

MAKING THE CASE FOR AFRICAN UNION LAW

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

1.0 INTRODUCTION

The 20th century witnessed the birth of several African democracies, all bearing the promise of a bright future. The emergence of these democracies led to the formation of the Organisation of African Unity (OAU) which helped a great many of these countries secure their independence from colonialists. Decades later, many of these countries are behind on these promises and are still plagued by the same set of problems that they had battled with from inception. The regional body, which has now transfigured into the African Union (AU), has churned out a plethora of treaties, declarations and protocols, etc to help address some of these issues, some of which have recorded greater successes than others. These instruments make up AU law, and the question now arises whether this system should be recognized and promoted. This essay seeks to make a case in its favour.

2.0 CONCEPTUAL ANALYSIS

2.1 THE AFRICAN UNION

The AU is the successor of the OAU which was established by independent African states on 25 May 1963 in Addis Ababa, Ethiopia.¹ The regional body at the time had as its primary focus the liberation of African states from the control of colonial powers.² A few years on, the Organisation had succeeded in achieving its aim,³ and this gave rise to the need to redefine the driving idea behind its existence. Hence, in July 1979, the OAU Charter Review Committee was established 'to re-examine the provisions of the Charter in light of the changes and realities in Africa'.⁴

However, it was not until 1999, when the African states at the fourth extraordinary session of the OAU Assembly of Heads of State and Government adopted the Siirte Declaration, that the idea of the AU fully came to life.⁵ Article 8 of the Siirte Declaration provided that:

Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of those proposals, and bearing in mind the current situation on the

¹ Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963).

² Preamble to the OAU Charter 1963, Article 2(1)(c) and (d) of the Charter.

³ By 1980 eradicating colonialism and establishing the independence of African nations had been virtually completed except for the continued struggle in South Africa.

⁴ Organisation of African Unity (Assembly of Heads of State and Government), 'Decision on the Review of the Charter' (6-20 July 1979) AHG/Dec.111 (XVI) Rev.1.

⁵ *ibid* 'Siirte Declaration' (8-9 September 1999) EAHG/Draft/Decl. (IV) Rev.1.

Continent, we decide to: (i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the provisions of the Treaty establishing the African Economic Community.

In July 2000, member states adopted the Constitutive Act of the AU,⁶ which marked the formal birth of the AU. The AU Assembly of Heads of State and Government held its inaugural session in Durban, South Africa on 9 July 2002. Essentially, the AU was created ‘to rectify the downsides of the OAU and build a new paradigm of African integration and solidarity that can enable the continent as a whole to keep up with the challenges of the day’.⁷

Pursuant to the realization that there has only been a change of nomenclature and the institution remains the same, in this essay the laws and instruments referred to cover all those from the era of the OAU into the present regime of the AU.

2.2 AFRICAN UNION LAW

‘Law’ is typically a difficult concept to define as it is a complex institution comprising several fundamental factors and integral elements. Its meaning varies from one end of the spectrum to the other. Hence there is generally no consensus on the meaning of the term ‘law’.

The concept of AU law, however, can be defined as the body of treaties, resolutions and decisions that have direct and indirect application on the member states of the AU.⁸ AU law is a conglomeration of treaties, resolutions, declarations and decisions that apply either directly or indirectly to the member states of the AU to regulate the behaviour, conduct and actions of the states towards one another, the Union itself and individual citizens. The AU legal instruments have arisen at different times to tackle pressing issues affecting African states and the African populace.

AU law consists of different instruments ranging from treaties and agreements, court decisions to soft laws. Examples include the main instruments like the AU Constitutive Act, the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, the African Charter on Democracy, Elections and Governance; protocols such as the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, better known as the Maputo Protocol, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (African Court Protocol); as well as soft laws such as Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Declaration of the Principles on Freedom of Expression in Africa.

⁶ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001).

⁷ Hiruy Wubie and Zelalem Tsegaw, *African Union Law Teaching Material* (Bhupendra University, 2009).

⁸ African Union Law <<https://africanunionlaw.org/>> accessed 30 September 2018.

However, AU law is not as developed as its counterparts. Amao acknowledges that the ‘AU legal order is still in its infancy and there is a long way to go’.⁹ In subsequent parts of this essay, attempts will be made to examine AU law in terms of the impacts and successes recorded, the challenges faced by the nascent system, the criticisms posed and the potential benefits it bears, all with a view to making a case for AU law.

3.0 CHALLENGES TO AFRICAN UNION LAW

The principal challenge to the development of AU law lies in the question of sovereignty of nations and whether at any point in time the regional body will be capable of making laws and enforcing them upon member states.¹⁰ This question is particularly pertinent in recognition of the fact that a law that lacks the feature of bindingness is unworthy of its description as such.

Unlike those in the European Union (EU), the member states of the AU have not relinquished nearly as much power to the AU institutions. In EU member states, EU treaties largely apply directly.¹¹ However, African states are yet to show signs of a willingness to surrender that much of their sovereignty to the regional body. This poses a serious problem to the AU law, and has caused questions to be raised as to its efficacy in terms of implementation and enforcement.

AU law is also plagued by the problem of institutional deficits in that the institutions set up to implement AU treaties and similar instruments are largely lacking, compared to their counterparts in other parts of the world.¹² The inability of these institutions to perform effectively the functions with which they have been charged by their establishing laws has also resulted in the persistent doubt of the wisdom behind the creation of an AU legal order.

Another challenge facing AU law is its nascency. The emergent status of the AU law has led to such a situation that even within the African continent the term AU law is largely unknown and yet to enjoy prominent use in the academic, social and political spheres.¹³

All these put together lead many to question the validity of AU law; the subsequent parts of this discourse are therefore aimed at justifying the concept of AU law.

⁹ News24, ‘Could African Union Law Shape a New Legal Order for the Continent’ <<https://www.news24.com/Africa/News/could-african-union-law-shape-a-new-legal-order-for-the-continent-20180710>> accessed 30 September 2018

¹⁰ Michèle E Olivier, ‘The Role of African Union Law in Integrating Africa’ (2015) *South African Journal of International Affairs* 513.

¹¹ Francesca Martines, ‘Direct Effect of International Agreements of the European Union’ (2014) 25(1) *European Journal of International Law* 129.

¹² Girmachew Alemu Aneme, ‘Introduction to the Norms and Institutions of the African Union’ (2010) <http://www.nyulawglobal.org/globalex/African_Union.html#theinstitutionsoftheafricanunion> accessed 30 September 2018.

¹³ Olivier (n 10).

4.0 THE CASE FOR AFRICAN UNION LAW

In light of the shortcomings of AU law, the criticisms that have followed and the challenges with which it has been faced, many have expressed skepticism as to the efficiency of the AU legal order and its continued promotion. However, this writer posits that the said legal order deserves a place to exist owing to many reasons, ranging from socio-cultural grounds to the potentials borne by the emergence of such an order. These include: promotion of African integration, joint African approach and solutions, and facilitation of economic development.

One recurring cultural phenomenon across several African communities is that of unity, oneness and communality. These concepts inform the establishment of an African regional body and also form the bedrock of the introduction of several legal instruments. Hence the need to continually advocate for the development of an AU legal framework in order to facilitate the achievement of regional goals. The grounds upon which this advocacy is advanced are now examined seriatim.

4.1 PROMOTION OF AFRICAN INTEGRATION

‘Africa is one people, one continent, one nation. Africans must unite or disintegrate individually’

– Kwame Nkrumah

It has been argued by scholars that the development of an African regional law is fundamental to the attainment of regional integration of the African continent.¹⁴ It is not hard to appreciate the merit in this argument in light of the existence of experiential evidence as derived from the European example of the EU and the introduction and operation of EU laws.

However, the primary obstacle to the attainment of this is the previously discussed problem of reconciling the sovereignty of member states with the supranationalist nature of an African union legal order. It must be noted in this regard that commentators such as Oliver have proposed that the AU be classified as interstate and not as supranationalist. It is submitted nonetheless that the need to integrate the African region, which is best achieved by the development of an AU law, overrides any reservations as to the compatibility of such laws with the sovereignty of nations.

It should be recalled that one of the objectives of African states in creating the OAU was to institutionalise the spirit of oneness of the African populace and integrate the African continent by promoting unity and solidarity amongst African states.¹⁵ To this end, member states were enjoined to harmonise their domestic laws and policies.¹⁶ The AU itself, as the successor of the OAU, is according to the Preamble of its Constitutive Act said to be ‘guided by a common vision

¹⁴ *ibid.*

¹⁵ OAU Charter (n 1) article 2(1)(a).

¹⁶ *ibid* article 2(2).

for a united and strong Africa'.¹⁷ Also, the emergence of the Pan-Africanist school of thought, to which many of the African 'founding fathers' such as Julius Nyerere, Kwame Nkrumah, Haile Selassie and Ahmed Sekou Toure belonged, as well as more recent calls for the creation of a United States of Africa, help to further substantiate this assertion. However, this writer must cautiously clarify that the said call and the advocacy for AU law are two different clamours, riding on different pedestals and objections to the former should not be taken as objections to the latter merely by virtue of this referencing.

Ultimately, it is submitted that AU law can serve as a veritable tool for the achievement of this traditional desire to integrate Africa as such integration requires both policies, legal instruments and institutional imperatives to be achieved, and all of these are predicated on the existence and efficacy of an AU Law. In so far as regional integration remains the destination, an AU legal order remains the most viable vessel.

4.2 JOINT AFRICAN APPROACH AND SOLUTIONS

'Africa's story has been written by others; we need to own our own problems and solutions and write our story.'

– Paul Kagame

Over the years, African countries have continued to adopt the practice of imitating and incorporating solutions that advanced foreign countries in Europe and Asia, amongst others, have implemented to solve their problems. Whilst this writer is of the opinion that learning from advanced nations and jurisdictions is essential for the speedy development of the African continent, he is also of the view that frequently this fails to account for the differences in social, cultural and political circumstances.

Noting the criticisms of the term African problems, it must also be clarified that the context in which the phrase is being used in this essay is for the purpose of depicting humanity's problems in the African context. Africa is plagued by its own unique problems, and hence must resort to finding unique solutions. In the popular words of Nkrumah, 'we must find an African solution to Africa's problems'. The emergence of AU law best guarantees the achievement of this.

As proof that this notion, though it appears cliché, is a valid one, regard must be had to the African Charter on Human and People's Rights. The Charter was adopted in 1981 and its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the extent of human rights violations.¹⁸ The African Charter has been largely

¹⁷ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) Preamble.

¹⁸ Makau wa Mutua, 'The African Human Rights System in a Comparative Perspective' (1993) 3 Rev Afr Comm Hum & Peoples' Rts 5, 7.

lauded as being unique and different from other regional human rights treaties. Some of its unique features include: its embodiment of the concept of indivisibility of rights,¹⁹ the absence of derogation,²⁰ its special emphasis on the right of peoples²¹ and its imposition of duties on the individual²² to mention a few. By introducing an Afrocentric human rights instrument that sought to respond to African specific problems and incorporate an African conception of human rights, the African regional body scored a great international point. It must be emphatically stated that the African Charter is an exemplary of the AU law being discussed, and Africa and African states owe the landmark developments in the African human rights arena to this AU legal instrument. The African Charter on Democracy, Elections and Governance, for instance, also helps to standardize governance across the African continent and ensure good governance in Africa in light of Africa's governance problems.

Hence, this sort of practice must be encouraged and more of these Afrocentric instruments must be introduced. Thus, AU law once again presents itself as an indispensable mechanism for the achievement of African solutions to African problems.

With its failing and failed states, its combination of fragile government and institutions, institutional weaknesses and attendant ungoverned spaces, and the increasing gap between the haves and the have-nots,²³ Africa cannot continue to rely on individual governments to solve the myriad of problems plaguing the African populace.. Hence, since many of these problems are common amongst African states, it is prudent to continue to pursue a joint solution to these common problems.

4.3 FACILITATION OF ECONOMIC DEVELOPMENT

For many decades Africa has struggled to catch up with the rest of the world in terms of development and advancement across several areas. It is submitted that the development of the African continent and the betterment of the lives of the African populace will be better achieved through the instrumentality of AU law.

Once again, illustrative of this potential is the European system. The EU has successfully built a single market founded on 'four freedoms', with people, goods, services and capital moving

¹⁹ See *SERAC v Nigeria* (2001) AHRLR 60.

²⁰ See *Media Right Agenda v Nigeria* (2000) AHRLR 262.

²¹ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003, para 155.

²² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) articles 27, 28 and 29.

²³ Hussein Solomon, 'African Solutions to Africa's Problems? African Approaches to Peace, Security and Stability. *Scientia Militaria*' (2015) South African Journal of Military Studies 43.

freely amongst member states.²⁴ The EU also operates a single currency system which serves to make the single market function more efficiently.²⁵ There is no denying that in terms of economic development, European countries and African countries do not rank equally, and much of this success is owed to the enabling treaties. This writer is not proposing that the EU system be imitated or that a single African currency be introduced, but the development of a more interwoven economic regime in Africa could help attain greater heights in economic growth. According to the rankings of the International Monetary Fund,²⁶ no African country ranks within the top 25 largest economies in the world by nominal GDP. Europe, on the other hand, boasts several representatives in that elite category, and if the European economy was to be considered as a single economy in that ranking, it would be second only to the United States.

Africa has some of the world's fastest growing economies and a conglomeration of these economies could herald brighter economic fortunes for Africa through the joint harnessing of potential. None of this, however, can be achieved without a body of international agreements and treaties to this effect for the purpose of establishing the requisite institutions and implementing the required policies. Hence, an AU legal order holds a great deal of potential in helping African states achieve their economic goals.

5.0 CONCLUSION

A failure to recognize, promote or respect the concept of AU law would ultimately amount to an utter disregard for the existence of a regional body, especially as the law remains the primary tool by which any organisation or body can achieve its goals. Hence, in light of the reasons adduced herein in favour of AU law, it is submitted that it is necessary to look beyond the theoretical challenges and limitations and focus on the practical realities of the African populace. If truly there is a determination to solve the problems of Africa, then AU law both as it is today and as it stands to be in the near future must be embraced. Greater recognition ought to be accorded to it by academia and the socio-economic and political spheres, not as an abstract concept but as a veritable tool to be channeled properly. AU law must indeed be granted its rightful place in the hierarchy of African legal norms.

²⁴ Europa, 'EU: What it is' <<http://publications.europa.eu/webpub/com/eu-what-it-is/en/>> accessed 30 September 2018.

²⁵ *ibid.*

²⁶ IMF, 'GDP (Nominal) Data' (April 2018)

<<https://www.imf.org/external/pubs/ft/weo/2018/01/weodata/weoselagr.aspx>> accessed 24 January 2019.

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