



POLITICAL ECONOMY DYNAMICS OF REGIONAL ORGANISATIONS IN AFRICA

PEDRO

The East African Court of Justice: The hard road to independent institutions and human rights jurisdiction¹

This paper sets out to better inform stakeholders about why the East African Court of Justice (EACJ) and national level stakeholders operate as they do. It concludes with implications for support.²

Political traction, member states interests and potential

The East African Court of Justice of the East African Community (EAC) started dealing with court cases in 2005. Initially, EAC member states intended for the court to address trade matters, in line with the economic rationale of the EAC. Meanwhile, the EACJ has mainly dealt with human rights violations such as arbitrary arrests, cruel, inhumane and degrading treatment, and government inaction in relation to mass killings. This prioritisation of rule of law, democracy and human rights is remarkable given the original EAC priorities of economic integration.

As an organ of the EAC, the EACJ has a formal mandate and role in dispute settlement and interpretation of the EAC Treaty. The three member states of the first EAC (dissolved in 1977) were reluctant to provide the predecessor to the EACJ - the East African Court of Appeal - with jurisdiction over human rights cases. In contrast, the present EAC Treaty gives the EACJ appellate and human rights jurisdiction. These functions still have to be operationalised by a protocol to be concluded by the partner states. Hence, since the inauguration of the Court in 2001, the EACJ has proactively developed jurisprudence and has used the provisions of the EAC Treaty to adjudicate on human rights cases.

Still, there remain two major hurdles to the independence and effectiveness of the operations of the EACJ. First, the Summit of Heads of State and Government remains the supreme decision-making body of the EAC, which now consists of six members. Government leaders have taken politically motivated decisions at regional summits that hamper the institutional development and functioning of the Court. Secondly, compliance with the interpretations of the Treaty and with judgements by the regional Court depends entirely on the political will at national level. The Court therefore faces enforcement challenges, worsened by budgetary constraints as funding is tied to the EAC budget. All this affects the Court's ability to effectively plan, prioritise and handle cases and develop institutionally.

¹ Based on a March 2017 background paper by ECDPM, available at www.ecdpm.org/pedro/backgroundpapers. The Policy Brief and background paper were prepared under the BMZ-financed project on the *Political Economy Dynamics of Regional Organisations (PEDRO)*. Author: Philomena Apiko (pha@ecdpm.org). Project team leader: Bruce Byiers (bby@ecdpm.org).

² Other papers related to the EAC or East Africa deal with regional trade and transport cooperation, industrialisation and youth employment, and the East African Standby Force.

A number of court cases illustrate the nature of the political backlash or of the resistance by member states against the Court's rulings. These cases also exemplify the ways in which the Court interprets and implements its mandate. In the *Anyang' Nyong'o* case, the Kenya government - the most powerful player in the EAC - together with other member states sought to constrain the Court by amending the EAC Treaty. These amendments included limitations on the Court's interpretation where jurisdiction is conferred upon organs of member states, and on the time within which individuals can bring a matter before the Court. This time bar puts a certain limit on access to justice for EAC citizens. The amendments, also divided the court into two divisions and revised the criteria for the removal of judges. The EAC Summit has not responded yet to requests to alter or revisit the amendments relating to the criteria for the removal of judges.

The *Sebalu* case brought the issue of the extension of jurisdiction to human rights matters before the EACJ. The EACJ decided that quick action needed to be taken to extend the Court's jurisdiction. However, as the court lacks an enforcement mechanism, the decision has not been implemented by the Council of Ministers or the Summit. Nevertheless, the court has embarked on judicial lawmaking by hearing cases with human rights issues despite the lack of clear terms in the Treaty to do so. The EACJ has interpreted such cases within the framework of the EAC Treaty's provisions on good governance, respect for the rule of law and respect for human rights. Other court cases in Kenya, Rwanda and Uganda further demonstrate the contrasts between on the one hand the activism of the EACJ on various types of serious violations of human rights in the region, and on the other hand with the lack of action by some national courts to deal with such matters and by governments to comply. Despite some setbacks, the EACJ has proven to be resilient and relied on the East African Community Treaty's provisions on good governance, respect for the rule of law and respect for human rights.

The Court receives support from three sources. Firstly, in its efforts to remain independent and principled in support of human rights, it has the backing of the East Africa Legislative Assembly (EALA), the regional parliament. EALA was an early supporter of the Court and brought the first case, one that activated the Court's operations. EALA has passed bills that cover human rights issues and gave jurisdiction to the EACJ. Given the budgetary powers of the member states to decide on the funding to the EACJ, the regional Parliament has campaigned to increase funding to ensure the Court's independence and operationality.

The EACJ has also received support from non-state professional bodies with regional and national level representation, and from human rights NGOs. Some of these organisations have seen their margins of manoeuvre constrained by legislative and other measures in EAC member states. Both non-state channels also bring cases related to human rights before the regional Court, and organise demand side pressures on member states' governments. Finally, donors have assisted the EACJ by providing funds for sensitisation and for improved visibility of the Court. Key member states, however, resist what they perceive as external interference or influencing of an independent institution.

Implications for support

1. The EACJ has shown a capacity to assert its independence, promote respect for human rights and galvanise support for its operations and rulings - even when put under pressure.

- Given the lack of political traction by government leaders behind the EACJ as an independent defender of human rights, support strategies need to balance measures at the level of the EAC Secretariat, of policy dialogue between donors and member states governments (especially through the European Union), and of engagement with regional and national non-state actors.

2. The bottom line for donors should be to do no harm while trying to do good in support of the EACJ.

- The Court stands to lose more than gain if external support should result in the perception that the Court is an implementer of donor agendas.

- This may warrant a hands-off approach as hostile attitudes by member states may at times take the overhand and further harm the institution that donors seek to support.

3. The future of the EACJ - and its ad hoc agenda setting - remains uncertain. Nevertheless, in close dialogue with the EACJ, core donors need to engage in a longer-term approach in order to:

- strengthen the supply side capabilities of the regional Court and
- facilitate the gradual broadening and strengthening of the demand-side for the core functions of an independent and effective regional Court both outside of the EAC organs and within.

Behind the formal structures of regional organisations is a messy world of regional power and politics. This messiness is often difficult to capture in the language of development cooperation and institutional development. Working with regional organisations and their programmes therefore implies engaging with complex, multi-level power and interest dynamics.

PEDRO, the **P**olitical **E**conomy **D**ynamics of **R**eional **O**rganisations, is an ECDPM project that looks at the politics behind regional organisations, and the structural factors, institutions and incentives that ultimately define the way in which countries and different stakeholders engage at a regional level. PEDRO covers 17 African regional organisations and 11 policy areas. For each of these, ECDPM has applied a political economy approach to help understand the dynamics and their effects in different regions and policy areas.

The studies are framed around three key questions: the first relates to the political traction of the regional organisation as this helps assess whether the regional organisation has enabled regional decision making and if it has contributed to implementation. The second focuses on the member state interests in engaging with the regional organisation, especially the more resourceful and powerful ones (the so-called 'swing states'). The third looks at the areas with most traction where regional and national level interests seem to be most aligned for regional outcomes.

The reports aim to present information and insights that can help regional stakeholders navigate the obstacles and better respond to reform opportunities. Rather than providing specific operational recommendations, the political economy approach encourages more reality-based discussions among practitioners and reformers about feasible ways to address regional challenges. It is hoped that this may help tailor the ambitions and approaches of donors and reformers and help identify ways to support national or regional champions or coalitions to take regional cooperation and integration forward.