Book Review: The Emergent African Union Law: Conceptualisation, Delimitation and Application. Olufemi Amao, Michèle Olivier and Konstantinos D. Magliveras (eds)

By:

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This substantial volume sets out to establish the case for recognition of a new field of law. The editors propose a concept of African Union (AU) law – by analogy with the established body of European Union (EU) law – and argue for the need for such a concept in order to create “a platform to examine legal developments in Africa from an Afrocentric perspective”.

There is of course existing literature that considers aspects of the themes treated in this book, but this literature is for the most part not conceptualised

as belonging to a field of study called “AU law” (with the exception of some articles by the editors of this volume). By bringing together detailed analysis of legal problems addressed by AU treaties and institutions – ranging from commercial dispute resolution to gender equality and customary law, via intellectual property, the right to a nationality, and counter-terrorism measures – the editors have surely succeeded in their objective. This volume has established the baseline information on a wide range of transcontinental legal frameworks that will form the starting point for much future scholarship. This scholarship will doubtless refer to itself as being about AU law, and cite chapters from the book as starting points.

The first task the editors set themselves is to define the idea of AU law. On the one hand, this is a simple statement: “the body of treaties, resolutions, decisions and declarations that have direct and indirect application to the member states of the African Union”. On the other, there are immediately blurred edges to this already wide definition, considering that the AU Constitutive Act does not itself (unlike the treaty establishing the EU) establish the definition and relative authority of legal acts adopted by its different institutions. Many of the authors go beyond strictly AU law to discuss legal frameworks of the regional economic communities (RECs) that group AU member states in other configurations, in order to show how they are often more important in creating the momentum for change at national level. Arguably, the proposed definition also encompasses United Nations law that has application to AU member states; an understanding supported by the fact that the jurisdiction of the African Court on Human and Peoples’ Rights reaches not only to international human rights treaties ratified by AU member states but to “any question of international law” (Article 28 of the court’s statute). However, the general brief is clear: the establishment of a critical body of knowledge about the institutions, treaties and decisions adopted within the framework of the AU, broadly understood.

The volume is grouped into five sections: the first to set out the conceptual framework for the idea of AU law; secondly, the idea of harmonisation and integration as drivers of AU law; thirdly and fourthly, sections that focus on civil and political and socio-economic challenges; and finally a collection of chapters on enforcement of AU law.

The questions addressed in the final section in fact permeate the book. Many chapters discuss the tension between the often ambitious nature of AU normative frameworks (whether legally binding or not), and the lack of application of these frameworks in practice. This is unsurprisingly highlighted for standards in the area of human rights, democracy, and good governance; including in chapters on nationality and statelessness (Chidebe Matthew Nwankwo), the right to education (Rui Garrido and Aua Baldé), and sustainable development (Eghosa Ekhator). But it is also true for the central integration projects of the AU considered in several chapters across the book, including the recent treaty to establish an African Continental Free Trade Area (AfCFTA) and, following the fiftieth anniversary declaration of 2013, the adoption of Agenda 2063 as a forward looking vision for the AU.

Other chapters choose primarily to highlight the deficient nature of existing legal frameworks, and call for their improvement. In some cases, these are missing altogether at AU level; for example, in the case of financial standard setting (Pablo Iglesias Rodríguez), private business registration (Iyare Otabor-Otubor), or commercial arbitration (Onyeka K Osuji and Oluwafikunayo D Taiwo). In others, there are existing frameworks, but the authors urge serious reform; as in the case of intellectual property (Emmanuel Kolawole Oke) or management of terrorism (Cristiano d'Orsi). Several chapters – especially Ovo Imoedemhe in the final section of the book -- consider the potential importance of the Agenda 2063 initiative in strengthening the AU, and the contribution made by the 2017 report on reform of the AU institutions commissioned by the AU under Agenda 2063 from President Paul Kagame of Rwanda (when he was AU president). The consensus is that a major shift will be needed in the attitudes of member states and their governments if these reforms are to have an effect and the AU legal regime achieve its potential.

Is it the case, therefore, that this volume is another tale of African failure to live up to lofty ambitions? It would be easy for an afro-pessimist to read the cumulative effect of the chapters in that way. But I think it would be wrong to do so. Several of the chapters, perhaps especially Regis Yann Simo on domestic enforcement of AU economic law, show how legal institutions and norms can take on their own life. He argues that the courts established by the RECs, many of which allow individuals or organisations and not only states to access them, have developed their own momentum and enforced rights at regional level.

Perhaps the most obvious (but also contested) example of the impact of the evolution of continental legal frameworks on state behaviour in practice is the response of the AU to unconstitutional changes of government. The Constitutive Act of the AU was adopted by the final meeting of the Assembly of the Organisation of African Unity (OAU) in 2000, in the same meeting as the Lomé Declaration on unconstitutional changes of government. The Declaration and Constitutive Act established norms – of course imperfectly applied – that have made clear that a government installed by military coup will not be admitted as representative of the state to AU meetings. The extension of the principle to stolen elections is also remarkable, though also much less solidly entrenched, as highlighted by Eki Yemisi Omorogbe; once again, he stresses the role of the RECs in implementation of these norms in practice.

Elsewhere, as the editors themselves highlight, we see how AU law has developed as part of a commitment to push back against western-dominated international law, creating the necessary legal basis to even consider “African solutions to African problems”. This is a feature, for example, of the protocol establishing the AfCFTA; the adoption of the Malabo Protocol giving the proposed African Court of Justice and Human Rights criminal jurisdiction (discussed in a chapter on relations with the International Criminal Court by Benedict Abrahamson Chigara); and, from a very different perspective, the discussion of the AU’s normative frameworks on gender equality in the development of customary law in the post-colonial context of legal pluralism in Africa (Adaeze Okoye). Rhuks Ako shows how the AU’s Peace and Security Council is itself developing international customary law in response to legal challenges facing the continent – a role that was not imagined when the AU Constitutive Act was adopted.

The chapters collected in this volume have enough work to do setting out the legal regimes they discuss, but I am sure that future scholarship will use these foundational contributions as the basis for more research. How are norms ‘vernacularised’ in national law (as Sally Engle Merry has described it)? That is, how do politicians and officials at national level in practice take account of the AU law frameworks (described and critiqued by the chapters in this book) as they develop national law and policy? Is it necessary for the formal enforcement measures to be used in case of non-compliance, and penalties imposed and scrupulously respected (with explicit public recognition of that

fact), for legal frameworks and decisions to have an impact on government behaviour? What is the influence of a document such as the 2014 Niamey Convention on Cross-Border Cooperation when states are deciding budgets, issuing internal directives and allocating personnel? The volume also invites future projects to learn more about the nitty-gritty of the adoption of AU normative frameworks and the roles of particular states in pushing them forward; as well as the role of particular individuals, advocacy groups, and governments. At the same time, the book will provide important source material for the strengthening and development of those formal mechanisms, and for the individuals, advocacy groups, and governments who may do so.

There are always gaps in a volume such as this – it is not possible to cover everything – but there are two chapters I felt to be missing from the first section.

The first is a constitutional history of the African Union, dating back to the pan-African institutions established in the pre-independence era, and the creation of the OAU in 1963, as the majority of African states gained independence. A important stage in this account is the establishment of the African Economic Community (AEC) in 1991. While a number of contributions refer to these steps, and discuss the formation of the African Union as a result of disillusionment with a weak and discredited OAU, the deep history of the project to establish pan-African institutions is not presented here. In addition to the interest in this history in its own right, the background can also explain some of the more confusing aspects of the contemporary framework.

Among these confusing aspects, and the second theme that I think could have benefited from its own stand-alone chapter, is an account of the historically ambiguous status of the RECs as “building blocks” of the AEC (and now of the AfCFTA) that in practice operate largely autonomously. Eight RECs are recognised by the AU through a protocol adopted in 2008, yet a number of other regional groupings exist in parallel; often with overlapping membership, as emphasised by Kamala Dawar and George Lipimile in their chapter on competition law. Some of those not recognised by the AU are among the more effective institutions in the African continent: for example, the West African Economic and Monetary Union (WAEMU, though usually known by its French acronym UEMOA), discussed in the chapter on competition law, and by Chisa

Onyejekwe’s contribution on efforts at tax harmonisation.

One final niggle is that, for such a dense and detailed work, the index is poor, making it difficult to find particular pieces of information. Among the RECs, for example, WAEMU has no dedicated index entry; ECOWAS has an entry with one page reference, although a search of the electronic version shows 112 references throughout the volume. The right to education, on the other hand, has half a column of references – all but one limited to the chapter dedicated to the right to education, and thus hardly needing to be indexed at all.

These points, however, should not distract from the substantial achievement of the editors in bringing together this volume, which will remain a reference work for some years to come.

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