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MISCONCEPTIONS ABOUT HARMONIZATION... AND ONE POLICY CONCLUSION CONCERNING HIGHER EDUCATION

R. Torrent
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Note: The HAQAA Policy Briefs are written in the HAQAA-3 framework but engage only their authors. This Brief has greatly benefitted from all the comments and discussions during the second webinar of the African Network on Regional and Continental Integration in Higher Education. All remaining errors, shortcomings or confusions are the sole responsibility of the author.

The Briefs are in open access and can be freely circulated. However, from an epistemological point of view, they are always "work in progress" open to criticism and revision

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DAAD Deutscher Akademischer Austauschdienst
German Academic Exchange Service

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European Association for Quality Assurance in Higher Education

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INTRODUCTION

Harmonization is one of the dominant topics in the discussion of continental and regional integration in African Higher Education (HE). Chapter 3 of the HAQAA Materials on Continental and Regional Integration in African Higher Education (the "HAQAA Materials"), written by professor Juma Shabani, identifies ***Harmonisation**, Homogenisation and Convergence Processes* as one of the three main topics that have been considered in the regional and continental framework, the other two being *Recognition* and *Integration* and *Networking of academic and research institutions and infrastructure.* However, the development of the MOOC Series in the second phase of HAQAA showed that a great deal of misunderstandings and misconceptions were subjacent to that consideration. The problem is not just semantic; it muddles the process of policy design and implementation.

This is why, after having discussed the issue of *Recognition* in the first Webinar of the HAQAA African Network on Continental and Regional Integration in African HE (the "HAQAA African Network", the topic chosen for the *second webinar was* ***The meaning of "Harmonization" and the difficulties in finding the right approach to tackle the issues embedded in that concept***.

This Policy Brief, written under the sole responsibility of his author, as all HAQAA-3 Policy Briefs, takes into account the discussions in that webinar.

ONE ESSENTIAL DISTINCTION AND TEN MISCONCEPTIONS ON HARMONIZATION

The webinar was organized around the presentation and discussion of ten assertions that seem true (and in fact were recognized as mostly true in a Survey to participants conducted before the webinar) but are, in fact, wrong. They will be presented and criticized successively in this Brief. But, first of all, an essential distinction must be summarily presented.

ONE ESSENTIAL DISTINCTION

> **The distinction between "harmonisation" (of national legislations) and "convergence" (of policies and the situations created or promoted by them).**

The distinction is not a mere issue of terminology. It is highly political as it points to the existence of two (not necessarily incompatible) approaches to regional integration.

- **Harmonization implies the production of "collective law"** by some legitimated regional entity (for example the European Union) or some collective aggregation of Member States (could be an Assembly of Heads of State and Government in other regional frameworks). In any case, it implies that Member States are legally subject to decisions enacting new law taken by another entity or by a collective body. This can be difficult to accept from certain political perspectives.
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- **By Convergence we understand a process in which Member States involved in a regional integration process more or less try (only "try", and always "more or less") to move in the same direction in terms of policies.** Of course, this process does not put into question the capacity of any State to decide whatever it considers adequate in terms of legislation. It can be accepted from political perspectives that would have great difficulties in accepting legal harmonization.

This Policy Brief discusses "harmonization" in the above sense, the legal sense.

TEN MISCONCEPTIONS

1ST WRONG ASSERTION

> ***In an advanced capitalist economy (that of Germany, for example), State intervention through regulation is limited to the correction of "market failures"*** *You can easily find in Internet, or in most textbooks, a standard definition of "market failures"; see, for example, https://en.wikipedia.org/wiki/Market_failure*

To criticize this statement, it is sufficient to reflect on our own personal experience and think on how many times any person living in Germany comes across regulation since he/she awakes until he gets to work: the enormous amounts of regulation behind the simple act of turning on the light or letting the water run in the bathroom; even before that, the enormous amount of legislation behind the construction of any building; during breakfast, another enormous amount of regulation on food (see below). And getting into a car or using public transport to go to work: what another enormous amount of regulation; and have you thought, from a legal perspective, in a street: how many pages of thick legislation is needed for it to come into existence? And we have not yet entered the worlds of education, health, social security, banks and financial markets (see below).

It is better to see the law, not as a correction of market failures, but as a creator of markets. Markets without regulation are not "advanced capitalist markets"; they are, in any case, "black markets", which is something completely different. And reflect on a fact very obvious but not sufficiently emphasized: Very sophisticated (and long) regulatory provisions (and jurisprudence) on Competition Law are needed just to intend (not more than intend) that markets operate, more or less, as the unregulated free markets described in the textbooks. Ironic, isn't it?

2ND WRONG ASSERTION

> ***When State regulations exist and they diverge, with the result that indirect barriers to trade and investment between economic operators of different States appear, there are two alternative ways to solve this problem in a process of regional/continental integration: regional harmonization of laws or mutual recognition.***

This is a statement that is very often asserted in discussions on international economic relations and regional integration. But does it make sense? It is obvious that it does not.

If one State, for environmental reasons, or for the protection of health, or in order to limit the power of certain economic agents … or for whatever well justified reason, imposes to their citizens and companies a regulation that very often involves heavy costs for companies, will it waive this regulation for companies operating from other States with a less costly regulation and

a lesser protection of the environment or health? If one State imposes very strict conditions to their citizens in order to practice some economic activities or professions, will it waive these conditions for citizens of other States? Not; of course not.

Very often, what is proposed under "mutual recognition" is not real mutual recognition of divergent regulations but, simply and plainly, "deregulation", which is another completely different matter.

Mutual recognition is not a magic wand that solves the problem caused by the existence of divergent regulations (and the consequent creation of "indirect barriers") in States attempting to build a process of regional integration (certainly a very difficult problem).

3RD WRONG ASSERTION

> ***In the European Community / European Union context, as the principle of mutual recognition is enshrined in the founding Treaties, the need for harmonization is very limited.***

This is, again, completely wrong. The alleged principle of "mutual recognition" might appear in some textbooks on EU integration, and on regional integration in general, but it is not enshrined in the founding EU treaties. As these Briefs are not the adequate place for academic discussions, lets simply look at the facts:

- The so-called White Book published by the European Commission in the second part of the 1980s in order to achieve an internal market without controls in the borders (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51985DC0310) envisaged the enactment of hundreds (yes, hundreds) of pieces of harmonizing legislation (which were effectively enacted in the period until 1992).

- The amount of EU pieces of legislation harmonizing (only partially!!!) important areas under EU competence (from food and agricultural products to financial markets) is enormous.

- And, as we shall see in a minute, even a topic so "essential" (said ironically) as the noise of machines operating outdoors, requires more than 70 pages of thick legislation full of mathematical formulae and drawings.

Would all this make sense if the principle of mutual recognition was enshrined in the Treaties? Certainly not.

4TH WRONG ASSERTION

> ***When harmonization is needed, the European Community / European Union can only enact "directives".***

5TH WRONG ASSERTION

> ***On content, a directive is a very peculiar type of legislation in which the EU (the EC before) simply gives broad guidelines of the regulation and leaves to Member States the task of "filling the details" within that legislation.***

It is better to discuss these two wrong statements together as, in general, they are also jointly asserted (and thought about).

First misconception. There have always been different pieces of EU (formerly European Community) secondary legislation ("secondary" in the sense that they are enacted by the EU - formerly the European Community - and not by its Member States). Different provisions of the Treaties give to the EU (formerly the European Community) different legal possibilities as concerns the FORM of the pieces of legislation. Mainly, some confer the possibility to enact directives, some to enact regulations. And, after the entry into force of the Lisbon Treaty in November 2009, all this has changed because this Treaty modifies the legal form of EU legislation.

But the difference between these legal acts concerns much more the FORM and the LEGAL EFFECTS than the substance. The EU (formerly the European Community) has always used both legal forms (directives and regulations) to produce harmonizing legislation.

Second misconception. The term "directive", very specific to EU/EC law has always created, and continues to create, even within EU Member States, a great misunderstanding. It is very often interpreted as the German word for it seems to mean: "Richtlinien", which in French can easily be translated as "lignes directrices"; or even "blueprint" in English. This was discussed when the Treaty of Rome was drafted and translated in all languages; the other Member States did not follow the German approach and invented a new term for what was a very peculiar piece of secondary legislation: "directive" in French, and "direttiva" in Italian. And this approach was later followed in the successive Treaties that enlarged the European Community and later the EU.

"Directives" are different from "regulations" in their legal effects (as it will be discussed in the criticism to the next wrong assertion). But they can be as detailed as regulations as concerns substance, not giving to Member States any margin of discretion as far as the regulatory content of their provisions. Some examples deserve to be examined:

- The already alluded to 78-pages DIRECTIVE 2000/14/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0014 and, for its consolidated version, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02000L0014-20090420) with an unbelievable detail in its provisions and annexes.

- The extremely detailed provisions of the directives on Banking and Financial Markets that are listed in https://finance.ec.europa.eu/regulation-and-supervision/financial-services-legislation/overview-financial-services-legislation_en . And, in particular, the 200-pages DIRECTIVE 2006/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0048)

- And, very in particular, the 121 (thick) pages DIRECTIVE 2005/36/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 September 2005 on the recognition of professional qualifications https://eur-lex.europa.eu/legal-

content/EN/TXT/PDF/?uri=CELEX:32005L0036 that harmonizes only very partially Member States regulations on that topic (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0036-20140117 for its consolidated version) that was already discussed in the first webinar of the HAQAA African Network and in the first Policy Brief of this Series.

6TH WRONG ASSERTION

On more formally legal aspects, the directive is also a very peculiar piece of international / regional legislation because it only enters into force after it has been transposed / internalized / domesticated by Member States

This is a wrong statement that pollutes the thinking of many specialists in regional integration (and even of most people in Europe).

In order to discuss this in plain terms, one must distinguish EU law (in fact, any regional/continental law) as **"law for the individuals"** and as **"law for the States"**.

- The characteristic of the directives is that, formally and in their legal effects, have always been a sort of "incomplete" piece of legislation because, *as law for the individuals, they do not "arrive/get to the citizens" directly and immediately, as regulations, but need, in order to achieve this effect, an "implementing piece of national law"* (the form of this piece can change: this is the "flexibility" a directive offers). And the directives offer a period to achieve this ("to be transposed into national law).

- *But they are "law for the States" from the moment they are published and enter into force. Which means that they create obligations for the States since that very moment. In policy terms: the policy (or the change of policy) embedded into the directive "is there" since that moment*, whether or not the directive will be adequately transposed or not. Member States that fail to transpose it will be in violation of EU law and will not prevent the EU and the Member States that have adequately transposed it to go ahead with the (probably new) policy embedded into the directive.

7TH WRONG ASSERTION

In the HE area, the Bologna process has worked, from a legal perspective, on the basis of the principle of mutual recognition enshrined in the EC/ EU Treaties

This statement is misconceived because of two main reasons.

- First, because it misinterprets the Bologna Process., which was not launched and has not unfold as an EU process but, rather, as a process led by some Member States that has been enlarged to many European (in particular Eastern European States) that are not members of the EU.

- Secondly, because the Bologna process has no legal provision in its basis. It works as a framework for the voluntary (greater or lesser) political convergence of participating States.

That being said, the EU, in particular through the European Commission has been able to strongly influence this process, in particular thanks to the setting up of a very successful programme, the Erasmus programme.

8TH WRONG ASSERTION

> ***In the African context, the UNESCO Addis Convention Revised Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications on Higher Education in African States provides the basis for a progressive process of harmonization of African HE.***

9TH WRONG ASSERTION

> ***In the African context, the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment (AU Free Movement Protocol), initially contained (1991) in the Abuja Treaty, and sort of "readopted" more than 20 years later within the context of the AfCFTA, does not envisage a process of harmonization of laws.***

As with assertions 4 and 5 above, it is better to discuss these two wrong statements together.

- First, the UNESCO Addis Convention should be carefully studied; in particular as it concerns its main provision, Article III.2 - Obligations Related to the Recognition of Qualifications. Its paragraphs say:
    - *1. Each Party shall recognize, for the purpose of access to each of its higher education programmes, the qualifications issued by the other Parties that meet the general requirements for access to these respective higher education programmes, unless a substantial difference can be shown between the general requirements for access in the Party in which the qualifications were obtained and those in the Party in which recognition of the qualifications is sought.*

    - *2. Parties agree to take all necessary measures in order to facilitate access to the higher education institutions of their country for qualifications holders of other Parties who satisfy the requirements for admission to the appropriate higher education programme.*

  If *"a substantial difference"* can be found, in the meaning of paragraph 1, or *"requirements for admission"* diverge, in the meaning of paragraph 2, no provision of the Convention provides a remedy for it or envisages a "progressive process of harmonization" of the legislations of Member Parties to the Convention.

- Contrariwise, if you examine the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment (AU Free Movement Protocol), you will discover Article 26, on Coordination and Harmonisation, which establishes:
    - *1. In accordance with article 88[1] of the Abuja Treaty and guided, as appropriate, by the implementation Roadmap annexed to this Protocol, States Parties shall harmonise and coordinate the laws, policies, systems and activities of the regional economic communities of which they are members which relate to free movement of persons with the laws, policies, systems and activities of the Union.*

- *2. States Parties shall harmonise their national policies, laws and systems with this Protocol and guided, as appropriate, by the Implementation Roadmap annexed to this Protocol.*

Therefore, the AU Free Movement Protocol is much more "dynamic", in the sense of the Analytical Framework of Regional Integration presented in the first chapter of the HAQAA Materials on African and Regional Integration in Higher Education, that the Addis Convention on Recognition. It does envisage a process of progressive harmonization.

10TH WRONG ASSERTION

> *For Africa to achieve a level of integration comparable to that of the EU in the area of undergraduate and postgraduate higher education, it is absolutely needed to enact some continental legal provisions harmonizing some aspects of States legislation on this area.*

Finally, this assertion is plainly wrong for two reasons.

- First, because integration in the EU in the area of undergraduate and postgraduate higher education has not required harmonization of national legislation (which is excluded from the EU competence since 1992 by the article on education in the EU Treaties, which only allows for measures of support excluding harmonization). And, as pointed out above, the Bologna Process is based on voluntary convergence and does not envisage any legal harmonization of national legislations. So, if the European precedent is to be invoked, it does not lead to assert the need for legal harmonization.

- Second, because the main driving force for EU integration in the area has come from voluntary cooperation between individual Universities in different countries and from the acceptance by each of them of students coming from other fellow Universities.

AND ONE CONCLUSION CONCERNING HIGHER EDUCATION

The discussion of these ten wrong assertions, and in particular that of the last one, leads only to one conclusion, which was very forcefully and convincingly put forward by Professor Oyewole, the Sec. Gral of the Association of African Universities (AAU), at the end of the second webinar of the African Network on Regional and Continental Integration in Higher Education:

Instead of relying on harmonization "from above" as the magic wand that will produce such integration, Universities must be aware that they already can move forward, "from below", in the path to integration on the basis of their own competences and by collaborating with fellow Universities in other countries in the continent.

And the best public policy to favour African regional and continental integration in higher education is that of empowering Universities as the main agent for it. "Empowering" means, in this area as in other,

- making Universities aware of their own capabilities,
- encouraging them to use these capabilities and
- favouring their collaboration with well designed support programmes that promote the mobility of students through agreements between Universities and unilateral action by each of them.

And this can be done on the basis of already existing legislation.