

Economic integration and human rights in Africa: A comment on conceptual linkages

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Summary

This paper focuses on treaties establishing African regional and subregional organisations for economic integration. These include AEC, COMESA, SADC, ECOWAS and EAC, all making reference to human rights. In addition, the founding treaties of all these organisations make provision for courts to determine trade disputes and interpret agreements. It is significant that trade arrangements such as Cotonou, AGOA and NEPAD also link economic integration to human rights by emphasising civil and political rights. It remains to be seen to what extent these organisations and agreements will apply human rights, in particular the African Charter on Human and Peoples' Rights. The paper reviews linkages and tensions between the rules and operations of the subregional economic institutions in Africa and human rights as conceptualised under the African Charter.

1 Introduction

Globalisation means different things to different people. To some it means increased growth, opportunity and prosperity while to others it denotes an orgy of greed and inequality. In the context of human rights, globalisation has been seen by some as promoting human rights while others see it as negatively affecting efforts to promote and protect

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human rights. Both human rights and trade rules set limitations on what states can do. However, trade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights. From this perspective, globalisation has been seen as promoting what have been called 'market friendly human rights', while negatively affecting rights related to distributive justice. Inherently, civil and political rights are critical in ensuring the rule of law and place checks on governmental power in relation to administrative and judicial activities that affect trade.

African governments and people are today more resolute about regional and continental goals of economic co-operation and integration in a quest to benefit from the processes of globalisation. In the last two decades or so, there has been a marked expansion in subregional economic blocs in Africa. At the same time, during this period a normative framework and institutions for human rights protection have been established. This comment focuses on how the legal developments in regional and subregional economic law and practice in Africa have taken into account developments in human rights law and *vice versa*. It reviews conceptual linkages between the rules and operations of subregional economic institutions in Africa and human rights under the African Charter on Human and Peoples' Rights (African Charter or Charter). In particular, the comment examines whether there are tensions or convergences between regional and subregional economic law and human rights law in the various instruments that form the normative framework in these two legal regimes.

2 An overview of the African human rights and economic integration regimes

2.1 The African human rights regime

In the main, human rights norms have developed at three levels: international, regional and municipal. In Africa, under the auspices of the Organisation of African Unity (OAU), various instruments have been devised to meet the challenges of promoting and protecting human rights. The main regional instrument is the African Charter. There are three other basic instruments which together with the African Charter make up the normative framework of the African human rights system: the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. A Protocol to the African Charter on the Rights of Women is currently being developed. The comment will, however, focus on the African Charter as the primary human rights instrument in Africa.

The African human rights regime became a reality in 1981 when the Assembly of Heads of State and Government of the OAU adopted the African Charter.¹ Africa thus became the third region after Europe and the Americas to put in place a regional intergovernmental system for human rights protection. The African Charter recognises the three generations of human rights, but develops a rather novel concept by placing all these rights on the same footing and in particular treating the first and second generation rights as inseparable and equal.² Essentially, the African Charter departs from the general trend in international human rights instruments of treating the first and second generation rights in separation and makes a clear statement about the indivisibility of human rights putting them side-by-side in a single document.³ The obligation of the state parties to recognise the rights, duties and freedoms under the African Charter therefore implies that the state parties recognise all the three generations of rights as conceptualised under the Charter and not as separate and distinct categories of rights.⁴ In theory, therefore, the African human rights regime conceptualises the three generations of rights as interdependent and indivisible.

Apart from the concept of indivisibility and interdependence, there are two other important features of the African Charter worth mentioning in the context of this comment. The first is the concept of the individual's duties and the second is the use of claw-back clauses. In addition to guaranteeing rights, the African Charter imposes duties not only on the state but also on the individual.⁵ What is not clear, however, is the sanction for failure to fulfil the duties, which has led some human rights advocates and scholars to argue that the inclusion of duties only serves as invitation to states to impose unlimited restrictions to the enjoyment of rights.⁶ So far the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission or Commission) does not shed any light on the effect of individual duties. It remains to be

¹ The Charter was adopted on 17 June 1981 in Nairobi. It entered into force on 21 October 1986. The OAU had earlier in 1969 adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 8 *International Legal Materials* 1288.

² See eg arts 15, 16, 17 & 18 African Charter.

³ See eg FJ Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 47. It is important to note, however, that the African Charter does not contain the full catalogue of civil and political rights and socio-economic rights as set out under the 1966 UN Covenants.

⁴ Art 1 African Charter.

⁵ See art 29. While the African Charter is the first human rights document to meaningfully articulate the concept of combining individual rights and duties in the same instrument, the idea is not entirely without precedent. See eg M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339 364.

⁶ Mutua (n 5 above); UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 65.

seen whether the African Court on Human and Peoples' Rights, once established, will take up the challenge.

The rights recognised under international human rights law are not absolute. For some rights and in some circumstances limitations may be imposed. A distinguishing feature of the African Charter is its use of claw-back clauses as opposed to the more traditional derogation clauses. The distinction between the two is that derogation clauses set out the extent and conditions under which a right may be limited or its enjoyment restricted, whereas claw-back clauses subject a right to state discretion.⁷ Essentially, the claw-back clauses in the African Charter have the effect of subjecting the Charter's rights to limitations imposed by domestic law.⁸ In the context of the discussion here, the claw-back clauses may be used to enable trade considerations to supersede human rights rules, particularly where subregional trade courts are called upon to apply human rights norms under the African Charter without a proper evaluation under human rights rules on the reasonableness of the measures.

2.2 Regional economic integration

In Africa, regional economic integration has taken place both at the continental level and at the subregional level. At the continental level, under the auspices of the OAU and now the African Union (AU), there is the African Economic Community (AEC), which establishes a continental economic bloc.⁹ At the subregional level, there are four main economic groupings, namely: the Common Market for Eastern and Southern Africa (COMESA); the Southern African Development Community (SADC); the Economic Community of West African States (ECOWAS); and the revived East African Community (EAC).¹⁰ Several countries have overlapping membership in the different subregional arrangements. The subregional economic blocs are seen as the building blocks for the AEC in line with the 1980 Lagos Plan of Action and the Final Act of Lagos, which envisaged African economic integration as an evolutionary and incremental process. The subregional economic blocs have in general the common goal of economic transformation and development.

⁷ R Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 152-154.

⁸ Viljoen (n 3 above). The phraseology of the claw-back clauses includes phrases such as 'except for reasons and conditions previously laid down by the law'; 'within the law'; 'provided one abides by the law'; 'in accordance with the law'.

⁹ The African Union is the successor to the OAU. The AEC Treaty was signed in Abuja in 1991.

¹⁰ Other regional economic initiatives designated as pillars of the AEC are the Economic Community of Central African States (ECCAS) and the Arab Maghreb Union (AMU).

3 Trade and human rights in Africa: Conceptual linkages

There are many instances where the African regional and subregional economic treaties make specific reference to human rights. Most of the instruments establishing the various economic groupings in Africa, particularly those created after the African Charter explicitly refer to the promotion of human rights under the African Charter either as an objective or as a fundamental principle of the economic grouping. Apart from the direct references, there may also be other provisions that are closely linked to human rights concepts. For example, although at the time of the formation of the OAU there was no African human rights system, the OAU Charter makes reference to the Universal Declaration of Human Rights (Universal Declaration) as an objective of the organisation.¹¹

The AEC Treaty establishes the recognition, promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of the economic system it establishes.¹² In similar fashion, the COMESA Treaty also establishes the recognition, promotion and protection of fundamental human rights as a fundamental principle of the system in addition to liberty, fundamental freedoms and rule of law.¹³ The EAC Treaty under article 6 establishes good governance, democracy, rule of law, equality and the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter as fundamental principles. The EAC goes further by requiring that any other states (apart from Kenya, Uganda and Tanzania which are the founding states) wishing to become a member must be seen to adhere to universally acceptable principles of good governance, democracy, rule of law and observance of human rights and social justice.

The ECOWAS Treaty follows the same approach as the AEC, COMESA and the EAC Treaties and ordains the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter as a fundamental principle of the economic system.¹⁴ The SADC Treaty, although making no direct reference to the African Charter, also commits members to the fundamental principle of human rights, democracy and rule of law.¹⁵

¹¹ See art 2(1)(e).

¹² Art 3(g).

¹³ See art 6.

¹⁴ Art 4(g).

¹⁵ Art 4(c).

At the textual level, it is fair to conclude that the African economic groupings tacitly recognise human and peoples' rights as conceptualised under the African Charter as fundamental principles of the trade regimes. There are therefore clear conceptual linkages between the regional and subregional economic rules and the human rights rules. In particular, specific reference to the provisions of the African Charter implies that all the three generations of human rights are considered fundamental in the formulation and implementation of trade rules. This may be at divergence with the idea of developing a core category of rights as those that must be recognised in the trade rules. However, there remains a question whether the trade institutions are designed to address distributive justice.

All the four subregional economic communities together with the AEC establish courts of justice fairly along the lines of the European Court of Justice.¹⁶ The subregional regimes also tacitly acknowledge the overarching principles and objectives of the AEC. Direct reference to the African Charter in the various economic treaties in Africa would, at least in theory, mean that the courts of justice and tribunals are bound to directly apply human rights rules in determining trade disputes and interpreting the agreements. In that sense, the African Charter could be seen as a kind of bill of rights for the African regional economic systems. How true this becomes in reality will depend on the judges and lawyers practising in these courts, but one can clearly say that there exist very clear entry points for the application of human rights principles in trade matters. At the same time, the tacit reference to the African Charter should permit the African Court and the African Commission to apply a human rights test to governmental economic decisions which fail to take into account human rights. In addition, with the power to interpret the African Charter reposed in the African Court and the African Commission, interpretations of the African Charter by the two bodies will have strong persuasive authority for the trade courts when faced with questions of interpreting economic principles in light of the African Charter.

4 Human rights and bilateral trade arrangements in Africa

There are numerous bilateral and multilateral economic initiatives, especially with donor countries, that also provide useful insights with regard to the relationship between international trade and human rights in Africa. The major initiatives in the recent past include the Cotonou Agreement, the United States (US) African Growth and Opportunity

¹⁶ Only SADC has a tribunal which is not christened a 'court of justice'.

Act (AGOA)¹⁷ and the New Partnership for Africa's Development (NEPAD). These initiatives, in more or less the same lines as the World Bank and IMF conditionalities, refer in one way or another to human rights concepts and have significant implications for the relationship between human rights and trade in the African context. A detailed analysis of human rights in the context of bilateral trade arrangements in Africa is beyond the scope of this comment and for our purposes the question is whether reference to human rights in bilateral trade agreements corresponds to the approach in the African economic instruments.

The US and the European Union (EU) in particular have adopted a system of conditioning economic aid to improvements in human rights and also conditioning trade privileges to human rights practices. In some cases, trade sanctions have been applied as a mechanism to ensure observance of human rights.¹⁸ However, the concepts most commonly referred to are the rule of law and democratic governance, concepts that are more related to the first generation of human rights. The basic theory has been that where human rights are protected, open markets will flourish as stability and rule of law are ensured. Protection of civil and political rights has been seen as a necessary prerequisite for democratic governance which promotes trade and market access. It is therefore fair to say that in bilateral trade agreements, human rights have been approached from the context of their relevance for the administration of trade. A brief overview of the various arrangements bears this point out.

4.1 The Cotonou Agreement

In its Preamble, the Agreement refers literally to all the main United Nations (UN) human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, and to the European Convention on Human Rights, the African Charter and the American Convention on Human Rights. Its predecessor, Lome IV, also referred to human rights and democracy. Good governance, respect for human rights, democratic principles and the rule of law have been singled out as essential elements of the renewed partnership. By expressly acknowledging the rights in the UN Covenant on Economic, Social and Cultural Rights and the African Charter, the Cotonou Agreement can be said to be similar in approach to the general approach in the African subregional economic groupings. In reality, however, there still remains a pervading categorisation, particularly when one examines the substantive provisions of the Agreement.

¹⁷ Trade and Development Act of 2000 <<http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.434>> (accessed 28 February 2003).

¹⁸ The latest example is the sanctions against Zimbabwe.

4.2 The African Growth and Opportunity Act

AGOA is part of the US Trade and Development Act 2000. The Act contains AGOA and the US-Caribbean Basin Trade Enhancement Act. The legislation establishes a framework that will govern future negotiations between United States and African countries. The approach here is related to broader participation in political process and political freedom and the typical rule of law notion.¹⁹ A better picture of the approach can be seen by an examination of the eligibility requirements.²⁰ African countries will be eligible to participate in the programme if they ensure the protection of private property rights, the rule of law, political pluralism, due process, and recognition of workers' rights. In the area of private property, in particular, there would be an inevitable clash if African governments insisted on the application of human rights as conceptualised under the African Charter. For example, the tensions that exist between the protection of intellectual property rights and health would be resolved in favour of the right to health since the African Charter recognises the right to health but does not explicitly recognise intellectual property rights.

4.3 NEPAD

This initiative is intended to help in the eradication of poverty and ensure sustainable growth and development to ensure the full participation of Africa in the world economy. As has been the case on many occasions, the African leadership undertook to promote democracy and human rights. However, in specific terms, the undertaking is to develop standards of transparency, accountability and participation, a concept based on the traditional view of human rights in the market economy.

5 Conclusion

African economic treaties overwhelmingly recognise and acknowledge the promotion and protection of human and peoples' rights as conceptualised under the African Charter as a fundamental principle of continental trade relations. In that context, it can be concluded that there exist clear conceptual linkages between regional economic trade rules and human rights rules in Africa. It will be critical to observe how seriously the regional trade courts take into account human rights considerations in the adjudication of trade disputes and in the interpretation of the economic treaties. Bilateral trade arrangements also clearly recognise the interlinkages between trade rules and human

¹⁹ See secs 102(7), 103(5) & 103(7).

²⁰ Sec 104.

rights although the approach in these arrangements is at variance with the concept of human rights embodied in the African Charter. The predominance of civil and political rights in the bilateral arrangements under this approach may run counter to the approach under African economic rules especially where economic, social and cultural rights come into play and balancing is required, as in the case of intellectual property rights and health. While more work and research is needed to establish the exact interrelation between trade rules and human rights in Africa, especially in practical terms, there exist very clear and promising entry points for integrating human rights into the economic rules, institutions and practices.