Chapter 5

Building a leviathan: The institutional architecture of a future supranational African Union

> It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than the creation of a new order of things. For the initiator has the enmity of all who profit by the preservation of the old institution and merely lukewarm defenders in those who would gain by the new one
>
> Nicolo Machiavelli[754]

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[754] Available at http://www.quotedb.com/authors/nicolo-machiavelli (Accessed 01 August 2008).

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5.5 Summary

5.1 Introduction

'Quality of institutions' according to Rodrick et al, 'trumps everything else'.[755] This succinct, yet powerful, statement precisely indicates the centrality of durable institutions to growth and development of any society. Metz also locates the success of European integration within the framework of institution building:

> Institutions and decision-making procedures have from the very beginning of integration proved very effective as a framework for shaping policies in an organisation that subsequently expanded its size and tasks. Especially the establishment of supranational institutions that can initiate and adopt binding legislation for the member states explains to a large extent the European success story.[756]

In the same vein, it is crucial that institutions are built around the peculiarities of a particular area. Be it at the national or international sphere, the effectiveness or qualitative output of any institution will depend on the ability of its architects to tailor its shape and functions around specificities particularly the historical and cultural background, needs and values of the people. As Goodin aptly remarks:

> [T]he fundamental notion of (institutional) design…relates to "goodness of fit" of the designed object to its environment…a well designed, in particular, would be one

[755] Rodrik et al (2004) 135.
[756] Metz A, *Strengthening capacities for reform – Perspectives of institutional building in the European Union*. Centre for Applied Policy Research (CAP) Working Paper (2006) 4 Available at http://www.cap-lmu.de/publikationen/2006/**metz**.php (Accessed 20 April 2009).

> that is both internally consistent and externally in harmony with the rest of the social order in which it is set. [757]

In as much as the EU serves as an admirable lesson and for regional integration, Africa must devise its own approach to regional integration. The path towards the building of a qualitative EU is rooted in a peculiar historical, political and economic context; therefore, to prescribe a verbatim approach in Africa is not only tantamount to ignoring realities but also a recipe for failure. However, this does not necessarily mean that the EU experience is totally irrelevant; it is in fact imperative in a globalised environment to continue to interact, draw and adapt useful lessons from the practice in other climes. The overriding aim should thus be the contextualisation of these practices.

It is against this background that this chapter aims to channel the core themes that have emerged from the preceding chapters into a coherent, African-specific institutional framework. In the preceding chapters, issues such as good governance, democracy, public participation and economic development have stood out as some of the necessary ingredients of regional integration. More importantly, the idea of a 'nucleus AU' was proposed as a feasible alternative to guaranteeing the qualitative attainment of a supranational AU. As explained elsewhere in this thesis, this idea is a radical approach which seeks to deviate from a redundant 'all-comers' philosophy that has characterised regional integration in Africa.

In order to provide a conceptual framework, this chapter begins with a theoretical discourse of institutional design. This is then followed by a discussion of the perspectives on institutional transformation of the AU. Lastly, it examines how the theories emanating from the foregoing analyses can be channelled into constructing a formidable and value-driven supranational continental institution.

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[757] Goodin R, 'Institutions and their design' in Goodin R (ed), *The theory of institutional design.* Cambridge: Cambridge University Press (1996) 37.

5.2 Paving the path of supranational integration: Theorising institution building

Institution building or design, as noted above, remains a necessary prerequisite for attaining meaningful cooperation and integration amongst member states, especially if the ultimate objective of such cooperation is supranationalism. Thus, the paths of integration will differ according to the objectives and intentions of member states. If for example member states agree that the cooperation among them should be limited to mere intergovernmental interaction, then its institutions are not expected to act contrary to and/or beyond national sovereignties. If, on the other hand, the integration or cooperation is designed to be supranational, the focus will be directed towards building institutions and putting in place mechanisms for the transfer of powers to such institution. Since the proposed 'nucleus AU' is framed as a feasible path to Afro-supranationalism, it is important to engage in a theoretical discourse of the concept of institutional design.

The term 'institutional design' is a concept that has found application in virtually every field of human endeavour.[758] The scope of this thesis, however, allows for a description rooted in social science. Bobrow & Dryzek define (institutional) design as 'the creation of an actionable form to promote valued outcomes in a particular context'.[759] This definition highlights policy-making as the thrust of institution design. Building on this, Goodin identifies the three pillars of institutional design as the designs of policies,[760] mechanisms[761] and whole systems.[762] Pettit provides a useful description of institutional design:

[758] Ibid, 31.
[759] Cited in Ibid.
[760] This is described as '…the crafting of new solutions, through a creative combination of recollection and innovation and a serious engagement with both values and contexts'. See Ibid 31-32.
[761] Mechanism design is an economic concept which relates to resource allocation. Ibid, 32-33.
[762] This is concerned with how designed object (policy, mechanism and system) fit into the larger context in which it is set. In essence, this borders on the realisation of set goals and objectives. Ibid, 33-34.

> When I speak of institutional design I do not necessarily have in mind the devising, from scratch, of new social arrangements. The phrase certainly covers that case, but it is meant to also apply to more commonplace project of examining existing arrangements to see if they are satisfactory and of altering them where necessary: the project of rethinking and reshaping things - perhaps quite modestly – rather than the project of giving them their initial form.[763]

Since the focus of this chapter, and this thesis, is the strengthening of AU institutions, this section will analyse the fundamentals of supranational institutional design. In this regard, the four scenarios outlined by Richmond & Heisenberg are instructive. In their analysis of supranational institutional design, four points are highlighted:[764]

- Intentionality (Did the member states intend to create a supranational institution?)
- Specificity (How concrete is the mandate of the institution?)
- Relationship to national institution (How much does the supranational institution depend on its national counterpart?)
- Institutional copying (Is the supranational institution explicitly modelled on a specific national institution?)

Another important point that will be added to these is compliance. This is crucial considering the fact that compliance with institutional decisions remains a major challenge in regional integration. Effective compliance grants institutions legitimacy, thus it is crucial that drafters of treaties put in place measures for ensuring the feasibility of compliance.

Before analysing these points, it is pertinent to note that the above-outlined principles are by no means sacrosanct; rather they provide some form of

[763] Pettit P, 'Institutional design and rational choice' in Goodin (2006) 55.
[764] Richmond A & Heisenberg D, *Supranational institutional building in the European Union: A comparison of the European Court of Justice and the European Central Bank.* Paper presented at the European Community Studies Association's Biennial International Conference, Pittsburgh, P.A., June 2-5, 1999. Available at http://www.aei.pitt.edu/2372/01/002574_1.pdf (Accessed 20 April 2009).

template that can be borrowed and adapted to Africa's situation. As Mazrui aptly admonishes, 'Africa must stand ready to selectively borrow, adapt, and creatively formulate its strategies for planned development'.[765]

a) Intentionality

Richmond & Heisenberg define 'intentionality of institutional design' as 'the awareness of the Treaty drafters of the institutional design's effect on national sovereignty'.[766] This implies that member states precisely set the parameters of the powers to be bequeathed to international institutions. As with any human endeavour, the contemplation of Treaty drafters does not always match the eventual reality. As Richmond & Heisenberg observe, the drafters of the EU judicial system, the European Court of Justice (ECJ), did not exactly envisage that the ECJ would make substantial inroads into national sovereignty and thus become a major driver of supranationalism in Europe ('silent motor of integration').[767] Thus, intention is not static but sensitive to the dynamics and need of the integration arrangement. In this regard, Goodin remarks that 'institutions are often the product of intentional activities gone wrong – unintended by-products, the products of various intentional actions cutting across one another, misdirected intentions, or just plain mistakes'.[768]

The issue of intention of the drafters of the AU Constitutive Act has been addressed in the previous chapter. Suffice to add that the incorporation of the comprehensive AEC Treaty into the AU structures is another strong indication of the intention to tread a supranational path. The Treaty, which was adopted in 1991, established a timetable towards the creation of an African Economic Community by outlining a six-stage process over a period of not exceeding 34

[765] Mazrui (2008).
[766] Richmond & Heisenberg (1999) 3.
[767] For example, the Judicial Committee rejected a number of proposals, chief of which was the idea of a self-contained European court system, with lower courts and ECJ as a supreme court. In addition, the Committee left the question of enforcement with the member states. See ibid 2, 3-6.
[768] Goodin (2006) 28.

years.[769] Read together with other AU documents, which have been explained in the previous chapter, one can safely argue that the supranational intention of the architects of the AU is not in doubt. Nevertheless, the glaring lacuna between intention and action can only be explained on the basis of tacit or express underlying resolve on the part of the architects (political elites) not to activate the espoused intentions. This is reflected in numerous ways ranging from non-compliance to stated guidelines, withholding of financial dues, weak or non-implementation of integration initiatives and unbridled attachment to national sovereignty.[770]

b) Specificity

The specificity of institutional mandate is described as '[t]he precision and detail of the Treaty language stipulating the rights and responsibilities of supranational institutions'.[771] The word 'precise' denotes some kind of rigid, 'cast-in-stone' rules that cannot be deviated from. However, practice reveals that supranational institutions thrive on the ability to explore the flexibility or *revisability* of their mandates.[772] An archetypical example is the ECJ's progressive interpretation of some EU laws which appear, on face value, restrictive.[773] Just like intentionality, the scope of institutional mandate should also be responsive to changes and environmental dictates.[774]

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[769] See art. 6 of *The African Economic Community Treaty*, 1991. Below is an outline of the six-stage process:

- Strengthening of the the RECs (5 years)
- Removal of tariffs and duties on goods within the RECs (8 years)
- Establishment of a free trade area and custom union within each REC (10 years)
- Coordination and harmonisation of tariff and non-tariff systems among the RECs (2 years)
- Establishment of an African Common Market (4 years)
- Consolidation of the common market, the establishment of a monetary union, central bank, parliament and single currency (5 years)

[770] These issues have been discussed in chapter 3.
[771] Richmond & Heisenberg (1999) 7-8
[772] Ibid, 8; Goodin (2006) 40.
[773] A former justice of the ECJ explains this phenomenon as 'the conversion of quantity to quality'. See Richmond & Heisenberg (1999) 8-11
[774] Goodin (2006) 40.

In this sense, the specificity of mandate must accord with what Goodin describes as the 'goodness of fit'.[775] Simply put, when designing objectives, principles and mandates of institutions, the drafters must be sensitive to the social order of that particular environment.[776] As explained above, the socio-political and economic context of Europe makes certain institutional principles non-transferrable to Africa. This does not, however, preclude the experimentation with, and reflection on ideas that have proved successful in other regions.[777]

c) Relationship to national institution

The issue of the relationship between national institutions and supranational institutions strikes at the heart of the basic premise of international relations. States remain the framework of international relations, and international institutions are the result of consensual agreements between and/or among states. Thus, in order to avoid a chaotic and acrimonious scenario, it is important that mechanisms are put in place to ensure a symbiotic relationship between both institutions.

The functionalist ideology, which prescribes a completely detached supranational agency as answer to transnational welfare and development, was rendered impractical by analysts simply because it ignores the nature and realities of international relations.[778] To rectify this, the neo-functionalists hinged the existence of supranational agencies to the proactive roles of national elites, which includes political parties and interest groups.[779] In this sense, the involvement of national elites can only result in measures that aim to strike a delicate balance between their national and transnational interests. Since national institutions enhance the internal and external legitimacy of states, the

[775] Ibid, 37.
[776] Ibid; Pettit (2006) 55-56.
[777] Goodin (2006) 42.
[778] O'Neil (1996) 34.
[779] Haas (1958) 17; Rosamond (2000) 55.

urge to synchronise their functions and that of supranational institutions becomes crucial.[780]

Supranational judicial institutions are mostly designed to reflect this principle. In the EU, for example, national courts may refer cases relating to the interpretation of EU laws to the ECJ for guidance.[781] The ECJ's ruling will then allow the national court to dispose of the matter itself. To ensure cooperative relationship between it and national courts, the ECJ once ruled that referral of cases is not necessary where the application of Community law is clear and definitive.[782] In the OHADA, the national courts may also request advice from the CCJA on matters relating to the implementation of the OHADA Uniform Acts.[783] However, the CCJA remains the Court of final appeal on OHADA laws.[784]

However, reliance on or cooperation with national institutions should not serve as a to the progress of integration. Since supranationalism entails the uniform application of rules and programmes, it is of the essence that national institutions are strengthened and have the capacity to promote and translate integration objectives into national realities. In a situation where the conduit is defective, the progressive realisation of goals becomes stunted. Thus, the call for African integration to be woven around shared norms and values becomes pertinent. The uniform adherence to principles (economic and political) can only benefit the quest for unity. The emphasis on shared values and norms in some of the adopted AU documents points to an acknowledgment of these principles as not only a viable foundation for regional integration but also the importance

[780] An example is the requirement for the exhaustion of local remedies. What this means is that natural or legal persons seeking to take their cases to international adjudicatory fora should in the first instance, except under extenuating circumstances, make use of national courts. Only after this can they proceed to the transnational arena.
[781] European Community Treaty, art. 234.
[782] *CILFIT v Ministry of Health* [1982] ECR 3415
[783] OHADA Treaty, art. 14.
[784] Ibid, arts. 14 & 15.

of strengthening national institutions.[785] The skewed or non-implementation of these principles is cumulatively responsible for the epileptic nature of integration drive on the continent.

d) Institutional copying

Richmond & Heisenberg define institutional copying as 'the extent to which the supranational entity was explicitly copying features of a specific national counterpart'.[786] This is done either through the wholesale replication of a similar national institution or a combination of features of different national institutions.[787] Since national institutions often predate their regional counterparts, this exercise ensures that useful lessons are drawn from the experiences of the former. While both institutions operate within different social dynamics, institutional copying can at least provide the possible institutional path and destination of a regional institution.

According to Richmond & Heisenberg, institutional copying, in relation to supranational judicial institutions, can have two positive effects: the expansion of the authority of the institution and the development of its own institutional character.[788] In relation to the former, since national procedures are imported into a transnational context, officials at the transnational level have the authority to interpret Community laws within the context of a national legal dispute.[789] The effect of this is that even when such decisions override existing national laws, it is viewed not as a conflict with national laws but rather as part of the

[785] These shared values are clearly articulated in instruments such as the AU Constitutive Act, NEPAD, APRM, ACDEG and the Convention on Preventing and Combating Corruption.
[786] Richmond & Heisenberg (1999) 14. According to Cini, the EEC Commission was notably modeled on the highly technocratic French public administration. See Cini M, 'The European Commission' in Warleigh A (ed), *Understanding European Union institutions*. London: Routledge (2002) 47.
[787] In the EU for instance, the ECB is modelled on the German *Bundesbank* while the ECJ is an amalgamation of the unique features of several judicial systems. See Ibid. Warleigh, however, notes that EU institutions are not simply a replica of national institutions rather they '… serve as a kind of laboratory for those concerned with how politics can be adapted in an era in which globalisation is lessening the independence of nation states'. See Warleigh A, 'Why study the institutions of the EU?' in Warleigh (2002) 6.
[788] Richmond & Heisenberg (1999) 15-16.
[789] Ibid, 16.

development of existing national laws.[790] The latter effect is that because the institution is the product of the amalgamation of different philosophies of national institutions, the transnational institution stands in a better stead to develop its own unique character, which reflects the influence of the diverse philosophies.[791]

The usefulness of institutional copying for African integration cannot be understated. As Africa embarks on the path of establishing and strengthening regional institutions, it is crucial that lessons are drawn from best practices in both national and sub-regional institutions. On issues ranging from poverty alleviation, elections, governance, economic development and information technology, the architects of African integration must be prepared to study the process of tackling these issues at the national level and also include the relevant national actors in the planning, monitoring and evaluation of similar measures at the regional level. The Information Technology revolution in Rwanda, commendable electoral processes in places like Ghana, Botswana and South Africa, the successful harmonisation of business laws in OHADA, can all be harnessed and channelled into similar continental programmes.

e) Compliance

All of the above analyses remain irrelevant so long as states routinely disregard decisions and rules emanating from regional institutions. As noted earlier, compliance with institutional decisions guarantees the competence and legitimacy of such organisation. As Chayes & Chayes put it, 'the adoption of a Treaty, like the enactment of any other law, establishes an authoritative rule system. Compliance is the normal organisational presumption'.[792] Theorists argue that the low rate of compliance with international regulations stem from two factors. The first is that unlike national governments, international

[790] Ibid.
[791] Ibid.
[792] Chayes A & Chayes H, 'On compliance'. *International Organisation.* 47/2 (1993) 179.

institutions lack the monopoly of legitimate force.[793] The second is the absence of national identity, a psychological factor that determines the consent of the subjects.[794] In order to gain a better understanding of this topic, some of the underpinning theoretical expositions of compliance are outlined below.

The first is the rational choice theory. This theory is predicated on the assumption that self-interest often dictates non-compliant behaviour.[795] To remedy this, this theory offers two strategies: the deviant-centred strategy and the complier-centred strategy.[796] The deviant-centred strategy proposes that if self-interest is the primary reason for non-compliance, then institutional design should aim to put in place measures that increase the motivation for compliance.[797] Crafting such a motivation will, however, vary, depending on the interests of member states. Because of its custom-built allowance for motivation, this theory prescribes coercive measures of enforcement for any deviation from laid down principles.[798] The complier-centred strategy on the other hand eliminates the prospect of self interest and motivations by assuming that an association of like-minded entities will ensure compliance.[799] To guarantee this, the complier-centred strategy prescribes that members must go through some sort of screening or vetting process.[800] The EU membership criteria are an apt example. Another example is the 'nucleus AU' idea which is discussed in the previous chapter.

The second theory, as propounded by Chayes & Chayes, rejects the claim that non-compliance is motivated by the calculated interests of member states.[801] According to this theory, the question of interest is superfluous since concerns

[793] See e.g. Zurn in Joerges & Zurn (2005) 5.
[794] Ibid; see also Hoffmann in Cantori & Spiegel (1970) 77-79.
[795] Petit in Goodin (2006) 71.
[796] Ibid, 72-87.
[797] Ibid, 72.
[798] Ibid.
[799] Ibid, 78-87.
[800] Ibid, 79.
[801] Chayes & Chayes (1993) 176. This is also known as the Managerial model. See also Kufuor (2006) 60.

of member states are usually dealt with during negotiations preceding the enactment of treaties.[802] Thus, the failure to adhere to treaty regulations stems from factors other than calculated interests of member states. These factors range from the ambiguity of treaty language, lack of financial or administrative capacity for implementation and the absence of 'a period of transition' between the adoption of the treaty and the expected time of compliance.[803] To address this, this theory de-emphasises formal enforcement measures by advocating an approach which accentuates continued interaction and engagement between organisations and states and states *inter se*.[804]

The third is known as the legitimacy model. Legitimacy, according to Franck, is 'the quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.'[805] The quest for legitimacy of international law rules is predicated on the perceived disregard and violation of its rules and regulations.[806] This theory holds that the violation of international rules is as much an issue of legitimacy deficiency (of rules and rule-making institutions) as it is the lack of instrument of enforcement.[807] Thus the focus should be on how to enhance the legitimacy of international law rules as an essential means of ensuring voluntary or non-coercive compliant behaviour from member states.[808] In order to achieve this, Franck identifies the core factors necessary for guaranteeing the legitimacy of rules as determinacy, symbolic validation, coherence and adherence.[809] Such points are discussed below:

[802] Chayes & Chayes (1993) 179-185.
[803] Ibid, 188-197.
[804] Ibid, 201-204.
[805] Franck T, 'Legitimacy in the international system'. *American Journal of International Law*. 82/4 (1988) 706.
[806] Ibid, 710.
[807] Ibid.
[808] Ibid, 710-713.
[809] Ibid, 712.

- Determinacy, or pointedly referred to as textual determinacy, implies the ability of a text to convey a clear and ascertainable message.[810] In this sense, compliance will be better guaranteed if respondents (member states) are presented with less elastic, straight-forward obligations.[811] As Franck puts it, '[t]he more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify non-compliance'.[812]

- Symbolic validation relates to the ability of the text to communicate authority.[813] The three concepts that best explains this theory are: symbolic validation, ritual and pedigree. Symbolic validation refers to the use of a signal to elicit compliance with a command.[814] An example of this is the singing of national anthems or the affirmation of a pledge.[815] Ritual and pedigree enhances compliance through ceremonies and emphasis on cultural anthropology of rules.[816] In the African context, Kufuor argues that the continuous invocation of pan-Africanism is an example of symbolic validation that aims to ensure compliance.[817]

- While determinacy and symbolic validation seek to legitimise rules, coherence points to the uniform and general application of rules and procedures.[818] In this regard, rules should be applied equally to all member states, regardless of their size and capacity. Inconsistent application of rules will thus elicit resistance or non-compliance by aggrieved states.

[810] Ibid, 713.
[811] Ibid, 713-714.
[812] Ibid, 714.
[813] Ibid, 725.
[814] Ibid.
[815] Ibid, 726.
[816] Ibid.
[817] Kufuor (2006) 64.
[818] Franck (1988) 735-751.

- Lastly, adherence relates to the link between rules and the procedural framework or process of making such rules.[819] In this vein, laws made by a recognisable and organised institution are likely to be adhered to than rules emanating from an ad-hoc arrangement.[820] Franck argues that over the years, the international system has devised a number of sophisticated and highly developed rule–making institutions.[821]

Having outlined the foregoing fundamentals, the next objective is to determine the extent of its applicability to the proposal of this thesis. But before doing that, it is instructive to start with an outline of some of the perspectives on the institutional transformation of the AU.

The logic behind this exercise is two-pronged. Firstly, it aims to show that the idea of institutional transformation of the AU is by no means novel. Secondly, beyond using it as a reference tool, the analysis below is aimed at showing the distinct difference between available proposals and the approach of this thesis. The approach of this thesis, as will be explained below, deviates from an all-encompassing, 'free-for-all' ideology by proposing an institutional framework that strictly adheres to shared norms, primarily reflected in its membership composition.

5.3 The quest for AU transformation: An overview of perspectives

As mentioned in the foregoing, the quest for institutional transformation of the AU remains a constant theme of political discourse on the continent. The failure to attain the long-held dream of political and economic integration is generally accepted as a corollary of the institutional deficiency of the AU. Ironically, a substantial amount of studies on how to transform the AU into an effective driver of integration come from within – the organs of the AU.

[819] Ibid, 752.
[820] Ibid.
[821] Some of the organs identified by Franck include the World Bank, the European Court of Justice and regional human rights tribunals. Ibid, 752-753.

To fully understand the underlying motivation behind this, one needs to situate it within Haas' narrative of integration. Haas explains that integration is primarily driven by the political elites of member states.[822] As the French newspaper, *Le Monde*, aptly frames it, 'the elites have their heads in the global world … The population keeps theirs in the national territory'.[823] Since member states are largely responsible for appointing the officials of regional institutions, it could be argued that these officials are an extension of national political elites. While this does not necessarily cast a doubt on the neutrality of such officials, it points to the primacy of nation states in international relations and thus their vantage position in terms of setting and attaining integration agendas. This does not, however, foreclose divergence of views and strategy between officials and member states.[824] The position of the AU can thus be explained in the following ways.

First, the technocrats (officials from the AU Commission) and politicians (members of PAP) working within these institutions have invested significant human resources in the project of granting these organs some modicum of legitimacy. Thus, these officials form part of the political elite with vested interests in the eventual autonomy of these organs. These officials see themselves as the custodians of a process too delicate to be completely surrendered to the whims of national politics.

The second explanation relates to the continued inability of member states to provide a coherent direction or agree on a feasible road-map. Largely constrained by limited funds and abysmally low levels of political will amongst member states, these initiatives are geared towards elevating the integration

[822] Haas (1958) 17; see also MacClanahan Y, *Supranational integration: Explaining the distinctive levels of sovereignty transferral between the different integrated areas.* Unpublished Doctoral thesis: Universitat Pompeu Fabra, Barcelona (2004) 216-7.
[823] Cited in Ibid, 216.
[824] As explained in chapter 2, a number of politico-legal mechanisms have been devised to either prevent or manage situations where interests of member states and technocrats at regional institutions conflict. These include the principles of subsidiarity, attribution of powers, proportionality and flexibility.

debate to pole position and thus stimulating corresponding attitude from member states.

It is against this background that some of the documents that will be discussed below were authored. In order to present a holistic view of these interventions, the views of scholars will also be discussed. The discussion will focus on proposals on how to strengthen the three key organs of the AU: the PAP (parliament), the AU Commission (executive) and the ACJ&HR (judiciary).

5.3.1 The Pan-African Parliament (PAP)

The clamour for the strengthening of the PAP should be understood within the political context surrounding its existence. Put differently, one should look at why and how it was established, the intentions of its architects (as shown in its founding protocol) and importantly, the express or tacit positions of its architects as to the expected time of exercise of full powers.

Although the PAP was only established in 2004, the idea of a continental parliament was one of the recognised organs of the AEC Treaty.[825] The AEC Treaty was adopted during the existence of the old OAU. However, the transformation of the OAU to AU ensured that PAP became an organ of the new organisation.[826] Moving a step further, the AU Constitutive Act provided the framework for the eventual protocol establishing the parliament.[827] Giving full expression to article 17(1) of the Constitutive Act,[828] article 3 of the PAP Protocol enumerates the objectives of PAP as:

[825] Art. 14 of the AEC Treaty (1991). In fact, the idea of a continental legislature has always been part of the integration narrative. Addressing African leaders at the 1964 OAU Summit, Nkrumah proposed a continental bicameral legislature: The Senate and a House of Representative. See Nkrumah (1973) 295-296.
[826] Art. 5 & 17 of the AU CA
[827] Ibid, art. 17(2).
[828] This article provides that the purpose of the PAP is to 'ensure the full participation of African peoples in the development and economic integration of the continent'.

- facilitation of the effective implementation of the policies and objectives of the AU
- promotion of the principles of human rights and democracy in Africa
- encouraging good governance, transparency and accountability in member states
- promotion of peace, security and stability
- facilitation of cooperation among Regional Economic Communities (RECs) and their parliamentary fora
- familiarisation of Africans with the programme of integration

Although it exercises only consultative and advisory powers, the protocol (article 11) stipulates that such powers shall be exercised over matters like:

- harmonisation or coordination of laws of member states, RECs and their parliamentary fora
- discussion on the budget of the Community and make recommendations thereon prior to its approval by the Assembly
- requesting the officials of the AU to attend its sessions, produce documents or assist in the discharge of its duties
- promoting the programmes and objectives of the AU in the constituencies of the member states
- adoption of its own rules and procedures

Lastly, it is important to highlight a factor that has significantly contributed to the urgency of transforming the PAP. Read together, articles 2(3) and 11 of the PAP Protocol indicate that the parliament may start exercising meaningful legislative powers at the end of its first term of five years (2009). As Mpanyane rightly points out, the completion of the first term does not equal automatic granting of full legislative powers since state parties still have to convene a

conference on the review of the PAP process thus far.[829] The reality on the ground, however, strongly points to the infeasibility of this goal.[830] The lack of political will to fulfil the promise of full legislative powers has, however, not affected the launching of a variety of initiatives geared towards mapping feasible ways of strengthening the PAP.

Measured against the outlined points above, various studies on the transformation of PAP collectively, expressly and impliedly, highlight the following draw-backs:[831]

- nomination, instead of direct election, of PAP members
- uneven democratic culture across the continent
- lack of effective legislative powers
- lack of political will to transfer powers to the PAP

Mindful of the political milieu within which African integration operates, these studies have adopted a cautious, pragmatic approach in addressing the issue of transformation. These approaches are designed to accommodate the realities and peculiarities of African integration, chiefly the existence of sub-regional parliamentary fora, overbearing influence of member states, and democratic and good governance deficit in some member states. In this regard, most of

[829] Mpanyane S, *Transformation of the Pan-African Parliament: A path to a legislative body?* Occasional Paper 181, Institute of Security Studies (2009) 4; see also art. 25 (l) of the PAP Protocol.
[830] Mpanyane (2009) 4.
[831] Ibid, 1-20; Hugo G, *The Pan-African Parliament: Is the glass half-full or half-empty?* Occasional Paper 168, Institute of Security Studies (2008) 1-12; Pan-African Parliament, *Strategic Plan 2006-2010;* Musila G, *United States of Africa: Positioning the Pan-African Parliament and Court in the political union debate.* Occasional Paper 142, Institute of Security Studies (2007) 1-16; Pan-African Parliament and the Institute of Security Studies, *Report of the Pan-African Parliament seminar on strengthening the capacity of the Pan-African parliament to exercise effective oversight.* One-day ISS/PAP Workshop, Gallagher Estate Midrand, 18th October 2007 (On file with the author) [Hereinafter referred to as ISS & PAP Report 2007]; Pan-African Parliament, *Report of the Committee on rules on the transformation of the Pan-African Parliament.* PAP/C.9/CRPD/RPT/37/08 [Hereinafter referred to as PAP Report 2008] ; African Union, *Study on an African Union Government: Towards the United States of Africa.* Addis Ababa: African Union (2006) 16-17 [Hereinafter referred to as African Union 2006]; Pan-African Parliament, *The Pan African Parliament contribution to the grand debate on the African Union Government.* PAP/P.7/WP/52/07 [Hereinafter referred to as PAP 2007]

these studies have employed a comparative analytical tool, especially in relation to existing regional parliamentary bodies, in explaining how legislative powers can be transferred to the PAP.[832]

With regard to the issue of membership, there is unanimity of opinion on the need for direct elections of PAP representatives through universal adult suffrage, even in the face of little or no political will to effect this.[833] The legitimacy of the body, according to opinions, can only be guaranteed when members are seen as the direct representatives of African people rather than being selected by governments.[834] In the same vein, it has also been proposed that such representation must accommodate proportionality, that is, African states with huge populations should have more representatives.[835] On the question of elections, Hugo views that a political culture which fosters irregularities and electoral chicanery in some African countries may diminish the credibility of PAP elections.[836]

On the politically charged issue of full legislative powers, these studies have adopted methods designed to ensure gradual and incremental transferral of powers. Unlike the insistence on direct elections of the PAP members, these studies have commonly anchored the exercise of reasonable legislative powers to the exploitation of existing legislative structures within the AU and sub-regional levels.[837] Mpanyane notes that the starting point of the PAP transformation should be the activation of a framework that ensures 'practical

[832] Mpanyane (2009); Musila (2007); PAP Report (2008)
[833] Contradistinctively, it has been noted that the advent of a popularly elected EU parliament was not a consequence of popular mobilisation rather it was primarily driven by political elites in Europe in order to grant legitimacy to the integration process. See e.g. MacClanahan (2004) 215-6.
[834] PAP (2007) 12; Hugo (2008) 8-9; ISS & PAP (2007); Mpanyane (2009) 11. Musila, however argues that the nomination of PAP members is less of a manifestation of illegitimacy as the lack of exercise of full legislative powers. Musila (2007) 8.
[835] Musila (2007) 8; African Union (2006) 17.
[836] Hugo (2008) 9. On how members of the PAP should be elected, Musila suggests that, like in the EU, separate elections should be held to elect PAP members. Musila (2007) 8.
[837] PAP Report (2008) 20; Hugo (2008) 9; Mpanyane (2009) 10; African Union (2006) 17; ISS & PAP (2007) 16

cooperation and regular interaction with other AU institutions'.[838] Such cooperation, according to him, should include joint briefings and submission of reports with relevant AU institutions and continuous engagement with national and regional legislative bodies.[839] Musila also avers that the PAP can utilise AU adjudicatory organs to ascertain clarity on some of its mandate and thus enhance the enforcement of its obligations.[840]

On the kind of laws that should emanate from a transformed PAP, analysts have proposed that the PAP should start with the issuance of model laws to member states.[841] The problem with this idea is that states are not obliged to implement model laws; therefore, it will have little or no effect on the strengthening of the PAP's legislative powers.[842]

Engaging in a comparative analysis, Musila proposes that the PAP could start exercising powers over issues that have assumed a transnational character.[843] These include human rights, trade, immigration and free movement of people.[844] He further notes that the exercise of full legislative powers by the PAP should be underpinned by the well-known principle of subsidiarity.[845]

In conclusion, other measures that have been identified as necessary for the transformation of the PAP include:

[838] Mpanyane (2009) 10.
[839] Ibid; PAP Report (2008) 20.
[840] ISS & PAP (2007) 16.
[841] See generally the Pan-African Parliament, *Report of the Pan-African Parliament seminar on the harmonisation of Regional Economic Communities and Regional Parliamentary Assemblies*. Arusha, Tanzania (2006); see also Madlingozi (2007) 32.
[842] Musila (2007) 9.
[843] Ibid.
[844] Ibid.
[845] Ibid. This principle implies that international institutions should only handle matters that cannot be effectively dealt with at the national level. For a detailed discussion on this principle, see Dashwood et al (2000) 156-62; Lenants & Van Nuffel (2004) 100-1.

- control over its own budget, which should include discussion and review of the budget of the whole AU[846]
- recruitment of staff with the requisite skills[847]
- confirmation and appointment of senior officers of the AU Commission and judges of the ACJ&HR[848]

5.3.2 The AU Commission

The AU Commission is the designated engine-room cum executive arm of the AU.[849] As it is in the EU, the AU Commission is designed to anchor the political and economic objectives of the AU and ultimately be the vehicle for the eventual realisation of a continental government. Part of its objectives includes:[850]

- initiating proposals for consideration by the organs of the AU
- implementation of decisions taken by other organs of the AU
- coordinating and monitoring implementation of AU decision
- representing the AU

While these remain laudable, the reality on the ground posits otherwise. Weakened by lack of political will among member states and its internal bureaucratic bottlenecks, the Commission continues to under-perform.[851]

[846] Mpanyane (2009) 10.
[847] Ibid, 11.
[848] PAP (2007) 12.
[849] Or what Nugent, writing about the EU, aptly terms 'the conscience of the Union'. Nugent N, *The government and politics of the European Union.* Durham: Duke University Press (1999) 141.
[850] Art. 3 of the AU CA.
[851] In spite of this, Ayangafac & Mpyisi highlight some of the achievements of the Commission to include raising the profile of the AU, the clear articulation of the African agenda; implementation of the peace and security architecture; and the comprehensive policies on conflict and democratic governance. Ayangafac C & Mpyisi K, *The proposed AU Authority: Hybridisation, balancing, intergovermentalism and supranationalism.* Institute of Security Studies Situation Report (2009) 3; See also African Union Commission, *Strategic Plan 2009-2012.* Addis Ababa (2009) 17 (Hereinafter referred to as Strategic Plan 2009-2012); see also *Audit Report of the African Union.* Addis Ababa (2007) 75-76. [Hereinafter referred to as AU Audit Report 2007].

According to the 2007 AU Audit report, the implementation rate of the decisions emanating from the Commission is just over 10%.[852]

It is against this background that efforts have been made to transform the Commission into an effective, supranational entity. The most recent of such efforts is the decision taken by the General Assembly of the AU to transform the Commission into an AU Authority.[853] It is, however, important to locate the issue of transformation of the Commission within the ideological divide that defines the quest for integration in Africa: Gradualist (minimalist) and the Maximalist.[854]

According to the Gradualists, the Commission is fulfilling its primary tasks, which are advocacy and coordination, but its failure stems from the deficiency of technical ability such as managerial problems, inadequate resources and competence, internal institutional incoherence and lack of coordination.[855] In essence, the gradualists regard revamping the internal administrative structure (technocratic ability) of the Commission as the necessary starting point. On the other hand, the Maximalists anchor the deficiency of the Commission to a vaguely articulated design, mandate and function.[856] Thus, they argue that the only way to correct this is to endow the Commission with wide-ranging supranational powers, similar to that of a national cabinet.[857] According to Anyangafac & Mpyisi, the proposed AU Authority is more in line with the Gradualist ideology since it only emphasises a change in structure rather than a change in the decision-making or implementation process of the AU.[858]

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[852] See generally, AU Audit Report (2007).
[853] See AU/Dec.233(XII), Special Session and Twelfth Ordinary Session 1-3 February 2009 Addis Ababa, Ethiopia.
[854] For a detailed contemporary discussion on the ideological views that define African integration, see e.g. Lecoutre D, 'Reflections on the 2007 Accra grand debate on a Union Government for Africa' in Murithi T (ed) *Towards a Union Government for Africa: Challenges and opportunities.* Institute of Security Studies Monograph Series 140 (2008) 45-59.
[855] Ayangafac & Mpyisi (2009) 2.
[856] Ibid.
[857] Ibid.
[858] Ibid, 3.

However, before discussing the proposed AU Authority, it is instructive to look at the existing proposals on the institutional transformation of the Commission. Since its inception, the AU Commission has authored important documents indicating the process and strategy of its transformation. Titled 'Strategic Plan of the African Union Commission 2004-2007 and 2009-2012', these documents capture the underlying philosophy and components of African integration, stages of transformation and more importantly, the central role of the Commission in attaining integration objectives. The first document, 'Strategic Plan 2004-2007', identifies the three components of (profound) institutional transformation as follows:[859]

- Institutional strengthening of the AU Commission
- Rationalisation of the institutional architecture
- Refinement of AU governance process

The first point - institutional strengthening of the Commission - adopts an inward looking approach, by stressing the improvement of the overall technical ability of the Commission. As a measure aimed at capacity building within the Commission, the following points are highlighted: the need for structural adjustments of the departments, training of staff members, recruitment of skilled personnel, upgrading the Commission's ICT infrastructure, and improved coordination within the Commission.[860] The process is designed in order to equip the Commission with the necessary skills for coordinating the integration process.

The second point - rationalisation of the institutional architecture - looks at the relationship between the Commission and other stakeholders in the integration process. The recognised stakeholders include member states, RECs, NEPAD,

[859] African Union Commission, *Strategic Plan of the Commission of the African Union: Volume 2: 2004-2007 Strategic framework of the Commission of the African Union.* Addis Ababa: African Union (2004) 19. (Hereinafter referred to as Strategic Plan 2004-2007).
[860] Ibid, 17-24.

Specialised Institutions of the AU, AU organs and AU international partners (United Nations Economic Commission for Africa, African Development Bank and international donors).[861] The idea is to ensure that there is effective coordination and communication between the Commission and these bodies so as to ensure coherent design and implementation of integration goals.[862] Especially in the relation to the NEPAD, the specialised institutions and the RECs, this document points to how the Commission can exert continental leadership in the integration process.[863]

An underlying theme of the rationalisation process is the so-called 'Minimum Integration Programme (MIP)', which is:

> [i]ntended to provide greater coherence in the overall movement towards regional integration on a continental level … [it] include a set of programmes to deliver on such goals as the establishment of a regional brigade for the African Stand-by Force, coordination of and a common approach to international trade negotiations, trade liberalisation, free movement goals within each REC, regional common policy in various areas, common monetary policy, common policy in various sectors, etc…

In essence, the MIP is a gradualist framework which provides the stages or process of attaining continental integration. It particularly focuses on the coordination and harmonisation of RECs by putting in place the framework for cooperation and integration of the RECs into a continental programme of action.[864]

The last point - refinement of the governance process - focuses on the need to create an open and transparent management and interaction within the AU. It identifies the four elements of successful governance as:[865]

[861] Ibid, 27.
[862] Ibid, 27-35.
[863] Ibid.
[864] Ibid, 31-32.
[865] Ibid, 38-41.

- *Formulation of decision making mechanisms that would facilitate the building of a shared vision*. This highlights the importance of consultation on policy initiatives and the strengthening of evaluation mechanisms.
- *Partnership for participatory governance*. In this regard, mechanisms should be put in place to ensure the participation of relevant stakeholders (PAP, ECOSOCC, etc.) in the matters of the Union.
- *Organise participation*. The increased involvement of the two democratic control organs (PAP and ECOSOCC) in the governance of the Union.
- *Progress towards a multi-annual financing structure.*[866] The importance of diversifying the financing of the Commission. Suggestions range from the deduction of 0.5% of the budget resources of member states, 10% deduction from the budget of Defence Ministries of AU member states, establishment of a fiduciary fund and exceptional contribution from the cost of air tickets for travels from outside or to the continent.

Building on the 2004-2007 Strategic Plan and realising that the objectives and goals highlighted in this document are yet to be fully realised, the Commission authored the 2009-2012 Strategic Plan.[867] The document highlights the Commission's comparative advantages (in relation to other stakeholders) to include:[868]

- political integration (continental reach and mandate of 53 states to coordinate integration)

[866] Other sources of finance which have being suggested include an imposition of Union tax on insurance policies, and a 5%-10% tax on natural resources in Africa's top- and sub-soil. See Interim Standing Committee of the Economic, Social and Cultural Council (ECOSOCC) of the AU, *Draft contribution to the Grand Debate on the African Union Government.* (2007) Available at http://www.foscam.org/Draft_contribution_of_Ecossoc.doc (Accessed 10 October 2009) 12, 14-15. (Hereinafter referred to as ECOSOCC 2007).
[867] A SWOT (Strength, Weaknesses, Opportunities and Threats) Analysis of the 2004-2007 Strategic Plan reveal some of the factors responsible for the weak implementation as inadequate physical infrastructure, unsupportive organisational culture, inadequate team work, inadequate sources of funds, administrative and leadership challenges, weak reputation, presence and reach in the continent, and inadequate and inflexible structural arrangements. See Strategic Plan 2009-2012, 17.
[868] Ibid, 18.

- scientific, economic, social and physical integration and development
- governance (e.g. the establishment of the APRM)
- institutional capacity building for continental integration and development
- peace and security (increased visibility in the arena of conflict prevention, resolution and management)

The report further considers the following as the strategic pillars around which its mandate and functions can be strengthened: peace and security; integration, development and cooperation; shared values; and institution and capacity building.

With regard to the first pillar, peace and security, the Commission aims to stem the tide of conflicts on the continent by coordinating and overseeing the implementation of policies emanating from AU Peace and Security Architecture (APSA), Common African Defense and Security Policy (CADSP) and the Post-Conflict Reconstruction and Development (PCRD).[869]

The second pillar is sub-divided into three: development, integration and cooperation. The programme on development is expected to achieve improved productivity, infrastructure development, agricultural development, youth development, migration policies, social welfare and diffusion of technology.[870] The programme on integration is focused on the implementation of the MIP, free movement of persons, goods, capital and services and the rationalisation and harmonisation of RECs.[871]The programme on cooperation is geared towards the establishment of a common platform for trade negotiations, increased trade and development, enhanced intra-African cooperation and strengthened global strategic partnership.[872]

[869] Ibid, 22.
[870] Ibid, 23-26.
[871] Ibid, 26-27.
[872] Ibid, 27-29.

The third pillar, shared values, focuses on the cultivation and entrenchment of democratic values such as good governance, democracy, human rights, gender equality and cultural values.[873] In this regard, the Commission will focus the strengthening and full implementation of the APRM, the promotion of cultural diversity, promotion of ratification and entry into force of all outstanding treaties, promotion and protection of African heritage, continental humanitarian policy and the implementation of gender policies.[874]

The last pillar, capacity building, aims to refine and develop the internal administration of the Commission. To achieve this, the Commission expects to put in place an effective human resources management reform programme, prioritises gender mainstreaming, improve organisational culture, improve working environment, timely and effective communication, and regular interaction with other AU organs and the RECs.[875] The above-outlined functions are expected to be exercised by 2012.

As part of the contributions to the famous '2007 Accra Grand Debate on a Union Government', the AU authored a study which expressed the restructuring of the existing institutions of the AU as an essential element of the proposed African Union Government.[876] It particularly highlights the importance of granting more powers to the office of the Chairperson of the AU Commission.[877] In this regard, it recommends the extension of the tenure of the Chairperson to 'non-renewable fixed term tenure of seven years.'[878] In addition, it suggests that the Chairperson be involved, together with the Assembly, in the process of appointing his or her Deputy and the Commissioners.[879]

[873] Ibid, 30-33.
[874] Ibid.
[875] Ibid, 34-36.
[876] AU (2006) 14.
[877] Ibid, 16.
[878] Ibid.
[879] Ibid.

Another important document that is worth considering is the AU Audit Report. Prepared by independent experts, at the request of the AU to, amongst other matters, evaluate the process of integration, review the operation of all the organs of the AU, assess the efficiency of the AU and make concrete recommendations on how to accelerate the integration process.[880] In its evaluation of the Commission, the Report notes that there is a 'fundamental lack of a full comprehension of the power, function, the authority, and the responsibilities of the principal actors (the Chairperson, Deputy Chairperson and the eight Commissioners).[881] According to the Report, this has negatively impacted on the management systems of the Commission.[882] The vaguely articulated delineation of powers and functions within the organisation has resulted in, according to the Report, lack of supervision, failure to delegate functions to Directors and mid-level staff, non-existent internal communication, low morale among staff and consequently, a dysfunctional system.[883] To address these, the Report recommends measures such as:[884]

- bequeathing the Chairperson with powers to exercise full authority, which includes the power to assign portfolios to Commissioners
- compulsory induction for all members and staff of the Commission
- four-year tenure for elected posts, with the elections of the Chairperson and his or Deputy taking place a year before those of the Commissioners
- assigning the coordination of staff matters and inter-departmental issues to the Secretary to the Commission
- mandatory regular meetings of the Commissioners and the Directors
- establishment of the AU Service Commission (AUSC) to be responsible for recruitment, appointments, promotions and enforcing discipline

[880] AU Audit Report (2007), xvi. Cillier notes that the audit came about as a result of an attempt by Southern African states to checkmate the then Chairperson of the AU, Alpha Konare, who was viewed as belonging to the maximalist ideological camp. See Cilliers (2008) 103.
[881] AU Audit Report (2007) 45.
[882] Ibid, 47.
[883] Ibid, 47-48.
[884] Ibid, 46-77.

It is important at this juncture to discuss the most recent intervention in the long list of proposals aimed at transforming the Commission. At the 12th Ordinary Session of the Assembly of the AU in January 2009, African leaders decided to transform the Commission into an AU Authority.[885] Under the AU Authority, the positions of the Chairperson, Deputy Chairperson and Commissioner would be re-designated as President, Vice President and Union Secretary respectively.[886] The Union Secretaries will be assigned twelve reconfigured portfolios.[887] The Authority's responsibilities or areas of jurisdiction can be classified, depending on the political sensitivity of the issues concerned, under two rubrics.[888] The first rubric deals with issues that have little impact on national sovereignty:

- Continent-wide poverty reduction
- Inter-regional and continental infrastructure
- Global warming, desertification and coastal erosion
- Epidemics and pandemics
- Research/university centres of excellence
- Food security

The second rubric is matters which will have direct impact on state sovereignty:

- Free movement of persons
- Foreign and Defence policy
- International trade and negotiations
- Transnational crime
- Peace and security

[885] AU/Dec.233(XII).
[886] Ibid.
[887] These include Defence, Peace and Security; Political Affairs and External Relations; International Trade and Co-operation; Continental and Regional Integration; Development, Finance and Economic Planning; Youth, Culture & Social Development; Education, Science and Technology; Agriculture & Water; Environment and Natural Resources; Continental Justice and Legal Affairs; Labour & Migration; and Health & Population. See Ibid, 3-6.
[888] Ayangafac & Mpyisi (2009) 4; see also Ibid, 2.

According to Ayangafac & Mpyisi, the Authority should have exclusive power, within the framework of the principle of subsidiarity, to initiate agenda and policies under the first rubric.[889] The idea behind this is to place the Authority in the driving seat of integration matters.[890] It is suggested that the Executive Council should initiate policies under the second rubric while the Authority provides support and coordination framework for implementation.[891]

5.3.3 African Court of Justice and Human Rights (ACJ&HR)

The importance of an adjudicatory organ in the integration process cannot be over-emphasised. As shown in the EU, a judicial organ has the potential to fast-track the integration process, even beyond the conceptions of the political actors involved.[892] Since the institutional path of the ACJ&HR, compared to the two organs discussed above, has not been straightforward, especially considering the merger issues and the fact that it is yet to take off, it is crucial that a succinct background is provided.

Unlike its predecessor, the OAU Charter, the Constitutive Act made provision for the establishment of an African Court of Justice (ACJ).[893] However, before the coming into being of the AU, African leaders agreed, in 1998, to complement the work of the African Commission on Human and Peoples' Rights (ACHPR) by establishing an African Court on Human and Peoples' Rights (AfCHPR).[894] The Protocol establishing the Court was adopted in 1998, it entered into force in 2004 and the eleven judges of the Court were elected in January 2006 at the AU Summit in Khartoum, Sudan.[895] Since its inauguration in 2006, the AfCHPR has held three sessions, which includes the agreement on

[889] Ayangafac & Mpyisi (2009) 4.
[890] Ibid.
[891] Ibid.
[892] See e.g. Richmond A & Heisenberg (1999) 3-6; see also Raworth P, *Introduction to the legal system of the European Union.* New York: Oceana Publication (2001) 84.
[893] Art. 5 of the AU CA
[894] Although the AfCHPR was not included as one of the organs of the new AU, it can be argued that the intention of the drafters of the Constitutive Act was the existence of a dual judicial organ for the AU.
[895] See Assembly/AU/Dec.100 (VI).

programme of work, meeting with members of the ACHPR and judges of the sub-regional Courts, and the adoption of rules of procedure and staff structure.[896]

However, upon the suggestion from Nigeria, the AU Assembly decided, in 2004, to merge the AfCHPR with the yet-to-be actualised ACJ.[897] The primary reason for doing this is that it is financially prudent, considering the fact that the continent struggles to meet the financial obligations of other integration initiatives.[898] Critics, however, highlight the logistical difficulty that will arise from the merger, bearing in mind that the AfCHPR is already operational.[899]

The Protocol establishing the merged Court, ACJ&HR, was finally adopted the 11th AU Summit in June-July 2008.[900] In terms of the Protocol, the Court has two sections: the General Affairs and the Human Rights Sections each composed of 8 judges.[901] Under the transitional arrangement, the term of office of the eleven judges of the AfCHPR would come to an end upon the election and inauguration of the judges of the ACJ&HR.[902] In order to create balanced representation, the Protocol provides that each geographical region of the continent will be represented by 3 judges, except for the most populous, the

[896] AU Audit Report, 87; see also Sceats S, *Africa's new human rights court: Whistling in the wind?* Chatham House Briefing Paper (2009) 4-5. Available at http://www.chathamhouse.org.uk/publications/papers/view/-/id/721/ (Accessed 20 0ctober 2009).
[897] Assembly/AU/Dec.45 (III) Rev. 1.
[898] Other advantages to be derived from the merger include the elevation of the status of human rights within the AU, simplicity, potentially stronger enforcement, unified and coherent indigenous jurisprudence, synergy between human rights and political/economic issues. See generally Kindiki K, 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits'. *African Journal of International & Comparative Law.* 15/1 (2007) 144-145; Sceats (2009) 5-6; Beyani (2007) 584; Musila (2007) 4.
[899] Kindiki (2007) 141. Sceats notes that there is a high risk of relegating the human rights section of the court to the background since states will likely be more concerned about issues, such as border disputes, within the general section. Sceats (2009) 6; see also Musila (2007) 4.
[900] ACJ&HR Protocol (2008).
[901] Ibid, art. 16.
[902] Ibid, art.4.

Western Region which will have 4 judges.[903] The ACJ&HR will be competent to hear the following cases:[904]

- Interpretation and application of the Constitutive Act and other AU Treaties
- Interpretation and application of the African Charter, Charter on the Rights and Welfare of the Child, Charter on Human and Peoples' Rights, Rights of Women and other human rights documents
- Any question of international law
- Decisions, regulations and directives of the organs of the AU
- Breach of any obligation owed to state parties or the AU
- Nature and extent of reparation to be made for such breach

The following parties are eligible to access the General Affairs Section of the Court:[905]

- State parties to its Protocol
- Organs of the AU as authorised by the Assembly
- Staff member of the AU appealing to a dispute as set out in the Staff Rules and Regulations of the Union.

The Human Rights Section is open to the following parties:[906]

- State parties to the Protocol
- The African Commission on Human and Peoples' Rights (ACHPR)
- The African Committee of Experts on the Rights and Welfare of the Child
- Accredited African Intergovernmental Organisations

[903] Ibid, art. 3(3).
[904] Ibid, art. 28.
[905] Ibid, art. 29.
[906] Ibid, art. 30.

- African National Human Rights Institutions
- Individuals or Non Governmental Organisations (NGOs) accredited to the AU, on the condition that the responding state party has made a specific declaration accepting the competence of the Court in this regard.

With respect to the enforcement of the judgments of the Court, article 46(4) of the Protocol provides where a party fails to comply with the decision of the Court, the Court may refer the matter to the Assembly.

Although the Court is yet to be operational, analysts have provided a number of suggestions to address its perceived inadequacies. A major point of concern is the restrictive accessibility to the Human Rights section of the Court as stipulated in article 30(f). It is argued that the impact of the Court can only be felt if individuals and NGOs are allowed automatic access without any formal declaration to this effect by the state party concerned.[907] In addition, Sceats views that measures such as effective protection programmes for victims and witnesses, and free legal aid will enhance the credibility and efficacy of the Court.[908] In terms of creating awareness, it has also been suggested that the Court hold sessions outside of its permanent base in Tanzania.[909]

With respect to the structure of the Court, Musila argues that considering the technicalities of some of the functions stipulated in articles 28 & 29, it is important that the drafters of the ACJ&HR Protocol reconsider the operationalisation of a unified tribunal.[910] In this regard, he proposes two options. The first advocates a single African Court of Justice with specialised chambers dealing with issues such as human rights, union civil service and

[907] See e.g. Odinkalu C & Mbelle N, *Africa: Continent needs effective human rights court.* Available at http://www.allafrica.com/stories/200806240710.html (Accessed 30 August 2009); see also Sceats (2009) 13; Musila (2007) 5.
[908] Sceats (2009) 13.
[909] Ibid.
[910] Musila (2007) 4.

trade.[911] The second option envisages the establishment of a major tribunal, which will exist alongside satellite or autonomous specialised tribunals.[912] In addition, he recommends that the positions of the judges, like that of the president and Vice-President of the Court, should be made full-time, considering the numerous legal issues the Court will have to address.[913]

In relation to the enforcement of the judgments of the Court, it is suggested that this responsibility should rather lie with an appropriate political body, capable of effectively monitoring compliance with court orders.[914] One such body is the Committee of Ministers, a body responsible for ensuring the compliance with the judgments of the European Court of Human Rights (ECHR).[915]

5.3.4 Dominant themes in the quest for AU transformation

The foregoing analysis represents, but are by no means exhaustive, the trends and patterns of institutional transformation of the AU. It provides a window to understanding the ideological contours and thoughts embedded in the pursuit and eventual transformation of the AU. Thus, in light of the conclusions drawn from the above analysis, this section will attempt to flesh out some of the factors that continue to shape or influence transformation. These conclusions can be explained under the following broad headings:

- Group-based approach

[911] Ibid.
[912] Ibid, 4-5.
[913] Ibid, 5. Only the President and Vice-President shall reside at the seat of the Court (art. 22 of the ACJ&HR Protocol) and receive annual salaries (art. 23(1)), while other judges will only receive sitting allowance for each day on which they exercise their functions (art. 23(2)).
[914] Musila (2007) 5-6.
[915] Ibid. According to art. 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Committee of Ministers is charged with the task of supervising the execution of the judgments of the ECHR. Art. 46(2) of the Convention, the Committee invites the respondent in order to gather information about how the respondent intends to abide by the judgment of the Court. In a situation where the respondent defaults, the Committee has the powers to exert political and diplomatic pressures. However, it has been observed that in practice, the Committee rather engages in constructive dialogue with defaulting respondents. See generally, the Committee's website: http://www.coe.int/t/dghl/monitoring/execution/Presentation/Default_en.asp (Accessed 10 September 2009).

- Diffusion
- Incrementalism

a) Group-based approach

The first, which is premised on the unconditional membership ideology of African integration, assumes that eventual transformation must include all the 53 members of the AU. A cursory glance at the above analyses reveals an underlying motif, which upholds the inclusion and participation of all member states in the transformation process. Even where some member states are outside the framework of the institutional process (e.g. the PAP and the ACJ&HR), the short, medium and long term goal remains the eventual inclusion of such states in the process. Hence the oft-stated appeal for ratification and adoption of related legal instruments.[916]

As indicated in previous chapters, the basis of a group-based, all-inclusive approach to membership is the ideology of pan-Africanism. Underpinned by the dual realities of racial consciousness and the geographic contiguity of African states,[917] pan-Africanism provides the political manure which continues to sustain unconditional membership.

b) Diffusion

The similarity between the EU and the AU extends beyond institutional structure and nomenclature; it is also evident in the proposed trajectory of AU transformation. As outlined above, transformation issues ranging from direct election of PAP members, increased legislative powers of the PAP, strengthening the Commission, and the structure and enforcement of the judgments of the ACJ&HR all bear a striking resemblance to what obtains in the EU.

[916] See e.g. PAP (2007) 13; Musila (2007) 10.
[917] Mazrui (1963) 89-90.

The above situation is best explained within the context of what social scientists call the diffusion model. Levi-Faur define diffusion as the:

> process by which the adoption of a social system is communicated through certain channels overtime and triggers mechanisms that increase the probability of its adoption by other members who have not yet adopted it.[918]

As a sub-set of the diffusion model, the 'policy transfer approach' best describes the similarity between the EU and the AU. As Levi-Faur puts it, the policy transfer approach is 'the process by which knowledge about how policies, administrative arrangements, institution and ideas in one political setting is used in another political setting in the development of change'.[919]

Elkins & Simmons, however, note that diffusion has little to do with the outcomes of policy transfers; rather it focuses on the mechanisms and processes that shape the likely outcome.[920] What this implies is that diffusion does not necessarily guarantee the successful operationalisation of a copied process, it simply points to the similarity of process and structure. In this vein, Elkins & Simmons identify the two kinds of diffusion as *adaptation to altered conditions* and *diffusion via learning*.

Adaptation to altered condition denotes the contextualisation or adjustment of a copied process to the prevailing conditions of a particular area.[921] This is similar to what Goodin pointedly typify as 'goodness of fit'.[922] While *adaptation to altered condition* aims to re-shape adopted policies, *diffusion via learning*

[918] Levi-Faur D, 'The global diffusion of regulatory capitalism' in Levi-Faur D & Jordana J (eds), 'The rise of regulatory capitalism: Global diffusion of a new world order'. *The Annals of the American Academy of Political and Social Science.* 598 (2005) 202; see also Elkins K & Simmons B, 'On waves, clusters and diffusions: A conceptual framework' in Levi-Faur & Jordana (2005) 36-38.
[919] Levi-Faur (2005) 202. In this regard, the success of the EU, especially in terms of its supranational features, has had a huge impact on policy-makers and architects of the integration process in Africa, both at the sub-regional and continental levels.
[920] Elkins & Simmons (2005) 36.
[921] Ibid, 39-42.
[922] This relates to how a designed objective or policy is consistent with the social order of a particular environment. See Goodin (1996) 37.

implies the adoption of policies as an instructive tool.[923] In this case, policy-makers adopt proven, tested and successful models without engaging in an evaluation of the effectiveness of such model in a specific setting or clime.[924]

Locating this within the African context, one could argue that the AU is essentially the by-product of the *diffusion via learning* of the EU process. Except for minor differences,[925] the AU - in terms of its structure, institutional machinery, mandates and objectives - is a replica of the EU.[926]

c) Incrementalism

As discussed earlier, African integration has for the past four decades been defined by the struggle between the advocates of an immediate establishment of a Union (federal) Government and a gradual, incremental attainment of such Union. At every point, the incrementalists have succeeded in shaping the discourse - a point evident in the outcomes of institutional design and initiatives.[927] A cursory look at the above analyses is testament of the triumph of incremental approach to transforming the AU. Examples include the emphasis on MIP by the Commission, suggestions on the nature and kind of laws that should emanate from the PAP, and the jurisdictional sphere of the proposed AU Authority.

Apart from the unbridled attachment to national sovereignty, incrementalism proves to represent a politically pragmatic tool for advancing integration, particularly in a climate where there is an acute deficiency of political will on the part of the supposed principal actors. Thus, incrementalism provides a narrative that acknowledges the importance of national sovereignty but at the same time

[923] Elkins & Simmons (2005) 42.
[924] Ibid, 42-45.
[925] These differences range from pan-Africanism rhetoric, the membership composition (unconditional membership in the AU); the number of Commissioners in the Commission and judges of the ACJ&HR, the proposed re-designation of the positions of the top officials of the Commission; and the merged court (ACJ&HR).
[926] See chapter 4, table 4.2.
[927] See e.g. Lecoutre in Murithi (2008) 55-57.

outlines the ways and means of gradual transference of authority to a transnational entity. In addition, the presence of sub-regional organisations with their relatively developed institutions requires a strategy that emphasises balanced and effective coordination and incorporation. As shown in the above exposition, proposals on AU transformation stress the importance of learning from and establishing substantial linkages with sub-regional institutions.

5.4 Building a qualitative leviathan: Institutional structure of a supranational AU

It is instructive at this juncture to recap the salient points that have so far emerged from this research. The aim behind this is to establish the extent to which these issues relate to the central thrust of this chapter: the institutional framework of a supranational African Union. In no specific order, below are the dominant positions:

- Regional integration is an important aspect of Africa's development strategy.
- Lack of political will to implement integration objectives,[928] political instability, democratic deficit at national level and regional hegemonic threats are some of the obstacles to the realisation of Afro-supranationalism.
- Pan-Africanism should not be the primary basis of African integration.
- The 'nucleus AU' is a feasible route to attaining Afro-supranationalism.
- It is important to locate institutional building or design within the socio-political, cultural and economic contexts of a particular area.

These points may be cross-cutting and related. Cumulatively they have the potential of shaping the on-going discourse on AU transformation. More

[928] As Kufuor notes the failure of supranationalism is not just about lack of political will but also the fact that the existence of certain supranational institutions is completely needless because there is clearly nothing to supervise. Using the ECOWAS as an example, he posits that the suggestion on the creation of an agency to regulate capital movement within ECOWAS is simply academic since there is low level of capital movement within the Community. See Kufuor (2006) 57.

importantly, these points will serve as an analytical tool for subsequent analyses.

5.4.1 The idea of a 'nucleus AU' revisited

The 'nucleus AU', an idea already discussed in the previous chapter, is the core of this thesis. Against the backdrop of institutional reform, it is pertinent that we revisit this idea, in order to be clear on how it will work in practise. The previous chapter suggests the 'nucleus AU' as a feasible framework for attaining a supranational AU. This section thus seeks to clarify and expand on some aspects of this idea, especially the attempt to review the present configuration of regional integration in Africa. Put differently, if the 'nucleus AU' is portrayed as the ideal representation of Afro-supranationalism, how does it fit into the prevalent realities of governance structures or *realpolitik* on the continent?

Since African integration is primarily defined by a pan-Africanist narrative which prioritises race and geography as a pre-requisite for membership, this idea appears, on face value, unrealistic. The question expected to be posed is neither based on the legal framework or economic impact of such enterprise but the feasibility of excluding African countries from a supposed pan-African agenda. Put simply, why challenge the *status quo*?

It should be restated that the 'nucleus AU' is not designed to renounce the underlying logic of pan-Africanism, particularly the importance of uniting Africa. Rather it is part of the discourse on seeking credible alternatives to addressing the disillusioned state of continental integration or specifically, the AU.[929] The 'nucleus AU' is framed as the underlying philosophy that should shape the rejuvenation and strengthening of the AU. As such, the question is not so much the importance of unity as it is the methodology of attaining such aspiration.

[929] Pettit's description of institutional design is instructive here. He describes it as '[t]he project of rethinking and reshaping things – perhaps quite modestly – rather than the project of giving them their initial form. See Pettit (2006) 55.

In this regard, the 'nucleus AU' is a nuanced expression of pan-Africanism, which highlights the essence of fashioning shared and common values. It questions membership criteria which are primarily based on race and geography rather than strict adherence to democratic values. As depicted by the diagram in the previous chapter, the present arrangement of 53 member states will still be retained. However, member states wishing to pursue deeper integration based on shared democratic norms can do so as long as they successfully scale the hurdles of a reformed APRM.[930]

This idea is not aimed at perpetually locking out certain African states from the integration project. Instead, it is geared towards entrenching a culture of democratic practise across the continent.[931] It seeks to enthrone uniformity of standard and practise, an essential requirement for a successful regional integration process. Upon the fulfilment of laid down requirements, states which initially fail to meet the required criteria may then decide to join the integration process. Continued flagellation of human rights and good governance principles on the continent can primarily be attributed to a regime which condones and rationalises serial violations without incorporating effective mechanisms for individual or collective dissension.[932] The usual hurried approach of presenting

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[930] See chapter 4, diagram 4.2.

[931] Analysts note that the underpinning democratic values of the EU and the urge to join the organisation spurred democratic reforms and practice in countries such as Romania, Spain and Greece See e.g. Ram M, *Romania's Reforms through European Integration: The Domestic Effects of European Union Law*. 1-23. Available at http://www.hks.harvard.edu/kokkalis/GSW1/GSW1/20%20Ram.pdf (Accessed 30 November 2008); see also Fenandez & Portes (1998) 208. Brenton also observes that an organisation built on the tenets of democratic standards and values offers its members a 'badge of respectability'. He further explains

> you could have one high-profile meeting a year at which insiders could congratulate each other on their legitimacy, while outsiders looked on uncomfortably. The process of entry and exit should be arranged to give maximum support to the forces for democracy in the countries concerned.

See Brenton T, *Join the club but only if your elections are free.* The Times (United Kingdom) July 14 (2009) 22.

[932] For instance Birikorang opines that the entrenchment of the AU's rule against unconstitutional change of government continues to be undermined by the insistence of certain influential African presidents on the non-application or removal of sanctions against violating states. See Birikorang E, 'Revisiting the trajectory of regime change in Africa – An overview'. Paper presented at the AHSI Seminar: Unconstitutional regime changes: The resurgence of coups in Africa (2009) 5-6. Available at

a common front[933] or establishing a Government of National Unity (GNU) in troubled member states,[934] without properly addressing the root-cause(s) of problems, are typical examples.

In addition, member states should be offered some form of incentive for adhering to the required democratic standards. As previously highlighted under the discussion on compliance, states exhibit positive compliant behaviour when measures that increase motivation are present.[935] According to Brenton, this may come in the form of monetary assistance directed at the overall economic development of poorer and aspiring members.[936]

In summation, the 'nucleus AU' is a politico-legal[937] framework which seeks to present nuanced, alternative methodological approach of pan-African institution building at the continental level. Embedded in this idea is an understanding of the peculiarities of Africa, a realisation which informs the need to design a framework which is sensitive to these specificities. Some of these peculiarities include, but not limited to:

- the existence of multiple RECs, some of which are relatively developed[938]

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http://www.issafrica.org/dynamic/administration/file_manager/file_links/09SEP09BIRIKORANG.PDF?link_id=5391&slink_id=8371&link_type=12&slink_type=13&tmpl_id=3 (Accessed on 9 October 2009).

[933] Soyinka typifies this arrangement as 'a club of personalities in perpetual mutual adoration'. See ADF III (2002) 37.

[934] In recent times, African leaders have crafted the GNU as a politically expedient mechanism for legitimising questionable leaders, by co-opting the real winners of the elections as secondary players in the government. Kenya and Zimbabwe are examples.

[935] This is known as the 'deviant-centred strategy'. Petit (2006) 72.

[936] Brenton (2009) 22.

[937] In the context of this thesis, this term denotes a) the normative instruments or framework that ensures compliance with the decisions of the AU b) the nature and shape of a future supranational AU and the factors capable of influencing it and c) the underlying objectives and goals of such process.

[938] This can have both positive and negative consequence for continental integration. On one hand, the success of sub-regional institutions can positively influence the development of corresponding institutions at the continental level. Such influence could come through continuous interactions, exchange of personnel and information-sharing. On the other hand, once these sub-regional institutions attain their stated (supranational) goals, acquiescing to an amorphous continental body might be considered unwise and impossible.

- limited finance for regional integration initiatives
- weak institutions at national levels
- low level of awareness and participation of the African populace in the integration process
- poor state of African economies
- deficiency of incentives to ensure compliance with institutional directives[939]
- ideological cleavage (maximalists versus minimalists)

These variables set the integration process in Africa apart from that of Europe, hence the importance of avoiding the pitfalls of prescribing the EU as a verbatim model.[940] As earlier stated, there is no danger in drawing useful lessons from the EU, especially the universal and workable factors that have ensured its success. Also, its pitfalls should be considered.[941]

The following discussion on the institutional framework of a supranational AU should be understood within the context of the prescribed 'nucleus AU'. While some of these institutions are already in existence under the current AU framework, the discussion below is done within the purview of an existing uniformity of adherence to democratic values and norms. It is thus conditional and prospective.

[939] Incentive to comply with decisions should not be confused with the motivation to join regional organisations. While states may feel compelled to join an organisation due to the potential economic benefits, it does not follow that such states will necessarily comply with the decisions of such organisation, especially if it conflicts with their political or economic interests. According to research, while the compliance the implementation of integration initiatives remain abysmally low, a reasonable number of African countries highlight the benefits they derive from their membership of RECs. 50% of countries surveyed reported that regional integration helped control inflation, 44% point to increase in investment, 50% benefitted from trade and market integration initiatives, 44% from transport, 39% from macro-economic convergence, 28% from agriculture and 26% from energy. See AU & ECA (2006) 82.
[940] This can only amount to rigid classification. It is akin to setting up oneself for failure and disappointment. Since both Europe and Africa have different histories, cultures and political structures, such verbatim process can only result in a dysfunctional state of affairs.
[941] These include limited public participation in the EU process, democratic deficits, and mismanagements in the EU institutions. See e.g. Cini (2002) 56.

5.4.2 Institutional organisation

5.4.2.1 Road to transformation: Preliminary matters

'Africa doesn't need strong men; it needs strong institutions' - Barack Obama[942]

As highlighted previously, the aim of this thesis is neither to re-invent the wheel nor create a brand-new institutional framework. Instead, it is a response to the organisational deficiency of the AU, and thus seeks to engage in a theoretical discourse of re-evaluation of the integration process, albeit at the continental level. This entails a dissection of the institutional arrangement (which has been done in the foregoing), and highlights the aspects that need to either be retained or refined and proffer additional framework that can meet some of the deficiencies that have been pointed out.[943]

According to Warleigh, institutions should perform the following roles:

> Institutions act as forums in which actors cooperate, argue, deliberate and make the decisions which eventually constitute public policy. Institutions can also shape the values and belief systems of those who work within them. As a result, they influence not just what actors do, but often also how they view the world in which they live as well as the people and ideas with which they must engage in order to realise their goals.[944]

Therefore, how can the decisions that emanate from the AU promote the essence of democratic governance, respect for human rights and concrete disapproval of violations? How can the AU impact meaningfully on the lives of Africans, shape continental socio-economic development and elevate the profile of the continent on the global stage? These questions border on the legitimacy

[942] 'A new moment of promise'. Speech delivered to Ghanaian Parliament, July 11 2009. Available at http://www.voanews.com/english/archive/2009-07/2009-07-11-voa6.cfm?CFID=325741458&CFTOKEN=96528518&jsessionid=de305792520a434292ec4d292c4a77a74456 (Accessed 20 October 2009).
[943] This is in line with Pettit's description of institutional design. See Pettit (2006) 55.
[944] Warleigh (2002) 4.

of the AU as an embodiment of the aspiration, values and renaissance of Africa. As Murithi aptly notes, the AU should be an enabler, supporter, facilitator and protector of the Africa people.[945]

The challenges facing the continent are gargantuan and require serious attention. Institutional reform of the AU, although not being the sole elixir, is an appropriate starting point. Institutional reform should, however, not be framed in such a way that it ignores the fundamental root problems. Rather, the underlying problems should shape the process of transformation and consequently the outcome of the institutional framework. For example what is the essence in granting more legislative powers to the PAP while some of its members are products of electoral irregularities? Why allow leaders who have emerged through questionable electoral process participate, and in turn shape the affairs of the AU? Why elect a serial violator of the supposed principles of the AU as its Chairperson? How can one expect motivation and qualitative output from AU institutions when the supposed principal actors routinely disregard their directives and decisions?

It is thus crucial that the goal of transformation objectively reflect a balance between the diagnostic appraisal and panaceas proposed. The diagnosis of a problem will usually point to possible solutions. However, the solution(s) offered must be specific and capable of adequately rectifying the problem diagnosed.[946] Situating this within the context of this study, the solutions offered should not only be desirable but be responsive to the social dynamics of the continent.

[945] Murithi (2005) vii.
[946] Iatrogenic interventions should also be avoided. This is a situation where the solutions administered, and not the underlying problems, leads to failure and inaction. Pat Utomi, a Nigerian policy analyst, has used this word, 'iatrogenic', to describe some of the policies of the Nigerian government. See e.g. 'The trouble with the new CBN leadership'. Available at http://www.ngrguardiannews.com/business/article05//indexn3_html?pdate=070210&ptitle=The%20Trouble%20With%20The%20New%20CBN%20Leadership,%20By%20Utomi&cpdate=070210 (Accessed 07 February 2010).

It is also important to avoid setting specific time-frames for the process of African integration. One thing practise has shown is that such targets have resulted in failure and disappointments. As Kambudzi remarks, these deadlines are simply unrealistic considering the fact that the parameters for achieving the stipulated targets are absent.[947] Therefore the approach of this thesis is not based on a specific chronological time-frame. Instead it hinges the feasibility of deeper and qualitative integration on the consolidation of democratic values among member states. Put differently, it envisages a two-stage process: firstly, the consolidation of democratic norms and institutions at the national level and secondly, crafting a transnational process based on uniform democratic standard.

It is important at this juncture to note that the underlying hypothesis or the context within which the institutional framework of the supranational AU is discussed is that membership will be regulated, thereby resulting in a situation where all members adhere to uniform democratic standards. The following discussion will centre on the germane points to consider in the discourse on Afro-supranationalism. These issues will be discussed under the broad themes of legal framework, institutional architecture and the feasibility of compliance.

5.4.2.2 The legal framework of a supranational AU

Weiler describes regional integration process as a creation of the law.[948] This description implies the centrality of Treaties and other related legal instruments as the foundation or reflection, explicit or implicit, of the destination and shape of the regional integration process. Thus, a study of the principles, obligations, institutional structure and objectives of a particular international institution, as stipulated in its constitutive legal instrument, will indicate whether it is an intergovernmental or supranational structure.

[947] Kambudzi A, 'Portrayal of a possible path to a single government for Africa' in in Murithi M (ed), *Towards a union government of Africa: Challenges and opportunities.* ISS Monograph Series No 140 (2008) 17-18.
[948] Weiler (1999) 221.

Where the organisation is supranational, the superintending legal framework will contain the dual elements of normative and decisional supranationalism.[949] While normative supranationalism denotes the supremacy of Community or Union laws in relation to national laws, decisional supranationalism presupposes majority voting system as an essential framework of the institutional decision making process.[950] Since supranational entities do not exist in a vacuum but within a largely state-centric global order, mechanisms have been designed to balance legal implications with political realities. One such mechanism is the principle of subsidiarity. As earlier discussed, this principle protects national interests by guaranteeing the relevance and supremacy of national institutions in relation to matters which are best handled at the national level.[951] As Zurn puts it:

> A supranational charter is, thereby, neither required to represent a territorial state nor does it presuppose the dissolution of national political systems. What it does require, however, is that the interests and concerns of non-nationals should be considered and legalised through juridification at levels beyond the nation-state and through the internalisation of international regulations.[952]

When designing a legal framework for continental integration, it is pertinent not only to apply the legal principles associated with supranationalism[953] but also to

[949] Weiler (1981) 273-280.
[950] Ibid; Hay (1966) 69; Pescatore (1974) 51-52.
[951] See e.g. Dashwood et al (2000) 156-162.
[952] Zurn in Joerges & Zurns (2005) 37
[953] Supranationalism should however not result in 'democratic deficit' of the organisation. Zweifel identifies the seven key indicators of democratic deficit, or lack thereof, as:

- Appointment (whether a directly elected legislature is involved in the appointment of key officials of the organisation)
- Participation (the involvement of the civil society in the decision-making process of the organisation)
- Transparency (whether the decision-making process is open and accessible to the public)
- Reason-giving (whether the organisation widely publishes the rationale behind its decisions)
- Overrule (whether there is a mechanism for checks and balances within the institutional framework)
- Monitoring (how are policies and decisions of the institutions monitored?)

keep in perspective the realities on the ground. This implies the existence of an uneven socio-political and economic development across the continent and also the absence of shared norms and values. And as such, the insistence on phrases such as 'African constitution',[954] 'United States of Africa' or a 'Union Government'[955] amounts to by-passing or conveniently ignoring the need for concerted progressive realisation of unity. In this vein, the supranational African Union, a virile institution built on the tenets of shared democratic values, provides a framework for solidifying the foundation of a future Union Government.[956] It is suggested that a reformed AU Constitutive Act is required to serve this purpose. The following are some of the issues that should be covered by the reformed Treaty.

a) Objectives and principles[957]

The reformed Treaty should not only encapsulate shared democratic standards, it should also include institutions and measures that are capable of promoting and safe-guarding such ideals. For instance, the provision dealing with conditional or regulated membership should consequently make way for the

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- Independence of the organisation from the overbearing influence of member states

See Zweifel T, *International organisations and democracy: Accountability, policies and power*. Boulder: Lynne Rienner Publishers (2006) 18-26.

[954] While the points and ideals encapsulated in the 'Third Draft Constitution of United Africa', a document authored by African civil society in 2005, are instructive and commendable, the semantic connotation of the document (as a Constitution) conveys a tone of total readiness and finality. The drafters of this document should rather have adopted a tag which indicates that the document as a working progress which may eventually become an African Constitution. It is against this background that this section argues that the legal framework of a supranational arrangement remain a Treaty, albeit a reformed one. However, such Treaty may one day evolve into a Constitution. The United Africa Draft Constitution is available at http://www.foscam.org (Accessed 10 October 2009). (Hereinafter referred to as UA Draft Constitution 2005); see also Tadadjeu M, 'An African constitution: Ten hypotheses of what it should include' in Murithi (2008) 171-181.

[955] In the ECOSOCC's contribution to the Grand Debate on the AU Government, the two phrases that have dominated African integration, 'United States of Africa' and the 'Union Government', is clarified. The 'United States of Africa' is an older concept, one which dates back to early 20th Century. It aspires for the United States of America model. The 'Union Government' on the other hand is a recent concept, 2005 to be precise, which implies a reinforced, reformed AU. See ECOSOCC (2007) 5-6.

[956] As MacClanahan explains, while federalisation, viewed as the last stage of supranational integration, precisely denotes the formation of a new country, supranationalism merely denotes the addition of an extra layer to existing political system. MacClanahan (2004) 4.

[957] The objectives of a supranational AU should be an expression of what Brenton refers to as a 'badge of respectability', that is, values capable of eliciting best practices. Brenton (2009) 22.

strengthening of existing institutions and the establishment of an additional supporting framework. In addition, such institutions should be clothed with real monitoring and disciplinary powers.

b) Subsidiarity and cooperation

The principle of subsidiarity is pivotal in African integration discourse considering the multi-layered (continental, sub-regional and national) nature of governance structure. Thus, such treaty should provide a clear framework that stipulates the functions of each level of the governance structure. While it is easier to centralise non-institutional forms of political integration,[958] the integration of already developed institutions at sub-regional level may prove more difficult than envisaged. What this implies is that the institutions (executive, legislative and judicial) at the sub-regional level, just like national institutions, will remain.[959] However, they will be part of an interlocking and hierarchical relationship which clearly delineates functions and obligations according to the scale or effects of actions. To ensure coordination and cohesion of plans and activities, the Treaty should provide a framework that promotes periodic interaction and exchange of personnel between the continental and sub-regional actors.[960]

c) Institutional balance

The (democratic) legitimacy of a supranational AU, especially with regard to the supremacy of its laws, will depend on the fair distribution of powers within the Union. As with the EU, the test for the AU will be on how to delineate the

[958] Examples include free movement, Union passports, abolition of border controls, transnational voting rights, peace-keeping and monetary union.

[959] This suggestion should be understood within the context of the earlier recommendation on the need for RECs to be reduced to five. The current framework of multiple RECs is too problematic for the effective operation of the principle of subsidiarity.

[960] Ngwane for example propose that there should be three continental liaison partners within the RECs charged with monitoring convergence and complimentarity of policies and programmes. See Ngwane G, *Towards a confederated United States of Africa (Between A6 and the African Union Authority).* Available at http://www.gngwane.com/2009/07/towards-a-confederated-united-states-of-africa-between-a6-and-the-african-union-authority.html (Accessed 10 0ctober 2009).

exercise of decision-making powers among technocrats (AU Commission), national politicians (the Assembly and Executive Council) and representatives of the people (PAP and ECOSOCC). In this regard, the reformed Treaty should provide a framework that not only allows the PAP to exercise reasonable legislative powers but improves the channel through which ordinary Africans can take ownership of the integration process. These could include national referenda, awareness campaigns, formal recognition of transnational cultural and traditional fora and cooperation with educational institutions.

d) Guaranteed autonomy

Apart from expressly tagging the AU as a supranational Union, the reformed Treaty should include provisions which reflect the autonomy of its institutions. Such provisions should insulate the institutional machinery from national politics.[961] Matters such as appointments, decision-making process, developmental programmes and policy frameworks should be managed to an extent that they highlight the independence of Union institutions. This independence should also be reflected in the nature of its laws and decisions. Such laws, especially in the areas of exclusive competence, must be superior to and have direct effect within the territorial jurisdiction of member states. Alongside consensus, weighted voting should also be prioritised as an institutional decision-making mechanism.

e) Revenue generation

Since limited financial resources remain one of the biggest obstacles to African integration, the inclusion of a well thought-out internally generated revenue system is imperative. It has been suggested that alternative means of generating income for the AU should include the imposition of taxes on natural

[961] Insulation does not amount to the creation of an iron-clad barrier between the Union and national politics; rather it posits that, within a symbiotic matrix, the Union institutions are empowered to shape the integration process, especially through matters where they have exclusive competence.

resources and air tickets, deduction from national defence budgets and the establishment of a fiduciary fund.[962]

f) Compliance mechanisms

As this will be discussed later, it will suffice to note that the possibility, or lack thereof, of compliance with the decisions of an organisation determines its (in) effectiveness. Therefore, the reformed Treaty must include a detailed framework which highlights mechanisms, ranging from tough to benign, for ensuring compliance with institutional decisions.

g) Opt-outs and flexibility arrangements

The reality of any integration enterprise is that not all member states will be comfortable with the pace, slow or fast, of the process. This can result in a situation whereby certain member states decide to proceed at a faster pace, albeit within the institution framework. Also, domestic imperatives might prevent a member state(s) from agreeing to certain supranational decisions or outcomes. Thus, without sacrificing the fundamental values of the Union, the reformed Treaty should provide legal frameworks that permit, in the former scenario, flexibility arrangements and, in the latter case, opt-outs. In addition, member states willing to renounce their membership must be allowed to do so.[963]

h) No rigid classifications

Apart from espousing the broad goals of supranationalism, the reformed Treaty should avoid classifications that portray ideological views, which veracity or acceptance is yet to be tested. As such, terms like 'United States of Africa' or 'African constitution' which connote radical and immediate shedding of sovereignty should be omitted. The Treaty should be skilfully crafted in a way

[962] ECOSOCC (2007) 12, 14-15; AU Strategic Plan 2004-2007, 38-41; Tadadjeu in Murithi (2008) 177-178.

[963] Libya is one country that is vehemently opposed to this idea. It views this as a divisive tool. See Maluwa (2004) 229. This idea of preventing member states to exercise this right is antithetical to the philosophy underpinning the establishment of a supranational AU.

that presents integration objectives and goals as dynamic and capable of evolving. To peddle fixed concepts like federalism or confederalism is to deny the organic development of the organisation.

5.4.2.3 Institutional architecture: What manner of Union?

As aforementioned, there is a need to avoid typifying the future of the AU with phrases which connotes finality or terminus.[964] This can have the following effects:

- Firstly, it can heighten the paranoia of states which already have a problem with shedding their sovereignty or embarking on a journey to the unknown.
- Secondly, phrases such as 'Union Government' or the 'United States of Africa' wrongly assume a state of readiness, when all indices on the ground indicate otherwise.[965]
- Thirdly, it diminishes the debate on the cultivation of shared norms and values as a prerequisite for proceeding with a continental Union.[966]

While the appellation used in this thesis, namely 'supranational', is in tune with the above phrases to the extent that it advocates a continental leviathan structure, it differs on the account of prioritising democratic requisite. As such, the institutional structure of the AU should reflect, in its composition, the values of democracy. Neither federalism nor confederalism should at this stage be

[964] Writing in 2003, Maluwa highlights the absence of deep discussion and understanding among political elites on the meaning of 'union'. He further notes, 'some leaders regard it as the panacea for all Africa's economic and political problems, while yet others still view it as the thin end of the wedge in a move towards the creation of a "United States of Africa". See Maluwa (2003) 163. Different interpretations and motives on the part of African political leaders evince an absence of common values and uniform adherence to a clearly framed socio-political goal. The fact that the most vocal advocates of a 'United States of Africa' run an autocratic regime in their domestic domains posit the little or no importance attached to democratic norms as the basis of a future continental leviathan. For example, the Libyan leader, Muammar Ghaddafi, a leading proponent of the creation of a 'United States of Africa', views multi-party democracy as the root cause of instability and conflicts in Africa. See e.g. http://news.bbc.co.uk/2/hi/africa/7883178.stm (Accessed 14 October 2009).

[965] Kambudzi in Murithi (2008) 17-18.

[966] Utterances and actions of the proponents of this philosophy indicate the little or no value attached to the idea of democratic governance. One such is Ghaddafi's continuous denunciation of democracy.

advocated as the terminal point of African integration; rather the process should be allowed to organically develop into any political system, which is shaped by democratic norms and standards.

The following discussion will focus on specific institutions which are central to the entrenchment of democratic values and norms in a future supranational AU. The existing AU institutions, although not discussed here, remain part of the institutional framework.

a) PAP: From talk-shop to peoples' assembly

The legitimacy of the PAP as an avenue for fast-tracking supranationalism is hinged on two factors: the direct election of its members and the exercise of full legislative powers. The PAP's potential of shaping the discourse on integration cannot be understated. The direct election of its members, based on proportionality, can have the following consequences:

- Expanding the (democratic) frontier of the effective consideration of transnational matters. Unlike the situation where members are nominated and thus answerable or sympathetic to their governments, the direct election of members will usher in an era of objectivity, neutrality and substance vis-à-vis debates and discussions.
- As it is in Europe, this will lead to the emergence of transnational political parties and transnational political coalitions.[967] It will provide an avenue for constructive engagement among the different ideological groupings on the continent, an engagement removed from the sometimes antagonistic context of national politics. In this sense, issues will be considered not within the context of ethnic affiliations and divisions but with a transnational outlook.

[967] The transnational political groups represented in the European Parliament include Europeans People' Party (with the most seats), Alliance of Liberals and Democrats for Europe, Independence/Democracy, Union for Europe of the Nations, Greens/European Free Alliance, Socialist Group, European United Left – Nordic Green Left, and Non-attached members. See Fontaine (2006) 19; see also Cini in Warleigh (2002) 63.

- Elevate the importance of transparent, free and fair election. As will be discussed below, elections to the PAP should be monitored by a continental body. As such, the standard for the fairness and transparency of the elections is safeguarded by a neutral body which is insulated from the vagaries of national politics. This does not, however, remove the influence of national politics from the process as issues are largely shaped by domestic factors.[968] An (un) intended consequence of this may be the diffusion of minimum standards and best practices.
- Increased awareness of integration issues. The participation of ordinary citizens in the electoral process, especially through nation-wide campaigns, ensures that they are confronted with transnational issues and politics. This electoral process will provide an empirical proof of how Africans perceive the integration process.[969] In addition, the roles of national trade unions, political parties, CSOs and the private sector will be instructive because they have the capacity to shape the opinions and views of the citizens.

On the issue of proportionality, the highest number of allocated seats per state should be ten, with two being the least.[970] This suggestion takes into account the limited financial resources available for integration initiatives. When the situation improves, the number of seats can be increased.

[968] Moravcsik, writing on European integration, posit that integration has both the demand and supply sides. The demand side entails that issues are formulated and shaped through the influence of national actors such as trade unions, interest groups and political parties. The supply side relates to the interstate bargaining of policies formulated at national level. See Moravcsik (1993) 481.

[969] As with Europe, the ideology of the party or coalition with the most seats will be an indicator of the mood of the citizens as to the pace of integration. This is in addition to national referendum on integration matters. For a detailed assessment of the European electoral process, see e.g. Franklin M, 'European elections and European voters' in Richardson J (ed), *European Union: Power and policy-making.* London: Routledge (1996) 201-216.

[970] This would be based on the population of each member state. For example, member states with a population of over 50 million could have ten members while member states that have less than 5 million people could be assigned 2 seats.

Without creating a complex and excessive bureaucratic network, the PAP should be able to exercise reasonable legislative powers.[971] Unlike the EU with its two-tier structure (national and regional), the PAP will have to share legislative powers with sub-regional and national parliaments. In addition, it will also have to contend with the Executive Council. Thus, the reformed AU Treaty should clearly stipulate the delineation of powers, areas of cooperation and the incremental attainment of reasonable legislative powers. In light of this, it may be asked to what extent can the PAP drive the entrenchment of democratic norms or more pointedly exercise democratic supervision over the Union? Although the two questions posed are related, the latter deals with the internal workings of the AU while the former denotes the external perception of the PAP as a legitimate institution.

To exercise democratic supervision over the AU, the PAP has to either be solely or jointly[972] involved in the:

- appointment, confirmation and removal of AU Commissioners (or Union Secretaries), members of the proposed African Electoral Commission (AEC) and judges of the ACJ&HR
- consideration of APRM and AEC reports on democratic standards
- consideration of the report on activities of other AU organs
- debate on the imposition of sanctions on AU member states
- the PAP should have exclusive control over its budget and the power to discuss the budget of the AU as a whole.[973]
- in terms of increasing awareness about its activities, the PAP committees or task team should conduct open hearings outside its headquarters.
- bilateral and multilateral agreements entered into by the Union.

[971] As Mpanyane rightly views, the exercise of supranational powers by the PAP cannot be discussed in isolation. As such, the PAP can only exercise reasonable legislative powers within a framework that also endows other AU organs with supranational powers. Mpanyane (2009) 5.
[972] With the Executive Council and the AU Commission
[973] For a detailed discussion on the institutional strengthening of the PAP, see e.g. Mpanyane (2009).

The exercise of democratic supervision should, however, be underpinned by enhanced functional cooperation with other governance structures such as sub-regional and national parliamentary bodies. As Mpanyane notes, such cooperation should include regular meetings, joint briefings and information-sharing.[974] For instance, when debating on whether or not to impose sanctions on a member state, the PAP should take into account available reports from the relevant sub-regional institution as well as wider consultation with the relevant stakeholders. As the supranational AU will be built on democratic values and norms, such cooperation should neither be at the expense of fundamental values nor be guided by pure political expediency but a philosophy that affirms the *grundnorm* of the Union – consistent democratic standards and values and the rule of law.

The eventual process of direct elections and exercise of real legislative powers should, however, be preceded by an inclusive audit involving wider consultation among stakeholders - member states, CSOs and the African populace. Beyond formal meetings and seminars, such consultation should include a framework for gauging the views of African citizens on the need to strengthen the PAP. Such involvement is what Zurn describes as 'deliberative supranationalism'.[975]

b) ACJ&HR: Deepening fundamental (integration) values

The influential role of a judicial organ in any integration process cannot be ignored. The Court's liberal and innovative interpretation of provisions in the constitutive instrument or Treaty may affect the development of concepts and principles which are essential for the furtherance and solidification of the integration process.[976] The reference to the ECJ as the 'silent motor of

[974] Ibid, 10.
[975] Deliberative supranationalism includes deliberations surrounding the enactment of regulations affecting the people, arguing about relevant problems, and the chance to articulate opinions on matters that would otherwise be dealt with in specialist media. See Zurn in Joerges & Zurn (2005) 37.
[976] See e.g. Raworth (2001) 84.

integration'[977] is a testament of the influence of its rich jurisprudence in the enhancement of European integration. Through several landmark judgments, the Court has given teeth to principles such as direct effect,[978] supremacy[979] and pre-emption.[980] For Wincott, the Court's activist role in ensuring the effectiveness of EU laws is tantamount to the 'constitutionalisation' of the constitutive Treaty.[981] He describes 'constitutionalisation' as:

> [t]he transformation of Community law from a system of conventional international law, which in principle imposes direct obligations on only states, to a new form of law, much more like the internal law of states.[982]

While a supranational judicial organ is not specifically clothed with policy-making powers or the capacity to chauffer the integration process, as these are the functions of technocrats and politicians, it can surreptitiously play this role through the dynamism and determination of its officials to develop a sound transnational legal system.[983]

The envisaged ACJ&HR thus has the potential of fast-tracking closer integration through its jurisprudence. Based on its exclusive competence, the Court will be expected to adjudicate on pertinent issues such as member states' ratification of and adherence to key principles and instruments, multi-level governance within the AU, human rights violations, the role of sub-regional institutions within the multi-layered integration framework, legitimacy of national regimes and appropriate sanctions for non-compliance with the AU rules and regulations. In

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[977] See e.g. Richmond & Heisenberg (1999) 2.
[978] *Van Gend en Loos v Nedelandse* (Case 26/62) [1963] ECR 1; *Reyners v Belgium* (Case 2/74) [1974] ECR 631
[979] *Flamino Costa v Enel* (Case 6/64) [1964] ECR 585, 593; *Amministrazione delle Finanze v Simmenthal* (Case 106/77) [1978] ECR 629; *Van Gend* case [1963] ECR 1.
[980] *Commission v Council* (Case 22/70) [1971] ECR 263; *Commission v Finland* (Case 469/98) [2002] ECR 1-9627.
[981] Wincott D, 'The court of justice and the European policy process' in Richardson (1996) 181-182.
[982] Ibid; see also Cottier & Hertig (2003) 270-271.
[983] The ECJ's substantial influence on the development of the EU legal system is attributed to factors such as the cleverness and political acumen of judges, the normative power of the 'formalism' of the law and the lack of attention paid to the Court during the early stages of the integration process. See Wincott in Richardson (1996) 193.

order for the ACJ&HR to effectively undertake these functions, certain points need to be given utmost priority.

Firstly, the appointment of judges to the Court should be merit driven. In this regard, such judges should be dynamic, progressive and have a good grasp of international law and politics. The delicate nature of the task before the Court, especially in relation to the entrenchment of democratic norms and values, requires a pragmatic and nuanced method of adjudication. Africa's different legal traditions (common, civil and customary) should be used as a platform for enriching the jurisprudence of the Court.

Secondly, it is important to provide the Court with a sound support framework. In order to ensure efficiency and maximum output, the ACJ&HR should be provided with adequate research support, skilled personnel and a working environment conducive to productivity.

Thirdly, in order to prevent the Court from being subdued by an avalanche of cases, it is pertinent that national and sub-regional judicial organs are granted the powers to act as Court of first instance in some cases that fall within the exclusive competence of the ACJ&HR. The Court's reliance on national structures, either as judicial partners or as an instrument of ensuring compliance, implies that national institutions conform to the minimum democratic standards set down by the Union. The independence of the judiciary, neutrality and efficiency of security apparatuses, transparency of the electoral process and accountability of the national executive are some of the factors that will make the task of the ACJ&HR easier and effective.

c) AU Authority: Policy incubator

As rightly highlighted in the foregoing discussion, the effective exercise of supranational technocratic functions is dependent on the reform of the internal administration of the AU Commission (to be known as the Authority). Both the

reports initiated within (e.g. the Strategic Plan documents) and externally (e.g. the AU Audit report) indicate the essence of a professional and highly efficient technocratic agency. Thus any discussion on the allocation of supranational powers of policy initiation and implementation to the Commission must begin with an overhaul of the Commission's institutional set-up.

The expertise and knowledge of the officials of the Commission in relation to the assigned portfolio is crucial. While the recruitment of the principal officials, Chairperson and the Commissioners, is political - to the extent that member states nominate them - it is important that member states take into account the track record and know-how of the individuals presented.

The Chairperson and his or her deputy could be a former head of state,[984] an ex-foreign affairs minister or an African who has a proven track record of superintending an intergovernmental institution. Similarly, the Commissioners must possess skills commensurate to their assigned portfolios. In appointing Commissioners, utmost priority should be given to their technocratic abilities such as managerial skills (private or public) and acute understanding of the assigned task. In this regard, the PAP's oversight role will be important in determining the veracity of such competence(s).

The suggestion on the establishment of the AUSC as the body to be responsible for recruitment, appointments, promotion and discipline of the professional and general staff of the Commission is commendable.[985] Such a body will ensure the promotion of professionalism and qualitative output by making sure that the right people are picked for available positions.[986] In addition to this, it is essential that the morale of staff members is boosted

[984] Such ex-head of state must be rated highly as someone with a proven track-record of adherence to democratic standards and champion of political and economic development. Such appointment will highlight the seriousness of the integration process.
[985] See AU Audit Report (2007) 53-54.
[986] In the EU, the Commission staffs are recruited through competitive examinations across member states. See e.g. Christiansen T, 'The European Commission: Administration in turbulent times' in Richardson (1996) 96.

through the provision of adequate resources for the fulfilment of their duties. This will impact positively on the retention of skilled personnel.[987] The issue of capacity building is also important. In this regard, the Commission should fully exploit avenues for cooperation with international institutions such as the UN, the EU, the international community and sub-regional institutions on the training and exchange of personnel.[988] Such a programme should be designed in a way that promotes and encourages retention.[989]

Having discussed the strengthening of the administrative capacity of the Commission, the next point is the consideration of the exercise of supranational powers of policy initiation and implementation. As shown in the foregoing, literature is replete with how the Commission can exercise these functions. More importantly, it has been shown that the exercise of such functions is contingent on the recruitment of skilled and competent officials. The technical expertise and understanding of the underlying politics and dynamics of transnational issues can only contribute positively to the efficiency of the Commission. Another imperative is the promotion of accountability and transparency of the activities of the Commission. In addition to political oversight by the PAP, the African populace should be sensitised on the operations of the Commission.[990]

d) Other institutions

In addition to the above institutions, it is essential that specialised and functional institutions are established to either complement the efforts of the principal

[987] According to the AU Audit Report, between July 2004 and October 2007, five of the thirteen directors of the Commission resigned. AU Audit Report (2007) 47.
[988] In addition to the capacity building of staff members, it has been suggested that the Commission should establish paid internship programme for African youth. See Ibid, 54. This suggestion is very essential as it has the potential of stimulating the interest of the youth in African integration.
[989] For instance, officials involved in the training programme could be mandated to sign agreements signifying their dedication to the Commission within a stipulated period after such training.
[990] This could be done through cooperation with African and international media, continent-wide publication of documents, an improved and up-to-date AU website and increased involvement of the civil society. See AU Audit Report (2007) 70-75.

organs or primarily focus on specific issues relating to matters of democratic governance and development. The following are examples of such agencies:

- *African Electoral Commission (AEC)*: Political development in post-colonial Africa remains tainted by the high level of electoral irregularities across the continent. Despite the adoption of the ACDEG and the ad-hoc constitution of electoral observers to monitor elections across the continent, the situation appears to be worsening. From Zimbabwe, Kenya, Algeria, Gabon, Nigeria to Egypt, the issue of transparency and fairness of the electoral process continues to beg for more constructive attention.

  Thus the proposed AEC is an attempt to address this malaise. The AEC should be a permanent body mandated to monitor elections,[991] work closely with parallel sub-regional bodies, report on the state of national electoral process, and recommend appropriate sanctions to be imposed on defaulting member states. The AEC should be composed of a Chairperson and Commissioners with distinguished and competent track record as members of national electoral bodies and the civil society.

- *The APRM*: As elaborated upon in the previous chapter, the APRM has the potential of playing a central role in the entrenchment of democratic governance on the continent. Even as a voluntary mechanism, it has created a contested space for deliberation on pertinent national issues hitherto suppressed by autocratic regimes across the continent. As suggested, the APRM could play a more effective role if it is transformed into a compulsory process, superintended by an independent and permanent Secretariat.[992] The purpose of the APRM will be to determine

[991] This should be done in collaboration with the relevant national and sub-regional bodies.
[992] As earlier noted, the AU Assembly, in April 2008, adopted the decision to confer legal personality to the APRM. See Assembly/AU/Dec. 198 (XI). See also section 4.4 in the previous chapter for a detailed discussion on the APRM.

whether or not member states meet the minimum standard of membership, based on the review process.

- *Africa Natural Resources Agency (ANRA)*: As Kambudzi notes, this agency should be mandated to 'provide and implement a continental regulatory framework governing the exploitation and transformation of Africa's natural resources'.[993] Similar to the Extractive Industries Transparency Initiative (EITI), the ANRA should provide a framework which enhances the ethos of accountability and transparency in the exploitation of natural resources on the continent.[994] In addition, the ANRA should be charged with determining the tax to be imposed on natural resources in Africa's top-soil and sub-soil. The advantages, according to Ayangafac, of establishing a common framework for the management of natural resources include an enhancement of human security, prevention of conflicts, adoption of uniform environmental standards, functional spillover into other related areas and the enhancement of Africa's position in the global political economy.[995]

- *Africa Infrastructure Development Agency (AIDA):* As proposed by Kambudzi, this agency will be responsible for overseeing the planning and implementation of physical infrastructure such as road, railway, waterways and telecommunication. This agency should only have exclusive competence on matters which directly impact on regional integration. The poor state of physical infrastructure on the continent is a key obstacle to the process of integration and this intervention will go a long way in addressing the problem.[996]

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[993] Kambudzi (2008) 26.
[994] For more on the EITI, see http://www.eiti.org (Accessed 20 October 2009).
[995] See Ayangafac C, *Natural resources boom: A blessing or a curse to African integration.* (2009). Available at http://www.issafrica.org/index.php?link_id=7895&link_type=12&slink_type=12&tmpl_id=3 (Accessed 24 July 2009).
[996] The Trans-Africa Highway Programme proposed by the ECA is one such initiative designed to address this problem. It is aimed at upgrading nine strategic highway sections across the continent – Cairo-Dakar,

- *The AU Commission on International Law (AUCIL):* The already established AUCIL, together with the ACJ&HR will play a significant role in the legal development of the AU. Charged with the codification and progressive development of international law in the African context,[997] the AUCIL will have to, amongst other things, determine issues relating to harmonisation of laws and the legal implications of supranationalism in the African context, especially the centrality of democratic standards and durable institutions.

- *African Information Services (AIS):* This agency will be tasked with the collation, management and dissemination of the activities of a supranational African Union. Working in tandem with the Communications Unit of the AU Commission, the AIS should adopt both conventional and creative methods of conveying the state of affairs in the Union to the general public. Modern technologies such as mobile phones and the internet (including social networking websites) should be fully exploited. To ensure effective coordination and coverage, there should either be AIS liaison officers in each of the organs of the AU or regular interaction with the communication departments of such organs.

- *Traditional and Cultural Affairs Forum (TCAF):* In addition to ECOSOCC, it is pertinent to create a forum for interaction among traditional leaders

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Algiers-Lagos, Tripoli-Windhoek, Cairo-Gaborone, Dakar-N'djamena, N'djamena-Djibouti, Lagos-Dakar, Lagos-Mombasa, and Beira-Lobito. See AU & ECA (2006) 11.

[997] Other objectives include:

- To propose draft framework agreements, model regulations, formulations and analyses of emerging trends in States' practice
- To assist in the revision of existing Treaties, assist in the identification of areas in which new Treaties are required and prepare drafts thereof
- To conduct studies on legal matters of interest to the Union and its member states
- To encourage the teaching, study, publication and dissemination of literature on international law, in particular laws of the Union.

See art.4 of the Draft Statute of the African Union Commission on International Law. MinJustice/Legal/2 (II) Rev.3

on the continent.[998] Beyond the recent sycophantic and propaganda initiatives,[999] such a body should play an active role in highlighting Africa's rich diversity of cultures and traditions and how it can influence supranational programmes and initiatives.[1000] Unlike the other institutions discussed above, the TCAF should only have an advisory status.

Provided with the necessary wherewithal, these institutions, together with principal organs such as the PAP, AU Commission and the ACJ&HR, are capable of placing Afro-supranationalism on a value-driven, development-oriented and socio-cultural sensitive course.

5.4.2.4 Ensuring compliance with the decisions of a supranational AU

The transfer of powers to an international organisation, especially concerning its corollary of expected compliance with rules, remains a contentious issue in a largely state-centric global order. The imperatives, political and/or economic, of establishing international organisations are not in doubt, a fact which is evident in the global proliferation of international organisations. The problem, however, lies in the non-acceptance of institutional directives as a legitimate consequence of institutional creation. Put differently, the difficulty is in accepting the hierarchical superiority and binding nature of international obligations.

Although compliance is regarded as an 'organisational presumption',[1001] practice reveals significant deficiencies of levels of compliance. Even in an organisation such as the EU, which is prided as a model of supranationalism, studies show a high level of infringements. In the 1990s, 10% of EU directives were not complied with and around 1,000 infringement proceedings were

[998] The King of Asante in Ghana has expressed similar view. See New African Magazine, October 2009, 54.
[999] A case in point is the Libyan-financed meeting of over 200 traditional rulers across Africa in which the Libyan leader, Muammar Ghaddafi, was crowned as the 'King of African Kings'. In addition to this, the traditional leaders rubber-stamped Ghaddafi's vision of a 'United States of Africa'. See Ibid, 53-54.
[1000] For a detailed discussion on how African traditional institutions can contribute to governance and development, see ECA (2007).
[1001] Chayes & Chayes (1993) 179.

brought against defaulting member states.[1002] Although there has being marked improvements over the years,[1003] this goes to prove that good compliance is not necessarily a programmed by-product of supranationalism. While supranationalism depends on good compliance for its survival and evolution, the reality of international relations entails a nuanced approach of minimising the occurrence and effects of non-compliance.

Such an understanding is reflected in the studies on compliance. Neyer & Wolf conceptualise compliance as a process of two types: Initial non-compliance and a compliance crisis.[1004] Initial non-compliance may occur as a result of a member states' lack of the necessary resources, financial and human, to implement regulations and directives.[1005] It may also be the consequence of an elastic or ambiguous rule or obligation, and the referral to a Court for clarification may cause delay in implementation.[1006] Other factors which may motivate initial non-compliance include a lack of effective monitoring capacity, and a deliberate process on the part of a member state to either avoid the cost of compliance or bring about the reinterpretation of a contentious rule.[1007]

On the other hand, 'compliance crisis' is an outright disregard of the decision of an authoritative body.[1008] An example is where a member state simply ignores or adduces legal reasons for not wanting to comply with the final decision of a supranational (quasi) judicial body. In this regard, such a member state can question the legitimacy of the institution by either drawing attention to the inconsistent application of rules and/or the deficiency in the procedural

[1002] See e.g. Neyer J & Zurn M, 'Conclusions – the conditions of compliance' in Joerges & Zurn (2005) 185.
[1003] Neyer & Zurn note that EU countries exhibited a compliance rate of over 96% in relation to the internal market programme. Also, the deficit in terms of compliance with directives was reduced from 6.3% in November 1997 to 2.5% in May 2001. See Ibid.
[1004] Neyer J & Wolf D, 'Analysis of compliance with international rules' in Joerges & Zurn (2005) 45.
[1005] Ibid; See also Chayes & Chayes (1993) 188-197.
[1006] Neyer & Wolf in Joerges & Zurn (2005) 46; See also Franck (1988) 714.
[1007] Neyer & Wolf in Joerges & Zurn (2005) 45-46.
[1008] Ibid, 46.

framework under which the decision was made.[1009] An example of the latter, according to Franck, is when an ad-hoc adjudicatory body makes a decision.[1010] Another example is when there is little or no economic incentive to induce compliance.[1011]

The above exposition shows the contours of compliance and how different variables can influence states' behaviour. As with Europe, non-compliance in Africa can be attributed to political, economic, legal and social factors. As such the departure point of any discussion of compliance with supranational AU decisions should be an acceptance of the inevitability of non-compliance. Such an understanding will not only provide useful guidelines for minimising the incidence of non-compliance but also designing compliance mechanisms that takes into account the political and economic realities on the continent. Thus the discussion below will explore possible means of ensuring compliance with the decisions of supranational AU.

a) Strengthened national institutions

The effectiveness of any supranational arrangement requires a concrete synergy between a supranational entity and its corresponding national institutions. As supranational institutions cannot literally enforce their own rules within the jurisdiction of member states,[1012] thus the onus of enforcement shifts to national institutions. As such, it is imperative that national institutions possess the necessary efficiency to translate supranational objectives into domestic norms.

The independence of national institutions such as the judiciary, the parliament and the electoral body are essential for the entrenchment of democratic standards and goals. When democratic values are already ingrained in

[1009] Franck (1988) 735-752.
[1010] Ibid, 752. See also Neyer & Wolf in Joerges & Zurn (2005) 43.
[1011] Kufuor links this point to the high incidence of non-compliance in ECOWAS. See Kufuor (1996) 7.
[1012] Theorists argue that international organisations cannot do this because they lack both the monopoly of legitimate force and national identity to compel consent. See e.g. Zurn in Joerges & Zurn (2005) 5.

domestic practice, it becomes easier for member states to accept supranational standards as norms.[1013] Therefore, the first step in ensuring compliance, or minimising the incidence of non-compliance, with the decisions and rules of a supranational AU should begin with an appraisal of democratic standards in member states. Where any state falls short of the laid down criteria, assistance should be offered. In this regard, the AU (vertical) and democratic member states (horizontal) could provide both human and material resources in aiding such state to build its national institutions.[1014] However, if such state refuses to accept this form of assistance or deliberately maintains its autocratic practices, it should fall outside of the supranational AU framework.[1015] As noted earlier, having an organisation of (democratic) like-minded states does not necessarily eliminate non-compliance, rather it allows for better anticipation and strategic reduction of the incidence of non-compliance.

b) Enhanced incentive for compliance

As a rule for ensuring compliance, the deviant-centred strategy is premised on the idea that a states' self-interest will determine its level of compliance. Where compliance conflicts with such interest(s), then the state is likely to ignore compliance.[1016] Thus, Pettit views that the institutional/organisational framework must incorporate mechanisms for motivating states to comply.[1017] Chayes & Chayes reject the view that non-compliant behaviour is motivated by calculated self-interest.[1018] Rather, their view is that non-compliance often stems from factors ranging from ambiguity in Treaty provisions to the lack of financial or administrative means to implement treaty standards.[1019]

[1013] As Kufuor rightly observes, the prevalent situation in post-colonial Africa, where national executives routinely undermine the decisions of the national judiciary, explains the usual disregard of supranational decisions. Kufuor (1996) 7-8.
[1014] The EU offers wide-ranging support to member states, especially the CEEC, to enable them implement and enforce EU policies. See e.g. Neyer & Wolf in Joerges & Zurn (2005) 61.
[1015] This is the underlying idea of the earlier proposed 'nucleus AU'. See section 5.4.1 above and also Chapter 4.
[1016] Pettit in Goodin (2006) 71.
[1017] Ibid, 72.
[1018] Chayes & Chayes (1993) 176; see also Neyer & Wolf in Joerges & Zurn (2005) 45-46, 61-62.
[1019] Ibid, 188-197.

While the above-mentioned theories differ on the cause(s) of non-compliance, they, explicitly or implicitly, highlight the necessity of providing incentives to ensure compliance. As with the EU, member states of the AU are also constrained by lack of administrative and financial capacity to implement integration objectives.[1020] As such, in addition to earning the 'badge of respectability' as a result of being a member of a supranational AU, mechanisms should be devised for enhancing and compensating for compliance. As noted in the foregoing analysis, both vertical and horizontal assistance should be offered for developing the capacity to comply with supranational AU rules. Thus, the attractiveness of a supranational AU should not only be its democratic nature but also its potential as a framework for improving the economic conditions of its member states.

c) Participatory policy-making process

As highlighted in the foregoing, the participation of civil society in supranational activities is crucial. Not only will this enhance the legitimacy of supranational institutions, it also ensures a keen sense of ownership by the people. This kind of participation ensures that citizens will become more cognisant of the origins of rules and regulations, the obligations of member states and the compliance mechanisms. In addition, enhanced participation will propel civil society to get more involved in playing an (in) direct role in monitoring compliance, reporting infringements and exerting pressure on member states to comply.[1021]

d) Enforcement through national institutions

Closely related to the issue discussed earlier, on strengthening national institutions, is the politically pragmatic idea of using established national institutions as enforcing instruments. This point is particularly important for

[1020] According to a survey conducted by the ECA, the major factor constraining the implementation of regional integration initiatives is the lack of resources (68%). Close to 75% of the countries polled cite this as a major hindrance, 44% point to the lack of capacity. See AU & ECA (2006) 73-74.
[1021] See e.g. Kufuor (1996) 9-10; see also Neyer & Wolf in Joerges & Zurn (2005) 51-52, 57-59.

ensuring compliance with ACJ&HR judgements. In order to minimise the possibility of non-compliance, it is essential that domestic courts are prioritised not only as partners but also as a direct guarantor and enforcer of supranational rules and regulations.[1022] This will impact on the gradual internalisation and legitimacy of supranational laws as part of the domestic *grundnorm.*

e) Decentralised monitoring system

In addition to the monitoring duty of the AU Commission, it is also important to establish other ad-hoc specialised monitoring bodies. Such bodies, composed of civil society and technical experts, should be designed to complement the efforts of the Commission by supervising the compliance with certain standards and guidelines. These could include compliance with ACJ&HR judgements, consumer protection, environmental standards and human rights protection. To minimise costs, these bodies should only be constituted when it is absolutely necessary, for example, where the AU Commission lacks administrative competence to monitor. The advantage of a decentralised monitoring system is that it engenders objective and thorough evaluation.[1023]

f) Coordinated sanctions

Apart from the prevalent deficiency of good governance and democratic values at the national level, the major reason why sanctions are ineffective in the African system is that member states have little to lose despite the imposition of sanctions. The low level of intra-African trade entails that trade and economic embargos amount to an inconsequential tool. In order to ensure the efficacy of sanctions, it is crucial that the organisation devises a synergised programme of sanctioning which includes the international community.

In this regard, the AU should engage the UN, EU and other relevant players in the process of sanctioning errant member states. As such, any sanction

[1022] See e.g. Kufuor (1996) 11; see also Musila (2007) 10.
[1023] See e.g. Neyer & Wolf in Joerges & Zurn (2005) 51.

imposed will not only have the backing of these bodies but also incorporate their facilities and disciplinary mechanisms. However, this measure should only be employed in a case of 'compliance crisis', where a member state, in spite of all entreaties, ignores the decisions of the organisation.

5.5 Summary

Having considered the feasibility of a supranational AU, especially considering the fundamentals, this chapter set out to investigate how such factors can be channelled into a supranational institutional framework. To put the analysis in perspective, the discussion began with a theoretical outline of the imperatives of supranational institutional design/building. Underpinning the theories discussed are the ideas that institutions should be designed within the context of the peculiarities of their environment and the need to develop effective compliance mechanisms.

Further, it considered the different perspectives on the need to transform the AU. This discussion focused on the PAP, ACJ&HR and AU Commission. The common thread that runs through these perspectives include an affirmation of the gradualist approach to African integration and the idea that all 53 member states must be included in the integration process.

In conclusion, this chapter discusses the institutional organisation of a future supranational AU. The departure point of such discussion is that membership should be based on adherence to democratic norms and standards. This chapter demonstrates how these norms should reflect in the legal framework, institutional structure and compliance mechanisms of the organisation.

Chapter 6

Final analysis: *Quo vadis* Africa?

Just because we cannot see clearly the end of the road...that is no reason for not setting out on the journey. On the contrary, great change dominates the world, and unless we move with change we will become its victim.

John. F. Kennedy[1024]

Traveller, you must set out
at dawn. And wipe your feet upon
the dog-nose wetness of the earth

Wole Soyinka (Death in the dawn)[1025]

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[1024] Cited in Nicholls G, *The challenge to scholarship: Rethinking, learning and research.* London: Routledge (2005) 113.
[1025] Moore G & Beier U (eds), *The penguin book of modern African poetry*. London: Penguin Books (1998) 246.

6.3.2 National recommendations

6.4 Contribution to practice

6.1 Introduction

Africa's search for unity, an idea that has taken different dimensions, has been going on for over four decades and will continue to be influenced by the political and economic variables of the 21st century. The advances made by the EU, especially in relation to changing the pre-existing political structure in Europe, have inspired a global pursuit of regional integration as a tool for unity and development. The establishment of the AU is Africa's answer to European supranationalism and its consequent achievements. The tacit indicators and verbal communications of its architects all point at the intention to use the organisation as a supranational platform for addressing Africa's socio-political and economic problems. With a truly functional and value-driven AU, Africa is poised to become the master of its own destiny.

This thesis aimed to situate Africa within the supranationalism discourse by investigating the feasibility of achieving the long desired political and economic integration. This was done through an in-depth theoretical analysis of regional integration and elements of supranationalism, an assessment of supranational attempts at the sub-regional level, and the key obstacles to attaining the desired level of supranationalism. Primarily focusing on continental integration, this work identified the primary obstacle to Afro-supranationalism as the unconditional membership ideology of the AU. An attempt was thus made to suggest mechanisms for addressing this.

The aim of this chapter is to present the summary of findings of the entire thesis, make recommendations on the way forward and indicate how this research can stimulate further studies on Afro-supranationalism.

6.2 Summary of research findings

The research question posed at the beginning of this study was to determine the feasibility of transforming the AU from a mere intergovernmental institution to a supranational entity. Put differently, the question was whether the existing politico-legal framework or prevailing political situation in Africa can lead to the establishment of a supranational structure. This study showed that the existing framework is deficient and suggested the adoption of a nuanced politico-legal framework, which is based on the cultivation of shared democratic norms and values.

As a point of departure, this study commenced with a theoretical analysis of regional integration. This analysis considered the political and legal understanding of regional integration, how supranationalism fits into the discourse and the relationship between state sovereignty and regional integration. It further contextualised this discussion by looking at the origins of regional integration in Africa and the different ideologies on the methodology of achieving African integration. Addressing the question whether Africa can integrate, it was found that while integration remains a developmental tool, it is not the sole elixir to Africa's political and economic woes. While the EU provides a useful lesson, it was noted that Africa should carve its unique integration path. It further found that the factors that will impact on African integration are ICT, democratic culture and investment by external actors, especially China, India and Brazil.

Having established a conceptual and theoretical framework for the scope of study, selected past and present supranational attempts in Africa were investigated. The aim was to evaluate the success and failings of such experiments in order to determine how it can provide useful lessons for the debate on continental integration. After an assessment of these sub-regional institutions, it was found that a number of common factors are responsible for the little or no movement toward supranationalism. This ranges from weak

institutional machinery, the disregard for democratic values and the rule of law at national levels, non-implementation of directives and regulations, overlapping and replicated membership of RECs, hegemonic threats, and political instability to democratic deficit at national level. The lack of political will on the part of member states remains a huge obstacle to realisation of supranationalism in Africa.

Against the background of identifying the key obstacles to the attainment of supranationalism at the sub-regional level, chapter four of the study investigated whether the AU is a supranational organisation. By testing the actual functioning of the organisation against the elements of supranationalism, it was found that the AU is yet to attain a supranational status although it has the potential. The proposition was that four key variables are at the core of the feasibility of supranationalism at the continental level: membership, harmonisation of laws, public participation and development.

The discussion on membership enjoyed some importance within the evaluation, especially concerning the identification of the AU's principle of unconditional membership as the primary obstacle to the cultivation and entrenchment of shared norms of democratic principles. Accordingly, the study explored the APRM process as a potential politico-legal tool for regulating membership of the AU, thereby creating a 'nucleus AU'. The study established that for the process to be an authentic tool for assessing eligibility of membership, the APRM must both be a compulsory process and possess legal status. The study was, however, quick to add that the proposed 'nucleus AU' is not aimed at replacing the AU. Rather, it presents a nuanced approach of strengthening and cultivating shared democratic norms.

Effective harmonisation of laws and policies is identified as an essential legal tool which gives impetus to the political process of integration. It was found that the fragmentation of legal systems is one of the key impediments to the

realisation of continental harmonisation in Africa. It further explored the two main ideological currents on how Africa should proceed with the harmonisation project. The first suggests that harmonisation of laws should be based on a neutral, international law model. The second holds that the harmonisation project should be set against the background of cultural values and norms of the African society. The study found that there can be some convergence between the two ideologies.

On public participation, the study highlighted the need to locate the people within the process of regional integration. The study emphasised the need to devise nuanced consultation mechanisms. Citing examples in the financial and ICT sectors, it was found that the private sector can play a key role in fast-tracking regional integration.

On the last variable, development, the study engaged in a theoretical discourse of the African development agenda. The purpose was to establish how a supranational institution can anchor a viable continental development strategy. It was found that the failure of development strategies on the continent lies in the inability to create culture-centred, people-oriented development goals. The stifling of democratic values and practises in certain African states ensures that the people are not involved in the crafting of policies affecting them. In addition, the dependency on foreign aid, corruption, lack of political will to transfer authority to regional institutions, and political instability were found to be major impediments to development.

Based on the findings in the previous chapters, chapter five sets out to investigate how the principles of democratic governance can be channelled into the establishment of a supranational AU. The analysis on the theories of institutional design showed that it is imperative that institutions are designed around the peculiarities of the environment they are meant to serve. Such consideration should then shape further discussion on the mandate, functions

and the feasibility of compliance with the institutional decisions. After considering institution design, the study engaged in a theoretical discourse of some of the dominant opinions on the issue of transforming the AU into a supranational entity. In contradiction to the approach of this study, it was found that none of the opinions advocated regulated membership for the AU. In addition, these opinions are more in tune with the gradualist approach to African integration.

Having evaluated the viewpoints on institutional transformation, the study advanced to establishing a normative framework for a future supranational AU. The analysis pointed out some of the issues that should guide the quest for institutional transformation. It found that appellations such as 'United States of Africa', 'Union Government of Africa' and 'African Constitution' presume a state of readiness and can thus stymie the capacity of the integration process to evolve according to the dynamics of the 21st century. As such, institutional development should be premised on current realities and feasible targets. It was thus found that the cultivation and entrenchment of democratic values and norms be reflected in the institutional structure and mandates of the organisation.

Overall, this study found that the prevalent political structure of unconditional membership is antithetical to the realisation of a supranational AU. The proposed 'nucleus AU' can provide an alternative framework for advancing continental unity, one which is based on fundamental democratic values. As noted in the introduction, the analytical framework of this thesis is motivated by the dearth of research on how unconditional membership negatively impacts on the progress of African integration. In this regard, this study aims to stimulate multi-disciplinary research on nuanced ways of addressing the quest for quality-oriented unity.

6.3 Further recommendations

Africa's long walk towards closer cooperation and integration has by no means reached a definitive phase. The plethora of initiatives and attempts at forging a supranational framework to address many of Africa's problems continues to falter as a result of multiple factors which have been identified in the preceding chapters. In light of these, this study proposed the 'nucleus AU' as the suitable means of attaining continental supranationalism. This idea is hinged on the review of AU membership criteria, with strict adherence and uniform application of shared norms and values as the primary determinate of membership. Building on recommendations already proffered in previous chapters, this section seeks to highlight the essential catalysts for the establishment and functioning of the 'nucleus AU'. This will be done under two rubrics: transnational and national recommendations.

6.3.1 Transnational recommendations

6.3.1.1 Consensus on the meaning and application of 'shared norms and values'

The core of the 'nucleus AU' idea is the strict adherence to shared norms and values. As highlighted in the preceding chapters, these include good governance, respect for fundamental rights and transparent electoral processes. Although all of these are espoused in AU and other sub-regional instruments, the reality on the ground shows that little or no meaning is attached to them. The spate of unconstitutional changes of government, either through military coups or subversion of constitutional principles by incumbents, demonstrate that Africa is far from entrenching the culture of shared norms and principles. How then can the continent arrive at a consensus on the meaning and application of these principles?

As suggested in chapter 5, the effective realisation of a democratic AU hinges on the enactment of a reformed AU Constitutive Act.[1026] Such a comprehensive

[1026] See section 5.4.2.2

document will amongst other provisions, clearly stipulate, and explain, the objectives and principles of the organisation. This will include the clear and concise fleshing out of concepts such as 'legitimate order', 'unconstitutional change of government', 'fundamental rights', and 'good governance' as well as the consequences in respect of violations. Ambiguity in the treaty language should be steered away from, a factor which Chayes & Chayes identify as one of the reasons for non-compliance with international regulations.[1027] To ensure legitimacy, these concepts should be explained within the context of traditional African values, such as *'Ubuntu'*, which places emphasis on respect for human rights and governance.

In order to ensure the uniform and substantive application of these norms, it is essential that measures that ensure compliance and monitor enforcement are put in place. As discussed in chapter 5, these measures include administrative and financial incentives for compliance, coordinated sanctioning system and enforcement through national institutions.[1028]

6.3.1.2 Regional *hegemons* must take the lead

Regional *hegemons* can either have a positive or negative impact on the integration process. With their economic and military prowess, regional powers can monopolise the majority of political and economic gains of regional integration, thereby creating a climate of mistrust.[1029] On the other hand, such *hegemons* can use their stature to influence attitudinal change and thus spur the integration process. As evident in the ECOWAS, a regional *hegemon* can significantly contribute to the maintenance of regional security.[1030] As such, regional powers can complement the efforts of a supranational AU by promoting the principles of democracy and good governance not only within but outside their boundaries. A democratic regional *hegemon* will have the moral and

[1027] Chayes & Chayes (1993) 188-197.
[1028] See section 5.4.2.4.
[1029] See section 3.4.4 in chapter 3.
[1030] See e.g. Adebajo (2005) 89-90.

political clout to exert diplomatic pressure on its errant neighbour(s) to adopt a democratic culture. Regional *hegemons* can also play a key role in offering financial and administrative assistance to other member states in developing their institutions thus increasing their capacities to adhere to democratic standards.[1031]

However, the democratic culture within African regional *hegemons* leaves much to be desired. Except for South Africa, other regional *hegemons* such as Kenya, Nigeria, and Egypt are serial violators of sacrosanct principles of democratic governance. They have weak democratic institutions, struggle with conducting transparent elections and rank low in surveys on good governance.[1032] Simply put, these regional *hegemons* suffer from credibility deficiency.

The reality is that African integration cannot make meaningful progress without the active role and exemplary leadership by regional *hegemons*. Starting from the sub-regional levels, democratic and prosperous regional *hegemons* have the potential of infusing continental integration with the requisite legitimacy and success. In as much as the inclusion of regional *hegemons* in the 'nucleus AU' framework will be a strategic move, it is of the essence that the underlying principles of this idea are not sacrificed. As such, the basis for including the regional *hegemons* should remain strict adherence to democratic ideals and norms.

6.3.1.3 Enhanced monitoring systems

As noted in the preceding chapter, the task of monitoring and entrenching democratic values and rule of law cannot be the exclusive preserve of a

[1031] For example, South Africa is involved in the improvement of infrastructure and the training of legal officers and civil servants form the Democratic Republic of Congo. See e.g. 'South Africa and Democratic Republic of Congo sign multi-sectoral agreements'. Available at http://www.unpan1.un.org/intradoc/groups/public/.../cpsi/unpan027213.pdf (Accessed 20 October 2009).
[1032] According to the Freedom House Survey of Political and Civil Liberties, both Nigeria and Kenya were ranked partly free. See Freedom House Survey (2009). In the Ibrahim Index on African Governance, Kenya and Nigeria ranked 17 and 39 respectively . Available at http://site.moibrahimfoundation.org/index-2008/ (Accessed 3 November 2009).

supranational AU. It is impossible for the organisation to monitor every aspect of state and non-state actors' attitude to stipulated norms and principles. In this sense, there is a need for civil society to play a complementary role in monitoring and reporting of best practices and violations.

Civil society initiatives such as the Ibrahim Index of African Governance and AU Monitor are commendable. However, much still needs to be done. More CSOs should be involved in monitoring the implementation of good governance standards at national, sub-regional and continental levels. Such involvement should range from general to sectoral analysis of the progress of African integration. These initiatives should, however, not exist in isolation. Efforts should be made to coordinate and incorporate their findings into the broader organisational framework of a supranational AU. This will in no way diminish the objectivity or independence of such initiatives; rather it will strengthen the pursuit and attainment of a common goal.

6.3.1.4 Nuanced methods of ensuring public participation

In addition to traditional methods of public participation - such as referendum, direct election of supranational legislators and the recognition of civil society fora, it is important to explore other ways of getting the people involved in the integration process. One such measure is the previously proposed inclusion of African integration in the curricula of African universities.[1033] Asante explains that teaching African integration has the potential to 'infuse among the younger generations of Africans a tradition of integrative spirit and thinking'.[1034] As the AU Audit Report suggests, such education should also extend to internship programmes by the AU Commission.[1035] This approach will go a long way in enhancing the knowledge of African youth on integration matters and in turn broaden the pool of skilled human resources necessary for integration.[1036]

[1033] Asante (1997) 175; see also Fagbayibo (2009) 18-25.
[1034] Asante (1997) 175.
[1035] AU Audit Report (2007) 54.
[1036] Fagbayibo (2009) 20.

Other measures should include the setting up of national focal points for discussions and analyses of integration matters. Such forums should be broad based - composed of government officials and civil society. Linked to the AU Commission and relevant national agencies, the forums should be charged with increasing awareness of integration through constant interaction with the general populace. For instance, the forums could promote horizontal transnational affiliations among students, artistes, traders and professionals.

6.3.1.5 Capacity building for African integration

As pointed out in the previous chapter, the effective functioning of regional institutions is dependent on a highly efficient and professional technocratic staff structure. Equally important is the need to design a uniform policy for the training of national officials responsible for implementing supranational directives. In this regard, member states and international partners should provide the necessary funding for programmes that enhances the awareness of police, judicial, immigration and other relevant government officials on integration issues. Such programme should provide regular guidelines and directions, through seminars and instruction manuals, on regional integration initiatives and the responsibilities of officials in this regard. In addition to this, it is also imperative that relevant government departments incorporate these measures as part of institution directives and orders.

6.3.2 National recommendations

As noted in the previous chapter, the ‘nucleus AU’ can only be built on an entrenched democratic practise across AU member states. As such, there is a need for nuanced political will to establish and strengthen critical national institutions necessary for the development of the ‘nucleus AU’ idea. Such institutions include the judiciary, legislature, police, electoral commission and anti-corruption agencies. These institutions are important implementing agencies of supranational directives and are thus required to possess a corresponding amount of independence and legitimacy.

To achieve these, certain factors are essential. Firstly, member states should make the internalisation[1037] of the ethos of shared norms and principles an utmost priority. In this regard, the principles of good governance and rule of law espoused in treaties and protocols should be implemented not as transnational directives but as part of national goals and objectives.

Secondly, member states with satisfactory democratic credentials should be more proactive in ensuring that other member states meet the desired criteria. In this sense, such member states, with good democratic records, should provide both human and financial resources to help develop the capacities of fellow member states to meet the requirements of the 'nucleus AU'. Where certain member states continue to engage in acts contrary to espoused shared norms, the so called 'democratic member states' should employ all means to highlight, through diplomatic negotiations or sanctions, such aberrations.

Thirdly, different indexes on democratic practise in African states show that only a handful would pass the strict test of becoming a member of the 'nucleus AU'. What this implies is the reality that not all states will initially be part of the 'nucleus AU' idea. As such, states that already satisfy the prerequisite should kick-start the process, with the understanding that other states will, upon the fulfilment of prescribed conditions, join later. The operationalisation of the 'nucleus AU' is not dependent on the numbers; rather it requires a commitment to democratic norms and values.

6.4 Contributions to practise

This study is a multi-disciplinary exercise which encompasses fields such as international law, political science, international relations, economics and sociology. In the course of investigations, it was found that for Africa to make a significant push with regional integration; nuanced and radical methods should

[1037] Internalisation would require a legislative transformation or incorporation of international law into domestic norms and regulations. This is discussed in chapter 3, section 3.4.2.

be considered. As such, this study argued for a review of the 'unconditional membership' ideology of African integration. Although this study is an addition to the numerous works on African integration, its pioneering nature lies in its examination and presentation of the methodology of regulating membership of the AU. The dearth of scholarly materials on unconditional membership can perhaps be attributed to the acceptance of the logic that no African state should be left behind in the march towards full unity and cooperation. As such, the shortage of materials is not so much a question of intellectual aloofness as it is the consideration of this topic as impractical. In this regard, this study introduces a nuanced pattern of discourse to African integration by highlighting the possibility of such a task.

Without laying any claim to a definitive approach, this study will serve as a theoretical stimulus for future research on general and specific analysis on the direction of African integration. By critically engaging the so-called basis for African integration, pan-Africanism, this study provides a valuable practical guide for an unconventional understanding of the problems of African integration – a contribution that will immensely assist related research projects.

In future, researchers may engage in an empirical analysis of the nexus between integration and democracy. The result of such study may further provide sufficient justification(s) for reviewing AU membership criteria. Furthermore, researchers may explore a comparative study of membership structure of international institutions and how it impacts on institutional development. In addition, future research may help determine how relevant traditional African values can help shape the integration discourse.

It is expected that this study may contribute to the design of policy frameworks aimed at strengthening of African regional institutions. Even if the core proposal of this study is not fully implemented, it will at least influence the serious

consideration of democratic norms as a fundamental component of the integration process.

Beyond the contribution to the body of knowledge, this study is an affirmation of the views of Africans, who desire qualitative integration – woven around the principles of shared democratic values and norms.

Table 6.1: Tabulated overview of the key requirements for a 'nucleus AU'

	Imperatives (legal, political, economic and social)	**Feasibility**	**Likely obstacles**
Nucleus AU	Conditional membership	The APRM was considered as a likely tool for effecting this.	The 'wisdom' of including all African countries in the integration agenda is ingrained and will be difficult to change.
	Democratised national institutions	The strengthening of critical institutions - such as judiciary, legislature and electoral commissions - is important for the internalisation of supranational goals and objectives.	The entrenched rationalisation of impunities, especially the consideration of the 'Government of National Unity' (GNU) idea as a corrective measure, is a huge threat to democratisation.
	Harmonisation of laws	Since Africa remains a part of the global community, harmonisation of laws and policies will	Lack of political will, sentimental attachment to colonial legal traditions and

		reflect the principles of globalisation. However, such project should be underlined by the peculiarities of African societies.	state sovereignty.
	Enhanced participation of the people in the integration process	Direct election of the PAP members, referendum on integration initiatives, teaching of African integration at universities, full recognition of ECOSOCC, recognition of traditional leaders' forum.	High illiteracy levels across the continent and the growing number of autocratic regimes can frustrate this goal.
	Effective compliance	Provision of administrative and financial incentives for compliance, strengthened national institutions, participatory policy-making process, enforcement through national institutions and coordinated sanctioning system are some of the factors that can ensure effective compliance.	Limited capacity of most African states to provide financial and administrative incentives for compliance and widespread deficit of democratic practises are likely hindrances.

	Development	There must be active and genuine participation of every segment of the society in the crafting of development strategies.	Poor state of African economies, good governance deficit, lack of political will and rampant corruption are major obstacles.
	Regional *hegemons*	Active roles of regional *hegemons* like Nigeria and South Africa in the initiation of integration initiatives and assistance to other member states is indicative of the potential of regional *hegemons* to drive development.	Little or no adherence to democratic norms diminishes their credibility and legitimacy to drive regional integration.