

# THE ROLE OF THE EAST AFRICAN COURT OF JUSTICE IN REGIONAL INTEGRATION

## THE PAST TWENTY YEARS

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### **1.00 Introduction**

1.1 Twenty years of existence is an opportune period for reflection on the achievements of the Court's role in the integration of the region. The Court was set up under the second integration project. The first had its genesis in the colonial schemes of cooperation within the production and marketing sectors of Kenya, Tanganyika/Tanzania, and Uganda. It was a scheme to ensure stable sources of raw materials transmitted freely to support the foreign manufacturing sector. The first project was anchored in institutional arrangements, infrastructure and shared services. Mechanisms for resolution of integration disputes existed, but, not at the level of a regional court.

1.2 The current integration project is different. First, it aims at integrating the economies of the Partner States of East African Community. Second, unlike the first project, the Treaty establishing the Community has conceptualised an integration project that targets overall human development as an objective. This implies a conducive environment for human existence that facilitates production and the spread of benefits for a better life. Therefore, fundamental and operational principles are expressly incorporated in the Treaty to reflect the human development dimension of integration. Third, the Community has a broader agenda of facilitating close ties in social, cultural, political, and technological sectors for sustainable development. Organs and Institutions of the Community are established to walk the journey towards implementation of the objectives. The role of the Court, one of the Organs of the Community, is the focus of the presentation.

### **2.0 The State of Regional Integration**

2.1 The major milestones in the integration process, at least on paper, are the *Customs Union*, and, *Common Market*.<sup>1</sup> Negotiations towards a *Monetary Union* and a *political federation* are

ongoing. The integration processes are challenged by issues that could be easily resolved given commitment, a key condition of integration. The other conditions for successful integration are a culture of mutual respect amongst the participants, and, a shift of mind-set from sovereign insularity to a shared destiny. A shortage in the conditions has led to operational challenges against *free movement*, the major pillar of integration. The outcry over border restrictions, non-tariff barriers to trade (NTBs) lack of facilitative harmonisation of national standards and laws, a dearth of regulations and directives to effectively implement the integration project, is an almost daily occurrence.

2.2 Other challenges to integration are institutional and have been the subject of frequent dialogue. The inter-governmentalist approach is eminent. The design right from the Summit down to the Sectoral Committees project Partner States', rather than regional interests, more so in view of the requirement of decisions by **consensus**, and, the option of a **veto** whose contribution is in adjourning decisions. The Legislative Assembly (EALA) and the Court (EACJ) stand out as the two organs of the Community with institutional capacity to take decisions undeterred by State interests. However, the electoral practice for returning members of EALA (majority being nominees of the ruling political party in the State) to some extent denigrates its capacity to steer clear of national demands that retards regional progress. That leaves the Court with the status of a near supranational organ of the Community. Over the period, has the Court enjoyed the independence and capacity for the role?

### **3.0 Independence of the Court-The Law**

3.1 The role of the Court to ensure adherence to law could only be played properly under an environment of independence. The Treaty as originally formulated, had guaranteed this in, clearly defining jurisdiction, dispersal of functions amongst organs of the Community, securing tenure and granting immunity in respect of judicial functions. Justices of the Court are currently nominees of the States selected in accordance with procedures that vary from State to State. It may not be clear that the selection process is transparent and fair to all aspiring and qualified persons. But for the moment, most nominees to the Court are already serving judges in their Home States where their integrity and capacity was assessed.

3.2 The practice so far can be equated to a secondment from the judiciaries of the Partner States. It may be argued in favour of the practice that constitutional rules of the States already guarantee the independence of the judiciaries at the national level which is transposed to the

regional level. Nevertheless, the retention, by the States, of control over the tenure of the Justices of the Court carries a potential for adverse effects with regard to independence and integrity which are core values of the Court.

3.3 The potential became evident when, in the matter of *Anyang Nyong'o vs. The Attorney General of Kenya and Others*<sup>2</sup>, the Court asserted its independence. The Court issued an Order restraining Kenya's nominees to EALA from taking their seats until a determination that their selection had been done in compliance with the Treaty. Kenya perceived the decision as an affront to its sovereignty. **Summit** convened, and hastily approved the *Anyang Nyong'o amendments* to the Treaty. No doubt, some of the amendments were a threat to judicial independence to the extent that they subjected the judges' tenure to disciplinary processes in their Home States.<sup>3</sup> It must be understood that the practice of secondment from the national Bench to the Court is not rooted in law. It is just for transitional convenience so long as the business of the Court is not adequate to warrant permanence of seating. The business will soon justify the permanence. ***It is therefore necessary to conceive of independent and transparent mechanisms for nominating persons to serve at the Court. The participation of the States should remain only at the stage of formal appointment via Summit.***

#### **4.0 Independence- Practice and Effect over Integration**

4.1 Subsequent to the *Anyang Nyong'o* restraint considerable expressions of anger ensued from Kenya as reported in the print media. But, the Court was not distracted by the furore. It proceeded to declare that the process of selecting Kenya's members of EALA was not compliant with the provisions of the Treaty.<sup>4</sup> Besides demonstrating its independence, the Court scored goals in the field of holding the States to their obligations to implement integration under the Treaty.

\* The first score is that, although Kenya was not happy with the outcome, circumstances forced it to rectify by enacting fresh Rules for election of its members to EALA.<sup>5</sup> Compliance was a message that the Court's role must be acknowledged and respected. It was a recognition that Partner had ceded some sovereignty to the regional project, and, must hence proceed accordingly.

\* The second is the democratising effect on the election process in the region. Aggrieved parties followed *Anyang Nyong'o* in seeking the annulment of what they alleged to be similarly faulty election processes.<sup>6</sup>

\* The third score is that the decision has contributed to the harmonization electoral jurisprudence in the region. In *Jacob Oulanyah v The Attorney General of Uganda*,<sup>7</sup> the constitutional court of Uganda followed the decision in opining that the Treaty envisaged an election by the National Assemblies and not something else. *Anyang Nyong'o* has also been cited with approval in some domestic electoral disputes of Uganda.<sup>8</sup>

4.2 In the aftermath of the anger over the injunctive Order in *Anyang Nyong'o*, it would have been expected that the Court would proceed with acute judicial self-restraint. However, soon after the amendments, the Court was approached by the *East African Law Society* for an opinion over the legality of the process by which the amendments were effected.<sup>9</sup> The amendments were effected in a space of barely seven days between their conception by the Attorneys General of the States and their adoption by Summit. This in itself raised suspicions in view of the timelines of the Treaty which envisaged effective consultation.<sup>10</sup> The States put up a spirited fight in defence of the process. The defence was based on the theory of Treaties being agreements between or amongst sovereign States. Hence, the right of the States to make and unmake as they wished. Therefore, the *East Africa Law Society* lacked competence to intervene in the exercise of sovereign rights.

4.3 The decision of the Court on the legality of the process for adopting the *Anyang Nyong'o amendments* is instructive over the role of the Court in the integration agenda from several perspectives.

- First, the centrality of the people in the integration process was emphasized. Integration is about human development and this is why the Treaty pronounces it to be *people-centred*. Therefore, the participation of the people in decision making had to be secured. The Court so declared when it pronounced that the Treaty intended to ensure public participation. Therefore, it was not appropriate to effect amendments without public consultation. Subsequently, the major pillars of integration (Customs Union, Common Market, and Monetary Union) have been pursued, and continue to be pursued through consultation.
- Second, the right of the people to intervene by action before the Court even if they were not personally affected by an alleged infringement was recognized. According to

the Court, the several provisions of the Treaty, such as Article 30, that empowered the people to approach the Court lent weight to the view that this *was deliberate.....to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty.*

- Third, at this early stage, the principle of the supremacy of the Court over matters of interpretation of the Treaty was enunciated. From hence, it was to be a guiding principle in decisions that have had an integrative effect. The impact is to integrate the judicial systems of the EAC region over issues of the Community.
- Finally, although the issue was not directly canvassed, the amendments for removal of judges based on disciplinary processes of their Home jurisdiction were condemned as intended to weaken the Court. Further, in a demonstration of its independence, the Court recommended that the amendments be revisited at the earliest opportunity.

## **5.0 Streamlining Institutions and Accountability**

5.1 Strong and accountable institutions are necessary for implementation of an integration agenda. The Organs of the Community as structured suffer from an inherent discord. At the apex is Summit which gives directions of a general nature, but, is largely dependent on Council for initiation of policy, research and submitting Bills to EALA. Council is therefore comparable to an executive arm of government, while EALA is the legislature. But, these Organs are not structured to reflect the distribution of functions that democratic discourse is familiar with. This is because the legislative role is shared between both Organs.<sup>8</sup> Further, Bills to EALA can be initiated by both Council and members of EALA.

5.2 The discord led to a near disruption of working relationships between Council and EALA. The EACJ had to intervene by its maiden judgement of *Calist Andrew Mwatela and Others v. East African Community*.<sup>11</sup> Council had imagined that having power to initiate Bills to EALA implied a right to withdraw a Bill introduced by a member of the Assembly. Council sought to rely on Article 16 of the Treaty by which its decisions are *binding on Partner States, on all organs and institutions of the Community other than Summit, the Court, and the Assembly within their jurisdictions*. Council's move would have led to grave repercussions for accountable exercise of powers. Integration would have been subjected to the whims of representatives of States to decide via consensus subject to a veto by any of the States. By intervention of the Court, the legislative integrity of EALA was preserved.

5.3 Since then the Court has sought to hold the Organs of the Community to their mandates and to act with due accountability. The court ruled that the Secretary General of the Community must not wait to be moved to discharge duties under the Treaty,<sup>12</sup> that Council does not implement the objective of the Treaty by mere holding of endless consultative meetings, and that executive functions are not the exclusive concern of the Organ to which they are vested. The import of accountable governance as stipulated in the Treaty is that the people can hold those in public office to account for the manner in which they exercise those functions.<sup>13</sup>

## 6.0 Sovereignty versus Supremacy

6.1 Two closely related aspects of sovereignty generate challenges to integration. The first is the right of a State to take decisions in its best interests. The second is the ideal of sovereign equality, and hence, the need to move together. As to the first, it should be obvious from the Treaty that the States have agreed to a regional handling of some of their sovereign powers and functions. But it has been necessary for the Court to remind the Partner States that integration implies subjecting their institutions and laws to those of the Community *on matters pertaining to the implementation of the Treaty*.<sup>14</sup> Implicit in the guidance is the warning that integration cannot be achieved without the States effectively ceding sovereignty over matters they have placed under the competence of the Community.

6.2 The second aspect has been, and might continue to be, problematic in view of the requirement of *consensus*<sup>15</sup> being perceived to be an uneasy companion to the principle of *variable geometry*. Prima facie consensus is easily interchangeable with unanimity so that a decision to move the integration agenda cannot be taken, or even implemented, without the consent of any one Partner State. On the other hand *variable geometry* allows for progression of agreed integration schemes at different speeds depending on the preparedness of some of the States. In an opinion requested by Council of the Community, the Court advised that *consensus* and *variable geometry* can co-exist because the latter is a strategy of implementation, while the former is a decision making tool.<sup>15</sup> But, as pointed out elsewhere,<sup>16</sup> implementation of *variable geometry* is likely to be perceived as a conspiracy to discard the unwilling or the less able. *Consensus* might never permit it, and, the opinion of the Court is likely to remain what it is, mere advice. **As**

**membership to EAC continues to grow, there will be need to revisit the requirement of consensus so as to expedite decision making, and to emphasize the regional interests.** To expect constant “unanimity” from ten or so often feuding *gentlemen* is unrealistic.

## **7.0 Strengthening the Economic Community**

7.1 In the area of the economic community, there has not been as much intervention and activity by the Court as would have been expected. This is in spite of the fact that integrating the economies was the major intention of the leadership that negotiated the Treaty. Even for the ordinary people, the expected benefit from EAC was free movement; breaking up the colonially induced, sovereignty driven barriers in the form of border controls, plus inter-State tariffs.

7.2 A major factor behind the minimal activity is lack of public awareness of the remedies available for non-conformity to obligations regarding the economy. That the Common Market Protocol enables recourse to national courts does not appear to have been amply appreciated by key players especially the Bar. Hence, the dearth of disputes arising out of violation of economic rights. Kenya courts have indirectly adjudicated over free movement of legal services.<sup>17</sup> At the EACJ, two disputes tripped from breach of human rights to violation of free movement of persons<sup>18</sup> and of goods.<sup>19</sup> *British American (U) Tobacco*<sup>20</sup> that struck down a law which imposed a discriminative tax on goods manufacture in, and, moving from Kenya to Uganda is a major milestone in strengthening the economic Community.

7.3 The Court has decided in two instances that its interpretative jurisdiction was not ousted by the trade remedies under the Customs Union Protocol and the availability of remedies before national courts.<sup>21</sup> It would appear that the Court would not decline to entertain a dispute over economic rights filed directly before it if the same involved interpretation of the Treaty or relevant Protocols. There is a potential for more engagements of the *British American (U) Tobacco* type.

## **8.0 Convergence in Governance**

8.1 It is accepted that good governance, democracy and peace are key pre-conditions to the attainment of sustainable social-economic progress that is the objective of integration. Hence *good governance* is declared a fundamental principle to guide the achievements of the objectives of the Treaty. Promoting harmonized standards of governance within a regional integration project serves several objectives which need not be recounted here.<sup>22</sup> In common parlance, it is risky and probably fruitless to continue dealing with an identified rogue. With regard to Partner States, the duty of ensuring that the undesirable position is not reached, has been cast onto the Court.<sup>23</sup>

8.2 Some of the aspects of *good governance* are mentioned by Article 6(d) of the Treaty. However, there exists a variety of elaborations of that concept. Some of the characteristics of the concept frequently mentioned are that good governance must be, *consensus oriented, accountable, transparent, efficient and effective, responsive, equitable, and, must adhere to the rule of law.*<sup>24</sup> It is possible to add more to those characteristics. For example, it is reported that the EAC Draft Protocol on Good governance identifies *decentralization* as key pillar of Good Governance.<sup>25</sup> The rule of law, by itself, holds a wealth of connotations susceptible to different interpretations. More significant is that the processes of implementation of the various aspects of the rule of law could vary from State to State. Therefore, harmonizing standards of good governance is an exercise that is, at times, bound to be perceived as transgressing the sensitive issue of sovereignty. So far, the Court has managed a balancing act whose reference point is the Partner States' obligations under the Treaty, and, other international instruments to which they subscribe. In view of the fact that some disputes might amount to questioning the propriety of domestic laws, including basic laws, plus the national processes of adjudicating disputes, the distinction between exacting adherence to the regional law, and, interpreting national laws, could blur. Two cases come to mind.

8.3 The first is *Baranzira Raphael and Another v. The Attorney General of the Republic of Burundi.*<sup>26</sup> Burundi enacted Act 1/26 establishing a special court on land and other assets. Appeals from a National Commission of Land and Other Property were to go to the Special Court whose decisions were final. Whether the law conformed to the standards under Article 6(d) of the Treaty, was disputed before the Court on a number of grounds. Most relevant to this presentation was the averment that the law impeded the effective administration of justice, obliterated the independence of the Judiciary from the Executive and negated the right to fair hearing. The specific provisions that gave rise to



that contention were that (a) the judges of the court were to be appointed by the President upon the recommendation of a Minister, and, (b) their emoluments were at the discretion of the Executive. In the case of other judges of the Superior Courts, and independent body identified the candidates for appointment by the President, and, Senate confirmed the appointments.

8.4 Burundi had plausible defences including pointing out that its constitutional court had endorsed the legality of the law, that the jurisdiction of the EACJ did not extend to interpreting national laws, or, to nullify them. The Court tried to steer clear of intrusion in national legal arrangement by sticking to the position that the issue is never whether an impugned State action is in conformity with national law, but rather whether it was in conformity with the Treaty. But then the Court went on to clarify its role as if to justify intrusion in some cases. It stated that where State action is challenged on the grounds that it did not conform to national law and therefore was in breach of the Treaty to observe the principles of good governance, then, *it is the Court's inescapable duty to consider the internal law of such a Partner State in determining whether the conduct complained of amounts to a violation of the Treaty.*

8.5 More significant is the apparent prescription of a constitutional structure for a Partner State. The Court observed that the principle of separation of powers is the cornerstone of an independent judiciary. That is not a matter for debate. What is more significant is the constitutional prescription that *it is incumbent upon them (Partner States) to ensure that the structure and operation of state power is founded on the true separation of its executive, legislative, and judicial branches, as well as the existence of an independent and impartial judiciary.*<sup>27</sup> As pointed out elsewhere,<sup>28</sup> separation of powers is applied in varying forms depending on the history and circumstances of each country. A *true separation* is, therefore, relative. Arriving at a decision that a law offends the principle of separation of powers *in so far as it designates the appointment of judges of the Special Court as the sole preserve of the executive branch of government without any demonstrable safeguards* ought to be preceded by a thorough review of the evolution of constitutional rule in a Partner State. Delving into that, as the Court attempted to do is susceptible to criticism and resentment as an intrusion on sovereignty.

8.6 The other case is *Burundi Journalists Union v. The Attorney General of the Republic of Burundi.*<sup>29</sup> Among other restrictions, the press law of Burundi prohibited dissemination

of information relating to the currency, or that which could harm the credit of the State and national economy, offensive articles or reports regarding public or private persons. The Court determined that parts of the law did not conform to the Treaty. The propriety of the annulled parts within the legal scheme of the Partner State might, or, might not have mattered because what the Court was determining was “*not a question whether the Press law meets the test of constitutional muster under the constitution of the Republic of Burundi, [Partner States] but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty.*” This could also be perceived as constitutionalizing the Treaty. For those who have not been initiated in the status of sovereignty under regional integration, it is a real affront.

8.7 The Court must be lauded for its resolve to harmonize standards of good governance. It would have been feared that Burundi, which has been a frequent customer at Arusha would be recalcitrant by disregarding the Court. However Burundi complied by introducing a new press law in conformity with the decision. It appears that even where Partner States do not directly respond to the Court’s directives, the decisions bear a civilising effect that could explain a reduction in the recurrence of incidents of non-compliance. Therefore, the foregoing apprehension notwithstanding, judicial restraint in the face of clear violations can never be advocated.

## **9.0 Human Rights-An Extended Jurisdiction?**

9.1 The Court is most celebrated for its stand that the protection of human rights is essential in all processes aimed at achieving sustainable development. In spite of the various African continental and regional commitments such as those in the Abuja,<sup>30</sup> COMESA,<sup>31</sup> and ECOWAS<sup>32</sup> Treaties, the participation of the people in holding States to account has not been as visible as in the EAC region. This is despite the fact that ECOWAS had to grant a direct human rights jurisdiction for its Court of Justice. The journey which the Court has travelled in the area of human rights has been recounted widely.<sup>33</sup>This presentation will not add to the discourse. It is proposed to end with some observations on the prospects out of the extended jurisdiction that has now been rekindled by the Resolution of EALA. The aim is to initiate debate as to what form an extension could take and what value the form might add.

9.2 The *status quo* provides the Court with the flexibility of testing compliance against the Treaty. It has considerable discretion to determine the extent to which it can seek

guidance from available jurisprudence. It has made declaratory orders where Organs and Institutions of EAC or Partner States have been found wanting. However, the people are disadvantaged in that they cannot plead and vindicate their rights for redress in the form of compensation. Whether an extended jurisdiction is a positive development will depend on the way it is conceived. Several options can be postulated. Underlying the postulates is a presumption that the reference point continues to be Community law; not redress of grievances for violation per se.

9.3 The first postulate is the *appellate model* whereby a right of appeal from human rights decisions of the final national courts is granted. This model has obvious disadvantages. First it would imply an *exhaustion of remedies*, in this case, having to run through the entire national system. Second, unless there is immediate adoption of a regional human rights regime binding on the Partner States,<sup>34</sup> the Court would often have to delve into the merits resulting from national law and possibly be hampered by domestic restraints and clawbacks. The alternative would be for the Court to discard all domestic peculiarities that do not resonate with the Treaty with the resultant resentment from national systems. The postulate also revives a perception of a regional, converted into an appellate, court for each of the States, the model of the defunct *East African Court of Appeal (EACA)*

9.4 A second postulate is the *exclusive direct model* by which the Treaty decrees that the Court shall have exclusive jurisdiction in all human rights disputes. It is possibly the model most activists have in mind. They will face a difficult task because, total surrender, by the States, of judicial sovereignty over their transgressions though welcome, can hardly be envisaged. Second, the model can be challenged as a violation of the operational principle of *subsidiarity*. In accordance with the principle, breaches of human rights are better handled by a forum close to the *locus in quo*. With regard to the role of the Court as an Organ in support of integration, it is doubtful whether this model would be supportive. This is because of the possible overload that could ensue. It must be conceded that an overload is, as yet, unsupported by empirical evidence as to the volume of human rights litigation against Partner States in national courts which would be an indicator of what would be offloaded to the Court. But, certainly. Nevertheless, the point remains that it would not be in the interests of its integration role to turn the Court into an *East African Court of Human Rights*.

9.5 A third postulate is the *alternative direct model* by which an aggrieved party would choose whether to approach the regional Court or to stick to the national fora. It is the model prevailing at the ECOWAS court. With this model, *exhaustion of remedies* is not required. Were the ECOWAS practice to be followed, the Court would not be deterred by *sub judice* when a similar dispute between the parties is already pending before a national court.<sup>35</sup> For EAC, this could be prevented by a prohibition against forum shopping. It may be argued that there would be a difference of approach in that the regional Court would be concerned with conformity with Community law, and not with redress of grievances per se. That would be a fine distinction as the *Burundi Journalist Union* case demonstrates. Therefore a major drawback of the model is the potential for conflicts in the interpretation of the law. In any case, it is difficult to imagine a breach by a State that is outside the confines of the Treaty.

9.6 In the light of the above, care must be taken in constructing a human rights jurisdiction. The content of Draft Protocol for the extended jurisdiction is, so far, not disseminated for debate. It is possible that it has made an appropriate cost-benefit analysis. The points of concern are that the construct: (a) must not deviate from the Treaty conception of a regional and integration Court (b) must not disable the capacity of the Court to develop and harmonize a regional jurisprudence on human rights, and, (c) ensure that the entire human rights jurisdiction of national courts is not offloaded onto the Court thereby turning it into a Court of Human Rights. It must be admitted that these are not issues easy to reconcile. What would approach an imperfect reconciliation is to keep the current jurisdiction with full authority to grant compensatory remedies. But, having the Court as an alternative forum for compensation could open up forum shopping unless some restrictions are introduced.

9.7 A major advantage of the status quo is the possibilities for developing a harmonized jurisprudence. Just like at the ECOWAS court, the advantage of an indeterminate human rights jurisdiction would continue. Indeterminate because, although the Treaty refers to protection of human rights in accordance with *African Charter*, it has not been determined that the Charter is, in all respects, the binding instrument to be applied by the Court. The *Revised Treaty* of ECOWAS in Article 4(g) carries the same reference to observing human rights in accordance with the *African Charter*. But the ECOWAS court does not consider that it is bound to apply the *Charter* in the same manner that the *African Court* would. The

court is simply guided by the *African Charter* and International Human Rights Instruments to which member States are party.<sup>36</sup>

9.8 It is obvious from precedents that the EACJ is similarly so guided, and also draws inspiration from opinions of International and Continental courts on human rights. This is in addition to the mainly Anglophonic precedent based approach of foreign and national courts. It makes it unnecessary to involve into the uncertainties, and controversies<sup>37</sup> inherent in exclusive allegiance to a particular Instrument such as the *African Charter* or embarking on a long journey of constructing an EAC Bill of Rights. The added advantage is that this mode creates a perception of steering clear of national law; safely getting away with *Baranzira*.

## **10.0 The Challenges of the Period**

10.1 In the twenty years of existence, the Court and the regional judicial system has faced, and, continues to face challenges. From the perspective of an outsider, a brief mention:

(a) The institutional structure for accessing the Court in respect of direct State infringements is muted. The States regularly violate Community objectives (closing borders, expelling residents, restricting inter-State trade without apparent justifications etc.) causing loss to other Partner States. It is inconceivable that one Partner State will drag another to the Court under Article 28 of the Treaty. That leaves the possibility of a Reference by the Secretary General under Article 29. But, thanks to the procedure by the this could be done, such a reference will never come to fruition. The involvement of the Council representing the States, including the Culprit State,<sup>38</sup> has ensured just that. **There is need for adjustments so that the Secretary General's discretion to refer violations by the States to the Court is not unduly circumscribed. Council should be obliged to make a reasoned decision whether or not the alleged violation should be referred to the Court with the possibility that the Secretary General can act notwithstanding Council's decision.**

(b) Ensuing from lack of effective public participation and representation is the fact that people lack knowledge of the judicial and other potentials for exacting accountability. EALA would be an appropriate organ of communication between the people and the other Community organs plus the Partner States. However, besides the democratic deficit, it lacks the capacity to reach the population. **There is need to enhance the representation**

**status of EALA and to democratise its selection so that it is an effective medium of sensitizing the public about the Community.**

(c) The Court has gone to considerable extent in selling itself but has institutional constraints on the extent to which it can go. While it is understandable that technology plus virtual mechanisms for hearings must now be embraced, **physical sessions in designated places of each Partner State would serve to enhance visibility.**

## **11.0 In Search of an East African-ness**

11.1 Integration is about unity in development. It is more about people than the market. It should be both people-centred and people driven. For it to be successful, commitment and a sense of belonging is necessary. Proximity, ethnic similarities, pre-colonial borderless interaction, and a shared destiny from a common colonial heritage through economic co-operation, had been perceived to be factors conducive to a sense of belonging to the now geo-political entity, East Africa. But then sovereignty, sanctity of borders, and the ensuing leader driven insularity set in. Good Governance that the Court is committed to, has an integrating effect and is contributory to the sense of belonging amongst the few who have access to it.

11.2 Federation can minimize the threats from sovereignty. It will remain a dream for a long time. It is important that the leadership enhances commitment to the objectives of the Community. Mutual respect and non-discrimination are important factors to unity and the evolvement of a sense of belonging. The benefits must not stop at being preached. They are of this world, and, must be visible. If the people, not only the market drivers, begin to enjoy the benefits accruing from the Community rights and freedoms, a sense of belonging leading to a true East African-ness will develop. If not, integration will remain a largely economic project, truly market-driven and market-centred.

## **FOOTNOTES**

- Advocate, Uganda
  1. The East African Protocols on the Customs Union and the Common Market.
  2. Prof. Peter Anyang Nyong'o and Others v. Attorney General of Kenya and Others, Application under Ref. 1 of 2006 (EACJ)
  3. Article 26(1) of the EAC Treaty

4. Prof. Peter Anyang Nyong'o op cit
5. The Treaty For Establishment Of The East African Community (Election of Members of the Assembly) Rules 2007 of Kenya
6. Democratic Party and Mukasa Mbidde v. Attorney General of Uganda Ref. 6 of 2011 (EACJ)
7. Constitutional Petition 26 of 2006 [CC(U)]
8. Akidi Margaret v. Adong Lily, Election Petition 06 of 2011 [HC(U)]
9. East Africa Law Society and Others v. Attorney General of Kenya and Others, Ref. 1 of 2010
10. See Article 150 of the EAC Treaty
11. Calist Andrew Mwatela and Others v. East African Community, Application 1 of 2005 (EACJ)
12. James Katabazi and Others v. Secretary General of the East African Community Ref. 1 of 2007
13. Article 3(4) of the EAC Treaty
14. E.g., Sitenda Sebalu v. Secretary General of the East African Community Ref. 1 of 2010, Anyang Nyong'o op. cit. and Samuel Mukira Mohochi v. Attorney General of Uganda Ref. 5 of 2011 (EACJ)
15. In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion, Application 1 of 2008 (EACJ)
16. E.F. Ssempebwa, " East African Community Law pp 32-33
17. Naomi Ochieng Okello v. Council of Legal Education, Pet. 69 of 2018 [HC(K)]
18. Samuel Mukira Mohochi v. Attorney General of Uganda op. cit.
19. Grands Lacs Supplier SARL and Others v. Attorney General of Burundi
20. British American (U) Tobacco Limited v. The Attorney General of Uganda Ref. 7 of 2017 (EACJ)
21. The East Africa Law Society v. Secretary General v. Secretary General of the East African Community, Ref> 1 of 2011 (EACJ)
22. See E,F. Ssempebwa, East African Community Law Ref. 9 of 2012 (EACJ)
23. Articles 27 to 32 of the EAC Treaty
24. Michel Johnston, "Good Governance, Rule of Law, Transparency and Accountability (2004) Colgate University NY, sourced at <http://unpan/un.org/intradoc/groups/public/documents/un/unpan0109pdf>

25. Report of the Committee On Legal, Rules and Privileges On the Assessment of Adherence to Good Governance in the East African Community and the Status of the EAC Political Federation (EALA, January 2014)
26. Reference 15 of 2014 (EACJ)
27. Baranzira op. cit. at paragraph 63 of the judgement.
28. E, F, Ssempebwa, "Brexit: Are There Lessons For The East African Community?" Paper presented for publication in the EAC Journal
29. Reference 7 of 2013 (EACJ)
30. The Abuja Treaty Establishing the African Economic Community, 1991
31. COMESA Treaty Article 6(e) (f) (g) and (h)
32. The Revised Treaty of the Economic Community Of West African States, Article 4(g) (h) and (j)
33. See James Gathii, "Mission Creep Or A Search For Relevance: The East African Court of Justice Human Rights Strategy, [Vol. 24 Duke Law Journal of Comparative And International Law, sourced at <http://scholarship.law.duke.edu/cgi?referer=httpsredir..>
34. An East African Bill of Rights or adoption of the *African Charter on Human and Peoples' Rights*.
35. Ayika v. Liberia ECW/CCJ/07/11
36. Hadijatou Mani Kouraou v. Niger, (2008) ECW/CCJ/App/0808, sourced at <http://www.worldcourts.com/ecowas/ery/decisions/2008,10.27karopu> v. Niger
37. The *African Charter* is more liberal in the area of socio-economic rights than the regimes of most of the Partner States
38. Article 33 of the EAC Treaty