The Relationship between Supranational and National Laws: An Appraisal of the 'Potency' of African Union Law

Kumi Ashong Codjoe - Lancaster University, Ghana.

'I hereby declare that this essay is an original piece of work in its entirety'.

ABSTRACT

In 2002, the establishment of the African Union (AU) to succeed the Organisation of African Unity (OAU) was seen as a paradigm shift in the process of achieving regional, political and socio-economic integration of African states. The OAU was established on 25 May 1963 in Addis Ababa, Ethiopia to protect the interests of African states in regard to the effects of colonialism whereas the main aim of the AU is to promote regional integration and achieve the supranationalism of the AU. The institutional agencies of the AU include the Assembly, the Executive Council, and judicial and human rights institutions, etc. It also has features such as the 'right of intervention' in member states that are geared towards the promotion of the objective of AU supranationalism. This suggests that the aim of the AU is to establish a complete institution, with policies and legislations, which supersedes both state and sub-regional laws to ensure its fiat is supranational in nature to the national laws of the member states. However, after almost a decade since the AU's establishment, it has arguably not made much or any significant progress in this respect.

As such, the purpose of this essay is to identify and critically examine the relationship between the supranational objectives of the AU and the national law of the member countries. The essay will also provide an appraisal of the assumed potency of AU law and assess the issues that affect the successful realization of AU supranationalism. This is essential since the AU has at its very core the aim of being supranational to the national laws of the member states. Furthermore, the essay will offer suggestions on how to properly address these issues in order to ensure the smooth policy implementation and realization of AU supranationalism as a body in relation to its subjects.

INTRODUCTION

The AU was established in response to the ineptitude or failure of the OAU to address the new challenges associated with the evolving nature of African and global politics. As such, the formation of the AU is widely regarded as a move to mainly ensure regional integration, socio-economic development, security and peace, and at the very least improved governance. The AU was also given the power to create contemporary institutions that would specifically aid in the successful implementation of the core objectives of the AU. As a result, there was a need for a paradigm shift to go past the archaic philosophical and theoretical framework of the objectives of the OAU (as an inter-governmental body) and establish the AU as a supranational body in order to address these modern challenges. This led to the disintegration of the OAU and its replacement with the more comprehensive AU system.

The structure, aims and objectives of the AU are set out in the Constitutive Act. This states that the highest organ of the AU is the Assembly, which is made up of heads of states drawn from all of its 55 member states. The Assembly is responsible for the establishment and coordination of all legislation and policies accepted under the annual conventions.

It also has the responsibility of ensuring the facilitation of continental integration in the African region. In matters of war, terrorism, security, emergency and peace, the Assembly may delegate power to the Executive Council, and the Security and Peace Council to act on its behalf and intervene. This is due to the fact that the Constitutive Act empowers the Assembly to intervene and prescribe sanctions to any defaulting member state in such events. However, this is now the main responsibility of the Security and Peace Council because the Assembly entrusted it to the Security Council in 2004. Additionally, there was the creation of judicial and parliamentary institutions and Regional Economic Communities (RECs) to regularize the policies of the AU. This has led to the creation of policies like the ‘right of intervention’ and ‘common defence’ to boost the supranationalism of the AU.

THE CONCEPT OF SUPRANATIONALISM

The birth and development of the European Union (EU) has greatly helped in understanding and analyzing the concept of supranationalism in relation to continental integration. This is because the relationship between the member states and the EU has provided a theoretical foundation and framework for a proper analysis of

supranationalism. Leading legal authors like Pescatore, Weiler and Hay have mainly propounded theories and ideas of supranationalism based on the development of multinational mechanisms such as the EU. In these, the EU is widely seen as a modern blueprint for countries that desire to create integration and supranationalism. In the book, *Federalism and Supranational Organization*, it is argued that there are three main factors that determine and support the concept of supranationalism. They are 'the creation of an effective power', 'the autonomy of these powers' and 'the recognition of common values and interests'.[1] He further argues that in scenarios where there is a lack of recognition of a common authority, then that organization will merely serve as a place for international association since the concept of supranationalism shows that there has to be a multi-stakeholder system where continental institutions like the AU and EU can assert their authority on their member states.[2] This appears to suggest that under this system it is the ratification by these member states that ultimately gives validity to the activities of continental bodies by adhering to and jointly accepting the union as 'supranational'. Another legal theorist, Ruszkowski, also propounds that supranationalism is a radical theory since it 'redefines the idea of borders within nations and between the nation and the state, or even within the nation itself'.[3] As such, supranationalism goes beyond the scope of internationalism or intercontinental cooperation by setting out the acceptable practices of a member state's sovereignty.

[1] Peter Hay, *Federalism and Supranational Organisation: Patterns of New Structure* (University of Illinois Press 1966) 69.
[2] Ben Rosamond, *Theories of European Integration* (Macmillan 2000) 204.
[3] Janusz Ruszkowski, 'Supranationalism as a Challenge for the European Union in the Globalised World' (Europe's Challenges in a Globalised World, 23-24 November 2006) 3.

Hay identifies some features of supranationalism. This includes the authority of the institution to make decisions and create policies that are binding on the member states by a weighted majority decision. Its decisions must have the clear binding effect of rules originating from that institution on any person or legal entity. It also looks at the autonomy of that institution from that of its member states. Here it is crucial to note that even if all features of supranationalism are satisfied, there may still be some form of intergovernmentalism by the member states. This is especially seen in the EU where ministers of the member states who are on the Council of the European Union still push for the realization of their nationalistic agenda in that same Council. This is because the Council acts as the highest organ of the EU on foreign policy and justice matters. As such, it possesses powers of supranationalism and has voting rights in the United Nations' General Assembly.

Another type is normative supranationalism. This looks at the legal consequences of the powers given to an organisation. It closely examines the connection between the laws of the member states and the laws of the regional organisations, and analyses whether the national laws supersede the regional laws or vice versa. Weiler argues that there are three points of enquiry for this concept. They are the principle of direct effect, the principle of supremacy, and the principle of pre-emption. The principle of direct effect talks about the competence of the laws of the regional organisations to directly affect those of the member states.[4] His second point, the principle of supremacy, looks at whether or not the

[4] Alan Dashwood and others, *European Union Law* (Sweet & Maxwell 2000) 158-9.

laws of the regional organisations are higher than those of the member states[5] and vice versa. Finally, the principle of pre-emption examines whether the member states are pre-empted from formulating national laws that contradict the laws of the regional organisations.[6] These three points of enquiry essentially talk about regional integration in relation to the common interests and customs of the member states in that region. Normative supranationalism should not be regarded as a loss of sovereignty but rather as another way for the member states to push for their national interests by a common decision-making process. In fact, the regional organisations depend on the member states to successfully implement and execute the enacted policies, laws and decisions of that regional organisation.

SUPRANATIONALISM AND THE AFRICAN UNION (REGIONALISM)

Supranationalism has been in existence in Africa since colonial times where it was used to govern the various territories. As a result, Africa as a region was divided into several blocs for the purpose of administrative convenience. This led to the establishment of the Southern African Customs Union in 1910 and the East African High Commission in 1948. On the regional level, the establishment of the OAU failed to achieve regional supranationalism although it had elements and aspirations to be a supranational organisation. In spite of the AU replacing the OAU, these supranational aspirations have still not been fully achieved. The AU remains at the sub-regional level and lags behind other regional organisations. The main element of African regionalism is the ability to

[5] Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 152.
[6] Case 22/70 *Commission v Council* [1971] ECR 263, paras 17-18.

enact and implement policies of the Regional Economic Council under the AU.[7] Without this, the AU will be rendered ineffectual in its aspirations of ensuring regional integration across the board. As a result, a strategic document will be required to ensure harmonisation of all the various custom unions, monetary and business policies under the RECs to achieve integration. Article 9 of the Constitutive Act captures some features of AU supranationalism.[8] This includes the power imposed on the Assembly to enact policies and legislations, and require compliance from the member states. Furthermore, Articles 28, 46(1) and (2) of the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR) is responsible for the interpretation of the Constitutive Act.[9] It also settles disputes amongst member states and the organs. Additionally, Article 4(h) of the Constitutive Act provides the 'right to intervene' in matters of war, conflict and mass genocide.[10] This was done by an amendment in 2003 and it applies when there is reason to believe that 'a legitimate order is under a serious threat'.

Moreover, Article 2(3) established the Pan-African Parliament (PAP) in March 2002. The PAP was launched with the aim of it possessing the power to legislate on behalf of the AU[11] after five years of existence. However, the legislative powers of the PAP are not automatic as there must be a conference to re-evaluate the power to legislate. However, no serious attempt has been shown by the AU to convene and give power to the PAP in order for it to assume and perform its full legislative responsibilities for the AU. Article 3(1) of the Constitutive Act gives power to the AU to 'harmonize and coordinate policies

[7] Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001) article 3(1).
[8] ibid article 9.
[9] ibid articles 28, 46(1) and (2).
[10] ibid article 4(h).
[11] ibid article 2(3).

between future and existing RECs for the gradual attainment of the objectives of the Union'.[12] In 2009, the AU Commission (AUC) was changed to the AU Authority and it was to be given the power to enact policies for the purposes of defence, peace, international trade and foreign policy, etc. However, this resolution to make the AU Authority a supranational entity is yet to be operational although it exists in theory.

The severe lack of political will and ideological differences on the method of regional integration have made it almost impossible for the AU to realize its aims and supranational aspirations. Some of the member states have argued for a gradualist approach, others for a radical approach. As a result, the AU is struggling to achieve the supranational objectives outlined in its Charter. Also, there is more focus on electing the person to head the AU than on empowering the institutions under the AU to enable it to effectively carry out its mandates. An example was the election of Egyptian President Abdel Fattah El-Sisi as the head of AU for 2019. President El-Sisi was elected despite being accused of the deaths of 819 peaceful protesters some five years ago in Egypt. To date, this same AU has not tried him for these alleged 'crimes against humanity'. It has busied itself with the publication of decisions and declarations instead of instituting drastic disciplinary measures against such violations in its member states.

The right of intervention by the AU has seen its fair share of complications, despite being widely regarded as one of its strongest supranational features. Pursuant to Article 4(h) of the Constitutive Act, the right of intervention is subject to recommendations by the Peace

[12] ibid article 3(1).

and Security Council, which is made up of 15 representative member states.[13] After a recommendation, the Assembly will possess the authority to initiate a proposed method of intervention. It may deploy troops on peacekeeping missions or choose to impose sanctions based on the type of violation. However, the lack of a standing army and severe financial constraints has limited the efficiency of the right of intervention possessed by the AU Assembly.

Numerous political issues have shown how ineffective the AU is becoming. An example is the political unrest in Burundi in 2015. Then, President Pierre Nkurunziza orchestrated and won a third term as its president. However, according to international observers, the election was fraught with irregularities. The opposition boycotted the elections due to these issues and there were widespread acts of violence that led to the displacement of over 200,000 people and over 1,000 deaths. His third term was characterized by violence, torture and assassinations of the opposition members. In addition, a referendum was held to extend his office to 2034. This act amounted to a clear violation of the Arusha Peace Accord that particularly prevents any African president from ruling for a period of more than 10 years. Again, the AU failed to take any drastic action to effectively address this issue.[14] Another example is how the AU failed to act swiftly when President Kabila was unwilling to hold democratic elections in the Democratic Republic of Congo amidst clear human right violations.

[13] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) article 7(1).
[14] Kristiana Powell, 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect' (The North–South Institute Working Paper, May 2005) 17.

The African Court on Human and Peoples' Rights (ACHPR), which is theoretically akin to the International Criminal Court (ICC) of Geneva, seems blind to these countless acts of gross human rights abuses. This is compounded by the fact that the main AU institutions like the Assembly, AUC, ACHPR and PAP which are capable of supranationalism are either inoperable or limited in their powers. Thus, the ICC remains the only possible legal solution for addressing the crimes in Africa although South Africa and Gambia have temporarily withdrawn from the ICC. The current head of the AU, President Kagame, claims that the ICC only addresses acts happening within African states instead of looking at the whole world.

MOVING FORWARD (SUGGESTIONS FOR SUPRANATIONALISM IN THE REGIONAL CONTEXT)

In conclusion, this essay has identified key policy suggestions to help improve the potency of the supranational relationship between the AU and its member states. First, there should be a higher exercise of political will by the AU since it already has the desired framework to achieve regional integration. The AU must therefore take steps to assert its supranational status and strictly implement its own policy guidelines through the effective participation of the various organs in order to address the existing issues confronting AU regional integration. It can ensure 'supranationalism' by closely liaising with other RECs, other regional supranational bodies. It can also formulate policies to meet the political and socio-economic needs of the member states. The AU should ensure strict compliance with its policies and laws and impose sanctions on any defaulting

member state. It is critical that the exercise of supranational powers of the AU develops the continent and enhances its status in global politics. To achieve this, the AU can learn from the difficulties encountered in other regions such as the EU.[15] Additionally, the Declaration of the 16th Ordinary Session of the AU Assembly in 2011[16] advocated for a regional integration process based on the shared values and norms of the member states.

There should be a balance between national interests and regional interests. The member states must be fully committed to attaining the shared values of the AU through domestication and ratification of these mechanisms. The mechanisms can be a 'non-decision instrument' that may be used to simplify discussions and the flow of information and ideas between the member states.[17] The development of the African Governance Architecture will empower the AUC to implement policies based on shared norms and values. The decisions of the AUC should be binding on all member states to ensure compliance with the shared standard.

Furthermore, the AU as a regional body should be conferred powers (i.e. principle of attribution of power) to handle matters that cannot be effectively resolved at the national level (i.e. the subsidiarity principle). A country-specific analysis may be used by the AU to determine the appropriate method to address a particular issue (i.e. proportionality principle) and an arrangement can be made to enable parties to seek legal assistance from

[15] Michelle Cini, 'European Commission' in Alex Warleigh (ed), *Understanding European Union Institutions* (Routledge 2002) 56.
[16] African Union, 'Assembly of the Union: Declaration of the 16th Ordinary Session of the AU Assembly' (30-31 January 2011) Assembly/AU/Decl. 1 XVI.
[17] Ruszkowski (n 3) 3.

external institutions outside the AU like the ICC (i.e. the flexibility principle) when they are not fully satisfied.

BIBLIOGRAPHY

African Union, 'Assembly of the Union: Declaration of the 16th Ordinary Session of the AU Assembly' (30-31 January 2011) Assembly/AU/Decl. 1 XVI

Case 22/70 *Commission v Council* [1971] ECR 263

Cini M, 'European Commission' in Alex Warleigh (ed), *Understanding European Union Institutions* (Routledge 2002)

Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001)

Craig P and de Burca G (eds), *The Evolution of EU Law* (Oxford University Press 1999)

Dashwood A and others, *European Union Law* (Sweet & Maxwell 2000)

Hay P, *Federalism and Supranational Organisation: Patterns of New Structure* (University of Illinois Press 1966)

Powell K, 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect' (The North–South Institute Working Paper, May 2005)

Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003)

Rosamond B, *Theories of European Integration* (Macmillan 2000)

Ruszkowski J, 'Supranationalism as a Challenge for the European Union in the Globalised World' (Europe's Challenges in a Globalised World, 23-24 November 2006)