United States of Africa
Positioning the Pan-African Parliament and Court in the political union debate

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Introduction

The need to assure greater human security in a world exposed to the dangers of terrorism and civil wars; the necessity of pooling economic endeavour and consolidating markets and generating economic growth in poverty stricken communities; and the imperatives of preserving dwindling resources in a menaced global environment; all these seem to preoccupy many across the globe. For these reasons, among others, the logic of unions of one kind or another, be they sub-regional, regional or continental, dominate contemporary policy debates at national, regional and global levels. Consequently the very suggestion that the dream of a United States of Africa should be afforded further serious consideration is, despite the numerous practical obstacles to its realisation, in itself considered to be a laudable idea.[1]

The need to assure greater human security in a world exposed to many dangers preoccupy many across the globe

Indeed, this idea of African unity has evolved substantially: from the challenges of newly independent states to the imperatives of continent-wide unity, the transformation in global and continental realities has not necessarily been matched by concomitant institutional infrastructure on the continent. The transition from the much criticised Organisation of African Unity (OAU) to the African Union (AU) and its associated programmes such as the New Partnership for Africa's Development (NEPAD) and African Peer Review Mechanism (APRM) was widely celebrated. Nevertheless, the desire for a more appropriate entity that can best confront the challenges of the modern world, arising from perceived inadequacies of the current initiatives, has remained alive. The present debate about the possibility of a United States of Africa is premised on these realities.

The purpose of this paper is twofold: first, to offer some insights into the challenges inherent in the practical implementation of this idea with respect to two institutions integral to the notion of a United States of Africa, namely the African Parliament and African Court of Justice, and second, to offer some suggestions, informed by comparative experiences of the EU and US, on what reforms may need to be undertaken with respect to these institutions and what other supporting institutional framework would render the dream a reality.

African Court of Justice and Human Rights

Current institutional arrangement

As the adjudicatory arm of government, the judicial body is crucial regardless of the form of governmental configuration - be it federal, confederate or unitary. The AU is no exception in this regard and has previously considered two courts: the African Court of Justice (Justice Court) and the African Court on Human and Peoples' Rights (the Human Rights Court). This section revisits various aspects of the two courts as well as the new court – African Court of Justice and Human Rights (ACJ & HR), the result of a resolution of the AU to merge the two.[2]

The merger into the African Court of Justice and Human Rights

The Protocol on the Statute of the African Court of Justice and Human Rights establishes the ACJ & HR (Protocol on the African Court of Justice and Human Rights and Annexed Statute 2006) as the main judicial organ of the AU (art 4, Statute on the African Court of Justice and Human Rights) and vests it with a mandate to complement the protective functions of the African Commission on Human and Peoples' Rights and the African Committee of Experts, which was established under the Charter on the Rights and Welfare of the Child.

In terms of the Statute of the Court of Justice and Human Rights (court statute), which regulates the specific functioning of the court, establishes two sections in the court. These are a General Affairs

Section composed of seven judges and a Human Rights Section composed of five judges (art 15). Unlike the European Court of Justice, in which each state is represented by a single judge (usually its national), the AU decided to limit the number of judges to regional rather than national representation. The Statute does provide that the Assembly may increase the number should the need arise (art 3). The General Affairs Section will be competent to hear all cases that may be deemed to raise 'essential concerns' of the AU (arts 16(1) & 30), with the exception of those relating to alleged violations of human rights which are reserved for the Human Rights Section of the court (art 16(2)). These essential concerns of the AU relate to the interpretation of AU treaties, including the Constitutive Act; acts and functions of the organs of the AU; disputes between states; and their obligations in international law generally (art 30). An important aspect is that the General Section Court may constitute itself into special chambers to attend to matters such as trade, economics and the environment (art 18 (1)).

The court is open to a number of parties: state parties to its protocol; organs of the AU authorised by the Assembly, the Assembly itself and the Pan-African Parliament (PAP). A staff member of the AU Commission may appeal to the court in a dispute as set out in the Staff Rules and Regulations of the Union. Yet, there is no provision for a court or tribunal of first resort for such cases. The court will also have no jurisdiction over cases from non-AU members (art 30(3)). AU states that have not ratified the court protocol may appear by special dispensation from the Assembly (art 30(2)) or may, on notice of the Court Registrar, intervene in a case which concerns the interpretation of the Constitutive Act (art 60).

With respect to human rights violations arising under the African Charter, the Women Rights Protocol, the African Charter on the Rights and Welfare of the Child and other agreements, the parties that have automatic access to the Court are the African Commission, the African Committee of Experts on the Rights and Welfare of the Child and African intergovernmental organisations (art 32(a, b & c)). Individuals and African non-governmental organisations (NGOs) may only bring cases against states that have accepted this jurisdiction when ratifying the court protocol (art 32(d)). There is no bar to such declaration being made at a later date by a state party.

With respect to the admissibility of cases relating to human rights protection, the Court Protocol holds to the general rule established by the African Charter (arts 55 & 56) that domestic remedies have to be exhausted before the court can be approached (arts 36, 41 & 42).

The court's jurisdiction is not limited to cases where there is a dispute. It may render an advisory opinion on any question of law at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the financial institutions or any other organ of the AU that may be so authorised by the Assembly (art 63).

Issues and parameters for the future judicial organ of the African Union

The design of a more integrated union, whether in the nature of a political federation, a confederation or a common market, impacts on a number of issues, ranging from economical, monetary and trade to politics, and thus requires serious contemplation. The configuration of the judicial branch is critical in this regard. Apart from general concerns, specific concerns arise from the multiplicity of issues that would have to be addressed if the court did become the central judicial body of the proposed union. These include the following:

- The protection of human rights
- Effectiveness and efficiency of the institution
- Resources – financial and human
- Its supervisory role in the union (in the manner of 'checks and balances') in the tripartite government arrangement
- How the judicial functions should be distributed, given that there will be a range of issues, several judicial organs may be established
- Whether the court should be divided into different divisions and which issues the main court should then address
- How many judges should be appointed to ensure a balance between fair representation and coherence of jurisprudence

As the main judicial organ of the union, such powers must vested in the court as would make it effective in its role of checking the political branches - Parliament and the Executive (whose functions may be said to be currently loosely exercised by the AU Commission). For instance, it would in this capacity mediate between the 'Executive' and union civil servants. It would ensure that Parliament's legislative function (whatever scope it may be awarded by the constituting instrument) conforms to the principles of the constitutive instrument.

With respect to the protection of human rights, the nature and structure of the court must be informed by its ability to protect human rights effectively. Given that financial and human costs always need to be borne in mind, a cumbersome and expensive structure would not be advisable. The effectiveness and efficiency of the court in delivering on its mandate is also a matter of great importance. In the light of the huge size of the continent and the multiple layers, from the AU to the actual implementation at state level, this may require

supporting mechanisms that may not necessarily be judicial in nature.

The effectiveness of the court in protecting human rights, its execution of other mandates as well as the need to reserve certain core judicial functions for the highest court, would determine the distribution of judicial functions in the Union. On the question of judges, the imperative is that 'jurisprudential chaos' and possible conflicts should be avoided at all costs. This may be problematic because if every state, or even the majority of states are represented in the judicial body in a union with a large membership, it may create a cumbersome institution with the attendant lack of coherence in its decisions.

The above factors may be said to set the parameters within which a fitting continental judicial organ(s) must be structured. These issues are addressed more specifically in the comparative discussion below and in the recommendations set out in the final section. An outline of the EU and US judicial structures and their function provides a starting point for proposals for an African Court.

The European Court of Justice and Supreme Court of the United States: a brief outline

The European Court of Justice (ECJ) was established in terms of the Treaty of Rome[3] as one of the four main institutions of the EU.[4] Its purpose is to interpret the treaties constituting the EU and to deal with disputes concerning those in the service of the EU. In other words, it is the main judicial arm of the EU, charged with ensuring that the law is observed in the interpretation of the Treaty of Rome. Its mounting caseload has been relieved by the establishment of the Court of First Instance.[5]

While the ECJ is the main court in the EU judicial structure, it is not the highest court to which matters that have not reached definitive resolution at the national level may be appealed. However, as is the practice, national courts (usually the highest courts) refer specific matters (relevant to the interpretation of EU treaty issues that arise in cases before them) to the ECJ for guidance on the meaning of the EU treaties and how they apply at the national level. The ECJ's ruling then allows the relevant national court to dispose off the matter itself. [This means the ECJ and national courts are not in the same system ie no hierachical relationshiphe with the ECJ-a case from a national court is not appealable to the ECJ]

The Supreme Court of the United States (US Supreme Court) is the constitutional court and custodian of the Federal Constitution and as such is vested with the powers to interpret the federal constitution (s 1, Constitution of the United States of America). Interpretation relates to a range of issues, from human rights and the relationship between the branches of government to the relationship between the states constituting the federation. Below the Supreme Court in the structure of federal courts are federal courts of appeal and district courts. Each of the 50 states has its own court system. Comparatively, the ECJ stands at the same level as the US Supreme Court in the sense that no appeals lie to its decisions (George et al 1997:121), although the US Supreme Court sits atop a hierarchical federal and state judicial structure. As noted above, the ECJ does not stand in the same relationship with national courts of member states.

The question therefore is how the African Court should be anchored, in comparison to the EU and US systems, particularly with regard to its function as a supreme court. There is no doubt that some kind of judicial arrangement has to be put in place and in particular that there should be a major court to interpret major issues in the envisaged union government. Indeed, in the constitutions of regional systems the prevailing practice is to establish tribunals charged with the interpretation of the constituent instruments, and how the polity is organised and functions.[6] Such tribunal furthermore mediate in disputes between the bodies of such entities or between their bodies and employees at federal, confederate or regional levels. As Bednar, Ferejohn and Garrent (1996:280) note, the courts or tribunals in such systems increase the confidence of members since it is assumed that they would be able to check the central government.[7]

The question therefore is how the African Court should be anchored with regard to its function as a supreme court

Structuring the African Court: Issues for consideration

The above outline offers several guiding questions with respect to the design of the envisaged court that would stand at the apex of the union: What should the structure of such court be? Should the union set up one or more judicial courts (tribunals) given the multiplicity of issues in a union government? Should the merger between the Justice Court and Human Rights Court go ahead? What mandates should such tribunal(s) have? What powers should the tribunal(s) wield? Who should have access to such tribunal(s)? How should its judgments be enforced?

On two further aspects decisions have already been taken: the Constitutive Act of the AU has entrenched the ACJ & HR as the principal organ of the AU and various powers have been vested in the new court by its protocol. Further, there is no other court or tribunal, apart from the African Commission on Human and

Peoples' Rights, whose protective mandate is to be complemented by the ACJ & HR.

Since the merger has far-reaching implications, it has to be addressed first. According to African governments and experts commissioned by the AU, two principal reasons were said to motivate this merger.[8] The first was to bring about saving of both financial and human resources and the second to avoid unnecessary duplication of mandates and efforts between an African Court and a separate Human Rights Court. These issues were first raised during the negotiations on the draft protocol on the court and in particular deliberations related to article 56(2), in 2003.[9] This resource-based justification for a single court has merit since the issue of resources constitutes a major challenge for institutions at the regional level.

However, this should be measured against further considerations, one of the most important of which is the effective protection of human rights on the continent. In the first place, merging the human rights tribunal with the general one creates the risk that this important matter may be relegated to the periphery. It is vitally important that human rights are seen to be protected. In the second place, while an attempt has been made to ensure specific attention to human rights issues by creating a human rights section, an insufficient number of judges (five) have been allocated to this division. Given the number and severity of human rights abuse cases that will in all probability be brought to this court, in spite of the existence of the Human Rights Commission, a bigger tribunal would be required.

In the EU, the European Court of Justice does not directly interpret and apply human rights treaties;[10] this function is reserved for a specialised court - the European Court of Human Rights - which has 46 judges. A smaller, special human rights court may be the correct option for the new AU, given that the General Affairs Division will be busy with the multitude of other core union issues, while the five-judge Human Rights Section is too small to ably address the whole host of human rights cases from the entire continent. However, if saving of resources and avoiding duplication while maintaining an effective human rights protection mechanism are the main motivations, the Human Rights Commission could be abolished, as was done by the EU.[11] All the resources could then be devoted to an expanded, separate human rights court. In terms of procedure, one or two judges could take over the functions at present fulfilled by the Human Rights Commission (for example vetting the complaints to establish whether they raise issues that should be considered before they are put to the full court (or section of court)). This practice is also followed in the European Court of Human Rights.

In view of the diversity and number of issues the ACJ & HR may be called upon to address, the second core concern is whether the unified tribunal will have the competence and expertise to handle the diversity of matters, which is likely to range from the interpretation of the Constitutive Act of the AU, to disputes between international civil servants and the different bodies, to disputes between states on environmental, trade and intellectual property issues. Inevitably such a diversity of issues in a huge political and economic union will need specialised judicial attention. Architects and proponents of the new government have to decide whether the Union will be best served by a single tribunal; a single tribunal with specialised chambers; a judicial organ with an appellate structure; or a major court (such as a court of justice) made up of specialised tribunals, including a human rights court.

It is likely that numerous cases will be referred from the highest courts of national systems for an interpretation

In the opinion of the author there are two possible options. The first is a scenario with a single African Court of Justice with integral special chambers. Each of the chambers could be dedicated to specialised matters, such as human rights, union civil service disputes or other issues relating to the bodies and functioning of the AU government. This is similar to the structure currently proposed for the ACJ & HR, although there does not seem to be clear guidelines on the jurisdiction of specialised chambers. In addition such specialised chambers could act as ad hoc tribunals (see art 18, ACJ & HR Protocol).

The second scenario envisages the establishment of a major tribunal, and alongside it, satellite or autonomous specialised tribunals vested with specific mandates for the issues mentioned above. In all probability, as the union develops and interactions become more 'sophisticated', workloads will increase and matters to be adjudicated more complicated and specialised. Then more permanent chambers or independent tribunals specialising in a specific core issue could be established. It is likely that numerous cases will be referred from the highest courts of national systems for an interpretation of how the union, and particularly union law, affects specific aspects of the national legal system.

The EU has such a system of specialised independent tribunals. Apart from the main tribunal, the European Court of Justice, and the independent European Court of Human Rights, the Treaty of Nice makes provision for the establishment of specialised tribunals to deal

with special interests (Treaty of Nice 2001). There is in fact already an EU Civil Service Tribunal,[12] while a European Union Patent Tribunal is being considered.[13] The architects of a possible African government or union will have to identify special interests, not necessarily different or limited to those in the EU, and design appropriate tribunals to protect them. This could be an ongoing process, but special care will have to be taken to prevent a snowball effect or duplication of judicial functions. What is important is that those spearheading the initiative should realise that, subject only to the availability of resources, these choices have to be made at one point or the other. It should be borne in mind, however, that a union, especially one that approximates a proper government, on a continent as vast as Africa will not come cheap. Members must commit themselves not only ideologically, but also in practical terms.

Regardless of the approach chosen, it is important with regard to human rights that the powers of the court be clearly delineated and limited to instruments under the AU framework. These instruments, such as the Protocol on Women's Rights and AU Charter on the Rights and Welfare of the Child, complement the ideals of the main Charter. The present ACJ & HR Protocol (art 30, Statute ACJ & HR) seems to have addressed the problems of the 1998 Human Rights Court Protocol, which suggested that its mandate could extend to the interpretation of non-AU human rights treaties (some commentators feared that this could lead to 'jurisprudential chaos' if it had been maintained) (see arts 3(1) & 7 1998, Human Rights Court Protocol; Heyns 2001:167; Naldi and Magliveras 1998:435).

It is important that the powers of the court be clearly delineated and limited to instruments under the AU framework

Apart from the merger and multiplicity of issues to be addressed by means of tribunals, a third major issue relates to participation in the ACJ & HR by member states of the envisaged union. The problem arises from the fact that AU states that are not parties to the ACJ & HR court protocol have no access to the ACJ & HR, either. As in the case of the EU, it will be imperative that all member states ratify the court protocol and by extension the new Human Rights Divison, perhaps as a condition for continued AU membership.[14] Members should commit themselves in advance to certain ideals espoused by the AU. Many observers have noted that one main reason why the OAU failed is because of the unconditional membership, which meant that states did not have to commit themselves to established ideals of the OAU, such as democracy, the respect for human rights and the rule of law. In its expansion programme, the EU required that aspiring member states meet certain basic requirements, and that they should subscribe to the basic ideals of the EU.

A fourth issue that needs to be dealt with relates to access by individuals and NGOs to the Human Rights Division. The role of NGOs in the protection of human rights in Africa, in particular filing of petitions before the African Commission, has been recognised and lauded. The imposition of onerous preconditions, in particular the requirement that states should specifically accept this jurisdiction when ratifying the court protocol, may militate against human rights protection. It is a well-known fact that states are unlikely to willingly allow themselves to be sued by individuals. Although it is assumed that the African Commission will bring cases on behalf of individuals (as in the American system), shutting out NGOs may well be counterproductive and a major setback. If all states are required to subscribe to the court, it would have the effect of avoiding a fragmented judicial system in which some states do not participate and ensuring that effective human rights protection mechanisms exist at the continental level, which are accessible to all citizens who meet internal procedural requirements as regulated by the court itself.

The permanency of the court(s) also needs to be considered. The current design is that the ACJ & HR will be a part-time tribunal, with only the president working on a full-time basis (art 8(4), Statute of ACJ & HR). This situation will definitely have to be changed. Numerous legal issues that need to be addressed will arise from interactions within the union, between institutions of the union themselves, the institutions and states and other international players, as well as the institutions with their employees.

The ACJ & HR's decisions ought to be underwritten by a mechanism of enforcement. It is not a sufficient provision that the Court should notify the Assembly annually about its orders and their implementation. An appropriate political body, such as the Council of Ministers, should have the power to follow up the Court's orders with the individual states concerned. In view of their national responsibilities the Assembly of Heads of States and Government is perhaps not the ideal body to exercise the supervisory function. Even with the best intentions, the Assembly lacks both the time and space to address such matters. In the past, members of the Assembly have been accused of demonstrating loyalties to fellow members that have prevented them from taking decisive action against such members. Akokpari (2004:469-470) has lamented this sad reality.

Apart from a firm commitment as a prerequisite for membership, the ideal situation would thus be if the task of monitoring compliance with court orders is assigned a more responsible body. In the case of the

European Court of Human Rights and Fundamental Freedoms, for instance, final judgments of the tribunal must in terms of article 46, as amended by Protocol No 11, be transmitted to the Committee of Ministers. This committee is charged with duty of overseeing the execution of the decisions of the court. The committee has been successful in ensuring compliance (for a discussion of role of the Committee of Ministers see Robertson & Merrills 1993 and Harris et al 1995).

The Pan-African Parliament

Before outlining the features and roles of the PAP, it is important to describe the criteria and/or factors that are critical when considering the structure of a parliament of this nature. These include legislation, oversight, a budget and protection of human rights and promotion of democracy.[15]

The extent of political integration defines both the structure and the legislative powers that will be vested in such an institution (e.g. a future PAP). However, by examining the PAP as it is currently formulated it will be possible to determine whether the PAP has sufficient powers to enable it play a decisive role in a more integrated polity. With regard to the legislation, parliaments generally exercise oversight on matters of policy formulation and major appointments. The budgetary role of a parliament, related as it is to oversight, is an important consideration, and must be in line with the nature of the union. The protection of human rights and promotion of democracy is at the core of the role of parliaments in general and indeed the objectives of the present AU. In this regard questions that will have to be answered will relate firstly to whether the parliament itself sufficiently embodies human rights and democracy in the form of popular participation, and secondly whether it would be able to effectively perform its role as a guardian of human rights and promoter of democracy in the AU in its present form. The latter will in part take place through the articulation of standards, in this case in the form of legislation.[16]

The Pan-African Parliament in historical perspective

Although the idea of a PAP preceded the AU, it was only established in March 2004 and as one of the eight main organs of the AU (arts 5& 17, Constitutive Act of the African Union). It is one of the nine bodies provided for in the Treaty Establishing the African Economic Community, and was eventually given effect by the PAP Protocol.[17] The protocol was adopted when the OAU was in place, but it is now one of the AU treaties and therefore all references to the OAU in it must be read to refer to the AU.

The purpose of the PAP is 'to ensure the full participation of African peoples in the development and economic integration of the continent' (art 17(1), Constitutive Act). In terms of the PAP Protocol, its objectives include (art 3, PAP Protocol):

- Facilitation of the effective implementation of the policies and objectives of the AU
- Promotion of the principles of human rights and democracy in Africa
- Encouragement of good governance, transparency and accountability of member states
- Familiarisation of the peoples of Africa with the objectives and policies aimed at integrating the African continent within the framework of the AU
- Promotion of peace, security and stability
- Contribution to a more prosperous future for the people of Africa by promoting collective self-reliance and economic recovery
- Facilitation of cooperation and development in Africa
- Strengthening of continental solidarity and building a sense of common destiny among the peoples of Africa
- Facilitation of cooperation among regional economic communities (RECs) and their parliamentary fora (art 3, PAP Protocol)

Its powers are expressed as follows (art 11(1)–(9), PAP Protocol):

- To examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and to make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion good governance and the rule of law
- To discuss its budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly
- To work towards the harmonisation or coordination of the laws of the member states
- To make recommendations aimed at contributing to the attainment of the objectives of the AU and draw attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them
- To request officials of the AU to attend its sessions, produce documents or assist in the discharge of its duties
- To promote the programmes and objectives of the AU, in the constituencies of the member states
- To promote the coordination and harmonisation of policies, measures, programmes and activities of the RECs and the parliamentary fora of Africa
- To adopt rules of procedure, elect its own president and propose to the Council and the Assembly the size and nature of the support staff of the PAP

Measured against the outlined criteria for Parliament, the following may be said of the PAP. First, the PAP does not have any legislative powers at present, although this may happen at the end of its first term of five years (art 2(3), PAP Protocol). At present the power to enact policies and legislation is vested in the AU Assembly (art 9(1)(a), Constitutive Act). For this reason alone, Hirpo (2006:15) questions whether the PAP meets the definition for a traditional parliament. The PAP must thus strive to achieve its objectives and perform its functions with only advisory and consultative capabilities (art 11, PAP Protocol). This is in sharp contrast to the European Parliament.

Second, while recognising that it is a new initiative and should evolve gradually, its democratic attributes are questionable. Its members are not directly elected, but appointed by national legislatures or other national deliberative organs (art 4(1), Constitutive Act) (the PAP Protocol does envisage a future parliament of directly elected members) (art 2(3), PAP Protocol). It further refers to national diversity in these appointments and requires that one out of five national representatives should be a woman (art 4(2), Constitutive Act), which is not in line with gender equity. While prescription is not always advisable, the suggestion should be made that in the light of decisions by various human rights bodies, states should undertake more robust measures to ensure substantive participation of women in public affairs. The PAP could have set an example by requiring a better ratio of women to men. This should in fact also apply to the AU itself.

The PAP must thus strive to achieve its objectives and perform its functions with only advisory and consultative capabilities

Third, the PAP's budgetary powers have no real bite, because it merely makes recommendations to the Assembly, while the latter is the body charged with adopting and approving the budget of the AU, including that of the PAP (art 9(1)(f), Constitutive Act). Again, this contrasts with the position in the EU. Fourth, on its role of protection and promotion of human rights and democracy, it has relatively weak capabilities. Fifth, the Assembly of the AU has the power to make the important decisions relating to the PAP, including whether legislative powers should be vested in the PAP. This is sure to create problems in future, for as Magliveras and Naldi (2002:225) note, all AU members are parties to the PAP Protocol (see recommendations section below).

The European Parliament and US Congress: Lessons for the PAP

All legislative power vests in the US Congress, which comprises of the House of Representatives and Senate (generally, art 1, Constitution of the United States). The US constitution sets out all federal legislative powers and only the remaining powers are exercised by the state legislatures (art 1, s 8, Constitution of the United States). It is unlikely that the African continent will follow the US model in the near future, if at all, and therefore its relevance to this discussion is limited.

Until 1979 the European Parliament functioned as an appointed advisory body, after which members were directly appointed for the first time (George et al 1997:120). Up to this time it neither had control over the budget of the European Community nor effective ability to influence legislative outcomes (Demeke 2004:56; Maurer 2003:227). The powers were later expanded both through practice and successive treaty amendments (Andrew 1998:47).

Through the cooperation procedure introduced by the Single European Act in 1987, the European Parliament today has the power, together with the council, to adopt European laws (directives, regulations, etc) and can accept, amend or reject the content of European legislation proposed by the council. Further, it has 'power of political initiative' which means it may present legislative proposals to the council arising from its examination of the commission's annual programme of work.[18] The Maastricht Treaty, complemented by the Amsterdam Treaty of 1999, introduced the 'co-decision procedure' by which the same weight is given to the European Parliament and the Council of the European Union on a wide range of matters, such as transport, the environment and consumer protection. Two thirds of European laws are adopted jointly by the European Parliament and the council.[19] In the case of some matters the European Parliament has a veto. The European Parliament is therefore the first chamber of the legislature, while the council acts as a second chamber from time to time rather than as a ministerial directive (Maurer 2003:227; Demeke 2004:56). It should be noted that with respect to some important policy issues (such as taxation), the European Parliament plays an advisory role to the council (Demeke 2004:57). Clearly, the European Parliament does not yet have the same full powers such the US Congress within its federal structure.

The European Parliament does have effective powers of oversight over the activities of the EU. First, citizens have a right of petition the European Parliament to take action on a specific issue that falls under its auspices. Second, through an inquiries procedure the European Parliament sets up commissions to inquire into incorrect applications of European law. Third, the European Parliament has a right of recourse to the Court of Justice to seek clarity on issues and enforce the treaties. Finally, it has financial control in the economic and monetary spheres through oversight

and appointments.[20] The European Parliament and the council together constitute the EU's budgetary authority, which decides annually on its expenditure and revenue and the European Parliament may reject the budget if it feels it does not meet the needs of the Union (Demeke 2004:58). Overall, the European Parliament exercises democratic control over the commission and limited parliamentary oversight over the council.[21]

A comparative view of the PAP

The following can be said of the PAP in comparative to particularly the European Parliament. Unlike its European and US counterparts, the PAP does not have any legislative powers. But it is similar to the European Parliament in that it can seek advisory opinions from the Court of Justice and Human Rights on any legal question and especially its particular functions (art 63, Statute of CJ & HR). This will help to resolve conflicts with the other AU organs. In contrast to the European Parliament and US Congress, which has a wide, legally entrenched supervisory mandate over all EU and US federal[22] activities respectively, the PAP has no such powers. It is not clear whether article 25 11(1) of the PAP Protocol, which provides that the PAP may on its own initiative examine, discuss or express an opinion on any matter including human rights, consolidation of democracy, promotion of good governance and the rule of law, allows the PAP to establish commissions of inquiry into such issues. However, one must conclude that on the whole the PAP cannot exercise any meaningful oversight over the activities of the Assembly and commission.

PAP members are not directly elected, in contrast to members of the European Parliament. This is a serious lack and will have to be addressed so as to begin to bring it to parity with what obtains in the EU, on the path to a more closely integrated political union. Unlike in the EU, the PAP has no provision for citizens to petition it directly, a condition that would serve to promote citizen participation in union matters. The European Parliament uses this function to good effect to ensure that member states attend to the situations raised in the petitions.

Given that the questions of direct election of the members of the PAP and vesting of legislative powers in the PAP have elicited much debate, it is considered in more detail here. It should be noted at the outset that the two aspects need not necessarily be linked. This position contradicts the views of Gutto (in Mashele:2006)[23] who argues that the exercise of legislative power by PAP would complicate matters as it is linked to direct election of members, which impacts on the national electoral laws of member states. While it is true that legislative powers would have implications for electoral and other laws, including national constitutions (as discussed below) the exercise of such power is not in the opinion of the author linked to direct election of members of the PAP. The implications for electoral laws would arise because such members would be directly elected at the national level (where reforms have to be undertaken) and not because elected members of the PAP will exercise legislative power. Members nominated through national processes (as is the current case) could still exercise legislative power. There would be indeed no legal bar to this, provided that the Protocol confers legislative powers on the PAP.[24] The only issue would be the legitimacy of such power.

Other issues raised by direct election of members relate to the basis of election. In most countries members of national legislatures represent a specific constituency, but on supra-national levels members ordinarily represent the national constituency in the continental parliament.[25] The question centres on the size of the PAP constituencies (states) and whether each state should be represented by an equal number of members or whether it should be based on population size. If population size is the criterion, problems arise because of large extremes, with Nigeria at over 130 million people on the one hand and small states with less than a million on the other.[26] This could lead to disputes, as happened in the EU on adoption of the Nice Treaty, with Germany demanding greater representation and France opposing the move. A further question is how members should be elected. The best solution may be to hold separate elections (especially where the term of the PAP does not coincide with that of the particular national legislature) to elect members at the national level (as is done in the EU).

Unlike in the EU, the PAP has no provision for citizens to petition it directly

Above all, the PAP Protocol and national electoral laws would have to be harmonised to reflect an agreed model and approach, which must necessarily entail compromise on key issues. As is the case at the European Parliament, members elected to the PAP may be organised along ideological lines or policy positions on key issues.

On the difficult issue of legislative power, it has already been argued that there is no need to retain a PAP with no real utility in the AU. Once there is agreement that it should be vested with some form of legislative power, the next question is how this should be done. The problem arises in part from the relationship between the PAP and the AU's current executive organs, and in part from the fact that member states retain, and will

continue to retain sovereignty that includes legislative powers. Even in Europe where states have ceded some of their legislative sovereignty on key issues in exchange for great successes by the EU, they continue to jealously guard against further encroachment.

In an attempt to grapple with the challenges of bequeathing legislative function to the PAP, some observers have circumvented the question of state sovereignty, or to avoid antagonism with states, proposed that the PAP should be enabled to propose model laws to states.[27] This well-intentioned proposal does not advance the issue a great deal. Since it is unlikely that states would be obligated to accept such legislative proposals, the situation would be no different from the current recommendations the PAP makes in its ineffectual advisory capacity. [28] Perhaps the legislative proposal route could be a starting point, but the final aim should be clearly defined legislative functions over specific issues whose scope could be gradually expanded through agreement by states.

There are a number of issues over which states no longer have absolute control, such as human rights and this may be a starting point for the PAP's legislative functions. Furthermore, it seems as if African states will seek economic unity ahead of a more integrated political union, which is the more pragmatic and less radical approach to union building as the case of the East African Community illustrates. In such a scenario states would be willing to cede legislative functions on a range of economic concerns to the PAP. So the PAP could initially have powers on laws relevant to trade, immigration and free movement of people within the union. At the same time national legislatures could still retain the power to 'fill in the blanks' by giving substance to PAP 'framework laws'. The latter should be directly applicable at the national level as is the case in the EU.[29] Since areas and issues over which the PAP would have legislative power would be stated, national legislatures would also retain legislative function over the remaining issues. These could gradually decrease as the union becomes a more politically integrated entity. The African Court of Justice would, in turn, adjudicate on the application of these laws at the national level in cases of disputes.

The way the East African Legislative Assembly (EALA), which has legislative power (art 49 (1), Treaty of the East African Community), approached matters provides some guidelines for the PAP. Since its inauguration in 2001 the EALA has adopted six bills proposed by the Council into Acts,[30] all of which relate to economic issues. For instance, the East African Trade Negotiations Act established a body for the East African Community states to undertake joint trade negotiations with major international entities such as the EU and World Bank, while the Customs Union Management Act regulates issues related to the EA Customs Union. The fact that EALA and various committees that were established are empowered to liaise with national assemblies on issues pertaining to the East African Community eliminates potential disputes between the parties (art 49(2)a, Treaty Establishing the East African Community).

Two issues need to be emphasised here. The first is that the PAP's powers could be shared with the Assembly and the AU's executive organs, bearing in mind democratic ideals in which a parliament, especially when elected, should dominate law-making processes. This is where the example of the EU could be used as a guideline. Second, it cannot be emphasised enough that national political structures, and particularly parliaments, would need to be reformed to bring their diminishing law-making functions in line with the new dispensation. For instance, it would be inefficient to retain cumbersome and expensive multilayered legislative institutions which have limited powers at the national level in the long run. However, the principle of subsidiarity,[31] which is revered in the EU and is indeed central to any federal dispensation, would dictate that appropriate legislative organs be retained at the national and sub-national levels to deal with local specificities and ensure that decision-making powers over local issues are retained.

It is recommended that all AU states be required to participate in all its main institutions

Conclusions

In this paper the provisions in the Constitutive Act of the AU and instruments relating to the ACJ & HR and the PAP were outlined. This was followed in each case by a comparison with EU and US institutions to inform the reform debate on these two African institutions as they could operate in a continental government. In conclusion, it is important to point out that as currently constituted, the AU is not a fully-fledged union. In this regard, Oluwu (2003:220) has rightly observed that 'the Constitutive Act does not contemplate an immediate pursuit of a regional unification agenda'. Indeed, at the very best it is merely a road map to the required regional understanding for future continent-wide cooperation and integration in Africa. This was the point of departure for the current discussion. Those envisaging a future continental government must realise that it cannot take place overnight. After all, the EU took 50 years to reach its current structure yet it is still shy of a full federal arrangement.

What is important is the existence of the will to move in that direction, as well as a great deal of patience and astute leadership. This, together with a convergence of purpose of member states, will be more easily be

achieved if the architects of an African government can provide concrete reasons to motivate why such an arrangement is necessary and what it would take to put it in place. States have to realise that they have to give up some of their sovereignty in all areas of government (depending on the union envisaged) to enable it to work. Commentators have rightly pointed out that the main reason why the EU has come this far is because states were willing to cede sovereignty to the EU and its institutions (see for instance Bedi 2007:20).

For any of the AU institutions to work, particularly in a more integrated political union, difficult decisions will have to be made. When all is said and done, and whether the current calls for an Africa-wide government are serious or mere rhetoric, only time will tell.

Recommendations

The African Court

- Create within the expanded African Court a type of 'grand chamber' with a president and judges to decide on the 'essential issues of the union' and ensure that the corpus of jurisprudence is coherent.
- Judges who are appointed must be trained in international law.
- Establish a union court of first instance to lessen the burden on the Court of Justice in respect of cases not related to the core functions and instruments of the union, to act as a filter.
- The new African Court of Justice should liaise with municipal courts, so that the latter can refer matters relating to interpretation of the regional treaties or their application in domestic jurisdictions to it. As the European experience shows, disputes will certainly arise in municipal jurisdictions relating to the interpretation of treaties of the regional body.
- Reform and align existing national court systems so that they are able to apply those regional laws which are applicable at domestic level. With respect to human rights for instance, national tribunals can play a major role in limiting the burden on regional courts by addressing violations at that level.
- Municipal courts could possibly be vested with powers to determine some union-related issues on a national basis, with advice from the African Court of Justice. Appeals could then be made to regional tribunal(s) to ensure consistent interpretations.

The African Parliament

- The PAP's current mandate, composition and powers would be inadequate in a more entailing union. It is only suitable for its present widely couched objectives. These aspects will have to be changed to reflect the nature of the new organisation.
- Accordingly, AU legal instruments, including the Constitutive Act and the PAP Protocol, will have to be revised to avoid overlaps in the mandates and roles of the 'new' AU bodies.
- The PAP's weak mandate also results in recommendations only, which are not binding, and would not be conducive to the strong oversight role that would be required in a more entailing Union. Therefore the PAP should be vested with some form of legislative function to facilitate a more active role in the union.
- Vesting of legislative powers would of necessity impact not only on the legislative sovereignty of states, exercised through various national assemblies, but also on the decision-making powers of the present executive organs of the AU. Therefore the powers of the PAP should be clearly delineated, starting with a limited range of issues and progressively increasing its mandate in a measured and pragmatic manner.
- There are numerous challenges including legal traditions and language arising from diversity on the continent that will need to be surmounted. Therefore a 'bottom up' approach in setting out these powers should be explored, so that powers of the PAP increases incrementally through collaboration with national and regional parliaments.
- In view of the grand purpose of the PAP as 'a platform for African peoples and their grass-roots organisations to be more involved in discussions and decision-making on the problems and challenges facing the continent', a more democratic structure should be adopted by amending the PAP Protocol to provide for direct election of members, with due consideration to gender.
- The PAP should be given more budgetary powers, especially with regard to its oversight functions. It should also play an enhanced role in the appointment of union functionaries, such as judges.
- Given the differences in population sizes of member states, it is recommended that proportional representation in an elected PAP be considered early on, to ensure democratic and legitimate representation.
- To avoid the conflict that may arise from the fact that Assembly makes important decisions with respect to the PAP, while some of its members have not ratified the PAP Protocol and are therefore not represented in the deliberations of PAP, it is recommended that all AU states be required to participate in all its main institutions, including the Court of Justice and Human Rights. It is vitally important that membership in the AU be predicated on adherence to certain fundamental ideals.

Notes

1 Suggestion made by President Kuffuor of Ghana and supported by other African leaders. Political integration has been identified as a primary goal of the AU. See AU 'Guideline Document' African Commission, May 2004, at 22 cited in Cilliers and Mashele 2005.

2 See decision of Assembly/AU/Dec 83 (V) adopted by the Fifth Ordinary Session of the Assembly of the Union held in Sirte, Libya, in July 2005.

3 Article 165 (amended) Treaty of Rome (1957) which established the European Economic Community and the European Atomic Energy Community. This treaty is supplemented by two others: the Treaty of the European Union, the Maastricht Treaty (1992) and the Treaty of Nice (2001) which together anchor the EU.

4 The others are the European Commission, the Council of Ministers and the European Parliament.

5 Article 168a, Treaty of Rome (amendment introduced by Single European Act, SEA).

6 George et al (1997:116) note that after the American Revolution the concept of a constitution developed as an essential government instrument, one in which the fixed principles of reason and fixed objects of the public good are stated specifically in a formal basic document.

7 See Bednar et al (1996:280) noting that the relevant court (in this case the highest) has the function of restraining federal power and '[preventing] the centre from encroaching on the domain of the member states, and to prevent member states from rationally anticipating encroachment' and that 'the adjudication of federal disputes by a politically independent court would, in theory, increase the confidence of member states that the centre will respect their autonomy'.

8 See AU Commission Report on the decision of the Assembly of the Union to merge the Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX CL/162 (VI) Sixth Ordinary Session 24-28 January 2005, pp 1-4.

9 Summary of Procedures of the First Meeting of Experts/ Judges and the PRC on the draft protocol of the Court of Justice of the African Union, 22-24 April 2003, ExptJudg/Draft/Prot/ACJ/Rpt(1); Ministerial Conference on the Draft Protocol of the Court of Justice of the African Union, 7–8 June 2003, Grand Baie, Mauritius, Min/Draft/Prot/ACJ/Rpt.

10 The ECJ only applies human rights indirectly as principles of the EU when interpreting the instruments that constitute the EU.

11 Protocol 11 to the European Convention on Human Rights (ECHR) abolished the commission and enabled individuals to apply directly to the human rights court

12 Arising from the Nice Treaty, European Civil Service Tribunal (ECST) was established on 2 December 2005 by the Council of the EU. This new specialised tribunal, composed of seven judges will adjudicate in disputes between the European Union and its civil service. Previously, this function was performed by the Court of First Instance until 2005. Decisions of the ECST will be subject to appeal on questions of law only to the Court of First Instance and, in exceptional cases, to review by the ECJ.

13 The single new centralised European Patent Tribunal will deal with all disputes relating to the infringement and/or the validity of community patents.

14 Observers have noted that the unconditional membership to the AU has meant that states need not commit themselves to established ideals of the Union, including respect for human rights.

15 See Hirpo (2006:18-25) discussing some of these in terms of the general attributes of the institution of parliament. See also generally Copeland and Patterson 1994.

16 On some specifics on human rights and democracy within the context of PAP see Hirpo 2006: 22-31.

17 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (PAP Protocol) signed in Abuja, Nigeria 1991. For a brief history and overview, see Magliveras and Naldi 2003 and Hirpo (2006).

18 See EU Presidency, Parliament's powers and procedures: an overview, at http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&pageRank=1&language=EN.

19 As above.

20 As above.

21 As above.

22 By virtue of the War Powers Act (1973), the US Congress's role was enhanced under new budget rules. Equally, Congress uses its appropriations function to investigate or check executive power. See Pynn 1993:362.

23 See comment at http://www.issafrica.org/index.php?link_id=5&slink_id=3686&link_type=12&slink_type=12&tmpl_id=3 (accessed on 20 April 2007).

24 See Hirpo (2006:37), who has raised this question.

25 This approximates to the US case where two directly elected members represent each state in the US Senate.

26 The situation in ECOWAS, where Nigeria, the most populous nation in the bloc has 35 out of 120 members may be instructive.

27 See report on the PAP seminar on the harmonisation of regional economic communities and regional parliamentary assemblies in Arusha, Tanzania where delegates made this proposal

28 For some discussion on the PAP's activity in this area see generally P Mashele 2005.

29 The question of the validity of EU laws was settled in two cases in 1963 and 1964. As elaborated by the ECJ, European law has direct application (priority) at the domestic level in member states. In this regard see Van Gend en Loos v Nederlandse Adminstratie der Belastingen (1963) and Costa v Enel (1964). See also Mancini (1991:504) and Bedi (2007:20-21).

30 East African Trade Negotiations Act (2003); East African Customs Union Management Act.

31 In terms of subsidiarity, important decisions over specific issues of concern to a particular region, or locality should be retained by that region or locality. The centre may make broad decisions over policy and principles, but particular implementation rests with the 'periphery'.

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About this paper

The dream of a United Africa has been alive since the heyday of the great and visionary African leaders such as Kwame Nkrumah. Attractive as the idea is in a world in which small entities tend towards joining together to form bigger economic and political units, the decision to form such a union is only one step in a journey that may prove, as history teaches, to be one of a thousand miles. A host of preliminary issues require critical reflection. Joining the reflection on what it would take to institute a continental political union, this paper, which offers some thoughts on the subject, focuses on two arms of the possible government: the Pan-African Parliament and the future African Court of Justice and Human Rights (a proposed merger between the African Court of Justice and the Africa Court of Human Rights). The paper argues that whatever model may be chosen for the political union, reforms of the two institutions as currently constituted will be an absolute necessity. With respect to the African Court, the suggestion is made that reform should take the form of three possible models: the Supreme Court of the United States (the highest court in a federal system), the European Court of Justice (the highest court in a 'confederate' system) or a hybrid format, depending on the powers vested in it. With respect to the African Parliament, the argument along similar lines is that the scope of its legislative mandate will depend on the nature and structure of the political union adopted. In the paper some of the elements of the institutions in Europe and the USA that may enlighten the current political endeavour are outlined.

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