

Could African Union law shape a new legal order for the continent?

In his forthcoming book, *African Union Law*, Femi Amao argues that Africa is on the cusp of a new continental legal order. It's evolving slowly but there are early signs that it's showing traits similar to the development of European Union law. *The Conversation Africa's* Julius Maina asked him to explain.



African leaders at the closing of the 26th African Union Summit in Addis Ababa, in 2016. EPA/Solan Kolli

What are the preconditions for a new legal order?

The African Union legal order stems from the integration efforts that started with pre-independence Pan-Africanism. This led to the formation of the Organisation of African Unity (OAU), which was succeeded by the African Union (AU) in 2002.

The formation of the AU formally marked the beginnings of continental legal order because, unlike the OAU, it was formed by a Constitutive Act – a recognised social contract and legal code that now underpins the continental legal order.

This development means that we now have the prerequisite framework for a continent-wide legal order. It's acknowledged that the legal order is in its infancy and there's a long way to go. Even though the AU has made significant progress in meeting its ambitious goal of political integration, African leaders are aware of the need for further reform. That was why the AU Assembly commissioned the Kagame report which recommended a number of institutional and legal reforms. These include improving the effectiveness of the AU Court system, clarifying the legislative powers of the Pan-African Parliament and the speedy implementation of the AU continental passport.

You argue that AU law is beginning to show traits similar to the development of European Union law. What are these?

The design of AU institutions is broadly similar to that of the EU with comparable institutions. Laws of supranational organisation evolve progressively with the institutions. It is therefore not surprising that the emerging AU law is also showing characteristics similar to EU law.

For example, the powers and jurisdiction of the African Court of Justice and Human Rights and that of the European Court of Justice are broadly similar. Also, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have increasingly made reference to the European jurisprudence in their case law.

The emergent AU law is seen as distinct and separate from international law and the domestic laws of member states. EU law is now seen as a "supranational law" – beyond individual nation states. It's arguable that, with time, AU law will evolve to the same level.

It's worth noting that the AU's legal order borrows certain legal principles from the EU. For example, the principles of subsidiarity and proportionality. The principle of subsidiarity prescribes that decisions should be taken at local levels except where continental level decision making is more effective. The principle broadly governs the division of powers between the AU and other regional bodies and also Member States. The principle of proportionality is closely linked with the subsidiarity principle and prescribes that actions at the continental level should not extend beyond what is necessary to achieve the objectives of the union. The concepts have already been applied in judicial decisions of the AU judicial system.

The area of human rights is probably where the greatest similarities are. Human rights are fundamental to the EU legal order. Member states are required to apply the Charter of Fundamental Rights of the European Union. Similarly, the AU Constitutive Act has consolidated and advanced the framework for promoting and protecting human rights in Africa by giving it constitutional status binding on all member states.

You also suggest that the AU is gradually and incrementally de-emphasising nation state sovereignty. Can you site examples?

National sovereignty was fundamental under the OAU, which adhered strictly to a norm of non-interference in a member state's affairs.

But the AU has abandoned this approach, adopting the "non-indifference" norm in Article 4 of its Constitutive Act. Under this act, the AU has the power to intervene in a member state's affairs and use force if necessary in grave circumstances. These include war crimes, genocide, crimes against humanity and serious threat to legitimate order.

The adoption and ratification of this act is the clearest example of African nations' willingness to surrender some sovereign powers for the greater good of the continent.

The "non-indifference" norm is a direct response to a long history of military interventions in Africa. It is widely acknowledged that military coups not only undermine democratic and constitutional rule. They also entrench bad governance that leads to the violations of the rights of citizens.

The recent military intervention in Zimbabwe is the latest example of how the norm is shaping member States' behaviour. To avoid AU sanctions, the military made every effort to abide by the country's constitutional law when it removed former President Robert Mugabe.

The role of the AU alongside ECOWAS and the EU in restoring democratic governance in the Gambia in 2017 is also evidence of the effect of the norm.

The emerging continental court system is also a significant step away from nation state sovereignty. The continental court system's decisions are binding on member states and supersede domestic courts in its area of competence.

In 2015, the African Court's competence to evaluate evidence presented to a domestic court and the appropriateness of the penalty imposed was challenged on the grounds that it could not sit as a 'Supreme Appellate Court'. But the African Court rejected this argument. It held it has the power to examine whether the proceedings at the member state's court was in conformity with the fair trial provision in the African Charter and held the domestic Court accountable on that basis.

EU members states have relinquished powers to pan-European institutions. Do you envisage AU countries doing the same?

AU member states have not relinquished nearly as much power to AU institutions when compared with the EU. This is not surprising because the two systems emerged from different historical contexts. But the AU is taking a gradual approach and also focusing on specific areas where collective action would be more productive, such as the example of managing the problem of coups d'état.

The introduction of the pan-African parliament and the expanding role of the continental level judicial system are strong indications that more powers may be ceded to the AU institutions in the future.

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