African Union at 20: The Emergence of African Union Law and its Role in the Integration Effort

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This short piece explores the role of norm generation at the continental level in Africa and its impact on the integration effort. It examines notable developments in Africa with impact on the normative and legal developments, including colonisation, Pan-Africanism, the formation of the Organisation of African Unity (OAU) and the African Union (AU). Particular attention is paid to the AU Constitutive Act and its significance.

Africa has come a long way from the time it was considered a 'dark continent' with little or no conception of law. Over time, legal scholars and historians have acknowledged that Africa has always had its own unique understanding of the law, one that is different from the Eurocentric Western idea of law. African Customary Law may be considered as the unwritten 'magna carta' with

variations across the continent. Though there were many legal systems in pre-colonial Africa, there was a recognisable universal body of principles running through the legal systems. These included substantial justice, natural justice, preservation of community and collectivism, a connection between law and morality, a belief in the supernatural, Ubuntu and its variants, and the idea of reconciliation.

Despite its disruption of the traditional legal order, colonisation unwittingly advanced the development of African Union (AU) law on a continental basis. The idea of Pan-Africanism, which developed as a response to colonisation and the struggle for independence of African states, sowed the seed for the pursuit of integration in Africa. The formation of the Organisation of African Unity (OAU) in 1963 moved the integration agenda forward to a limited extent and produced part of the corpus of AU law.

The emergence of the AU could be considered as the crystallisation of the integration agenda and the formal establishment of a new legal order. The AU Constitutive Act empowers the institution to govern wider areas of activities within the continent that affect member States and their citizens at large. The AU Constitutive Act, which entered into force as a binding legal instrument in 2001, effectively replaced and superseded the OAU Charter. The Constitutive Act is significant because it has constitutional status. It represents the organic written constitution of the AU. It not only established the AU as an institution but also provided for the fundamental principles governing the Union. The AU Constitutive Act is recognised as the social contract and legal code that now underpins the continental legal order. The ultimate aim of the AU Constitutive Act is the ambitious goal of achieving political integration in the continent, which is a far cry from the OAU Charter's limited ambition that aimed only at fostering cooperation among members of the OAU.

Even though the Constitutive Act accommodated some of the principles of the OAU Charter, at the same time, it marked a significant change in direction for the legal framework of the Union. Article 3 of the Constitutive Act states the objectives of the AU, and it is notable that the objectives which are geared towards the ultimate goal of the AU are more extensive than similar provisions under the OAU Charter. A majority of the objectives of the AU are directly or indirectly linked with integration and collectivism. In contrast, the OAU

objectives are mainly focused on solidarity, cooperation and ending colonialism. The principles set out in Article 4 also signify a new approach to the underlying principles of an African approach to the norm and standard setting. These principles include popular participation, common defence policy, peaceful conflict resolution, the right of the AU to intervene in member States, self-reliance, gender equality, social justice, the rejection of terrorism and the rejection of an unconstitutional change of government. These expanded objectives and additional principles are playing significant roles in the normative underpinning of the emerging AU law.

Indeed, Murithi has observed that the AU is playing a continental role as a 'norm entrepreneur' and a 'normative leader' who encourages member States to uphold a range of norms and standards. The evidence for this assertion includes the AU's active role in advancing norms relating to peace, security and stability; the rights to intervene in member States; unconstitutional change of government; and human rights.

The ability of the AU and its institutions to generate norms and standards at the continental level that has consequences for the Member States and their citizenry underscores the importance of the emerging AU legal order. A notable example is how the development of the normative standard on unconstitutional change of government under the AU legal order has shaped the AU's opposition to military interventions. It is widely acknowledged that military coups not only undermine democratic and constitutional rule, but they also entrench bad governance that leads to the violations of the rights of citizens. The norm evolved gradually from the time of the OAU and became one of the foundational principles of the AU Constitutive Act, which is also backed by a sanction regime. Other instruments of the AU, such as the Protocol establishing the AU Peace and Security Council, incorporated the norm and expounded on it. The approach of the AU in articulating the norm of unconstitutional change of government as a threat to peace and security even goes further than the United Nations (UN) approach to peace and security 'by establishing an elaborate list of major breaches of the principles of constitutionalism and democracy as threats to peace and security.' However, it is acknowledged that the AU’s evolving approach is undermined by the recent spate of coup d'etat in countries such as Burkina Faso, Sudan, Guinea and Mali. It is notable that the AU suspended the membership of the mentioned countries following the coup.

However, the norm relating to the right to intervene in member States is recognised widely as the AU's potential ability to set global standards because of its clarification on when an international organisation can interfere in the affairs of Member States. It is noteworthy that the AU is the first international organisation to comprehensively provide a legal basis for such in its Constitutive Act. However, the provision is yet to be activated by the AU.

The emerging continental court system in Africa is also notable and significant. Though nascent, the African court has a better prospect with respect to effectiveness and enforcement when compared to the quasi-judicial African Commission on Human and Peoples' Rights. The decision to introduce a court system to complement and ultimately take over the judicial function of the African Commission is a notable movement towards supranationality.

It is acknowledged that there are major challenges that the AU legal order would need to grapple with as it develops. Examples of such challenges include effective enforcement of decisions and capacity building. Nonetheless, current trends in norm generation at the continental level underscore the emergence of a new and significant legal order in Africa.

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