

The Role of the Rule of Law in the Implementation of the Agreement for the African Continental Free Trade Area

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The Agreement forming the African Free Trade Area came into force on the 30th of May 2019 and was launched on the 1st of January 2021. The main objective of the agreement is to create a single market for goods and services and to facilitate the movement of persons in order to deepen the economic integration of the African continent. At the heart of the agreement lies what are known as “phase 11 negotiations.” These negotiations are to be carried out by member states in order to harmonize intellectual property, investment and competition laws across the continent.

The agreement has been met with much excitement from different players, especially political players. This article seeks to highlight the main legal hurdle that needs to be dealt with if this agreement is to bring about any meaningful change in Africa.

Africa is notorious for concluding agreement-forming regional economic communities. Examples of these are, the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC).

Many people see the prospects of a single market bringing economic prosperity to Africa. If it was a simple matter of concluding agreements, the Agreement for the African Free Trade Area should not have seen the light of Zimbabwe, Africa Day, as its objectives would have already been met through the numerous regional economic agreements listed above. If it was that simple, Africa should have met its economic objectives through these block agreements. What is clear is that without proper policies that result in sustainable institutions, 2063 (as per the agreement) will arrive and none of the objectives of the agreement will have been achieved.

The Rule of Law

The main legal hurdle that the continent has to overcome is centered on the issue of the rule of law. The concept of the rule of law implies that each and every person is subject to the law. Everyone is subjected to clear laws stemming from well-defined sources of law. This includes the three arms of the state, that is, the legislature, the executive and the judiciary.

There is no general consensus on what concept of the rule of law entails in Africa. Africa is not one big village made up of people living together in one big hut. Africa is made up of 55 countries with about 1.2 billion people. These countries are further fragmented into societies made up of people from different tribes and ethnic backgrounds. All these people ascribe a different meaning to the concept of the rule of law and the whole spectrum is covered, from total disregard of the law to full reverence of the law.

Incidences which prove this are well documented throughout history up to modern times. It is unnecessary to burden this article by tracing these incidences. However, there are some extreme incidences of lawlessness that are worth mentioning. For example, the Rwandan Genocide of 1994; the Zimbabwean Farm Invasions of the 2000s; the South African Umkhonto We Sizwe standoff of 2021. On the other hand, the Kenyan Constitutional Court decision on elections brings a little hope.

From a legal perspective, the rule of law is central to the success of the Free Trade Area Agreement. Since the agreement is between multiple parties, it is natural that disputes are going to arise. The agreement itself envisages this and constitutes a dispute settlement body. I submit that the efficacy of this body depends upon the respect that it is given by the member states, and this respect is bound to be the same as the respect they ascribe to the rule of law. If some of the member states do not give the dispute settlement body the authority and reverence it deserves, the body will essentially be toothless entity. A precedent has already been set by Zimbabwe, which refused to recognize the decisions of the SADC Tribunal.

It is not very difficult to harmonize the intellectual property laws, investment laws and competition laws across the continent. What is difficult is equally adhering to those laws. Some of the African countries are notorious for expropriating private property without compensation. Again, Zimbabwe is well known for moving from one currency to the other without compensating anyone for the exchange loss. Without respect for private property, which is in itself respect for the rule of law, it is difficult to imagine substantial economic change in Africa.

It is highly unlikely that investors will flock into Africa and make sustainable investments if the quality of African institutions is still lacking. The issues of corruption, lack of accountability and transparency have a huge effect on investments. All these issues can be dealt with, if there is unwavering respect of the rule of law. South Africa is well known for constituting commissions of inquiries which, unfortunately, do not result in meaningful arrests.

In as much as the rule of law brings about legal certainty, which aids in attracting foreign investment, it must also be used as an anchor from which beneficiation and other industrial policies stem. Developing a free market for foreign goods and services in is akin to opening up Africa for others to thrive while the continent remains a producer and exporter of raw materials.

In conclusion, in order for the Agreement to bring any real change, state actors across Africa need to seriously look into the issue of the rule of law. There is need for a serious shift from the culture of impunity to a culture in which the law is respected. The respect of the rule of law has to be absolute.

Without this, this Agreement will only succeed in creating a costly political talkshop spewing nothing but the same old tired rhetoric. The difference is, instead of blaming western or eastern countries, it will be African against African; if it degenerates further, the African identity will quickly be ditched for a country identity, which will be in turn ditched for tribal or ethnic identity. Brexit has set precedent for this.

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