

Booklaunch of the maiden edition of the SADC Law-Journal and the 10th edition of "Monitoring Regional Integration"

SPEECH FROM ANDRÉ DU PISANI AT THE LAUNCH OF THE PUBLICATION OF SADC LAW JOURNAL, JULY 22ND 2011, GOETHE CENTRE, WINDHOEK/NAMIBIA

Address of Welcome

Introduction

Launching a book and a scholarly journal, such as *The SADC Law Journal* Volume One (2011) signals a major advance in our thinking and humanness, for such scholarly publications reinforce the belief in the intrinsic value of law and public reasoning as markers along the long, difficult, and often twisted road, of improving jurisprudence and the lives of those who live in the SADC-region.

Let me, at the outset, offer two caveats. First, I am not providing a review of the publications, and secondly, in the interest of time, I shall not refer to every article and chapter contained in both publications.

At the heart of *The SADC Law Journal* Volume One (2011) is the insistence that law replete with all its pluralities and imperfections, is an integral normative seam of the regional integration project – a project that traverses culture, economics, trade, education and training, labour, politics and security. But there are always choices to be made between alternative assessments and understandings of what is just and reasonable. Often, such choices are made at the level of high politics as illustrated by recent political decisions that culminated in the suspension of the SADC Tribunal, arguably

a key string in the bow of regional integration and the access to law and the delivery of justice for the people of the region.

The preoccupation with economic and trade integration within SADC, however important, the contributors to *The SADC Law Journal* as well as to *Monitoring Regional Integration in Southern Africa 2010*, all point to the evidence that democracy and political and civil rights tend to enhance freedoms of other kinds (such as human security and economic freedom itself) through giving a voice, to the deprived and the vulnerable. That is, in the words of Amartya Sen, is "an important issue, and closely linked with democracy's role in public reasoning and in fostering 'government by discussion'"¹.

Justice and Law

The constructs of justice and law are immensely important and moved people in the past and will continue to move people in the future. And public reasoning and critical scrutiny through informed research can indeed offer much to extend the reach and to sharpen the content of these vital constructs, and in this respect *The SADC Law*

¹ Amartya Sen (2009) *The Idea of Justice*. London: Penguin Books.

Journal provides food for thought. And yet, as we now know in this region (and elsewhere in the world), it would be a mistake to expect that every decisional problem for which the constructs of justice and law might conceivably be relevant would, in fact, be resolved through reasoned scrutiny such as provided for in law. And it would also be a mistake to assume, that since not all disputes can be resolved through critical scrutiny, we do not have secure enough grounds to apply the ideas of justice and law in those cases in which reasoned scrutiny yields a conclusive judgment. We must go as far as we reasonably can.

Having read most of the contributions to both publications, one is tempted to ask: Did the recent decision of the last SADC Summit on the SADC Tribunal, go as far as it reasonably could? Or was it based on an antiquated understanding of *sovereignty* exercised by a 'club of presidents' as one analyst rather inelegantly recently referred to SADC?

While sovereignty typically requires respect for territorial integrity and for the rule that treaties cannot bind a state unless it has given its consent to be bound. As Gerhard Erasmus points out in his contribution to *The SADC Law Journal*, the converse also holds: "it is an act of sovereignty to become party to an international agreement or a member of an international organisation". Adding, "This has additional implications: states cannot invoke their national law or constitution as a justification for not respecting their international obligations. If that were possible, there could be no international law. Change of government in a particular country will not affect the bonding nature of existing agreements to which that state is a party; States are the subjects of public international law – not governments"².

² Gerhard Erasmus (2011) 'Is the SADC trade regime a rules-based system?', *The SADC Law Journal Volume One 2011*, p. 23.

Compliance with SADC Tribunal decisions

One of the most topical contributions to *The SADC Law Journal*, wrestles with issues of compliance with decisions of the SADC Tribunal and its capacity for enforcement, and recommends that SADC member states adopt enforcement measures to address issues of non-compliance³. In an informative research note, Werner Scholtz explores the roles, functions and terms of reference of the SADC Tribunal. The author concludes on a rather contradictory note: 'The de facto suspension of the Tribunal subsequent to Zimbabwe's non-compliance with its orders creates the impression that SADC members are not committed to regional integration under the auspices of SADC. Conversely, the establishment by the same member states of an independent Tribunal with wide jurisdiction affirms that SADC is a system based law and order and respect for the rule of law'⁴.

Coincidentally, Richard Frimpong Oppong addresses the legal and political challenges in enforcing judgments of the SADC Tribunal in the domestic courts of member states, in a closely-reasoned contribution to *Monitoring Regional Integration in Southern Africa Yearbook 2010*. Oppong concludes differently to Ndlovu, namely that in important respects, "the existing state of national laws is inadequate to meet the community treaty's demand that national civil procedure rules on enforcement of foreign judgments be used to enforce judgments of the community courts"⁵. The writer then pro-

³ Precious N. Ndlovu (2011) 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal', *The SADC Law Journal Volume One*, pp. 63-79.

⁴ Werner Scholtz (2011) 'Review of the role, functions and terms of reference of the SADC Tribunal', *The SADC Law Journal Volume One 2011*, p. 201.

⁵ Richard Frimpong Oppong (2011) 'Enforcing judgments of the SADC Tribunal in the domestic courts of member states', *Regional Integration in Southern Africa 2010 Yearbook*, pp. 115-142.

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vides examples of model legislation on the enforcement of judgments of community courts that could overcome some of the challenges identified in the chapter.

Also in the *Monitoring Regional Integration in Southern Africa Yearbook 2010*,

Afadameh-Adeyemi and Kalula, provide an admirable re-examination of the legal and institutional autonomy of the Southern African Development Community (SADC). Their contribution should be read together with those mentioned above, for there it resonates with some of the concerns addressed in *The SADC Law Journal*.

Perhaps recent developments around the SADC Tribunal underscore the fact that regional integration itself is by and large still a shallow process. Once the Tribunal had to rule on matters that carried the seeds of potential division and conflict within them, especially in a symbolic sense of challenging the liberation mythology that permeates the politics of some of the SADC member states, its days were numbered. If such an interpretation is warranted, then it tells us that the entire project of regional integration in its different dimensions is more about regime survival and the politics of resource mobilization, principally by state elites.

Trade Law and dispute settlement

Other timely contributions to *The SADC Law Journal* deal with key aspects of trade law and the degree to which dispute settlement processes emanating from the World Trade Organisation (WTO) can and should be embedded in Annex VI of the *Protocol on Trade in the Southern African Development Community* (SADC).

Read together with the article in *The SADC Law Journal* that explores 'Regional Trade Integration Strategies under SADC and the EAC: a comparative analysis' by Mutai, and the chapters on 'The inter-regional mobility aspects of the proposed Free Trade Area' by Kathleen Rubia; 'Intra-African trade in Southern and Eastern Africa and the role of South Africa' by Ron Sandrey, and 'An assessment of the Trade, Development and

Cooperation Agreement' (also by Ron Sandrey) all published in *Monitoring Regional Integration in Southern Africa 2010 Yearbook*, the reader is provided with a current status report on trade and the politics of trade in SADC and beyond. These contributions to both publications offer much in terms of conceptual and policy-based understandings of the politics of trade as they negotiate their way through complex terrain.

Social policy

The *SADC Law Journal* also carries articles that explore matters at the heart of social policy. One such article is that by Marius Olivier. In his contribution, the challenge of enhancing access to South African social security benefits by SADC citizens within a multilateral framework breaks new ground.

African philosophy of Law

I was particularly excited when I read my colleague, Clever Mapaure from the Faculty of Law at The University of Namibia (UNAM), contribution on the relevance of African values and traditional African philosophy of law in a globalizing world. Mapaure writes with a feel for history and conviction on 'traditional' African philosophy of law. His insightful contribution raises many important epistemological and philosophical questions, especially since Africa in the words of the Ugandanbased scholar, Mahood Mandami, 'has not had the equivalent of the Enlightenment'. This engaging contribution provides compelling evidence that the Western world is not a universal referent when it comes to the philosophy of law. A similar argument can also be made in respect of ethics and other moral value systems.

Security

Specific dimensions of public and human security feature in articles in both publications. Charles Goredema teases out the topography of drugs and violent crime in southern Africa in his contribution to *The SADC Law Journal*. André du Pisani 'paints' on a slightly larger canvas when he mines

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the security dimension of regional integration in SADC and provides an update of the most salient developments in the security domain, particularly since 2006 in his contribution to the *2010 Yearbook*. Writing in the same publication, Christian Peters provides a useful and critical rendition of SADC in respect of both its 'hardware' and 'software' in a chapter titled: 'Is SADC losing track?'

Peters concludes that: 'SADC has not (yet) lost track but risks to lose the necessary momentum to carry regional integration further. Currently, there is a mismatch between the political fundamentals of regional integration and economic ambitions resulting in a reduced commitment for deeper regional integration, especially when questions of national sovereignty are at stake'⁶.

Case Reviews

Apart from the articles, *The SADC Law Journal* also contains two important case reviews, one of which relates to the locus standi and the grounds for jurisdiction of the SADC Tribunal in *United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Alaye Jogoo (T) 01/2009*.

The value to researchers and practitioners alike of *The SADC Law Journal* is further enhanced through the Journal carrying SADC Protocols (The SADC Protocol on Tribunal and Rules of Procedure Thereof) and book reviews.

Conclusion

Finally, I wish to unreservedly commend the initiators, editors of and contributors to both publications. Both are not only splendid publications – thoughtful, scholarly and rich in ideas – but also reflect the multiple geometry that is SADC; the challenge is more than intellectual – it is also to improve the

lives of and to restore hope to all our people. We should be academics and dealers in hope, for that is what true leadership is all about. To all that made these publications possible, our deepest appreciation and thanks for enriching scholarship and the ideas that underpin it.

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⁶ Christiaan Peters (2011) 'Is SADC losing track?', *Regional Integration in Southern Africa 2010 Yearbook*, p. 166.