

# The role of transnational legal activism in the construction of participatory regionalism in East Africa

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## Abstract

New regionalism scholars recognize the role of Civil Society Organizations (CSOs) in undertaking transnational legal activism, which focuses on regional law-making and litigation in regional courts. More broadly, the New Regionalism Approach emphasizes the participation of CSOs and other actors in regional integration in a process described as multidimensional, involving both state and non-state actors. This study investigates the role of transnational legal activism in East Africa. It focuses on interactions between CSOs on one hand, and the bodies responsible for lawmaking and litigation, that is, the East African Legislative Assembly and East African Court of Justice, on the other. It argues that by undertaking transnational legal activism, CSOs advance people-centered regionalism as anticipated by the Treaty. But in doing so, they encounter challenges associated with the construction of the EAC as an elite-driven, intergovernmental process.

**Key words:** EAC, participatory regionalism, transnational legal activism, East African Legislative Assembly, East African Court of Justice

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## 1. Introduction

Scholars of new regionalism recognize the role of Civil Society Organizations (CSOs) in undertaking transnational legal activism. In this manner, CSOs take part in constructing regional integration as a site for activism (Grugel 2019). They use the institutions and processes of regional integration to influence regional law and policy, advance the participation of citizens in regional integration processes, foster transparency, demand accountability from partner states, and promote adherence to norms such as human rights, rule of law, democracy, etc.

Transnational legal activism aligns with the broader roles assigned to CSOs in regional integration by several scholars. They are seen, for example, as partners, legitimizers or counter-hegemonic forces (Iheduru 2014) in their interactions with regional institutions. Furthermore, they are said to be involved in legitimation, manipulation or contestation within regional governance frameworks (Fioramonti 2014). CSOs also engage in research, decision-making, agenda-setting, policy-design, implementation and evaluation (Reinold 2019). This theorization accords with the *New Regionalism Approach*, which explains the construction of participatory regionalism and, therefore, the place of transnational legal activism therein. Transnational legal activism acts as a tool, approach or strategy for realizing the goals of CSOs in regional integration schemes.

In addition, transnational legal activism aids CSOs in regional issue-framing. Issue-framing refers to the ways in which 'CSOs render events or occurrences meaningful to their target groups... members and partners by organizing experiences and guiding action in a certain pedagogical and sometimes provocative way (Keck & Sikkink 1998). It is through issue framing that CSOs are able to exert influence at different levels of governance. According to Godsater the tools used by CSOs to frame issues are information and knowledge. Through research, CSOs are able to develop the requisite technical capacity to articulate the issues that are of concern to them in regional integration schemes (Godsater 2013; Godsater 2015).

The East African Community (EAC) regional integration process describes itself as people-centered and private sector-driven (EAC 1999). The Treaty for the Establishment of the EAC (hereafter, the Treaty) provides for the participation of civil society through various articles as reflected in the table below.

**Table 1: How the EACT provides for participation of CSOs**

Article	Provision
5.3(g)	... the Community will ensure, <i>inter alia</i> , the enhancement and strengthening of partnerships with civil society, so as to achieve sustainable socioeconomic and political development
127.1	... the Partner States agree to provide an enabling environment for the participation of civil society in the development activities within the Community
127.3	... the Partner States undertake to promote a continuous dialogue with civil society at both the national and the Community level
127.4	... the Secretary General shall provide the forum for consultation between civil society organisations, the private sector, other interest groups and appropriate institutions of the Community

**Source: Adopted from Kituo Cha Katiba, 2010**

In order to provide the institutional framework for the participation of CSOs, the EAC has put in place the East African Community Observer Status framework and the Consultative Dialogue Framework for the Private Sector, Civil Society and Other Interest Groups in the EAC Integration Process (CDF). Beyond these two main frameworks, CSOs also develop direct relationships with the decision-making organs of the EAC through Memoranda of Understanding (Odhiambo 2015, p. 32) and personal relationships with individual decision-makers. These mechanisms and relationships aid CSOs' transnational legal advocacy.

This study investigates the role of transnational legal activism in East Africa. It is part of a larger study into the role of CSOs in the construction of participatory regionalism in the East African Community region. Although the larger study adopted a Mixed Method Approach (MMA), involving both qualitative and quantitative methods, the examination of transnational legal activism is based solely on qualitative data collected through key informant interviews and desk/documents review undertaken in 2024.

The study focuses on interactions between CSOs on one hand, and the bodies responsible for lawmaking and litigation, that is, the East African Legislative Assembly and East African Court of Justice, respectively, on the other. In particular regard to the EACJ, the study narrows down to human rights litigation at the EACJ, which has happened despite partner states' reluctance to confer such jurisdiction to the Court through a Protocol as demanded by the Treaty. It argues that by undertaking transnational legal activism, CSOs advance people-centered regionalism as anticipated by the Treaty. But, in doing so, they encounter challenges associated with the construction of the EAC as an elite-driven, intergovernmental process. Below, we discuss lawmaking and litigation in the EAC in order to enrich the study's conceptualization.

### *1.1 Law-making in the EAC*

Like any other legislative system, the EAC has a hierarchy of laws that include the Treaty, protocols (and their annexes), laws enacted by EALA and regulations (Odhiambo 2015, p. 13-14; Binda 2017). These instruments have different levels of bindingness in the overall construction of the Community. Protocols are concluded to enhance cooperation in agreed areas. In this case, some of the notable protocols of the EAC are: (i) The Protocol on the Establishment of the East African Customs Union, which entered into force in 2005; (ii) The Protocol on the Establishment of the East African Common Market, which came into force in 2010; and (iii) The Protocol on the Establishment of the East African Monetary Union, which entered into force in 2015 (Binda 2017, p. 109).

EALA, the primary lawmaking organ in the EAC, is established under Article 9(1)(f) of the Treaty. It is one of the seven organs established under Article 9(1) of the Treaty, which also gives discretion to the Summit to establish other organs for the Community (EAC, 1999, Article 9(1)(h)). It consists of nine members elected from each partner state of the EAC and a total of 8 ex-officio members, including the Secretary General and the Council to the Community.

EALA members are elected by parliaments in partner states from among non-members of parliament in accordance with their constitutions. Potential members must also not be ministers in the government of partner states or officers of the EAC. The members must have the qualifications required at partner states' level to be elected to the national

parliament. Additionally, potential members are required to have 'proven' experience' or 'interest' in consolidating and furthering the aims and objectives of the Community.

The Treaty describes EALA simply as the legislative arm of the Community. Beyond legislation, it also liaises with the National Assemblies of partner states on matters concerning the Community; debates and approves the budget of the Community; and considers the annual reports of the Community, and annual audited reports and any other reports referred to it by the Council of Ministers. EALA also recommends to the Council the appointment of the clerk and any other officers of the Assembly. Finally, it is empowered to establish committees to carry out its functions and is also responsible for establishing its own rules of procedure.

As the law-making body in EAC, EALA has over the years attracted CSO activists attempting to shape the EAC's legislative agenda as part of the construction of participatory regionalism. This study revealed two approaches taken by CSOs working with the legislative body. These are: (i) carrying out advocacy activities to influence regional legislation; and (ii) working to strengthen EALA as an institution and thereby boosting its relationship with CSOs. These approaches will form the basis of the substantive discussion of interactions between CSOs and EALA in later sections of this article.

### *1.2 Litigation at the East African Court of Justice*

EACJ is established under Article 9(1)(e) of the Treaty. The Treaty describes it as a judicial body responsible for, in overall terms, ensuring adherence 'to law in the interpretation and application of and compliance' of the Treaty. It is divided into two divisions: First Instance Division and Appellate Division. Whereas the First Instance Division has jurisdiction to hear matters brought to EACJ, at first instance, the Appellate Division is responsible for handling appeals from the First Instance Division.

Judges of the court are appointed by the Summit from among persons recommended by partner states. They are required to be persons of 'proven' integrity, impartiality and independence. Furthermore, they must have the qualifications required to be judges in their own countries before they can be considered for appointment to the regional court. The Treaty sets the maximum number of judges to serve in the court at 15. Among these, not more than 10 serve in the First Instance Division, and not more than 5 serve in the Appellate Division of the court (EAC 1999; Article 24(2)).

The more specific mandates of the court include dealing with (i) disputes on the interpretation of the Treaty; (ii) disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the court to which the Community or any of its institutions is a party; (iii) disputes between the partner states regarding the Treaty if the dispute is submitted to it under a special agreement; and (iv) disputes between the Community and its employers arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations. The Treaty provides for the extension of the court's jurisdiction to cover human rights and other matters (Odhiambo *et al.* 2015, pp. 19-20; EAC 1999; Ambani 2012, pp. 15-16).

In addition, the Court entertains references by partner states as well as the Secretary General in case of an infringement of the Treaty by a partner state and failure of that partner state to correct the infringement (EAC 1999; Article 29). It also accepts matters from legal and natural persons resident in a partner state in regard to 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' (Article 30). Importantly for this article, these requirements and provisions have enabled CSOs to undertake transnational legal activism, notably litigation on human rights issues, thus also advancing the construction of participatory regionalism.

## **2. Conceptual framework and literature**

This study combines a number of concepts and theories that create a linkage between transnational legal activism and regional integration. This section discusses and ties together these theories and concepts, which include participatory regionalism, transnational advocacy networks, transnational collective action, civil society (in its national, regional and global manifestations), functionalism, neofunctionalism, intergovernmentalism, and the *New Regionalism Approach*.

Literature on transnational activism reveals its meaning, nature and a number of its essential characteristics. Activism in its broad sense involves interventions geared towards effecting social and political change. They

include 'voluntary action, social movement campaigns, the formation of Non-Governmental Organizations, as well as diverse methods of advocacy and protest' (Davies *et al* 2024, p. 4). Transnational activism is understood as the 'cross-border mobilization of individuals, groups and movements advocating for social and political change' (Davies *et al* 2024, p. 2). In terms of scope, it can be global or regional and is generally acknowledged to transcend national borders. It, therefore, involves cross-border collaboration, as well as the formation of cross-border networks, coalitions and movements (Davies *et al* 2024, p. 4). Studies of CSOs engagements in the context of regional integration reveal these characteristics (for example, Odhiambo 2025; Godsater 2013).

Transnational activism challenges the fundamental character of the nation-state i.e. the idea of state sovereignty (Erdem 2015, p. 314), an important factor in regional integration and, in particular, the building of supranational institutions. As enablers of transnational activism, regional institutions can potentially influence the behaviour of states. Indeed, scholars frame the institutions of regional integration as sites for social mobilization and activism. According to Grugel (2006), for example, region building (used here with the same meaning with regionalism and regional integration), 'creates opportunities for transnational collective action and social activism via either inclusion of society-based organizations in policy-making or grassroots mobilization coordinated across regional states' (Grugel 2006, pp. 209/210).

One of the outcomes of transnational activism is the development of transnational advocacy networks made up of CSOs operating at global and regional levels. These networks, which form the basis for transnational activism, are 'bound together by shared values, a common discourse, and dense exchanges of information and services' (Karns and Mingst 2015, p. 59). In addition,

*'These networks also try to set the terms of international and domestic debate, to influence international and state-led policy outcomes, and to alter the behaviour of states, international organizations and other interested parties'*  
(Karns and Mingst 2015, p. 59).

The most important actors in transnational activism are CSOs and their networks. There are differing conceptualizations of the meaning of civil society. The EACT defines civil society as, 'realm of organized social life that is voluntary, self-supporting, autonomous from the state, and bound by a legal set of shared values' (EACT, Article 1). Civil society can also be construed as a 'space' in which citizens 'freely discuss matters of common interest and where people can come to a consensus on the desired direction and form of social organization in a free environment by exchanging rational arguments' (Flyvbjerg 1998; Suransky *et al.* 2005). Across East African countries, CSOs operate under different legal regimes, which include Non-Governmental Organizations (NGOs), associations, trusts, etc. All these are considered part of CSOs for purposes of this study.

As pointed out in the introduction, CSOs perform certain functions in relation to regional integration such as being legitimizers or counterhegemonic forces, taking part in legitimation, manipulation and contestation as well as research, agenda-setting, among others (Iheduru 2014; Fioramonti 2014; Reinold 2019). In addition, they are mechanisms for citizen participation and therefore, 'enablers of regionalism from below in these interstate arrangements. This has consequently enhanced the anticipation of their influence on regional integration policies and processes' (Kimutai *et al.* 2021, p. 52). Regionalism 'from below' involves the aspect of grassroots mobilization (Grugel 2006, pp. 209/210). In taking part in construction of participatory regionalism, CSOs perform these tasks in different permutations and combinations, thus being agents of change.

Civil society is also framed as the carrier of norms in international relations. Thus a lot of CSO interventions align with international norms such as human rights, climate change, etc. This same logic applies to regional integration. Grugel (2016), for example, theorizes that institutions of regional integration are platforms for championing human rights. Similarly, for Nwache (2009), regional integration is an important instrument in the struggle to fulfil the socioeconomic rights of citizens in a given region. In the same vein, Nwogu (2007) avers that by seeking to fulfil the right to development in the African context, regional integration becomes an instrument in the realization of Article 22 of the African Charter on Human and People's Rights (ACHPR). The ACHPR is one of the leading human rights instruments on the continent. Logically, transnational legal activism is a tool in a wider arsenal deployed in the quest to further the human rights agenda in East Africa.

Furthermore, CSOs fill the 'democratic deficit' experienced by regional integration schemes. The 'democratic deficit' emerges from the nature of regional integration particularly when construed from an intergovernmental perspective and where they involve the creation of 'supranational governance arrangements' (Kimutai *et al.* 2021, p. 52). Related to this, is their perceived role in policy-making. As pointed out by Kimutai, *et al.*, quoting Zimmer (2010),

*'It is apparent that integration scholars agree that CSOs have a significant role to play in policy processes in integration arrangements. They associate civil society with the promotion of participation and hence democratic legitimacy. ... Integration and civil society studies generally recognise the contribution of CSOs to regional governance and policy processes...'* (Kimutai et al 2021).

But, even as CSOs presumably provide a link between citizens and institutions of regional integration, some scholars remain skeptical about their effectiveness in doing so. Adenkule, *et al.* (2014), for example, note that 'the jury is still out on whether the process of regional integration has become more popular, more democratic and more participatory since the advent of the 21<sup>st</sup> Century because of the intervention of non-state actors and agencies' (Amuwo 2009, p. 2). This is partly because CSOs are 'limited in their scope, reach and depth by the fact that they are largely an urban phenomenon, mainly donor-created, donor-driven and donor-funded' (Amuwo 2009, p. 10). These limitations affect the construction of both transnational legal activism and participatory regionalism.

Besides, an assessment of the EAC and its people-centeredness must contend with what scholars see as an elite-driven process that only pays lip service to the participation of CSOs, the private sector and citizens. According to Binda (2017), the wording of the Treaty (with phrases such as 'partner states shall....' 'partner states agree....') 'confirms that the EAC is a partner states'-led organisation in accordance with its intergovernmentalist approach (Binda 2017, p. 104). According to Protas (2015) the commitment to people-centeredness 'seems to be only on paper' and the practice by 'partner states and various institutions of the Community reveal a different approach' (Protas 2015, p. 2). This same position is articulated by O'Reilly *et al.* in their 2023 study (O'Reilly & Vaughan 2023) on people-centered regionalism in EAC. Thus, transnational activism has to contend with these limitations even as it contributes to the construction of participatory regionalism in line with the *New Regionalism Approach*.

Even with the shortcomings pointed out above, some scholars theorize civil society as an important ingredient in the creation of participatory regionalism. According to Acharya (2003, p. 382), participatory regionalism is distinguished by two key features. The first one is the acceptance by governments of a more relaxed view of state sovereignty, while the second is the development of a close nexus between governments and civil society in managing regional and transnational issues. This formulation enables the development of a close working relationship between governments and civil society geared towards solving regional or transnational problems. The formulation and implementation of mechanisms of CSO participation such as the EAC Observer Status framework and the Consultative Dialogue Framework (CDF) signifies some level of commitment to participatory regionalism.

Acharya also theorizes the emergence of a regional civil society as a result of the development of a close nexus between governments and civil society. This phenomenon promotes transnational legal activism since CSOs and their regional networks are a basic infrastructural requirement for such activism. Equally important, the emergence of a regional civil society necessitates the development of an interactive nexus between official and non-official regionalisms (Acharya 2003, p. 382) through the activities of governments (such as spearheading the formation and implementation of CSO mechanisms of participation) and CSOs (such as networking and advocacy), respectively.

Theories of regional integration have often taken into account the roles of interest groups, including CSOs. Whereas functionalism (Mitrany 1943) focused on the roles of states and international organizations, neofunctionalism theorized the roles of different actors in regional integration, including non-state actors, such as interest groups, labour groups and political parties as well as the development of supranational institutions and transnational elites (Haas 1958). However, it is during the era of new regionalism in which the participation of CSOs in regional integration has received full attention academically, in terms of regional policies as well as concrete mechanisms of participation.

New regionalism theorists construct regionalism as an inclusive process that involves different actors (Godsater 2013). In addition, new regionalism is 'characterized by its multidimensionality, complexity, fluidity and non-conformity, and by the fact that it involves a variety of state and non-state actors, who often come together in rather informal multiactor coalitions (Soderbaum 2003, pp. 1-2). New regionalism studies also postulate the involvement of networks of civil society whose focus is national, regional and oftentimes, global. As pointed out by Soderbaum,

*'New regionalism scholars pointed out to an increasing relevance and strength of civil society regionalization around the world... Civil society regionalization emerged for a range of different reasons, such*



*as functional problem-solving, and service delivery, a need to transcend the structures and boundaries of nation-states, sharing of information and learning...* (Soderbaum 2015, p. 19).

What emerges from the literature above is the close nexus between transnational legal activism and the construction of participatory regionalism. In turn, transnational legal activism is supported by the emergence of a regionalist civil society as theorized by the *New Regionalism Approach* and studied by different scholars (for example, Odhiambo 2025; Godsater 2013). Within this broad construction, CSOs take part in various activities as theorized by several scholars, including legitimization, contestation, agenda-setting and policymaking, thus contributing to regional integration. CSO participation in these activities is enabled by official mechanisms of participation spearheaded by states as well as their own initiatives, partnerships and collaborations. Below, we discuss the methodological approach of the study.

### 3. Methodological approach

The study was carried out in Kenya and Uganda, two of the founder members of the EAC. Partner states that joined the EAC from 2006<sup>1</sup> were left out because they were not members when the adoption and implementation of the EAC Observer Status framework commenced in 2001. Furthermore, Kenyan and Ugandan CSOs such as Kituo Cha Katiba and the Southern and Eastern African Trade Information and Negotiations Institute (in Uganda), as well as the Society for International Development and Association of Professional Societies in East Africa (in Kenya), have observer status with the EAC (Open Society Foundations 2015, p. 38-39).

In addition, Kenya and Uganda (alongside Rwanda) have been the foremost champions of the integration process and have operated under the banner of the 'Coalition of the Willing' to undertake joint projects. Conversely, Tanzania, the third founder member, has shown less commitment to the integration process with scholars Ahmed Salim and Aidan Eyakuze asserting that the country has slowed down the integration process through what they call 'timid defensiveness' (Odhiambo *et al.* 2015, p. 44).

Adopting a Mixed Method Approach (MMA), the study collected both qualitative and quantitative data through a survey of CSOs in the two countries as well as key informant interviews, documents review and Focus Group Discussions. It targeted organizations working in the following sectors: human rights, economy, trade and agriculture, health, youth and children. A stratified random sampling approach was applied to ensure that the sectors were all represented in the sample. The strategy yielded 45.2% human rights organizations, 30% CSOs working in the economy, trade and agriculture sectors, 13.4% youth (and children) CSOs and 11.4% of CSOs working in the health sector.<sup>2</sup>

Furthermore, the study sampled key stakeholder groups including civil society, present and former employees of the EAC secretariat, members of the EALA and scholars in the field of International Relations. The survey, carried out among 186 CSOs to elicit quantitative data, utilized a questionnaire with both open and close-ended questions. The key informant interviews were carried out using checklists developed for the different stakeholder groups so as to effectively capture their experiences and opinions.

A total of 44 key informant interviews were held. Respondent selection was based on knowledge of regional integration as well as direct association with the EAC. Among those interviewed were a former and a serving member of the East African Legislative Assembly (EALA), a former Registrar of the EACJ, and three International Relations scholars. The selection of key informants was based on their knowledge of regional integration and direct involvement in the affairs of the EAC. The researcher used personal knowledge of the stakeholders in EAC integration to come up with a list of possible respondents who were then contacted randomly and requested to participate in the study. This analysis of transnational legal activism is based on thematic analysis of qualitative data. Emerging analytical themes and patterns were further triangulated with explanations from documented sources covering the subject matter. The sections below discuss the findings under different headings.

### 4. Discussion of findings

This section discusses the findings of the study. It begins with a broad overview of the relationship between transnational legal activism and lawmaking in the EAC, then proceeds to discuss CSO interventions aimed at directly influencing lawmaking. Thereafter, it discusses the processes of building advocacy relationships with

<sup>1</sup> These are: Rwanda and Burundi (2006), South Sudan (2016), Democratic Republic of Congo (2022) and Somalia (2023).

<sup>2</sup> The seven sectors were grouped into four for ease of administering the questionnaire.

EALA to enable CSO participation in regional litigation, before summarizing the challenges involved in transnational legal activism.

#### *4.1 CSOs and law-making in EAC: An overview*

Several organizations and networks were found to engage in law-making either through advocacy for enactment of protocols or through legislation by EALA. These include Transparency International, Kituo Cha Katiba (Eastern Africa Center for Constitutional Affairs), and the Eastern African Sub-Regional Support Initiative for the Advancement of Women (EASSI). Other CSOs and CSO networks were found to work with EALA to improve its capacity to engage with CSOs. This later strategy was instrumental in establishing and maintaining a working relationship with EALA hence enabling transnational legal activism. CSOs that took this approach include the East African Tax Governance Network (EATGN), and Mzalendo Trust.

The CSOs involved in influencing regional legislation were found to work closely with members of EALA who are allowed by the Treaty and EALA rules of procedure to move private members bills (EAC 1999; Article 59(1). In this undertaking, they both developed personal relationships with the legislators and operated through Memoranda of Understanding (MoU) with EALA. Indeed, MoUs are recognized as one of the mechanisms through which CSOs form collaborative relationships with the EAC (Odhiambo *et al.* 2015, p. 32). CSO relationships with EALA were generally found to facilitate transnational legal activism.

However, the use of private members bills as an avenue for transnational legal activism attracted negative repercussions from EAC partner states. During the 25<sup>th</sup> meeting of the Council of Ministers in Bujumbura, Republic of Burundi, the Council considered a request by the Republic of Tanzania to amend Article 59 (1) regarding private members' bills. This was seen as a move to curtail and dilute EALA's lawmaking mandate. In response, EALA members, during a plenary session held in Nairobi in September 2012, passed a resolution of the House to prevent this move.<sup>3</sup>

The review of CSO interactions in this section is based on sectors that have been prioritized by the EAC Treaty and specific plans. The Treaty, for example, prioritizes questions of gender equality in Article 121 that addresses the role of women in the socioeconomic development on the basis of their marginalization, while health as a sector is identified as an issue that requires regional cooperation in Article 118 (EAC 1999). Human rights in general, the place of youth and children, are all recognized by the Treaty. These sectoral priorities have, therefore, attracted transnational legal activism by CSOs and have provided a basis for participatory regionalism.

##### *4.1.1 Interventions to directly influence lawmaking*

Transparency International-Kenya (TI-Kenya) is one of the CSOs that were found to have attempted to influence EAC protocols. Based on its transparency and accountability mandate, the organization supported the development of the EAC Protocol on Good Governance, which was first initiated as a good governance framework before being upgraded by EAC partner states to the status of a protocol (EALA 2013, p. 4).

The draft protocol, whose drafting started in 2011, was designed to incorporate key normative pillars of the Treaty, including human rights and the promotion of equal opportunities, transparency, accountability through economic governance, access to justice, equality; democracy and democratization and adherence to rule of law, constitutionalism and access to justice (EALA 2013, p. 5). Even though the process of enacting the Protocol itself was successful including approval by the Council of Ministers, it has never been ratified by all partner states.<sup>4</sup> This brings to light one of the key challenges that CSOs face in the enactment of laws in the EAC: uncertainty as to whether or not the partner states will eventually accept the resultant framework.

Kituo Cha Katiba, whose mandate includes the promotion of constitutionalism, good governance and democratic development in East Africa, successfully advocated for the enactment of a regional human rights legislation until it was passed by EALA in 2012, six years after the commencement of the advocacy process. Kituo's strategies include research, public education, policy advocacy and litigation. It is one of the CSOs that have an observer status with the EAC (Odhiambo 2015, p. 39). Its advocacy process for the regional human rights law was based on the requirement by the Treaty for partner states to abide by, among others, the principle of 'good governance,

<sup>3</sup> More information can be found here: <https://www.eala.org/media/view/eala-sessions-end>

<sup>4</sup> Interview with the representative of Transparency International 24<sup>th</sup> June, 2024.

including adherence to democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights' (EAC 1999; Article 7).

Part of Kituo's strategy was to work closely with the National Human Rights Institutions (NHRIs) in the partner states. NHRIs are independent national human rights bodies charged with the responsibility of protecting and promoting human rights in line with the 'Principles Relating to the Status of National Human Rights Institutions' or Paris Principles.<sup>5</sup> In the campaign, the NHRIs were mandated with the task of carrying out reviews of the constitutions of partner states. This exercise produced a report that was useful throughout the advocacy process. Working with the NHRIs across partner states (except Burundi which did not have one at the time) as well as CSO partners, was based on the principles of transnational legal activism, which involves partnerships and collaborations across borders.

EASSI, which promotes the rights of women in the Eastern and Southern Africa region, is one of the CSOs that have attempted to advocate for passage of bills and protocols by EALA. Its flagship advocacy project resulted in the passage of the EAC Gender Equality and Development Bill by EALA in 2016.<sup>6</sup> The advocacy process was largely facilitated through a Memorandum of Understanding signed in July 2008. Among others, the MoU ensured that EASSI and its transnational advocacy network were invited to relevant meetings especially the CSO/Gender Department.

Similar to the Kituo Cha Katiba case, EASSI's advocacy process was based on Article 6(d) of the EACT, which calls for adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities and gender equality. More importantly it was justified by the Treaty's recognition of the role of women in socioeconomic transformation in Article 121, which states,

*'The Partner States recognize that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programs for the economic and social development of the Partner States without the full participation of women'*  
(EAC 1999; Article 121).

The EAC Gender Equality and Development bill has the goal of making provision for gender equality, protection and development in the Community (EAC 2016). In line with the provisions of the Treaty, the enactment of the bill was prompted by the need to achieve the EAC's commitment to gender equality, which also reflect such commitment at the continental level through instruments like Agenda 2063. EASSI took advantage of the provision for private members bills as per the Treaty and EALA's Rules of Procedure to achieve this goal.<sup>7</sup>

In addition, and in line with the key characteristics of transnational legal advocacy, EASSI formed a broad coalition of 'like-minded' CSOs across the six (as it was then) six partner states after undertaking a stakeholder mapping exercise.<sup>8</sup> This networking approach proved to be invaluable to the advocacy process and is in line with the postulations of the *New Regionalism Approach*, which puts emphasis on the creation of CSO networks as part of regionalization processes. The table below shows the CSOs that formed the network across the six countries.

**Table 2: EASSI's transnational gender bill advocacy network**

Contry	Organization or network
Kenya	Caucus for Women in Leadership
Tanzania	East African Law Society
Uganda	National Association of Women Organizations in Uganda
Rwanda	Pro-Femmes Twese Hamwe
Burundi	Collectif des Associations et ONGs Feminines du Burundi

**Source: Author's own construction, 2024.**

In framing gender equality as an issue that merits regional legal attention, EASSI used research as a strategy. It commissioned studies early in the campaign (2008) that were carried out in all the six partner states and produced 'gender audit reports' as the main advocacy tool. It also borrowed lessons from the Southern African Development

<sup>5</sup> More information can be found here: <https://ganhri.org/paris-principles/>

<sup>6</sup> More information can be found here: [https://www.eala.org/uploads/the\\_eac\\_gender\\_equality\\_and\\_development.pdf](https://www.eala.org/uploads/the_eac_gender_equality_and_development.pdf)

<sup>7</sup> Interview with the representative of EASSI, 10<sup>th</sup> June, 2024. (Interviews in this study are anonymized by making reference to the name of the CSOs but not the individual interviewed).

<sup>8</sup> Interview with the representative of EASSI, 10<sup>th</sup> June, 2024.



Community. CSOs in the SADC region had successfully advocated for passage of the SADC Declaration on Gender Equality. Other strategies that led to success include awareness raising (awareness raising forums were carried out between November 2008 and February 2010), meetings with partner states' officials at country level, and the designation of regional as well as country focal point organizations to coordinate advocacy activities.<sup>9</sup>

#### *4.1.2 Building advocacy relationships with EALA*

The study also noted how CSOs build relationships with EALA that increase the success of transnational legal activism. For example, Mzalendo Trust was found to engage with EALA in programs and projects that are geared towards raising the awareness of citizens to the 'existence' of the legislative body and 'what it does'.<sup>10</sup> This intervention is based on the fact that there is limited understanding of the EAC integration process as a whole, and the mandates of different organs and institutions, more specifically. As part of the continent-wide network - African Parliaments Monitoring Organizations Network (APMON) - one of the objectives of Mzalendo is to monitor the performance parliaments and, at the point of the interview, was already implementing a monitoring project covering Kenyan representatives to EALA.<sup>11</sup>

Similarly, the East African Tax Justice Network (EATGN) works with both the EAC secretariat and EALA so as to build the capacity of the law-makers 'to infuse the principles of tax justice in all EAC policies and laws'. One of the key concerns of the EATGN is with Illicit Financial Flows (IFFs), which happen when companies are engaged in tax evasion and tax avoidance. The extent of the problem of IFFs was confirmed through the Report of the High Level Panel on IFFs led by Thabo Mbeki, the former president of South Africa.<sup>12</sup> According to the report, Africa as a continent loses more than \$50 to IFFs every year (Mbeki *et al.* 2014).

EATGN's engagements with EALA as elaborated above are important in building a working relationship with EALA and its capacity to take part in transnational legal activism, which supports the construction of participatory regionalism. EATGN is also part of the Africa Parliamentary Network on Illicit Financial Flows and Taxation (APIFFT). Its involvement in a larger continental network is part of the inherent characteristics of transnational legal activism and gives it leverage in the construction of participatory regionalism. Such networks avail opportunities to learn, collaborate and even build the resources needed to successfully carry out regional activism.

Finally, in 2016, EACSOFF initiated advocacy to realize a platform that would bring together CSOs and EALA in conversations on regional integration priorities that touch on its lawmaking mandate. The platform was to be modeled along the lines of the EAC Consultative Dialogue Framework (CDF). Part of the motivation for the initiative was the fact that EALA members often felt marginalized in the CDF processes. However, at the time of writing this article, this process had effectively stalled. EACSOFF also invites EALA members to its Annual Civil Society Summits as a way of bridging the existing gap (EACSOFF 2023; EACSOFF 2024).<sup>13</sup> These actions contribute to transnational activism and the construction of participatory regionalism. Below, we turn to litigation through EACJ.

#### *4.2 Transnational legal activism and regional litigation*

The second limb of transnational legal activism is the engagement of CSOs in litigation at EAC's regional court. In particular, the study established CSOs involvement in advancing EACJ's human rights jurisdiction in the face of reluctance by EAC partner states to extend such jurisdiction as required by the Treaty. Subsequently, CSOs have utilized the 'acquired' human rights jurisdiction to bring several matters to the court. This 'successful' transnational legal activism has boosted the participation of CSOs in human rights litigation to the extent that the court has been referred to as 'a human rights court' (Gathii 2016). Applied in this manner, transnational legal advocacy fits into the conceptual framing of the New Regional Approach, which privileges the participation of CSOs in regional integration.

In overall terms, the question of conferring a human rights jurisdiction on the EACJ has been historically contentious. It is recorded that the East African Court of Appeal (EACA) in the 1970s also lacked a human rights jurisdiction. According to Apiko, this reflected a reluctance of partner states to confer such jurisdiction (Apiko

<sup>9</sup> Interview with the representative of EASSI, 10<sup>th</sup> June, 2024.

<sup>10</sup> Interview with the representative of Mzalendo Trust, 6<sup>th</sup> September, 2024.

<sup>11</sup> Interview with the representative of Mzalendo Trust, 6<sup>th</sup> September, 2024.

<sup>12</sup> Interview with the representative of Mzalendo Trust, 6<sup>th</sup> September, 2024. The report of the panel can be found here: [https://au.int/sites/default/files/documents/40545-doc-IFFs\\_REPORT.pdf](https://au.int/sites/default/files/documents/40545-doc-IFFs_REPORT.pdf)

<sup>13</sup> Interview with the representative of EACSOFF 28<sup>th</sup> August, 2024.

2017, p. 20). Whereas Article 27(2) of the current Treaty provides for extension of the Court's jurisdiction to cover human rights and other aspects, such extension has not happened 24 years since the Court's inauguration (Odhiambo 2015, p. 20).

It is broadly acknowledged that regional integration across the African continent is largely based on economic interests as opposed to normative concerns like human rights, democracy social justice, and good governance. Most Regional Economic Communities (RECs) did not, therefore, make much reference to human rights in their constitutive instruments (KHRC 2023, p. 26). The EAC, in particular is said to favour economic interests and the participation of the private sector as opposed to that of CSOs (O'Reilly & Vaughan 2023). However, viewed from a different perspective, the narrow conceptualization of regionalism in the face of regional governance challenges, creates the requisite impetus for transnational legal activism.

Several cases brought to the EACJ by individuals and organizations helped shape its human rights jurisdiction. These include the James Katabazi and Others v. Secretary General of the EAC; Prof. Anyang' Nyong'o and 10 others v. the Attorney General of the Republic of Kenya and 5 others; Independent Medico-Legal Unit v. Attorney General of Kenya and Plaxeda Rugumba vs. Secretary General of EAC and Attorney General of Rwanda. The impact of these cases on EACJ's human rights jurisdiction has been analyzed by several scholars (for example, Gathii 2016; Apiko 2017; Deichmann 2020; Ambani 2012).

The James Katabazi case set the ball rolling in 2007. Katabazi was among 22 Ugandans charged in the High Court of Uganda with treason and misprison of treason in 2004 without bail. After almost two years, on 16<sup>th</sup> November 2006, they were eventually granted bail. However, upon their release, security personnel surrounded the High Court premises in Kampala and rearrested them. They were subsequently charged again before the General Martial Court established under the Uganda People's Defence (UPDF) Act of 2005 for the purpose of hearing cases brought against members of the armed forces.

The case was escalated to the EACJ when Ugandan authorities ignored a determination by the Constitutional Court of Uganda (following an intervention by the Uganda Law Society), which challenged the charging of the group in a military on the basis of its unconstitutionality. Faced with the challenge of deciding whether or not it had jurisdiction over a matter that touched on human rights, the regional Court noted as follows,

*'While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations'* (EACJ 2007; Apiko 2017, p. 17; KHRC 2023, p. 22).

Further, in the Emmanuel Mwakisha Mjawasi and 748 others v. The Attorney General of the Republic of Kenya, the regional Court made reference to the fundamental and operational principles of the EAC to claim human rights jurisdiction. The basis of the cause was the non-payment to members of staff of the defunct first phase of the East African Community. The former employees complained that the Government of Kenya had neglected to pay their terminal dues owing to the services provided as employees of the EAC in accordance with the 1984 Mediation Agreement. Article 6(d), which is of particular importance to this study, states that the EAC is committed to the principle of,

*'... good governance including adherence to the principles of democracy, the rule of law, account ability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'* (EAC 1999, Article 6(d)).

The operational principles in Article 7(2) somewhat reiterate what is expressed in Article 6(d) but also emphasize the 'maintenance of universally accepted standards of human rights.' All in all, both articles are critical in the promotion of human rights as part and parcel of the EAC regional integration enterprise and, by extension, the development of both transnational legal activism and participatory integration.

In 2015, the East African Community Civil Society Organizations Forum (EACSOF)<sup>14</sup> together with the Pan African Lawyers Union (PALU) filed Reference No. 2 (Apuko 2017, p. 19) against the Attorney General of Burundi, the country's Elections Management Body (EMB) and the Secretary General of the EAC. This followed the decision of the Constitutional Court of the Republic of Burundi, which had allowed the then outgoing President,

<sup>14</sup> Interview with the representative of EACSOF 28<sup>th</sup> August, 2024.

Pierre Nkurunziza, to run for office for the third term on the grounds that it violated the terms of the Arusha Peace and Reconciliation Agreement for Burundi,<sup>15</sup> or the 'Arusha Accord', the constitution of Burundi and, by extension, the Treaty.

According to EACSOF, which is also the 'apex' body for CSOs in the EAC, Article 7(2) of Protocol II of the Arusha Accord strictly restricted Nkurunziza to a term of 5 years renewable once, and explicitly prohibited a third term for the president. Burundi's constitution of 2015 reiterated the need for peace, reconciliation and national unity, which also formed the basis for the Arusha Accord. What's more, Burundi's Parliament had in 2014 out rightly rejected an amendment to the constitution to allow a third term for President Nkurunziza.

The subsequent nomination of the president by the *Conseil National Pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie* (CNDD-FDD)<sup>16</sup> political party to run for a third term prompted a number of senators to file a petition with the constitutional court seeking interpretation of the constitution. Subsequently, the Constitutional Court ruled that the president could run for a third term, thus prompting EACSOF's intervention in the regional court at a time when Burundi was on the verge of a major political rupture with an escalation of human rights violations and banning of CSOs. Irrespective of the outcome ultimately rendered by the EACJ, EACSOF's case further contributed to the development of transnational legal advocacy in East Africa and the potential inherent in the EACJ to develop participatory regionalism.

Apart from the court cases, this study noted CSO actions by CSOs and other non-state actors that aimed to create a working relationship with the Court thus boosting transnational legal activism in the region. For example, the East African Law Society, which brings together bar associations in the EAC partner states, reported being involved in the training of judges and lawyers on the use of the regional court.<sup>17</sup> Similarly, the East African Judges and Magistrates Association was found to support EACJ's mandate by 'urging national courts to refer matters to the EACJ concerning the interpretation of the EAC Treaty' (Apiko 2017, p. 19). These actions aided the development of transnational legal activism and, by extension, the construction of participatory regionalism in East Africa.

Finally, the Prof. Peter Anyang' Nyong'o and 10 others v. The Attorney General of the Republic of Kenya was instrumental in understanding the perils of transnational legal activism in the context of regional integration. It demonstrated the power imbalances between the organs of the EAC and the partner states. The case challenged the nomination of EALA members by the Government of Kenya (Ambani 2012, p. 17) in the immediate aftermath of the country's violent political rupture in 2008. The court's ruling that the Government of Kenya had indeed infringed on critical provisions of the Treaty and its own laws led to the amendment of the Treaty in a way that confirmed the reluctance of partner states to entertain transnational legal activism that challenges their authority.

In the aftermath of the ruling, the Treaty was amended (for the first time since it came into effect in 2001) to restructure the court into two divisions, to review the grounds for removing judges of the court and to provide for the suspension of judges under investigation in their home countries. The amendments had the effect of limiting the court's jurisdiction to that conferred by the Treaty or organs of partner states, and, among others, set a time limit within which a reference may be instituted (Ambani 2012, p. 18). However, these decisions did not have a significant effect on EACJ's 'appropriated' human rights mandate, which has continued to shape transnational legal activism and the construction of participatory regionalism. Below, we summarize the challenges that face CSOs in undertaking transnational legal activism.

## 5. Transnational legal activism: A summary of challenges

This section itemizes the challenges faced in undertaking transnational legal activism based on the foregoing assessment as follows:

- (i) The power asymmetry between different decision-making organs of the EAC, in particular the Summit and Council of Ministers on one hand, and the EALA and EACJ, on the other, as well as that between the EAC and the people of East Africa;

<sup>15</sup> The Accord can be found here: [https://www.brookings.edu/wp-content/uploads/2016/07/Burundi\\_Arusha-Peace-and-Reconciliation-Agreement-for-Burundi.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/Burundi_Arusha-Peace-and-Reconciliation-Agreement-for-Burundi.pdf)

<sup>16</sup> The English translation of the name of the political party is the National Council for the Defence of Democracy - Forces for the Defence of Democracy.

<sup>17</sup> Interview with the representative of the East African Law Society, 26<sup>th</sup> August, 2024.

- (ii) Related to the above is the non-adherence to the rulings of the EACJ and persistent tensions between EALA and the Council of Ministers;
- (iii) The inordinately long time taken to debate, conclude and pass EAC laws, including protocols;
- (iv) The preference and prominence given to economic integration, as opposed to community building, social integration and cohesion, good governance, rule of law, social justice, etc., by the region's political leaders;
- (v) The challenge of working with the Council of Ministers, which only convenes periodically but wields immense decision-making power;
- (vi) The expensive nature of activities related to transnational legal activism and especially the sustenance of advocacy networks;
- (vii) The lack of a framework that enables more elaborate consultations between CSOs and EALA; and
- (viii) The possibility of denial of assent (rejection) by heads of state once laws, protocols, etc., supported by CSOs have been accepted by the Council of Ministers or passed by EALA.

## 6. Conclusion

This study has focused on the role of transnational legal activism in shaping participatory regional integration in the EAC. The participation of CSOs in EAC integration is affirmed both by the EAC treaty and the mechanisms created to enable structured participation, such as the EAC Observer Status framework and the CDF. Transnational legal activism is undertaken by CSOs and their networks in order to realize societal change.

The study has based its assessment on interactions between civil society and the two organs of the EAC responsible for lawmaking (EALA) and legal adjudication (EACJ) - the two interlinked limbs of transnational legal activism. In addition, it analyzed how CSOs have used these two bodies to advance processes that favour a broader agenda in the regional integration process, such as human rights, good governance and gender equality.

Furthermore, the study has explained how CSOs engagement in promoting these agendas has led to tensions between the different decision-making organs of the EAC. These tensions suggest that, even though the EAC describes itself as people-centered and private-sector driven, it follows an intergovernmental approach which favors the role of state elites in the affairs of the Community, as opposed to the *New Regionalism Approach*, which constructs regional integration as an inclusive process that involves both state and non-state actors. This theoretical paradox is an important part of the discourse on regional integration, not only in East Africa, but in Africa as a whole. Finally, the study summarizes the challenges involved in undertaking transnational activism with the aim of eliciting debate on possible solutions.

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