HOW TO REBOOT THE SADC TRIBUNAL: A EUROPEAN PERSPECTIVE

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Abstract

This paper addresses some aspects of the Southern African Development Community (SADC) Tribunal's current review process from a European point of view, comparing elements of European judicial integration with the perspectives for supranational rule of law in southern Africa. It appears that the achievements at stake since the Campbell crisis – namely the Tribunal's individual complaints mechanism – are only one, albeit important, field of activity for a community judge. Another most intriguing challenge for the cause of regional integration, shared by all African regional courts, remains the use of preliminary ruling procedures by national judges in order to end the radio silence between national and regional judiciaries. Besides pursuing ways to solve this challenge, the search for a proper place for the Tribunal within the community needs to be contextualised in the overall functioning of the institutional setting. Remedies to the current intergovernmentalist overweight will necessarily have to include a strengthening of independent institutions at the regional level; the establishment of a legislative assembly would be particularly promising in this regard.

I Introduction

The current crisis of the Southern African Development Community (SADC) Tribunal, its suspension and the unpredictable results of the announced review process, have created great uncertainty over the future of an independent and expedient regional judiciary in southern Africa. For the outside observer, crisis befell the Tribunal all the more brutally as it had in its very recent past become one of the most aspiring regional jurisdictions on the African continent, with its landmark 2008 *Campbell* decision[1] creating an international sensation.

It is, therefore, considerable what might have been irrevocably lost with the SADC Extraordinary Summit's May 2011 decision to suspend the Tribunal's work until at least summer 2012, and to review the respective Treaty Protocol.[2] The present paper, however, without wanting to give up on the SADC Tribunal in its known form and features, takes for granted the uncompromising message sent out by member state governments, meaning their determination to redesign the judicial branch of regional integration in southern Africa.

Drawing from the experience of other African regional courts, the paper looks for pragmatic avenues that should be promoted in the review process: avenues that might not be able to compensate for all features which are now under threat of removal (especially the individual access by community

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1 *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* SADC (T) 02/2007, judgement of 28 November 2008.

2 For a concise introduction to the review process, see Werner Scholtz 'Review of the role, functions and terms of reference of the SADC Tribunal' (2011) 1 *SADC Law Journal* 197 – 201.

citizens to the regional court), but that still may help to consolidate and advance regional integration. The paper argues that the main avenue in directly strengthening the function and role of a future SADC Tribunal would be to bolster the procedural technique of preliminary references. While this form of communication between national and regional judges has been key to the success of judicial integration in Europe,[3] it has so far remained unused in all African regional judiciaries.[4]

Likewise, a broader Treaty reform needs to be considered if the establishment of a sustainable regional judiciary – and of regional integration tout court – is to be taken seriously. Even under the old SADC Tribunal, regional integration within the community – as in other regional economic communities (RECs) – has suffered from ephemeral and exclusive intergovernmentalism. In order to have a true dynamic of integration unfold, regional institutions need to be emancipated and to offer a space for debate among each other. The judiciary branch cannot be the sole counterpart to member state governments in such a debate; ideally, regional judges should be no more (and no less) than an impartial referee between the various community institutions, member state governments and civil society. Therefore, as much as member states need to commit themselves to regional integration and as much as civil society needs to participate in regional politics, existing community organs such as the SADC Secretariat need to be strengthened, and the institution of a fourth institutional actor in form of a democratically legitimated legislative assembly should be considered.

I Some legal aspects regarding the causes of the SADC Tribunal's current crisis

In one's search for answers to the ongoing crisis of judicial organisation within SADC, one has to remind oneself that, already before the *Campbell* case and apart from questions of individual access and human rights jurisdiction, SADC's judicial architecture – and more so its functioning – showed room for improvement. While the numerous critics of the current review process fear for good reason that a paralysed and impaired Tribunal might be its result,

[3] In 2011, 423 of 688 new cases of the court were preliminary questions, with tendency to rise; cf ECJ, *Annual Report 2011* at 96; available at *http://curia.europa.eu/jcms/jcms/Jo2_7032/*, accessed on 18 August 2012.

[4] The only preliminary reference in an African regional court that has come to the author's knowledge was made within the West African Economic and Monetary Union (UEMOA). In *Air France v Syndicat des Agents de Voyage et de Tourisme du Sénégal* (Cour de justice de l'UEMOA, Arrêt No. 02/2005), the Senegalese Conseil d'Etat had referred to the UEMOA judge a prejudicial question regarding the interpretation of Article 7§2 of Directive No. 02/2002/CM/UEMOA of 23 May 2002 on the cooperation between the UEMOA Commission and national competition authorities. More precisely, the Senegalese judge asked which domestic jurisdiction would be competent to adjudicate complaints against decisions of the *Commission Nationale de la Concurrence du Sénégal*. However, the UEMOA Court of Justice declared itself incompetent to answer this reference, since it concerned an internal question of jurisdiction which predated the community legislation on competition and which, hence, was not to be decided upon by the regional judge (at 14 – 5).

lawyers involved in the process should still keep in mind that some positive change of the Tribunal's function and role might as well be achieved.[5]

Not being a focus of this paper, but not to be neglected as another factor for the potential weakening of the SADC Tribunal, are parallel structures within and outside the community. Within SADC, the dispute settlement mechanism in trade matters through a World Trade Organization (WTO)-inspired panel system, Annex VI of the SADC Trade Protocol, has provoked some criticism but has to date never been used; yet its total abrogation remains highly desirable.[6]

From the outside, the partly overlapping coexistence of SADC with other RECs has not been resolved.[7] While a unification of RECs might present some interest in many policy fields, in particular regarding trade, it renders the achievement of a high level of integration – which is characteristic of a supranational community – more difficult if it means a further enlargement of the membership. Whether SADC enlarges its membership, or whether it merges itself into a greater entity by way of a perpetuated unification with the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA),[8] these scenarios are not likely to strengthen the judicial role of the SADC Tribunal or a successive institution, seeing the challenges today's Tribunal and its sister court in East Africa already face.

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5 In this sense, see Precious N Ndlovu '*Campbell v Republic of Zimbabwe*: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63 – 79; Ndlovu calls in particular for the adoption of effective enforcement measures to enhance compliance with judgments. In this last regard, see also Richard Frompong Oppong 'Enforcing judgments of the SADC Tribunal in the domestic courts of member states' in Anton Bösl, André du Pisani et al (eds) *Monitoring Regional Integration in Southern Africa Yearbook 2010* (2011) 115 – 42 ch 7, who proposes a private international law solution to the enforcement problem, by enhancing enforcement opportunities in front of the national courts of other member states.

6 See Lorand Bartels' convincing argumentation in *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* (Final Report) (2011) 25 – 7. Bartels explains that the main concern of 'the possibility of overlapping primary jurisdictions' cannot be resolved by removing the respective subject matter from the Tribunal's jurisdiction, since 'the same matter can arise under a number of different instruments' when touching different subject matters simultaneously, and argues that a ruling balancing the interests of different policy fields (such as free trade and human rights) 'can only be given by a tribunal with a general power to interpret all applicable law'. He further observes that strictly separating the subject matters concerned from the Tribunal's jurisdiction would ultimately contradict the mechanism of preliminary rulings, through which questions concerning the uniform interpretation of SADC law have so far had to be referred to the Tribunal. Noting further that the panel system has its own flaws, and that Annex VI of the Trade Protocol, which installed it, was probably created 'to protect against the possibility that the Tribunal would never come into operation' (ref. to Jan Bohanes, 'A few reflections on Annex VI to the SADC Trade Protocol' (2005) *tralac Working Paper No. 3/2005* at 6), Bartels concludes perspicuously: 'In short, radical as it may seem, there is no reason why SADC should not adopt the model that has been adopted in virtually every regional economic organization that purports to be a 'Community' with its own internally consistent and directly applicable system of law: namely, that of a single Tribunal to hear all dispute arising under its law.' (p 27); for a different view, see e.g. Clement Ng'ong'ola, 'Replication of WTO dispute settlement processes in SADC', *SADC Law Journal*, vol. 1 (2011), p 35-62, p 60 f.

7 Different SADC member states are notably also members of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Customs Union (SACU).

8 Based on the Tripartite Free Trade Agreement between the three organisations.

(a) The general preoccupation with individual complaints

The destructive counter-reaction by SADC member state governments in the aftermath of the Tribunal's controversial 2008 *Campbell* decision has potentially set a negative precedent for other African RECs, besides further orienting the operation mode of regional integration within SADC towards mere intergovernmentalism. Thus, while the *Campbell* case may mark a dramatic turning point of regional judicial integration in southern Africa, many commentators have pointed out that the suspension of the SADC Tribunal needs to be seen in the larger context of a growing distrust between the Tribunal and both the member states and the regional administration.[9] In another line of attack, critics of the Tribunal complain that, in its previous constitution, it was mainly an instrument of 'white farmers and corporate interests' and, thus, a 'vanguard of minority interests and … a bulwark against the objectives of the liberation struggles of the region'.[10]

While formally established by Treaty in 1992,[11] the SADC Tribunal was only operationalised upon the decision of the SADC Council of Ministers in 2003. The first judges took office in 2005, and the first hearings began in 2007. Having been indefinitely suspended since May 2011, the life span of the Tribunal has been rather short compared with other African regional courts. Political discussions and debates have, thus, far exceeded the real existence of a southern African regional judiciary.

With over twelve decisions on various affairs between the end of 2007[12] and the beginning of 2010,[13] the Tribunal can be regarded as quite successful. At the same time, a common phenomenon among African regional courts can be observed and is particularly true for the SADC Tribunal, which is that virtually all legal actions brought before the regional judges have been initiated by individuals or civil society organisations.[14]

Hence, while the Tribunal had quickly become active after its operationalisation, this activity has been a somewhat partial one, leaving unused most of the procedural tools provided for in the foundation texts.

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9 An article in the *Zimbabwe Review*, for instance, stated that mistrust towards the Tribunal had continued to grow within the SADC executive organs after the regional judges in early 2010 'quashed the decisions of the SADC council of ministers and of the summit not to renew the contracts of two high-level officials of the SADC'; in 'Did ruling in favor of white Zim farmers kill off the SADC Tribunal?', 25 August 2011, available at *http://www.thezimreview.com/2011/08/did-rulings-in-favor-of-white-zim.html*, accessed on 18 August 2012; referring to *Mondlane v SADC Secretariat* (SADC (T) 07/2009), 5 February 2010, and *Kanyama v SADC Secretariat* (SADC (T) 05/2009), 29 January 2010.

10 See 'Killing the "Monster"', 15 July 2011, available at *http://www.newsafrica.net/en/news/1565/killing-the-monster.htm*, accessed on 18 August 2012. The title of the article refers to Tanzanian President Kikwete's reported comment regarding the SADC Tribunal: 'We have created a monster that will devour us all'.

11 Article 16 of the SADC Treaty, signed in Windhoek on 17 August 1992; Article 16§1 was slightly changed by an amendment agreement adopted in Blantyre on 14 August 2001.

12 Ruling in *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* (SADC (T) 02/2007), 13 December 2007.

13 Judgment in *Gondo and Others v Republic of Zimbabwe* (SADC (T) 05/2008), 9 December 2010.

14 Richard Frimpong Oppong, 'The African Union, the African Economic Community, and Africa's Regional Economic Communities: Untangling a complex web', 18 *African Journal of International and Comparative Law* (2010) 100; see also Lukas Knott, 'African regional courts and the paradox of regional economic integration', presentation at the Fourth European Conference on African Studies, Uppsala, June 2011.

These unused procedures notably include disputes between SADC member states (Article 15 of the SADC Tribunal Protocol), disputes between SADC and member states (Article 17), and the procedure of preliminary rulings (Article 16).

(b) The absence of judicial control of member states beyond individual complaints

As for the first of the said procedures – disputes between member states – its existence on paper only is not surprising, and its non-use quite normal: even in five decades of litigation at the European Court of Justice there have been almost no interstate disputes. An important difference between most African regional communities and the European Union (EU), however, is that, in the latter, independent community institutions – namely the EU Commission – have been fulfilling the role of "guardian" of community treaties, bringing member states that are in violation of community law to court as a last resort.[15] Article 17 of the SADC Tribunal Protocol provides for such a role,[16] but no 'organ or institution of the Community' has ever made use of it. Thus, it may be concluded that the executive power within SADC is too concentrated at the Summit and the Council of Ministers. The SADC Secretariat, as the only official community institution besides the Tribunal that is not directly dominated by a member state government,[17] turns out to be too weak to counterbalance the intergovernmentalist domination exercised by member states.[18]

Although regional administrations in other African RECs have not sufficiently developed such a role either, the SADC regime is particularly restrictive towards an effective institutional control of member states regarding their adherence to community law, for it also does not provide for any other more subtle institutional counterweight against member state governments on the regional level. Unlike, for instance, the EAC, which through its East African Legislative Assembly (EALA) has added an independent, political

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[15] The EU Commission regularly initiates proceedings for member states who fail to or delay the transposing of EU directives into national law or fail to or delay the correct application of EU regulations. Also, the EU Commission has not hesitated to threaten member state governments with judicial action in politically highly sensitive issues not related to secondary EU law, such as in the case of Hungarian media laws and constitutional reform, or the French administrative treatment of Roma populations; see 'EU commission starts legal action against Hungary', 17 January 2012, available at *http://euobserver.com/news/114917*, accessed on 18 August 2012; and 'EU Threatens Action Over France's Roma Expulsions", 14 September 2010, available at *http://www.npr.org/templates/story/story.php?storyId=129852033*, accessed on 18 August 2012.

[16] It reads as follows: 'Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between the States and the Community. Such disputes may be referred to the Tribunal either by the State concerned or by the competent institution or organ of the Community'.

[17] The eight community institutions, according to Article 9§1 of the SADC Treaty, are the Summit; the Organ on Politics, Defence and Security Cooperation; the Council of Ministers; the Integrated Committees of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and SADC National Committees.

[18] See infra II(c).

component to the institutional architecture.[19] The EALA has some genuine legislative prerogatives, and its very constitution as well as its participation in community legislation has already given rise to case law in front of the East African Court of Justice (EACJ).[20]

Secondly, the consultative function of the SADC Tribunal[21] in rendering advisory opinions 'on such matters as the Summit or the Council may refer to it' is particularly restricted. Since advisory opinions can only be requested by member state governments, whether meeting as a Summit or a Council, the advisory function of the Tribunal is deprived of much of its controlling effect – towards member states as well as towards the executive organs of the community. While the EAC, for instance, provides for a similarly restrictive role of the EACJ's advisory function, the Western African Economic and Monetary Union (UEMOA) and the Economic Community of West African States (ECOWAS) also allow for advisory opinions requested by the respective community administrations.[22] This can be a decisive step towards a more emancipated, properly supranational administration of RECs, and appears as a pragmatic compromise with respect to the sensitivities of member state governments. Both the UEMOA Commission and the ECOWAS Secretariat have already made noticeable use of it.[23]

II Pragmatic avenues towards the durable re-establishment of a regional judiciary in Southern Africa

While neither the goals, shape nor timeline of the announced SADC Tribunal review process are clear, fears of a considerable weakening of the judiciary branch of SADC have been formulated by many observers, in particular since a review by Cambridge scholar Lorand Bartels for the SADC Council of Ministers seemed to have had no positive effect on the outcome of the May 2011 extraordinary Summit.[24] However, this first in-depth report examining the

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19 Regarding the EU, it could be compared with the European Parliament before the introduction of direct elections in 1979.

20 *Calist Andrew Mwatela and Others v East African Community*, Appl. No. 1/2005, and *Prof. Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others*, Ref. No. 1/2006; for a further discussion of EALA and the desirability of a parliamentary assembly as a community institution, see infra II(c).

21 Under Article 16§4 of the SADC Treaty and Article 20 of the Tribunal Protocol.

22 Article 15§7 of the UEMOA Court of Justice Rules of Procedure (Règlement n° 1/96/CM); Article 10 of the ECOWAS Court Protocol.

23 See, for example, Demande d'avis de la Commission de l'UEMOA relative à l'interprétation de l'Article 84 du Traité de l'UEMOA, opinion n° 2/2000, 2 February 2000; Demande d'avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du Traité relatifs aux règles de concurrence dans l'Union, opinion n° 3/2000, 27 June 2000; Demande d'avis de la Commission de l'UEMOA relative á la création d'une Cour des Comptes au Mali, opinion n° 1/2003, 18 March 2003. The President of the ECOWAS Commission, who can request advisory opinions under Article 11 of the Community Court of Justice Protocol (formerly Article 10) has also benefitted from the possibility of consulting the regional judiciary (Advisory Opinion Community Parliament, ECW/CCJ/ADV.OPN/01/05, 5 December 2005; Advisory Opinion GIABA, ECW/CCJ/ADV.OPN/ 01/ 08, 16 June 2008).

24 Human Rights Watch states that 'SADC's failure to act on the recommendations of the first review suggests that the ultimate goal of the review order was not to strengthen the tribunal's mandate' but that member states, 'faced with a contested ruling[,] failed to take any steps to enforce it and instead paralyzed and try to weaken the tribunal itself'; in *SADC: Q&A on the Tribunal – Regional Court's Future Hangs in the Balance*, available at *http://www.hrw.org/news/2011/08/11/sadc-qa-tribunal*, accessed on 18 August 2012.

'role, responsibilities and terms of reference of the SADC Tribunal' has offered numerous constructive suggestions on how to render the regional judiciary more efficient, effective and transparent. While highlighting that all member states are already internationally bound by the SADC Treaty (including its different Protocols), that this included in particular the contested 2001 Treaty amendment, and that by no means could the Tribunal be understood to have appellate jurisdiction over national courts, Lorand Bartels suggested a number of important clarifications. These notably included having member states ensure, within their own domestic constitutional setting, the supremacy of community law (recommendations 3 and 4); reuniting all community dispute settlement under the original jurisdiction of the Tribunal (7); and having the Tribunal – like other international courts – determine its own rules of procedure (13). Bartels also made detailed proposals on how to strengthen the enforcement of SADC Tribunal decisions (15 – 23), recommended ensuring the qualification of SADC Tribunal members as international lawyers (25), and suggested a more independent and long-term funding of the Tribunal (30).[25]

(a) Reconsidering the inalienability of individual access

Despite the numerous constructive and rather demure proposals that can be made to improve the functioning of the regional court, even in an overall regressive review process, individual complaints for SADC law violations by member states so far remain a defining feature of the SADC Tribunal, shared by its sister institutions the EAC and ECOWAS. Repealing individual access would, therefore, mean a revolutionary turn, and probably a regrettable one as well. In the last few years, individual complaints – and in particular those in human rights cases – have set the most outstanding precedents for the emergence of an African regional jurisprudence.[26]

However, there are other arguments that might relativise the potential loss of direct individual access to the Tribunal. The African Court on Human and Peoples' Rights in Arusha is already starting to work, with numerous procedures introduced since 2011,[27] and promises to become a unique and continent-wide jurisdiction for intrinsic human rights cases, independent from overlapping and changing (sub-)regional integration schemes.[28] On the other hand, the

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[25] Lorand Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* op cit note 6 at 76-81.

[26] For EAC and ECOWAS, see *James Katabazi and 21 Others v Secretary General of the EAC and Attorney General of Uganda*, Ref. No. 01/2007, judgment of 1 November 2007, in which the East African Court of Justice ultimately recognised its human rights jurisdiction on the sole basis of the Treaty, albeit a still missing additional Protocol ('while the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction … merely because the Reference includes allegation of human rights violation [sic]'); and *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008, in which the ECOWAS Court held Niger responsible for the plaintiff's enslavement over nine years and awarded compensation of CFA francs 10 000 000 (about 15 000 euros) to the latter, because the public authorities had failed to protect her sufficiently from the practice of slavery.

[27] See *http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases*, accessed on 18 August 2012.

[28] SADC members who have already signed their declaration under Article 34§6 of the Protocol Establishing the Court, opening direct access to the Court for individuals and non-governmental organisations (NGOs), are Malawi and Tanzania.

European Court of Justice serves to exemplify a court that has never provided for individual complaints against member states, and yet has had an immense impact on a large array of individual rights and the respective domestic court procedures – through the mechanism of preliminary rulings.[29]

In the long term – assuming the success of the regional judiciary is a lasting one – it could even prove beneficial to exclude individual actions against community members from the Tribunal's jurisdiction. A single community court is hardly best placed for being the direct addressee of all legal recourses by community citizens implicating SADC and international law to some degree.[30] It would be much more desirable to achieve a subsidiary application of community law by domestic, low-instance courts, with the SADC Tribunal only setting interpretive precedents for that purpose.

The real concern about abolishing individual access to the SADC Tribunal for complaints against member states is, hence, of a rather empirical nature. Since the SADC judiciary's contribution to regional integration and to the respect of community law has so far been its jurisprudence on individual complaints,[31] the question is how to obtain a judicial stimulation and control of SADC through other procedures – which the SADC Treaty already provides for, as shown at the beginning of this discussion. The following parts of this paper, therefore, aim to make suggestions for judicial action beyond individual complaints. While it is clear that the realisation of a more perfect rule of law in southern Africa is indispensable for economic development, for it is a prerequisite of both a functioning public administration and successful private entrepreneurship, individual human rights complaints are only one way of approaching that goal.

Two such alternatives for a strengthened legal integration by the future SADC Tribunal and its environment will be discussed: vertically, that is, with regard to national legal systems; and horizontally, that is, in relation to other actors and institutions on the community level.

(b) Linking up national and regional judiciaries through preliminary references

A major obstacle for the development of RECs of a supranational quality, in particular with regard to the judiciary, seems to be the creation of the necessary linkages between the domestic and regional levels. A disinterest towards community law and for its judge seems to be particularly stark among judges themselves, as illustrated by the almost total absence of preliminary questions from African domestic courts to regional judges. Before discussing

[29] See supra note 3.

[30] The European Court of Human Rights is a well-known victim of its own success, with 64 500 applications allocated in 2011 (5% more than in 2010) and 151 600 applications pending before a judicial formation of the court (9% more than a year before), which comprises a total of 47 judges. More than a quarter of the pending applications come from Russia; more than 10 per cent from Turkey; around 7 to 9 per cent each from Italy, Romania and Ukraine. Thus, 5 of the 47 member states stand for almost two thirds of the pending applications. See European Court of Human Rights, Statistics 2011, available at *http://www.echr.coe.int*, accessed on 18 August 2012.

[31] Apart from staff cases, which are individual complaints against community institutions.

the question of preliminary rulings in particular, therefore, it is to discuss the potential reasons for the apparent disinterest displayed by domestic judges when it comes to engaging in a judicial dialogue with their regional court(s).

As pointed out by Lorand Bartels in the introduction to his review of the SADC Tribunal and as reflected in a number of policy initiatives, issues of 'outreach and accessibility, infrastructure, case management and training' are 'critical to the practical effectiveness of the Tribunal'.[32] While improving the performance of the Tribunal itself regarding these issues is certainly important and even necessary in many regards, creating a perfect Tribunal does not help much if this Tribunal is not able to take up its role as an interpreter of community law for the national legal orders by which it is constituted, and for the citizens concerned.

Therefore, as much as an array of capacity-building measures is needed within regional courts and for their personnel, the issues of infrastructure, accessibility, case management and training need to be addressed as forcefully within the domestic legal orders. While well-informed and well-financed individuals have, since the start of community adjudication in Africa, been able to go to regional courts, a potential abrogation of individual complaint mechanisms makes community law education on the domestic level even more important, and less automatic.[33]

Moreover, the technical possibility for courts to refer a preliminary question to the SADC Tribunal needs to be ensured. To this end, member states need to create the necessary procedural tools. Indeed, as Lorand Bartels points out, according to Article 16 and Rule 75 of the SADC Tribunal Protocol, members states are obliged to create such tools under international law, resulting from Article 6§4 and 5 of the SADC Treaty.[34]

However, the apparent disinterest of national judiciaries towards the community court can probably not be explained by a mere lack of awareness of the domestic actors involved. Quite generally, it would be interesting to see socio-anthropological research on the attitudes of domestic judges towards relevant supranational judiciaries. Yet, there would be good reason for domestic judges to get involved with regional courts: not only does a possible reference to the supranational level in politically sensitive cases allow national judges to avoid political pressure by confiding a critical issue in the prejudicial stage to

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[32] Lorand Bartels, op cit note 6 at 6; he notably cites the SADC Tribunal Strategic Plan (December 2010). See also Ulrik Spliid & Marian Nell *Study on the SADC Tribunal Capacity Needs Assessment* 2009; European Union Tradecom Programme for the SADC Tribunal *Developing the Institutional Capacity of the SADC Tribunal* (2010).

[33] As an aside, it is worth noting that the perception that SADC law would only help 'white' and corporate interests (see supra, note 9) appears in great part to be due to a lack of promotion of the new community law and its Tribunal within domestic legal orders. In order to make preliminary references emerge, it is not enough to have a few well-informed individual plaintiffs (as in the case of individual complaints), but that the domestic legal community at large (and the judges in particular) needs to accommodate the idea of the regional court as a prejudicial instance, which is a more complex and difficult educational undertaking.

[34] Lorand Bartels, op cit note 6 at 31.

the higher and independent authority of the community judge;[35] it also allows domestic courts to retain the mass of cases and the final decisions in their own hands, in a mechanism of subsidiarity. Furthermore, it encourages domestic courts to cooperate across national boundaries within the community, since they have a common interest in obtaining certain preliminary rulings, and since subsidiarity works community-wide.

More mundane reasons for the absence of preliminary rulings in the SADC Tribunal's short history might, however, simply be the scarcity of applicable material community law, and the shared common law tradition of most of the national legal orders concerned. This could result in a grand convergence of domestic laws, on the one hand, and the quite generally phrased existing community law, on the other – which accordingly would result in a small probability of conflictual questions on the interpretation of community law that could possibly arise. Yet, the extended treaty work of SADC offers a large array of different community policies, and the grounds for the production of more material community law are well prepared: about two dozen Protocols expand the Treaty on a variety of policy fields,[36] and the SADC Charters and Declarations add to some of these.[37]

The striking difference between an abundance of intergovernmental policy initiatives manifested in a range of protocols, charters and declarations, and a rather shallow regulatory and implementation activity, seems to be typical for executive-driven regional integration initiatives in which the density of the community law remains low. Consequently, it is not surprising if the attractiveness of regional thinking within the domestic legal order is low, too. While it is very possible to create specialised human rights protection instruments within international organisations that are otherwise purely intergovernmental,[38] creating a community law solely based on a handful of general principles but lacking real commitment to a common, supranational governance may remain somewhat redundant and futile.[39]

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[35] It is important to point out the difference between a *preliminary ruling* and an *appeal*. Unlike a court of appeal, the community judge in a preliminary ruling interprets the meaning of the law in the precise, purely legal question that it has been asked by the referring domestic judge. The preliminary ruling is prejudicial, so the decision in the case remains with the domestic judge, whose proceedings are only temporarily suspended until the community judge has responded to the preliminary question.

[36] These deal with corruption, illicit drugs, firearms control, culture, sports, information, education, gender, energy, extradition, movement of persons, fisheries, forestry, health, immunities, legal affairs, mining, mutual assistance in criminal affairs, defence and security cooperation, shared watercourse systems, tourism, trade, transport, communications, meteorology, wildlife conservation, and – last but not least – the SADC Tribunal, in the Protocol on Tribunal and Rules of Procedure Thereof; for a compilation see *http://www.sadc.int*, accessed on 18 August 2012.

[37] There are notably the Charter of Fundamental Social Rights in SADC, and Declarations on Agriculture and Food Security, Gender and Development, HIV and AIDS, Information and Communication Technologies, and on Productivity.

[38] The African Court of Human and Peoples' Rights, the Inter-American Court of Human Rights, and the European Court of Human Rights are well-known examples.

[39] It appears that community law, as opposed to the eclectic evolution of classic international law, necessitates a large common ground of legal principles – for which a common understanding of human rights, the rule of law and democracy is an indispensable precondition. A real shift of government (in the executive, legislative or judicial field) on the supranational level becomes less likely if this precondition still needs to be renegotiated in an already existing, supposed community.

Hence, presupposing a successful effort in promoting community law and its judge within the domestic legal orders of member states, vertical integration through the procedure of preliminary questions[40] – so far unused in southern Africa – appears to be the most effective way of sustainably achieving an improvement of the rule of law on a domestic level, where material community law provides for it. Realising a judicial dialogue between national and regional judges through this kind of procedure makes it possible to directly transpose regional legal standards into municipal case law and, thus, effectively achieve a subsidiary application of community law by subordinate courts.

(c) Breaking the predominance of intergovernmentalism through emancipated institutions, including a community parliament

Based on the assessment made earlier – that the unbroken predominance of intergovernmentalism within SADC has prevented the development of a dynamic of integration on the regional level – some suggestions will also be made regarding the readjustment of the community's institutional functioning and design. The *Campbell* experience shows that the SADC Tribunal alone can hardly assert itself as the only counterweight to the intergovernmental decision-making by member state governments within the SADC framework. Furthermore, the Tribunal, as the community's judiciary, is not best placed to play the counterpart to member state governments, but should ideally have the role of an arbiter within the institutional setting of the community, guaranteeing a supranational rule of law.

Hence, the independence and actionability of other community organs has to be strengthened. Not only does the emancipation of the SADC Secretariat need to be encouraged, but experience from the EAC also suggests the role of the SADC Parliamentary Forum should be re-evaluated as a fourth institutional actor with legislative competences, thus reaching a competitive dynamic of integration among the various regional institutions as well as national governments within SADC.

(i) Enabling the emancipation of the SADC Secretariat

As Ashimizo Afadameh-Adeyemi and Evance Kalula note, at the moment of the creation of SADC's predecessor, SADCC, the organisation's founding fathers consciously 'opted to adopt[41] a decentralised structure where each member state took responsibility for the implementation of policy decisions' – despite creating institutions such as Sectoral Commissions, a Standing Committee and a Secretariat.[42] While the inscription of these institutions in the 1992 SADC Treaty meant a change of the constitutive legal regime,[43] only

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[40] Article 16 of the SADC Tribunal Protocol and Rule 75 of the Rules of Procedure.

[41] In the SADCC Memorandum of Understanding.

[42] Ashimizo Afadameh-Adeyemi & Evance Kalula 'SADC at 30: Re-examining the legal and institutional anatomy of the Southern African Development Community', in Anton Bösl, André du Pisani et al (eds) *Monitoring Regional Integration in Southern Africa Yearbook 2010* (2011) 8 (hereafter Afadameh-Adeyemi & Kalula 'SADC at 30').

[43] Ibid.

the additional creation of the SADC Tribunal was a real change in terms of dislocating policy decisions away from member state governments.[44] However, as Afadameh-Adeyemi and Kalula agree –[45]

> … the importance of the existence of supranational institutions in promoting regional integration cannot be overemphasised.

This paper assumes that a regional organisation whose institutions are largely predominated by member state governments in fact lacks a truly supranational character, and, in the same vein, that the SADC Tribunal is (or was) the only truly supranational institution within SADC.[46]

The only other community organ participating in policy decisions that is not directly composed of representatives of the member state governments is the SADC Secretariat. Article 14§1 of the SADC Treaty defines the Secretariat as the 'principal executive institution of SADC', and its Executive Secretary, according to Article 15 of the Treaty, is responsible for the coordination of member state governments between Council and Summit meetings. However, the actual political independence of the Secretariat is already curtailed within the Treaty: Article 12 provides for a close political guidance by member state governments. The 'integrated committee of ministers', comprised of at least two ministers of each member state, notably oversees the activities of all 'core areas of integration' (§1), provides 'policy guidance' to the Secretariat (§3), controls the different directorates (§4 and 5), and is bound to take its decisions by consensus (§7).

No regional administration of an African REC has so far abundantly utilised its existing means to have the regional court control the respect of community law by member states (unlike the EU Commission), and only the UEMOA Commission and ECOWAS Secretariat have made use of their courts at all – by way of requesting advisory opinions. This indicates that the emancipation from member state governments can only partly be facilitated through institutional reform. However, the legal-constitutional subjugation of SADC's regional administration under its member states' governments is not as pronounced in the two other major RECs on the continent. In ECOWAS, the Executive Secretariat has greater and more independent competencies in the community's daily administration. Notably, Article 19 of the ECOWAS Treaty envisages the 'preparation of draft budgets and programmes of activity

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[44] Other new institutions were the Organ on Politics, Defence and Security Cooperation, the Integrated Committee of Ministers, and the SADC National Committees.

[45] Afadameh-Adeyemi & Kalula 'SADC at 30' op cit note 42 at 10; they notably refer to Mutharika, who 'rightly notes [that] economic *cooperation* requires the delegation of power to a supranational body entrusted with the task of safeguarding the interest of both the *multinational* grouping as well as that of individual member states' [emphases added]. This assessment does not seem radical enough in a context of supranationality and regional economic *integration* such as the SADC Treaty. Here, the existence of unique, indivisible interests of the region and its citizens preconditions the existence of a real, supranational community, and the latter consequently necessitates the existence of supranational institutions that exclusively "safeguard" the interests of the community as a whole (see accordingly ibid at 12).

[46] For a detailed characterisation of SADC as being a 'rules-based system' through its Tribunal, see Gerhard Erasmus 'Is the SADC trade regime a rules-based system?' (2011) 1 *SADC Law Journal* 28 – 32.

of the Community' (§3(d)), and the 'initiation of draft texts for adoption by the Authority or Council' (§3(i)).

An even more important role within its community is that of the EAC Secretariat, which Article 66 of the EAC Treaty entitles 'the executive organ of the Community'. The functions of the Secretariat as provided for in Article 71 of the latter Treaty are far-reaching: it notably initiates, receives and submits recommendations to the Council (§1(a)) and, in §1(d), –

> … [undertakes] either on its own initiative or otherwise, … such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination.

Furthermore, Article 72 of the EAC Treaty strictly forbids member states to unduly influence the Secretariat and its staff. Interesting with regard to the immediate implication of the regional judiciary is Article 29 of the said Treaty, which provides explicitly for references to the Council by the Secretary General in the event a member state fails to fulfil an obligation under the Treaty or infringes one of its provisions. If the Council cannot resolve the matter, the Secretary refers the matter directly to the EACJ (§3).

The two examples of ECOWAS and EAC illustrate very well that regional integration within SADC – and institutional emancipation in particular – remains at a comparatively low level, despite the strong economic and cultural ties among many of its members. It seems only logical that further Treaty reform within SADC should continuously strengthen the development of an independent and effective regional administration within the Secretariat. If the member states could be convinced to strengthen and emancipate the community administration in the form of the Secretariat, it should include the latter's full capacity as an applicant in front of the Tribunal – not only against member states,[47] but also against the member state governments' representation at community level, that is, the Summit and the Council. The implication of the judiciary in the debate between community institutions can help to separate political and legal discourse. This would help dissolve a fundamental problem of intergovernmentally dominated community governance: the problem that the cooperating governments – unchallenged by other community institutions – tend to disguise political desires and decisions in the language of legal predetermination and ineluctability.

(ii) The importance of a community parliament

What cannot be changed, however, either by a "communitisation" of the executive branch or by the possibility of inter-institutional disputes before the community judge, is that important political decisions in a regional community will always be taken by the representative organs of member state governments. This is true even for the most independently operating and politically self-

[47] Yet, creating the possibility of a regional administration that is member-state-government-neutral to refer to the Tribunal actions against member states for violations of community law remains one of the most important means of emancipation; see also the conclusion in Afadameh-Adeyemi & Kalula 'SADC at 30' op cit note 42 at 19f.

determined regional administrations like the EU Commission. Here, it seems, lies one of the qualitative differences between a supranational community and a state-like federation. Therefore, even a community administration that operates relatively independently with its own, integration-friendly agenda will not on its own be able to structurally change the polarising dualism between an executive branch and the regional judiciary.

Hence, it seems only logical to complete the triangle of community government by creating a parliamentary assembly at community level, as a participatory platform that is closer to community citizens than all other institutions, and yet can pursue an own political agenda at the highest, supranational level. Most active African RECs have provided for a parliamentary institution of some sort. The ECOWAS Parliament of the Community was established by Article 13 of the 1993 Cotonou Treaty. Currently counting 115 members, this community parliament was elected for the third time in August 2011. Yet, while its organisation is rather sophisticated[48] and its visibility considerable, the Parliament is deprived of any legislative function – as illustrated by the Preamble to the 1994 Community Parliament Protocol:

> Convinced that the Community Parliament as a forum for dialogue, consultation and consensus for representatives of the peoples of the Community, can effectively promote integration … .

Under these circumstances, ambitious and astute parliamentarians might still be able to advance community politics towards integration, but the lack of real competencies for the parliament within the community government remains regrettable.

The SADC Parliamentary Forum was created by southern African Heads of State and Government at the 1997 Blantyre Summit. The SADC Tribunal, in one of its last cases before it was suspended, confirmed the Forum as being a community institution according to Article 9(2) of the SADC Treaty.[49] The functions of the Parliamentary Forum are as symbolic as those of the ECOWAS Community Parliament, but the lack of a real community of regional parliamentarians, elected for the sole purpose of working regionally,[50] constitutes an additional obstacle for rerouting regional integration in southern Africa towards a logic of more direct democratic participation.

A model that is admittedly more worthy of consideration within SADC is the EALA. Here, the regional parliament has genuine legislative prerogatives: it is 'the legislative organ of the Community' (Article 49(1) of the EAC Treaty) and only the veto of the heads of state can prevent the EALA from successfully passing a bill (Article 63). In particular, the EALA needs to approve the community's budget (Article 49(2)b). The EALA experience not only shows that the existence of a genuine legislative assembly at the supranational level is likely to stimulate regional integration, but that it may also have a direct

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[48] See the 1994 Community Parliament Protocol (A/P.2/8/94), and its amending 2006 Supplementary Protocol (A/SP/.3/06); the Parliament has its own budget.

[49] *Bookie Monica Kethusegile-Juru v SADC Parliamentary Forum* (SADC (T) 02/2009), ruling on preliminary objections of 5 February 2009.

[50] Membership of the Parliamentary Forum is open to all members of national parliaments (Article 6 SADC PF Constitution).

influence on the activity of the community judge. Thus, two major affairs in the young EAC Court's case law originate from the EALA environment. In the 2006 *Mwatela* case, the very legislative function of the EALA was endorsed by the court. Three EALA members successfully contested the validity of Sectoral Council decisions where member states were not represented on the ministerial level. The EACJ also followed the plaintiffs in judging that a draft bill that had already been introduced in the EALA could not be withdrawn later on without the consent of the Assembly.[51] In its landmark 2007 *Anyang' Nyong'o* decision, the EACJ declared void the nomination of the Kenyan members of the EALA, judging that Kenya had to hold proper elections in its national parliament for this purpose, in order to satisfy Article 50 of the EAC Treaty.[52] Four months before the judgment, the EACJ had already granted an interim injunction preventing the unduly appointed new members from taking office.[53]

These precedents demonstrate that introducing a well-equipped parliamentary assembly with genuine legislative functions into the SADC institutional framework would be likely to stimulate debate on the substance and manner of regional integration, including in front of the Tribunal, even if the parliament as such cannot directly demand its advisory opinion (as is the case in the EAC). Moreover, the participatory openness of a parliamentary assembly is needed to increase the democratic legitimacy of, and the democratic pressure on, the community and its members.

III Conclusion

While this paper agrees with those who bewail the brutal interruption of the Tribunal's activity upon the decision of the SADC Heads of State and Government, it serves as a reminder that there is considerable room for improvement in a review of the Tribunal's functioning and role. When one examines which features of the community jurisdiction are the most effective in durably fostering regional integration and economic development in southern Africa, it appears that the achievements at stake in the *Campbell* crisis, namely individual complaints against member states, are only one – albeit important – field of activity for a community judge. Another, most intriguing challenge for the cause of regional integration, shared by all African regional courts, remains the use of preliminary ruling procedures by national judges in order to end the radio silence between national and regional judiciaries. Besides the search for ways to solve this challenge, the search for a proper place for the Tribunal within the community needs to be contextualised in the overall functioning of the institutional setting. Remedies to the intergovernmentalist overweight will necessarily have to include a strengthening of independent institutions; the establishment of a legislative assembly might be particularly promising in this regard.

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[51] See *Calist Andrew Mwatela and Others v East African Community*, Appl. No. 1/2005, 1 October 2006; limiting the practical consequence of his decision on the first issue, the court declared only a prospective annulment of legislative decisions in the future.

[52] See *Prof. Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others*, Ref. No. 1/2006, 30 March 2007.

[53] EACJ ruling of 27 November 2006.