Regulating the EAC: the origins, jurisdiction and authority of the East African Court of Justice

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Abstract

The East African Court of Justice (EACJ) is the judicial body responsible for ensuring that Partner States respect the obligations laid out in the EAC Treaty (Article 23, EAC Treaty).

This chapter explores the origins of the EACJ. It examines its roots as an appellate court serving certain communities in parts of Eastern Africa during colonial times, its retention as the Court of Appeal of East Africa after independence and upon the establishment of the first East African Community in 1967. It then considers the evolution of the earlier court into the EACJ of today – no longer a court of second instance ruling on appeals relating to domestic issues, but a fully-fledged international institution with a significant role to play both in furthering the integration process in the region and in bringing about change in the practices of Partner States at national level. In doing so, it reflects on some of the challenges which the Court has faced as it seeks to establish its authority in the EAC. It concludes that, despite these challenges, the EACJ has built on the successes of its predecessor in harmonising EAC law and in bringing a valuable contribution to the EAC's principles of respect of the rule of law, democracy, good governance and human rights, principles which are also deeply embedded in the European project.

Introduction

The evolution of the current EACJ from the early origins of the Court is remarkable. It is a testimony of the journey travelled by this region of Africa since the imposition of institutions and procedures by the colonial powers, through the independence of the different East African states at varying dates during the twentieth century, to their current drive towards greater East African regional integration. The impact and authority of the judgments of the current EACJ demonstrate the Court's determination to fulfil its role, exercise its independence, defend the rule of law and promote good governance in the region. Comparisons between the current iteration of the EACJ and the Court of Justice of the European Union (CJEU) are inevitable, and while there is no denying that a legal order 'comparable to one developed in the European Community has not yet been created' in East Africa (van der Mei 2009: 406), the EACJ has shown its resolve to be the guardian of the EAC Treaty and a key player in regional integration.

This chapter explores the origins of the EACJ, examining its roots as an appellate court serving certain communities in parts of Eastern Africa during colonial times, its retention as the Court of Appeal of East Africa after independence and upon the establishment of the first

East African Community in 1967. It then considers the evolution of the earlier court into the EACJ of today as a fully-fledged international institution with a significant role to play both in furthering the integration process in the region and in bringing about change in the practices of Partner States at national level. It reflects on some of the challenges which the Court has faced as it seeks to establish its authority in the EAC, focussing on the threat to judicial independence following the case of *Anyang' Nyong'o and others*. It concludes that, despite these challenges, the EACJ has built on the successes of its predecessor in harmonising EAC law and in bringing a valuable contribution to the EAC's principles of respect of the rule of law, democracy, good governance and human rights, principles which are also deeply embedded in the European project.

Origins and composition of the EACJ

The creation and decline of the first EAC has already been outlined above in this volume (see Huliaras and Kalantzakos).

When the EAC was revived on 7 July 2000, it was accompanied by a new iteration of the court, the EACJ, which became operational on 30 November 2001 (Possi 2018: 2). It should be noted, however, that the court which serves the EAC today differs from its predecessor, both in its name, the former court being known as the East African Court of Appeal, and also in its function. The East African Court of Appeal was not an international court in the manner of the current EACJ, whose principal responsibility is to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty (EACJ 2020), but which also is a motor for regional integration and strengthening the rule of law and good governance in East Africa. The earlier East African Court of Appeal functioned only as an appeals court, in which appeals were heard of both civil and criminal matters – except constitutional matters and, in the case of Tanzania, the offence of treason – from the national High Courts of the original three Partner States: Kenya, Uganda and Tanzania (Nsekela 2011; Sebalu 1972: 352). In contrast to the current EACJ, it had no role as a court of first instance.

The first East African Court of Appeal developed from an institution of the British colonial regime. That original Court was founded in 1902 as His Britannic Majesty's Court of Appeal for Eastern Africa (HBM Court of Appeal for Eastern Africa) and served as the appellate court for the East Africa Protectorate (as Kenya was then known), for Uganda from 1904 and for the British Central African Protectorate (subsequently known as Nyasaland and today the Republic of Malawi) between 1911 and 1947 (Eastern African Protectorates (Court of Appeal) Order in Council 1902, Preamble). It became competent for Zanzibar in 1914, which was where the Court usually sat. However, this jurisdiction was hypothetical only, as at first no appeals from Zanzibar were heard there. These went to Zanzibar's own High Court rather than to HBM Court of Appeal for Eastern Africa. This was due possibly, as Kato hypothesises, to the 'religio-ethnical composition of the dominant but ruled class' in Zanzibar and to Zanzibar's dual jurisdiction: at the time, Zanzibar had the status of a Protected State, but with administrative sovereignty reserved to the Sultan of Zanzibar. The British monarch had authority to legislate for British subjects by Orders in Council, with the Sultan retaining

legislative power over his own subjects (Kato 1971: 6; Abrahams 1941: 169). Later, in 1922, Tanganyika also passed legislation directing its appeals to HBM Court of Appeal for Eastern Africa, when the German colonies in Africa were ceded to the allied powers after the First World War (Bierwagen and Peter 1989: 399). It can be seen that HBM Court of Appeal for Eastern Africa was an institution which grew organically to adapt to circumstances as the East African context evolved.

It should be noted that the development of the British court system in the East African protectorates related initially to a right to adjudicate in actions (both civil and criminal) which involved British subjects (Russin 1963: 235). Furthermore, Britain concerned herself 'primarily in securing her control over certain areas with a view to preventing them from falling under the sway of her European rivals' in the late nineteenth and early twentieth centuries (Morris 1970: 9). Dual legal systems therefore co-existed: 'one to administer the general law established by the colonial administration, the other to settle disputes arising between members of the indigenous African population' (Pfeiffer 1978: 40). The colonial authorities were only too happy to leave in place and allow to develop the 'effective bodies of indigenous law' which were already well-established. This state of affairs continued well into the twentieth century, with parallel colonial and customary systems operating until an integration of the structures was effected upon independence. Features of the dual systems still remain today (Morris 1970: 8).

Before 1902, when the Order constituting HBM Court of Appeal for Eastern Africa was made, appeals from court judgments handed down in the British East African territories were heard in appellate courts in those countries, before proceeding either to the High Court of Judicature in Bombay or the Court for Zanzibar. Appeals from these courts then went to the Judicial Committee of the Privy Council (JCPC) in London, which was at that time the court of last resort for the entire British Empire. In 1902, the constitution of HBM Court of Appeal for Eastern Africa meant that HBM Court of Appeal for Eastern Africa replaced the intermediary function of the High Court of Judicature in Bombay and the Court for Zanzibar as far as appeals from domestic courts in the three original East African partner countries were concerned. Appeals from this new regional Court of Appeal then proceeded directly to the JCPC in London (Kato 1971; Possi 2018: 3; Russin 1963: 239). Indeed, although the majority of African states abolished rights of appeal to the JCPC soon after they obtained their independence in the 1960s and 70s, the Judicial Committee of the Privy Council still retains this appeals purpose for some Commonwealth countries, (O'Brien 2018: 959).

The 1902 Order in Council did not outline the jurisdiction of the Court precisely, but left it to the protectorates to determine how they would 'exercise such appellate jurisdiction and such other powers in relation to the High Courts and other Courts in the said Protectorates as may from time to time be conferred by Ordinances passed under the provisions of the Orders in Council relating to the said Protectorates respectively'(Eastern African Protectorates (Court of Appeal) Order in Council 1902, para 2), subject to overview by the Secretary of State. The Order thus created a service institution, and left to the individual protectorates the task of setting out its parameters of action. This broad and flexible approach was maintained at the

establishment of the first East African Community's court in 1967. The British colonial regime encouraged the establishment of a number of common services between the countries, and the fact that they were all administered by Great Britain facilitated this, thanks in part to a shared official language – English – and similar traditions of government (Mgaya 1986:3; Kato 1971: 2-5). HBM Court of Appeal for Eastern Africa was one of the common services shared by these East African countries both before and after they gained their independence.

Over the course of time, the Court was known as the East African Court of Appeal or the Court of Appeal for Eastern Africa (Katende and Kanyeihamba 1973). At various points, its territorial jurisdiction to hear appeals also covered Aden (1947), Seychelles and British Somaliland (1950) and St Helena (1961), although not all simultaneously, Somaliland leaving as it gained independence in 1960 (Russin 1963: 241-2). As the East African countries gained their independence from the colonial powers in different years and at different speeds, it became unclear whether the court would survive the dramatic changes of the mid twentieth century. Ultimately, when the first East African Community was formed in 1967, the court, known as the East African Court of Appeal, was retained by Kenya, Tanzania, and Uganda as the appellate court for the East African Community. The Court gained a reputation for the standard of its judicial activity and the quality of its judgments (Kato 1971; Possi 2018: 3).

The Treaty for East African Co-operation, signed on the 6th June 1967 'on behalf of the Governments of the United Republic of Tanzania, the Sovereign State of Uganda and the Republic of Kenya' made provision for a Court of Appeal for East Africa, therein confirming its new name, with 'jurisdiction to hear and determine such appeals from the courts of each Partner State as may be provided for by any law in force in that Partner State' and to 'have such powers in connection with appeals as may be so provided' (Treaty for East African Co-operation 1967, Articles 80 and 81). In the spirit of the colonial predecessor, considerable discretion was therefore granted to the individual Partner States as to the jurisdiction they would confer on the East African Court of Appeal and how much sovereignty they were ready to surrender to it (Odoki 2011). Consequently, as Katende and Kanyeihamba explain, 'for all intents and purposes, the Court of Appeal for East Africa [was] a court of appeal for each partner state singly when it [was] sitting there and hearing appeals therefrom.' (Katende and Kanyeihamba 1973: 44). In that case, one might have expected that the East African Court of Appeal would apply only the laws and precedents of the state from where the appeal it was hearing emanated. However, although at times conflicted and a little ambiguous, it appears that the Court tended to follow the model of the English common law system of binding precedent of which it was a product, and was inclined to be bound by its own previous decisions, regardless of whether they related to Ugandan, Kenyan or Tanzanian parties and laws: if it wished to reach a contrasting decision, the Court needed to distinguish the case in front of it from its own previous judgments (however, compare Allott 1968: 25 and Newbold 1969). The application of the inherited common law doctrine of binding precedent by the East African Court of Appeal was judged to have had a harmonising impact on the laws across the region. Former Chief Justice of the Republic of Uganda, Benjamin Odoki resumes the successes of this Court:

> ‘The Court of Appeal was credited with harmonising the various laws in East Africa and also developing law and common jurisprudence in the region. It also promoted the observance of the rule of law, the protection of human rights, democracy and good governance, the advancement of economic development and the promotion of unity, cooperation, peace and security.’ (Odoki 2011).

The Court of Appeal for East Africa ceased to exist following the collapse of the East African Community in 1977 (Nsekela 2011), however, the achievements of the former Court are stated as clear objectives and principles to be espoused by the current EACJ, which came into being in 2001. These can be found in Articles 5 and 6 of The Treaty for the Establishment of the East African Community, signed on 30 November 2000. The current EACJ is endeavouring to build on these foundations.

When the original East African Community collapsed, each of the former Partner States established their own Courts of Appeal, to which they transferred the former jurisdiction of the East African Court of Appeal. With the exception of Tanzania, the Partner States each established a Supreme Court as their final appellate court. This move has contributed to the challenges facing the East African Court of Justice, which has had to be assertive in seeking to define its jurisdiction and enforce its decisions in the region, in the face of the inevitable reluctance on the part of Partner States to relinquish sovereignty.

Role, composition and jurisdiction of the East African Court of Justice

The composition and jurisdiction of the East African Court of Justice of today are different from those of its predecessor, and its scope extends beyond that of the earlier court, which, as explained above, was an appellate court for domestic matters. This significant extension of the reach of the Court is a demonstration of its authority in the region and its potential influence in the integration process.

When the decision was reached by Kenya, Tanzania and Uganda to endeavour to revive the EAC, their aims were to establish a Customs Union, a Common Market, later a Monetary Union and ultimately a Political Federation (Article 5 (2) EAC Treaty. All statutory references are to the Treaty for the Establishment of the East African Community as amended on 14th December, 2006 and 20th August, 2007, unless otherwise expressly stated). To achieve this, a strong institutional structure was conceived, resembling that of the European Community (van de Mei 2009: 406), and there was a need for a solid and efficient judicial system. The increased scope of the EACJ today reflects the EAC’s aims to achieve a deeper regional integration (McIntyre 2005: 3; see Amone, chapter 2). Greater and deeper regional integration require an authoritative institution which can ensure that the EAC Treaty is respected with regard to the interpretation and application of its provisions and the respect of EAC law more broadly across the region, since with deeper integration, as former EACJ Registrar Ruhangisa points out, ‘the more disputes of a trans-boundary nature are likely to happen’(Ruhangisa 2010: 3).

A judicial body serving the partner states, the EACJ is an international court (Nsekela 2011), whose role is set out in the EAC Treaty as the 'judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty' (Article 23). Its international character is demonstrated through the provenance of its judges, who are drawn from the six Partner States. They are appointed by the EAC Summit of the Heads of State or Government, from persons recommended by the Partner States, and are professionals of proven integrity, impartiality and independence who hold high judicial office, or jurists of recognised competence, in their home states (Article 24). The EACJ strategic plan 2018-23 puts the number of judges at eleven – one from each of the six Partner States in the First Instance Division and five judges drawn from Burundi, Kenya, Rwanda, Tanzania, and Uganda in the Appellate Division (EACJ 2018: 4). The EAC Treaty allows for expansion of the Court personnel up to a maximum of fifteen judges – not more than ten appointed to the First Instance Division and not more than five appointed to the Appellate Division. This distribution was logical before the number of EAC Partner States expanded to six, when South Sudan gained accession in 2016, but is now in need of modification, as the strategic plan highlights, in the interests of fairness, balance and objectivity, to ensure equitable representation of all Partner States at both levels.

The judges, with the exception of the President and Principal Judge, serve on an ad hoc basis, holding office for a maximum period of seven years or until the age of seventy years, in a Court which sits temporarily in Arusha and does not yet have a permanent seat. The judges retain their positions as serving judges in their home jurisdictions, with commitments which sometimes render it challenging to compose a panel of judges to sit on the EACJ bench in Arusha. Kenyan Appeal Court Judge James Otieno-Odek points out the detriment to the Court's efficiency which its 'intermittent and ad-hoc nature' causes:

> 'The EACJ does not have any continuous sittings; the court sits in sessions and this delays disposal of cases and hinders efficiency. The current work load of the EACJ does not require all the Judges to reside permanently in Arusha….' (Otieno-Odek 2017: 485).

This is a cause of concern for the Court, which also sees the lack of a permanent seat as an impediment to its visibility and to accessibility to potential stakeholders, to judicial independence and the separation of powers, and to its influence as a regional mechanism for dispute resolution and a motor for regional integration. The hybrid nature of the judges' roles – shared between professional obligations in their domestic courts and at the international court – perhaps also makes it somewhat difficult to make a clear statement and demonstration to the outside world of absolute independence from national structures. The vision expressed in the EACJ strategic plan, an acknowledgment of these issues, is to 'end the transitional life' of the Court and establish a permanent seat (EACJ 2019: 16, 23). Former EACJ Registrar John Eudes Ruhangisa regrets the lack of a permanent court, talking of 'absentee leadership, for ten years' and considers this as a handicap for strategic growth and progress. He considers that the work load of the Court has increased and will continue to increase further and that

there is enough work for the First Instance Division at least to be engaged on a full time basis (Ruhangisa 2011: 24-25).

The Court's current function involves 'settling disputes, legally guiding the integration process with its judicial pronouncements and … building regional legal decisions that have become common and applicable to the … Partner States of the Community' (EACJ 2013: 4). It is inevitable that disputes, legal problems and contradictions will arise amongst Partner States as they move towards deeper co-operation and integration, and a regional legal mechanism to resolve such disputes or problems is essential. The EACJ Court Users Guide specifically mentions amongst the objectives of the EACJ 'Proactively influenc[ing] a positive shift in the mind-set of the EAC Policy Organs and other Stakeholders concerning the role and place of the Court' and making 'the Court visible and indispensable in [matters related to] the discharge of its mandate', and this stated objective provides an aperçu into some of the challenges which have confronted the EACJ since its inception (EACJ 2013).

As would be expected, the EACJ has jurisdiction to adjudicate failures of a Partner State, EAC organ or EAC institution with regard to the respect of Treaty obligations, where these are referred to it by another Partner State (Article 28). The right to approach the Court for a remedy extends also to natural and legal persons (Article 30). The EAC Treaty declares that the Community 'is a people-centred and market-driven co-operation' (Article 7 (1) (a)), and it reinforces this commitment by granting 'natural and legal persons' (eg private individuals and companies) the right to challenge the legality of actions of a Partner State or of any of the nine EAC institutions which might be contrary to the EAC Treaty. Standing to bring a case that the EAC Treaty has been infringed is thus extended to all individuals resident in the Partner States, who are not even required to demonstrate that they personally have a specific right or interest which has been infringed or have suffered damage: '…it is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner' (Otieno-Odek 2017: 470). Nor are claimants required to have pursued the matter in the domestic courts before approaching the EACJ. This is confirmed in the judgment of the Court in the *Nyong'o* case in 2007 (see below), which states clearly the extent of the access of individuals to the Court. It held that Article 30:

> '… confers a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We … do not agree with the notion that before bringing a reference under Article 30, a litigant has to "exhaust the local remedy". In our view there is no local remedy to exhaust.' (*Nyong'o*: 21; see van der Mei 2009: 409).

However, significantly, actions of EAC organs, ie the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat, may not be challenged by private individuals (Articles 28 and 30), and it has been raised as a concern that this is 'an example of how the EACJ's jurisdiction is circumscribed' (Possi 2018: 13). Logically, in addition to failures of Partner States to respect Treaty obligations, disputes between the Community and

its employees may also be heard before the EACJ (Article 31), as well as matters arising from express arbitration clause agreements conferring jurisdiction on the Court (Article 32).

National courts in Partner States may also approach the EACJ, to request a preliminary ruling on the interpretation and application of the EAC Treaty (Article 34). Ottervanger et al point out that this mechanism has been under-exploited by the EAC and emphasise that the preliminary ruling process has a distinct role to play in furthering the development of EAC law. In a comparison with EU institutions, they underline that the preliminary ruling process has been 'a successful mechanism for integration within the EU by supporting national courts in providing a uniform interpretation of EU law' (Ottervanger et al 2017). The Court may also give an advisory opinion regarding a question of law arising from the Treaty at the request of the Summit, the Council or a Partner State (Article 36).

In contrast to the situation in the European Union, however, where the CJEU alone has the authority to interpret EU law, the EACJ does not have exclusive jurisdiction over EAC law. Domestic courts are also endowed with the authority to rule on disputes involving the interpretation and application of the Treaty – although the Treaty makes clear that decisions of the EACJ on the interpretation and application of the Treaty take precedence over decisions of national courts on similar matters (Article 33 (2)). This possibility is infrequently used (Otieno-Odek 207: 485), but it nonetheless empowers individual Partner States, granting them their own influential role in the integration process (van der Mei 2009: 409). At the same time, varying layers of shared jurisdiction created by expressly conferring jurisdiction on national bodies as well as the EACJ (including those introduced via amendments to the EAC Treaty in 2013 in the aftermath of the *Nyong'o* case) mean that it is possible 'to have different interpretations of the same EAC Treaty provision, leading to legal uncertainties and different levels of legal protection' (Ottervanger et al 2013). This state of affairs does not help to strengthen perceptions of the EACJ's authority.

The issue of blurred jurisdiction is compounded by the fact that other quasi-judicial dispute resolution mechanisms which run parallel to the EACJ have also been established by the EAC. The Customs Union Protocol provides for a Committee on Trade Remedies to handle matters dealing with rules of origin and regulations on anti-dumping measures (Article 24, Customs Union Protocol). In addition, the Common Market Protocol appears to allocate jurisdiction on common market-related matters to national courts (Article 54 (2), Common Market Protocol). The Committee on Trade Remedies appears yet to be ratified, but in the meantime any jurisdiction of the EACJ is excluded from Customs Union and Common Market matters, and 'the people of East Africa have nowhere to present their disputes arising out of Customs Union' (Ruhangisa 2010: 578). The implications of this are critical, not only as far as making official EAC judicial mechanisms relevant and attractive possibilities to which East African private businesses might have recourse, but also with regard to the threat to the harmonisation of EAC law, which is undermined by the existence of such parallel jurisdictions.

The full extent of the jurisdiction of the Court is not yet established, and the EAC Treaty allows for new areas to be added to its current jurisdiction. The Court's jurisdiction is set out

in Articles 27-32, and this includes 'such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date' (Article 27 (2)). These areas come in addition to the Court's jurisdiction over the interpretation and application of the Treaty provisions. The Council, which is therefore responsible for determining the new areas of jurisdiction to be brought under the wing of the EACJ, is composed of the Ministers or Cabinet Secretaries from the respective Partner States who are responsible for regional co-operation. It is therefore not within the control of the EACJ itself to determine its jurisdiction, but this is a decision made by political representatives of the Partner States. They may, according to the Treaty, determine further jurisdiction in due course, or delay the expansion of jurisdiction to other areas.

Indeed, the express extension of the Court's jurisdiction to cover human rights issues has been long-awaited, yet still appears to be remote, and the extension of its jurisdiction has been the source of much discussion. At the time of writing, the EAC does not yet have jurisdiction to deal with human rights cases, nor does it, in contrast to its predecessor, yet hear appeals from domestic courts of the Partner States, despite the principles stated in the Treaty.

Amongst the fundamental and operational principles outlined in Articles 6 and 7 is an undertaking to 'abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights' (Article 7 (2)). In order to extend jurisdiction expressly to cover human rights issues, Partner States must adopt a specific protocol to this end, but it would appear that there is little desire on the part of Partner States to do this. In 2005, an opportunity existed to extend the Court's jurisdiction to human rights matters and to appeals from Partner States' domestic courts in commercial and trade matters. In compliance with the EAC Treaty (Article 27 (2)), a protocol was drafted (the Zero Draft Protocol), whose aim was principally to extend the EACJ's jurisdiction to reflect the higher levels of economic integration resulting from the establishment of the Customs Union, but which also provided for human rights and appellate jurisdiction (Bossa 2006: 32). The protocol was not approved. A succession of meetings followed the drafting of the protocol, the outcome of which was the endorsement by the Summit in 2013 of the recommendations of the Sectoral Council on Legal and Judicial Affairs that: i) the jurisdiction of the EACJ should be extended to cover trade and investment disputes as well as matters associated with the Monetary Union; ii) the EACJ should not have appellate jurisdiction as this would run contrary to the constitutional principles of the Partner States and iii) allegations of human rights infringements and crimes against humanity should be addressed to the African Court on Human and People's Rights. This leaves the EACJ in the ambiguous position of not having a mandate to adjudicate on matters of human rights, yet tasked with interpreting and applying EAC law, of which human rights protection forms a stated part. This situation can seem all the more bewildering in light of the proposals by the Summit in 2012 that the EACJ's jurisdiction should be extended to include crimes against humanity. The intention behind these proposals was ultimately for the EAC to be in a position to request the transfer of Kenyan cases from the International Criminal Court to the EACJ for judgment (Possi 2015: 192, 210-11).

However, lack of express jurisdiction for human rights cases has not prevented the EACJ 'through a mix of judicial activism and creative interpretation' (Lando 2018: 467) claiming by indirect means some limited but significant human rights jurisdiction. Possi maintains:

> '…the Court has been playing an important role in protecting human rights within the Community… The EACJ has laid down its position clearly that it cannot 'abdicate' exercising its interpretive mandate, even if a matter before it contains allegations of human rights. In doing so, the EACJ has been protecting human rights indirectly in the EAC through other forms of actions such as the rule of law and good governance.' (Possi 2015: 194).

There is eagerness on the part of some protagonists for human rights cases to fall to the EACJ. This would enable the integration process to be more effective in enhancing human rights in the region via the Court, which would then arguably have a greater influence over the national human rights frameworks of Partner States (Lando 2018: 467; Otieno-Odek 2017: 485). Otieno-Odek comments that the Court's decisions 'play a role in putting the national governments of the Partner States under check and control' (Otieno-Odek 2017: 484) and shines a light on the contribution that its jurisprudence is already making to rule of law, good governance and respect for human rights in the region. For the time being, however, although human rights remain at the forefront of the agenda in the East African integration process, there appears to be a reluctance on the part of EAC leaders to extend the jurisdiction of the EACJ expressly to deal with them.

Independence of the Court and the case of *Anyang' Nyong'o and others*

The EACJ has an instrumental role to play in the process of integration in the East African Community, by 'settling disputes, legally guiding the integration process with its judicial pronouncements and building regional legal decisions that have become common and applicable to the …Partner States of the Community' (EACJ 2013: 4). However, this role can be a controversial one.

The aim of the EAC to establish 'ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States' (Article 5 (2)) inevitably involves Partner States relinquishing some degree of sovereignty, and this can be met with reluctance on their part. The independence of the EACJ and of its judiciary, its freedom to reach judicial decisions unhampered by political considerations and national concerns, is of paramount importance if it is to be a credible international court. It has begun to make its mark in this respect, but, as may be anticipated, not without challenges.

The case of *Peter Anyang' Nyong'o et al v The Attorney General of Kenya et al* is key as a demonstration of the determination of the Court to protect the rule of law in the face of the potential threat to judicial independence posed by Partner States. In this case, the claimants were officials of Kenyan political parties and nominees who were unsuccessful in

appointment to the East African Legislative Assembly (EALA) in 2006. They challenged the appointment by the Kenya National Assembly of nine Kenyan representatives to the EALA on the grounds that the process by which they had been appointed to the Assembly, and the Kenyan rules for the appointment process, infringed the provisions of Article 50 of the EAC Treaty. Consequently, the claimants put forward that the nine representatives had not been 'elected' to the EALA as specified in Article 50 of the EAC Treaty and referred their case to the Court. The EACJ ruled in favour of the claimants, concluding that the Rules of election applied by the Kenya National Assembly infringed Article 50 of the EAC Treaty, and were inconsistent with it:

> 'The evidence before us leads to only one conclusion, namely that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty' (*Nyong'o* (2006): 34).

This case is not only noteworthy because it demonstrates the resolve of the EACJ in interpreting and enforcing the EAC Treaty. The repercussions and the consequences of the decision reached by the Court were also very significant. Firstly, an injunction was issued by the EACJ to prevent the nine Kenyan representatives taking office in the EALA pending determination of the Reference. Immediately, there were ructions and accusations made by official figures in Kenyan politics of bias in the Court (Onoria 2010). Indeed, the EAC Summit, consisting of the Heads of Government of the Partner States, condemned the actions of the Court. In an extraordinary summit of heads of state of the EAC Partner States held in December 2006, several amendments to the EAC Treaty were agreed. Particularly relevant were those concerning the introduction of a new two-tier structure of the Court and the process by which judges could be removed from office. The Court was reorganised, to introduce a First Instance and an Appellate Division, (see Article 23 (2)), a move which had the impact of opening the Court's decisions to review and challenge in front of a second chamber. It has been suggested that this gives the impression of undermining the Court's authority (Possi 2018: 8). Additional grounds were also added (Article 26) to the conditions in which judges could be suspended or removed from office by the Summit, thus extending the control of the Summit over the Court, and making the judges' positions potentially more vulnerable to rogue political decisions of Partner States (Possi 2013: 14).

Some commentators consider these moves pose questions about 'institutional balance and the relationship between the key Community organs and, more critically the independence of the Court vis-à-vis the potential politicization of the judicial process in the Community' (Onoria 2010: 83). However, in the *Nyong'o* case, the Court held firm: an appeal by the Attorney-General of Kenya lodged to the newly-formed Appellate Division of the EACJ was dismissed, and the decision of the first instance hearing was confirmed in 2010. The disquiet regarding the manner in which the EAC Treaty was amended was the subject of a referral by the East African Law Society to the EACJ in 2007, in which it was contended that the procedures to amend the Treaty prescribed in Article 150 had not been respected, and that the amendments therefore infringed the principles of the Treaty. The EACJ concurred (*East African Law Society and Others v The Attorney General of Kenya and Others)* but it declined

to invalidate the amendments retrospectively. Former EACJ Registrar Ruhangisa emphasises that this incident 'did not deter the Judges from acting impartially and independently' and argues that 'this makes the EACJ an exemplary model of the Court that stands to propel the integration process'(Ruhangisa 2010: 7). Alter, Gathii and Helfer are perhaps more circumspect and suggest that the 2007 amendments 'have nonetheless affected the Court's subsequent trajectory,' but emphasise that unpopular court rulings are nothing new. They summarise the ambivalence:

> 'the EACJ Appellate Division – itself a result of the backlash – provides a mechanism to reverse more expansive First Instance rulings. Yet both chambers of the EACJ remain stubbornly independent' (Alter *et al* 2016: 326, 328).

It remains to be seen how effective the EACJ will be in asserting its authority as the custodian of the EAC Treaty (Ottervanger et al 2012), but this case is evidence of a determination not to be undermined.

Conclusion

The EACJ of today is a far cry from the Court of Appeal for Eastern Africa of the colonial era. It has made its mark as an international court, whose judgments are to be respected by Partner States, and have an impact on the domestic legal processes of Partner States. Thanks to its creativity and judicial activism, the Court has been able to influence the behaviour of national authorities, and contribute to upholding the EAC's principles of respect of the rule of law, democracy, good governance and human rights, principles enshrined in the EAC Treaty. It has survived an attempt to clip its wings, albeit seeing subsequent Treaty amendments make inroads into its sphere of action, and the actual impact of these amendments remains to be seen.

There are still sectors of the Community where recourse to the EACJ is disappointing, with litigation before the Court by the business community being very limited due to the existence of parallel dispute resolution mechanisms (Otieno-Odek 2017: 484) and the inability of the EACJ to award compensation to successful parties as a remedy. For the Court to assert its authority, it would be helpful to gain the confidence of businesses and private individuals as a mechanism for resolving disputes. The first obvious steps to take in this respect are for the Court to become more visible and more approachable. The standardisation of judgments of courts within the EAC, and the harmonising of Partner States' national laws and of their legal training are commitments enshrined in the EAC Treaty (Article 126). The realisation of these aims would contribute significantly to creating a more cohesive legal framework in the region.

The establishment of a permanent seat for the Court, where judges would sit on a full-time basis, free from their obligations to their own national courts, would contribute to reinforcing the Court's independence, both actual and perceived. The EACJ does not yet have the same autonomy enjoyed by the CJEU, and cannot guarantee the acceptance of its supremacy in

matters of EAC law, but it has shown a determination to be heard as a major voice in the East African integration process.

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