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Exploring a constitutional framework for African integration and African Union law

Abstract

African Union (AU) law is a recently developed term. As yet, its content remains largely unmapped and open to discourse by scholars and legal practitioners. AU law points to a legal space that needs to be identified and developed to serve post-colonial Africa as a continent. Within the broader context of regional integration law and politics, AU law refers to a society's response on how to self-regulate instead of being regulated by the other. At the same time, integration law would empower Africa to compete successfully in a globalised context based on self-interest instead of ideological constraints.

Institutional development within the AU, coupled with a commitment to democracy, has contributed to a slow but steady integration process in Africa. The paper explores the link between the need for supranational rule-making capacity within the AU and achieving closer political and economic integration. It is suggested that such powers will form the backbone of a corpus of binding AU law and the foundation for a Pan-African rule of law. Given the prominent role European Union law plays in European integration, the question is posed whether there is a similar role to be played by African Union law in African integration. Although the EU serves as a well-developed model for continental integration through law, it has also shown itself to be less than perfect given the number of crisis it faced over recent years – of which Brexit is but one example. The development of AU law should heed the lessons learnt from the EU's experience.

The establishment of AU law depends on the capacity of the AU institutions to take decisions that will bind its member states as a matter of law. Identification of potential sources of AU law-making powers requires a careful reading of the AU's various constitutional treaties which establishes the AU and its institutions. It is suggested that a constitutional framework should be therefore be the starting point in the discussion on the conceptualising of AU law. The nature of these powers, whether they are supranational, policy or recommendations will determine the level

of African integration and whether an 'ever closer union' in Africa can evolve as has happened in Europe.

Within such framework, the Pan African Parliament (PAP) seems like the obvious institution to exercise legislative powers, whilst at the same time addressing the lack of democratic legitimacy the AU faces. African leaders, however remain reluctant to cede the required sovereign powers needed by the PAP to engage in AU law making.

1. Introduction

In 2013, African heads of state and government pledged their commitment to progress in eight key priority areas, viz African identity and renaissance, the continued struggle against colonialism and the right to self-determination, continental integration, social and economic development and transformation, peace and security, democratic governance, determining Africa's destiny and fostering Africa's place in the world.¹ This resulted in the adoption of Agenda 2063,² a Pan-African people-centered vision and action plan aimed to position Africa for growth over the next 50 years – an ambitious plan that embodies Africa's firm commitment to 'resolutely move towards continental unity'.³ The transformation called for is built on aspirations underpinned by the important role of law as well as the rule of law. Law is central particularly to aspirations 2 and 3 of Agenda 20163 where African Union (AU) member states commit themselves to an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa's Renaissance; and an Africa of good governance, democracy, respect for human rights, justice and the rule of law.

This paper builds on an earlier publication on the role of AU law in African integration⁴ which places the AU's capacity to take binding and enforceable decisions as central to the furtherance of an African integration agenda. It is suggested that supranational law emanating from an invigorated and reformed AU can foster democracy, human rights, justice and the rule of law. Supranational powers will form the backbone of a corpus of binding AU law and the foundation for a Pan-African rule of law. Given the prominent role European Union (EU) law plays in European integration, the question is posed whether there is a similar role to play for

1. Kaitlyn De Ghetto, Jacob R. Gray & Moses N. Kiggundu, "The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research," *Africa Journal of Management* 2 (2016) - Issue 1. Published online: 25 Feb 2016.

² "About Agenda 2063." <https://au.int/agenda2063/about>

³ "Key documents of Agenda2063." Last modified 12 October 2014.

<https://au.int/en/documents/20141012/key-documents-agenda2063>

⁴ Michele E. Olivier, "The role of African Union law in integrating Africa," *South African Journal of International Affairs* vol 22, issue 4 (2015): 513-533. Available at:

<http://www.tandfonline.com/doi/full/10.1080/10220461.2015.1119718>

AU law in African integration? Although the EU serves as a well-developed model for continental integration through law, it has shown itself to be less than perfect given the number of crises it faced over recent years. Nevertheless, embarking on the development of AU law should heed the lessons learnt from the EU's experience in this regard.

The establishment of AU law depends on the capacity of the AU institutions to take decisions that will bind its member states as a matter of law. The identification of potential sources of AU law-making powers requires a careful reading of the AU's various constitutional treaties establishing the AU and its institutions. It is suggested that a critical evaluation of the AU's constitutional framework should be an important discussion point in the realisation of the Agenda 2063 aspirations. The powers of law-making, implementation and enforcement exercised and overseen by AU institutions will determine the speed and success of African integration and whether Africa will follow the success of the European integration experience. Within such a framework, the Pan African Parliament (PAP) as the obvious institution to exercise legitimate legislative powers, will be considered here.

2. AU law and decolonisation

Like Europe, Africa should establish its own legal order to cement its independent voice and to position itself as master of its own destiny. This should be established at a continental level and complement and strengthen domestic legal systems where binding AU decisions will be implemented. Thus far, the AU has not created a body of binding law due to the fact that the power to do so is absent from its constitutional instruments, most notably the Constitutive Act of the AU.⁵ Although there is a significant body of treaties adopted under the auspices of the AU and its predecessor the Organisation for African Unity (OAU), these do not bind all AU members as they leave each the choice to become a party or not. Ideally, Africa should be integrated through enforceable law emanating from an AU representing African citizens, thus opening a space for a Pan-African rule of law. The absence of such a legal framework makes it challenging to achieve the integration targets through coordination and cooperation envisaged by Agenda 2063.

⁵ "The Constitutive Act of the African Union," adopted in 2000 at the Lome Summit (Togo), entered into force in 2001, <https://au.int/en/constitutive-act>.

Self-regulation through African law applicable at a Pan-African level/rule of African law adds another layer to the current discourse of decoloniality, a political and epistemological approach aimed at liberation of ex-colonised people from global coloniality and the implied approach to knowledge (and the law).⁶ It challenges the hegemony of the west and global imperialism. It enables African thinkers to engage critically with knowledge generated in Europe and to respond in a new and inventive manner to African challenges having witnessed the trajectory of European integration with the benefits but also obstacles experienced. Africans' experiences should become a legitimate component of global knowledge. However, fragmentation as played out by sovereign states pursuing their own political agendas undermines the strength and credibility of Africa as a global and independent role player.

The quest for strengthening the continent through coordination and cooperation predates Agenda 2063. Notable African leaders and scholars such as Kwame Nkrumah⁷ have long since called for a united Africa. Where the uniting of Europe helped the continent to overcome the scourges of two world wars, it is suggested that Africa is likewise best placed to overcome the many challenges it faces as a single united entity. The dream of a fully integrated United States of Africa became the bedrock of Pan-Africanism. This would serve as a bulwark against imperialism and what Nkrumah described as the tentacles of the 'Wall street Octopus'.⁸ It is suggested that norm creation by an effective, reformed and financially self-sustained AU would take back control not only at an economic level but also at a cultural level. Presently Africa is grappling as much with damage inflicted by self-enriching African post-colonial politicians adding another level of alienation and inequality to the legacy of colonialism. Lamentably, the AU has failed to live up to the noble commitment to change, democracy and prosperity for all as envisaged by its Constitutive Act. Solomon Dersco observed with reference to the AU's position *vis-a-vis* the International Criminal Court, that the AU serves as a 'club for dictators' using the AU 'as a forum of elite solidarity for self-preservation' in the same way as the

⁶ Sabelo J Ndlovu-Gatsheni, "Decoloniality as the future of Africa," *History Compass* (13/10/2015): 486.

⁷ Kwame Nkrumah, *Africa must Unite*, (New York, 1963).

⁸ Kwame Nkrumah, *Neo-Colonialism: The last stage of Imperialism*, (New York: International Publishers, 1965), 9.

OAU did'.⁹ In response to the election of Egypt's President Abdel Fattah el-Sisi as head of the AU's 31st session due to start in January 2019, Aljazeera commented that the AU 'has failed to achieve most of its goals and instead transformed into an exclusive club of brutish despots who exhibit weak, corrupt, undistinguished and divisive leadership.'¹⁰

Unless the AU is transformed into a legitimate and democratic institution it would be dangerous to place more powers in the hands of its institutions. The AU's call for 'African solutions to African problems', has become an impotent attempt 'to positively influence national politics, monitor the internal behaviour of member states, and prevent human rights violation atrocities.'¹¹ However, the notion has lost all moral credibility as a response to western hegemony and colonially imposed values, and is dismissed as ironic, cynical, hypocritical and misleading.¹² The situation is further compounded by the fact that AU institutions receive funding by various European and other foreign donors such as the EU, the World Bank, International Monetary Fund (IMF) and the UN Development Programme.¹³

It is clear that if the AU wants to lead the way towards a decolonial and democratic future, African citizens should be placed at the helm¹⁴, seeking African solutions that do not serve the demands of the elite few. The biggest challenge is not to move away from Euro-North American centrism but towards African accountability and the rule of law.

3. The AU leading continental governance

Within an envisaged hypothetical configuration of a United States of Africa as envisaged by the likes of Nkrumah, the OAU or the AU would act as continental governance structure within a federal or confederal structure. Given the arbitrary

⁹ SA Derso, "The AU's ICC Summit: A case of Elite Solidarity for Self-preservation?", 2013, <https://www.issafrica.org/iss-today/the-aus-cc-summit-a-case-of-elite-solidarity-for-self-preservation>.

¹⁰ Tafi Mhaka, "The African Union: An exclusive club for brutish despots," *Aljazeera Africa*, June 9, 2018.

¹¹ Kasaija Phillip Apuuli, "The African Union's notion of 'African solutions to African problems' and the crises in Côte d'Ivoire (2010–2011) and Libya (2011)," African Centre for Constructive Resolution of Disputes, Jun 11, 2012.

¹² Balachew Gebrewold, "The cynicism of "African Solution for African Problems", *African Security*, 3.2 (2010): 80-103; Henrietta Mensa-Bonsu, "African Solutions for African Problems: Where is the Research? **Keynote** Address delivered at the African Peacebuilding Network (APN) Grantee Training Workshop, LECIAD, University of Ghana, Accra, June 27th, 2016.

¹³ Babatunde Fagbayibo, "Why the Pan-African Parliament must clean up its act if it wants to survive," *Mail and Guardian*, 28 May 2018.

¹⁴ Ndlovu-Gatsheni, "Decoloniality as the future of Africa," 493.

demarcation of Africa amongst colonial rulers, bringing Africa back together to its pre-colonial state seemed like the logical thing to do. Instead, post-colonial Africa emerged as a community of independent, fully sovereign nation-states, loosely affiliated through the OAU.¹⁵ The concept of unbridled state sovereignty became firmly embedded in the constitutional architecture of African states and African thinking. This remained the position under the AU when it replaced the OAU in 2001 and is evidenced by the AU's Constitutive Act. The AU is guided by a common vision for a united and strong Africa,¹⁶ yet again identifies the defence of the sovereignty and territorial integrity of its member states¹⁷ as an objective. With state sovereignty receiving such high regard, it is not surprising that integration across Africa has been weak and ineffectual, with many African leaders abusing the organisation for their personal purposes. This approach has clearly failed in addressing the many challenges Africa faces at levels of security, economic, developmental, governance and human rights.

4. Should the EU serve as example for African integration?

Despite the many differences between Europe and Africa, European integration is a developed model for continental integration and a credible example for Africa to consider.¹⁸ Although the AU mimics many of the EU institutions at a formal structural level (executive, legislative and judicial bodies), the EU has advanced much further on the integration road.¹⁹ This is reflected in the vast differences in the scope of its powers, level of integration, internal dynamics and decision-making processes between the two organisations. The EU is therefore a good example to consider as to where Africa may in future stand with a more driven integration agenda. The EU, however, has shown itself to be less than perfect and is an institution under siege. Given the turbulence in the EU with the Eurozone crisis, Brexit and nationalist sentiments playing out in recent elections, it should be considered whether the EU

¹⁵ Michele E Olivier, "The Emergence of a Right to Democracy – An African Perspective," in *The Arab Spring – New Patterns of Democracy and International Law*, ed. Carlo Panara et al. (Leiden: Martinus Nijhoff Publishers, 2013), 29-52.

¹⁶ Preamble of the Constitutive Act, 2000

¹⁷ Art 3 of the Constitutive Act

¹⁸ Olivier, "The role of African Union law in integrating Africa," 513.

¹⁹ Fraser Cameron, "The European Union as a Model for Regional Integration," September 24, 2010, <https://www.cfr.org/report/european-union-model-regional-integration>.

'as-is', is necessarily the best legal blueprint for a more integrated Africa and what lessons can be learnt.

The success of regional integration, according to theorists, depends on the degree to which member states are willing to transfer elements of national sovereignty to a central body. Such supranational powers are required to make legally binding decisions and to move beyond symbolic gestures. For this to happen, a deep trust is required from both the governments of member states and their citizens to the effect that the centre can add more than it is taking away with regards to wellbeing, security and prosperity. Self-interest and ideology are central in belonging to such a structure. A willingness amongst African states to shift loyalties and political activity to a new centre which possesses political authority over national states is largely absent, despite the symbolic importance of African unity. For integration to accelerate, ordinary Africans need to commit to the deal. It is exactly this lack of democratic support that has fuelled the recent referendum which led to support for Brexit in the UK. Following the architecture of the EU institutions in terms of its formal structures, the AU has its own legislative, executive and judicial bodies in the form of the Pan African Parliament, an Assembly (heads of state), Executive Council (Ministers) and a Court of Justice. But, unlike the EU, these institutions do not have supranational powers enabling them to make binding decisions.²⁰

Trade and free movement perhaps represent the most tangible benefits of EU integration. The EU project led to the bloc becoming a major world trading power and its GDP per capita is now ahead of the US. Trade among African countries is estimated to be a dismal 15% to 18%, while countries in other regions such as the European Union and Asia have increased intra-continent trade to more than 60%.²¹ African Export-Import Bank (Afreximbank) president and chairperson Benedict Oramah recently remarked at an Intra-African trade fair in Cairo that African trade is limited by both colonial barriers and a lack of knowledge citing the following example:

²⁰ Michele E Olivier, "Despite Brexit, the EU still holds valuable lessons for African integration," *The Conversation*, June 25, 2017,1.

²¹ Sizwe Sama Yende, "SA and Nigeria stall Africa trade agreement due to legal issues," *City Press*, June 03 2018, 06:07, <https://www.fin24.com/Economy/sa-and-nigeria-stall-africa-trade-agreement-due-to-legal-issues-20180603-2>.

“We did a study with the UN and found interesting things. Kenya was importing a certain kind of leather product it was using to manufacture shoes. The same product was exported by Burundi at a lower rate, but because Kenya didn’t know this, it was buying it from New Zealand. People buy things at a much higher cost because they don’t know about the alternatives. Because of colonial barriers that we’ve created, people don’t have information. The trade fair will make it possible to know what is going on within Africa.”²²

Intra-African Trade received a boost with the landmark signing of the Continental Free Trade Agreement (CFTA) in Nairobi, Kenya, in March 2018 by 44 of the 55 African states.²³ According to reports, the CFTA has the potential to create a single trading market of 1.2 billion Africans and will potentially lead to economic growth, industrialisation and sustainable development. However, South Africa and Nigeria, two of the continent’s biggest economies, have not yet signed the CFTA due to legal and internal issues.²⁴

5. Constitutional framework

The constitutional framework of the AU is the logical starting for a discussion on the AU’s powers. The AU was established by means of a multilateral treaty, the Constitutive Act of the African Union 2000/2001, agreed to by member states of the OAU. As founding instrument, the Constitutive Act serves as constitution of the AU and determines its structure and organs as well as the powers allocated to such organs. The Constitutive Act as amended,²⁵ is supplemented by various other constitutional treaties adopted under its provisions.²⁶ These instruments indicate the powers of the various AU institutions and should be read within the context of the values, principles and objectives of the organisation.

The term AU law does not appear in the Constitutive Act, neither directly nor by implication.²⁷ This is in line with the absence of powers allocated to AU organs to

²² Intra-African Trade Fair began in Cairo, Egypt, June 2018

²³ Yende, “SA and Nigeria stall Africa trade agreement due to legal issues”.

²⁴ South Africa and Nigeria account for roughly one third of the \$3.4 trillion combined gross domestic product across Africa.

²⁵ Protocol on Amendments to the Constitutive Act of the African Union (2003).

²⁶ OAU/AU Treaties, Conventions, Protocols & Charters, <https://au.int/en/treaties>.

²⁷ Art 31 of the Vienna Convention on the Law of treaties, article 31(1) states as a general rule of interpretation that treaties shall be interpreted in accordance with the ordinary meaning given to terms of the treaty in their context and in the light of its object and purpose.

take binding decisions. At the same time, it also contradicts the strong aspirational provisions of the Constitutive Act's preamble calling for a united and strong Africa determined to promote and protect human rights, democratic institutions, good governance and the rule of law. Surely these objectives can only be achieved through law. Not endowing AU organs with the necessary powers to carry out these ideals, leave them with very little capacity for effective implementation. There are two possible exceptions: Sub-articles 4 (h) and (j) provide for the right of the AU to intervene in member states in grave circumstances and a similar right of member states to request such intervention.²⁸

The executive, legislative and judicial organs established by the Act lack the executive and regulatory powers of the European body. The AU Assembly, identified as the supreme organ of the AU, is composed of heads of state and government and enjoys the most wide-ranging decision-making capacity.²⁹ Their powers include administrative powers, such as taking decisions on reports and recommendations of other AU organs,³⁰ appointing the Chairperson of the Commission³¹ and adopting the AU budget³². Examples of supranational powers include the power to establish AU organs³³ and to delegate of power to any other organ.³⁴ However, whether such decisions have a direct impact in member states is debatable. The Assembly is supported by the Executive Council which has the power to take decisions on policy matters in a number of common interest areas,³⁵ but on its own lacks the power to take enforceable decisions. These organs function at an executive level and lack legislative powers.

The obvious institution to exercise legislative powers will be the PAP, established by the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament³⁶ calling for a body with law making powers and elected

²⁸ Michele E Olivier, "Conceptualising African Union Law," paper delivered at the African Union Law Network Workshop *Exploring the history, scope and creation of African Union Law*, June 30 2017, Sussex University, Brighton.

²⁹ Art 9 of the Constitutive Act of the AU.

³⁰ Art 9(b) of the Constitutive Act of the AU.

³¹ Art 9(i) of the Constitutive Act of the AU.

³² Art 9(f) of the Constitutive Act of the AU.

³³ Art 9(d) of the Constitutive Act of the AU.

³⁴ Art 9(2) of the Constitutive Act of the AU.

³⁵ Art 13 of the Constitutive Act of the AU.

³⁶ 2001/2003, <https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-pan-african-parliament>

by universal adult suffrage representing all the peoples of Africa.³⁷ This ideal remains elusive and misplaced in spite of the recent initiative by the so-called Malabo Protocol,³⁸ to strengthen the PAP as legislative organ of the AU and give a voice to African peoples and the Diaspora.³⁹ Currently the PAP is made up of 250 members, five per each of the AU's 50 member states. These members are not directly elected but are chosen from national legislators by the respective member states. Since they are not elected by African citizens, the PAP is neither representative nor accountable to African civil society.

The absence of power to adopt binding legislation affects the PAP's status as legislative power. The powers provided for by the Malabo Protocol are limited to proposing model laws⁴⁰ on subject areas determined by the Assembly or on subjects/areas it would like to suggest for consideration and approval of the Assembly. It will be a case where the supposedly democratic legislature is subordinate to the executive. Despite the limited legislative powers granted by the Malabo Protocol, only six states have ratified the protocol falling short of the 28 ratifications needed to bring it into force.⁴¹

Understandably, African leaders are unwilling to cede sovereign powers to an outside parliament that would interfere with the national parliaments they control. A way out may be to grant PAP legislative powers on specific areas of common concern. Terrorism, climate change, aspects of trade and free movement of people are possibilities. Other areas would be reserved for states. If such a balance could be agreed on, it might increase democratic legitimacy of the AU whilst at the same time not trample on the core sovereignty of national governments. Without real powers and not being directly elected by African citizens, it is difficult to see how PAP will address the democratic legitimacy issues the AU faces. Even if and when the Malabo Protocol comes into force, PAP will remain yet another toothless and expensive advisory body. The reputation of the PAP is already tarnished by

³⁷ Art 2 of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament.

³⁸ Protocol to the Constitutive Act of the African Union Relating to the Pan African Parliament, 2014.

³⁹ Art 3 of the Protocol to the Constitutive Act of the African Union Relating to the Pan African Parliament.

⁴⁰ Art 8 (1) of the Protocol to the Constitutive act of the African Union Relating to the Pan African Parliament.

⁴¹ Gambia, Madagascar, Mali, Sahrawi Arab Democratic Republic, Sierra Leone and Togo. Last modified May 10, 2018 https://au.int/sites/default/files/treaties/7806-sl-protocol_to_the_constitutive_act_of_the_african_union_relating_to_the_pan-african_parliament_1.pdf.

allegations of corruption and wasteful expenditure such as the refusal of its president Nkodo Dang of Cameroon, to table a report about the PAP and its finances.⁴²

6. Conclusion

Agenda 2063 sets ambitious targets for law in Africa, but there is a long way to go. It is suggested that the development of a supranational body of law emanating from the AU should act as glue to bind African states together and as a tool for continental integration, development and transformation. Such a system of AU law will enable Africa to speak with one voice on issues of importance to the whole continent.

Europe has benefited from European integration, bringing about peace and prosperity after the turmoil of the Second World War. Political and economic integration are likewise needed to respond effectively to Africa's challenges. The EU integration was in many ways facilitated through EU law and offers many valuable lessons for the conceptualisation and development of an AU Law. There is, however, not a one size fits all recipe for integration at the economic and political levels. It is important that African integration responds to African realities and thinking. Integration should give Africa an independent voice and position the continent as a global role player to be reckoned with. To make the AU a legitimate voice of African citizens, it is important to encourage constitutionalism and change its current reputation as a club for the often corrupt political elite disguising inefficient governance as 'African solutions to African problems'.

The AU's constitutional instruments do not enable the AU and its organs to adopt binding law. To adopt decisions and rules that would bind African states by virtue of their AU membership, supranational powers are needed. The absolute sovereignty enjoyed by African states prevents the AU from doing this. It is a matter of design, as the impunity of African governments will be compromised by a body that exercises political authority over national states. Most believe that a transfer of power will inevitably compromise political independence. The AU is thus confined to carry out governance through the mostly soft powers at its disposal. Supranationalism and deeper integration should be regarded as different sides of the same coin. Deeper

⁴² Fagbayibo, "Why the Pan-African Parliament must clean up its act if it wants to survive,".

integration at a Pan-African level will only be possible when the centre enjoys authority. For any discussion on supranationalism, there is a need for a deep trust of governments and ordinary people rooted in the understanding that the center can add more than it is taking away when it comes to well-being, security and prosperity. Integration needs to be supported from the bottom up. For this to happen the AU must be credible and legitimate. A first step to achieve this is to create a PAP with meaningful legislative powers whose members are directly elected through universal suffrage. Such powers are the foundation of AU law.

Should the PAP be endowed with real decision-making powers, a balance of power is needed with regard to matters that states have sovereignty over and matters where the AU might override the jurisdiction of states. To achieve this, the AU will have limited authority over certain mutually agreed areas of cooperation. In these areas AU law would impose legally binding obligations and override national law. The real question is whether the political elite will be willing to restrict their current powers. There remains a long way to go to fulfil the Agenda 2063, a Pan-African people-centred vision and action plan.

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