



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**THE PROSPECT OF MONETARY AND FINANCIAL CO-OPERATION: A
LEGAL EVALUATION OF KENYA'S REGIONAL ECONOMIC
INTEGRATION ENDEAVOUR IN THE EAST AFRICAN COMMUNITY**

By:

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G62/35524/2019

**A Thesis Submitted to the University of Nairobi in Partial Fulfillment of the
Requirements for the Award of the Degree of Master of Laws (LLM), of the
University of Nairobi.**

2021

DECLARATION

Student's Declaration

I hereby declare that this thesis is my original work and has never been submitted elsewhere for examination or any other learning institution for the award of any Degree Certificate or publication, by either me or any other individual, whatsoever.

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Supervisor's Declaration

The thesis has been submitted for examination with my approval as the research supervisor.

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DEDICATION

I dedicate the thesis to my late cousin, Tracy Namatsi. I miss you.

ACKNOWLEDGMENT

I would like to express my gratitude to the Almighty God for bringing me this far, blessing me with good health and giving me the intellectual capacity to undertake this research.

I also acknowledge my parents, Nicholas Makana and Beatrice Namatsi without whom this research would not have been possible. Thank you. I also express thanks to my brother, Bryson Makana and my sister, Brenda Namai for continuously giving me words of inspiration. I would also like to acknowledge the immense contribution of Mr. Kennedy Echesa, Arthur Wesonga and Paul Meltus. I am lucky to have all these individuals in my life.

I would also like to immensely thank my supervisor, Dr. Jackson Bett. I am appreciative for your guidance during this research. I would like to thank and acknowledge you for taking your time, notwithstanding having a busy schedule, for guiding me on how to proceed. This thesis would not have been finalized without your wisdom and supervision.

I am forever appreciative.

LIST OF STATUTES

Arbitration Act of 2012

Banking Act of 2012

Central Bank of Kenya Act of 2012

Civil Procedure Act of 2012

Computer Misuses and Cybercrimes Act of 2018.

Foreign Investment Protection Act of 1964

Kenya Information and Communications Act of 2011

Kenyan Competition Act of 2010

ABSTRACT

The thesis interrogates the legal elements and impediments to regional economic integration in the Kenyan-EAC setting. An examination of regional economic integration has to take into account legal factors. The problem that is addressed is that there is no direct legal framework covering mobile money transactions in Kenya. Regulation is left to distinct telecommunications and financial legislations. It is for this reason that harmonization is necessary which will enhance monetary and financial cooperation in the EAC. The study relied on desktop research by analyzing the treaty establishing the EAC, text books, journal articles and reports from the internet focusing on economic integration, harmonization of commercial legislation and dispute resolution.

The research found out that the Treaty establishing the EAC is the *grund norm*. A scrutiny of the phases of integration shows that there are deeper relationship dynamics between the EAC participant states and the citizens of the member states. The EAC treaty is also discussed in regard to its place vis a vis the Kenyan constitution in as pertains to hierarchy of laws. The Covid-19 pandemic has also affected Regional Economic integration and the study posits that a collaborative approach is crucial in the integration endeavor. In evaluating the legal challenges for Kenya, the study delves into an analysis of labour as a factor of production, the informal sector and dispute resolution.

The study also looks at arbitration and addresses the inconsistency from the Kenyan courts in regard to interference in arbitration matters. This affects monetary and financial cooperation in the Kenyan-EAC context since a good dispute resolution mechanism attracts investments from the international community. The study also looks to the European Union for lessons. Kenya was colonized by the British and one implication of this is that this colonial experience had an impact on Kenya's legal structure. Further, the European Union has had a long time to grow whereas the EAC is at the stage of infancy compared to the European Union. The study also looks at the Kenya- United Kingdom Economic Partnership Agreement (EPA) of 2020 and establishes that there are a variety of interests that need to be balanced.

The prospects for Kenya's endeavor in regard to monetary and financial cooperation in the EAC is thus fraught with legal challenges which ought to be addressed. The study is thus useful in the Kenyan-EAC context especially since 2024 is the set year when the monetary union should come into fruition. The study is thus nascent as it will offer legal insights in regard to regional economic integration in the EAC.

ABBREVIATIONS

AfCFTA	African Continental Free Trade Agreement
ACP	African, Caribbean and Pacific countries
COMESA	Common Market for Eastern and Southern Africa
COVID	Corona Virus Disease
CET	Common External Tariff
EAC	East African Community
EALA	East African Legislative Assembly
ERM	Exchange Rate Mechanism
EPA	Economic Partnership Agreement
ESCB	European system of central banks
EU	European Union
EAMUP	East African Monetary Union Protocol
FDI	Foreign Direct Investment
FTA	Free Trade Area
ICT	Information and Communications Technology
ICMS	Integrated Customs Management System
IEL	International Economic Law
KRA	Kenya Revenue Authority
LAPSSET	Lamu Port South Sudan Ethiopia Transport Corridor Project
MFN	Most Favored Nation
MOU	Memorandum of Understanding
RECs	Regional Economic Communities
RTA	Regional Trade Agreements
SADC	Southern African Development Community

SGR	Standard Gauge Railway
TEU	Twenty foot Equivalent Unit
WHO	World Health Organization
WTO	World Trade Organization

TABLE OF INTERNATIONAL INSTRUMENTS

African Continental Free Trade Agreement (AfCFTA) (2019)

International Convention on the Settlement of Investment Disputes (ICSID)

New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)

The Treaty for the establishment of the East African Community (2000)

UNCITRAL Model Law on International Commercial Arbitration

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CHAPTER ONE

1.0 Introduction: Background of the Study

The legal implications and difficulties that Kenya faces in ensuring monetary and financial cooperation within the East African Community are examined in the study. This is in order to facilitate regional economic convergence and to achieve long-term economic growth in the community.¹ Legal issues and problems should be considered when analyzing economic integration. International and national rules restrict the movement of people, commodities, utilities, and resources. These limitations are reflected by the law, and they can be realized by understanding economic and sociopolitical factors.² A comprehensive legal framework is therefore a necessary prerequisite to ensure the success of economic integration in any structure.³

The absence of a distinct legal framework in Kenya in regards to mobile money transactions underscores the importance of legislation. This is especially true when M-pesa as a mobile payment platform is commonly used to complete transactions in the Kenyan economy.⁴ The fact that legislation is left to separate telecommunications and financial legislations is problematic given the prevalence of mobile money transactions. There is therefore need for harmonization in regards to legislation which will promote monetary and financial cooperation in the EAC.

The EAC is a distinct regional bloc with a roadmap of creating a customs union, common market, monetary union, and finally, a political union. Kenya's membership in the EAC is given credence by Article 2 (6) of the Constitution of Kenya, which requires that each treaty ratified by the country becomes a part of the Kenyan law.⁵ It is from this premise that the African Continental Free Trade Agreement (AfCFTA) is discussed. The treaty came into effect on May 30, 2019.⁶ Kenya is one of the countries that ratified AfCFTA and this took place on May 10, 2018. The operational phase began on July 7, 2019.

¹ EAC Secretariat, 'The Treaty for the Establishment of the East African Community' [2000] Nairobi, Kenya: Department of Political Federation, EAC Secretariat.

² Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011).

³ Ibid.

⁴ Scott Burns, 'M-Pesa and the 'Market-Led' Approach to Financial Inclusion' (2018) 38 *Economic Affairs* 406.

⁵ Article 2 (6) Kenya Constitution, 'The Constitution of Kenya' [2010] Government Printer." Kenya: Nairobi.

⁶ 'Agreement Establishing the African Continental Free Trade Area' (2018) 2018 *Acta Juridica* 217.

One of AfCFTA's objectives is to boost intra-African trade by promoting collaboration of trade, its harmonization and liberalization around the continent's Regional Economic Communities (RECs).⁷The EAC is one of these RECs. The implication of this is that Kenya by virtue of being an EAC member state, its institutional framework should be aligned to that of AfCFTA. Kenya, therefore, has to balance various interests in the quest for Regional Economic Integration and the study will demonstrate that this has legal implications.

The European Union (EU) will also be useful to this study in offering lessons to Kenya. The European Union history in regard to regional integration will demonstrate that legislation can be seen as an important tool. The European Union's history will hence be interrogated keeping in mind that this degree of convergence did not occur overnight. It stems from the 1950s, when much of Africa was still under the control of the colonial masters.⁸The study will thus offer a legal perspective of regional economic integration, the legal challenges that Kenya faces in this endeavor and the solutions offered from the European Union experience.

1.1 Statement of the Problem

It is difficult to pursue cross-national economic integration. The presence of an appropriate legislative system is therefore a significant factor in demonstrating a state's commitment to this goal.⁹ Kenya's monetary and financial cooperation in the EAC is negatively affected because of the extent to which established laws are not adjusted to the local situations and cultural conditions.

The problem addressed in the study is that mobile money transfer services have gained traction in Kenya yet there is no distinct legislation governing these transactions. Mobile money transfer services for instance are governed by financial statutes such as the Central Bank of Kenya Act, The Banking Act and Kenya's Competition Act. There is no direct legal structure covering these transactions. This thus negatively affects economic actors and Kenya's prospect for monetary and financial co-operation in the EAC is compromised.¹⁰ A consequence of this is that

⁷ *ibid.*

⁸ Oponng (n 2).

⁹ JP Wakhungu, GP Okoth and EOS Odhiambo, 'Challenges and Opportunities Constraining and Enhancing Kenya and Tanzania Participation in the EAC Econo-Political Integration Process' (2021) 11 *Open Journal of Political Science* 134.

¹⁰ Agasha Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) 19 *European Journal of Law Reform* 306.

there are no ramifications in the event the mobile money application malfunctions with peoples' money still tied up in the application

Another ripple effect of lack of harmonization is that state agencies are hampered and Kenya's opportunities for monetary and financial co-operation in the EAC are jeopardized. Kenya, for instance, loses approximately fourteen million U.S dollars in tariff income per year.¹¹ Hence there is a legal nexus between monetary and financial cooperation and regional economic integration in the EAC.

There are also policy harmonization problems in Kenya's statutory and regulatory systems that obstruct the institutional framework on financial and monetary matters in the EAC. An example is that as a result of deficiency of harmonization of policies in the mobile banking area, the unbanked poor are negatively affected.¹² In order to achieve regional economic integration, Kenya, as an affiliate of the EAC needs to consider the local conditions while harmonizing laws. The European Union's history also shows how legislation has been utilized to promote regional economic convergence.

1.2 Research Objectives

The objectives of the study are as follows:

- a) To analyze the treaty establishing the EAC's relation to regional economic integration in the EAC;
- b) To examine the legal challenges for Kenya in realizing monetary and financial cooperation in the EAC; and
- c) To examine the lessons from the European Union.

1.3 Research Questions

The following are the research questions:

- 1) What is the significance of the treaty establishing the EAC in regional economic integration in the EAC?
- 2) What are the legal challenges for Kenya in realizing monetary and financial cooperation in the EAC?
- 3) What are the lessons from the European Union?

¹¹ Enock NW Bulime, Aida K Nattabi and Isaac Shinyekwa, 'Within the EAC, Which Countries Stand to Benefit from the Implementation of the AfCFTA' (2020) Ageconsearch Working paper.

¹² Serena Natile, 'Digital Finance Inclusion and the Mobile Money "Social" Enterprise' (2020) 45 GESIS- Leibniz Institute for Social Sciences 74.

1.4 Justification of the Study

Regional economic communities are becoming prominent in an effort to promote development. This is because it is beneficial for nations to negotiate as a bloc as opposed to individually. It is therefore expected that individual countries have to cede an aspect of their sovereignty in order to promote the goals of the regional economic community.

It is on this basis that the Kenyan, EAC dynamic is investigated where the study finds out that harmonization of laws in the mobile money transactions area needs to take place. There has also been a lack of a collaborative approach by the EAC countries amid the COVID-19 pandemic where non tariff barriers were used to impose restrictions. Additionally, there has been a lack of consistency from the Kenyan courts in matters touching on arbitration which affects the dispute resolution environment. This directly affects the favorability of Kenya as an investment destination.

1.5 Hypothesis

The hypothesis of the research is that there will be a rush to implement the EAC treaty provisions without having regard to legal issues such as harmonization of commercial legislation leading to more harm than good. A manifestation of this is whereby 2024 is the set year when the monetary union should become fully operational yet the East African Monetary Institute is yet to have a base of operation in any of the EAC countries.

1.6 Research Methodology

The research adopts secondary methods of collection of data. The primary focus is on text books, journal articles, electronic literature, reports from the internet and other literature by authors on economic integration, harmonization of commercial legislation and dispute resolution. Secondly, the study takes a doctrinal approach by analyzing the treaty establishing the EAC, legislative provisions on mobile money transfers, some legal challenges Kenya faces in the quest for regional economic integration and the lessons Kenya can learn from the European Union.

1.7 Theoretical Framework

There are two theories influencing the study. These are the law and development theory propounded by Max Weber and the theory of legal change propounded by

Alan Watson. The theory of law and development illustrates that a legal framework is a key factor that influences development in society. The theory of legal change on the other hand shows that the law does not operate in a vacuum but it operates in the context of the society.

Max Weber's approach to law and development theory is one of the study's theoretical pillars. According to Max Weber, the advent of modern society is aided by the rule of law. Weber attributes the rise of capitalism to legal institutions. He propounded that the law was a significant factor as to why the new industrial development paradigm was only seen in Europe. Weber focused on the distinctiveness of European society, which explains why capitalism arose there.¹³ This study corresponds to this theoretical framework by attempting to demonstrate that there is a link between legal phenomena and economic prosperity, predominantly in the context of regional economic integration. This study will also look at Kenya's efforts to integrate commercial legislation in order to foster EAC financial and monetary cooperation.

The second theoretical basis of the study is the theory of legal change proposed by Alan Watson. The theory notes that development of law is to be majorly explained by transplantation of legal rules.¹⁴ This was evident in the European Union's history, where the German legal system was preferred.¹⁵ The theory is relevant to this research because it aims to demonstrate that Kenya's efforts to harmonize commercial laws have been hampered by legal issues. Watson's legal theory is significant because it offers a unique and controversial perspective on the interaction between the society and the law. In the study for instance, the arbitration process ought to proceed with minimal court interference according to Section 10 of the Arbitration Act.¹⁶ This however has not been the case. This shows that the legislation does not always represent societal relationships and the market dynamics. The case of court's interference in arbitration matters is relevant because it shows that it is not enough that harmonization of commercial legislation takes place. It is necessary to go a step further and ensure implementation of the harmonized provisions is effected.

1.8 Scope of the Study

¹³ David Trubek, 'Max Weber and the Rise of Capitalism', (1971) 3 Wis. L. Rev. 720.

¹⁴ William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 The American Journal of Comparative Law 489.

¹⁵ Armin Cuyvers, 'Free Movement of Capital and Economic and Monetary Union in the Eu', *East African Community Law* (Brill Nijhoff 2017).

¹⁶ Section 10, Arbitration Act.

The scope of this study is restricted to looking at the aspect of integration of the economy in the Kenyan-EAC context. The focus of the research will be on Kenya's legal difficulties in accomplishing monetary and financial cooperation in the EAC in comparison to the European Union which has achieved a greater degree of integration.

1.9 Literature Review

The literature for the study concentrates on economic integration and the harmonization of commercial laws. There is also an analysis of dispute resolution in the context that a good dispute resolution environment promotes investments and promotes regional economic integration in the context of the EAC.

1.9.1 Economic integration

Richard Frimpong Oppong promotes the idea that Africa's successful economic integration is undermined not only by socioeconomic, political, and infrastructure issues. He advises that, even when the socioeconomic, democratic, and infrastructure issues are resolved, the current laws will still restrict progress. The author addresses the EAC and points out that the technique of utilizing Regional Economic Communities (RECs) as a basis for the African economic communal system is hampered by legislative issues that have yet to be resolved.¹⁷

The stages of regional integration in the EAC are discussed by Mutubwa A. This is interrogated in relation to the production factors which are labor, land, capital and entrepreneurship. One illustration that the author emphasizes is the importance of participant states' transparency and the importance of unrestricted movement of workforces for effective economic collaboration in the EAC common market.¹⁸

In regard to the harmonization of commercial rules, Agasha Mugasha points out the importance of taking into account the local conditions in the EAC framework. The rule of law is a prerequisite for prosperity. Mugasha nevertheless points out that the rule of law does not exist in a vacuum, and that other considerations such as trading networks and a stable political environment must be taken into account. The author also claims that the attempts in the EAC to harmonize money-oriented laws are mostly a result of the transplantation of legal regulations that do not correspond to

¹⁷ Oppong (n 2).

¹⁸ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017).

domestic needs and ambitions. The author goes on to say that the existing legal system in the EAC does not take the informal sector into consideration.¹⁹ Gunther Teubner concurs that the practice of transplanting rules from one nation to another in varying conditions raises compliance and practicability issues.²⁰

Mwangi S Kimenyi and Katrin Kuhlmann point out that, while political factors affect regional integration the most, it is economic concerns that accelerate the regional integration endeavor. Kenya by virtue of its small population in comparison to the rest of the world, benefits from regional economic integration. This means that as a result of regional economic integration in the EAC, Kenya will be able to engage in foreign trade with the rest of the world.²¹ Francis Akena Adyanga points out that East African economic convergence leads to benefits from both domestic and foreign commerce.²²

Anna Cichecka observes that the East African integration process seems to be similar to that of the European Union at first sight. A closer review shows that there are regional variations in terms of collaboration. The EAC Treaty was concluded on November 30, 1999. It is important to note that the 1990s was a time of intense convergence among the European Union institutions. This therefore leads to the observation that the European Union convergence proposals inspired East African regional cooperation.²³

Henry Kyambalesa discusses the main concepts that are expected to lead to the global convergence of national economies. The author addresses the various manifestations of economic integration, the possible consequences associated with national economic integration and the prerequisites for the realization of the integration of national economies.²⁴ This literature is helpful in studying the concept of economic integration in view of existing legislations.

¹⁹ Agasha Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) 19 *European Journal of Law Reform* 306.

²⁰ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies' (1998) 61 *The Modern Law Review* 11.

²¹ Mwangi S Kimenyi and Katrin Kuhlmann, 'African Union: Challenges and Prospects for Regional Integration in Africa' (2012) 13 *Whitehead Journal of Diplomacy and International Relation*.

²² Adyanga Francis Akena, 'Regional Integration, a Prospect for Development: Lessons from Rwanda's Experience in the East African Community' (Peter Lang AG 2019).

²³ Anna Cichecka, 'EAC—an Answer for Regional Problems or Failed Solutions in East Africa?' (2018) 15 *Ksiegaria Akademica* Issue No 56

²⁴ Henry Kyambalesa and Mathurin C Hounnikpo, *Economic Integration and Development in Africa* (Routledge 2016).

Economic integration, according to Armin Cuyvers, necessitates both free capital flow and economic monetary union. The author interrogates the European Union's situation as well as the destructive euro crisis. A common currency is one of the objectives of the EAC and this literature is thus useful. The EAC can also learn from the various strategies used to correct structural defects.²⁵ In a publication, Edward Kafeero discusses the EAC's efforts to achieve trade facilitation. In terms of import and export processes, he compares the EAC customs union protocol to the WTO trade facilitation rules, guidelines, and suggested activities.²⁶

Glen W Atkinson examines the legal underpinnings of European international union from both a legal and economic perspective. The author examines how the evolution of European Court of Justice cases affected economic ties within the group. The examination demonstrates how the justice structure can contribute to greater integration.²⁷

The elimination of tariff and non-tariff blockades is an incentive for nations to join arrangements that involve economic collaborations. This is according to Kati Cole, Russell Lyons, and Deborah Cary.²⁸ Another reason for regional unification, according to Menna Bizuneh, Steven Buigut, and Neven Valev, is to achieve international clout. The writers indicate that European countries started to integrate in the 1950s in order to enhance their negotiation standing with the United States of America.²⁹ In the case of the EAC, this is a good motivation to pursue the regional economic integration goal.

According to Paul R Masson and Catherine Pattillo, a country's membership in various regional bodies leads to an overlap which creates complications in the EAC monetary integration goal. Some EAC nations are also affiliated with COMESA, an international organization with its peculiar routine for regional incorporation. The problem is additionally complicated by the fact that nine countries are members of both SADC and COMESA. The analysis is further extended to looking at the

²⁵ Cuyvers (n 15).

²⁶ Edward Kafeero, 'Customs and Trade Facilitation in the East African Community (EAC)' (2008) 2 World Customs Journal 63.

²⁷ Glen W Atkinson, 'Legal Foundations of European Economic Integration' (1984) 18 Journal of Economic Issues 507.

²⁸ Kati Cole, Russell Lyons and Deborah Cary, 'Regional Economic Integration' (1999) 2 The Review: A Journal Of Undergraduate Student Research 70.

²⁹ MennaBizuneh, Steven Buigut and Neven Valev, 'Gaining Global Clout through Monetary Union: Evidence from East Africa' (2018) 33 Journal of Economic Integration 1363.

stumbling blocks to obtaining a shared currency.³⁰The analysis given by the authors will be examined in light of the East African Monetary Union Protocol.

1.9.2 Harmonization of Commercial Laws and Dispute Resolution

Mobile banking systems in the East African Community are discussed by Joseph Kariuki Nyaga. This is in the light of the current legal framework which experiences challenges. The author points out that the different legal and regulatory structures within EAC member states pose a challenge to policy harmonization. This is relevant to this study since mobile gadgets are utilized to transact over half a billion dollars in the EAC on a monthly basis.³¹ Policy harmonization is thus needed given the economic magnitude of the mobile banking services. Njaramba Gichuki also delves further into Kenyan laws governing financial institutions. The author discusses banking's legal and structural facets.³²

Serena Natile claims that social entrepreneurship encourages a mindset of individuality as opposed to that sharing of resources. This is espoused in a paper regarding a socio-legal criticism of M-pesa in Kenya. This benefits mobile money companies and institutions at the expense of enhancing the life of the unbanked poor who are the expected beneficiaries.³³

Rosemary Mwanza discusses the recent history of Kenya's alliance with Chinese foreign direct investment. This emphasizes how a country's membership in an RTA will help it draw foreign direct investments. The literature is imperative to this enquiry since it is based on the assumption that Kenya's EAC connection helps to draw foreign direct investment.³⁴ This is an example of the EAC's financial and monetary collaboration.

Bibi Aisha Wadvalla describes the tactics taken by Kenya and Tanzania during the Covid-19 pandemic in an effort to assess the EAC's success in terms of monetary and financial cooperation.³⁵ H. Njoki Mboce and Kariuki Muigua argue for a collaborative

³⁰ Paul R Masson and Catherine Pattillo, *The Monetary Geography of Africa* (Brookings Institution Press 2004).

³¹ Joseph Kariuki Nyaga, 'Mobile Banking Services in the East African Community (EAC): Challenges to the Existing Legislative and Regulatory Frameworks' (2014) 4 *Journal of Information Policy* 270.

³²

³³ Serena Natile, 'Digital Finance Inclusion and the Mobile Money "Social" Enterprise' (2020) 45 *GESIS- Leibniz Institute for Social Sciences* 74.

³⁴ Rosemary Mwanza, 'Chinese Foreign Direct Investment and Human Rights in Kenya: A Mutually Affirming Relationship' (2016) 2 *Strathmore Law Journal* 133.

³⁵ Bibi-Aisha Wadvalla, 'How Africa Has Tackled Covid-19' (2020) 370 *BMJ* 2020; 370m2830.

commitment to incorporation as a logical underpinning. This is contextualized to the Covid-19 pandemic. The authors point out that by analyzing cross-border partnerships, it is essential to strike a compromise between improving domestic and neighboring nation capacities.³⁶

In terms of legal problems for Kenya, Archibold Ombongi claims that the EAC Agreement calls upon the Kenyan judicial system, where there is need to mediate between the Kenya's Constitution sovereignty provision and the treaty's assertion of conflicting national rules. The author examines this legal issue where treaties require laws to be enforceable on a national level.³⁷

The facilitation, harmonization, and greater coordination of trade regimes is one of AfCFTA's goals.³⁸The EAC, according to Shitta A Bello's publication, is a component of the AfCFTA. The author goes on to show how progress in regional fiscal incorporation in the EAC contributes to accomplishment in the adoption of the AfCFTA agreement.³⁹ R. Mukamunana and Kabelo Baikutso discuss regional fiscal incorporation in the context of Africa pointing it out as a tool for facilitating economic growth. The writers go on to address the barriers and obstacles for regional incorporation in Africa.⁴⁰

The progress of trade agreements is dependent not only on complex foreign directives and international relations, but also on African regimes' inclination to bring into fruition substantial domestic policy changes. These policy variations necessitate political concessions according to Tomer Broude, Marc L Busch, and Amelia Porges.⁴¹This literature attempts to show that when enacting policies that cause a harmonization crisis, the informal sector is usually overlooked. Victor Tokman also emphasizes the importance of the informal sector's incorporation. Lawlessness is a characteristic of the informal sector. This is because it exists outside the legal and

³⁶ H Njoki Mboce and Kariuki Muigua, 'Africa's Regional Co-Operation and Integration: The Corona Virus Litmus Test' (2020) *Journal of cmd* Volume 4 (2).

³⁷ Archibold Ombongi Nyarango, 'A Jigsaw Puzzle or a Map: The Role of Treaties under Kenya's Constitution' (2018) 62 *Journal of African Law* 25.

³⁸ Malebakeng Agnes Forere, 'The Agreement Establishing the African Continental Free Trade Area: Will It Spur Foreign Direct Investment in Africa' (2018) 2018 *ActaJuridica* 43.

³⁹ Shittu A Bello, 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26 *Sri Lanka Journal of International Law* 121.

⁴⁰ R Mukamunana and KabeloBoikutsoMoeti, 'Challenges of Regional Integration in Africa: Policy and Administrative Implications' (2005) UP Space Institutional Repository.

⁴¹ TomerBroude, Marc L Busch and Amelia Porges, *The Politics of International Economic Law* (Cambridge University Press 2011).

regulatory standards. The author outlines three approaches to integrating the informal economy. This is important in the light of the EAC's monetary and financial cooperation.⁴² Furthermore, according to Charles E. Makoko, social protection is a vital factor when it comes to the autonomy of movement of the workers. Labor is a major driver of development in the EAC, and the EAC Common Market protocol recognizes this.⁴³

There are also challenges that are addressed in the context of having a good dispute resolution mechanism as a necessary requirement for economic integration in the EAC. In a publication, Dr. Kariuki Muigua looks at the viability of commercial arbitration as a way of fostering integration in Eastern Africa. He reasons that arbitration in the commercial context is a stronger forum in resolving conflicts that are likely to occur as a result of competing personal or state interests in the current Eastern Africa Integration process. One legal obstacle identified by the author is that the five East African Community (EAC) member countries have separate legal structures, which is a significant impediment to harmonization efforts.⁴⁴

Dr. Kariuki Muigua goes on to question the position of the courts in regard to arbitration as a dispute resolution mechanism. The author examines the UNICITRAL Model Law on International Commercial Arbitration and the Kenyan Arbitration Act, 1995 in the context of the Kenyan courts stance in interfering in arbitration matters.⁴⁵ In regard to the court's position in arbitration, the 1996 English Arbitration Act tends to be aimed toward minimizing the court's involvement as much as possible. The House of Lords stressed three circumstances where the judges could inevitably intercede in arbitration matters.⁴⁶ This was in the case of *Coppee- Lavalin SA/NV v Ken- Ren Chemicals and Fertilizers Ltd.*⁴⁷

⁴² Victor E Tokman, 'Integrating the Informal Sector in the Modernization Process' (2001) 21 SAIS review 45.

⁴³ Charles E Makoko, 'Free Movement of Workers and Social Security Protection in the EAC Common Market Protocol' (2018) 28 Uongozi Journal of Management and Development Dynamics.

⁴⁴ David K Muigua, 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration' (2015) University of Nairobi Digital Repository.

⁴⁵ David Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi 2012).

⁴⁶ David Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi 2012).

⁴⁷ *Coppee- Lavalin SA/NV v Ken- Ren Chemicals and Fertilizers Ltd*, [1994] 2 All ER 465.

Kenyan judges, however, have been contradictory when it comes to intervening in arbitration cases. Judicial participation is only permitted if the Arbitration Act requires it, according to Section 10 of the Act.⁴⁸ However the decisions in *Sadrudin Kurji& another v Shalimar Limited & 2 Others*⁴⁹, *Ann Mumbi Hinga v Victoria Njoki Gathara*,⁵⁰ *Tononoka Steels Limited v E.A Trade and Development Bank (PTA Bank)*,⁵¹ and *David Onyango Oloo v The Attorney General*⁵² illustrate deficiency of uniformity on the Kenyan judges. This analysis is relevant to the study given that courts intervention in arbitration matters might lead to delays which affect the time period of resolving cases. This has a ripple effect of discouraging investments in the country thus affecting regional economic integration.

1.9.3 Conclusion

In respect of economic integration, legal considerations need to be given credence in regional economic communities. Labour as a factor of production is also an important aspect where the free movement of labour is a positive indicator of a successful regional economic community. Harmonization of commercial legislation also needs to take place and the East African Legislative Assembly as an institution of the EAC is better placed to evaluate the divergence in laws as it has representation from all the EAC member states. In the Kenyan case harmonization is necessary in the mobile money sector.

The Covid-19 pandemic has also illustrated a need for a collaborative approach in order to revive the EAC countries' economies. This entails tariff and non-tariff aspects which require legal considerations in order to be effected. A good dispute resolution environment attracts investments and it is from this premise that the courts interference in arbitration matters is discussed. Finally, in the quest for successful regional economic integration in the EAC, it is necessary for Kenya to take into account the above legal challenges.

1.10 Limitation of the Study

The EAC and the European Union are compared despite the variance in levels of development as regional bodies. Further, the research takes cognizance of the fact that

⁴⁸ Arbitration Act, 1995, Section 10.

⁴⁹ *Sadrudin Kurji& another v Shalimar Limited & 2others*, [2006] eKLR.

⁵⁰ *Ann Mumbi Hinga v Victoria Njoki Gathara*, Civil Appeal No 8 of 2009.

⁵¹ *Tononoka Steels Limited v E.A Trade and Development Bank (PTA Bank)*, 2(2000) EA 536.

⁵² *David Onyango Oloo v The Attorney general*, [1987] K.L.R 711.

Britain left the European Union and it is from this premise that the Kenyan-United Kingdom Economic Partnership Agreement (EPA) is discussed. This is in order to show that various interests need to be balanced so as to promote regional economic integration.

1.11 Chapter Outline

Chapter One: Introduction

This chapter provides an overview of the research. It includes the introduction, problem statement, the study's justification, objectives of the research, the research questions, theoretical framework, research methodology, literature review and the hypothesis.

Chapter Two: A legal analysis of Regional Economic Integration and Kenya's Monetary and Financial Cooperation prospects in the EAC

The role of law in regional economic integration is discussed in this chapter. The chapter intends to show that the law plays an important role in regional economic integration and that there is a nexus between regional economic integration and monetary and financial cooperation in the EAC. The chapter also attempts to demonstrate that a well-structured legal framework is a required precondition for an economic community's effectiveness.

Chapter Three: Legal challenges for Kenya in achieving EAC monetary and financial cooperation in the EAC

This chapter looks at Kenya's efforts to harmonize commercial laws in the light of Article 82 of the EAC Treaty, which deals with monetary and financial cooperation. This is in order to determine the legal ramifications and obstacles that Kenya faces as an EAC member state.

Chapter Four: Lessons from the European Union for Kenya

The lessons and best practices Kenya can learn from the European Union framework are examined in this chapter.

Chapter Five: Findings, Recommendations, and Conclusions

The aim of this chapter is give the findings, make recommendations and conclude.

CHAPTER TWO

A LEGAL ANALYSIS OF REGIONAL ECONOMIC INTEGRATION AND KENYA'S MONETARY AND FINANCIAL COOPERATION PROSPECTS IN THE EAC

2.0 Introduction

The East African Community Agreement was concluded on November 30, 1999, and was effected on July 7, 2000. This came after the founding member states; Kenya, Uganda, and Tanzania ratified the treaty. On June 18, 2007, Rwanda and Burundi signed the EAC Treaty, and they became full members on July 1, 2007. On April 12, 2016, the Republic of South Sudan ratified the treaty.⁵³ It is important to note that the future contribution to improving integration within the East African area is one of the main considerations for partner states when awarding membership to a foreign country upon request to join the community.⁵⁴

The Kenyan constitution shows that sovereignty belongs to the Kenyan citizens, who may exercise it directly or by democratically elected members.⁵⁵ The revival of African consciousness has however shown that there has been a pattern of transferring authority from states to regional and continental bodies.⁵⁶ As a result, convergence in the international and regional sphere is becoming more popular. This has been realized by negotiations and in the East African sense; the East African Community Treaty illustrates this. Kenya is a member of the EAC as a result of the treaty's ratification.⁵⁷

In order to accomplish the aim of regional economic integration, it is necessary to acknowledge that there are social, economic, and legal obstacles to overcome. The aim of this chapter is to demonstrate that when considering economic integration in the EAC, legal considerations must be taken into account. In the EAC, there exists a connection between regional economic integration and financial and monetary collaboration. This means that a successful society must be able to show efficacy by

⁵³ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) Journal of cmsd Vol 1 (2).

⁵⁴ Secretariat (n 1).

⁵⁵ Article 1 (1) & (2) Constitution (n 5).

⁵⁶ Oppong (n 2).

⁵⁷ Article 2 (6) Constitution (n 5).

maintaining a judicious and well-managed partnership with supplementary legal structures.

2.1 The Significance of Regional Economic Integration

An arrangement amongst nations in a specific geographical zone with the intention of growing and ultimately exterminating tariff and non-tariff blockades to the unrestricted movement of products, services, and factors of production is known as regional economic integration.⁵⁸ Land, labour, capital, and entrepreneurship are the drivers of development in the EAC. There is recognition that strong legal frameworks enhance joint decision making in regional economic communities which promotes cooperation.⁵⁹

Regional economic development is important because it allows countries with limited economies to participate in foreign trade with larger economies.⁶⁰ The motivation for forming regional economic integration communities came after World War II as a measure against military aggression and an instrument of economic growth and development. This necessitated treaty formations and hence revealing a legal framework.⁶¹ In the Kenyan domain, this is advantageous for the informal sector in terms of imports and exports which implies that the EAC provides Kenya with a demand for its products and services. A multifaceted trading structure is therefore created with few tariff and non-tariff barriers as a result of regional economic convergence.⁶²

The prospect of nations being able to integrate is achievable if there are little barriers to the flow of the factors of production across national boundaries. In Kenya, for example, an obstacle is the blatant demand of bribes from the law enforcement as the local merchants seek to cross the borders. The result is that merchants are obligated to pay bribes to customs agents and police officers in order to get their merchandise over

⁵⁸ Kati Cole, Russell Lyons and Deborah Cary, 'Regional Economic Integration' (1999) 2 *The Review: A Journal Of Undergraduate Student Research* 70.

⁵⁹ Giovanni Capannelli, Jong-Wha Lee and Peter A Petri, 'Developing Indicators for Regional Economic Integration and Cooperation' [2009] *Singapore Economic Review*, Forthcoming, Asian Development Bank Regional Economic Integration, Working Paper.

⁶⁰ Mwangi S Kimenyi and Katrin Kuhlmann, 'African Union: Challenges and Prospects for Regional Integration in Africa' (2012) 13 *Whitehead Journal of Diplomacy and International Relations* 7.

⁶¹ Stefan A Riesenfeld, 'Legal Systems of Regional Economic Integration' [1974] *The American Journal of Comparative Law* 415.

⁶² Mutubwa A (n31).

the border. ⁶³The inference from this illustration is that smuggling weakens Kenyan state agencies and promotes a system of corruption. This has an impact of making monetary and financial institutions in the EAC more difficult to operate.

Regional economic integration is also a tool that is utilized to promote economic growth.⁶⁴ This can be demonstrated in the case of Uganda which enjoys advantages even though it is a landlocked republic. This is because tariff and non-tariff blockades elevate the trade costs in a landlocked nation and consumers cannot be reached unless borders are crossed.⁶⁵ A manifestation of a legal framework in regards to tariff and non-tariff barriers is further illustrated through a nations competition laws.⁶⁶ In the Kenyan case there is the Competition act number 12 of 2010.

Regional Economic Integration may also be scrutinized in the context of RTAs (Regional Trade Agreements), which are perceived by certain states as a mechanism of progressing economic and financial collaboration. RTAs are seen as a protective requirement by smaller nations, whereas big economies depend on them to prevent being left out in the cold. Being a part of an RTA gives a nation the ability to attract Foreign Direct Investment (FDI). An occurrence of this manifests itself in the case where a nation with minimal cost of labour has privileged access to a wider, more established economy.⁶⁷ In Kenya, Chinese foreign direct investment has risen rapidly in recent years. Inflows of Chinese FDI into Kenya totaled to approximately two billion American dollars in 2012, up from approximately five hundred million American dollars in 2010.⁶⁸ In 2014, more than fifty Chinese firms were operating in Kenya on approximately eighty ventures worth a total of two billion dollars. Three Chinese firms were also responsible for the design of the Thika superhighway in regard to public works. The Lamu Port-South Sudan-Ethiopia Transport Corridor Project is also another indication of Chinese participation in Kenya's economy (LAPSSET).⁶⁹

⁶³ Wakhungu, Okoth and Odhiambo (n 9).

⁶⁴ Mukamunana and Moeti (n 39).

⁶⁵ Kimenyi and Kuhlmann (n 60).

⁶⁶ Richard O Cunningham and Anthony J LaRocca, 'Harmonization of Competition Policies in a Regional Economic Integration' (1995) 27 Law & Pol'y Int'l Bus. 879.

⁶⁷ Mutubwa A (n 31).

⁶⁸ Rosemary Mwanza, 'Chinese Foreign Direct Investment and Human Rights in Kenya: A Mutually Affirming Relationship' (2016) 2 Strathmore Law Journal 133.

⁶⁹ *ibid.*

2.2 A Legal Perspective of Regional Integration

During the integration period, it is necessary to address legal issues. The relationships dynamics which involve a multitude of participants that include: state agencies, the courts, institutional agencies and the citizens of the EAC affiliated states. A legal analysis has to take into account how these dynamics intersect in the quest for economic integration in the EAC.⁷⁰ The treaty establishing the EAC is a legal document and by virtue of ratification by the individual member states, it amounts to a binding contract. This is enhanced by the Constitution of Kenya under Article 2 (6) where ratification of a treaty amounts to making it part of the Kenyan legal framework.⁷¹

The regulatory issues must be taken into account throughout the different stages of the integration process. An illustration of this is that a free trade area can exist without a structured mechanism between affiliated nation states legal structures and those of the EAC. On the flip side, a common market and a customs union cannot function efficiently until the rational problems are addressed. The explanation for this is that as global development progresses through the different phases of integration, the relations between legal structures become more complex.⁷² This demonstrates the importance of the legislation as a tool for economic integration.

It is also important to note that the factors of production can be restricted by national and foreign legislation. These limits can be informed by economic and sociopolitical factors, but they are brought to the surface by the medium of the law. This level of legal convergence has only recently been achieved within the European integration experience. This gives African nations optimism because it reveals that it is a dream that can be achieved. The European Union's high level of legal convergence was not reached overnight. This research acknowledges that this is a legacy from the 1950s, when many African countries were already under colonial control.⁷³ In 1963, Kenya gained freedom from colonial rule. From a legal standpoint, the colonial past often leads to a shared legal infrastructure, which is a critical component of economic

⁷⁰ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011).

⁷¹ Kenya Constitution, 'The Constitution of Kenya' [2010] Government Printer." Kenya: Nairobi.

⁷² Oppong (n 2).

⁷³ Ibid.

integration. Kenya's adherence to common law can be traced back to the country's imperial relationship with the United Kingdom.⁷⁴

The treaty establishing the EAC has the effect of tying legal commitments together and envisioning deeper legal integration within the legal structures of the societies that is formed by the member states. The legal essence of the treaty's commitments must be examined by looking at the questions around the incorporation of community law into member states' legal systems. One of the EAC's goals is to establish policies and programs that will broaden and deepen cooperation among partner countries. This must be done in the light of legal and judicial questions, as well as political, fiscal, and social issues.⁷⁵

The legal success of the EAC can be examined by looking at the free movement of production factors, as well as court decisions, in the economy in accordance with the diverse phases of integration of the economy. It is therefore important to integrate the provisions of the EAC treaty into the laws of affiliate state members. This can be accomplished within a legislative system involved in handling and maintaining complex interactions that exist between the state and the population, as well as between governments, communities, and organizations.⁷⁶ An appropriate and well-resourced administrative structure is often needed for the implementation of community law. A key prerequisite is a well-structured framework for evaluating violations of the community laws and guaranteeing that the community's growth needs are fairly represented at national level.⁷⁷ This analysis shows that regional integration of the economy is not just a stage but it involves a process.

2.3 Stages of Economic integration in the EAC

The affiliate nations of the EAC agreed to create a customs union, a common market, a monetary union, and eventually a political union.⁷⁸ An overview examination of integration phases shows that connections involving the EAC and nations intensify as progress is made through the economic integration processes or/and levels. In order to hold these engagements in check, an appropriate legal structure is needed. In the

⁷⁴ Ibid.

⁷⁵ Article 5 Secretariat (n 1).

⁷⁶ Oppong (n 2).

⁷⁷ Oppong (n 68).

⁷⁸ Article 5 Secretariat (n 1).

EAC context, each stage has a protocol that governs the stage. This amounts to a legal pronouncement binding the individual EAC nations.

2.3.1 Customs Union

This stage entails the incorporation of free-flowing of commodities and the factors of production.⁷⁹ The factors are land, labour, capital, and entrepreneurship. Non-member states are subject to import restrictions and a general tariff wall in a customs union. The acquired import revenue from third-country non-member nations is also distributed.⁸⁰

In the EAC context, there is the Customs Union Protocol which is premised on Article 75 of the EAC treaty and it entered into operation in 2005.⁸¹ The Customs Union Protocol created a Free Trade Area (FTA) whereby products and services traded between member states are duty-free. There is also the aspect of trade to any East African Community partner state where products from third-nonmember countries are subject to a common external tariff (CET). The Customs Union Protocol also establishes a common rule of origin.⁸²

A review of EAC Customs Union Protocol shows the inclusion of a range of WTO trade facilitation rules, guidelines and best practices for importation and exportation guidelines and protocols. This benefits the financial and monetary sectors. Article 6 of the EAC Customs Union Protocol lays out several additional measures for achieving trade facilitation. They include lowering the quantity and volume of documents needed for trade between partner states, adopting common standards of documentation and procedures where international standards do not fit partner state conditions, reviewing procedures used in international trade and transportation facilitation on a regular basis with the aim of simplification, and finally improving trade facilitation.⁸³

⁷⁹ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) Journal of cmsd Vol 1 (2).

⁸⁰ Ibid.

⁸¹ Article 75 Secretariat (n 1).

⁸² Mutubwa A (n50).

⁸³ Kafeero (n 26).

2.3.2 Common Market

The free flow of labor and capital as production factors is part of the common market economic integration process. In addition, the standardized regulations for the factors of production are created. The objective of market integration is achieved by free flow of products, commodity market integration, and trade liberalization. Non-tariff obstacles must also be eliminated in order to promote the efficacy of a common market. Policies dealing with fiscal and budgetary matters also have to be coordinated.⁸⁴This would ultimately foster economic interdependence that extends beyond national policy and the welfare of individual member states.

The Common Market Protocol became operative in the EAC in 2010. The protocol provides guidelines to encourage the free flow of development factors such as individuals, commodities, services, and resources. The need for clarity in issues involving other partner states is another key concept that is espoused in the Common Market Protocol. This may be accomplished by exchanging knowledge between the member states to ensure the protocol's smooth execution. The other mentioned principle is that there should be no discrimination in the treatment of foreigners.⁸⁵

Even though substantial progress has been made, obstacles to movement of the factors of production still remains prominent as a consequence of member state laws and regulations. This is according to the East African Community Common Market Score Card released in 2014.⁸⁶This shows how the integration process is shaped by the regulatory systems and contributes to monetary and financial cooperation.

Effective economic integration also requires the right to free movement of workers. This is significant because labour as a production factor can promote economic growth. It is, therefore, important to consider the issue of social security benefits in order to promote the free mobility of labour. The EAC common market protocol protects employees' freedom to travel and entitles them to the same social security rights and benefits as workers in host partner nations.⁸⁷ The EAC partner states,

⁸⁴ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) Journal of cmsd Vol 1 (2).

⁸⁵ Ibid.

⁸⁶ Wakhungu, Okoth and Odhiambo (n 9).

⁸⁷ Charles E Makoko, 'Free Movement of Workers and Social Security Protection in the EAC Common Market Protocol' (2018) 28 Uongozi Journal of Management and Development Dynamics.

therefore, need to harmonize their labour and social security legislation and regulations in order to realize the right of free mobility of workers within the EAC. The need for harmonization is necessary because despite these stipulations, the partner states' labour and social security laws are quite distinct.⁸⁸

2.3.3 Economic Union

This entails the synchronization of nationwide economic guidelines and policies, such as monetary and fiscal policies, tax structures, and the use of a single currency. This is important because tax and monetary policies are key factors in determining where a business will operate. Market and labour policies also have an additional impact on population movements and manufacturing costs of products. As a result, member states must streamline their policies. The divergence of national transportation and regional and industrial strategies in the EAC, which distorts rivalry is also an example of an impediment that must be removed.⁸⁹

The East African Monetary Union Protocol (EAMU) was signed in November 2013 in the East African context. The protocol envisions the member countries adopting a common currency by gradual integration of their currencies. This is expected to be accomplished in ten years. This implies that 2024 is the due year. As a result, it was concluded that monetary and fiscal strategies, financial and settlement processes, and financial management and reporting standards should all be harmonized. This necessitated the development of an East African Central Bank. It is important to remember that the EAC had a shared legal tender prior to 1977.⁹⁰

2.3.4 Political Federation/Union

Under Article 5 (2) of the EAC Treaty, a political union is an aspiration of the integration phase.⁹¹ A process is needed to bring this aspiration to fruition and a special summit composed of the heads of state of the EAC countries passed a resolution to that effect. In August 2014, the summit established a committee to

⁸⁸ Ibid.

⁸⁹ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) Journal of cmsd Vol 1 (2).

⁹⁰ Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) Journal of cmsd Vol 1 (2).

⁹¹ Article 5 (2) Secretariat (n 1).

provide recommendations on the mechanism and to ensure the success of political integration.⁹²

The political union stage builds on the economic union stage by establishing a fully integrated body with a central supranational political control whose decisions are binding on all members. A political union is described as a group of states that have agreed to share legislative and political systems and have given up their political sovereignty. It envisions all of the above phases coming together at some point to form a coherent and amalgamated supranational political area. It often entails representatives holding collective decisions or delegating decision-making authority to new central organs. A political union's goal is generally to create a supranational body with effective power over the state members in the community.⁹³

2.4 Legal Analysis of Integration Stages in the EAC

Irrespective of the angle in which the EAC is studied, the effects of international integration are compared to the rules, legal structures, and institutions of the member states in order to pursue a shared economic vision. The management and structuring of relationships among different actors is a popular stumbling block in economic integration. As a result, an appropriate legal structure is needed to handle the different relationships in the EAC.⁹⁴

The relationship structure is a legal system that defines the link between national and community rules. It also includes methods for enforcing community rules in member states, identifying the community and state representatives' competencies, and anticipating and resolving conflicts. A legal framework's aim is to maintain the community's efficacy. It is important to remember that a successful legal system goes hand in hand with raising visibility through education and making community law accessible. This guarantees that the gains are felt at the grassroots stage.⁹⁵

The EAC also has the ability to make and enact laws which makes it a legal system despite it not being a state. The EAC shares this trait with governments. When

⁹² Mutubwa A, 'The COMESA-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream? (2017) *Journal of cmsd* Vol 1 (2).

⁹³ Ibid.

⁹⁴ Oppong (n 2).

⁹⁵ Ibid.

determining whether or not a legal system exists, there are four conditions to take into account. They include; the existence of codes of conduct, bodies that are established where rules are applied, a recognizable source of rules that is part of the legal structure, and a duty to obey the legal system's rules.⁹⁶

A positivist examination of a legal system's features shows the need for an ultimate basis of valid norms. However, where the source decrees, the origin of these rules or norms cannot be undermined or rendered inferior to other rules or norms. As a result, origin of rules or norms is crucial, and hence the need for clear guidelines as to how the norms interact with other norms outside of that source.⁹⁷ The EAC Treaty as the foundation of the East African Community assumes legitimacy in Kenya after it is ratified.⁹⁸In the case of the EAC, it is important that the treaty serves as the legal basis for its competence. This is also supported by the community's legislative capacity to exercise all of the roles conferred on it by the treaty for execution of its purposes.⁹⁹This impression of the EAC's lawful framework provides valuable intuition into how the EAC interacts with the lawful systems of its member states, in this case Kenya. Finally, the EAC is norm generating. The treaty establishes institutions with the authority to make and enact rules. The treaty also extends its application to the member states, organizations, and citizens. This means that the EAC Treaty serves as a *grundnorm* thus it possesses enforcement stipulations for nonconformity. It is also important that the affiliate EAC nations willingly follow the rules of the community.

2.5 The EAC's Institutional Framework

The manifestation of the legal commitments agreed by the nation states in the treaty establishing the EAC are brought into fruition by the various institutions. It is for this reason that they are discussed as their performance can be used to evaluate the prospect of the regional economic integration endeavor. The Summit of Heads of State and Government, the Council of Ministers, the Coordination Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat are some of the EAC's main organs.¹⁰⁰

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Article 2 (6) Constitution (n 5).

⁹⁹ Article 4 Secretariat (n 1).

¹⁰⁰ Ibid.

The summit is made up of the member states' heads of state and governments. It is responsible for presenting the East African Community's view. The council of ministers on the other hand is responsible for setting policies. The council of ministers delegate twice every year. The East African Legislative Assembly (EALA) is responsible for enacting legislation and supervising the secretariat. The EALA was founded by the EAC Treaty's Article 9. It is made up of forty five participants, nine from each of the partner states. As a result, the EALA has an international element and it enacts legislation.¹⁰¹

The East African Court of Justice (EACJ) is the other institution that serves as EAC's judiciary branch. It interprets the EAC Treaty and protocols and ensures that they are followed. The location of the court is in Arusha, Tanzania. It is made up of ten judges selected by the summit. The judges are chosen from among the serving adjudicators of affiliate nations. There are two segments in the court: appellate and first instance. The EAC secretariat is the administrative body of the EAC, and it is responsible for the community's day-to-day operations. The secretariat is led by the secretary general, who is chosen by the summit. The secretary general's tenure is non-renewable and lasts for five years. The secretariat is in charge of ensuring that the council's directives and legislation are fully enforced.¹⁰²

2.6 Assessment of EAC Progress

The law does not function in a vacuum. It operates in the context of a society and it is for this reason that an assessment is necessary. The EAC has made strides in ensuring unrestricted movement of products and persons', nevertheless it still faces challenges in realm of labour mobility, service provision, and residency rights. The explanation in regard to the challenges is the refusal by certain EAC affiliate nations to allow access of their economies to other countries with more advanced economics such as Kenya.¹⁰³ The outcome is that this negatively affects Kenya where it is unable to completely expand her access to a wider market. Non-tariff barriers are used to achieve this retrogressive objective. This has an effect on the EAC's monetary and financial institutions. The disagreement between Kenya and Tanzania about their respective approaches to dealing with the Covid-19 pandemic is an example of the

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Mutubwa A (n50).

non-tariff obstacle. An explanation from the late Tanzania's president John Magufuli proclaimed Tanzania to be Covid-19 free on June 8, 2020 as a result of God's mercy. There was no scientific proof for this. Tanzanian borders thus stayed accessible as a result, and Tanzanian truck drivers were suspected of bringing the virus to Kenya's border towns.¹⁰⁴ A dispute eventually ensued owing to the long time period spent in the Kenya –Tanzania borders for commodities to go through. This eventually resulted in a ban of Kenyan cargo trucks into Tanzania. This is an illustration of how rules can affect trade and regional economic development.

A common external tariff is also another problem because member states negotiate with third partners such as the European Union on their own, reducing the EAC community's bargaining power. The declaration in February 2020 by Kenyan President, Uhuru Muigai Kenyatta and US forty fifth President, Donald J Trump, that the two states plan to begin talks on a road map for bilateral unrestricted trade agreement is an example of this. This is a source of worry for international integration since the United States of America continues to concentrate on the advantages for American businesses.¹⁰⁵ It can be argued that EAC would benefit more as opposed to Kenya going to the negotiating table alone.

An examination of the EAC's objectives and expectations reveals the organization's foresight. In 2010, a customs union was created. In 2023, a monetary union would be completely operative, followed by a political union. Notwithstanding the impediments to establishing a customs union, the EAC common market entered into effect in 2010 after the end of negotiations in 2009.

2.7 Regional Economic Integration in the EAC in the midst of COVID-19 pandemic

The Corona Virus Disease (COVID-19) has had a significant impact on Regional Economic Communities, like the EAC. The World Health Organization (WHO) proclaimed the COVID-19 epidemic a universal health emergency of intercontinental significance on January 30, 2020. This entailed numerous states imposing policies and determining how these measures will affect domestic, international, and global

¹⁰⁴Wadvalla (n 35).

¹⁰⁵Oxford Analytica, 'US-Kenya Trade Pact May Undermine African Aspirations' Emerald Expert Briefings (2020).

obligations.¹⁰⁶These restrictions harmed commerce and, as a result, had a detrimental impact on international monetary and financial institutions.

In order to reduce human-to-human touch and transmission, the EAC had to change and go electronic. Any regulatory directive adopted had to promote the flow of products and resources during the Covid-19 pandemic. Trade facilitation is another important objective to promote regional economic integration and the partner states must look at ways to help Micro, Small, and Medium Enterprises (MSMEs) in order for them to stay afloat and advance a foundation for the post-COVID-19 retrieval phase.¹⁰⁷The first reaction by the EAC partner states was to recoil and make all possible changes to defend the sovereign, according to an overview of the Covid-19 countermeasures by the member states. This is significant since the restrictions mostly influenced the transportation of persons and goods.¹⁰⁸The countries-imposed restrictions in the form of enforcing lockdowns, which limited mobility, shutting airports, and issuing travel restrictions. In order to combat the COVID-19 pandemic, the EAC took a comprehensive formal collaborative strategy. This is in reference to migration across national borders. The ministers of health in EAC relations released a joint announcement on Covid-19 readiness and rejoinder in the EAC area via video conference. This occurred on March 25, 2020. The aim of the conference, according to the joint statement, was for EAC state representatives to exchange details and existing awareness about the Covid-19 pandemic. It also sought to devise methods to prevent the virus from spreading further throughout the EAC and to establish a strategy to mitigate its effects.¹⁰⁹

The Covid-19 pandemic has highlighted the importance of cross-border partnerships, which must be reviewed in order to strike a compromise between strengthening domestic and neighboring nation capacities. Integration is logically underpinned by a collaborative response, particularly during a crisis. The reactions of the EAC member state countries when the Covid-19 pandemic hit are examined against this context.¹¹⁰The responses of Kenya, Uganda, and Tanzania (as of March 30, 2020) show that a country's degree of cooperation and integration importance is ingrained in its DNA.

¹⁰⁶Mboce and Muigua (n 36).

¹⁰⁷<https://www.eac.int/coronavirus>.

¹⁰⁸Mboce and Muigua (n 36).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

This is an important aspect since it informs the initial evaluation and response to any risks or requirements. The first impulse is to defend the sovereign.

In the Kenyan context for instance, both international flights into and out of the country were suspended by the Kenyan government on March 25, 2020. On March 21, 2020, President Museveni issued an order to close all Ugandan borders. There was no response from the United Republic of Tanzania, according to reports. Rwanda closed its boundaries on March 21, 2020, with the exception of freight transporting merchandise and Rwandans heading home. South Sudan's government shut down all of its airports and land borders on March 23, 2020. As of March 30, 2020, there had been no confirmed response from Burundi.¹¹¹

2.8 Agreement on the African Continental Free Trade Area (AfCFTA)

The African Continental Free Trade Area (AfCFTA) aims to provide a common market for products and services in Africa. The African Union's forty-four member states ratified the treaty in 2021. One of the key goals of the AfCFTA is to make trading regimes easier to harmonize, facilitate and coordinate. It also seeks to solve the problems that come from simultaneous participation of trade negotiations across Africa. Local markets would be prosperous as a consequence of this convergence. Domestic suppliers would also profit from economies of scale, capital that will be distributed efficiently, and foreign direct investment that will be attracted.¹¹²

In order for AfCFTA to be successful, the hard and soft infrastructure needs to be given attention. Trade with existing partners need to be deepened.¹¹³ The Covid-19 pandemic has been a threat to this endeavor however there have been other existing obstacles such as conflicts in African countries, wars and disease outbreaks such as cholera, malaria and Ebola.¹¹⁴ There is also a difference among African nations in terms of development. It is therefore necessary to apply special and differential treatment for the less developed countries to maximize the benefits of AfCFTA.¹¹⁵

¹¹¹ Ibid.

¹¹² 'Agreement Establishing the African Continental Free Trade Area' (n 6).

¹¹³ Eunice Ajambo and Chukuwebuka Emebinah, 'The African Continental Free Trade Area (AfCFTA): Maximizing Benefits for the Continent.' [2021] Harvard Africa Policy Journal.

¹¹⁴ Michael Takudzwa Pasara and Steven Henry Dunga, 'Who Wins And Who Loses Under The AfCFTA? A Simulation Analysis Across Ecowas Countries' (2020) 12 International Journal Of Economics And Finance.

¹¹⁵ David Luke, 'Making the Case for the African Continental Free Trade Area', *Inclusive Trade in Africa* (Routledge 2019).

Additionally, the cost effective implementation of the agreement needs to take place to ensure it's benefits are realized.¹¹⁶ The EAC countries thrive in terms of exporting agricultural commodities and minerals. AfCFTA is therefore an opportunity to enhance this dominance.¹¹⁷

The AfCFTA in terms of its structure, is split into a foreword, seven sections, thirty pages, with three separate protocols divided into parts and annexed provisions. Regional Economic Communities (RECs) and Free Trade Areas (FTAs) are recognized as building blocks in Article five of the AfCFTA.¹¹⁸ The African Continental Free Trade Area (AfCFTA) aims to boost the continent's economic development. This is accomplished by attracting foreign direct investment (FDI) to Africa. Prices of products and services need to be reduced, and commodity markets have to be integrated in the hopes of attracting Foreign Direct Investment (FDI). An example of an impediment that may be removed in order to draw Foreign Direct Investment (FDI) include non-tariff barrier obstacles.¹¹⁹ AfCFTA is often thought to be a workaround for countries with several memberships in different RECS. The African Continental Free Trade Area (AfCFTA) addresses this issue by encouraging sub-regional economic convergence.¹²⁰ EAC has progressed through the integration phases as elaborated in the prior discussions.

AfCFTA has also resulted into benefits such as: employment gains, increased competitiveness among African MSMEs, reduction of poverty and also nations that share borders can better trade with one another. The EAC situation is an illustration where Kenya, Uganda, and Tanzania exchange goods between themselves. The rationale for this is that trading costs are significantly lower. AfCFTA seeks to improve intra-African exchange by bridging the gap between physical infrastructure and trade. The regional communities involved in this endeavor as AfCFTA building blocks include COMESA-EAC and SADC.¹²¹

¹¹⁶ Komi Tsowou and Junior Davis, 'Reaping the AfCFTA Potential Through Well-Functioning Rules of Origin' [2021] *Journal of African Trade*.

¹¹⁷ Isaac MB Shinyekwa, Enock NW Bulime and Aida Kibirige Nattabi, 'Trade, Revenue, and Welfare Effects of the AfCFTA on the EAC: An Application of WITS-SMART Simulation Model' (2021) 4 *Business Strategy & Development* 59.

¹¹⁸ 'Agreement Establishing the African Continental Free Trade Area' (n 6).

¹¹⁹ *Ibid.*

¹²⁰ Shittu A Bello, 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26 *Sri Lanka Journal of International Law* 121.

¹²¹ *ibid.*

The EAC and the Southern and East African region is another area that will be discussed. The basis for this is that AfCFTA has an intention strengthening economies of African countries by harmonizing trade liberalization. This is to be done at the sub regional level and eventually at a continent level. As a result, the manufacturing market will become more dynamic, and economic diversification will increase. The Boasting Intra-African Trade (BIAT) program, which involves clusters on trade facilitation and logistics intend to assist sustain the AfCFTA agreement's inclusive gains. The least developed countries that are signatories to the AfCFTA agreement would also profit from the expansion of trade and increased spending in infrastructure, all of which are essential for the effective delivery of products and services.¹²²

Regardless of the lofty goals, AfCFTA faces certain obstacles. One concern is that the benefits would not be distributed evenly among the member countries. This is due to the economic disparities between nations. Another issue is that well-established transnational corporations are expected to control the business, putting emerging companies at a disadvantage. The response to this impediment is to put in place complementary measures to safeguard companies that are at their infancy. The complementary measures include consumer protection and policies that address competition.¹²³ Kenya, for example, loses approximately fourteen million American dollars in tariff revenue. Kenya must therefore improve its productivity with the aim of offsetting detrimental effects of trade diversion and follow policies which encourage the growth of industries in order to promote profit from the AfCFTA. The other impediment is a shortage of financial capital. The introduction of AfCFTA thus necessitates the construction and extension of the required facilities and institutions. The lack of political will and determination is another problem, as several countries have yet to liberalize their RECs.¹²⁴

2.9 Conclusion

The main goal of this section was to show how important a legal underpinning is in regional economic integration in the EAC. A prerequisite for successful regional economic integration is a well-structured legal system. The treaty that established the

¹²² Ibid.

¹²³ Bello (n 112).

¹²⁴ Ibid.

East African Community was also examined, and an examination of the phases of integration revealed deeper layers of relationships between the community and its member states. Kenya's prospects for monetary and financial corporation in the EAC are also hampered by legal and administrative flaws, as illustrated by the study. This has been illustrated in the form of the imposed non-tariff barriers.

In the midst of the Covid-19 pandemic, the medium of the law is further utilized and this affects regional economic integration. The research has shown that the law was used to limit people's movement amongst EAC countries. In terms of the AfCFTA, the analysis has shown that the EAC is a critical component in achieving regional economic integration. As a result, this chapter has shown the importance of the legislation in achieving regional economic integration. It's also crucial for the EAC to achieve monetary and financial union.

CHAPTER THREE
**LEGAL CHALLENGES FOR KENYA IN ACHIEVING MONETARY AND
FINANCIAL COOPERATION IN THE EAC**

3.0 Introduction

The law, as illustrated in the previous chapter, is a significant tool in the EAC's endeavor to attain successful regional economic integration. This chapter will examine some of Kenya's legal problems in attaining monetary and financial collaboration inside the EAC. The regulatory issues would be addressed in relation to complexity of legislation, mobile banking, the informal sector and labor as a production factor.

3.1 The Complexity of Domesticating Legislation for Kenya

The EAC Treaty is applicable in Kenya under Article 2 (6) of the Kenyan Constitution where it is stipulated that any agreement signed by Kenya comprises a segment of the Kenyan law.¹²⁵This transposes to a discussion of the connection between domestic legislation and treaty provisions both in the Kenyan context as well as in relation to foreign jurisprudential pronouncements before the courts in Kenya. An issue that this research aims to highlight is the debate in Kenya over where treaties fit into hierarchy of laws. The Treaty that fashioned the EAC presents this obstacle to the judiciary in Kenya, which must decide either the constitution's supreme provision or the EAC'S treaty prerogative to be supreme over conflicting rules of the nation. The constitution generally is above the provisions of the treaty in terms of hierarchy and thus treaties should be treated equally to national home-grown legislation. This however should take place when certain requirements are met. These requirements are; that such a treaty has to be signed in accordance with the Treaty Making and Ratification Act 2012 (TRA 2012), and secondly they can become operational by application of its provisions.¹²⁶

This lawful issue can be analyzed in the Kenyan sense through examination of whether a treaty requires additional laws to be enforceable in the domestic jurisdiction. The study interrogates court rulings which have not been clear in an effort to see whether immediate applicability of treaties is feasible.¹²⁷

¹²⁵ Article 2 (6) Constitution (n 5).

¹²⁶ Nyarango (n 37).

¹²⁷ Ibid.

This research aims to take a standing on the position of treaties in Kenya's hierarchy of norms in order to analyze the above legal challenge. It is important at this stage to distinguish between two doctrines: monism and dualism. National and International law systems are separate under the dualism doctrine. This therefore implies that a treaty cannot be implemented on a national level unless a state enacts legislation that converts or interprets the treaty into national law. On the flip side, monism as a doctrine is of the view that national rules and foreign laws are two components of the same structure. This means that a treaty becomes law after it is signed in accordance with a state's constitution and takes place in that state.¹²⁸

This research takes a dualistic perspective. Article 2(6) of Kenya's Constitution is supposed to guarantee that domestic legislation is consistent with foreign law that applies to Kenya. An illustration of the application of the dualistic doctrine in Kenya was stipulated by the court in the case of *Walter Osapiri Barasa v Cabinet Secretary, Minister of Interior and National Coordination and Six Others (2014)* Eklr where it was emphasized that treaties and conventions have to go through domestication to achieve the power of law. Domestication takes place in parliament where various bills are debated. This is also a manifestation of how delegated power is exercised by the legislature on behalf of the Kenyan people.¹²⁹

The above example is important to this study since it shows how Kenya must pass different laws in order to put the EAC Treaty's provisions into effect. The legal difficulties Kenya faces in adapting current commercial legislation to Kenya's local situations are addressed based on this premise. The research will thus show that this has a cascading impact that impedes Kenya's financial and monetary cooperation.

In the case of the EAC, a legal challenge is that the EAC Treaty could violate the constitution's supremacy clause, resulting in constitutional litigation. The East African Court of Justice (EACJ) proposed in *Nyongo and Ten Others v Attorney General and Others* that the EAC convention offered no simple remedy in the case of a dispute between a treaty clause and a national statute.¹³⁰ Article 8(4) of the EAC Treaty discusses the transition of authority from affiliate nations to the community. The

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ *Nyongo and Ten others v Attorney General & Others* (2008) 2 KLR (EP) 397 at 430.

clause implies that organs of the community, agencies, and its legislation take priority over legislations from a nation where identical topics are under consideration.

An important aspect that has to be considered is that the Constitution of Kenya 2010 became operational after the EAC treaty was ratified and became enforceable. The East African Community Act of 2000 was used to ensure enforcement. Article 8 of the act deals with enforcement, stating that each state partner must ensure the passage and successful implementation of any legislation required to give effect to the treaty within twelve months of signing it.¹³¹

The legal issue in the above situation is that the act did not clarify when and to what degree community law should take precedence over national laws. This leaves a lot of room for speculation, and if the wording of Article 8 (4) is to be believed, member state rules, even constitutional laws, must yield to the EAC laws, when a dispute arises. This might mean that legislation that has no significant impact in the EAC could take precedence over beloved constitutional norms. It is important to note that constitutional norms represent the desires and cultures of the citizens, which poses an issue.¹³²

Another perplexing aspect of the EAC Treaty and the 2010 Constitution is that Kenyan judicial officers are obliged to protect and follow constitutional provisions. The EACJ, an institutional organ of the EAC, is not included in any of member states' constitutions. This implies that the EACJ may declare a national constitutional clause unconstitutional if it explicitly contradicts the treaty. The other issue that emerges is in the form of the AfCFTA, where convergence is prioritized. The EAC was identified as a building block for AfCFTA in the previous chapter of the study. This means that the EACJ's influence is expected to increase given that the EAC as a regional block is one of the foundational corner-stones for AfCFTA. There is therefore the opportunity for EALA to authorize legislations that contradict the Kenyan Constitution, and for individuals distraught by the Kenyan judicial decisions who wish to seek clarity on the constitution's superiority to refer to "higher"

¹³¹Article 8 EAC Secretariat, 'The Treaty for the Establishment of the East African Community' [2000] Nairobi, Kenya: Department of Political Federation, EAC Secretariat.

¹³²Nyarango (n 37).

community rule by petitioning the EACJ for relief, thereby circumventing the constitution's local supremacy.¹³³

3.2 Measures Taken by Kenya in a Bid to Promote Regional Economic Integration in the EAC

Under the current government regime in Kenya (as of 2021), there is the ministry of East African Community and Regional Development and the Cabinet Secretary in charge of the ministry is Honorable Adan Mohamed. Based on a report which concerns the ease of doing business within Kenya, the Kenyan government has undertaken measures to enhance trade across its borders. One area the government has placed emphasis is on documentary compliance. This entails the cost and time needed to comply with documentary prerequisites of all government agencies of the origin of the economy, the destination economy and any transit economies.¹³⁴

The administrative controls by the regime in power are important so as to ensure the state meets its economic objectives in creating a conducive environment for attracting investment opportunities. The home state or investment destination has leverage since it sets the terms of investments.¹³⁵ The burden of meeting these requirements is an important factor in determining the ease of trade and thus monetary and financial cooperation in the EAC. The other considerations that have to be taken into account in regard to monetary and financial cooperation in the Kenya-EAC context are border compliance requirements and the time taken to transport the goods either by sea or land.

In this regard, Kenya has undertaken some measures to enhance the regional economic integration endeavor in the EAC. One measure is the creation of an integrated customs management system (ICMS). This has improved the cargo processing timelines by up to three hundred percent in regard to real time document processing. There is also the introduction of a national electronic single window. This has enabled the application of permits and licenses to be done through the portal thus reducing the time taken in complying with documentary requirements.¹³⁶ Traders can thus spend less time in cross border trade.

¹³³ Ibid.

¹³⁴ <http://meac.go.ke/wp-content/uploads/2020/11/Ease-of-Doing-Business-Reform-Milestones-Report-20142020-Final.pdf> accessed on 1-8-2021 at 6:49am.

¹³⁵ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2017).

Based on the Treaty for the establishment of the East African community, these measures are in line with its provisions. Affiliate EAC states are supposed to eliminate all impediments with regard to exports and imports. It is for this reason that the affiliated EAC countries have to undertake to adopt policy measures in accordance with a unanimous economic policy framework.¹³⁷In that regard, the protocol on the establishment of the East African Community Monetary Union was envisaged. There is an emphasis in the protocol on the harmonization of affiliate states policies, laws and systems in order to ensure the protocol is implemented. The reasoning behind creating a monetary union among the EAC affiliated states was to promote and maintain financial and monetary stability. This was with the objective of attaining sustainable growth and development of the community.¹³⁸

Kenya has also invested in infrastructure such as the SGR, rail and mobile scanners, new port terminals and smart gates which has increased efficiency in cargo clearance. In the Mombasa port for instance, there has been an increase in its handling capacity where the Mombasa Container Terminal has improved from a capacity of seven hundred and fifty thousand to a capacity of one thousand three hundred measuring twenty feet Equivalent Units (TEUS) per annum. The other improvement measures Kenya has taken include enhancement of the automation process for instance online payments and the implementation of administrative and policy measures for expedited cargo clearance.¹³⁹

Corruption is a vice that Kenya faces and in a bid to eliminate this vice; there has been elimination of non-essential government agencies at the ports. This has reduced bureaucracy and the time required for clearance of cargo. There has also been the introduction of scanning and risk profiling which has reduced physical verification to below twenty percent hence saving time. The Kenya Revenue Authority has also introduced the pre-arrival clearance of cargo. Cargo cleared under this system is

¹³⁶<http://meac.go.ke/wp-content/uploads/2020/11/Ease-of-Doing-Business-Reform-Milestones-Report-20142020-Final.pdf> accessed on 1-8-2021 at 6:49am.

¹³⁷Secretariat (n 1).

¹³⁸<http://meac.go.ke/wp-content/uploads/2018/09/EAC-Monetary-Union-Protocol.pdf> accessed on 1-08-2021 at 3:15pm.

¹³⁹<http://meac.go.ke/wp-content/uploads/2020/11/Ease-of-Doing-Business-Reform-Milestones-Report-20142020-Final.pdf> accessed on 1-8-2021 at 6:49am.

therefore discharged from the vessel straight to the truck, avoiding port handling charges. This enables the truck to leave the port within thirty minutes.¹⁴⁰

Access to justice for commercial purposes is another area that the Kenyan government has placed emphasis on. This has been done through the promotion of the Court Annexed Mediation whose objective has been to assist in reduction of backlog, ensure the speedy resolution of disputes, reduce the cost of resolving disputes, encourage resolutions suited to parties needs, promote voluntary compliance of parties with resolutions and to increase foreign investments.¹⁴¹

Amid the Covid-19 pandemic, the Court Annexed Mediation has adopted a virtual dispute resolution mechanism and has developed guidelines for the Virtual Dispute resolution in order to navigate the new challenges. There has also been an expansion of the monetary jurisdiction of the small claims court from two hundred thousand Kenyan shillings to one million Kenyan shillings so as to increase the number of cases that merit the expedited service provided in this court.¹⁴² This reduces the time taken to determine commercial disputes and it acts as an incentive to attract foreign investment.

3.3 Institutional and legal challenges faced by Kenya and the EAC

Kenya in an effort to achieve monetary and financial cooperation has reaffirmed its commitment towards improving business climate in all the EAC countries. One way it aims to achieve this is through Public- Private Dialogues. The Chairperson of the EAC Council of Ministers and Kenya's Cabinet Secretary for EAC and regional development said that Kenya is currently in the process of building a five billion cross border market at the Kenya- Uganda border which will increase cross border trade. This was said in a meeting held under the theme of "Enhancing a private sector led integration and emerging opportunities in East Africa." There are also other important stakeholders who are needed to achieve the goal of monetary and financial cooperation. They are the Kenya Private Sector Alliance (KEPSA) and the Kenya Association of Manufacturers (KAM).¹⁴³

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ <https://www.eac.int/documents/category/newsletter> accessed on 6-09-2021 at 4:53am.

Investment in infrastructure is a vehicle that can be used by Kenya in a bid to improve competitiveness and thus increase intra-EAC trade. This was emphasized by Hon. Dr Peter Mathuki; the East African Community (EAC) Secretary General. This was said during the opening session of the East Africa Trade and Industrialization Week (EATIW 2021) held at the Julius Nyerere Convention Centre, in Dar es Salaam, Tanzania. He further said that currently manufacturing contributes to GDP of eight point nine percent. In order to achieve the set target of twenty five percent in 2032, there is a need for diversification of the manufacturing base and raising local value-added content resource- based exports.¹⁴⁴

In regard to challenges the EAC region faces; one is that there is a competing culture instead of a complementary one. A complementary approach will harness the regions comparative advantage by collectively improving infrastructure connectivity and thus regional development. The Covid-19 pandemic has affected monetary and financial cooperation as illustrated earlier in the study. Kenya and the East African region benefits when it is perceived an attractive destination for investments. A contributing factor in this endeavor is the Covid vaccination drive promoted by the government regimes. This is currently a contributing factor in labeling a country as an attractive investment destination.¹⁴⁵

The EAC secretary General in a speech said that; with only about two percent of East Africans vaccinated, it is critical that the private sector leads deliberate public campaigns on Covid-19 vaccination and jointly enhance the EAC as an investment destination.¹⁴⁶ This was said during the thirty eighth meeting of the EAC Sectoral Council of Ministers on Trade, Industry, Finance and Investment (SCTIFI) which was held on 26th May 2021. In the same meeting Dr Mathuki gave a comparison the European Union where he said that intra-EAC trade currently stands at less than fifteen percent compared to seventy percent within the EU and the secretary gave an assurance that the community would try to raise it over the next five years.¹⁴⁷

In regard to the East African Monetary Union, the East African Monetary Institute Act took effect on 1st July, 2021. This is a timely occurrence having in mind the ambitious EAC Monetary union goal of having it operationalized by 2024. It is

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ <https://www.eac.int/documents/category/newsletter> accessed 6-09-2021 at 4:59am.

¹⁴⁷ Ibid.

however important for Kenya not to rush and reevaluate its current framework in a bid to avoid the potential shortcomings. In an effort to operationalize the monetary union agenda in the EAC, Kenya ought to overcome some challenges. One is the overlapping initiatives as a result of being a member of multiple regional blocs.¹⁴⁸

Additionally, there is the aspect of sovereignty where the government regime in Kenya wants to maintain a grip on economic issues and it has its own economic blueprint. This often contradicts the monetary and policy goals of the EAC which leads to problems in harmonization. There is also a challenge in regard to the EAC Monetary union where there is no institutional framework mandated to oversee the intended economic convergence. A better coordination of policies is thus needed so as to avert the consequences of having weak and ineffective rules causing implementation and oversight problems.¹⁴⁹

In analyzing the legal framework, the study will look at the East African Monetary Institute Act, 2018 which establishes the East African Monetary Institute. The institution is responsible for the preparation of the EAC monetary union according to Article 23 of the protocol establishing the EAC monetary union.¹⁵⁰ Some of the functions of the institute include; co-ordinate the harmonization of the legal framework for the regulation and prudential supervision of the banking systems of partner states, to enhance cooperation between the national central banks of partner states and to foster coordination of monetary and fiscal policies. The institute is also responsible for the development of an effective legal and institutional framework. Crisis management is another aspect that the institute takes into account so as to promote stability within the monetary union.¹⁵¹

Given that these are some of the functions of the institute, the problem is that there is already a set year of 2024 when the monetary union should be operationalized. The danger is that there may be a rush to put in place the necessary prerequisites without careful consideration by partner states such as Kenya hence causing problems in the future. Based on an EAC –e newsletter No 134 dated 31 August 2021; the EAC secretariat (Dr Mathuki) invited interested partner states to submit proposals or

¹⁴⁸Steven Buigut, 'Monetary Integration Initiatives in Eastern and Southern Africa (ESA): Sorting the Overlapping Membership' (2006) 9 International Finance 295.

¹⁴⁹Florian Preis, 'An Optimal East African Monetary Union?' (PhD Thesis, Doctoral dissertation, Copenhagen Business School 2019).

¹⁵⁰ The East African Monetary Institute Act, 2018.

¹⁵¹ Section 4 of the East African Monetary Institute Act, 2018.

applications to host the East African Monetary Institute. This shows the institute is yet to have a base of operation.¹⁵² The 2024 set year is thus a dangerous initiative as it can lead to more harm than good.

3.4 Harmonization of Laws

In order to establish harmonization of legal texts in the EAC, domestic social conditions should be taken into account. The EAC demonstrates however that harmonized monetary provisions are mostly legal transplants meant to accomplish home grown desires and requirements. The procedure of merging legal provisions on the identical subject among nations or areas neighboring each other is known as harmonization of laws. The aim of harmonizing national laws is to encourage economic growth and development.¹⁵³ The aim of this analysis is to demonstrate the importance of taking into account current economic and social conditions. The drive for commercial law harmonization has gained traction as a result of the belief that industrialized countries thrive because they prioritize financial and market agendas, and that developing countries can do the same.¹⁵⁴

It's worth noting that the EAC has a variety of legal and regulatory structures. Kenya, Uganda, and Tanzania use a mix of customary and common law, whereas Rwanda and Burundi use civil and customary law. This makes the integration endeavor more complex. One aim of this research is to show how laws favor the rising local middle class. However, the majority of the people, who depend on a subsistence agricultural economy are excluded. Traditional awareness and traditional cultural expressions, for example, are not protected by intellectual property laws.¹⁵⁵ As a result, the informal economy exists outside of the existing legislative framework. The problem is that a significant portion of the economy is not subject to government scrutiny. This thus results in challenges such as lost taxes and time wasted in settling conflicts.

The practice of transplanting rules to a different nation and enforcing them in different conditions poses compliance and practicability issues. The aim is usually to implement the ideals and ideas. The law reform team and municipal experts would

¹⁵²<https://www.eac.int/documents/category/newsletter> accessed on 6-09-2021 at 5:15am.

¹⁵³Agasha Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (2017) 19 Eur. JL Reform 306.

¹⁵⁴Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Civitas Books 2000).

¹⁵⁵Anthony CK Kakooza, 'The Cultural Divide: Traditional Cultural Expressions and the Entertainment Industry in Developing Economies.' (PhD Thesis, 2014).

then guarantee that the rules are applicable to the current situation of the area where the laws are to be transplanted. It's possible that this could result in occurrence of legal irritants. A legal irritant happens where a provision of the law or principle is passed in a particular cultural setting and fails to adhere to the new context, resulting in the rule's restoration.¹⁵⁶

It's important to consider the local demands and current situations when it comes to commercial legislation. The legislature determines this before deciding whether or not to approve draft legislation that must be signed by the president and then gazetted. In order to complete this procedure, it is necessary to determine if the rule of law in question would trigger or benefit the growth of the economy. The presence of statutes that are available to the public as well as access to the courts and institutions responsible for enforcing them is also a vital procedural feature.¹⁵⁷The World Bank notes that the rule of law promotes sustainable prosperity and that there is a clear connection between the rule of law and a country's high incomes.¹⁵⁸ A stronger view is that the rule of law is critical for promoting long-term economic stability and prosperity. The rule of law, however, does not function in isolation; it operates effectively taking into consideration other circumstances such as trading networks, political security, and other foreign and domestic factors. ¹⁵⁹Harmonization is an essential characteristic in contemporary legal systems, and it has been widely implemented in European law.¹⁶⁰Harmonization thus entails a higher level of convergence, with national provisions being replaced by regulations that apply to all partner states.

The East African Community treaty under Article 126 (2) (b) calls for the synchronization of decrees in the context of the EAC. It is espoused that affiliate nations must take appropriate measures to harmonize their nationwide legislation that concerns the EAC in order to ensure the advancement of the community's goals.¹⁶¹ The community's main purpose is to develop policies and programs aimed at

¹⁵⁶Teubner (n 20).

¹⁵⁷Hiroshi Matsuo, 'The Rule of Law and Economic Development: A Cause or a Result?' (2005) 2 *The Role of Law in Development: Past, Present and Future*. CALE Books.

¹⁵⁸Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (n 145).

¹⁵⁹ibid.

¹⁶⁰Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford university press 2020).

¹⁶¹Article 126 Secretariat (n 1).

broadening and deepening cooperation among partner states in areas such as economics, social policy, politics, culture, science and technology, security, and legal and judicial relations.¹⁶²This can be achieved for the shared good of the state partners.

The partner states also agreed to create a common market among themselves under Article 5 (2) of the EAC treaty. Article 14 (d) of the treaty establishing the EAC emphasizes an important issues of legislation in regard to harmonization where the Council is given the authority to issue directions, give suggestions and offer advice in compliance with treaty provisions.¹⁶³ The council thus promotes the community's growth and enhances operation of the community.

Banking and capital market growth are also addressed in Article 85 (b) and (d) of the Treaty. The state partners are obligated to provide a conducive atmosphere for free movement of capital in the East African Community. The partner states thus have to harmonize their banking acts, regulatory and legislative structures.¹⁶⁴ It is critical that legal pronouncements impose a legal responsibility in regard to enforcement of measures that advance the integration of the EAC by getting rid of impediments to the unrestricted flow of products, facilities, resources and individuals.

Article 47 of the EAC Common Market Protocol requires state partners' to approximate laws in order to bring the common market protocol into effect. Approximation is the process of aligning national laws with generally accepted legal standards without rendering them identical.¹⁶⁵The aim is to reduce gaps in member state laws. The mutual acceptance of the approximated laws by the concerned partner states is also necessary.¹⁶⁶ Recognition is important because the approximated laws will have no effect unless they are accepted by the concerned partner states. There is then a selection of ideologies in line with best practices from the international setting on the pertinent subject and appraising the prevailing legislations of partner states against the identified ideologies.¹⁶⁷

¹⁶² Article 5 (1) *ibid*.

¹⁶³ Article 14 Secretariat (n 123).

¹⁶⁴ Article 85 Secretariat (n 1).

¹⁶⁵ Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (n 145).

¹⁶⁶ Article 126 Secretariat (n 1).

¹⁶⁷ Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (n 145).

When harmonizing laws, it's important to consider if state partners' national legislation covers the issue at hand, as well as the EAC countries' degree of conformity with international best practices. It is therefore necessary to examine the legislations of the partner states in order to identify variations, loopholes, shortcomings, and similarities. There is also a determination of standards that are consistent with international common practice in the relevant field, as well as an assessment of state partner laws that are inconsistent with such principles.¹⁶⁸

Under Article 14 (3d) of the EAC treaty, the EAC council has authority to give guidelines in order to achieve harmonization.¹⁶⁹ A directive is a legislative instrument issued by the council to realize harmonization by the state partners in a specific field of cooperation.¹⁷⁰ The state partners are bound by directives under Article 16 of the East African Community Treaty.¹⁷¹ The Council is also empowered under Article 51 of the EAC Common Market Protocol to make authoritative decisions that could be needed for the protocol's successful execution. According to Article 8 (2) of the EAC Treaty, the partner states must deliberate on Community guidelines that have legal force in their jurisdiction and transfer their terms to their corresponding legal frameworks in a year's time period by enacting legislation or adopting a Parliamentary Act.¹⁷²

3.5 Mobile Banking

Independent legislative and regulatory frameworks in EAC member states present barriers to policy harmonization when it comes to mobile banking services. In order to maximize the benefits of mobile banking, the EAC must find a way to resolve the divergence of the telecommunications and financial industries, especially for the poor. The study thus advocates for financial inclusion and this will provide many people with long-term accessibility to a variety of monetary resources tailored to their requirements. Finance is a crucial element of social security, and access to finance has an effect on the ability to grow. It is essential to take a comprehensive assessment of growth of the financial segment with a focus on what development entails in order to

¹⁶⁸Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (n 19).

¹⁶⁹Article 14 Secretariat (n 123).

¹⁷⁰Mugasha, 'The Reform and Harmonization of Commercial Laws in the East African Community' (n 19).

¹⁷¹Secretariat (n 1).

¹⁷²ibid.

create an inclusive financial sector. This therefore necessitates steps at the strategic and policy levels, the financial blue print and the market as an institution.¹⁷³

In the EAC, mobile headsets are utilized to send over half a billion dollars per month in mobile money transfers.¹⁷⁴ This study is therefore relevant because EAC's successful legislative and regulatory response to mobile money services is important. M-PESA is Kenya's most popular mobile money network and it allows the majority of the population to access financial services without the need for a bank account. There is currently no statutory or regulatory mechanism in place at the EAC that is applicable to mobile currency. As a result, it is up to the member states to ensure regulation.

The legal problem in the case of the EAC is that, considering the large sums of money involved, there is actually no direct legal structure covering these transactions. Any legislation falls under the ICT and financial distinct sector-specific regulations. Cell network providers are often not required to register or publish details on mobile money to the regulatory bodies of either fiscal or broadcasting nature in either of the EAC affiliated republics. Member states are required by the EAC treaty to prepare and guide their policies and resources in order to foster regional economic growth. This is expected to happen through their appropriate national agencies, which would take the requisite measures to harmonize all of their national legislation that affect the population.¹⁷⁵ Article 126 of the EAC Treaty and Article 47 of the Common Market Protocol all emphasize the importance of harmonization.

The fact that the EAC countries have two separate legal frameworks raises a legal obstacle in the harmonization effort. Kenya, Uganda and Tanzania have a common law legal structure, while Rwanda and Burundi have a civil law legal system. As a result, the EAC states' legislative practices and procedures have diverged, slowing the region's harmonization pace.¹⁷⁶ While mobile money transactions have advantages, they are subject to regulatory impediments. This is because mobile money blurs the lines between the historically prominent and distinct regulatory fields of telecommunications and finance. There is the presence complementary functions'

¹⁷³NjarambaGichuki, 'Access to Financial Services: A Human Rights Perspective' [2015] E. Afr. LJ 165.

¹⁷⁴Nyaga (n 31).

¹⁷⁵Article 8 (1) Secretariat (n 1).

¹⁷⁶Nyaga (n 31).

between the ministries and agencies which contributes to complexity with regard to regulation.

Access to financial services is not established as a human right in Kenya. This is another legal issue. The access to financial resources is not included in the scope of social and economic rights under Article 43 of Kenya's 2010 Constitution.¹⁷⁷ This void means that no one is responsible for ensuring that organizations follow the law in regard to financial services as there is no duty bearer. Consumer rights are however covered by Kenya's Constitution, where it is stipulated that customers have a right to fair quality products and services. This clause implies that the financial services offered should be reasonable in quality.¹⁷⁸ This clause demonstrates that even though there is a lack of acceptance of financial services as a right, individuals who access the service are covered under Article 46 of the Constitution of Kenya.

3.6 The Regulation of the Mobile Money Service Sector in Kenya

The ICT policy of 2006 did not have any guidelines for mobile money transfer services since the infrastructure had not yet been established at the time of the policy's implementation. The draft ICT policy for 2016 did, however, make provisions for the implementation of mobile money transfer services. It lays out the measures the Kenyan government plans to take to encourage the use of mobile money transfer services.¹⁷⁹ Kenya's mobile money transfer services market is governed by the following regulatory framework:

The Kenya Information and Communications Act (enacted in 1998 and updated in 2010 and 2013) establishes the Communications Authority of Kenya (CA) as well as a regulatory mechanism for the communication, information, broadcasting and media sub-sectors.¹⁸⁰ In the National Assembly, the Kenya Information and Communications Amendment Bill 2019 was introduced. The bill aims to distinguish companies that provide telephone services from those that provide other services.¹⁸¹ This is meant to aid in regulation.

¹⁷⁷ Article 43 Constitution (n 5).

¹⁷⁸ Article 46 *ibid*.

¹⁷⁹ Draft ICT policy 2016 18.6. Mobile Money.

¹⁸⁰ *The Kenya Information and Communications Act* (enacted 1998, amended in 2010 and 2013).

¹⁸¹ <http://www.parliament.go.ke/sites/default/files/2019-06/Kenya%20Information%20and%20Communications%20%28Amendment%29%20Bill%2C%202019.pdf> Accessed on 11th November 2019.

Mobile money transfer services, on the other hand, will be discussed in relation to the following laws. One is the *Central Bank of Kenya Act* (enacted in 1966 and amended in 2009), which established the Central Bank of Kenya. Its objective is to develop and enforce policies that encourage the development, control, and oversight of productive and successful payment, clearance, and settlement processes.¹⁸² There is no concept of mobile money transfer services or mobile payment services in this legislation. It seems to be mostly associated with conventional banking methods and does not seem to consider the disclosure of financial and ICT industries. The Central Bank is responsible for ensuring that payment processes do not pose a high risk to participants and consumers of financial services. It is the aim of the Central Bank to ensure that stakeholders continue to operate without significant disturbances and that they provide consumers with reliable, effective, and healthy payment facilities. This is achievable in an appropriate and regulatory legal structure.¹⁸³

The *Banking Act* (enacted in 1991 and revised in 2010) is another financial legislation, which governs the operations of banking institutions and other related uses in Kenya's financial market. According to an examination of this legislation, all Mobile Money Transfer Applications and Mobile Payment Networks should be covered by the Banking Act since they are services related to banking. While there is no unique provision in the Act that allows for Mobile Money Transfer services, the Mobile Money Transfer Services explicitly include elements of conventional banking structures.¹⁸⁴

The other financial regulation is *Kenya's Competition Act No. 12 of 2010*. This law promotes competition, protects consumers, and creates an autonomous competition regulator (the Competition Authority of Kenya) as well as a competition tribunal to guarantee compliance. The Kenya Gazette Supplement Notice No 59, Legal Notice No 73, enacted the Competition Act on August 1, 2011. Part IV of the act also contains information on consumer welfare. The act repealed the Monopolies and Price Control Act which was not effective. The Competition Authority of Kenya is now established as an autonomous body under the act. One aim of the legislation in regard to competition is to encourage and maintain competition in a free market while still

¹⁸² *Central Bank of Kenya Act* (enacted 1966, amended through 2009).

¹⁸³ *Ibid.*

¹⁸⁴ Njaramba Gichuki, *Law of Financial Institutions in Kenya* (Second Edition 2013) Law Africa Publishing Ltd, Nairobi. ISBN 9966-1511-8-6.

safeguarding consumer welfare in controlled industries. The users of commodities have a right to products and amenities of fair quality, to knowledge required to enable them fully profit from goods and amenities, to the security of their health, safety, and monetary benefits, and to reimbursement in the event of damages or injury resulting from faulty goods or amenities, as stated in Article 46 of the Kenyan Constitution.¹⁸⁵ Competition legislation has the effect of limiting monopolistic firms from abusing their market power, as well as anti-competitive activities such as price disparity and predatory pricing. Mergers and acquisitions are another field where competition law has an influence.¹⁸⁶

National competition rules usually do not apply outside the boundaries of member states, which poses a legal problem in the EAC sense. The East African Legislative Assembly (EALA) passed the East African Competition Act (2006), which establishes a regional EAC Competition Authority. Nevertheless, in some cases, sector-specific authorities are in charge of competition control. In order to prevent potential clashes, regulators are increasingly signing memorandums of understanding (MOUs). When it comes to mobile money market, competition law is critical in examining; the price consumers pay for services, permissible competitive activities, and the market structure.¹⁸⁷

Finally, there's the 2018 *Computer Misuses and Cybercrimes Act*. It addresses computer-related offenses, as well as enabling early and successful identification, prohibition, deterrence, reaction, review, and conviction of computer and cybercrime. It also aims to promote international cooperation in coping with computer and cybercrime issues. The legislation's constitutionality has been questioned in arbitration, and the Data Protection Act No. 24 of 2019 is awaiting its outcome. The legislation lays down the rules governing the collection of personal details. This is important because personal data collection is a key element of Mobile Financial Services. As a result, it is clear that there is no direct regulatory system in Kenya that regulates mobile money transactions. Any form of legislation depends on the ICT and financial distinct sector-specific regulations. The central banks (as financial regulators) and the communications commissions have no responsibility to publish or

¹⁸⁵ Article 46 Constitution (n 5).

¹⁸⁶ Nyaga (n 31).

¹⁸⁷ Ibid.

reveal details on mobile money providers to the mobile network operators (as telecommunications regulators).¹⁸⁸

3.7 Labor as a Factor of production

Capital, land, labour, and entrepreneurship were addressed in the previous chapter as factors of production. This segment of the study focuses on labour by specifically highlighting the obstacles to the fulfillment of the right to unrestricted movement of labourers in the EAC. The Protocol on the Establishment of the East African Community Common Market will be useful in this analysis. It is important to have the freedom of mobility of workers in order to achieve sustainable economic integration. National markets convergence is an objective that can be achieved if commodities (goods and services) and resources (labor and capital) are allowed to cross interstate boundaries.¹⁸⁹ If people are allowed to travel freely, more labor services will be used, resulting in greater economic integration.

Social security protections are a vital element in promoting the workers mobility and ensuring their safety. Free movement of employees is assured under the EAC common market protocol. Foreign employees are often entitled to the same social security protections and benefits as workers in the host member nations.¹⁹⁰ The harmonization of labour, defense, and policy laws and regulations is another aspect that aids in the achievement of the EAC's aim of unrestricted movement of employees.

One legal issue that ought to be addressed in the Kenyan sense is that, considering the commitments placed on affiliate nations under the EAC common market protocol, the EAC affiliate republics also have disparities in their labour and social security laws and policies. Citizens in partner states have the right to apply for jobs and take job opportunities because of the free mobility of labour in the national economy. This means they are able to travel across the partner states' territories without fear of being discriminated against. It is permissible to be joined by a partner and children while exercising one's right to movement.¹⁹¹ The free mobility of labor must meet three criteria in order to facilitate economic integration. One is the elimination of all

¹⁸⁸Ibid.

¹⁸⁹Charles E Makoko, 'Free Movement of Workers and Social Security Protection in the EAC Common Market Protocol' (2018) 28 Uongozi Journal of Management and Development Dynamics.

¹⁹⁰ Article 10 of the EAC Common Market Protocol.

¹⁹¹Makoko (n 181).

immigration limits on the admission of community employees by each member state. The second goal is to ensure all people who live in another member state's jurisdiction are treated equally in terms of jobs and that community workers' social security interests are protected. The third requirement is to consider and protect social security benefits.

The EAC Council is expected to provide guidelines on social security under Article 10 (4) of the EAC Communal Market Protocol. Social security is defined as an official criteria intended to offer protection against common known circumstances such as destitution, disabilities, lack of employment and other social welfare contingencies.¹⁹² In the international sense, the International Labor Organization (ILO) calls for the respect of all foreign workers' fundamental human rights under ILO Convention No. 143.¹⁹³ The convention demands that foreign employees and their families in the host country be treated equally to national workers in terms of wages, remuneration, social security, and other benefits.¹⁹⁴

Furthermore, Article 2 of ILO Convention No. 111 calls for the enactment and reform of national legislation and laws in order to safeguard desirable national standards and practice and ensure non-discrimination for migrant employees.¹⁹⁵ The effective adoption of unrestricted movement of employees in the EAC is dependent on effective harmonization of labour rules, regulations, and programs. Under the EAC Common Market protocol, affiliate nations are required to remove barriers to workers' free mobility and offer social insurance services across the Community.¹⁹⁶ In Kenya, the legal impediment is that there has been no harmonization.

The Kenya Citizenship and Immigration Act governs how international workers are managed and governed in Kenya. Section 59 of the Act gives the Minister for Immigration and Registration of Persons the authority to impose binding requirements on the issuance of work permits to foreigners.¹⁹⁷ According to Section 20 (1) (4) of the act, one is issued a residence permit after proving that he or she can guarantee a

¹⁹²John-Jean Barya, *Social Security and Social Protection in the East African Community* (fountain publisher 2011).

¹⁹³ Ibid.

¹⁹⁴Makoko (n 181).

¹⁹⁵ibid.

¹⁹⁶ Article 5 (2) (c) of the EAC Common Market protocol.

¹⁹⁷ Kenya Citizenship and Immigration Act No 12 of 2011.

minimum yearly income of twenty four thousand US dollars or its equivalent in Kenyan currency.¹⁹⁸ Going by the market exchange rate as at November 11, 2021, the equivalent is approximately two million, six hundred and ninety eight thousand, three hundred and twenty Kenyan shillings. The practical effect of this provision is that it segregates the employees who wish to take advantage of different job openings but do not have the requisite annual salary.¹⁹⁹ This is an example of Kenyan law that is unconcerned with local conditions.

Another factor to remember before a foreigner is granted a work permit in Kenya is their age. The rules stipulate that the claimant must be at least thirty five years old and that his or her participation in Kenya would be advantageous.²⁰⁰ The age group falls into the category of people who are most in need of work and are eager to take advantage of the EAC Common Market Protocol's opportunities. Furthermore, a foreign worker is only qualified to work in Kenya if he or she obtains exclusive jobs with a specific employer under a contract of employment.²⁰¹ These restrictions are in violation of the EAC Common Market Protocol's intent.

The regulations also stipulate that the claimant must hold skills or credentials that are not accessible in Kenya and whose jobs would be of support to Kenya.²⁰² The State Ministry for Immigration and Registration of Persons is empowered to effect amendments to Kenya's immigration laws at any time in order to maintain influence over and secure the domestic labor market. These limitations have an effect on the harmonization of various laws. Despite the fact that Article 10 (1) of the EAC Common Market Protocol assures unrestricted movement of employees who are inhabitants of other affiliate EAC nations, the aforementioned legislative restrictions make unrestricted movement of labour in the EAC Common Market nearly impossible. It is important to remember that the freedom of movement of labour forces does not extend to public servants until the host partner state's national laws and regulations permit it.²⁰³

3.8 Integration of Kenya's Informal Sector

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ The Kenya Citizenship & Immigration Regulations, (Legal Notice) No 64 of 2012.

²⁰¹ Makoko (n 181).

²⁰² Ibid.

²⁰³ Article 10 (10) of the EAC Common market protocol.

Survival practices that have little hope of merging with the center of a country's economy are a feature of the informal sector. It also encompasses a range of operations whose expansion is contingent on their willingness to completely integrate into the overall economic structure.²⁰⁴ It's critical to lobby for the advancement of the informal sector into a means of self-sustaining development activity that isn't reliant on government assistance. Focusing on integration is essential since it can help to explain the orientation of different organizations established to promote informal practices.²⁰⁵ In differentiating between formal and informal activities, the legal status is the main distinguishing element. This conceptualization may mean that to let the informal sector grow translates to deregulation of the market, greater private property rights and almost complete neglect of intervention by the state.²⁰⁶ The study however advocates for integration as opposed to neglect.

The incorporation of the informal sector necessitates a transformation phase that can be accomplished in a variety of ways, all of which are complementary. A three-pronged strategy is favored by the policies in this regard. The first entails providing assistance to help micro-businesses develop more productively. This is accomplished by making it easier for them to enter the business. The second strategy focuses on the socioeconomic well-being of informal jobs. At this stage, there are a variety of policy alternatives available, including poverty-alleviation policies. When an uninsured owner or staff becomes ill, the micro-enterprise fails. Externalities generated by mutually complementing policies introduced from a social welfare viewpoint are capable of generating a constructive relationship with the poor's productive growth. The legislative system is the subject of the third strategy. Informal transactions are exacerbated by the economic system's inability to produce sufficiently viable jobs, not by legislative inadequacies. Despite this, it is important to recognize that legislative changes favor the inclusion of informal practices in the modernization phase.²⁰⁷

Legal criteria requirements are not met by informal practices. They function outside of the legal framework. As a result, lawlessness is a part of the informal sector. The informal sector was described by the International Labor Conference of 2002 to

²⁰⁴ Ibid.

²⁰⁵ Tokman (n 42).

²⁰⁶ Klarita Gërzhani, *Informal Sector in Developed and Less Developed Countries* (Tinbergen Institute 1999)

²⁰⁷ Ibid.

include all unprotected labor, including in large corporations (more than 5 employees).²⁰⁸The lack of binding arrangements is a general characteristic synonymous with informality. This element, however, does not imply informality. Instead, the emphasis should be on tax avoidance. Due to the decentralized existence of small-scale commercial practices, they are unable to bear the costs of regularizing employees' contractual situations and complying with social security standards.²⁰⁹

3.9 Dispute Resolution

Kenya's future contributions to the EAC integration efforts can be hampered by looming commercial conflicts. This is particularly true in light of expanded regional commerce, finances, and member-state conflicts of interest. As a result, a professional conflict resolution system is needed for successful trade and investment liberalization.²¹⁰The study will now look at Kenya's conflict resolution system.

An examination of the legislation as a core component of regional economic integration in the previous chapter revealed that regional integration is not a goal in and of itself, but rather a tool to promote a policy of economic growth and development. As a result, development is impossible in a dispute environment. In order to facilitate progress, conflicts and disagreements must be resolved efficiently and quickly.

Litigation is one of the tools for resolving disagreements. Arbitration and adjudication procedures are the other options. Litigation in Kenya has been blamed for failure to ensure the administration of justice is realized. High court fines, complicated codes of practice, and the usage of legalese have all become problems for Kenyan courts when it comes to access to justice.²¹¹The limits in civil law and the litigious paths chosen by the parties are often relied upon by the courts. As a result, it can take years for parties to receive justice.

²⁰⁸GB ILO, 'Minutes of the 285th Session' [2002] Geneva: ILO.

²⁰⁹Tokman (n 42).

²¹⁰David K Muigua, 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration' (2015) University of Nairobi Digital Repository

²¹¹Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>.

Arbitration, on the other hand, is a preferred way of resolving international trade conflicts over litigation. The parties ought to select an arbitrator to decide the case and the arbitrator should have experience in the field of conflict resolution. Additionally, anyone can represent a side in the dispute, the process is flexible, cost-effective, confidential, fast, and the award is binding.²¹² Informality of the process is also advantageous as opposed to the litigious nature of the court room process.

The Arbitration Act is the legislative structure that governs arbitration in Kenya. Kenya is also a signatory of foreign agreements including the New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC) and the International Convention on the Settlement of Investment Disputes (ICSID). Foreign arbitration awards need recognition for them to be valid and upheld in compliance with the terms of the NYC or some additional agreement which Kenya is a party to which pertain to arbitral awards. This is according to the Kenyan Arbitration Act, 1995.²¹³ This means that enforcing foreign arbitration awards is left to the good faith of the national courts.

The legal problem for Kenya is exacerbated by the courts' involvement in arbitration proceedings. It is espoused in the Arbitration Act that; except of what is specified in the Act, no court is supposed to interfere with issues that are to be dealt with by the legislation.²¹⁴ As a result, the court's authority is restricted to issues covered by the statute. Section 10's implications are twofold: First, courts can intervene where the law explicitly allows it, and second, courts (particularly the high courts) have inherent authority to function in the public interest. The action of the court is thus justified as it is performing its function in the public interest.²¹⁵

The Kenyan judiciary however, has not been consistent in their application to Section 10 in matters that deal with arbitration. In *Sadrudin Kurji & Others v Shalimar Limited & 2 Others*, the court's interference was justified in extraordinary cases where laws were broken and mistakes were made.²¹⁶ In *Anne Mumbi Hinga v Victoria Njoki Gathara*, the Court of Appeal indicated that courts can interfere in arbitration because

²¹²Kariuki Muigua, 'Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1 Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution 43.

²¹³ Section 36 (2), Arbitration Act.

²¹⁴Section 10 of the Arbitration Act.

²¹⁵David KariukiMuigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi 2012).

²¹⁶*Sadrudin Kurji& Others v Shalimar Limited & 2 Others*,(2006) eKLR.

public policy is a term that does not lend itself to a simple meaning and therefore is not exhaustible.²¹⁷ This inconsistency has ramifications with fairness to justice. This is because the means of conflict resolution is a decisive factor in the ease of doing business in every economy. Arbitration provides many benefits over litigation, as seen above. Since there are varying precedents, this discrepancy with relation to court action poses a legal challenge for Kenya in EAC. Additionally, there are clauses in the Civil Procedure Act for both consultation and arbitration.²¹⁸ The civil procedure act gives the court the authority to refer any issue to Alternative Dispute Resolution (ADR) processes if the parties consent or the court deems it necessary.²¹⁹ In addition, once both parties consent, the court has the authority to send any disagreement between them to arbitration.²²⁰

Kenya's legal and administrative structure shows that it is capable of promoting international commercial arbitration for the unification of Eastern Africa. The problem is that this structure hasn't been aligned with EAC policy on strengthening incorporation.²²¹ This requires to happen in order for real change to be realized. The Arbitration Act demonstrates that the courts have a part to play. The courts should take into account the EAC's regional priorities in maximizing investment and trade by enticing international investors.²²² This means that limited and impartial judicial interference in international commercial arbitration would be a positive move toward regional economic integration in the context of international commercial arbitration.²²³

3.10 Conclusion

The intention of this chapter was to recognize the obstacles in the law that Kenya faces in accomplishing financial and monetary cooperation in the EAC. The research used a dualistic doctrine, in which a convention is not enforceable domestically before a state enacts a law that converts it into national law. The legal issues facing Kenya have been examined based on this doctrine, as seen above. Kenya has also undertaken some measures to promote the goal of regional economic integration in the EAC and

²¹⁷ Civil Appeal No 8 of 2009.

²¹⁸ Section 59, Cap 21 Laws of Kenya.

²¹⁹ Ibid.

²²⁰ Order 46, rule 1, civil procedure rules 2010.

²²¹ Muigua, 'Building Legal Bridges' (n 201).

²²² Ibid.

²²³ Ibid.

this was discussed in the context of the Treaty for the Establishment of the EAC and the EAC monetary union protocol.

The chapter has also shown that legislation does not necessarily represent the needs of community. There is also a deficit left on the informal sector, which exists outside of the legal framework. The issue of regulation in the case of mobile banking is also interrogated where various sector specific regulations were discussed. Finally, dispute resolution is discussed where the research notes that courts intervention in regard to arbitration matters should be limited.

CHAPTER FOUR

LESSONS FOR KENYA FROM THE EUROPEAN UNION

4.0 Introduction

The legal obstacles that Kenya faces in the EAC's search for regional economic integration were addressed in the previous chapter. The lessons Kenya should learn from the European Union's experience will be discussed in this segment. Gaining foreign clout is a huge motivation for the EAC to pursue regional economic integration. The European countries started to integrate in the 1950s in order to achieve influence in international relations with the United States.²²⁴ When the EAC countries negotiate as one, they achieve greater negotiation leverage or diplomatic bargaining power than if Kenya negotiates trade agreements alone. There's also the issue of trade agreements' complexities, which necessitates a high degree of experience. Regional collaboration can help with this by reducing costs and pooling human resources.²²⁵

Historical conditions also influenced Kenya's decision to turn to the European Union for guidance which is exemplified in Kenya's judicature act. The act includes acts of the United Kingdom, as basis of law for the nation.²²⁶ This demonstrates a historical nexus between Kenya and the West. The British colonized Kenya as well and hence there exists a connection between the two nations.

²²⁴Bizuneh, Buigut and Valev (n 29).

²²⁵ Ibid.

²²⁶Section 3 of the Judicature Act, Cap 8 Laws of Kenya.

4.1 The European Union's Lessons

Maintaining the current convertibility of member state currencies is an ambition for the EAC in its pursuit for financial and monetary collaboration. This is intended to reduce the usage of foreign exchange through encouraging the practice of utilizing domestic money in payment agreements with all EAC partner state transactions.²²⁷ The euro serves as an influential tangible sign of solidarity, identity, and collaboration in Europe, giving the continent a greater presence and economic clout in foreign exchange.²²⁸

The East African Monetary Union (EAMU) was signed in November 2013, with the aim of lowering transaction costs to aid market stability, boost capital distribution across the country, increase trade integration, and improve investment prospects.²²⁹ Regional African monetary unions can also serve as a restraint agent and have more market stability than national central banks.²³⁰

There are lessons that can be realized even though the fiscal and political situations of the EU and EAC nations, especially Kenya, diverge significantly. Still, the lessons learned from the EU historical set up could help the EAC escape the impending political and fiscal costs that the EU has undergone.²³¹ The unrestricted flow of investment is a requirement for complete economic integration. The role of labor as a production factor is important in the EAC and this was addressed in the previous chapter.

The advantages to using a common currency (the euro) in the EU are that it eliminates the issue of varying exchange rates, which can obstruct unrestricted investment flows. The euro is both a groundbreaking success and one of the most pressing issues confronting European integration today.²³² Democratic opposition was a factor in the transition of economic policy to the EU, according to a historical study of the EU's economic and monetary union. The amount of money to invest and how to spend it is among the political issues discussed. These issues also have to do with legislative

²²⁷ Article 82 (2) Secretariat (n 123).

²²⁸ Bizuneh, Buigut and Valev (n 29).

²²⁹ Ibid.

²³⁰ Steven Buigut and Neven T Valev, 'Benefits from Mutual Restraint in a Multilateral Monetary Union' (2009) 37 *World Development* 585.

²³¹ Cuyvers (n 16).

²³² Ibid.

authority. As a result, EU member states initially showed their unwillingness to hand over regulation of economic policy to the EU.²³³ This demonstrates the importance of democratic good will in matters that deal with the economy.

In 1989, a caucus led by Delors (the then-powerful president of the European Commission) presented a study on how the EU should create an economic and monetary union. According to the report, the union should be formed in three stages. A complete internal market and state membership in the Exchange Rate Mechanism constituted the first step (ERM). The development of a European System of Central Banks was a focus of the second step (ESCB). The ESCB was also supposed to be in charge of planning countrywide monetary policy and conducting monetary policy. Under the auspices of the European Central Bank, the third step was to settle exchange rates and adopt a new common currency (ECB).²³⁴

The Delors report called for a much smaller transition of economic policy powers to the EU. The Delors report arrived at a crucial juncture in terms of both economics and politics. Economically, the EU member states were seeing rapid expansion, and the Berlin Wall had just been demolished in the political context. The dynamics of European unification thus shifted as a result of this. The member states were terrified of a united Germany's political and economic power. As a result, France desired a common European currency to bind Germany to the rest of Europe. As a price for unification, Germany had to give up its very powerful currency (Deutschmark). It did so, though, on the basis that the new currency's legal structure should be based on the German model, which featured a central bank and a main emphasis on market stabilization by monetary policy.²³⁵ The lesson to be learned from this is that the euro was created mainly as a result of political reasons than economic ones.

The implication of this is that the law does not operate in a vacuum. It is influenced by other external factors such as politics as illustrated in the above case. It is thus important to consider how the society can shape the law as opposed to being narrow minded by focusing only on how the law can shape the society. In this context, the research interrogates Kenya's prospects for regional economic integration. It is for

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

this reason that the factors of production and the informal sector were analyzed in relation to legislative provisions.

With the political assistance of Germany and France, the first stage of the EU's Economic and Monetary Integration began in July 1990. Following the processes outlined in the Delors report, a common currency was finally implemented in the 1992 Maastricht Treaty. Another useful lesson the EAC should take is that the EU has established a permanent fund to assist EU member countries in periods of catastrophe. This often serves as a confidence signal to the wider markets that the EU is dedicated to the single currency. The allocation of monetary aid, on the other hand, is subject to stringent conditions. As a result, member states should only request help after they have exhausted their other options. This is intended to mitigate the moral hazard of governments actually overspending with the expectation of being bailed out.²³⁶

4.2 Worker Mobility within the EU

The free mobility of labor was addressed in the previous chapter in light of Article 10 (1) of the EAC Common Market protocol. Article 10 (1) of the protocol imposes restrictions that are similar to those imposed by the EU. The EU Treaty also cites economic policy, public welfare, and public health as justifications for restricting worker mobility.²³⁷The European Court of Justice (ECJ) determines the framework of foreign policy and public order.

The EU experience often shows that, unlike the EAC, there is no dichotomy of workers into categories. Regulations on the mobility of jobs can be found in Annex 11 of the EAC Common Market protocol. The EAC affiliated nations have chosen their peculiar groups of professional employees who are devoted to free mobility of labor employees in the Annexure. In the EU, on the other hand, everybody has the freedom to work everywhere in the bloc. The EU treaty specifies that any discrimination based on ethnicity amongst employees from member states in terms of jobs, remuneration, and other job and employment conditions is prohibited.²³⁸There is also the issue of social security coverage cooperation among EU member states. It's necessary to

²³⁶ Ibid.

²³⁷ Article 45 (4) European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*. *Off J Eur Union*. 2012 (October).

²³⁸ Makoko (n 181).

remember that synchronization, not harmonization, is the goal. As a result, member states would be able to have separate social welfare policies.²³⁹

4.3 An Assessment of the Kenya-UK Economic Partnership Agreement for 2020

Kenya and the United Kingdom concluded an EPA (Economic Partnership Agreement) on December 8, 2020. The Kenyan legislature then adopted the EPA on March 9, 2021. The overarching goal of an EPA is to increase consumer connectivity between the countries. Given the difference in the economies of the two nations where Kenya is emerging while the United Kingdom is already an established economy, this is advantageous to Kenya.²⁴⁰ This is because of the access to wider market which is offered by the UK. There is also the aspect of attracting investments.

An EPA is a development oriented asymmetric arrangement which offers significant benefits and protections to African, Caribbean, and Pacific (ACP) nations and the European Union in order to promote their long-term fiscal growth, continental convergence, and incorporation into and inside global markets. One of the reasons for the creation of EPAs with the intention of liberalizing exchange between different economies is addressing disparities in growth levels. In this case, the EU or a single continental bloc (the United Kingdom) offers EPA countries with complete duty-free and quota-free market entry, whereas the ACP regions promise to open at least seventy five percent of their markets to European counterparts.²⁴¹

The foundation of EPAs is based on four concepts. They are cooperation with mutual responsibilities and privileges, regional integration in which ACP countries are incorporated into the global economy, growth for contracting parties, and finally, a bond between ACP countries and the WTO.²⁴²

EPAs are negotiated as a limb of the Cotonou Partnership Agreement, which was signed between the EU and ACP countries in 2000. The Marrakesh Agreement, which established the World Trade Organization (WTO), governs these. EPAs are unique in

²³⁹Frans Pennings and Gijsbert Vonk, *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2015).

²⁴⁰Waihenya Jacqueline, 'Evaluating The Kenya-United Kingdom Economic Partnership Agreement, 2020 and its Dispute Resolution Provisions' (2021) 6 (2) *Journal of cmsd* 295.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

that they are signed by ACP countries under regional blocs, but they are executed and ratified bilaterally by the state parties, and the signatories are obliged bilaterally.²⁴³

It is no coincidence that Kenya and the United Kingdom signed an EPA deal around the same time that the United Kingdom was exiting the European Union. Kenya is listed as a Low-Middle-Income Country. The implication of this is that the country is not eligible to special treatment other than that specified in the EU-ACP Economic Partnership Agreement, which she has signed.²⁴⁴ As a result, the United Kingdom had to sign international trading arrangements.

Kenya and the United Kingdom have a long history together since Kenya was a British colony until 1963, when it gained independence. Kenya has pursued a strategy of attracting international investment since independence, as shown by the Foreign Investment Protection Act of 1964. Kenya's fundamental foreign investment security is also outlined in this act. Kenya and the United Kingdom have always retained strong political and economic links since signing a bilateral agreement in 1999 that is still in effect. This study thus shows that Kenya's economic partnership with the United Kingdom is complicated since many factors must be considered.²⁴⁵ The EU's priorities, the post-brexite dynamic, and the EAC's needs as a bloc are among the complicating factors.

4.4 Lessons for Kenya

Political factors are a key consideration in the success of any regional economic community. Concessions have to be made and this involves ceding an aspect of a nation's sovereignty in favor of a regional community so as to make progress. Labour is also an important production factor and more emphasis has to be placed on harmonization of legislation. Kenya also stands to benefit more if it negotiates trade agreements within the EAC framework as opposed to negotiating alone. There are also advantages in terms of numbers where the agreements may be complex and the EAC nations can unite to demystify the issues.

4.5 Conclusion

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ The Foreign Investment Protection Act, 1964.

The EU's history tells us that democratic goodwill is crucial in matters that deal with the economy. A legal structure is equally significant, as demonstrated by the EU, which embraced the German legal model which was a precondition by Germany for giving up its extremely powerful currency (Deutschmark). There is also no such set of worker groups dichotomy in the EU as there is in the EAC. There is also the recognition that the EPA between Kenya and the United Kingdom presents a complicated dynamic under which Kenya must align its own interests, those of the East African Community, and those of the United Kingdom.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The prospect for Kenya's endeavor in regard to monetary and financial cooperation in the EAC is fraught with legal challenges which ought to be addressed. The first chapter lays the foundation of the study. The second chapter places emphasis on the importance of a legal framework in the institutional framework of the EAC while taking a positivist perspective. The third chapter discusses the legal challenges for Kenya. The fourth chapter interrogates lessons Kenya can learn from the European Union experience and the fifth chapter gives the findings, conclusion and recommendations.

5.1 Findings

The findings of the research show that regional economic integration and financial and monetary coordination in the EAC are inextricably linked. This is shown in second chapter, which analyzes the legal nexus in the EAC using a positivist approach. The study discovered that the EAC generates norms and has entities with powers granted by the treaty to create laws and execute them. As a result, the EAC Treaty serves as the *grundnorm*, with consequences for non-compliance with its rules.²⁴⁶

In the case of Kenya, a legal examination revealed that the colonial experience resulted in the creation of a shared legal infrastructure that is critical for economic integration.²⁴⁷ An examination of the EAC's structural and the phases of integration showed that the EAC's success depends on a well-established and controlled partnership with the partner states' legal systems. The EAC's Regional Economic Integration has also been harmed by the Covid-19 pandemic. The Covid-19 pandemic also highlighted the importance of assessing cross-border partnerships in order to strike a compromise between improving domestic and neighboring country capabilities. As a result, a collaborative method is needed.²⁴⁸

The EAC is also a building block for the AfCFTA, according to the research. The threats to the AfCFTA are discussed based on this assumption. According to the

²⁴⁶Oppong (n 2).

²⁴⁷Oppong (n 68).

²⁴⁸Mboce and Muigua (n 36).

study, well-established transnational companies are more likely to lead in industrial growth in Africa, whereas emerging businesses are more likely to be disadvantaged. The alternative is to guard infant industries by enacting customer rights and competitiveness policies. Kenya must also improve its productivity in order to counteract the detrimental impressions of trade digression and follow strategies that endorse industrialization.²⁴⁹

The study's third chapter focused on Kenya's legal problems in pursuing monetary and financial collaboration in the EAC. One legal problem identified by the research is a disagreement in Kenya over where treaties fall into the hierarchy of norms. The study takes a dualistic view, in which a treaty is not enforceable without the state enacting enabling laws that ensures transformation or interprets the treaty into domestic legislation.²⁵⁰

The harmonization of certain commercial legislation is examined based on this dualistic view. The Central Bank of Kenya Act, the Banking Act, the Kenya Competition Act, and the Kenya Information and Communications Act are among the commercial laws examined. It has been established that there is no identifiable structure regulating mobile money transfers, and that any legislation must be sector specific. Labor is often debated as a driver of demand, and it was discovered that the EAC partner states do have separate labor and social security rules. Given the EAC common market's responsibilities to the party states, this is the case. The illicit economy must also be integrated into Kenya's legislative system.²⁵¹

How a country resolves its differences is one indicator of its economic performance. This is why the research interrogated litigation and arbitration in Kenya. The study discovered that the courts are inconsistent in their interpretation of Section 10 of Kenya's arbitration act, which deals with court interference in arbitration cases.²⁵²

The study equally discovered that the EU integration blue print has shown that a positive democratic and political gesture is a key element to ensure progress in matters that deal with the economy. A legal framework is also significant, as it demonstrates that the EU legal foundation is heavily influenced by the German

²⁴⁹Bello (n 112).

²⁵⁰Nyarango (n 37).

²⁵¹Makoko (n 181).

²⁵²Section 10, Arbitration Act, Kenya.

framework. There is also no sub-set of worker groups in the EU as there is in the EAC.²⁵³ Finally, the study discovered that Kenya's Economic Partnership Agreement (EPA) with the United Kingdom presents a complicated dynamic in which Kenya must align its own objectives with those of the EAC and the United Kingdom.

5.2 Recommendations

The need to take local circumstances into consideration when enacting laws is important. This should take place in parliament when a bill is under consideration before presidential assent. This can further be enhanced by public participation. The harmonization of laws is an important aspect towards the promotion of Regional Economic Integration. The EALA can assist towards this endeavor as it has membership from affiliated EAC states and it is better placed to assess divergence in the legal frameworks. A focus on regional economic integration is also advantageous to Kenya since it enables it to compete with countries with larger economies. The informal sector is a good area to place emphasis in order to attain the regional economic integration objective.

There is also need to consider the Regional Trade Agreements that Kenya is a party to. There is a danger of contrasting objectives as a result of being a member of different RTA's. The intention of joining an RTA may be influenced by positive factors such as creating an enabling environment to attract foreign direct investment (FDI) however Kenya's policy makers should have a long term vision on implementation. This necessitates a sustainable direction in policy making. This means that those in positions influencing regional economic integration policies ought to analyze what was done before their time in office before putting in place new policies.

The implementation of the East African Monetary institute is very important in achieving the goal of monetary and financial cooperation according to the EAC monetary union. Towards this end, it is important for the institute to be facilitated so that it can undertake it's mandate. A beginning point would be finding a base of operation in one of the partner states. The Covid-19 pandemic has also had a global impact on countries' economies and Kenya has not been spared. It is therefore important for the Kenyan government and the larger east African regions to prioritize

²⁵³Cuyvers (n 15).

vaccination drives in order for the region to be considered as an attractive investment destination. This is one positive indicator given the effect of the Covid-19 pandemic on global economies.

Harmonization of laws is a major challenge facing Kenya. It is important to consider local demands and current situations when it comes to commercial legislation. The approximation of laws can help in the integration endeavor since EAC partner states have different legal systems. Recognition of the approximated laws is also necessary to facilitate implementation. There is also a need to resolve divergence of the telecommunications and financial industries especially for the poor. This can be done by promoting financial inclusion which will ensure access to a variety of financial resources tailored to people's needs. Legislation involving transfer of mobile money transfer is cross cutting falling under the ICT and distinct financial sector specific regulations. Considering the cumulative large sums of money involved in these transactions, there is need for a direct legal structure covering these transactions.

In order to promote successful economic integration, labour as a factor of production needs to be prioritized. Harmonization is therefore encouraged owing to the disparities in labour and social security laws and policies of EAC partner states. Incorporation of the informal sector also favors regional economic integration in the EAC.

A good dispute resolution mechanism ensures it is easier to do business in Kenya and thus promotes economic integration. Arbitration is one of the mechanisms that is encouraged and the courts intervention in the arbitration process should be limited. In making trade agreements, the EAC countries should negotiate as a block as opposed to Kenya negotiating trade agreements alone. This achieves greater leverage in negotiations. It is also important for the regime in power to have good democratic will towards the goal of economic integration. This means that the Kenyan voter has immense power when voting during general elections. Finally towards this end, political parties seeking power during general elections ought to outline in their manifestos their foreign policy and regional economic integration agendas to enable the voter to make an informed decision.

5.3 Conclusion

The study sought to analyze the challenges Kenya faces in the quest for monetary and financial cooperation in the EAC. An analysis of the above research question showed that there is a tendency for Kenya to protect its sovereignty first before looking at the interests of the EAC community. This was shown in the midst of the Covid-19 pandemic where a collaborative approach was advocated for after Kenya had already imposed boarder restrictions. Additionally, the study demonstrated that mobile money transactions are governed by legislations in both financial and ICT sectors and there is a need for harmonization given the prominence of mobile money services in the Kenyan economy. In the research, I argue that there will be a rush to implement provisions of the monetary union specifically under the East African Monetary Institute act. This will led to difficulty in implementation given that 2024 is the target year when the protocol should come into operation. The European Union experience also demonstrates that political factors play a key role in the success of a regional economic community.

The study contributes to the literature in the regional economic integration area by underscoring the importance of legal elements in the success of a regional community. The AfCFTA agreement is also in the process of being implemented and the fact that it uses regional blocs such as the EAC as its foundational pillars necessitates the need for research in this area. The results of the research can be used to do further research given the infancy of AfCFTA. Other researches can also see how Kenya and the EAC tackled the Covid-19 pandemic and in the event of another global crisis, future scholars can use the research to show how a lack of a collaborative approach can slow down the regional economic integration endeavor.

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