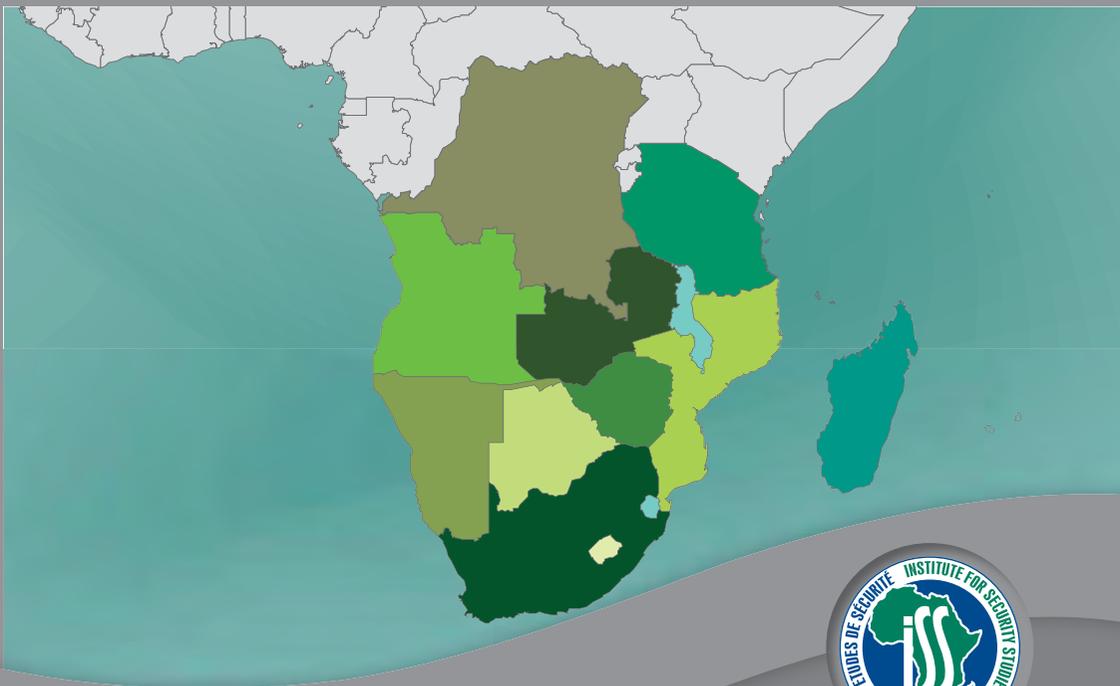


# The proposed SADC Parliament

Old wine in new bottles or an ideal  
whose time has come?



Takawira Musavengana

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# Acronyms

ACB	African Central Bank
ACM	African Common Market
ACP	Africa, Caribbean and Pacific
AEC	African Economic Community
AEMU	African Economic and Monetary Union
AU	African Union
CA-AU	Constitutive Act of the African Union
CAR	Central African Republic
CCJ	Community Court of Justice
CCU	Continental Customs Union
CEN-SAD	Community of Sahel-Saharan States
CJEC	Court of Justice of the European Communities
CMA	common monetary area
CoM	Council of Ministers
Comesa	Common Market for Eastern and Southern Africa
CPA	Commonwealth Parliamentary Association
CSP	Case for a SADC Parliament
CU	customs union
DPSP	Draft Protocol on the SADC Parliament
DRC	Democratic Republic of the Congo
EAC	East African Community
EAF	East African Federation
EALA	East African Legislative Assembly
EC	European Community
ECA	Economic Commission for Africa
ECB	European Central Bank
ECCAS	Economic Community of Central African States

ECOSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
EP	European Parliament
EU	European Union
FTA	free trade area
GoZ	Government of Zimbabwe
ICM	Integrated Committee of Ministers
IDEA	International Institute for Democracy and Electoral Assistance
IOC	Indian Ocean Commission
IOR-ARC	Indian Ocean Rim Association for Regional Cooperation
MEP	Member of the European Parliament
MP	Member of Parliament
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation
OAU	Organisation of African Unity
OPDSC	Organ on Politics, Defence and Security Cooperation
PAP	Pan African Parliament
PLA	Parliamentary Leadership Centre
PTA	Preferential trade area
P-UEMOA	<i>Parlement de l'Union Economique et Monétaire Ouest Africaine</i>
RAs	Regional assemblies
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADC PF	SADC Parliamentary Forum
SAP	structural adjustment programme
SCO	Standing Committee of Officials
SEOM	SADC Election Observer Mission
SIPO	Strategic Development Plan of the Organ
UMO	Arab Maghreb Union
UNO	United Nations Organisation
UNSC	United Nations Security Council

# Executive summary

The past two decades of democratic consolidation and accelerated regional integration efforts in Southern Africa, as evidenced by the more than 25 Southern African Development Community (SADC) protocols and declarations, have witnessed increasing demands for the participation of the region's people in the formulation and implementation of public policy at sub-regional and regional levels. These calls, which have been articulated through increased civil society activism, lobbying and advocacy, have been equally strident among parliamentarians, themselves elected representatives and public policymakers. Calls for enhanced participatory decision making and democratic space for parliaments and non-state actors seem to fall within the sphere of the so-called third wave of democracy of the 1990s (Huntington, 1991). In response to these calls, the Southern African Development Community Parliamentary Forum (SADC PF) was established in 1996 as a consultative forum of parliamentarians desirous of playing a part in and influencing regional policymaking. The SADC PF was intended to provide a mechanism for ordinary citizens to engage with and have input into regional (SADC) policymaking, through their elected parliamentary representatives.

Unfortunately, as a loose association of national parliaments, in its more than ten years of existence, the SADC PF has been unable to locate itself – in a sufficiently influential way – in the decision- and policymaking processes of SADC. This, coupled with other political imperatives such as deepening democracy and public participation, as well as the establishment of the Pan African Parliament (PAP), envisaging as it does that the parliamentary fora of regional economic communities (REC) such as SADC would be its building blocks, has prompted the question of whether the SADC PF should be transformed into a regional parliament with lawmaking powers.

In response to this challenge, the SADC PF has gone as far as developing a draft protocol on the establishment of such a parliament – the Draft Protocol

on the SADC Parliament (DPSP). The protocol defines, among other issues, the powers, functions and relational linkages among the proposed parliamentary body, national parliaments and other organs of SADC. Given the historical hegemony of the executive branch of government in regional policymaking, should the SADC Parliament initiative succeed, arising from a draft protocol drafted entirely by parliamentarians, it would be the first time that SADC's regional policy will have been initiated from outside its formal structures. Unfortunately, however, given the challenges associated with the region's fledgling and fragile democracies, coupled with generally weak national parliaments, the envisaged oversight and lawmaking agenda of the proposed supranational parliament seems very unlikely, at least in the near term.

This is further compounded by, among other challenges, the enormous financial implications that have thus far accompanied the establishment and functioning of the PAP, overemphasis on the sanctity of the sovereignty of member states, and the political realignment that should accompany full political and economic integration among states. The sluggish pace and missed targets in SADC's pursuit of a free trade area by 2008 and a SADC Customs Union by 2010 – all of which had been agreed previously at the highest political levels – could be harbingers of bad news for the SADC parliament agenda.

Against this background, it is worth noting that the establishment of a SADC parliament will require more than just an amendment to the SADC Treaty (Treaty). Rather, strategic socioeconomic and political paradigm shifts will have to take place in the executive-oriented manner in which SADC has hitherto negotiated regional policymaking. Consequently, it would seem that until rhetoric is aligned with action, the SADC PF may be better off striving for stronger, more professional and more accountable national parliaments before becoming a lawmaking body for Southern Africa. The apparent lack of discernible impact on regional policymaking and oversight in PAP's first years of existence, due partly to a number of systemic, structural and political issues – including the weak parliaments that make up PAP – is highly instructive to the manner in which the SADC Parliament objective should be understood. On a positive note, the successes so far scored by the East African Legislative Assembly (EALA) in all facets of a regional legislative framework are both an inspiration and a useful point of reference and learning opportunity for SADC. The EALA experience demonstrates that with the requisite political will, the meaningful infusion of a parliamentary dimension in regional policymaking

could enhance co-ownership and acceleration of the regional integration project as a vehicle for improved economic growth and development, and for better standards of living. Advocacy for a SADC (sub-regional) parliament is not, in that sense, the proverbial reinvention of the wheel.

# 1 Introduction

The communiqué of the 1997 SADC summit meeting at which the establishment of the SADC PF was formally approved notes ‘... the main objective of the SADC PF is to constitute a parliamentary consultative assembly ... to establish a regional parliamentary framework for dialogue on issues of regional interest and concern’.<sup>1</sup> This study explores whether in approving the establishment of the SADC PF as a consultative assembly, the Summit of SADC Heads of State and Government (Summit) consciously envisaged the establishment, in the long term, of a regional parliament with lawmaking powers. Or, was it simply recognition of the inevitability of the need for a semblance of representation of citizens in regional policymaking through elected representatives, albeit without much significant influence? Could it have been part of the healthy tension that characterises relations between the executive and legislative arms of government at national level, where the former appears to give up some of its hegemony in government and governance, and subordinate itself to robust scrutiny and sanction while, in practice, maintaining the upper hand?

Assuming the answer to the first question is yes, the study further seeks to evaluate why, after more than ten years of existence of the SADC PF and against

the background of parliamentarians' intense lobbying and advocacy for more structured participation in regional matters, the SADC 15-year economic blueprint, the Regional Indicative Strategic Development Plan (RISDP), makes no reference whatsoever to the role of parliamentarians in regional development and integration.

Key to this analysis will be a reflection on why the establishment of a SADC Parliament was not provided for in the Treaty, even at the time of far-reaching amendments to the Treaty in 2002, which resulted in the creation of, among other organs, the SADC Tribunal as the judicial arm of SADC. The significance of this reflection stems from the observation that all other functional sub-regional parliamentary assemblies in sub-Saharan Africa are direct products of the treaties establishing their respective RECs. This is equally the case with the PAP, which is established in terms of the Constitutive Act of the African Union (CA-AU). Inter alia, the study attempts to answer the following questions:

- How different would a SADC Parliament be from the existing association of national parliaments of SADC member states currently operating as an interparliamentary consultative body 'promoting dialogue and popular participation (in the affairs of SADC) particularly at the grassroots level ...?'<sup>2</sup>
- Could the parliament have oversight powers over SADC and its institutions as is the case with parliaments at national level?
- Could the proposed parliament have supranational authority over SADC member states – something that, even in its many years of existence, and ever-widening powers, the European Parliament (EP) is yet to fully achieve?
- Assuming there was consensus on the legislative authority of the envisaged regional parliament, what type of issues would it legislate on and what would be the relationship between its laws and those of national legislatures, and of PAP – if and when PAP does acquire legislative powers? This is especially important given that the more than 20-odd SADC protocols and declarations have suffered from lack of ratification, domestication and implementation to accelerate the pace of regional integration.<sup>3</sup>
- In the light of the AU Assembly of Heads of States (Assembly), apparent reluctance to grant PAP legislative powers, at least in the first five years of its existence; could the Summit view the proposed SADC Parliament any differently?
- In relation to 5 above, what are the prospects and potential impact of the PAP on AU policymaking if, indeed, it is conferred a legislative mandate?

- Finally, what are the chances that while a new entity may be created, such a body would, in all likelihood, perform just about the same functions and have the same status within SADC as the current consultative SADC PF or be 'something of a talking shop' (Richardson 2001: 116), albeit with a new name. Indeed, the proverbial old wine in new bottles?

The last question pays special and particular attention to the historical supremacy of the executive branch of government in general, but more especially in international relations and the international arena. The question recognises a view within the European Union (EU) that the perceived democratic deficit of the EP among ordinary EU citizens stems from the fact that 'the main democratic link is and should be one in which national parliaments control their governments, which in turn represent the member states in the (EU) Council (of Ministers)' (Richardson 2001: 116), rather than the members of the European Parliament (MEPs) trying to constrain the powers of their governments within the EU system. In terms of this understanding, therefore, citizens' perceptions of democratic accountability have more to do with the national legislatures through which they seek to hold their governments to account, than seeking directly to hold accountable the supranational parliament in Brussels, Luxembourg and Strasbourg. In this case, citizens do not ordinarily see their livelihoods as directly linked to supranational authorities. It, therefore, remains for governments to relate with and hold such authorities accountable on behalf of the people they represent.

Should the SADC parliament be established, it will not be an entirely novel initiative. As of February 2010, there were no fewer than seven African regional parliamentary assemblies, including the PAP – some existing only in name and others more vibrant and visible.

The treaty of the Economic Community of West Africa States (ECOWAS) provides for a parliament for ECOWAS (ECOWAS Parliament). The functions and powers of the parliament are set out in the Protocol on the ECOWAS Parliament of 1994. After some teething problems, the protocol eventually was enforced in March 2000, paving the way for the first session of the parliament in 2001. The tenure of the inaugural parliament ended on 14 November 2005, after which the life of each parliament was revised from five to four years to coincide with the tenure of commissions at the ECOWAS Commission.

The ECOWAS Parliament comprises 15 West African states, namely Nigeria, Ghana, Côte d'Ivoire, Burkina Faso, Guinea, Mali, Niger, Senegal, Benin, Cape

Verde, The Gambia, Guinea Bissau, Liberia, Sierra Leone and Togo. Unlike other African parliamentary bodies, representation of member states in the ECOWAS Parliament is not equal. Rather, it is on an equitable basis, in proportion to the population of each member state. Each national parliament is entitled to a minimum of five seats plus additional seats allocated in proportion to the population of each state. Consequently, the ECOWAS Parliament's 115 seats are distributed as follows: Nigeria, being ECOWAS's and Africa's most populous country, has thirty-five seats, Ghana eight and Côte d'Ivoire has seven seats. Burkina Faso, Guinea, Mali, Niger and Senegal have six seats each, while Benin, Cape Verde, The Gambia, Guinea Bissau, Liberia, Sierra Leone and Togo have five seats each.

Structurally, the plenary, comprising all the elected members of parliament (MPs), is the highest decision-making body of the parliament. The plenary meets twice a year. There is, however, provision for extraordinary sessions to be convened at either the request of the chairman of the ECOWAS Authority of Heads of State and Government (Authority) or by a resolution of two thirds of the membership of the parliament. Below the plenary is the Bureau of the Parliament, comprising the speaker and four deputy speakers. The bureau is the governing body of the parliament and its functions include the supervision of the administration and financial management of the parliament, the parliament's annual budget, and decisions on matters relating to implementation of the budget. Other functions include recruitment of the secretary general and approving the recruitment of other staff of parliament. The speaker and deputy speakers are elected rotationally from the members of the ECOWAS Parliament.

Another important structure of the ECOWAS Parliament is the Conference of Committees Bureau, which comprising all chairpersons of standing committees and their respective rapporteurs. The conference coordinates the parliament's relations with external organisations and approves the annual activity programme of the parliament. It is significant to note that the annual activity programme is linked to that of the ECOWAS Commission. The conference and the bureau are jointly responsible for approving the agenda and work programme of the sessions of parliament.

The ECOWAS Parliament has 13 standing committees, each of which is headed by a chairperson, one deputy and two rapporteurs. The committees work in tandem with the respective mandates of the technical commissions/departments in the ECOWAS Commission as articulated in the ECOWAS Revised

Treaty. The link between the ECOWAS Parliament's committees and activities, and those of the ECOWAS Commission, is especially important in the analysis of the SADC PF's activity programme, which is neither linked with nor related to the annual or overall programme of the SADC Council of Ministers (CoM) or SADC directorates.

The final structure of the ECOWAS Parliament is the administrative and technical arm – the general secretariat. Under the leadership of a secretary general, the secretariat provides administrative and technical support to the parliament and its members in line with the ECOWAS Treaty. The secretary general is the accounting officer of the parliament by delegation, and reports directly to the Bureau.

The ECOWAS Parliament, whose members are drawn from member states and are simultaneously members of national parliaments of these states, currently has an advisory and consultative status. It is mandated by treaty law to provide advisory opinions to the Authority on issues concerning integration in ECOWAS. Such opinions carry both a compulsory and optional effect. Article 6 of the protocol includes the following as areas in which the opinion of the parliament should be sought: human rights and fundamental freedoms, inter-connection of communication systems and energy, public health policies, and common educational policy. Others include youth and sports, scientific and technological research, common policy on environment, treaty review, community citizenship, and social integration. It is envisaged that in due course, members of ECOWAS will be elected by adult universal suffrage.

In East Africa is the East African Legislative Assembly (EALA), which is a product of Article 49.1 of the 1999 treaty establishing the East African Community (EAC) Treaty. The EAC dates back to 1967, when the leaders of Kenya, Uganda and Tanzania signed the Treaty for East African Cooperation with a view to establishing an REC. However, due to 'competing, narrow, "national" self interest, divergent ideologies and parochial sovereignty' (Baregu 2005: 56), this dream had to be suspended when the EAC collapsed in 1977. In 1993, the leaders of the three countries came together again to revive the EAC and work towards an East African Federation (EAF).

The EALA was 'inaugurated together with the East African Court of Justice (EACJ) on 29 November 2001, formally completing the institutionalisation process of the EAC' (Ongwenyi 2001: 1). This followed the resuscitation of the EAC following its collapse in 1977 (Oosthuizen 2006). In both name and

function, the EALA has evolved progressively into the legislative organ of the EAC existing alongside other key organs of the EAC, notably the Summit, the CoM and the EACJ. When it was established, the EALA comprised ‘twenty-seven elected members, nine each from the three partner states (Kenya, Tanzania and Uganda) and five ex-officio members’ (Ongwenyi 2001: 2). The EAC treaty defines ex-officio members of the EALA as government ministers (or assistant ministers) responsible for regional cooperation in each of the partner states, the secretary general of the EAC and the counsel to the community. Over the years, the number of EAC member states has increased from three to five, following the admission of neighbours Rwanda and Burundi in 2007. The membership of the EALA now stands at 52, calculated using the same formula of nine elected members from each of the partner states plus ex-officio members. Article 50 (1) provides:

The National Assembly of each partner state shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that partner state, in accordance with such procedure as the National Assembly of each partner state may determine.

Members of the EALA are not elected by adult universal suffrage, but are indirectly elected through their national parliaments but not from among the sitting MPs. By law, the election of members of the EALA should reflect the diversity of views of member parliaments and achieve gender balance, but, unfortunately, in some cases, the configuration of member parliaments’ delegations to the EALA reflects the partisan political dynamics prevalent in national parliaments (Ongwenyi 2001). Even the predisposition and competence of regional parliamentarians to think and act with the regional interest and focus requires much handholding.

Unlike its counterpart institutions in Western and Southern Africa, the EALA is empowered by the EAC treaty law to make laws that are binding on the EAC’s partner states, subject to certain conditions being met. This is in addition to performing key parliamentary functions such as debating and approving the budget of the EAC, considering annual reports on the activities of the EAC, annual audit reports of the audit commission and any other reports referred to it by the CoM, as well as discussing all matters pertaining to the community

and making recommendations to the CoM for the implementation of the Treaty (EALA 1999). The EALA also exercises political oversight by questioning the regional executive (CoM).

In the Horn of Africa, there is the Inter-Parliamentary Union of Intergovernmental Authority on Development Member States (IPU-IGAD), whose member states are Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda. The protocol establishing the IPU-IGAD came into force on 28 November 2007 after ratification by four IGAD member states, namely Ethiopia, Djibouti, Sudan and Somalia. The first meeting of the Conference of the Speakers of Parliaments of IGAD member states, the highest organ of the IPU, took place in Addis Ababa on 28 November 2008. Present were speakers of parliaments of Djibouti, Ethiopia, Uganda, Sudan and Somalia. The Parliament of Kenya was represented by senior government officials following dissolution of the legislature pending general elections. The IGAD (the mother body) has done significant work in agriculture and the environment, economic cooperation and social development. Worth noting is the work of the Committee on Early Warning and Response (CEWARN), which has been actively addressing conflicts along and across the borders of member states. However, not much is known about the work of the IPU-IGAD.

In Central Africa, in 2002, the protocol was signed establishing the Network of Parliamentarians of the Economic Community of Central African States (REPAC). REPAC is the parliamentary forum of the ten-member Economic Community of Central African States (ECCAS), which brings together Angola, Burundi, Cameroon, the Central Africa Republic (CAR), Chad, Congo-Brazzaville, the Democratic Republic of Congo (DRC), Equatorial Guinea, Gabon, and São Tomé and Príncipe. It was launched in Luanda, Angola in November 2002 with a mandate to '(oversee) good political governance in each country and in the region of the sub-region ... (make) recommendations to the governments of the states in the community, for greater participation of the private sector and civil society in the big decisions concerning national conditions in the member states'. The protocol entered into force only in 2009, paving the way for practical work towards a REPAC secretariat in Malabo, Equatorial Guinea.

Finally, there is PAP – the mother of all parliaments of Africa – bringing together parliaments and other deliberative organs of almost all AU member states. PAP has been in existence since 2004 and shares its historical significance with the launch of the AU in July 2002. PAP is a creation of articles 7

and 14 of the 1991 treaty establishing the African Economic Community (AEC) and articles 5 and 17 of the CA-AU. Its composition, powers and functions are further enunciated in a separate protocol – the protocol to the treaty establishing the AEC relating to PAP (PP Protocol). PAP comprises five representatives of each of the national parliaments whose countries are members of the AU. As with all other parliamentary bodies in Africa, with the exception of the EALA, PAP’s mandate, at least for the first five years, has been ‘advisory and consultative’.<sup>4</sup> Article 2 (3) of the PAP Protocol envisages that, in due course, PAP will evolve into a legislative body, and its members shall be elected by universal adult suffrage.

There are other parliamentary forums, notably Amani Forum, the *Parlement de l’Union Economique et Monétaire Ouest Africaine* (P-UEMOA), and the Common Market for Eastern and Southern Africa (COMESA) Parliamentary Forum, but PAP, EALA, ECOWAS Parliament and the SADC PF are by far the most active (Oosthuizen 2006). For this reason, this study will, where necessary, compare the SADC PF to PAP, EALA and the ECOWAS Parliament.

Below are some of the African parliamentary assemblies and their memberships:

**Table 1** Major African regional parliamentary bodies

MAJOR AFRICAN PARLIAMENTARY ASSEMBLIES	
ASSEMBLY	MEMBER PARLIAMENTS
REPAC	Angola, Burundi, Cameroon, CAR, Chad, Congo-Brazzaville, DRC, Equatorial Guinea, Gabon, and São Tomé and Príncipe
IPU-IGAD	Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda
EALA	Kenya, Tanzania and Uganda, Rwanda and Burundi
ECOWAS Parliament	Nigeria, Ghana, Côte d’Ivoire, Burkina Faso, Guinea, Mali, Niger, Senegal, Benin, Cape Verde, The Gambia, Guinea Bissau, Liberia, Sierra Leone and Togo
SADC PF	Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe
PAP	AU member states

This study also seeks to address the crucial question of whether the doctrine of separation of powers among the executive, judiciary and legislature, as it applies within nation states, can be similarly applied to the international, regional or sub-regional levels. The doctrine posits that the legislature makes laws, which should be implemented but may be vetoed by the executive. Such laws can also be declared unconstitutional by the judiciary. The doctrine envisages that each branch of government is separate from and not under the control of another, yet working cooperatively for good government and governance. At the centre of this doctrine is the quest for transparency, accountability and checks and balances in the exercise of state power and possibly against abuse of such power. There is no debate on the inviolability of separation of powers between the judiciary and the other two arms of the state, but the same cannot be said of the executive/legislature dichotomy at national level, let alone internationally.

Often, separation of powers at nation-state level is blurred. This is especially the case in Westminster-inspired governance systems, where government ministers may simultaneously be members of the legislature. Consequently, members of the executive do both legislation and execution. And, in theory, because they are also members of parliament, they exercise oversight over their own work.

Even with separation of powers between the judiciary and the other two arms of government, it can be argued that such separation is not strictly applied. It is applied in the manner in which these arms conduct themselves daily, but not in how they come into being. For instance, the executive and parliaments are involved in the appointment of members of the judiciary, something that could be interpreted as influencing, at least, the composition of the judiciary. A case in point is the current debate on the need to transform the racial and gender composition of the South African judiciary from apartheid to the new democratic ethos. At another level, judges have also been known not to confine themselves simply to interpretation of laws, but are legislating from the bench. South African Minister of Justice Jeff Radebe argues:

Often, jurists are perceived by society as implementing the law and, therefore, are rigid with regard to new developments. However, none other than jurists are better positioned to understand the limitations of prevailing legal frameworks and, accordingly, the basis and possibilities of shifting the frontiers of what is legally permissible.<sup>5</sup>

In a near-perfect separation of powers, whereas the legislature may appear to assume a fair measure of supremacy over other national arms of the state, internationally, the balance shifts dramatically in favour of the executive. Not only are legislative arms generally viewed as deliberative and advisory bodies, but regional and international judicial systems may be too. Terlinden (2004: 4) argues, ‘powers of regional assemblies (RAs) are by and large confined to advisory functions and RAs are even more constrained by regional and national executives than national parliaments’. Against this background, this study seeks to demonstrate that, in both law and practice, interstate relations tend to give precedence to the executive and not the legislature, let alone the judiciary.

Finally, the study provides an analysis of the historical developments within both SADC and the SADC PF, including a comparative analysis of related developments in other subregional organisations such as ECOWAS and EAC as well as in the AU, and their respective parliamentary bodies. The experiences from these organisations are juxtaposed against those of the EU and, to a lesser extent, the United Nations (UN) system.

# 2 Genesis of the Southern African Development Community

SADC was founded in 1992 as a successor organisation to the Southern African Development Coordination Conference (SADCC) established in 1980. The founding member countries of SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. They were joined at various stages by Mauritius, Namibia, South Africa, Seychelles and the DRC – although Seychelles quit the organisation in 2003 (Oosthuizen 2006), only to return in 2008. SADCC had been formed to, inter alia, reduce economic dependence, particularly but not only on apartheid South Africa; forge links to create genuine and equitable regional integration; mobilise resources for the implementation of national and interstate policies, and take concerted action to secure international cooperation within the framework of the strategy of economic liberation (SADC 2003). Following the liberation of most countries in the sub-region, with the exception of South Africa, where apartheid was, nevertheless, in its proverbial sunset, in 1992, SADCC was transformed into SADC – a development community.

The inevitability of regional integration, not least for Southern Africa, is corroborated by the finding of the African Development Bank's 2003 study on economic integration, which concluded that 'so serious are the challenges

facing Southern Africa that governments cannot afford to ignore ... the limitations which national boundaries impose on their prospects for economic recovery and growth' (Gibb 2006: 1). Indeed, over the years, as demonstrably evident from the many regional economic development and integration organisations that have mushroomed in Africa and other regions of the world, there is overwhelming consensus on the importance of a collective, integrated and mutually beneficial development trajectory.

The signing of the treaty in 1992, which led to the transformation of a hitherto 'loose association into a legally binding arrangement'<sup>6</sup> was not merely an act of dropping the letter C. The transformation was informed by 'a developmental integration approach, which recognises the political and economic diversities of regionally integrating countries including their diverse production structures, trade patterns, resource endowments, development priorities, institutional affiliations and resource allocation mechanisms'.<sup>7</sup> Unlike its predecessor, SADC was aimed at forging deeper economic cooperation and integration to respond to the new socioeconomic and political imperatives.

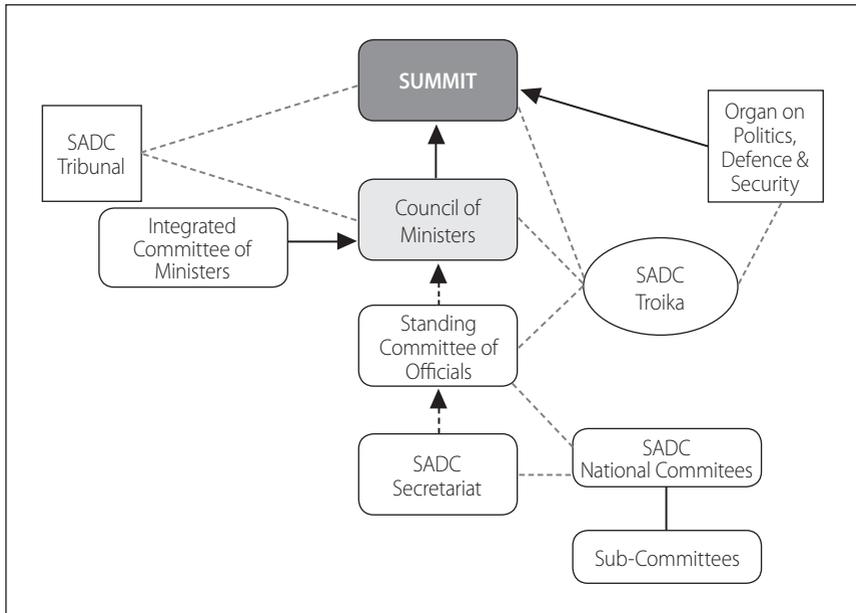
The signing in 1991 of the Abuja Treaty on the AEC and its provision for 'RECs as building blocks for the continental community'<sup>8</sup> also meant that SADCC could not remain a coordinating conference anymore, but had to move towards being an REC and, therefore, one of the building blocks of the AEC. However, 'all these RECs are not organs of the AU ... they are established independently by treaties concluded and ratified by the respective member states ... neither the AU nor its organs has direct peremptory authority or jurisdiction over the RECs'.<sup>9</sup> For the building-blocks mantra to have any effect on the relationship between the AU/PAP and RECs and their parliamentary assemblies, there must be functional linkages or memoranda of understanding between the parties.

When SADC was established – rather, when SADCC was transformed into SADC – the treaty provided for the following main organs: the Summit, the CoM, the secretariat, Standing Committee of Officials (SCO), and sectoral committees in member states, among others. In August 2002, Article 9(1) of the treaty was amended to provide for, inter alia, the Organ on Politics, Defence and Security Cooperation (OPDSC) and the Tribunal. Over the years, new organs have been created, while others have been abolished. The implementing arm of SADC, the secretariat, has also undergone major restructuring, with sectoral institutions hitherto located in the different SADC member states being centralised at the SADC's Botswana headquarters (SADC 2003).

One could argue that all these institutional changes could be seen as an attempt to complete the architecture of an REC by establishing the pillars of a development community and repositioning the organisation to respond to emerging economic development and integration imperatives. What was conspicuously absent, however – and remains glaring in its absence in 2009 – was the regional legislative arm or the SADC Parliament.

Figure 1 shows the core organs of SADC in terms of hierarchical and relational linkages between and among them. These are the Summit at the apex, flanked by the OPDSC and the Tribunal. The OPDSC, which at the political and policymaking level comprises four heads of state and government, reports directly to the Summit. At the same level as the OPDSC is the judicial arm of SADC, the Tribunal, which has a functional but not subordinate relationship with both the Summit and Council. This is in line with the principle of separation of powers between the executive and the judiciary. Immediately below the Summit, and reporting directly to it, is the Council, followed by the SCO and the Secretariat. Another important structure is the SADC Troika, which

**Figure 1** SADC Institutional Framework



*Source Adapted from the 2006 SADC Official Diary*

comprises the incumbent chairperson of SADC elected rotationally for one year, the deputy chairperson – who is also the incoming chairperson – and the immediate past chairperson.

The Council, which usually comprises ministries of foreign affairs, economic planning and finance, is responsible for ‘overseeing the functioning and development of SADC and ensuring that policies are properly implemented ... (it) usually meets twice a year, in February and just before Summit in August or September’.<sup>10</sup> The organisational structure of SADC in Figure 1 graphically illustrates the notable absence of the SADC PF.

In SADC, the ‘Summit and Tribunal are the only institutions whose decisions are expressly described by the SADC Treaty as binding, though it does not say on whom’ (Oosthuizen 2006: 168). Even the OPDSC, whose mandate is to promote peace and security in the region, does not seem to have the capacity to take binding decisions. Whereas the OPDSC chairperson – who is one of the heads of state – is mandated to make recommendations to the Summit on peace, defence and security matters, including recommending ‘armed force to be taken against one or more of the disputant parties when peaceful means of resolving conflict are unsuccessful, his/her recommendations are not binding on SADC. In other words, although the SADC chairperson is obliged to seek and take note of the advice, he is not bound to act on or to follow it’ (Oosthuizen 2006: 219).

Nowhere near being an integral institution of SADC, and deprived of the power to make decisions that are binding on its own membership (national parliaments), let alone governments and SADC institutions, the SADC PF remains outside the regional policymaking arena of SADC. Had the SADC PF been an *integral organ* of SADC, it would have been on par with the (judiciary) – the Tribunal. The executive branch (Council) would be expected to account to the legislature for regional policy and implementation. Consequently, the SADC PF has played a ‘marginal role in the formal integration agenda of SADC as encapsulated in both RISDP and SIPO, essentially dominated by powerful political executives’ (Matlosa 2006: 18).

The role of national and other parliaments in SADC matters is not contemplated or articulated in any of the policy documents of SADC. The closest that one comes to finding an inkling of a parliamentary dimension in SADC matters is Article 16(A) of the SADC Treaty. This provides for the creation of SADC national committees, whose role is to:

provide input at national level in the formulation of SADC policies, strategies and programmes of action; coordinate and oversee, at national level, implementation of SADC programmes of action; initiate projects and issue papers as an input to the preparation of the RISDP, in accordance with the priority areas set out in the SADC Common Agenda; and create a national steering committee, subcommittees and technical committees.

The Article provides that national committees shall consist of what are called 'key stakeholders', namely government, private sector, civil society, non-governmental organisations (NGOs), and workers' and employers' organisations. Ominously, there is no mention of parliament. Unfortunately, national committees do not exist formally in some SADC countries or where they do, they are barely functional as the lowest level of agenda setting for SADC. Of particular concern is the notable absence in most cases of parliamentary engagement and civil society participation and representation in SADC national committees.



# 3 Genesis of the SADC Parliamentary Forum

In terms of its constitution, ‘membership to the SADC Parliamentary Forum (is) open to national parliaments whose countries are members of SADC’.<sup>11</sup> At present, all 15 national parliaments whose countries are members of SADC are also members of the SADC PF. Consultations on the need for a sub-regional body of parliamentarians of SADC started around 1993, leading to the formal launch of the SADC PF in July 1996. Judged on continuous existence alone, the SADC PF is ‘technically the oldest regional parliamentary structure’ in Africa (Cilliers and Mashele 2004: 78). Arguing the case for the establishment of the SADC PF in 1993, the then speaker of the National Assembly of Namibia, who later became the founding chairperson of the SADC PF, Dr Mose Tjitendero, argued that, ‘SADC is, for lack of a better word, executive-orientated. The CoM ... appears to be both the legislative and executive body’ (AWEPA African-European Institute, 1993: 23). This was buttressed by the then coordinator of the Southern Africa Desk of the United Nations Economic Commission for Africa (ECA), SKB Asante, who commented thus:

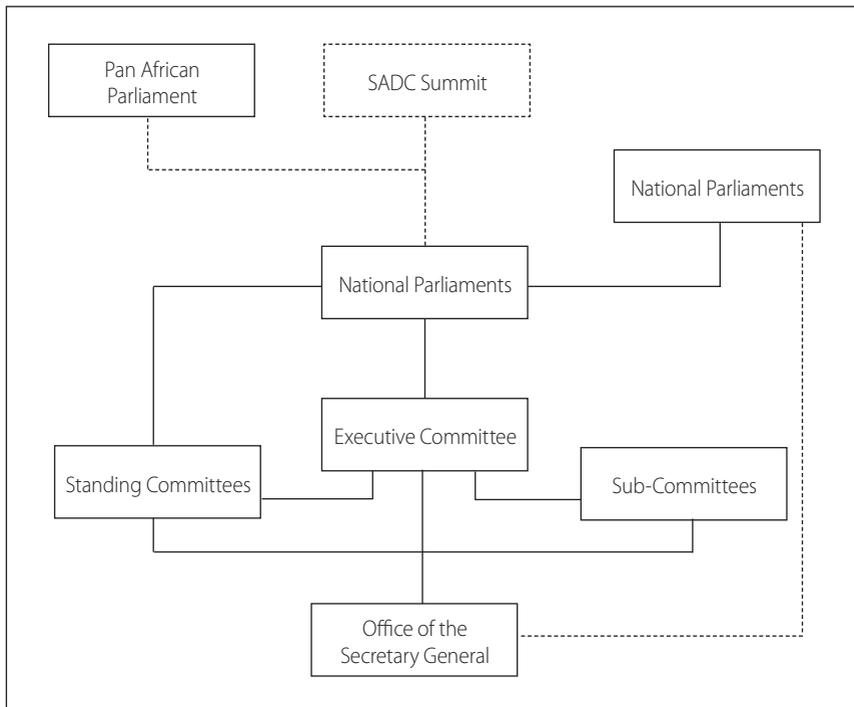
what is lacking in the Windhoek Treaty ... is the relevant institutional structures that would enable the people and their elected

representatives to find appropriate and adequate channels of participation in regional, social, cultural, political and economic development activities (AWEPA African-European Institute 1993: 25).

In September 1997, the Summit approved the establishment of the SADC PF as an ‘autonomous institution of SADC’,<sup>12</sup> thus providing what should have been a vital organic link between the new organisation and the REC that is SADC. Importantly, the establishment of the SADC PF was in terms of Article 9 (2) of the Treaty, which provides that in addition to those institutions already specified in Article 9 (1) of the Treaty, ‘other institutions may be established as necessary’.<sup>13</sup>

Although the Treaty does not say so, a closer examination of the mandate of Article 9 (1) institutions, namely the Summit, CoM and the Tribunal, suggests that they are the core institutions – indeed the building blocks of SADC.

**Figure 2** The institutional architecture of the SADC PF



Their respective powers are more far reaching than those of Article 9 (1) institutions. In fact, the establishment or change of status of Article 9 (1) institutions would require an amendment of the SADC Treaty by ‘three-quarters of all the members of the Summit’.<sup>14</sup> In contrast, the establishment or dissolution of Article (9) (2) institutions requires a resolution only of the Summit. Therefore, it should theoretically be much easier for the Summit to reverse an earlier decision through another resolution without amending the Treaty (Oosthuizen 2006). Figure 2 illustrates the organisational structure of the SADC PF.

At the apex is the Plenary Assembly, which is the supreme policymaking organ of the organisation. Presumably, the Plenary Assembly has a link with the Summit. In the last 13 years of the SADC PF’s existence, however, there has been no evidence of an organic link between the Plenary Assembly and the Summit. On only very rare occasions have issues relating to or associated with the SADC PF been discussed by either the CoM or Summit. An analysis of communiqués of successive Summit meetings shows that opportunities for the leadership of the SADC PF even to be present at and address or formally present recommendations to the Summit have been very few and far between. Having said that, however, heads of states and governments hosting biannual Plenary Assembly meetings of the SADC PF have not missed the opportunity to address and officially open such meetings, and to pledge their own and SADC’s support for a range of matters relating to the SADC PF, including its quest for transformation into a legislative body. Predictably, since setting its transformation juggernaut in motion, the SADC PF has been riding on these pledges without much substantive reward.

In the Plenary Assembly, each national parliament, irrespective of size, is represented by five members, namely a presiding officer and four other members. Of the other parliamentary representatives to the SADC PF, the Constitution of the SADC PF requires that at least one be a woman. Of the remaining three members, one must be the chairperson of each of the national women’s parliamentary caucuses. This, and the fact that the caucuses are women-only organisations, means that at least two of the four other representatives – excluding the presiding officer – must be women. Thus, it holds the distinction among SADC institutions – if it is agreed that it is one – of making it mandatory through its constitution that at least 50 per cent of ordinary members of the Plenary Assembly are women. In other words, at least 30 out of a total of 60 back-bench members of parliament, four each from the 15 national parliaments, must be

women. The remaining 15 members are presiding officers, speakers or presidents of parliament.

Apart from gender parity, the Constitution of the SADC PF requires that parliamentary delegations to the Plenary Assembly reflect the political complexion of each parliament. In other words, where applicable,<sup>15</sup> delegations should have representatives of both governing and opposition political parties represented in their parliaments. Again, the SADC PF mirrors or should mirror the diverse political milieu in parliament, and therefore, the nation it represents. Whereas one would expect this requirement to lead to equitable political representation in parliamentary delegations, this is rarely the case, as delegations tend to be dominated by governing political parties. Similarly, whereas the Constitution of the SADC PF envisages that parliamentary representatives are 'elected' by the national parliaments, this is not usually the case. Representatives tend to be nominated by the presiding officers or party whips trading off with other leadership positions in parliament or representation on inter-parliamentary delegations. This issue's effect on the legitimacy and democratic nature of decision-making in regional parliaments is examined later in this study.

As some countries have bicameral parliaments, for the purposes of the SADC PF a presiding officer is defined as the speaker of the directly elected House in Parliament, or where both Houses are directly elected, that of the National Assembly or the lower House.<sup>16</sup> Consequently, whereas their members are eligible, presiding officers of second Houses or the Upper Houses, as they are called in the Westminster parliamentary system, cannot be representatives of their national parliaments within the SADC PF. It would seem this exclusion was motivated by the fact that traditionally some or all members of second Houses were either appointed or indirectly elected. Some become members of these Houses through lineage rather than elections. This is indeed true of the House of Chiefs in Botswana and kingdoms such as Swaziland and Lesotho. In Namibia, however, because of the electoral system used for regional council elections, members of the second Chamber – the National Council – are more directly elected than those of the National Assembly. Members of the latter are indirectly elected from a party list system, while those of the former are directly elected from regional councils.<sup>17</sup>

Below the Plenary Assembly is the Executive Committee, which is made up of one representative from each of the national parliaments, bringing the total

to 15. The Constitution of the SADC PF requires that at all times half of the members of the Executive Committee are presiding officers, while the other half are backbenchers. This has ensured equal representation of speakers and back-benchers, and obviated the risk of speakers dominating decision-making in the organisation and turning the Executive Committee into a speakers' forum. The onus of representation through a presiding officer or a backbencher rotates among parliaments every two years, that is, parliaments that had presiding officers in the previous terms of office of the Executive Committee would be required to elect a backbencher for the next two years and vice versa.

The Executive Committee has a number of subcommittees that are either permanent or ad hoc. These include the steering committee, which comprises the officer bearers of the SADC PF, namely the chairperson, vice chairperson, treasurer and the speaker of the parliament hosting the headquarters of the SADC PF, in this case, Namibia. The Secretariat is headed by a secretary general, who is also a member of the steering committee. The committee's mandate is to facilitate implementation of decisions of the Executive Committee and Plenary Assembly in between statutory meetings of these bodies. Subject to ratification by the Executive Committee, it is also empowered to take decisions for the committee on specific matters and exigencies that do not allow it to usurp the committee's powers. Other Executive Committee subcommittees are human resources, finance and legal.

The main business of the SADC PF is supposedly conducted through five thematic committees, namely the Standing Committee on HIV and AIDS, Standing Committee on Democratisation, Governance and Gender Equality, Standing Committee on Trade Development and Integration, (Standing Committee on the) Regional Women's Parliamentary Caucus and the Standing Committee on Inter-Parliamentary Cooperation and Capacity Development. The term 'supposedly' is used advisedly because in practice, although modelled around national parliamentary systems where parliamentary committees meet more frequently than the plenary session, due to financial limitations standing committees tend to meet twice a year on the occasion of the mandatory biannual meetings of the Plenary Assembly. In addition, the election of chairpersons of standing committees is driven more by the desire to ensure that parliaments are equitably represented than by regard to the capacity of candidates to understand the thematic area under their leadership. This is especially important given that election and/or appointment of parliamentary representatives to

the SADC PF do not consider parliamentarians' familiarity with regional development and integration issues. In the absence of informed, structured and regular policy direction from a standing committee, the business of the SADC PF depends to a very large extent on the initiatives of the Secretariat. As will be noted later, this has severely limited the capacity of the SADC PF to discuss and exert political influence over regional policymaking and implementation.

As is the case with SADC, the implementing arm of the SADC PF is the Office of the Secretary General, which is headed by the Secretary General. The Secretary General is accountable to both the Executive Committee and the Plenary Assembly. The former appoints the Secretary General on the recommendation of the latter. He is supported by staff recruited exclusively from SADC member states.

The Constitution of the SADC PF states that its primary objective is to strengthen the implementation capacity of SADC by involving parliamentarians in the work of SADC. Other objectives include facilitating effective implementation of SADC policies and projects, and promoting principles of human rights and democracy in the SADC region. In Article 8 (ix) of its Constitution, the SADC PF commits its members to the encouragement of good governance, transparency and accountability in the SADC region and in the operation of SADC institutions, in addition to promoting the participation of NGOs, business and intellectual communities in SADC activities, among other objectives (SADC PF 1996).

Curiously, as if the SADC PF were a fully fledged regional parliament, Article 5 of the Constitution empowers the Plenary Assembly – its supreme policymaking structure – to:

consider and make recommendations on policies, strategies and work programmes of SADC, scrutinise and make recommendations on the budget of SADC, consider and make recommendations on the SADC executive secretary's annual report ... including SADC audited accounts, consider and make recommendations on any treaties and draft treaties referred to it by SADC ... study, be briefed and make recommendations on all SADC sectoral reports.<sup>18</sup>

These functions are quasi-legislative in nature, which, as currently constituted – in form, function and competence – the SADC PF is certainly not. Of all the

existing regional parliaments in Africa, the EALA comes closest to exercising legislative powers. Not even the much-vaunted parliament of Africa – the PAP – is near exercising even quasi-legislative powers. Unlike the UN General Assembly, which is a quasi-parliament only to the extent that it is not ‘a body designed or empowered to enact laws for its constituents’ (Finklestein 1998: 864), but whose decisions become evidence of international law, the SADC PF, ECOWAS Parliament and PAP are far from being quasi-parliaments. There is as yet no evidence of decisions and resolutions of the SADC PF setting a precedent for and directly influencing regional policymaking in SADC.

On the other hand, the UN General Assembly’s repeated affirmations of the right to self-determination in cases such as that of pre-independence Namibia have become useful anchors for evidence of international law and practice (Klein and Sands 2001). In that limited sense, the UN General Assembly qualifies as a quasi-parliament. It is such only because it does not legislate for the world. Its equally quasi-executive branch, the United Nations Security Council (UNSC), also fails to qualify as a typical executive arm of the UN in that it is not directly accountable to the quasi-legislative body, the UN General Assembly (Klein and Sands 2001). Accountability of the executive to the legislature or legislative oversight of the executive is the glue that holds together parliamentary democracy. Unlike the UN General Assembly, the SADC PF is not empowered to make, nor has it so far made, any policy decisions that could be evidence of regional law. It also lacks the fundamentals of a parliament in that it ‘cannot introduce laws, enact laws or raise revenues (directly from the regional public)’ (McCormick 1999: 101).

In its more than ten years of existence, the SADC PF has not been able to exercise functions and powers that are ordinarily associated with formal parliaments. Far from being known for legislative oversight, the SADC PF is ‘perhaps best known for its observation of elections...its setting of election standards... and its efforts to enhance the participation of women in national parliaments’ (Oosthuizen 2006: 189). Its seminal work in developing Norms and Standards for Elections in the SADC Region<sup>19</sup> and Model Law on HIV and AIDS in Southern Africa (Model Law)<sup>20</sup> has gone largely unnoticed by the SADC regional policymaking machinery.

In relation to HIV and AIDS and given its devastating footprint in the SADC region, in November 2008 the SADC PF adopted the Model Law to, among other things, provide a legal framework for the review and reform of national

legislation related to HIV in conformity with international human rights law standards, and to promote the implementation of effective prevention, treatment, care and research strategies and programmes on HIV and AIDS. The Model Law also seeks to ensure that the human rights of those vulnerable to HIV and people living with or affected by HIV are respected, protected and realised in the response to AIDS; and stimulate the adoption of specific national measures to address the needs of groups that are vulnerable or marginalised in the context of the AIDS epidemic.<sup>21</sup>

Like the regional electoral norms and standards developed before it, though highly instructive, the SADC PF's Model Law does not have the status of soft law to inform policymaking in Southern Africa. This is because it was developed by the SADC PF and not one of the structures of SADC fully mandated to do so by the SADC Treaty. Similarly, the SADC PF cannot use the Model Law or electoral norms and standards to hold SADC member states accountable for lack of compliance. Why the SADC PF has not been able or was not allowed to exercise the full extent of the powers conferred to it through its own constitution is an important area of inquiry and one that is at the heart of this study.

# 4 Roles and functions of regional parliaments

A parliament can be described in many different ways, depending on the jurisdiction, historical background and political system of a particular country, that is, whether the country follows a presidential or parliamentary system of government, or a combination of both. The Commonwealth Parliamentary Association (CPA) defines parliament as ‘a lawmaking assembly constituted under the laws of a nation at...the national, state, province, territory or dependency level functioning within a parliamentary system’.<sup>22</sup> However, experiences from different parts of the world suggest that not all parliaments are legislatures. Some have only a deliberative and/or advisory mandate. Besides being ‘...central institutions for political legitimacy’ (Katz and Wessels 1999: 10), by far the most well-known and commonly understood function of a national parliament, at least in the African context, is representation. As Wanyande (2005: 67) rightly observes:

Any political community will have diverse interests, which must be addressed. The complexity of modern societies makes it difficult, if not impossible, to have every person present his or her interest directly to the governing authority. Parliaments, through elected

leaders, perform this representational role ... [P]arliament provides a forum for the aggregation of diverse interests, and the processing and conversion of those interests into policy decisions.

Other key functions of parliaments include representation of citizens, enactment of laws and exercising oversight on the work of the executive branch of government, and, in some jurisdictions, ratification and domestication of international conventions and 'investigating sources of major conflict in society and proposing solutions' (Wanyande 2005: 67). The exercise of these functions anchors the notion that 'freely elected parliaments are the building blocks upon which representative democracy is built' (Richardson 2001: 116) and that the 'core of every representative system is its parliamentary institutions' (Andersen and Eliasson 1996: 3).

As popularly elected institutions, parliaments are the closest one can get to the axiom government of the people, by the people and for the people. Parliament provides a formal link among the citizens and the government of the day and the state. The time-honoured principle of separation of powers among branches of government – the executive, the legislature and the judiciary – posits that it is the role of the legislature (parliament) to represent the nation's views and translate them into laws, policies and budgetary measures for implementation by the executive branch of government. Further, the legislature superintends the implementation of government policies in pursuit of democratic dividends. The judiciary, on the other hand, interprets laws and tests their compliance with the constitution and constitutionalism.

Whether or not an institution that purports to be a parliament is indeed qualitatively so could be a function of three essential factors, namely its impact on policy, the degree to which it independently sets its own agenda and the extent to which interests outside the formal decision-making institutions work to influence it (Richardson 2001). These three factors provide reasonable criteria to assess whether a parliament is a rubber stamp institution or not, but also whether the work that it does resonates with the general sentiments of the population. In addition to a legislative mandate, some parliaments are also empowered to ratify international treaties, the socioeconomic, political and cultural ramifications of which transcend national boundaries.

Parliaments also play a crucial role in domesticating international conventions and treaties or principles into domestic law. This may involve the

enactment of new laws or amendment of existing ones. In this regard, the constitutions of some SADC countries are such that supranational instruments have no force of law unless they are ratified by parliament, and subsequently domesticated. In others, however, notably Angola, Botswana, Lesotho, Mozambique, Swaziland and Zambia, the power of ratification rests with the executive and not the legislature.

A unique and highly instructive scenario in the domestication of international instruments exists in Namibia, where the constitution provides that 'the general rules of public international law and international agreements binding upon Namibia under this constitution shall form part of the law in Namibia'.<sup>23</sup> If Southern African countries were to adopt this provision, efforts towards harmonisation and integration would be significantly enhanced. Unfortunately, in addition to political will and some negative public sentiments towards a shared Southern African identity, legal questions stand in the way of full integration of SADC. Different Southern African countries are at different levels of jurisprudential development. They use legal systems that are informed by different historical and colonial backgrounds, a convergence of which has delayed ratification and domestication of some of the more than 20-odd international instruments developed by SADC in the last two decades.

At another level, the centuries-old hegemony of the executive in matters of the state defines the nature and form of engagement between the executive and the legislature. Whereas 'parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the constitution, free from unlawful interference',<sup>24</sup> in practice the executive dominates and may even interfere in the work of the other two arms of government, especially the legislature, which ironically should oversee and sanction the performance of the executive.

In as far as it relates to executive-legislature relations, the principle of separation of powers is severely compromised under the Westminster-inspired system of government that is prevalent in most countries of Southern Africa. Under this system, most members of the executive (ministers) are also members of the legislature. Consequently, the views of senior party leaders, who are also members of the executive, usually dominate those of their junior colleagues, who are backbenchers.

An interesting example that best illustrates this dilemma can be found in Namibia. The membership of the National Assembly of Namibia arising from the November 2004 elections showed that the number of members of the

executive – who are also members of parliament – was much higher than that of backbenchers in the National Assembly. Specifically, of the 72 elected (and voting) members of the National Assembly, some 41, or 57 per cent, were either ministers or deputy ministers. This raised the risk that positions of cabinet (the executive) on policy matters or proposed bills could effectively become law or be approved without any significant changes simply because of the numerical strength of the executive in parliament – what one could refer to as a parliamentary executive. Any changes to cabinet proposals would be guided more by the benevolence of the executive than by the envisaged sanctioning powers of the legislature.

It is hard to avoid such dilemmas, particularly in small parliamentary countries where the difference between the numbers of MPs and cabinet members is minimal. Perhaps a mitigating strategy against this would range from delinking to disallowing or limiting cabinet appointments from parliament. Article 76 of the Ghanaian Constitution makes provision for a cabinet consisting of the president, the vice-president and no fewer than ten and not more than nineteen ministers of state. Article 78 further provides for the appointment of ministers of state ‘from among members of parliament or persons qualified to be elected as members of parliament’, provided that ‘the majority of ministers of state shall be appointed from among members of parliament’.<sup>25</sup> The total membership of the parliament in Ghana is 228. Even if the president of Ghana were to appoint twice the number of deputy ministers as ministers, there is no way that the executive could, numerically speaking, dominate parliament. A proposed clause in the recent draft harmonised constitution of Kenya attempts a similar strategy. Article 152 provides for a cabinet comprising the president, deputy president, attorney general and ‘not fewer than fourteen and not more than twenty-two cabinet secretaries (who) “shall not be ... member(s) of parliament.”<sup>26</sup>

Yet another affront to effective parliamentary oversight is parliamentarians’ membership to political parties in government, which may unwittingly result in undue adherence to party loyalty at the expense of their oversight mandate. Parliamentarians who are members of political parties have an obligation to show (and be seen to be showing) loyalty to the party, while at the same time discharging their constituency and constitutional obligations of overseeing the work of the executive. This dilemma is well articulated by the former speaker of one of South Africa’s provincial legislatures, Firoz Cachalia, who observes (Cachalia 2005: 21):

Parliamentary systems tend to ... produce an imbalance in the relationship between the executive and parliament, and a subordination of the internal workings of parliament to the requirements of government. This is so because the members, on whose support the government is dependent to sustain it in office, and who are subject to party discipline, are at the same time required to subject the government to critical scrutiny. This can lead to a weakening of parliament's investigative and oversight roles and to less transparent, accountable and effective oversight.

Robust oversight, which is what the electorate (and parliamentary democracy) demands, could harm the image and incumbency of the governing party. In the end, parliamentarians are forced to kowtow to the whims and caprices of the party bosses, in the name of party discipline.

This generally weak position of national parliaments could be a hindrance to a regional parliament's influence on and oversight of the regional executive. This is in view of the fact that regional parliaments can be only as strong as and not stronger than their constituent elements – the national parliaments. It is inconceivable that regional parliaments could be expected to exercise those powers that national parliaments are unable or not allowed to exercise in their jurisdictions.

The experiences of PAP in relation to the continental executive (AU Commission) provide some pointers on the extent to which the proposed SADC Parliament could be of any influence in regional policymaking, bearing in mind that contestation for political space, power and supremacy, particularly between the executive and the legislature, which is all too common at national level, naturally escalates at international level. Beyond the nation-state level, the executive either dominates the relationship or the legislature has no role at all. Even the much-acclaimed economic development plan for Africa, the New Partnership for Africa's Development (NEPAD), which like all others before it is driven by the executive, does not in and of itself envisage or articulate a parliamentary dimension. It would seem that what the executive is unwilling to give up at national level, it is equally unlikely to cede in the international sphere. Attempts by the legislature to constrain and hold the executive accountable for decisions taken on international matters remain a heavily contested terrain.



# 5 The rise of parliamentarianism in regional integration in Southern Africa

In a paper titled African regional parliaments – engines of integration and democratisation, Terlinden (2004: 1) locates the parliamentarianism vis-à-vis regional integration nexus in Africa in the late 1990s where ‘it became increasingly apparent that integration obviously required political understanding (not least as an environment conducive to economic development) too’. Before then, regional integration was regarded as a purely economic process best understood and executed by economists and bureaucrats in the executive arms of government. Where parliaments were involved, it was invariably at the tail end of the process where the exercise of their power of ratification was required, albeit as *fait accompli*. In time, ‘the political dimension of integration experienced new emphasis, involving a strong call for good governance, accountability and transparency’ (Terlinden 2004: 2), all of which are primary functions of parliaments.

It is worth noting that the historical juncture that saw the rise and centrality of parliamentarianism in regional integration in Africa, especially through the establishment or resurgence of, among other bodies, the SADC PF, the EALA, the ECOWAS Parliament and PAP, coincides with an era of increasing activism against and contestation of the role of structural adjustment programmes (SAPs) as engines of economic growth and development in Africa. Tied to those

discussions were key questions about the executive-centric nature of these economic austerity programmes, and the extent to which they were viewed as alienating popularly elected public representatives – parliamentarians.

In the context of trade relations between the African, Caribbean and Pacific (ACP) economic bloc and the EU, the Cotonou Agreement framework (ACP-EU 2000) gave rise to the establishment of the ACP-EU Joint Parliamentary Assembly with a call for enhanced capacities of national parliaments in regional integration matters (Terlinden 2004). The establishment of the ACP-EU Joint Parliamentary Assembly was driven by a ‘common desire to bring together the elected representatives of the European Community (EC) – the MEPs – and the elected representatives of the African, Caribbean and Pacific states ... that have signed the Cotonou Agreement ... with the aim of promoting the interdependence of north and south’.<sup>27</sup>

The same can be said of the G8-Africa Action Plan and the NEPAD African Parliamentarians’ Forum, both of which emphasise the central place of parliaments in economic development. A convergence of these factors provided fertile ground for the emergence and strengthening of already existing regional parliamentary initiatives. For the first time in the discourse of economic development and integration in Africa, there was acknowledgement and growing consensus on the importance of a parliamentary dimension on regional integration. It is now accepted fact that a legislative mandate is fundamental to regional integration. Regional parliaments provide or should provide ‘a legal framework for carrying out the activities related to integration, which legitimises any activity carried out in accordance with the legal framework’ (Wanyande 2005: 70).

The SADC PF constitution envisages the eventual evolution of the organisation into a future legislative assembly. It, however, qualifies the legislative mandate of such a body by unambiguously stating that the assembly would not infringe ‘on the sovereignty of SADC national parliaments’ legislative functions’.<sup>28</sup> This raises questions on whether there indeed exists a common agenda of transforming the SADC PF into a fully fledged legislative body with supranational powers, if ultimately there is no intention of infringing on the sovereignty of national parliaments. Is it not trite that decisions of supranational parliaments inevitably affect the sovereignty of national legislatures? Does it not follow that submission to supranational parliaments necessarily entails ceding a measure of sovereignty of the nation-states involved? What role would the proposed parliament perform if it did not have supranational authority? In

what form, role or function would that parliament differ from the already existing consultative assembly that is the SADC PF?

Why even contemplate establishing a regional parliament if such would be subordinate to national laws and constitutions and be without supranational authority? although the expressed intention was transformation, there seemed, and continues to be, a lack of clarity on the exact nature, extent of powers and functions of such a parliament. As the experiences of the EALA and the EP demonstrate, a supranational legislative mandate necessarily comes with national parliaments (and their states) ceding some of their sovereignty to give effect to regional laws.

Granted, experiences from other parts of the world would suggest that the objective of becoming a regional parliament with enforceable lawmaking powers is not easy to achieve. The 'only directly elected international assembly in the world' (McCormick 1999: 101) – the EP – has come a long way from the time it had only a non-binding advisory capacity to the present when its influence is palpable in EU policymaking and implementation. Even then, it still has 'relatively few powers on how law and policy are made' within the EU (McCormick 1999: 101). It is apparent that even in the more developed EU, with the entrenched objective of a fully integrated economic community, when compared to national parliaments, the EP does not find as much resonance in member states in terms of legitimacy and perceived relevance. In fact, 'the proper role of the EP and the nation-state parliaments within the EU is (still) hotly debated' (McCormick 1999: 102). This is despite the facts that since 1979, MEPs have been elected through direct universal suffrage, and that citizens can identify and interact with their MEPs at local level.

Consequently, one would have hoped that acceptance of the regional parliament would be universally accepted within the EU. If anything, however, 'the idea that parliament is at the core of democracy has long been intertwined with the existence of the independent nation-state' (Blondel et al 1998: 1). Hence, despite the momentous strides the EU has made towards greater integration, it is not, strictly speaking, a nation-state. This partly explains the uneven acceptance of the EU charter in member states. The votes against the new EU constitution in France and Netherlands,<sup>29</sup> for example, could be seen as evidence that Europeans still see themselves firstly as French, Dutch, English or German, before they are Europeans. Even more profound are the recent experiences of the EU in relation to the Lisbon Treaty, which almost failed to take off in the

absence of affirmation from one of the EU member states, Ireland. Until Ireland overwhelmingly approved the EU's Lisbon Treaty,<sup>30</sup> with two-thirds of the electorate on 2 October 2009, the long-delayed blueprint for reform of the 27-nation bloc hung in the balance.

The influence of other well-established sub-regional parliaments, such as the ECOWAS Parliament and the EALA, on regional and national policy varies. As indicated, although it is a creation of the ECOWAS Treaty, its role is still restricted to making recommendations to the appropriate institutions or organs of the community. The parliament is not empowered to make laws for the Community, nor does it have supranational authority over member states. Ultimate decision-making authority rests with the Authority, which still 'determines the general policy and major guidelines of the Community, (and) gives directives harmonise and coordinate the economic, scientific, technical, cultural and social policies of member states'.<sup>31</sup>

As with SADC, the Authority, in the execution of its functions, is assisted by another executive structure, the CoM, which 'is responsible for the functioning and development of the Community ... (and) make(s) recommendations to the Authority on any action aimed at attaining the objectives of the Community'.<sup>32</sup> The CoM is also responsible for approving the work programme and budget of the Community and its institutions. Sitting parallel to the CoM is the Community Court of Justice (CCJ), whose mandate it is to deal with complaints from both member states and institutions of ECOWAS, including issues relating to defaulting member states. Individuals and corporate citizens have direct access to the CCJ in terms of the protocol that established it. The CCJ also has powers to adjudicate on matters relating to violation of human rights.

When the AU, ECOWAS, EAC and SADC are compared with the present-day EU framework, one notes that the EP has a fairly advanced state of supra-national parliamentary jurisdiction. European institutions have gone through a long history of transformation and integration. From March 1962, when the European Parliamentary Assembly changed its name to the EP, through to 1978, when MEPs became products of direct universal suffrage, the powers of the EP have also been strengthening and expanding, akin to 'an underdog fighting for recognition' (Blondel et al 1998: 119). Such expansion has anchored the EP's, and through it, the European citizens' increasing political control over the European executive. This has not been without its problems, however, at EU level, and even more so at national level. The challenges in the EP's quest for

more influence in the EU policy environment, especially within member states, are very instructive to the quest of the SADC PF to transform into a regional parliament with significant oversight and lawmaking powers.

Scholars agree that although the status of the EP has been elevated from the Maastricht Treaty through to the Amsterdam Treaty, national parliaments remain the main and influential actors in the EU political system. For instance, control over public spending, which is one of the key functions of a parliament, still rests with national parliaments. The EU and its institutions control only a fraction of the total public spending in the EU (Sands and Klein 2001). Likewise, whereas the EP exercises some powers over the appointment of the European Commission and can propose amendments to laws to that commission and to the CoM, or even delay or reject policy proposals, the CoM remains the main legislative and policymaking body of the EU. This is indeed the case with SADC, EAC, ECOWAS or the AU. To its advantage, however, in the realm of policy- and lawmaking, the EP can suggest that the commission initiates a new law or policy. For instance, the much-acclaimed co-decision procedure under the Amsterdam Treaty makes the CoM and the EP equal partners in passing European legislation. On the other hand, the consultation procedure under the Treaty of Rome allowed the EP to offer its otherwise non-binding opinion to the CoM.

The influence of the EP is also evident in the admission of new member states into the EU and in the granting of associate status, where a parliamentary majority is required. Significantly, the EP also retains the power to force the resignation of the commission through a two thirds majority vote (Corbett et al 2000). The major obstacle to the supremacy and supranational authority of the EP, however, seems to be that 'the main democratic link is and should be one in which national parliaments control their governments, which in turn represent the member states in the CoM' (Richardson 2001: 116). It remains to be seen how the SADC region, in its nascent stages of integration, grapples with this challenge.

The budget process is a key area that defines an effective parliament. An effective parliament should be empowered to approve expenditure from the public purse and monitor government expenditure. Based on this principle, and borrowing from the EALA protocol, the DPSP purports to confer on the parliament the power to debate and approve its own budget as well as that of SADC. Elsewhere, although the EP has almost the same powers as the CoM on other

matters, in relation to the budget process, it is the commission that holds the power of initiation, with the CoM (representing national governments) retaining decision-making powers. On its part, the summit of heads of government (Euro Council) retains power over personnel matters such as the appointment of the presidents of the commission and the European Central Bank (ECB), on important issues such as mapping long-term EU policies. The dominance of executive structures suggests that, ‘the EP is a junior member in the EU decision-making system’ (McCormick 1999: 101).

Detailed below are the powers of the EP in each parliamentary function.

**Table 2 Powers of the EP**

Powers of the EP	
Legislative power	<ul style="list-style-type: none"> <li>• Shares legislative power equally with the European Council (the council is the only institution empowered to initiate legislation)</li> <li>• Empowered to adopt European laws, directives and regulations</li> <li>• Can accept, amend or reject the contents of European legislation</li> <li>• Holds the power of political initiative to request the council to present legislative proposals to the council</li> <li>• Can play a proactive role in the development of new laws, through examining the council’s annual programme of work and recommending laws that should be introduced</li> </ul> <hr/> <p>Can adopt legislative acts following two major threads, namely the ordinary legislative procedure (co-decision), where EP has equal powers with the council, and the special legislative procedures, where the EP has only a consultative role (this consultation procedure [advisory] applies to ‘sensitive’ matters such as as taxation, industrial policy and agricultural policy). In some cases, consultation with the EP is obligatory, and an EC proposal does not have the force of law unless the EP has delivered an opinion on it</p>
Budgetary power	<ul style="list-style-type: none"> <li>• Joint constituent with the council of the EU’s budgetary authority, which decides annually on expenditure and revenue (EP and the council must adhere to annual spending limits laid down in the multiannual financial perspective, and the budget has to be balanced in revenue and expenditure)</li> <li>• In close collaboration with the council, decides on ‘non-compulsory expenditure’ (the council has the last word on ‘compulsory expenditure’ such as that linked to agriculture expenditure and to international agreements)</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• Considers/amends the draft budget prepared by the council based on a preliminary budget drawn up by the commission, and returns it to the council, for further amendments if necessary</li> <li>• Adopts or rejects the amended budget at second reading (budget must be signed by EP president before implementation)</li> </ul>

Powers of the EP	
Supervisory and oversight powers	<ul style="list-style-type: none"> <li>• Attends to any petitions by European citizens for remedies in areas within EU scope (every citizen has the right to petition)</li> <li>• Appoints an ombudsman, who deals with complaints by individuals against EC institutions or bodies</li> <li>• Holds the power to set up a committee of inquiry to look into violations or wrong application of EC law by member states</li> <li>• Has right of recourse before the Court of Justice of the European Communities (CJEC), where an action can be brought against the EC or the council if they fail to fulfil their obligations</li> </ul>
	<ul style="list-style-type: none"> <li>• Has powers of control in the economic and monetary domain</li> <li>• Has to assent to appointment of the executive board of the ECB, whose president presents the annual report to the EP in plenary session</li> </ul>
	<ul style="list-style-type: none"> <li>• Exercises democratic control over the Commission and some parliamentary oversight over the activities of the council</li> <li>• Approves or rejects the council's proposed appointment of the president of the EC</li> <li>• Endorses commissioners appointed by member states</li> </ul>
	<ul style="list-style-type: none"> <li>• Has the power to censure the EC</li> <li>• Can force the entire College of Commissioners to resign</li> <li>• Receives regular reports from the Commission (eg annual report on the functioning of the communities, annual report on the implementation of the budget)</li> </ul>
	<ul style="list-style-type: none"> <li>• Tables through the MEPs' written and oral questions to the council and the EC</li> <li>• Can call on the EC to submit a proposal to the council</li> <li>• Regularly invites the EC and the council to develop existing policies or initiate new ones</li> <li>• Receives a programme from the council's president at the beginning of his presidency and reports on the results achieved at the end of the mandate</li> </ul>

*Source Cobbett et al, 2000; Hix, 2001; Maurer, 1999 and Scully, 1997*

In locating the potential for a fully functional and influential SADC Parliament, it is important to assess the competence of PAP in the AU and that of the EALA in the EAC. PAP is to the AU what the EP is to the EU. It is, or should be, the legislative branch of the AU, charged with, among other responsibilities, the legislative agenda of the African continent. Its founding instrument, the PAP Protocol, sets out PAP's objectives as follows:

- Facilitating effective implementation of the policies and objectives of the OAU/AEC and ultimately, the AU

- Promoting principles of human rights and democracy in Africa
- Encouraging good governance, transparency and accountability in member states
- Familiarising the peoples of Africa with the objectives and policies aimed at integrating Africa into the framework of the establishment of the AU
- Promoting peace, security and stability
- Contributing to a more prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery
- Facilitating cooperation and development in Africa
- Strengthening continental solidarity and building a sense of common destiny among the peoples of Africa
- Facilitating cooperation among RECs and their parliamentary fora<sup>33</sup>

In line with Article 11 of the PAP Protocol, since its inauguration on 18 March 2004, PAP's mandate has been limited to an 'advisory and consultative' capacity. In this role, its functions and powers are:

- Examining, discussing or expressing an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs, and making any recommendations it may deem fit on, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law
- Discussing its budget and that of the Community and making recommendations thereon prior to its approval by the Assembly
- Working towards the harmonisation or coordination of the laws of member states
- Making recommendations to contribute to the attainment of the objectives of the OAU/AEC and drawing attention to the challenges of the integration process in Africa and to strategies for dealing with them
- Requesting officials of the OAU/AEC to attend its sessions, produce documents or assist in the discharge of its duties
- Promoting the programmes and objectives of the OAU/AEC in member states
- Promoting the coordination and harmonisation of policies, measures, programmes and activities of the RECs and the parliamentary fora of Africa
- Adopting its rules of procedure, electing its own president and proposing to the CoM and the Assembly the size and nature of the support staff complement of PAP

- Performing such other functions as it deems appropriate to achieving the objectives set out in Article 3 of the PAP Protocol

Even without being a legislative body, these are far-reaching powers indeed.

The extent to which PAP has or has not fully exercised some or all of these powers is an important area of inquiry and learning opportunity for the proponents of the SADC Parliament. Suffice to say at this stage that since its establishment, PAP has been bedevilled by serious capacity and leadership constraints. The usual challenge of human and financial resources has reared its ugly head. Also crucial is the apparent lack of a coherent strategic and implementation plan to meet the objectives set and to use the powers and functions articulated in the PAP Protocol.

Article 2 (3) of the PAP Protocol envisages that in due course, PAP will evolve into a legislative body, and its members shall be elected by universal adult suffrage. The Abuja Treaty of 1991 establishing the African Economic Community (AEC), of which PAP is a part, envisaged the establishment of PAP in the sixth and final stage of the 34-year long development trajectory of the AEC. The proposed stages were as set out in Table 3.

**Table 3** 34-year development trajectory of the AEC under the Abuja Treaty

34-year development plan of the African Economic Community (Abuja Treaty, 1991)		
Phase	Milestones	Timeframe
Stage 1	Strengthening existing RECs and creating new ones where needed	5 years
Stage 2	Stabilisation of tariff and other barriers to regional trade and the strengthening of sectoral integration, as well as coordination and harmonisation of the activities of the RECs	8 years
Stage 3	Establishment of a free trade area (FTA) and a customs union (CU) in each REC	10 years
Stage 4	Coordination and harmonisation of tariff and non-tariff systems among RECs, towards establishing a continental customs union (CCU)	2 years
Stage 5	Establishment of an African Common Market (ACM) and the adoption of common policies	4 years
Stage 6	Integration of all sectors, establishment of an ACB and a single African currency, setting up of an African Economic and Monetary Union (AEMU), and creating and electing the first PAP	5 years

If this timetable had been followed, PAP would have come into being only around the year 2028. Three years down the line, however, the fourth extraordinary summit of the (then) OAU – the precursor to the AU – decided through the Sirte Declaration of September 1999 to bring forward the establishment of PAP, and hopefully accelerate the implementation of the Abuja Treaty and ‘shorten the implementation periods of the Abuja Treaty’.<sup>34</sup> So it was that in 2001 the PAP Protocol was signed and in 2003 it came into force. Some analysts have argued that the Sirte Declaration in general and the decision to truncate the implementation timetable of the Abuja Treaty were driven by Libyan leader Colonel Muammar Gaddafi, himself a proponent of the United States of Africa. They have argued that the relatively weak position of PAP in relation to other organs of the AU could be attributed to the fact that ‘ambition and enthusiasm clouded the importance of putting in place the necessary structures and methodology for establishing such a critical institution’ (Hugo 2008: 2). This is evident in the fact that apart from the broad pronouncements of seeking to involve the peoples of Africa in the continent’s development and integration agenda, the modus operandi of such involvement through PAP was hardly articulated.

As provided in Article 18 of the PAP Protocol, which enjoins PAP to convene ‘annual consultative fora with the parliaments of the RECs, national parliaments or other deliberative organs to discuss matters of common interest’, there have been joint workshops and meetings between PAP and parliaments of RECs, but these seem to have been stand-alone activities not feeding directly into the committee system and broad agenda of PAP plenary sessions. During PAP’s short history, there has been no evidence of an organic link or substantive connection with parliamentary fora such as the EALA, the ECOWAS Parliament and the SADC PF – all of which preceded PAP. Further, ‘members of PAP are exclusively elected from national parliaments’ (Terlinden 2004: 14), and have no formal relationship with and sit parallel to their counterparts in the abovementioned bodies. In fact, the risk exists that the agenda, discussions and resolutions of these and other African parliamentary bodies may not dovetail, which presents a challenge in coordinating regional policymaking processes and harmonising regional and national policies.

It has been argued that ‘because of its lack of legislative powers and its weak decision-making role within the AU governance architecture, ... PAP remains less effective than it could be and occupies a marginal position in the policy-making process of the continent’ (Mpanyane 2009: 3). PAP has thus far been

unable to create organic linkages to influence policymaking within organs of the AU such as the Assembly, Peace and Security Council, Executive Council and Commission.

The configuration of the committee structures of PAP has little relationship to the relevant organs of the AU Commission (AUC), which, in theory, they should shadow in the interests of national oversight. In terms of Rule 22 (1) of its rules of procedure, PAP has ten committees, nine of which are as follows:

- Committee on Cooperation, International Relations and Conflict Resolution
- Committee on Justice and Human Rights
- Committee on Education, Culture, Tourism and Human Resources
- Committee on Health, Labour and Social Affairs
- Committee on Gender, Family, Youth and People with Disabilities
- Committee on Monetary and Financial Affairs
- Committee on Transport, Industry, Communications, Energy, Science and Technology
- Committee on Trade, Customs and Immigration Matters
- Committee on Rural Economy, Agriculture, Natural Resources and Environment

Given the number of committees, highly skilled and experienced staff – both researchers and committee officials – are required to enable parliamentarians to follow up on the work of the AUC in general and that of the various commissions. The Committee on Cooperation, International Relations and Conflict Resolution seems to be the most well known, through, among other initiatives, fact-finding missions and election observation missions. Conflict remains a key challenge affecting integration, peace and stability on the continent, but it is equally true that matters relating to justice and human rights, rural economy, agriculture, and natural resources and environment, and energy, among others, are priorities for Africa. The lack of a sharp focus on these sectors is cause for serious concern.

Formal and organic linkages among PAP and the AUC, the Peace and Security Council (PSC) and the Economic, Social and Cultural Council (ECOSOC), among others, are crucial to the work of any effective legislative body. In terms of relations with the PSC, for example, Article 8 of the Protocol Relating to the Establishment of the Peace and Security Council empowers PAP to request from the PSC annual reports on the peace and security situation on

the continent, with which the PSP chairperson is obliged to comply. That this has not happened reflects the capacity of PAP fully to exploit its powers.

Central to the debate, however, is the exact nature of the legislative mandate that the PAP should seek to achieve in the short- to medium term. The transformation of PAP into a legislative body was not time bound,<sup>35</sup> a lack of predictability it shares with the SADC PF and the ECOWAS Parliament. The PAP Protocol articulates the vision of becoming a legislative body, but does not set a timetable. Article 21 (1) of the Protocol states that:

Five years after the entry into force of this Protocol, a conference of the states parties to this Protocol shall be held to review the operation and effectiveness of this Protocol, with a view to ensuring that the objectives and purposes of this Protocol, as well as the vision underlying the Protocol, are being realised and that the Protocol meets the evolving needs of the African continent.

This leaves the transformation agenda and timetable to the conference of state parties, some of which are not signatories to the PAP Protocol (Mpanyane 2009). Will non-signatories support the enhancement of the powers of PAP beyond the current innocuous advisory and consultative mandate that they have not even deemed it fit to endorse?

Within the limits of its current mandate, PAP has done some work in the area of elections observation and fact-finding missions in human rights, environment and post-conflict contexts. Whatever the merits of these activities, they had only a psychological and publicity effect, but not much impact on policy. To be useful, these missions should ideally be followed up by specific policy-oriented interventions (and reforms) as identified, driven or recommended to the relevant organs of the AU by PAP. As Mpanyane (2009: 4) rightly observes, PAP would be more visible and effective 'if the current advisory and consultative function is made obligatory and there is closer cooperation between PAP and AU policymaking organs'. To the extent that PAP's resolutions and recommendations are of no consequence in AU policymaking, the impression is easily created that PAP is merely a talkshop unable to justify its existence and related costs.

The definition of the eventual legislative mandate of PAP rests with the Assembly. *Ipsa facto*, for some time to come, PAP's policy- and lawmaking

mandate will be either defined by or remain largely the preserve of the executive. In addition, in terms of Article 5 of the PAP Protocol, members of PAP are ‘elected or designated by the respective national parliaments or any other deliberative organs (own emphasis) of the member states ...’ Therein lies the problem. Deliberative organs are not necessarily parliaments; neither are they inevitably lawmaking institutions. The SADC PF, for example, is only a deliberative organ. How it is envisaged that representatives from deliberative organs can be empowered to legislate for the continent of Africa, when in fact they do not wield such powers in their national jurisdictions, boggles the mind. Some parliaments, notably those of Eritrea, Libya and Swaziland, arise from a no-party system, yet the PAP Protocol requires diversity of political voices among parliamentary representatives to PAP. This brings into sharp focus the qualitative nature of the constituent elements of PAP. There is simply no membership qualification required for the torch-bearer of African parliamentarianism other than being a national parliament or deliberative organ of an AU member state.

A balance has to be struck between the powers of PAP vis-à-vis those of national parliaments. Adding regional parliaments to the mix presents new and unique problems. This is especially important given that a number of African countries are plagued by the spectre of weak parliaments that are barely able to hold the executive accountable (Azevedo, Mozaffar and Nijzink 2006). Related to that is the scourge of overbearing executives. How a weak and barely influential national parliament is expected to engage with decisions of a supranational parliament and domesticate them in local legislation requires careful consideration.

Befittingly, the question has been asked: ‘What can a parliament composed of parliamentarians from weak national parliaments do to improve governance on the continent (and by extension, the SADC region)?’ (Mashele 2005: 110). The situation is not any better with PAP’s role on the budget process. PAP is empowered to discuss only its own budget and that of the AU, and make recommendations to the Assembly for approval. Even on matters relating to the size and nature of its own staff complement, PAP can only make recommendations to the CoM and Assembly for approval.

On the power of the purse, which is a central pillar of a parliament, Mpanyane (2009: 10) rightly observes that the ‘the lack of independent financial resources, and specifically the lack of control over its own budget...severely

constrains the capacity of PAP as it cannot prioritise issues and activities, or even carry out its plans independently'. Since its establishment more than five years ago, the extent to which the PAP has been able to fulfil its objectives remains a grey area. In fact, given its chequered history and its deliberative and advisory mandate, serious questions remain about the viability of granting PAP legislative powers, what such powers would entail and how they would interface with the different political systems, parliamentary and democratic traditions of the more than 50 AU member states.

The apparent lack of administrative capacity of PAP and allegations of financial profligacy have dominated assessments of the progress made in the PAP's first five years. Concerns around financial management and adherence to existing policies of the AU have been considered by the AUC itself. So concerned was it about the state of affairs at the PAP that at its 12th ordinary session held in Addis Ababa, Ethiopia from 1 to 3 February 2009, the Assembly requested – rather embarrassingly – that PAP:

- Stop implementing any decisions of the bureau of PAP that have financial implications until approved by AU policy organs
- Adhere strictly to AU financial rules and regulations and staff rules and regulations in preparing and executing the budget, and to the provisions of Article 15 of the PAP Protocol dealing with budget preparation
- Not include any unauthorised budget lines in the 2009 budget, in particular of the sitting, advocacy and communication, and coordination and responsibility allowances
- Apply the daily subsistence rates as per the AU financial rules and regulations
- Stop paying higher housing allowance rates and apply AU-approved rates<sup>36</sup>

Against this background, the question still remains whether PAP can be trusted with more power if it has been unwilling, unable or even unaware of the full extent of the limited yet wide-ranging powers at its disposal.

# 6 Defining membership criteria for regional parliaments

Unlike in the EU member states, where MEPs are elected by direct universal suffrage, representatives to the SADC PF are elected or appointed from among the members of each national parliament. This is also the case with the ECOWAS Parliament and PAP. An exception is the EALA, whose members are elected by their respective national parliaments but need not be parliamentarians at national level. At present, the ordinary people of Africa do not have a direct say in who represents them in regional and continental parliaments. It is significant, however, that the election of members of the ECOWAS Parliament and the PAP from among MPs in national parliaments is only an interim measure. In the long term, it is envisaged that members of those parliaments would be elected by direct universal suffrage in the member states. Legitimacy of representation and of decisions made by those representatives is underpinned not by appointment, or indirect or proxy election, but through direct election of parliamentary representatives. For all its problems, the EP has amply demonstrated the viability of direct elections and the legitimacy that comes with decisions made by directly elected representatives.

Regarding membership criteria, in the EU a nation-state does not qualify for membership simply by accident of geographic location. Membership is

conditional on a number of stringent political and economic imperatives. These include respect for human rights and adherence to democracy and the rule of law, both of which are accorded the similar importance as economic cohesion of free market economies. Aspiring member states must adhere to the EU's body of law or the *acquis communautaire* (Katz and Wessels 1999). EU membership is also accompanied by sanctions for errant members. The requirements for membership of SADC are not as stringent. A country seeking membership is required to (Oosthuizen 2006, 135):

...be 'well-versed with and share SADC's ideals and aspirations' set out in the Treaty. There must be commonality of 'political, economic, social and cultural systems of the applicant with the systems of the SADC region, as well as observance of the principles of democracy, human rights, good governance and the rule of law in accordance with the African Charter on Human and People's Rights'. The applicant should have a 'good track record and ability to honour its obligations and to participate effectively and efficiently' in the SADC Programme of Action 'for the benefit of the Community'. The applicant should 'not be at war and should not be involved or engaged in subversive and destabilisation activities, or have territorial ambitions against the SADC, any of its member states or any member state of the AU'. The applicant should have levels of macroeconomic indicators 'in line with targets' set out in RISDP. States may be readmitted only after settling any outstanding arrears.

The SADC Treaty provides for the imposition of sanctions against any member state that,

persistently fails, without good reason, to fulfil obligations assumed under the Treaty; implements policies that undermine the principles and objectives of SADC; or is in arrears in the payment of contributions to SADC, for reasons other than those caused by natural calamity or exceptional circumstances that gravely affect its economy, and has not secured the dispensation of the Summit.<sup>37</sup>

Unfortunately, the nature and form of sanctions are not defined. To what extent, one could ask, will SADC be able to 'promote common political values,

systems and other shared values that are transmitted through institutions that are democratic, legitimate and effective',<sup>38</sup> if SADC member states are allowed to hide behind the banner of sovereignty in the face of questionable electoral management bodies, election arrangements, lack of adherence to the rule of law and threats to judicial independence. What 'common political values, systems and other shared values' could be identified in the continued deprivation of Swaziland citizens' political rights through a political system that does not guarantee free political participation?

It being trite that a convention that does not have attendant sanctions 'is invariably a scarecrow on which the would-be predators sooner or later perch as they eat the produce' (Mutasah 2007), there is clearly apparent lack of willingness by regional leaders to move into a rights-based SADC and ensure that member states are held accountable for violation of human rights, elections and democracy-related protocols and declarations. The lack of condemnation of well-publicised human rights violations in Zimbabwe over the last decade and appalling election management and related violence – even in the face of negative reports from the SADC Election Observer Mission (SEOM) to that country – calls into question the regional leaders' commitment to bridge the gap between rhetoric and practice.

Another case in point is the lack of commitment at national level to see through reforms aimed at meeting the objectives set out in the SADC Declaration on Gender and Development and the African Charter on Democracy, Elections and Governance. Even more disconcerting is the lack of appetite on the part of SADC to improve and upscale the principles and guidelines for democratic elections in the SADC region.

The requirement for an applicant to be 'geographically proximate to the region' (Oosthuizen 2006: 135), which was part of the 1995 and 2003–2004 criteria for membership, has since been removed, hence SADC now includes countries such as the DRC, in central Africa. Following this precedent, SADC admitted Rwanda and Uganda, which, with Tanzania, are members of the EAC and the EALA.



# 7 Regional policy- and lawmaking

Whither the SADC PF?

Unlike those of the EALA, the role and influence of the SADC PF in SADC policymaking processes have been conspicuous by their absence. Pursuant to the EAC Treaty, Rule 77 of the rules of procedure of the EALA empowers the EALA to appoint committees with a mandate to:

- Examine, discuss and make recommendations on all Bills laid before the Assembly
- Initiate any Bill within their mandate
- Assess and evaluate activities of the Community
- Carry out relevant research in their mandate
- Examine policy matters affecting their subject areas
- Examine the Community's recurrent and capital budget estimates
- Report to the Assembly on their functions

Since 2001, the EALA has passed the following laws, among others: the Community Emblems Act (No 1) 2004; EALA (Powers and Privileges) Act (No 2) 2004; EAC (Appropriation) Act (No 3) 2004; EAC (Appropriation) Act (No 3) 2004; EAC Supplementary Appropriation Act 2005; Acts of the EAC Act (No 5) 2004, and Laws

of Community (Interpretation) Act (No 6) 2004. Others include the EAC Customs Management Act (No 1) 2005; EAC Competition Act 2006; EAC Standardisation, Quality Assurance, Metrology and Testing Bill 2006, and EAC (Appropriation) Bill 2006. In the most important area of the power of the purse, the EALA debated and approved the EAC budgets for the financial years 2002/03, 2003/04, 2004/05, 2005/06 and 2006/07.<sup>39</sup> The EALA has exercised oversight through oral answers to the CoM relating to matters of the Community. According to the EALA website ([www.eala.org](http://www.eala.org)), '(t)he First EALA asked a total of 30 priority questions on the implementation of the Treaty, which were duly answered by the CoM chairperson'.

In its more than ten years of existence, the SADC PF has been peripheral to, if not completely excluded from, SADC decision-making structures and processes. It has not been consulted, nor has it contributed to regional policy formulation, including the more than 20 protocols and declarations that SADC has developed so far. Since the SADC PF is not considered a formal SADC structure and SADC structural arrangements do not envisage a role for parliaments in policy formulation, the only time that parliamentarians come into contact with regional policies and protocols is when the executive brings such instruments to national parliaments for ratification, and domestication into the domestic legal framework. At that time, such policies are *fait accompli*, as they have been signed by heads of state and government or responsible ministers.

Even where the power of ratification rests solely with parliament, the configuration of political parties and design of governments in most of Africa, where the party leader is invariably the head of state and/or government, means that parliaments' power of ratification becomes largely an academic or rubber-stamping exercise. Instances of Southern Africa parliaments withholding ratification are rare. How can a political junior, who looks forward to a cabinet or other senior appointment, openly differ with the president or prime minister, who is also the dispenser of patronage, political and economic privileges? In any case, the mandate to ratify international agreements does not apply to all parliaments of SADC member states, hence the sustained hegemony of the executive in regional policymaking.

The legendary deliberate exclusion of the SADC PF from SADC policymaking prompted former President Thabo Mbeki of South Africa to lament thus:

Despite its importance, derived from the fact that it is a collective representative of our democratically elected legislatures, the SADC PF has

not been factored into the decisive regional dialogue ... on accelerating the process of our regional integration (and) previous SADC decisions... to transform the SADC region into an FTA by 2008 ... (and) agreed ...to create a SADC CU by 2010.<sup>40</sup>

Another more poignant example is the debacle surrounding the observation of the 2005 and 2008 elections in Zimbabwe. Since 1999, the SADC PF had been independently invited as an autonomous entity to observe elections in different SADC member states, including two previous elections in Zimbabwe, in 2000 and 2002. In fact, it was against this background that the SADC PF was able to develop seminal electoral norms and standards for Southern Africa. In a new twist to that tradition, however, in 2005, the Government of Zimbabwe invited the SADC PF to observe elections 'under the overall leadership of the chairman of the SADC Observation Mission (SEOM)<sup>41</sup> as part of the SEOM. The SADC PF argued that since it had '...not been invited in its own right as an autonomous institution of SADC, which (was) a fundamental departure from the established practice by SADC countries',<sup>42</sup> it regretted that it would not be able to observe elections under the leadership of the executive.

This mode of invitation was to be repeated for the country's controversial 2008 elections. In justifying Zimbabwe's position, the spokesperson of the South African Department of Foreign Affairs, Ronnie Mamoepa, was quoted as asserting that SADC PF had 'no *locus standi* in terms of official SADC structures'.<sup>43</sup> In his dramatic exposé, the spokesperson further opined that, '(a)s far as the (South African) government (was) concerned, Zimbabwe invited the national parliaments of SADC member states, which allow (sic) for report-backs to sovereign national parliaments (after) the elections. On the other hand, the SADC PF would have no fora to report on (sic) its findings to'.<sup>44</sup>

Here is an institution supposedly established under the Treaty and approved by Summit being described by a representative of one of the SADC member states as having 'no *locus standi* in terms of official SADC structures'. In other words, a regional body comprising elected representatives of 'sovereign' national parliaments of SADC member states is effectively declared legally non-existent. Since then, and in the absence of a repudiation or clarification from the executive secretary of SADC or SADC PF itself, the SADC PF, in the minds of many, remains a non-governmental organisation (NGO). In fact, during elections, it has been found useful to distinguish the SEOM from SADC PF election

observer missions by referring to the former as ‘SADC proper’. This has raised the question of whether the establishment of the SADC PF by resolution of the Summit, as opposed to treaty law or a protocol, was not simply an oversight, but rather a symptom of the executive’s reluctance to be held accountable by regional parliamentarians.

Ironically, a recent (2010) decision of the SADC Tribunal,<sup>45</sup> which affirmed the tribunal’s jurisdiction over the SADC PF – as a SADC institution – in a labour dispute between the SADC PF and a former employee, may provide respite to the SADC PF’s hitherto illegitimate status in SADC. The outcome of the case is ironic given the fact that the former employee argued, among other things, that the:

[t]ribunal does not have jurisdiction in that it has power only to interpret ... the SADC Treaty, Protocols, Subsidiary Instruments and acts of the Institutions of the Community (own emphasis) and such other matters as may specifically be provided for in any other agreements that member states may conclude among themselves or within the Community, and which confer jurisdiction on the Tribunal – *vide* Article 14 of the Protocol on the Tribunal (the Protocol).

As the equivalent of the EAJ in the EAC, the CCJ in ECOWAS or the CJEC in the EU, the Tribunal has:

jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol, which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that member states may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.<sup>46</sup>

The SADC PF, in arguing that it did not fall under the jurisdiction of the Tribunal, seemed to suggest that it was not one of the ‘institutions of the Community’ or alternatively, that there were no subsisting agreements concluded ‘within the Community, and which confer jurisdiction on the Tribunal’. *Ipsa*

*facto*, wittingly or perhaps selfishly, the SADC PF apparently concurred with its detractors' argument that it was not a SADC institution and was, therefore, not covered by Article 14 of the SADC Protocol on the Tribunal. The Tribunal countered that through its decision of 8 September 2008, the Summit 'approved the establishment of the SADC PF as an autonomous institution of SADC, in accordance with Article 9 (2) of the Treaty'.<sup>47</sup> Although the decision weighed against the SADC PF in its dispute with a former employee, it provides scope for a new relationship between the SADC PF and SADC. And, because the Treaty decrees that Tribunal decisions are binding, SADC, its officials and its member states can no longer argue that the SADC PF is not a SADC institution. This would be viewed as contempt of the SADC Tribunal.

Contempt of the Tribunal's decisions is not without precedent, however, as Zimbabwe, a founding member of SADC, recently disavowed the Tribunal's jurisdiction. The matters were between a farming entity, Mike Campbell (Pvt) Limited and William Michael Campbell and the Government of Zimbabwe (GoZ), and also Mike Campbell (Pvt) Ltd and 76 others and GoZ.<sup>48</sup> Both matters related to GoZ's seizure of agricultural land belonging to the applicants and subsequent litigation in Zimbabwean courts and at the SADC Tribunal by the affected parties. Central to the disputes was a challenge to the compulsory acquisition of agricultural land by GoZ and the constitutionality of a section of the Constitution of Zimbabwe, which ousts the jurisdiction of the courts on affected persons' challenges to state acquisition of land. The applicants also sought and were granted an interim order restraining GoZ from removing or allowing the removal of the applicants from their land until the dispute was resolved. In its 13 December 2007 ruling, the Tribunal ordered GoZ to take 'no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm'.<sup>49</sup> On 20 June 2008, the 79 applicants were back at the Tribunal, this time drawing attention to GoZ's lack of compliance.

In response, '(t)he Tribunal, having established the failure, reported its finding to the Summit'<sup>50</sup> as provided in Article 32 (5) of the SADC Protocol on the Tribunal. On the substantive case, the Tribunal, having found that it had jurisdiction to hear the application, found that against the rules of natural justice, the applicants had been denied access to the courts in Zimbabwe,<sup>51</sup> that they had been subjected to racial discrimination, and finally, that they were entitled to fair compensation. To the surprise of many in the SADC region and abroad, Zimbabwe's

justice minister responded by announcing his government's withdrawal from the Tribunal, asserting, 'any decision that the (SADC) Tribunal may have or may make in future against the Republic of Zimbabwe is null and void'.<sup>52</sup>

GoZ's contempt for the Tribunal's ruling was reported to the Summit in August 2009, but no admonishment has followed. This brings into sharp focus the extent of the authority of supranational bodies – both judicial and parliamentary – over sovereign states that are nevertheless members of such bodies. To what extent then can the proposed SADC Parliament hope and expect to be treated differently, firstly by SADC, but more importantly by its member states?

As indicated earlier, the ongoing exclusion of parliamentarians from regional policymaking in SADC runs against developments elsewhere, not least on the continent, where the CA-AU provides for PAP as an AU core organ. A useful lesson from PAP is that, from its inception, its competence and functions were circumscribed. At the time, Adebayo Adedeji observed the apparent subordination of PAP 'not directly to the will of the people but to the authority of the executive arm of governance' (Adedeji 2003: 52). He also noted that while the composition, powers and functions of the Assembly of the AU and the Executive Council were clearly spelt out in articles 6 to 13 of the CA-AU, the same Act left '... the determination of the composition, powers, functions and organisation of PAP to a protocol that will need to be approved by the Executive Council (of ministers) and the Assembly before being ratified by member states' (Adedeji 2003: 52). This is a paradox given that PAP is expected to exercise oversight over the Executive Council once it attains the envisaged legislative powers. Given the historical contestation of power between the executive and the legislature, to what extent would the Executive Council approve wide-ranging powers of PAP, thus curtailing its own?

By the same token, the establishment of the proposed SADC Parliament is expected to be entirely dependent on decisions of the CoM and the Summit. The SADC PF's motivation document entitled 'The case for a SADC Parliament (CSP)' says as much. The CSP presents as the centrepiece of the document an 'appeal to the SADC Summit of Heads of State or Government and other relevant organs of SADC to facilitate the process'<sup>53</sup> of transforming the SADC PF into a SADC Parliament. Accordingly, since 2003, the SADC PF has been lobbying SADC heads of state and government on the matter.

To argue its case, in 2003, the SADC PF developed the DPSP and a draft amendment to the SADC Treaty – specifically to Article 9(1) – to establish a

SADC Parliament as a core SADC organ. Informed by the PAP Protocol, the DPSP identifies the following as the functions of a future SADC Parliament:

- Providing a regional SADC PF for dialogue, consultation and public consideration of matters of common interest by representatives of the peoples of the region; in other words, setting the SADC agenda at parliamentary level
- Facilitating the harmonisation of laws in the region
- Facilitating the ratification and implementation of international agreements by state parties
- Informing other SADC institutions of popular views on development and other issues affecting SADC states
- Debating and approving its budget and that of SADC
- Considering annual reports on the activities of SADC, annual audit reports of all SADC institutions and any other reports referred to it by the CoM or Summit, and taking binding decisions on issues when requested to do so by the Summit
- Examining, discussing or expressing an opinion on any matter, either on its own initiative or at the request of the Summit, CoM or other policy organ of SADC and, where appropriate, making recommendations on respect for human rights, the consolidation of democratic institutions and the culture of democracy, and the promotion of good governance and the rule of law
- Enacting regional laws as determined by the Summit<sup>54</sup>

The SADC PF's intention to become a regional parliament has been publicly supported by some of the heads of state in their addresses to Plenary Assembly meetings of the SADC PF. None of the regional leaders has publicly questioned the principle of establishing a SADC Parliament. In different ways and at various fora, SADC heads of state and government have pledged their support for the concept. Mbeki, in particular, argued that 'the fact of the involvement of the SADC PF in the practical work of accelerating the process of regional integration would, in a concrete manner, demonstrate the need for the establishment of the regional parliament to which all of us, in principle, have agreed'.<sup>55</sup>

In spite of supportive political statements from a high level, the only time the SADC Parliament is publicly known to have found its way onto the agenda of the CoM and the Summit was in 2004, when it is understood,

the CoM recommended the establishment, in the long term...the Summit, in turn, concluded that while the proposal to establish a regional parliament would be welcome, the institutionalisation of the recently established PAP should take precedence... Consequently, the establishment of a regional parliament was deferred, to be considered as a long-term objective.<sup>56</sup>

Interestingly, none of the public records of SADC policy organs reflect the discussion. For quite some time there had been no further public pronouncement by SADC on the matter, even as the SADC PF continued in its spirited courtesy calls from one head of state (or government) to the next. Perhaps the matter is being handled quietly, behind closed doors, but this is only conjecture. Judging by the tone of some of the communiqués of the recent SADC PF's Plenary Assembly meetings, there seems to be an acceptance that something was terribly wrong with either the approach or the concept itself.

An unlikely break, however, came in late 2009 from an unlikely source. Zimbabwe's President Robert Mugabe, whose government is at loggerheads with the Tribunal, made by far the most direct pledge and commitment to have the issue of the SADC Parliament addressed by the Summit. In his address to the 26th Plenary Assembly of the SADC PF, the controversial leader stated that 'Zimbabwe fully supports the establishment of the SADC Parliament and ... would want the issue to be brought up, debated and concluded at the next SADC Summit of Heads of State and Government in 2010'.<sup>57</sup>

There could very well be a confluence of factors resulting in this unexpected commitment from one whose country has never really accepted the bona fides of the SADC PF, and in fact refused to allow the SADC PF the opportunity to observe independently elections in Zimbabwe in 2005 and 2008. The pledge came as the Plenary Assembly met in Zimbabwe and during the time that Mugabe had been forced into a transitional power-sharing government arrangement with members of the former opposition. In addition, Zimbabwe has become an international pariah state following many years of economic mismanagement, oppression of political opponents and precipitous collapse of the economy. Mugabe may have grabbed the opportunity to renew friendship with parliamentarians of the region to restore a patina of 'democratic credentials' long lost through many years of his rule. His personal appetite for short-term glory may have surpassed his apparent knowledge of the evident lack of appetite

for a SADC Parliament among his peers – the regional leaders.. The final as-suaging could very well be the change of leadership at the SADC PF secretariat following the appointment of a Zimbabwean to replace the retiring secretary general. Despite the well-publicised pledge, the Summit meeting that followed did not – at least officially – address the SADC Parliament question.

Another worrying factor mitigating prospects for the proposed parliament is the lack of evidence to show that the matter is being extensively debated even in national parliaments. This is despite the fact that, as part of the agenda of the biannual Plenary Assembly meetings, national parliaments are required to report on the implementation of decisions taken at previous meetings, including matters relating to the ratification, domestication and implementation of SADC instruments. Notwithstanding the Plenary Assembly's 2004 resolution requesting national parliaments to debate the SADC Parliament to improve information sharing, build national consensus and put pressure on ministers who attend SADC meetings, only the Namibian and Zambian parliaments have debated a motion or taken formal and affirmative resolutions on the matter.

This is not that strange, however, given that SADC matters are rarely debated in most national parliaments. Debates of matters of interest to or affecting the region take place only when protocol is presented for ratification or where a major natural disaster such as a flood has affected not just one of the countries in the region, but that particular country as well. For instance, a perusal of the verbatim records (where such exist) of most parliament shows that there is very little debate – with a regional perspective – on issues such as climate change, energy shortages, epidemics, and trans-boundary movement of goods, people and services. Where such debates take place, the thrust is invariably inward-looking, nationalistic and sometimes xenophobic. By comparison, EU matters in general and those relating to or coming before the EP are of intense interest to national parliaments and the general European citizenship (Blondel, Sinnott and Svensson 1998).

The SADC PF's motivation document – the CSP – forcefully argues the case for an organic link between the proposed SADC Parliament and PAP. Articles 3(9), 11 (7) and 18 of the PAP Protocol commit PAP to facilitating:

cooperation among RECs and their parliamentary fora (and) coordination and harmonisation of policies, measures, programmes and activities of the RECs and the parliamentary fora of Africa ... (working) in close

cooperation with the parliaments of RECs and the national parliaments or other deliberative organs of member states. To this effect, PAP may, in accordance with its rules of procedure, convene annual consultative fora with the parliaments of RECs, national parliaments or other deliberative organs to discuss matters of common interest.

Although the establishment and functioning of PAP is not dependent on the prior or ongoing existence of the parliamentary fora of RECs, it is apparent such fora are necessary to PAP's fulfilment of the objectives and functions set out in Articles 3 (9), 11 (7) and 18. It, therefore, seems plausible that a REC that does not have such parliamentary fora, which is currently the case with SADC, would be deprived of the opportunities accruing to regional parliaments during PAP meetings. What such cooperation entails, however, is undefined.

# 8 From a consultative forum to parliament

Rhetoric or reality?

In exploring the likelihood of the concept of a SADC Parliament gaining and retaining the support of SADC, one arrives at a number of insightful yet contradictory findings. Chief among these is that although there is consensus by some parliamentarians on the need for a regional parliament, there is a glaring lack of clarity on the competitive advantage of such a parliament vis-à-vis current arrangements. In conversation with the author of this study, some expressed frustration with the limited competence and influence of PAP on a range of issues, including oversight and legislative capacity, and openly wondered what, if any difference, a SADC Parliament would make. That the Summit has thus far not found it necessary to debate the issue extensively raises key policy challenges for the SADC PF. It remains to be seen if the executive is willing to respond to the far-reaching ambitions of parliamentarians and with that, cede its traditional supremacy in regional and international policy, politics and governance.

The paucity of national discussions on the matter is equally puzzling. The SADC PF's 20th Plenary Assembly session, which coincided with the tenth anniversary of the SADC PF in June, 2006, reiterated the call for the 'early establishment of the SADC Parliament'<sup>58</sup> as a fitting tribute to its ten years. Yet,

like all the others before it, a meeting of the Summit, which followed in August 2006, maintained military silence on the matter. Other than reiterating the need for a SADC Parliament, subsequent meetings of the Plenary Assembly seem to have skirted the issue by not outlining any renewed impetus and strategy to realise the concept. Even the presence at the 26<sup>th</sup> SADC Summit in Kinshasa in August 2009 of a high-level SADC PF delegation – including its chairperson, and outgoing and incoming secretaries general, could not persuade the Summit to discuss the matter.

Perhaps out of frustration at the slow pace of the advocacy campaign for a SADC Parliament, a former high-ranking SADC PF office bearer wondered in conversation with the author whether it would not be prudent for the SADC PF to declare itself simply a regional parliament, rather than seeking the concurrence of SADC executive structures.<sup>59</sup> The import of his assertion was that if parliament was expected to be independent of the executive and, in fact, hold it to account in regional policymaking and implementation, how could it logically expect the executive to ratify it. This resonates with the observation that the provisions of the PAP Protocol, which mandate the executive to determine ‘the composition, powers, functions and organisation of the PAP’ (Adedeji 2003: 52), effectively subordinated PAP to the executive.

Yet, others argue that parliamentarians should not expect the executive to cede some of its traditional powers in regional policymaking without resistance. They argue that ‘SADC does not want to be placed under a watchful eye of a regional parliamentary body to account for its activities in pursuit of the regional integration project’ (Matlosa 2006: 21). This view is particularly apt given that, at present, the key structures of SADC – the Summit, CoM and other organs – comprise exclusively ministers and government officials. Of particular interest to the SADC PF is that 30 per cent of its membership is drawn from opposition parliamentarians from the 15 member states of SADC. Some have risen to the second highest position in the organisation, that of vice chairperson of the SADC Executive Committee. Given that as with all other African RECs, SADC is a government-driven organisation and that (SADC) governments by their very nature are established by governing (ruling) parties, the SADC PF’s configuration threatens the manner in which it has operated since establishment.

On the road to the proposed parliament, the SADC PF (and SADC) will have to navigate the inevitable pothole presented by the geographical configuration of SADC vis-à-vis Southern Africa as defined by the AU. In terms

of the AU's five geographical regions of Africa, countries such as Tanzania, DRC and Mauritius do not belong to the Southern African region. Tanzania and Mauritius belong to East Africa, while DRC belongs to Central Africa. All three, however, belong to SADC and could, if the regional parliament comes to fruition, become part of the SADC Parliament. This raises the paradox of multiple memberships to RECs vis-à-vis the reconfiguration of the regions by the AU. Gibb (2006: 2) passes a damning and dim verdict on the functionality of multiple memberships to RECs as follows:

Eastern and Southern Africa has a multiplicity of regional institutions with remarkably similar integrative ambitions. The institutions overlap both geographically, with shared membership, and structurally, with shared desire to create, at the very minimum, customs unions. There is also rivalry and tension among some of these regional institutions. The institutional structure supporting regionalism is overcomplicated and incoherent. Put bluntly, the present structure of overlapping memberships and shared integrative goals ... is unworkable. It does not work now and it will not work in the future.

Table 4 illustrates the multiple memberships of different SADC member states to the numerous African REC arrangements.

So many and overlapping are these initiatives that in 2006 the AU decided to rationalise Africa's RECs to avoid the unintended consequence of them competing against rather than complementing each other, resulting in reversing economic integration on the continent.

The rationalisation of African RECs is not a new debate. It has been on the agenda of the OAU and subsequently, that of the AU for many decades. As far back as 1976, the 27th Ordinary Session of the OAU CoM decided that 'there shall be five regions of the OAU, namely northern, western, central, eastern and southern'.<sup>60</sup> Not surprisingly, this did not stop the development of new RECs straddling one or more regions of the then OAU. In 1986, the 44th ordinary session of the CoM requested 'the OAU secretary general to examine the practical and operational modalities for coordinating and harmonising the activities and programmes of existing sub-regional economic groupings'.<sup>61</sup>

This was reinforced by a decision of the 23rd Ordinary Session of the OAU Heads of State and Government, requesting the 'secretary general of the OAU,

**Table 4** SADC countries' membership of RECs

	SACU	CMA	COMESA	EAC	ECCAS	RIFF	IOC	IOR-ARC	SADC
Angola									
Botswana									
DRC									
Lesotho									
Madagascar									
Malawi									
Mauritius									
Mozambique									
Namibia									
South Africa									
Swaziland									
Tanzania									
Zambia									
Zimbabwe									

*Source Adapted from Oosthuizen, 2006: 146.*

the executive secretary of the ECA and the authorities of sub-regional and regional economic groupings, particularly ECOWAS, preferential trade area (PTA), SADCC and ECCAS to take the necessary steps to ensure coordination, harmonisation and rationalisation of activities, projects and programmes of all the African intergovernmental cooperation and integration organisations in their respective regions to avert overlaps, power conflicts and wastage of efforts and resources'. In March 2006, African ministers responsible for integration made a recommendation to AU heads of state and government to 'halt the recognition of new RECs'. They also recommended the recognition of only 8 of the more than 18 African RECs, as follows: ECOWAS, COMESA, ECCAS, SADC, IGAD, UMA (Arab Maghreb Union), CEN-SAD (Community of Sahel-Saharan States) and the EAC.

In the light of the above and the discussions within the AU regarding rationalisation of RECs, it would be prudent for SADC to reconfigure its geographical spread by dropping the three non-Southern African countries mentioned above. However, given the active and almost religious interest that SADC has in keeping its membership as it is, coupled with the economic rivalry between SADC and COMESA,<sup>62</sup> it seems unlikely that a reduction in membership could even be imagined. SADC's interest in the political developments and fledgling democracy of DRC, as evidenced by the participation of three of its members – Angola, Namibia and Zimbabwe – in the DRC's armed conflict in 1998<sup>63</sup> indicates a perception that SADC is not up for 'Balkanisation'. A peaceful and stable DRC presents huge economic spinoffs for the region. This is indeed one of the key motivating factors for the investment of so much economic and political capital, as evidenced by regional and bilateral support for the peace talks and the subsequent first democratic elections, in 40-odd years, in 2006.<sup>64</sup>

Tanzania's membership of the EAC and the EALA presents yet another conundrum. Tanzania is a founder member of SADC, dating back to the days of the frontline states and through SADCC. The SADC Parliament agenda places Tanzania in the potentially invidious position of belonging to two regional parliamentary assemblies, both seeking to anchor the regional integration agenda of their RECs. If the new SADC Parliament were to gain legislative capacity, one wonders how Tanzania would respond to SADC regional policy or legislation that may be at variance with that of the EAC and the EALA. Would it be economically, financially and politically viable and beneficial for Tanzania to belong simultaneously to both the EALA and the SADC Parliament? How compatible are the parallel ambitious objectives of both the EAC and SADC to establish FTAs, customs unions and, possibly, common currencies for their regions?

All indications are that for Tanzania (and other members of the EAC), the long-delayed EAF is a crucial political and economic integration project. The EAC has moved quite rapidly in building its community institutions and closely integrating the peoples of East Africa. The fact that some SADC member states belong to multiple RECs will be a major headache, even for the AEC.

The third lacuna, which is related directly to the first two, is the costs associated with establishing and running a supranational parliament. As the experience of PAP shows, finance has been a major issue. For instance, the third ordinary session of PAP, which opened in Midrand, South Africa on 29 March 2006, presented key funding challenges. Of the proposed budget of US\$21

million, only US\$5,6 million was approved by the executive CoM (Mashele 2005). This was against the backdrop of AU member states defaulting on their financial obligations to the AU. PAP's financial challenges are symptomatic of the broader sustainability challenges faced by the AU itself. It has been observed, for instance, that 'fewer than 20 of the 53 AU member states (have been) able to pay their dues to the AU and the stark reality is that very few countries on the continent have hitherto demonstrated political and material commitment to PAP' (Mashele 2005: 108).

Reliance on benefactors for important political projects such as PAP and the SADC Parliament hardly augurs well for the African solutions for African problems mantra that underpins the African Renaissance of the AU and NEPAD. Whereas the large majority of SADC PF's programmes, including but not limited to elections, HIV and AIDS, regional integration and the Parliamentary Leadership Centre (PLC) are dependent on donors,<sup>65</sup> this would have to change if the SADC PF were to become the truly intergovernmental (parliament) body it wishes to be.

Then there is the sheer lack of interest and focus of the parliamentarians in the work of PAP itself as a potential mirror image of how SADC parliamentarians may position themselves. In one instance, it was found that 'when the house (parliament) adjourned on 11 April, there were only 100 parliamentarians left ... the parliamentarians who crammed the house during the official opening had either disappeared into thin air or joined shoppers at some of Johannesburg's tempting malls' (Mashele 2005: 108). How serious are the elected representatives about their duties as legislators and people's ombudsmen? Are they just a political elite believing that the taxpaying public does not matter much as long as their taxes bankroll the elite's travel and shopping opportunities, when they should be debating and making policies to address the continent's development challenges? Is there an appreciation that the scarce resources made available for PAP could be redirected to meet other pressing development challenges, such as sanitation, health, provision of clean water and the scourge of HIV and AIDS? What are the chances that SADC parliamentarians could be wired to conduct themselves any differently? What, in fact, is it that, in terms of orientation, background and training, separates a member of the SADC Parliament from a counterpart in PAP?

Financially, what chances of viability would the SADC Parliament have, depending, as it is expected to be, on the SADC budget? This is said to be one of the key concerns of the CoM. Even if the new institution were to be funded

directly from the annual contributions of national parliaments, as is currently the case with the SADC PF and as proposed in the DPSP, similar financial challenges as those besetting the AU and PAP are likely to visit the SADC Parliament. Ultimately, the source of funding is SADC member states' taxpayers. Regarding fundraising, which the prime movers of the SADC Parliament idea consider a parallel source of funding, one only needs to look to PAP for inspiration. One wonders how much has been raised so far by the PAP trust fund, which was proposed by the president of PAP during the third ordinary session (Mashele 2005).

In contrast to the SADC PF's arrangements, both existing and proposed, the core funding of PAP, EALA and the ECOWAS Parliament comes from the regional parliaments' respective mother bodies. This raises a question regarding the autonomy of the parliaments, given that final decisions on budgets are the preserve of the executive arm of government, over which such parliaments are expected to exercise oversight. Even in the case of the EALA and EP, which are fairly advanced supranational parliaments, the respective structures of heads of state and government retain considerable veto power especially on financial matters.

The funding structure is another factor related to the availability of resources and is expected to impinge on the operational efficiency and cohesion of the parliament. The DPSP envisages the retention of the current funding arrangements of the SADC PF through 'annual and equal contributions from national parliaments of state parties'.<sup>66</sup> This is the direct opposite of the ECOWAS Parliament arrangement, which provides for population-based representation and contributions to the running costs of the regional parliament. In the latter case, 'the populous Nigeria shoulders more than half of the budget' of the ECOWAS Parliament (Terlinden 2004: 10).

The equal contributions and equal membership formula envisaged in the DPSP would see South Africa and the DRC, with their estimated populations of 46 million and 66 million inhabitants respectively, having five members each and contributing the same amount as Lesotho and Swaziland, the latter with their respective populations of fewer than two million each. Whereas this confers a measure of equality and respect for smaller states by bigger ones, it brings into question the proportionality vis-à-vis the democratic representation equation. If the equal representation model that applies in all the regional parliaments of Africa and PAP itself were to be followed, Nigeria, whose estimated 126 million citizens are more than half the total population of the 15

**Table 5 Membership of the European Parliament in September 2001<sup>68</sup>**

MEMBERSHIP OF THE EUROPEAN PARLIAMENT		
Country	Seats in 2001	Seats decided at Nice
Germany	99	99
France	87	72
Italy	87	72
United Kingdom	87	72
Spain	64	50
Poland	-	50
Romania	-	33
Netherlands	31	25
Belgium	25	22
Greece	25	22
Portugal	25	22
Hungary	-	20
Czech Republic	-	20
Sweden	22	18
Austria	21	17
Bulgaria	-	17
Denmark	16	13
Finland	16	13
Slovakia	-	13
Ireland	15	12
Lithuania	-	12
Latvia	-	8
Slovenia	-	7
Cyprus	-	6
Estonia	-	6
Luxembourg	6	6
Malta	-	5
<b>Total</b>	<b>626</b>	<b>732</b>

member states of ECOWAS put together, would be represented in the ECOWAS Parliament by the same number of parliamentarians as any other member state, however small the size of its population. This is the opposite of the allocation of parliamentary seats in the EP.

In the EP, the number of seats is based on population size where Germany, France, Italy and the United Kingdom have the highest number of seats ranging between 87 and 99, while the least populated Luxembourg has 6 seats<sup>67</sup> as illustrated in Table 5.

The variable financial contributions formula, however, has its positive side, especially in terms of sustainability of membership-based organisations. Organisations whose members include affluent states could benefit from the comparatively higher contributions of those states to supplement the less affluent ones. In Southern Africa, for example, the more affluent South Africa and Angola would significantly subsidise less wealthy states such as Malawi, Lesotho, Madagascar and Swaziland. The challenge, however, arises with decision-making processes. Would a country contributing a far greater percentage to the budget of an organisation be expected to have similar influence and voting rights as those that contribute much less? How would that measure against the current mutual benefits in a community of member states with equal voting rights articulated in the Treaty?

Whatever financing arrangements and membership formula the proposed SADC Parliament adopts, due attention should be paid to these dynamics, particularly in view of the fragility of democracies and the generally weak and small economies of Southern African countries. In his critique of the proportionality vis-à-vis the democratic representation equation, Morara (2001: 5) adds another dimension. He argues,

Fixation with equal national representation leads to the neglect of important factors such as population density and size. The latter should ordinarily determine the level of representation, particularly when one takes into account that all the founding protocols proclaim that the parliamentary bodies are supposed to represent the people of the respective regional and not an accumulation of individual national interests.

Parliamentary constituencies under the constituency electoral system, which applies in most of Southern Africa,<sup>69</sup> are determined on the basis of population. In other words, each parliamentarian represents more or less the same number

of citizens in parliament. Therefore, equality in membership could be seen as an affront to proportionality and democratic representation based on numbers. The corollary to that is dictatorship of the majority, which in regional policy-making and legislation could easily tilt the benefits of development and integration in favour of the more populous member states at the expense of their less populous neighbours.

Another important dimension to this discussion is the presumption, as mentioned above, that, ideally, 'parliamentary bodies are supposed to represent the people of the respective regional and not an accumulation of individual national interests' (Morara 2001: 5). This raises the issue of the qualifications of national MPs vis-à-vis their counterparts in regional parliaments. Current arrangements in PAP, ECOWAS Parliament and the SADC PF allows that MPs elected on a national campaign platform, where they invariably articulated domestic (constituency) and national concerns, could be given the opportunity to articulate matters of regional concern and interest, and related policies. Nothing could be further from the truth. Precisely because at national level MPs in a constituency parliamentary system are elected on specific party tickets and manifestoes – except in the case of independents – the test for qualification as a candidate rarely transcends constituency boundaries, let alone national boundaries.

Even MPs elected under proportional representation on a national party list equally confine their commitments to domestic issues. It is unheard of for a political party or candidate to include in a campaign manifesto, issues around ending conflicts in other countries – unless such conflict has a direct and palpable bearing on local bread and butter imperatives – allowing free movement of people across national borders or fighting for the eradication of female genital mutilation in some other country in Africa. These are issues that are generally 'foreign' to constituents, who are primarily concerned with immediate issues of day-to-day survival. As these issues are extraneous to voters, they may not guarantee victory at the polls. However, this phenomenon is not an entirely African approach to elections.

Fundamental to whether or not a voter chooses party A over party B is the extent to which party A is viewed as having higher potential over party B to make a direct difference in the voter's life. If the withdrawal of US and UK troops from Iraq or Afghanistan is viewed by the average American or British voter as directly related to a secure US or UK, it becomes a key consideration when voting. Because human beings, by their very nature, are generally concerned

with their own safety and security before those of others, votes will go to candidates perceived most likely to bring troops back home. In the example above, therefore, it is not primarily because US and UK troops have brought democracy to Iraq or Afghanistan, but rather, peace to the US or the UK.

Against this background, therefore, regional parliamentary arrangements require a different type of MP from one who campaigns and is elected in national legislatures. Regional parliaments require MPs who are adequately sophisticated to appreciate matters that happen in and beyond their nation state have a bearing on their own state, other states and the region as a whole. Take for example, the crises of HIV/AIDS, human trafficking, money laundering, water, energy, and poaching of endangered natural resources. Realistic regional laws and policies can be developed only if the MPs involved sufficiently understand the transboundary nature of these crises and how nations must work together in mutually beneficial ways. Regional parliaments, therefore, require MPs who are conversant with the import of the axiom 'no nation is an island'. Such MPs would be better placed to appreciate the importance of enhanced regional integration and be able to debate and articulate to their compatriots, ways in which free movement of peoples of Southern Africa across national borders augurs well for local economic development as it does for other countries in the region.

To attract the right calibre of regional MPs and make the regional integration project worth the effort, time and investment, selection modalities have to be changed. Sending national MPs to represent their countries in regional parliamentary structures serves only to mute constructive and knowledgeable debate, but may also create a situation where nationalistic tendencies and localised interests dominate debates. Specifically, serious consideration should be given to direct election of regional MPs, in the similar way as national legislators are elected. In addition to ensuring that the selected MPs are chosen for their knowledge, commitment and articulation of regional issues, direct elections will go a long way to confer legitimacy on regional parliaments such as the proposed SADC Parliament. Once regional MPs are directly elected, as is the case in the EP, citizens of different countries will be able to identify with, lobby and discuss issues directly with their easily recognisable representatives. The issues raised above are succinctly summarised by Wanyande (2005: 67):

For any organisation, and especially a public political organisation...  
to be effective, it must enjoy a strong sense of legitimacy and popular

support among its constituents...Legitimacy of a regional parliament... is a function of at least three factors. The first relates to the method of its coming into being, and more particularly the method of recruiting its members. The second is its mode of operation or of conducting its official business. Finally, and related to this, is the issue of performance. The legitimacy of the regional parliament will be affected by the extent to which it performs its functions and carries out its mandate according to the expectations and to the satisfaction of the people.

In reference to the case of EALA and in favour of direct election of members of regional assemblies, Morara (2001: 2) asserts that, 'in the spirit of the people-centred cooperation that the EAC professes, it is imperative that the people of East Africa have the opportunity to elect their own representatives to the regional assembly. Those elected must also enjoy security of tenure to release them from the shackles of survivalist concerns, and thus enable them to effectively concentrate on community affairs'. The ECOWAS Parliament, PAP and the proposed SADC Parliament are not immune to these challenges!

# 9 Is the SADC Parliament an ideal whose time has come?

The question of whether the SADC Parliament is an ideal whose time has come could be answered yes and no. The former stems from contemporary thinking on the enhanced participation of the ordinary people of Africa in public policy development and implementation, especially in hitherto closed clubs of presidents, ministers and officials. The organisational architecture of the new AU envisages a role for elected representatives and non-state actors through such institutions as PAP and the ECOSOC. If effectively used and allowed to function, these institutions could provide alternative voices for the peoples of Africa outside the bureaucracy of the executive. PAP, in particular, provides hope that once fully functional and legislative, it should bring to fruition the wishes of the ordinary men and women across the continent by bringing pressure to bear on the executive structures of the AU.

Even in its nascent stages and without lawmaking powers, PAP has shown some potential to strive to meet the expectations of the people of Africa to do business differently from the OAU. Many, the author included, remember the OAU with very little nostalgia, as a club of presidents who, despite their good intentions of liberating Africa from the yoke of colonial oppression and apartheid, were hamstrung by, among other challenges, the archaic policy of

non-interference in the internal affairs of sovereign states (Malan 1997). Yet, in taking the unprecedented step of sending an observer mission to Darfur in Sudan, PAP struck the right arpeggio with most on the continent and beyond, which was understandably frustrated by the continental leadership's inclination to bury the proverbial head in the sand when faced with key governance and human rights challenges (Malan 1997).

The establishment of a functional and effective regional parliament for Southern Africa augurs well in two key ways. First, through their elected representatives, ordinary people may be able to hold SADC to account for decisions and policies. In its 27-year history, SADC has developed roughly one regional protocol, declaration or other agreement per year. Sadly, 'the ratification of SADC agreements and harmonisation of ... laws have been painfully slow. Equally slow and ineffective has been the implementation of such agreements' (SADC PF 2006: 28). In the absence of channels for popular participation, SADC may well remain an exclusive club of presidents and ministers or a road-show of sirens and expensive limousines that comes to town once a year, causing the local municipal authorities to spruce up the town's image, only to revert to business-as-usual as soon as the road-show is over. Except through a regional parliament and very importantly, robust civil society participation and investigative media, it is highly unlikely that citizens of the region would identify with the objectives and/or achievements of these institutions.

The second benefit stems from the link that a regional parliamentary structure, if effectively implemented, could provide between the sub-regional and the continental policymaking processes. The building-blocks status that the PAP Protocol confers on the parliamentary fora of RECs vis-à-vis PAP is a useful window of opportunity. One of the conundrums of the emerging architecture of parliamentarianism in regional integration in Africa is the yet undefined functional relationship among regional, sub-regional and national parliaments. Except in the case of the EAC, where through treaty law, the competences and relationships between the EALA and national parliaments of EAC member states have been addressed, the spheres of influence and competence between PAP and regional parliaments remain unresolved, thus raising the risk of competition for space as opposed to complementarities.

In view of the fact that Southern Africa is one of the few regions that do not as yet have a regional assembly, the region may miss some of the benefits that accrue from formal interactions with PAP. Although there is a Southern

African caucus within PAP, it, as with all others from the five regions of Africa, is composed only of representatives of national parliaments. Representatives of national parliaments in PAP need not be members of the regional parliament. Even assuming they were, one could prophesy that their mandates would most likely be different and may not necessarily simultaneously represent the two institutions and their countries.

The answer 'no' relates to the apposite challenges of relevance and impact. Other than assertions to the effect that Southern Africa is lagging behind other regions that have established regional parliaments, there is a palpable incoherence in the public discourse on the competitive advantages of such a parliament. At the time of conducting this study, there was no practical evidence – at least in the public domain – of the issue having been discussed in more than two national parliaments and of a clear, binding and unequivocal resolution taken on the matter. This is despite the fact that when the parliament was mooted, it was agreed that parliamentarians would table the matter in their national parliaments to build national consensus.<sup>70</sup> Could it also be that within national parliaments, the objective of establishing a regional parliament is, at best, not shared and at worst, unknown? The lacklustre performance of PAP in its first five years, and the mudslinging, and allegations and counter-allegations of impropriety that marked the transition from the inaugural presidency of PAP to a new leadership has not helped matters. Generally speaking, PAP has also been associated with a culture of *per diems*, wherein members of PAP have been accused of seeking unusually high subsistence allowances to perform their public service functions.

The common view seems to be that, to the extent that African leaders have been reluctant to grant oversight and lawmaking powers to PAP, there is very little chance that regional leaders would beat their continental counterparts at their game. Related to this is the often-asked question: are parliamentarians ready and willing to take on sub-regional and regional roles? Has the orientation of parliamentarians shifted sufficiently to allow for robust issue-based debate and policymaking beyond the nation state?

A further source of doubt arises from the scourge of powerful presidents and the entrenched hegemony of the executive, at least nationally. It would seem the executive is always unwilling to share, let alone cede, some of its traditional powers in the public policy- and lawmaking arena. The experiences of backbenchers in most parliaments of Southern Africa vis-à-vis their senior party

and cabinet colleagues are very instructive. In a number of parliaments, decisions of cabinet are fait accompli. Backbenchers may also be arm twisted and compelled to agree with decisions of the cabinet/executive. The head of state, who is almost always the leader of the majority/governing party, is a dispenser of political patronage, without which the political careers of most politicians are almost always doomed. As a result, the role of most national parliaments has been depressing. Not many citizens and government officials hold parliaments and parliamentarians in high regard (Afrobarometer 2009).

Predictably, the assurance by Mugabe at the 26th Plenary Assembly of the SADC PF from 18 to 28 November 2009 that 'Zimbabwe fully supports the establishment of the SADC Parliament and ... would want the issue to be brought up, debated and concluded at the next SADC Summit of Heads of State and Government in 2010',<sup>71</sup> never saw the light of day. Ironically, as mentioned previously, it was Mugabe's government that scored a regional first by refusing not only to abide by rulings of another very important and properly constituted Tribunal, but dismissing its very existence as a nullity in law.

While this is not a new pledge, it is the first time that a head of state has made a public commitment to have the issue of the SADC Parliament 'debated and concluded' at a specific summit. Perhaps, the sentiment among SADC heads of state and government is shifting in favour of a SADC Parliament. Given the history of previous pledges, however, nothing different should be expected.

# 10 Conclusion

The issues raised in this study point in one direction: the performance of PAP thus far; SADC region's strong sentiment on sovereignty of member states; limited resources, and SADC's vast and varied ambitions are better served first of all by strengthening national-level regional integration mechanisms, eg. speedy ratification of protocols and declarations, domestication of principles contained therein, and amendment and enactment of laws and policies to facilitate compliance and achieve greater integration. The proposed (and delayed) transformation of SADC into an FTA by 2008 and the creation of a SADC customs union by 2010, both of which were intended to bring countries of the region significantly closer and boost intraregional trade, would require significant national-level legislative interventions. Parallel to that is the need to strengthen national legislatures to improve their functions – including oversight on the capacity of the state to fulfil national and regional commitments. The almost rubber-stamp role of most Southern African countries does not augur well as a foundation for the proposed SADC Parliament.

Hughes (2006: 1) observes that, 'in SADC, parliaments are particularly weak and the executive branch is overwhelmingly strong'. This weakness of parliaments in national public policymaking processes begs the questions of

whether the proposed regional parliament will not itself be a glorified ‘talking shop’ (Richardson 2001: 116). Some may have already ascribed this infamous label to PAP. The fact that PAP’s ascendancy to a continental body with full legislative powers has been delayed and is unlikely to come soon, indicates that African states are at a point in their political development at which the supremacy of the executive remains paramount and uppermost in the minds of governments.

One could also examine the challenges of the smaller but older EAC for evidence of the need for long-term and thorough planning for an enhanced role of the legislature and regional institutions. Although commendable and significant progress has been made in imbuing the EALA with a truly legislative character, presidents retain considerable influence on the extent to which the powers of the EALA may be exercised (Wanyande 2005). Research shows that historically, linguistically and culturally, there is more that brings together than separates the member states of the EAC – at least the founding states, namely Kenya, Tanzania and Uganda. The EAC’s regional project actually dates as far back as 1967. One could argue, therefore, that over the years, the EAC has been able to exorcise its ghosts, hence the seeming accord towards an EAF.

By the same token, it is hardly conceivable that what took the 27-member EU and the EP some 56 years of persuasion and cajoling, could be achieved in SADC in 27 short years. This is especially obvious given the emphasis on the inviolability of sovereignty of member states, varying levels of economic and political development, and the apparent lack of mechanisms to ensure full compliance with the Treaty. Other crucial factors include the apparent paucity of political will to integrate fully and the fact that the *raison d’être* of SADC is yet to filter to and resonate with ordinary citizens as a bread and butter issue. Although SADC has been in existence for slightly over a quarter of a century, there is very little doubt that if the question of what would be lost if SADC were to disintegrate were to appear in an undergraduate economics or political science exam, most students would fail.

Politically, rather than say ‘no’ to a SADC Parliament – which seems to be SADC’s default position – the Summit is understood to believe that ‘priority should be given to PAP and to strengthening national parliaments, and that establishing a regional parliament would be expensive’ (Oosthuizen 2006: 190). A cost-benefit analysis of PAP’s performance suggests that the Summit may have a valid point.

Against this background and to the extent that parliaments continue to be the weakest link among the three organs of the state at national level, the SADC PF may be better off striving for stronger, more professional and more accountable national parliaments. Until there is a groundswell of national and regional consensus and competence among MPs, the SADC PF could consider continuing to operate ‘independently of the executive and its immediate consent, provided that sufficient funds can be raised’ (Terlinden 2004: 9). Unlike PAP, whose financial requirements are met by and therefore subject to the AUC, the SADC PF’s resources are subject only to national treasuries of SADC member states. The Plenary Assembly, Executive Committee and Secretariat decide where and how resources are used. Therefore, the SADC PF enjoys relative financial autonomy when compared to other parliamentary fora of RECs in Africa. For this reason – for good or bad – the SADC PF has been able to take positions that sometimes do not conform to mainstream SADC thinking. A case in point was the SADC PF’s infamous pronouncement on the 2002 elections in Zimbabwe, which precipitated a wave of angry protestations and even claims that the SADC PF is an illegitimate organisation – at least within SADC institutional arrangements.

That notwithstanding, should the SADC Parliament agenda remain on the political radar and assuming there is consensus and conviction within SADC on the matter – which is not the case now given the asymmetrical reception of the matter so far – the SADC PF might want to consider a radical change of strategy. To move an idea forward that, to all intents and purposes, seems stuck in a political swamp, it would be in the strategic interest of the SADC PF to engage SADC’s real powerbrokers, the CoM. If, as it seems, the CoM is not convinced or is bypassed, it is very unlikely that any amount of lobbying the highest echelons of power in SADC would pay dividends, at least in the short to medium term. Seemingly, by approaching the Summit or individual heads of state and government, without reference to the CoM, the SADC PF may have lost the opportunity to draw on and retain the attention of a crucial policymaking structure of SADC.

To recap, in SADC, policy dialogue is supposedly generated at national level where stakeholders’ discussion in (SADC) national committees defines and refines the member states’ position on issues coming before or proposed for consideration. National committees relate directly to either the SADC Secretariat or the SCO. According to the Treaty, the SCO ‘consists of one permanent

secretary or an official of equivalent rank from each member state, from the ministry that is the SADC national contact point. The standing committee (is) ... a technical advisory committee to the CoM. The standing committee ... process(es) documentation from the Integrated Committee of Ministers (ICM) to the Council'.<sup>72</sup> The 'CoM ... consist(s) of one minister from each member state, preferably a minister responsible for foreign or external affairs. It (is) ... the responsibility of the CoM to: ... oversee the functioning and development of SADC... (to) recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs.'<sup>73</sup> There is no evidence thus far that structures empowered by the Treaty 'to process documentation from the ICM to the CoM',<sup>74</sup> to ensure that the CoM is in a position to 'recommend, for approval to the Summit, the establishment of directorates, committees, *other institutions and organs*'<sup>75</sup> (own emphasis) have been adequately consulted on, and convinced on the merits of, the SADC Parliament.

In targeting its diplomatic efforts at the apex of SADC – the Summit – the SADC PF may have jumped the gun, in that, to adulterate a biblical analogy, no one comes to the Summit except through the CoM. Even when the SADC PF was established 1997, a presentation was made to the CoM through the SADC Secretariat. Subsequently, the CoM made a positive recommendation, which was duly endorsed by the Summit.<sup>76</sup> Why the SADC PF chose a different route to advance the transformation agenda remains unanswered. One would have hoped for a situation where the proposal to transform the SADC PF into a regional parliament was presented to at least the ICM, for onward submission to the CoM. Perhaps, in taking this route, the leadership of the SADC PF was mindful of Adedeji's caution about the subordination of PAP 'not directly to the will of the people but to the authority of the executive arm of governance' (Adedeji 2003: 52). However, given that the lobbying initiatives of the SADC PF have largely bypassed the Council, it would seem the subject of the SADC Parliament stands very little chance of being substantively debated by the Summit, unless as stated earlier, Mugabe makes good on his recent pledge, or another head of state advocates the idea at the Summit, the harsh reality that SADC PF has to live with – at least for the foreseeable future – is that international policymaking is such that the executive (and not the legislature) is the ultimate centre of power and decision maker.

Should the SADC Parliament be established, it would become one of the integral institutions of SADC under Article 9(1) of the Treaty. This would shed

the new institution of its current ambivalent definition 'autonomous institution'. It is not clear what was intended or implied by 'autonomous', which the Summit endorsed when it approved the establishment of the SADC PF in terms of Article 9(2) of the SADC Treaty in September 1997. What is known, however, is that autonomy seems to have deprived the SADC PF of any formal linkage with SADC structures. Also, in view of the SADC PF's autonomy, the secretariats of SADC and the SADC PF have no formal or structured linkages and information sharing, hence there seems to be no formal technical discussions on the matter. Consequently, SADC PF reports and recommendations have not had a way of feeding into the decision-making processes of SADC, except perhaps when they are filtered through the national structures that relate to SADC, such as the national committees.

By remaining outside the mainstream of SADC, the SADC PF will continue to deprive the region of the crucial oversight and accountability of the executive. In the words of the founding chairperson of the SADC PF, the late Dr Mose Tjitendero, 'SADC is, for lack of a better word, executive-orientated. The CoM ... appears to be both the legislative and executive body' (AWEPA African-European Institute, 1993: 23). It can, therefore, be forcefully argued that in the interests of transparency, accountability and participation of the peoples of SADC in decisions that affect their lives, SADC requires effective and efficient parliamentary and civil society dimensions.

Credit is due to the SADC PF for seeking to regularise its standing within SADC, albeit through transformation into a legislative body. With hindsight, one is persuaded to argue for an interim arrangement where the SADC PF is formalised through a SADC protocol along the same lines as PAP and with similar powers and functions. Even without being a 'bona fide' parliamentary institution of SADC, the SADC PF has demonstrated immense potential in setting a parliamentary agenda for elections, HIV/AIDS and gender standards. Member parliaments of the SADC PF, equally, have invested significantly to ensure that their footprint is felt, if not within SADC, at least among inter-parliamentary bodies such as the Inter-Parliamentary Union (IPU) and the CPA. SADC PF's recent work to develop benchmarks for democratic legislatures<sup>77</sup> is testimony of its path-finding role in improving democratic consolidation in the region. It cannot be wasted.

In preparation for eventual transformation into a sub-regional parliament, the SADC PF needs to reconfigure its standing committees to mirror SADC

directorates (and units). As in the ECOWAS Parliament, the standing committees will shadow the directorates and follow progress in policy development and implementation. Thus, the SADC PF will be able to inform the peoples of SADC on the pace of regional integration and development, including challenges and opportunities. In addition, pursuant to its constitution, the SADC PF should work closely with civil society and intellectual communities, notably universities, research institutions and think-tanks, the SADC Council of Non-Governmental Organisations, Southern African Trade Union Coordination Council, Southern Africa Business Forum and the SADC Lawyers Association. Through these networks, the regional integration project will achieve greater visibility and legitimacy across the sub-region.

In conclusion, there is no doubt that SADC requires a parliamentary dimension to complement the current efforts of the executive to bring its nations and economies closer. The dimension will foster accountability, broader participation and political legitimacy in the SADC regional integration project. In addition to making laws for the sub-region with national parliaments, a SADC Parliament is potentially an important long-term vehicle through which parliamentarians could ensure the speedy ratification of protocols in national parliaments, monitor the domestication of such instruments, monitor and report on the pace of implementation of such instruments, debate issues of regional interest and concern, and monitor SADC fiscal responsibility. From a financial and strategic political perspective, however, a SADC Parliament is unlikely in the next two years or so. It remains good idea, but its time, politically speaking, is yet to come.

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- 16 The United Kingdom's Westminster Parliament – around which most Southern African parliaments are modelled - comprises a democratically elected lower House called the House of Commons, and the unelected upper House referred to as the House of Lords. The latter is composed of Lords Spiritual, who are senior bishops of the Church of England, and the Lords Temporal or members of the peerage, who are appointed by the queen as head of state on advice of the prime minister as head of government.
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Cette monographie constitue une analyse des perspectives d'une assemblée législative régionale pour la Communauté de Développement d'Afrique Australe (SADC). Elle examine les menaces et les défis que peut présenter une telle initiative dans une sous-région où, au cours des 30 dernières années du projet d'intégration régionale, les décisions ont été prises par l'organe exécutif sans véritable implication des autres branches du gouvernement ou acteurs non-étatiques. Par ailleurs, l'étude examine les mandats, pouvoirs et fonctions respectifs de l'Assemblée Législative de la Communauté Est-Africaine, du Parlement de la CEDEAO, du Parlement panafricain, et du Parlement européen pour apporter des informations sur l'avantage concurrentiel d'une institution législative sous-régionale pour la SADC. Enfin, l'étude émet des recommandations sur les voies et moyens permettant d'atteindre l'objectif visant à établir un parlement de la SADC.

This monograph is an analysis of the prospects for a regional legislative assembly for the Southern African Development Community (SADC). It explores the threats and challenges posed by such an initiative in a sub-region where, for the past 30 years of the regional integration project, policy making has been executive-centric without much involvement of other arms of government and non-state actors. The study further explores the respective mandates, powers and functions of the East African Legislative Assembly, the ECOWAS Parliament, the Pan African Parliament, and the European Parliament to inform the competitive advantage of a sub-regional legislative institution for SADC. Finally, the study makes recommendations on ways and means through which the objective of establishing a SADC Parliament could be realised.

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