



THE DEMISE OF A LEGITIMATE SOUTHERN AFRICAN REGIONAL COURT

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Regional Economic Communities

The adoption of the Charter of the African Union (formerly Organisation of African Unity) marked the beginning of regional integration in post-colonial Africa. This initiative was followed by the formation of sub-regional economic communities, such as the East Africa Community (EAC) (1967), the Economic Community of West African States (ECOWAS) (1975) and the Southern Africa Development Coordinating Conference (SADCC) (1980). The main objective of the co-operation was the pursuit of economic development of AU member states.

Economic Community of the West African States (ECOWAS) Court

ECOWAS is a fifteen member group of West African states formed in 1975 to promote economic integration within the Region. The Protocol to operationalize the ECOWAS Court was adopted in 1991, and in 1993 the Treaty of ECOWAS was amended to recognize promotion and protection of human and peoples' rights in accordance with the African Charter on Human and People's Rights (African Charter). In 2005 and 2006 respectively, the ECOWAS Treaty was amended further to give the ECOWAS Court competence to determine cases of violation of human rights occurring in any of the member states.

The East African Community (EAC) Court

Economic integration in post-colonial East Africa dates back to the East African Co-operation Treaty of 1967 (EAC Treaty) concluded between Kenya, Uganda and Tanzania but entered into force in 2000. The EAC is founded on, among others, the principles of good governance including the recognition, protection and promotion of human and peoples' rights in accordance with the African Charter. The EAC Treaty refers to respect for human rights as a component of good governance; makes reference to aspects of human rights, and even predicates the admission of new members of the community on their human rights record. The East Africa Court of Justice (EACJ) is established by the EAC Treaty, as the judicial organ of the EAC.

Southern Africa Development Community (SADC) Tribunal

SADC is the Southern Africa sub-regional equivalent of ECOWAS and EAC with a current membership of sixteen states. The institution was established to promote economic development into a community based on human rights, democracy and the rule of law. Since its establishment in 1992, SADC has pledged its commitment to regional integration and poverty eradication within Southern Africa through economic development whilst ensuring peace and security. The SADC Tribunal was first envisioned in 1992 in terms of Article 9 of the Treaty of SADC.

The Protocol established the Tribunal with a mandate to hear disputes between States, and between natural or legal persons and States. Although it was established in 2000, the SADC Tribunal only started operating on 18 November 2005 when the first judges of the court were sworn in. The first dispute was lodged in 2007 and for many years, the SADC Tribunal was the only sub-regional court to hear cases filed by individuals within the SADC region.

Events Leading up to the Suspension of the Tribunal

In 2006, the government of Zimbabwe began a land distribution program which led to forcible expropriation of white-owned landholdings. This led to a number of white farmers including Mike Campbell, to have their farms expropriated. Being dissatisfied with the actions of the Government, Mr. Campbell challenged the Zimbabwe Government's decision before the [domestic courts](#). He then went on to file an [application](#) with the SADC Tribunal, alleging discrimination on the basis of race, lack of due process in the deprivation of property and denial of access to the courts. He was joined by 77 other white farmers who were in a similar predicament. The Tribunal found in favour of Campbell and issued a preliminary injunction preventing the Zimbabwe government from evicting Campbell or interfering with his use of the land. In the years following the judgment, the farmers instituted a number of judicial processes against the government of Zimbabwe for non-compliance with court judgments, all of which were decided in favour of the farmers. The political consequence of the Campbell judgment was almost immediate. Reacting to the judgment, former Zimbabwean President Robert Mugabe reportedly [stated as follows](#): *“Some farmers went to the SADC Tribunal in Namibia, but that’s nonsense, absolute nonsense, no one will follow that ... We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal.”*

The Zimbabwe government challenged the legitimacy of the Tribunal and started a campaign to lobbying SADC member States for the suspension and eventual abolition of the SADC Tribunal. In August 2010, following the persistent pressure of Zimbabwe, the SADC Summit (the community's highest political body) announced a review of the role, functions and terms of reference of the Tribunal. An independent consultant mandated to review the role, functions and terms of reference of the Tribunal found that the Tribunal was properly constituted with authority under international law to hear individual petitions regarding human rights violations. The consultant's report was presented to the SADC Summit in February 2011 who adopted a resolution to suspend the operations of the Tribunal.

The Revised Tribunal

Following the suspension of the Tribunal, the SADC Summit adopted a new protocol to the Tribunal which was signed at the SADC Summit by eight SADC member States in August, 2014. The new protocol amended the original jurisdiction of the tribunal by taking away its mandate to hear cases filed by individuals against States and only allowing it to hear cases brought by SADC member states against each other, also known as inter-state disputes. The adoption of the new protocol, in effect, took away the possibility of individuals to approach the tribunal to vindicate their rights.

The revision of the Protocol to remove the human rights jurisdiction and individual access to the Tribunal remains a concern for a number of reasons. It is a retrogressive step in the promotion and protection of the right of access to justice for individuals in the SADC region. The 2002 Protocol in its original form provided an opportunity to individuals to challenge unfair decisions of governments/member states and served as an important counter-balance to judicial independence at domestic level. The few decisions that have been delivered by the Tribunal attest to the need for a regional body for citizens to seek redress in the event they are dissatisfied with adjudication at a domestic level. It is for this reason that a number of law societies including the Law Society of South Africa, Tanganyika Law Society (Tanzania) and the Mozambique Law Society challenged the decisions of the SADC Summit before domestic courts to participate in the suspension of the Tribunal and their signing of the 2014 (new) protocol.

The Effect of Domestic Litigation Aimed to Resurrect the SADC Tribunal

Mozambique High Court Case

In August 2016, the Mozambique Bar Association (MBA) brought a case against the government of Mozambique concerning the government's participation in the decision of the SADC Summit which suspended the SADC Tribunal. The Court held that since the action of the Executive at the SADC Summit was political in nature, the court does not have jurisdiction to hear the matter and the case was dismissed.

Tanzania High Court Case

The Tanganyika Law Society challenged the government's participation in the suspension of the SADC Tribunal. On 4 June 2019, the [Tanzanian High Court](#) found that the President of Tanzania had violated its obligations under the SADC Treaty by participating in the suspension of the Tribunal and replacing the Protocol establishing the SADC Tribunal with a new Protocol contrary to the SADC Treaty.

The Tanzania High Court emphasised that, “...*The suspension of the operations of the SADC Tribunal; and failure or refusal to appoint judges contrary to the clear Treaty provisions, was inimical to the Rule of Law as a foundational principle inherent to the legitimacy of the community; and as expressly entrenched in the SADC Treaty.*” The court confirmed that all SADC member states are enjoined pursuant to the respective Treaty obligations; to give effect to the Treaty, and that the SADC Tribunal as established under the Treaty, still exists as an international court, and that it was a basic principle of international law that if a party treats a treaty as valid it is precluded from later denying its effect.

The Court concluded that all SADC member states were bound to implement the Treaty in good faith, and that the SADC Tribunal was rendered secure from any control or influence of any State parties, and could not, as an independent tribunal be held hostage to unilateral withdrawal of confidence expressed in a motion challenging its legality by one of the State parties. Furthermore, that the resolution to suspend operations of the Tribunal, based on a challenge to its legality eroded existing rights of parties (who had been assured) of the existence of an independent juridical body to which they could turn in case of dispute.

South Africa High Court Case

In the case of *The Law Society of South Africa and Others v The President of the Republic of South Africa and Others*, the Law Society of South Africa challenged the President of South Africa's participation in the suspension of Tribunal in 2011. The case also challenged the President's decision to sign the 2014 Protocol establishing a new SADC Tribunal Protocol.

The [North Gauteng High Court](#) agreed with the applicants and declared the actions of the President of South Africa in participating in the suspension of the Tribunal and subsequently signing the 2014 Protocol on the SADC Tribunal as being unlawful, irrational and unconstitutional. In terms of the provisions of section 172(2)(a) of the Constitution of the of South Africa, the Court referred its order to the Constitutional Court for confirmation.

On 11 December 2018, the [Constitutional Court](#) handed down judgment where it confirmed the order of constitutional invalidity made by the High Court under these terms: “*The President's participation in the decision making process and his own decision to suspend the operations of the Southern*

African Development Community Tribunal is unconstitutional, unlawful and irrational.” The Court also held that the President’s signature of the 2014 SADC Protocol was also unconstitutional, unlawful and irrational. The Court directed the current sitting President to withdraw his signature from the 2014 Protocol. The South African President has now officially informed SADC of its decision to withdraw its signature and this was noted at the 39th [SADC Summit](#) of Heads of State and Government in August 2019.

Conclusion

The suspension of the SADC Tribunal raises several issues of concern confirming that the actions of the SADC Summit was a retrogressive step in the promotion and protection of the right of access to justice. It also reinforces lack of accountability and impunity for African leaders. The fact that a regional court can be suspended due to political interference, by challenging treaties that have already been ratified and implemented, creates an undesirable precedent for States renegeing on their human rights commitments.

The fact that that both ECOWAS and EAC have functioning adjudication bodies for members to bring human rights concerns to, is reason enough for the SADC summit to see the importance of providing a platform for citizens in the SADC region to have an impartial body to raise their grievance’s with. Even though Seychelles, Mauritius, Madagascar, Botswana, Angola and Swaziland have not signed the 2014 Protocol, which is yet to enter into force, the suspension of the SADC Tribunal has completely changed the legal landscape in so far as the rights of individuals within the region to seek redress outside of domestic courts.

SADC is a regional block which has a functional aim to push the agenda of promoting investment in the region, this very same agenda is threatened if the region cannot create platforms that repose confidence on investors. The rule of law is of paramount importance if the region is to prosper, and one way of ensuring this is to re-establish an independent and impartial court to which member states, individuals- both citizens or investors, can approach in order to access justice, on an equal footing, as has been created by other regional communities.