East African Court of Justice: a midwife of the political federation? The new case-law on the remedies awarded by the Court

By:

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Despite the East African Community (EAC) Partner States attempts to rattle the East African Court of Justice (EACJ) it the wake of its judgment in the Anyang' Nyong'o case by amending the EAC-Treaty and introducing new provisions on removal of judges from office, the Court maintained its generally proactive jurisprudence, in particular with regard to the violations of EAC-principles. In the recent case law, the EACJ strengthens its position in a way that sheds new light on the system of the sources of law in the EAC, in a way that makes the Community look like a political federation. And it is precisely such a federation that the EAC-Treaty envisages as a final goal of integration.

The EACJ's recent innovative approaches concern the effects of its judgments in individual reference cases. According to Article 30 of the EAC-Treaty, any

person who is a resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty. In line with Article 151 of the EAC-Treaty, the Court interprets the words “this Treaty” as encompassing also the Protocols concluded later (e.g. the Customs Union Protocol and the Common Market Protocol). The EACJ’s jurisdiction is generally provided for in Article 27 of the EAC-Treaty; it is a jurisdiction over the “interpretation and application” of the EAC-Treaty; the Court determines whether the impugned action is lawful or infringes the Treaty. Article 23 of the EAC-Treaty defines the Court’s role as a judicial body, which shall ensure adherence to law in the interpretation and application of the Treaty. Finally, Article 38(3) of the Treaty sets out a general obligation for the Partner States to “take, without delay, the measures required to implement a judgement.”

In older cases, the EACJ took a very cautious approach. In line with the literal reading of Articles 27 and 30, it limited itself to “determining” whether there was an “illegality” or “infringement” of the Treaty. It means that its judgments were of a purely declaratory character. In the iconic Katabazi judgment of 2007, in which the court for the first time applied the principles of the Community provided or in Articles 6 (d) and 7 (2) of the Treaty, the Court confined itself the following statement: “We, therefore, hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty.” No further remedies were ordered. The court continued in the same vein in the 2010 judgment Plaxeda-Rugumba v. The Secretary General: “A declaration is hereby issued that the detention of the Subject, Lieutenant Colonel Seveline Rugigana Ngabo by the agents of the Government of the Republic of Rwanda from 20th August 2010 to 28th January 2011 was in breach of the fundamental and operational principles of the East African Community as enunciated in Articles 6(d) and 7(2) of the Treaty which demands that Partner State shall be bound by principles of inter alia, good governance and the rule of Law.”

And also in the 2013 Samuel Mohochi judgment: “The denial of entry into

Uganda of the Applicant, a citizen of a Partner State, without according him the due process of law was illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty"

The approach slowly began to change with the 2016 Burundian Journalists Union case, in which the EACJ, having established a violation of Articles 6 (d) and 7 (2) through a piece of Burundian legislation, added the following sentence: "The Republic of Burundi shall, in accordance with Article 38(3) of the Treaty take measures, without delay, to implement this Judgement within its internal legal mechanisms"

Even if it was hardly anything more than a repetition of the Treaty text, the EACJ went beyond a mere declaration of illegality or infringement. In the same year, in the Tom Kyahrurwenda case, the Court seemed to be hinting at some division of roles between the EACJ and the national courts: while it regarded both as being authorised to make declarations of incompatibility between the national laws and administrative actions with the EAC-Treaty, it was only for the latter to award specific remedies and compensation, let alone invalidate the impugned decisions or laws.

In the 2016 case of EALS vs. Secretary General of the EAC, the Court was a bit more explicit. The case concerned the expulsion of refugees by Tanzanian authorities from Kagera region, of which the court opined that, if confirmed, they would constitute "flagrant violations of the objectives and fundamental principles of the Community". Following a directive of the EAC Council of Ministers, the Secretary General of the EAC sent a fact-finding mission to Kagera. However, on its completion the Secretary General failed to submit mission's "findings and recommendations" to the EAC Council of Ministers, which would be – according to the EACJ – "the normal course of action". The Court held that the Secretary General was in violation of Article 71 (1) a of the EAC-Treaty. But then the Court issues what it termed a "practical order": it ordered the Secretary General to submit the report to the Council of Ministers. The EACJ was still quite reserved; it did not present this order as any major innovation, but as a simple, straightforward consequence of its declaration of incompatibility of Secretary's General action with the EAC-Treaty. However, it was for the first time that the Court ordered a positive remedy for a violation.

The landmark decision came with the appellate judgment in the case of Hon. Dr. Margaret Zziwa vs. the Secretary General of the EAC. The applicant was removed from the position of the Speaker of the East African Legislative Assembly (EALA). She sought not only a declaration that the removal violated the EAC-Treaty provisions, but also her reinstatement as a Speaker and an award of damages. While the First Instance Division of the EACJ made a declaration that there was indeed a violation of the Treaty provisions, it declined to make the orders sought. From the wording of Articles 23 and 27 of the EAC-Treaty which speak of "interpretation and application" of this Treaty, the Court inferred that its jurisdiction were only "interpretative". The mere declaration of Treaty's violation would offer "sufficient remedy to the parties". Regarding the reinstatement, the Court concluded that it is for the EALA to ensure compliance with the EACJ's judgment "within its own mandate". To "direct EALA how to conduct its business" would not be within the mandate of the Court. However, it was precisely what the Court did with respect to the Secretary General in the EALS case of 2016. The applicant appealed.

The Appellate Division held that the First Instance Division erred in law by refusing the reinstatement and the damages. It therefore decided to award the damages. The Appellate Division could not order reinstatement of Hon. Zziwa as the EALA Speaker, since the term of the EALA over which she was presiding had already expired when the Appellate Division's judgment was made. However, as the Appellate Division underscored, at the time when the First Instance Division was delivering its judgment the term of the respective EALA was still on and a reinstatement was possible. And it was also what the First Instance Division should have done.

Contrary to the First Instance Division, the Appellate decision focused not on the "interpretation and application" of the Treaty, but on the "ensuring the adherence to law" which is also a part of the EACJ's role description in Article 23. On this basis, the EACJ's Appellate Division described the Court as a "guardian of the Treaty". It went on to clarify: "In plain language, it is the Court's duty to ensure that the Partner States and other duty bearers under the Treaty march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances."

Drawing upon the Francovich case of the European Court of Justice (as it then was), the EACJ saw its duty in ensuring the "full effectiveness" of the EAC laws. According to the Court: "[t]he full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws."

Turning to the question of what those "appropriate remedies" and "effective relief" entail, the Court relied on the UN International Law Commission's 2011 Draft Articles on the Responsibility of International Organizations. On this basis, the Court explained that the remedies it can grant include cessation (usually known as injunction in internal law), reparation (which may take the form of restitution, or compensation), satisfaction, or similar, or other remedies.

The Court's reasoning is a puzzling mix. On one hand, it uses arguments drawn form the general public international law, even emphasising that it is an "international judicial body". But on the other hand, the concept of "full effectiveness" and the Francovich judgment are rooted in the idea that the European Community Law, from which the EACJ is here explicitly borrowing, constitutes an autonomous legal order comprising not only the States, but also the individuals. This is also what distinguishes the European Law form the general Public International Law. And it is this very idea, the idea of an individual whose rights under the autonomous legal order must be effectively enforced, which prompted the European Court of Justice to recognise the liability of a European Economic Community Partner State for breaches of Community Law. Does it now mean that the East African Community law constitutes an autonomous legal order comprising not only the Partner States, but also individuals with all the far-reaching consequences, which such a pronouncement would have? Such a declaration would certainly be a milestone on the way towards a political federation. But it is a declaration, which the EACJ has never made.

What happened next is even more puzzling. In the 2018 case of Grands Lacs Supplier S.A.R.L. and others vs. AG of Burundi, the Court granted a compensation to a private company for losses incurred due to violation of the EAC-Treaty by organs of a Partner State; Burundi was ordered to pay 20,000

USD. The EACJ does not seem to differentiate between awarding of damages for an illegal action of the Community organs and similar actions by the Partner States. It seems thus to look at the Community and the Partner States as elements of one organism. The Court does not elaborate on this point any further; it merely states that it “respectfully abides” by the judgment of the Appellate Division in the Hon. Dr. Zziwa case.

On the 28 March 2019, the EACJ delivered a judgment in the case of Media Council of Tanzania and others vs. AG of Tanzania, in which the applicant sought an “order to Respondent state to cease the application of the impugned Act and repeal or amend it so as to bring it into conformity with the Treaty”. The Court’s order was however more general; the Respondent was ordered to “bring the media services Act into compliance with the Treaty”.

The reserved approach of the Court in the Media Council of Tanzania case is quite surprising, because it had put real constitutional dynamite two days earlier in the British American Tobacco case from 26 March 2019. In the same, the applicant sought a declaration that some provisions of Ugandan tax legislation are “null and void” to the extent that they infringe certain provisions of the EAC-Treaty, Customs Union Protocol and Common Market Protocol. Those provisions served as a basis for the reclassification of cigarettes imported from Kenya to Uganda - they were to be charged as imported products and not as domestic ones. While the EACJ found there was indeed an infringement of the EAC law, it blamed it not on the enactment of the impugned legislation, but on its wrong implementation, or, as the Court expressed itself, a “misapplication”. It is for this reason only that the court declared itself “disinclined” to declare the provisions “null and void”. Hence, it did not say that it had no authority to nullify Ugandan legislation as a matter of principle. And it went on to declare “illegal, null and void” the acts of “misapplication” in form of the “Payment Registration Slips” seeking the payment of additional taxes.

To say that a piece of legislation is violation of the EAC-Treaty is one thing, and to say that it is null and void is quite another. Here lies the explosive potential of these pronouncements. The EACJ seems to be assuming a competence to invalidate national legislation, even if it declines to exercise it in this particular case. And it does assume and exercise the competence to invalidate the

administrative acts (decisions of the tax authorities), while watering it down by ordering the Respondent to “rescind and withdraw” the Payment Registration Slips. But why “rescind and withdraw” them, if there are “null and void”? Are they not to be considered a “blank sheet of paper”?

What emerges from this case law is a unitary system of sources of law, with the EACJ having the power to police their hierarchical compatibility and invalidate a lower-ranking norm if it contradicts a higher-ranking one. Such an arrangement is typical for federal states; the EACJ positions itself as a guardian of hierarchical compatibility of norms within the federal system, and consequently as a constitutional court within such a system. A judge-made political federation?

Many questions remain, however, unanswered: Is the invalidation order an “appropriate remedy” within the meaning in which this term was used in Hon. Dr. Zziwa appellate judgment? Is the Court of the opinion that an effective implementation of the EAC-law necessarily implies that it has the power to invalidate national legislation and national administrative acts? And what about the national constitutions of the Partner States? What is their rank? The chain novel is clearly not yet complete and one may eagerly await its new chapters, which the EACJ is definitely going to write. And the potential applicants might be happy to obtain effective remedies for the violations of the EAC-Treaty, which may boost the usage of the Court and the Rule of Law in the EAC.

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