have to be imposed by the Summit as is currently the case. Also, issues of policy creation and implementation should not be delegated to the Secretariat but they should rather be vested in the Secretariat. The Secretariat should have the powers to formulate appropriate legislations that would enhance integration in the region. Likewise, member states have to take the initiative to ratify and implement SADC protocols.

The true test of transfer of powers to central institutions should lie in compliance with decisions of institutions like the Tribunal. Compliance with the decisions of the Tribunal is vital because among all the institutions created in Article 9 (1) of the SADC Treaty, it is the only institution that does not report to the Summit. It is the contention of this paper that member states to a large extent still control the process of regional integration and are yet to yield power to central institutions. While these central institutions do exist, most of them are controlled by member states and the ones not controlled by member states have no real authority over member states. The attitude of the Summit towards Zimbabwe's non-compliance with the decisions of the SADC Tribunal points to the fact that regional integration still has a long way to go in SADC.

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