The Policy of Free Movement of Workers in the AU and Recognised African Sub-Regional Organisations: Comparative Study with the EU

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ABSTRACT

The study analyses the extent to which efforts are being made at national, regional and continental level towards establishing the free movement of workers in the African Union (AU) and recognised African sub-regional organisations including a comparative analysis with similar policies and approaches in the European Union (EU) where this principle is highly respected. It also identified the extent to which major challenges such as institutional and legislative differences (i.e. legal constraints, political and cultural obstacles) in member states have affected the progress of endeavours to meet objectives of the AU. This study has mentioned nomads and semi-nomads who are moving seasonally as part of their ancient traditions, however are not protected in the above legal frameworks.

It is recommended that the AU should take charge of the integration process and revise the legal frameworks of economic integration rather than delegating this task to the African sub-regional organisations. Nomad's rights should be enshrined in legal frameworks as one of the most important parts of the integration project in Africa.

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DECLARATION

I Yousef Elgallai confirm that the material contained in this thesis has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

The word count for this thesis is 89,995 words (without references).

Yousef Elgallai

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Date: ...31/01/2016.....

TABLE OF ABBREVIATIONS

ACHPR: African Court on Human and Peoples' Rights

ACM: African Common Market

ACM: African Common Market

AEC: African Economic Community

AMU: Arab Maghreb Union (same as UMA)

ASEAN: Association of Southeast Asian Nation

AU: African Union

CCPAC: Central African Police Chiefs Committee

CEMAC: Central African Economic and Monetary Community (same as Communauté Économique et Monétaire de l'Afrique Centrale)

CEN-SAD: Community of Sahel Saharan States

CET: Common External Tariff

CFA: Communauté Financière Africaine or African Financial Community

CFI: The Court of First Instance

CHIPS: Clearing House Interbank Payment System

CM: Common Market

CMP: Common Market Protocol

CoJ: The Court of Justice of the EU (same as ECJ)

COMESA: Common Market for Eastern and Southern Africa

CU: Customs Union

EAC: East African Community

EAEC or EURATOM: European Atomic Energy Community

EAPCCO: East African Police Chiefs Cooperation Organization

ECA: Economic Commission for Africa

EC: European Community

ECB: European Central Bank

ECCAS: Economic Community of Central African States

ECGLC: Economic Community of the Great Lakes Countries

ECHR: European Convention of Human Rights

ECOMOG: Economic Community of West African States Monetary Group

ECOWAS: Economic Community of West African States

ECSC: European Coal and Steel Community

EC Treaty: Treaty of Rome in 1957

EEC: European Economic Community

EFTA: European Free Trade Association

EU: European Union

FDI: Foreign Direct Investment

FMP: Free Movement Protocol

FTA: Free Trade Area

GATT: General Agreement on Tariffs and Trade

GDP: Gross Domestic Product

ICCPR: The International Covenant on Civil and Political Rights

ICEFRD: International Convention on the Elimination of All Forms of Racial Discrimination

ICGLR: International Conference on the Great Lakes Region

ICJ: International Court of Justice

IGAD: Intergovernmental Authority on Development

IMF: International Monetary Fund

IGADD: Intergovernmental Authority on Drought and Development

ILO: International Labour Organization

IOC: Indian Ocean Commission

LPA: Lagos Plan of Action

LDC: Less Developed Countries (known now as developing countries)

MEQR: Measures Equivalent to Quantitative Restrictions

MERCOSUR: Common Market of the South America

MRU: Mano River Union

NAFTA: North American Free Trade Agreement or North American Free Trade Area

NATO: North Atlantic Treaty Organisation

NEPAD: New Partnership for Africa's Development

OAU: Organization of African Unity

OECD: Organization for Economic Cooperation and Development

OHADA: Organisation for the Harmonization of Business Law in Africa (same as Organisation pour l'Harmonisation en Afrique du Droit des Affaires)

OSCE: Organisation for Security and Cooperation in Europe

PSC: Peace and Security Council

PTA: Preferential Trade Agreement

PU: Political Union

RECSA: Regional Centre on Small Arms in the Great Lakes Region

RISDP: Regional Indicative Strategic Development Plan

RSA: Republic of South Africa

SAARC: South Asian Association for Regional Cooperation

SACU: Southern African Customs Union

SADC: South African Development Community

SADDC Southern African Development Co-ordination Conference

SADR: The Saharawi Arab Democratic Republic

SAFTA: South Asian Free Trade Agreement or South Asian Free Trade Area

SARPCCO: Southern African Regional Police Chiefs Cooperation Organisation

SWIFT: Society for Worldwide Interbank Financial Telecommunications

ToA: Treaty of Amsterdam

TEU: Treaty on EU

TFEU: Treaty on the Functioning of the EU

UDHR: Universal Declaration of Human Rights

UMA: Union du Maghreb Arabe (same as AMU)

UNCTAD: United Nations Conference on Trade and Development

UNECA: United Nation Economic Commission for Africa

UNO: United Nations Organisation

WAEMU: West African Economic and Monetary Union (same as UEMOA)

WAMZ: West African Monetary Zone (part of ECOWAS)

WAPCCO: West Africa Police Chiefs Committee Organization

WTO: World Trade Organization

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction and Background

This chapter sets out the historical and legal background to the study of the free movement of workers in the AU and sub-regional organisations by examining the economic integration aspirations of Africa. It will briefly examine the historical context of the AU and the African sub-regional organisations' objectives and desire to create an African Economic Community (AEC) and the motivation for seeking an economic union. The chapter will also include a brief examination of historical landmark cases within the EU where the principle of free movement of workers has always been regarded as fundamental and supported by well developed laws and policies. The chapter will further review the literature concerning the free movement of workers in order to inform the discussion and establish the motivation for undertaking the research. The focus of the literature review is to establish gaps that exist in the current research regarding the development of law and policy on the free movement of workers within the AU and its sub-regional organisations. As part of the historical background, the section will briefly discuss the progress made on the economic integration front in the AU's sub-regional organisations before presenting the structure and outline of the rest of the thesis.

With similar integration goals to the EU, many regional organisations have been established in Africa - e.g. Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS) and South African Development Community (SADC) to promote economic integration and stability in Africa. There is a universal recognition that economic integration, whether regional or continental, has benefits and advantages - for example, enabling the pooling of resources in research and development, lowering transaction costs to business and market expansion and many other benefits. In view of the achievements made in the EU, it is important for the AU and sub-regional organisations to prioritise economic integration as the foundation stone for economic progress. But this cannot be achieved without effective legal and institutional frameworks.

The EU is perhaps the best example of what is possible to achieve through economic and political integration. The EU is 'by some distance the most developed project of regional

integration in the world'.[1] From its modest beginnings in 1951 with the development of a common market for coal and steel (the European Coal and Steel Community or ECSC), and continuing with the adoption of a general common market through the Treaty of Rome in 1957 (EC Treaty), the EU has evolved progressively into an increasingly integrated economic and political community. The EU itself was created as recently as 1993 from its predecessor the European Community (EC) and before that the European Economic Community (EEC). Since the coming into force of the Amsterdam Treaty in 1999, the scope and significance of the legal measures adopted has developed considerably.[2] The stages of economic integration, across the free trade area, the customs union, and the common market to the economic union developed through a regular integration. Part Three of the EC Treaty contains many of the fundamental principles, which are of importance to the establishment of a customs union and common market. This part of the Treaty sets out, *inter alia*, the 'four freedoms' which are of central importance in promoting the goals of the Community.[3] In addition to the free movement of goods, services and capital, the free movement of workers is one of the fundamental freedoms of the EC Treaty.[4] From cases such as *Dona v. Mantero*[5], to *the Kurz* case[6], it is clear that the principle of free movement of workers was introduced to enable workers to move from States with relatively high levels of unemployment to where greater employment opportunities were, hence promoting the mobility of the labour force.

In the above cited case of *Dona v Montero*, it was held that national rules or practices that are incompatible with the Treaty cannot be applied to discriminate against a person of a different nationality from taking employment in another member state where the opportunities existed. In this case, Dona had placed an advert in Belgium looking for football players to play for Ravigo in Italy. *Montero* did not agree with Dona and refused to pay for expenses incurred stating that only Italian nationals where eligible. When Montero required clarification from the courts, it was declared that discrimination of citizens of EU member states is against Article 7 of the EEC Treaty (also Articles 48 to 51 and 59 to 66 of the EEC Treaty) which guarantees the free movement of workers (now under Art 45 TFEU (free movement) and Art 18 TFEU (anti-discrimination principle) and except where discrimination is allowed, in cases where

[1] Jeffrey Haynes et al, *World Politics* (1st published 2011, Pearson Education Limited, Routledg, 2013) p 298
[2] Paul Craig & Gráinne de Búrca, *EU Law*:*Text, Cases and Materials* (3rd edn, OUP, 2003) p 581
[3] Ibid p 581
[4] Ibid p 701
[5] Case 13/76 [1976] ECR 1333
[6] Case 188/00 [2002] ECR 1-10691

public interest or concerns arise, which was not in this case. In the *Kurz* case, it was held that where foreign nationals who meet the criteria of getting employed in the host country cannot be treated differently from nationals of the host countries. These two cases reinforce the principles of free movement and of non-discrimination. The principle of non-discrimination suggests that employers should select candidates based on merit and not their nationality.[7] The EU's efforts to harmonize the economic policies of its members began to come into force with the adoption of the euro as a common currency, which was possibly the last step in the process of achieving full economic and political integration of the European economies[8]. It is also worth noting that EU policy on free movement is not restricted to "workers" as such but also extends to job seekers or "migrant workers" (as decided in the cases of *Royer*[9] and *Antonissen*[10]) and to the free movement of persons generally.

In the quest to liberalise African economies and to promote the mobility of the factors of production, and considering the rate of economic advancement in other continents of the world, the Organisation of African Unity (OAU) was constituted in 1961 and the AEC in 1991 under the Abuja Treaty. Recognising the need to further the objectives set-out in the AEC Treaty, African leaders in 2000 concluded the Lome Treaty[11] which transformed the OAU into AU. The successor of the OAU, the AU still embodies the visions that led to the founding of the OAU, but with a mindset for greater integration amongst the member nations. As stated in its preamble, the state parties were convinced of the need to accelerate the process of implementing the Treaty establishing the AEC in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization.

Success at socio-economic integration is a necessity that entails migration and human interaction amongst different populations, which historically has itself been a way of life for some sections of the African population. In the past, population movements aimed at restoring

[7] Catherine Barnard, *The Substantive Law of the EU-The Four Freedoms* (1st edn, OUP 2004) p 264
[8] Eduardo Mayobre, *the Developing Countries in the International Financial System* (Lynne Rienner Publishers, London 1999) p 198
[9] *The State v. Jean Noël Royer* , Case C-48/75
[10] *R v Immigration Appeal Tribunal ex p. Antonissen* (Case C-292/89) [1991] ECR 1-745
[11] In 2000, 27 African countries signed the Constitutive Act of the AU at the OAU Summit in Lome. The Constitutive Act provided for the establishment of the AU to achieve greater unity and solidarity among the African countries and the people of Africa; defend the sovereignty, territorial integrity, and independence of its Member States; accelerate the political and socio-economic integration of the continent and promote security, peace and stability on the continent. The act also provided for the establishment of various institutions, including the Pan-African Parliament Court of Justice, financial institutions, including the African Investment Bank, African Central Bank and African Monetary Fund.

ecological balance and the search for greater security succeeded over wide areas. Today, population movements (both inside and outside national borders) continue to be a central feature of African life, with professionals and cross border workers forming the majority of migrants within Africa.[12] Therefore, the restrictions on the free movement of these workers amongst others, caused by immigration controls across the various African States constitute a major obstacle towards the realisation of the AU`s socio-economic integration goals. Free movement of workers has a deeper meaning beyond market integration. It concerns human beings, and therefore there is a human rights element involved. In the EU, for example, the policy of free movement of workers identifies people as the receiver of a right in a more direct sense than any other area of Community law. [13] On the other hand, in the African context, nomads who require pastures for grazing their animals often find themselves at conflict with modern day states concerning pastoral rights. With economic integration, a framework can be developed which recognises their freedom of movement and this modern day conflict can be addressed by managing and recognising the historic rights of nomadic people by providing them with safe passage on condition that they respect the rights of settled people, for example access to water sources.

Economic integration takes various forms depending on the degree of involvement of the participating economies[14]. It ranges from preferential trade area, consisting in an arrangement between states in which they agree to remove all customs duties and quotas on trade between them, to the customs union, the common market and the economic union - a common market in which there is also a complete unification of monetary and fiscal policy. In our contemporary world, regional integration is not a choice but a necessary strategy for rapid and sustainable development. With this in mind, African regional and continental organizations should prioritize integration arrangements which include the freedoms - i.e., free movement of workers, free movement of capital, freedom of establishment and the provision of services, and the free movement of goods. In the Treaty Establishing the European Community, separate provisions were adopted under Title III (Free Movement of Persons, Services and Capital) Chapter 1 dealing specifically with the freedom of movement of workers under Articles 39 to

[12] Aderanti, Adepoju, (2002), 'Fostering Free Movement of Persons in West Africa: Achievements, Constraints, and Prospects for Intraregional Migration', International Migration IOM Vol 40, Issue 2, June 2002, p 4
[13] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press 2007) p 423
[14] Paul Craig & Gráinne de Búrca (2003) ,Op cit, p 580

42[15], while the movement of persons was dealt with under provisions stated in Title IV (Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons)[16].

1.2 Research Problem

In the EU, the free movement of workers was achieved as part of the four freedoms and the policy is now well embedded in both primary EU sources (treaties) as well as secondary EU sources of law (regulations, directives and decisions or case law). In the AU, the Abuja Treaty of 1991 under Chapter VI Article 43 dealing with the establishment of the AEC, provided:

1. Member States agree to adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within the community.
2. For this purpose, Member States agree to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment.

From Article 43 of the Abuja Treaty of 1991, it can be seen that the duty to ensure the implementation of policy for the free movement of persons is a process for which the AU has limited powers in terms of enforcement. The responsibility of driving the process was delegated to Member States and to the sub-regional organisations. Article 43 of the Abuja Treaty appears cautionary in nature and failed to make a clear pronouncement as expected on the free movement of workers, with emphasis being placed on the free movement of persons, which in nature appears broad. The movement of persons without a specific statement on the free movement of workers appear to be inconsistence with the goal of creating an AEC where the free movement of workers should be the main aim of economic integration. Rather than promoting the movements of persons for economic integration, there is need to be promoting the free movement of workers in clear terms and it is the aim of this research to argue that Article 43 under Chapter VI of the Abuja Treaty dealing with the free movement of persons appears to undermine the goal of establishing an effective and properly functioning AEC.

[15] Derrick Wyatt, *Rudden and Wyatt's EU Treaties & Legislation* (9th edn, OUP) p 13
[16] ibid p 19

Under Chapter VI Article 43 of the Abuja Treaty, economic integration has to be achieved using recognised RECs. An assessment of the establishment, history, status and functioning of the RECs is therefore obligatory, as it will help inform and shape the discussion on the free movement of workers and economic integration. The analysis of events associated with the RECs will from time to time be contrasted with events that existed when the EU embarked on economic integration and the findings from the situation in EU will be used as the basis for suggestions that can help inform the direction which the AU has to take to achieve its main goal of setting up an AEC. It is the intention of the research to come up with new insights that can inform debate in the area free movement of workers in the AU and African sub-regional organisations. The use of information from the EU will help to improve our understanding of how the process of economic integration can be successfully achieved and whether the European experience can be replicated in Africa with any degree of success.

It must be stated at this point that while there was a clear separation between the freedom of movement of workers and persons within the EU treaties, the same cannot be said about the AU and the RECs. The Treaty Establishing the African Economic Community (TEAEC) under Chapter II Article 4 (i) provided for the gradual removal of obstacles to the free movement of persons.[17] Under Article 6 of TEAEC, it stated that the 'free movement of people' will have to be achieved at stage 6 under the way of establishing the community.[18] Chapter VI Article 43 of TEAEC is titled 'Free Movement of Persons, Rights of Residence and Establishment' and under Chapter XIII article 71 of TEAEC dealing with human resources it states that member states should adopt policies that allow free movement of persons by strengthening and establishing labour exchanges that will facilitate the employment of skilled manpower within the community.[19] In this important Treaty establishing the AEC, there is no mention of free movement of workers or labour but only free movement of persons. In the RECs the situation regarding the free movement of workers or labour is also muted with Treaties or Protocols talking about movement of persons. Only in EAC and COMESA is there a clear pronouncement in the Treaties and Protocols that there is free movement of workers and persons within the Communities. However, in the EAC, the free movement is subject to producing proof of contract of employment in the host state before a permit equivalent to the term of employment is issued, which is not different from

[17] Treaty Establishing the African Economic Community (AEC) Abuja, Nigeria on 30/06/1991
[18] Ibid
[19] Ibid

what prevails in other countries where they require permits to take employment beyond the visa-free period.

The research problem can therefore be summarised in three main points:

1. Article 43 of the Abuja Treaty of 1991 represents the root cause of the problem by delegating the process of integration to Member States and RECs with no clear procedures for centralised control, hence the absence to date of strong and effective institutional framework at the continental level for promoting integration and protecting the rights of free movement.
2. The second research problem takes the form of the emphasis put on free movement of persons rather than workers in Article 43 of the Abuja Treaty and how has that enhanced or hindered the integration effort.
3. The absence of any reference in national, regional and continental sources of law to the protection of ancient and seasonal rights of migration across national borders for nomadic and semi-nomadic populations.

These three problems will therefore provide the main focus for the research.

1.3 Research Aims and Objectives

The following are the main aims and objectives of the research:

A. To demonstrate that within existing legal frameworks (treaties or protocols) there are inherent obstacles to the free movement of workers and economic integration in AU and African sub-regional organisations. The following objectives will be adopted to achieve this aim:

1. Evaluate the concept of economic integration, examine treaties or protocols on economic integration and evaluate the economic integration process in AU and African sub-regional organisations. This objective will be addressed in Chapters three and four.
2. To examine provisions in the treaties or protocols dealing with the free movement of workers and policy in the AU and Africa sub-regional organisations and in the EU. This objective will be addressed in Chapters four and seven.

3. To undertake a comparative analysis of the process and progress of economic integration and the free movement of the workers in the AU, Africa sub-regional organisations and EU. This objective will be addressed in Chapter eight.
4. To make recommendations based on the findings of the research Chapter nine is devoted to this objective.

B. To argue for the establishment of law and policy for promoting the rights of nomadic and semi-nomadic populations regarding freedom of movement. To achieve this aim, the objectives are as follows and Chapter six addresses these objectives:

1. To analyse the historic rights of free movement traditionally enjoyed by nomadic and semi-nomadic peoples.
2. To examine existing legal frameworks regarding their rights.
3. To identify and to assess areas of conflicts with modern day national immigration policies and laws which, can restrict the historic rights of nomadic and semi-nomadic peoples to free movement across national borders.
4. To identify obstacles which stand in the way of achieving protected rights for nomadic and semi-nomadic peoples similar to those enjoyed by settled populations and to explore and recommend possible legal solutions.

1.4 Research Questions

The issues highlighted above regarding the free movement of workers in the AU bring us to the research questions for this thesis. The main questions needs to be answered by this thesis are:

1. What are the legal obstacles to the implementation of the free movement of persons and workers in the AU and Africa sub-regional organisations?
2. What are the legal and institutional weaknesses that need to be addressed in order to have effective legal and institutional frameworks for the free movement of persons and workers in the AU?
3. What lessons can be learnt by the AU and African RECs from the successful integration model of the EU?

4. Can the development of law and policy in the AU and Africa sub-regional organisations regarding the rights of nomads within the economic integration framework, in particular the principle of free movement of workers, resolve the continuing conflicts between modern day states and nomads?

An examination of the treaties supporting economic integration in the AU and African sub-regions will be undertaken in addressing the research questions identified above. Examining the treaty or protocol provisions will allow for a clear assessment of the member states' commitment within the RECs to policy on the free movement of persons or workers. It is the aim of the thesis to extend our understanding on the development of law and policy regarding the free movement of workers to nomads as they have historically exercised rights of free movement with no attention to national borders, yet no official recognition is given to their ancient status which can be argued to be prescriptive right in law. By examining their way of life and entitlements, this might help in the development of legislation and policy that will protect their rights.

1.5 Literature Review

1.5.1 Introduction

The literature review will explore what is in the literature regarding the movement of people within the context of economic integration in Africa and analyse the extent to which free movement policies have been examined by various scholars. Various secondary sources on the free movement of workers in the EU will be discussed. It is worth mentioning that there is very limited literature that deals with free movement of workers in the AU and sub-regional organisations and reviewing the available literature will help in putting the free movement of workers as an aspect of economic integration into perspective.

1.5.2 Review of Secondary Sources on the Free Movement of Workers in Africa:

1.5.2.1 Books

Kyambelesa and Houngnikpo (2007) focused on regional economic groups in Africa noted that there were disparities between a majority of member states as they were colonized by different European countries using different languages.[20] The level of economic development in the different countries is not comparable, on one hand there are better off countries and the

[20] Henry Kyambalesa and Mathurin C Houngnikpo, *Economic Integration and Development in Africa* (Ashgate Publishing 2006) p 79

worse off. The differences have also been evident in the economic integration front. Due to the inherent problems that existed before in most countries, efforts to integrate economically proved a failure. In the AMU, ECCAS (CEEAC) and CEMAC some member states had to deal with political instability or even wars which hindered the progress on economic integration.[21] In their findings, Kyambalesa and Houngnikpo observed that African states were involved in multiple memberships which were wasteful because of the duplication. Though, not examining the free movement of workers, their research had implication for this study because the issue of multiple memberships has since been magnified up to present day. It was also noted the then President of Zambia, F. Chiluba suggested the integration of SADC and COMESA into one regional grouping as it was not necessary as most member states belong to the two organizations.[22] Despite this recommendation still to date there been no progress in terms harmonising the groups.

In another research by Ellis and Segati (2011) they established that the new South Africa was a bit reluctant to engage skilled workers from other countries but however later adopted a highly skilled migrant programme in the Immigration Act 2002 with the hope of addressing skills shortage.[23] The resistance to employing highly skilled migrant workers in the early 2000s by South African government was not helped by business people who acknowledged that skills shortages were going to affect the country as more people were moving and less were coming in to feel in the vacancies left. The South African government was in denial that it faced skilled manpower shortages and wanted locals to fill in the vacancies.[24] The South Africa government is interested in protecting its labour market despite having skills and manpower shortage. Having removed tariffs under the SADC Protocol on tariffs, the South African government took over 10 years to sign the SADC Protocol on Trade 1996, the facilitation of movement of persons which if had been done earlier, could have addressed the issue of skilled labour shortages. To reinforce its desire to protect the labour market, the 2011 Immigration Amendment Act 2011 was adopted despite the protests from business and human rights.[25] The author even though not investigating the free movement of workers highlighted the importance of removing barriers limited the movement of skilled workers

[21] Ibid pp 88-90
[22] Ibid pp 96-97
[23] Stephen Ellis and Aurelia Segati, '*The Role of Skilled Labor' in* (Aurelia Segatti and Loren B Landau, editors), *Contemporary migration to South Africa: A regional development issue* (World Bank Publications 2011) p 73
[24] Ibid
[25] Ibid p 77

within the SADC region and observed that South Africa's government actions were counterproductive and not in the spirit if economic integration.

1.5.2.2 Journal Articles

Iwa Salami (2011) examined the legal and institutional challenges facing economic integration in Africa and highlighted the fact that the multiple membership frameworks within the RECs posed serious challenges for effective economic integration.[26] Salami concluded that the failure to grant supranational powers to the regional economic communities posed the greatest challenge to economic integration. Failure to give supreme status to REC provisions in the national laws constitutes an uncertain block to economic integration. The finding is vital for free movement of workers in RECs because without supremacy of the REC provisions, the concept is relegated to the background. It should be pointed out that the findings of the research conducted later by Afadameh-Adeyemi (2013) confirm and are consistent with findings of Salami (2011).

Julian, Kitipov (2012) in researching African Integration and Inter-regionalism compared RECs and their role in the integration process with the development of integration in the EU. The author found that in Africa, the integration process was politico-economic thus establishing societal communities.[27] This was contrasted with the development of the EU where the intention was to promote greater stability and co-operation at regional (i.e. continental) level through specific inter–regional or common market policies in areas of development, institution building, trade and other issues of common interest.[28] Kitipov also found out that the economic integration effort is not well structured in Africa because the Abuja Treaty of 1991 was not designed to deal with the political and relational differences that existed. Instead the process was seen as an opportunity for increasing unity amongst African states with most countries having independence from the colonisers (i.e. the focus seems to be more on political rather than effective economic integration). Kitipov stated that the Abuja Treaty encouraged member states to settle political issues quickly. However, that statement has been tested many times so far and member states with political problems often

[26] Iwa Salami (2011) 'Legal and Institutional Challenges of Economic Integration in Africa', European Law Journal, Volume 17, Issue 5, pages 667–682, September 2011
[27] Julian Kitipov (2012) 'African integration and inter-regionalism: the regional economic communities and their relationship with the European Union' , Strategic Review for Southern Africa, Vol 34, p 22
[28] Ibid p 22

do not settle quickly enough and that has seen the process of economic integration delayed in some of the RECs such as the AMU.

Craig Jackson (2003) analysed the Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe; Jackson concluded that there is need for African states to be aware of the weaknesses of federalism based on a group of sovereign states. In the author's view there is a need for a detailed description of institutional powers allocated to the centre and the need for speed in protocol development with limited opt-out plan, which might be useful in keeping member states engaged in the process.[29] The findings by Jackson are significant because they place emphasis on power at the centre and having a process with limited opt-out option.

1.5.2.3 Others

Ashimizo Afadameh-Adeyemi (2013) when discussing the need for securing compliance with African economic integration treaties noted that the absence of supranational institutions and the failure by member states to comply with integration obligations hampered progress towards economic integration.[30] In the view of the author, there are institutional, technical and infrastructural development challenges facing the AU and its sub-regional organisations hampering efforts to implement integration treaties and protocols. Furthermore, lack of good governance and the lack of public involvement in the process make it difficult to have the right conditions in place to achieve implementation of the regional agreements.[31] Even though focus was not on free movement of workers but on implementation of treaties on integration generally, the findings are very important in trying to assess the free movement of workers in the AU and its sub-regional organisations.

In examining AU frameworks for migration, Henrik Klavert (2011) observed that one of the most inconsistent aspects of the AU's desire to set up an economic community is that the AU set itself high standards in terms of the aspirations contained in its legal framework.[32] The

[29] Craig Jackson, 2003, 'Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe', 13 Transnat'l L. & Contemp. Probs 139 (2003) p.143
[30] Ashimizo Afadameh-Adeyemi (2013) 'Securing Compliance with African Economic Integration Treaties', (PhD thesis in law, University of Cape Town, February 2013) p 15
[31] Ibid
[32] Henrik Klavert, (2011) , 'African Union frameworks for migration: current issues and questions for the future', in a discussion paper No. 108, ecdpm, http://ecdpm.org/publications/african-union-frameworks-migration-current-issues-questions-future/ accessed on 13/02/2014, p iv

legal framework had initiatives that focussed on capacity building and standard setting and also seem to allow RECs to develop own strategies and initiatives based on AU agreements. In Klavert's view, allowing RECs to come up with own initiatives appears to have been the main undoing of the AU in the economic integration process as there were no follow up mechanisms to ensure that their mandate was carried out in terms of the Abuja Treaty 1991. Klavert highlighted the very important point that the implementation of frameworks for free movement of persons depended on the 'buy-in' of member states and the importance member states attached to migration issues. Once a framework requires 'buy-in' (in this case at two levels, i.e. agreeing to bound by the Abuja Treaty and then agreeing to be bound by the REC treaties or protocols), the chances are that some member states would prefer to remain out in the lesser organisation, unlike if they were to buy-in into the bigger organisation. This raises the question as to why the AU did not take the initiative to take for granted direct control of the process. Though the paper did not focus on the free movement of workers, it highlighted an important point that the AU delegated its authority to regional members who interpreted the AU agreements in their own ways, creating challenges to the integration process as the AU has no ability to monitor or enforce the protocols or treaties.

Research conducted by Aderanti Adepoju, (2002) focused on fostering free movement of persons in ECOWAS by looking at the achievements, challenges and prospects for Intraregional migration.[33] The author's findings and observations were that people within the region moved to other countries because of poverty, possible employment opportunities in other countries and the search for better living conditions. Adepoju also observed that free movement was hampered by the failure of members of ECOWAS to harmonise national laws with regional protocols or treaties. Furthermore, it was noted that there was a need for the revision of national employment laws so that they were in line with ECOWAS protocols so that the rights of migrant workers would be protected. However, the observation by Adepoju raises questions because in the Treaty of ECOWAS, there is no mention of migrant workers or labourers, implying there is no regional legal framework in ECOWAS governing migrant workers or labourers. However, the author fails to highlight the fact that the Treaty of ECOWAS may require amendment to clearly focus on the movement of workers.

[33] Aderanti Adepoju, (2002) Op cit, p 16

The work by Wandera Martin (2012) focused on East African Common Market Protocol and free movement of labour, with a case study of Uganda where the achievements and challenges of implementation were highlighted.[34] The findings revealed that despite the protocols on free movement and the historical and cultural ties, the free movement of workers was mandated under the protocols but restricted by national laws.[35] Even under the Protocol only highly skilled professionals were entitled to move for employment often subject to limitations by member states on grounds of public health and security policy. In the view of the author, the limitations highlight the fact that the construction of the Protocol was defective because it allows member states to restrict free movement of labourers. However, the present author does not agree with this view, as the limitations based on public health and public security are often based on good grounds and can be found in most of the successful economic integration models including the EU. A stronger observation which forms part of Wandera's finding on the the free movement of labourers was the issue of public support, where leaders often sign protocols without seeking the support of the people In the author's view, (a view supported by the present researcher) the lack of public support causes tension which results in lack of harmonisation and non-compliance with the Protocol.[36]

In another regional study of the East African Community and the free movement of workers, Yurendra Basnett (2013) noted that the institutional framework for the formalisation of free movement of workers was important because it facilitated access and participation in member states and provided protection and benefits to be enjoyed by migrant or cross-border workers.[37] Basnett also noted the limited study of the role of institutions in enabling protocols on free movement of workers. Despite organisations belonging to many multilateral, regional and bilateral organisations, no proper institutions are in place to implement the various agreements and as such the cross-border movement of workers is not well regulated. In the EAC, there are challenges and inconsistencies when it comes to the free movement of workers. These include: the continuation of a work permit regime, the emphasis on highly skilled labour, lack of preference and privileges for regional workers, and inadequate

[34] Wandera Martin, 'The East African Common Market Protocol and Free Movement of Labour: Achievements and Challenges of Implementation in Uganda' (Draft paper for a Friedrich Ebert Stiftung Sub-Regional Workshop 2012) http://www.fes-uganda.org/media/documents/East_African_Common_Market_Protocol_and_Free_Movement_of_Labour_in_Uganda__Martin_Wandera.pdf , accessed 23/11/2014, p 5

[35] Ibid, p 5

[36] Ibid p 36

[37] Yurendra Basnett, (2013), 'Labour Mobility in East Africa: An Analysis of the East African Community's Common Market and the Free Movement of Workers', Development Policy Review, Vol 31, Issue 2, March 2013, p 132

provisions for mutual recognition of qualifications and experience.[38] In Basnett's view the definition of who is a worker and entitled to move is limited to highly skilled. He further argues that the policy which recognises only highly skilled workers, in effect defeats the purpose of free movement of workers, because workers should cover various groups of people including low paid and semi-skilled workers. This point highlights the barriers that are put in place despite the existence of protocols aimed at removing all obstacles to the free movement of persons and workers.

Nicos Trimikliniotis, Steven Gordon & Brian Zondo (2008),'Globalisation and Migrant Labour in a 'Rainbow Nation': a fortress South Africa?' researched on globalisation and migrant labour in South Africa and covered wide issues that included the following: regional migration, economic integration, racism/xenophobia and exclusion in South Africa.[39] In their findings, they clearly highlighted how South Africa blocked the implementation of the SADC Protocol on free movement of workers within the SADC region. Post-Apartheid South Africa halted the implementation of the Draft Protocol on free movement because they preferred alternative of free trade and support for regional member states. The Post-Apartheid South African government continued with the legacy of the previous pre-independence government's authoritarian legal migration instruments, which allowed many undocumented migrant workers from neighbouring countries who were in turn exploited by employers, then harassed by police and immigration authorities and treated with suspicion.[40] The action of the South African government meant that one of the largest economic blocs in terms of population size and GDP could not make the required progress as far as economic integration is concerned. Even though the focus was not on the free movement of workers, their research included some significant findings which explain the reasons for the failure to implement the protocol.

Having reviewed the literature in Africa, it is clear that few of the sources examined the principle of free movement of workers and the ones that dealt with the concept focused on single regions and compared these with the EU with the main focus being on economic integration. The next section will briefly analyse the literature on the EU with specific

[38] Ibid, p 147
[39] Nicos Trimikliniotis, Steven Gordon and Brian Zondo, (2008) 'Globalisation and Migration Labour in a Rainbow Nation: a fortress South Africa' Third World Quarterly, Vol. 29, No. 7: p 1323
[40] Ibid

reference to the free movement of workers in order to put into perspective the situation in Africa and Europe in a comparative context.

1.5.3 Review of Secondary Sources on Freedom of Movement of Workers in EU

1.5.3.1 Books Review

To start with a brief background, the free movement of workers as has evolved in the EU is clearly enshrined in legislation and well defined. The free movement of workers played an important role economically and socially in the EU.[41] The role of the worker is not seen just as a labourer but has come to include all human rights such that workers in member states are treated as human beings. The freedom to move as a worker is protected under Art 45 TFEU and was defined as a fundamental right exercised in freedom and dignity (the case of *Mr and Mrs F v Belgian State* (Case 7/75). In the case of Mr and Mrs F, the significance of the freedom of movement was demonstrated and it was upheld that the migrant worker was to be viewed as a human being rather than a source of labour Art 45 TFEU is significant in that it clearly defines what possible migrant workers should expect once they arrive in the host country and the integration is expected to cover economic and social aspects of host member states.[42] The employers of migrant workers are also expected to uphold provisions of Art 45 TFEU

The provisions of Art 45 TFEU emphasises that the freedom of movement involves the abolition of any discrimination on the basis of nationality with regards to remuneration, employment, other conditions of work and employment subject to recognised limitations. Within the EU non-discrimination is a principle associated with freedom of movement principle (Art 18 TFEU)

In the EU further legislation to ensure the freedom of movement of workers is ensured, Art 46 TFEU mandated the European Parliament and the Council to what was necessary including issuing directives or making regulations that brought about the freedom of movement of workers.[43] Some of the measures included abolishing administrative procedures and practices, such as qualifying periods in respect of availability for employment, either from national legislations or agreements between member states; ensuring close cooperation

[41] John Fairhurst, *Law of the European Union* (Foundation Studies in Law Series) (10th edn, Pearson Education Ltd ,2014) p 358
[42] Ibid, p 359
[43] Ibid

between national employments services; abolishing qualifying periods and abolishing of any legislation that hinders the freedom of movement.

However John Fairhurst (2014) noted that, the issue of reverse discrimination is that the provisions of Art 45 TFEU and Art 46 TFEU regarding rights to freedom of movement were only applicable to EU workers. In cases of *R v Saunders* (Case 175/78) and *Morson and Jhanjan v Netherlands* (Cases 35 and 36/82), nationals residing in their own countries could not claim right to freedom of movement which nationals of other countries can make when they decide to move to another country.[44] Where EU nationals are in their own country and want to bring in family members who are not nationals of member countries (non-EU nationals), they cannot rely on the provisions of Art 45 and Art 46 TFEU because they have not moved. Had they moved to another EU country, they could have relied on Directive 2004/38 and Regulation 492/2011 (which repealed Regulation 1638/68) to bring their parents who were non-EU nationals.

As much as has been highlighted above, how fundamental is the freedom of movement of workers in the EU?

Nigel Foster has observed an important aspect of the principle – i.e. that it was no longer seen as a tool for economic development but was more of a social right, where social concerns dominated the free movement of workers[45] In other words the free movement of workers policy in the EU has been transformed from an aspect of economic integration into one of social integration (i.e. socio-economic integration). This involves the free movement of workers being seen more as a social right with the passage of time and acceptance of the principle of freedom of movement of workers. In the case of *Grogan (Case C-159/90)*, the economic right to move to receive services abroad took priority over legislative provisions of member state regarding ethical and moral considerations of the sacredness of life.[46] This serves to highlight the fact that the freedom of movement can extend to other aspects of social life which is beneficial to citizens of the community. A lesson to be drawn from this is that in the case of Africa, achieving the free movement of workers could be a channel that can lead to deeper integration in other subjects of life. Nigel Foster equally highlighted the fact that the freedom of movement was no longer restricted to economic activity alone but widened to including the freedom of movement for those receiving services as well. The

[44] Ibid p 360
[45] Nigel Foster, *Foster on EU Law* (8th edn, Oxford University Press, 2006) p 339
[46] Ibid

author thus recognises the fact that the original freedom of movement of workers had expanded beyond those originally covered by Community law.[47] What is significant is that the extension of the freedom of movement to other areas was undertaken having achieved the freedom of movement of workers, implying that freedom of movement can be a channel that could foster further cooperation in other areas apart from economic activity. The AU's focus on free movement of persons without first achieving the freedom of movement of workers may be misguided for economic integration because it is rather broad for a start and open to interpretation, which could explain why there are different protocols or treaties concerning the free movement of persons in the RECs.

The freedom of movement of workers in the EU is not without tensions and they result from economic and social dimensions which should be taken into account in the case of AU and RECs.

Paul Craig and Grainne de Burca highlighted the fact that as migrant workers cease to be viewed as simply economic agents but human beings with rights, then issues of enjoying equal treatment personally and for their families take centre stage.[48] The tensions often raise political and social challenges to the policy of free movement of workers, such that political leaders have had to query the principle of free movement of workers and in the case of the UK there are calls for renegotiation of the freedom of movement of workers principle because it is viewed as encouraging benefits tourism.[49] However, the Commission has resisted and continues to resist any attempts to renegotiate one of the basic fundamentals of the freedom of movement of workers. Craig and Burca also explored social issues that arose as a result of the freedom of movement of workers such as rights of families as being dependent on the worker's rights which are now regulated by Directive 2004/38.[50]

Having reviewed the situation in the EU, it is noteworthy to state that the freedom of movement of workers went beyond economic activity and also embraced social and political objectives and challenges. What the EU has managed to do is not to allow the social and political challenges to overshadow the fundamental principle of freedom of movement of

[47] Ibid p 336
[48] Paul Craig and Grainne de Burca, *EU Law: Texts, Cases and Materials* (6th edn, Oxford University Press, 2011) p 744
[49] Ibid
[50] Ibid pp 782-784

workers. The EU can be a model from which the AU and RECs can take important and essential lessons. The AU and RECs should study closely the historical evolution and progress of the EU, including the progressive development of its legal and institutional framework, with a view to ensuring the implementation of the freedom of movement of workers in the AU and RECs in a manner that would allow a more effective model of integration

1.5.4 Review of Secondary Sources on Nomads

1.5.4.1 Books

Jeremie Gilbert in 2014 explored nomadism and focused on issues that had to do with the freedom of movement and discrimination among other issues and advocated for the protection of nomadic people so that they can continue living their way of life. [51] Jeremie proposed the development of a legal framework that would allow the freedom of movement, land rights and development for nomads. Though looking at the human rights aspects, Jeremie goes on to advocate for legislation for freedom of movement which is significant and shows that the area of freedom of movement of workers can be extended to nomads too.[52]

Marco Moretti (2012) emphasises that the failure to recognise the rights of the nomadic people was a kind of injustice because nomads have their own way of life which observes their own laws which governments or states do not wish to take into account. [53] Moretti highlighted the case of Western Sahara which was decided at the United Nations and established that nomadic societies were juridical entities, well entitled to collective rights and that nomadic style of life practiced by nomads does not stop them from exercising the right to self-determination.[54] Moretti also calls for the recognition of the rights of nomadic people.

[51] Jérémie Gilbert, (2011) 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights. International and Comparative Law Quarterly', Vol. 60, No. 1, January 2011) p 247
[52] Ibid
[53] Marco Moretti, 'International Law and Nomadic People' (2006) <http://www.ie-ei.eu/Ressources/file/biblio/NOMADIC%20PEOPLE.pdf> accessed on 5 January 2014) p 1
[54] Ibid

1.5.4.2 Journals Articles:

Jeremie Gilbert (2011) examined native people's human rights in Africa in particular the case of the nomadic Endorois pastoralists of the Kenyan rift valley. The author points out the fact that the African Commission has acknowledged that the rights of native people should be supported.[55] However Gilbert noticed that the issue of native rights was still controversial in Africa and less progress has been made in terms of implementing the rights in practice despite some progress on the international stage.[56] The African Commission on Human Rights made a ruling that the Endorois were unfairly displaced from their land in order to make way for the setting up a game reserve and as such their rights needed to be restored. However, this ruling proved to be a politically controversial issue in Kenya, but there was an acknowledgement of the need to extend rights to the pastoralists.[57]

A Montavon and others (2013) when examining the health issues of pastoralists of the Sahel region observed that there was no longer respect for the pastoralists' nomadic way of life and that often conflicts abound as what were once their traditional lands for grazing cattle are often inaccessible to them resulting.[58]

Jeremy Sarkin and Amelia Cook (2011) studied the case of the nomadic San tribe of Botswana who were moved off their ancestral land beginning in 2002 in the Central Kalahari Game Reserve and denied water rights they used to enjoy before their land was turned into a game reserve and part of it used for diamond mining.[59] The Government of Botswana in a case in 2010 argued that the San's presence interfered with conservation programmes and that the water was required for diamond mining purposes.[60]

However the United Nations (UN) Special Rapporteur on Indigenous Rights in a 2010 report highlighted the fact that the position of the Government of Botswana was conflicting for it allowed Gem Diamonds (Gope Exploration Company (Pty) Ltd) to carry out mining activities within the reserve which meant more than 500 people were to be involved within the reserve

[55] Jérémie Gilbert, (2011) Op cit,p 247
[56] Ibid
[57] Jérémie Gilbert (2011) Op cit, p 248
[58] A. Montavon, et al, (2013) 'Tropical Medicine and International Health' (A European Journal, September 2013 Vol 18, Issue 9) p 1045
[59] Jeremy Sarkin and Amelia Cook (2011) 'The Human Rights of the San (Bushmen) Of Botswana – The Clash Of The Rights Of Indigenous Communities And Their Access To Water With The Rights Of The State To Environmental Conservation And Mineral Resource Exploitation' J.of Translation Law and Policy,Vol. 20, No. 1 (Spring, 2011) p 2
[60] Ibid

for the mining.[61] The rejection of water rights for the San people was despite them having won a case in 2006 where the Government of Botswana was not supposed to move the San off their land. [62]

From the above, it is clear that there are many people leading nomadic life in Africa whose rights are not respected and owing to their traditional way of life where they have to move from place to place, governments often do not recognise them or their nomadic migratory lifestyles which create conflicts and tensions. In the context of free movement, it may be worth exploring extending rights within the protocols and treaties, so that rights of nomads can be acknowledged, legislated and protected.

1.5.5 Summary of the Literature Review

In the literature, the free movement of workers in the African context is not well explored and the focus has been on the movement of persons. From the perspective of economic integration, there is a lack of focus on the key principle, which is the free movement of workers. The literature review has thus identified gaps that exist in our understanding of the free movement of workers in AU and sub-regional organisations. One of the main gaps identified in the literature concerns the historic migration rights of nomadic populations. This is an issue which has received very little attention in the academic literature. The main objective of Chapter Six of the thesis is to address this gap in the literature.

The focus on the movement of persons as articulated in Article 43 of the Abuja Treaty could have been the original source of the wider problem concerning the absence of a clear policy on the free movement of workers in the AU, unlike in the EU. The few studies that attempted to focus on the free movement of workers highlighted the following problems:

- That there were institutional weaknesses.
- The lack of clarity in the law itself – for example, there is no definition of who is a worker
- In the case of AEC, the free movement of workers being limited only to highly skilled workers.

[61] Ibid
[62] Ibid

- A lot of inconsistencies in the protocols, in some cases such as the SADC, where draft protocol on free movement completely delayed because South Africa preferred free trade and support for member states. This highlights inconsistencies in the approach to economic integration because such free trade and support can be better achieved by implementing protocols on the free movement of workers.

Apart from addressing the gaps in the literature, it is also one of the aims of this thesis to examine the role and functions of the recognised RECs and identify and analyse the issues that restrict the free movement of workers. The research will then explore ways in which effective regional integration can be achieved as part of the process of fulfilling the desired goal of continental economic integration. There is need for an objective academic study that covers the recognised African RECs with the free movement of workers as the focus of such a study, rather than broadly examining the free movement of persons or economic integration generally, as the latter approach will be too wide.

The research draws part of its inspiration from the EU, where the free movement of workers is fundamental and is guaranteed for EU citizens**,** and where the process of integration has moved to other spheres covering political and social issues.

The next section contains a summary outline and structure of the thesis.

1.6 Outline and Structure of the Thesis

This research will be divided into nine chapters:

Chapter One provides the setting for the research with an introductory background and a literature review of secondary sources on the progress and development of law and policy on the free movement of workers in AU and EU, including a brief review of concepts of economic integration before presenting the research problem and research question.

Chapter Two will focus on the various approaches to undertaking research which include quantitative and qualitative approaches and the associated methods for data collection. The section will highlight the strengths and limitations of each approach before providing the rationale for using the comparative method in this study. Ethical and legal considerations were also considered in this chapter.

Chapter Three introduces the concept of economic integration and will examine the types and discuss general trade integration policies aimed at promoting economic development in the

developing world within the context of the free movement of workers policy. In Chapter Three, there will also be an examination of the benefits and disadvantages of economic integration before exploring the concepts of trade liberalisation and globalisation in the context of the free movement of workers. The main method used in this chapter is the doctrinal or analytical approach.

Chapter Four will analyse the progress and status of economic integration in the AU and sub-regional organisations and will examine progress made in the AU on the free movement of workers through a comparative study with the EU. The chapter analyses, appraises and assesses the policy of free movement of workers in the sub-regional organisations. This will help in establishing whether the principle of free movement has been achieved or not.

In Chapter Five, the challenges of economic integration and the progress of free movement of workers in the AU and sub-regional organisations will be explored including the role of the judiciary in promoting and protecting the rights of free movement. This chapter will examine the relevant treaties and other primary sources employing the black letter law approach.

In Chapters Six, the focus will be on nomadic rights. This chapter will advocate for their inclusion in the integration framework as this has potential of reducing conflicts regarding grazing rights and access to resources. Nomadism and the concept of free movement of workers is an area that has received no attention in economic integration and is a new aspect that will be addressed in this thesis. The discussion in Chapter 6 promoting the inclusion of migratory rights for ancient nomadic and semi-nomadic peoples within the legal framework for regional and continental integration seeks to fill a gap identified in the literature in that this issue has not received much academic attention before. As such the chapter represents one of the main contributions to knowledge of this thesis.

Chapter Seven will focus on the free movement of workers in the EU with particular attention given to scope, benefits and rights of free movement for workers and their families, rights of residence and freedom of establishment, and exceptional cases where freedom of movement of workers can be restricted.

Chapter Eight will compare and contrast the progress on the free movement of workers in the AU and EU and will concentrate in the differences in approach towards the concept of free

movement. The Chapter will highlight the main obstacles to achieving the free movement of workers within the sub-regional organisations contrasted with the situation in the EU.

The final chapter nine will conclude the thesis by summarising the findings of the research and putting forward recommendations before highlighting the contributions of the thesis and identifying areas needing further research.

Having examined the background of the research and identified the research problem, the aims and objectives of the research, the research questions, and then undertaken the literature review in this first chapter, the main aim of the next chapter is to build on this process by addressing the research methodology adopted for the research, and the grounds for choosing the comparative method as one of the main tools for conducting the research.

CHAPTER TWO

RESEARCH METHODOLOGY

2.1 Introduction

The aim of this chapter is to examine research methods in general and to discuss the research methodology applicable to carrying out this research. The purpose is to highlight awareness of the available methods that can be applied to carry out the research and the grounds for choosing a particular method instead of other methods.

An academic thesis must be rooted in a scholarly process and needs to have consistency in both its arguments and in its presentation.[63] It is important to note that a thesis is not a self-expressive activity as the writer does not write to express himself but writes to contribute to a discussion that is already taking place, where the writer's contribution becomes part of the discussion on the topic and will be reviewed, commented on or assessed by scholars who are experts in the field.[64] The real meaning of research is to answer a question or seek an answer to a question and in writing a thesis, the main aim is to address issues that have not been addressed before or it could be to examine issues which have been addressed before but this time using a different methodological approach. Equally, a thesis attempts to address what is unknown, unrecognised or misinterpreted and the heart of a thesis is to provide answers to research questions. [65]

This thesis is going to use the comparative method as it allows for the achievement of new insight by comparing different legal systems, the EU law and the AU and African sub-regional organisations law with regard to policies on the free movement of workers and their implementation. The main purpose of the comparative method is to search for similarities and differences between the different legal systems and identify what lessons can be learnt from other legal systems so that such lessons can be applied to improve one's own legal system.

[63] George Watson, *Writing a thesis: a guide to long essays and dissertations* (1st edn, Longman Group UK Limited, 1987) p 5
[64] Ibid p 6
[65] Ibid, p 29

As stated above, the purpose of this chapter is to explore the available research methods that can be used to answer the questions arising from the proposed research. Broadly speaking, there are two main categories of research methods and these are qualitative and quantitative. These methodological approaches help in shaping research design. The two main methods have different approaches.

2.2 The Main Approaches to Carry Out a Research:

The importance of the research design lies in its ability to collect data that will enable the answering of a particular research question. However legal research falls under the area of legal academe and is a systematic investigation of the first aspect of law. The researcher undertakes a systematic analysis, evaluation of the legal principle, rule, concept or fact. Depending on the analysis of the conceptual basis of the legal policy or rule, the researcher may forward new proposals for reform. [66] Law scholars have been giving emphasis on only analytical legal research and have not been able to evolve a specific methodology for carrying out legal research.[67]

The main methods for carrying out a particular research are given below together with the advantages and disadvantages of using each method.

2.2.1 Quantitative Approach

The quantitative approach in research is often related with positivism and there are terms often related to quantitative research such as scientific and objectivist.[68] Quantitative research philosophy often uses highly structured data collection techniques and uses logical thinking in its approach. Data collected is often used to test theory and where the data is used to develop theory, it tends to be deductive.[69] The main features of quantitative research are that it looks at relationships between numbers and analysed using a range of statistical techniques. There are issues to do with controls in order to achieve validity of the results. In quantitative research, there is use of probability sampling techniques to ensure generalisability and in

[66] Khushal Vibhute and Filipos Aynalem, (2009) 'Legal Research Methods,'(prepared under the Sponsorship of the Justice and Legal System Research Institute, chilot.word press, 2009) http://www.academia.edu/8221697/Legal_Research_Methodology accessed on 22/10/2014, p 44
[67] Ibid, p 45
[68] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (3rd edn, Sage Publications 2009) p 4
[69] Mark Saunders, Philip Lewis, Adrian Thornhill, *Research methods for business students* (6th edn, Pearson 2012) p 163

most cases the researcher tends to be independent of those being researched.[70] The main research strategies related with quantitative research are database and survey research. In a survey research, strategy data is often collected using questionnaires, structured interviews, or structured observation.

This research is not going to use quantitative methods because this methodology is not suitable for the type of research being conducted (i.e. legal research). The quantitative approach is not going to be used because the research is going to use information that is readily available.

2.2.2 Qualitative Research

The second research method is qualitative and is often related to terms such as phenomenological, subjectivist and interpretative. Qualitative research is often linked with interpretative philosophy.[71] It is interpretative in the sense that researchers often need to make sense of the subjective and socially constructed meanings articulated about the phenomenon being considered or studied. Qualitative research tends to be naturalistic in settings meaning researchers operate within the natural setting or research context, in order to gain insight or a deeper understanding. In qualitative research, the subjective element of the research brings with it the problem of validity. Validity refers to whether conclusions of results are strong or well-founded and accurately reflects to the real world. Validity tends to be weak because of the personal nature of observations and judgements.[72] There is the black letter method where information is taken from primary sources such as conventions, acts or treaties and the primary aim is to compare, organise and describe legal rules and offer interpretation on the appearance and significance of the authoritative legal sources in which such rules are considered. There are secondary sources such as books, journal articles, websites and many others which can be found electronically. Legal information extracted from such sources, which can be analysed, is going to be the source of data for this thesis.

The research approach in qualitative research design often begins with an inductive approach, where naturalistic and emergent research design is used to develop a richer theoretical perspective than already exist in literature. The approach tends to look at new topics or

[70] Ibid
[71] Norman Denzin & Yvonna Lincoln (2005) Op cit, p 2
[72] Boris Blumberg Donald R. Cooper and Pamela S. Schindler, *Business Research Methods* (3rd edn, McGraw, Hill Education 2008) pp 124-126

concepts and in most cases there is no hypothesis that is being tested. However, there are instances where some qualitative researchers begin with a deductive approach, to test an existing theoretical perspective using qualitative procedures.[73] The main features of qualitative research studies are that participants' meaning and relationships are collected using different data collection techniques and analytical procedures, to develop a conceptual framework. In most cases data collection is non-standardised such that questions and procedures may be modified, as new information is being gathered and analysed. The techniques used for recruiting participants often tend to be non-probability sampling techniques. There is need for the research to build relationship and develop sensitiveness in order to gain access.[74] A variety of strategies is often used in qualitative research. Each strategy often has a specific emphasis and scope as well as a set of procedures.

This research is not going to use the grounded theory approach, action research; ethnography and narrative research because the aim of the thesis is to compare two supranational legal systems (i.e. the AU with the EU).

2.2.3 Mixed Methods/Multiple Methods

There is also another type of research called the mixed method research design[75] which combines the qualitative and quantitative research methods. In mixed method, researchers may use quantitative analysis of officially published data followed by qualitative research methods to explore awareness. The research approach of mixed methods research design may use either a deductive or inductive approach and is likely to unite both. Quantitative or qualitative research may be used to test propositions or theoretical propositions, followed by further quantitative or qualitative research to develop a richer theoretical perspective.

There can be situations where theoretical perspectives can be used to provide direction for further research. Theory can be used to provide focus for research and limit the scope of the research.[76] The use of mixed methods often overcomes the weaknesses often associated with using only one method and often provides scope for richer approach to data collection,

[73] Robert K Yin, *Case study research: Design and methods* (4th edn, Sage 2009) p 24
[74] Mark Saunders, Philip Lewis, Adrian Thornhill, *Research methods for business students* (6th edn, Pearson 2012) p 163
[75] Abbas Tashakkori and Charles Teddlie, *The Sage Handbook of Mixed methods Research: integrating Quantitaive and Qualitative Approaches in the Social and Behavioural Sciences* (2nd edn, SAGE publications, 2010) p 286
[76] Ibid

analysis and interpretation.[77] The mixed methods research designs have multi-method and mixed method design. With the multi-method research, more than one data collection technique is used with related analysis procedures, but restricted with either a quantitative or qualitative design.[78] For example, you can choose to collect quantitative data using both questionnaires and structured observation, analysing these data using statistical procedures, leading to multi method quantitative study. The alternative approach is to collect qualitative data using in-depth interviews and diary accounts and analyse these data using qualitative procedures, known as a multi qualitative study.

The mixed method is not going to be used for this research because the focus is on using qualitative data in order to address the central research questions using secondary sources of data (including what is considered to be primary legal sources such as international conventions).

2.3 Ways of Collecting Data

2.3.1 Secondary Data

How to obtain information for research is an important consideration. Rather than collecting primary data, secondary data can also provide an important source of valuable information that can be used for research. Secondary data is that data which can be analysed further having already been collected for some other purpose. There are many sources of secondary data containing legal information such as textbooks and journal articles.[79] [80] Secondary data can be used to answer research questions or objectives and can be used to provide main data, time series data, and area based data. It is however important to ensure that the secondary data used goes with the aims and objectives of the research as most of the times it would have been collected for a different purpose. The advantage of using secondary data is that it is available at low cost and some may be available freely. The advancement of technology means most data is available on the website or internet and some is available where access may have to be negotiated. There is also need to evaluate the data for reliability and objectivity as some may contain biases and where biases exist, the data cannot be good in

[77] Alan Bryan (2006). 'Integrating Quantitative and Qualitative Research: How is it Done?' In: Qualitative Research, Vol. 6, No. 1, p 106
[78] Abbas Tashakkori and Charles Teddlie, (2010) Op cit, p 286
[79] Khushal Vibhute and Filipos Aynalem, (2009) Op cit, p 48
[80] Abbas Tashakkori and Charles Teddlie, (2010) Op cit, p 331

answering the research objectives or questions. One needs to avoid the danger of misinterpreting the data.

The research being undertaken on the free movement of workers in the AU and recognised African sub-regional organisations: comparative study with the EU, will make use of secondary data including scholarly contributions in the form of books, journals, articles (i.e. literature review), statistics and other sources, and all steps necessary would be taken to ensure that data used has been evaluated for its suitability. Secondary sources include any information obtained from primary sources and these include abstracts, textbooks, reviews, bibliographies, legal researches, and commentaries on statutes. [81] The study will be largely library-based (physical and electronic), which is adequate because the scope of the research will deal with an analysis of legislation, international and regional implements, and case law. My first search has revealed good access to primary and secondary sources of legal information required for this research.

2.3.2 Primary Data:

Primary data is often collected for use with the quantitative approach to research and the main methods of collecting primary data are questionnaires, structured interviews and structured observation. Primary data is original in nature and has to follow specific ways of collecting data if the results are to be reliable.

Primary sources are the sources that contain original information and observations are known as primary sources of information and in legal research include national gazette which publishes acts/proclamations passed by Parliament, rules, regulations, statutory orders, directives, cases reports and higher courts judicial pronouncements and the constitution.[82]

2.3.2.1 Questionnaires

Having addressed the key aspects of qualitative and quantitative methodologies, it is worth considering questionnaire/interview and literature review as methods of collecting data conducting research. Questionnaire is one of the methods that are commonly used for data collection purposes. There is a tendency of people using questionnaires for data collection

[81] Khushal Vibhute and Filipos Aynalem, (2009) Op cit, p 47

[82] Ibid

without regards to other data collection methods such as examination of secondary sources, observations, semi-structured or unstructured interview.[83] However, questionnaires are not helpful for exploratory studies or researches that require a lot of open-ended questions. Questionnaires are best suited for standardised questions which can be interpreted in the same way.[84] Questionnaires can be best used for descriptive research. Questionnaires can be helpful in explaining variability in different phenomena, hence why they tend to be used in explanatory or analytical research to determine the relationships between variables (cause and effect relationships).[85]

There are different types of questionnaires and the design all depends on how they are to be delivered, collected or returned and the amount of contact the researcher has with the respondents. There are self-administered questionnaires and usually completed by respondents. Self-administered questionnaires can be sent electronically via internet, website, postal, mail or hand delivered. There are also interviewer-completed questionnaires where responses collected and recorded by the interviewer based on answers provided by the interviewee. There are also telephone questionnaires where questionnaires are completed over the phone.

There are many factors that have to be considered when using questionnaires such as the choice of the questionnaire, type of questions to be asked, nature of data to be collected, be able to select and justify use of proper questionnaire, be able to design, guide and deliver a questionnaire that addresses the research question. However, the proposed research is not going to make use of the questionnaire for data collection. Many issues arise when using a questionnaire such as the data will be analysed or interpreted. There is need to take all these into account and furthermore there is need to take into account timing and response rates as they can all affect the research if not enough responses are received and what response rate is aimed at to achieve validity, issues often associated with explanatory research.

Questionnaires will not be used as they are not suitable for the purpose of this study as secondary sources of data are going to be used.

[83] Abbas Tashakkori and Charles Teddlie, op cit (2010) p 419
[84] Colin Robson, *Real World research 3e,* (3rd edn, John Wiley 2011) p 252
[85] Jill Gill and Phil Johnson: *Research methods for managers,* (4th edn, SAGE 2010) pp 140-141

2.3.2.2 Interviews

The other method of data collection is the interview. It often involves a conversation between two or more people, with the interviewer establishing relationship to ask short and clear questions to which the interviewee is willing to respond and to listen carefully. The key is to ask clear questions and get clear answers that will be used further in the research. Interviews should allow the gathering of valid and reliable data relevant to the research questions and objectives and can assist in refining ideas where the research questions and objectives have not yet been formulated.[86] The term research interview covers several types of interviews and the interview chosen should be consistent with the research objectives or research questions, purpose and strategy adopted. Interviews can be structured, semi-structured, unstructured or in-depth interview. Other terms that can be used are standardised or non-standardised interviews or focussed interviews or non-directive interviews. [87]

Structured interviews often use questionnaires, are based on pre-established and standard questions, and are often called interviewer-administered questionnaires. More often questions are read to respondents and answers recorded on a standard schedule with pre-answers. There is a need not to show any bias because the interviewer will have contact with the respondent. Structured interviews often collect quantifiable data, hence are referred to as quantitative research interviews.[88] The other field involves semi-structured or in-depth interviews which are non-standard and are often referred to as qualitative research interviews.[89] In non-standard research or semi-structured interviews or in-depth interviews, the researcher often has a list of questions that must be covered and their use may vary from interview to interview which is not the case with structured interviews. The sequencing of questions may vary and some questions may be omitted depending on circumstances and at times additional questions may be required to explore further the research question or objectives. There is often audio recording of conversation or note taking. Semi-structured interviews often allow

[86] Ibid, p 375
[87] Colin Robson (2011) Op cit p 131
[88] Ibid p 374
[89]Catherine Cassell and Gillian Simmon, *Essential Guide to Qualitative Methods in Organisational Research* (1st edn, Sage, 2004) p 11

interviewees to express themselves while the interview schedule may contain further discussion and comments to open and close the interview.[90]

The last type of interview to be considered is the unstructured interview. In most cases, unstructured interviews are informal and would be used to explore in depth a general area one is interested in and often referred to as in-depth interview. Being unstructured implies there is no prearranged list of questions to work through, but it still requires clear idea about what the interviewer wants to explore. In unstructured interviews the interviewee has the freedom to express themselves freely about behaviour, viewpoint or events in relation to topic area; hence the whole process is non-directive. It is often referred to as informant interview in which it is the interviewee's views that guides the conduct of the interview. In focussed interviews, it is the interviewer who steers the direction of the interview at the same time allowing the respondents' opinions to emerge as they respond to the questions asked.[91] Interviews can also be secret according to influence of the researcher and those who participate. There can be face to face interview or where the researcher meets a group of participants and the interviews could either be face to face or over the internet or electronic.

Different types of interviews can be used in the different kinds of studies. In-depth interviews and semi-structured interviews may be used in exploratory studies as they can provide a way of finding out what is happening and to understand context. They can provide important background and related material for the study. Where the objective is to test a theory, a structured interview will provide data that makes it easier to test statistical propositions or hypothesis. Semi-structured interviews may also be used in explanatory studies in order to understand the relationship between variables. The different types of interview methods can be used in multiple methods or mixed. Semi-structured interviews are most frequently used in explanatory studies and less frequent in exploratory studies. Unstructured interviews are most frequently used in exploratory studies and never used in either descriptive or explanatory studies.[92]

[90] Mark Saunders, Philip Lewis, Adrian Thornhill,(2012) Op cit, p 375
[91] Pervez Ghauri and Kjell Gronhaug, *Research Methods in Business Studies:A Practical Guide* (4th edn, Prentice Hall , 2010) p 126
[92] Mark Saunders, Philip Lewis, Adrian Thornhill, (2012) Op cit, p 375

It is worth pointing out that, there are several issues which need addressing as part of conducting an interview. The main aim in conducting an interview is to ensure the quality of the data and there is need to take into account issues of bias and generality and be aware that there are limitations associated with each research method. There is need to evaluate all options when looking at particular research method so that one can choose an interview method that reduces bias which can threaten reliability and validity of data. When conducting semi-structured and in-depth interviews, issues such as suitability of the researcher's appearance, opening statement, questioning approach, use of different types of questions, behaviour of respondent during interview, use of considerate listening skills, scope to summarise and test understanding, being able to deal with difficulty participants and ability to record data accurately all affect the result of the interviews. There is need to consider the resources and logistics when intending to use semi-structured or in-depth interviews. There are issues such as location, which must be taken into account. There is need to consider also conducting interviews by telephone or electronically. There is also a need to consider use of group interviews although they may be difficult to do than one-to-one interviews.

However, no interviews will be conducted for this research as the approach will be qualitative (doctrinal black letter law approach) rather than quantitative, given the nature of the research.

2.3.2.3 Survey

A survey is usually used when trying to understand people's attitudes, views and opinions, or beliefs on different aspects of social life. Surveys often give detailed description of population on a number of variables and can provide links such as relationship or association between variables.[93] Surveys have the advantage that they are generally standardised and often use closed questions where respondents have to choose from given answers. The difficulty is that respondent cannot express their true beliefs because they have to choose from given answers.[94] [95]

This research is not going to use surveys for the collection of data as they are not suitable for the purpose of this study.

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[93] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) p 59-60

[94] Ibid, p 60-61

[95] Robert M Lawless, Jennifer K Robbennolt and Thomas S Ulen, *Emperical Methods in Law* (Aspen Publishers 2010) p 79

2.4 Nature of Research Design

It is important to note that research can be descriptive, exploratory or explanatory in approach. The way in which the question is asked will involve exploratory, analytical and descriptive or explanatory research, which often leads to an answer that is descriptive or explanatory. It is worth explaining these terms further.

In an exploratory study, the aim is to ask open questions that allow the researcher the opportunity to discover what is happening and to have insight about a topic of interest. It is very important when one wishes to clarify understanding of a problem, especially when unsure of the specific nature of the problem. The ways in which an exploratory study can be conducted include a search of the literature, conducting in-depth interviews, or conducting focus group interviews or interviewing experts in the subject area. One advantage of exploratory study is that it is flexible and adaptable to change.[96] When conducting exploratory study, as new data appear and new insights take place that presents scope for change in direction which is a key feature of exploratory study. Furthermore, exploratory study may begin with a wider focus which can be narrowed down with the progress of the research.

The research on free movement of workers in AU will be exploratory in nature and will focus on the literature and examine what is being said and then narrowed down to focus on why the articulation and implementation of the policy on free movement of workers appears to be problematic in the AU.

The other research design to be considered is analytical and exploratory study. In analytical and exploratory studies, the aim is to gain an accurate profile of events, persons or situations. Analytical and exploratory study may be an extension of a piece of exploratory research or most of the times explanatory research. One key aspect of analytical and exploratory study is that the researcher should be aware of the clear picture of the phenomenon on which data is about to be collected before beginning the data collection process.

This research is going to be analytical and exploratory in nature, as secondary data will be explored in trying to answer the research questions.

[96] Mark Saunders, Philip Lewis (2012) p 171

2.5 Research Themes

There are different themes that inform research. There is analytical, empirical, historical, comparative and philosophical or sociological. However, in this section the focus will be on the comparative method for it is the method that will be applied to the proposed research. The comparative approach to law is an attempt to recreate the norms and ethos characteristic of one legal system in terms of how those characteristics can be applied effectively to another legal system.[97] It is a method of comparing different laws and in the proposed research, the intention is to examine relevant laws of the EU and then compare these with AU laws concerning the free movement of workers and ascertain where the differences are and what lessons can be learnt from the more successful EU model of integration. The comparative exercise will also extend to examining the influence of political, economic and cultural factors which slow down the free movement of workers in the AU.

2.6 Ethical and Legal Considerations

Often connected with research are ethical and legal considerations and these factors are important in the formulation of the research design. It is a requirement of most universities and organisations that researchers must obtain formal approval from research ethics committees for the proposed research prior to granting permission to precede with the research. Research in some cases involve human participants and as such there is need to protect the participants by not exposing them to risk or harm and there is need to obtain informed consent and protection of privacy unless if there is no risk to participants. As a researcher there is need, to act ethically at all times and one should not unnecessarily misinform people, avoid fraud and plagiarism. Research ethics are standards of behaviour that guide one's conduct in relation to the rights of those who become subject of your research and are affected by it. There is need for the researcher to ensure that from the beginning of the research ethical issues have been considered for they form one of the criteria upon which research is judged. Using codes of ethics, ethical guidelines and ethical principles would help in the process. [98] The proposed research has to conform to university requirements

[97] Clifford Geertz , *Local Knowledge, Further essays in Interpretive Anthropology,* (3rd edn, Basic Books Inc, 1983) p 216

[98] Mark Saunders, Philip Lewis, Adrian Thornhill (2012) Op cit, p 171

for ethical guidelines and principles. As no participants are involved in the research design, there is no need for issues such as informed consent. Following consultations with the supervisor and the Business School Research Office it was also decided that there was no need to make an application to the Ethics Committee.

2.7 The Motivation for Choosing the Comparative Method

The research will use the comparative method because it is a unique systematic method applied to gain new knowledge and understanding about the legal systems in respect of which we apply it, and involves knowing the similarity and differences, and the strengths and weaknesses of the legal systems which form the subject matter of the study. Furthermore, it enhances the vision of the researcher. The comparative method allows a selective and accurate search for legal principles common to many nations. It promotes shared understanding by acquiring knowledge of foreign legal systems.[99] It allows for the comparisons of differences and similarities and of the strengths and weaknesses of the different legal systems, being analysed thus the reason it will be used in this research. The knowledge gained by the researcher is then used to produce recommendations which can be used to strengthen the weaker and less effective legal system, which is the ultimate objective of this research – i.e. to examine ways in which lessons from the EU integration model can be used to promote a more effective integration model in the AU and recognised African sub-regional organisations for the free movement of workers.

There is an increasing tendency towards internationalisation where efforts are made towards unification of legal rules in different countries. There is the promotion of development in national law sometimes through legal transplant or borrowing of foreign and legal principles which have then been incorporated into national law. The use of the comparative method can facilitate the promotion of social changes that have taken place elsewhere. The method also helps in establishing which policies should find application in one's legal system, including case law and academic publications. The method allows for wider understanding of legal methodology; it informs social function of the law and gives insight into specific legal principles.

These are the key points that support comparative method as a research method:

[99] Campbell McLachlan (2009) 'Anthony Angelo and the Comparative Law Tradition' in (2009) 39(4) VUWLR, p 566

(i) In order to achieve information on the content applicable in foreign legal rules, research can be done on specific elements of different legal systems which form the basis of comparative legal research.

(ii) An analysis can be carried out to identify those elements in the foreign legal systems, each against the background of its own legal and community framework, in order to understand its full impact and its own legal system. This would allow for the examination of the EU law and understand it and how it influenced the process of integration, which can be compared to the situation existing in Africa.

(iii) Using the comparative method will allow for the consideration of similarities and differences, between the AU viewpoint and the EU, including the advantages and disadvantages, and the strengths and weaknesses of the two legal systems. However the main limitation of the comparative method concerns the different approaches to law making and differences in the socio-legal cultures as well as historical development of the legal systems which are the subject of the comparison. Such differences raises contextual concerns about comparing systems with differences in function and culture, which may not be comparing like for like. [100] However, it is the differences as well as the similarities in the legal systems that make such comparison the subject of academic study. In the case of this research the fact that most African countries inherited some of the legal culture and legal principles of European countries such as France, the United Kingdom, Portugal, Spain and Italy has to a certain extent overcome this limitation in the comparative approach. This is because some of the legal culture which is present in the EU can also be found in the AU due to the colonial heritage of AU countries.

[100] Ralf Michaels, *Comparative Law, in Oxford Handbook of European Private Law* (Basedow, Hopt, Zimmermann eds., Oxford University Press, 2006) pp 1-2

2.8 Conclusion

In conclusion, this chapter highlights the fact that there are two main research methods, which is quantitative and qualitative. There is also a third method, which mixes the two approaches, which is the mixed method or multi-method. There is recognition that using a mixed approach at times helps to address weaknesses that are inherent in single method. Quantitative research often uses numbers for data collection and uses statistics to analyse the data, whereas qualitative research uses interpretative philosophy where the researcher investigates subjects in their natural settings to come up with themes about the phenomena that is being researched. Qualitative research tends to be subjective and brings with it the problems of validity. Quantitative research tends to be descriptive and explanatory in nature and often investigates connecting relationships between variables, whereas qualitative research tends to be exploratory in nature. This chapter also drew attention to the fact that there are various ways of collecting data, including primary methods such as survey, interviews and questionnaires. Primary sources include all original sources of information such as the constitution, national gazette, rules, regulations, statutory orders, and directives and many more. There are also secondary methods of collecting data and these include textbooks, bibliographies, abstracts, legal researches, reviews, and commentaries on statutes.

On the other hand, in general research where interviews and questionnaires are used the researcher has to deal with issues such as format, design, content time and cost. The research designs largely depend on the data collection method used. Using primary methods of data collection requires more time and resources and can be costly. On the other hand, using secondary data is less costly and with the advent of technology, some of the sources of data are freely available. Secondary data is an important source of research data and one has to consider its use before embarking on research. Ethical and legal considerations are also important in research. Where research-involving participants or subjects are concerned, one has to ensure compliance with the necessary ethical and legal issues. Issues of access to data or subjects or participants have to be taken into consideration especially where it concerns primary data collection. Secondary data has the advantage over primary data collection in that the level of compliance with ethical considerations may be less in that the researcher does not necessarily have to obtain informed consent when the research concerned does not involve the use of participants or subjects, but relies on data which is already available Finally, there

are research methods specific to legal studies such as the comparative research method, which will be used in the research.

Methodology Table:

Chapters	Quantitative	Qualitative	Mixed Methods	Secondary Data	Questionnaires	Interviews	Legal issues	Comparative Method
Chapter 1	No	Yes	No	Yes	No	No	Yes	Yes
Chapter 2	No	Yes	No	Yes	No	No	Yes	No
Chapter 3	No	Yes	No	Yes	No	No	Yes	Yes
Chapter 4	No	Yes	No	Yes	No	No	Yes	Yes
Chapter 5	No	Yes	No	Yes	No	No	Yes	Yes
Chapter 6	No	Yes	No	Yes	No	No	Yes	No
Chapter 7	No	Yes	No	Yes	No	No	Yes	No
Chapter 8	No	Yes	No	Yes	No	No	Yes	Yes
Chapter 9	No	Yes	No	Yes	No	No	Yes	Yes

Source: the Researcher

This chapter has presented discussions on the research methodology, the main approaches to conducting the research, ways of collecting data and the motivation for choosing the comparative method. The next chapter will analyse the concept of economic integration, types and function of economic integration, the benefits of regional economic integration, the disadvantage of regional economic integration, relationship between integration and trade liberalization, globalization and the factors driving global economic integration.

CHAPTER THREE

THE CONCEPT, TYPES AND FUNCTION OF ECONOMIC INTEGRATION

3.1 Introduction

The focus of this chapter is on economic integration concepts, including the benefits and the challenges of integration. The concept of integration is an important aspect of the discussion in this chapter, as it will help in understanding the concept of the principle of free movement of workers. The various forms or steps towards full economic integration will be explored and then attention will briefly turn to the various levels of integration achieved by the African RECs. Furthermore, the chapter will discuss trade liberalisation and globalisation in the context of countries chasing economic integration in particular the effects of these two concepts on countries embarking on economic integration. As already highlighted, there is very little literature focused on the free movement of workers policy in the AU and African RECs, and it is for that reason this study will examine economic integration within the context and framework of the free movement of workers.

3.2 The Concept of Integration

The term economic integration is largely dependent on legislation and legislation can take the form of regulations or directives.[101] The word 'integration' indicates the bringing together of parts into a whole.[102] According to the Concise Oxford English Dictionary, 'Integration is the combination of parts into a whole, and union is a whole resulting from the combination of parts or members'.[103] However, the economic literature does not provide a specific meaning for the term 'economic integration'.[104] A number of authors include social integration in the concept; others consider different forms of international cooperation under this heading, and the argument has also been advanced that any simple trade relationship between independent national economies is a type of integration.[105] From a functional point of view economic integration is "designed to eliminate discrimination between economic units that belong to

[101] Mike Artis and Frederick. *The Economics of European Union: Policy and Analysis* (4th edn, Oxford University Press, 2007) p 21
[102] Bella Balassa, *The Theory of Economic Integration,* (1st published, George Allen & Unwin Ltd 1961) p 1
[103] Geoffrey R Denton, *Economic Integration in Europe*, (Weidenfeld & Nicolson 1969) p 143
[104] Snorri Thomas Snorrason, *Asymmetric Economic Integration: Zise Characteristics of Economies, Trade Costs and Welfare (Contributions to Economics),* (physica, 2012 edition (8 JULY 2012) p 13
[105] Bella Balassa (1961) Op cit, p 1

different national states"[106] Economic integration is thus seen as intergovernmental cooperation which would lead to very important policy decisions, to encourage exchange of goods, services, labour and capital.[107]

The OAU Charter 1963[108] and the AU Constitutive Act 2000[109] view regional integration as one of the securing ideals of African unity. The Lagos Plan of Action 1980[110] and the Abuja Treaty 1991 establishing the AEC outline the economic, political, and institutional mechanisms for achieving this ideal'.[111]

Since independence, integration has been viewed as a core element of African countries' development strategies.[112] The Africa-wide development programme, as supported by the AU is based on regional integration and the creation of an AEC. This was laid out in the Abuja Treaty of 1991 and the 1980 Lagos Plan of Action for the Economic Development of Africa. The Africa regional integration roadmap considers the Regional Economic Communities (RECs) as the building blocks of the AEC. [113]

The economic integration expected in Africa is the one of the models for promoting global economic integration with focus on economics, international political economy and sociology. The AU wants an integration that is beyond free trade and financial market integration. However when considering the EU, the global financial crisis of 2007 – 2008 has highlighted the fact that deeper economic integration is not without its challenges.**[114]** Following global financial crisis, there is an acknowledgement that free trade alone is not sufficient to protect member states from global financial crisis because there are other factors

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[106]Ricardo Argüello (2000) 'Economic Integration, An Overview of Basic Economic Theory and other Related Issues' (Universidad de Rosario, 2 March 2000)
<http://www.urosario.edu.co/economia/documentos/pdf/bi03.pdf> accessed 21 January 2014 p 4

[107] Esekumemu Clark and Phil, D. (2014) 'Developing country studies the economic community of west African states (ECOWAS): The challenges to the implementation of the protocol on the free movement of goods, persons and establishment', Developing Country Studies Vol.4, No.6, 2014, p 124

[108] OAU Charter, Addis Ababa, Ethiopia, 25/ 05/1963, available at:
http://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf

[109] Constitutive Act of The African Union Adopted by The Thirty-Sixth Ordinary Session of The Assembly of Heads of State And Government 11 July, 2000 - Lome, Togo

[110] Lagos plan of action for the economic development of Africa 1980-2000, Held in Lagos, Nigeria, from 28 to 29 April 1980

[111] Economic Commission for Africa, *Assessing Regional Integration in Africa*, (UNECA, May 2004) http://www.uneca.org/sites/default/files/PublicationFiles/aria2_eng.pdf accessed on 24 April 2014, p 1

[112] Trudi Hartzenberg, (2011) Regional Integration in Africa, Trade Law Centre for Southern Africa (tralac) (World Trade Organization, Economic Research and Statistics Divisio,Staff Working Paper ERSD-2011-14) p 2

[113] Study Commissioned by GTZ, 'Regional Economic Communities in Africa, a Progress Overview' (Prepared by Atieno Ndomo, Nairobi, May 2009) , http://www.g20dwg.org/documents/pdf/view/113/ accessed on 20/10/2014, p 11

[114] Dagmar Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* (Edward Elgar Publishing Limited 2012) p 17

that come into play. The focus should be on individual economies because within the union, there will be member states that are better off than others and imbalances tend to be magnified during the time of a financial crisis.[115] Despite deep integration, member states can be influenced by loyalties, customs and other irrational factors when it comes to economic decision making.[116]

One observation from the economic integration of the EU is that the free trade can be achieved by having a common market and the movement of factors of production was expected to follow the liberalisation of trade but there are exceptions. The international mobility of labour has been slow and is constrained by international migration.[117] There is recognition that labour and capital mobility cannot move unrestrained which call into question how AEC intends to deal with this new realisation by the EU. There is a need to balance interstate needs and societal expectations and needs if economic integration is to be beneficial to Africa.

There is an aspect of competition that would need addressing if economic integration is to be achieved in Africa and it is therefore essential that the laws made within the RECs address competition issues, otherwise where there are obstacles to competition, then it would become difficult to realise benefits from free trade. In the EU, economic integration succeeded in increasing trade in goods and services but with limited movement between factor mobility. From Eurostat figures of 2008, only 2% of EU citizens lived in other member states, although there was a significant increase with the enlargement of the EU by ten new member states. [118] Between 2000 to 2007, about 4.5 million workers moved from new member states to old member states representing 0.5% of old member states population and 2.57% of populations of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovak Republic, and Slovenia.[119] However the situation changed with more movement of workers within the EU after the financial crisis with over 3.3% (in 2013 and 2014) of EU citizens living in another member state.[120] The populations of EU citizens residing in other countries for 2013 and

[115] Ibid
[116] The case of the Greece crisis brings these issues into perspective when the ruling party Syrza Party was brought into power on the back of anti-austerity measures, but because of its membership of the EU, it did not want to leave the EU. Leaving the EU would have meant that it had to pay off massive debts without the support of the EU, which could have meant that Greece would have found it difficult to remain afloat. With the financial crisis it became more exposed and its people resented austerity measures as they caused enormous hardships.
[117] Dagmar Schiek (2012) Op cit, p 19
[118] Ibid p 29
[119] Ibid
[120] 'Labour Mobility in the EU', EU - European Union Business News and Information (25 September 2014) <http://www.eubusiness.com/topics/employment/labour-mobility> accessed 10 November 2014

2014 were over 7 million and 8.1 million respectively with German and UK receiving over 1.4 million and 1.6 million respectively. [121] Though there has been an increase in the percentage to 3.3% on average when compared to the figure of 2004 to 2007 of about 2% of EU citizens, the free movement of workers has not rose to alarming figures except that the German and the UK appears to be the ones receiving a lot of EU migrants[122] and the majority moving from Poland (over 1 million (15.4%) in 2012) and Romania (over 1.2 million (18.4%) in 2012)[123] of the 6.6 million EU citizens staying and working in other EU countries in 2012, almost 34% came from two countries Poland and Romania and these two countries are part of the countries that became part of the EU in 2004[124] and 2007[125] respectively. Romania had a seven year restriction for its citizens to work and claim benefits within the EU within the first seven years of signing the accession treaty and the restrictions expired in 2014. In the case of Romania and Bulgaria some of the poorest countries within the EU, the free movement of workers meant that their citizens could at least move to those countries where there are opportunities hence the large numbers of their citizens moving within the EU.[126]

Central to European Economic integration was the desire to achieve free trade and accurate competition and in order to reach this goal there were social liberals who insisted that there should be a certain legal framework. Such a legal framework would allow for competition and free trade and that framework were supposed to create laws that were binding and safeguard the economic order from discretionary political interventions.[127] From the onset of making the framework of economic integration, the EU had a strong economic and legal foundation central to which was the concept of legal integration which required that member states had to comply with the same legal texts, principles and policies.

Major milestones that were achieved by the EU as a result of legal integration include the following: The 1951 Treaty of Paris which established the European Coal and Steel

[121] Ibid
[122] European Commission - Press Releases - Press Release - Free Movement of Workers: Commission Improves the Application of Worker's Rights – Frequently Asked Questions' (26 April 2013) <http://europa.eu/rapid/press-release_MEMO-13-384_en.htm> accessed 10 October 2014
[123] Ibid
[124] Plainpicture/Fancy and others, 'Understanding Enlargement the European Union's Enlargement Policy' (2007) <http://ec.europa.eu/enlargement/pdf/key_documents/2007/understanding_enlargement_102007_en.pdf> accessed 26 October 2014, p 5
[125] Elspeth Guild and Sergio Carrera,(2014) 'Labour Migration and Unemployment What can we learn from EU rules on the free movement of workers?' Liibarity and Security in Europe, February 2012, p 2
[126] Ibid
[127] Dagmar Schiek (2012) Op cit, p 21

Community (ECSC) (foundation stone of today's EU); 1957 EEC Treaty (establishing The Common Market), the Single European Act 1986 (completed the common market and introduced new policy areas); and the 1992 Treaty of Maastricht on European Union.

The EEC Treaty (also known as the Treaty of Rome) established the integration of product markets and factor mobility through law and also included the free movement of persons and capital.

To ensure that the laws of the EEC were implemented and enforced, the European Court of Justice was established, with EU laws having supremacy over national laws *Flaminio Costa v ENEL* (Case 6/64) [128] and Van Gend en Loos (Case 26/62).. The original treaty had clear focus on free markets but also contained other provisions that were aimed at ensuring that there was no obstruction to free trade and exploitation of the weaker states by the dominant states. These other provisions included the common agricultural policy which covered planning production, price regimes and consumption of agricultural goods; external customs tariff in order to protect European production; and common transport policy[129]. Everything was reduced to law in order to ensure an effectively functioning common market.

In order to ensure that competition was clear and fair within the EEC, competition laws were enacted and Article 3 of the EEC Treaty provided that competition within the common market was not distorted and the Treaty prohibited cartels and abuse of dominant market position and any merger activities require approval of the Commission. While the text regarding competition has remained almost the same, the economic concept of competition gained ground from the mid-1990s and there is more debate about competition within the EU.[130]

The issue of common policy and common currency saw the EU adopting an unusual path. In order to achieve a fully integrated regional economy what is essential is the liberalization of markets and enhanced factor mobility and that can be followed by common monetary system which will require a common economic policy. The EU adopted an approach that has seen economic policy remaining the competence of member states (Articles 120-126 TFEU),

[128] In *Flaminio Costa v ENEL* , Case 6/64: [1964] ECR 585 at 593, ECJ. it was stated that, 'by agreeing to form a community that had unlimited duration, having its own institutions, its own personality and its own legal capacity, having real powers stemming from limitation of sovereignty or transfer of powers from member states to Community (Union), it was implied that member states limited their sovereign rights (within limited fields) thus creating a body of law which binds both their nationals and themselves'. John Fairhurst (2014) Law of the European Union, p 265

[129] Dagmar Schiek (2012) Op cit, p 23

[130] Ibid p 26

while monetary policy is under the EU (Articles 127-135 TFEU). With the common currency, the common market is protected against adverse effects of global monetary instability while a common monetary policy is aimed at pooling sovereignty in order to overcome factual loss of sovereignty resulting from the internal market.[131] The Maastricht Treaty of 1993 introduced political and monetary union with the advent of the Euro together with agreeing not to reverse the fixing of the exchange rates of member states that met the criteria and had not opted out of monetary integration such as UK and Denmark. Key to the European Monetary Union is price stability and budgetary discipline (Article 126 (1) and 128 (1) TFEU.[132] There have been problems with the use of the Euro, although there are conditions that should be met by member states before they can join. Some of these problems came under examination in the case of Greece where she was allowed to become a member of the Euro zone despite not meeting all conditions. [133] Furthermore, Member States cannot unilaterally leave the Euro except by agreement of all Member States [134] and that presents problems once there are imbalances within the monetary union because weaker states are often vulnerable whereas states with powerful economies and strong finances would be in a better position to react to any financial crisis. Successful regional integration depends on peace and security, enhancing political and civic commitment, and mutual trust among member states, and stability and financial management.

What can be highlighted from the above discussion is that economic integration has to be supported by legal integration where same texts of law are applicable to all member states. This ensures that member states are subject to the same rules, thus creating a level playing field within the common market. This raises question as to whether this is the case with the AU's model of integration based on sub-regional organizations.

The next section examines the concept of economic integration in more depth by analyzing the various levels of economic integration.

[131] Willem Molle, *The Economics of European Integration* (5th edn, Ashgate 2006) p 265
[132] Dagmar Schiek (2012) Op cit, p 27
[133] Ibid
[134] Ibid

3.3 Levels of Integration

Essentially, there are different forms of integration and these include economic integration such as AU, European Common Market, Economic Community of West African States (ECOWAS), North American Free Trade Area (NAFTA), and Southern African Development Community (SADC). On the other hand, there is political integration, and examples of this include the Organisation of African Unity (OAU), the defunct League of Nations (LN), and United Nations Organisation (UNO) among others. In addition, there is security integration such as the Association of Southeast Asian Nation (ASEAN), North Atlantic Treaty Organisation (NATO) and Organisation for Security and Cooperation in Europe (OSCE). [135]

These forms of integration involve varying levels and degrees of cooperation between member states, and between them and third parties. In economic relations, integration is based on arrangements between different regions marked by the reduction or elimination of trade barriers and the coordination of monetary and economic policies.

The main objective of economic integration is to reduce costs for both consumers and producers, as well as to increase trade among the countries joining the agreement. Between 1995 and 2010 trade in Asia more than doubled while trade in sub-Saharan Africa has largely slowed down at 2% of world total trade. Africa registered the lowest percentage of trade worldwide. Only 12% of total exports take place within Africa, compared with 25% in ASEAN and over 60% in the EU.[136]

To achieve the forms of integration highlighted here involves the concept of legal integration because member states have to comply with the same legal texts and principle including basic texts, treaties, documents, and protocols. Enforcement mechanisms should be precise and clear as to what is to be achieved, how it is to be achieved so that the application becomes effective. The implementation and enforcement should clearly spelt out the consequences of a breach and the penalties for non-compliance should be clearly defined because where there are no penalties of non-compliance, member states may fail to comply where it is in their interest to do so, thus resulting in a lack of progress. Most forms of economic integration

[135] Michael M Ogbeidi, (2010), 'Comparative Integration: A Brief Analysis Of The European Union (EU) And The Economic Community of West African States (ECOWAS)', The Journal of International Social Research Vol 3 / 10 Winter 2010, p 479

[136] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) 'Challenges and Opportunities for Regional Integration in Africa: The Case of SADC', IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 12, Ver. IV (Dec. 2014) p 109

involve social integration (for example, the policy of free movement of workers within the common market area) and it is essential therefore that legal provision is strong and should be forcefully, uniformly and effectively implemented. This in turn requires a sound and effective institutional framework for monitoring, supervision, implementation and enforcement.

The level of international trade and investment continues to rise and the scope of economic integration among different groups of nations has also been expanded. An illustrative example of this is the EU, which has developed from a group of sovereign nations to become a fully integrated economic unit. The World Trade Organisation (WTO) is global model of economic integration aimed at promoting global trade in goods and services and the peaceful settlement of trade disputes between member countries. Further they protect the rights of producers of goods and services, importers and exporters in conducting their businesses by negotiating fair and preferential terms of trade. With over 160 member countries who are signatories, it is truly global form of integration[137] as opposed to the WTO which focuses solely on trade in goods and services (purely economic integration), regional economic integration pursued in Africa aims to include freedom of movement for persons as well (a form of social integration) and as such requires an even stronger legal and institutional framework if the process is to be a success.

The various levels of economic integration are discussed below.

3.3.1 Preferential Trading Agreement (PTA)

A preferential trade agreement (also known as preferential trade area) (PTA) is an arrangement, which favours member parties over non-members by extending tariff and other nontariff preferences.[138] Indeed this type of agreement refers to a trading bloc that provides preferential access to certain products from the participating countries. A preferential trading agreement is the lowest form of economic integration. Under this model a group of countries has a formal agreement to allow member states' goods and services to be traded on preferential terms and conditions. This means that the tariffs are reduced among the member countries or that special quotas allow preferential access for their goods. PTAs can be used as

[137] David Collins, *The World Trade Organisation A Beginner's Guide* (ebook edn, Oneworld Publications, 2015) p 10

[138] Raymond J Ahearn, 'CRS Report for Congress Europe's Preferential Trade Agreements: Status, Content, and Implications' (2011) <http://fas.org/sgp/crs/row/R41143.pdf> accessed 31 August 2014, p 1

the foundation or stepping stone for achieving higher levels of trade and economic integration in practice PTAs often develop and evolve into a free trade area.

In recent years participation in preferential trade agreements (PTAs) has grown rapidly. In 1990, there were about 70 PTAs in force. Subsequently, by 2014, the number of PTAs was nearly 350. [139] The Association of Southeast Asian Nations (ASEAN) is an example of a PTA and because PTAs covers regions they are also known as Regional Trade Agreements and the EU is a special form of PTA as it goes beyond the remit of PTAs.[140]

3.3.2 Free Trade Area (FTA)

'Free trade area is a type of trade bloc, a group of countries that have agreed to eliminate [internal] tariffs, quotas and preferences on most (if not all) goods and services traded between them'[141]. Membership of this type of trading bloc is usually among countries with a similar level development with a high level of infrastructure.[142] The FTA can be considered as the second stage of economic integration. Members of a free trade area do not have a common external tariff, meaning differential quotas and customs levies. To avoid re-exportation the countries use the system of certification of origin usually known as rules of origin. [143]

In a free trade area, all barriers to the trade of goods and services among member countries are removed. In the theoretically ideal free trade area, no discriminatory tariffs, quotas, subsidies, or administrative difficulty are allowed. Member states are free to determine their own trade policies with regard to nonmembers.[144] An example of this trade is NAFTA. In January 1994 Canada, Mexico and the United States put in place NAFTA[145]created the richest market and largest free trade area in the world.[146] At the time, the NAFTA was the most comprehensive regional trade agreement ever negotiated by the United States. In 1996, U.S. two-way trade in goods under the NAFTA with Canada and Mexico stood at $420

[139] Carlo Piccardi and Lucia Tajoli, (2015) 'Are Preferential Agreements Significant for the World Trade Structure? A Network Community Analysis', KYKLOS, Vol. 68 – May 2015 , 2015 John Wiley & Sons Ltd, p 222
[140] Ibid, p 236
[141] Michael Holden, 'Stages of Economic Integration: From Autarky to Economic Union', (PRB, 13 February 2013) <http://publications.gc.ca/Collection-R/LoPBdP/inbrief/prb0249-e.htm> accessed 18 August 2013
[142] Ibid
[143] Ibid
[144] Ricardo Argüello (2000) Op cit, p 5
[145] Angeles M Villarreal and Ian F Fergusson, 'The North American Free Trade Agreement (NAFTA)' (2015) <http://fas.org/sgp/crs/row/R42965.pdf> accessed 22 December 2014, p 1
[146] Gerald F Cavanagh, 'U.S. Business and Global Treaties: Lobbying as It Effects Multilateral Agreements' (2008) <http://www.i-jibe.org/achive/2004fall/8-Cavanagh.pdf> accessed 11 November 2014, p 138

billion- a 44% increase since the NAFTA was signed.[147] It is worth highlighting the fact that the NAFTA is an example of economic integration that does not include social integration because there is no policy on the free movement of persons within the member states.

In relation to Africa, in January 2012, the AU adopted a decision to establish the Continental Free Trade Area (CFTA) by the indicative date of 2017.[148] The United Nations Economic Commission for Africa (UNECA) estimates that by 2022 the CFTA could increase intra-African trade by $35 billion, although imports from outside of the continent would decrease by $10 billion per year.[149]

3.3.3 Customs Union (CU)

A customs union consists of a group of countries that have agreed to eliminate all tariffs on trade among themselves but maintain a common external tariff on trade with all third countries.[150] CUs involve a relatively large number of geographically close countries.[151] Usually it builds on the ground of a free trade area. The main benefit of a customs union is the elimination of the need for rules of origin. The rules of origin concept is a costly process and can lead to conflicts over interpretation of the rules and transaction delays. Cost savings and efficiency gains are the main benefits of the CU concept.[152]

South America's MERCOSUR, is a leading example of a CU. Known as the Common Market of the South, MERCOSUR was set up in March 1991 by Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asuncion.[153] The 1994 Treaty of Ouro Preto gave the bloc a wider international status and formalised a customs union. It aims to bring about the free movement of goods, capital, services and people among its Member States.[154] It is the fourth largest trading bloc after the EU, NAFTA and ASEAN.[155] Its united market included almost

[147] Ibid
[148] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 109
[149] David Luke and Babajide Sodipo, (2015) 'Launch of the Continental Free Trade Area:New prospects for African trade?', Bridges Africa | Vol 4, Issue 6 – July 2015, p 8
[150] Robert Christopher York, *Regional Integration and Developing Countries* (Paris, France : Organisation for Economic Co-operation and Development:Washington, D.C:OECD Publications and Information Centre [distributor], ©1993 OECD Paris, 1993) p 22
[151] Soamiely Andriamananjara**, '**Customs Unions', (World Bank, 2011) http://siteresources.worldbank.org/INTRANETTRADE/Resources/C5.pdf accessed on 12/12/2014, p 111
[152] Michael Holden, (2013) Op cit
[153] Pitou van Dijck and Marianne Wiesebron, *Ten Yers of Mercosur* (Centre for Latin American Research and Documentation Keizersgracht 397, 1016 EK Amsterdam, 2002) p 1
[154] Ibid, p 2
[155] Natalia Cordoba (2012) 'Snapshot of MERCOSUR and the EU', University of Wupperta Bergische Universität Wuppertal Europäische Wirtschaft Und International Makroökonomik,

250m people and accounts for more than three-quarters of the economic activity on the continent[156]. Whichever view is taken of the constraints encountered by the MERCOSUR and other Andean regional organisations, it can still be argued that economic integration has made relatively good progress in the region as compared to other regions such as the AU.

In the longer term, MERCOSUR aims to create a continent-wide free-trade area, and the creation of a MERCOSUR development bank has been argued.[157]

Turning our attention elsewhere, it is worth noting that the EU has customs unions with three countries, Andorra, San Marino and Turkey.[158]

3.3.4 Common Market (CM)

A common market has been described as a major step towards large-scale economic integration. The theoretically ideal common market has no barriers to trade between member-countries and has a common external trade policy. Unlike in a customs union, in a common market, factors of production also are allowed to move freely between member-countries. Thus, workers and capital (in addition to goods and services) can move freely, as there are no restrictions on immigration or cross-border flows of capital among member-countries.[159] The EEC provided a good example of a CM before it was renamed in 1993 to the EU and is a step towards a single market.[160] The main difference between a CU and CM is that in customs union member states have a free trade area and charge common external tarrifs to third party countries, whereas the common market goes beyond the customs union and have free movement of labour, capital and some policy harmonisation.[161]

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http://www.eiiw.eu/fileadmin/eiiw/Daten/Publikationen/Sonstiges/MERCOSUR_EU-TRADE.pdf , accessed on 13/12/2014, p 11

[156] Martin H. Thelle and Eva R. Sunesen (2011) *Assessment of Barriers to Trade and Investment Between the EU and Mercosur,* (Economic Impact Assessment, European Commission, May 2011) p 8

[157] Michael Holden, Op cit

[158] Bill Oxford and MarcinLobaczewski, 'LOGO CE - Quadri' <http://europa.eu/pol/pdf/flipbook/en/customs_en.pdf> accessed 26 January 2015, p 4

[159] Rolf Mirus and Nataliya Rylska, (2001) 'Economic Integration: Free Trade Areas Vs. Customs Unions'(2004)<https://business.ualberta.ca/Centres/WCER/Publications/Other/~/media/business/Centres/WCER/Documents/Publications/OtherPublications/NAFTA/NAFTArylska.ashx> accessed 31 September 2014, p 4

[160] Boundless, 'Common Markets' (21 July 2015) <https://www.boundless.com/business/textbooks/boundless-business-textbook/international-business-4/international-trade-agreements-and-organizations-39/common-markets-202-1258/> accessed 26 July 2015

[161] Michael Holden, Op cit

3.3.5 Economic Union

An economic union is an agreement between two or more sovereign nations to coordinate trade policies. Progression to a formal economic union typically involves several stages of increasing cooperation between nations. Member states in these various stages commonly share land borders, though there are many exceptions to this. Economic unions increase the efficiency of trade by eliminating trade barriers and promoting cooperation on monetary policy'. [162] Economic union is a form of trade bloc which is composed of a single market with a common currency. Economic union is the deepest form of economic integration[163], which adds to a common market concept the need to harmonize a number of key policy areas. It involves the free flow of products and factors of production between member-countries and the adoption of a common external trade policy. A full economic union also requires a common currency, harmonization of the member-countries tax rates and a common monetary and fiscal policy, as for example, the Economic and Monetary Union of the European (i.e. the European Monetary System which uses the Euro as its currency). However, it is importnant to note that monetary union does not have to apply to all member states of the economic union. In the case of the Euro, some countries such as Denmark and the UK opted out of using the Euro.

3.3.6 Political Union (PU)

This form of integration is generally believed to be the most advanced form of integration with a common government, where the sovereignty of member countries is significantly reduced. It is usually found within nation states, such as unitary states (e.g. the United Kingdon of Great Britain and Norther Ireland) federations (e.g. the United States of America) or confederations (e.g Swirtzerland) where there is a central government and regions, states, countries or provinces have a high level of political autonomy.[164] In 1960, the EU started out as a free trade zone and has since embarked on a process of considerable political integration over a period of several decades. However, the EU is far from being a unified state and is still

[162] Wise Geek, 'What is an Economic Union?' (Wise Geek, 2013) < http://www.wisegeek.com/what-is-an-economic-union.htm> accessed 20 August 2013
[163] Ricardo Argüello (2000), p 5
[164] 'Levels of Economic Integration' <http://people.hofstra.edu/geotrans/eng/ch5en/conc5en/economicintegration.html> accessed 20 August 2014

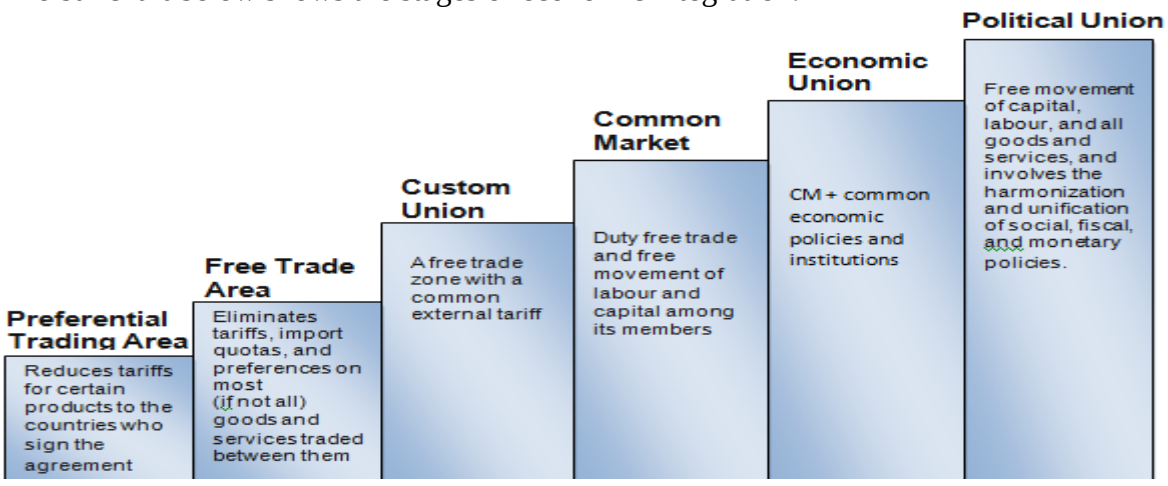
a long way from being a satisfactory Europe-wide political and democratic order, as long as the EU's member governments still remain many aspects of their sovereignty.[165]

The following table shows levels of the economic integration and the degrees of cooperation:

Type of Arrangement	Preferential Trade Terms and Free Trade among Members	Common Commercial Policy	Free Factor Mobility	Common Monetary and Fiscal Policies	One Government	Example
Preferential Trade Area	Yes (only for Preferential Trade Terms)	No	No	No	No	ASEAN
Free Trade Area	Yes	No	No	No	No	NAFTA
Customs Union	Yes	Yes	No	No	No	MERCOSUR, SACU & COMESA
Common Market	Yes	Yes	Yes	No	No	EEC & EAC
Economic Union	Yes	Yes	Yes	Yes	No	EU
Political Union	Yes	Yes	Yes	Yes	Yes	UK

Source: the Research + (2015)[166]

The bar chart below shows the stages of economic integration.



Source: the Researcher

[165] 'Political Integration and National Sovereignty' (2015) <http://www.globalpolicy.org/nations-a-states/political-integration-and-national-sovereignty-3-22.html> accessed 22 August 2013

[166] Brinkman H and others, 'Economic Commission for Africa African Development Bank African Union A N Developme N T F Assessing Regional Integration in Africa V (2012)' <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Assessing%20Regional%20Integration%20in%20Africa%20-%20Towards%20an%20African%20Continental%20Free%20Trade%20Area.pdf> accessed 26 January 2014, p 29

3.4 The Benefits of Regional Economic Integration

Regional integration is a tool that can be used in support of the political, economic and social development of countries.[167] Integration is a necessary strategy of economic survival and development. States participate in regional integration for economic, social and political grounds.[168]

There are several advantages of economic integration and the extent of the integration depends on the commitment of independent states to sharing and thereby reducing their national sovereignty. In developed countries member states of regional economic communities achieved significant successes in regional integration as evidenced by increases in intra-regional trade and resultant increases in economic growth and development e.g. the EU and NAFTA.[169] In developing countries, the motive for economic development has been identified as trade, development, political and security consideration. This is equally applicable to developed countries [170] Economic and political aspects have also been identified as primary motives for integration. [171] There are issues to consider for countries involved in economic integration such as the nature and scope of the agreement, and the extent and degree of integration.[172] For developing countries, the degree to which large industrial countries are involved is important, so is the nature of integration and its depth. The main benefits of economic integration are trade opportunities leading to the creation of employment. Employment opportunities coming from economic integration can lead to economic growth, creating more job opportunities for individuals as they move from one nation to another within the integration area in search of employment. It is for this reason that the EU created from the beginning laws promoting and protecting the principle of equal treatment and non-discrimination on the basis of nationality within its common market, which in turn promoted regional integration. However, in the AU or in the sub-regional

[167] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 104
[168] Mohammed Mubarik, 'Challenges and Prospects for Regional Integration: A case of the Economic Community of West African States (ECOWAS'), http://www.academia.edu/3058362/Challenges_and_Prospects_for_Regional_Integration_A_case_of_the_Economic_Community_of_West_African_States_ECOWAS_, accessed on 21/07/2015, p 7
[169] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 104
[170] Mari Pangestu and Robert Scollay, 'Regional Trading Arrangements: Stocktake and Next Steps', (Trade Policy Forum, 2001) pp 5-6
[171] Bernard Hoekman, Aaditya Matoo and Philip English, *Development, Trade and the WTO,* A Handbook, (Public Disclosure Authorized , the World Bank, 2002)<http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/08/19/000160016_20040819140633/Rendered/PDF/297990018213149971x.pdf> accessed 31 January 2015, pp 8-9
[172] Ibid

organisations, the legal and institutional framework for protecting citizens of member states from discrimination is still not well developed.

Trade creation allows for a wider choice of goods and services, lower costs, removal of trade barriers, and encouragement of more trade between member countries. [173] In other words, the advantages of regional integration take the form of benefits from new trade opportunities, larger markets, and increased competition.[174] Through having larger markets, countries could able to produce products at a scale that is cost-effective. "For example, where you need large-scale investments such as $200m to create a pharmaceutical factory, you couldn't do that if you were only selling the products in one country."[175] Furthermore, larger markets motivate people to migrate in search of opportunities to employ their skills. Migrant workers can make a significant contribution to the host economy. For example in the UK workers who came from EU members such as Poland, France, Italy and Germany contributed more than £22.1 billion to UK public finances between 2001 and 2011.[176] The immigrants from the EU in the UK have paid more in taxes than they received in services and benefits, supporting and helping to relieve the burden of taxation on UK-born workers and contributing to the financing of public services.[177] This to some extent highlights the benefits of having an effective policy on the free movement of workers.

Regional economic integration in its deepest form can provide a useful tool for reducing doubts and improving reliability for example in the EU there are clear policies regarding the movement of factors of production[178] which is beyond achievement of a policy based only on trade liberalisation. In an environment where there are fewer worries regarding the free movement of factors, it becomes easier for private investors to plan and undertake their investment decisions. The benefit from regional economic integration depends on how the agreements are structured, the nature and effectiveness of enforcement mechanisms and the

[173] College Accounting Coach, *The advantages and disadvantages of economic integration,* (*CAC*, 2008) <http://basiccollegeaccounting.com/2008/10/the-advantages-and-disadvantages-of-economic-integration/> accessed 20/06/2013

[174]'Assessing Regional Integration in Africa' (2004) <http://www.worldcat.org/title/assessing-regional-integration-in-africa/oclc/56479500> accessed 25 January 2015, p 10

[175] Africa creates TFTA - Cape to Cairo free-trade zone, http://www.bbc.co.uk/news/world-africa-33076917 accessed 11/06/2015

[176] Christian Dustmann and Tommaso Frattini, 'Discussion Paper Series the Fiscal Effects of Immigration to the UK' (2013) <http://www.cream-migration.org/publ_uploads/CDP_22_13.pdf> accessed February 2015, p 27

[177] Ibid

[178] David Brooke, *Q&A Jurisprudence (Questions and Answers),* (7 edn, Routledge-Cavendish; 4 edition (27 Feb. 2009) p 137

conditions under which the agreements can be reviewed or modified.[179] Economic integration can be a channel for attracting foreign direct investment. Reforms such as currency stabilisation and market liberalisation tend to increase private investment.[180] Economic integration ensures that production is located according to comparative advantage between member countries leading to specialisation and greater efficiency, which in turn leads to increased productivity which benefits member countries.[181]

Politics can play an important role in regional economic integration and politics rather than economic goals can drive the desire to integrate. Political objectives that can steer integration include factors such as security, governance, democracy and human rights. The founding fathers of the EU imagined a 'European family' in which it would no longer be possible to have wars between countries caused by national interests. Some authors have argued that the more trading between countries, the more friendship, social interaction and familiarity develops between the people of member countries. Economic integration could also be a way to support democracy and governance so as to achieve necessary political and institutional reforms. [182]

The issue of the level of integration is very important because the benefits of economic integration such as larger markets, greater achievement and realisation of economies of scales depend on the level of integration. Where there is deeper integration, that tends to extend to service markets and regulatory regimes decide the level of competition to be achieved in the regional markets. [183] Some authors argued that developing countries at comparatively same stages of industrial development with almost similar market sizes and with the hope of bringing together their industrial growth could benefit from re-assessing their policies in the context of economic integration.[184] Africa can create conditions for accelerated joint economic development through the creation of larger internal markets, which can encourage long-term development. Economic integration can be a way to encourage a balanced of labour among a grouping of countries, which in their individual capacities would be unable to

[179]Raquel Fernandez, (1997) 'Returns to Regionalism: An Evaluation of Non-traditional Gains from Regional Trade Agreements', (World Bank Policy Research Working Paper No. 1816, Department f Economics, August 1997) pp 30-31

[180] Innwon Park and Soonchan Park (2007) 'Reform-Creating Regional Trade Agreements and Foreign Direct Investment: Applications for East Asia', (Working Paper Series Vol. 2007-01 February 2007) p 14

[181]Richard Baldwin and Anthony J Venables, *Regional Economic Integration*, (London School of Economics, 2004) p 8

[182]Bernard Hoekman, Aaditya Matoo and Philip English, Op cit, p 7

[183] Ibid

[184] Michael P Todaro and Steven S Smith, *Economic Development*, (9th edn, Pearson Education 2006) p 646

benefit from specialisation. Without integration, each country would be unable to provide enough domestic market to allow local industries to lower production costs through larger scales of economy.[185]

One of the benefits of economic integration is the trade creation; however, there is one undesirable aspect that can also arise from economic integration, which is trade diversion. Trade diversion can be a result of diverting production from efficient foreign suppliers to less efficient domestic industries of member states, which is undesirable for the world economy, and member states in general.

In the next section the disadvantages of regional economic integration will be identified and discussed.

3.5 The Disadvantages of Regional Economic Integration

Despite the advantages of economic integration, there are however, disadvantages that come with integration, which tends to restrict what can be achieved by integration. Regional economic integration can lead to the following disadvantages:

3.5.1 Uneven Distribution of Benefits

The main problem of economic integration is the uneven distribution of benefits among members, which tend to go mainly to the most developed nations in the grouping.[186] The end result is that member states with more developed economies have to deal with the flow of people from the countries with weaker economies which increases pressure on resources and opportunities for the locals. For example in 2000, anti-African riots happened in Libya where 130 Sub-Saharan migrants who came from Chad, Ghana, Niger, Nigeria and Sudan were killed by Libyan rioters on suspicion of engaging in socially illegal activities such as drug dealing, murder, kidnapping and theft.[187] Another case in point is that of entry of foreigners into South Africa mainly from Zimbabwe due to failing economic conditions in the late

[185] Ibid
[186] Ombeni N Mwasha, 'The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC)' (Korea Review of International Studies, 2008) <http://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> accessed 20 February 2015, p 76
[187] Sylvie Bredeloup and Olivier Pliez, 'The Libyan Migration Corridor' (2011) <http://cadmus.eui.eu/bitstream/handle/1814/16213/EU-US%20Immigration%20Systems%202011%20-%2003.pdf?sequence=1> accessed 17 January 2015, p 7

2000s. The presence of these foreign workers led to xenophobic attacks[188]. The arrival of foreign people creates increased competition in the local job markets with citizens of South Africa complaining that the new arrivals take their jobs, which often results xenophobic attacks on foreigners. At the time of writing the latest of such attacks took place in April 2015.[189]

3.5.2 Lagging Nations

Lagging nations tend to hold back progress on integration, which can lead to the failure of the integration project[190] Those countries that fall behind in various aspects of implementation will find it difficult to integrate and will not fully adapt to the speed of integration. Furthermore, countries which lag behind can be a source of problems for progressive nations e.g. by exporting unemployed migrant workers to the countries with stronger economies.[191] One example is the tension that exists in South Africa as discussed above.

3.5.3 Conflict and National Sovereignty

For reasons still not known, developing countries tend to be much more unwilling than developed ones to transfer some of their sovereignty to supranational bodies, which is normally a requirement for full integration. Supranational bodies tend to be independent from members' governments, for example, the EU is structured in such a way that its institutions (apart from the Council of Ministers) are independent from individual member states' governments.[192] Member states by transferring some aspects of national sovereignty also give up control over key policies. Where integration is deep, usually member states would have complied with the need to give up control on key policies.[193] The EU has long been the most developed model of regional integration. However, it was shaken by the recent economic crisis, causing doubts about the integration process. The lack of immediate response to the Euro Crisis provided question about the sincerity of the Euro Zone, whose institutional shocked by the financial crisis. Despite all the successes, the regional integration process has

[188] Amy Copley and others, 'Accelerating Growth through Improved Intra-Africa Trade' Reports (1 January 2012) <http://www.brookings.edu/research/reports/2012/01/intra-african-trade> accessed 2 March 2014, p 16
[189] Ibid
[190] Dominick Salvatore, *International Economics* (9th edn, Willey International Edition, 2004) p 327
[191] Mwangi S Kimenyi and Jessica Smith (2012) Op cit, p 16
[192] Ibid
[193] College Accounting Coach, *The advantages and disadvantages of economic integration* , (*CAC*, 2008) <http://basiccollegeaccounting.com/2008/10/the-advantages-and-disadvantages-of-economic-integration/> accessed 20/06/2013

slowed down in the last years because the attitude of some member states to keep more of their national sovereignty.[194] Open borders between EU Member States are now under threat from some member states giving priority to national sovereignty which is against the EU Schengen agreement.[195] Some States are now taken independent action(s) to restrict movement by re-imposing border controls. For example, in 2011 France re-imposed border control between France and Italy, because Italy allowed Tunisian refugees who fled the Arab Spring into Italy as a transit point for their ultimate destination which is France. As such France re-imposed border control and checks on trains and cars crossing the borders between the two countries. Thus, the idea of an EU without borders is being put to test by some EU members[196], which can be a source of conflict between member states. There are some member countries that have already given notification to the European Commission of their desire to reintroduce temporary border controls in view of the migrant crisis.[197] The member coutries that made notifications for reintroduction of temporary border controls include the following: Denmark (4 January 2016 to 3 February 2016), Norway (15 January 2016 to 14 February 2016), Sweden (10 January 2016 to 8 February 2016), Austria (16 November 2015 to 15 February 2016), Germany (14 November 2015 to 13 Febreuary 2016) and France (13 Niovember 2015 to 26 February 2016).[198] The actions of the countries that reintroduced the temporary border controls are in line with the Schengen Border Control Code Articles 23

[194] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 107
[195] Europe Rethinks the Schengen Agreement, https://www.stratfor.com/analysis/europe-rethinks-schengen-agreement , accessed on 10/10/2015
[196] Clark E and Phil D, 'Developing Country Studies the Economic Community of West African States (ECOWAS): The Challenges to the Implementation of the Protocol on the Free Movement of Goods, Persons and Establishment' (2014) 4 <http://www.iiste.org/Journals/index.php/DCS/article/viewFile/11792/12143> accessed 31 January 2015, p 70
[197] European Commission, 'Temporary Reintroduction of Border Control' (20 March 2012) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm> accessed 16 January 2016
[198] Ibid.

and 24 which gives member states the right to reintroduce temporary border controls where they have established that there is a serious threat to public policy and internal security.forsee the need to do so for protection of the public. [199] Countries can do so as a last resort and the period of up to which they can keep the temporary border controls is 30 days renewal for a period not exceeding six months implying the Commission is not willing to have permanent controls. Article 26 of Schengen Border Control can only be invoked where there are exceptional circumstances and in that case the Commission is the one that would recommend on the course of action. The reintroduction of temporary border controls within the Schengen affect the freedom of movement and there is a threat that they may become permanent however, since they are temporary, it allows member states time to review and be in a position to come up with a better and permanent solution.

In the case of AU and sub-regional organisations, negotiating transfer of some aspects of sovereignty has proved difficult because of political reluctance by governments.

3.5.4 Political Pressure:

One of the previous Presidents of Nigeria, Shehu Shagari carried out a mass expulsion of ECOWAS people and other African citizens from Nigeria. The reasons given by the government for their expulsion was that they were illegal migrants and involved in crimes. This action was against the ECOWAS' protocol on free movement of persons and goods. It could be argued that President Shehu Shagari's actions was due to pressures from his ruling party's (National Party of Nigeria) fears of a defeat in future elections as a consequence of the economic decline in Nigeria.[200] In another example, in the UK, there has been debate as to the arrival of people from Europe in particular new nations joining the EU such as Bulgaria,

[199] Ibid.
[200] Victor Clark Esekumemu, (2012) Op cit, p 68

Poland and Romania with some people expressing the view that the new arrivals will take jobs and put pressure on services such as housing, health and social security services, and education. Despite being a signatory to the EU Treaty, the current government is under a lot of political pressure to control immigration, and this has led to the rise of far right parties with migration control high on their agendas.

The issue of migration has often led to a growing number of people and politicians in the UK making calls for the UK to withdraw from the EU. As things stand, there will be a referendum in the UK in the near future as to whether Great Britain should leave or stay in the EU.

3.5.5 Criminal Gangs:

Criminal gangs are likely to have an easy run across countries if those countries are within a regime of free movement.[201] Criminal gangs are known to use the free movement rights of EU citizens in order to facilitate major fraud against the UK benefits system. This kind of crimes has very serious negative impact on EU citizens.[202] Criminal gangs traffic people into the UK and force them to beg on the streets and open bank accounts in order to claim welfare benefits, before withdrawing the money and leaving them penniless.[203] In one case the Metropolitan Police discovered a £2.9 million benefit fraud by a Romanian gang.[204] Therefore, criminal gangs can affect the progress of economic integration and can provide a reason for the imposition of border controls between member countries.

One solution to this problem in the EU has been the adoption of the concept of legal integration through the policy of Police and Judicial Cooperation in Criminal Matters which was first introduced by the Treaty of Maastricht which was signed by member states of the EU in 1992. As part of this policy, the issue of European Arrest Warrant allows for the tracking of citizens of the EU who run away from justice either in their own states or from some other member state. But for the measure to be effective there is a need for up to date

[201]Antoine Pécoud and Paul de Guchteneire,(2007) *Migration Without Borders', Essays on the Free Movement of People* (Berghahn Books, Oxford & New York, 2007) p 106

[202] 'HC 83-Xxviii Thirty-First Report of Session 2013–14 Report, Together with Formal Minutes' (2014) <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxviii/83xxviii.pdf> accessed 1 February 2015, p 25

[203]Revealed: Home Office dossier on abuse and fraud by EU migrants, http://www.telegraph.co.uk/news/politics/conservative/10597409/Home-Office-hid-dossier-on-EU-migrants.html , accessed on 27/11/2014

[204] Bulgarians and Romanians in the British National Press | the Migration Observatory' <http://migrationobservatory.ox.ac.uk/reports/bulgarians-and-romanians-british-national-press> accessed 1 February 2015, p 15

information sharing so that criminals running away from the law can be quickly captured otherwise the free movement can be used to flee from justice. It is important that the institutional framework for enforcement, monitoring, compliance and control is effective, otherwise any shortcomings would make the system unsuccessful.

3.6 Relationship between Integration and Trade Liberalization

Integration into the world economy has proven an effective way for countries to promote economic development, growth and poverty reduction. International trade flows have increased dramatically over the past three decades. The value of world goods exports rose from US$ 2.03 trillion in 1980 to US$ 18.26 trillion in 2011.[205] Open trade policies are necessary for participating successfully in the globalizing process. In fact, increased trade is naturally the first expression of the benefits of globalization in any economy[206].

For economic growth, policies are needed that allow an economy to open up to trade and investment with the rest of the world. In recent decades, no country has achieved economic success (i.e. increases in living standards) without being open to the rest of the world. [207] There is great evidence that countries that are more external tend to consistently grow faster than ones that are isolated. It has even been argued the benefits of trade liberalization can exceed the costs of not liberalising by more than ten times.[208]. Countries that have opened their economies in recent years such as as India, Vietnam, and Uganda, have registered faster rates of economic growth and development leading to poverty reduction.[209] Those developing countries that decreased tariffs sharply in the 1980s grew more quickly in the 1990s than those that did not.[210]

Trade liberalisation is an important step in achieving economic integration; however, there have been problems with implementing economic integration for most African countries that

[205] 'World Trade Report 2013', Factors shaping the future of world trade,(by World Trade Organization) https://www.wto.org/english/res_e/booksp_e/world_trade_report13_e.pdf , accessed on 12/01/2015, p 55
[206] Luis E Berrizbeitia, *The Process of Globalization*, in (Eduardo Mayobre 'edited', *G-24 The Developing Countries in the International Financial System)* (Lynne Rienner Publishers, 1999) p 201
[207] Steven Matusz and David Tarr, (1999) 'Adjusting to Trade Policy Reform', (World Bank Policy Research Working Paper No. 2142, July 1999) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=597268 accessed 12/12/203 p 33

[208] Ibid
[209] David Dollar (2004) Op cit, p 33
[210] Ibid

tend to restrict trade openness. The World Bank who often offer financial support to developing economies often advise that by opening up economies gains can be achieved.

3.7 Globalization and the Factors Driving Global Economic Integration

Economically, 'globalization' is a historical process, the result of human improvement and technological progress. However, due to problems faced by countries in Sub-Saharan Africa, most countries are unnoticed when it comes to globalisation. It will take time for the countries to be noticed as they need to overcome the challenges that they face. [211]

From an economic point of view the concept of globalization is founded on the WTO. WTO provides the framework for multilateral cooperation for trade in goods and services. Globalisation refers to the increasing integration of economies around the world, particularly, through trade and financial flow. It is a process through which an increasingly free flow of ideas, people, goods, services and capital leads to the integration of economies and societies.[212] According to the International Monetary Fund (IMF) presentation on globalization, it is not just a recent phenomenon as the world economy was just as globalized 100 years ago as it is today. [213] However, today business and financial services are far more developed and deeply integrated than they were at that time. The most important feature of this has been the integration of financial markets made possible by modern electronic communication.[214]

Globalisation affects the development of national economies. It offers participating countries new opportunities for accelerated growth and development, while bringing challenges and constraints on policymakers in the management of various economic systems. However, there are risks and costs connected with globalisation, which can have adverse impacts on developing economies and poor countries. The main disadvantage of globalisation is the risk of exposure to global financial and economic crises. Global economic and financial crises tend to have a big adverse impact on the developing world and the poor countries, while in

[211] Michael Ogwezzy (2014) Op cit, p 81
[212] Muhammad Akram et al (2011) 'Globalization and its Impacts on the World Economic Development', International Journal of Business and Social Science, Vol. 2 No. 23 [Special Issue – December 2011] p 292
[213] IMF, Globalization: Threat or Opportunity? (IMF, April 12, 2000; updated January 2002) https://www.imf.org/external/np/exr/ib/2000/041200to.htm ,accessed 12/08/2013
[214] Ibid

times of economic prosperity the benefits are not necessarily shared fairly with developing countries.[215]

3.8 Conclusion

In conclusion, there are different stages of integration, with the scope ranging from Preferential Trade Area, to Free Trade Area, Customs Union, Common Market and Political Union. Most of the recognised African RECs will be found in one of these levels of integration. There are benefits that come with integration which include trade creation and employment opportunities. In the same way, where political union has been reached the possibility of going to war between member states is greatly reduced, and political and economic stability among member states is enhanced.

There is also a need for stronger institutions if the goals of integration are to be achieved. Furthermore, with globalisation it becomes difficult to remain a closed economy as such the process could be forced upon the country by circumstances happening in the global world. Therefore, there is need for countries to recognize that integrating into the world economy has its own benefits as it provides access to a wider market and more economic opportunities.

On the other hand, there are also disadvantages that come with economic integration which include among other factors, the uneven distribution of the benefits. As seen in this chapter, where benefits are unevenly distributed that can lead to problems which in turn can result in tensions between member states. Conflict and national sovereignty can also be problem in economic integration, as members will not be prepared to agree to a significant transfer of national sovereignty to the regional grouping. However, these difficulties are manageable, and acceptable when compared with the benefits.

This chapter has analysed the concept of economic integration, types and function of economic integration, as well as the benefits of regional economic integration and the disadvantages of regional economic integration. It also examined the relationship between integration, trade liberalization and globalization, as well as the factors driving global economic integration. Chapter Four will build on this discussion by analysing the status of

[215] Machiko Nissanke1 and Erik Thorbecke, (2005) 'Channels and Policy Debate in the Globalization-Inequality-Poverty', (United Nations University, Wider, Discussion Paper No. 2005/08 June 2005)<http://www.sarpn.org/documents/d0001644/P1992-Globalisation_UN-WIDER_June2005.pdf> accessed 1 February 2015, p 1

economic integration and the policy of free movement of workers in AU and recognised Africa sub-regional organisations.

CHAPTER FOUR

THE PROGRESS OF ECONOMIC INTEGRATION IN AU AND AFRICAN RECs AND POLICY MADE ON THE FREE MOVEMENT OF WORKERS

4.1 Introduction

The main aim of this chapter is to examine economic integration in the AU and the sub-regions and examine the policy of the free movement of persons and workers as envisaged by the AU and the efforts beings made by each of the sub-regional blocks.

African governments since the early years of independence identified regional economic integration as a top priority, initially mainly for political reasons and later as a development strategy to overcome challenges of small markets, landlockedness and to benefit from economies of scale in production and trade.[216] Regional integration is necessary as part of the dynamics of the global economy, and as a means to enhance and promote competitiveness by gaining access to the international trading system. Regional integration is necessary for Africa in order to overcome conflicts, misrule and the colonial legacy of divide and rule which has led to the fragmentation of African societies. Regionalism has long been regarded as a solution for the continent's economic problems and political. A study conducted by the United Nations Economic Commission for Africa on regional integration has found that the benefits of integration include sustainability, promotion of regional goods, increased foreign and domestic investment, enhanced global competitiveness, prevention of conflict and improvement in the political environment. [217]

Economic integration requires removal of barriers.[218] The 8 RECs recognised by the AU have each been moving at a different pace to implement the 1991 Abuja Treaty Establishing the AEC.[219] Most borders remain inaccessible, making the integration within Africa difficulty to achieve. Visa requirements are known to exist in almost all African countries for inter-African travel thus recording the highest requirements in the world. In addition, business

[216] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p103
[217] Study Commissioned by GTZ, (Prepared by Atieno Ndomo), 'Regional Economic Communities in Africa A Progress Overview', Nairobi, May 2009, p 8
[218] 'Global Value Chains and Africa's Industrialisation' (2014) <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/E-Book_African_Economic_Outlook_2014.pdf> accessed 1 February 2015, p 78
[219] Ibid

visas are often more difficult to obtain than tourist visas. No more than 5 African countries (Madagascar, Mozambique, Rwanda, Comoros and Seychelles) of fifty-four countries offer visa-free on arrival of all African countries.[220] To reach the EU level of integration the visa requirements need either to be withdrawn or reduced.

There is also the need to promote regional integration awareness among the citizens of the regions so that there are aware of their rights and obligations as far as integration is concerned. Priority in the RECs should be given to those activities that encourage harmonisation at the REC level, strengthening banking co-operation and monetary integration. The use of multiple currencies should be discouraged and gradually scaled down with a view to adoption of a common currency, which would speed up the rate at which trade is conducted. Furthermore, the harmonisation of programmes of study, examinations, standards, certification and official recognition of educational and training institutions would help in tackling the absence of relation in educational systems. Adopting same processes across the borders would reduce costs of transacting and operating across borders. [221]

Regional economic organisations for developing countries offer possibilities of rectifying long-term structural problems. Any legal framework adopted by member states in order to co-operate depends on policies or projects aimed at achieving stated objectives. The AU, for example, can be successful in establishing a more pro-active continental court as an independent institution within the context of institutional framework project, thus making the new court more effective than the current court. This type of court can represent in reality the hope of a more sustainable form of integration based on the observance of the rule of law and effective enforcement of the rules of the common market area.

The leadership of most member states in the AU adopted cautious attitudes towards implementation of the agreed obligations for the regional communities and the union at large. This prevailing attitude causes a serious and crippling obstacle to integration. Protocols are drafted in a manner that leaves most powers in the hands of governments of member states, thus adversely affecting progress on the integration front. For instance, article 4 of the

[220] Mo Ibrahim, Facts & Figures Regional Integration Uniting to Compete<http://static.moibrahimfoundation.org/downloads/publications/2014/2014-facts-&-figures-regional-integration-uniting-to-compete.pdf> accessed 28 December 2014, p 17

[221] AU Commission, 'Status of Integration in Africa (SIA IV)', (AU 2013) p 86

ECOWAS[222] and Article 27 of SADC Protocols on facilitation of movement of persons gave member states the powers to determine and to reject the entrance of a citizen of a member state under its internal laws if deemed a prohibited immigrant. [223]

It could be argued that, due to the tendency of most African states in giving priority to domestic laws, the leadership should be held accountable for any duty or obligation to implement regional or sub-regional protocols. However, African leaders seem to think that it would be better to be subject to internal laws rather than accept the provisions in the protocols being performed at the regional or sub-regional level. This leaves national jurisdictions with the power of interpretation of regional legal instruments, leading to the exclusion of immigrants - which is detrimental to the integration effort. Harmonisation of community (regional and domestic) laws is a very important issue.

It can be argued that the above provisions signify a departure from and lack of respect for the principle of the Free Movement as laid down in the AU Protocol.

The table below shows the current state and practices in implementation of regional integration in Africa.[224] All 8 RECs in the table have been recognised by the AU for the purpose of integration towards establishment of the AEC. These sub-regional groupings were created among countries sharing the same colonial history and they are countries within the same geographical region.[225]

[222] ECOWAS, 'Economic Community of West African States (ECOWAS): Protocol on Free Movement of Persons, Residence, and Establishment. Article 4 which stated that 'Notwithstanding the provisions of Article 3 above, Member States shall reserve the right to refuse admission into their territory to any Community citizen who comes within the category of inadmissible immigrant under its laws'.

[223] SADC, 'SADC Protocol on the Facilitation of Movement of Persons' *Article 27 which states that member states shall put in place immigration, police and security arrangements as they would deem necessary in order to enforce provisions of the Protocol.*

[224] Addis Ababa and Ethiopia, 'Eighth Session of the Committee on Trade, Regional Cooperation and Integration Best Practices in Regional Integration in Africa' (2013) <http://repository.uneca.org/bitstream/handle/10855/22132/b10696192.pdf?sequence=1> accessed 12 February 2015, p 2

[225] Iwa Salamim (2011) Op cit, p 662

Current State of Implementation of Regional Economic Integration

	Free Trade Area (FTA)	Customs Union (CU)	Common Market (CM)	Economic and Monetary Union
AMU	Not yet established	Not yet established	Not scheduled	Not scheduled
CEN-SAD	Established	Not yet established	Not scheduled	Not scheduled
COMESA	Established in 2000 with 14 (74%) participating countries	Launched in 2009 with three year transition period. Not achieved yet	Not scheduled	Proposed for 2018
EAC	Established	Established	Agreement ratified in 2010 with five years transition period	Scheduled for 2012. Not achieved yet.
ECCAS	Established	Established	Not scheduled	Not scheduled
CEMAC	Agreed but implementation delayed	Established	Freedom of capital in place	Monetary union with common currency
ECOWAS	Established	Established	Initial steps to freedom of movement	Eventual merger of UEMOA and WAMZ envisaged
UEMOA	Established	Established	Initial steps to freedom of movement	Monetary union with common currency since 1994
IGAD	Established		Not scheduled	Not scheduled
SADC	Established in 2008	Launch was due in 2010 but postponed and still remains so	Proposed for 2015. Not achieved	Proposed for 2016
SACU	Established	Established	Postponed for 2015. Not yet achieved	In progress at practical level

Source: the Researcher + United Nations Economic and Social Council (2013) [226]

From the table above, the progress in the various regional groupings varies but on the whole there has been very little progress in most regional economic communities. The progress in ECCAS and SADC highlights the problem of duplication of memberships. CEMAC is a grouping of countries that also belong to ECCAS, and in the CEMAC grouping there is movement of capital and monetary union already in place, but not at ECCAS level. The same applies to SADC. SACU is a grouping of five countries who are all members of SADC and a Customs Union already exists between SACU members but not in SADC as a whole. There is a monetary union between four out of the five members (excluding Botswana). Efforts to establish a Customs Union were postponed with proposals for Common Market in SADC being aimed for in 2015, and with economic and monetary union targeted for 2016. As of the time of writing (December 2015), SADC still has not achieved a customs union as yet and

[226] Ababa A and Ethiopia, 'Eighth Session of the Committee on Trade, Regional Cooperation and Integration Best Practices in Regional Integration in Africa' <http://repository.uneca.org/bitstream/handle/10855/22132/b10696192.pdf?sequence=1> accessed 28 January 2014, p 2

that means the common market, and economic and monetary union will not be achieved by the timetables envisaged in the table above.

4.2 The Economic Integration and Policy of Free Movement of Workers in the African Union (AU)

4.2.1 Brief History of the AU:

The Organization of African Unity (OAU), which was founded on May 25, 1963 and worked to bring African nations together to achieve independence from European colonial powers. The OAU stood against dependence on foreign countries, colonialism and apartheid. However, the OAU was unable to act or prevent many of Africa's civil wars (e.g. Angola, Congo, Kinshasa, Liberia, Mozambique, Sudan and Rwanda) under its principle of "non-interference" in which millions of people were killed. The OAU's failure to achieve its primary aims of "enhancing the unity and solidarity of African States" led African leaders to feel the need for new pact. [227] With the AU its aims were not for the promotion of economic integration but were for mainly political solidarity.

The arrival of the AU had been in the making arguably from 1977 (when African leaders acknowledged that aspects of the OAU charter had become outdated and needed to be reformed) and unmistakably since September 9, 1999 at the organisation's fourth extraordinary session in Sirte, Libya, where African Heads of State agreed to create the AU.[228] At the OAU's 36th ordinary session in Lome, Togo on July 11, 2000, African leaders adopted the Constitutive Act of the AU. Soon afterwards, at its fifth extraordinary summit in March 12, 2001, again in Sirte, Libya, African leaders issued a general declaration on the formation of the AU. On April 26, 2001, Nigeria became the 36th member state to ratify the Constitutive Act thus enabling the new pan-African agreement to enter into force on May 26, 2001.[229] Shortly thereafter, at the 37th summit of the OAU on July 9, 2001, African Heads of States agreed to a one-year transition plan for the transformation of the OAU into the AU. On July 9, 2002, Fifty-three Heads of State from across the African continent gathered at a

[227] Diedre L. Badejo, *The African Union*, (Chelsea House Publishers, 2008) p 12
[228] Olufemi Babarinde (2007), 'The EU as a Model for the African Union: the Limits of Imitation' , University of Miami, Jean Monnet/Robert Schuman Paper Series.Vol. 7, No. 2. Miami, April 200, p 6
[229] Ibd, pp 6-8

memorable final session of the OAU in Durban, the Republic of South Africa, to bid fare well to the organisation and to welcome the new Union (AU).[230]

To begin with, the AU, at least in its institutional set up shows a remarkable similarity to the EU. However, the challenge for the AU will be to plan its own route, make progress at its own pace, find its own time, and write its own history. The host President and the AU's first president, Thabo Mbeki, even promised that the Union would liberate the African people from their misery, poverty and permanent underdevelopment. African people hope and expect that the new pan-African construct will increase intra-African economic activities, resolve socio-political crises, foster continental unity and improve the region's visibility and profile on the global stage.[231] The AU gives emphasis to democracy, human rights, and economic development. The main aim of the AU is to build greater unity and cooperation between the member countries and among the peoples of Africa in order to improve living standards of its people. The Fifty-four member nations look forward to the fact that the organization will make it possible for the voice of African countries to be heard as part of global discussions and negotiations.[232]

The AU headquarters is in Addis Ababa, Ethiopia and is currently made up of Fifty-four countries including South Sudan which joined the Union in 2011.[233] The Saharawi Arab Democratic Republic (SADR) is the only AU member that is a partially recognized state and not a UN member. It joined the OAU in 1984, which resulted in Morocco choosing to withdraw from the AU organization. Morocco considered SADR as a part of its state. [234]

The Constitutive Act (2000) of the AU highlighted the formation of the following institutions: (a) The Assembly of the Union; (b) The Executive Council; (c) The Pan-African Parliament; (d) The Court of Justice; (e) The Commission; (f) The Permanent Representatives Committee; (g) The Specialized Technical Committees; (h) The Economic, Social and Cultural Council;

[230] Wafula Okumu (2009) 'The African Union: Pitfalls and Prospects for Uniting Africa', (Journal o International Affair, African Union Vol 62, No 2 Spring/Summer 2009) p 94
[231] Olufemi Babarinde, (2007) Op cit, p 6-8
[232] Diedre L. Badejo, Op cit, p 12
[233] Beholdingeye, 'African Union Handbook 2014' (2013) <http://summits.au.int/fr/sites/default/files/MFA%20AU%20Handbook%20%20Text%20v10b%20interactive.pdf> accessed 22 March 2015 p 10
[234] Eric G. Berman and Kerry Maze, *Regional Organizations and the UN Programme of Action on Small Arms (PoA)*, (Published in Switzerland by the Small Arms Survey, August 2012) p 22

and (i) The Financial Institutions which include African Central Bank, African Monetary Fund, African Investment Bank.[235]

The map below shows members of the AU (Morocco is the only African country which is not a member of the AU):

Source: African Union map[236]

4.2.2 The Progress of Economic Integration in the AU

Attempts have been underway to create economic cooperation among African countries at a continental level. Lagos Plan of Action (LPA) which adopted by African leaders in 1980 is the aspiration to integrate Africa. LPA aimed at increasing Africa's self-sufficiency and reducing dependency on the Western power. The Abuja Treaty was signed in 1991 and was the ground for the African integration plan.[237] There is a strong belief that regional integration will accelerate the development of Africa.[238] Africa as a continent has made efforts towards economic integration despite the fact that the African approach to integration is not along the lines of the EU or the North American model. Most of the integration efforts in Africa have taken the form of Regional Economic Communities (RECs) and by the Abuja Treaty of 1991, it was envisaged that the RECs would be the basis for the establishment of the African Economic Community (AEC).[239] The AU recognises only 8 RECs in Africa as

[235] Constitutive Act of the AU, 11th of July 2000
[236] African-Union-map http://www.sldinfo.com/the-french-operation-in-mali-intervene-leverage-and-withdraw/bigstock-african-union-map-and-surround-41224855/ , accessed on 12/12/2014
, accessed on 12/12/2014
[237] Vincent Itai Tanyanyiwa and Constance Hakuna (2014), op cit, p 103
[238] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 109
[239] Reiner Kenneth et al, *The Princeton Encyclopedia of the World Economy*, (Two volume set) Princeton, NJ, USA: Princeton University Press, 2008, pp 8-9

key to the formation of AEC and the RECs are primarily trade blocs. Some RECs involve some form of political co-operation.[240]

Before exploring the levels of integration, we need to consider the Abuja Treaty integration milestones, which must be met by all the RECs. There are six stages that should lead to the creation of the African Economic Community. The six stages are:[241]

Stage One: (completed in 1999) creation of regional blocs in regions where such blocs do not yet exist. All recognised RECs were in place by 1999.

Stage two: (in progress) strengthening of intra-REC integration and inter-REC harmonisation.

Stage three: (To be achieved by 2017) establishment of a free trade area and customs union in each regional bloc.

Stage four: (To be completed in 2019) Coordination and harmonisation of tariff and non-tariff system among the RECs with a view of establishing a Free Trade Area culminating in a continent-wide customs union.

Stage five: (To be achieved by 2023) establishment of a continent-wide African Common Market (ACM.)

Stage six: (To be completed in 2028) establishment of a continent-wide economic and monetary union and a Parliament; and all transition periods are expected to end in 2034 at the latest.

The movement towards implementation of the 1991 Abuja Treaty has been progressing at different pace in the different RECs.

The AU's Constitutive Act (2000) agreed to accelerate the process of implementing the 1991 Abuja Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and be in a position to face challenges posed by globalisation. Under Article 3(c) and 3(j) of the Constitutive Act (2000) of the AU the objectives were to accelerate the political and socio-economic integration of the continent and that meant embarking on a path that in the long-run would achieve integration almost along the EU lines.

[240] AU Commission, 'Status of Integration in Africa (SIA IV)', (AU 2013) p 19
[241] Ibid

Article 3 of the Constitutive Act (2000) provides that the main objectives of the AU shall be to:

(a) 'achieve greater unity and solidarity between the African countries and the peoples of Africa;

(c) accelerate the political and socio-economic integration of the continent;

(f) promote peace, security, and stability on the continent;

(g) promote democratic principles and institutions, popular participation and good governance;

(j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

(l) co-ordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;[242]

Despite the above objectives, progress made on the ground has not been encouraging. From the Consultative Act (2000), importance is given to political considerations at the expense of economic integration and this could be a possible reason for the slow pace of progress on economic integration. On the other hand, the political fragmentation of Africa could also be a possible factor as to why economic integration is taking long to achieve maybe justifying the emphasis on political considerations in the Constitutive Act 2000. Africa likewise faces various other challenges such as poverty, starvation, unemployment, slow economic growth, poor health, inadequate education systems, political instability and wars in others, which stand in the way of economic growth and integration.

Cap VI, Article 43 of the AEC Treaty provides, 1) Member States agree to adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the Free Movement of Persons, and to ensure the enjoyment of the right of Residence and the Right of Establishment by their nationals within the Community; 2) For this purpose, Member States agree to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment. Articles 88, 89, 90, 93, 94, and 95 are to the effect that the Community shall be established through the co-ordination, harmonization and progressive integration of the activities of the regional economic communities, regional

[242] Article 3 of Constitutive Act of the AU, 11th of July 2000

continental organizations, other socio-economic organizations and associations, and international organizations, the aim being to ensure their involvement in the integration progress of Africa.[243] The provisions for the legal framework are already in place but its implementation is the real problem.

For Africa to achieve deeper integration there is need for the AU and its institutions to assume and to play a dominant role, which is not the case at present. There are lessons to learn about the importance of having institutions with effective powers such as in the EU, which help in progress the integration effort. A strong organisation with strong institutions allows for progress to be made The AU has taken the first steps towards integration, which can be considered a move in the right direction. Whether the goals will be achieved is yet to be seen. The sequencing of integration in Africa need not necessarily follow EU lines because once the process is in motion change in the political economy in each country can result in deeper integration.[244]

The model of integration in Europe was in a sense unique in that it is difficult to replicate elsewhere in the world due to the historical circumstances that led to its creation.[245] In Africa, there is more scope for enlargement and expansion rather than for deeper integration. Since African nations seem reluctant to transfer some of their powers to the AU, the route to take should be the one pioneered by the European Free Trade Area, where the objective was to encourage regional free trade with as little political integration as possible. Rather than have bilateral agreements between African countries, RECs can have minimum institutions and establish the practice of a duty free pool involving any further agreements entered into with other RECs. This means that the RECs can access each others' markets duty free without need for bilateral agreements. The use of what can be termed African Free Trade Areas allows for the enlarging of integration, which is a possibility, rather than seeking deeper integration. However, it will require clear and common rules of origin so that countries wishing to join will know how the group works.[246]

Since in Africa at present there is widening of integration, it is worth examining what the RECs can do in order to facilitate this process. There is need to review what the RECs can do

[243] AU, Treaty Establishing the African Economic Community
[244] Marc J Melitz, (2003) 'The impact of trade on Intra-Industry Reallocate and Aggregate Industry Productivity', Journal of the Econometrica, Vol. 71, No. 6. (Nov., 2003), p 1717
[245] Erik Jones, (2010), 'The Economic Mythology of European Integration'.(JCMS. 48(1), Volume 48, Issue 1, January 2010) p 99
[246] Richard E Baldwin (2008)'Sequencing and Depth of Regional Economic Integration: Lessons for the Americas from Europe' (World Economy, Vol. 31, Issue 1, January 2008) p 18

to ensure that the Treaties or protocols already in place can have a practical effect in promoting and protecting the policy for the movement of workers.

In Africa, the disadvantage of the legal framework of most REC treaties is that there is no power in the regional enforcement institutions. The regional enforcement institutions have a duty to ensure that states meet the terms with the provisions of the treaties; however, they lack power to make Member States comply. Under Article 17 of the AU dealing with integration, it clearly states that:

"In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan- African Parliament shall be established".

However, the Pan-African Parliament is not fully functional in the sense where it can spearhead the integration effort. As such the integration effort is taking place with little or no input from the Pan-African Parliament[247]. This is in stark contrast with the EU where Community institutions such as the EU Parliament (and the CoJ) were already functional in the early days, setting the rules and actively participating in all matters concerning integration.

In some RECs such as EAC and COMESA courts were granted powers such as the CoJ of EU but have not been able to exercise those powers because of opposition from some member states. The legal institutions in most of the RECs in Africa do not function as expected and are therefore not making any contribution to the integration effort. In Africa, the domestic legal and judiciary systems not seem to be taking on board their responsibilities with regard to the RECs treaties. If RECs treaties were integrated into the domestic laws of member states, that would effectively give political, legal and judicial recognition to the Treaties and ensure their enforceability. The domestic legal system would be the channel through which the policies of the regional treaties that have become law in Member States can be enforced.

There is need for AU to ensure that the African Court on Human and Peoples' Rights (ACHPR) is empowered to have enforcement mechanisms so that regional courts or members states can refer their cases for determination. When the ACHPR has powers to preside over matters from member states and regional courts, then the integration effort can be advanced.

[247] Gerhard Hugo and Institute, *The Pan-African Parliament* (Institute for Security Studies 2008) <https://books.google.be/books/about/The_Pan_African_Parliament.html?hl=nl&id=zV8qAQAAIAAJ> accessed 1 March 2015.p 5

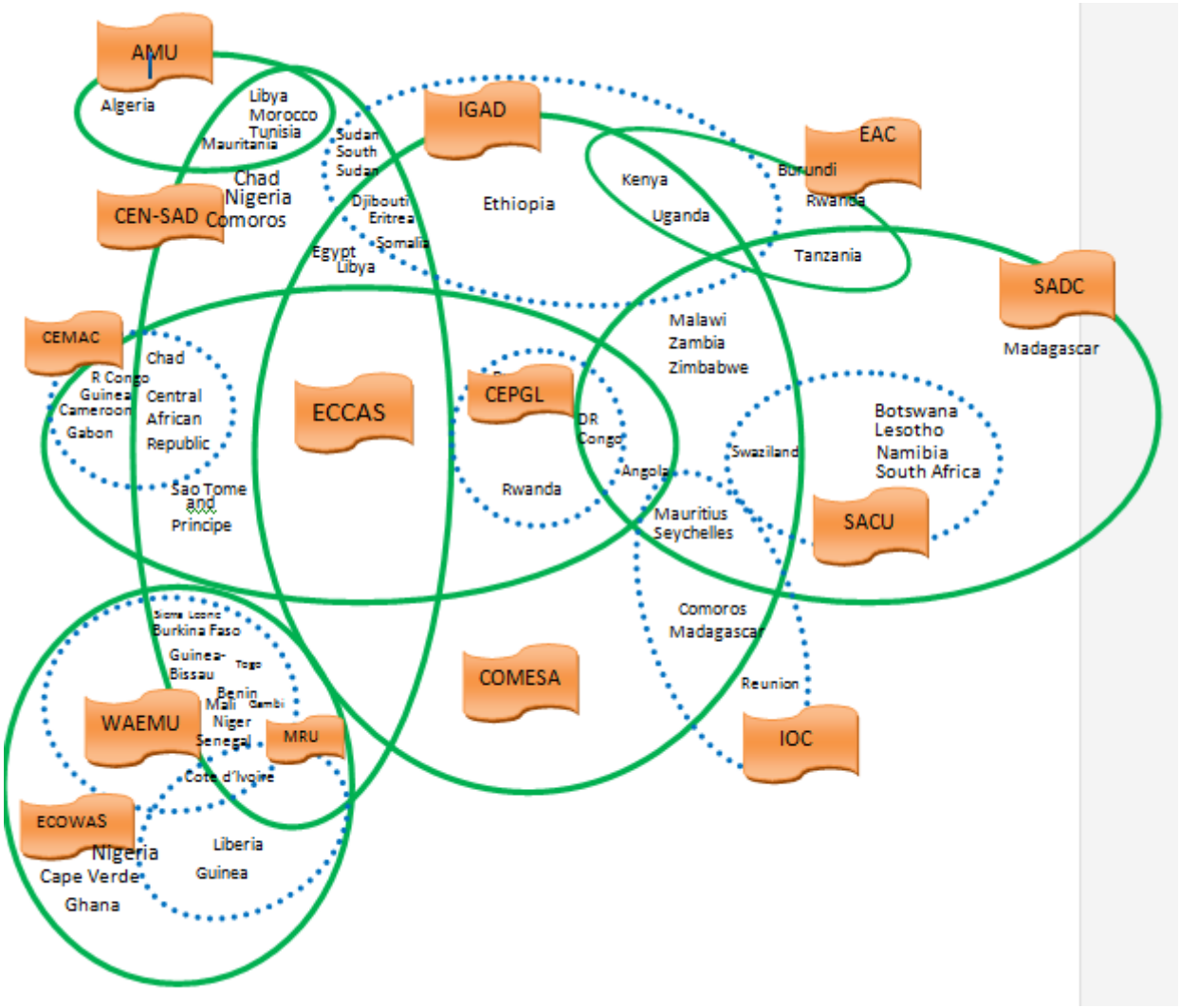
With a view to adopting a widening model of integration it is therefore necessary to ensure that the ACHPR act as the central point of reference for legal disputes and the regional courts given wider powers to determine disputes. The problem in Africa is that in most member states the rule of the law is not followed and even where there are stable civilian governments, there is no recognition of regional laws by the national courts. The lack of supremacy of the regional law within national law affects the success of the regional arrangement because it would be difficult for regional policies to be implemented in Member States. [248]

In Africa, if the supremacy of the regional law is supported by the legislature, decision-making and judiciary in Member States, then the effectiveness of treaties in Member States would be enhanced. There would be need for harmonisation of domestic laws with regional laws so that no municipal laws that are in conflict with regional laws are passed by national governments of member states. There is equally a need for ensuring that the governments of member states facilitate administrative processes necessary for the implementation of regional policies. The clear separation of powers between the legislature, executive and judiciary can ensure the administration of justice is effective and the adoption of regional laws can be done with little effort.

The legal and institutional frameworks dealing with integration in the AU are both weak and dysfunctional at both regional and sub-regional levels and the initiative for implementation was delegated by the AU to the recognised sub-regional organisations. There are RECs that have made some progress and some the progress has been very slow in achieving their stated goals. The chart below shows the recognised and unrecognised African sub-regional organisations.

[248] Iwa Salami (2011) Op cit , p 679

The web of recognised and unrecognised African Sub-Regional Organisations



Source: the researcher

The groups in the green areas are recognised by the AU and the groups inside the blue areas are unrecognised. In the ECCAS there are two unrecognised RECs CEMAC and CPLG, in ECOWAS there is the WAEMU and MRU, and COMESA has CPLG and part of SACU. From the chart above, the complexities of the membership to RECs unrecognised by the AU can be seen and little effort has been made to streamline or harmonise them.

4.2.3 The Policy of the Free Movement of Workers in the AU:

The multiple regional cooperation and integrated initiatives and programmes in Africa vary from customs union to more ambitious plans and proposals for monetary unions. The various provisions towards its gradual realisation are discussed below.

Under Article 3 of the Constitutive Act of the AU the objectives of the African Union with regards to integration shall be to accelerate the political and socio-economic integration of the continent, promote sustainable economic development at the economic, social and cultural level, and coordinate and harmonise the policies between existing and future RECs for gradual attainment of the objectives of the Union.

However, the free movement of workers is not defined in objective terms. Instead it is provided only in the form of general provisions. Therefore, further reference needs to be made to other treaties in view of the fact that Articles 98 and 99 of the Treaty Establishing the African Economic Community states that treaties and protocols should form an essential part of the OAU and AU Charter.

In the Abuja Treaty of June 1991, (the Treaty Establishing the African Economic Community), the free movement of workers was again not fully defined in the Treaty. Article 43 of Chapter VI lays down general provisions about free movement of persons, rights of residence and establishment.[249] The failure by the AU when making agreements to draw a clear distinction between free movement of persons and the free movement of workers could be seen as a reason why there are differences with the RECs as to what is free movement. For example, in the EAC, there is a clear focus on the free movement of workers although with some reservations. Other RECs do not make provision for free movement of workers, instead reference is to the free movement of persons within defined limitations such as, free movement of person for 90 days per year without need for a VISA in the case of SADC, but with work permit being required for immigrant workers from other member states.[250]

[249] Treaty Establishing the African Economic Community, <http://www.au.int/en/sites/default/files/treaties/7775-file-treaty_establishing_the_african_economic_community.pdf> accessed 26 November 2014

[250] SADC Protocol on Facilitation of Movement of persons 2005, <http://www.sadc.int/files/9513/5292/8363/Protocol_on_Facilitation_of_Movement_of_Persons2005.pdf> accessed 26 January 2014 , p 8

The two provisions for the free movement of persons as required by the AU are stated below. On closer analysis, the AU gave discretionary powers to the individual RECs of deciding what represent free movement, which is different from the EU concept of free movement as contained in Articles 45-48 and Articles 49-55 of the Treaty on the Functioning of the European Union (TFEU) which clearly defined what free movement was all about and the need for doing away with discriminatory national laws against citizens of EU.

Article 43 of AbujaTreaty Establishing the African Economic Community provided:

1. *'Member States agree to adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within the Community.*

2. For this purpose, Member States agree to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment'.

Indeed, it is clear there is no provision which specifically mentioned to the movement of workers within the region instead it was left to member states to put in place their own agreements with regards to the movement of persons.

Article 6 (2)(f)(i) of the above treaty provided, *Within a period not exceeding five (5) years:*

Consolidation and strengthening of the structure of the African Common Market, through including the free movement of people, goods, capital and services, as well as, the provisions herein regarding the rights of residence and establishment;

However, this Article does not mention to the free movement of workers, which should be a key policy goal in promoting economic integration; emphasis should be on movement of workers rather than persons. That could be one of major differences between EU and AU.

In the AU there is no obvious declaration which provides for this right despite Article 71 (2) (e) of Treaty Established, the African Economic Community provided:

Adopt employment policies that shall allow the free movement of persons within the Community by strengthening and establishing labour exchanges aimed at facilitating the employment of available skilled manpower of one Member State in other Member States where there are shortages of skilled manpower.

The focus of this provision is clearly on the free movement of persons. On the other hand, this Article makes reference to 'persons' and 'labour exchanges' at the same time which can be interpreted that the intention was to assimilate labour to persons. Even this article does not provide the right for general workers to move freely in the region. Instead, it provided a general recommendation *'where there are shortages of skilled manpower'*.

In the writer's view, there ought to be a clear focus on the free movement of workers as the cornerstone of the policy on economic integration in Africa. Therefore, the AU needs to revise its Constitutive Act with a view to making provision for the right of movement of general workers.

From the various provisions above listed, it is understandable that there is a legal framework. However, the principle of free movement of workers has not received sufficient consideration.

The AU appears to have made a conscious decision not to have clear provisions defining the free movement of workers, unlike the case in the EU. In the EU there was a clear vision as to the objectives of the union. Clear policies were set before the process began, including the policy on the free movement of workers. .

In contrast to the EU, within the AU and the RECs the absence of judicial precedents and court decisions on concepts such as worker, work, job seekers, rights of family members of the worker and entitlement to social advantages such as holiday entitlement and retirement benefits is holding back the development of the legal framework for free movement of workers.

4.3 Economic Integration and Policy of Free Movement of Workers in East African Community (EAC)

4.3.1 Brief History of EAC

Regional integration is not a new concept in the EAC. In the years that followed the collapse of the first EAC, the previous member states of EAC (Uganda, Kenya and Tanzania) attempted to regulate economic affairs by means of individual multilateral agreements. Two important steps were taken in 1993 and 1997 towards establishing EAC. In 1993 the Permanent Tripartite Commission for Cooperation was set up: a coordinating institution that in 1998 produced a draft treaty for the later EAC. Cooperation on security matters was also initiated during this time. In November 1999, the Treaty for the Establishment of EAC was signed by the heads of state of the above states. It entered into force on 7th July 2000. In 2007 Rwanda and Burundi joined the Community.[251] It has the following countries as members: Burundi, Kenya, Rwanda, Tanzania and Uganda. As a regional intergovernmental organisation, the EAC aims to widen and deepen co-operation among member states and other RECs in areas of politics, economics and social fields of shared interests with the 8 RECs recognised by the AU. In terms of progress towards regional integration, the EAC is considered to be the most advanced towards economic integration.

The following map shows the EAC location, [252]

EAC Member States

Source: United Nations Economic Commission for Africa (UNECA) (2014)

[251] Stefan Reith and Moritz Boltz, 'The East African Community Regional Integration Between Aspiration and Reality' (Kas International Reports, 2011)

[252] EAC http://siteresources.worldbank.org/INTAFRREGINICOO/Images/r-map-eac.gif ,accessed on November 7, 2014

4.3.2 The Progress of Integration in EAC

The treaty established EAC, aims to improve and strengthen co-operation on the basis of the historical ties amongst their Countries. Article 5 of the treaty provides,

"The objectives of the community shall be to develop policies and programmes aimed at widening and deepening co-operation among partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit."

The EAC has made significant progress to date in the free movement of people. It is the second most open sub-region in the world in providing visas on arrival.[253] EAC does not required visa for its Member States.[254] It has a community passport that allows multiple entries to citizens of the community for a period of six months. [255] The member states were considering making the EAC passport recognised and accepted internationally. However the EAC passport is only recognised within the EAC region and not all member countries have adopted it with four member states Burundi, Kenya, Rwanda and Uganda agreeing to use national identities for travel between the four member states (that excludes Tanzania). [256] [257] Citizens of EAC have special immigration counters at the region's airports meaning citizens of member states do not face obstacles when travelling within the community. EAC has made great steps in the movement of business persons. It has registered significant increases in intra-regional trade over the past few years.[258] Within the EAC, member states are working towards harmonising employment policies and recognition of professional qualifications within the community such that citizens would be able to seek employment within member states without discrimination. Furthermore, the EAC on 1 July 2010 started implementing protocols towards establishing a common market. [259]

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[253] Global Value Chains and Africa's Industrialisation' (2014) Op cit, p 79
[254] Ibid
[255] AU Commission, Status of Integration in Africa (SIA IV). (AU 2013) p 84
[256] Edward Ssekalo, 'The East African Passport' (2009) <http://www.eac.int/travel/index.php?option=com_content&id=112-eapassport&Itemid=78> accessed 25 October 2015
[257] EAC, 'Annex on the Free Movement of Persons' (2011) <http://www.eac.int/commonmarket/index.php?option=com_content&view=article&id=87&Itemid=137> accessed 25 October 2015.
[258] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) 'Challenges and Opportunities for Regional Integration in Africa: The Case of SADC', IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 12, Ver. IV (Dec. 2014) p 109
[259] AU Commission, Status of Integration in Africa (SIA IV 2013) p 84

The EAC established a Customs Union in 2005 and established a Common Market in 2010. The bloc is working towards establishing Monetary Union, resulting in the establishment of a Political Federation of the East African States. The aims and objectives of EAC are more in line with what is envisaged by the 1991 Abuja Treaty. However, it is worth mentioning that EAC has the potential to become fully integrated before the AU can achieve its last desired of Monetary and Economic Union by 2034. [260] The EAC bloc has a population of 135.4 million people and at USD 85 billion, the 7th richest African economy. [261] In addition, removal of tariffs in the EAC member States is in full force. The EAC Customs Union is a unique borrowed practice from COMESA. The protocol of the EAC Customs Union was borrowed from the COMESA Free Trade Area (FTA). With these developments the EAC can now be considered to have become a zero tariff zone. [262]

Concerning the right of establishment, Kenya and Rwanda are implementing a bilateral agreement to allow citizens from each country to freely establish businesses in each country in 2011.[263] The agreement also abolished all work permit fees. In addition, Kenya is already implementing a similar agreement with Uganda.[264]

This is one region which has made significant progress in terms of implementation of agreed protocols. Important steps have been taken in terms of harmonising immigration and movement of people. Work is being done towards harmonising qualifications and standards so that trade is enhanced in the member states. [265] However, despite some clear progress in this economic grouping, the main problems seem to be multiplicity where almost all members belong to some other regional grouping, which reduces the effectiveness and efficiency of the integration effort. There is need for EAC to focus on one REC rather than having members belonging to more than one REC hence leading to a dissipation of resources and energy

[260] Ibid p 19
[261] Constantine Manda et al, (2014)'Borders : Social Interaction and Economic and Political Integration of the East African Community (2014) <http://cega.berkeley.edu/assets/cega_hidden_pages/5/Manda_Borders.pdf> accessed 3 March 2015, p 2
[262] United Nations Economic And Social Council, 'Best Practices in Regional Integration in Africa' , Addis Ababa, Ethiopia, 6-8 February, p 3
[263] EAC, 'Annex on the Free Movement of Persons' (2011) <http://www.eac.int/commonmarket/index.php?option=com_content&view=article&id=87&Itemid=137> accessed 25 October 2015.
[264] Addis Ababa and Ethiopia, 'Eighth Session of the Committee on Trade, Regional Cooperation and Integration Best Practices in Regional Integration in Africa' (2013) <http://repository.uneca.org/bitstream/handle/10855/22132/b10696192.pdf?sequence=1> accessed 15 February 2015 p 7
[265] AU Commission, 'Status of Integration in Africa (SIA IV)', 2013, p 84

through duplication of bureaucracy, manpower and political effort. The relative progress achieved in the EAC could be partly due to its size. In all, there are five member states, which make management and co-ordination far less complicated unlike when the grouping has more member states. Furthermore, the member states share similar political histories and cultural values as well as common working languages in English and Swahili, which facilitates the significant progress achieved to date.

4.3.3 The Policy of the Free Movement of Workers in the EAC:

The EAC Treaty emphasised co-operation in areas of immigration as an important factor in creating East African Market. The easing of travel restrictions ensured that workers could move freely within the bloc. Article 7 (1) (c) of EAC Treaty provided,

'the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;'

In addition, Article 76 (1) of EAC Treaty stated,

'There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment.'

Furthermore, Article 104 (1) stated,

'The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.'

In March 2006, the EAC had a meeting of its High Level Task Force on the negotiations of the Draft Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence.[266] Following up from the 2006 High Level Task Force, the East African Community on 1 July 2010 ratified the Protocol on the Establishment of the Common Market and article 5 of the Protocol deals with the free movement of four factors which are: free movement of goods, free movement of labour, free movement of services and free movement of capital.

[266] African Development Bank African Development Fund Eastern Africa Regional Integration Strategy Paper 2011 -2015' (2011) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/East%20Africa%20-%20Rev%20RISP%20.pdf> accessed 1 March 2015, p 11

Article 10 of the Protocol that deals with the free movement of workers, provided, member states guarantee the free movement of workers who are citizens of member states and that there should be no discrimination against workers from other member countries in the host state.

Article 10 further provides that the Partner States guarantee the free movement of worker of member states within their territories and that there should be non-discrimination of nationals on grounds of nationality in matters relating to employment. [267]In addition, workers have the right to take up employment in member states and there are provisions enabling the free movement of family members such as spouse and children.[268] Under the Protocol, employment in public service is excluded unless permitted by a Partner State. In some member states, Kenya and Rwanda, there are no work permit fees for East Africa nationals working in these two countries.

The movement of persons is dealt with under Article 7 of the EAC Common Market Protocol and there is community ID card that can be used by citizens of four Partner states excluding Tanzania. In the light of these developments it can be argued that the East African Community has made considerable progress as compared to other RECs with respect to regional integration and the free movement of persons and workers. It could equally be argued that the policy on free movement in EAC has progressed towards its goal and it can be a model for other RECs in Africa.

However, there is still more progress to be made because the free movement of workers policy in the EAC is still restricted to highly qualified professionals who in most cases would be eligible to move anyway. Highly qualified people are in an advantaged position and with more opportunities and the ability to migrate when compared with those who are less qualified. The Protocol provides no justification or rationale for the restriction, which raises the question as to why the free movement of workers policy is restricted to highly qualified people only. In the Common Market Protocol, the article does not mention highly skilled workers but in practice the situation is different. [269]

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[267]' The East African Community Common Market Protocol for Movement of Labour Achievements and Challenges of Implementation of the Protocol' (2012) <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/CMP%20Conference%20Report%20November%202012%20Nairobi.pdf> accessed 1 April 2015, p 3

[268] John Bosco Kanyangoga (2010), 'Integration Migration with Development in EAC: Policy Challenges and Recommendations', CUTS International Geneva Resource Centre, p 15

[269] Wandera Martin, 2012, Op cit , p 5

In as far as the EAC is concerned the free movement of workers is at least progressing at a reasonable pace and there are mechanisms for seeking justice in cases where citizens of EAC are denied the right to free movement. But it should be noted that if they are not happy with decisions made there appears to be no option at the regional level to appeal to AU courts for the time being. However, in the EAC, citizens have confidence in their regional courts. From 2005 to November 2015, a total of 126 cases were decided and judgements passed, averaging more than 10 cases per year from 2010. Most cases handled involved judgements and other rulings on community issues, followed by taxation cases where 18 cases were heard.[270] There were few cases heard that involved common market issues such as issues of customs union and fundamental and operational principles of the Community. A case in question is that of *Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda* which was decided against The Attorney General. Muhochi, a citizen of Kenya was denied entry into Uganda and was arrested, detained and deported to Kenya. He appealed the decision by invoking the free movement of persons under the Treaty and Common Market Protocol. The Attorney General cited section 52 of Uganda's Citizenship and Immigration Control Act 1999 However, it was argued on the appellant's behalf that the Ugandan Act was rendered invalid by Uganda's obligations under Articles 6 (d) and 7(2) of the Treaty. Denying the appellant entry into Uganda, a member state of EAC, was declared by the court to be unlawful under Article 104 of Treaty and Article 7 of Common Market Protocol and therefore a breach of community law.[271]

[270] EAC Court of Justice. 2015. Court Decisions . http://eacj.org/?page_id=2414
[271] *Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda* (Case No. 5 of 2011)

4.4 The Economic Integration and Policy of Free Movement of Workers in Common Market for Eastern and Southern Africa (COMESA)

4.4.1 Brief History of COMESA:

The COMESA was established in December 1994. Its most important focus is on the creation of a large economic and trading unit that is able to dismantle some of the barriers standing in the way of regional integration. The membership of COMESA consist of the following countries: Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eretria, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.[272]Libya is the only Maghreb country to participate in this organisation.[273]

The map below shows the member states of COMESA.

Source: COMESA (2016) [274]

COMESA is an organisation with members belonging to other regional economic communities.[275] For example, Djibouti, Eritrea, Ethiopia, Kenya, Sudan and Uganda are members of IGAD region of which only Somalia is not a member of COMESA. Malawi, Seychelles, D. R. Congo, Swaziland, Zambia and Zimbabwe are members of the SADC

[272]Alemayehu Geda and Haile Kebret (2007) 'Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA', Journal of African Economies, Vol 17 Number 3, p 3
[273] Gary Clyde Hufbauer; Claire Brunel, 'Maghreb regional and global integration : a dream to be fulfilled', (Peterson Institute For institutional Economics, Washington, ISBN paper 978-0-88132-426-62008) p 15
[274] Map of COMESA Member States, http://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa , accessed on 2016.
[275] Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?' (2016) <https://www.africaportal.org/dspace/articles/sacu-regional-integration-and-overlap-issue-southern-africa-spaghetti-cannelloni> accessed 7 March 2015, p 9

region; while Burundi, Kenya, Rwanda and Uganda are members of the EAC region. The problem here is that the AU recognises COMESA, EAC, IGAD and SADC, organisations that are central to the problems of duplication of membership. For SADC, only six members out of thirteen are members of COMESA, while IGAD and EAC have almost all the members of the REC belonging to COMESA.

4.4.2 The Progress of Economic Integration in COMESA

In COMESA only four member states have signed the Protocol on the Free Movement of Persons, Labour, Service, Right of Establishment and Residence and these include Burundi Kenya, Rwanda, and Zimbabwe. Burundi is the only member that ratified the Protocol. The rest are yet to either sign or ratify the Protocol. Security threats have slowed down the ratification and implementation of the protocol. In the meantime member states have agreed on a number of programmes aimed at addressing some of the concerns such as a) joint capacity building programme on immigration issues; b) the establishment of a database on the movement of persons, services and labour within the COMESA Region; and iii) the revision and harmonization of laws on the basis of the COMESA Model Immigration Law. There is flexibility on applying for visas within COMESA; eight Member States currently issue visas to citizens of other COMESA countries on arrival at the airport. [276]

COMESA was born through a shared destiny, one of pan-African solidarity and collective self-reliance. Although its roots go back to the 1960s, 1978 saw the first steps for the establishment of a Preferential Trade Area for Eastern and Southern Africa, which started as a sub-regional economic community with a commitment to upgrading to a common market after 10 years. The Treaty paving the way for the PTA came into force in 1982 after being ratified by more than seven signatory states who were mainly members of the former SADDC (Angola, Botswana Lesotho, Malawi, Mozambique, Swaziland, Zambia, and Zimbabwe). PTA was the foundation stone for the establishment of a common market, which was achieved by the establishment of COMESA in 1993. It was envisaged that a larger market size would allow for the sharing of the region's common heritage and destiny and allow for greater social and economic co-operation. The transformation from PTA to

[276] Status of Integration in Africa, (SIA V), (2014) <http://ea.au.int/en/sites/default/files/SIA%20V-%20En_f.pdf> accessed 21 January 2015, p 7

COMESA was in line with the objectives of the Lagos Plan of Action and the Final Act of Lagos of the Organisation of African Unity, which envisaged the establishment of an economic integration in which RECs, constituted the building blocks of African Economic Community.[277]

Most of the COMESA countries' economies in the 1980s and 1990s were dominated by the state in aspects of production leaving the private sector to play a minor role. In the 1990s there was significant economic decline in the COMESA region with record falls in gross domestic product over a 20-year period, low Foreign Direct Investment, falling exports and high external debt. [278] One thing of note is that by 1993 COMESA included in its membership 15 countries classified as Least Developed Countries (LDCs) by United Nations. [279]

As per Abuja Treaty in 1991, in terms of regional integration, COMESA is at Stage 3, which is the Customs Union level. [280]

On the other hand, in COMESA, the main problem obstructing progress is the non-ratification of protocols by all member countries. Out of seven states required for the implementation of treaties on free movement of people, only 3 countries have signed the treaties and there are no specific reasons given by the other countries considering that the heads of agreements were signed in 2001. However, COMESA has made significant increases in intra-regional trade over the past few years.[281]

However, the COMESA Customs Union is a unique practice. The 14 member States (Burundi, Comoros, DRC, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Zambia and Zimbabwe –i.e. except Ethiopia, Eritrea, Swaziland and Uganda) represent a FTA and zero tariff zone, proof to the regional trade liberalization regime.[282]

The main problem in COMESA is that of duplication of membership as has been highlighted above. Although the intention was to harmonise the integration effort, this remains a

[277]COMESA, 'Harnessing Science and Technology for Development', Annual Report 2011, p i
[278] Looking Back Evolution of PTA/COMESA (2014), http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117. Accessed on 20/02/2014
[279] Ibid
[280] AU Commission, Status of Integration in Africa (SIAIV), (AU 2013) p 19
[281] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 9
[282] Francis Mangeni and Wilson Chizebuka, (2013) 'The COMESA India Trade and Economic Relations' (Key Issues in Regional Integration Volume 2, p 78

challenge because only six members out of the thirteen members of SADC are members of COMESA. It would have been appropriate if the whole of SADC was to be integrated into COMESA. But with SACU being in SADC, it becomes a big challenge to integrate effectively into an organisation that is not fully functional. For IGAD, the aim of integration was to promote the objectives of COMESA and AEC, implying they envisaged economic integration through COMESA. But with less progress on economic integration front, it follows that those objectives will take a longer time than expected to achieve. With EAC well established, the lack of progress in other regions would not be of too much concern to them, which further weakens the progress on integration. A further example is that of Botswana, Namibia and South Africa who all belong to SACU but who still have not ratified the SADC protocol on free movement of workers.[283] Having member states who already belong to successful RECs can hinder progress in the newer RECs should those member states decide that it is not in their best interests to ratify the protocols.

4.4.3 The Policy of the Free Movement of Workers in COMESA

Article 164 of COMESA treaty provides:

1. The Member States agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market.
2. The Member States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence.
3. The Member States agree that the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements within the PTA adopted under the PTA Treaty shall remain in force until such time that a Protocol on the Free Movement of Persons, Labour, Service, Right of Establishment and Residence enters into force.[284]

This Article confers very clear rights on labourers (i.e. migrant workers, which include both job seekers and workers who have already been offered employment in the host State before leaving their country of origin) to move freely within the COMESA. The completion of the COMESA policy is regarded as a long-term objective, with the free movement of persons,

[283] John O. Oucho and Jonathan Crush (2001), 'Contra Free Movement: South Africa and the SADC Migration Protocols', Africa Today, Vol 48, Number 3, Fall 2001, Project Muse, p 143
[284] Article 164 (1) (2) (3) of the Common Market for Eastern and Southern Africa treaty

establishment of a monetary union, including right of establishment, to be fully achieved by the year 2025. COMESA is implementing a Protocol on the gradual relaxation and final elimination of visa requirements and a Protocol on the free movement of services, persons, labour, and the right of residence and establishment. Therefore, under the objective of the agreement COMESA provided for full labour mobility.[285] However, on the ground less progress has been made in this region in terms of ratifying Protocol on the free movement of workers.[286] Only Burundi ratified the Treaty and only four member states signed it (Burundi Kenya, Rwanda and Zimbabwe).[287] Reasons cited include security concerns especially with movement of labour. There is also known to be a general tendency of wait and see adopted by those member states that have not yet ratified the Treaty.[288]

COMESA is one of the largest regional economic blocs in Africa and the member states also belong to RECs where the policy on movement of persons or workers is at least clearer, such as in EAC and SADC. The duplicity of membership has led to the COMESA-EAC-SADC Tripartite agreement, which was established in 2005 and agreed for implementation in 2008.[289] The key focus of the Tripartite agreement is to achieve harmonisation and improvement of the functionality of the regional trading arrangements and programmes and addressing challenges of overlapping membership through harmonisation of programmes in the three RECs. One of the objectives of the Tripartite agreement is to ensure the free movement of business persons and facilitating the conduct of business. It can be suggested that if harmonisation is achieved through the Tripartite agreement, free movement of workers within the three RECs would be achieved. However, this will require effective implementation of the provisions on free movement of labour.

Progress in COMESA has been limited because member states belong to more than one regional community. The lack of progress is a cause for concern because of the adverse

[285] Julia Nielson, (2002), 'Current Regimes for Temporary Movement of Service Providers, Labour Mobility in Regional Trade Agreements',(OECD 11-12 April 2002) p 9

[286] Mohamed Saïb and Musette, '77E Report on Legislation Concerning International Migration in Central Maghreb' (2006) <http://staging.ilo.org/public/libdoc/ilo/2006/106B09_180_engl.pdf> accessed 1 April 2015, p 7

[287] Osemo W, 'Fresh Commitment towards Free Movement of Persons in the Region' (2015) <http://www.comesa.int/index.php?option=com_content&view=article&id=1003:fresh-commitment-towards-free-movement-of-persons-in-the-region&catid=5:latest-news&Itemid=41> accessed 26 January 2015

[288] COMESA 2015. Fresh commitment towards free movement of persons in the region http://www.comesa.int/index.php?option=com_content&view=article&id=1003:fresh-commitment-towards-free-movement-of-persons-in-the-region&catid=5:latest-news&Itemid=41 accessed on 24/07/2014

[289] COMESA-EAC-SADC Tripartite, (COMESA-EAC-SADC, 2005) <http://www.comesa-eac-sadc-tripartite.org/about/background> accessed on 29 July 2014

impact which this could have on the progressive development of the policy on the free movement of workers. The lack of genuine progress on the harmonisation effort means that progress will continue to be very slow, if not limited.

4.5 The Economic Integration and Policy of Free Movement of Workers in Arab Maghreb Union (AMU)

4.5.1 Brief History of AMU

Another significant African regional union is the North African Arab countries, which consist of Algeria, Libya, Morocco, Mauritania and Tunisia. The Arab Maghreb countries took steps to enhance regional integration with the creation of the AMU in February 1989.

These countries share a common culture, language and religion. North African countries are mostly Arabic countries and the region is relatively more developed than the rest of the continent.

The main aim of AMU is to promote cooperation and integration in the region. The preamble of Treaty Instituting the AMU provides, [290]

In response to the deep and firm aspirations of these peoples and their leaders to establish a Union that would reinforce the existing relations and provide them with the appropriate ways and means to gradually proceed toward achieving a more comprehensive integration among themselves.

The aims of AMU are:

'Strengthening the ties of brotherhood which link the member States and their people to one another;

Achieving progress and prosperity of their societies and defending their rights;

Contributing to the preservation of peace based on justice and equity;

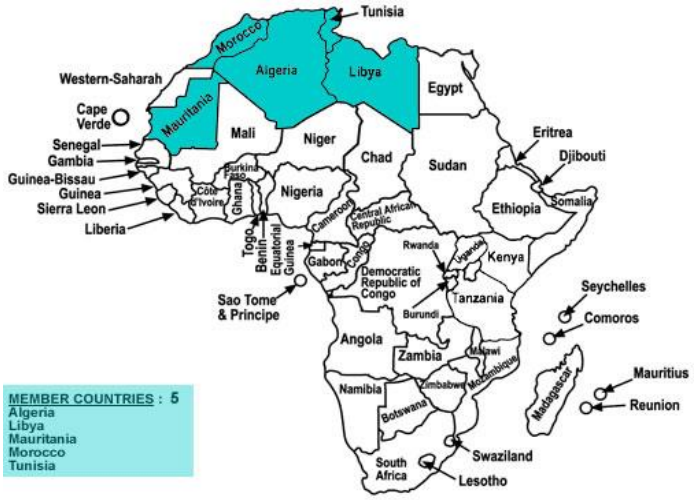
Pursuing a common policy in different domains; and

Working gradually towards achieving free movement of persons and transfer of services, goods and capital among them'.[291]

[290] Treaty instituting the Arab Maghreb Union (with declaration), Concluded at Marrakesh on 17 February 1989
[291] Article two of Treaty instituting the Arab Maghreb Union (with declaration), Concluded at Marrakesh on 17 February 1989

It is clear that the main objectives of the AMU Treaty are to strengthen all forms of ties among Member States in order to ensure regional stability and improve policy coordination as well as to facilitate the free circulation of goods, persons, services, and factors of production among them. However, there are some issues which have affected the progress of regional integration in AMU [292] as will be seen in the chapter on challenges of integration.

The following map shows the location of the AMU and its member states.



UMA Member States

Source: UMA - Arab Maghreb Union [293]

4.5.2 The Progress of Economic Integration in AMU

It would be important for policymakers to assess whether the creation of the AMU has indeed contributed to improving and enhancing the economic and financial relationship that tie the Arab Maghreb countries together. If the evidence is in the positive, then strengthening the AMU could serve as a good example for pushing forward the agenda of effective regional integration.

In this region there is lack of adequate transport infrastructure. On the other hand, only Morocco has an open skies policy. However, at the initial stage the member states aimed to reach common position on foreign affairs and national defence. A custom union was planned by 1995, and eventually an economic common market by 2000. However, political tension

[292] Claire Brunel, C. 2008. 'Maghreb regional integration. In Maghreb regional and global integration: A dream to be fulfilled', ed. G. C. Hufbauer and C. Brunel. Washington, D.C: p 10

[293] Maghreb, The Equestrian Tradition of Northern Africa, http://www.uneca.org/oria/pages/uma-arab-maghreb-union accessed on 11/11/2014

erupted between Morocco and Algeria over Western Sahara. This led to the closure of the border between the two countries in 1994 and became very harmful to the integration effort because the two countries accounted for about 77 percent of the AMU population. These political tensions hindered commercial and labour relation among other member states. Because of these political tensions the initial plans of AMU were never achieved.[294]

The table below is evident by the comparison of the economic performance of AMU member countries and the region from 1989 and 2007.

Trade between Maghreb countries in comparison with total trade of the countries

Country	Population 1989 (millions)	Population 2007 (Millions)	GDP($ Billion) 1989	GDP($ Billion) 2007	Trade % Maghreb (1989)	Trade Maghreb (2007)	Trade EU (1989)	Trade EU (2007)	Trade USA (1989)	Trade USA (2007)	Total trade (%GDP) 1989	Total trade (%GDP) 2007
Maghreb	63.5	84.1	114.5	302.6	1.3	1.3	69.7	59.4	7.8	11.3	41.8	72.6
Algeria	24.7	34.0	52.6	125.2	1.6	1.3	65.3	47.6	15.5	22.3	34.6	67.7
Libya	4.6	6.1	25.1	66.0	2.2	3.1	81.5	71.6	0.5	6.6	51.8	20.9
Mauritania	1.9	3.0	1.1	2.7	1.2	6.0	56.1	33.6	3.7	5.1	72.0	118.1
Morocco	24.7	30.5	25.5	72.8	2.6	2.1	62.5	59.6	6.9	3.7	34.5	64.3
Tunisia	7.9	10.3	10.1	34.2	5.6	6.6	70.1	73.0	3.8	2.4	74.8	98.6

Source: Direction of trade statistics, IMF, 2008; World Economic Outlook, 2007

The table shows the level of trading transactions among the Maghreb countries in relation to the total trade of the countries before and after the union's creation. The population of the countries has increased within the period of 18 years (1989- 2007) as suggested in column 2 and 3 of the table, in Maghreb the total population of the region rose from 63.5 million to 84.1 million. In addition, during the same period the corresponding economic prosperity of the region represented by the Gross Domestic Product (GDP) ($) rose from $114.5 Billion to $302.6 Billion.[295] This reflected in all the countries of the region with Morocco having the highest growth rate[296] because of this trade value as percentage of GDP among member

[294] Jacob Mundy, 'Algeria and the Western Sahara Dispute' (The Maghreb Center Journal, Issue 1, Spring/Summer 2010) p 10
[295] Claire Brunel (2008) Op cit, p 7
[296] Ali F. Darrat & Anita Pennathur, A (2002): 'Are the Arab Maghreb countries really integratable? Some evidence from the theory of cointegrated systems', Review of Financial Economics 11 (2002) 79–90,

countries was expected to witness a corresponding growth due to the creation of the union followed by the elimination of trade barrier and improvement of trade across the border. However, the trade volume among member states remained 1.3 % of GDP in 1989 and in 2007.[297] The figures for individual countries indicated that some countries witnessed a decline in corresponding trade in the period as seen in the two largest economies, Algeria and Morocco. However, the other countries recorded slight growth over the period. It appears that 18 years after the creation of the AMU there has been no enhancement of the trade relationship between member states.

Furthermore, the table also shows that trade among the Maghreb countries was very small in comparison with EU and USA.

Trade between Maghreb countries is about 3% of their total foreign trade, one of the lowest regional rates in the world[298]. A report by the World Bank[299] considers high tariff barriers to be among the main factors restricting economic integration in this region. The report goes on to say that tariffs in the Maghreb countries are almost double the world standard[300]. At the level of railway and motorways, the closed borders between Algeria and Morocco have affected cross-border transit and in consequence led to the flourishing of smuggling activities.

The lack of regional integration in Maghreb also led to much dependence of the five North African countries on Europe. In the case of Morocco's and Tunisia's exports, the EU receives 75% and 60% respectively.[301]

Several analysts estimate the non-Maghreb imports cost 2.5 points of GDP growth of each state [302] which costs the region 220,000 job opportunities annually[303]The lack of integration in the region is also harmful to attracting Foreign Direct Investments (FDI), which are necessary for job creation.

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https://www.researchgate.net/publication/222671105_Are_the_Arab_Maghreb_countries_really_integratable_Some_evidence_from_the_theory_of_cointegrated_systems accessed 22/4/2015 p 80

[297] Claire Brunel (2008) Op cit, p 11

[298]United Nations Economic Commission for Africa Office for North Africa, 'Analysis of development challenges and priorities for the revival of regional integration process', January 15, 2013- Rabat (Morocco) http://www.uneca.org/sites/default/files/uploaded-documents/RCM/reunion_de_concertation_avec_luma_et_les_oig-eng.pdf , accessed on 12/04/2015, p 5

[299] The World Bank, 'Economic Integration in the Maghreb', (The World Bank October 2010) , p 5

[300] Ibid, p 5

[301]Carnegie Middle East Center, 'Risks of Maghreb's Excessive Reliance on Europe',(Carnegie 2010) <http://carnegie-mec.org/publications/?fa=40860> accessed 25 March 2014

[302] Ibid

[303] World Bank Middle East And North Africa Region Integration In The Maghreb' (2010), Op cit, p 5

The closure of the border between Algeria and Morocco in 1994 was very detrimental to progress on economic integration in AMU because the two countries account for approximately 77 percent of the AMU population. [304]Only Tunisia allows free entry to its territory by citizens of all the other member states of AMU, free movement of people is between three member countries, which include Libya, Morocco and Tunisia. In, a further development, in 1992, the UN Security Council imposed an air and arms restriction on Libya in connection with the bombing of Pan Am Flight 103 in 1988. The other four AMU members decided to implement the Security Council decision leading Libya to boycott the AMU. And recently, in a very serious and negative development for regional integration in AMU, Tunisia announced its intention to construct a 160 km (100 miles) wall along its border with Libya in response to terror attack on a beach by a Tunisian gunman who is believed to have received training in Libya.[305]

The situation so far shows that this region does not properly implement and respect the spirit of the Treaty instituting the AMU, which aims to:

'*Strengthening ties of brotherhood which link the member states and their people to one another'*

The above examples of difficulties can be argued to account for the relative lack of progress with AMU integration. Hence, some commentators are of the view that there is an urgent need to address the difficulties and find effective solutions. The closure of the Algerian-Moroccan border undermines the free movement of workers, as there is need for migrant workers to cross the border at various points rather than having to cross by air. In addition, the Arab Spring uprising has created further uncertainty about the AMU's countries future.[306]

The Libyan revolution, which led to the fall of Gaddafi, has had a negative impact on the Tunisian economy, particularly in 2011. Tunisia's second economic partner after the EU is Libya. The unstable economic situation in Libya has thus affected the Tunisia economy

[304] Maghnia Crossing the Uncrossable Border , Mission Report on the Vulnerability of Sub-Saharan Migrants and Refugees at the Algerian Moroccan Border, December 2013, Euro-Mediterranean Human Rights Network, p 13

[305] Tunisia to build 'anti-terror' wall on Libya border, http://www.bbc.co.uk/news/world-africa-33440212 , accessed on 12/07/2015

[306] The Union of the Arab Maghreb and regional integration: Challenges and Prospects, http://epthinktank.eu/2014/01/16/the-union-of-the-arab-maghreb-and-regional-integration-challenges-and-prospects/ accessed on January 16, 2014

severely. During the Libyan revolution over 60,000 Tunisian migrant workers returned to Tunisia within the space of a few days and about 700,000 to 900,000 Libyan nationals sought refuge in Tunisia at the same time.[307] On the other hand, Libya after the revolution has imposed visa restrictions on Algerians, Moroccans, Egyptians, Syrians, Sudanese, Chadians and nationals of Niger. However, Tunisians is exempted from entry visa restrictions.[308] This new policy by Libya has clearly been a setback for AMU objectives because many of the countries and individuals affected by the visa requirement are member states and citizens of AMU.

On the other hand, Mauritania has made some progress by providing guarantees of equal treatment between Mauritanian and foreign individuals, which means that foreigners in the country including AMU citizens receive the same treatment as Mauritanians. This policy also extends to freedom of establishment and capital investment, freedom to transfer foreign capital, and the ability to transfer the professional income of foreign employees. AMU citizens, businessmen and investors are well positioned to take advantage of these policies. It may therefore be argued that the new direction taken by the Mauritanian government is a positive step for regional integration in the AMU, and that other member states ought to adopt similar policies.[309]

Furthermore, unlike the other RECs, AMU has no relationships with the AEC. It has not yet accepted the Protocol on relationships with the AEC. Additionally, according to 1991 Abuja Treaty, AMU is still at the pre-PTA level. [310]

Nevertheless, AMU has been described by the AU as a pillar of African integration.[311]

[307] Emanuele Santi, Saoussen Ben Romdhane and Safouane Ben Aissa, 'New Libya, New Neighbourhood: What Opportunities for Tunisia?', African Development Bank, January, January 2012, p 1,2
[308] Ibid, p 6
[309] Economic Commission For Africa, 'Best Practices in Regional Integration in Africa', Addis Ababa, Ethiopia, 6-8 February 2013, p 7
[310] AU Commission, Status of Integration in Africa (SIA IV). (AU 2013) p 19
[311] Calestous Juma, 'The New Harvest Agricultural Innovation in Africa', (Oxford University Press, 2011) p 220

4.5.3 The Policy of Free Movement of Workers in AMU

The objectives of Treaty Instituting the Arab Maghreb Union are:

Strengthening the ties of brotherhood which link the member States and their peoples to one another;
Achieving progress and prosperity of their societies and defending their rights;
Contributing to the preservation of peace based on justice and equity;
Pursuing a common policy in different domains; and working gradually towards achieving free movement of persons and transfer of services, goods and capital among them[312]

Apart from the Treaty that was signed in 1989, there was no protocol facilitating the free movement of persons that was put in place and what followed were agreements at a bilateral level which facilitated the free movement of persons. The free movement of persons is not guaranteed or facilitated by any signed multilateral agreement instead the movement of persons including workers is selective and obtained through bilateral agreements signed by the member states. Three bilateral agreements exist but they do not cover all member states. The three bilateral agreements are between Tunisia and Morocco, Tunisia and Algeria, and Tunisia and Libya.[313] Citizens of the states concerned are guaranteed the right to employment in the countries to the bilateral agreements. Citizens of the signatory states are also allowed to exercise any industrial, business or farming activity or any other recognised profession. But only the bilateral agreement between Tunisia and Morocco states that right to employment is guaranteed migrant workers from Tunisia in the same way as nationals with same rights and obligations.[314] In the bilateral agreement between Tunisia and Libya, the rights applicable to host state citizens apply to the citizens of the other country. As far as economic integration is concerned, less progress has been made and no effort has been made towards establishing a multilateral agreement that covers all the countries. With the exception of the 1991 agreement between AMU member states on social security, no other specific agreement or convention deals with the subject of worker migration.[315] That could be due to the fact that there are political disagreements between two of the member states that have led to the closing of the border between Algeria and Morocco, which could explain why the countries of this union

[312] Article 2 of treaty instituting the Arab Maghreb Union (with declara tion). Concluded at Marrakesh on 17 February 1989
[313] Mohamed Saïb Musette,(2006) Op cit, p 31
[314] Ibid
[315] Ibid, p 30

have opted instead for bilateral agreements. Therefore, if free movement of workers is to be achieved there is a need to have a comprehensive and effective agreement that covers all member states. [316]

However, once again political instability has presented the main difficulty in this sub-region, for example Arab Spring which saw leaders being overthrown in Libya, Egypt and Tunisia. The Arab Spring uprising has created further uncertainty about regional and economic integration in the AMU.[317] The Libyan revolution, which led to the fall of Gaddafi, had an adverse impact on the Tunisian economy, particularly in 2011. There was a result of the return to Tunisia of over 60,000 Tunisian migrant workers in a few days. However, the new governments in Libya and Tunisia agreed to work towards ensuring that citizens of both countries enjoy the right to freedom of movement as otherwise the economic integration project will be affected seriously.[318] On the other hand, Libya after the revolution has imposed visa restrictions to Algerians and Moroccans.[319] However, Tunisians are exempted from entry visa restrictions in view of the bilateral agreement between Libya and Tunisia. Visa requirements have clearly affected the progress of AMU integration and objectives. Nevertheless, one of the reasons why there appears to be slow progress in this sub-region concerning integration could be that three of the member states (Libya, Tunisia and Morocco) have bilateral agreements concerning movement of its citizens with European countries which they have all been ratified. However, there has been very limited progress in terms of promoting the policy on the free movement of persons and workers within AMU itself.

AMU countries need to overcome their political difficulties and endeavour to work together to transform their bilateral agreements into a multilateral framework to achieve at least the goals contained in Article 2 of Treaty Instituting the Arab Maghreb Union. On the other hand, there is need for greater clarity within the legal framework, which could further enhance and protect the principle of free movement of workers in this sub-region.

[316] Ibid, p 32
[317] Oliver Masetti et al, (2013) 'Tow Years of Arab Spring, Where are we now? What's next?', , Deutsche Bank AG, DB Research , 25/01/2013 <https://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000300328/Two+years+of+Arab+Spring%3A+Where+are+we+now%3F+What%E2%80%99s.pdf> accessed 6 February 2015, p 10
[318] Emanuele Santi, Saoussen Ben Romdhane and Mohamed Safouane Ben Aïssa1, Op cit, p 1,2
[319] Ibid p 6

4.6 The Economic Integration and Policy of Free Movement of Workers in South African Development Community (SADC)

4.6.1 Brief History of SADC

The aim of SADC is to promote sustainable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance and peaceful co-existence among member countries. The member countries include the following: Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.[320] SADC has a population of 277 million[321] and a combined Gross Domestic Product (GDP) of US$575.5 billion.[322]

The following map shows SADC location, [323]

Source: South African History Online (2015)

[320] Eric G. Berman and Kerry Maze, Regional (2012) Op cit, p 55

[321] SADC Regional Vulnerability Assessment and Analysis (RVAA) Synthesis Report (2013) http://www.sadc.int/files/3114/1172/2871/SADC_Regional_Vulnerability_Assessment_and_AnalysisRVAA_Synthesis_Report_2013.pdf accessed on 13/3/2015, p 16

[322]Colin McCarthy (2014) 'Industrial policy in Southern African Regional Integration and Development', (Stellenbosch: tralac) http://paulroos.co.za/wp-content/blogs.dir/12/files/2014/05/S14WP022014-McCarthy-Industrial-policy-in-Southern-African-regional-integration-development-20140508-fin.pdf accessed on 13/3/2015, p 5

[323] Southern African Development Community (SADC) http://www.sahistory.org.za/organisations/southern-african-development-community-sadc , accessed on, November 20, 2014

4.7.2 The Progress of Economic Integration in SADC

The main objective of SADC treaty is to, *promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;*[324]

Even though, the SADC Treaty does not provide a clear and detail plan for integration, the detail was provided in the Regional Indicative Strategic Development Plan (RISDP) of 2003. This strategic plan shows the project for SADC's integration and provides for the establishment of a free trade area by 2008, a customs union in 2010, a common market in 2015, monetary union in 2016 and a single currency in 2018. [325]

In SADC, the entry of citizens from a member country onto the territory of another member country is not subjected to obtaining a visa for a maximum period of ninety days per year. Authorization to reside in the territory of a member country must be obtained by applying for a permit from the authorities of the concerned country in conformity with the legislation of the Member State in question.[326]

Despite having several Articles that focus on economic integration such as Article 5, 21, 22 and 23,[327] SADC avoided inclusion of a policy on the free movement of workers and instead maintained restrictions on movement, with South Africa being in the forefront of protecting its territory from the free movement concept.

[324] Article 5(a) of SADC Treaty of Establishing SADC
[325] Trudi Hartzenberg (2011) Op cit, pp 5-6
[326] AU Commission, 'Status of Integration in Africa (SIA IV). (AU 2013)', p 13
[327] Article 5, the objectives of SADC shall be to a. promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; Article 21 – Areas of co-operation 1. Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit. 2. Member States shall, through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of cooperation; Article 22 – Protocols: 1. Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration; and Article 23 Stakeholders - 1. In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.

However, since there are at the moment differences in the laws of member states, the power given to the host state under article 27 of the SADC Protocol[328]appears as a weakness in community law as each member state can enact laws it deems necessary. Harmonisation of state (internal or domestic) laws is therefore called for and is really a very important issue.

The SADC region has also experienced its problems with disputed elections in some member countries like, Madagascar, Mozambique, Malawi and Zimbabwe. Furthermore, not all members have ratified protocols dealing with the economic integration. The problems in SADC are also found in other unstable economic regions where progress towards integration is moving at a very slow pace (if not halted). In the SADC there was the case where Zimbabwe was unhappy with the decision of the SADC Tribunal *(Mike Campbell and others v Government of Zimbabwe)* which went against the government[329]. The Tribunal became unpopular after passing a judgment in favour of white farmers led by the late Mike Campbell, whose land was seized by the Government of Zimbabwe in 2000. The judgement led to protests by Zimbabwe that its sovereignty was being undermined.[330] Unhappy with the decision, the SADC Tribunal was suspended in 2012. This showed the lack of the strength of the regional institution meant to implement agreements or protocols. Where a Tribunal is suspended because a member state is not happy with its decision this shows that Africa still has to do a lot if integration is to be achieved. In a new development the SADC Tribunal was restructured this time with a permission of hearing disputes between states but with individuals not allowed to bring cases against their governments to the Tribunal. Restricting the jurisdiction of a tribunal to hearing only interstate cases flies in the face of the goals of economic integration. In contrast, in the EU the most important aspect of integration was that it conferred legal standing on private individuals to bring cases in national courts under the principles of direct effect, indirect effect and state liability with a view to enforcing the rights of free movement in the EU.[331]

RECs should play a critical role in ensuring that member states comply with policies on integration, and with the legal and institutional framework for promoting the free movement of

[328] Article 27-Complementary Measures states that in order to assist in the enforcement of the Protocol on Free movement of persons, State Parties shall put in place such immigration, police, or other security co-operation arrangements as may be deemed necessary

[329] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008)

[330] Ray Ndlovu (2014) 'Sadc Tribunal back with mandate reduced to interstate cases' (RMB Business Day Live, 2014) <http://www.bdlive.co.za/africa/africannews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases> 20 August 2014

[331] Ibid

persons.[332] The inability of SADC to take effective measures against a defaulting member would seem to suggest that the organisation as a whole is there to serve the interests of the leadership rather the interests of the citizens. Zimbabwe should have been at least sanctioned or banished from SADC to show that the organisation is there to serve the interests of the citizens. The suspension of the Tribunal because the Zimbabwe government did not agree with the ruling serves to reinforce weaknesses in the legal and institutional framework of SADC in its quest to be a fully functioning REC.

4.7.3 The Policy of Free Movement of Workers in SADC

The SADC was established through the reorganisation of the Southern African Development Coordination Conference SADCC and was achieved by the SADC declaration and treaty signed in Namibia in 1992.[333] With the signing of the Treaty, SADC ceased being a conference to being a development community with an agreement to further integration of the community. [334] The SADC Treaty, its protocols and programmes clearly emphasise the duty to promote interdependence and integration for harmonious, balanced and sustainable development of the region, with the need to mobilise resources to promote economic integration. Furthermore, the objectives of the bloc are to increase regional and international trade for the achievement of economic growth. It is also worth mentioning that the majority of the countries in this bloc are English speaking.[335] In order to foster the interdependence of regional economies and allow for movement of workers in the sub-region, the 2005 Protocol on the Free Movement of Persons in SADC was signed and Article 3 of the protocol provides the following with the objective of conferring on every citizen of SADC:

a) the right to enter freely and without a visa the territory of another Member State for a short visit;

b) the right to reside in the territory of another Member State; and

c) the right to establish oneself and work in the territory of another Member State.

[332] Ashimizo Afadameh-Adeyemi and Evance Kalula (2011) 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community', in Anton Bosl et al, *Monitoring Regional Integration in Southern Africa* (Tralac, 2011) p 16-17

[333] SADC Declaration, Treaty and Protocol of the Southern African Development Community, (SADC, 1992) , p 5

[334] Thoko Kaime, (2004), 'SADC and Human Security: Fitting Human Rights into the Trade Matrix', African Security Review 13(1). 2004, p 109

[335] Original members of SADC were: Lesotho, Swaziland, South Africa, Malawi, Zambia, Zimbabwe, Namibia, Mauritius, Botswana, Seychelles and Republic of Tanzania.

Article 2 provides for the progressive abolition of controls on movements of citizens of a Member State at an internal border with another Member State.

This show that similar to the case of ECOWAS, legal provisions are in place for the free movement of people, but how they are enforced in practice is another matter.

In August 2005, the SADC Protocol on Movement of Persons[336] was adopted and subject to ratification by at least nine of member states. [337] The Protocol was in line with the completion of the SADC Treaty and in promoting the AU objective of encouraging the free movement of persons in African RECs. The Protocol was developed with the aim of progressively eliminating obstacles to the movement of persons within the region. One landmark of the Protocol was Article 14, which provided that within three years of entering the Protocol, citizens of member countries did not need a visa to enter countries of member states for a period of 90 days. This represented a major achievement for citizens of SADC though people intending to benefit under this policy by migrating to another member state needed to provide evidence of means to support themselves and also be in possession of valid travel document such as passport.

However, it can be stated that the 2005 SADC Protocol was specifically tailored for the movement of persons rather than workers. Although 13 members who signed and adopted the Protocol, it was ratified by only six members when it should have been ratified by at least two thirds (9 member states) for it to be harmonised in domestic laws. [338] It should be mentioned that when the 1996 original draft protocol facilitating the free movement was prepared, Article 23 of the draft clearly focused on the free movement of workers but was dropped in the final document adopted at the insistence of South Africa, Namibia and Botswana who felt they did not want to open up their borders to be swamped by people seeking work.[339] From the perspective of integration, it represented a missed opportunity for SADC opting to go for movement of persons rather than workers, which could have had wider repercussions for the whole continent because the other regions were likely to adopt the free movement of workers instead person by taking the lead from SADC. The abandonment of a specific policy on the

[336] SADC, Protocol on Facilitation of Movement of Persons (2005), 18 August 2005) http://www.sadc.int/documents-publications/show/800 , accessed on 29 July 2014

[337] Vincent Williams,(2006), 'In Pursuit of Regional Citizenship and Identity: The Free Movement of Persons in the Southern African Development Community', Policy, Issues & Actors: Vol 19, No 2, Johannesburg, March 2006, pp 7-8

[338] Adrian Kitimbo, (2014) 'Is it Time for Open Borders in Southern Africa? The Case for Free Labour Movement in SADC', Brenthurst Discussion Paper 4/2014, Strengthening Africa's economic performance, p 9

[339] Ibid

free movement of workers appeared to have had a negative impact on the momentum towards integration with only a few member states ratifying the protocol (South Africa, Mozambique, Botswana, Lesotho and Swaziland) [340] Zambia only ratified it in 2013 with the aim of increasing tourism rather than economic integration.[341] As of 2015 it has been ten years since the SADC Protocol on Free Movement of Persons was adopted and not all members have ratified the protocol highlighting the challenges and obstacles obstructing efforts to achieve regional integration and free movement of persons not to mention workers (Angola, Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Namibia, Seychelles, Tanzania and Zimbabwe, still have not ratified the Protocol). [342] The precise details of the application of the policy on movement of workers was left to be dealt with under national laws although citizens are allowed to move under article 14 of SADC protocol on facilitation of Movement of Persons while the right of establishment is provided under Article 18.

The use of bilateral agreements for labour movement within SADC, in particular South Africa, means that adoption of a community-wide policy on free movement of workers, will be more difficult to achieve because those member states with bilateral agreements would be very reluctant to jeopardise the benefits which they and their citizens currently enjoy under such bilateral agreements.[343] However, by failing to allow the free movement of workers within the SADC region, South Africa had to cope with shortages of highly skilled labour. Furthermore a lot of differences exist in national laws regarding recruitment of skilled workers when the region was supposed to be harmonising.[344]

[340] Ibid
[341] Lusaka Times, 'Zambia agrees to free movement of persons in SADC region' Lusaka Times (Lusaka 27 March 2013) http://www.lusakatimes.com/2013/03/27/zambia-agrees-to-free-movement-of-persons-in-sadc-region/ accessed on 29 July 2014
[342] John O. Oucho and Jonathan Crush (2001), 'Contra Free Movement: South Africa and the SADC Migration Protocols', Africa Today, Vol 48, Number 3, Fall 2001, Project Muse, p 146
[343] Adrian Kitimbo, (2014) Op cit, p 6
[344] Ibid, p 10

4.8 The Economic Integration and Policy of Free Movement of Wokers in Economic Community of West African States (ECOWAS)

4.8.1 Brief History of ECOWAS)

The idea of the creation West African community first came from President William Tubman of Liberia in 1964. However, his call came to nothing.

In April 1972, President Gowon of Nigeria and President Eyadema of Togo again called for the creation of ECOWAS. On 28 May 1975, 15 West African countries signed the treaty for an ECOWAS (Treaty of Lagos). The protocols launching ECOWAS were signed in Lomé, Togo, on 5 November 1976. In 1977 Cape Verde joined ECOWAS, while in 2002 Mauritania left it. ECOWAS was designated one of the five regional pillars of the African Economic Community (AEC). Together with COMESA, ECCAS, IGAD, and SADC, ECOWAS signed the Protocol on Relations between the AEC and Regional Economic Communities (RECs) in February, 1998.

The following map shows the location of the ECOWAS[345]

Source: IOM (2014) [346]

[345] Mariama Awumbila, et al, 'Across Artificial Borders :An assessment of labour migration in the ECOWAS region', (International Organization for Migration (IOM)2014) p 7

[346] Ibid, p 7

4.8.2 The Economic Integration in ECOWAS

The Aims and Objectives of creating the ECOWAS is '*to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent'*[347]

Thus the ECOWAS objectives is to promote regional economic stability, develop the standard of living of their people, promote freedom of movement of persons, capital, services, agriculture telecommunication, customs union, energy and development transportation. Amongst other reasons for the creation of ECOWAS is the desire to overcome economic weaknesses and to promote close political ties amongst member states.[348]

ECOWAS has made great steps in the movement of persons.[349] In the ECOWAS, visas are not required for nationals of member states within the community who travel across member states. Residents of ECOWAS can travel anywhere within the bloc freely and carry out any legal activity. ECOWAS introduced an ECOWAS passport in 2007 that entitles the holder to enter any member states without having to complete immigration forms.[350] The ECOWAS passport is currently used in Benin, Guinea, Liberia, Niger, Nigeria and Senegal. In addition, ECOWAS passport can be used internationally. [351]This is a significant achievement in terms of enhancing integration. Furthermore, ECOWAS adopted measures facilitating the movement of persons transported in private or commercial vehicles where such transport can remain in member states for period not exceeding 90 days for private vehicles and 15 days for commercial vehicles.[352] ECOWAS also introduced brown card relating to insurance of motor vehicles, which has same effect in member countries meaning those producing it, are able to travel in member states without problems as long as they have all supporting documents. The following twelve member states instituted the ECOWAS brown card: Benin, Burkina Faso, Ivory Coast, Ghana, Guinea, Guinea Bissau, Mali, Niger, Nigeria, Senegal, Sierra Leone and

[347] Article 3(1) of Treaty Of ECOWAS
[348] Victor Clark Esekumemu, (2012) Op cit, p 66
[349] Vincent Itai Tanyanyiwa and Constance Hakuna (2014) Op cit, p 109
[350] Mariama Awumbila, et al, (2014) p 80
[351] Addis Ababa and Ethiopia, 'Eighth Session of the Committee on Trade, Op cit, p 7
[352] Mariama Awumbila, et al, (2014) p 80

Togo.[353] It can therefore be argued that ECOWAS has made significant progress in improving the mobility of its people within regional border. [354]

ECOWAS has the following institutions: The Commission, The Community Parliament, The Community Court of Justice and ECOWAS Bank of Investment and Development (EBID). The Commission and ECOWAS Bank are the two main institutions designed to implement policies, monitor programmes and implement projects in member states. The projects cover telecommunications, agriculture, energy and water resources and road construction in member states. In addition, according to the 1991 Abuja Treaty, ECOWAS is at PTA level and it has been working towards achieving Customs Union level. [355] The tables below show the progress of integration in the ECOWAS[356] with actions taken by ECOWAS countries in the implementation of the ECOWAS Free Movement Protocols as of 2013.

Progress on Economic Integration in ECOWAS

Country	Abolition of Visa and Entry Requirements for Stay up to 90 Days	Introduction of ECOWAS Travel Certificate	Introduction of ECOWAS Passport	Harmonised Immigration and Emigration Forms
Benin	Yes	No	Yes	No
Burkina Faso	Yes	Yes	No	No
Cape Verde	Yes	No	No	No
Cote D'Ivoire	Yes	No	Yes	No
Gambia	Yes	Yes	No	No
Ghana	Yes	Yes	Yes	Yes
Guinea	Yes	Yes	Yes	No
Guinea Bissau	Yes	No	Yes	No
Liberia	Yes	No	Yes	No
Mali	Yes	No		No
Niger	Yes	Yes	Yes	No
Nigeria	Yes	Yes	Yes	No
Senegal	Yes	No	Yes	No

[353] Ibid

[354] Atieno Ndomo,'Regional Economic Communities in Africa', A Progress Overview, (Study Commissioned by GTZ, May, Nairobi May 2009) http://www.g20dwg.org/documents/pdf/view/113/ accessed on 20/03/2015, p 20

[355] Ibid

[356] Mariama Awumbila, et al, (2014) Op cit, p 67

Sierra Leone	Yes	Yes	Yes	Yes
Togo	Yes	No	Yes	No

Source: the Researcher + IOM (2014) [357]

From the table above, it is can be seen that the free movement of persons within ECOWAS is guaranteed for 90 days where citizens of member states do not require a visa. However, not all members have implemented the use of ECOWAS travel certificate, which can be one of the challenges of integration where not all members ratify the protocols. Less than 50% of the 15 members agreed to the use of the ECOWAS travel certificate, meaning the free movement of persons will take long to achieve as long as member states do not implement the agreed protocols. However, the use of an ECOWAS passport was adopted in 73% (11 out of 15 members) of interest is the fact that of the eight members not using the ECOWAS certificate, only Cape Verde and Mali do not use the ECOWAS passport and the rest use the ECOWAS passport. Of the fifteen member states, only 3 (Ghana, Liberia and Sierra Leone) have harmonised immigration and emigration forms. This further highlights the absence of enforcement mechanism where member states have not implemented agreed protocols and the situation is allowed to continue without corrective actions being taken.

In addition, monetary zones in ECOWAS provide another aspect of the economic integration in this region.

The two potential monetary zones in ECOWAS are the West African Economic and Monetary Union (WAEMU) and West African Monetary Zone (WAMZ). WAEMU being a monetary union of former French colonies was established in 1994 and its members include Benin, Burkina Faso, Cote d'Ivoire, Mali, Niger, Senegal, Togo and Guinea Bissau (a former Portuguese colony). The WAEMU member states use the CFA franc (Communauté Financière Africaine) whose rate of exchange is tied to the Euro and backed by the French speaking country) in 2000 decided to form the West African Monetary Zone (WAMZ). The WAMZ Eco currency was expected to be in operation by 1 January 2015 however, the decision was finally abandoned with focus on having a single currency for ECOWAS region.[358]

[357] Ibid

[358] Jessica Acheampong, 'WAMI Abandons ECO for New Currency - Graphic Online' (9 September 2015) <http://www.graphic.com.gh/business/business-news/49114-wami-abandons-eco-for-new-currency.html> accessed 25 October 2015

The expectation of merging the ECO and CFA franc to a single currency at some point could be considered a big challenge. Take for example the fact that WAMZ was supposed to have been launched in 2003 but this was postponed to 1 July 2005 and then to 1 January 2015 and was finally abandoned in September 2015.[359] The difficulties experienced by WAMZ were a cause for concern because it would appear that the motivation for its establishment was to rival the CFA franc. Rather promoting economic integration, member states of ECOWAS seen to split themselves along colonial lines, which raises serious questions about the commitment of member states towards genuine economic integration in the region. . If the aim is to have a single currency within ECOWAS, why not work on the adoption of a widely used currency which is already in circulation? This could be an indication that member states place far more importance on their own national interests and tend to work towards promoting and preserving those interests within the regional organisation. The fact that WAZM found it difficult to implement the proposed ECOWAS common currency is a further indication that economic integration in AU context will be difficult to achieve if member states are not prepared to adopt a common position without the need to compete against each other on the basis of colonial histories or alignments. At the time of merger, the real challenge will be whether the various groups are prepared to give up their own currencies for a single regional currency.

On the other hand, in order to achieve the aims of the community the revised ECOWAS Treaty of 1993, provides in Article 3(2)(d)(iii),

"the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital, and to the right of residence and establishment".

The substantive provisions on "Immigration" under Article 59(1) are as follows:

a) Community citizens are granted the rights of entry, residence and establishment and Member States undertake to recognize these rights of Community citizens in their territories in accordance with the provisions of the Free Movement Protocols;

b) Member States undertake to adopt all appropriate measures to ensure that Community citizens fully enjoy the rights granted to them;

c) Member States undertake to adopt, at national level, all measures necessary for the effective implementation of the provisions of this Article.

[359] Ibid

However, to achieve these goals would require a comprehensive review of national laws, immigration policies, customs formalities and other laws with the aim of removing all administrative obstacles and restrictions that go against the exchange of capital, services, persons and goods among member states. [360]

Examples of such obstacles to integration include the following: in Liberia non-nationals are not allowed to establish business. While, in Ghana the domestic laws makes it obligatory for ECOWAS nationals to register their businesses with a capital investment the equivalent of thirty thousand US dollars before they can operate.[361] Therefore, and despite implementing measures towards free movements, there nonetheless seems to be a lack of awareness on the part of the people in government departments of the right of free movement to which citizens of other member states are entitled. There is therefore a need for awareness campaigns in member states so that both public officials and citizens are well informed regional integration policies and entitlements as that can help citizens in demanding their rights to freedom of movement. Furthermore, where they encounter problems then the laws will need enforcing. An effective awareness and enforcement regime is a critical factor to the implementation and success of the regional policy on free movement.

ECOWAS has witnessed a lot of political instability. Such instability has not been restricted to major countries such as Nigeria and Ivory Coast, but has also included smaller countries such as Liberia and Sierra Leone. For instance, during the Liberian and Sierra-Leone crisis respective ethnic groups from both countries supported their fellow kinsmen in the other country.[362] There are also conflicts such as the crisis of terrorism in West Africa, especially in Nigeria where the Boko Haram has been causing insecurity in the northern parts.[363] In addition, from the time since the end of the war in Liberia and Sierra Leone there have been a large number of small arms and light weapons in the West African region. These weapons have caused civil conflict, ethno and religious crises, crimes and political tensions in the ECOWAS sub-region, which has affected investment and often leads to capital flight. [364]

[360] Victor Clark Esekumemu, (2012) Op cit, p 68
[361]Ibid
[362] Ibid, p 69
[363] Ibid, p 68
[363] Ibid, p 69
[364] Ibid, p 68
[364] Ibid, p 69

One of the major challenges in the ECOWAS is the absence of national identity cards in some member states, thus causing the difficulty of establishing the nationalities of travellers. Moreover, Article 4 of the ECOWAS Protocol provided: *Member States shall reserve the right to refuse admission into their territory any Community citizen who comes within the category of inadmissible immigrants under its laws.* This article gave Member States the power to determine under its internal laws and to refuse entrance of a community citizen considered as prohibited immigrant.[365] This leaves at the discretion of member states different and sometimes conflicting interpretations of the word 'inadmissible' in relation to the exclusion of ECOWAS citizens from entry and residence in other member states, which can be disadvantageous to the policy on free movement. Clarity in the legal framework is important because member states can exploit loopholes in the law created by the lack of clarity in order to avoid fulfilling their obligations under the protocols.

4.7.3 The Policy of Free Movement of Workers in ECOWAS

The idea for the ECOWAS Treaty was pioneered by Nigeria.[366] The ECOWAS Treaty of 1975 provides in Article 27(1) that citizens of Member States shall be regarded as Community citizens and that member states undertake to abolish all obstacles to free movement within the Community. Article 55 of the amended ECOWAS Treaty provided that there shall be total elimination of obstacles to the movement of four factors (people, goods, capital and services). There will be right of entry, establishment and residence in member states for citizens of other member states.

The Treaty envisaged a homogenous society that once existed in the sub-region. In their colonial past, the people of West Africa regarded themselves as being members of a single community with a shared cultural heritage and common customs and belief systems. [367] The Protocol on Free Movement of Persons and the Right of Residence and Establishment of May 1979 included specific provisions on free mobility of persons. Stage one of the Protocols, guaranteeing free entry of community citizens without visa for 90 days, was ratified by Member States in 1980 and put into effect in an era of free movement of ECOWAS citizens within member States.

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[365] Ibid, p 62

[366] Olatunde J. B. Ojo, 'Nigeria and the Formation of ECOWAS', in International Organization, (Cambridge 1980) Volume 34 / Issue 04 / Autumn 1980, p 573

[367] Roger Gravail, (1985)'The Nigerian Alien Expulsion Order of 1983' Oxford Journals Social Sciences African Affairs Vol 84, Issue 337, 84 African Affairs London, p 529

Article 2 of the amended ECOWAS Treaty provides that:

1. *The Community citizens have the right to enter, reside and establish in the territory of Member States.*
2. *The right of entry, residence and establishment referred to in paragraph 1 above shall be progressively established in the course of a maximum transitional period of fifteen (15) years from the definitive entry into force of this Protocol by abolishing all other obstacles to free movement of persons and the right of residence and establishment.*

Article 3 of the amended ECOWAS Treaty provides that:

1. *Any citizen of the Community who wishes to enter the territory of any other Member State shall be required to possess a valid travel document and an international health certificate.*
2. *A citizen of the Community visiting any Member State for a period not exceeding ninety (90) days shall enter the territory of that Member State through the official entry point free of visa requirements. Such citizen shall, however, be required to obtain permission for an extension of stay from the appropriate authority if after such entry that citizen has cause to stay for more than ninety (90) days.*

As per the above articles, the right of entry, residence, and establishment were to be progressively established within 15 years[368] from the definitive date of entry into force of the protocol. The implementation of the first stage over the first five years (5) years abolished requirements for visas and entry permits. Community citizens in possession of valid travel documents could enter Member States without a visa for up to 90 days. Nevertheless, Member States under Article 4 can refuse admission into their territory of any Community citizen who comes within the scope of prohibited immigrant under its laws.

'*Member States shall reserve the right to refuse admission into their territory to any Community citizen who comes within the category of inadmissible immigrant under its laws'.*

The problematic aspect of this exception relates to the fact that the phrase 'inadmissible immigrant' has no clear definition in the Protocol. The definition (and in effect the

[368] There are still problems being faced with the implementation of the protocol on free movement of persons, right of entry, establishment and residence. Leaders tasked the review of the protocol and were supposed to have reported by November 2013. Still work in progress. http://www.ecowas.int/life-in-the-community/education-and-youth/ accessed on 17/012015

interpretation of this exception) is left to the local laws of each Member State. This leaves the member states with a lot of legislative and judicial discretion in deciding who they should admit and who they deemed to be inadmissible.

The delayed of stage (Right of Residence) came into force in July 1986 when all Member States ratified it, but the Right of Establishment has not been implemented as of September 2015. In 1992, the revised ECOWAS Treaty confirmed the right of citizens of the Community regarding entry, residence, and settlement and enjoined Member States to recognise these rights in their respective territories. The launch of the ECOWAS Passport in May 2005 added an improved aspect to the free movement of Community citizens. However, it can be argued that without right of establishment, the free movement of persons cannot be regarded as complete.

Although governments have been at the forefront of signing agreements supporting economic integration and allowing for the free movement of persons not as much has been achieved in terms of implementing the signed agreements. The problem of multiplicity of regional economic groupings has affected ECOWAS as it recognises some of the groupings, which are not recognised by the AU. These groupings include the Senegal River Development Organisation, the Mano River Union, the Lake Chad Basin Commission and the West African Economic Community. Members of ECOWAS belong to some of these organisations, which have effectively weakened the implementation of most signed agreements. There are challenges posed by being members of these blocs because the objectives are not necessarily the same as those of ECOWAS. [369] The other problem for ECOWAS is the re-grouping of countries in francophone (French colonies), Anglophone (English) and Lusophone (Portuguese). It is a generally held view among commentators that agreements at the lower sub-regional levels have been effective implying that there is need to recognise the integration at a lower level rather than at the ECOWAS level.[370] The major achievement for the ECOWAS has been the free movement of persons without a need for a visa. The main problem in the ECOWAS has been the failure to harmonise national laws with the Protocol, which means citizens still face administrative and bureaucratic obstacles when crossing borders as they are still required to comply with national immigration formalities. [371]

[369] Aderanti Adepoju, (2011) 'Operationalising the ECOWAS Protocol on Free Movement of Persons: Prospects for Sub-Regional Trade and Development (Draft)', (Network of Migration Research on Africa 2011) p 4
[370] Ibid, p 5
[371] Ibid, p 9

Again, the free movement of workers in the case of ECOWAS is not clearly defined. At the moment there is no clarity as to the precise scope of the policy on free movement of workers. Member states still retain a discretion to require applications for permits for those looking for work which means the domestic markets remain closed to those seeking work and entry is only open to tourists or visitors, which can be argued meets the requirements of the Abuja Treaty. The provisions of the Abuja Treaty are open to different interpretations, which is a disadvantage. A further problem lies in the fact that the police, immigration officers, gendarmerie, customs officers and personnel of other relevant agencies charged with the responsibility of entry and departure formalities in the common borders are not well versed with the protocol on free movement of persons so that citizens from other member states are harassed and in some cases required to bribe corrupt officials when they are supposed to move unhindered without obstacles. There is need for revisiting the protocols in ECOWAS so that there is clarity on the meaning, scope and application of the policy on free movement of workers.

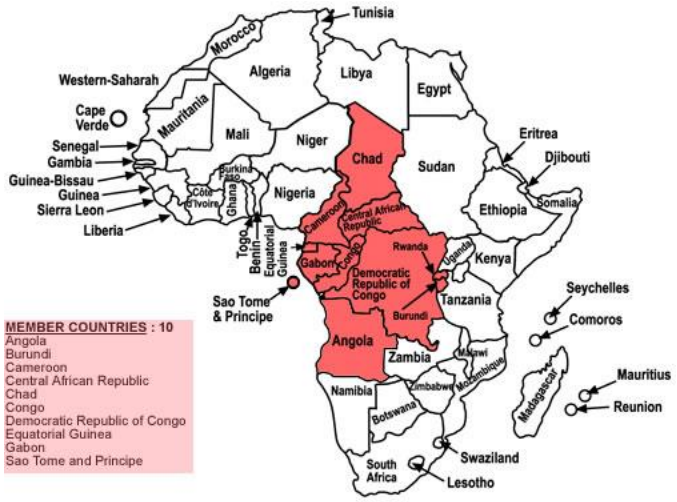
4.8 The Economic Integration and the Policy of Free Movement of Workers in Economic Community of Central African States (ECCAS)

4.8.1 Brief History of ECCAS

ECCAS was established in October 1983 by members of Central African Customs and Economic Union and Economic Community of the Great Lakes Countries (ECGLC). It consists of ten countries that include the following: Angola, Burundi, Cameroon, Central African Republic, Chad, R Congo, D R Congo, Equatorial Guinea, Gabon and Sao Tome Principe.

The aims of the community are stated in Article 1 of the Treaty Establishing the Economic Community of Central African States which stated the basic objective of the Community as being to promote and strengthen harmonious cooperation in all parts of economic and social activity in order to raise the living standard of its people. [372]

The following map shows the location of ECCAS



ECCAS Member States

Source: African Union, *ECCAS Overview* (2014)

[372] Treaty Establishing the Economic Community of Central African States (ECCAS)

4.8.2 The Economic Integration in ECCAS

In ECCAS, there has been less progress in terms of facilitating the free movement of people. In some ECCAS countries some member states require visas from visitors from other member states to enter their territories. These member states include Angola, Equatorial Guinea, Gabon and Sao Tome Principe. Security problems are given as the main reason for delaying implementing decisions taken at the regional level, meaning integration is slowed down as a result. There seems to be a lack of political will on the part of some member states of ECCAS to seriously address the problems affecting progress on economic integration.[373]

In ECCAS there is a problem of non-payment of membership fees by member countries and also conflicts that affected member states within the region. [374] ECCAS has the potential of becoming one of the pillars of AEC if it can overcome political problems among member states. The member states (for example DR Congo, Equatorial Guinea and Angola) are development of Africa. When ECCAS can achieve full functionality without political problems and wars, it can work towards achieving not just full economic integration within the region but also act as a catalyst for African economic development.

According to the 1991 Abuja Treaty, ECCAS is at the PTA stage and should be working towards achieving Customs Union status. [375] However, ECCAS faces the following challenges that were confirmed at a Heads of States meeting on 14 November 2014 held in N'djamena, the capital of Chad, where the Secretary General of the organisation highlighted the fact that the economic bloc faced the following problems or challenges in the integration effort despite being in favour of deep structural and institutional reforms that would result in a viable and strong regional economic bloc:[376]

1. The slow pace of institutional reforms in ECCAS needed acceleration so that the region can complete its goals of becoming a fully functioning REC by 2017. No progress has been made since 2007 on the harmonisation and rationalisation of the economic communities that merged to form ECCAS. This implies that members continue to operate as if they belong to their old organisations.

[373] African Union Commission, Status of Integration in Africa (SIAIV). (African Union 2013) p 82
[374] Ibid
[375]Ibid
[376]Economic Community of Central African States ' Structural Reforms and Institutional to ensure the success of regional integration in Central Africa (ECCAS, 2014) <http://www.ceeac-eccas.org/index.php/en/actualite/secretariat-general/91-des-reformes-structurelles-et-institutionnelles-pour-garantir-le-succes-de-l-integration-regionale-en-afrique-centrale> Accessed 20 November 2014

2. Most member states have not been paying their financial contributions into the integration programme funding mechanism called the Community Integration Contribution.

Non-compliance or application by the majority of member states of the provision for the free movement of people and goods in the Free Trade Area The Secretary of ECCAS was worried by the slow progress in integration despite the region being endowed with a lot of resources and having the potential to be a pillar of economic integration within the AU. The main source of the problem as clearly stated in the meeting was the lack of harmonisation in ECCAS. This has been identified as a problem in the SADC and COMESA as well. This highlights the fact that membership duplication still exists and as long as there is no mechanism to tackle it, economic integration will take long to achieve and the free movement of workers will remain unachieved. Compared to other RECs of the Continent, Central Africa has limited basic infrastructure.[377]

Furthermore, to highlight the problems posed by multiplicity of membership, the Economic Community of Great Lakes Countries (ECGLC) made up of Burundi, Democratic Republic of Congo, Rwanda, and all members of ECCAS signed an agreement on 20 March 2014 in Arusha Tanzania[378] with the East African Community whose members include Burundi, Kenya, Rwanda, Tanzania, and Uganda. The agreement includes among other things regional integration with measures aimed at comprehensive borders management, eliminating non-tariff barriers, facilitating free movement of goods, people, services and capital. The signing of the agreement by Economic Community of the Great Lakes Countries (ECGLC)[379] and EAC is a further indication of the fact that integration effort in Africa is uncoordinated and highlights the role played by those RECs not recognised by the AU in undermining the integration effort. Worse still, the AU appears to have no say on what is happening despite

[377] 'African Development Bank African Development Fund Central Africa Regional Integration Strategy Paper (Risp) 2011-2015 Regional Department Center (Orce) Nepad, Regional Integration And Trade Department (Onri) Table Of Contents List Of Boxes, Tables And Ann' (2011) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/RISP%20CENTRAL%20AFRICA-ECCAS%20English%20FINAL.pdf> accessed 1 January 2015.p 10

[378]East African Community 'Great Lakes Economic Community (CEPGL) and EAC Sign Memorandum of Understanding' (EAC, 2014) <http://www.eac.int/index.php?view=article&catid=146%3Apress-releases&id=1525%3Agreat-lakes-economic-community-cepgl-and-eac-sign-memorandum-of-understanding&format=pdf&option=com_content&Itemid=194> Accessed on 20 November 2014

[379] Economic Community of the Great Lakes Countries (ECGLC) (in French CEPGL - Communauté Économique des Pays des Grand Lacs)

being an interested party in regional integration. When it was hoped that those RECs not recognised would be harmonised, what happens in practice is that such RECs have the potential to enter into agreements that go against the aims of integration. It could be argued that the lack of supervision from the AU is responsible for the situation prevailing in the sub-regional communities.

There are also some new challenges in this region. Recently, in the Central African Republic, there was a civil war between Christians and Muslims[380], which led to the displacement of millions of people. Internal conflict affects the region and the regional integration efforts are affected by the instability and displacement of a lot of people. The conflict has almost turned into genocide of ethnic.[381] This instability is not limited to Central African Republic alone with other countries to the north affected as well.

4.8.3 The Policy of Free Movement of Workers in ECCAS

The main aim of creating this community has been highlighted in Article 4 (1) of ECCAS treaty, which provided that the aim of the Community is to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity, and fostering peaceful existence between members of the Community. Furthermore paragraph (e) of Article 4 states that member states should progressively abolish obstacles to the free movement of persons, goods, services and capital, and to right to establishment. Article 40 dealing with Freedom of Movement, Residence and Right of Establishment states that citizen of member states shall be deemed to be nationals of the Community. Articles 4 and 40 conferred the right of citizens to move freely within the region.

However, not all Member States have recognised free movement and establishment as a priority, despite the fact that labour migration is an important facet of life in Central Africa. Gabon and Equatorial Guinea hosts the largest number of migrant workers in Central Africa.[382] Most of migrants work in the construction and oil industries. However, the recurring political crisis between Christian and Muslim people in the West and Central African region represents a challenge for the affected countries and for the integration of the

[380] Angela Meyer, (2015) Op cit, p 5
[381] Alexis Arieff and Tomas F Husted (2015) Op cit, p 1
[382] IOM. Regional Strategy for West and Central Africa 2014 – 2016, United Nations, Department of Economic and Social Affairs, Population Division, September 2013, p 7

region as a whole.[383] In addition, this region has also been affected by financial and economic crises as well as political and human conflicts in the Great Lakes region, which proved divisive to its member states and detrimental to the integration effort. [384]

Therefore, it could be argued that as a result of these various obstacles, the pace of integration has been rather slow and what has been achieved in this economic bloc is well below its true potential. The efforts towards integration have been undermined by multiplicity of membership. Economic and Monetary Community of Central Africa (or CEMAC from its name in French) hampered efforts towards integration; however, that was overcome when CEMAC agreed to be integrated into ECCAS. Despite agreeing to be integrated into ECCAS, CEMAC continues to be in existence and has better organisational and institutional structures than ECCAS. Similar to ECOWAS and AMU where secondary agreements exist between member states, multiplicity of regional agreements leads to fragmentation in the approach to integration with conflicting objectives, policies and priorities, thus undermining the integration effort of the larger bloc. For example, Equatorial Guinea discovered oil reserves and is the largest oil producer in Africa, but had to expel illegal migrants who were attracted to working in the oilfields.[385] Rather than allowing for the free movement of workers, Equatorial Guinea has policies that hinder the free movement of workers.

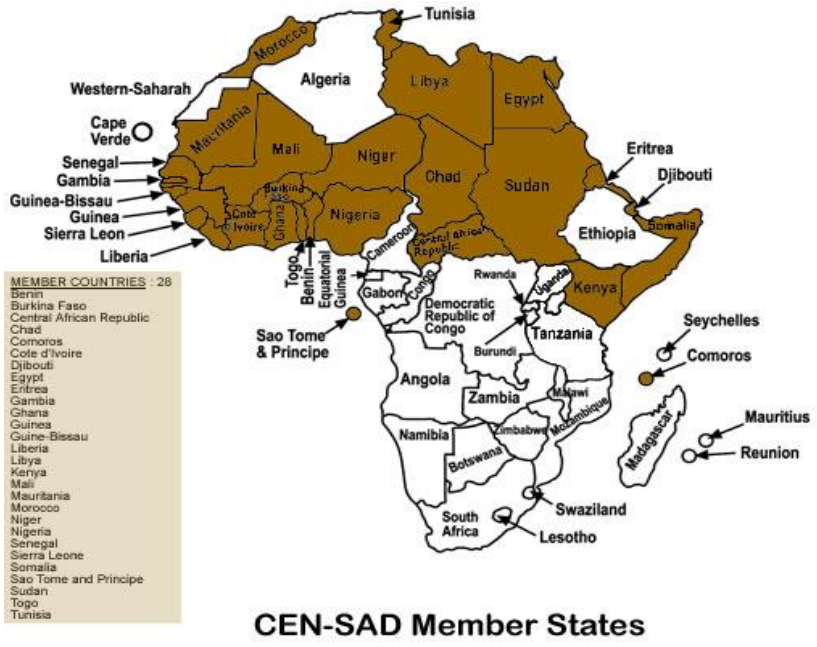
[383] Amadou Sy and Amy Copley, op cit, p 5
[384] African Union, 'Africa's Regional Economic Communities Briefing to UN Member States', (AU,16 December,2009)<http://www.un.org/africa/osaa/reports/newreports/Background%20Note%20to%20the%20RECS%20briefings%20to%20Member%20States.pdf > accessed 25 may 2014
[385] Moki Edwin Kindzeka, 'Equatorial Guinea Expels Illegal Immigrants' (February 2015) <http://www.voanews.com/content/equatorial-guinea-illegal-immigrants-expelled-after-african-football-matches/2636240.html> accessed 25 October 2015

4.9 The Progress of Economic Integration and the Policy of Free Movement of Workers in Sahel-Saharan States (CEN-SAD)

4.9.1 Brief History of CEN-SAD

CEN-SAD known as the Community of Sahel-Saharan States was established in February 1998 in Libya. Member States of CEN-SAD consist of Benin, Burkina Faso, Chad, Central African Republic, Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Guinea Bissau, Guinea, Gambia, Ghana, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, Somali, Sudan, Tunisia and Togo. Cape Verde was expected to become the 29th member of CEN-SAD following an announcement in Libya on 20 June 2009. However, that is still outstanding.[386]

The following map shows the location of CEN-SAD [387]



Source: United Nations Ecconomic Commission for Africa (UNECA) (2014)

[386] Gilbert M. Khadiagala, (2011)'Institution Building for African Regionalism' Asian Development Bank, Working Paper Series on Regional Economic Integration No. 85 | August 2011, p 17

[387]CEN-SAD - The Community of Sahel-Saharan http://www.uneca.org/oria/pages/cen-sad-community-sahel-saharan-states ,accessed on, November 7, 2014

4.9.2 The Progress of Economic Integration in CEN-SAD

The main objectives of CEN-SAD is the establishment of a regional Economic Union based on the implementation of a community development plan complementing local development plans of member states in different fields of socio-economic development and removal of restrictions inhibiting free movement of persons, capital, free trade and movement of goods, and services among member states.

In this region visa exemptions apply in principle only to diplomatic and service passports. There is therefore need to extend the freedom of movement to other professionals such as, sportspersons, businessmen and academics.[388] In terms of implementation there is also need for member countries to ratify the decision that was signed by 17 member states in 2009 allowing holders of duly issued and valid diplomatic passports entry for a maximum of 30 continual days without visas into other member countries as long as the issuing state and the receiving state have signed and ratified the decision.[389]

The majority of AMU and ECOWAS members as well as a number of ECCAS and COMESA countries have joined CEN-SAD leading to overlapping with several other regional communities. CEN-SAD has not made any substantial progress towards AEC integration. So far, it has been mostly active as a political organisation. [390]

CEN SAD is still at the pre-PTA stage where negotiations between member states are still ongoing.[391] Most members belong to other RECs so there is little motivation to transform CEN-SAD into a truly integrated common market. The AU ought not to recognise CEN-SAD as a regional economic community as it represents a waste of effort because up to date no progress has been made at the first level of regional economic integration .CEN-SAD has 28 member states representing more than half of the membership of AU, with most members belonging to ECOWAS and AMU. Being a large group, almost the size of the EU in terms of land area and failing to move the integration forward raises a lot of questions about the group

[388] Addis Ababa and Ethiopia, 'Eighth Session of the Committee on Trade, Regional Cooperation and Integration Best Practices in Regional Integration in Africa' (2013) <http://repository.uneca.org/bitstream/handle/10855/22132/b10696192.pdf?sequence=1> accessed 20 February 2014, p 6

[389] AU Commission, Status of Integration in Africa (SIA IV), (AU 2013) p 83

[390] Tesfaye Dinka and Walter Kennes, (2007) op cit, p 11

[391] What is CEN SAD? AU (2014). http://www.au.int/en/recs/censad accessed on 20/02/2014

and also AU's ability to drive the process forward. In addition, CEN-SAD progress has been limited as it essentially focuses on finding political solutions to conflicts in Somalia and Darfur conflict thus devoting less effort to economic and integration matters.[392] CEN-SAD is one example of a grouping that needs to be re-examined and if need be dismantled by reason of multiple and overlapping membership. This is because at present it seems to be standing in the way of, rather than promoting, the integration effort.

4.9.3 The Policy of Free Movement of Workers in CEN-SAD

The eventual paralysis of the Arab Maghreb Union (AMU) was due to political tensions between Morocco and its North African neighbours and the AU over recognition of Western Sahara, which was under Moroccan control.[393] This situation brought Libya into African regional politics with its pioneering establishment of the CEN-SAD in 1998.

The objective of CEN-SAD is to achieve the aims and objectives of the Abuja Treaty of June 1991:

Establishment of a comprehensive economic union based on a strategy implemented in accordance with a developmental plan that would be integrated in the national development plans of the Member States. It includes investment in the agricultural, industrial, social, cultural and energy fields.

Elimination of all obstacles impeding the unity of its Member States through adopting measures that would guarantee the following:

Facilitating the free movement of individuals, capital and meeting the interest of Member States citizens.

(b) Freedom of residence, work, ownership and economic activity

(c) Freedom of the movement of national goods, merchandise and services

(d) Encouragement of foreign trade through drawing up and implementing an investment policy for Member States

(e) Enhancement and improvement of land, air and sea transportation and telecommunications among Member States through the implementation of joint projects

[392] Gary Clyde Hufbauer; Claire Brunel, Op cit, p 15
[393] Shaw, N. Malcolm , *International Law*, (5th edition, Cambridge, 2003) p 213

(f) Consent of the community Member States to give the citizens of Member States the same rights and privileges provided for in the constitution of each member state.

(g) Coordination of pedagogical and educational systems at the various educational levels, and in the cultural, scientific and technical fields[394]

The basic objectives of CEN-SAD is to promote the free movement of people and services; Paragraph 2 of Article I of the Treaty on the Establishment of the Community provided for the removal of the restrictions that pose obstacles to integration in the CEN -SAD members States. These objectives take the form of measures to ensure the free movement of workers, persons, capital, and goods, and to promote the general interests of the nationals of the Member States.[395]

However, CEN-SAD policies would be difficult to practically implement, because they overlap with the aspirations of ECOWAS, ECCAS, COMESA and other blocs, which are more advanced in their integration. In addition, CEN-SAD member countries allow holders of diplomatic passports from member countries visa-free entry into other member states. However, only seventeen members ratified the decision in May 2009. It was envisaged that if all members ratify the decision, then the privilege would be extended to other disciplines such as sports, students and academics, and artistic groups but there is no commitment by member states that would be extended to ordinary citizens and workers.[396]

It is also worth recalling the sudden decision (in 1997) by the ousted Libyan leader Muamar Gaddafi to open Libyan borders to Sub-Saharan African workers, a policy which was not well received by the Libyan people. Following the anti-immigration riots of October 2000, about 150 illegal migrant workers were killed and thousands fled from Libya. This incident provided further evidence of a negative response by Libyan citizens to the policy of opening borders to African workers when an estimated one-third of Libya's youth were unemployed at the time.[397] This policy was not carefully thought out, thus leading to an unstructured and

[394] CEN-SAD Treaty
[395] Liwaeddine Fliss, 'Status of Integration in Africa (SIA V)' (2014) <http://ea.au.int/en/sites/default/files/SIA%20V-%20En_f.pdf> accessed 30 November 2015., pp 91-92
[396] African Union Commission, (AU, 2013) 'Status of Integration in Africa (SIA IV)', p 83
[397] Kathryn Sturman (2003), 'the Rise of Libya as a Regional Player', African Security Review, Vol 12 No 2, 2003

unsystematic approach to the implementation of the free movement of workers policy. Such policy mistakes and similar uncoordinated approaches to regional integration have negatively affected the progress of the CEN-SAD scheme.

Consequently CEN-SAD, similar to other regional economic communities, requires a coordinated regional and continental wide approach to institutional harmonisation as well as strategic coordination and implementation. However, policies alone are not sufficient. Improving the transport infrastructure on the continent is a significant factor to promoting freedom of movement in the CEN-SAD region and outside the region.[398]

The problems of CEN-SAD are not different from those experienced in COMESA. This regional organisation has 28 member states that also belong to various regional groups, with its membership is also split along the lines of Francophone, Anglophone and Arabs. Co-ordination of policies in such a large group is a major challenge. Thus it is not surprising that progress has been so slow. CEN-SAD was spear-headed by Muamar Gadaffi who saw the grouping growing from six member to twenty eight members with thirteen years and had the ambition of bringing all majority Muslim countries together with the exception of Algeria who are not a member, however with the political problems and instability facing the region, less progress was made and furthermore with countries such as Kenya and Nigeria being powerhouses in EAC and ECOWAS respectively meant that they would not take an active role in CEN-SAD which was a recognised by the AU which have remained relatively unknown.[399]

[398] African Union (AU, 2009),'Status Of Integration In Africa (Sia)', Second Edition ,April 2009, Addis Ababa, Ethiopia, pp 91-92

[399] Benjamin Nickels, 'Morocco's Engagement with the Sahel Community' <http://carnegieendowment.org/sada/?fa=50490> accessed 25 October 2015.

4.10 The Economic Integration and Policy of Free Movement of Workers in the Intergovernmental Authority on Development (IGAD)

4.10.1 Brief History of the IGAD

IGAD was formed in 1996 to replace the Intergovernmental Authority on Drought and Development (IGADD). The organisation was initially formed to help find solutions to problems of lack of food due to droughts.[400] With time the organisation has acquired more responsibilities which include protecting the environment, keeping peace and security; creating working policies in social, technological and scientific fields. [401] The group now works towards promoting free trade and free movement of people within the region. The members of the group include: Djibouti, Ethiopia, Kenya, Somalia, Sudan, South Sudan, and Uganda.

The following map shows the location of IGAD [402]

Source: Intergovernmental Authority on Development (IGAD)

[400] Sally Healy,(2009) 'Peacemaking In The Midst Of War : An Assessment of IGAD's Contribution to Regional Security, (Royal Institute of International Affairs, (Crisis States Working Papers Series No.2) p 3
[401]Ibid p 2
[402]Intergovernmental Authority on Development (IGAD) https://www.kfw-entwicklungsbank.de/International-financing/KfW-Development-Bank/Local-presence/Subsahara-Africa/IGAD/ accessed on, 22/06/ 2015

4.10.2 The Progress of Economic Integration in the IGAD

In the Intergovernmental Authority on Development (IGAD) region, free movement of people is promoted among the Member States on a bilateral basis and not harmonized at the regional level. It could be argued that this approach is counter-productive to the purpose of regional integration. Ethiopia and Kenya have no visa requirements for nationals of the two IGAD Member States. Djibouti and Ethiopia have a similar bilateral agreement. IGAD have undertaken and validated in April 2012 a study to develop and implement a protocol on free movement of persons in the region in line with the IGAD Minimum Integration Plan.

IGAD cover a region troubled by frequent natural disasters and political instability with periodic conflicts among member states. Sudan and South Sudan had been in armed conflict for a quite long time, and South Sudan is now itself experiencing internal conflict after secession and independence from Sudan. In Somalia, there is political instability compounded by the presence on terrorist organisations, and Kenya is also affected by instability and terrorism from Somalia. As such it has been difficult to make progress on regional integration. The regional threat posed by international terrorism in the form of the Al Shabaab group presents a challenge to the policy of free movement of persons. Following the killing of 148 students at Garissa University by the Al Shabaab terrorist group, the Kenyan government decided to build a 440 mile wall along its border with Somalia in an effort to keep out Al Shabaab.[403] The erection of the wall serves to highlight problems of tension and conflicts and also the negative impact which such developments can have on regional integration effort. Where the aim of economic integration is to enable free trade and removal of restrictions to free movement of factors of production, the Kenyan government's actions seem rather to be aimed at restricting such free movement, which highlights the fact that genuine integration will take some time to achieve. The impact of the construction of the wall will be most felt by people who live close to the borders where borderlines are blurred. Such frontier communities used to enjoy free movement across national borders but with the

[403] 'Global Security and Intelligence Report' (2014) <http://www.intermanager.org/wp/wp-content/uploads/downloads/2015/05/Allmode-Global-Security-and-Intelligence-Report-April-20151.pdf> accessed 1 February 2015, p 5

erection of the wall, their way of life and economic wellbeing will no doubt be adversely affected.[404]

4.10.3 The Policy of Free Movement of Workers in the IGAD

The instability and insecurity have placed obstacles in the way of economic cooperation in the Horn of Africa.[405] Economic integration should be advanced within the institutional framework of the IGAD. [406] In the IGAD there are different stages of integration between its members. Each country maintains its own economic regime but has agreed on targets set by regional IGAD and other RECs, where progress has generally been very slow. On the other hand, informal cross-border trade is essentially a free trade area with the movement of labour and capital. This creates a local common market in northeast Kenya and southeast Ethiopia, south Somalia, and at the border between Ethiopia and Somaliland. [407] The main aims of IGAD legal framework is to promte the cooperation and economic integrating in this region and to help member countries to eliminate barriers to trade; facilitate the movement of people and goods.[408] Article 7 (b) of Agreement Establishing IGAD provides, *Harmonize policies with regard to trade, customs, transport, communications, agriculture, and natural resources, and promote free movement of goods, services, and people and the establishment of residence*;

The implementation of Article 7 in the IGAD agreement has not been achieved because of instability and insecurity. It can also be noted that the above agreement does not mention of the free movent of workers. The awareness and understanding of the benefits that migration and labour mobility are powerful drivers of sustainable economic and social development to countries of origin and the host countries, however, in IGAD, the progress has been very slow.

The assessing on how far the RECs have gone in putting into practice the provisions of Article 43 of Chapter VI of the 1991 Abuja Treaty is shown in the following table.

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[404] Ainslinn Laing, 'Kenya erects a wall along border with Somalia to keep out Al-Shabaab (The Telegraph', 22 April 2015). http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/11556269/Kenya-erects-a-wall-along-border-with-Somalia-to-keep-out-al-Shabaab.html , accessed on 20/10/2015

[405] Sally Healy, 'Hostage to Conflict Prospects for Building Regional Economic Cooperation in the Horn of Africa' (A Chatham House Report, November 2011) p 4

[406] Ibid

[407] Ibid, p 10

[408] Ali I. Abdi and Edris H. Seid (2013), 'Assessment of Economic Integration in IGAD' (The Horn Economic and Social Policy Institute (HESPI) ,Policy Papers No. 13/2) p 22

Below is a table summarising various treaties /protocols facilitating free movement.

Protocols/Treaties dealing with Free Movement

AEC (AU)	**Treaty Establishing AEC 1991**	**Free movement of persons or people**	**Chap II Art 4(i) and Art 6 Chap VI Art 43 Chap XIII Art 71**
SADC	Protocol facilitating free movement of Persons 2005	1.Free movement of persons – no visa required for 90 days 2. Movement of workers require permit (national laws apply)	1.Art 14 2. Art 18
EAC	1.Treaty for the Establishment of the East African Community 2. EAC Protocol on establishment of EAC Common Market	1.Free movement of persons and labour 2.Free movement of workers Free movement of persons	1.Chap 11 Art 76, Chap 17 Art 104 2. Art 10 Art 7
SEN-SAD		Free movement of diplomatic and service passports only	Paragraph 2 of treaty 1991 Article 3 of treaty
IGAD	IGAD Agreement	Facilitate free movement and right of establishment of residence of nationals	Art 7 (i) Promote and recognise objectives of COMESA and AEC Article 13A (o)
COMESA	COMESA Treaty	Free Movement of persons and labour Free movement of persons[409] Free movement of Labour[410]	Art 164 of COMESA Art 2 of Protocol Part II Art 3 Part III Art 9
ECOWAS	ECOWAS Treaty	Free movement of persons	Art 55 of ECOWAS Protocol A/P.1/5/79
AMU	AMU Treaty	Free movement of persons	Art 2 of AMU 1989 No protocol
ECCAS	ECCAS Treaty	Free movement of persons	Art 4 of ECCAS Chap V Art 40

Source: the Researcher

From the above table, it is evident the free movement varies in the RECs with free movement of persons in most RECs and both free movement of persons and workers in only EAC and

[409] EAC (2009) Protocol on Etsablishment of the African Economic Community Common Market, p 6
[410] Ibid, p 7

COMESA. In the IGAD region, the free movement person was to be achieved through COMESA protocols.

4.11 Conclusion

From the different RECs, it is clear that some member countries have overlapping memberships, which can result in unnecessary duplication and waste of resources. Some RECs are on track towards meeting the 1991 Abuja Treaty milestones whereas others are still at the negotiation stage. Those in the negotiation stages include member states of the AMU and CEN-SAD that have to deal with political problems or wars, with unfinished progress towards economic integration. It is still a long way before Africa can reach the goal of establishing a Monetary and Economic Union as envisaged by the AU.

This chapter reviewed criticalty the integration effort in Africa among the recognised regional groupings AMU, COMESA, ECOWAS, EAC, ECCAS, IGAD, SADC and SEN-SAD. The research found out from relevant literatures that the challenges that the obstacles against effective integration as compared with other global practice were multifaceted, but the most common challenges identified among the various grouping include; lack of commitment from states; lack of political will lack of basic infrastructure development and poverty level; monetary diversity; riots and insecurity; and cultural differences that will be discussed in the next chapter.

That effort has been made to perform provisions in treaties, protocols or agreements for the free movement of people and workers within the regions. However, the RECs and member states tend to be cautious about derogating power or transferring some of their legislative sovereignty to the AU. This cautious and lacklustre approach to integration obstructs the efforts being made towards integration at the continental level. At the institutional level, unlike the EU where there is the CoJ which has wide ranging jurisdiction over matters to do with economic and social integration in the EU, its African counterpart (the African Court of Justice and Human Rights) has very limited judicial authority in practice. This represents a weakness in the institutional framework for integration which needs addressing before any positive and effective progress can be made towards achieving the desired goal and full integration and the free movement of persons and workers in the AU by the target date of 2028.

In Africa, protocols are drafted in ways that leave much authority in the hands of governments of Member States instead of genuinely promoting free movement of their citizens. For example, Article 4 of the ECOWAS Protocol and Article 27 of the SADC Protocol give member states the power to determine under their internal laws (including the rights to reject) the entrance of a community citizen considered a prohibited immigrant. This is not consistent with the requirements for free movement of people within the region. Article 27 of the SADC Protocol gives power to host states to decide on immigration policies and that is not in the spirit of regional integration as the article is at conflict with the concept and spirit of the free movement of persons and workers.

There is one point worth noting regarding movement of workers within the EU. The EU do not require total agreement on the issue of migration, but allows for managed migration, meaning that the EU issued directives to deal with asylum seekers, rights to family reunions, rights to integration and permanent residence of third country migrations and highly skilled migration.[411] Issues of economic migration are left to member countries to deal with. The EU contributes to selective gate keeping approach to migration, where migration is managed, migrants selected and differentiated with member states playing an important role in the process.[412] An author rightly summed it that: 'EU action on migration and asylum can be seen as part of the sustenance of core state functions, in this instance to regulate access to territory through the development of EU cooperation and integration...Europe as an arena that allows national executives a freer reign over migration and asylum'.[413] All the EU did was to ensure that EU migration and asylum policies penetrated domestic systems with effects on both regulation and integration allowing for scope of difference.[414] The idea of regulating immigration is not different from what is happening in the RECs in Africa. Member states always pay very close attention to domestic attitudes and reaction when it comes to the issue of migration as it has a tendency to potentially spill over into xenophobic attacks on migrants as happened in South Africa in early 2015.[415]

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[411] Emma Camel, 'Migration governance in the European Union: a theme and its variations.' [2012] 20(1) Journal of Poverty and Social Justice 31-9 <http://dx.doi.org/10.1332/175982712X626752> accessed 28 May 2014, p 32

[412] Henk Van Houtum, and Roos Pijpers R, (2007), 'The European Union as a gated community: the two-faced border and immigration regime of the EU', 39(2) Antipode, Volume 39, Issue 2, March 2007, p 292

[413] Andrew Geddes, *Immigration and European Integration: Beyond Fortress Europe?* (2nd edition: Manchester University Press, 2008**)** p 173

[414] Ibid p 172

[415] Traveluser, 'Never Again! Xenophobia – the South African Perspective…' (2015) <http://www.kas.de/wf/doc/kas_41151-1522-1-30.pdf?150428150119> accessed 1 June 2015., p 2

In conclusion, a well managed and streamlined strategy of integration at the regional level could be the best way forward for Africa. The creation of a continental type trading bloc like the EU is not an easy task to achieve. EU integration has had its own problems but is largely seen by commentators to be a successful model. For the AU to achieve the same level of success may be asking too much for the region in view of the current political, infrastructural and institutional challenges. In the short and medium a possible solution may thus lie in integration at the regional level as within most of the RECs there is often a common affiliation or association between member states in the form of a shared historical (colonial), cultural or linguistic heritage.

Following the analysis of the progress and the status of economic integration and the policy of free movement of workers in AU and Africa sub-regional organisations made in this chapter, the next chapter would build on this process. It will examine the challenges of economic integration and the free movement of workers in the AU and Africa sub-regional organisation, and judiciary role in economic integration in the African regional blocs: AU and RECs.

CHAPTER FIVE

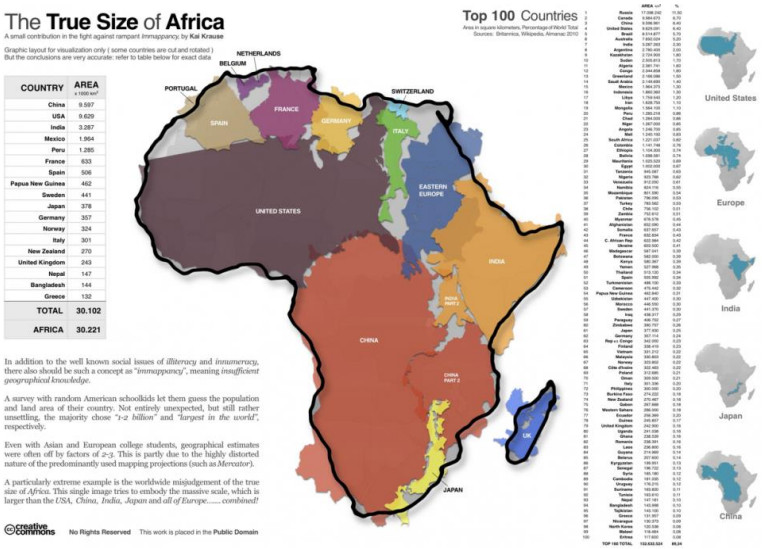
CHALLENGES OF ECONOMIC INTEGRATION AND FREE MOVEMENT OF WORKERS IN THE AU AND AFRICA SUB-REGIONAL ORGANISATION

5.1 Introduction

This chapter examines major challenges standing in the way of progress on the policy of free movement of workers in the AU and Africa Sub-Regional Organisation. There is need for an analysis to be done on the challenges of regional integration within Africa in order for African RECs to obtain the best from regional integration. It will focus on the legal constraints, as well as the political and cultural obstacles that hinder the African integration programme. This chapter will explore the question whether the AU model of integration represents the best way forward.

5.2 Africa and its Attempts on Economic Integration

Africa is a continent of great size, almost 12 million square miles or about three times the size of Europe.[416] It is endowed with a large quantity of natural resources. Much of its natural resources are yet to be developed. The following map shows the true size of Africa in relation to the rest of the world[417]. Despite having a lot of natural resources and potential, Africa still faces many challenges.



Source: Kai Krause (2014)

[416] Matt Rosenberg, 'Ranking of Continents by Area and Size Continents Ranked by Area and Population' (Education, 16 December 2015) <http://geography.about.com/od/lists/a/largecontinent.htm> accessed 24 December 2015.

[417]Kai Kruse (2014) 'The True Size of Africa', http://kai.subblue.com/en/africa.html Accessed 7 November 2014

Historically, Africa is a continent that has struggled towards achieving economic integration; however, efforts towards achieving this goal have not been equalled by events results on the ground. Much has to do with the historical context in which Africa found itself following long periods of colonial occupation. Colonisation left Africa with some historical heritage and connections that have seen countries retaining political, economic and cultural ties with their colonial masters. The effect of this post-colonial heritage has been to slow down or in some cases even hinder the project of African economic integration. When the OAU was established in the 1960s, its main aim was to secure peace and enhance cohesion among member states and ending colonial subjugation. At that time the idea of economic integration was not promoted as the focus was on liberation struggle to secure the independence of the whole of the continent from colonial rule.[418] With the attainment of independence by most African countries the leaders soon realised that the organisation was almost becoming irrelevant to the post-independence political and economic landscape. Attention thus turned towards refocusing the activities of the OAU which led to the organisation being renamed AU in July 2002. One of its main aims was to drive the continent towards economic integration with the ultimate goal of liberating Africa and its people from misery, poverty and underdevelopment.

It was envisaged that with the arrival of the AU, Africa would increase intra-African economic activities, resolve socio-political crises, foster continental co-operation and improve the region's visibility and profile on the world stage.[419] With this in mind the AU set up a road map with time lines by which economic integration should achieved. The AU envisaged a model of economic integration along the lines of the EU.[420] But with the realities on the ground, integration along EU lines is difficult to emulate because with its distinct historical and cultural heritage there are a lot of challenges facing African countries that hinder the efforts towards economic integration.

The model of integration in Africa is designed along Regional Economic Communities (RECs) with the Abuja Treaty of 1991 as the basic legal framework. The latter required that RECs form the foundation or organic basis for the establishment of the African Economic

[418] Diedre L. Badejo, ,'The AU', Chelsea House, An Imprint of Infobase Publishing, 2008, p 12
[419] Olufemi Babarinde (2007) Op cit, pp 3-4
[420] Yared Tesfaye Aleme, 'Regional Integration Schemes in Africa: Limits and Benefits of Taking on EU's model to the AU' , (Lambert Academic Publishing 2011) pp 60-65

Community (AEC)[421]. There are currently 17 RECs in Africa which are, AMU, COMESA, CEN-SAD, Central African Police Chiefs Committee(CCPAC), ECOWAS, ECCAS, Economic Community of Great Lakes Countries (ECGLC), East African Police Chiefs Cooperation Organization (EAPCCO), Indian Ocean Commission (IOC), International Conference on the Great Lakes Region(ICGLR), IGAD, Mano River Union (MRU), Regional Centre on Small Arms in the Great Lakes Region (RECSA), SADC, Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) and West Africa Police Chiefs Committee Organization (WAPCCO).[422] The AU recognises only eight as being essential for the formation of AEC which are as the following:, COMESA, CEN-SAD, EAC, ECCAS, ECOWAS, IGAD, SADC and AMU.

The RECs are primarily trading blocs and some involve political co-operation.[423] The progress towards implementation of the 1991 Abuja Treaty has been slow in most of the RECs. However, of the eight recognised RECs, EAC is by far the most advanced having launched its Common Market in 2010 followed by COMESA, which launched its Customs Union in June 2009. ECOWAS and SADC have progressed well in establishing FTAs and have plans to launch Customs Unions by 2015 and 2013 respectively. However, these goals have not been met at the time of writing this thesis. The reason being offered in the case of SADC for the failure is the problem of multiplicity of membership and failure to establish a single Common External Tariff.[424]. ECCAS launched an FTA in 2004 but is facing enormous challenges in its implementation. The rest of the RECs, i.e. AMU, CEN-SAD and IGAD have achieved little success and are still in the negotiation stages amongst the member states. [425] The progress of free movement of workers within the RECs has been limited due to various challenges facing the member states meaning that AU still has a lot to do if it were achieve its objective. From reviewing the RECs, it is evident that all of them are at different levels of development and implementation of their regional arrangements. The member states are endowed with varying resources, have different levels of infrastructural, institutional and financial market development which all impact on the integration process.

[421] Article Articles 3(c) and (j) of the Constitutive Act of the AU provided the acceleration of the political and socio-economic integration of the continent; and promotion of sustainable development at the economic, social and cultural levels as well as the integration of African economies
[422] Eric G. Berman and Kerry Maze,(2012) Op cit p 21
[423] AU Commission, 'Status of Integration in Africa (SIA IV)' 2013, p 9
[424] SADC, Customs Union. http://www.sadc.int/about-sadc/integration-milestones/customs-union/ accessed on 12/06/2014
[425] Ibid

When the Treaty of Rome first founded the European Economic Community (EEC) in 1957, one of the aims of the founders was to create a Europe that was economically and politically united. The founders worked towards the establishment of a common market in which there was to be free movement of goods, services, people and capital. [426] The most important thing the EEC did at the beginning was to allow the free movement of the main factors of production (including workers) within member states. The general situation in the AU is different because the goal towards achieving this policy of free movement of workers, and persons generally, is based on the RECs and member states. The free movement of workers as planned by the AU is more of an end result rather than a way towards integration. Most of the RECs since their establishment have not allowed for the free movement of workers despite their agreements and treaties containing such provisions. In those RECs with relevant policies, there appears to be no mechanisms for enforcement of the Treaty provisions allowing for the free movement of workers. The question thus arises as to how the AEC can achieve the free movement of workers policy when this is proving difficult to achieve at the REC [427]

Despite the lack of progress on economic integration, there are areas in which the AU has been able to make some progress. The AU has had reasonable success through direct contribution and group effort with the international community in resolving conflicts in Africa, such as in Sudan, post-election violence in Cote d'Ivoire, Kenya, Somalia, Madagascar and Zimbabwe among others, and pressurising military coup-makers to organise elections and hand over power back to constitutional rule in countries such as Burkina Faso and Guinea. The AU can use its influence and prerogatives through decisions of the Peace and Security Council to intervene in member states to promote peace and protect democracy, including using military force in situations where genocide and crimes against humanity are deemed to have been committed. Article 30 of the Constitutive Act of the AU, clearly states that, *"any government which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the union"*. But the problem is that the rule is sometimes applied selectively, such as in coup d'états in Madagascar where an elected leader was overthrown by the military and the AU did not intervene except to condemn the coup. The political will of the AU is also called into question, when some AU nations are run by autocrats.[428] On the Libyan 2011 Revolution, the AU decided not to recognize the Libyan

[426] Paul Craig and Gráinne de Búrca, (2011) Op cit, p 715
[427] Treaty Establishing African Arab Maghreb Union (1989)
[428] AU, The Constitutive Act of the AU Art 30, 11 July, 2000 - Lome, Togo

rebel leadership (National Transitional Council) as the legitimate government of Libya. The anti-Gaddafi camp viewed the AU's stated position as a confirmation of their suspicions that the AU supported Gaddafi. They also viewed the AU as being hostile to their goal of liberation from Gaddafi's 42 years of what they considered to be oppressive rule.[429] In its quest to encourage democracy, AU observer missions are usually sent to cover elections in member states.[430] On the whole it can be argued that if efforts made by the AU in the promotion of peace and security were equally aimed at promoting economic integration, then significant progress could well have been made in Africa by now towards the achievement of this goal.

There are benefits that come with integration, such as bigger market size which brings with it more opportunities, promotion of intra-regional trade, free movement of factors of production, fostering unity and peace among member states[431]. There is strength in global negotiations if countries belong to an economic community grouping based on shared interests, which can help in the promotion of economic co-operation and co-ordination. Regional integration is an essential contributing factor towards more effective and equal participation in the global economy.[432] Despite all the envisaged benefits of economic integration, Africa seems to be at a crossroads of instigating but so far achieving very little from its efforts towards economic integration. An examination of the reasons why Africa has not achieved much in terms of integration will now be examined with a view to explaining why the realisation of the gaol on economic integration and the free movement of workers within the region has so far proven to be elusive. The next section will identify and discuss the challenges facing Africa in its integration efforts while focussing on the legal issues that are cornerstones in economic integration.

[429] The AU Says "No" to the Libyan Rebel Leadership,https://mbokor.wordpress.com/2011/08/26/the-african-union-says-%E2%80%9Cno%E2%80%9D-to-the-libyan-rebel-leadership/ ,accessed on 24 March 2012
[430] Warwick, 'The AU after 10 years: Success and Challenges' (Warwick, 2014) <http://www2.warwick.ac.uk/newsandevents/expertcomment/the_african_union/> accessed on 24 April 2014
[431] Charles Abuka, et al, *Africa in the World Economy - The National, Regional and International Challenges* (Fondad The Hague, (2005) p 132
[432] Ibid

5.3 Challenges of Integration in the AU and Africa Sub-Regional Organisations

Source: Africa Geographic (2014)[433]

This section will focus more on the legal issues of the AU and its RECs with reference being made to the EU, which was built or born out of a strong legal foundation. The section will highlight and explore the significance of legal provisions and the importance of accepting the supremacy of Treaties establishing the economic blocs.

5.3.1 Lack of co-ordination

When what is now the EU was established by the original founders, the economies of the founding member states were quite developed with sound institutions and democracies. The founders of the EU focused on a bigger Europe, which is why the EU was made a supranational organisation where members willing to join were required to meet certain entry standards within a given period before accession. The EU's strict entry requirements, known as conditionality, cover the key areas of human rights, a sound economy and good governance while the condition for AU membership seems to be based on a geographical criterion only – in other words any country can be a member of the AU as long as they are located in the African continent. The AU could benefit from adopting more stringent

[433] Africa Geographic (2014) 10 impossible loads made possible via African transport – Part II http://africageographic.com/blog/10-impossible-loads-made-possible-via-african-transport-part-ii/. Accessed 6 March 2014

conditions for admission, as that will only allow for countries that are fully committed to integration rather than having countries that are simply there to add to the numbers. [434] Having said this, it is worth noting that the OAU (now AU) was founded as an essentially political rather than an economic organization.

The EU was founded together with institutions that were established to run the relationships of the bloc.[435] These institutions, of which the key ones are the Commission, the Council of Ministers, the EU Parliament and the Court of Justice of the EU (to name but a few), were endowed with administrative, legislative, and judicial (enforcement) functions. This can be contrasted with the AU where RECs are required to work towards regional and ultimately continental integration with no effective institutional framework. This leaves the AU as a weak organisation at the mercy of the RECs. There is a risk that economic policies and aspirations could be controlled by RECs instead of the AU, which means the success of integration efforts will depend on the success or failure of the RECs. There are no key countries in the AU responsible for steering the integration effort in contrast with the EU where there were founding member states such as Germany and France which had substantial domestic economies. The African economic integration model based on RECs also allows for the creation of regional boundaries or borders that can hinder the integration effort at the continental level. Some authors for example Charles Abuka argue that the way forward for Africa would be to allow integration within the individual RECs[436], which can be easier to administer rather than trying to bring together a union of 54 countries. A much more sustainable and effective approach could be to abolish all RECs and focus instead on continental integration (similar to the EU model) but that requires development of institutional infrastructure and legal integration which might be a mammoth task given the political problems and instability that have affected and continue to affect the continent.

It should be remarked that some RECs such as SACU, for example, were even established before the AU was established. This makes it difficult to bring them under the control of the AU.[437] There is an obvious lack of co-ordination in the AU in relation to the functioning of

[434] Joseph O'Connor The AU, *Challenges of a Pan-African Project* (AU, February 2013) <www.theforeignreport.com/2013/02/the-african-union-challenges> accessed 24 April 2014
[435] Kristin Archick, 'The European Union: Questions and Answers' (September 4, 2015, Congressional Research Service, CRS Report) See the 'Summary'
[436] Charles Abuka, et al (2005) Op cit, p 135
[437] Alemayehu Geda and Haile Kebret (2007) Op cit, p 358

the RECs. A number of countries belong to more than one REC, which results in duplication of effort and waste of resources, making administration difficult.[438] There are obvious differences between AU and EU; the two organisations had different approaches towards integration. The current model of RECs is likely to maintain borders which are likely not to achieve continent wide integration. The fear factor, perhaps explains why less has been achieved in terms of integration. For example when migration is discussed or debated in South Africa, it often receives negative reactions, xenophobic fears and expressions of security concerns.[439] Despite protocols guiding the free movement of people in SADC, nothing in practice has been achieved because not enough members have ratified the protocols. South Africa has a unilateral approach to immigration policy and has bilateral agreements dealing with the movement of workers which is often not followed through because of fear of prejudice and xenophobia. The authorities in South Africa often do not pay much attention to issues of immigration and would like the current status quo to continue whereby the multilateral approach to the movement of workers is side-stepped by not ratifying the SADC protocol.[440] It could be argued that fears of mass migration following implementation of the free movement of persons' policy often tend to be either exaggerated or unfounded. One of the findings of this research based on the free movement of workers within the EAC is that following the decision by Kenya and Rwanda to abolish work permit requirements, there has been no influx of citizens either way explaining that the opening up of borders would not necessarily result in an influx of people.[441] At the same time it has to be acknowledged that the reason for this could well be explained by the weak economies of these two nations, as compared to South Africa where there has indeed been an influx of migrant workers despite South Africa not subscribing to the free movement of persons policy.

What is important in Africa is to first of all learn the lessons of history by examining successful integration processes and sustainable federations and distinguishing them from those that have been less successful. It is not the absence of challenges but rather the ability to find solutions to those challenges that should be the focus of policy makers within the AU. The challenges for the AU are numerous and multifaceted. According to former UN Secretary General, Kofi Annan, for AU to achieve the goals of economic progress and good

[438] AU Commission, Status of Integration in Africa (SIA IV) 2013) p 9
[439] Lorenzo Fioramonti (2013) 'Advancing Regional Social Integration Spcial Protection and the Free Movement of People in Southern Africa', Regions and Cohesion, Volume 3, Issue 3 Winter 2013, pp 142-143
[440] Ibid
[441] Ibid

governance, there has to be great stamina and iron political will in order to move the process forward.[442]

5.3.2 Institutional Framework

The absence of an effective institutional framework poses a serious challenge which has been a crippling obstacle progress on integration on the African continent. As will be seen in latter chapters of this thesis, there are many examples of incidents which serve to demonstrate the severe weaknesses which are present in the institutional framework of the AU with its complete lack of enforcement mechanisms in the form of effective sanctions which can be imposed on recalcitrant member states.

Due to institutional weaknesses, the AU is severely restricted and constrained as to what it can do to steer the programme of economic integration forward. The weaknesses of the AU's institutional set up also extends to the individual RECs with the same result that it will be difficult for AEC to achieve economic, monetary and political union by end of 2028. Even with a further transitional period of 6 years, it would remain to be seen whether all RECs would have complied with all the requirements for full integration.[443] The institutional set up of the AU compounds an already complicated situation because its legal framework has no effect in the member countries as it provides only a road map and recommendations which are not legally binding. Citizens of the members cannot take cases to the AU because member states are not bound by AU laws. In some RECs such as ECOWAS, EAC and AMU, there are legal instruments that have provision for obligatory effect but these often fail on implementation, thus leaving decisions in the hands of local or domestic law. This is due to the lack of effective implementation and enforcement mechanisms at both the supranational and national levels. Where the member states have provisions such as in the case of ECOWAS, EAC and AMU, the RECs agreements / provisions are not deemed to have supremacy over national laws of member states, and the failure to make REC laws and provisions supreme means they have limited recognition and are not effectively enforced in the member states unlike in the EU where provisions of EU Treaties are supreme and therefore take precedence over any inconsistent national laws passed by member states.[444]

[442] BBC News, 'Huge challenge for African Union', (BBC News World, Africa 8 July 2002) , available at http://news.bbc.co.uk/1/hi/world/africa/2115410.stm accessed 8 July, 2014
[443] AU Commission, Status of Integration in Africa (SIA IV), 2013, p 9
[444] Iwa Salami (2011) Op cit, p 673

5.3.3 Enforcement Mechanism

In Africa, the AU and RECs have provisions for Courts of Justice or tribunals for the communities but without enforcement mechanisms in place.[445] COMESA and EAC have treaties that allowed member state courts to refer cases to regional courts or tribunals. Other regional RECs such as SADC, ECCAS, AMU and IGAD have frameworks with no enforcement mechanisms in place. In the case of the EU there were cases where it was demonstrated that the European Court of Justice had supremacy. In the case of *Francovich and Bonifaci v Republic of Italy* (Cases C-6/90 and 9/90), the failure by the Italian state to implement a community directive was considered under the principle of state liability. In this case the ruling was that the state had to comply with implementation of EU laws. In the case of *Commission v Belgium* (case 1/86), it was held that there was no defence for non-implementation, whatever the circumstances the obligation to implement is strict.[446] The doctrine of supremacy of EU law can be traced back to the earlier cases of *Costa v ENEL*[447] and *Van Gend en Loos v Nederlandse*.[448]

The ECOWAS have got The Community Court of Justice that was created under Articles 6 and 15 of the Revised Treaty of ECOWAS.[449] In January 2005, an Additional Protocol was adopted to allow persons to bring suits against Member States.[450]

The decisions of the Court are not subject to appeal but can it revise its own decisions. However, the court has no mechanisms for enforcing or implementing the majority of its decision. After ten years of its operations, the court, including its role, functions and objectives remains quite unknown to West African people.[451]

It is worth highlighting that it is not mentioned in the Articles of the Community Court of Justice that the law of Community displaces the laws of member states or that national laws should be aligned with community laws.

[445] Ibid, p 675
[446] John Fairhust, Op cit,288
[447] *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)
[448] *Van Gend en Loos v Netherlands* [1963] ECJ
[449] Iwa Salami (2011) Op cit, p 675
[450] Mohammed Mubarik, Op cit, p 6
[451] Ibid

From the time the ECOWAS Community Court of Justice was established and from 2004 when it became operational to November 2014, the Court decided a total of 70 cases. The breakdown of the cases in each year from 2004 to date is given in the table below:

List of Cases Decided from 2004 to November 2014

2004	**1**
2005	4
2006	2
2007	5
2008	8
2009	8
2010	7
2011	15
2012	18
2013	2

Source: Community Court of Justice (2014)[452]

It is worth mentioning that almost all of the cases decided on had nothing to do with issues of free movement of persons or workers within member states. There are therefore no landmark cases that would put the free movement of workers or persons at the forefront of regional integration, implying that it will take time before the significance of free movement of workers can become an integral part of the framework for ECOWAS economic integration.

The importance and significance of enforcement mechanism cannot be overemphasised as can be seen from the relative success of the EU integration model in which judicial precedents set by the Court of Justice of the European Union have played in key role in interpreting, applying/ implementing and extending the boundaries of community freedoms. Well-known cases handled by community courts often serve to reinforce the ethos and spirit of integration. This also enables member states to bring their laws into line with community laws. In the case of the EU, member states were required and are still required to bring their national laws into line with EU laws and where there is conflict then EU laws will take precedence as supreme as source of law.[453] [454] [455]

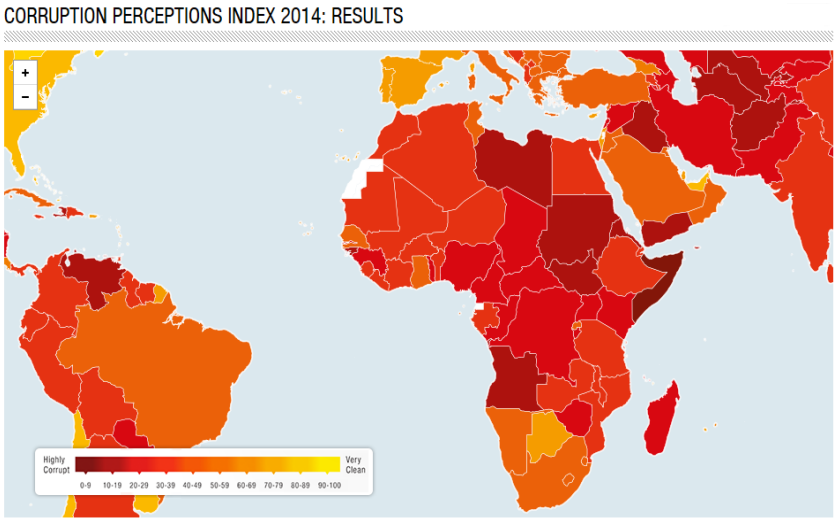
[452] Community Court of Justice 'Decided Cases' (Community Court of Justice, 2014) <http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27> accessed 21 November 2014

[453] *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)

[454] *Van Gend en Loos v Netherlands* [1963] ECJ

5.3.4 Problem of Lack of Resources, Poverty and Corruption

The issues of corruption and poverty are well spread in Africa. The following map from Transparency International (2014)[456] shows where most African countries are classed in relation to corruption.



Source: Transparancy Inrenational (2014)[457]

Zimbabwe was ranked 156 out of 174 countries and other African countries that were ranked lowly include Libya ranked 166, Sudan 173 and Somalia 174.

Corruption compounds poverty, and the issue of poverty is a serious one that needs to be tackled. Most governments in Africa do not have resources to implement infrastructural development, which is very important for human and economic development and for regional integration. There is often lack of investment in infrastructure and existing infrastructure is often left to deteriorate due to lack of adequate maintenance. There is need for improvement in service delivery, but that cannot be achieved when resources are not there or the little that is there is corruptly diverted for personal gain.[458]

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[455] *R v Secretary of State for Transport Ex p Factortame* (No.2) [1991] HL

[456] Transparency International Corruption Perceptions Index 2014, EYGM Limited BMC Agency 2015, available at http://www.ey.com/Publication/vwLUAssets/EY-transparency-international-corruption-perceptions-index-2014/$FILE/EY-transparency-international-corruption-perceptions-index-2014.pdf accessed on 06/04/2015, p 2

[457] 'Transparency International Corruption Perceptions Index 2014', EYGM Limited. BMC Agency 2015, p 2

[458] Charles Abuka, et al, (2005) Op cit, pp 23, 24

When a country falls into corruption and poverty, their will to commit to regional integration is compromised due to lack of resources, the absence of transparency and the rule of law, the lack of commitment to the regional integration effort and the absence of political will. Zimbabwe can be cited an example in this regard. The country was responsible for the suspension of the SADC Tribunal after refusing to respect the decision of the Tribunal when it lost a case brought by farmers who had lost their land without compensation to most people linked to the ruling party.[459]

5.3.5 Language and Culture Differences

Language and cultural differences obstruct the integration efforts as there are so many languages used in the different RECs. Africa, with its ethnic and cultural diversity, has thousands of minority languages which can create difficulties when compared to the situation of Europe where there are a small number of functional languages that the citizens can easily understand. But even in Europe, where there is free movement of people within the common market area, language barriers have also led to the limited movement of people from their countries of origin. Less than 2% of EU citizens live away from their states of origin.[460]

Article 25 of the Constitutive Act of the AU recognised the following working languages for the AU: Arabic, English, French and Portuguese. The article also provides that all AU institutions shall be where possible using African languages which are about 2000 languages. Despite being well intended recognising all languages is a daunting task and almost impossible to achieve in practice. Most African languages and dialects are not even written in the first place. Perhaps at a regional level this could be possible with the more prominent African languages as most African countries within the RECs have close historic relations due to some cultural, geographical or language ties. Therefore, there should be focus on the main languages rather than focusing on more than 2000 languages, for example: Arabic in North Africa, English, French, Kiswahili in East Africa, Lingala in Central Africa, Hausa/ Fulani in the Sahel region, and Pidgin English in West Africa.

Language and cultural differences have an effect if a person chooses to migrate to another country because those citizens of the community who cannot speak the languages of other regions will choose to stay within their region. Furthermore, once they travel there are no facilities where they learn the local languages with support from the host countries. Due to

[459] *Mike Campbell (Pvt) Ltd and 78 others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007
[460] Karen Davies, *Understanding European Union* (5th edn, Taylor Francis 2012) p 137

the fact that there are so many languages it is often difficult to integrate people or workers who cannot speak any of the official languages. Integration within the communities becomes difficult so that people would prefer not to migrate. However, language should not necessarily be seen as a barrier. Citizens of the communities, and workers in particular, should be allowed free movement with the regions and facilities should be provided by host states so that migrant workers can learn the local language and be able to integrate themselves into the local community.

It is also important to note that in Africa, there are countries where a good number of the population live abroad due to political instability, bad governance, and economic decline and language differences has not hindered this movement. However, it has to be acknowledged there is obviously an element of pressure or duress in these cases in that if the migrants had a choice they would stay in their own countries if they had not been displaced by political instability.

5.3.6 Political Instability

Most countries in Africa are victims to conflict. Where there is no war between countries, there is often internal conflicts, which end up destabilising the regions as well. There has been instability in countries such as Libya, DR Congo, Uganda, Angola, Tunisia, Egypt, Zimbabwe, Madagascar, Nigeria, Chad, Sudan and Mali, just to name a few.

Africa has experienced a lot of problems over the years and the colonial legacy to a large extent has been responsible for most of the problems compounded by the lack of good leadership. With exception perhaps of Ethiopia, all countries in Africa had to undergo the transition from colonialism to independence. In the process, the system leading to transition often produced leaders who at achievement of independence were held to be heroes who later turned into dictators with little or no prospect of a democratic transition. Often connected with poor leadership are problems of mismanagement and misappropriation of national resources for personal gain, as well as restriction of democratic space often leading to balance of power being tilted in favour of the present leadership and organs of the government dominated by inadequate and partisan people.[461] It has even been argued that most of the leaders that have often been responsible for problems in Africa tend to be imposed on the

[461] Antony Otieno Ong 'ayo, 'Political Instability in Africa Where the Problem Lies and Alternative Perspectives' <http://www.diaspora-centre.org/DOCS/Political_Instabil.pdf> accessed 1 June 2015, p 10

masses through involvement of the international community, usually previous colonial masters of through the geopolitics of international diplomacy based on carving out spheres of influence [462]

Political instability has significant impact on integration as member states will be engaged in trying to overcome the domestic problems caused by such instability. In RECs in Central Africa progress in integration was often slow due to conflicts in member states such as Burundi, Rwanda, Democratic Republic of Congo, Uganda, Angola, and Central African Republic. Rather than focusing efforts on integration, the country had to overcome problems within their states. The same situation also prevailed in AMU where political problems led to the closing of the border between Morocco and Algeria. In addition, the Tunisian government has approved plans to build a 104-mile-long barrier to better secure its border with Libya[463] which meant economic integration could not proceed as envisaged in the Treaty establishing AMU. Political instability problem can be overcome if leaders and masses are prepared to uphold democratic values, unlike in a situation where leaders want to hold on to power, which is not in line with progressive democratic transition and political evolution leading to the strengthening of national institutions which might ultimately be beneficial to the process of regional economic integration.

The holding on to power inhibits democratic, political and ultimately economic progress as the international community and investors tend to disengage once they see that a leader does not want to relinquish power. Due to political instability, countries that have to receive people from problem member states would not want to commit to the total free movement of workers as they believe that they will end up being disadvantaged by such forced migration through the pressure which it puts on the local employment market and on national resources and infrastructure.

This is the case of SADC, South Africa and Botswana have been apprehensive about completely allowing the free movement of workers and as such agreed to a SADC Protocol on Free movement of persons that still gives control to the member states to decide the people they would like to take employment within their borders.[464] Arab Maghreb countries suffered

[462] Ibid
[463] Aaron Zelin 'Tunisia's Fragile Democratic Transition' (14 July 2015) <https://www.washingtoninstitute.org/policy-analysis/view/tunisias-fragile-democratic-transition> accessed 11 September 2015, p 4
[464] Nicos Trimikliniotis, Steven Gordon & Brian Zondo (2008) Op cit, p 1325

from political instability as well. Before the Arabic Spring people of Libya, Morocco and Algeria were travelling to each of these countries with no visa required. However, when the Arabic spring started visa restrictions were imposed, which affected free movement, the flow of commerce and therefore integration in this region. This situation has driven a number of African people to migrant illegally to the EU especially by the Mediterranean Sea.

5.3.7 Legal Constraints

In most countries in Africa there are no proper functioning state institutions. Due to weak institutional structures, there is no separation of power between administrative, legislature and judiciary, leading to a democratic deficit and poor governance. If there are any reforms, they are mainly designed to strengthen the existing orders rather than to promote better governance. The institutions often lack power to enforce existing laws especially where they go against the will of the leadership. This has a negative impact on the application of the rule of law, which in turn accounts for the lack of implementation and enforcement of regional policies within the RECs.

The cautious attitude of Member States in meeting their obligations to regional communities and to the Union creates greater obstacles to deeper integration. Protocols are drafted in such forms as to leave much authority in the hands of governments of Member States instead of adopting provisions aimed at liberalising the movement of their citizens and promoting wider integration. For instance, Article 4 of the ECOWAS Protocol and Article 27 of the SADC Protocol give Member States the power to determine under internal laws whether to reject the entrance of a community citizens considered prohibited immigrants.

Referring to internal laws in this respect is not clear whether it is existing laws or laws made after the ratification of the Free Movement Protocols. The writer would submit that due to the reputation of most African States according primary recognition to their laws, any real intention to implement such a Protocol as this would necessitate the removal of such ambiguous provisions. Varied interpretations of words such as ‘inadmissible,’ (with reference to the power member states to exclude undesirable immigrants from entry) do not benefit community citizens nor promote the integration effort.

With the exception of the EAC, most treaties and protocols in the region focus on free movement of persons and not workers. The African Court of Human and People’s Rights

does not have provisions for dealing with issues of economic integration except, with the focus of its jurisdiction being on the adjudication of cases on human rights.[465]

5.3.8 Challenges Posed by Globalization

Globalisation challenges demands that countries are prepared to take the necessary steps that would enable them to compete in the international markets, the world being a global village. Therefore, it is difficult to keep one's economy closed from the outside world. There is need to evaluate situations that are in the best interest of the country and only open the economy in a way that benefits the country. With the advent of internet and information technology, information and trade can now take place at a faster pace and the failure to move with the pace of technology have seen the economic performance and potential of some African countries severely limited by outdated technology and policies needs to be created which will allow the opening up of the economy while identifying areas of national interest that will need to be protected so that they can benefit both current and future generations. The best way to do this will be through integration. By not promoting integration at a much faster pace, African leaders are holding back the development of the continent and its people.

Due to the world being a global village, there is need for member states in most African regional economic communities to realise that there are benefits that come with regional, continental and global integration. Confining integration to RECs is not a viable long term option as globalisation continues to gather pace with new and innovative technologies with the global movement of people at its forefront.

5.3.9 Challenges of Prioritization of National Interests

The issues of sovereignty are at the heart of the debate on African integration with countries seemingly reluctant to give up any aspect of their national sovereignty. This could explain why less progress has been made in terms of economic integration. Only those countries prepared to bargain away some of sovereignty in return for the economic benefits stemming from integration have been able to make some progress in the integration effort.

With most leaders overstaying in power that has meant democracy has suffered and are not keen to even give up sovereignty to a supranational body. [466] If the leaders cannot accept

[465] The African Union , 'The African Court on Human Rights and People's Rights', (AU, 2015) http://au.int/en/organs/cj, accessed on 12/12/2014

democracy, then how can they be prepared to hand over power to a supranational organisation as happened in the EU where member states have to give more powers to the EU. There is requirement to balance the need for national interests and economic integration.[467]

National interest issues tend to limit progress on integration. For example countries such as Nigeria or Libya may not wish to promote full integration because they want to preserve their oil wealth; Zambia or Botswana may want to preserve mineral wealth; South Africa may wish to protect its employment market for its citizens. All these national interest considerations make countries reluctant to commit themselves to full integration.

5.3.10 Lack of Adequate Transport Infrastructure

Poor infrastructure remains one of the main obstacles to moving goods, services and people in Africa. [468] The lack of adequate transport infrastructure is among the most difficult factors that obstruct trade and integration. Transport costs in Africa are among the highest in the world.[469] The investment in African countries is more expensive, 70 percent higher than the Organisation for Economic Co-operation and Development or East Asia, and as a result Africa remains losing 0.44 percent in average growth per year. [470] In most connected African countries, services are available only in cities and limited to the urban centres.[471] Generally, Africa's countries have low per capita income levels and small populations, lack of skills, capital to establish and lack of modern communication systems which result in small markets that presents a critical bottleneck to regional integration in the continent. [472]There is need to improve the connection among African regions in order to improve the movement of goods,

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[466] The Telegraph, 'African presidents' dilemma: Should I stay or should I go?' , available at http://www.telegraph.co.uk/news/worldnews/africaandindianocean/burundi/11614000/African-presidents-dilemma-Should-I-stay-or-should-I-go.html , accessed on 27 Oct 2015

[467] Ibid

[468] Assessing Regional Integration in Africa IV, Enhancing Intra-African Trade, United Nations Economic Commission for Africa, 2010, p 502

[469] Ionel Zamfir,'The Tripartite Free Trade Area project Integration in southern and eastern Africa' , European Parliament, Briefing March 2015, http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)551308 accessed on 20/05/2015, p 8

[470] Charles Abuka, et al,(2005) p 122

[471] 'Regional Economic Communities in Africa A Progress Overview Study Commissioned by GTZ' (2009) <http://www.g20dwg.org/documents/pdf/view/113/> accessed 1 February 2015, Op cit, p 21

[472] Narendra and Anuradha Goel (2014), 'Impact of Regional Economic Integration on Economic Growth – A Review of Literature', Vol. 2 , Issue. 4 , Jan 2014, Tactful Management Research Journal, p 8

[472] Assessing Regional Integration in Africa IV, Enhancing Intra-African Trade, United Nations Economic Commission for Africa, 2010, p 10

services and people.[473] However, African economies can begin the process of deep integration if their infrastructure networks are developed across the continent. If the roads, railways and air networks are not well development, then movement of goods and people will be limited. Developing the infrastructure linking the continent will enable fast movement of both people and goods which is an essential component of economic integration. Development of the infrastructure can be undertaken at a regional level where countries lagging behind will be given priority so that they can be such as other countries that are fairly developed. However, most African leaders have invested in projects that offered significantly high political returns but produced a negative social cost so called "white elephants.[474],[475]

5.3.11 Diseases and its Part in Immigration Policy

The impact of infectious diseases on African countries represents a challenge to all sectors. As a result, infectious diseases can affect income and social status, education, productivity and economic growth and other direct and indirect human development.[476] From an integration point of view the most adverse impact of disease takes the form of restrictions placed by governments and other international organisations on the movement of people across national borders. In West Africa the Ebola eruption lead to the closure of borders and postponement of flights cause a harmful effect on trade, strictly limiting the ability of countries to import and export products. Examples of Ebola disease impacts included the announcement by Kenya Airways that it was suspending flights to and from Liberia and Sierra Leone, and the closure of Cameroon's lengthy border with Nigeria. Contagious diseases have clearly had an adverse impact on African economic integration through restricting the movement of goods and people within the continent. The outbreak of diseases such as Ebola has the effect of compelling member states into closing their borders and demanding more checks so that the spread of the disease can be contained which is not in line with the principle of free movement.

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[473] Ibid

[474] "A white elephants." A burdensome possession; creating more trouble than it is worth, see the meaning and origin of the expression: A white elephant at http://www.phrases.org.uk/meanings/410050.html accessed on 12/11/2015

[475] John Mukum Mbaku, 'The Brookings Institution ׀ Africa Growth Initiative Building Opportunities: Addressing Africa's Lack Of Infrastructure' (2012) <http://www.brookings.edu/~/media/research/files/reports/2013/01/foresight-africa/foresight_mbaku_2013.pdf> accessed 1 February 2015

[476] Abdesslam Boutayeb, (2010)Disease Burdens and Economic Impacts , 'The Impact of Infectious Diseases on the Development of Africa', (Springer Science, Business Media LLC 2010 (USA)) p 1174

5.3.12 Multiple and Overlapping Memberships

Few studies have examined the extent to which multiple and overlapping membership affect the integration effort and the free movement of workers. [477] The 54 Member States of the AU belong to many RECs leading to overlapping membership difficulties.[478] The implications of multiple memberships are a complicated system of administration, increase compliance costs and waste of time as well as decreased commitment level as it becomes difficult to serve the RECs in the same manner. In addition, multiple and overlapping memberships of RECs makes compliance difficult. There are difficulties to do with differences in economic policies and failure to harmonise member states domestic laws with regional policies; which makes it difficult to achieve the aims of economic integration.[479]

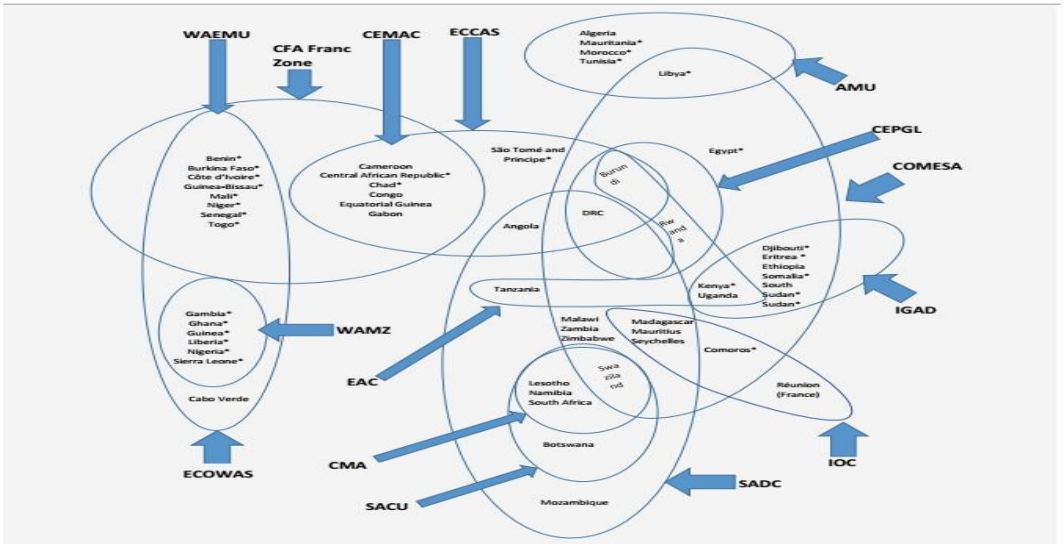
The bar chart below shows clearly multiple and overlapping memberships in Africa:[480]

Source: UNECA annual report ARIA II

In addition, the following table as well shows overlapping membership in regional integration groups in Africa: [481]

[477] Ashimizo Afadameh-Adeyemi (2013) 'Securing Compliance with African Economic Integration Treaties', (PhD thesis in law, University of Cape Town, February 2013) p 4
[478] Addis Ababa and Ethiopia, 'Eighth Session of the Committee on Trade, Regional Cooperation and Integration Best Practices in Regional Integration in Africa' (2013) <http://repository.uneca.org/bitstream/handle/10855/22132/b10696192.pdf?sequence=1> accessed 1 December 2014,p 2
[479] 'United Nations Economic Commission for Africa) Study Report On Mainstreaming Regional Integration Into National Development Strategies And Plans' (2013) <http://www.erisee.org/sites/default/files/paper-on-mainstreaming.pdf> accessed 1 December 2014. p 30
[480] 'Regional Economic Communities in Africa A Progress Overview Study Commissioned by GTZ' (2009) Op cit, p 10
[481] Jacques Fernandes and others, 'African Development Report 2014 Regional Integration for Inclusive Growth' (2014) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/ADR14_ENGLISH_web.pdf> accessed 1 March 2015. p 16

Membership of African regional integration arrangements

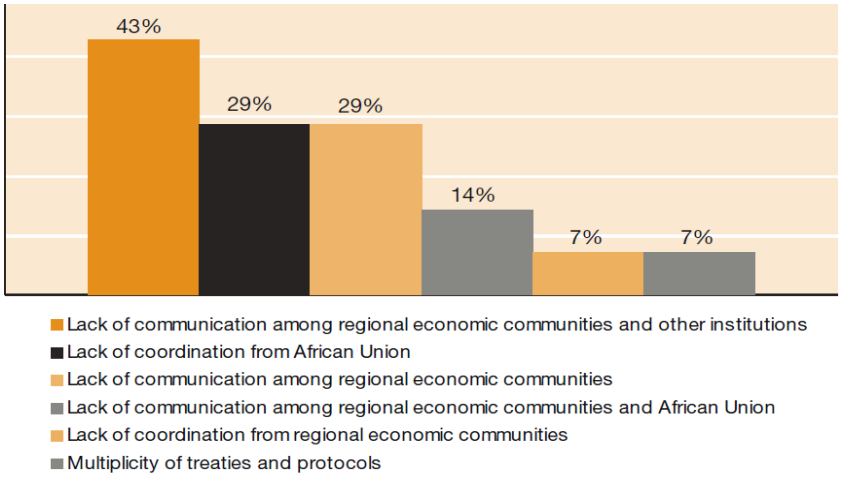


Source: African Development Report 2014[482]

Due to the overlapping memberships, it was in the interests of the AU to first work on the mechanism of ensuring that RECs were only to be made of member states who belong to one regional organisation and not two or more. The first step would have been to ask member states to choose which REC they want to belong to and then work on ending the other memberships so that focus would be on one organisation without having divided loyalties as to which organisation to serve. The AU Commission was tasked with monitoring the harmonisation of the economic integration activities, but up to now they have made less progress as those RECs they do not recognise continue to exist, raising more questions about commitment. There was need for the AU from the start to get involved in reforming the RECs with a view to achieving the realisation of the African Economic Community dream. The following bar chart contains a representation in percentage form the reasons given for multiple RECs membership, of which the key ones are the following: lack of communication among regional economic communities and other institutions, lack of communication among regional economic communities, lack of communication among regional economic communities and AU, lack of coordination from regional economic communities and Multiplicity of treaties and protocols.[483]

[482] Ibid
[483]Ibid

Reasons why African regional economic communities duplicate activities (%)



Source: Economic Commission for Africa[484]

5.3.13 Migration

Never ending conflicts such as in the Uganda, Somalia, Western Sahara and others weaken stability and integration efforts.[485] Despite all the RECs having agreed (signed) the various protocols on the movement of persons, the problem remains that of effective implementation of what they have been agreed. Progress has been made in the case of the EAC and ECOWAS whereas in the case of SADC there are countries that seem to be reluctant to completely abolish visa requirements and furthermore there are about five countries (Botswana, Namibia, South Africa, Zambia and Zimbabwe) that still impose the requirement for work permits which undermines the integration effort. The most troubling aspect is that one of the fairly developed countries, South Africa is one of the countries that insist on visas and work permits which make it harder for integration to progress. When major partner such as South Africa holds back as in this case, it effectively means they will be little progress in the areas of mutual interest. In the case of South Africa's concerns regarding opening its borders completely maybe due to the desire to protect its job market. Other concerns include the problem of illicit migration, which can increase the incidence of human trafficking

[484] 'Assessing Regional Integration in Africa II Rationalizing Regional Economic Communities', Economic Commission for Africa, Addis Ababa, 2006, p 58

[485] Aderanti Adepoju, *Migration in sub-Saharan Africa, (*Nordiska Afrikainstitutet 2008) p 52

organised crime and terrorism. Finally there is the apprehension of receiving asylum seekers, as most of the movement in Africa is due to war. [486]

The table below shows that great effort is still required in order to achieve the complete free movement of people and workers.

Implementation of Migration Policy in Interrgional Organization

Interregional Organisation	Protocol	Countries that have Implemented Freedom of Movement Protocol	Common Passport	Universal Tourist Visa	Right of Establishment for Business
AMU	Article 2 of Treaty 1989	3 out of 5	No	No	No
CEN-SAD	Paragraph 2 Treaty 1991	Unclear	Visa Waived for Diplomats and Certain Professions	No	Right of Riesdence (Not Ratified)
EAC	Article 7	3 out of 5	Yes, EAC Passport	In Progress	Yes 2 out of 5 (Implemented)
ECCAS	Article 4 and 40 of Treaty and Protocol in Appendix Vii	4 out of 11	Travel Books, Cards, Special Line in Airport	In Progress	Yes 4 out of 11 Implemented
ECOWAS	Protocol N 0 A/P/.1/5/79	All 13 out of 13	Yes, ECOWAS Passport, Travellers Checks	No	Yes
CEMAC	Arete, June 29, 2005	4 out of 6	No	No	No
COMESA	Article 164	None	No	No	No
SADC	Article 14	7 out 15	Yes, but Visa Still Required in SA and Zimbabwe after 90 Days	In Progress	No
UEMOA	Article 4	All 6 out of 6	Harmonized with ECOWAS	No	Yes

Source: the Researcher +United Nations Development Programme (2010)

[486] United Nations Development Program (2010), it was highlighted that of the 29 million emigrants from Africa, 2.3 million were recognised refugees displaced by war, other natural disasters and drought. Abebe Shimeles, Migration Patterns, Trends and Policy Issues in Africa (African Development Bank 2010) p 7

From the above table, it is evident that only all members of ECOWAS and UEMOA have ratified some protocol of free movement and have a common passport, while the rest still have to complete the ratification process and do not have a common passport. CEN-SAD and COMESA have not ratified any protocol. This highlights that the level of commitment of some of the members is questionable as it has been a long time since the protocols were adopted but have still not ratified them.

5.4 Judiciary Role in Economic Integration in the African Regional Blocs: AU and Africa Sub-Regional Organisations

With the efforts so far made towards economic integration by the various institutions of the AU, it is necessary therefore that in order to have a smooth administration of the body of rules and regulations governing this process, a judiciary has to be in function. Article 7(1) (e) of the African Economic Community (AEC) Treaty established a Court of Justice[487] which was adopted in 2003, and entered into force in 2009. It was however, replaced by a protocol creating the African Court of Justice and Human Rights (ACHPR), which will include the already established, African Court on Human and Peoples' Rights and has two chambers, one for general legal matters and one for rulings on the human rights treaties.

Specifically, article 18 (2) of Treaty Establishing the African Economic Community provides that the Court of Justice shall ensure respect of the rule of law in the interpretation and application of this Treaty and shall decide on disputes submitted pursuant to this Treaty. Article 19 of the treaty provides that the decisions of the Court of Justice shall be binding on Member States and organs of the Community.

Article 5 (1) (d) of the AU Charter make provision for an African Court of Justice and Human Rights located in Arusha, Tanzania. Pursuant to this, article 18 established the Court, with its ruling and functions to be defined later in a protocol.

In establishing its organs, the EAC Treaty in article 9(1) (e) provides for the EAC Court of Justice which, according to article 23, shall ensure the observance to law in the interpretation application and compliance with the Treaty. The jurisdiction of the Court shall be the

[487] 'Regional Economic Integration Treaties: Abuja Treaty Establishing the African Economic Community (AEC)' <http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=217> accessed 26 July 2014

interpretation and application of the Treaty with such other jurisdiction as will be determined by the Council upon the conclusion of a protocol to operationalise the extended jurisdiction.

Pursuant to article 9(1) (f) of the SADC Treaty, a Tribunal for the Community was established as a build-up to the regional integration process and will be a judge among the member states. It will be responsible among other things, for the proper interpretation of the SADC Treaty, the interpretation, application or validity of SADC protocols and all additional instruments adopted within the framework of the SADC community. The Tribunal was suspended[488] in 2012 while leaders tried to find ways of how it was to operate. Unfortunately, in August 2014 it came back but much weakened and will not be able to handle any cases brought by people against their governments.[489] The reducing of its competencies is not in line with protocols of other regional economic communities. The surprising issue is the lack of monitoring by the AU. It also means that citizens of SADC would have their rights undermined by their governments and they will have nowhere to take their cases. The heads of SADC appear to have protected themselves to appear in cases where they do not respect the human rights of their citizens.[490]

According to article 7(1) (C) of the Common Market for Eastern and Southern Africa (COMESA) which is one of the pillars under the AEC, the organs of the Common Market shall include, among other things, a Court of Justice. Pursuant to this provision, article 19 provides that the Court of Justice established under article 7 of this Treaty shall ensure the compliance with the law in the interpretation and application of this Treaty. It further provides that the Court shall have jurisdiction to pass judgment upon all matters, which may be referred to it pursuant to this Treaty (Article 23). It has to be mentioned that COMESA does not hear individual cases involving human rights violations. In a landmark case heard in Zambia in 2013 brought by *Polytol Paints v Mauritius Government*[491] it was ruled that the government of Mauritius broke Article 46 of the COMESA Treaty that required that all member states to have eliminated by year 2000 all customs duties and other charges on goods which created from member states in the COMESA FTA. It was ruled that by re-establish

[488] Ashimizo Afadameh-Adeyemi and Evance Kalula (2011) 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community', in Anton Bosl et al, *Monitoring Regional Integration in Southern Africa* (Tralac, 2011) p 16
[489] Ray Ndlovu (2014) Op cit
[490] Ibid
[491] Osemo W, 'PRESS RELEASE - Companies Can Sue Governments in the COMESA Court' (2015) <http://www.comesa.int/index.php?option=com_content&view=article&id=499:companies-can-sue-governments-in-the-comesa-court-&catid=6:press-releases&Itemid=57> accessed 20 August 2014

customs duties, the Mauritius government was in breach.[492] This ruling goes on to show the powers of a regional court in economic integration dispute.

On its own, article 6 (1)(e) of the ECOWAS Treaty made provision for the establishment of a Community Court of Justice, consequent upon which it was established in article 15. This Court, established with a Treaty in 1991 and with the Supplementary Protocol of 2005 in Abuja, Nigeria, has jurisdiction as provided for in Article 9 of the Protocol.

At the 38th Session of the African Commission on Human and Peoples' Rights held in Banjul in 2005, one issue that was top on the agenda was that of the merger of the African Court of Justice and the African Court of Human Rights. There are about 14 Courts and Tribunals funded by the African States. These include the Court of Justice of the Economic Community of West African States (ECOWAS), based in Abuja, Nigeria ; the Court of Justice of the West African Economic and Monetary Union in Ouagadougou, Burkina Faso; the Court of Justice of the Common Market of East and Southern Africa (COMESA) in Lusaka, Zambia; the Court of Justice of the East African Community in Arusha, Tanzania; and the SADC Tribunal (i.e., the Tribunal of the Southern African Development Community) based in Windhoek, Namibia. In addition to these, there are two other Regional Courts though so they say created by Treaty but are not yet in place. One is the Court of Justice of the Arab Maghreb Union, which was supposed to be in Morocco. The other is the Court of Justice of the CEMAC countries (Central African Economic and Monetary Community) which is supposed to be in Libreville. All of these courts have jurisdictions over issues of regional integration, free movement of persons, workers, goods and services and some associated human rights cases. The African Court of Justice is going to have jurisdiction among other things over regional integration issues, including free movement of persons, workers, goods and services. However the African Court of Justice is yet to be fully operational.[493]

[492] 'COMESA Court of Justice Rules That Mauritius Breached FTA Rules | tradeMark Southern Africa (TMSA) - Advancing Regional Integration in Southern and Eastern Africa' (2010) <http://www.trademarksa.org/news/comesa-court-justice-rules-mauritius-breached-fta-rules> accessed 20 August 2014

[493] Souhayr Belhassen, The African Court on Human And Peoples' Rights, towards the African Court of Justice and Human Rights (FIDH, International Federation for Human Rights) https://www.fidh.org/IMG/pdf/african_court_guide.pdf accessed on 20/10/2014 p 5

5.5 Conclusion

In conclusion, the main problem obstructing the integration efforts in most sub-regional economic blocs is the lack of implementation and harmonisation. Most agreements are in place, but there is a lack of political will power to drive the process forward. There is often lack of good, dedicated and visionary leadership by the relatively large and wealthy countries to move the process forward. The challenges being faced are daunting and would call for an improved strategy aimed at achieving the goals of integration. Political instability, civil conflicts, wars, diseases, lack of adequate transport infrastructure, prioritization of national interests, language and culture differences, corruption and poverty, weak enforcement mechanism, and administrative restrictions are all factors which stand in the way of progress towards effective integration The duplicity of membership and the multiplicity of economic agreements undermine the integration effort, in particular in ECOWAS and ECCAS. In the COMESA, at least there is a Tripartite Agreement that was signed aimed at harmonising the economic integration of three regional economic blocs that include COMESA, EAC and SADC. There has been slow progress towards tackling the problem of multiple memberships.

Judging from the above, it is clear that not much has been achieved in the area of direct judicial intervention in promoting economic integration, because as of now there are no cases of economic integration that have been brought to the African Court of Justice though it is now operational as of 2009.[494]As seen, most of these legal provisions setting up these regional courts have not advanced much beyond the act of institutional establishment itself, which in the case of some, took place years before now.

This chapter has analysed the challenges of economic integration and free movement of workers in the AU and Africa sub-regional organisation, and the role of the judiciary in economic integration in the African regional blocs: AU and Africa Sub-Regional Organisations. The next chapter aims to analyse the status of nomads and their rights of movement.

[494] The African Court on Human and Peoples' Rights , towards the African Court of Justice and Human Rights, https://www.fidh.org/IMG/pdf/african_court_guide.pdf , accessed on 15/11/2015, p 15

CHAPTER SIX

NOMADIC MIGRATION AND THE PRINCIPLE OF FREE MOVEMENT OF PERSONS IN THE AFRICAN CONTEXT

Source: Uncovering the stories of the Sahara (2014)[495]

6.1 Introduction

This chapter will review, analyse, examine and assess one area that has received little or no attention when discussing the movement of people or workers in the context of regional economic integration in Africa. The issue of nomadic and semi-nomadic seasonal migrations, though an essential aspect of life in many parts of Africa, have featured less on the economic integration agenda. This chapter will explore the historical background to semi-nomadic and nomadic migration.

The chapter will argue that the right of free movement of semi-nomadic and nomadic peoples (such as, for example, the Fulani herdsmen of West Africa, the Tuareg of North Africa and the Masai of East Africa) is an ancient and therefore a prescriptive right which from time immemorial knew no national boundaries. Although some of these tribes have now settled in particular locations, nomadic migration is nonetheless still a modern phenomenon, mostly in search of seasonal cattle rearing pastures. Hence the phenomenon of semi-nomadic or nomadic migration itself tends to be seasonal.

The main challenge to this form of free movement in the modern era has been the erection of national boundaries and policies aimed at immigration controls. These developments have

[495] Foodtank (2014) Africa Nomads Conservation. http://foodtank.com/news/2014/01/africa-nomads-conservation. http://lacuna.org.uk/review/land-of-fear/
Accessed 7 November 2014

posed a serious obstacle to the ancient rights of free movement historically enjoyed by nomadic groups. Yet none of the RECS or any of the other integration programmes seem to be addressing this problem, hence the rationale for including a chapter in this thesis which is specifically dedicated to examining this issue.

6.2 Nomadic Migration and Human Rights

To put it into perspective, it is very important to examine the free movement of persons from another angle, i.e. of international human rights law. Rather than ignoring the plight of semi-nomadic and nomadic peoples on the African continent, it is worth understanding that provisions of international human rights law actually have freedom of movement provisions that can be applied to these groups of people. For this reason the situation concerning the rights of nomads to free movement across national boundaries can also be seen in a human rights context. This thesis has already highlighted the importance and the need for free movement of workers if African Economic Community integration is to be a success. Various articles, treaties and protocols were negotiated and adopted to promote the free movement of persons as desired by the African Union in one of its main objectives of achieving economic integration using the concept of Regional Economic Communities.

Regional agreements dealing with integration have chapters, provisions or declarations in treaties which deal with the free movement of persons or workers, but the principle of free movement of persons and right to cross borders for nomads remains an issue not well defined within the treaties. The vast majority of treaties or protocols such as SADC, ECOWAS, COMESA, and EAC mention the free movement of persons but contain no specific provisions on the unique status of nomads and the legal protection of their ancient and historic rights to migration (free movement across national borders). Most of the RECs focus on the free movement of persons or workers. Nomads would normally be expected to benefit from the free movement provisions as envisaged in the various blue prints which constitute the legal framework for economic integration. However, in view of their special status and way of life nomads do not easily fit into the concept of ‘person’ or ‘workers’ as envisaged by the various RECs. This is in view of the fact that person or worker in the sense used in the RECs refers to settled populations. Nomadic peoples therefore face two main problems: firstly the erection of national boundaries in the colonial and post-colonial which have now become obstacles in the path of seasonal migration because of the requirement for immigration formalities. Secondly the RECs unfortunately have not given particular attention

to the special status of semi-nomadic and nomadic peoples whose lifestyle involves seasonal migration across national borders.[496]

Nomads can be found anywhere in the world. They are distinguished by their highly mobile non-sedantic life style and they often tend to face the same types of threats to their mobility and survival. In Africa the main challenges which often confront them include rights of free passage over private land across national borders or access to historic seasonal migration routes, access to water resources and land rights, access to other natural resources and inter-communal conflict such as farmer-grazier disputes.[497] Despite nomads having been in existence since the dawn of human civilisation, the establishment of modern states and legal concepts of private property mean that the migratory lifestyle of nomads started being viewed as a threat to the modern state and to modern concepts of land rights and property ownership. Nomads thus became regarded as trespassers who do not appear to respect borders and land rights, coupled with the ability to move undetected by authorities of the modern state. They have no concept of national identity and do not recognise borders, often resisting or evading immigration controls when crossing borders. Some nomads live within border zones often engaging in cross-border trading activity which is regarded by state authorities as illicit smuggling activity. From a society point of view, the perception of nomads as being backward often lead to the conclusion that nomads must be settled and be put under the control of the modern state. A combination of these various factors has led to an erosion of the historic rights of cross-border migration for nomadic communities.

It is worth noting that there is no generally accepted definition of who is a nomad and there has been movement towards using the word mobile to describe the different societies whose way of living involves seasonal movement from place to place.[498]This gives a new perspective to nomadism with the argument that the emphasis should be shifted to using the word 'travellers' because such groups are on the move most of the time. [499]

Nomadism can be defined as a way of life often characterised by seasonal migration along historic routes. Nomads are a group of people who practise mobility as a way of life, mostly in search of new pastures or natural resources such as water. This way of life often has a management strategy that allows for the provisions of land use and maintenance and gives

[496] Jeremie Gilbert, *Nomadic Peoples and Human Rights: Routledge Research in Human Rights Law,* (1st Published, Routledge 2014) p 3
[497] Ibid
[498] Ibid
[499] Ibid

nomads a distinct cultural identity.[500] Nomads were often seen as people who followed pre-determined migration routes and who were often endowed with very good geographical knowledge of their migration range. However, it is widely agreed that their movement is a consequence of reasonable and efficient strategy for using limited resources, which are irregularly spread, over a wide area. The word nomad is of Greek origin, which means people who move from place to place to find fresh pastures for their animals and have no permanent place or home.[501] The key words from the definition of nomads are moving from one place to another and having no permanent place. The significant issue for nomads is the ability to move from place to place and the fact that they have no permanent place which they can call their home means their life is tied to the principle of free movement. In view of the fact that in most cases their movement is in search of seasonal resources such as water and pastures, it could be argued that their movements constitute a form of work. "Free movement is essential to nomadism and mobility is not only a source of lifestyle and an economic mode of production, but also often a necessary strategy for survival in the relatively environment of the lands available to nomadic people".[502]

However, the downside of this migratory lifestyle with no permanent abode has its own practical and legal problems. The first of these is the factor that nomads do not acquire any rights to land ownership, although it can be argued that they have ancient rights of prescription in terms of access and free passage over land along recognised routes of migration. The second problem arises from the fact that due to their non-settled lifestyle nomads do not often belong to a particular country or nationality, which in turn poses a legal problem in terms of cross-border migration and complying with immigration formalities in the modern era.

An essential aspect of nomads' life is the ability to move freely and in the economic integration sense, it is often argued that economic integration achieves the free movement of people or workers. In the case of nomads it may be argued that this right of free movement should come under the free movement of workers and family members or dependents of the worker. The concept of free movement is well known in international human rights laws, however when it comes to applying it to nomads, it is unclear whether it can indeed be applicable. Control of movement of people and the establishment of borders is a central part

[500] Ibid
[501] Ibid
[502] Ibid p57

of international law and has to do with restricting movement of persons. This highlights a potential conflict between international law which permits the control of movement across borders, and human rights law which promotes free movement as one of the key liberties that an individual must have.[503] For nomads, free movement and right of residence are not only essential, but also one of the most fundamental human rights.[504] Most human rights treaties regard freedom of movement as an essential freedom for individuals or groups. But despite freedom of movement being protected in most international human rights law, this right does not seem to have been extended to those who need it the most, i.e. nomads.

6.3 Nomads and Free Movement

The analysis in this section will highlight the treaties or international instruments which contain provisions on the free movement of people within the context of the migratory rights of nomadic and semi-nomadic populations.

In the Universal Declaration of Human Rights 1948 (UDHR), Article 13 confirmed that: *'everyone has the right to freedom of movement and residence within the borders of each state' and that everyone has the right to leave any country, including his own, and [to] return to his country"*.[505] This was an important provision from the global perspective of the principle of free movement of people. However, it did not mention nomads and the use of the words 'within the borders of each state' would seem to restrict the freedom of movement within national boundaries – whereas nomadic migration tends to be across national frontiers. Nonetheless it should be enough to cover nomads since it mentions 'everyone' and also makes reference to the right to leave or to return to a country.

There is also another provision which emphasises the right of movement. The International Covenant on Civil and Political Rights 1966 (ICCPR), under Article 12 states that: a) *'everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residency; b) everyone shall be free to leave any country, including his own'.*

[503] Ibid
[504] Stig Jagerskiold, "The Freedom of Movement", in Louis Henkin, ed., The International Bill of Rights, New York, 1981, p 166
[505] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

Just like the UDHR, the ICCPR emphasises on everyone's freedom of movement and right of residence, and once again we could argue that this right extends to the migratory rights of nomadic and semi-nomadic populations.

Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD) referred to the enjoyment of: *a) right to freedom of movement and return to one's own country without any discrimination.*[506] Different regional blocs also adopted the UDHR in their affirmation of freedom of movement and rights of residence. The cases of Europe and Africa are examined below. These regions have confirmed in principle the right to freedom of movement, and in all cases have mentioned movement of people but is open to question whether that also included nomads. In any case it can be argued that what is required are special rules or a special legal framework for protecting nomad's rights of free movement because of the special and historic nature of this type of movement.

Starting with Europe, Article 2 of Protocol No. 4 of the European Convention of Human Rights (ECHR) reconfirmed the freedom of movement almost word for word from the UDHR where it stated:

'Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of free movement and freedom to choose his residence; and

Everyone shall be free to leave any country, including his own…..'

Taking from the UDHR, the European convention is very clear on the freedom of movement, which, it can be argued, is a right which be extended to nomadic populations of Europe such Roma gypsies. It can therefore be further argued that the decision by the French to expel the Romas from France in 2009 and 2014 is a breach of their right of free movement both under the ECHR, the UDHR 1948 and arguably under EU law.[507]

Turning our attention to the African Charter on Human Rights and People's Rights, Article 12, states that:

'Every individual shall have the right to Freedom of movement and residence within the borders of a state provided he abides by the law; and

[506] International Convention on the Elimination of All Forms of Racial Discrimination. 1965. 660 U.N.T.S. 195 195

[507] Henri Astier. BBC News Magazine. France's unwanted Romas. http://www.bbc.co.uk/news/magazine-25419423. (13 February 2014) accessed on 25/12/2014

Every individual shall have the right to leave any country including his own, and return to his country…..'

In the light of this article it can be said that the right of free movement is one that is protected in principle on the African continent. However a critical reading of this provision seems to imply that the right is restricted to settled populations. To begin with, the trans-border migratory habit of nomads outside the passport control system is often seen to be an activity who does not abide with national immigrations laws and policies, hence not in keeping with the phrase 'abides by the law'. Secondly, the reference to 'his country' in the second paragraph of Article 12 is somewhat ambiguous in the case of stateless nomadic populations which quite often do not have a country which they can call their own. This is because historically nomads have moved from place to place without any roots, deep ties of national affiliation to any one or particular country (e.g. the Fulani of West Africa and the Tuaregs of the Sahara). It is for this reason that the argument for a special regime for nomadic peoples is even stronger.

On the whole, within the different treaties on human rights, the issue of nomads have received either very little attention or no attention at all. The rights of free movement in particular appear to only apply to those considered normal citizens (i.e. settled populations). Under international human rights law, the freedom of movement has two-fold. First, there is the right for citizens of a state to travel and reside freely within the state and secondly, there is a right for citizens to leave and to return to that state at any time. In the case of nomads, these rights are not so easily exercised. This is because to be able to exercise these rights in the modern state requires certain formalities to be fulfilled in accordance with immigration rules and regulations, for example, the acquisition of certain documents such as national ID cards and a passport together with a visa. However, because nomads are not tied to one particular state or country and frequently have family members living in more than one country, they are often not considered to be citizens of any one country. Therefore from being multiu-state citizens they are transformed into stateless peoples. For this reason they are not entitled to certain rights of citizenship such as the acquisition of a passport or national ID card, and hence are not able to comply with relevant immigrations formalities which would give them the right of free movement either within the state or across borders.

The regional economic communities of Africa also have some treaties or protocols dealing with the free movement of workers or persons. A closer look at them is made below:

ECOWAS has provisions for the free movement of persons as key for a larger union.[508]. The SADC has a protocol promoting free movement, which provides a legal basis to facilitate the free movement of people within member states.[509] The Treaty of COMESA requires that member states facilitate the removal of obstacles to free movement of persons, the right of establishment and right of residence. The EAC has a protocol on the Establishment of Common Market, which under Article 5 deals with, *inter alia*, the free movement of factors of production - with free movements of persons and workers dealt with under separate headings. However, there are no provisions dedicated specifically to the free movement of nomads. Despite all the efforts towards the free movement of persons or workers, one group, which by force of argument should be included, is however not covered by the various treaties or protocols, which calls for a rethink of the definition of words used in the various treaties such as 'person', 'individuals', 'citizen', 'everyone' or 'worker'. There is a pressing need for the RECs and African Union to re-define who exactly is covered under these words. Better still, there is need for a specialised legal framework which applies exclusively to the free movement of nomads and which is specifically dedicated to the protection of nomadic of cross-border migratory rights. Even in the case of the EU, where there are clear policies about free movement of persons and workers, there was no clear emphasis on the movement of nomads, although the declaration that there is free movement of all citizens provide room for nomads to claim a right to carry on their mobility across borders[510] - but only if they can first of all prove that they are EU citizens by belonging to a particular EU member state.

One of the problems often cited concerning nomads is that they are looked upon as stateless vagrants and trespassers on land who do not have rights to move and their movements need to be restricted. There is need to recognise that nomads are just as other human beings and their historic human right to free movement needs to be respected and legally protected in the context of nomadism. Above all the rights of nomads to mobile residency and cross borders needs to be legally recognised and enforced within a specific legal framework in all regions of the world.[511] In international law, there has been limited scope for recognising the rights of nomads and populations divided by borders, in particular their rights to cross-border movements. In practice this has been left at the discretion of nation states which often tend to apply national immigrations laws and regulations which have the effect of denying cross-

[508] Article 27 of ECOWAS Treaty (1975) and Protocol A/P. 1/5/79 on Free Movement of Persons, Rights of Residence and Establishment, 1979
[509] Draft Protocol on the Free Movement of Persons in SADC
[510] Jeremie Gilbert (2014) Op cit, p 58
[511] Ibid

border access to nomad populations, thus restricting their historic rights of migration. The need for specific rights within specific international or regional legal framework protecting the historic rights of nomads to travel across national borders during seasonal migration is therefore a pressing necessity which is important to their survival in the modern world for economic and cultural reasons.[512] One of the contradictions of modern times lies in the fact that with globalisation and ever increasing interaction between peoples, the concept of free movement is gaining more acceptance around the world with the consequence that international travel is become easier for much of the world's population. At the same time, however, the right of nomadic peoples to free movement has become more and more restricted in this new global trend.

6.4 Examples of Nomadism

In Europe, there has historically been a problem with recognising the rights of Roma and Travellers to stop at places along their migratory route. However, there is increasing recognition in the European legal system of these rights, linking it to the freedom of movement and right to mobile residency.[513] Even so there is often a failure by European governments to recognise tents, caravans, mobile houses and other forms of non-permanent habitats used by nomads as residences which are common to many nomadic communities worldwide.[514] Failure to recognise the mobile way of life of the nomads tend to restrict their freedom of movement and also affects the right to temporary residence while on migratory routes, as governments often want nomads to lead a settled way of life. Some call for the right of freedom of internal movement and residency, which can be a way of promoting the right of nomads to maintaining nomadic way of life. The idea of freedom of movement across national borders could be applied in the case of Roma and Travellers (in Europe) and can also be applied to the Fulani in whose seasonal migratory routes range from Guinea in the far west through countries such as Sierra Leone, Liberia, Ghana, Mali, Niger, Nigeria, Cameroon, and then Chad to Sudan in the East.

From a domestic point of view, allowing for internal freedom of movement of Fulani pastoralists in Nigeria, for instance, would allow them to move within the local areas without problems. However, the lack of recognition of their rights to internal free movement within the country often creates conflicts with the settled farmers or local populations. Therefore, it

[512] Ibid p 59
[513] Ibid, p 58
[514] Ibid, p 71

is essential that there should be an enforceable legal framework that can enable nomads to be able to access those areas where they can find water and pastures for their animals. The security of pastoral livelihoods depends on the condition of their grazing environment, which in turn depends on the availability of grazing pastures, watering holes and other natural conditions. [515] The challenge in achieving such an objective would be how to find a balance between the rights of migratory nomads to free movement and access to natural resources with the interest of settled populations in preserving the acquired rights to land ownership and protecting the livelihoods from farming which often face damage from migratory cattle and other livestock.

Another important point to highlight on the freedom of movement for nomads relate to the possibility of crossing borders (i.e. international migration and cross border access to historic migratory routes). Nomads often find themselves divided by borders established without taking consideration of cultural ties and traditional migration routes. A case in point is that of Tuareg nomads of the Sahara whose movements were affected because of colonial borders used by post-colonial nation-states to deny Tuareg the rights to associate with their relatives who often find themselves on the other side of these borders.[516] The borders themselves are colonial creations whose main effect has been to severely restrict the Tuaregs' ancient habits of migration by denying them access to historic migration routes across the Sahara desert. It could be argued that it is a breach of international human rights to restrict or deny people access and interaction with their family members of members of the same tribe through the erection of what they view as artificial borders separating them from parents or other relatives who by the combined accidents of history, politics and geography just happen to be on the other side of what is now viewed as a border.

There are so many cases in Africa of nomads whose way of life have been affected by the modern state. Their migratory way of life is often not considered within the context of the movement of workers or persons. This is despite the fact that nomads often moves in search of grazing pastures (which it could be argued amounts to seasonal work), although they often do so without the need to carry passports, identification cards or other official documents

[515] Isah Mohammed Abbass, 'No Retreat no Surrender Conflict for Survival between Fulani Pastoralists and Farmers in Northern Nigeria the Setting and Framework of Conflict in Pastoralism and Sedentarism' (1994) 822 63 <http://eujournal.org/index.php/esj/article/viewFile/4618/4414> accessed 10 October 2014, p 332

[516] Report of the Working Group on Indigenous Population/Communities of the African Commission on Human Rights and Peoples Rights Mission to the Republic of Niger, 14 -24 February 2006, http://www.achpr.org/files/sessions/40th/mission-reports/niger/achpr40_misrep_specmec_indpop_niger_2006_eng2.pdf , accessed on 20/12/2014, p 55

proving their nationality.[517] Tuaregs, for example, can be found along the borders of Libya, Algeria, Mali and Niger. They seasonally move trading silver jewellery, arts and handicrafts. Because their migratory patterns correspond to the rhythm of the seasons, they often do so without the need to have passports, ID cards or official travel documents. The Tuaregs' ancient way of life and historic rights of access to new grazing pastures has been severely affected by new post-colonial boundaries and yet their migratory rights are not protected in the countries they travel and temporarily live in.

The nomadic way of life have evolved over a long period of time and as such has become the main occupation or way of life of Tuaregs. One of the factors that have influenced their way of life includes factors such as political crises, droughts in the Sahel regions of Niger and Mali, which often result in forced migration to surrounding states such as Algeria and Libya. Their migration through Algeria and Libya is often done without any formal travel documents and their loyalties are not tied to any one of the transit nation states along their routes but are based on tribal bonds. As part of this unique trans-Saharan lifestyle of the Tuaregs, migration, trade and smuggling often come together. They live and work above and beyond national loyalties for they find themselves in different countries in different seasons. The modern threat to this freedom which defines the Tuaregs traditional way of living and pasturing clearly lies in a combination of the post-colonial nation building process and the absence of a legal framework protecting their ancient rights of migration and free movement across national borders.

In discussing the free movement of workers, there is therefore a need to consider the rights of the nomads for the seasonal movements form part of their working life. In the African context, there is need for laws to be developed which will take into account the human rights of the nomads for they form an important group of people that is often not acknowledged but yet they exist. The very fact that they move for historic reasons and that the patterns of their migration are historically pre-defined gives rise to the need for new laws that can protect their right. It would appear to be the case that nomads themselves do not believe that they require travel documents in order to carry out their seasonal movement against borders. During the lifetime of most nomads they would have involved in such trans-border migrations quite a number of times. Apart from immigration controls put in place by modern nation states, anti-

[517] Ines Kohl, 'Going "Off Road": with Toyota, Chech and E-Guitar through a Saharian Borderland, in Hans Peter Hahn and Georg Klute (eds), *Cultures of Migration: African Perspectives (*Transaction Publishers 2007) pp 104-105

smuggling operations by national enforcement agencies together with the problem on international terrorism poses new threats and challenges to this ancient right of trans-border-migration, particularly in areas such as sub-Saharan Africa.

One of the key objectives of the thesis to extend our understanding of the free movement of workers to the area of nomads as they have enjoyed free movement over a long period of time and yet no official consideration is given to their status and activities. It is hoped that highlighting this gap in the legal framework could lead to the development of relevant legislation aimed at promoting and protecting the migratory rights of nomadic peoples, both internally and across national borders.

6.5 Nomads and Legal Framework

The issue of semi-nomadic and nomadic peoples may not have been included in the treaties and protocols establishing the free movement of persons in the context of African Union and the sub-regional organisations. However, it is worth considering because nomads have a migratory life style, which requires them to be constantly on the move in search of pastures and grazing lands. It is a life style that they have been practising time immemorial so that there is need for legal recognition that they do have seasonal migratory rights which should to be respected by the state. The concept of free movement in the case of EU allows citizens of member states freedom of movement as migrant workers to go to those countries where there are opportunities for work without having to face administrative hindrances or obstacles in the form of immigration formalities at the borders or in the host country. The same principle should equally be applicable at law to nomads who are often face restrictions as to where they can go in search of grazing lands and are often treated as if they do not have any rights, including that of migration.

The case of Western Sahara is one example of what could go wrong when the rights of nomads are not recognised. The Saharawi nomads who have a long history of migratory existence found themselves being forced off the land by the Moroccan and Mauritanian governments, The Moroccan government even went as far as to claim total control of the area despite the fact that the Western Saharawis were proven to be the rightful owners and residents.[518] The dispute has been stalemated for a long time with no resolution in sight

[518] Western Saharawi Profile (BBC News Africa) http://www.bbc.co.uk/news/world-africa-14115273, accessed on 7 January 2014

despite the international community recognising that the Western Saharawis have the right to the land and a right to self-determination, which the Moroccan government does not seem prepared to accept. The problem of self-determination for Western Sahara has also seen relations between Algeria and Morocco being at a low point for a long time with the border between the two countries being closed for almost three decades.

There is a need to protect the rights of nomads and the reasons for that concern the need to recognise access routes seasonal migration and prohibition from removing nomads from their traditional areas. In the colonial era, nomads were often forced off their migratory range and settled in reserved areas, a practice prohibited under Convention No.169[519] of the International Labour Organization (ILO) which does not allow the removal of local peoples from their lands without their consent.[520] The Draft United Nations Declaration on the Rights of Native Peoples states that local people cannot be removed by force from their land or territories, and that no relocation can take place without the free and informed consent agreement on just and fair compensation, and where possible the option of return.[521] Where the removal or relocation concerns exploitation or conservation of natural resources in the traditional lands of the nomads, they must be consulted as part of the decision making process. However, in most cases where mineral resources are concerned, the state usually has over-riding interests and as such nomads are often not consulted regarding decisions to exploit underlying resources such that the environment is often polluted and depreciated at the expense of the nomads. There is a need to involve them in decision making as some decisions can have a significant impact and detrimental effect on their way of life.

The International Labour Organization (ILO) Convention No. 169 and the Draft United Nations Declaration on the Rights of Native Peoples also requires that States to consult the native populations before exploitation of resources in their territories with a view to determining whether they will be affected when their land is used. In cases where they are affected, there is need to have agreements in place as to how they will participate in the profits to be obtained from the exploitation of their land. The traditional activities of nomads do tend to have a beneficial impact on the environment through sustainable development of dry regions. It is thus clearly the case that their traditional way of life and systems play an

[519] Convention No. 169 – Indigenous and Tribal Peoples 1989. International Labour Organisation
[520] Marco Moretti , *International Law and Nomadic People*, (Maeco Moretti, Published by AuthorHouse, 2012) p 14
[521] Marco Moretti , *International Law and Nomadic People*, (Published by AuthorHouse, 2012) p 14

important role in the protection of local habitats and bio-diversity, and forcing nomads off the land can have an adverse impact on the local environment. In 2002, the United Nations Development Programme (UNDP) introduce a three year programme where civil society, national governments and international organisations were required to promote sustainable development through raising of animals or livestock in arid lands. There is need for international law to provide further protection to nomadic peoples in situations where they have to cede their rights of self-government to modern nation states or to significantly change their way of life. Nomadic populations with a long history of existence in a particular region should be accorded autonomous or semi-autonomous rights of self determination. Their migratory ranges should be recognised under international law as autonomous regions, even where it straddles the boundary between two or more countries. Otherwise, nomads and other native people will continue to suffer from exploitation by modern states when their rights are not taken into account in the making of important decisions regarding their land. Protecting their rights to self-determination would help in promoting and enforcing their migration rights.

Protecting nomads' rights in law gives them an opportunity to go about their way of life without obstacles or insecurity, and also enables them to exercise their rights without exploitation by the state or any organisations. That will also go a long way in protecting a traditional way of life, which is different from modern day lifestyles. This will enhance co-existence and bring to light the activities of a group of people that is often misunderstood. However, it is clear that some form of legislation is required nationally, regionally and internationally in order to achieve these goals and objectives.

6.6 Conclusion

In conclusion, it has been argued in this chapter that an examination of the free movement of workers or persons in African Union cannot be complete without considering the special situation regarding nomads. Nomads have been an important part of African Society and in some countries such as Libya, Algeria, Nigeria and the Sahel region play an important cultural, economic and historical role. The fact they move from place to place in search of natural resources and grazing lands for their animals and do not have settled status should not deprive them of their rights in society. There is therefore a pressing need for protection of their rights to seasonal movement from one area to another, including cross-border migration from one country to another. Such rights should be included in the treaties and protocols dealing with the free movement of persons and workers. There is need for re-interpretation of protocols dealing with free movement of persons so that nomads can have their rights clearly spelt out and upheld. After all the Universal Declaration of Human Rights grants rights to every individual or persons, this should also include nomads. Nomads have a cultural significance in their migratory way of life which should be respected.

Freedom of movement should not be limited to permanent settlers but should be extended to migratory populations because it is their way of life and their work even though different to those settled people nonetheless makes a positive contribution to national and regional economies. Creating a regional or continental legal framework promoting and protecting the rights to free movement of nomads will require national and international authorities and settled communities to respect their way of life, thus avoiding conflicts. The legal framework will help to empower nomads as their migration rights will be recognised at law. Nomads in the case of Africa should be able to move freely without the requirement for immigration formalities as their historic migrations do not interfere with the national security or other vital interests of the modern state. However, the fact that they and their historic rights of migration are not recognised by the modern states can make them feel both stateless and insecure. It is submitted that the ancient migration rights of nomadic and semi-nomadic populations, including cross-border access, is a historically prescriptive right. As such it should be legally recognised, embedded in national legislation as well as relevant regional and international instruments (including international human rights law), and enforced accordingly. This will further complement the aspect of regional and continental integration based on free movement of persons.

Chapter 6 has considered the condition of nomads and their rights of movement. The next chapter would analyse the principle of free movement of workers in the EU, which has been described as the best example of what is possible to achieve through economic and political integration.

CHAPTER SEVEN

THE PRINCIPLE OF FREE MOVEMENT OF WORKERS IN THE EU

7.1 Introduction

This chapter will focus on the historical context of economic integration in the EU and move on further to define who is a worker and what rights are given to being a worker under the free movement of workers concept. It will also explore when the rights can be restricted.

7.2 Brief History of Integration in the EU

The consequences of the Second World War led the leaders of many Western European[522] States to build closer union through integration or economic cooperation.[523] This began in 1952 with the European Coal and Steel Community (ECSC). This Community was characterised by transfer national sovereign from member states to community institutions.[524] Then in Rome, in 1957 six member states, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, signed the Treaty of Rome setting up the European Economic Community (EEC), and the second Treaty establishing European Atomic Energy Community (EAEC) or (EURATOM). The Single Market was completed in 1993 as envisaged by the Single European Act of 1986. The foundation of the EU was laid down by the Treaty on EU (also known as the Maastricht Treaty) in 1992. The membership of the EU has grown from six nations in 1952 to twenty-eight, with the latest member state being Croatia, which joined in July 2013. The EU maintains close and friendly relations with all its neighbours both in Europe and around the eastern and southern coast of the Mediterranean.[525]

As earlier noted in the introductory chapter to this work, the EU is perhaps the best example of what can be achieved through effective economic and political integration.[526] The EU

[522] The term 'Europe' is often taken to mean Western Europe and is often used as another term for the EU. However, the focus only on Western Europe is changing because of the collapse of communism in central and Eastern Europe, the end of the Cold War and the fall of the Soviet Union. Therefore, the EU has included some of Eastern Europe countries. See Frank McDonald and Stephen Dearden, *European Economic Integration, (*2nd edn, Longman,1994) p 271

[523] Jean-Pierre Sabsoub, *The Council of the European Communities*, (Office for official publications, 1992) p 1

[524] Mike Cuthbert, *European Union Law*, (2nd edn, Sweet & Maxwell, 1997) p 1

[525] European Commission, 2005, *Key facts and figures about Europe and the Europeans*, General for Press and Communication, p 3

[526] Jeffrey Haynes et al, Op cit, p 298

represents a relatively successful model of a regional integration effort.[527] Since its establishment, the Treaty of Rome has been revised several times. The first significant revision was in 1986 by the Single European Act with its objective to create 'European laws' which transformed the European Economic Community (EEC) into the European Community (EC) with the addition of social integration. The second revision was in 1992 by the Maastricht Treaty. It has transformed the European Community (EC) into the European Union (EU) through the concept of political integration. This implies that the Community (or union) is now concerned not only with trade but also with social integration, political integration and legal integration. The third major revision was in 1997 by the Treaty of Amsterdam (ToA). The ToA renumbered some old Articles, abolished some and introduced some new Articles while substantively developing EU law by extending the legislative competences of the EU Parliament with the introduction of the co-decision procedure (now known as the "ordinary" procedure). Under this procedure, the EU Parliament now has a power of veto over the adoption of secondary EU legislation. The latest revision takes the form of the Treaty of Lisbon 2007 and the Treaty on the Functioning of the European Union (TFEU) 2010, which have once again renumbered and consolidated the EC Treaty articles. The attempt by the Treaty of Lisbon to put in place a Constitution for the EU was not so successful after the proposed EU Constitution failed to pass the first referendum conducted in the Republic of Ireland on 12 June 2008.[528] However, on 2 October 2009 a second referendum was held which resulted in a clear 'yes' vote in favour of the revised Lisbon Treaty.[529]

Since the coming into force of the ToA in 1999, the scope and significance of the legal measures adopted by the EU has developed considerably. The development of economic integration in various stages from the free trade area, the customs union, and the common market to the economic union evolved through a gradual process of integration. Part Three of the revised EC Treaty contains many of the fundamental principles, which are of importance in the establishment of a customs union and common market. This part of the Treaty sets out, *inter alia*, the 'four freedoms' which are of central importance in realising the goals of the

[527] Michael M Ogbeidi, (2010), 'Comparative Integration: A Brief Analysis of The European Union (EU) and The Economic Community of West African States (ECOWAS)', the Journal of International Social Research Volume 3 / 10 Winter 2010, p 479

[528] Christian Egenhofer, et al, (2009)'The Ever-changing Union: An Introduction to the History, Institutions and Decision-Making Processes of the European Union', (Bruseels, Centre for European Policy Studies 2009) p 15

[529] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press 2010) p 60

Community. Along with the free movement of persons, goods, services and capital, the free movement of workers is one of the fundamental freedoms of the EC Treaty.

The free movement of workers is thus one of the cornerstones of the EU and appears at the heart of the EU legal framework.

From cases such as *Dona v. Mantero*[530], to the *Kurz case*[531], it is clear that the principle of free movement was introduced to enable the liberalisation of the labour market within the common market, together with all the other factors of production. In addition, the principle of non-discrimination based on nationality means that citizens of member states have equal opportunities in the EU labour market.[532]

However, notwithstanding its restrictions, the EU laws on the four freedoms are largely better established, with the CoJ of the EU actively involved in its further clarification. From the case law on workers in particular, it is possible to detect the seed of what later became the concept of EU citizenship.[533]

It is with the quest to remove the obstacles aimed at by the above Treaty provisions that the CoJ has, through case law, contributed in furthering economic integration.[534]

[530] Case 13/76 [1976] ECR 1333
[531] Case 188/00 [2002] ECR 1-10691
[532] Catherine Barnard (2004) Op cit, p 264; see also *Commission v France (Re French Merchant Seamen)* Case 169/73 [1975] ECR 117; *Commission v France (Re French Nurses)* (Case 307/84) [1986] ECR 1725
[533]Catherine Barnard (2004) Op cit, p 290
[534] *Van Duyn v Home Office* Case 41/74, [1974] ECR 1337, *The State v. Jean Noël Royer* , Case C-48/75*Antonissen* C-292/89 [1991] ECR I-745

The following map shows the location of the member states of the EU.[535]

Source: Council of the EU (2015) [536]

The EU currently has 28 member states:[537] In 1952, Belgium, Federal Republic of Germany (West), France, Italy, Luxembourg and the Netherlands became the founding members of the new community, the European Coal and Steel Community (ECSC).[538] In 1973, Denmark the Republic of Ireland and the United Kingdom of Britain and Norther Ireland joined.[539] In 1981, the Hellenic Republic i.e. Greece became the tenth member state. In 1986, it was the turn of Portugal and Spain to successfully apply for membership.[540] In 1995 Austria, Finland and Sweden joined.[541] In 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovenia, Slovakia and Poland became members.[542] In 2007, Bulgaria and Romania joined and in 2013, Croatia also joined the EU, bringing the membership to 28 countries.

[535] Member States of the European Union, http://www.nationsonline.org/oneworld/europe_map.htm, accessed on 05/12/2014
[536] Council of the European Union, 2015 <http://www.consilium.europa.eu/en/home/> accessed 19th October 2015
[537] Ibid
[538] Ibid
[539] Ibid
[540] Ibid
[541] ibid
[542] Ibid

The free movement of people within the EU is guaranteed within countries in the Schengen Agreement where passport free travel is allowed within twenty six European states that agreed not to impose border controls. [543] The twenty six countries participating are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland. Bulgaria and Romania are in the process of joining. The Schengen Agreement allows for the adoption of common immigration policy. Apart from the free movement within the Schengen zone, there are countries that adopted the Euro as the main currency and of the twenty eight member states, nineteen uses the Euro as the main currency and the countries are: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain.[544] With the free movement, monetary integration was made possible and common immigration policy was achieved although there are some countries that opted out of both the Euro (UK and Denmark) and Schengen Agreement (UK and Ireland).

7.3 Who is an EU Worker? A Critique of the Concept of a Worker under EU Law

For an EU citizen to be entitled to the rights of freedom of movement as a worker, they first of all have to qualify as an 'EU worker' by satisfying the criteria which determines the conferment of the status of "EU worker". From this point of view, the legal definition of the term "EU worker" under EU law can be quite technical. So who is an "EU worker"?

In the EU, Art 21 Treaty on the Functioning of the European Union (TFEU) confers on all citizens of a member state the status of an EU citizen. However, Art 22 TFEU further states that the status and rights, which derive from EU citizenship, are subject to qualifications and restrictions. In other words, being an EU citizen does not carry the same rights as being a citizen of a member state such as for example, the UK. One of the restrictions to which EU citizenship is subject is that of residence in another member state. Under relevant secondary EU legislation (i.e. Articles 2 and 3 of Directive 2004/38) EU citizens, have only temporary rights of residence of 90 days in another member state. To be resident for more than 90 days

[543] ITV News, 'What Is the Schengen Agreement and Does Europe's Migrant Crisis Put It at Risk?' (14 September 2015) <http://www.itv.com/news/2015-09-01/what-is-the-schengen-agreement-and-does-europes-migrant-crisis-put-it-at-risk/> accessed 24 October 2015

[544] European Union, 'The Euro' (19 April 2010) <http://europa.eu/about-eu/basic-information/money/euro/index_en.htm> accessed 25 November 2015

is therefore subject to status, e.g. that of an EU worker or self-employed person. Job seekers or migrant workers also have limited rights of residence in another member in that they are permitted to be in the member state for a 'reasonable time' if they can prove that they have a reasonable prospect of finding employment. In a number of cases including *Procureur du Roi*[545] *v Roye*r, and *Antonissen*[546] the term 'reasonable time' has been held to be between 3 months and 6 months respectively.

The TFEU provides the framework for EU workers' rights to be considered a worker depends on one's status and nature of work-related activity covered by several articles.[547] The following EU articles cover the overall rights free movement of worker: Art 45-48 TFEU covers rights of workers; Art 49-55 TFEU covers rights of self-employed / rights of establishment; Art 56-62 covers rights for provision of services (i.e. rights of temporary or short-term establishments). For others who are non-economically active, family members and non-EU citizens rights to free movement is covered under Directive 2004/38 and Regulation 1612/68 (now Regulation 492/2011).[548]

Article 45 TFEU provides 4 main rights for EU works: the right to accept an offer of employment in another member state; the right of entry into that member state; the right of residence for purpose of employment and rights of free movement within the member state in question; and the right to remain or to retire in that member state subject to the laws of the member state concerning retirement benefits.

Article 45 TFEU provides for the following:

a) freedom of movement of workers shall be secured within the Community and such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment;

b) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health to accept offers of employment actually made and to move freely with the territory of Member States for this purpose;

[545] Case 48/75 [1976] ECR 497, [1976] 2 CMLR 619
[546] Case 292/89 [1991] ECRI-745
[547] Karen Davies, *Understanding European Law*, (5th edn, Taylor Francis 2012) p 137
[548] Ibid, p 149

c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administration;

d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

Article 45 TFEU provides only the basic policy concerning the rights of EU workers. More detail aspects of the implementation of the policy has therefore been developed through secondary EU legislation on EU workers' rights pursuant to Article 46 TFEU and also through the CoJ of the EU.

Turning now to the legal definition of an EU worker, treaty or secondary legislation have not provided a definition for the term worker. However, the Court of Justice made it clear that 'worker' is a Union concept and the Court alone has the competence to define it under the preliminary ruling procedure of Article 267 TFEU. In the case of *Levin v Staatssecretaris van Justite* [549], the court ruled in a preliminary reference process that in order to be considered an EU worker, the EU citizen in question should have moved to another member state; be employed under a contract of employment and under the supervision of another person; and should receive some form of remuneration. In other words, the key to being an EU worker lies in activating Article 45 by accepting an offer of employment in another member state. Once they have done this, the status of an EU worker remains with them for the rest of their life even if they subsequently return to their own member state.[550] To sum up, a citizen of a member state of the EU who has never been to another member state to work is not considered to have the status of an EU worker and therefore is not entitled to any of the rights under Article 45 TFEU[551].

The term worker in EU context therefore tends to be defined by case law. Some of the cases in which a worker was defined include: In *Hoekstra*[552] it was held that a community citizen who lost his job but was capable of getting another job should be considered a worker. The case highlighted that the definition of who a worker should not be defined narrowly or

[549] Case 53/81[1982] E.C.R. 1035
[550] *R v Secretary of State for the Home Office* [1989] 1 QB 26
[551] *Morson and Jhanjhan v Netherlands* (Cases 35-36/82)
[552] *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* (Case75/63 [1964] ECR 171 (177)

restrictively by national laws and should follow Union law.[553] From a legal perspective, *Levin*[554] concerned the definition of "work" for the purpose of the free movement of workers' policy under EU law. It was ruled that a part-time employee who engaged in casual work was to be considered a worker on condition the work is real or genuine work of an economic nature and not nominal, minimal or ancillary.[555] In another case, *Kempf v Staatssecretaris*[556], Kempf was a part-time music teacher from Germany. She worked 1 hour a day for 6 days a week and was receiving additional benefits in Netherlands to bring up her wage up to minimum level. Her work, although only 6 hours a week, was nonetheless held to be genuine and effective economic activity and she was therefore held to be a worker for the purposes of EU law on social integration.[557] *Steymann*[558] was a member of a religious community, which provided him with his 'keep' and pocket money, but no wages. He was considered a worker because he was receiving some form of recognition or reward (i.e. remuneration). Another example involves *Ninni - Orasche*[559] In this case, it was considered that it is the nature rather than the extent of the work, which determines status, and being employed on a fixed-term contract will amount to 'work'. Furthermore, 'on call' agency workers should not be discriminated against and should be treated in the same manner as contract workers because it is the work they do rather than the nature of the contract that is relevant.[560] However, in *Bettray*[561] was contended that as the position was artificially created by the government as part of a drug rehabilitation programme, he could not be considered to be engaged in economic activity of a genuine nature.[562] In other words, his 'work' was part of a medical treatment programme or a kind of therapy, and therefore secondary to his main motive for entry and residence in the host member state, which was to receive treatment. This last case illustrates the limits which judicial precedent has imposed on the meaning and status of an EU worker under community law.

From the above it is clear that defining what a worker is constitutes a very important aspect of social integration in the EU because there are extensive rights that migrant workers enjoy

[553] John Fairhurst (2014) Op cit, p 363
[554] Case 53/81, R-53/81, [1982] EUECJ R-53/81, [1982] ECR
[555] John Fairhurst (2014) Op cit, p 363
[556] C-139/85, R-139/85, [1986] EUECJ R-139/85, [1986]
[557] Karen Davies (2012) Op cit, p 150
[558] Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159; [1989] 1 CMLR 449
[559] Case 413/01 *Ninni-Orasche* [2003] ECR I-13187
[560] Working Conditions - Temporary Agency Workers, http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=207 , accessed on 21/09/2015
[561] *I. Bettray v Staatssecretaris van Justitie,* (Case 344/87) [1989] ECR 1621, 17–19
[562] Karen Davies (2012) Op cit, p 150

once they come within the definition of an EU worker. Being a migrant worker in the EU gives one additional rights, which include extension of rights to residence. A worker has immediate rights to reside beyond the period of the contract (Art D 2004/38) on condition that any administrative formalities were being satisfied and further migrant workers must not be discriminated against on the basis of their nationality in terms of payment and other conditions of work and employment. [563]

Article 45 TFEU in effect allows for the free movement of workers from States with less employment opportunities to those with better prospects with the full knowledge you will not be discriminated against as employers are under a legal obligation to select candidates based on merit and not nationality.[564] Cases in point are that of *Kurz case*[565] and *Dona v. Mantero*.[566] It can this be argued that the fact that citizens of member states cannot be discriminated against on the basis on their nationality provides the basis of EU citizenship.

7.4 Basic Provisions of EU Law on Workers' Rights

It is submitted that the manner in which this right has become firmly established within EU law, as well as the jurisprudence by the CoJ, provide an illustrative example and lessons to learn for the AU. This section will therefore discuss the scope of the European free movement of workers right and freedom of establishment, including the broader concept of the free movement of persons. Relevant EU treaty articles and secondary legislation will also be referred to. In addition, the rights self-employed (freedom of establishment which involves the free movement of capital and services) and the rights of retired persons, as well as students will also be discussed.

Article 26 (2) of the TFEU explains that the internal market is "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."*[567] Article 3 (2) of the Treaty on EU (TEU) also provides that "*the Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and*

[563] Karen Davies (2012) p 150
[564] Catherine Barnard, (2004) Op cit, p 264
[565] Case 188/00 [2002] ECR 1-10691
[566] Case 13/76 [1976] ECR 1333
[567] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law, Constitutional Responsibility and the Court of Justice* (Oxford University Press, 2013) p 21

the prevention and combating of crime." Accordingly, free movement of workers is one of the main freedoms necessary to create the EU internal market and to create an area without internal borders as one of the cornerstones for integration.

As explained, the first objective was economic integration through the free movements of goods and the right to free movement of workers was eventually granted, so that workers could move to those areas where their work was required. Also, Article 18 TFEU provides for "*the principle of non-discrimination*", "*there had to be some economic nexus*", but this concept has changed over time in light of the no longer purely economic but the principle is equally applicable as a social rather than just being an economic objective.[568]

As seen above, the most significant Article for workers is Article 45 of the TFEU. It spells out the basic rights which workers can enjoy. Subsection 3(a) enables workers to take up employment.[569] Subsection 3(b) makes this possible by allowing workers to freely move. Subsection 3(c) confers the right to stay within the Member States and subsection 3(d) extends this right to remain after having ceased employment, though Member States can curtail this to a certain extent. Consequently, subsections 3(a)-(d) of Article 45 are designed to ensure that workers can access other labour markets within the EU.[570]

Additionally, Directive 2004/38 grants the rights to enter and reside in a host member state to EU citizens and their family members and thus also applies to workers.[571] Moreover, Directive 2005/36 recognises professional qualifications.[572] Further, Regulation 492/2011 provides workers with the right to receive equal treatment, the right to residence and particular rights, for instance, in relation to social advantages.[573] Hence, the treaty articles together with secondary legislation form the backbone for the free movement of worker jurisprudence.

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[568] Lorna Woods and Philippa Watson, *Steiner and Woods EU Law* (12th edn, Oxford University Press, 2014) p 331
[569] Nigel Foster, *EU Law Directions* (4th edn, Oxford University Press, 2014) p 363
[570] Reiner Schulze, Hans Schulte-Nölke, *European Private Law - Current Status and Perspectives* (Munich, European Law Publishers GmbH, 2011) p 187
[571] Paul Craig and Gráinne de Búrca, *EU law* (2011) Op cit, p 850
[572] Nicola Rogers, Rick Scannell & John Walsh, *Free Movement of Persons in the Enlarged European Union* (2nd edn, London, Sweet & Maxwell, 2012) p 229
[573] Nigel Foster (2014) Op cit, p 382; Katharina Eisele, *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Leiden, Koninklijke Brill NV 2014) p 433

The right to free movement was dependent on demonstrating that one was a worker and not an EU citizen, though the term was not defined by any treaty provision or secondary legislation.[574] However, even today one has to show that one is a worker or is self-employed if one wants to reside in excess of three months; otherwise the person may use up the economic resources of the host state.[575] This in effect means that the concept of "EU citizenship" is a more restrictive concept as it does not grant an automatic right to permanent residence in a member state if a person is not a citizen. In other words, the right to reside for more than 90 days in another member state is subject to the economic status of the EU citizen concerned.

The CoJ ensured that the term 'worker' was not defined in a narrow manner by the member states, but instead established "an independent concept of worker."[576]

7.5 The Benefits of the Concept of Free Movement of Workers:

The EU right to free movement of persons was at first focused on workers, i.e. "economically active persons" and those were afforded the same treatment as nationals of the member states where they move to.[577] Economically active persons are those, who are self-employed persons,[578] those who provide services[579] and workers[580] and they therefore have "free market access in all Member States of the EU."[581] Whilst different EU secondary legislation existed for retired persons,[582] students[583] and "those nationals of a member state who do not enjoy the right of free movement under other provisions of Community law",[584] this was replaced by "Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States."[585] Hence, pursuant to Directive

[574] Karen Davies (2003) Op cit, p 105
[575] Article 6 Directive 2004/38; Friedl Weiss, Clemens Kaupa, *European Union Internal Market Law* (Cambridge, Cambridge University Press, 2014) p 123
[576] Norbert Reich, and, Ksenija Vasiljeva, Understanding EU Law: Objectives, Principles and Methods of Community Law (Oxford, Intersentia, 2005) p 58
[577] Elspeth Berry, Matthew Homewood, *Complete EU Law, Text, Cases, and Materials* (Oxford, Oxford University Press, 2013) p 381
[578] Article 49-54 TFEU dealing with the right to establishment
[579]Articles 56-62 TFEU
[580] Articles 39-42 TEC and Articles 45-48 TFEU
[581] Thomas Eger and Hans-Bernd Schafer, *Research Handbook on the Economics of European Union Law* (Cheltenham, Edward Elgar Publishing Ltd, 2012) p 147
[582] Directive 90/365
[583] Directive 93/96
[584] Directive 90/364
[585] Peter-Christian Müller-Graff, *The European Economic Area Enlarged* (Berlin, Berliner Wissenschafts-Verlag GmbH, 2006) p 87

2004/38, all EU citizens,[586] including retired persons and students, now have the right of free movement.

Moreover, Article 20 of the Treaty on EU and the Treaty on the Functioning of the EU (TFEU) confirm, the right to EU citizenship and Article 21(1) of the TFEU further provides that "*every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."* Hence, the strategy which the EU initially adopted was to put in place different pieces of legislation and then unite this by creating "*a single legal regime for free movement and residence within the context of citizenship of the Union while maintaining the rights of workers*."[587] Hence, the EU moved from granting firstly an economic right to a social right, i.e. extended the free movement of worker right to the free movement of persons. Under the economic perspective "*workers are perceived as mobile units of production of the EU single market whereas under the social perspective, EU workers are human beings, exercising a personal right to live in another State and to enjoy equality of treatment for themselves and their families*."[588]

Directive 2004/38 promotes the idea that EU citizens can freely move to other member states and reside there by reducing administrative formalities, defining family members and reducing the ability of member states to terminate residence or refuse entry.[589] Pursuant to Chapter VI of Directive 2004/38, all EU citizens, as well as their family members have "*the right to permanent residence*" and Article 16(1) makes clear that those, who have lived for five years are entitled to residence and Article 16(2) also grants the rights to family members, who have lived there for five years.[590] Article 5 of Directive 2004/38 further states that all EU citizens are entitled to enter the host state with a valid passport or identification card and even family members, who are not EU citizens, are entitled to enter, though a visa may be required from them.[591] Other rights are also granted to family members, for instance, Article 12 of Directive 2004/38 provides that family members can remain in the host country after a

[586] Article 20 TFEU
[587] Paul Craig and Gráinne de Búrca (2011) Op cit, p 850
[588] Sergio Carrera and Massimo Merlino (2009) 'State of the Art on the European Court of Justice and Enacting Citizenship' (CEPS Special Report, April 2009) p 65
[589] Freedom of Movement in the EU, Directive 2004/38/EC, 2004 <http://eumovement.wordpress.com/directive-200438ec/> accessed 30th August 2014
[590] Tony Turner, Chris Storey, *Unlocking EU Law* (4th edn, Abingdon, Routledge 2014) p 206
[591] Ibid p 206

worker has died.[592] Article 7 of Regulation No.1612/68 prohibited treated worker differently in relation to work conditions and remuneration and provides that they are entitled to the same social and tax advantages as national workers and "*training in vocational schools and retraining centres*." Social benefits also extend to maintenance grants.[593] Regulation No.1612/68, Article 10 enables the children of workers to reside in the Member State, so long as they are under 21 years old or are a dependent of the worker.[594] Moreover, Article 12 of Regulation No.1612/68 provides that children of workers are entitled to access "*general educational, apprenticeship and vocational training courses*" and the same treatment has to be afforded to them as to nationals and this extends to the admission process and all types of education.[595]

7.6 The Rights of the Family under the Free Movement of Workers in the EU

Workers should be able to enjoy their right to family life and it is for this reason that in the EU, the rights of workers to free movement have been extended to members of their family such as dependents, as set out in Directive 2004/38. Article 2(2) states that family members are the following, *"(a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."* Furthermore, Article 3 of Directive 2004/38 stipulates that member states *"facilitate entry and residence"* for those family members, irrespective of their nationality, who were dependent on the worker. Article 3 also requires host states *"to undertake an extensive examination of the personal circumstances"* and to give reasons for a refusal of residence or entry.[596] In *Flora*

[592] Nigel Foster (2014) Op cit, p 388
[593] *Lair v Universitat Hannover* (Case 39/86) [1988] ECR 3161; Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Koninklijke Brill NV, Leiden, The Netherlands, 2006) p 191
[594] Anne Pieter van der Mei, *Free Movement of Persons Within the European Community: Cross-border Access to Public Benefits* (Oxford, Hart Publishing, 2003) p 357
[595] Joined Cases 389 and 390/87 *Echternach* [1989] ECR 723, 29; Case 76/72 *Michel S* [1973] ECR 457, 15; Anne Pieter van der Mei, *Free Movement of Persons Within the European Community: Cross-border Access to Public Benefits* (Oxford, Hart Publishing 2003) pp 356-357
[596] Paul Craig and Gráinne de Búrca (2011) Op cit, p 748

May Reyes v Migrationsverket,[597] it was clarified that dependence is established by showing that a family member pays an income on an ongoing and regular basis.[598] Only this is sufficient to show that there exists a situation where s/he is dependent on a family member.[599]

In *Netherlands v Reed*,[600] it was held that a spouse is a person, who is married.[601] Moreover, in *R v Secretary of State for the Home Department, ex parte Sandhu*,[602] it was held that the non-EEC spouse was "*entirely and utterly and completely permanently dependent upon the continued affection and cohabitation of the EEC spouse*."[603] However, in *Diatta v Land Berlin*,[604] a wider interpretation was adopted which thereby changed the law. It was found that the right to residence for family members does not depend on family members living at all times with the worker. In this case of *Mrs Diatta* (Senegalese national) was married a French national, lived in Germany and, when they separated, the CoJ decided that *Mrs Diatta* is still remain the status of a dependant of an EU worker. Therefore, she could continue to be resident in Germany.

The *Diatta* ruling became part of EU jurisprudence and following Directive 2004/38, there is no longer any uncertainty on this position since Article 13 makes it clear that a divorce and termination of a registered partnership does not mean that the Non-EU nationals can no longer reside in the host member state. Additionally, Article 13 makes clear that it has to be shown that they are economically independent and have sufficient resources.[605] Directive 68/360, Directive 2004/38 now provides more clarity by stating that EU citizens can enter the host state by simply presenting an identification card or a passport, and in the case of workers a contract of employment.[606] Even where a spouse is not from another EU member state and a visa may be needed, member states are required to assist with the process of granting a visa.[607]

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[597] Case 423/12
[598] Lorna Woods and Philippa Watson (2014) Op cit, p 468
[599] John Fairhurst, *Law of the European Union* (9th edn, Harlow, Pearson Education Ltd 2012) p 337
[600] Case 59/85, [1986] ECR 1283
[601] Clare McGlynn, *Families and the European Union, Law, Politics and Pluralism* (Cambridge University Press 2006) p 48
[602] [1983] 3 CMLR 553
[603] Per Justice Comyn, cited from Helen Stalford, Families Valued?: Comparing the EU and European Convention on Human Rights, Centre for Research on Family, Kinship & Childhood, p 4
[604] Case 267/83, [1985] ECR 567
[605] Nigel Foster (2014) Op cit, p 388
[606] Articles 4 and 5 Directive 2004/38
[607] T. P. Kennedy, *European Law* (5th edn, Oxford University Press 2011) p 24

On the other hand, in terms of the right of permanent residence, if members of the worker's family want to reside permanently, they are entitled to remain permanently under two sets of conditions:

(1) if the worker himself has acquired the right to remain under article 3(1) of directive 2004/38.

(2) if the worker dies before acquiring the right to remain, worker has continuously resided in the state for two years or more, the death was from an accident or illness resulting from work place, spouse is national of that state of residence or had lost nationality of the state by marriage to the worker.[608]

Articles 16-18 of Directive 2004/38 maintain that permanent residence is *a key element in promoting social cohesion* [609] *and* is granted to all those who have resided in the host country for five years continuously under Article 16(1) of Directive 2004/38.[610]

The term social advantages have been interpreted in the widest sense, and as the member states in the EU have welfare systems, it was also necessary to ensure equal treatment in this respect. Regulation 492/2011, Article 7(2) thus affirms equality in respect of "social and tax advantages", so that the worker can enjoy the same advantages as national workers, including his/her family.[611] These advantages are not just restricted to those, which are contained in a contract of employment, but all those, which nationals receive, as made clear in *Fiorini aka Cristini v SNCF*[612] Mrs. Fiorini, an Italian national resided in France since 1962. She was a widow of a worker who was an Italian national but died as a result of an industrial accident in France in 1968. In 1971 she applied for a discounted rail travel card for large families by the Société Nationale des Chemins de Fer Français (S.N.C.F.) for herself and her children but her application was rejected because she was not a French national. Mrs Fiorini claimed discrimination in breach of article 12 and article 7(2) of Regulation 1612/68. The French tribunal did not accept her claim, but the CoJ took a different view. It was held, that the phrase "the same social and tax advantages as national workers" was to be enjoyed by

[608] Josephine Steiner & Lorna Woods Text Book on EC Law, (7th edn, Blackstone Press Ltd ,2000) p 330
[609] *Secretary of State for Work and Pensions v Lassal* Case 162/09 [2010] ECR I-9217
[610] *Ziolkowski & Szeja v Land Berlin*, Cases 424, 425/10 [2011] NYR; Tony Storey and Chris Turner, *Unlocking EU Law* (4th edn, Abingdon, Routledge 2014) p 209
[611] Nigel Foster Op cit (2014) p 381
[612] Case 32/75, [1975] ECR 1985

Community nationals and should be interpreted widely without any discrimination on the grounds of nationality. Therefore, if the infant children and widows of nationals are entitled to reduce rate cards for a national transport company, provided the request had been made by the father before his death, then the same must apply where the deceased father was an immigrant worker and Community national.[613]

In the EU, Article 24 of Directive 2004/38 therefore, ensures that EU citizens have the right to be treated such as nationals of the host member state.[614] Moreover, Regulation 492/2011 sets out the rights of workers and their family members from when they have been *"admitted and installed in a member state*."[615] Additionally, workers and their families are protected by Article 18 of the TFEU, which contains the very important non-discrimination principle. It provides that *"within the scope of application of the Treaties, and without prejudice to any specific provisions contained therein, any discrimination on grounds of nationality shall be prohibited*."[616] This principle was already enshrined in Article 7 of the EEC Treaty.[617]
Moreover, Regulation 492/2011 details particular subjects[618] where workers and their families have to be treated equally, for instance, pursuant to Article 1 this applies in respect of "*access to the labour market and...job seekers,"*[619] pursuant to Article 9, this has to be afforded in respect of *"housing and house ownership"*[620] and pursuant to Article 10, this principle has to be respected in relation to *"study finance for migrant workers' children*."[621]
If a national of a member state is practising an activity as an employed or self employed person (freedom of establishment) in the territory of another member state, then his/her spouse and children below the age of 21 years have the rights to take up any activity as an employed person in the territory of that same state. This remains the case although the dependents may not themselves be nationals of the host state or even EU nationals[622]. This right was established in the Gul case[623]. Mr Gul, a Cypriot national, was married to a British

[613] John Tillotson & Nigel Foster, *Text cases and materials on European Union Law* (4th edn, Routledge-Cavendish, 2003) p 324
[614] Karen Davies (2011) Op cit, p 160
[615] Lorna Woods, Philippa Watson, Op cit, (2014) p 526
[616] Katharina Eisele (2014) Op cit, p 193
[617] Ibid
[618] See especially Article 1-10 Regulation 492/2011
[619] David Edward, Robert Lane, *Edward and Lane on European Law* (Cheltenham, Edward Elgar Publishing Ltd, 2013) p 561
[620] Alina Kaczorowska, *European Union Law* (3rd edn, Abingdon, Routledge 2013) p 675
[621] Elspeth Guild, Steve Peers (2014) Op cit, p 230
[622] Article 11 of the EC Law
[623] *Gül (Emir) v Regierungspräsident Düsseldorf* Case 131/85 [1986] ECR 1573

national working in Germany. He had qualified as a doctor of medicine from the University of Istanbul. He obtained temporary authorisation to practise medicine in Germany in order to permit him to specialise in anaesthesiology. He worked there on a temporary basis for some years. Mr Gul's application for further renewal of his authorisation was rejected. Mr Gul sought to annul this decision on the ground that it was in breach of EC law. The ECJ in response to a request for a preliminary ruling held that, as long as he had the qualifications and diplomas necessary for the pursuit of the occupation in question in accordance with the legislation of the host state, and observed rules governing the pursuit of that occupation, he was entitled under Article 11 of Regulation No 1612/68 as the spouse of an EC worker to practice his profession in that state even though he did not have EC nationality. In the case of a spouse seeking to practice a profession it will be necessary to establish whether the spouse's qualifications are recognised as being equivalent national qualifications of the host state.

7.7 Non-Discrimination Based on Nationality

The CoJ has also prohibited direct discrimination based on nationality, as well as indirect discrimination,[624] i.e. having domestic laws containing conditions, criteria or requirements which nationals can more easily meet than migrants.[625] For instance, in *Reyners v Belgium*,[626] it was found that a requirement to have Belgian nationality in order to practice as lawyer violated Article 49 of the TFEU since it was directly discriminatory against non-Belgium EU workers. Equally, in *Commission v France (French Merchant Navy)*,[627] it was held that a French limitation which imposed a three to one ratio for non-French navy staff, amounted to direct discrimination.[628]

When determining whether there is indirect discrimination, the court employs an objective "*effects test*." [629] However, for instance, in *Groener v Ministry for Education*,[630] there was no indirect discrimination in circumstances where an Irish language test was required because

[624] *O'Flynn v Adjudication Officer*, Case 237/94 [1996] All ER (EC) p 541
[625] Karen Davies (2003) Op cit, p 109
[626] Case 2/74, [1974] ECR
[627] Case 167/73, [1974] ECR
[628] Damian Chalmers, Gareth Daviesand and Giorgio Monti, *European Union Law* (3rd edn, Cambridge University Press, 2014) p 859
[629] Norbert Reich, Christopher Goddard and Ksenija Vasiljeva, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Oxford, Hart Publishing 2004) p 193
[630] Case 379/87, [1989] ECR 3967

both Irish citizens and foreigners had to pass this test. This decision has been criticised, as Irish citizens were clearly paced at an advantage (being native Irish speakers) to the disadvantage of applicants from a non-Irish background.[631]

One of the most important decisions is *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*.[632] In this case, the court adopted the same grounds as in relation to the "free movement of goods and freedom to provide services", when holding that not only will measures be discriminatory when they draw a distinction between nationals and non-nationals, but also in relation to "*restrictions on employment and establishment*", thereby firmly affirming the principle of non-discrimination."[633] The *Bosman* case concerned a Belgian footballer whose playing contract had already expired and who wanted to move to a French football club. His Belgian club required a transfer fee, as was normally required by other football clubs too. The CoJ found that this directly impacted on the ability of the players to work in other Member States. The Court observed that *"the transfer rules constitute[d] and obstacle to freedom of movement for workers prohibited in principle by Article [45 TFEU]."*[634] The impact of this case on the football industry was the coming to being of the 'free transfer' system under which a football player now has the freedom to change their club once their contract has expired without the requirement for a transfer fee to be paid to their old employer by their new club.

By taking such an approach the CoJ has adopted a "*market access approach*", as further highlighted by *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,*[635] where the court moved away from *"the language of discrimination"* when it noted that *"the national measures were liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty*."[636]

[631] Norbert Reich, Christopher Goddard and Ksenija Vasiljeva, (2004) Op cit, p 193
[632] Case 415/93, [1995] ECR I-4921
[633] Damian Chalmers, Gareth Daviesand and Giorgio Monti (2014) Op cit, p 842
[634] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*, Case 415/93, [1995] ECR I-4921
[635] Case 55/94, [1995] ECR I-4165, para.37
[636] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013) p 19

7.8 Education for Workers, Including their Families

For the free movement of workers and persons to be fully established within the EU, it was important to confer rights in respect of education to workers and especially their families. Migrants and their family are therefore granted the right to education, so they can become a full member of the host society.[637] It could thus be argued that such an approach has the desired effect of promoting much deeper social integration. Article 7(3) of Regulation 492/2011 provides that workers shall have "*the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centre*." However, to prevent possible abuses of the system of other member states (for example, by working for a short time in order to gain access to educational institution), it was held that actual and effective activity should be undertaken as a condition for such entitlement, not just casual or ancillary activity whose primary aim and purpose is to gain access to the studies. This is to ensure that "*the employment relationship was considered main to the studies undertaken*."[638]

Moreover, "*the fact that an educational establishment provides a measure of vocational training is not sufficient for it to be regarded as a vocational school*", but instead vocational schools are only those "*establishments which provide...instruction interposed between periods of employment or else closely connected with employment, particularly during apprenticeship*."[639] However, such an approach significantly restricts the worker when accessing education and can be avoided if reliance is placed on the new Regulation 492/2011.[640]

It is the right of children as dependents of the worker that they should be admitted to the courses of general education, apprenticeship and vocational training under the same conditions as nationals of that state. If these children are residing in the host state together with the worker then they are eligible for educational grants on the same basis as nationals. This right has been held also apply to a grant to study abroad. Furthermore, this duty continues to be imposed on a member state even if the parents return to their own country and

[637] Katharina Eisele (2014) Op cit, pp 422-423
[638] Gisella Gori, *Towards an EU Right to Education* (The Hague, Kluwer Law International 2001) p 218
[639] *Lair v Universitat Hannover*, Case 39/86, [1988] ECR 3161, para.26; *Brown v Secretary of State for Scotland*, Case 197/86, [1988] ECR 3205, para.12
[640] Also see *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (Cases 389 & 390/87) [1989] ECR 723

the child has to stay in the host country to complete his/her education.[641]Article 10 of Regulation 492/2011 states that, "*the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory*." Children even maintain their rights under Article 10 of regulation 492/2011 when their parents lose their job or get divorced.[642] Also, the words "*same conditions*" in Article 10 have been widely interpreted in *Casagrande v Landeshauptstadt München*,[643] where it was held that they covered "*general measures intended to facilitate educational attendance*"; in this case "*a grant for maintenance and training*."[644]

In *Lair v Universitat Hannover*,[645] a French woman, who had relocated to Germany, had undertaken some part-time jobs and then applied to undertake a degree at a German university. She applied for a German maintenance grant. The court affirmed the principle that workers who had undertaken a real and effective activity could be entitled to a grant pursuant to Article 7(2), so long as there was a connection between the studies and the previous work. The court also noted that where a worker had become unemployed, it was not necessary to show that there was a connection between the occupation and the studies.[646] However, viewed through the lens of Member States, such an approach is problematic since social advantages should not be made available to quasi-workers - i.e. those who are no longer workers or who have stopped searching for employment.[647]

In *Brown v Secretary of State for Scotland*,[648] Brown had obtained a place at Cambridge University for an engineering degree. Brown had British and French nationality and his family had resided in France for several years. Before applying to university, he had been given a university sponsorship under which he worked for eight month for a Scottish company. The CoJ did not consider that Brown was entitled to the university sponsorship by

[641] Article 12 of Regulation 1612/68
[642] *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department*, Case 310/08, [2010] ECR I-1065
[643] Case 9/74, [1974] ECR 773
[644] Catherine Barnard (2013) Op cit, p 471
[645] Case 39/86, [1988] ECR 3161
[646] *Lair v Universitat Hannover*, Case 39/86 [1988] ECR 3161, para.37
[647] Robert Schütze, *An Introduction to European Law* (2nd ed, Cambridge University Press 2015) p 274
[648] Case 197/86, [1988] ECR 3205

Article 7 of Regulation 1612/68. This was because Brown mainly relocated to the UK to obtain his degree and his work formed part of his preparation. Also, he had been admitted to Cambridge before he started his work.[649] Woods and Watson note that "this reasoning, which is implicitly based on the possibility of 'abuse', is problematic. It suggests that motive is relevant for the gaining of worker status, whereas in many cases, the CoJ has clearly stated that motive is irrelevant."[650]

Most importantly, in *R (Bidar) v London Borough of Ealing*,[651] the decision in *Brown* was overturned.[652] In this case, the court also dealt with "*the closeness of the connection to the host state which students needed to show before they could be entitled to subsidised loans and grants."*[653] It was established that a person, who was not economically active, could use Article 18 of the TFEU after they had stayed in the host member state for a particular length of time or had a resident permit.[654] In *Bidar*, a French student had been refused a student loan when he applied for this in the UK because he did not meet the residency requirements. It was held that the residency requirements amounted to indirect discrimination, as non-UK nationals were being discriminated against and that so long as students are lawfully resident in the host member state, they could rely on Article 18 of the TFEU. Hence, those who lawfully reside in a Member State have to be afforded the same treatment as nationals in respect of maintenance loans and grants.[655]

Furthermore, in *Maria Martinez Sala v Freistaat Bayern*,[656] a Spanish woman, who had EU citizenship, but had not worked for seven years and lived in Germany, had been refused a child-raising allowance. It was found by the CoJ that this constituted direct discrimination on the basis of her nationality and the court confirmed that, "*a citizen of the EU, such as the appellant in the main proceedings lawfully resident in the territory of the host Member State, can rely on Article [18 TFEU] in all situations which fall within the scope ratione materiae (subject matter) of Union law*."[657]

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[649] Lorna Woods and Philippa Watson (2014) Op cit, pp 457-458
[650] Ibid
[651] Case 209/03, [2005] ECR I-2119
[652] Paul Craig and Gráinne de Búrca (2011) Op cit, p 588
[653] Ibid
[654] Adam M. Waite, European Union Citizenship: More Than Merely Financial Integration, 4(5) Student Pulse 2012 <http://www.studentpulse.com/articles/647/2/european-union-citizenship-more-than-merely-financial-integration> accessed 1st September 2014
[655] Case 209/03, *R (on the application of Danny Bidar) v London Borough of Ealing*
[656] Case 85/96, [1998] ECR I-2691
[657] *Maria Martinez Sala v Freistaat Bayern* Case 85/96 [1998] ECR I-2691, para.61

In *Rudy Grzelczyk v Centre Public d'Aide Sociale*,[658] a student from France had moved to Belgium in order to study there.[659] He paid for for his studies and undertook some work, but he wanted to spend more time on his studies during his final year and therefore asked for a "minimex", i.e. financial help for which Belgian nationals could apply. The minimex was not granted, but the CoJ found that this was unlawful.

In *D'Hoop v Office National de l'Emploi*,[660] a Belgian woman, who had lived in France where she undertook her secondary schooling, studied at a Belgium university. She applied for an allowance, but this was rejected since her secondary school had not been a school which had been authorised or financially supported by the Belgium state. The Court stated "*it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement*."[661] In other words, she was held not to be entitled to the said allowance on the grounds that a French national attending the institution would not be entitled to such an allowance, and for an EU worker or citizen to be entitled to the allowance in these circumstances would amount to discrimination against nationals (i.e. French citizens).
The role of the courts could be seen here as being within the spirit of the purposive interpretation of the law and does not promote social integration.

7.9 Retiring in a Host Member State

Before the adoption of Directive 2004/38, Directive 90/365 dealt with retired persons. Article 1 required that they should be entitled to a pension and also sickness insurance to prevent them becoming a burden for the host state.[662] Directive 2004/38 provides all those with EU citizenship with a right of residence and spells out an easier process for those who retire in another member state. Article 17(1) (a) states that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

[658] Case 184/99, [2001] ECR I-06193
[659] Rahiela Mustafovska, *European Union Citizenship: A new kind of citizenship or the extension of the national citizenship of the Member States?* Budapest, Hungary, 2008, pp 26-27
[660] Case 224/98, [2002] ECR I-6191
[661] Sacha Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (AH Alphen aan den Rijn, Kluwer Law International 2011) p 124
[662] Ibid

"(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;
(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work....
(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week..."

Article 17 thus results in "the formerly economically active"(i.e. retired persons) receiving "more favourable" treatment in respect of residence in comparison to those who are economically active (i.e. currently in employment) by granting the former the right to permanent residence only upon residing for five years, as made clear by Article 16 of Directive 2004/38.[663] Of course, apart from workers, full economic benefits can only be earned if also self-employed persons are granted the right to free movement. The law seems to be very clear regarding retiring in member states and self-employment and provides good grounds for not discriminating against workers who end up retiring in the host country.

7.10 The right of employment, self-employment and establishment of EU worker's family members

Article 23 of Directive 2004/38 states "*irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there."* Previously this was set out in Article 11 of Regulation 1612/68.[664] In *Gul v Regierungspräsident Düsseldorf*,[665] a Cypriot Turkish doctor, who had an English wife, who worked in Germany,

[663] Elspeth Berry, Matthew J. Homewood, Barbara Bogusz, et al, *EU Law, Text, Cases, and Materials* (Oxford University Press 2013) p 413
[664] Nigel Foster, *Foster on EU Law* (4th edn, Oxford University Press 2014) p 296
[665] Case 131/85, [1986] ECR 1573

was not permitted to work as a doctor. The CoJ found that this was unlawful.[666]

In the EU, those who are not employed by others, but are self-employed, are therefore also given the right to freely move, as well as the right to establish themselves in business in another member state. Traditionally, the right to freedom of establishment has been enjoyed mainly by business organisations (legal persons), but there is nothing to stop individual (natural persons) from exercising this right in the form of self-employment. Article 49 of the TFEU provides that "*....restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."* Moreover, Directive 2004/38 also applies to self-employed persons.[667]

The jurisprudence of the CoJ of the EU has been very pro-active in further developing this right, as in the *Reyners v Belgium*[668] case, which was particularly important for the right of establishment. In this case, the CoJ stated that "Article 49 TFEU by its real meaning is capable of being directly invoked by nationals of the Member States and that it 'imposed an obligation to obtain a precise result'".[669] In other words, Article 49 TFEU is directly applicable and therefore directly effective. Hence, the CoJ found that no domestic legislation was required to enact Article 49, but that a Belgian national law position with regards to self employment or the provision of a service breached the non-discrimination principle.[670] In *Jean Reyners v Belgian,*[671] a Dutch person who was living in Belgium had a legal qualification, but could not practise in Belgium since Belgian law required that to be a legal practitioner he had to be a Belgian national. However the CoJ in its judgement ruled that *Reyners* could not be barred from practising, just because of his nationality.

Direct discrimination on the basis of nationality, as in the case of *Reyners*, as well as indirect discrimination,[672] is a breach of Article 49 of the TFEU. As such a 'public ownership requirement, which appeared to apply to both foreign and domestic companies alike, was

[666] George Miles et al, *Foundations for the LPC 2014-15* (16th edn, Oxford University Press, 2012) p 305
[667] Lorna Woods, Philippa Watson (2014) Op cit, p 551
[668] Case 2/74, [1974] ECR 33
[669] *Reyners v Belgium*, Case 2/74 [1974] ECR 33, paras25-26
[670] Damian Chalmers, Gareth Daviesand and Giorgio Monti, *European Union Law, Cases and Materials* (2nd edn, Cambridge University Press, 2010) p 859
[671] Case 2/74, R-2/74, [1974] EUECJ R-2/74, [1974] ECR 631
[672] *Commission v Italy***,** Case 3/88, [1989] ECR 4035

considered indirectly discriminatory in *Commission v Italy*,[673] in circumstances where this resulted in only Italian businesses being able to meet the requirement.

Moreover, in *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*,[674] it was found that unclearly applicable domestic measures, which hamper or limit the ability to exercise the right to establishment, constitute a restriction under Article 46 of the TFEU.[675] The CoJ established the following test: *"national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."*[676] Article 46 TFEU provides that "*the European Parliament and the Council shall…issue directives or make regulations setting out the measures required to bring about freedom of movement for workers."* This Article is aimed to liberalise the freedom of workers to move by abolishing administrative practices, procedures and qualifying periods for eligibility and those which restrict employment choice; facilitating co-operation amongst domestic employment services and promoting that the EU employment market develops harmoniously.

Another important measure to promote the right of establishment is the mutual recognition of academic and vocational qualifications amongst member states, which the EU has done.[677] Whilst the CoJ acknowledged that in the absence of EU legislation, member states and professional bodies were able to determine which measures had to be complied with, there still had to be compliance with Article 4(3) of the TEU and the non-discrimination principle.[678] For instance, in *Patrick v Ministre des affaires culturelles*,[679] a UK architect, who wanted to be authorised to provide his services in France, was not permitted to do so since there was no agreement between France and the UK to mutually recognise qualifications. The CoJ disagreed and held that no directive was needed to transpose "*the rule on nationality*

[673] Case 3/88, [1989] ECR 4035
[674] Case 55/94, [1995] ECR I-4165
[675] Alina Kaczorowska (2013) p 690
[676] *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, [1995] ECR I-4165, para.37
[677] Catherine Barnard (2013) Op cit, p 315
[678] *Criminal proceedings against Marc Gaston Bouchoucha*, Case C-61/89, [1990] ECR I-3551; cited from Catherine Barnard (2013) Op cit, p 315
[679] Case 11/77, [1977] ECR 1199

since this is from now on sanctioned by the Treaty itself with direct effect."[680] In *Krzystof Pesla v Justizministerium Mecklenburg-Vorpommern*,[681] it was further explained that the member state has to determine whether the qualifications are equivalent in terms of the professional and academic training and required experience, prior to requesting the person to take a skill test.[682]

In view of the importance of this aspect of recognition to the policy of integration, the EU has adopted legislation in this area. Directive 2005/36 has been adopted to recognise professional qualifications in replacement of Directives 89/48, Directive 92/51 and Directive 99/42, as well as "sectoral Directives."[683] This Directive spells out different options for recognition, which depend on the particular profession.[684] It is clear that without a policy of mutual recognition of academic, vocational and professional qualifications, the integration effort will be frustrated. The policy of recognition therefore provides an important point between the legal framework on the free moment of workers policy, including the freedom of establishment, and the actual implementation of the policy.

7.11 Derogations and Exceptions: The Circumstances in which Member States can Restrict the Right of Free Movement

One of the challenges which the EU faced was that member states wanted to maintain their sovereignty. Nevertheless, in certain circumstances, it is important that member states can restrict the right to freedom of movement of persons. Exceptions to the freedom of movement policy are intended to create a balance between promoting integration and maintaining the vital interests of member states in situations in which allowing free movement may be harmful to those interests. In the EU, Article 45(3) of the TFEU makes it clear that the right to free movement of persons can be limited "*on grounds of public policy, public security or public health..."* Equally, Article 27 of Directive 2004/38 allows member states to limit the right to freely move on the basis of public security, public health or public policy.[685] Moreover, Article 27(2) of Directive 2004/38 ensures that case law and old legislative law

[680] *Patrick v Ministre des affaires culturelles*, Case 11/77, [1977] ECR 1199, para.13; Catherine Barnard (2013) Op cit, pp 315-316
[681] Case 345/08, [2009] ECR I-11049
[682] Catherine Barnard (2013) Op cit, p 316
[683] T. P. Kennedy (2011) Op cit, p 42
[684] Ibid, p 43
[685] Ibid, p 29

have been merged.[686] It is also worth mentioning the fact that for similar reasons there are equally exceptions to the free movement of goods policy under Article 36 TFEU.

The CoJ has played a particularly important role in defining the circumstances in which member states can restrict the right to free movement of persons.

For instance, in *R v Bouchereau*,[687] the CoJ explained that measures, which were adopted on the basis of public health, public policy or public security, are steps, which affect the ability to enter the member state and reside such as nationals in the host member state.[688] The approach of the court in interpreting the exceptions is very narrow and any derogation of the right by a member state is subject to the principle of proportionality. In other words the measures taken must be seen to be proportionate to the national interest which require protection and the overall interests of the EU in preserving the free movement also has to be considered. In practice, this means that exclusion orders have to be of a temporary nature and allow for a review of the relevant factors with a view to permitting entry at a future date.

[686] Nigel Foster, *EU Law Directions* (2012) Op cit, p 338
[687] Case 30/77, [1977] ECR 1999
[688] T. P. Kennedy (2011) Op cit, p 29

7.11.1 Restrictions in Respect of Public Policy

In *R v Bouchereau*[689], a French person, who had worked in the UK, had received a suspended sentence for the possession of illicit drugs. Subsequently, he was again convicted of a similar offence. The court sentenced him and also ordered that he should be immediately deported on the ground of public security. The CoJ found that deportation on the ground of public security or public policy was only acceptable in circumstances where the presence of the person form a serious and genuine threat and expressed an opinion that "*the existence of a previous criminal conviction can...only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirement of public policy*."[690] Hence, as in this case *Bouchereau* had been sentenced twice for importing a large amount of cocaine, it was acknowledged that one conviction by itself can be sufficient in extraordinary cases, especially when the person is considered a threat to society.[691] However, *Bouchereau* did not fall into this category of persons (he had only a small amount of drugs) and therefore was not deported, but only fined.[692]

The concept of personal behaviour is thus very important, as also highlighted by *Criminal proceedings against Donatella Calfa.*[693] In this case, an Italian individual was convicted for drug possession whilst on holiday in Greece. She was sentenced to serve three months in prison and was barred from entering Greece, as ordered by Greek legislation. The Greek legislation required this, except where grounds could be established, for instance, because of family connections, which would allow her to remain a resident. Moreover, only the Minister for Justice could determine whether there were such compelling grounds. The CoJ found that an automatic deportation breached the personal behaviour condition and that excluding her for life failed to take into account whether her personal conduct posed a continuing threat or danger.[694]

[689] Case 30/77 [1977] ECR 1999
[690] Chris Turner, *EU Law* (Abingdon, Routledge, 2014) p 143
[691] Glenn Robinson, *Optimize European Union Law* (Abingdon, Routledge 2014) p 152
[692] Case 30/77 *R v Bouchereau* [1977] 2 CMLR 800, 801
[693] (Case 348/96) [1999] ECR 1-11
[694] Tony Storey, Chris Turner (2014) Op cit, p 231

Moreover, in *Rutili v Minister de l'Intérieur*,[695] an Italian was a political activist and for this reason had been barred from entering particular parts of France. The court made clear that this would only be lawful if French citizens could be equally barred, but this was not the case and consequently, the prohibition was unlawful.[696] Hence, the CoJ has interpreted the grounds restrictively and Articles 27-33 of Directive 2004/38 further ensure that the exceptions in Article 45(3) are more clearly set out.[697] Member states are therefore, restricted in their ability to freely use these exceptions, as also made clear by Article 27(2) of Directive 2004/38, which states that "*measures taken on grounds of public policy or of public security must be based exclusively on the personal behaviour of the individual concerned*." The Article also requires compliance with the principle of proportionality. In *Rutili v Minister de l'Intérieur*,[698] it was therefore also made clear that a person cannot be deported simply because he is exercising his human or political rights; here the right to be active in a trade union, except in circumstances where this falls into any of the qualifications to the particular human rights of the European Convention on Human Rights, on which states can rely. Moreover, the court made it clear that the response by the state also has to be fair.

However, member states have to exercise a certain degree of caution, as explained in *Adoui and Cornuaille v Belgium State.*[699] In this case, French persons were not permitted to live in Belgium, as they had worked as waiters in a bar, which was described as "*suspect from the point of view of morals*" and they were therefore barred on public policy grounds.[700] The CoJ pointed out that, "*Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as an opposite to public policy*."[701]

In *Bonsignore v Oberstadtdirektor der Stadt Köln*,[702] an Italian person had been convicted for unlawful firearm possession and manslaughter, whilst living in Germany. Once he had spent his sentence, Germany wanted to deport him, but the German legislation did not consider

[695] Case 36/75, [1975] ECR 1219
[696] Margot Horspool and Matthew Humphreys, *European Union Law* (7th edn, Oxford University Press 2012) p 382
[697] August Reinisch, *Essentials of EU Law* (2nd edn, Cambridge University Press, 2012) p 153
[698] Case 36/75 [1975] ECR 1219
[699] Cases 115 & 116/81, [1982] ECR 1665
[700] Stephen Weatherill, *Cases and Materials on EU Law* (11th edn, Oxford, Oxford University Press 2014) p 375
[701] *Adoui and Cornuaille v Belgium State*, Cases 115 & 116/81 [1982] ECR 1665, para.8
[702] Case 67/74, [1975] ECR 297

personal behaviour as a possible restriction to deportation. The CoJ found that this breached EU law because deportation had to be based on the personal behaviour, which had to violate public security and public order.[703] It was made it clear that deportation was not justified to show "an example to others."[704] The decision in *Bonsignore* is also clearly reflected in Article 27(2) of Directive 2004/38, which emphasises that "*the personal conduct...must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*." Hence, a criminal conviction is not enough to justify deportation, but instead the personal conduct of those concerned has to be assessed on a case-by-case basis.

In this context, it has to be also determined whether the person has reformed himself or herself, as made clear in *Astrid Proll v Entry Clearance Officer Dusseldorf.*[705] In this case, a former convicted terrorist from Germany, but who had reformed herself, was convicted for 12 months. When she applied to enter the UK in order to work as a photographer, her application was rejected. However, her appeal to the Immigration Appeal Tribunal was successful since it was found that her previous convictions were not a reason to reject her request to enter the UK since she was no longer a danger to the public or a threat to public security.[706]

Furthermore, Article 28 of Directive 2004/38 contains provisions to protect against deportation.[707] Individuals can thus challenge their deportation. Firstly, Article 28(1) provides that "*the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin*." Secondly, Article 28(2) requires that the expulsion of those with permanent residence can only be taken "*on serious grounds of public policy or public security*." Similarly, Article 28(3) states that such a decision has to be, "*based on imperative grounds of public security*" if they "(a) *have resided in the host Member State for the previous ten years; or* (b) *are a minor, except if the expulsion is necessary for the best*

[703] Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Oregon, Hart Publishing 2000) p 132
[704] Tony Storey, Chris Turner (2014) Op cit, p 231
[705] (1988) 2 CMLR 387
[706] Susan Wolf, *Briefcase on European Community Law* (2nd edn, London, Cavendish Publishing, 1999) pp 136-137
[707] Lorna Woods, Philippa Watson (2012) Op cit, p 546

interests of the child, as provided for in the United Nations Convention on the Rights of the Child (November 1989)."

Furthermore, pursuant to Article 30(1), "*the persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them"* and Article 30(2) further requires member states to inform *"the persons...precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security."* Again, this Article is based on previous case law, especially *Adoui and Cornuaille v Belgium State,*[708] where it was made clear that individuals have to be notified in a way which is clear and "*the notification of the grounds must be sufficiently detailed and precise to enable the person concerned to defend his interests*."[709]

Additionally, Article 31(1) of Directive 2004/38 requires member states to ensure that persons can access "*judicial and, where appropriate, administrative redress procedures...to appeal against or seek review."* Hence, "*all domestic public law solutions*" have to be afforded to the migrant, as also highlighted by *R v Secretary of State for the Home Department, ex parte Shingara*.[710] In this case, two EU citizens were not allowed to enter the UK due to public policy reasons. The only available solution was to make an application for judicial review. This was challenged, but the CoJ found that this was enough as they were afforded the same legal remedy as nationals.[711]

Moreover, Article 31(3) of Directive 2004/38 further requires that domestic courts assess the facts which form the basis for the decision and not just whether the decision is legal, which is also in line with the decision in *Adoui and Cornuaille v Belgium State.*[712]

Also, Article 33(2) of Directive 2004/38 provides that whenever "*an expulsion order is...enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the*

[708] Cases 115 & 116/81 [1982] ECR 1665
[709] *Adoui and Cornuaille v Belgium State*, Cases 115 & 116/81 [1982] ECR 1665, para.39
[710] Case 65 & 11195, [1997] ECR I-3343
[711] T. P. Kennedy (2011) Op cit, p 31
[712] Cases 115 & 116/81 [1982] ECR 1665

expulsion order was issued." This also complies with the European Court of Human Rights decision in *Uner v Netherlands*[713] and the CoJ decision in *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg*,[714] where it was said that "*the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion*."[715]

Furthermore, the Commission to the European Parliament and the Council has explained "*that the Directive must be interpreted and applied in accordance with fundamental rights, in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy as guaranteed in the European Convention of Human Rights (ECHR) and as reflected in the EU Charter of Fundamental Rights."*[716]

Clearly, this restrictive approach has ensured that the right to free movement of persons has not been compromised or undermined by member states placing too much emphasis on the exceptions.

7.11.2 Restrictions in Respect of Public Sector Employment

Another exception under which European member states can set aside the free movement of workers' principles in a particular case is contained in Article 45 TFEU, which provides that "*the provisions of this Article shall not apply to employment in the public service*." Accordingly, non-nationals can be denied employment within the public service. Yet this exception has been narrowly interpreted and can only be used in relation to some public service positions.[717]

In *Sotgiu v Deutsche Bundespost*,[718] the CoJ made it clear that it does not have to follow the way in which the domestic law of the member states defines public service because "*these*

[713] Application No.46410/99, 18 October 2006
[714] Joined Cases 482/01 and 493/01, [2004] ECR I-5257
[715] *Adoui and Cornuaille v Belgium State*, Cases 115 & 116/81 [1982] ECR 1665, para.39
[716] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States /* COM/2009/0313 final, Brussels, 2009 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009DC0313> accessed 1st September 2014
[717] OECD, 'OECD Economic Surveys: European Union 2012' (Paris, OECD 2012) p 83
[718] Case 152/73, [1974] ECR 153

legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law."[719] Hence, member states cannot identify or designate a job to be within the public sector.

In *Commission v Belgium*,[720] Belgian law required that persons should have Belgian nationality to work for public bodies and local authorities, irrespective of their skills. The CoJ clarified that EU law had to be interpreted in a uniform manner and that the jobs where the exception can be applied, "*presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality*."[721] It was also made clear that when public bodies do not provide a typical public function, the exception cannot be evoked, as otherwise the "public service exception" could be used *"to remove a considerable number of posts from the ambit of the principles set out in the Treaty and to create inequalities between Member States according to the different ways in which the State and certain sectors of economic life are organized.*"[722] Hence, the main conditions for the exception to apply are to show "a specific bond of loyalty and mutuality of rights and duties between state and employee."[723]

In *Bleis v Ministere de l'Education Nationale*,[724] it was confirmed that teaching positions do not fall within Article 45(4) of the TFEU and equally trainee teachers.[725] Also, security guards working in the private sector[726] and nurses[727] do not fall within Article 45(4) of the TFEU.[728] Moreover, it has been established that the exceptions can only be evoked when the activities are undertaken regularly and do not constitute an additional part of the job role, as held in *Anker, Ras and Snoek v Germany*.[729] In this case, the court adopted a "functionalist approach", when it stated, "*the fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of Article 39(4) EC, Article 45(4)*

[719] *Sotgiu v Deutsche Bundespost*, Case 152/73, [1974] ECR 153, para.5
[720] Case 149/79, [1980] ECR 3881
[721] Ibid
[722] *Commission v Belgium*, Case 149/79, [1980] ECR 3881, paras18-19; also see *Commission v Luxembourg* [1996] Case 473/93, [1996] ECR I-3207, para.11
[723] Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012) p 506
[724] Case 4/91, [1991] ECR 1-5627
[725] *Lawrie-Blum v Land Baden-Wurttemberg*, Case 66/85, [1986] ECR 2121
[726] *Commission v Italy*, Case C-283/99, [2001] ECR I - 4363
[727] *Commission v France*, Case 307/84, [1986] ECR 1725
[728] Matthew Homewood, *EU Law Concentrate: Law Revision and Study Guide* (4th edn, Oxford University Press, 2014) p 136
[729] Case 47/02, [2003] ECR I-10447

TFEU since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority, at the service of the general interests of the flag state."[730] However, the court explained that functionalism is curtailed by the proportionality principle when it stated "however, recourse to the derogation from the freedom of movement of workers provided for by Article 39(4) EC (Article 45(4) TFEU) cannot be justified only on the ground that rights under powers conferred by public law are granted by national law to holders of the posts in question.

It is still necessary that such rights are in fact exercised on a regular basis and do not represent a very minor part of their activities. Indeed the scope of those exceptions must be limited to what is strictly necessary for protection of the general interests of the Member States concerned, which cannot be put at risk if rights under powers conferred by public law are exercised only from time to time, even exceptionally, by nationals of other Member States."[731] In contrast, member states preferred an "institutional test", so that the criterion would be for which institution the person works, as opposed to the job the person undertakes because they thought "that the public service is an area in which the State should exercise full sovereignty."[732] This institutional approach was not allowed by the CoJ, which preferred the useful approach because otherwise "a quantitatively large sector of employment would have been protected from the demands of equal treatment if the Member States' view of the public service exception had been accepted, and this would have been detrimental given the economic objective of equal treatment in Article 45."[733] In *Commission v France* regarding the discrimination of nationals of other EU members on grounds of public law was not upheld because it ran against principles of non-discrimination even though there are exceptions in as far as public work is concerned. [734]

[730] *Anker, Ras and Snoek v Germany*, Case 47/02, [2003] ECR I-10447, para.62
[731] *Anker, Ras and Snoek v Germany*
[732] *Commission v France*, Case 307/84, [1986] ECR 1725, 1727
[733] Paul Craig (2012) Op cit, p 508
[734] *Commission of the European Communities v French Republic.* Case *307/84) [1986] ECR 1725*

7.11.3 Restrictions in Respect of Public Health:

Public health can only be used as a ground to limit free movement of persons in relation to diseases "*with epidemic potential as defined by the relevant instruments of the World Health organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.*"[735] Furthermore, such measure can only be taken for a limited time, as made clear by Article 29(2) of Directive 2004/38, which states that "*diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory*." Additionally, Article 29(3) states that prior to expiry of the three months, persons with residence can "*undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions...Such medical examinations may not be required as a matter of routine*." However, this does not mean that patients can be forced to undergo medical tests when they do not consent to this and employers cannot test them secretly to ensure that the workers are healthy.[736] Moreover, being HIV positive is also not a reason to exclude someone from work and so long as the person has no symptoms, s/he should be consider fit, as any other approach undermines the concept of equal treatment.[737]

[735] John Walsh, *Free Movement of Persons in the Enlarged European Union* (2nd edn, London, Sweet & Maxwell 2012) p 261
[736] *P X v Commission*, Case 404/92 [1994] ECR I-4737
[737] *A v EC Commission*, Case T-10/93 [1994] ECR II-179

7.12 Conclusion:

Over time, the scope of the right of freedom of movement of workers has been enlarged in line with the development and historical progress of the EU project, which started with economic integration, but has evolved and developed into the realisation of social, political and legal integration. This was partly achieved through a much deeper purposive and contextual judicial interpretation of the main Treaty provisions. Additionally, secondary legislation has been adopted to extend and further embed these rights into the EU legal framework. The concept of workers has been broadly defined. Not only workers, but also their families have been afforded migratory rights. The concept of non-discrimination has been interpreted in a progressive manner. The rights of self-employed have been increasingly protected to those of host state citizens. Hence, the free movement of workers in the EU cannot be easily restricted. Whilst there are exceptional cases when restrictions apply on grounds of public policy, public sector employment and public health, the scope of these derogations has been curtailed. Hence, the caution of Member States in admitting migrants from other areas of the common market has been dramatically limited.

Having analysed in this chapter the principle of free movement of workers in the EU, which is generally regarded as the best example of what is possible to achieve through economic and political integration, the main aim of the next chapter is to build on this process by analysis and comparative of the progress of economic integration and free movement of workers in the AU, African sub-regional organisations and the EU

CHAPTER EIGHT

COMPARATIVE OF THE PROGRESS OF ECONOMIC INTEGRATION AND THE POLICY OF FREE MOVEMENT OF WORKERS IN THE AU AND THE EU

8.1 Introduction:

This chapter will focus on comparative analysis of the integration process and the free movement of workers policy as both apply in the AU and EU. Particular attention will be paid to benefits of integration by examining examples from the EU. Attention will then be turned to obstacles of integration by examining issues that are critical in slowing the progress towards integration in the case of the AU and sub-regional organisations. A comparison of the institutional set up will be made with particular reference to examples and cases promoting the principle of free movement of workers in EU versus AU.

8.2 The Main Obstacles to Integration in AU and African Sub-Regional Organisations in Comparison to the EU

When compared to EU, integration in Africa lacks one major aspect, which is the political will power to see the process moved forward. When the process of integration was started in Europe the leaders were prepared to sacrifice national sovereignty whereas in Africa, the countries are not yet ready to give away sovereignty which was achieved in some cases after waging wars of liberation against colonial masters. Endemic corruption and the absence of transparency, accountability and democratic transition are all factors which are detrimental to the integration effort. While governments seem quite happy to negotiate and sign trade agreements and to become part of RECs, they nonetheless seem to be unwilling to implement such agreements and the lack of enforcement mechanisms means they have nothing to lose from non-compliance. Most of the African leaders seem to be more concerned with holding on to power, and as such they perceive integration efforts through the RECs and the emergence of supranational institutions as a potential threat to their hold on power in that a transnational process with an over-arching political, legal and institutional framework could undermine national political authority, sovereignty municipal judicial competences. Until such a time that there are major changes in the political attitudes of most African countries, regional integration as currently designed will remain an unfulfilled aspiration.[738] Creating a borderless Africa needs a generational change of attitude together with an understanding that

[738] Okori Uneke, (2010), 'Corruption in Africa South of the Sahara: Bureaucratic Facilitator or Handicap to Development?' The Journal of Pan African Studies, Vol.3, no.6, March 2010, pp 111-112

the world is now a global village. Concentrating on holding on to power in an effort to prevent change is unsustainable in the long term and the sooner the older generation of African leaders realise this is the better. Rather than focusing a great deal of effort on safeguarding domestic political power without a viable economic base, it is better to have economic power, which can indirectly lead to political recognition and power on the international stage, just such as in the EU where member states ceded their national sovereignty to supranational EU institutions, but gained economic power and greater political influence on the world stage.

The lack of proper and effective admission criteria for the RECs proved to be a major problem for African economic integration. In the EU, a country needed to fulfil conditions that include maintenance of democratic principles and respect for human rights, which is a key pre-requisite for membership of the EU. Until such a time a country has fulfilled its mandate it cannot join the group of democrats. In Africa, the absence of such a criteria together with the absence of enforcement mechanisms and penalties for non-compliance at both the AU and regional level have weakened the integration effort. The lack of political will power has also played a decisive part in undermining the success of the integration effort. African leaders, it would seem, are quite prepared to sacrifice the benefits of integration for their own personal gain. Since most leaders do not wish to be accountable to the people who voted them into power in the first place, they are even less prepared to be accountable to the supranational institutions that are charged with implementing and monitoring the policies of the RECs.

It is worth drawing attention to the institutional set up for economic integration in Africa in comparison to European Union. In the case of the African Union and sub-regional organisations, since the integration effort started there has not been a defining moment when judicial institutions were called upon to make decisions on cases with broader implications for economic integration. The situation is different in the EU where the judicial organ in the form of the European Court of Justice (ECJ or CoJ) has adjudicative competence over cases that have over the years defined what the EU and ECJ stood for. In the case of the ECJ, it is a respected institution which has, inter alia, proclaimed the principle of supremacy of community law over national law. Although the supremacy of Union law is not stated anywhere in Treaty, it is implied through judicial construction using the purposive rule of interpretation. As already seen in Chapter 7, the first case in which this principle was

highlighted is that of *Flaminio Costa v ENEL* (Case 6/64)[739]. It should be recalled that under the doctrine of supremacy of EU law, where there is conflict between Community law and the inconsistent provisions of the national law of a member state, EU law prevails. For instance, in the case of *R. v Secretary of State for Transport ex parte Factortame*[740] the Merchant Shipping Act 1988 (an inconsistent law passed by the UK Parliament) was ruled to be a breach of EU Law on free movement of services, and because of the conflict with EU Law and the doctrine of supremacy of EU law the Act had to be either amended or repealed. An earlier case in which the doctrine also featured was the case of *Van Gend en Loos*.[741] In this case, the CoJ declared that:

'*the Community constituted a new legal order in international law, for whose benefit the States have limited sovereign rights, albeit within limited fields'.*[742]

This case was heard in 1963 which was more than a decade after the Treaty of Paris establishing the ECSC (1951) and was defining in that it clearly stated the supremacy of the EU laws over national laws and as such the member states needed to align their laws to meet the new legal order.

In the case of African Court of Justice and Human Rights, since it was established it has not presided over a case dealing with economic integration and neither have there been 'defining moment' cases with judgements aimed at resolving matters to do with integration or the free movement of persons. As long as the institutions that are supposed to enforce policies and to strengthen the process are weak or weakened, it will take a long time to realise the goals of political and economic integration through the African Economic Community. The weaknesses of institutions clearly have adverse implications for the progress of free movement of workers within the region and sub-regions.

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[739] In the case, it was stated that, 'by agreeing to form a community that had unlimited duration, having its own institutions, its own personality and its own legal capacity,……, having real powers stemming from limitation of sovereignty or transfer of powers from member states to Community (Union), it was implied that member states limited their sovereign rights (within limited fields) thus creating a body of law which binds both their nationals and themselves'. John Fairhurst (2014) Law of the European Union. P.265

[740] *R v Secretary of State for Transport*, ex parte Factortame [1991] 1 AC 603 at 659

[741] Van Gend en Loos (Case 26/62) [1963] ECR 1

[742] Mike Cuthbert, *Questions and Answers Series: European Union Law* (7th edn, Routledge – Cavendish, 2009) p 35

8.3 The Main Obstacles to the Progress of Free Movement of Workers in AU and African Sub-Regional Organisations Comparison to the EU

The progressive development of free movement of workers does not appear to be a central theme within the framework of economic integration in Africa. It would appear that it is viewed more as an end in itself rather than a means to economic integration. The failure to provide specific protection for freedom of movement for workers in the Abuja Treaty of 1991 clearly demonstrates the situation prevailing in most sub-regional organisations where free movement of workers is not clearly pronounced; instead, the emphasis is always on the free movement of persons. In the main objectives of Art 43 of the Abuja Treaty there is no mention of free movement of workers. However, in general provisions, there is some mention of free movement of persons. Equally, in Articles 98 and 99 of the Treaty Establishing the African Economic Community, no clear mention of the free movement of workers is made. In successful economic integration models such as that in the EU, the free movement of workers was a fundamental right that is guaranteed and protected by both primary and secondary sources of EU law. It is clearly defined in the jurisprudence of the CoJ of the EU and the free movement of workers policy is separate from free movement of persons. In order to ensure consistency and uniformity in the application, interpretation, implementation and enforcement of the policy in all member states of the EU, defining cases were brought before the CoJ of the EU and legally binding decisions were passed that had far reaching consequences for the integration effort so that member states knew exactly what it meant to allow for free movement of workers.

In focusing on the free movement of workers, the EU had in mind the development of a common market for labour and when Article 39 EC (now Article 45 TFEU) was established it had to deal specifically with the free movement of workers.[743] The aim was the removal of all obstacles to the free movement of factors of production and in this case labour. Initially the focus was on economic situations rather than absolute migration. Subsequently there have been relaxations of the policy with a view to granting job seekers the right of free movement but with the proviso that those in search of work should not be a burden on member states[744] (*Procureur du Roi v Royer* and *R v Immigration Appeal Tribunal, ex parte Antonissen*).

[743] Ibid, p 137
[744] Ibid

Increasingly the focus of the policy on free movement has also shifted to students and retired people.[745]

The aim of free movement of workers being to allow movement of labour or workers within the community and no formalities are required at the borders except for passport or identity card especially for workers within the Schengen Agreement area. Under Article 45 TFEU workers of member states can freely move to another member state where they can accept offers for employment actually made and remain in the member country for the purpose of employment.[746] The main highlight is that even when Article 45 TFEU is used to avoid immigration law, the policy of free movement still prevails over any such circumvention of national immigration laws. The case of *Secretary of State for the Home Department v Akrich (2003)*[747] is illustrative of this situation. In the case, Mr Akrich had attempted to enter the UK both lawful and unlawfully and failed. He then decided to take advantage of his EC law rights when he temporarily went to the Republic of Ireland together with Mrs Akrich in order to activate Community laws. In the case the UK considered Mrs Akrich's motive in establishing a marriage of convenience, arguing that the primary intention was to allow Mr Akrich to circumvent the tough UK laws. But it was held that EU rights would be triggered. In deciding on the case the CoJ highlighted that going to Ireland was not relevant to the status of the worker neither was returning to the UK. The key issue for the UK courts was to decide if the two were genuinely married to which the ECHR Article 8 would be applicable. The court further held that Article 10 of Regulation 1612/68 applied to Third Country Nationals only if they are lawfully resident in the member country before moving to another country to try and avoid the member states' laws in which they were previously resident.[748] This case highlights the dangers of loopholes that can be exploited under the guise of free movement of workers.

In the EU, no definition of a worker existed in the Treaty but secondary legislation and case law provided guidance to support a much wider and contextual meaning of the term worker.[749] For instance anyone working part time has been considered a worker with rights to remain (Levin 1982) [750] and a worker could be someone performing services for another for

[745] Ibid
[746] Ibid
[747] *Secretary of State for the Home Department v Akrich* (Case 109/01) [2003] 3 CMLR 26
[748] Nigel Foster (2006) Op cit, p 377
[749] Ibid, p 138
[750] *Levin v Staatssecretaris van Justitie* (Case 53/81) [1982] ECR 1035; Laurie-Blum (Case 66/850 [1987] 3 CMLR 389

a certain period of time under direction of another and for remuneration (Laurie-Blum 1987).[751]

In the cases of *Levin* and *Kempf v Minister of Justice*[752], it was held that what matters is not number of hours worked or the remuneration earned but whether the work was genuine or not. This raises the question whether working one hour per day constitutes work to qualify one as a worker under the free movement of workers, a status which grants entitlement to residence in another member state and associated benefits that come with the status of a worker? It could be argued therefore that the boundaries of EU law may have been stretched too far by creative judicial interpretation of EU law and judicial activism. However, it should also be pointed out that in the case of *Kempf* it was found that the work done was genuine and effective, which gives credence to the decision to disregard the amount of remuneration or the number of hours worked.

In the case of the EU, the law regarding the free movement of workers has clarified and articulated through judicial precedents and is now fairly settled and anchored in a *corpus juris* of case law, which is not the case in the AU and the sub-regions. The question to ask is why there are no defining cases regarding the free movement of workers as part of the legal framework for economic integration in Africa. An assessment of the judicial institution of AU will now be explored together with the situation prevailing in the regional economic organisations.

To begin with the role of the African Court on Human and Peoples' Rights will be analysed. Despite the protocol of the African Court on Human and Peoples' Rights being established in 1998 in Burkina Faso, the protocol only came into existence after being ratified by 15 member states out of the 54 member states of the African Union, only 26 have ratified the protocol as of January 2016.[753] The court, which is supposed to adjudicate disputes relating to regional economic integration (including the free movement of workers), is not yet functional as of January 2016 apart from carrying out administrative work.[754] The African Court on

[751] Ibid
[752] *Kempf v Staatssecretaris van Justitie*, Case 139/85, [1986] ECR 1741

[753] The African Union , *The African Court on Human Rights and People's Rights*, (AU, 2015) http://au.int/en/organs/cj, accessed on 12/12/2015
[754] Ibid

Human and Peoples' Rights has jurisdiction mainly over cases and disputes submitted to it regarding the application of the Charter (African Charter on Human and People's Rights), the Protocol and any other relevant human rights instruments ratified by the States concerned.[755] Access to the court is by the African Commission of Human and Peoples' Rights or state parties to the Protocol or African Intergovernmental Organisations, Non-Governmental Organisations with observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court. As at 2012 only five countries had made such a declaration (Burkina Faso, Ghana, Malawi, Mali, and Tanzania). From the protocol setting the court, it is not stated anywhere that the Court will adjudicate economic disputes from member states and has limited its jurisdiction to human rights issues. The position of the African Court is in stark contrast to the CoJ in the EU which played a significant role in the integration effort and more importantly is advancing matters relating to the free movement of workers.

With the continental AU court not yet functioning, attention can be shifted to an analysis of the regional courts that are functional so that it can be established if they are properly constituted to deal with matters relating to the integration effort and the free movement of workers. Of the eight RECs recognised by the AU, only four have courts at regional level that are functional: the EAC's East African Court of Justice, the ECOWAS' Community Court of Justice, SADC Tribunal and COMESA's Common Market law. The other RECs (AMU, CEN-SAD, IGAD have no courts in place and ECCAS has a court that is not yet functional). However, CEMAC which should be harmonised with ECCAS uses the OHADA[756] legal framework which is also used by some members of UEMOA and ECOWAS.[757] The OHADA framework was introduced in 1993 and is a Treaty on Organisation of Business Law in Africa and the main aim was to ensure that when it comes to doing business in member states, natural laws where replaced with regulated communal system and the Common Court of Justice and Arbitration is a supranational supreme court with exclusive jurisdiction to rule

[755] African Commission on Human and People's Rights (2015) Protocol To The African Charter On Human And Peoples` Rights On The Establishment Of An African Court On Human And Peoples` Rights.
[756] OHADA is an organization of business laws and implementing institutions adopted by seventeen west and Central Africa nations. OHADA "Organisation for the Harmonization of Business Law in Africa". in French, "Organisation pour l'Harmonisation en Afrique du Droit des Affaires". It was established in Port Louis Mauritius on 17 October 1993. The OHADA Treaty is consist of 17 African states.
[757] Trinity International (2009) The Harmonisation of business law in Africa and its impact on investors. Focus (26 June 2009). http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investors/ accessed on 12/12/2014

upon disputes under the Uniform Acts and ensures uniformity and consistence in legal interpretation in member states.[758] There are seventeen member states signed to OHADA legal framework and they are predominantly French speaking countries.[759] The OHADA legal framework came not long after the signing of the Abuja Treaty in 1991 could have been strengthened and incorporated in the AU since its membership is open to AU member states and would have been used as a rallying point for economic integration given that its objective is harmonisation of business laws in member states. Nine areas of business law are covered and are key areas in integration efforts.[760] However, the only problem is that they are oriented towards the French civil system of law rather than common law system such that the uptake has been limited.[761] The OHADA legal framework should have been modified and adopted by all members of the African Union because uniformity of business laws would at least boost confidence in doing business in Africa as there will be a court of arbitration whose decisions binds all member states. Linguistic and cultural barriers have to be overcome if the system is to be broadened and the African Union should include the OHADA legal framework as one of its organs for it has benefits for integration.

It is important to highlight the fact that of the four functional courts, originally the East African Court of Justice and ECOWAS Community Court of Justice had only limited jurisdiction. In the case of the East African Court, the main responsibility was to ensure the interpretation and application of and compliance with EAC Treaty and that means cases brought before it are those relating mainly to this Treaty. With respect to ECOWAS Community Court of Justice, its main task was to settle disputes in accordance with ECOWAS law, legal disputes submitted by States and giving advisory opinions on legal questions referred to it by member states and any institutions of the Community.[762] In the cases of both EAC and ECOWAS the main jurisdiction and function is interpretation of treaty laws in disputes between member states with no provision for hearing cases brought by

[758] Sydney Domoraud-Operi and Anthony Riley, Orrick, Herrington & Sutcliffe LLP, 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' 2014 Emerging Markets Private Equity Association, 2014, p 1

[759] Trinity International (2009) The Harmonisation of business law in Africa and its impact on investors. Focus (26 June 2009). http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investors/

[760] Sydney Domoraud-Operi and Anthony Riley, Orrick, Herrington & Sutcliffe LLP, (2014) Op cit, p 1

[761] Ibid

[762] ECOWAS . Community COURT of Justice - cases http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=4&Itemid=7 , accessed on 20/07/2015

ordinary citizens of member states as in the case of the EU where cases brought by citizens can be referred by national courts and tribunals to the CoJ under Article 267 TFEU preliminary ruling procedure.

Between 2005 and November 2015, the East African Court of Justice had heard 122 cases[763], but with no defining cases as far as integration and free movement of workers was concerned. Most of the cases were to deal with interpretation of Treaty provisions and jurisdiction with no landmark judgements or ground breaking precedents on matters relating to economic integration and the free movement of workers. There are some cases relating to Common Market and Customs Union Protocol but still no landmark cases.[764] In the case of ECOWAS, 71 cases were head between 2004 up to November 2015.[765] Just such as the case of East African Court of Justice; most of the cases had to do with the interpretation of the Community law. No notable judgements were passed during the period concerning free movement of workers or economic integration.

Turning to SADC, as already discussed, the Tribunal before it was suspended in 2010, made rulings against the Government of Zimbabwe in which farmers won cases against land confiscations. The cases made headlines throughout the region and were heralded as a success by individuals against their abusive government, thus strengthening the credentials of the SADC tribunal which handed down the judgements. Despite protesting the government of Zimbabwe lost the cases and threatened to withdraw from the Tribunal, which led to its suspension in 2010. In 2012, it was resolved at a meeting in Mozambique that the Tribunal must be reconstituted but with limited powers where it could only preside over cases brought by member states and not private individuals against their government – thus depriving private litigants of locus standi. This new development meant that the role of the SADC Tribunal was to be restricted to interpretation of the SADC Treaty and Protocols relating to disputes between member states, adopting a line pursued by ECOWAS Community Court and East African Court.[766] The case of the policy reversal by SADC leaders shows the extent of the lack of commitment to integration by the leaders who are supposed to lead the whole

[763] The East African Court of Justice (2015) Court Decisions. http://eacj.org/
[764] Ibid
[765] Community Court of Justice ECOWAS (2015) List of Decided Cases from 2004 Till Date. http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27 , accessed on 20/07/2015
[766] 'SADC Tribunal', (SADC, 2015) http://www.sadc.int/about-sadc/sadc-institutions/tribun/ accessed on 12/12/2014

effort. Their failure to strengthen the SADC Tribunal and choosing to weaken it without providing an alternative avenue for redress for private litigants serves to highlight that SADC leaders chose to undermine rights of their citizens and in doing so will be hard to see how they can enhance the free movement of workers when they choose to weaken the Tribunal which is supposed to be dealing with cases of integration. Rather than serving the interests of the citizens of SADC, the interests that are protected are those of the leaders because in advancing the new proposals, no consultation with the citizens were made.

With regard to COMESA common market law, of all the regional courts established, it is the one that is unique amongst the RECs in that it follows the EU model. It has an independent Court of Justice whose main aim is to apply uniform laws in member states. COMESA law is separate from and yet superior to national law and its many provisions are directly applicable to member states.[767] The COMESA Court of Justice has jurisdiction to decide cases to which member states, Secretary General of COMESA, and residents of member states (individuals and legal persons) may be parties but it does not deal with individual human rights complaints. Its main responsibility is to ensure that Common Market law is applied uniformly in all member states and where there are conflicts or variations, then Common Market law is supreme implying that domestic law has to be aligned with the Common Market Law.[768] The COMESA Court of Justice has adjudicated only a small number of cases but among these was a significant case which had implications for economic integration. This was the case of *Polytol Paints v Mauritius Government* [769] where it was ruled that COMESA Court of Justice's Common Market Law was supreme thus also sending a very clear message that private companies can sue the government if the latter are in violation of treaty provisions, and also making it clear where laws of the member state were not in line with Treaty laws, then treaty laws were to take precedence over the conflicting provisions of the national laws of member states. *The Polytol Paints v Mauritius Government* case highlighted the importance of member states' duty to align their national laws with community laws, similar to position which prevails in the EU.[770]

[767] COMESA – About COMESA – COMESA Court of Justice http://about.comesa.int/index.php?option=com_content&view=article&id=83:comesa-court-of-justice&catid=43:institutions&Itemid=133 , accessed on 12/12/2014
[768] Ibid
[769]COMESA , Companies Can Sue Governments in the COMESA Court, http://www.comesa.int/index.php?option=com_content&view=article&id=499:companies-can-sue-governments-in-the-comesa-court-&catid=6:press-releases&Itemid=57 ,accessed on 12/12/2014
[770] William Mwanza, *Polytol Paints v Mauritius Government: Evidence of the existence and direct effect of community law in COMESA?*, Tralac Trade Brief, January 2014, p 4

From the cases highlighted in sub-regional organisations, it is evident that there are no cases focusing on the free movement of workers and only in SADC and COMESA have there been defining cases which impact on regional integration. The lack of cases as highlighted above clearly relates to the limited functions, duties and responsibilities of the regional courts involved. The issue of jurisdiction in the case of EAC, ECOWAS and SADC is very important because it determines the nature of the cases that can be taken to the courts. In the case of COMESA though not many cases have been decided since it was established, its jurisdiction is broad and the court has powers to make decisions that ties member states. Even of more significance is the fact that where domestic laws are in conflict with Treaty laws, then Treaty laws prevail, which is very important if progress is to be made on the integration front. A fundamental problem with COMESA has been the duplication of membership with some of the member states belonging to rival RECs, which has been one of the reasons for the slow progress in the ratification of the Treaty.

8.4 Conclusion:

It conclusion, it could be argued that the EAC and COMESA member states appear to be benefiting from regional integration as they witnessed an increase in trade for the periods from 2001 to 2011 while in the other regions for the same period intra-member states trade appears to be falling. This is to a large extent due to well defined legal framework and institutions that are prepared to adjudicate in the cases brought before their courts.

African states were supposed to be benefitting from integration because there are a large number of smaller countries that rely on neighbouring countries economically. However, the problem is that the smaller states (not many bigger states belongs multiple memberships) have multiple regional memberships which duplicate effort and energy trying to meet competing rules, thereby hindering the integration effort.[771] The desire for countries to join many regional trade blocs could be due to the most member states being landlocked therefore need to have access to the sea for imports and exports and with integration that should help in removing obstacles to African intra-trade. In addition, many borders have poor infrastructure and communication, which all hinder regional trading. Failure to implement trading and bilateral agreements is a major concern as leaders put national interests ahead of regional interests.[772]

The free movement of workers in EU is well anchored in case law whereas in Africa, no cases were addressed in the regional courts. Almost all treaties or protocols agreed upon by member states do not give status to the concept of free movement of workers. It is not regarded as a fundamental principle of integration such as in the EU where any interference with the free movement of workers by member states is considered a violation of a fundamental right. For example, despite reservations to the concept of free movement, the UK will not gain support in trying to abolish free movement because it is a fundamental right in the EU Treaty and any negotiations to change would prove difficult and unsustainable.[773] Arguments offered by those in favour of free movement of workers in Europe is that it helps

[771] Brookings Africa Growth Initiatives, 'Accelerating Growth through Improved Intra-African Trade (2012')'. Washington DC: Brookings, p 2
[772] Paul Brenton and Gozde Isik (eds) , (2012), 'De-Fragmenting Africa: Deepening Regional Trade Integration in Goods and Services'. Washington DC: The World Bank (2012), p 2
[773] Ibid

create a pool of workers from which countries benefit, although there are complaints by some countries that there is social dumping where movement of immigrants who are paid lower wages in some countries create problems of undercutting locals thus reducing wages rates that can be paid to locals, which often gives rise to political tensions.

The main difference between EU and Africa is that in Europe there are some fairly developed economies such as that of France, UK and Germany which can spearhead the integration effort, not least by providing the necessary expertise and financing. These big economies also provide opportunities that can be exploited by those workers from some of the less wealthy countries and free movement allows EU citizens from member states to benefit from more employment opportunities within the EU without the requirement of immigration formalities within the common market. In the case of Africa, job opportunities are limited in most member countries and the economies of most countries are not performing well which discourages countries that are relatively rich from adopting measures that would allow the free movement of workers from the region.[774] With that in mind, it is not surprising that the free movement of workers in AU and sub-regional organisations is likely to remain a difficult aspiration to achieve.

Following the comparative analysis of the progress of economic integration and free movement of workers in the AU, African sub-regional organisations and the EU in this chapter, the next chapter presents the conclusion and the recommendations.

[774] Laurence Peter (2014) , 'Q&A : EU Freedom of Movement', (BBC News Europe, 28 November 2014) http://www.bbc.co.uk/news/world-europe-25237742 , 28 November 2014

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 Conclusion

The conclusion will address the main findings of this research and make recommendations and highlight areas for further research.

The AU in 1991 through the Abuja Treaty embarked on a process of regional economic integration with the final goal of achieving the free movement of persons including workers in stage five (that is by June 2020) with full implementation being achieved by June 2025 (one of the goals of stage six).[775] The integration process was set out in six key stages, to be achieved within a timeline of thirty four (34) years with an additional six (6) years for transition to African Economic Community. In total the whole process is expected not to exceed forty years. Central to this discussion is not questioning how long it will take to achieve economic integration at continental level, but whether the free movement of persons including workers will be achieved as given in the current set up of the Treaty Establishing African Community. According to Chapter II Article 6 of AEC Treaty, the free movement of persons should be achieved in the period from June 2016 to June 2025 (that is to say must be achieved from 25 to 34 years after the establishing of the AEC Treaty). This raises questions as to the motive of trying to achieve the free movement of persons, capital, goods and services after 25 years since the establishment of the AEC Treaty. In the case of the EU the free movement of workers was protected in the EC Treaty right from the start and did not require 25 years to achieve. Further questions arise in the case of AU because historically the movement of persons on the African continent had been in existence since ancient times through nomadic migrations. In view of the fact that economic integration is a pre-requisite to the economic success and survival of the African continent in the global market place, it is essential that rather than focus on movement of persons, movement of economic agents in this case workers should be given due attention.

[775] Treaty Establishing African Economic Community (1991) Chapter II Article 6

In the Treaty established the AEC, Chapter VI Article 43 ‘general provisions’ contains general principles on the policy of free movement of persons, goods, capital and services. However, it was left to member states to establish treaties or protocols at individual, bilateral, regional or continental level to adopt mechanisms that would facilitate the free movement persons plus the other three factors of production. One of the shortcomings of the economic integration effort in Africa lies in the fact that the AU Treaty chose to focus on movement of persons rather than workers. This research therefore argues that the focus should specifically be on free movement of workers as one of the factors of production.

The Treaty Establishing the African Economic Community, whose main aim was economic integration, should have as one of its foundation stones the free movement of workers because the labour force plays an important role as a catalyst in the process of economic integration. In the absence of specific provisions on the free movement of workers within the AEC Treaty, questions arise as to whether the principle of free movement of workers can be achieved in practice within the regional economic communities. When considering the integration process in the European Union, one thing was made clear from the beginning of the economic process: there was clear distinction made between the free movement of persons and the free movement of workers meaning there were legal provisions in place to clearly define the rights of persons and the rights of workers. This separation of the two types of rights was important because it clearly stated the duties and obligations of member states in this regard to each type of right. The clear commitment by the EU to the policy of economic and social integration meant that persons who qualify as EU workers know exactly what their rights are and in cases where they felt their rights were being denied, they had recourse to the judicial process using principles such as direct effect, indirect effect and state liability.

Before addressing the main issue of free movement of workers in the economic integration process, it is important to re-cap the approach adopted by the African Union in comparison to the one adopted by the European Union focus on any influence which the latter nay have had on the free movement of workers in African Union and sub-regional organisations.

One clear difference between the approaches adopted by the AU and EU is regarding the role played by each organisation. In the case of the EU when the process was set in motion, the original member countries ceded sovereignty in the form of legislative competences in certain

areas to the European Union and the EU became an organisation with supranational powers whose organs were made responsible for making decisions that had to bind both old member states and new member states. The EU institutions such as the Commission and the Council were responsible for providing leadership for the economic integration process and were responsible for implementation and monitoring of progress on the ground, as well as enforcement. The African Union in sharp contrast to the EU is not directly or actively involved in the process of economic integration apart from having a passive role in spelling out what has to be achieved within a period of thirty-four years. The duty to undertake the various stages of the process was assigned to regional economic communities without oversight mechanisms to ensure that member states were carrying out their functions as per AEC Treaty. Delegating the integration process to sub-regional organisations meant that the AU itself had little role in the process until the time when all regional organisations would have achieved the milestones set up by the AU. Furthermore, the AU in its current set up is not in a position to monitor the activities of the RECs or has powers to enforce non compliance with the Treaties or Protocols within the sub-regional organisations. This is largely due to the lack of institutions weaknesses.

Exploring the free movement of workers in the AU and sub-regional organisations, Chapter 1 introduced the need for free movement of workers and highlighted that there is obvious difference in approach between the EU approach and that of the AU. In EU, there is clear recognition that human beings are involved in so far as free movement of workers is concerned and the need to protect the fundamental principle in national law was emphasised. The logical basis behind allowing the free movement of workers being to create a large pool of a single market for labour where citizens of the EU can move from countries with unemployment to countries where there is employment. These benefits both the country with the jobs opportunities as they can fill any vacancies while improving lives of EU citizens from those countries with unemployment. The concept of free movement of workers in the case of the EU means that as long as citizens of member countries have a passport or ID issued by a member state they do not have to be denied entry into other member states in search of work.

The EU started with six member countries in the 1952 and has since grown to 28 countries; meaning 22 more countries members have acquired membership since its establishment. New members had to meet criteria that include maintenance of democratic principles and human rights, transferring some aspects of legislative competences or national sovereignty to the EU

and ensuring that the domestic economy was in line with the requirements of the EU. This represents a major difference to the case of Africa, where the process had to start from regional economic communities and then move through various stages in order to harmonise and progress into an Economic Community with monetary union at the end at continental level. This seems to be the reverse of the EU process. The AU started off with more than fifty member countries with no set criteria for members to meet before joining. The AU approach does not seem to be effective in promoting the process of economic integration as the AU decided to choose only eight regional economic communities that it recognises, ignoring the fact that it would be difficult to side-line those RECs it chose not to recognise. This further complicates the whole approach to integration and free movement of workers. In the case of SADC, the free movement of workers was well established between the five member states of SACU. Instead of using SACU which has South Africa as an economic power house being the recognised REC, the AU opted for SADC which is made up of some smaller economies that rely on South Africa, for integration purposes it would have been much easier to assimilate the countries with smaller economies into a group with an economic power house. Instead of building on from the well established SACU, the AU missed the opportunity. It would have been easier to integrate other members of SADC into SACU rather than opting to recognise SADC. The situation of those RECs not recognised by AU serves to weaken the integration effort as member states are often unwilling to withdrawn their membership from such organisations. This weakness in turn delays the implementation of the free movement of workers and slows down the whole integration process.

Chapter 1 identified that there is very limited literature that have focused specifically on the free movement of workers with most of the available literature focusing on economic integration in the AU. As mentioned earlier, the aim of this research is to focus on the free movement of workers and in doing so there are obstacles that have been identified which may also serve to explain why the free movement of workers in the AU may not have made much progress. However, when dealing with economic integration, the free movement of workers should be an essential part of the policy as it involves movement of a key factor of production which can make significant impacts on national, regional and the continental economies. As such should be clear legally binding provisions and when the free movement of workers can be legally guaranteed, then it would be easier to move the process of economic integration forward.

Chapter 2 explored the methodological approach for conducting this research which is the comparative method. This method has been used as it helps in looking at different systems and approach to economic integration. This research adopted mainly a qualitative approach with secondary data being used in all chapters. Legal issues were considered in all cases with the comparative method being used in five chapters (One, Four, Seven, Eight and Nine). Quantitative methods such as questionnaires and interviews were not used and mixed methods were also not used in any of the chapters.

In Chapter 3, consideration was given to what economic integration involves and the benefits and challenges that are encountered in the process of economic integration. One of the key aspects emphasised was the need to transfer some aspects of economic sovereignty if deeper integration is to be achieved as planned in the case of Africa. However, it also became a central point when examining whether economic integration can take place with or without some transfer of sovereignty. The lack of political will among leaders who sign treaties where they are not prepared to transfer some power and national sovereignty to African Union or sub-regional organisations has created a major problem for African economic and social integration. The lack of courage to cede some political power is further worsened by the underdeveloped institutional infrastructure and lack of democracy. This is a common problem in most African countries. The fact that a lot of inequalities in the level of development exist between member countries raise further challenges when it comes to economic integration, which pushes the issue of free movement of workers further into the background. If most African leaders are not prepared to transfer some aspects of national sovereignty and power to AU and sub-regional organisations, then it becomes very difficult to institutionalise the free movement of workers with the region. There is need for a rethink of the African Union approach and strategy towards regional and continental economic integration because the current approach is less likely to succeed in view of the failure to strengthen the sub-regional organisations and the AU as explored in Chapter 4.

Chapter 4 addressed the fact that free movement of workers cannot be separated or isolated from the economic integration process. In this chapter, it was observed that not many of the recognised RECs have met the milestones for integration set by the African Union. The lack of progress in most member states have been be due to a lot of factors which include political

instability such as in the AMU, CEN-SAD, IGAD, and ECCAS. There is a lack of political will to push the process forward such as in the case of SADC and COMESA. A third and common problem concerns the duplicity of memberships which has restricted progress on the integration front. The EAC is the only REC where there has been some encouraging progress in terms of integration and free movement of workers. However, even in this example, the policy of free movement is not absolute as there are some jobs where work permits are required from certain member countries, which can be argued to be inconsistent with the spirit of free movement of workers. Chapter 4 highlighted the fact that the progress achieved by most of the RECs provides good reasons for an approach that should not focus on wide (continent) integration but should focus on sub-regional integration because the absence of enforcement mechanisms at both the AU and sub-regional levels means the processes will miss the target of a one single market for the whole continent. The duplicity of memberships could be for various reasons since most African states are landlocked and the desire to have access to sea ports for imports and exports encourage or force states to form many alliances, giving basis to belong to many groupings.

The lack of supranational organisations at both the AU and sub-regional level formed the main subject of discussion. The role of the AU Court and sub-regional courts was explored and compared with the functions and judicial activities of the CoJ of the EU. One major highlight was that the AU's court has not dealt with economic integration cases or had any dealings with the free movement of workers. This should not come as a surprise since the integration effort is at sub-regional level, but the fact that even at sub-regional level there are no cases dealing with integration issues except in COMESA and SADC raises more questions about the effectiveness of the whole proces. From the time of the AEC Treaty which is now almost twenty four years, no significant cases have been reported in any of the RECs, which raise more questions. Four of the RECs do not have sub-regional courts and where the sub-regional courts are, they have not dealt with economic integration cases except for COMESA where the case of *Polytol Paints v Mauritius Government* was decided. And as seen previously in SADC, there was a headline case where the Zimbabwe government lost farmers who went to court to reclaim land confiscated from them by the government. Of all the courts analysed only the COMESA court have supranational powers, but does not preside over individual cases concerning human rights (which could arguably include the concept of free movement). The COMESA Common Market legal framework has laws that must be applied uniformly in all member states and where there are conflicts between domestic and Common

Market laws, the COMESA laws are supreme. The COMESA line is the one that is almost the same to the situation prevailing in the EU where the CoJ of the EU is a source of secondary EU law the form of judgements or precedents in addition to interpreting Treaty laws. Furthermore, it is well known in COMESA that private companies can take their governments to court. It is a disappointment that not a lot has been done in terms of setting up sub-regional courts that have supranational powers as that denies the courts the opportunity to make legally binding precedents that defines the integration process. In Chapter 4, there is evidence that economic integration at a sub-regional level rather than continental level may be the best way forward in view of the lack of progress at the continental level.

Chapter 5 highlighted the many challenges facing the economic integration process and free movement of workers. The main challenges were institutional set-up at regional levels and the AU. Most of the AU organs that are supposed to lead the integration effort are underfunded and as such lack the capacity and mechanisms to take a leading role. Most member states are not up-to-date with their financial contributions meaning the institutions are under-funded and inactive and in the absence of enforcement mechanisms, there is no urgency on the part of the uncommitted states. There is need for a new strategy to address this problem because if member states cannot pay their contributions then how can they be expected to meet their other commitments and to comply with the free movement of workers principle? It has been suggested that the failure in making progress may also have to do with colonial legacy where most institutions in Africa were designed to serve for the needs of the minority (colonial masters) and were not designed to serve the interests of the majority and as such the participation is meant for the leaders and the chosen few rather than for the majority. When independence was achieved in most countries, political leaders adopted institutions that they opted not to reform and, instead continued using the same pieces of legislation that were left behind by the colonial authorities. It perhaps explains the problems that are faced on the integration front as the colonial legacy lingers on. Without addressing some of these problems, the free movement of workers would remain a far-fetched aspiration which is defined by words on paper rather than real achievements on the ground.

Chapter 6 highlighted the argument that the free movement of workers or persons in African Union cannot be complete without considering the free movement of nomads. Nomads have

been an important part of the African Society and in some countries such as Libya, Algeria, Nigeria and the Sahel region play an important role by making significant economic and cultural contributions to the region. The fact that they do not have a permanent home does not mean they should be disregarded and considered non-existent. There is need for protection of their rights to movement from one area to another and if it means moving from one country to another, they should be granted such a right and it should be included in the treaties and protocols dealing with the free movement of persons and workers. There is need for re-interpretation of protocols dealing with free movement of persons so that nomads can have their rights clearly spelt out and upheld. Also the Universal Declaration of Human Rights which, grants rights to every individual or persons, which should cover nomads. Nomads have a cultural significance in their way of life and this should be respected.

It is submitted that it is worth considering extending rights of free movement of persons/ workers to nomads because they tend to be discriminated against and their migratory rights are not recognised in some states. Nomads have a way of life, which requires them to move from one place to another in search of grazing lands and fresh pastures, and in some cases it means having to cross national borders. The lifestyle of nomads tends to be seasonal and for that reason they tend to be regarded as people with no fixed abode or permanent home. But in Africa, nomads have been in existence since historic times. But in some cases such as in Botswana the bushmen have been integrated into the main community where they are encouraged to live a settled way of life, which is against their nomadic way of life. In the Sahel region there are, the Fulani and the Tuaregs, and in East Africa the Masais, all of whom live migratory life styles but have no recognised rights. It is very important that their rights are protected in law so that they do not have to be marginalised and have no say as to changes that have an impact on their way of life. The African Union and sub-regional organisations should consider including the rights of nomads under the free movement principle.

Chapter 7 addressed the progress of the EU where the free movement of workers is well defined and is not limited to the right to work only but also includes other rights such as education, family and retiring. The worker's rights are clearly defined and protected in the EU in both primary and secondary sources of EU law. The free movement of workers in the EU cannot be restricted; however, there are exceptional cases when derogations from the policy can apply on grounds of public security, public policy, public health and employment

in the public service (which tends to be restricted to local citizens). However, the situation prevailing in the EU does not exist in the African Union and sub-regional organisations. The AU and sub-regional organisations ought to learn from the experience in the EU and should be committed to the concept in full if the free movement of workers is to be achieved.

In chapter 8 the comparative between the EU and AU and its sub-regional organisations is made. In the EU there are a lot of cases that have contributed to the effectiveness of the principle of free movement of workers and helped in promoting the enforcement of the principle. The principle of free movement of workers is fundamental to the EU such that any attempt to restrict free movement of workers outside of the recognised exceptions is not permitted. Member states of the EU enjoy benefits from the common market by maintenance the principle of free movement of workers. However, African Union and African sub-regional organisations missed an equivalent opportunity by focusing on the more restricted concept of movement of persons rather than workers. There are no AU cases dealing with economic or social integration and that makes the process very ineffective as member states are not put under any judicial obligation to perform their obligations under the Treaties or Protocols. In the case of the EU, decisions made by the CoJ of the EU have wider or far reaching impacts as they have effects for national laws and member states are obliged to comply with EU laws. A review is required in the case of the AU in order to create a culture that will encourage members to consider reforming and strengthening the institutions they have created. At present, there seems to be no political will or commitment working towards the creation of African Economic Community because the progress on the ground is not encouraging.

Chapter 8 also highlighted the fact that by allowing the free movement of workers, the UK economy benefitted by more than £60 billion from its membership of the EU, which increases the standards of life for its citizens. The same cannot be said for Africa where there is very little trade within the sub-regional organisations and in ECOWAS and SADC intra-sub-regional trade is dominated by Nigeria and South Africa respectively. There are benefits as well as challenges that come with integration, but the key is that often benefits are more important than the disadvantages. In the case of EU there is an issue to deal with immigration and state benefits which puts pressure on governments to adopt hard line positions, often advocating restrictions on who can access state benefits or be allowed to enter the host

countries. The free movement of workers in the case of the UK is often blamed for putting pressure on public services and lowering wages for low paid jobs, often resulting in the rise of political parties that are anti-immigration, which can have detrimental effects on the free movement of workers. However, it is worth mentioning that the EU makes the point of emphasising that member who wants to access the common market must remain loyal to the fundamental principle of free movement of workers, and that this position gives member states little incentive in terms of restricting the free movement of workers.[776]

The conferring of supreme powers on regional courts in Africa must be a pre-requisite moving forward because it is only by vesting such organisations with judicial powers and competences that they will have the necessary authority to work towards upholding and enforcing the policy of free movement of workers which should be the main goal of economic integration. Migration is common in Africa and as a result adopting a free movement of workers policy should not be viewed with apprehension by African governments because competition for jobs will help to ensure that the best people are recruited, which it turn means an increase in productivity and economic growth. Furthermore, issues such as language and cultural differences often act as obstacles to migration for those wishing to go and work in other member states within regional organisations, which can act as limiting factor on the freedom of movement. However, it also has to be mentioned that those living close to national borders often find themselves separated from their relatives and friends when borders were first drawn and as such, they often develop a lifestyle which involves having to cross over the border in search of work or supplies, or for social events and family occasions. Such cross border movement pre-date modern national boundaries and have been going on since pre-colonial times. As such, it should not be taken that countries will be flooded with immigrants from other regions once they chose to adopt the free movement of workers principle.

The free movement of workers in the AU and African sub-regional organisations is still work in progress. The AU's main objective remains the establishment of a continent-wide economic and monetary union. The research has explored and examined the major challenges such as institutional and legislative differences (i.e. legal constraints, political and cultural obstacles) in member states, which have adversely affected the progress of actions to meet the objectives of the AU. In most member states, the enthusiasm and interest for economic integration is weak. National interests take priority instead of regional interests, which is a

[776] Paul Craig & Gráinne de Búrca (2003) Op cit, p 200

significant obstacle towards integration. Leaving authority in the hands of governments of member states hinders the free movement of their citizens.[777] Furthermore, many sub-regional governments of member states become suspicious of measures that reduce their sovereignty and political control.

All these notwithstanding, there is a real economic integration going on at an informal level. It has been recognised for many years that many countries` `real` economies have been mostly informal, and much larger, more dynamic and more regionally integrated than their official economies. With regard to the informal integration process in Africa in particular, there are relatively few social and cultural barriers to migration of workers. The political process of creating the AU therefore represents rather a high-level formal and conceptual model of a much deeper social, economic and cultural unification across Africa. The real process of integration may not be visible to political scientists, but it should not be misjudged.

[777] Two good examples are given by Article 4 of the ECOWAS Protocol and Article 27 of the SADC Protocol which give member states the power to determine under its internal laws and to reject the entrance of a community citizens considered as prohibited immigrants.

9.2 Recommendations

In light of the above findings, it is therefore necessary that the following recommendations are made with a view to developing effective policies aimed at eliminating obstacles to the free movement of persons and workers in Africa which can be a step towards accelerating the pace of economic integration.

There is need for the AU and recognised African sub-regional organisations to change their focus from free movement of persons to free movement of workers and this requires a clear policy and effective implementation of the principle of free movement of workers. Adopting the free movement of workers will give the AU and recognised African sub-regional organisations the opportunity to test the preparedness of the member states and their commitment to the goals of AEC. The issue of acceptance by the citizens of the AU and recognised African Sub-Regional organisations can be tested when an effective policy can be put into practice and opportunities for defining moments can also be realised when decisions by some member states would be challenged by individuals in the member states regional courts. There is need for mechanisms to be put into place that will accelerate the economic integration effort and render it much more effective. Enacting specific treaty provisions on the free movement of workers in the AU and sub-regional organisations would be the starting point.

The AU needs to be a supranational organisation that makes decisions which are legally binding on all member states. This is based on the principle of acceptance by member states and where member states have agreed to give up sovereignty and power in certain areas; then it should be easier to promote the free movement of workers. Where leaders and states are not prepared to cede some aspects of sovereignty and decision-making powers to continental or regional organisations, then in such cases the member states would have proven their unwillingness to accept the idea of a common market and such reluctant countries should not enjoy the privilege of membership. Restricting access recalcitrant member states to the common market can act as a tool that can be used to enforce compliance. Creating institutions with supranational powers within the sub-regional organisations and the AU ensures that enforcing compliance becomes much more effective. The principle of free movement of workers can become a tool that can be used to tackle the slow progress achieved in the economic integration effort and to unlock the great economic potential of the RECs and the AU.

It should be highlighted that sub-regional organisations in Africa were given a mandate to agree protocols or treaties that would allow the free movement of persons, goods, services and capital. What was not clearly stated was what form the free movement of persons should take. It should have been specifically stated that at the heart of the free movement of persons policy is the free movement of workers in all the sub-regional organisations, and in order to achieve this goal, sub-regional organisations should adopt a protocol defined by the AU aimed at ensuring uniformity and consistency within the sub-regional organisations. Most RECs refer to the free movement of persons and do not include any reference to the free movement of workers. To correct this, the AU should define further what its expectations are as regards the free movement of workers because the concept has more 'value added' to the integration effort, rather than the free movement of persons which is rather broad, ill-defined and has no real economic basis. However, member states, it seems, would rather protect their economies from invasion by workers while allowing the movement of persons, which cannot be in the spirit of true economic integration. There is a problem in some member states where there is a requirement for work permits from migrants seeking work in host countries, as is common within the SADC region. The absence of a clear distinction between a person and worker in almost all RECs except the EAC imply that the status quo remains and even in the case of COMESA, the free movement of workers is restricted to highly skilled workers, a marked difference from the EU where there is a clear definition of who is a worker.

There are nine RECs that are not recognised by the AU and the duty to either submerge them into regional organisations or to exclude them was left to the sub-regional organisations. By choosing not to recognise the nine RECs the AU created a problem which, it can be argued, has been partly responsible for the slow progress in most RECs. There is no clear indication of the criteria used by the AU in not recognising the nine RECs. An illustrative example is the recognition of SADC rather than SACU. SADC, even though it had more member states than SACU, is an organisation that was far less integrated than SACU. SACU had been in existence longer than SADC and had better economic ties between member states in terms of economic integration than SADC.[778] In view of this, it could have made more sense to recognise SACU and then have those countries which were not already members of SACU to become members. By keeping the two separately, that would have allowed members states not belonging to SACU to work towards achieving the same status as SACU members, and

[778] SACU 'About SACU: Objectives of SACU' < http://www.sacu.int/about.php?id=397> Accessed 20 October 2014

when in the same position with SACU members, then they could merge to form one regional bloc. This would also have meant that those members directly benefiting from SACU membership would not delay progress in SADC. At present, SADC do not seem to achieve a lot in the area of free movement of workers because SACU members enjoy that freedom and are not ready in the case of South Africa to allow that benefit to those outside SACU.

It would be recommended for the AU to re-examine the issue of duplicity of membership and to recognise all RECs and streamline them on the basis of achieving the same level of regional integration. In that case where the REC not recognised by the AU is fairly integrated, the REC that is not as well developed should be the one to be streamlined through a merger with the more developed REC, with those countries not belonging to either the recognised or unrecognised REC joining the more established grouping. This streamlining and merger approach should address the problem of duplicity of membership, thereby providing an effective solution which in turn will allow for progress to be made on the integration front. Furthermore, the free movement of workers can be achieved when member states which do not subscribe to the policy of free movement are requested to work towards achieving it instead of having a mixed group of member states some of who subscribe to the policy while the other members do not. This way all member states would be requested to achieve the same status before they can be merged into one REC, this achieving the desired goal of consistency and uniformity which is critical to the economic and social integration programme.

In the case of Africa, unlike in the EU, the economic integration drive is being undertaken in a different historical and economic context where there were regional economic groups already in place at the time of independence in the early 1960s. This reality called for better planning on how to implement a continental approach to integration under the AU. Unlike in the EU, specific policy geared towards the free movement of workers generally in the AEC was not part of the focus of the integration effort because Article 71 (2) (e) of AEC Treaty envisaged that the RECs would adopt policies that would allow for the free movement of persons by strengthening and creating labour exchanges that would facilitate the *employment of available skilled manpower of one Member State in other Member States where there are shortages of skilled manpower.*[779] Contrasted with EAC, their application of free movement of workers to highly skilled professionals could be said to be in line with Article 71(2) (e),

[779] In the view of the EAC unskilled workers do not appear to be covered in their definition of who is a worker. The target for free movement is skilled rather than unskilled workers.

implying from the start, the African Union never intended to embark on the free movement of workers in line with the EU definition of the term 'worker', but the free movement of highly skilled professional workers.[780] .

The implications for the free movement of workers are therefore very high because for starters, the AU never advocated for the free movement of workers except for the highly skilled, which is discriminatory to workers who are semi-skilled and unskilled.

The situation on the ground in most RECs highlights the fact that the integration project was an enormous and difficult task that needed proper regional and continent wide planning because the whole exercise involved dealing with a continent that had many regional groupings. Most of the regional groupings came into existence because of various factors including geographical, political, cultural and economic factors. The adopted strategy was not to wish that those regional groupings did not exist but an acknowledgment that they existed and will be recognised and streamlined accordingly based on progress achieved. [781] The free movement of workers principle is one that the AU should have used to unlock barriers that exist between the various RECs (the recognised and those not recognised). In the cases of SACU, WAEMU, CEMAC and CEPLG, these were better constituted and had either Customs Union (SACU) or monetary union in place (WAEMU, CEMAC and CEPLG) and should have been considered the bases for regional economic integration rather than having competing organisations. Their legal frameworks could have been further developed and strengthened to provide the platform for economic integration which could have paved way for the free movement of workers. It may not be late for the AU to use those unrecognised RECs as vehicles through which economic integration should take place. The OHADA legal framework can also be incorporated and used for harmonising all business laws within the AU which will ensure uniformity and consistency in the application of the law in member states.

It can be submitted that a new approach or strategy is required. To begin with, the AU should require that for the purposes of economic integration, a member state can only belong to one REC. The role of the AU will constitute of streamlining the RECs taking into account how the RECs function and their level of progress, and where necessary countries not belonging to a well established RECs are encouraged to form their own grouping which will be merged on achieving same status with the well established group. This approach will allow the AU to oversee the process with supervisory functions and be responsible for ensuring enforcement.

[780] Article 6 of AEC Treaty

[781] African Union Commission, *Status of Integration in Africa* (SIA IV), (African Union 2013) p 86

This also removes the potentially damaging competition that arises when one REC is recognised while the other is not recognised. With the proposed new strategy, there should be a more effective approach to the conception and implementation of a legally binding principle of free movement of workers which should form the basis of economic integration in the AU.

From nomads' rights to free movement of workers, it is recommended that the AU should be at the forefront of international legal efforts aimed at promoting and protecting this right because it is important to ensure that nomads are not discriminated against. They have a way of life that needs to be recognised in law and respected. Under the principle of free movement of workers, the trans-border migratory rights of nomadic communities in Africa should be guaranteed and one way of doing so is to have these rights recognised at the highest level and enshrined in legal instruments such as regional and continental treaties and conventions.

The free movement of workers is a principle that has not been fully adopted in the AU and sub-regional organisations. It is recommended that there is need for revisiting the objectives of economic integration in Africa because without the free movement of workers, the effort will be lacking a sound economic, legal and conceptual base. Effective and genuine economic integration can only be achieved if the free movement of workers provides the foundation stone for the implementation of the policy of integration. There may be obstacles that come with the free movement of workers, but without implementing the principle in practice, the economic integration project will remain only an aspiration or worse still, political ambitions which exist only on paper and whose realisation will forever remain an illusion. For the African Union, the EU approach with its successful model of integration should be the approach to adopt, otherwise, continental economic integration will remain an unachievable goal meaning Africa will also lag behind on political integration which often comes with the successful implementation and effective functioning of an economic community.

The AU and the RECs should review; revise and update the legal framework dealing with economic integration in particular the framework dealing with the free movement of workers within member states if they are promote economic integration. In the EU there have been many such revisions and amendments of both primary and secondary EU legislation over the years. There is clearly need in the AU and RECs for a paradigm shift leading to the amendment of the Treaty and Protocols accordingly and aimed at defining fundamental principles together with what needs to be achieved in economic integration. This should start

with declaration that the free movement of workers would be guaranteed and non-negotiable in order to achieve economic integration and outline clearly areas of exemptions such as in the EU where positions in the public sector do not come under the concept of freedom of movement of workers.

The table below shows the areas where original contribution occurs in this thesis.

Summary of Recommendations and Contribution

Original Contribution to knowledge in the Field	**Chapter of Contribution**
1. Identification of the disconnection between the legal framework and economic integration goals in AU and sub-regional organisations.	Chapters 1, 4,5
2. Exploration of the principle of free movement of workers in the EU against the free movement of persons in AU and sub-regional organisations.	Chapters 4 and 5
3. Proposal for extending the principle of free movement of workers to semi-nomadic and nomadic populations.	Chapter 6
4. Investigation of any similarities in approach between economic integration in AU and sub-regional organisations, and the EU.	Chapter 8
5. Recommendations in light of the findings from the research.	Chapter 9

9.3 Further Research

This thesis set out to address the issue of the progress on the policy of free movement of workers in the AU and sub-regional organisations. One thing that is very clear is that at a comparative level, the developments in Africa makes comparison difficult because of the different approaches towards economic integration involving the RECs. This has been one of the limitations of the research in terms of the comparative methodology. In Europe, the EU chose the free movement of workers as one of its fundamental principles whereas in African Union it is the free movement of persons. The different points of focus highlight in the case of the AU the difficulty with which the integration effort has progressed. The fact that the AU is not playing much of an active role as it should calls for a change of approach or strategy which will require the AU to define its mission with greater clarity and assume overall control of the integration process.

This thesis adopted a qualitative approach using secondary data which was readily available in the case of the EU. In the case of AU and sub-regional organisations less research has been undertaken on the free movement of workers, which required the need to conduct mainly primary research and gather information from the AU, sub-regional organisations.

Undertaking a primary research where views are sought from major players through quantitative data collection methods within the region will help to provide a clearer perspective regarding the free movement of workers because within the available literature there is no specific focus on this. Further research can be carried out to question whether the AU prefers free movement of persons or free movement of workers – i.e. social or economic integration - since the aim is to economically integrate.

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