

AN EXAMINATION OF THE APPLICABILITY OF THE EAC'S

PRINCIPLE OF MUTUAL RECOGNITION IN KENYA

BY

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MASTERS OF LAWS (LLM)

DECLARATION

Student's Declaration

I declare that this thesis is my original work and has not been presented before for a degree in this or any other university.

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Date

Supervisor's Declaration

This thesis has been submitted for examination with my approval as the university supervisor.

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LIST OF ABBREVIATIONS

AAK	-Architectural Association of Kenya
AAT	-Architects Association of Tanzania
ABARCH	-Association Burudaise des Architects
ANZCERTA	- Australia New Zealand Closer Economic Relations Trade Agreement
APEC	-Asia-Pacific Economic Cooperation
AQC-AQF	-Australian Qualification Framework
AQSEB	-Architects and Quantity surveyors Education Board
BORAQS	-Board of Registration of Architects and Quantity Surveyors
CALA	-Canadian Architectural Licensing Authorities
CLE	-Council of Legal Education
CMP	-Common Market Protocol
CPA	-Certified Public Accountant
CUP	-Customs Union Protocol
EAC	-East African Community
EACJ	-East African Court of Justice
EALA	-East African Legislative Assembly

EBK	-Engineers Board of Kenya
EC	-European Community
EC-	-European Commission
ECJ-	-European Court of Justice
EEC-	-European Economic Community
EPA	-Economic Partnership Agreement
ERB	-Engineers Registration Board
EU	-European Union
GATS	-General Agreements on Trade in Services
ICPAK	-Institute of Certified Public Accountants of Kenya
ICPAR	- Institute of Certified Public Accountants of Rwanda
ICPAU	- Institute of Certified Public Accountants of Uganda
IEK	-Institution of Engineers of Kenya
KASNEB	-Kenya Accountants and Secretaries National Examinations Board
LSK	-Law Society of Kenya
LEAT	-Legal Education Appeals Tribunal
MRA	-Mutual Recognition Agreement
MFN	-Most Favoured Nation

NAFTA	-North American Free Trade Area
NBAA	-National Board of Accountants and Auditors
NCARB	-National Council of Architectural Registration Board
OPC	- Ordre des Professionel Comptables
PAFA	-Pan Africa Federation of Accountants
REC	-Regional Economic Community
SCLJA	-Sectoral Council on Legal and Judicial Affairs
TTMRA	-Tran-Tasman Mutual Recognition Agreement
UK	-United Kingdom
UNESCO	-United Nations Educational, Scientific and Cultural Organization
UN	-United Nation
USA	-United States of America
VCLT	-Vienna Convention on the Law of Treaties
WTO	-World Trade Organization

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LIST OF CONSTITUTIONS AND CONSTITUTIONAL INSTRUMENTS

Constitution of Kenya, 2010.

LIST OF TRANSNATIONAL LEGAL INSTRUMENTS

The Treaty for the Establishment of the East African Community.

Protocol on the Establishment of the East African Community Common Market.

Vienna Convention on the Law of Treaties.

General Agreement on Trade in Services.

The Treaty of Rome, 1957.

The East African Community Common Market (Schedule of Commitments on the Progressive Liberalization of Service) Annex V.

The East African Community Common Market Protocol (Mutual Recognition of Academic and Professional Qualifications) 2011, Annex VII.

LIST OF STATUTES

Accounting Act No. 15 of 2008

Advocates Act Cap 16 Laws of Kenya.

Architects and Quantity Surveyors Act Cap 525 Laws of Kenya

Engineers Act No. 43 Of 2011.

Law Society of Kenya Act No. 21 of 2012

Treaty Making and Ratification Act No. 45 of 2012

LIST OF CASES

1. Nairobi High Court Petition No. 1174 of 2007; (2013)eKLR.

Kenya Small Scale Farmers Forum and 6 others vs Republic of Kenya and two Others.

2. Case 26/76 Van Gend en Loos V Nederlandse Administratie der Belastingern (1963)

ECR1.

ABSTRACT

The Protocol on the Establishment of the East African Community Common Market provides for mutual recognition of professional qualifications within the East African Community. The Protocol also provides for the conclusion of mutual recognition agreements by professional bodies in the respective Partner States to facilitate the free movement of professional service providers. The Republic of Kenya, which is a Partner State in the East African Community, has undertaken commitments to liberalize professional services and entered into several Mutual Recognition Agreements. Despite concluding the MRAs, not much has been achieved towards the recognition of professional qualifications. This is largely the result of the legal uncertainty surrounding the applicability of the agreements in Kenya. This thesis explores three closely related questions concerning the applicability of MRAs. First, do professional bodies in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC? Second, what is the legal status of the concluded agreements? Third, are the concluded agreements binding on the Government of Kenya?

The main aim of this research is to determine the applicability of MRAs in Kenya. It seeks to determine the process of translation of MRAs into the country's municipal laws. In addition, the study seeks to provide solutions to the legal questions.

CHAPTER ONE

INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE

1.0. Introduction

On 1st July 2010 the East African Community Common Market became operational. The actual negotiations on the establishment of the Common Market started in April 2008 and ended in November 2009 when the East African Community (EAC) Heads of State signed the Protocol on the Establishment of the EAC Common Market (CMP). The ratification process was completed by each Partner State and in July 2010, the Common Market came into force.¹

The foundation of the Common Market is derived from Articles 76 and 104 of the Treaty for the Establishment of the EAC (the Treaty). Article 76(1) of the Treaty provides as follows;-

- 1. There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital and the right of establishment.²*

Article 104 (1) of the Treaty provides for the scope of co-operation by the Partner States. It provides as follows;-

- 1. The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.³*

¹ Kennedy Gastorn and Wanyama Masinde, (2017) “The EAC Common Market” Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Amin Cuyvers (eds) in *The East African Community Law Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, 285.

² Article 76(1) of The Treaty on the Establishment of the East African Community.

³ Article 104(1) of The EAC Treaty.

A Common Market is essentially an arrangement whereby member or partner countries of a regional economic community (REC) operate as a single market for goods, services, capital and labour having common revenue and trade laws.⁴ The overarching objective of the EAC Common Market is to widen and deepen cooperation among the Partner States in economic and social fields for their benefit.⁵ The EAC Common Market focuses mainly on four freedoms viz; free movement of goods, labour, services and capital. It therefore involves the integration of four markets viz: markets for goods, labour, services and capital.⁶ The CMP defines “labour” to include ‘*a worker and a self-employed person.*’⁷ On the other hand, “services” is defined as including;

(a) services in any sector except services supplied in the exercise of governmental authority which are not provided on a commercial basis or in competition with one or more service suppliers;

*(b) services normally provided for remuneration in so far as they are not governed by the provisions relating to free movement of goods, capital and persons.*⁸

Free movement of labour relates to the unhindered movement of workers within the Community. It entails the principle of non-discrimination in labour laws and policies on grounds of nationality. On the other hand, free movement of services refers to the movement of services supplied by nationals of the Partner States within the Community.⁹ A key characteristic of the services sector is the role played by licence and qualification requirements which can be a serious impediment to trade. This is especially true for professional services that usually require that certain qualifications be met. Even where services sectors are liberalized, the free flow of services can easily be nullified by

⁴ Gastorn and Masinde, *ibid* (n1) 289.

⁵ Article 4(1) of the Protocol on The Establishment of the East African Community Common Market Protocol.

⁶ Gastorn and Masinde, *ibid* (n1)

⁷ Article 1 of the CMP.

⁸ Article 16 (7) of the CMP.

⁹ Gastorn and Masinde, *id*, 290

qualification requirements because obtaining a new qualification that is recognized by the host country may be extremely burdensome.¹⁰

One of the major challenges associated with the movement of professionals across borders is the lack of recognition of foreign-obtained academic and professional qualifications. Unilateral recognition of professional qualifications conducted on an ad-hoc basis has long been the norm for professionals wishing to practice across borders. This involves comparing the qualifications acquired by a professional in a home state with those required in a host state where the professional requests recognition and the professional bodies assess some level of equivalence according to unilaterally determined criteria.¹¹

In order to overcome the problems associated with the difference in qualifications across countries, mutual recognition agreements (MRAs) are becoming increasingly important. A MRA is an effective complement to service liberalization agreements. Given the difference in qualification requirements across countries, the question is how to verify the common elements of qualifications so that service suppliers only have to fill any “gap” in qualification requirements.¹² There are now a number of initiatives to develop MRAs to address issues of professional recognition. Free trade agreements have contributed to this development by encouraging the development of MRAs between parties to such agreements to facilitate trade in professional service. In general, regional trade agreements include provisions for recognition and delegate the negotiation of such agreements to the relevant

¹⁰ Kalypso Nicolaïdis, (2004) “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals” at [http://kalypsonicolaidis.com/wp-content/uploads/2017/oi/mr Human-faces pdf](http://kalypsonicolaidis.com/wp-content/uploads/2017/oi/mr%20Human-faces.pdf) (accessed on 10th January, 2017)

¹¹ id

¹²Shintaro Hamanaka and Sufian Jusoh (2016), “The Emerging ASEAN Approach to Mutual Recognition: A Comparison with Europe, Trans-Tasman and North America,” available at <http://www.ide.go.jp/library/English/Publish/Download/Op/pdf/618.pdf>. (accessed on 10th January, 2017).

bodies.¹³ At the multilateral level, the General Agreement on Trade in Services (GATS) permits members of the World Trade Organization (WTO) to enter into recognition agreements. In the GATS, recognition agreements may be concluded between states or agencies acting under delegated authority.¹⁴

The objective of establishing the EAC Common Market is to realize accelerated economic growth and development through the attainment of the five freedoms viz; the free movement of goods, persons, labour, services and capital.¹⁵ With a view to realizing the twin freedoms of labour and services, the CMP requires the Partner States to harmonize and mutually recognize academic and professional qualifications.¹⁶ Recognition of academic and professional qualifications is currently being done through the conclusion of MRAs where the Partner States agree to accept and recognize each other's professional requirements, certificates and licences.¹⁷ The requirements of the CMP notwithstanding, the conclusion of MRAs have not resulted in the free movement of professional service suppliers in Kenya and the EAC.

1.1. Background to the Problem

Globally, recognition of professional qualifications is accorded through a wide range of arrangements depending on the forum.¹⁸ Trade agreements provide important legal

¹³ OECD,(2004) "Quality and Recognition in Higher Education: the cross-border challenge" available at http://www.oecd-library.org/educatopm/qualitiy-and-recognition-in-highereducation_9787264015104-en.(accessed on 10th January 2017)

¹⁴ id

¹⁵ Caroline Kago and Wanyama Masinde, (2017) "Free Movement of Workers in the EAC" id

¹⁶ Article 11(1)(a) of the CMP (n5).

¹⁷ Article 11(1)(a) of the CMP.

¹⁸ Julia Nielson, (2004) "Trade Agreements and Recognition" available at <http://www.oecd.org/edu/skills-beyond-school/33729996pdf> (accessed on 12th January, 2017)

frameworks for the international recognition of qualifications.¹⁹ The trade agreements maybe concluded bilaterally, regionally or multi-laterally. Under the multi-lateral trading arrangement, MRAs are government to government agreements. However, not all MRAs are concluded between governments. Some are concluded between agencies acting under delegated authority laid down in legislation, while others are concluded between professional associations which may be wholly independent of government or through a combination of these actors.²⁰ The agreements may be binding on states or only part of the states depending on the legal system and the parties to the agreement.²¹

The CMP provides for the principle of mutual recognition²² and MRA²³ as the instrument for liberalization of professional services. In the CMP, mutual recognition is defined as *‘the formal acknowledgement and acceptance of an award or professional qualification from a Partner State by a competent authority of another Partner State;’*²⁴ while MRA is understood to mean *‘any agreement entered into by competent authorities to recognize professional qualifications within the Partner State.’*²⁵

Competent authority is defined as *‘a ministry, department, office or agency designated by a Partner State to carry out the functions required by (these) regulations.’*²⁶

Regulation 1 of Annex VII of the Protocol provides as follows;-

¹⁹ Carlo Maria Cantore,(2009) “How Does it Feel to Be on Your Own?” “Mutual Recognition and Non-discrimination in The GATS” available at https://www.stals.it/files/stals_Cantore.pdf (accessed on the 12th January, 2017).

²⁰ Nielson, id (n18).

²¹ id

²² Article 11(1)(a), of the CMP.

²³ The East African Community Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011, Annex VII.

²⁴ Regulation 3of Annex VII.

²⁵ Regulation 3of Annex VII.

²⁶ Regulation 3of Annex VII.

*1. For purposes of this Annex, Partner States shall permit the competent authorities to enter into Mutual Recognition Agreements to facilitate free movement of professionals in accordance with commitments made under the Protocol.*²⁷

From the foregoing, it is evident that the CMP grants a competent authority in a Partner State the power to negotiate, enter into and conclude a MRA. This therefore requires that designated competent authorities responsible for regulating professional services liberalized by the Partner States be identified and required to negotiate MRAs.²⁸ They include authorities responsible for regulating accounting services, architectural services, engineering services, integrated engineering services, medical and dental services, nurses and midwives, veterinary services, paramedics and physiotherapy services.²⁹ So far, competent authorities in Kenya have concluded MRAs in accounting, architectural, engineering and legal services with their counterparts in the region.³⁰

In Kenya, the accounting, architectural, engineering and legal professions fall under the category of “accredited”³¹ or “regulated” professions. They are regulated by law. If a profession is regulated, no one can practice it without a licence. Regulated professions have a number of characteristics in common viz; they are all based on specialized knowledge and skill obtained from a higher institution of learning; the right to practice the profession depends on competency testing; and, lastly they all have a general public interest and ethical component.³² Competency testing is normally administered by professional bodies.³³ In

²⁷ Regulation 1 of Annex VII.

²⁸ J.B. Cronje’ (2005), “Mutual Recognition of Professional Qualifications: The East African Community”, at <https://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.html>.(accessed on 12th January, 2017)

²⁹ *id.*

³⁰ *id.*

³¹ Accreditation here refers to ‘*the formal approval of a higher education institution/provider or programme that has been found by a recognized accreditation body to meet pre-determined and agreed standards.*’

³² Simonetta Zarilli, (2005) “Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS” available at http://unctad.or/en/does/ditchned2005_en.pdf. (accessed on 12th January, 2017)

³³ *id.*

Kenya, a person who holds a qualification that is not recognized locally must have the qualification recognized by the respective professional body. In the case where a professional body wishes to generally recognize the qualification obtained in another jurisdiction, the laws permit the professional body to enter into a MRA with its counterpart.³⁴

In the EAC, the Treaty is the primary source of Community law. Besides the Treaty, the other sources of law are the protocols, legislations enacted by the East African Legislative Assembly (EALA), rules and orders of the Summit, regulations, directives, decisions, recommendations and opinions of the Council of Ministers.³⁵ Protocols are agreements between the Partner States which supplement or implement the Treaty. Protocols form an integral part of the Treaty.³⁶ Regulations are issued by the Council to implement the protocols and are supposed to bind the Partner States, the organs and institutions of the Community and those to whom they may be addressed.³⁷

The CMP provides for mutual recognition of professional qualifications. Annex VII, which is a regulation issued by the Council to implement the CMP, obligates Partner States to designate competent authorities and authorize them to negotiate and enter into MRAs to facilitate the movement of professionals in the Community in accordance with market access commitments made under the CMP.³⁸ The Treaty outlines the areas in which the Partner States agree to cooperate. One such area is in the movement of professionals where regulatory convergence is to be achieved through MRAs. The mandate to negotiate and enter into these agreements is conferred on competent authorities.³⁹ This is in line with the

³⁴ Section 8 (1) of The Legal Education Act No. 27 of 2012.

³⁵ Edward Ssempebwa, (2015) *East African Community Law*, Lexis Nexis 96.

³⁶ *id* at 35-36.

³⁷ *id* at 36-37.

³⁸ Cronje, *supra* (n28).

³⁹ *id*.

Treaty which anticipates participation of actors beyond the Community and the States. Pursuant to the requirements of the CMP, Kenya designated and authorized several competent authorities to negotiate and enter into MRAs.⁴⁰ In Kenya, regulation of professions is a preserve of professional bodies. These bodies set entry requirements and develop standards to which qualifications and credentials must comply.

At the 11th meeting of the EAC's Sectoral Council on Legal and Judicial Affairs (SCLJA) to consider and provide legal input on Annex VII of the CMP, the SCLJA questioned and expressed doubts on the applicability of MRAs concluded by competent authorities in the Partner States. In particular, they questioned the legal status of the agreements and the ability of professional bodies to conclude agreements binding on the Partner States. The SCLJA also doubted whether Partner State's municipal laws provided for the arrangements envisaged in the MRAs.⁴¹ The SCLJA did not suggest answers to the concerns raised; neither did they provide any solution. The issues raised have created legal uncertainty on the legal status of the concluded MRAs and the applicability of Article 11(1) (a) of the CMP that embodies the principle of mutual recognition in Kenya. The purpose of Annex VII of the CMP is to create a mechanism for the implementation of Article 11(1) (a) of the CMP by the Partner States and ensure that the process of implementation of the Article is predictable and consistent with the CMP. In light of the above issues, this research examines the legal status and applicability of the principle of mutual recognition in Kenya. In particular, it will seek to answer the questions and concerns raised by the SCLJA viz;

- (a) what is the legal status of the MRAs that would be concluded by the various professional bodies in the Community?
- (b) the applicability of the MRAs concluded by the professional bodies.

⁴⁰ The Republic of Kenya submitted a list of its competent authorities to the EAC Secretariat.

⁴¹ Report of the 11th Meeting of the Sectoral Council on Legal and Judicial Affairs.

- (c) are the MRAs concluded by the professional bodies binding on the Partner States? and finally,
- (d) do the Partner States municipal laws provide for the arrangements envisaged in the MRAs?

1.2 Problem Statement

This study examines the legality and applicability of MRAs to Kenya which is an EAC Partner State.

1.3 Justification of the Study

The CMP adopts the principle of mutual recognition of professional qualifications⁴² and MRAs as the means for recognition of those qualifications.⁴³ The CMP also assigns the responsibility for concluding the agreements on competent authorities.⁴⁴ However, concerns have been raised and doubts cast on the legal status of the concluded MRAs, the competent authorities to negotiate and enter into the agreements, and the applicability of the concluded agreements.⁴⁵ The concerns and doubts raised have created legal uncertainty on the applicability of Article 11(1) (a) of the Protocol. The uncertainty has negatively impacted the implementation of Article 11(1) (a) in Kenya.

Even though the Republic of Kenya as a Partner State in the EAC has undertaken market access commitments in various professions, it has not led to the recognition of professional qualifications obtained in Kenya in the other Partner States. Kenya is yet to fulfill its obligation in the CMP of recognizing qualifications from the other Partner States. This is

⁴² Article 11(1)(a),supra (n5).

⁴³ Annex VII, supra (n23).

⁴⁴ Regulation 7(1) of Annex VII.

⁴⁵ Report of the SCLJA, ibid (n41).

partly the result of the uncertainty surrounding Article 11(1) (a) of the Protocol.⁴⁶ Given the importance of regional migration and the opportunities it portends to Kenya, it is imperative that the issues raised by the SCLJA be addressed. Kenya is committed to systemizing labour migration for the benefit of its citizens and the EAC as a whole.⁴⁷ This necessitates the examination of the operationalization of Article 11(1)(a) of the EAC CMP as applicable to Kenya. To date, no research has been undertaken on the legality and applicability of Article 11(1) (a) of the CMP or Annex VII of the said CMP. Consequently, this study examines the application of Article 11(1) (a) of the CMP to Kenya and hopefully addresses the legal uncertainty that has enveloped the implementation of Article 11(1) (a) of the CMP.

1.4 Research Objectives

The overall objective of this study is the examination of the applicability of MRAs in Kenya.

The specific objectives of the study are;

- (i) To examine whether professional bodies in Kenya have the legal competence to conclude MRAs.
- (ii) To determine the legal status of the concluded MRAs.
- (iii) To determine whether the concluded MRAs are binding on the Government of Kenya.

1.5 Research Questions

⁴⁶ Regional Integration Policy for Kenya, 2015 available at http://meac.go.ke/wp-content/uploads/2017/03/regional_integration_policy-rev_15_04pdf. (accessed on 12th January, 2017).

⁴⁷ John O Oucho, Linda A Oucho and Anthony O Ong'ayo, (2013) "The Biggest Fish in the Sea? Dynamic Kenyan Labour Migration in the East African Community," available at https://www.academia.edu/3681714/The_Biggest_Fish_in_the_Sea_Dynamic_Kenyan_Labour_Migration_in_the_East_African_Community. (accessed on 12th January, 2017).

This study seeks to answer the following questions;-

- (1) Do professional bodies in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC?
- (2) What is the legal status of the concluded MRAs?
- (3) Are the MRAs concluded by professional bodies binding on the Government of Kenya?

1.6 Hypothesis

This study tests the following hypothesis;-

- (1) Professional bodies in Kenya have the legal mandate to negotiate, enter into and conclude MRAs.
- (2) The concluded MRAs are integral parts of the EAC Treaty having the force of law in Kenya and are therefore international agreements.
- (3) As integral parts of the EAC Treaty, MRAs are binding on the Government of Kenya.

1.7 Conceptual and Theoretical Framework

This study will adopt and consider the concept of mutual recognition and the theories of sovereignty and subsidiarity in examining the legality and applicability of MRAs in Kenya.

1.7.1. Conceptual Framework

This study adopts the concept of mutual recognition as espoused by Kalypso Nicolaidis and Gregory Shaffer.⁴⁸ It establishes the general principle that if a service can be supplied lawfully in one jurisdiction, then the same service can be supplied freely in any other jurisdiction without having to comply with the regulations of the other jurisdiction.⁴⁹

⁴⁸ Kalypso Nicolaidis (2004) "Globalization with Human Face; Managed Mutual Recognition and the Free Movement of Profession" op.cit.

⁴⁹ *ibid.*

Governments adopt the principle as a contractual norm to become reciprocally obligated to transfer regulatory authority from one jurisdiction e.g. (host jurisdiction where a transaction takes place) to another jurisdiction e.g. (home jurisdiction from which a person or a service originates.)⁵⁰ The concept postulates that recognition agreements can be between sovereign states or sub-state agencies acting under delegated authority, or between professional associations or be concluded by a combination of these actors. Mutual recognition regimes therefore involve both horizontal and vertical relations among global, transnational and national institutions.

This study advances the argument that professional bodies in Kenya have the legal competence to conclude MRAs in the EAC. This is in light of the stipulations in the CMP that mandate competent authorities in Kenya i.e. professional bodies to negotiate, enter into and concluded MRAs. Further, the Treaty emphasizes the multi-level engagement of stakeholders in the process of integration and makes special mention of professional bodies as a key stakeholder in the integration process.

1.7.2. Sovereignty

Today's world politics recognizes that the most important territorially organized body politic in global political culture is the state.⁵¹ The basis of the international legal order is an international community made up of sovereign states. Contemporary international law pre-supposes this structure of co-equal sovereign states. The international community's constitutive set up is dominated by it.⁵² The conventional meaning of a state that is

⁵⁰ Kalypso Nicolaidis and Shaffer (2005) "Transnational Mutual Recognition Regimes: government without Global Government" op.cit

⁵¹ Winton P Nagan and Aitza M Haddad, (2011-2012) "Sovereignty in Theory and Practice" at https://works.bepress.com/winston_nagan/7/download (accessed on 15th April, 2017).

⁵² Christopher Schreuer, (1993) "The Waning of the Sovereign State: Towards a New Paradigm for International-Law?" at <https://www.ejil.org/pdfs/4/1/1213> pdf (accessed on 15th April, 2017).

sovereign is that it is a territorially organized body politic which has indications of a person or institution vested with supreme control and authority of that entity.⁵³ The classical definition of sovereignty centers on the state as a legal entity. In this respect, the state is a legal person with all the rights and obligations under international law. J. Crawford notes that sovereignty means *'the totality of international rights and duties recognized by international law.'*⁵⁴

The most significant diplomatic and juridical event for the idea of sovereignty emerged from the Peace of Westphalia of 1648.⁵⁵ The Peace of Westphalia is generally understood as the critical moment in the development of the modern international system composed of sovereign states each with exclusive authority within its geographical boundaries.⁵⁶

The sovereign state model is a system of political authority based on territory, mutual recognition, autonomy and control. Territoriality means that political authority is exercised over a defined geographic space rather than for instance, over people. Autonomy means that no external actor enjoys authority within the borders of the state. Mutual recognition means that juridical independent territorial entities recognize each other as being competent to enter into contractual agreements, typically treaties. Control means that there is an expectation not only that sovereign states have the authority to act but also, they can effectively regulate movements across their borders and within them.⁵⁷ The basic rule of mutual recognition sometimes referred to as international legal sovereignty, is that

⁵³ Nagan and Haddad, id.

⁵⁴ J Crawford, (1979) *The Creation of States in International Law*, Oxford Clarendon Press 26.

⁵⁵ Nagan and Haddad, id.

⁵⁶ id.

⁵⁷ Stephen D Krasner, (2001) "Rethinking the Sovereign State Model," available at <http://vanity.dss.ocdassis.edu/~maoz/> Krasner 2001.pdfp.27,17-42.(accessed on 15th April, 2017).

recognition is accorded to juridical independent territorial entities which are capable of entering into voluntary contractual agreements.⁵⁸

Classical treaty law is typical of the horizontal structure of international law and its focus on the interaction of sovereign and equal participants.⁵⁹ As understood at Westphalia, the international legal order is a system of contractual obligations among independent states.⁶⁰ The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*). Classical treaty law view treaties as express agreements and a form of substitute legislation undertaken by states. They in a superficial sense, bear a close resemblance to contracts in that the parties to the treaty create binding obligations for themselves.⁶¹ The necessity of being a party to a treaty for the purpose of assuming obligations and rights under a treaty is governed by the theory of sovereignty. International law believes that nothing can be done without or against the will of sovereign states. International law is therefore a meeting point of the necessity to take international obligations. Sovereignty of the state is thus one of the central points of international law.⁶²

The theory of sovereignty with an international community made up of sovereign states was influenced by the works of Jean Bodin, Thomas Hobbes, John Austin, Hugo Grotius, Johann Jakub Moser and George Friedrich Von Martens. The central idea of this theory is that international law depends on the interaction of states in the form of treaties.⁶³ That is so because the basic rule of international legal sovereignty is that recognition is accorded to

⁵⁸ id(n48)

⁵⁹ Schreuer, id(n52).

⁶⁰ id.

⁶¹ M N Shaw, (2008) *International Law* Cambridge University Press (6th ed) 93.

⁶² Yubaraj Sangroula, "International Treaties: Features and Importance from International Law Perspective," available at <http://ssm.com/abstract=2359978> (accessed on 20th May, 2017).

⁶³ Schreuer, *ibid*(n52).

juridical independent territorial entities which are capable of entering into voluntary contractual agreements.⁶⁴ Bodin's work is credited with giving the concept of sovereignty coherence, content and currency. Bodin's theory explains how public order tasks fell to local elites who controlled territory and population and how the local prince was seen as representing the idea of *majestas*.⁶⁵ Hobbes on the other hand, provided a clearer and more precise concept of sovereignty than Bodin in terms of effective power or control.⁶⁶ In his view, the fundamental obligation of the sovereign is the obligation to protect the citizen. According to Hobbes, it is essential for sovereignty to have certain rights that cannot be tested. These rights confer powers that must be reliably and effectively used in governance.⁶⁷

Austin developed his imperative theory of law whose central idea was that law was the command of a sovereign.⁶⁸ According to Austin, sovereign power is essential to every political society. Austin explains that a sovereign is not necessarily a single person; in the modern western world he is rarely so, but he must have so much of the attributes of a single person as to be a determinate.⁶⁹ To Austin, state is a legal order in which there is a supreme authority which is the source of all powers.⁷⁰ According to Austin, sovereignty is concerned with man, and every man, and every state must have a human superior who can issue commands and create laws.⁷¹ Further, Austin postulated that sovereign power is indivisible. In his view, division of sovereignty leads to its destruction. It cannot be divided. Lastly,

⁶⁴ Krasner, *ibid*(n57)

⁶⁵ Nagan and Haddad, *supra* (n51).

⁶⁶ *id.*

⁶⁷ *id.*

⁶⁸ *id.*

⁶⁹ Standard Encyclopedia of Philosophy see. <https://plato.stanford.edu/entries/austin-john>. (accessed on 20th May, 2017).

⁷⁰ *id.*

⁷¹ *id.*

Austin postulated that the command of sovereignty is superior to all individuals and associations. The sovereign is not bound to obey anyone's order. His will is supreme.⁷²

Austin's theory has been the subject of criticism. The first criticism regards Austin's idea of sovereignty residing in a determinate superior. Even sovereign's acts are shaped by so many other influences such as morals, values and customs of the society. Secondly, Austin's postulation that the sovereign is possessed of unlimited powers is possible only in theory, not in practice. Thirdly, Austin has been criticized for stating that the sovereign is indivisible. This has been disproved by the federal system of government. It is a characteristic of federal states that power must be divided between the federal government and the units.⁷³

Grotius is justly regarded as the father of modern international law.⁷⁴ Grotius' integration of the independence and autonomy of the sovereign state and the challenges of developing orderly relations between states in periods of war and peace, show how a great deal of international law effectively evolved with a working through of the imperatives of sovereign power and authority and the constraints suggested by reason and expressed in the form of international law.⁷⁵ Grotius understood that the international society of burgeoning sovereign states had to find and abide by certain rules of conduct in war and peace, formalizing diplomatic relations and mutual respect for sovereignty.⁷⁶ Since modern international society is still dominated by the legal and political supremacy of the nation-state, Grotius' treatise is still an essential foundation for international law.⁷⁷ International

⁷² *id.*

⁷³ *id.*

⁷⁴ Nagan and Haddad, *supra* (n51).

⁷⁵ *id.*

⁷⁶ *id.*

⁷⁷ *id.*

law is still essentially based on state practice as recorded in custom, treaties, and other international agreements.⁷⁸

Moser and von Martens introduced the concept of agreements made by sovereigns as a source of international law.⁷⁹ Moser developed the idea of the European law of nations, but did not conceive it as an exclusive system. He denied European nations any right to infringe⁸⁰ on the sovereignty of other countries in a manner inconsistent with the law of nature. The concept of public law of Europe referred mainly to treaty practice among European states. The idea of European international law as a system separate from or specific to general international law was advanced by von Martens. Martens considered that states were guided in their external relations by natural law which formed their external public law and which in its turn, was part of the law of nations. However, natural law did not suffice to govern relations between nations.⁸¹

Positive law of nations mitigated the rigors of natural law. This positive law of nations rested on conventions, whether express or tacit, or through usages.⁸² In the international context, sovereigns overwhelmingly communicated with each other in terms of agreements. In their view, what was important was what sovereigns did and how they acted. In this regard, agreements represent the consent of the sovereign to be bound; therefore, such consent is reconcilable with the sovereign powers of the state.⁸³

⁷⁸ See <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-trancrips-andmops/grotius-hugo-1583-1645>. (accessed on 21st May, 2017).

⁷⁹ Nagan and Haddad, *ibid*.

⁸⁰ www.encyclopedia.com, *ibid*.

⁸¹ *ibid*.

⁸² European Journal of International Law at <http://academic.oup.com/ejil/article/17/2/315/275256>. (accessed on 21st May, 2017)

⁸³ *ibid*.

The Republic of Kenya, which is a sovereign state, is a signatory to the EAC Treaty. The EAC is an inter-governmental organization established by treaty.⁸⁴ Since the EAC is an organization established by sovereign states through a treaty, the law applicable to it and the Partner States is international law. Membership to the EAC is reserved only to the Contracting Parties.⁸⁵ The EAC Treaty defines “treaty” as ‘... *this Treaty establishing the East African Community and any annexes and protocols thereto*’⁸⁶

This study acknowledges the theory of sovereignty given that the EAC Treaty is a government to government agreement. As already noted, sovereignty of the state is one of the central points of international law. Nothing can be done without or against the will of sovereign states. According to this theory, it is only juridical independent territorial entities which are capable of entering into voluntary contractual agreements.⁸⁷ The theory will provide the basis for the contextual analysis of the process of negotiation, entering and conclusion of MRAs and unravel the question whether competent authorities in Kenya have the capacity to conclude agreements.

However, the traditional image of an international community composed of sovereign states has not only displayed practical shortcomings but has also shown weaknesses as a theoretical model. International law has always accepted certain actors in addition to states e.g. the Holy See, International Organizations, the International Committee of the Red Cross, Amnesty International, corporations and individuals.⁸⁸ Likewise, the EAC Treaty

⁸⁴ Wilbert T.K Kaahwa, (2017) “The Institutional Framework of the EAC,” in *The East African Community Law, Institutional Substantive and Comparative EU Aspects*, op.cit

⁸⁵ Article 2, EAC Treaty, supra (n2).

⁸⁶ Article 1, ibid.

⁸⁷ Krasner, supra (n57)

⁸⁸ Schreuer, supra (n52).

recognizes business organizations and professional bodies as partners in its cooperation programs and activities.⁸⁹

1.7.3. Subsidiarity

According to Tomer Broude, ‘*subsidiarity generally is the normative concept whereby rules and policies are better deliberated, devised and determined at lower rather than higher levels of authority and interest unless convincing reasons exist to prefer otherwise.*’⁹⁰ This principle regulates authority within a political order, directing that powers or tasks should rest with the lower level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them. The principle contains the proposition that action to accomplish an objective should be taken at the lowest level of government capable of effectively addressing the problem.⁹¹

The principle embraces the concept of multilevel governance in which functions and authority traditionally assumed by the nation-state are diffused and fragmented among a wide range of actors, both public and private and at many different levels, be they local, regional, national, supranational and even global.⁹² States are delegating or relinquishing some of their functions to other actors on the sub-state as well as on the inter-state level.⁹³ In this regard, responsibility for policy design and implementation is distributed between

⁸⁹ Article 129 (1) EAC Treaty, supra (n2).

⁹⁰ Tomer Broude , (2015) “Selective Subsidiarity and Dialectic Defence in WTO” available at [https://papers.SSM.COM/SO13/Delivery.cfm/SSRN DI2729753](https://papers.ssrn.com/SO13/Delivery.cfm/SSRN_D12729753) code (accessed on 21st May, 2017).

⁹¹ Werner Vandernbruaene (2017) The Legal Enforcement of the Principle of Subsidiarity at <https://repository.uantwerpen.be/link/irua/119393>. (accessed on 21st May, 2017).

⁹² *ibid.*

⁹³ Schreuer, supra (n52).

different levels of government and special purpose institutions⁹⁴ whereby rules and policies are better deliberated, devised and determined at lower levels of authority and interest.⁹⁵

States are typically the parties to MRAs and state representatives typically play the leading role in the negotiation and implementation of MRAs. Yet, negotiation and implementation of MRAs also highlight the disaggregated nature of the state in the modern era.⁹⁶ Recognition of professional qualifications is also accorded through agreements between agencies acting under delegated authority laid down in legislation and between professional associations which may be wholly independent of government or a combination of these actors.⁹⁷

There are several versions of subsidiarity that have very different implications for the allocation of authority. The different theories of subsidiarity each have different implications both for authority above the state and for the allocation of authority about who should apply the principle.⁹⁸ Johannes Althusius, who is usually identified as the father of federalism, developed an embryonic theory of subsidiarity. Althusius was concerned with the division of powers within the sovereign state. Althusius main argument was that no higher authority can legitimately claim responsibility for something that a lower authority can do.⁹⁹ The second conception of subsidiarity holds that powers and burdens of public goods should be placed with the populations that benefit from them. This theory not only was concerned with competence allocation, but also aspired to provide standards for sub-

⁹⁴ OECD, Quality and Recognition in Higher Education, *supra* (n13).

⁹⁵ Broude, *id.*

⁹⁶ Kalypso Nicolaidis and Gregory Shaffer, (2005) “Transnational Mutual Recognition Regimes: Governance without Global Government” available at <http://law.duke.edu/journals/lcp> (accessed on 23rd May, 2017).

⁹⁷ Nielson, *supra* (n18).

⁹⁸ Adreas Follesdal, (2011) “The Principle of Subsidiarity as a Constitutional Principle in International Law: the case of the EU and the European Convention on Human Rights” available at <https://ecpr.eu/Filestone/PaperProposal/bbd954cc-d0d8-49f0-9800-8e>. (accessed on 23rd May, 2017).

⁹⁹ *id.*

unit identification. Finally, the Catholic Church developed a theory of subsidiarity which was described as Catholic Personalism. This version of the theory is founded on the premise that hierarchies of associations allow persons to develop skills and talents and assist those in need. Arising from this, the state must serve the common interest and intervene to further an individual's autonomy. On this account, subsidiarity should regulate both the allocation of legal authority and its exercise.¹⁰⁰

The EAC is currently the only African regional organization that includes an express reference to the principle of subsidiarity in its founding instrument as one of the “operational principles” of the Community.¹⁰¹ According to the Treaty, *‘the practical achievement of the objectives of the Community is to be governed by the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake-holders in the process of integration.’*¹⁰² Article 1 of the Treaty defines subsidiarity as *‘a principle which emphasizes multilevel participation of a wide range of participants in the process of economic integration.’*¹⁰³ In this definition, participation by stakeholders across levels is made the defining characteristic of the principle as it applies to economic integration.¹⁰⁴

This theory advances the view that states are not the only actors in the international legal order. International law recognizes other players such as International Organizations, non-governmental organizations, corporations, individuals and sub-state entities.¹⁰⁵ MRAs are not always concluded between governments, some are concluded by professional or

¹⁰⁰ id.

¹⁰¹ Khoti Chilomba Kamanga and Ally Possi, (2017) “General Principles Governing EAC Integration” in *The East African Community Law, Institution, Substantive and Comparative EU Aspects*, supra(n1), 206.

¹⁰² id.

¹⁰³ id.

¹⁰⁴ id.

¹⁰⁵ Schreuer, supra(n52).

regulatory bodies.¹⁰⁶ This theory will be adopted in the context of the requirement for multilevel participation of a wide range of participants in the process of integration as provided in the Treaty. The theory also highlights the disaggregated nature of the state in the modern era in which functions and authority traditionally assumed by the nation-state are diffused and fragmented among a wide range of actors.¹⁰⁷ This study favors this theory because it is attuned to the operational principle of the Community of multi-level participation and involvement of a wide range of stakeholders in the process of integration. It will be applied to demonstrate that competent authorities in Kenya are capable of negotiating, entering into and concluding MRAs.

1.8.Literature Review

In Kenya, many professions are regulated by specific Acts of Parliament. These laws prescribe stringent domestic entry requirements for foreign-obtained professional qualifications. In order for a foreign qualified person to practice in Kenya, he must obtain prior authorization. Authorization is basically a function of professional bodies.¹⁰⁸ This is largely the result of Government policy on regulation which is a mix of state, self and co-regulation.

According to Simonetta Zarilli,¹⁰⁹ regulated professions have a number of characteristics in common viz; (i) they are based on specialized knowledge and skills obtained from an institution of higher learning; (ii) the right to practice depends on competency testing; and

¹⁰⁶ Nielson, *supra* (n18).

¹⁰⁷ Nicolaidis and Shaffer, *id* (n96).

¹⁰⁸ Nora Dihel, Ana M Fernandes, Aaditya Matoo and Nicholas Strychacz, (2010) "Reforms and Regional Integration of Professional Services in East Africa" available at http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/5_Professional_services_Policy_Note_FINALpdf. (accessed on 23rd May, 2017)

¹⁰⁹ Simonetta Zarilli, (2005) "Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS" available at http://unctad.or/en/does/ditchned2005_en.pdf. (accessed on 12th January, 2017)

(iii) they all have a general public interest and ethical component. As a result, the activities that regulated professionals are allowed to undertake are limited to those in possession of the prescribed qualifications. Professionals are usually regulated to correct market failures such as asymmetries of information between professionals and consumers. This is because many professions are so specialized and sophisticated that consumers cannot determine the quality of the service delivered to them.¹¹⁰

Article 11(1) (a) of the CMP provides for mutual recognition of professional qualifications obtained in other Partner States. Annex VII of the CMP places an obligation on Kenya and the other Partner States to designate competent authorities and authorize them to enter into MRAs to facilitate the movement of professionals in accordance with the market access commitments made under the CMP.¹¹¹ This requires that all professional bodies responsible for regulating professional services liberalized by Kenya be identified and recognized to negotiate and conclude MRAs.¹¹² Although Kenya and the other Partner States have undertaken extensive market access commitments in various professions and negotiated and entered into MRAs, the MRAs have not led to automatic recognition of professional qualifications awarded in other Partner States. This is largely a result of the legal uncertainty surrounding the legality and applicability of MRAs.

In 2011, while considering Annex VII, the SCLJA identified a number of legal issues that in their view, needed to be addressed before the Annex can be adopted as an instrument of the Community. It identified the following issues:-

- (a) what is the legal status of the MRAs that would be concluded by the various professional bodies in the Community?

¹¹⁰ Cronje, op cit (n28).

¹¹¹ Regulation 1 of Annex VII.

¹¹² Cronje, supra (n28)

- (b) the applicability of the MRAs concluded by the professional bodies.
- (c) are the MRAs concluded by the professional bodies binding on the Partner States?
- (d) do the Partner States municipal laws provide for the arrangements envisaged in the MRAs?¹¹³

The SCLJA did not provide answers to the issues raised. Instead it directed the EAC Secretariat to identify the outstanding legal issues, prepare draft regulations and circulate the draft regulations to Partner States for comment. Several attempts have been made to resolve the outstanding legal issues without success. In a meeting of experts from the Partner States convened by the EAC Secretariat to address the issues raised by the SCLJA, the experts considered the issues and made several recommendations. According to the experts, Annex VII of the CMP was adopted by the Council of Ministers which is an organ of the Community thereby making the Annex an instrument of the Community. The Annex authorizes and mandates competent authorities in the Partner States to negotiate enter into and conclude MRAs. Therefore, MRAs are legal instruments in the Community and are binding on the Partner States.¹¹⁴

The SCLJA rejected the recommendations claiming that the experts did not address their concerns. It directed the Secretariat to carry out further consultations with the Partner States and the regulatory bodies and re-draft Annex VII to reflect their concerns.¹¹⁵ Again, the SCLJA did not provide answers to the questions leaving the task to the Secretariat and the Partner States.

¹¹³ Report of the 11th Meeting of the SCLJA, supra (n41).

¹¹⁴ Report of the Meeting of Experts to Update Annex VI (renamed Annex VII) of the CMP dated 23rd May, 2014.

¹¹⁵ Report of the 19th Meeting of the SCLJA dated 17th February, 2017.

Indeed, the experts failed to address the issues raised by the SCLJA. The issues that concerned the SCLJA were not about the capacity of competent authorities to enter into MRAs, or a mechanism to ensure that signed MRAs are adopted as instruments of the Community. The issues raised by the SCLJA were broader and deeper. Generally, the SCLJA was questioning the rationale of mutual recognition as a policy instrument for liberalization of professional services. The overall objective of this research is the examination of the applicability of MRAs in Kenya. The reviewed literature traces the genesis of the subject matter of this research and the attempts made to address them. It sets the stage and provides the basis for the research.

The CMP donates the power to negotiate, enter into and conclude MRAs to professional bodies. The Constitution of Kenya 2010 does not shed much light on the issue of treaty making. Like the former Constitution, the Constitution of Kenya 2010 is silent on the state organ vested with the authority to make treaties. Article 2 (6) of the Constitution is the basis of the application of treaties and conventions in Kenya. Parliament enacted the Treaty Making and Ratification Act with a view to giving effect to Article 2(6) of the Constitution.¹¹⁶ The Act provides for the procedure of initiating and ratifying multilateral treaties and certain bilateral treaties.¹¹⁷ Under the Act, the national executive is responsible for initiating the treaty making process.¹¹⁸ These responsibilities may be delegated to relevant state departments.¹¹⁹ The Act explicitly states that it is only the national executive and relevant state departments with delegated authority that may negotiate treaties. A cursory reading of the Act suggests that professional bodies have no role in the making of

¹¹⁶ Maurice Oduor, (2014) “State of International Law as Part of the Law of Kenya” *African Nazarene Law Journal* available at SSRN; <https://ssrn.com/abstract=2326135>. (accessed on 20th February, 2018).

¹¹⁷ Preamble to the Treaty Making and Ratification Act, No. 45 of 2012.

¹¹⁸ Section 5 (1) the Treaty Making and Ratification Act.

¹¹⁹ Section 4(1) and (2) the Treaty Making and Ratification Act.

agreements. This is of significance given the fact that professional bodies in Kenya have negotiated and entered into MRAs in the EAC. This brings into question the legality of the MRAs entered into by the professional bodies.

The Act defines a “treaty” but fails to provide a definition for “agreement.” In the definition of the term “treaty,” the Act provides that “*“treaty” means an international agreement concluded between states,*”¹²⁰ which further suggests that it is only the state that can enter into international agreements. V.D Mahajan in his book “*International Law*”¹²¹ writes that treaties are entered into between states and not individuals. According to the author, treaties regulate the conduct of relations between the concerned states. He states that speaking generally; it is only sovereign states that have the power to enter into treaties. J. Crawford¹²² elaborates this position by stating that classical treaty law is typical of the horizontal structure of international law and its focus on the interaction between sovereign and equal participants. Mahajan explains that this right of state independence encompasses the competence of a state to participate in international agreements of concern to them.¹²³ He writes that international agreements must not be confused with treaties even though no clear distinction is made between them.¹²⁴ Under international law, an agreement is an instrument less formal than a treaty. Agreements have also acquired a special meaning in the law of regional economic integration. In regional integration schemes, agreements are based on general framework treaties with constitutional character.¹²⁵ The Treaty Making and Ratification Act adopt the practice in international law where no distinction is made

¹²⁰ Section 1 of the Treaty Making and Ratification Act.

¹²¹ V D Mahajan, *International Law*, Eastern Book Company Law Publishers and Booksellers, Lalbagh road, Lucknow, 306.

¹²² Crawford, *ibid* (n54) 26.

¹²³ Mahajan, *id*.

¹²⁴ *id*.

¹²⁵ United Nations Treaty Collection, Treaty Reference Guide, available at <https://treaties.un.org> (accessed on 1st October, 2017).

between an agreement and a treaty. MRAs in the EAC are in the nature of technical agreements entered into under the general framework of the EAC Treaty.

In his book “*International Law*” Malcom Shaw¹²⁶ writes that treaties are negotiated and entered into by the executive arm of government. Anthony Aust¹²⁷ expounds on this by stating that treaties are entered into by heads of state, heads of government or foreign ministers. In diplomatic parlance, the trio is usually referred to as “the Big Three.” Treaties are also entered into by heads of diplomatic missions or accredited representatives with full powers to bind their respective countries. According to the authors, treaties are also known by a variety of names ranging from conventions, international agreements, pacts, general acts, charters, declarations and covenants.

In a paper titled “Globalization with Human Faces,” Kalypso Nicolaidis¹²⁸ describes mutual recognition as ‘*a contractual norm between governments or bodies with delegated authority mandating the transfer of regulatory authority from a country where a transaction takes place to the country from which a service originates.*’ She argues that the entities empowered to recognize qualifications generally are sovereign states but can also be sub-national units in federal states.

Julia Nielson¹²⁹ and Carlo Maria Cantore¹³⁰ examine recognition of qualifications in the GATS. Nielson argues that MRAs in the GATS can be concluded between states or between agencies acting under delegated authority laid down in legislation and between professional associations which may be wholly independent of government, or a combination of these actors. Unlike Nicolaidis, Nielson recognizes actors other than the state as competent to

¹²⁶ Shaw, supra (n61) 93.

¹²⁷ Anthony Aust, (2007) *Modern Treaty Law and Practice*, Cambridge University Press (2nd ed) 78.

¹²⁸ Nicolaidis, supra (n10).

¹²⁹ Nielson, supra (n18).

¹³⁰ Cantore, op.cit (n19).

enter into MRAs. In similar vein, Cantore acknowledges that MRAs are not just governmental practices. There are a significant number of MRAs signed by professional bodies. She gives the examples of accountants, architects and engineers as some of the professions where professional bodies have concluded MRAs. She makes the argument that these bodies benefit from a public fiat from government to exercise legislative authority in narrow fields.

Under the EAC Treaty, the practical achievement of the objectives of the Community is governed by the principle of subsidiarity with emphasis on multi-level participation and involvement of a wide range of stakeholders in the process of integration.¹³¹ According to Khoti Chilomba Kamanga and Ally Possi,¹³² the principle oversees the achievement of the objectives of the Community and is also a normative source of law. They recognize the participation of stakeholders other than the Partner States in the integration process. According to Edward Ssempebwa,¹³³ the EAC Partner States have conferred competency on the Community to act directly through its organs and institutions or through national institutions in the Partner States. He cites the example of education where harmonization of standards as a basis of implementing some freedoms such as movement of workers or the right of establishment is within the Community's competence. However, regulation of standards remains a state responsibility.

The reviewed literatures indicate that recognition is accorded through a wide range of entities. In the context of the Community, the mandate to conclude MRAs is given to competent authorities in the Partner States. Professional bodies in Kenya perform a number of functions including development of curricula, accreditation, licensing and recognition of

¹³¹ Article 7(1)(d) of The EAC Treaty.

¹³² Khoti Chilomba Kamanga and Ally Possi, (2017) "General Principles Governing EAC Integration" in the *East African Community Law, Institution, Substantive and Comparative EU Aspects* at op.cit (n101) 206.

¹³³ Ssempebwa, *supra* (n35),45.

qualifications. Yet, the question whether these bodies have the legal competence to negotiate, enter into and conclude MRAs has not been addressed. The reviewed literatures do not address the legal competence of professional bodies to conclude MRAs in the EAC. The process and mechanism of negotiating, entering and concluding MRAs in Kenya is a moot point. As already noted, Parliament enacted the Treaty Making and Ratification Act with a view to giving effect to Article 2(6) of the Constitution.¹³⁴ Article 2(6) of the Constitution is the basis for the application of treaties and conventions in Kenya.¹³⁵ Definition of treaty under the Act is similar to that in the Vienna Convention on the Law of Treaties (VCLT). However, unlike the VCLT, the Act includes the term convention in the definition.¹³⁶ Neither the Act nor the VCLT defines convention. Convention is defined in the UN Treaty Reference Guide. According to the Guide, *'the generic use of the term convention embraces all international agreements in the same way as the generic term treaty'*.¹³⁷ As international agreements, MRAs therefore can rightly be categorized as falling under the term convention under the Act.

Beviglia Zampetti¹³⁸ examines the status of recognition agreements under international law. He argues that recognition agreements entered into by professional and self-regulatory bodies are at best private contracts. In his view, regulatory bodies are incapable of entering into international agreements. Maria Cantore¹³⁹ has also written about the status of MRAs entered into by professional bodies. She states that MRAs entered into by professional bodies with no ad hoc authorization should be considered as private contracts. In her view,

¹³⁴ Preamble to the Treaty Making and Ratification Act

¹³⁵ Oduor, *ibid* (n116).

¹³⁶ Section 1 of The Treaty Making and Ratification Act.

¹³⁷ UN Treaty Collection, *supra* (n125).

¹³⁸ Beviglia Zampetti, (2000) "Market Access through Mutual Recognition" The Promise and Limits of GATS Article VII, in Sauve' Pierre and Robert M Stern (eds) *GATS 2000: New Directions in Services Trade Liberalization*, Brookings Institution Press, 283-306.

¹³⁹ Cantore, *supra* (n19).

the identity of the body signing the agreement, be it government or professional, influences the legal nature of such agreements. She appears to suggest that agreements entered into by professional bodies specifically authorized to do so, can be considered inter-governmental agreements.

Article 2(6) of the Constitution of Kenya¹⁴⁰ incorporates treaties that Kenya ratifies into law. Once ratified, a treaty forms part of the law of Kenya and therefore justiciable. Kenya ratified the CMP and deposited the instruments of ratification with the EAC Secretariat.¹⁴¹ In the context of the Community, the mandate to conclude MRAs is given to competent authorities in the Partner States.¹⁴² Professional bodies in Kenya have concluded MRAs for accountants, architects, engineers and lawyers with their counterparts in the region.¹⁴³ Professional bodies with or without delegated governmental authority perform a number of functions including development of curricula, accreditation, licensing and negotiation of MRAs.¹⁴⁴ The Constitution of Kenya 2010 and the Treaty Making and Ratification Act are silent on the making of agreements by bodies other than the state. Hence the legal uncertainty on the status of the agreements concluded by professional bodies.

Edward Ssempebwa examines the status of Community law in the EAC. He argues that out of caution over the uncertainties that might be caused by a dualist approach to international agreements, the EAC Treaty requires Partner States to secure the enactment of such legislation as necessary to give effect not only to the Treaty, but also to legislations, regulations and directives of the Community and its institutions. The Partner States have all

¹⁴⁰ Article 2(6) of the Constitution of Kenya, 2010.

¹⁴¹ Registry of Treaties, Office of The Attorney General and Department of Justice, available at <http://www.statelaw.go.ke/registry> (accessed on 2nd October 2017).

¹⁴² Regulation 1 of Annex VII.

¹⁴³ Cronje, *supra*(n28).

¹⁴⁴ Zarilli, *supra* (n32).

complied with this requirement.¹⁴⁵ In his view, with the existence of such domestic legislation, there would be no doubt that the Treaty has legal effect in the Partner States. This means that the Treaty is not just an agreement between States, but it can also give rise to rights and obligations enforceable within the States. Ssempebwa examined the status of Community law in the Partner States and concluded that Community law has legal effect in the Partner States.¹⁴⁶ However, he did not examine the status of agreements concluded by competent authorities in the Community. This study will further his work by examining the legal status of MRAs in Kenya.

A principle challenge in regional economic integration is how to make community laws legally binding and enforceable within national legal systems. Community laws take the form of treaties, protocols, regulations, decisions, principles, objectives and general undertakings.¹⁴⁷ Oppong characterizes this challenge as one of law translation. Law translation encompasses all processes and principles that render international law capable of enforcement or application within national legal systems. In his view, a number of factors influence the extent to which community laws can be effectively translated within national legal systems. They include the national constitution, the judicial philosophy which informs judgments, the legal culture and public awareness. The central question in this study is the application of EAC's MRAs in Kenya. Kenya's legal system is silent on the applicability of MRAs within its legal system hence the need for its examination.

¹⁴⁵ Ssempebwa, *ibid* (n36) 35-36.

¹⁴⁶ Ssempebwa, *id* (n45).

¹⁴⁷ R F Oppong, (2008) "Making Regional Economic Community Laws Enforceable In National Legal Systems; Constitutional and Judicial Challenges" available at www.kas.de/.../aus/andshomepages/namibia/MR/2008_07_Oppony.pdf. (accessed on 20th February 2018).

Beviglia Zampetti¹⁴⁸ argues that recognition agreements entered into by professional and self-regulatory bodies entrusted with negotiating the agreements are not capable of binding states at international law, unless they have a clear delegation of authority to that effect. He adds that even in the context of a regional arrangement, recognition agreements entered into by professional bodies are considered part of the government structure and competent to enter into international agreements. In his view, such bodies are incapable of concluding international agreements binding on states. He sums up by stating that such agreements are at best private agreements enforceable between private parties.

Carlo Maria Cantore¹⁴⁹ weighs in on the debate. She agrees with Zampetti albeit for different reasons. She suggests that when professional bodies without ad hoc authorization conclude MRAs, it would be plausible to view them as private contracts. However, in regional integration frameworks, the agreements explicitly stipulate that they are to be put in practice by local authorities where they are competent. She argues that the identity of the signing body, be they governments or professional bodies specifically authorized to commit, influence the legal nature of the agreements. She concludes by stating that in principle, MRAs are binding on governments irrespective of the signing body provided that they can be considered inter-governmental agreements.

As already noted, the CMP obligates Kenya to designate and authorize professional bodies to enter into MRAs to facilitate the movement of professionals in the region. The purpose of MRAs is ostensibly to reduce regulatory barriers to the movement of professional service providers. Professions in Kenya are regulated by specific Acts of Parliament which prescribe stringent domestic entry requirements for foreign-obtained professional

¹⁴⁸ Zampetti, supra (n138).

¹⁴⁹ Cantore, supra (n19).

qualifications. In order for a foreign qualified person to practice in Kenya, he or she must obtain prior authorization. Authorization is basically a function of professional bodies.¹⁵⁰

As observed earlier, the Constitution of Kenya does not specify the state organ vested with authority to make treaties or agreements. The Treaty Making and Ratification Act prescribe the procedure of initiating and ratifying multilateral and bilateral treaties. The Act donates the power of treaty making, negotiation and ratification to the executive arm of government. The Act fails to specifically mention the making of agreements neither does it provide for the making of international agreements by bodies other than the state. This calls into question the legal status of MRAs entered into by professional bodies and in particular whether the said agreements are binding on the Government of Kenya.

Ssempebwa writes that implementation of the Common Market is to be achieved through the CMP and the laws of the Community which include regulations, directives and decisions.¹⁵¹ To achieve this, the EAC Treaty commands the Partner States to enact laws that shall give effect to Community law. According to him, with the enactment of such legislation, there would be no doubt that the Treaty has legal effect in the Partner States. Ssempebwa argues that the legislation passed by the Partner States must confer the force of law upon the legislations, regulations and directives of the EAC and its institutions.

Ssempebwa further argues that once Community law is ratified, they become directly applicable in the Partner States. He argues that regulations are issued by the Council of Ministers of the EAC for the purpose of implementing the CMP. In his view, regulations apply in the Partner States directly without the need for transposition. Regulations, just like the CMP are integral parts of the Treaty. Regulations are therefore a source of law.

¹⁵⁰ Dihel, Fernandes, Mato and Strychacz, supra (n108).

¹⁵¹ Ssempebwa, supra (n35) 45.

According to him regulations bind Partner States as if they are part of domestic law. Partner States must implement Common Market rights such as the right of free movement in accordance with regulations issued by the Council. Ssempebwa cautions that failure to do so may provoke legal action against a state by either the Community or by persons aggrieved by the failure.

Ssempebwa's work is important to this study because it sheds light on the applicability of Community law in the Partner States. In his view, Community law is binding on the Partner States. His work is useful in the examination of the question whether MRAs are binding on Kenya. Although he focused on the applicability of Community law generally, he did not extend the discussion to MRAs. This study aims to further his work by examining whether MRAs as regional agreements are binding on Kenya.

1.9. Research Methodology

In order to address the research questions, this study will be conducted mainly by desk review of both primary and secondary literature on the subject. The primary sources of information shall include the Constitution of Kenya 2010, the Making and Ratification of Treaties Act 2012, relevant Acts of Parliament touching on the subject matter, the EAC Treaty and Protocol, international conventions and treaties, reports on the making of treaties and conventions etc. Secondary sources of data will include books, law journals and articles. The primary and secondary sources of information will be obtained from a review of relevant materials to be obtained from internet searches and law libraries. The study will adopt the benchmarking technique of research.

1.10. Limitation

This study will limit itself to the applicability of Article 11(1) (a) of the CMP Protocol to Kenya. The study will only focus on professional services and in particular the professions that Kenya has taken commitments in and concluded MRAs on.

1.11. Chapter breakdown

Chapter one: A broad Overview and Layout of the Study

This chapter introduces the researcher's topic. It puts the study into context by giving a background of the research area, the justification of the study, the views of authors and scholars concerning the area of study, the objectives of the study, the research questions, what the study seeks to answer, the theory and concepts underlying the study and the limitations of the study.

Chapter two: Legal Basis and Authority of MRAs

This chapter attempts to answer the first research question, do professional bodies in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC? The chapter begins by a brief history of mutual recognition, and an examination of the nature, scope and application of the concept of mutual recognition. It then assesses the existing policy and legislative frameworks pertaining to the recognition of qualifications and the making of agreements both in Kenya and the EAC. The hypothesis set forth is that competent authorities in Kenya have the legal mandate to negotiate, enter into and conclude MRAs.

Chapter three: Applicability of MRAs in Kenya

This chapter explores the second and third research questions viz; what is the legal status of the concluded MRAs? Two, are the concluded agreements binding on the Government

of Kenya? The chapter seeks to test two hypotheses viz; that the concluded MRAs are integral parts of the EAC Treaty having the force of law, therefore are international agreements. The second hypothesis it seeks to test is, that as integral parts of the EAC Treaty, MRAs are binding on the Government of Kenya.

Chapter four: Findings and Conclusion.

This chapter is the concluding chapter. It gives the findings of the study, and summarizes the issues of primary concern related to MRAs.

CHAPTER TWO

LEGAL BASIS AND AUTHORITY OF MRAs

2.0. Introduction

This chapter examines the first research question: do competent authorities in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC? The chapter examines the concept, nature and scope of mutual recognition of professional qualifications. It explores the history and coverage of labour mobility and the recognition of professional qualifications. It examines the principal actors involved in the development of MRAs. Finally, it examines the regulatory and institutional frameworks underpinning the making of MRAs.

The conclusion drawn from this chapter will assist in answering the research questions in chapter three viz; what is the legal status of the concluded MRAs? and, are the concluded MRAs binding on the Government of Kenya?

2.1. A brief history of Mutual Recognition

The history of labour mobility across the world is an old phenomenon.¹⁵² Mobility, whether labour mobility or professional labour mobility has always arisen due to various pull and push factors which have been both voluntary and non-voluntarily.¹⁵³ Before World War I, there were few border controls. The subsequent introduction of passports restricted movements of people. After World War II, labour shortages in many economies around the

¹⁵² Chandra Shah, Michael Long and Joel Windle(2007), “Recognition of Skills and Qualifications; Labour Mobility and Trade in Services”, at <http://files.eric.ed.gov/fulltext/ED505792.pdf> (accessed on 21st May, 2017).

¹⁵³ *ibid.*

world encouraged large migrations not only to the traditional new world destinations such as the USA, Canada, Australia, and New Zealand but also to Europe.¹⁵⁴ According to the United Nations (UN) Population Division, there are at present almost 200 million migrants worldwide, which is more than double the figure recorded in 1980. Most of the migrants are workers with their families. Hence, a cross-border labour market is taking shape. Majority of migration flow take place between countries in the same region. In the USA, a high proportion comes from Mexico and Central America. In Europe, migrants from non-EU countries tend to come predominantly from Eastern Europe, the Balkans, Turkey and Maghreb. In Africa, migration takes place predominantly between South Africa and the neighboring countries, i.e. between countries of Central Africa, and to the West, between countries of West Africa.¹⁵⁵

In East Africa, the history of labour mobility is long. Recorded movements of labour were linked to work on plantations and mines. Professional labour mobility in search of well-paying jobs, wages and related socio-economic opportunities emerged after the introduction of the money economy during the colonial period in the early twentieth century.¹⁵⁶ Integration efforts in the EAC region were started by the colonial power, i.e. Great Britain. Initially, the colonialist's main concern was abolition of slave trade. This changed when they realized the economic potential in the region. Until independence, they initiated various efforts aimed at attaining integration of the East Africa region.¹⁵⁷ During the colonial and immediate post-colonial period, the colonial power put in place a policy of harmonization

¹⁵⁴ *ibid.*

¹⁵⁵ Eva Hartman (2008) "The Role of Qualifications in the Global Migration Regime" <https://warwick.ac.uk/fac/soc/pais/researchcenters/csg/garnet/workingpapers/3908.pdf>.

¹⁵⁶ Esther Bosibori Onduko, "Regional Integration and Professional Labour Mobility" (LLM, University of Nairobi, 2013).

¹⁵⁷ Nyagah, Davis Mawira, "Free Movement of Labour within the EAC : Kenya's Compliance with East African Common Market Protocol" (LLM, University of Nairobi 2013).

of higher education in the region.¹⁵⁸ The policy was effected through the provision of education and training services based on a common curriculum and through the establishment of regional organizations and institutions.¹⁵⁹ The East African National Examination Council ensured standardization and quality assurance of education in East Africa while the University of East Africa served the region's higher education needs.¹⁶⁰ The various colleges of the University of East Africa were located in the then three Partner States viz, Kenya, Tanzania and Uganda, each specializing in a specific discipline. Such cooperation provided sharing opportunities amongst the people of East Africa as well as their mobility. However, this cooperation ceased with the break-up of the East African Community in 1977. The break up introduced fragmentation of higher education initiatives, diversity and barriers.¹⁶¹

Trade agreements provide important legal frameworks for the international recognition of qualifications.¹⁶² The number of trade agreements has increased significantly over the years. The majority of these agreements are bilateral, regional and multilateral.¹⁶³ For example, at the bilateral level, there has been cases of MRAs in different sectors e.g. the 1989 agreement between the European Community (EC) and Switzerland on “*direct insurance other than life insurance*,” in order to create identical conditions to access direct insurance activities.¹⁶⁴ In 1889, Argentina, Bolivia, Colombia and Ecuador signed the agreement known as “Convenio of Montevideo,” an example of a regional agreement. Such agreements started to be frequent during the XXth Century among parties sharing the same

¹⁵⁸ See Harmonization of Higher Education in Africa; Why We Need To Hang In There Together, (2015), available at https://www.adeanet.org/en/system/files/policy_brief_harmonization_en.pdf. accessed on 23rd May, 2017.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² Cantore, *supra* (n18).

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

language or the same region (or both), or having strong cultural ties.¹⁶⁵ Within the framework of these agreements, the parties usually provided recognition to academic and professional diplomas obtained in the country, due to the reciprocal trust regarding the strong similarities between the educational and training programs in general.¹⁶⁶ At the multilateral level, United Nations Educational, Scientific and Cultural Organization (UNESCO) have developed frameworks for the recognition of educational qualifications.¹⁶⁷

Mutual recognition has also been incorporated in the international trade regime through the reference made to it in the GATS. The GATS allows WTO members to reach mutual recognition with regard to;-

*education or experience obtained, requirements met, or licenses or certificates granted.*¹⁶⁸

Trade agreements often include clauses streamlining regulations dealing with mobility of services across borders. Some agreements include clauses on mutual recognition of qualifications and occupational registration mainly at professional levels.¹⁶⁹ Its adoption generally comes in two phases. First, it is enshrined in a broader treaty or agreement as a general principle for further liberalization.¹⁷⁰ Second, following these injunctions and guidelines, actual MRAs involving specific rights and obligations are negotiated at bilateral, pluri-lateral or multilateral levels.¹⁷¹

Mutual recognition found general application in the context of the European Union integration.¹⁷² As a means of creating a Common Market, mutual recognition was

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ Article VII of the GATS.

¹⁶⁹ Shah, Long and Windle, *supra*(n152).

¹⁷⁰ Nicolaïdis, "Globalization with Human Faces," *supra*(n9).

¹⁷¹ *ibid.*

¹⁷² Cantore, *supra* (n18).

recognized first for services in the Treaty of Rome where it was mentioned for professional services and the recognition of diplomas.¹⁷³ Since its adoption in the context of the single market in Europe, it has proved contagious.¹⁷⁴ NAFTA,¹⁷⁵ APEC,¹⁷⁶ FTAA,¹⁷⁷ ANZCERTA,¹⁷⁸ and the EAC etc. all call for future negotiations on mutual recognition.¹⁷⁹ Mutual recognition of qualifications however, remains one of the most significant factors inhibiting the mobility of labour across borders. Not only has this been a problem in international structures such as the EU and WTO,¹⁸⁰ but until recently, it was also the case within the EAC.¹⁸¹

2.2. Concepts and Contexts of Mutual Recognition

There are many different contexts for recognition and definitions can differ, including between academic or professional recognition.¹⁸² Mutual recognition as a theoretical concept is the process by which two or more countries agree to recognize some aspect of the others' regulatory regime as being interchangeable with their own.¹⁸³ The World Encyclopedia of Law defines mutual recognition as '*a principle of international law whereby States party to an agreement decides that they will recognize and uphold legal decisions taken by competent authorities in another member State.*'¹⁸⁴

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ Cronje, *supra* (n27).

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² Nielson, *supra* (n18).

¹⁸³ Trans Atlantic Consumer Dialogue, Briefing Paper on Mutual Recognition Agreements (2002) at <http://tacd/wd-content/upload/2013/09/TACD-TRADE-2009-Briefing-paper-on-Mutual-Recognition-Agreement.pdf> (accessed on 16th May, 2017).

¹⁸⁴ World Encyclopedia of Law at <https://about.lawin.org> (accessed on 16th May, 2017).

Formally, mutual recognition can also be defined as ‘*a contractual norm between governments or bodies with delegated authority, mandating the transfer of regulatory authority from the host country (or jurisdiction) from which a service or a firm originates.*’¹⁸⁵

Mutual recognition may refer both to the recognition of academic and professional qualifications. Recognition of professional qualifications refers to ‘*the decisions concerning the evaluation of credentials for entry into and/or practice of a profession.*’¹⁸⁶ The recognition involved here is that of “*equivalence,*” “*compatibility*” or “*acceptability*” of the counterpart’s regulatory system while the “*mutual*” part indicates that the reallocation of authority is reciprocal and simultaneous. Mutual recognition of academic qualifications on the other hand, concerns the recognition of curricula and degrees. The qualification can be conferred for academic purposes to allow students to further their studies or be eligible for training. It also confers to a person the right to use a title or degree.¹⁸⁷

Mutual recognition establishes the general principle that if a service can be supplied lawfully in one jurisdiction then it can be supplied freely in any other participating jurisdiction without having to comply with the regulations of these other jurisdictions.¹⁸⁸ A MRA on the other hand, is an agreement in which the respective competent authorities accept in whole or in part, the regulatory authorization obtained in the territory of the other party or parties to the agreement in granting their own authorizations.¹⁸⁹ It therefore is a

¹⁸⁵ Nicolaïdis, “Globalization with Human Faces” supra (n10).

¹⁸⁶ Nicolaïdis, “Non-Discriminatory Mutual Recognition; An Oxymoron in the New WTO Lexicon. In T.H. Cottier and P.C. Mavroids (eds). “*Regulatory Barriers and the Principle of Non –Discrimination in World Trade Law,*” the University of Michigan Press.299.

¹⁸⁷ Nicolaïdis, id(n10).

¹⁸⁸ id.

¹⁸⁹ id.

specific instance of application of the general principle between specific parties applied to specific services.¹⁹⁰

Governments usually adopt mutual recognition as a contractual norm in order to become reciprocally obliged to transfer (partially or completely), regulatory authority from the host jurisdiction (where a commercial transaction takes place) to the home jurisdiction (from which a person or a service originate).¹⁹¹

2.2.1 Approaches to mutual recognition

Approaches to mutual recognition vary. Governments and regulators around the world have taken different approaches to mutual recognition. However, three basic approaches can be singled out as the basis for mutual recognition viz, vertical, horizontal and umbrella.¹⁹²

2.2.1.1. Vertical Approach

Under the vertical approach also referred to as harmonization approach, recognition of qualifications is provided on a profession-by- profession basis. In this case, recognition of qualifications is the result of harmonization or co-ordination¹⁹³ among concerned parties of the education and training of each profession. In other words, the concerned parties establish a system for common regional qualifications that is effective within the contracting parties' territories which usually, but not always, lead to the abolishment of national qualification systems.¹⁹⁴

An example of the vertical approach to mutual recognition is the bilateral MRA for architects between the USA and Canada. This MRA is between the National Council of Architectural Registration Boards (NCARB) of USA and the Canadian Architectural

¹⁹⁰ id.

¹⁹¹ Cantore, supra (n19).

¹⁹² Zarilli, supra. (n32).

¹⁹³ Hamanaka and Jusoh, supra (n12)

¹⁹⁴ id.

Licensing Authorities (CALA). The MRA recognizes the significant and substantial equivalence of the USA and Canadian regulatory system for the licensure and registration of architects. It provides for automatic recognition of licensed architects with permanent residence or citizenship in the USA or Canada.¹⁹⁵ The MRA, signed in 2014 is not mandatory; constituent organizations of NCARB and CALA may choose to join or not to join. The recognition process under the MRA is quite straight forward. Canadian and USA architects who are in good standing and have completed 2000 hours of practice post licensure, enjoy automatic recognition in any USA state or Canadian province that has signed the MRA. In this system, architects are not required to provide educational transcripts, work experience dossiers or exam scores when registering in a signatory jurisdiction in either country, thus easing the documentation burden on mobile professionals.¹⁹⁶

2.2.1.2 Horizontal Approach

Under the horizontal approach sometimes referred to as the equivalence approach, mutual recognition of qualifications is provided without prior harmonization of curricula and training on the basis of a broad equivalence of qualifications.¹⁹⁷ In this case, recognition of qualifications can be either full or partial. Full recognition implies that a partner country's set of qualification requirements is equivalent to its own qualification requirements. Less than full recognition or partial recognition implies that a partner's qualification system has common or equivalent requirements in some areas but that unique requirements also exist in the host country's qualification system that must be met.¹⁹⁸

¹⁹⁵ id.

¹⁹⁶ id.

¹⁹⁷ Zarilli, supra (n32).

¹⁹⁸ id.

An example of a horizontal mutual recognition is the Trans-Tasman MRA between New Zealand and Australia (TTMRA). The TTMRA is a broad-based and horizontal MRA.¹⁹⁹ It covers all registrable occupations except medicine. It provides that a person registered to practice an occupation in Australia is entitled to practice an equivalent occupation in New Zealand, and vice versa, without the need for further testing or examination. Professionals registered in either Australia or New Zealand can quickly register in the other jurisdiction without compensatory measures. A person in a registered profession need only notify the registration authority of the jurisdiction in which he wishes to work to be automatically deemed registered.²⁰⁰ Administration and compliance are largely delegated to regulators in each jurisdiction. Individuals with overseas academic qualifications need to have their qualifications recognized by the appropriate professional association or governmental regulatory authority of the other country.

In Australia, in the case of the self-regulating professions such as accountancy and engineering, professional associations determine whether an applicant's qualification is comparable to an Australian qualification, and whether an applicant meets the requirements for professional practice. For those professions regulated by law, e.g. architecture and dentistry, the assessments of overseas qualifications are made by the registration boards which are established under State and Territory authorities.²⁰¹

2.2.1.3. Umbrella Approach

In this approach, instead of negotiating a MRA, policymakers may opt to negotiate an umbrella agreement that outlines key terms and conditions of a mutual recognition process

¹⁹⁹ Hamanaka and Jusoh, *supra* (n12)

²⁰⁰ *id.*

²⁰¹ *id.*

leaving ample room for further MRA negotiation.²⁰² The France-Quebec accord is an example of an umbrella MRA. The France-Quebec accord sets out a common framework and procedure for the conclusion of occupation-by-occupation MRAs. It defines the clear terms, the principles and objectives of engaging in mutual recognition, as well as the main criteria of the procedure that must be followed across the different professions and trade. At the same time, the accord creates leeway for regulatory bodies in each profession and trade to negotiate their own specific eligibility requirements for recognition.²⁰³ The accord allows for the automatic recognition of licenses when there is overall equivalence in the scope of practice and the formal qualifications or learning programs required for getting a license. The scope of practice is equivalent when there are no substantial discrepancies in training in the two territories.²⁰⁴

The EAC has adopted the umbrella approach. Annex VII of the Protocol outlines the key terms and conditions of the process for recognition. The Annex sets out a common framework and the procedure for the conclusion of profession-by-profession MRAs. At the same time, the Annex gives the regulatory bodies in each profession the leeway to negotiate their own specific eligibility requirements for recognition. The Annex allows for automatic recognition of qualifications once a MRA is concluded between the competent authorities.

2.3. MRAs and Professional Qualifications

In many countries there are some services which cannot be automatically placed on the market without receiving prior authorization, licensing or certification to indicate that the services meet a certain standard. The justification for such requirements can be found in a

²⁰² id.

²⁰³ id.

²⁰⁴ id.

public interest test which maybe explicitly or implicitly applied.²⁰⁵ The requirement of prior authorization for the supply of certain services is commonly justified on a combination of consumer protection and other public policy grounds e.g. the independence of lawyers from the state.²⁰⁶

When such services are traded across international borders, the question of market access for foreign suppliers becomes an issue. One way of dealing with this which allows for the acceptance of foreign services without requiring duplicate authorization processes or the undermining of domestic public policy has been for trading countries to negotiate and enter into MRAs.²⁰⁷ MRAs are intended to provide a framework which permits the acceptance of authorizations acquired in the partner country.²⁰⁸ Such agreements create a situation in which two or more countries accept the fulfillment of certain requirements in the other countries as equivalent to its own requirements on a mutual and reciprocal basis. The agreements focus on the activities authorized to be carried out under each registration and whether or not they are substantially the same or equivalent.²⁰⁹

Mutual recognition only works where there is substantial commonality between the nature of the professional activities and therefore, the professional education and training which underpins the professional qualification in the professions in both the home and host country. To be effective, the principle of mutual recognition of professional qualifications requires certain pre-conditions be met. First, there must be in place a corresponding profession where a substantial number of professional activities practiced in the “home”

²⁰⁵ Alison Hook, (2017) “Mutual Recognition Agreements in Professional Service and CEFTA Services Integration” available at http://cefta.int/wp-content/uploads/2016/05/WB-MUTUAL-RECOGNITION-AGREEMENTS-IN-PROFESSIONAL-SERVICES-CEFTA_final.pdf (accessed on 2nd June, 2017).

²⁰⁶ id.

²⁰⁷ id.

²⁰⁸ id.

²⁰⁹ id

country comprise the profession as practiced in the “host” country. Secondly, there must be in existence appropriate regulation of the profession in the “home” and “host” country. Lastly, there must be a degree level entry to the profession in both countries.²¹⁰

Theoretically, mutual recognition covers various components of professional qualifications viz, professional education which is normally sanctioned by a certificate or diploma; professional experience, formal licensing, examination and membership of a professional association.²¹¹ Recognition of professional qualifications therefore comprises the decision concerning the evaluation of credentials for entry into and/or practice of a profession. It has two components viz, the content of the training and the certification of such training through the granting of diplomas or other evidence of qualification.²¹² Policy-making and regulation in education are largely the responsibility of national and regional governments.²¹³ This is because education in many countries is strongly linked to national history, linguistic identity, cultural specificities, national economic development and social cohesion. They are therefore seen as a field of national policy-making.²¹⁴

The service sector is a highly regulated sector the world over with regulations and established processes formalizing services transactions.²¹⁵ One of the key characteristics of the service sector is the role played by qualification and licence requirements which can be a serious impediment to trade. This is especially true for professional services that usually require that certain qualifications be met.²¹⁶

²¹⁰ Stig Enemark and Frances Plimmer, (2002) “Mutual Recognition of Professional Qualifications” available at https://www.fig.net/resources/proceedings/fig_proceedings/korea/full-papters/pdf/plenary/enemark-plimmer.pdf.(accessed on 2nd June, 2017)

²¹¹ Nicolaidis, supra (n10).

²¹² id.

²¹³ OECD, supra (n13).

²¹⁴ id.

²¹⁵ Hamanaka and Jusoh, supra (n12).

²¹⁶ Cronje, supra (n28).

The process of being admitted to practice a particular profession is relatively standardized in many countries. It begins by a person graduating from a tertiary institution. The courses leading to the granting of an academic qualification are accredited by a professional body and/or governmental authority. Academic qualifications are normally complemented with a period of supervised work-based internship during which period the graduate acquires practical training and is tested in relevant competences.²¹⁷ On successful completion of both academic and vocational training, a person is granted professional status by being admitted to a professional body. Responsibility for the education and training of professionals is generally shared between various institutions. Tertiary colleges provide technical and theoretical training. Practitioner employers offer apprentices on the job training to learn their professions and develop practical skills. Regulatory authorities certify successful completion of set requirements and bestow a recognized appellation. Thereupon, it awards a license to enable a practitioner to trade. Professional associations represent the interests of professional practitioners and are entrusted with maintaining control or oversight of the legitimate practice of the profession.²¹⁸

To qualify as an accountant in Kenya, a person is required to take a course in accountancy. The Certified Public Accountant (CPA) certification is intended for students who wish to qualify and work as professional accountants, auditors, finance managers, tax specialists and financial accountants. The CPA qualification is attained after successfully going through training in all the levels of a CPA course. On completion, a student is simply referred to as a CPA finalist. Completion of the CPA course is a requirement for registration as a member of the Institute of Certified Public Accountants of Kenya (ICPAK). Upon qualifying, CPA finalists are required to acquire practical experience as part of the pre-

²¹⁷ Zarilli, *supra* (n32).

²¹⁸ *id.*

qualification programme. The minimum period of training required is three years. After attaining ICPAK membership, a member is allowed to use the CPA (K) designation. The CPA curriculum and examination is set by the Kenya Accountants and Secretaries National Examination Board (KASNEB).²¹⁹

In the case of architects, a person is required to obtain a degree from a recognized university. After successful completion of the training, a candidate is required to acquire practical experience in the work of an architect for a period of at least one year to the satisfaction of the Board of Registration of Architects and Quantity Surveyors (BORAQS). The candidate is then required to sit and pass a prescribed examination before admission to the professional organization i.e. Architectural Association of Kenya (AAK).²²⁰

An admission to practice law in Kenya is acquired when a lawyer receives a licence to practice law. To obtain a licence, a person is required to obtain a degree from a university recognized in Kenya. The student must also attend and receive instruction in the proper business, practice and employment of an advocate from an advocate of not less than five years' experience in professional practice. The candidate must also pass examinations set by the Council of Legal Education (CLE). The CLE sets the standards for curriculum and modular instruction.²²¹

Graduate engineers are required by law to register with the Engineers Board of Kenya (EBK). Before the Board may register a graduate engineer, the engineer is required to possess a degree in engineering from a recognized university. Graduate engineers are registered by the EBK upon successful completion of their graduate training and passing the prescribed examinations. Upon admission, graduate engineers undergo an internship

²¹⁹ See <https://www.icpak.com/> (accessed on 15th January, 2018).

²²⁰ See <https://boraqs.or.ke/news-and-events.boraqs> (accessed on 30th January, 2018).

²²¹ See <http://lsk.or.ke> (accessed on 4th February, 2018).

programme under the supervision of a qualified engineer for a period of two years. On successful completion of the programme, a graduate engineer is eligible to be registered as an engineer. The EBK is responsible for accrediting engineering courses in institutions of higher learning.²²²

2.3.1. Mutual Recognition and the Professions

In common usage, professions have been defined by certain defining characteristics. First is the possession of a special knowledge. Second, is the practice within an ethical framework. Fourth, are the fulfillment of some broad societal need and the possession of a social mandate that permits significant discretionary latitude in setting standards for education and performance of the members.²²³ Professions have certain distinguishing features viz, they are based on intellectual specialized knowledge and skills often associated with a university degree; the right to practice a profession relies on competency testing; and lastly, they include a general public interest as well as an ethical component.²²⁴

The accounting, architectural, engineering and legal professions in Kenya exhibit these features. They are based on intellectual specialized knowledge and skills often associated with a university degree except for accountancy where the possession of a university degree is not a necessary requirement. In the other three professions, possession of a university degree is mandatory. In all the professions, the right to practice depends on competency testing. Finally, the advancement of public interest and ethical conduct amongst their members is part of the objectives of these professions.

²²² See <http://ebk.or.ke/> (accessed on 15th February, 2018).

²²³ Zarilli, supra (n32).

²²⁴ id.

Traditionally, a small number of occupations by virtue of their educational breath and importance in satisfying some fundamental human needs have been called professions.²²⁵ Medicine, law and the academia enjoyed this status in the past. In many countries, professions such as law, health care, engineering, architecture and accountancy fall in the category of “*accredited*” or “*regulated*” professions.²²⁶ A profession is regulated if the national legislation of the host country stipulates that the take up or pursuit of the profession in question is subject, directly or indirectly by virtue of laws, regulations or administrative provisions to the possession of evidence of education and training. In other words, practice of the profession is subject to an attestation of competence.²²⁷

A distinguishing feature of a regulated profession is the licensing of practitioners. Licensing of professionals is aimed at protecting the public from physical or financial harm that may be visited on them by incompetent or unethical professionals.²²⁸ As a result, the activities that regulated professionals are permitted to engage in are limited to those in possession of the prescribed qualifications.²²⁹ The practice of accountancy, architecture, engineering and law in Kenya is subject to licensing. Practitioners are required by law to take out licences before engaging in practice. The law further prescribes that only practitioners in possession of prescribed qualifications are eligible to be licensed.

If a profession is regulated, the state nominates competent authorities who take the decisions upon recognition of foreign qualifications for the purpose of take up and pursuit of the profession in question. Apart from assessment of the foreign education credentials, the

²²⁵ *id.*

²²⁶ *id.*

²²⁷ Andrejs Rauhvargers, (2004) “Recognition of Foreign Qualifications –Guide to recognition of specialists” available at [https://shelbycearley.files.wordpress.com/2010/06/recognition-of-foreign-qualifications-guide-for-recognition-specialist\(pdf\)](https://shelbycearley.files.wordpress.com/2010/06/recognition-of-foreign-qualifications-guide-for-recognition-specialist(pdf)) (accessed on 15th February, 2018)

²²⁸ Zarilli, *supra* (n32).

²²⁹ OECD, *supra* (n13).

recognition of a foreign qualification for the purposes of take up or pursuit of a regulated profession involves checking if the professional has fulfilled a whole set of additional requirements for taking up the profession in the home country.²³⁰ This may involve practice periods upon completion of the education/training programme; testing of a specific knowledge or skill required for the pursuit of the profession; and in some cases, membership of professional organizations.²³¹

2.3.2. Mutual recognition and professional organizations

A distinction could be made among three forms of professional entities viz, regulatory bodies, professional bodies or a combination of both. A regulatory body is normally established by statute or law by governments to protect public interest. That is the sole or main purpose of statutory bodies. On the other hand, a professional association composed only of professionals, is often just a voluntary association established as a learned society to advance professional knowledge and to protect the interests of the professionals. Professional associations may have ethical standards that require looking after the public interest but are not established solely or mainly for that purpose.²³² In some cases, professional associations can be regarded as political bodies established to defend the interest and preserve the scarcity of their member's labour. A professional organization may also be established to further a particular profession, the interests of members engaged in that profession and the public interest.²³³

ICPAK is the statutory body mandated by law to regulate the accounting profession in Kenya. ICPAK combines the professional as well as the regulatory functions for accountants. As a professional body, ICPAK is established as a learned society to advance

²³⁰ Rauhvargers, id (n227).

²³¹ id.

²³² Zarilli, supra (n32).

²³³ id.

the professional knowledge and protect the interest of its members by promoting professional competence and practice. It does so by issuing standards of professional practice. As a regulatory body, ICPAK is charged with the responsibility of licensing accountants, developing curricula, arranging and conducting examinations; and accrediting and recognizing accounting qualifications. Recognition of qualifications extends both to local and foreign qualifications.²³⁴

BORAQS is the statutory body mandated to regulate the architectural profession. Unlike the accounting profession where the regulatory and professional body is one, the regulatory and professional bodies for the architectural profession is separate. BORAQS is the regulatory body while AAK is the professional body.²³⁵ AAK is a voluntary association established as a learned society to promote the interest of its members.²³⁶ As the regulatory body, BORAQS is charged with the responsibility of licensing architects, conducting and administering professional examinations and recognizing architectural qualifications. The recognition of qualifications extends both to local and foreign qualifications.²³⁷ On the other hand, as the professional body, AAK has the responsibility of promoting integrity and liaising with the Government and regulatory agencies such as BORAQS on matters affecting registration and licensing of architects. In discharging its mandate, BORAQS works closely and cooperates with AAK.²³⁸

The LSK and CLE are the statutory bodies mandated by law to regulate the legal profession. LSK combines the roles of professional as well as the regulatory body for advocates. As a professional body, LSK is established as a learned society to advance professional

²³⁴ See www.icpak.com, supra (n219).

²³⁵ See boraqs.or.ke, supra (n220).

²³⁶ See www.aak.or.ke (accessed on 30th January, 2018).

²³⁷ See boraqs.or.ke, *ibid*.

²³⁸ www.aak.or.ke. *ibid*.

knowledge and protect the interest of its members by promoting professional competence and ethical conduct; improving the standards of learning and facilitating the acquisition of legal knowledge. The law also mandates LSK to promote cross border legal practice. As part of its regulatory functions, LSK facilitates the issuance of practicing certificates to its members. It ensures that practitioners who provide legal services do so with competence and conduct appropriate for the legal services that they provide. The law also mandates the LSK to develop and facilitate adequate training programs for practitioners.²³⁹

The Legal Education Act mandates the CLE to regulate legal education and training offered by legal education providers. The Act also places the responsibility for the recognition and approval of qualifications obtained outside Kenya for purposes of admission to the Roll of Advocates, on the CLE.²⁴⁰

EBK is the statutory body mandated by law to regulate the engineering profession. As the regulatory body, the law mandates the Board to register, licence, evaluate local and foreign engineering programs, approve and accredit engineering programs; prepare detailed curriculum and conduct professional examinations for the purpose of registration of engineers. The Act also mandates the Board to assess approve or reject engineering qualifications of foreign persons intending to offer professional engineering services or work in Kenya.²⁴¹

The Institution of Engineers of Kenya (IEK) is the learned society of the engineering profession. It draws its membership from practicing engineers. It represents the interests of all its members and has the responsibility of safe-guarding the dignity and integrity of the engineering profession.²⁴² From the foregoing, it is evident that professional and regulatory

²³⁹ Isk.or.ke, supra (n221).

²⁴⁰ See www.cle.or.ke (accessed on 10th February, 2018).

²⁴¹ ebk.or.ke, supra (n240).

²⁴² See <http://iekenya.org/> (accessed on 20th February, 2018).

bodies have different responsibilities in their pursuit of professional and public interest. They may be entities established and governed by public law, or private entities controlled by the government. They may also be purely private sector bodies.²⁴³

2.3.3. Negotiating MRAs

Cross-border recognition of professional qualifications involves a number of different actors.²⁴⁴ It also encompasses a wide range of agreements such as agreements between states; agreements between agencies acting under delegated authority laid down in legislation; agreements between professional associations which may wholly be independent of government, or a combination of these actors.²⁴⁵ First, a situation may exist where there is no organized professional body. Secondly, there may be a governmental regulatory body whose mandate may include control of the education system for a specific profession. Thirdly, a national government may delegate the responsibility for education, licensure, registration and professional development to a specific body e.g. the professional orders. Fourthly, a completely independent professional body may assume responsibility for a specific profession. Lastly, a combination of the above systems may exist.²⁴⁶

In many countries such as the USA, the UK, Australia and Canada, autonomous professional regulatory bodies exist for a growing number of professions. These bodies set entry requirements and standards to which qualifications and credentials must comply.²⁴⁷

As a result of the decentralized and deregulated nature of such arrangements, recognition of professional qualifications can be very different among various jurisdictions.²⁴⁸ In

²⁴³ Zarilli, supra (n32).

²⁴⁴ OECD, supra (n13).

²⁴⁵ Nielson, supra (n18).

²⁴⁶ Zarilli, supra (n32).

²⁴⁷ id.

²⁴⁸ OECD, supra (n13).

continental European countries, there is a strong tradition that state recognition of academic qualifications also implies professional recognition. This therefore, guarantees access to professional practice and may make matters more straight forward.²⁴⁹

MRAs are negotiated by an array of bodies with different legal structures e.g. central government authorities, sub-federal government authorities as well as professional associations who may or may not have been empowered by the state to negotiate on its behalf. Moreover, within the same country, only one among several associations representing a specific profession may have delegated authority.²⁵⁰

States are typically the parties to MRAs and state representatives typically play the leading role in negotiating and implementing MRAs. Yet the negotiation and implementation of MRAs also highlight the disaggregated nature of the state in the modern era.²⁵¹ States are delegating or relinquishing some of their functions to other actors on the sub-state as well as on the inter-state level.²⁵² In this regard, responsibility for policy design and implementation is distributed between different levels of government and special purpose institutions whereby roles and policies are better deliberated, devised and determined at lower levels of authority and interest.²⁵³ Institutional autonomy, decentralization, deregulation and the increasing involvement of external stakeholders are features of contemporary changes in policy environments in many countries.²⁵⁴ It therefore comes as no surprise that professional associations with or without delegated governmental authority

²⁴⁹ *id.*

²⁵⁰ Nicolaidis, *supra* (n10).

²⁵¹ *id.*

²⁵² Schreuer, *supra* (n52).

²⁵³ Broude, *supra* (n90).

²⁵⁴ OECD *supra* (n13).

perform a number of functions related to capacity building, development of curricula, accreditation, licensing and negotiation of MRAs.²⁵⁵

2.4. Recognition of Accounting Qualifications

In the CMP, Kenya undertook to liberalize accounting services.²⁵⁶ The accounting profession is regulated by the Accountants Act No. 15 of 2008.²⁵⁷ The Act provides for the establishment, powers and functions of three bodies viz, ICPAK, the Council of the Institute and KASNEB.²⁵⁸ The statutory framework described above provides for the regulation of the profession through these entities. ICPAK was established in 1978 and is a member of Pan-African Federation of Accountants (PAFA) and the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession.²⁵⁹ In the year 2011, ICPAK negotiated and concluded a MRA with its counterparts in the region viz, the National Board of Accountants and Auditors of Tanganyika (NBAA), the Institute of Certified Public Accountants of Uganda (ICPAU), the Institute of Certified Public Accountants of Rwanda (ICPAR) and Ordre des Professionnels Comptables (OPC) of Burundi.²⁶⁰

2.4.1. The Institute

ICPAK draws its mandate from the Act.²⁶¹ The Act prescribes the following as the functions of the Institute;-

- (i.) promotion of professional competence and practice amongst members;

²⁵⁵ *ibid.*

²⁵⁶ The East African Community, Common Market Schedule of Commitments on the Progressive Liberalization of Services (Annex V) 65.

²⁵⁷ Accountants Act No. 15 of 2008.

²⁵⁸ Preamble to the Accountant Act.

²⁵⁹ See <https://www.icpak.com/> (n219).

²⁶⁰ *ibid.*

²⁶¹ Accountants Act.

- (ii.) promotion of research into the subject of accountancy;
- (iii.) promotion of the international recognition of the Institute;
- (iv.) advising the Examinations Board on matters relating to examinations, standards and policies.²⁶²

2.4.2. The Council of the Institute

ICPAK is governed by the Council of the Institute.²⁶³ However, the day to day operations of ICPAK are undertaken by a management team headed by the Chief Executive who is also the Secretary to the Council.²⁶⁴ The Act confers upon the Council the following roles and functions:-²⁶⁵

- (i.) issuing standards of professional practice, including accounting and auditing standards;
- (ii.) issuance of bye-laws, regulations and guidelines to govern matters affecting the operations of the Institute and practice by members of the Institute;
- (iii.) establishing such committees as are necessary for the performance of the functions of the Institute and may subject to the provisions of the Act, delegate powers conferred on it to such committees.²⁶⁶

2.4.3. The Registration Committee

The Act establishes a Registration and Quality Assurance Committee (Registration Committee).²⁶⁷ The functions of the Committee are as follows:-²⁶⁸

²⁶² Section 8 of the Accountant Act.

²⁶³ Section 9(1) of the Accountant Act.

²⁶⁴ See <https://www.icpak.com/>, *ibid.*

²⁶⁵ Section 9(3)(4) of the Accountant Act.

²⁶⁶ Section 10(1) of the Accountant Act.

²⁶⁷ Section 13(1) of the Accountant Act.

²⁶⁸ section 13(2) of the Act, above.

- (i.) receive consider and approve applications for registration as an accountant and grant practicing certificates and annual licenses;
- (ii.) monitor compliance with professional, quality assurance and other standards published by the Council for observance by members of the Institute;
- (iii.) prescribe regulations to govern quality assurance programs.²⁶⁹

2.4.4. The Examinations Board

The Act establishes an Examinations Board.²⁷⁰ The functions of the Board are as follows;-

- (i) prepare syllabuses for professionals' and technicians' examinations in accountancy;
- (ii) make rules with respect to such examinations;
- (iii) arrange and conduct examinations and issue certificates to candidates who have satisfied examination requirements;
- (iv) promote recognition of its examinations in foreign countries;
- (v) liaise with the Ministry of Education in accreditation of institutions offering subjects examinable by the Board.²⁷¹

2.4.5. Qualification for registration

The Act recognizes two types of qualifications, local and foreign. A person is qualified to be registered as an accountant if the person;-

- (a) has been awarded by the Examinations Board a certificate designated the final accountancy certificate; or
- (b) holds a qualification approved by the Council.²⁷²

²⁶⁹ Section 13(2), (a)(b)(c) of the Act, above.

²⁷⁰Section 14 (1), of the Act, above.

²⁷¹ Section 17(1), (a)(b)(c)(d) (h) of the Act, above.

²⁷² Section 26 (1), (a) (b) of the Act, above.

The Council may in consultation with the Examinations Board and with approval of the Minister from time to time by notice in the Gazette, approve qualifications which it considers sufficient to allow a person to be registered.²⁷³ The Act also empowers the Council to require a person making an application for registration to satisfy the Registration Committee that the person has adequate knowledge of local law and practice and adequate experience in accounting.²⁷⁴

ICPAK is the statutory body mandated by law to regulate the accounting profession. It is the professional as well as the regulatory body for accountants in Kenya. As a professional body, ICPAK is established as a learned society to advance professional knowledge and protect the interest of its members. It does so by promoting the professional competence and practice amongst its members and by issuing standards of professional practice. As a regulatory body ICPAK is charged with the responsibility of licensing of accountants, developing curricula, arranging and conducting examinations and the accreditation and recognition of accounting qualifications. Recognition of accounting qualifications extends both to local and foreign qualifications. The authority to recognize accounting qualifications is delegated to ICPAK by law. That authority is laid down in the Accountants Act.

2.5. Recognition of architectural qualifications

In the CMP, Kenya undertook to liberalize architectural service.²⁷⁵ The profession of architecture is regulated by the Architects and Quantity Surveyors Act Cap 523 Laws of Kenya. The Act provides for the registration of architects and quantity surveyors.²⁷⁶ The Act establishes BORAQS as the governing Board.²⁷⁷ The Board was established in 1934²⁷⁸

²⁷³ Section 26(2) of the Act

²⁷⁴ Section 26 (3) of the Act.

²⁷⁵ Annex V, *supra* (n274).

²⁷⁶ Preamble to the Architects and Quantity Surveyors Act, Cap.525, Laws of Kenya.

²⁷⁷ Section 4 of the Act, above.

²⁷⁸ See www.aak.or.ke (accessed on 30th January, 2018).

and is mandated to regulate the professions of architecture and quantity surveying through training, registration and enhancement of their practice.²⁷⁹ The Act also creates the office of the Registrar.²⁸⁰ On the other hand is the Architectural Association of Kenya, which is the association for professionals in the built and natural environment.²⁸¹

In 2011, BORAQS and AAK negotiated and concluded a MRA with their counterparts in the region viz;- Architects Registration Board of Uganda, Uganda Society of Architects, Rwanda Institute of Architects, Ministry of Culture Burundi and Association Burundaise des Architectes (ABARCH). Even though the Architects Registration Board of Tanzania and Architects Association of Tanzania (AAT) took part in the negotiation, they did not sign the MRA.²⁸²

2.5.1. The Board

BORAQS draws its mandate from the Act. The Act gives the Board power subject to the confirmation of the minister to make by laws for all or any of the following purposes;-

- (a)
- (b) *for the appointment and duties of the officers of the Board,*
- (c) *for the appointment of committees, and the powers and duties and the proceedings of such committees;*
- (d)
- (e)
- (f)
- (g)
- (h) *for the holding of examinations authorized or permitted under the provisions of this Act and for carrying into effect of any scheme or curriculum for education in architectureformulated under the provision of section 10;*
- (i) *for prescribing the procedure to be followed by persons applying*

*for registration.*²⁸³

²⁷⁹ <https://boraqs.or.ke/news-and-events,boraqs> (accessed on 30th January, 2018).

²⁸⁰ Section 6 (1) of the Act, above.

²⁸¹ See www.aak.or.ke *ibid.*

²⁸² boraqs, *ibid.*

²⁸³ Section 5 (b)(c)(h)(i) of the Act, above.

2.5.2. The Registrar

The Act mandates the Registrar to keep and maintain a register in which the name of every person suitably qualified under the Act shall be entered after the person is accepted by the Board for registration.²⁸⁴

2.5.3. Architects and Quantity Surveyors Education Board (AQSEB)

The Board has established the Architects and Quantity Surveyors Education Board (AQSEB) to execute the scheme and curriculum for professional education and other activities of continuous training for registered persons and administering examinations for those wishing to be registered.²⁸⁵ The specific mandate of AQSEB include;-

- (i) conducting and administering professional examinations;
- (ii) conducting training for the registered persons;
- (iii) appointment of trainers and examiners;
- (iv) linking the Board with other training institutions such as universities and colleges.²⁸⁶

2.5.4. Qualification for Registration

The Act recognizes two types of qualifications i.e. local and foreign. The Act provides as follows;-

“No person shall be registered as an architect unless he-

- (a) .*
- (b) either-*
 - (i) has had a minimum of five years of approved training followed by at least one year of practical experience in the work of an architect to the satisfaction of the Board, and has passed a prescribed examination; or*

²⁸⁴ Section 6 (2) of the Act.

²⁸⁵ See <https://boraqs.or.ke/gallery,supra> (n279).

²⁸⁶ *ibid.*

- (ii) *has been admitted as a corporate member of an approved professional institution whose qualifications for such admission are not less than those set out in sub-paragraph (i) of this paragraph; and*
- (iii) *has had a minimum of one year of professional experience in Kenya to the satisfaction of the Board or has satisfied the Board that he has otherwise acquired an adequate knowledge of Kenya building contract procedures.*²⁸⁷

The law grants registered architects the exclusive right to practice architecture. No person can practice under any name, title or style containing any of the words or phrases “architect,” “architecture,” or “architectural” unless the person is registered under the Act as an architect.²⁸⁸ A contravention of this provision is an offence punishable under the Act.²⁸⁹

2.5.5. Architectural Association of Kenya

Established in 1976, the AAK is the body representing professionals in the built and natural environment. It incorporates architects, quantity surveyors, town planners, engineers, landscape architects, environmental design consultants, and construction project managers.²⁹⁰ The association is registered under the Societies Act and brings together professionals from the private and public sectors and the academia. The AAK also acts as a link between professionals and stakeholders in the construction industry including policy makers, manufactures, real estate developers and financial institutions.²⁹¹

2.5.6. Objectives of AAK

The objectives of AAK inter alia are:-

²⁸⁷ Section 7(b) (i)(ii) and (c) of the Act.

²⁸⁸ Section 3 of the Act, supra (n294)

²⁸⁹ Section 3(2) of the Act, ibid (n294).

²⁹⁰ See www.aak.or.ke supra (n236).

²⁹¹ Section 3, ibid.

- (i) to co-ordinate the activities of professionals concerned with the built and natural environment in Kenya and promote professional integrity and to direct the members of the association in all matters of practice;²⁹²
- (ii) to establish and accredit continuous professional development programs;
- (iii) to liaise with the Government and regulatory agencies on matters affecting registration and licensing of professionals engaged in the built and natural environment;²⁹³ and
- (iv) to foster national, regional and international cooperation in matters dealing with the professions related to the built and natural environment;²⁹⁴

BORAQS is the statutory body mandated by law to regulate the architectural profession in Kenya.²⁹⁵ Unlike the accountancy profession where the regulatory and professional body is one, that is not the case for architects. BORAQS is the regulatory body while AAK is the professional body. As the regulatory body, BORAQS is charged with the responsibility of licensing architects, conducting and administering professional examinations and recognizing architectural qualifications.²⁹⁶ The recognition of qualifications extends to both local and foreign. The authority to recognize architectural qualifications is delegated to BORAQS by law. That authority is laid down in the Architects and Quantity Surveyors Act. AAK on the other hand, is the learned society of architects.²⁹⁷ As a professional body, AAK is charged with the responsibility of promoting professional integrity and liaising with the Government and regulatory agencies such as BORAQS on matters affecting registration

²⁹² See www.aak.or.ke supra (n236)

²⁹³ id.

²⁹⁴ id.

²⁹⁵ id.

²⁹⁶ id.

²⁹⁷ www.aak.or.ke, *ibid.*

and licensing of architects. BORAQS works closely and cooperates with AAK in carrying out its mandate. AAK participated in the negotiation of the architects MRA and witnessed its signing.²⁹⁸

2.6. Recognition of advocates qualifications

In the CMP, Kenya made a commitment to liberalize legal services.²⁹⁹ The practice of law in Kenya is governed by several laws the principal ones being the Law Society of Kenya Act, The Advocates Act, Legal Education Act and The Kenya School of Law Act.

2.6.1. The Law Society of Kenya Act

The Law Society of Kenya Act establishes the LSK.³⁰⁰ The LSK is a bar association with membership of all practicing advocates. It is the principal regulatory authority of the legal profession.³⁰¹ The objects of which the Society is established inter alia are;-

- (i) *ensure that all persons who practice law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;*
- (ii) *set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;*
- (iii) *determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;*
- (iv) *facilitate the acquisition of legal knowledge by members of the society and ancillary service providers, including paralegals through promotion of high standards of legal education and training;*
- (v) *develop and facilitate adequate training programmes for legal practitioners.*³⁰²

²⁹⁸ *ibid.*

²⁹⁹ Annex V, *supra* (n274).

³⁰⁰ Section 3 of the Law Society Act, No.21 of 2014.

³⁰¹ See <http://lsk.or.ke>. (accessed on 4th February, 2018).

³⁰² Section 4 (c)(e)(f)(g)(m) of the Act, above.

The Act further provides that in carrying out its functions and in exercise of the powers given to it by the Act, the Society shall have regard to the principle of the promotion of cross border legal practice.³⁰³

As can be seen, the governance of the practice of law is a key mandate of LSK. This is on account of the fact that as is the case with other professions locally and abroad, the legal profession is substantially self-regulated.³⁰⁴

2.6.2. The Advocates Act

The Advocates Act Cap 16 Laws of Kenya is the law that provides for the admission of advocates in Kenya and the right to practice as an advocate. The Act provides that no person shall be qualified to act as an advocate unless the person has;-

- (i) *been admitted as an advocate; and*
- (ii) *his name is for the time being on the Roll; and*
- (iii) *he has in force a practicing certificate.*³⁰⁵

The Act prescribes the professional and academic qualifications that a person must possess in order to qualify for admission as an advocate. The Act provides as follows;

(1) a person shall be duly qualified if;

- (a) having passed the relevant examinations of any recognized university in Kenya, he holds, or has become eligible for the conferment of a degree in law of that university ; or*
- (b) having passed the relevant examinations of such university, university college or other Institution as the Council of Legal Education may from time to time approve, he holds or has become eligible for conferment of a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve;*

and thereafter both-

- (i) he has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate and has attended such course or tuition as*

³⁰³ Section 6(1) of the Act.

³⁰⁴ See <http://lsk.or.ke> , ibid.

³⁰⁵ Section 9 (a)(b) and (c) of the Advocates Act, Cap 16 Laws of Kenya.

may be prescribed for a period which in the aggregate including instruction, does not exceed eighteen months; and

(ii) he has passed such examinations as the Council of Legal Education may prescribe; or

(c) he possess any other qualification which are acceptable to and recognized by the Council of Legal Education.³⁰⁶

(2) The Council of Legal Education may exempt any person from or all of the requirements prescribed for the purpose of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose.³⁰⁷

2.6.3. The Legal Education Act

The Legal Education Act provides for the establishment of the Council of Legal Education (CLE). The Legal Education Appeals Tribunal (LEAT), the regulation and licensing of legal education providers and for connected purposes.³⁰⁸ The objectives of the Act are twofold viz, the promotion of legal education and the maintenance of the highest possible standards in legal education; and the provision of a system to guarantee the quality of legal education and legal education providers.³⁰⁹ Under the Act, the CLE has inter alia the following functions;

- (i) regulation of legal education and training in Kenya offered by legal education providers;*
- (ii) licensing legal education providers; and*
- (iii) recognition and approval of qualifications obtained outside Kenya for purposes of admission to the Roll.³¹⁰*

The LSK and CLE are the statutory bodies mandated by law to regulate the legal profession. LSK is the professional as well as the regulatory body for advocates. As a professional body, LSK is established as a learned society to advance professional knowledge and protect the interest of its members by promoting professional competence and ethical conduct,

³⁰⁶ Section 13 (a)(b)(i)(ii) (c) of the Act, above.

³⁰⁷ Section 13 (2) of the Act, above.

³⁰⁸ Preamble to the Legal Education Act No. 27 of 2012.

³⁰⁹ Section 3 (a) and (b) of the Act, above.

³¹⁰ Section 8(1) (a)(b) and (e) of the Act, above.

improving the standards of learning and facilitating the acquisition of legal knowledge amongst its members. The Act also mandates LSK to promote cross border legal practice. As a regulatory body, LSK facilitates the issuance of practicing certificates to its members, ensures that persons who provide legal services in Kenya do so with competence and conduct appropriate for the legal services that they provide. The LSK is also charged with the responsibility of developing and facilitating adequate training programs for legal practitioners.

The Legal Education Act mandates the CLE to regulate legal education and training offered by legal education providers. The Act also places the responsibility for the recognition and approval of qualifications obtained outside Kenya for purposes of admission to the Roll on the CLE. The mandate of recognizing and approving legal education qualifications obtained abroad is placed on the CLE. The mandate of recognizing foreign qualifications is delegated by law to the CLE.³¹¹

In 2012, the Government of Kenya amended section 12 of the Advocates Act, which prescribes the criteria for qualification for admission as an advocate in Kenya. The amendment recognizes advocates who are citizens of the Republic of Burundi, Republic of Rwanda, Republic of Uganda and the United Republic of Tanzania as eligible for admission as advocates in Kenya.

2.6.4. The Kenya School of Law

The Kenya School of Law (KSL) is established by an Act of parliament. KSL is the agent of the Government responsible for providing professional legal training. The School trains persons to be advocates and also provides continuing professional development for all cadres of the legal profession.³¹²

³¹¹ See www.cle.or.ke (accessed on 10th February, 2018).

³¹² See <http://www.ksl.ac.ke>. (accessed on 10th February, 2018).

2.7. Recognition of engineering qualifications

In the CMP, Kenya undertook to liberalize engineering services.³¹³ The engineering profession is regulated by the Engineers Act. The Act provides for training, registration, licensing and development of the practice of engineers in Kenya.³¹⁴ The Act provides for the establishment of EBK.³¹⁵ The EBK is a statutory body established under Section 3(1) of the Act. The Board is the successor to the Engineers Registration Board (ERB) which was established by the Engineers Registration Act, Cap 530 of 1969, now repealed.³¹⁶

The Board has the overall mandate of developing and regulating the practice of engineering in Kenya. The Board is also mandated with the responsibility of regulating standards in the engineering profession and building the capacity of individual engineers and engineering firms. The Board also registers engineers and engineering firms and regulates their conduct for improved performance of the profession.³¹⁷ The Act provides for the establishment of the office of the Registrar who is also the Chief Executive Officer of the Board and is responsible for the day to day management of the Board. The Act empowers the Board to establish committees where necessary and delegate to such committees the exercise of any of the functions or duties of the Board.³¹⁸

Besides the Board is the IEK. IEK is the learned society of the engineering profession and co-operates with national and other international institutions in developing and applying

³¹³ Annex V, *supra* (n274).

³¹⁴ Preamble to the Engineers Act, No. 43 of 2011.

³¹⁵ Section 3 (1) of the Act, above.

³¹⁶ See <http://ebk.or.ke/> (accessed on 15th February, 2018).

³¹⁷ *ibid.*

³¹⁸ *ibid.*

engineering to the benefit of humanity. IEK was registered as a professional/learned and independent body in 1972.³¹⁹ In 2012, the Board negotiated and concluded a MRA with its counterparts in the region viz, Engineers Registration Board of Tanzania and Engineers Registration Board of Uganda. Engineers Registration Board of Rwanda acceded to the Agreement in 2015. Burundi did not sign the MRA.³²⁰

2.7.1.The Board

The Board draws its mandate from the Act. The Act prescribes the following as the functions of the Board among others:-

- (i.) *receive, consider, make decisions on applications for registration and register approved applications;*
- (ii.) *keep and maintain the Register;*
- (iii.) *publish the names of registered and licensed persons under the Act;*
- (iv.) *issue licenses to qualified persons under the Act;*
- (v.) *carry out inquiries on matters pertaining to registration of engineers and practice of engineering;*
- (vi.) *assess, approve or reject engineering qualifications of foreign persons intending to offer professional engineering services or works;*
- (vii.) *evaluate other engineering programmes both local and foreign for recognition by the Board;*
- (viii.) *approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering;*
- (ix.) *prepare detailed curriculum for registration of engineers and conduct professional examinations for the purposes of registration.*³²¹

2.7.2.Academic Qualifications Committee

Under the Act, the Board is empowered to establish committees and delegate to such committees the exercise of its functions and duties. Towards that end, the Board has established the Academic Qualifications Committee (AQC). The Board has delegated to the

³¹⁹ See <http://iekenya.org/> (accessed on 20th February, 2018).

³²⁰ *ibid.*

³²¹ Section 7 (1) (a)(b)(c)(d)(f)(h)(i)(j) and (n) of the Engineers Act, *supra* (n314).

AQC the power to examine the qualifications of any applicant for registration. The AQC is mandated to approve engineering training programmes and/or engineering degrees and diplomas in the faculties of engineering at Kenyan universities and polytechnics respectively.³²²

The AQC is charged with the responsibility of examining the qualifications of any applicant for registration to ensure that they meet the acceptable standards recognized by the Board. This applies only to applicants who obtain their engineering training from educational institutions not already recognized by the Board for a specific discipline. The Board has a list of universities/institutions it recognizes as offering engineering training commensurate with its standards in specific disciplines.³²³

2.7.3. Office of the Registrar

The Act establishes the office of the Registrar³²⁴ and donates to the office several functions. The function of the office relevant to this study is that of maintenance of the register of persons registered in accordance with the Act.³²⁵ The Act provides that only persons whose names have been entered in the register as professional engineers or consulting engineers shall for as long as their names remain in the register, be entitled to adopt and use the style and title “professional engineer” or “consulting engineer” after their name or such contraction as the Board may from time to time approve.³²⁶ Only persons licensed to practice engineering are permitted to engage in the practice of engineering.³²⁷ The Act empowers the Registrar to issue licenses to practitioners by entering the date of issuance of

³²² See *ebk.or.ke*, *supra* (n316).

³²³ See *ebk.or.ke*, *ibid.*

³²⁴ Section 13 (1), *supra* (n308).

³²⁵ Section 14(a) of the Act.

³²⁶ Section 26 (1) of the Act.

³²⁷ Section 32 of the Act.

a license on the register of every person licensed to practice.³²⁸ A person who engages in the practice of engineering without a license contravenes this requirement and thereby, commits an offence.³²⁹

2.7.4. Institution of Engineers of Kenya

As noted, the IEK is the learned society of the engineering profession. Since formation, the ideals and objectives of IEK have been;

- (i.) to represent the diverse interest of all branches of engineering;
- (ii.) to promote, encourage and improve the application of engineering to technical and other related practices;
- (iii.) to facilitate the exchange of information and ideas on technical and other related matters;
- (iv.) to safe-guard the dignity and integrity of the engineering profession and safeguard the standards set to guide the application of engineering knowledge to the solution of problems;
- (v.) to contribute to and set standards for theoretical, practical and management training leading to acceptance to membership of IEK and registration by the EBK.³³⁰

The membership of IEK is drawn from practicing engineers' resident in and outside Kenya. IEK represents the interests of all its members. As the professional body of engineers, IEK participated in the development of the engineers MRA by giving their input and validating the agreement.³³¹

³²⁸ Section 32(4) of the Act.

³²⁹ Section 32(5) of the Act.

³³⁰ See <http://iekenya.org/about-us/background-information.html>, (accessed on 15th February, 2017)

³³¹ *ibid.*

EBK is the statutory body mandated by law to regulate the engineering profession. As the regulatory body, the law mandates EBK to register, license, evaluate engineering programs both local and foreign, approve and accredit engineering programs, prepare detailed curriculum and conduct professional examinations for the purpose of registering engineers. The Act also mandates EBK to assess, approve or reject engineering qualifications of foreign persons intending to offer professional engineering services or work in Kenya. Regulation of professions in Kenya is delegated by law to professional regulatory bodies. These bodies are responsible for education, licensure, registration and professional development of their members. They set entry requirements and develop standards to which qualifications must comply. Therefore, the decisions concerning the evaluation of credentials for entry into or practice of the accounting, architectural, engineering and legal professions are vested in the professional regulatory bodies.

2.8. Regional Integration Policy

In its Regional Integration Strategy, Kenya identifies wide stakeholder engagement as one of the key guiding principles that will enable it leverage its participation across different Regional Economic Communities (RECs). The regional integration framework is anchored on Article 2(5) and (6) of the Constitution and on regional treaties, protocols and multilateral agreements. The policy is shaped by the RECs to which Kenya is a signatory. The strategy acknowledges that engagement of stakeholders in regional integration is a constitutional as well as a Treaty requirement necessary for improving policy and regulatory frameworks for the support of the creation of an enabling business environment. The strategy points-out that regional integration programs are multi-sectoral and are implemented across different sectors of the economy.³³²

³³² Regional Integration Policy for Kenya, supra (n46).

The strategy adopts a policy of a coordinated approach to regional engagements and creation of opportunities for employment, poverty reduction and wealth creation. The strategy proposes two policy measures to address the issues. It proposes that the Government should ensure adequate stakeholder consultation by including county governments, policy makers, implementers and non-state actors in regional integration matters. Secondly the strategy proposes that the Government should facilitate implementation of regional frameworks that liberalize trade in service, accreditation and mutual recognition of qualifications.³³³ It also seeks to promote regional trade in professional services. It seeks to promote recognition of educational and professional skills to create opportunities for more professionals.³³⁴ Operationalization of the policy is anchored on the principle of subsidiarity in the distribution of power/authority and responsibilities across the different layers and stakeholders.

We have seen that recognition of professional qualifications and regulation of professional standards are within the competence of professional regulatory bodies. The authority to recognize qualifications is delegated by law to regulatory bodies. Therefore, the decisions' concerning the evaluation of credentials for entry into or practice of a profession is vested in the professional regulatory bodies. On the other hand, the responsibility for making agreements is given to the national executive. The law permits the executive to delegate that responsibility to a relevant state department. The act does not envisage a scenario where that mandate may be delegated to a regulatory body. However, by dint of the CMP which has the force of law in Kenya, competent authorities have the power to negotiate, enter into

³³³ *ibid.*

³³⁴ *ibid.*

and conclude MRAs. It is also important to note that Community law takes precedence over domestic law and apply directly in the domestic sphere.

2.9. Conclusion

The discussion in this chapter was aimed at answering the first research question: do competent authorities in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC? The hypothesis was that competent authorities in Kenya have the legal competence to negotiate, enter into and conclude MRAs in the EAC. In answering this question, the chapter analyzed the principal actors in the recognition of professional qualifications. MRAs maybe between states, or agencies acting under authority delegated by law or between independent professional associations, or a combination of these actors. The chapter also examined the context of making the agreements. It looked at the regulatory frameworks underpinning the agreements both at the regional and domestic spheres. The inquiry was to determine whether under the Treaty and domestic laws, professional regulatory bodies can conclude MRAs. The discussion has demonstrated that recognition of professional qualifications is vested by law on the professional regulatory bodies, while the mandate of concluding the MRAs is vested on the regulatory bodies by the CMP.

CHAPTER THREE

APPLICABILITY OF MRAs IN KENYA

3.0.Introduction

In chapter two, this study examines the legal basis and authority for the recognition of professional qualifications. The aim is to establish whether competent authorities have the requisite competence to negotiate, enter into and conclude MRAs. In doing so, the chapter explored the nature, scope and functions of MRAs. It also traced the history of labour migration and the factors that influenced the migration. The chapter then focused on the regulatory and institutional framework appertaining to the recognition of professional qualifications.

Chapter three addresses two research questions viz; what is the legal status of the concluded agreements? Secondly, it asks the question, are the concluded agreements binding on the Government of Kenya? The chapter first seeks to test the hypothesis that concluded MRAs are integral parts of the EAC Treaty having the force of law in Kenya and therefore, are international agreements. The chapter then seeks to determine whether the said agreements are binding on the Government of Kenya. The hypothesis set forth is that MRAs are integral parts of the EAC Treaty and therefore, binding on the Government.

3.1.Treaty Making Authority in the International Plane

Over the past centuries, state practice has developed a variety of terms to refer to international instruments by which states establish rights and obligations among themselves. The terms include treaties, agreements, conventions, charters, protocols, and declarations, memoranda of understanding, modus vivendi and exchange notes.³³⁵ For

³³⁵ UN Treaty Collection, Treaty Reference Guide, supra (n125).

purposes of this research, this study shall limit itself to two terms, viz international agreements and treaties.

According to Hans Kelsen, *‘a treaty is an agreement normally entered into by two or more states under general international law.’* *‘.... [A] treaty like a contract is a legal transaction by which the contracting parties intend to establish mutual obligations and rights.’*³³⁶

The term “treaty” can also be used as a common generic term or as a particular term which indicates an instrument with certain characteristics. As a generic term, the term “treaty” has regularly been used as a term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation.³³⁷ In order to speak of a treaty in the generic sense, an instrument has to meet various criteria. First, it has to be a binding instrument, which means that the contracting parties intend to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty making powers. Thirdly, it has to be governed by international law.³³⁸ The EAC treaty fits this bill. The EAC is an inter-governmental organization established by sovereign states through a treaty. In creating the EAC, the contracting parties intended to create rights and duties. Lastly, the EAC is governed by international law.³³⁹

A distinction may be made between treaties and contracts. Under municipal law, contracts are agreements which can be imposed by courts of law and are entered into among the citizens of a state.³⁴⁰ Treaties on the other hand, are entered into between states and not

³³⁶ Mahajan, *ibid* (n121) 306.

³³⁷ United Nations Treaty Collection, *supra* (n125).

³³⁸ *id.*

³³⁹ Wilbert T K Kaahwa, *supra*(n84).

³⁴⁰ Mahajan, *ibid*, 306

individuals. Treaties regulate the conduct of relations between the concerned states.³⁴¹ The sanction behind contracts is the authority of the state which expresses itself through the laws and the tribunals of the country. In the case of treaties, they are considered to be binding on account of a customary rule of international law.³⁴²

State practice has also developed the term “agreement” to refer to international instruments by which states establish rights and obligations among themselves.³⁴³ Agreements must not be confused with treaties although usually, no clear distinction is made between them.³⁴⁴ Under international law, an agreement is an instrument less formal than a treaty or convention proper. It is usually applied to agreements of more limited scope and with fewer parties than ordinary conventions.³⁴⁵ The term can have a generic and a specific meaning. It has also acquired a special meaning in the law of regional economic integration.³⁴⁶ As a generic term, the Vienna Convention on the Law of Treaties (VCLT) employs the term “*international agreements*” in the broadest sense. On the one hand, it defines treaties as “*international agreements*” with certain characteristics. On the other hand, it employs the term “*international agreements*” for instruments, which do not meet its definition of “*treaty*.”³⁴⁷

Agreements used as a particular term is usually less formal and deal with a narrow range of subject matters than treaties.³⁴⁸ It is employed especially for instruments of a technical or administrative character which are signed by representatives of government departments, but are not subject to ratification. Typically agreements deal with matters of economic,

³⁴¹ *ibid*,

³⁴² Mahajan, *ibid*, 306

³⁴³ UN Treaty Collection, *supra* (n125).

³⁴⁴ Mahajan, *ibid*.

³⁴⁵ *ibid*.

³⁴⁶ UN Treaty Collection, *id*.

³⁴⁷ *id*.

³⁴⁸ *id*.

cultural, scientific and technical co-operation. Such agreements also frequently deal with financial matters such as avoidance of double taxation, investment guarantees or financial assistance.³⁴⁹ MRAs in the EAC are in the nature of technical or administrative agreements. This is so because MRAs are a type of agreement in which the respective competent authorities in the EAC Partner States accept in whole or in part, the regulatory authorizations obtained in the territory of the other Partner States in granting their own authorizations.

Agreements in regional integration schemes are based on general framework treaties with a constitutional character. International instruments which amend this framework at a later stage e.g. accessions or revisions are also designated as “treaties.”³⁵⁰ Instruments that are concluded within the framework of the constitutional treaty or by organs of the regional organization are usually referred to as “agreements” in order to distinguish them from the treaty.³⁵¹ For example, whereas the EAC Treaty serves as a quasi-constitution of the EAC, treaties concluded by the EAC with other nations are usually designated as agreements, e.g. the agreement between the EAC and EU which is known as the Economic Partnership Agreement (EPA).

3.2. Legal status of MRAs

Constitutive treaties of RECs often contain provisions aimed at defining relations between community and national laws. This is done with a view to make community law effective in national legal systems. The principle of direct applicability allows community law to

³⁴⁹ id.

³⁵⁰ id.

³⁵¹ id.

become part of national legal systems without the necessity for intervening national measures which aim at transforming community law into a national one.³⁵²

The measure to achieve this could be a parliamentary resolution, an Act of parliament, or an executive act e.g. a cabinet approval. The character of the measure often determines the domestic effect or status of the relevant international law. Direct effect should be distinguished from direct applicability. Whereas direct applicability deals with the processes or means by which community law becomes part of national legal systems, direct effect determines whether community law creates enforceable rights within national legal systems. Thus, although all directly effective laws can be considered as part of national legal systems, not all directly applicable laws are directly effective. Direct applicability maintains the specificity of community laws within national legal system.³⁵³

The EAC Treaty does not include the principle of direct applicability. However, it provides for the principle of supremacy of the laws of the Community. The principle may be applied to prioritize Community laws which conflict with national laws.³⁵⁴ As already noted, MRAs in the EAC are in the nature of technical or administrative agreements. Agreements in regional integration schemes such as the EAC are based on general framework treaties with a constitutional character. Instruments that are concluded within the framework of the constitutional treaty are usually referred to as “agreements” to distinguish them from the treaty. They are less formal and deal with a narrow range of subject matters than treaties.³⁵⁵

3.2.1. Sources of EAC Law

³⁵² R.F.Oppong (2008) “Making Regional Economic Community Laws Enforceable in National Legal Systems Constitutional and Judicial Challenges” available at www.kas.de/.../aus/andshomepages/namibia/MR/2008_07_Opony.pdf. (accessed on 20th February 2018).

³⁵³ *ibid.*

³⁵⁴ *ibid.*

³⁵⁵ UN Treaty Collection, *supra* (n125).

The Treaty is the primary source of Community law. Besides the Treaty, the other sources of law are protocols, Acts of EALA, rules and orders of the Summit, agreements, regulations, directives, decisions, recommendations and opinions of the Council.³⁵⁶ The basic law of the Community is derived from the Treaty. The Treaty establishes the Community as a body corporate with legal capacity in each Partner State. It grants the Community power to perform functions conferred upon it by the Treaty.³⁵⁷ The Treaty commands the Partner States to establish a Customs Union and a Common Market. Establishment of the Customs Union and Common Market was to be done by concluding protocols.³⁵⁸ Protocols are agreements among the Partner States which supplement or implement the Treaty. As many protocols as maybe necessary to facilitate each area of cooperation maybe concluded. Each protocol must spell out the objectives, scope and institutional mechanism for integration.³⁵⁹ Regulations are issued by the Council.³⁶⁰ The main objective of regulations is implementation of the CMP. Regulations ensure uniformity in the implementation of the rights and freedoms among the Partner States.³⁶¹

As already noted, in 2010 the EAC Partner States concluded the CMP which establishes the Common Market.³⁶² The objective of establishing the Common Market was the realization of accelerated economic growth and development through the attainment of the free movement of labour and services amongst other freedoms.³⁶³ The attainment of free movement of professionals is to be achieved through mutual recognition of qualifications granted, requirements met and certificates or licenses issued.³⁶⁴ Annex VII of the CMP sets

³⁵⁶ Ssempebwa, *ibid* (n35) 96.

³⁵⁷ *ibid*

³⁵⁸ Article 76(1) of the EAC Treaty.

³⁵⁹ Ssempebwa, *ibid* (n36) 35-36.

³⁶⁰ Article 14(3)(d) of the EAC Treaty

³⁶¹ Annex VII of the CMP, *supra* (n22).

³⁶² Gastorn and Masinde, *op.cit* (n1) 285.

³⁶³ Kago and Masinde *op cit* (n15) 345.

³⁶⁴ Article 11(1)(a) of the CMP.

out the institutional mechanism for the realization of this freedom. It grants competent authorities in the Partner States the power to enter into MRAs. It provides as hereunder;-

*1. For purposes of this Annex, Partner States shall permit the competent authorities to enter into Mutual Recognition Agreements to facilitate free movement of professionals in accordance with commitments made under the Protocol.*³⁶⁵

Annex VII is a regulation issued by the Council for the implementation of the Protocol. It obligates Kenya to designate and authorize competent authorities to enter into MRAs to facilitate the movement of professionals in the Community. The Council of Ministers has both policy and legislative functions. It performs its legislative function through the issuance of regulations.³⁶⁶

The EAC is an inter-governmental body established by sovereign states through a Treaty. As a body established by sovereign states, the law applicable to the EAC is international law.³⁶⁷ The Treaty establishes the Community as a body corporate with legal capacity in Kenya.³⁶⁸ Unlike States which possess rights and obligations automatically, international organizations such as the EAC and similar bodies derive their rights and duties in international law from particular instruments.³⁶⁹ The EAC as an inter-governmental body derives its rights and obligations from the Treaty.

In making the Treaty, the EAC Partner States did not incorporate the principle of direct applicability. Instead, they left it to the Partner States to resort to their respective constitutional procedures to give effect to the Treaty.³⁷⁰ The Treaty provides as follows;-

³⁶⁵ Regulation 1 of Annex VII.

³⁶⁶ Ssempebwa, supra (n35) 48-49.

³⁶⁷ Wilbert T K Kaahwa, (2017) "The Institutional Framework of the EAC," supra (n84)

³⁶⁸ Ssempebwa, ibid (n34) 35.

³⁶⁹ Duncan B. Hollis (2005) "Why State Consent Still Matter Non-State Actors, Treaties and Changing Sources of International Law," *Berkeley Journal of International Law* available at <https://shcoolanship.law.berkeley.edu/ugi/viewcontent.cgi?refer=https://www.bing.com/&httpsredit=/&article=1283content=bjil>. (accessed on 20th February 2018).

³⁷⁰ Oppong, supra (n147).

Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular;-

(a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.³⁷¹

Inclusion of this Article in the Treaty was out of caution over uncertainties that might be caused by a dualist approach to international agreements. With the existence of such domestic legislation, there would be no doubt that the Treaty has legal effect in the Partner States.³⁷² The Government of Kenya fulfilled its obligation under the Treaty by enacting the Treaty for the Establishment of East African Community Act 2000,³⁷³ where the Treaty was annexed as a schedule. This law was to give effect to the Treaty and confer legal capacity and personality upon the Community. It was also meant to confer the force of law upon legislations, regulations and directives of the Community and its institutions.³⁷⁴ The Treaty provides that annexes and protocols to the Treaty shall form integral parts of the Treaty.³⁷⁵ Therefore, the Treaty, protocols and annexes have legal effect in Kenya.

3.2.2. The Status of Community Law

The Treaty is explicit on the status of Community law. It provides as follows;-

Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.³⁷⁶

³⁷¹ Article 8(2)(a) and (b) of the EAC Treaty.

³⁷² Ssempebwa, *ibid* (n35) 35.

³⁷³ Act No. 2 of 2000.

³⁷⁴ Ssempebwa, *ibid*.

³⁷⁵ Article 151 (4) of The EAC Treaty.

³⁷⁶ Article 8 (4) of the EAC Treaty.

Article 8 (4) of the Treaty establishes the principle of supremacy of Community law over the laws of Kenya. The Article ensures that any conflict between Community and national laws is resolved in favor of the former. Any law or measure that conflicts with the objectives of the Community will lose effect. Community law therefore takes precedence over national law.³⁷⁷ There are two main reasons behind the doctrine of supremacy of Community law. First, it places an obligation on Kenya as a Partner State to implement Community objectives which under the Treaty, it has made undertakings. Failure to do so has implications beyond inter-state obligations. One implication is that state laws and other measures which conflict with Community law cease to have effect. The second reason for the doctrine is to ensure certainty and uniformity in the application of Community law.³⁷⁸

3.3.Coverage of the Common Market Protocol

The CMP covers all levels of government activity be it central, regional or local as well as non-governmental bodies that have powers delegated to them by government.³⁷⁹ Article 16(3) and (4) of the CMP provides as follows;-

*(3) In fulfilling their obligations and commitments under this Part, the Partner States shall take such measures to ensure the observance of the measures by local governments and local authorities and non-governmental bodies within the Partner States.*³⁸⁰

(4) The measures to be taken by the Partner States under paragraph (3) include laws and administrative actions taken by;-

(a) national governments, local governments, or local authorities; and

*(b) non-governmental bodies in the exercise of powers delegated by national governments, local governments or local authorities.*³⁸¹

³⁷⁷ Ssempebwa, *ibid.*

³⁷⁸ *ibid.*

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*

³⁸¹ Article 16(4) of the CMP.

Article 16 (3) and (4) of the Protocol is similar to Article 1.3(a) and XXVIII of the GATS.

Article 1.3(a) of the GATS provides as follows;-

- (a) *“measures by members” means measure taken by;-*
- (i.) *central, regional or local governments and authorities; and*
 - (ii.) *non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.*³⁸²

The term “measure” is defined in Article XXVIII of the GATS as follows;-

- (a) *“measure” means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.*³⁸³

In the GATS, the term “measures” encompasses the conduct of any state organ regardless of whether the organ exercises legislative, executive and judicial or any other functions whatever position it holds in the organization of the state and whatever its character as an organ of the central government or of a territorial unit of a state.³⁸⁴ Examples of measures would include legislation of a member, by-laws of a municipal authority and rules adopted by professional bodies in respect of professional qualifications and licensing. Such measures could potentially come within the scope of GATS.³⁸⁵ It is instructive to note that Kenya and the EAC Partner States are all members of the WTO and are obliged to adhere to its rules on regional integration. As a result of the provisions of Article 16(3) and (4), the obligations of the Protocol apply to all forms of interventions by central, regional, local government, non-government organizations as well as professional bodies with delegated powers.

³⁸² Article 1.3(a) of the GATS.

³⁸³ Article XXVIII of the GATS.

³⁸⁴ Zarilli, supra(n32).

³⁸⁵ UNCTAD, “Dispute Settlement at the World Trade Organization” available at http://unctad.org/en/does/edmmise232add31_en.pdf (accessed on 25th October, 2017)

The Protocol guarantees the free movement of services within the Community.³⁸⁶ Fulfillment of this obligation is to be achieved in accordance with the commitments that Kenya undertook in the Protocol. As already noted, Kenya liberalized accounting, architectural, engineering and legal services. Liberalization of services was to be done by concluding MRAs.³⁸⁷ Annex VII of the Protocol embodies the principle of subsidiarity. It sets out the institutional mechanism for the recognition of professional qualifications. It provides as follows;-

*[MRA is] any agreement entered into by competent authorities to recognize professional qualifications within Partner States.*³⁸⁸

While competent authority is defined as;-

*a ministry, department, office or agency designated by a Partner State to carry out the function required by (these) regulations.*³⁸⁹

Regulation 1 of the Annex reads as follows;-

*(1). For the purposes of the Annex, the Partner States shall permit the competent authorities to enter into Mutual Recognition Agreements to facilitate free movement of professionals in accordance with commitments made under the Protocol.*³⁹⁰

The principle of subsidiarity governs the achievement of the objectives of the Community. It emphasizes the multi-level participation and involvement of a wide range of stakeholders in the process of integration.³⁹¹ One of the objectives of the Community is to deepen and widen co-operation among the Partner States.³⁹² To achieve this objective, Kenya as a Partner State is required to involve a wide range of stakeholders.

³⁸⁶ Article 16(1) of the CMP, *ibid.*

³⁸⁷ Cronje, *supra*(n28).

³⁸⁸ Regulation 3 of Annex VII.

³⁸⁹ Regulation 3 of Annex VII.

³⁹⁰ Regulation 3 of Annex VII.

³⁹¹ Kamanga and Possi, (2017) “General Principles Governing EAC Integration” *op.cit* 206

³⁹² Article 5(1) of the EAC Treaty.

As earlier observed, where a profession is regulated, a state must nominate a competent authority to recognize foreign qualifications for purposes of registration and licensing.³⁹³ Accountings, architectural, engineering and legal professions are all regulated professions. Practice of the professions is subject to possession of a recognized qualification. According to Annex VII, Kenya is obligated to designate and authorize competent authorities to negotiate and conclude MRAs. Kenya designated and authorized ICPAK, BORAQS, EBK, CLE and LSK to negotiate and conclude their respective MRAs. In addition, Kenya designated AAK and IEK as the professional associations representing architects and engineers respectively.³⁹⁴ The Treaty confers certain competencies on the Community to act directly through its organs and institutions. Some competencies have been given to Partner States to act through their national institutions.³⁹⁵ The competence to negotiate, enter into and conclude MRAs is reserved to competent authorities in the Kenya.

3.4. Treaty Making Authority In Kenya

By itself, the Constitution of Kenya does not shed much light on the issue of treaty making.³⁹⁶ Like the former Constitution, the Constitution of Kenya 2010 is silent on the state organ vested with the authority to make treaties. Article 2(6) of the Constitution provides that all treaties ratified by the Government become law, while Article 94(5) reserves the power of making law to Parliament. The Article provides as follows;-

*[n]o person or body, other than Parliament has the powers to make provision having the force of law in Kenya except under authority conferred by[the] Constitution or by legislation.*³⁹⁷

³⁹³ Rauhvargers, (2004) "Recognition of Foreign Qualifications," op cit (n227).

³⁹⁴ List of competent authorities, supra (n40).

³⁹⁵ Ssempebwa, id (n35)at 30.

³⁹⁶ *ibid.*

³⁹⁷ *ibid.*

Pursuant to the above edict, Parliament enacted the Treaty Making and Ratification Act with the intention of giving effect to Article 2(6) of the Constitution. The Act provides for the procedure of initiating and ratifying multilateral and certain bilateral treaties.³⁹⁸ The Act defines a treaty in the following terms;-

*“Treaty” means an international agreement concluded between states in written form and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes conventions.*³⁹⁹

The Act defines a treaty in the same terms as that in the VCLT cited above except that unlike the VCLT, the Act includes the term “convention” in the definition of treaty. Neither the Act nor the VCLT defines the term “convention.” The term “convention” is defined in the UN Treaty Reference Guide. The Guide gives the term convention a generic meaning. According to the Guide, the generic use of the term “convention” embraces all international agreements in the same way as does the generic term “treaty.” The generic term “convention” thus is synonymous with the generic term “treaty.”⁴⁰⁰ As international agreements, MRAs can rightly be categorized as falling under the term “convention” under the Act.

The definition of treaty under the Act limits treaties to agreements concluded between states. The Act donates the power of treaty making, negotiation and ratification to the executive arm of government except that, that mandate maybe initiated by either the National Executive or the relevant State Department. Section 4 of the Act provides as follows;-

³⁹⁸ Preamble to the Treaty Making and Ratification Act, *ibid* (n117).

³⁹⁹ Section 1 of the Act, above

⁴⁰⁰ UN Treaty Reference Guide, *supra* (n125).

- (1) *Subject to the provisions of this Act, the national executive shall be responsible for initiating the treaty making process, negotiating and ratifying treaties.*
- (2) *The responsibility provided for in sub-section (1) may be delegated to a relevant state department.*⁴⁰¹

Section 5(1) of the Act provides for initiation of the treaty making process. It provides as follows;-

- (1) *Subject to the provisions of this section, the relevant national executive or the relevant state department shall initiate the treaty making process in such manner as may be prescribed by the cabinet secretary.*⁴⁰²

The Act donates the power of prescribing the manner of initiating the treaty making process to the Cabinet Secretary for the time being responsible for matters relating to foreign affairs. The Act defines relevant state department as the department responsible for the subject matter of the treaty to be approved for ratification.⁴⁰³

In the case of *Kenya Small Scale Farmers Forum and 6 others V Republic of Kenya and 2 others*, the High Court of Kenya had occasion to pronounce itself on the import of Section 4 of the Act. The Court held as follows;-

*Under the Act, the national executive is responsible for initiating the treaty making process, negotiating and ratifying treaties, though this responsibility may be delegated to the relevant state department.*⁴⁰⁴

This case related to the state's obligation in facilitating public involvement in public governance, formulation of public policy, legislative processes and in the present context, the formulation and conclusion of international agreements and treaties. The petition was filed at a time when Kenya was negotiating the Economic Partnership Agreement as part of the Eastern and Southern Africa (ESA) geographical configuration with the EU. The petitioners faulted the process of negotiation on the ground that the state was in breach of

⁴⁰¹ Section 4 of the Treaty Making and Ratification Act.

⁴⁰² Section 5(1) of the Act, above.

⁴⁰³ Section 1 of the Act, above.

⁴⁰⁴ Nairobi High Court Petition No. 1174 of 2007; [2013] eKLR.

its obligations under international law by failing to involve them in the negotiations. As the name suggests, the 1st Petitioner was an association of small scale farmers, while the 2nd, 3rd and 4th Petitioners were officials of the 1st Petitioner. The 6th Petitioner was a Nairobi based human rights organization.

The Government of Kenya initiated the making of the EAC Treaty. On 30th November, 1999, the Government appended its signature on the Treaty. The Treaty entered into force on 7th July, 2000 following its adoption and deposition with the EAC Secretariat.⁴⁰⁵ As already noted, in 2010, the EAC Partner States concluded the CMP.⁴⁰⁶ Article 151 of the Treaty provides for the conclusion of protocols where necessary.⁴⁰⁷ Concluded protocols are subject to signature and ratification by the parties.⁴⁰⁸ On 20th November, 2009, the Government of Kenya signed and adopted the CMP. Thereafter, on 1st July, 2010, the Government deposited the instrument of acceptance with the EAC Secretariat.⁴⁰⁹ With the deposition of the instruments of acceptance, the Government signified its consent to be bound by the Protocol. In the result, the Protocol having been adopted by the Government has legal effect and the force of law in Kenya.

3.4.1. Application of the Treaty

The basis for the application of treaties and conventions in Kenya is Article 2(6) of the Constitution of Kenya which provides as follows:-

*[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya.*⁴¹⁰

⁴⁰⁵ See Registry of Treaties, supra (n141).

⁴⁰⁶ Gastorn and Masinde, op cit, (n1)

⁴⁰⁷ Article 151(1) of the EAC Treaty.

⁴⁰⁸ Article 151(3) of the EAC Treaty.

⁴⁰⁹ See Registry of Treaties, supra (N141).

⁴¹⁰ Article 2 (6) of the Constitution of Kenya, 2010.

The purpose and effect of Article 2(6) of the Constitution is the recognition of ratified treaty law as part of the laws of Kenya. The meaning of this is that ratification of a treaty creates legal relations between Kenya and other state parties.⁴¹¹ As already noted, the Government of Kenya ratified the Treaty and the CMP granting the two instruments the force of law in Kenya.⁴¹² The Treaty, the CMP, Annex VII and MRAs are all sources of law in the Community.⁴¹³ The CMP and Annex VII are instruments that supplement and implement the Treaty.⁴¹⁴ MRAs are technical or administrative agreements entered into under the general framework of the EAC Treaty. The Treaty confers competent authorities the power to enter into the agreements. Regulation of professionals is a core function of competent authorities. The function entails the evaluation of credentials for entry into or practice of a profession. The authority to do so is delegated by law to the competent authorities. MRAs are therefore an integral part of EAC law which is part of Kenya's domestic law making them international agreements.

3.5. Are MRAs binding on Kenya?

The Constitution of Kenya has created a framework for the recognition and enforcement of international law. These include commitments made by Kenya within regional integration frameworks. It provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.⁴¹⁵ The meaning of this is that ratification of a treaty not only creates legal

⁴¹¹ E. Oluoch-Asher, (2013) "Incorporating Transnational Norms in the Constitution of Kenya: the Place of International Law in the Legal System of Kenya" Vol.3 No.11, *International Journal of Humanities and Social sciences*, available at http://www/ijssnet.com/journals/Vol_3_No11_June_2013/29pdf. (accessed on 20th February 2018)

⁴¹² See <http://eac.int/about/EAC-history> (accessed on 20th February, 2018).

⁴¹³ Ssempebwa, *ibid* (n35) 96.

⁴¹⁴ Ssempebwa, *id* (n 35) 32-35.

⁴¹⁵ Article 2(6) of the Constitution of Kenya, 2010.

relations between Kenya and other state parties, but also and more significantly, binds the state at the domestic level.⁴¹⁶ Therefore, the process by which a treaty is ratified under Kenyan law is significant. Some states allow the executive to play that role while others consider a legislative process to be ideal.⁴¹⁷ The Constitution is silent on the mode of ratification.

Ratification is the process by which a state expresses its intention to be bound by the terms of a treaty.⁴¹⁸ Article 2(1)(b) of the VCLT defines ratification as;-

*The international act so named whereby a state establishes on the international plane its intention to be bound by a treaty.*⁴¹⁹

Ratification consists of (1) the execution of an instrument of ratification by the executive and (2) either its exchange for the instrument of ratification of the other state (bilateral treaty) or its lodging with the depositary (multilateral treaty).⁴²⁰ The EAC Treaty defines the relation between Community and national laws. It provides as follows;-

*'This Treaty shall enter into force upon ratification and deposit of instruments of ratification with the Secretary-General by all Partner States.*⁴²¹

*Each Protocol shall be subject to signature and ratification by the parties hereto.*⁴²²

*The Annexes and Protocols to this Treaty shall form an integral part of this Treaty.*⁴²³

The Protocol for good measure provides that;-

⁴¹⁶ A.O Adede, "Domestication of International Obligations; Report of the Constitution of Kenya Review Commission," Vol V, Technical Appendices, available at <http://katibainstitute.org/Archives/images/Technical%20Appendices%20to%20CKRC%20Report%20part%201.pdf> . (accessed on 20th February, 2018).

⁴¹⁷ Oduor, id (n116)

⁴¹⁸ Aust, ibid (n127) 78.

⁴¹⁹ The Vienna Convention on the Law of Treaties Vol. 1155UNITS p.331, Article 2(i)(a).

⁴²⁰ Aust, ibid.

⁴²¹ Article 152 of the EAC Treaty.

⁴²² Article 151(2) of the EAC Treaty.

⁴²³ Article 152(3) of the EAC Treaty.

*The Partner States shall conclude such annexes to this Protocol as shall be deemed necessary and such annexes shall form an integral part of this Protocol.*⁴²⁴

The Treaty establishing the EAC is a multi-lateral or pluri-lateral agreement. The Government of Kenya appended its signature to the Treaty on 30th November, 1999. The Treaty entered into force on 7th July 2000, following its adoption and deposition with the Secretary General of the EAC.⁴²⁵ The act of adopting and depositing the Treaty gave the Treaty the force of law in Kenya. In addition, parliament domesticated the Treaty by enacting the Treaty for the Establishment of the East African Community Act, No. 2 of 2000. Article 151 of the Treaty provides for the conclusion of protocols. In 2010, the Partner States concluded the CMP.⁴²⁶ Concluded protocols are subject to signature and ratification. Once ratified, the protocols form an integral part of the Treaty. The Government of Kenya signed and adopted the CMP on 20th November, 2009 and deposited the instrument of acceptance with the Secretary-General on 1st July, 2010.⁴²⁷ With the deposit of the instrument of acceptance, the Government signified its consent to be bound by the Protocol. The Council of Ministers is a policy organ of the Community.⁴²⁸ It has both policy⁴²⁹ and legislative roles.⁴³⁰ It promotes monitors and keeps under constant review the implementation of programs and ensures the proper functioning and development of the Community.⁴³¹ Towards that end, it makes policy decisions and gives directions to the Partner States, organs and institutions of the Community. Besides policy, the Council also performs legislative functions through regulations. Implementation of the Common Market

⁴²⁴ Article 51 of the CMP.

⁴²⁵ See <http://aec.int/about/EAC> history, supra (n413)

⁴²⁶ *ibid.*

⁴²⁷ *ibid.*

⁴²⁸ Article 14(1) of The EAC Treaty.

⁴²⁹ Article 14(3) (a) of the EAC Treaty.

⁴³⁰ Article 14(3) (d) of the EAC Treaty.

⁴³¹ Article 14(2) of the EAC Treaty.

is done through the Protocol and regulations.⁴³² The initial regulations are annexed to the Protocol. Kenya as a Partner State was obligated to enact a law necessary to give effect not only to the Treaty, but also to regulations. The Government complied. Regulations issued by the Council are therefore binding on Kenya. Regulations are enforceable by courts of law in Kenya.⁴³³

In the Protocol, the Government of Kenya made commitments to liberalize professional services.⁴³⁴ Article 23(1) of the Protocol provides as follows;-

*The implementation of Article 16(1) of the Protocol shall be progressive and in accordance with the Schedule on the Progressive Liberalization of Services, specified in Annex V of the Protocol.*⁴³⁵

Article 16(1) guarantees the free movement of services. The commitments were specific to accounting, architectural, engineering and legal services. The specific commitments are specified in the Schedule of Commitments on the Progressive Liberalization of Services also known as Annex V. In the Schedule, the Government specified the services it was opening up to service suppliers from the other EAC Partner States. Under international law, commitments to liberalize services are binding and enforceable.⁴³⁶

Annex VII embodies the principle of subsidiarity. It obligates Kenya to designate and authorize competent authorities to enter into MRAs to facilitate the movement of professionals in accordance with the market access commitments specified in Annex V.⁴³⁷

Kenya complied with this requirement by identifying and authorizing the competent authorities to negotiate and conclude the agreements.

⁴³² Ssempebwa, *ibid* (n35) 96.

⁴³³ Ssempebwa, *ibid* (n35) 36-37

⁴³⁴ Annex V of the CMP.

⁴³⁵ Article 23(1) of the CMP.

⁴³⁶ Kern Alexander and Mads Andenas (2008) "The World Trade Organization and Trade in Services." <https://www.bookdepository.com/World-Trade-Organization-Trade>.(accessed on 20th February, 2018).

⁴³⁷ Cronje, *supra* (n28).

As already noted, the CMP applies to all forms of interventions by central, regional or local government as well as non-governmental organizations with delegated powers. The state has delegated the responsibility of regulating professions to competent authorities. The authorities are responsible for education, licensure and registration of practitioners. Implementation of the Common Market is done through the CMP and the regulations. The CMP and the regulations annexed to it are binding on Kenya. Annex VII, which is a regulation adopted by the Council, embodies the principle of mutual recognition. The Annex mandates competent authorities to negotiate and enter into MRAs.

Under international law, nothing can be done without or against the will of sovereign states.⁴³⁸ The Government initiated, negotiated and ratified the CMP giving it legal effect and force of law in Kenya. The CMP, Annex V and Annex VII are integral parts of the Protocol and have the force of law in Kenya. The Annexes are binding on the Government. Competent authorities in Kenya entered into the MRAs pursuant to the binding commitments undertaken by the Government of Kenya. Annex VII confers on competent authorities the power and mandate to negotiate, enter into and conclude MRAs. The MRAs are concluded within the general framework of the Treaty which is binding on Kenya. MRAs are therefore binding on Kenya.

International law does not distinguish between treaties and agreements.⁴³⁹ Under international law, an international agreement is generally considered to be a treaty and binding on the parties if it meets four criteria viz; (a) the parties intend the agreement to be legally binding and the agreement is subject to international law (b) the agreement deals with significant matters (c) the agreement clearly and specifically describes the legal

⁴³⁸ Sangroula, *op cit*.

⁴³⁹ UN Treaty Collection, *supra* (n125).

obligations of the parties and (d) the form indicates an intention to conclude a treaty, although the substance of the agreement rather than the form is the governing factor.⁴⁴⁰

3.5.1. Mutual Recognition in the EU

Over the last half century, the EU has evolved from a union of six countries to that of twenty-seven countries today. One of the founding principles establishing it was the free right of its citizens to live and work in different member states⁴⁴¹ just as in the EAC. Every EU citizen has a fundamental, personal right to move, reside and seek employment freely within any EU state.⁴⁴²

One of the major obstacles to intra-EU mobility is the lack of recognition of an individual's qualifications and competencies in Member States other than their own.⁴⁴³ As already noted, the EAC also faces similar obstacles to the movement of labour. To overcome these obstacles and ensure the completion of a single market, the EU introduced a General Directive.⁴⁴⁴ The Directive imposes a system of mutual recognition which applies to all professions. The general system Directives obliges EU Member States to recognize the qualifications of other EU members unless there is a substantial difference between the qualifications required in the host Member State and the qualifications of the person in question.⁴⁴⁵ A Directive is a legislative act of the EU which requires Member States to implement certain policies, but how Member States do this remain in their competence.⁴⁴⁶ The EU, as opposed to the EAC, has adopted a horizontal approach to recognition.⁴⁴⁷ Administration of mutual recognition is the preserve of stated organizations in each Member

⁴⁴⁰ *ibid.*

⁴⁴¹ Shah, Long and Windle, *supra* (n152).

⁴⁴² *id.*

⁴⁴³ *id.*

⁴⁴⁴ Enemark and Plimmer, *supra*(n210).

⁴⁴⁵ Hartman, *supra* (n155).

⁴⁴⁶ *ibid.*

⁴⁴⁷ *ibid*

State just as in the EAC. Unlike the EAC, the EU has adopted direct effect as a basic principle of Community law. The Principle is not included in any of the EU Treaties.⁴⁴⁸

Articles 249 of the European Community provides as follows;

*A directive shall be binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*⁴⁴⁹

The concept was first introduced by the Court of Justice of the European Community (ECJ) in the land mark case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*.⁴⁵⁰

The claimants, Van Gend en Loos, imported chemicals from West Germany to the Netherlands where they were asked to pay import taxes at the Dutch customs. The claimants objected to this requirement on the grounds that it ran contrary to the European Economic Community's (EEC) prohibition on inter-state import duties as per Article 12 of the Treaty of Rome. The defendants contended that as the claimants were not a natural person but a legal person, they could not claim such rights.⁴⁵¹

The issue before the ECJ was whether the European Community Treaty gave rise to actionable rights and whether legal persons could rely upon such rights in the same manner as natural persons.⁴⁵² The ECJ found for the claimants stating that the European Treaties gave rise to rights for legal and natural persons alike. This case state that European treaty law has direct effect against Member States and that they are directly bound by its provisions. Consequently, European law could be enforced by individuals through the national courts system of a Member State, rather than necessitating that the European

⁴⁴⁸ Enemark and Plimmer, *ibid.* (n210)

⁴⁴⁹ Article 249(ex 189) of The Treaty of Rome 1957.

⁴⁵⁰ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) ECR1.

⁴⁵¹ Case 26/62, *Van Gend en Loos*, above.

⁴⁵² above.

Commission (EC) bringing a legal action against the State in question for failure to comply with its international obligations.⁴⁵³

3.6. Conclusion

This chapter sought to answer research questions two and three. The chapter discussed the applicability of MRAs in Kenya with the aim of establishing the status of the agreements and to demonstrate that the agreements are binding on the Government of Kenya. The inquiry was based on the following hypothesis: (1) that the concluded MRAs from an integral part of the EAC Treaty having the force of law in Kenya and therefore, are international agreements, (2) as integral parts of the EAC Treaty having the force of law, MRAs are binding on the Government of Kenya.

The chapter examined the principle of international law that governs the relations between community and national law. It discussed the sources, status and application of Community law in Kenya. The chapter also considered the regulatory and institutional framework governing the implementation of the Common Market.

As has been discussed, conclusion of MRAs is done under the general framework of the EAC Treaty. Annex VII which is a regulation issued by the Council of Ministers for the implementation of the Common Market provides for MRAs as instruments for liberalization of professional services. The Annex also provides that conclusion of MRAs shall be undertaken by the competent authorities. Regulations are an integral part of the Protocol. Regulations are binding on Kenya. This chapter has illustrated that MRAs are international agreements entered into under the general framework of the Treaty and are binding on the Government of Kenya.

⁴⁵³ above.

CHAPTER FOUR

FINDINGS AND CONCLUSION

4.0. Introduction

This study set out to answer three research questions. First, do competent authorities in Kenya have that legal competence to negotiate, enter into and conclude MRAs in the EAC? Second, what is the legal status of the concluded MRAs? Third, are the MRAs concluded by competent authorities binding on the Government of Kenya?

The examination of the above research questions was guided by three hypotheses viz; competent authorities in Kenya have the legal mandate to negotiate, enter into and conclude MRAs. Second, the concluded MRAs are integral parts of the EAC Treaty having the force of law in Kenya and are therefore international agreements. Third, as integral parts of the EAC Treaty having the force of law in Kenya, MRAs are binding on the Government of Kenya.

The main aim of the research was to examine the applicability of MRAs in Kenya and determine the status of the agreements. In addition, the study sought to determine whether the agreements are binding.

4.1. Findings

This section focuses and provides a summary of the research questions, hypothesis and the findings in each of the chapters.

4.1.1. Legal basis and authority of MRAs

This chapter examined the first research question: do professional bodies in Kenya have the legal competence to negotiate, enter into and conclude MRAs in EAC? The hypothesis that guided the study is that professional bodies in Kenya have the legal mandate to negotiate, enter into and conclude MRAs. It explored the concept, nature and scope of recognition of professional qualifications and the various approaches to recognition. It also looked at the various actors involved in the making of MRAs in different fora. The chapter then explored the regulatory and institutional frameworks undergirding the recognition of qualifications in Kenya.

Annex VII of the Protocol mandates competent authorities to negotiate, enter into and conclude MRAs. The Annex gives effect to the principle of subsidiarity, an operational principle of the Community which emphasizes the multi-level participation and

involvement of a wide range of stake-holders in the process of integration. The Treaty identifies professional bodies as key stakeholders in the integration process. In its Regional Integration Strategy, Kenya has identifies wide stakeholder engagement as a key guiding principle that will enable it leverage its participation in the EAC integration process. The strategy singles out professional bodies as key stakeholders. Annex VII of the Protocol has the force of law having been domesticated by the Treaty for the Establishment of the East African Community Act 2000.

Annex VII obligates Kenya to designate and authorize competent authorities to enter into MRAs.

The authority to recognize qualifications is delegated by law to regulatory bodies. The accounting, architectural, engineering and legal professions are regulated by law. The laws have established statutory bodies with powers to recognize qualifications. Recognition of professional qualifications is therefore within the competence of the competent authorities. However, the Treaty Making and Ratification Act which is the substantive law governing the making of treaties and conventions vests the responsibility of making treaties and conventions to the National Executive. The Act permits the Executive to delegate that responsibility to a relevant state department. The law is silent on delegation of that responsibility to professional bodies. Under the law, professional bodies lack the requisite legal competence to negotiate, enter into and conclude MRAs.

4.1.2. Applicability of MRAs

Chapter three examined two research questions viz, what is the legal status of the concluded MRAs? And, are the concluded MRAs binding on the Government of Kenya? Two hypotheses were put forward to guide the study; first that the concluded MRAs are integral parts of the EAC Treaty having the force of law in Kenya, and therefore are international

agreements. Second, as integral parts of the EAC Treaty having the force of law in Kenya, MRAs are binding on the Government of Kenya. The objective of the chapter was to establish the applicability of MRAs in Kenya.

4.1.2.1. Legal Status of MRAs

MRAs are technical or administrative agreements concluded by professional bodies under the auspice of the EAC Treaty. The Treaty stipulates that recognition of professional qualifications shall be by conclusion of MRAs. The Government of Kenya initiated, negotiated and ratified the CMP. The Constitution of Kenya recognizes ratified treaties or conventions as part of the law of Kenya. By ratifying the CMP, the Republic of Kenya domesticated the Protocol and its Annexes making them part of the laws of Kenya. The CMP, the regulations made thereunder and agreements are sources of law in the Community. The CMP and the Annexes are an integral part of the Treaty with the force of law in Kenya. MRAs are therefore international agreements having the force of law.

4.1.2.2. Are the MRAs binding on Kenya?

The Government of Kenya signed and deposited the EAC Treaty with the Secretary General. It also signed and adopted the CMP and deposited the instrument of acceptance with the Secretary General. With the deposition of the instruments of acceptance, the Government signified its consent to be bound by the Treaty and the Protocol. In addition, the Government domesticated the Treaty and the Protocol by enacting into law the Treaty for the Establishment of the East African Community Act, 2000. The Act confers the Treaty, the Protocol, Annexes V and VII of the Protocol the force of law. The Protocol and the

Annexes are integral parts of the Treaty. MRAs are also an integral part of the Treaty having the force of law and therefore, binding on Kenya.

Further, in the Protocol, the Government made commitments to liberalize professional services. The commitments were specific to accounting, architectural, engineering and legal services. Commitments to liberalize services are binding and enforceable. The professional bodies i.e. accounting, architectural, engineering and legal negotiated, entered into and concluded their respective MRAs pursuant to the commitments made by the Government. MRAs apply in Kenya in the same manner as municipal laws. MRAs are therefore binding on the Government of Kenya.

4.2. Conclusion

This study set out to examine the applicability of MRAs in Kenya. The over-arching research question was; professional bodies in Kenya have the legal competence to negotiate, enter into and conclude MRAs? The research advanced the hypothesis that professional bodies have the legal mandate to conclude the agreements. The study has determined that professional bodies do not have the legal competence to conclude MRAs. This is because the Treaty Making and Ratification Act recognize the National Executive as the only organ that can make treaties and conventions. The Act also empowers the National Executive to delegate that function to a state department, but not to a professional body.

The second research question was; what is the legal status of the concluded agreements? This study advanced the hypothesis that concluded MRAs are an integral part of the Treaty having the force of law and therefore, are international agreements. The study confirmed the hypothesis that MRAs are international agreements by virtue of being part and parcel of the EAC Treaty. Finally, this study examined the question, are the concluded MRAs binding on Kenya? The study advanced the hypothesis that as integral parts of the Treaty having the

force of law MRAs are binding on the Government. The study confirmed the hypothesis. MRAs are an integral part of Community law. Ratification and domestication of the Treaty and the Protocol binds the Government of Kenya. MRAs are therefore binding on Kenya.

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