THE ROLE OF THE EAST AFRICA COURT OF JUSTICE IN REGIONAL INTEGRATION; EMERGING JURISPRUDENCE AND THE WAY FORWARD

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DECLARATION.

I RUTH CHEBESIO KEFA...., hereby declare that this thesis is my original work. It has not been submitted to this or any other University for the award of a Masters degree.

..... 19TH NOVEMBER 2008

Candidate: Ruth C.Kefa Date

Reg.No. G62/P/7910/06

Submitted with my Consent:

....

Supervisor: Date

I dedicate this work to my Father in Heaven.

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TABLE OF SELECTED INTERNATIONAL AND REGIONAL INTEGRATION ARRANGEMENTS.

1. The Economic Commission for Africa 1958
2. The Organization of African Unity 1963
3. The East African Community 1967
4. The Lake Chad Basin Commission 1964
5. The Federation of Arab Republics 1971
6. The League of Arab States 1945
7. The Central African Customs and Economic Union 1964
8. The Organization of the Senegal River States 1968
9. The Conference of East and Central African states 1967
10. The Senegambia Permanent Committee 1967
11. The Union of Central African States 1968
12. The Economic Community of West Africa States 1970
13. The Maghreb Permanent Consultative Committee 1964
14. The West African Regional Group 1968
15. The Economic Community of Eastern Africa 1966
16. Afro-Malagasy Common Organization 1966

ABBREVIATIONS

AU.....African Union

CET.....Common External Tariff

COMESA.....Common Market for Eastern and Southern African

CU.....Customs Union

EAC.....East African Community

EACJ.....East Africa Court of Justice

EU .....European Union

ECO.....European Cooperation Organization

ECOWAS .....Economic Community of West African states

FTA .....Free Trade Area

GATT.....General Agreement on Tariffs and Trade

NEPAD.....New Economic Partnership for Economic Development

OAS.....Organization of American States.

OAU.....Organization of African Union

OECD.....Organization for Economic Cooperation and Development

PTA .....Preferential Trade Area (for Eastern and Southern Africa)

RIAs.....Regional Integration Arrangements

REC.....Regional Economic Cooperation

SACU.....Southern African Customs Union

UK.....United Kingdom

WTO.....World Trade Organization

ECA.....Economic Commission for Africa

ABSTRACT

This research takes cognizance of the fact that Regional Economic Integration which entails the establishment of some structural conformity is an important variable in the process of development. In following a growing trend, the East African Community was re-created in order to achieve rigorous developmental objectives it has set for itself. To this extent, Regional Economic integration is a complex and much debated issue among analysts and policy makers in almost every corner of the world.

In East Africa the previously defunct East Africa Customs Union has been resurrected to improve trade between Kenya, Tanzania and Uganda. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from 1st July 2007. In any renewed effort towards integration, the emphasis ought to be laid on the integrity of the various institutions set up to ensure the smooth operation of the organization. This paper seeks to assess this objective, with particular reference to the East Africa Court of Justice relative to the principle of separation of powers and respect to the rule of law.

The courts play a very important role in the interpretation of the treaty as well as settling any disputes that may arise within the EAC. To effectively carry out their work it is important that the rule of law and the doctrine of separation of powers are adhered to.

This is in recognition of the fact that it is necessary and desirable to surrender a certain degree of sovereignty of states in a regional integration. The relationship between municipal and treaty law presents the theoretical issue as a clash between dualism (or pluralism) and monism. Both these schools of thought assume that there is a common field in which the international and municipal legal orders can operate simultaneously in regard to the same subject matter, and the problem then is, which is to be master? This paper tries to answer this question and propose ways of having a sound judicial system that will propel the East Africa Community towards successful integration.

CHAPTER 1

SETTING THE AGENDA

INTRODUCTION

Economic Integration: An Overview

For a variety of reasons it often makes sense for nations to co-ordinate their economic policies. Co-ordination can generate benefits that are not possible otherwise. It is clear that if countries co-operate and set zero tariffs against each other, then both countries are likely to benefit relative to the case when both countries attempt to secure short-term advantages by setting optimal tariffs[1].

In a book titled 'Economic Integration and Development in Africa' by Henry Kyambalesa and Mathurin C. Houngnikpo, the authors are of the view that African countries are not going to make any headway in socio-economic development unless they integrate their economies[2]. He argues that the primary rationale for economic integration derives not only from economic considerations; rather it emanates from social security, technological and political factors as well.

The author quotes from Dr.Kingsley Y. Amoaka, ECA Executive Secretary and UN Undersecretary General, who espoused this inescapable reality on February 17th 2000 during the opening session of the conference on US-Africa relations convened by the US National summit on Africa[3];

"Regional integration is the key to Africa's success in the twenty first century"

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[1] Henry Kyambalesa and Mathurin C. Houngnikpo, 'Economic Integration and Development in Africa', Institute for Global Dialogue (2005), pg xx
[2] Ibid at pg xxv
[3] Ibid

Integration Through Cooperation

The East Africa Community (herein after referred to as EAC) grouping brings together countries of diverse resource endowments, and socio-economic, political and historical backgrounds. These countries have agreed to co-operate in creating an economic community that allows free trade, investment and movement of people. The strategic challenge is to clearly define co-operation, and harmonize expectations with regard to its meaning and anticipated benefits. It has to be understood that co-operation within the EAC framework is intended to improve the ability of member States to compete amongst each other within the grouping and, as a collective, compete with the outside world. In order to enhance this ability to compete, EAC strives to create a playing field that is level, i.e. one that allows free and fair competition within the principles of market economics[4].

In any renewed effort towards integration, the emphasis ought to be laid on the integrity of the various institutions set up to ensure the smooth operation of the organization. This paper seeks to assess this objective, with particular reference to the East Africa Court of Justice relative to the principle of separation of powers and respect of the rule of law.

In order to understand better the concept of the role of regional courts in regional integration, this discussion focuses on the East Africa Court of Justice (EACJ) as a regional court and the East Africa Community (EAC) as an organization aiming at regional integration. We cannot appreciate the import of this discussion without first paying a short visit to the history of what we see today.

BACKGROUND

Geographical contiguity and the fact that the three East African territories were under the British rule made close economic relations between Kenya, Uganda and Tanganyika natural. In the first place they constituted a common market. There were no internal tariff barriers either on imported or locally produced goods and there was free movement of

[4] Association of Political Science (AAPS), 30 Years of Independence in Africa: The Lost Decades? (1992), pg 18

capital and labor within the East Africa. They had a common external tariff 'revenue raising' rather than protective intent[5].

These included the Customs Union between Kenya and Uganda in 1917, which the then Tanganyika later joined in 1927; the East African High Commission (1948-1961); the East African Common Services Organization (1961-1967); the East African Community (1967-1977) and the East African Co-operation (1993-2000). The East African Community has now enlarged to comprise of 5 neighboring states, Kenya, Uganda, Tanzania, Rwanda and Burundi. The five countries have an Area of 1,817,945km and a combined population of approximately 125 million[6].

In 1977 the East African Community collapsed after ten years due to demands by the Kenyan government to have more seats than Uganda and Tanzania in decision-making organs, amid disagreements caused by the dictatorship of Idi Amin in Uganda, socialism in Tanzania, and capitalism in Kenya. During the 1950s, Tanganyika and Uganda become increasingly dissatisfied with the way in which the East Africa Cooperation was operating. They felt that the East African Common Market and the various East African institutions were operating more to the advantage of Kenya. On the other hand the British rule left behind a legacy of inequalities in the levels of economic development with Kenya enjoying the highest level of economic development among the three countries and Tanzania the least. It is one of the factors that have been identified by scholars as a major cause of the collapse of the first EAC in 1977[7].

The Common Market and the High Commission became the subject of heated controversy between the three territories. It was therefore decided to appoint an Economic and Fiscal Commission under the chairmanship of Sir Jeremy Raisman (a Governor of the Bank of England) and include Professor R.C Tress and A.J Brown, to investigate the allegation and to make proposals for reform. The Raisman Commission

[5] Ibid

[6] Ibid

Midrand, South Africa (2005) at pg 10

[7] Ibid at pg 13

made the recommendation in a report that suggested a number of steps to promote the equalization of gains[8].

The major economic and fiscal change it proposed was the institution of a distributable pool which was to have the dual object of fiscal redistribution between the three territories and of providing an independent source of revenue for the common services. In spite of this, the East African Cooperation collapsed. The dream of East African federation proved in the event to be short lived[9].

The three member states lost over sixty years of co-operation and the benefits of economies of scale. Each of the former member states had to embark at great expense and at lower efficiency, upon the establishment of services and industries that had previously been provided at the community level. The problem of unequal distribution of benefits is central to the stability of regional cooperation[10].

The more recent attempts at economic integration the, 'new regionalism' can be traced back to the Lagos Plan of Action (LPA), adopted at the second extraordinary session of African heads of state and government of the OAU in Lagos in July 1980. The LPA was aimed at:

- Promoting the economic and social integration of African economies in order to enhance self-reliant and self-centered development.
- Creating national, sub regional, and regional institutions in pursuit of self-reliance: and
- Undertaking proper planning in all sectors of development with a view to achieving modern economies at the national, sub national and regional levels by the year 2000[11].

Another attempt at continental economic integration was the Abuja Treaty – establishing the African Economic Community (AEC) in June 1991. But like the LPA the Abuja

[8] Ibid
[9] Ibid
[10] Ibid
[11] Supra note 5 at pg 27

Treaty has remained largely on the drawing board, and has been overtaken by events as African leaders have scrambled to reposition the continent globally.

New Economic Partnership for Economic Development (NEPAD) on the other hand recognizes the need to strengthen Africa's Regional Economic Corporations (RECs) thus enabling them to serve as the building blocks of an African economic regeneration. The NEPAD initiative also acknowledges the limited markets for existing national economies, and therefore concludes that successful economic regeneration can only be brought about by pooling markets and resources in order to enhance regional development and economic integration. It is against this broad backdrop of attempted regional economic integration, ultimately directed at African Economic Regeneration (AER) that the revival of the EAC must be situated. In other words the EAC has been revived at a conjuncture defined by an overarching continental determination to achieve a political renewal and economic regeneration via the activities of RECs[12].

In the analysis of the revival of the EAC Rok Ajulu[13] suggests that a number of developments, both global and regional, provided the environment in which such a revival has been possible. The first is the post – cold war political environment: and the renewed interest in regionalism as a vehicle for global competitiveness. Second is the ideological convergence in the region: gone are the ideological differences of the previous 3 decades – Nyerere's ujamaa. Obote's socialist charter and Kenya's market fundamentalism and attachment to the coat-tails of American and British imperialism that had sharply divided the 3 countries. Third is the demise of the one-party states and the introduction of multiparty systems (although Museveni's Uganda still clings to a kind of one-party system described as the 'movement system') which have similarly introduced a degree of political convergence. Finally and most important factor has been the widespread conversion to neo-liberal (free market) economic policies in all three partner states, which has ensured greater harmony in the region, both economically and politically. It was in this context that talks about the revival of the EAC began culminating to the November 1993 agreement to establish the Permanent Tripartite

[12] Ibid

[13] Supra note 5 at pg 20

Commission for Co-operation, and finally the Secretariat of the Tripartite Commission which drove the revival until the New East Africa Community (NEAC) was established in July 2002[14].

Following the dissolution of the former East African Community in 1977, the Member States negotiated a Mediation Agreement for the Division of Assets and Liabilities, which they signed in 1984. However, as one of the provisions of the Mediation Agreement, the three States agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation.

Subsequent meetings of the three Heads of State led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation on November 30, 1993. Full East African Co-operation operations started on March 14, 1996 when the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania. Considering the need to consolidate regional co-operation, the East African Heads of State, at their second Summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty[15].

The Treaty-making process, which involved negotiations among the Member States as well as wide participation of the public, was successfully concluded within three years. The Treaty for the Establishment of the East African Community was signed in Arusha on 30 November 1999. The Treaty entered into force on 7 July 2000 following the conclusion of the process of its ratification and deposit of the Instruments of Ratification with the Secretary General by all the three Partner States.

Upon the entry into force of the Treaty, the East African Community came into being. At the on-set, East African Co-operation generally viewed itself as a fast track for regional integration in the Eastern and Southern African region, particularly as fast tracking the C

[15] Ibid at pg 24

was out of the fact that the 3 Member states were also members of COMESA and at that time were trading under the COMESA trade regime[16].

The regional integration process is at a high pitch at the moment which. There is encouraging progress of the East African Customs Union, the enlargement of the Community with admission of Rwanda and Burundi, the ongoing negotiations of the East African Common Market as well as the consultations on fast tracking the process towards East African Federation all underscore the serious determination of the East African leadership and citizens to construct a powerful and sustainable East African economic and political bloc[17].

Institutional Arrangement

To achieve its stated objectives, the EAC treaty provides for the creation of some supranational institutions. The main organs, provided for in Article 9 of the Treaty Establishing the East Africa Community, are the Summit of Heads of State, the Council of Ministers, the Co-ordination Committee, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.

The Summit, which consists of Heads of State or government of the member countries, has the role of 'giving general directions and impetus as to the achievement of the objectives of the Community'. The summit is essentially a political forum where the heads of government meet at least once a year to thrash out the EAC's political agenda. Comprising the ministers responsible for regional co-operation of each of the partner states, the Council of Ministers is the EAC's policy organ. Its main function is to promote, monitor, and review the implementation of the EAC's programmes, and ensure the proper functioning of regional organizations. In this regard it is mandated to 'issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of the treaty'. The Council is the most important organ as far as the

[16] Supra note 3
[17] Ibid

implementation of the treaty is concerned. It meets regularly, and can also hold extraordinary meetings[18].

The Coordinating Committee, which consists of the Permanent Secretaries responsible for regional co-operation, is charged with coordinating the activities of sectoral committees. It reports directly to the council of ministers. The Sectoral Committees, for their part, prepare comprehensive implementation programmes, setting out priorities with respect to their respective sectors, and monitor their implementation. They report to the Co-ordination Committee[19].

The other two important organs are the East Africa Court of Justice and the Legislative Assembly. The Court of Justice is meant to interpret the treaty[20] and ensure compliance with its provisions, while the Legislative Assembly is the legislative organ of the EAC. Suffice it to say here that they play an important role in the EAC hierarchy. The last organ is the EAC Secretariat – the Executive organ of the Community. It is headed by a Secretary-General, assisted by two deputies.

PROPOSAL

Statement of the Problem

The East Africa Court of Justice has a role to play in regional integration of the East Africa Community.

The presence of regional courts provides the forum and mechanism for two disputing countries or citizens, or any legal personality in those member countries, to present their grievances. Also, violations of human rights, and issues of democracy and good governance, are today matters of great concern to the international community. In most

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[18] John Eudes Ruhongiso, "The East Africa Court of Justice", in 'The Making of a Region; The Revival of the East Africa Community', Institute for Global Dialogue, Midrand, South Africa, 2005 at pg 93

[19] Ibid at pg 94

[20] Article 9 of the Treaty Establishing the East Africa Community

regional organizations, therefore, the importance and the role of regional courts as tools of regional integration cannot be overemphasized.

However the East Africa Court of Justice (herein after referred to as the EACJ) like any other court should be independent in the administration of justice. Following the case of **Peter Anyang' Nyong'o and 10 others Vs The Attorney General of the Republic of Kenya**[21] the action taken by the Kenyan government to amend the EAC Treaty which had the effect of removing two judges from the EACJ showed that the decisions or judgments of this court are politically influenced, or specially engineered, where a particular government or any of its institutions is involved. This happens when the principle of separation of powers is not respected as the executive influences the decisions made by the court, and the rule of law is not upheld.

An independent judiciary is crucial to the integration process. It is this attempt to analyze the EACJ and in particular the independence of the Court that provides the raison d'etre of this volume.

Rationale, Scope and Justification of the Study

Under Article 2[22] of the Treaty, the contracting parties namely United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda (the partner states) established among themselves an East African Community (the community) and under Article 9[23] established diverse organs and institutions of the community. One of the eight organs established under the treaty is the EACJ.

The EACJ is proposed to ensure, "the adherence to law in the interpretation and application" of the treaty and to determine disputes submitted to it under the treaty though the assembly could decide to expand its jurisdiction[24].

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[21] No. 1 of 2006 available at http://www.ealawsociety.org

[22] Treaty Establishing the East Africa Community

[23] Ibid

[24] Article 18.2 and Article 18.4 respectively

Disputes, however undesirable, are part of life therefore, they have to be addressed. Thus the judicial system of any organization, whether international or regional, is deemed to be of great importance because one of its major functions is to settle disputes among member states. Other functions include providing advisory opinions on whatever legal matters may arise. The number and role of regional courts/tribunals has grown significantly in recent years. The intensification of the trend of globalization and the attendant rise in the density of international relationships, and the institutions that govern them, have focused attention more closely than ever on the structure and functions of those institutions[25].

It is also important to recognize that the East African region is part of the Great Lakes region, which is prone to conflicts. Since admission to the EAC is open to any country that may qualify[26], the presence of the EACJ assures not only the existing partner states, but also prospective members of the community, a reliable regional dispute settlement mechanism[27].

The main consideration in the establishment of regional courts for various regional organizations has been the potential for conflicts and disputes related to the trade that is aimed at bringing about economic development. A dispute settlement mechanism is necessary. Its absence would definitely occasion disharmony and consequently lead to breaches of peace in the region, thus defeating the spirit behind the establishment of the regional organization[28].

The EACJ is proposed to ensure "...the adherence to law in the interpretation and application" of the treaty and to determine disputes submitted to it under the treaty, though the assembly could decide to expand its jurisdiction[29]. Decisions of the court are

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[25] Supra note 5 at pg 94

[26] Article 3 of the Treaty Establishing the EAC 1999
[27] **Supra note 17**
[28] Ibid at pg 95
[29] Article 18.2 and Article 18.4 respectively

"...binding on member states and organs of the community..."[30] and that the functions of the court should be carried out "...independent of the member states and the other organs of the community"[31].

The EACJ is beginning to experience challenges as Kenya, one of the community's member states expressed great discomfort with a supranational court exercising authority on a matter that it argued was within its exclusive competence[32]. The controversy arose following a decision issued by the EACJ in the case of **Peter Anyang' Nyong'o and 10 others Vs The Attorney General of the Republic of Kenya**[33] (hereinafter referred as the **Nyong'o** case) temporarily stopping the swearing in of Kenyan members to the East African Parliament, one of the bodies of the East African Community. The decision stirred up criticism of the court's decision for undermining Kenya's sovereignty[34].

The Treaty establishing the EAC defines the role of the court as ensuring "...adherence to the law in the interpretation and application of and compliance" with the treaty. The role of the judiciary is to adjudicate on disputes which arise out of the laws established. The treaty establishing the East African Community vests jurisdiction initially only on the interpretation and application of the treaty and specifically provides that in a subsequent period its jurisdiction could be extended to confer on it original, appellate human rights or other types of jurisdiction[35].

Following the EACJ's **Nyong'o** decision in November 2006 an extraordinary meeting of the Attorneys general of the constituent states of the East African community was quickly convened in early December 2006 at which amendments to the Treaty establishing the

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[30] Article 19
[31] Article 18.5
[32] James Thuo Gathii, 'The Promise of the African Economic Community', Paper Prepared for the University of Minnesota Conference on Developing Countries in the WTO Legal System, pg 10
[33] No. 1 of 2006 available at http://www.ealawsociety.org

[34] East African Law Society, "No integration Without the Rule of Law", Monday December 4, 2006 (Press Release) available at http://www.ealawsociety.org
[35] Article 27.2 of the Treaty for the Establishment of the East African Community

East African Community were agreed on and submitted to the Assembly of the East Africa for approval.

The amendment had the apparent effect of weakening the independence and authority of the EACJ. For example they provide that a Judge who has been removed from judicial office in his or her home state for misconduct or resigned from such office following allegations of misconduct would automatically lose his or her seat at the EACJ, thereby amending Article 26 of the Treaty establishing the EAC. In addition the amendment provides for the removal of a judge for inability to perform the functions of their office pursuant to a recommendation of an independent tribunal established for that purpose. The amendment also creates an Appellate division of the Court and confer appellate jurisdiction to the Court[36].

It is ironical that at the time when the amendments were proposed two Kenyan judges sitting on the EACJ that issued the orders against the Kenyan government were suspended from their judicial positions on the Kenyan bench in 2003 following allegations of corruption against them[37].

It is such conduct of the government officials trying to influence the decisions of the judiciary that result in the weakening of the judicial authority creating uncertainty within the system.

Objectives of the Study

We shall analyze the various decisions of the EACJ in relation to its jurisdiction as set out in the Treaty establishing the East Africa Community and to find out whether the principle of separation of powers and the rule of law is being respected. These are fundamental to the judiciary and success of regional integration process within the region.

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[36] Thereby amending Article 23 and 35A respectively to the Treaty Establishing of the East African Community

[37] Ringera Report on the State of the Judiciary in Kenya available at http://www.icj/org visited on 6/11/08

This paper pays particular attention to the institutional capacity of the EACJ with the objective of identifying the institutional weaknesses within the structure and functioning of the EACJ and proposes to steer the EAC into a meaningful integration.

Research Methodology

My sources of data include:-

- Official documents derived from the state. This includes textual materials such as Acts of Parliament and official reports.
- Official documents deriving from private sources which include newspapers and magazine clippings especially reviews.
- Speeches delivered.
- Virtual outputs which are documents that appear on the internet for qualitative and quantitative data analysis.
- Discourse analysis of various texts
- Websites and WebPages for both qualitative and quantitative content analysis E-research; using the internet as object and method of data collection[38].

I use multi-strategy research that combines qualitative and quantitative research.

Plan of Data Analysis

Data analysis is by secondary analysis of both qualitative and quantitative data. I analyze the various sources of existing data by exploring the research questions of interest using this data. In interpreting the documents, qualitative content analysis approach is used where the materials are searched and analyzed. This research involves secondary analysis of data produced by other researchers and official statistics.

Technique for analyzing includes computer based data, Websites and WebPages for both quantitative and qualitative content analysis; 'E-research'. It will also includes argument analysis by way of claim, data and warrant.

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[38] Alan Bryman, 'Social Research Methods', 2nd Edition, Oxford University Press (2004), pg 218

The purpose of combining qualitative and quantitative methods is;

1. To offer a more critical attitude to the mechanistic use of quantitative methods and a more relaxed attitude to the use of qualitative methods.

2. Provide room for combination of qualitative and quantitative methods from different disciplines e.g. flexibility and improvisation in choice of practical methods.[39]

Literature Review

It is necessary to evaluate the existing literature for relevant theoretical and empirical implications, and to provide the basis for the research that will be carried out in the following chapters.

Adewoye in his book 'Constitutionalism and Economic Integration[40]' argues that constitutionalism, or the rule of law, is basic to regional integration. The fact that this condition is satisfied in the European case is considered to be one of the important reasons for the success of the European Union. He points out that there are several reasons for this relationship. One is that constitutionalist states, accustomed to the separation of powers, more easily accept the transfer of sovereignty to regional institutions. Constitutionalism also ensures the political and social stability necessary to the pursuit of long-term projects such as regional integration. Finally, the rule of law facilitates human interaction among individuals or groups of different nationalities, thanks to the basic freedoms provided and the effective enforcement of contracts. West African states have barely begun instituting constitutionalism as a mode of governance, and it is therefore not surprising that their efforts at economic integration have met with little success. In the author's view, the establishment of a regional tribunal enforcing basic human rights against authoritarian regimes would be a good starting point for the enthronement of constitutionalism and democracy in the sub region.

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[39] Little, Daniel: 'Varieties of Social Explanation; An introduction to the Philosophy of Social Sciences', West view Press (1991), pg 34

[40] Ominiyi Adewoye, 'Constitutionalism and Economic Integration' in "Constitutionalism and Economic Integration", International Development Research Centre (2000), pg 56

In the book 'Economic Integration and Development in Africa', by Henry Kyambalesa and Mathurin C. Houngnikpo, the author defines economic integration to refer to the formation of an Inter-governmental Organization (IGO) by three or more countries to create a larger and more open economy expected to benefit member countries. The author suggests pre-conditions for viable and beneficial integration of national economies which includes *inter alia* ; sustained peace and stability in member countries, sustained political will, competitive national economies, similar stage of development, geographical proximity, a viable mechanism for ensuring equitable sharing of gains and losses among members and a mutually acceptable mechanism for ensuring fair distribution of essential IGO institutions[41].

'Can Africa Claim The 21sth Century?[42]' is a product of a collaborative effort that began in October 1998 when several representatives of various institutions including the African Development Bank, African Economic Research Consortium, Global coalition for Africa United Nations Economic Commission for African and World Bank met to initiate a study on sub-Saharan Africa's prospects for economic and social development in the 21st Century.

Under the title, 'Widening the Economic space: Regionalist & Multilateralism'[43] , the author argues that despite past failures and the lackluster implementation of existing schemes, the case for Africa's economic integration remains compelling. The author explores how regionalism can help achieve Africa's development goals in a globalized economy.

This he does by suggesting reasons why the region (Africa) has had rather disappointing record in regionalism. Despite a multitude of sub-regional schemes and the strong political rhetoric supporting them, the results of integration remain modest. Progress on the 1991 Abuja Treaty – which envisions an African Economic Community – has been

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[41] Henry Kyambalesa and Mathurin C. Houngnikpo, 'Economic Integration and Development in Africa', International Development Research Centre (2000), pg 15
[42] The World Bank Washington D.C. Edition 2000
[43] Ibid at pg 226

mostly sub-regional. These arrangements are sometimes overlapping, with countries subject to conflicting obligations. There have also been wide variations in the nature and speed of integration[44].

The author suggests that one of the reasons for the region's shortcomings is that African integration schemes have suffered from implementation lapses, including those due to weak governance and that some states could not cope with a loss of national sovereignty. Other factors include a lack of adequate technical and management expertise, concerns about losing trade tax revenues, and concerns about equitable growth and polarized industrial transformation within the sub-region[45].

Despite all that had happened with regard to integration in Africa, there are those who believe that meaningful cooperation is not attainable on this continent. Ravenhill in his article, 'The Future of Regionalism in Africa'[46], stated;

> 'Africa, in fact, is uniquely ill suited for regional integration; at least, for the form most typically adopted by developing countries, the integration of markets.....African economies, far from complementing each other, competes in the world market as exporters of primary products. But, more important, African economies are simply irrelevant to the needs of their neighbors – a problem compounded by the lack of physical infrastructure, which hampers communication. Add to this a variety of languages, currency areas, continuing close ties to ex-metropolis, and a critical shortage of skilled personnel, and one arrives at a very dismal scenario indeed[47]' .

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[44] Ibid at pg 227
[45] Ibid at pg 229
[46] London and Basingstoke, 'The Future of Regionalism in Africa', Macmillan Publishers (1985), pg 205
[47] Ibid at pg 207

Jose E. Alvarez in his book 'International Organization as Law Maker'[48] suggests some generalization about international organizations that aspire global participation. That if one defines real legislation or law making as requiring the power;

1. To take binding action backed by at least the possibility of real coercive enforcement
2. Affecting all relevant actors (including all states as well as any non-state actors that need to be reached for purposes of effective enforcement) and
3. Capable of a repeated application across time in comparable instances it would seem that International Organization legislation does not exist.

John Eudes Ruhongiso in his article titled "The East Africa Court of Justice", in 'The Making of a Region; The Revival of the East Africa Community'[49], argues that the presence of multiple regional courts with overlapping functions and jurisdiction may by itself defeat the whole purpose of establishing the respective regional organizations as economic zones to spearhead and accelerate the growth and economy of the people. It is not an incentive to foreign investors, who prefer certainty and predictability of decisions in the event a dispute emerges calling for judicial intervention. In this kind of situation there is no certainty or predictability, especially given that one is not even sure of which court one should go to if a dispute arises. Overall, the regional integration process is gaining depth, although progress is uneven and far from certain due to implementation problems arising from the complex web of overlapping membership. He proposes that developing African countries should struggle to bring together the existing regional organizations, especially those having overlapping objectives. In the same vein, the functions of the respective regional courts should be harmonized to enable regional organizations realize their objectives.

Report of the Committee on Fast Tracking East African Federation, submitted to the sixth summit of heads of state of the EAC[50] provides that the fear for loss of sovereignty is an issue that is in the minds of some members of the political elite of the East Africa. The

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[48] OUP (2005) at pg 118

[49] Institute for Global Dialogue, Midrad, South Africa, 2005 at pg 94

[50] 2004 at pp 4.4.2

fear is that as a federation the nation states would cease to have any meaningful powers and would be relegated to mere provinces within the federation. This fear is manifested in a number of ways including among others; loss of power at political level; loss of decision making and loss of flexibility in exercising powers at national level. Some of these fears are only perceptions that need to be put in their proper context in order to move forward and counter negative perception.

Theoretical Framework

Any integration, if it is to have a chance of lasting success, must be achieved and maintained through legal means. An independent judiciary in a regional organization is an incentive to foreign investors, who prefer certainty and predictability of decisions in the event a dispute emerges calling for judicial intervention.

The law governing regional integrations lacks effective institutional machinery for enforcing its laws on occasion when the law is challenged. This is because it exhibits sharp differences from the centralized arrangement of familiar domestic system[51].

In social contract terms law is understood as a set of rules and regulations of the social contract and those rules are enforced by political institutions which are referred to as the state or government. In this theory, the idea also includes the notion of enforcement of the rules with punishment or sanctions which follow from the disobedience of rules. Thus for the proponents of social contract theory, law might be said to reflect the values of the population, and this value system, which the legal system advances, might also be called an ideology, made up of political, economic, moral and social values[52].

According to Dicey the rule of law meant that no man was punishable or can be lawfully made to suffer in body or good except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

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[51] J.G. Merrills B.C.L, "Anatomy of International Law" in 'A study of the Role of International Law in The Contemporary World', 2Ed, London, Sweet & Maxwell (1981) at pg 14

[52] Carl F. Stychin, 'Legal Method: Text and Materials', London Sweet & Maxwel (1999), pg 2

Since Dicey's time most lawyers have come to realize many inadequacies in his limited concept of the rule of law. Today's government does have fairly wide discretionary powers, and most people would agree that governments do need discretion to operate effectively. That is ensuring that officials of government only act in accordance with strict rules may prove too inflexible in the implementation of public policies. Instead officials need flexibility and discretion in tailoring law and policy to fit individual circumstance. However while it is increasingly recognized of the importance of discretion on the part of officials of the state the rule of law may seem important as a way to limit the power of officials to act in ways which are perceived as arbitrary or unfair. Thus it might be argued that although discretion is not inconsistent with the rule of law, discretion should be exercised in accordance with general principles of law. The action of state officials should therefore be constrained by the law so that they do not act arbitrarily[53].

Hypothesis

The judiciary should be independent of both the executive and the legislature to guard against the excesses of the government and arbitrary action of government officials. Moreover the EACJ acts as the guardian of the law and in this case the treaty establishing the East Africa Community. The treaty describes all the organs of the EAC, determines their composition, their powers and duties. To gauge the effective settlement of disputes and guard against arbitrary actions of the executive the regional organization must have an independent judiciary. The EACJ Justices need to make decisions without fear or recrimination for that decision.

The rule of law ensures supremacy of the law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of the prerogative or even of the wide discretionary authority on the part of the government. A judiciary which is independent of the other branches of the government is also sometimes described as central to the rule

[53] Ibid at pg 26

of law, as is the accessibility of the courts to the general public. The rule of law is based upon an assumption about the character of human relationships; namely that the law (and its rule) is necessary to the maintenance of civilized society, the assumption here is that without the rule of law, society would degenerate into a chaotic and authoritarian state. Marxists criticize this idea because they argue it accords too much power to law, and it ignores the way in which the rule of law actually serves to legitimize the political and economic status quo.

Proposed Chapters

In Chapter 2 we begin by analyzing the structure and jurisdiction of the East Africa Court of Justice, the doctrine of separation of powers and make a comparative analysis with the European Court of Justice. In chapter 3 we will discuss the role of regional courts as tools of regional integration, sovereignty of states in regional integration and discuss the historical background of the judicial system in East Africa.

In Chapter 4 we shall discuss East Africa Community Treaty Law in the EACJ and analyze various cases as handled by the EACJ and the extent to which it has been influenced by the executive. In Chapter 5 I will propose recommendations.

CHAPTER 2

ANALYSIS OF THE EAST AFRICA COURT OF JUSTICE

Law is an instrument for preserving and promoting common interest in a regional organization. An instrument with which states can achieve together what none can achieve separately. By doing so they achieve a degree of integration which would neither be possible nor desired at the global level[54].

The Treaty for Establishment of the East African Community[55] (hereinafter referred to as EAC) defines the role of the East African Court of Justice (EACJ) as ensuring, "...the adherence to law in the interpretation and application of and compliance with this Treaty." This role is exercised through delivery of judgments arising out of matters referred to it by partner states, the Secretary General or any person resident in East Africa. It is done in the context of the main objective of the Community described as developing policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs.

In light of the above, the court is faced with heavy responsibilities at every stage of the integration process. In this respect it is different from the national courts. Whereas the national courts are essentially for dispute resolution, the EACJ in addition to dispute resolution is mandated to work towards attaining the objectives of the Treaty. It is one of the organs of the community and cannot therefore distance itself from the objectives of that community. The last five years have revealed that the court faces many challenges[56].

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[54] J. G. MerrillsB.C.L, M.A, "Anatomy of International Law" A study of the Role of International Law in the Contemporary World; 2 Ed, London , Sweet & Maxwell, 1981 at pg 58

[55] In the Preamble

[56] John Eudes Ruhongiso, "The East Africa Court of Justice", in 'The Making of a Region; The Revival of the East Africa Community', Institute for Global Dialogue, Midrad, South Africa, 2005 at pg 94

Structure and Jurisdiction of the Court

According to the treaty for the establishment of the EAC the EACJ is a judicial body, which shall ensure the adherence to law in the interpretation and application of and compliance with the treaty. The court is one of the eight organs of the East African community, which shall perform the functions, and acts within the limits of the powers conferred on them by or under the treaty[57]. Gender balance is required to be observed in the appointment of staff and compositions of these organs.

The initial and therefore present jurisdiction of the EACJ is over the interpretation and application of the treaty. However the EACJ shall have such other original, appellate, human rights and other jurisdiction as will be determined by the council of ministers at a suitable subsequent date and the partner states shall conclude a protocol to operationalise the extended jurisdiction. The other existing jurisdiction of the court is the jurisdiction under Article 32 of the Treaty for the establishment of the EAC. The EACJ has jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract or agreement, which confers such jurisdiction to it which the community or any of its institutions is a party[58].

There is also jurisdiction for the EACJ to hear and determine any matter arising from a dispute between the partner states regarding the treaty if the dispute is submitted to it under a special agreement between the partner states concerned. It can also hear and determine any matter arising from an arbitration clause contained in a commercial contract or agreement if the parties have conferred jurisdiction on the court[59].

The court has jurisdiction to adjudicate on references by partner states. Where a partner state considers that another partner state or an organ or institution of the community has

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[57] Article 9

[58] The Hon. Moijo Masaiya ole Keiua, Judge of the Court of Appeal of Kenya (as he then was), Focus on The East African Court of Justice available at http://www.ealawsociety.org

[59] Ibid at pg 2

failed to fulfill an obligation under the treaty or has infringed its provision, it may refer the matter to the court for adjudication.

A partner state may refer for determination by the court the legality of an act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the provisions of the treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. The court can also hear references made to it by the Secretary General. Where he considers that a partner state has failed to fulfill an obligation under the treaty or has infringed a provision thereof he shall submit his findings to the partner state concerned to submit its observation to the secretary general or if the observations are unsatisfactory, he shall refer the matter to the council, which shall decide whether the matter shall be referred to court.

Jurisdictions exist under the treaty for references to be made to the court by legal and natural persons. However this is subject to section 27 of the treaty, which creates the initial jurisdiction of the court. A resident of a partner state may refer for determination by the court, the legality of any act, regulation, directive, decision or action of a partner state or an institution of the community. Such reference may be made on the ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the treaty[60].

Disputes between the community and its employees are another area in which the treaty has conferred jurisdiction to the court to hear and determine. The disputes must arise out of the terms and conditions of employment of the employees of the community or the application and interpretation of the staff rules and regulations and terms and conditions of service of the community[61].

The Treaty provides that except where it confers jurisdiction on the court disputes to which the community is a party shall not on that ground alone, be excluded from the

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[60] Ibid
[61] Supra note 53 at pg 4

jurisdiction of the national courts of the partner states. But decisions of the court on the interpretation of the treaty shall have precedence over decisions of national courts on a similar matter. Where a question is raised before any court or tribunal of a partner state on the interpretation or application of the provisions of the treaty or decision or regulation of the community, that court or tribunal, shall if it considers that on the question is necessary to enable it give judgment, request the court to give a preliminary ruling on the point[62].

The appointment of the judges of the court is by the summit and appointment must be made from among persons recommended by the partner states. Such person must be of proven integrity, impartiality and independence. Upon appointment a judge must subscribe to an oath. The tenure of office is seven years save in the case of those who in the meanwhile attain 70 years, resign or die in office or removed as provided in the treaty.

The persons appointed should fulfill the conditions for holding of such a high office in the respective partner states. Each partner state must nominate no more than two judges to the court. The membership of the court must be a maximum of six judges. The court has a president and a vice president of the court appointed by the summit from the judges already appointed to the court. The president and the vice president shall be persons recommended for appointment by different partner states[63].

The president of the court shall direct its work, represent it and preside over its sessions. The post of president rotates after completion of any one term by a judge recommended for appointment by a particular partner state. The vice president of the EACJ performs the functions of the president at any one time when the person holding office of president is for any reason, unable to perform the functions of that office. A temporary president or judge is be appointed by the summit if the president reports to it that the president or judge has disqualified himself from the case.

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[62] Ibid
[63] Supra note 3 at pg 4

Judge may be removed from office if the question of his removal has been referred to and recommended by a tribunal appointed by the summit. Membership of the tribunal shall consist of three eminent judges from within the commonwealth[64].

A judge of the court is immune from legal process for acts or omissions made in the discharge of judicial functions under the treaty. Such a judge cannot hold any political office or be in the service of a partner state or the community or engage in any trade or vocation likely to interfere or create a conflict of interest to his position. This situation is however different when a judge is serving on ad hoc basis before the court is fully operational. The salary and the terms of which shall be determined by the summit and have to be commensurate with the ad hoc services such a judge provides before the court is fully operational. For the rest of the time when judges are not in the service of the court they have to remain in their respective courts in the partner states[65].

The court is mandated under the treaty to give advisory opinion on the request of the summit, the council or partner state. Upon receipt of such request the registrar of the court is required to notify all the partner states and accord them opportunity to respond[66].

Parties to disputes or references before the court are entitled to legal representation by advocates of their choice authorized to appear before a superior court of any partner state. The counsel to the community is entitled to appear in any matter in which the community or one of its institutions is a party. The counsel may appear before the court where he thinks such appearance is desirable[67].

The Treaty has conferred on the court the power to make its rules of procedure together with rules to govern the court's jurisdiction[68].

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[64] Chapter 8 of the East Africa Treaty
[65] Ibid
[66] Ibid
[67] Ibid
[68] Ibid

Chapter 8 of the Treaty establishing the EAC provides that the court shall have original, appellate, human rights and other jurisdictions as may be determined by the Council at a suitable date. On December 14, 2006, the Summit of the Heads of State of the then three partner states of the EAC considered and adopted amendments to restructure the EACJ into two divisions, that is a First Instance Division and an Appellate Division[69].

The EACJ has handled many several cases since its inception. Examples include; *Athumani Juma and Others Vs Commissioner General Kenya Revenue Authority*[70], *Bank of India Vs Commissioner of Lands*[71] which are matters involving government institutions and citizen from the member states.

Constraints to the East Africa Court of Justice

On 24th April 2001, H.E. Daniel Arap Moi, H.E Yoweri Museveni and H.E Benjamin Mkapa signed the East African Community Development Strategy 2001-2005. The important document that carried promises has a policy action matrix which states the policy, the action to be taken, the time frame and the lead implementing agency. There is only one sentence about the Court: "...put in place a functioning East Africa Court of Justice." Beyond that, nothing in terms of policy on the court, not even a date for extended jurisdiction, yet other sectors have details on the strategy[72].

The seat of the court is to be determined by the summit whose composition is the three presidents of the three partner states. So far no such determination has been made with regard to the seat of the court. The court while awaiting such determination is hosted in Arusha, Tanzania.

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[69] Article 24 of the EAC Treaty
[70] Application No. 60 of 2006, (2007) eKLR
[71] Petition No. 48 of 2007, (2007) eKLR
[72] Ibid at pg 78

Other Challenges Facing the EACJ

Lack of adequate financial resources has stagnated the development of the court. Up to now, no sub-registries have been established in the partner states. Neither has equipment been purchased nor staff employed to manage them. As a result, access to the court is severely limited. An aggrieved party in Arua (Uganda), Mandera (Kenya) or Mbeya in Tanzania has to travel hundreds of miles just to file a case. Many would be litigants will simply give up because of the distance, cost and inconvenience. The prospect of having to cross two international borders to file a case is very unnerving to an ordinary citizen[73].

Secondly, though the court has authority to employ staff at Arusha, it has been unable to do so. There are no librarians, researchers, technicians or personal assistants for at least the President and Vice President. How can we expect efficiency and timely service delivery when the court has no secretariat to support it? You only have to call at the court to understand the trials and tribulations of the Registrar in this almost one man staff court. Thirdly, although the Treaty provides that the President of the court directs the work of the court and regulates the disposition of matters brought before the court, the president is rarely to be found at the court. How then shall the President direct the work of the court when he is not at the court? The President is unavailable because the Budget of the community sets the number of days the Judges will be in Arusha. Outside the set days, there is no money. This is the only court where Judges do not have residences within driving distance of court. They have to stay in hotel rooms strictly for days set in the budget. If they go beyond those days, they have to pay themselves. East Africa cannot afford to rent even one house for the president of the court in Arusha[74].

Fourthly, this court is unique in Africa and is vested with jurisdiction which calls for reference to similar courts. There is need for a well stocked library. This is necessary for the court to reach decisions which a state (however aggrieved) will accept. East Africans are still looking for money to furnish the court with a library. Lastly, the EACJ has a

[73] Available at http://www.ealawsociety.org visited on 20th June 2008

[74] Ibid

courtroom similar to a Magistrate's court in terms of size. In fact some magistrate's court rooms are larger[75].

The answer to these problems lies in structural defects in the Treaty. The East African legislative Assembly lacks one fundamental function found in any legislature - the power to raise revenue. Legislatures, through enactment of the Finance Act, annually raise revenue and direct the Executive when and how it will spend the money allocated through the Appropriation Act[76].

The East African Community relies on contributions from partner states. The Assembly is unable to make provision beyond what is contributed by the states.

Perhaps the situation would be better if the council of Ministers exercised its powers under the Treaty and considered the budget prior to its introduction in the Assembly. At that level the council could make a difference by making meaningful provisions for the Court. As it is, the council of Ministers has abdicated its responsibilities and become a rubber stamp. It merely endorses what the technocrats from the three countries determine. The technocrats are the real decision makers on what will be available to the court. As long as the legislature pretends to debate the budget and the Council of ministers make wrong decisions, the EACJ will continue to be under-funded and therefore unable to meet the expectations of the people of East Africa[77].

Historical Background of the Judicial System in East Africa

It is important to asses the historical background of the judicial system in East Africa to understand it's effectiveness in conflict resolution.

The role of law and the functioning of the legal system, especially the judiciary in the sub-region, during political pluralism, have to be understood within the historical and

[75] Ibid
[76] Supra note 8
[77] Ibid

comparative perspectives. This is more so because not only has the failure of centralized governance and its attendant consequences to social institutions. The transition from centralism to multi-partysm is associated with changing emphasis in the way in which political power is exercised[78].

The existing legal system came about as a result of colonialism. The judiciary which was imposed on by colonial masters survived as an institution throughout the colonial era and into independence, throughout the socialist construction and military rules, and now into the multi party systems of the government. The executive monopoly and domination extended affecting the law making body and the judiciary. It has been noted in literature that the judiciary, being aware of trends in the exercise of executive powers, adopted a subservient posture as its members were appointed depending on their support for the government of the day. This undermined the integrity of the judiciary in general and threatened the ethos of the rule of law enshrined in the constitution[79].

Challenges and demands placed on the judiciary during the one-party and military rule were wide ranging. Law was used to promote a single ideology and to maintain the power of an unchallenged ruling class. The judiciary endorsed most of these aspirations.

It has been suggested that in free market and political pluralism, law and legal institutions should be accorded a central and prominent role. This is in sharp contrast to the centralized state and one party regime where law and legal institutions are marginalized and played down. At times most of the members of the judiciary are willing to go to great lengths in support of the status quo[80].

In the absence of the independence of the judiciary and respect of the rule of law, the basis on which liberal justice rest are already in doubt. Even if justice were to be done, it may not be said to have manifestly been seen to be done. That in itself has enormous

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[78] A. Bukurura,'Liberal Legalism and the Legitimacy of the Judiciary,' Macmillan Publishers (1985), pg 111

[79] Ibid at pg 50
[80] Ibid at pg 57

consequences not only to the institutions of power but also to the wider social fabric in which the institutions concerned operate[81].

The Doctrine of Separation of Powers

The doctrine of separation of powers is one of the fundamental pivots upon which the notion of the rule of Law revolves. Constitutional lawyers regard as fundamental the doctrine of separation of powers whereby the courts, the legislature and the executive are constitutionally separate, thus serving democratic ideals by ensuring that no one of these 'arms of state' becomes powerful through complex checks and balances of each arm by the two. Thus the theory the judges operate independently of party politics and in a manner untainted by political bias[82].

Professor Yash P. Ghai in his inaugural lecture published in the 1972 issue of, 'The International & Comparative Law Quarterly' discussed two conceptions of a constitution. The first is that the there must be separation of powers amongst different organs of government. This is a fundamental constitution principle that forms the water mark of all good constitutions in the world. It encourages their independence and to maximize their mutual checks and balances and avoid tyranny and arbitrary government.

According to modern notions, the government of a state consists of three main branches; the executive, the legislature and the judiciary. Whether the Monarchical or Republican, the executive lays down the national policies as well as carry out the function of the state. The legislature whether bicameral or unicameral makes the laws for the regulation of the affairs of state including both intra-governmental relations and those between the state and the citizens; while the primary role of the judiciary is to interpret the laws made with a view to administration of justice.[83]

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[81] Ibid

[82] Carl F. Stychin, 'Legal Method: Text and Materials', London Sweet & Maxwel (1999) at pg 113

[83] Ibid

Although the germ of the idea of a three-tire government could be traced back to Plato in the 'Republic' and Aristotle in the 'Nichomachian Ethics'[84], it was never the less left to John Locke in his work on 'Civil Government' to express the modern view on the subject. Montesquieu the French author has refined and popularized the doctrine of separation of powers in his L'Espirit des Lois[85] (1748) for the constitutional lawyer and political scientist. It is usually presented as the 'doctrine of separation of powers' and it implies that the three branches of government must be organized in such a way that the chances of abuse of the respective powers of the government of the day are reduced to a minimum by ensuring that they are separated. Montesquieu believes that without such separation of powers, arbitrary government and tyranny would be the result and the liberty of the citizen would be at a risk. A system of checks and balances as the doctrine connotes is the only guarantee against the exercise of arbitrary powers by the state. The author did not advocate for complete separation of powers as he would be the first to admit that such an arrangement would obviously be impossible because the powers themselves impinge upon one another at some point[86].

The doctrine involves three propositions, each of which it is argued is open to question. First the doctrine requires that the same person should not occupy positions in more than one of the three arms of the state-judiciary, legislature and executive. In practice however as is well known members of the cabinet (executive) are invariably members of one or the other house of parliament (legislature), this is one departure from the strict doctrine. This is stipulated in the treaty establishing the EAC which provides that a judge in the EACJ cannot hold any political office or be in the service of a partner state or the community or engage in any trade or vocation likely to interfere or create a conflict of interest to his position.

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[84] Available at www.friesian.com/plato.htm visited on 6/11/08
[85] Available at www.rjgeib.com/thought/montesquieu- bio.html visited on 6/11/08
[86] Ibid

The second requires that each arm of the state exercises its functions independently of any control or interference from the others. In practice this requirement is not fulfilled and the treaty also does not provide for this[87].

Thirdly the doctrine of separation of powers requires that one organ of the state should not exercise the functions of either of the others. In practice the distinction between functions may be seriously blurred. To take an outstanding illustration, an Act of Parliament may empower a minister of the government to make rules having legal effect known as 'delegated legislation' and it is arguable in some cases this devise amounts to a minister having law making power (as opposed to mere power to make regulations in furtherance of parliamentary enactment). This is seen as delegated legislative powers being exercised by a member of the executive[88].

Relationship Between the EACJ and The Executive

The doctrine of separation of powers goes a long way in ensuring good governance if properly applied. The arms of government though independent relate to each other by way of checks and balances. Accordingly, there has to be a methodology by which they relate to each other. In partner states, the Attorney General or Minister of Justice who may sit in cabinet plays the role of "speaking for" the court and also for "Government" when interacting with the Chief Justice. There is an exchange and flow of information between the two arms. Many problems are resolved this way.

In East Africa, the Executive is the Council of Ministers. However there is total separation in the real sense between the Executive and the Court. There is no mechanism through which there is a flow and exchange of information. Secondly the Council by Treaty only meets twice a year. Even when the Council meets, it is for a short period of three or so days. Recognizing this problem, the East African Legislative Assembly passed a resolution calling for establishment of practical working relationship between the Court, the Assembly and the Council of Ministers. Unfortunately it never took off because of

[87] Ibid at pg 115
[88] Ibid

bad working methods at the Secretariat. The Court therefore has a problem relating to the Executive. Its problems are practically unknown to the Executive, which is supposed to address them[89].

Comparison with the European Court of Justice

The European Economic Community was established by the Treaty of Rome in 1957 with the purpose of creating closer relationships between the countries of Europe. The Treaty of Rome together with the single European Act 1986 made provisions inter alia for the harmonization of the legal codes of member states to the extent required for the proper functioning of the common market. What was originally an economic community however moved towards both monetary and political union; the Treaty on European Union (the Maastrich Treaty) of 1992 established the European Union and contains provision for closer ties on matters including foreign policy, national security and defense[90].

The European Court of Justice comprising a judge from each member state has as its main task the responsibility of '...ensuring that the interpretation and application of this treaty the law is observed'[91]. The role and function of the court have been concisely summarized thus;

> '... It is the supreme authority on all matters of community law and in this capacity is required to decide matters of constitutional law, administrative law, social law and economic law in matters brought directly before it or on application from national courts. In its practices and procedures it draws on continental models; in developing the substantive law it draws on principles and traditions from all member states...[92]

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[89] Kwame Frimpong & Gloria Jacques, "The Judiciary & Democratic Governance in Sub-Saharan Africa", in Corruption, Democracy & Good Governance in Africa, Essays on Accountability & Ethical Behavior, pg 13

[90] Stephan Weatherill & Paul Beaumont, 'EU Law; the Essential Guide to the Legal Workings of the European Union', Penguin Books (1999), pg 173

[91] Treaty establishing the European Union

[92] Supra note 87

Each government is able to nominate its own judge and advocate general. This system would seem to follow for political bias in the appointment and reappointment of judges and advocates general. It seems in practice the people who have been appointed have gained their position on merit rather than on the acceptability of their view to their government, although this is hard to verify[93].

Article 177[94] provides that where such a question arises any case before a court or tribunal within any member state, that court or tribunal may refer the question to the European Court for a ruling. This jurisdiction is essentially one of preliminary rulings on matters of interpretation of European law (not the domestic law of member states). The European court hears and decides disputes concerning matters of EC law arising from Article 177 references from domestic courts, and so has an important function regarding matters of interpretation of the articles of the treaty.

In the case of *Garland Vs British Rail Engineering Ltd*[95], the appellant who was a married woman, complained to an industrial tribunal that her employer, British Rail, was discriminating against her because of sex contrary to Section 6(2) of the Sex Discrimination Act 1975 by continuing to provide male employees after they retired with non-contractual concessionary travel facilities for themselves and their wives and dependent children. When female employees retired the provision for such facilities for their families was withdrawn. The industrial tribunal dismissed the complaints on grounds that section 6(4) of the Act exempts "a provision in relation to …retirement" (i.e. such provisions are outside of the purview of the Sex Discrimination Act) and therefore the discrimination was not unlawful. The appellant after several appeals to the Employment Tribunal and Court of Appeal and the House of Lords, which referred to the European Court of Justice the question whether the discrimination was contrary to Article 119 of the EEC (now E.C) Treaty (which reads 'each member state shall….maintain the application of the principle that men and women should receive equal pay for equal

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[93] Stephan Weatherill & Paul Beaumont, 'EU Law; the Essential Guide to the Legal Workings of the European Union', Penguin Books (1999), pg 173
[94] The Treaty on European Union
[95](1982) 2 All E.R. 402, ECJ and HL

work"), and if so whether the Article conferred enforceable community rights on individuals.

The *Garland* case stands for the proposition that the judiciary should interpret, if possible domestic legislation in such a way as to be consistent with obligations entered into by the United Kingdom government under international treaties. It can be argued that this does not directly undermine the principle of parliamentary supremacy. Lord Diplock stated that we must assume that parliament intended to abide by its international obligation and judges must interpret legislation accordingly[96].

Another case that illustrated this principle is the case of *Factortame Ltd and Others Vs Secretary of state for transport.*[97] The European Court of Justice stated that;

> "It must be added that the full effectiveness of the community law would be just as impaired if a rule of national law could prevent a court seized of a dispute governed by judgment to be given on the existence of the rights claimed under community law".

The court also held that the provisions of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of the community law by either holding from the national court having jurisdiction to apply such law the power to do every thing necessary at the moment of its application to set aside national legislative provisions which might prevent even temporarily community rules from having full force and effect are incompatible with those requirements, which are the very essence of community law[98].

In the case of *Factortame Ltd* Lord Bridge stated that if the supremacy within the European Community of community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the court of justice long before the United Kingdom joined the community. Thus

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[96] Supra note 1 at pg 70
[97] No.2 (1991)1 All E.R. 70, ECJ and HL at pg 7
[98] Supra note 1 at pg 71

whatever limitation of its sovereignty parliament accepted when it enacted the European Community Act 1972 was entirely voluntary[99].

However international law is not like domestic law. At their best, national laws enjoy the legitimacy conferred on them by accountable legislatures. National courts operate inside established systems of law enforcement. The international system and order, by contrast, remains highly imperfect[100].

[99] Ibid
[100] Supra note 28

CHAPTER 3

ROLE OF REGIONAL COURTS AS TOOLS OF REGIONAL INTEGRATION

Globalization and regional integration are arguably the most significant aspects of contemporary international relations. The argument running through the former is that sound national economic policies can no longer be articulated independently of international economics and financial processes since national economic policies are increasingly becoming subsumed into a system of global processes and transactions.[101]

Chinsinga in her paper, 'The challenges of globalization and Regional Integration: The Case of Southern African Development Community'[102], stated that one of the reasons for virtual failure of the 'old wave of regionalism' was limited institutional capabilities of the state apparatus of the member states which betrayed their genuine commitment to create viable regional trading blocs. The supportive context for the potential success of regional integration initiative did not exist and this includes the court system.

Law is an instrument for preserving and promoting common interest in a regional organization. An instrument with which states can achieve together what none can achieve separately. By doing so they achieve a degree of integration which would neither be possible nor desired at the global level[103].

Institutional frame work governing this regional integration initiative must be in tune with the intricate policy demands of globalization and the institution's capacity must be able to foster compliance from the partner states. Adjustments often undesirable from the point of view of the partners, in regional and domestic environments are inevitable.

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[101] Blessings Chinsinga; 'The Challenges of Globalization and Regional Integration: The case of Southern African Development Community' in "Democracy, Human Rights & Regional Co-operation in South Africa", International Development Research Centre (2000), pg 115

[102] Ibid at page 117

[103] J. G. Merrills B.C.L, M.A, "Anatomy of International Law", A Study of the Role of International Law in the Contemporary World, 2Ed, London, Sweet & Maxwell, 1981

This is in recognition of the fact that it is necessary and desirable to surrender a certain degree of sovereignty for the betterment of the East African people. Inherent in this surrender is the potential for disputes and conflicts. This is where the East African Court of Justice (herein after referred to as the EACJ) , as a regional court, comes in to play in the integration process, whenever dispute arises out of this co-operation and within the limits as prescribed by the treaty. As mentioned earlier, the EACJ, like other regional courts, therefore has a crucial role to play in conflict resolution and confidence building in the region. The peaceful settlement of disputes is deemed a common denominator of all international judicial systems. Within the context of the EAC, as with other like bodies, this function is further considered of major importance as it stands as the only means of maintaining regional peace and security[104].

By playing its role effectively, the court is expected to enhance the observance and upholding of human rights through good governance and democratic institutions in the region. Issues perceived as sensitive at the national level might be better dealt with at the regional level, where they might be less sensitive.

The judicial branch has the responsibility to determine the legislative intent of the law and to provide public forums for resolving disputes. This is accomplished by determining the facts and their legal significance in each case. In determining what the law says and providing a public forum involve the court in policy making. Policy can be defined as choosing among alternative choices of action, particularly in the allocation of limited resources "where the chosen action affects the behavior and well being of others who are subject to the policymaker's authority".[105]

Similarly, for the East Africa Community (EAC), as well as Economic Community of West African States (ECOWAS), and Common Market for Eastern and Southern African (COMESA), interpreting and applying the treaties establishing these organizations, and ensuring adherence to law, are the main objectives of their respective regional courts.

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[104] Ibid

[105] Kenneth J. Peak; 'Justice Administration; Police, Courts, and Corrections Management', Macmillan Publishers (2000), 5th Ed at pg 185

For the regional courts to carry out their role effectively it should be independent of the other organs of the community which is also sometimes described as central to the rule of law, as is the accessibility of the courts to the general public[106].

The European Court of Justice for example has extended to developing principles of a constitutional nature as part of community law to which it then claims to hold both the institutions and member states bound, when they act between the community spheres[107].

International Organization as Law-maker

Apart from the formidable powers conferred on European Community institutions, some regional organizations have, at least on the face of their charters, a greater degree of standard-setting powers than those universalistic. The institutions established for the African Union (AU), the African Economic Community (AEC), and the Economic Community of West African States (ECOWAS) resemble, structurally, the internal organs of European Community institutions, share the range of objectives associated with European Community institutions, and, on paper at least, are given considerable legal authority vis-a-vis their members. Thus, the Treaty establishing the AEC envisions not only the traditional tripartite division among International Organization (IO) bodies (Assembly-Council-Secretariat) but also a Pan-African Parliament, an Economic and Social Commission, a Court of justice, and a set of specialized technical committees that resemble the executive departments of national governments. That treaty gives its Assembly the power to take, by consensus or two-thirds majority vote, "decisions" that are to be "automatically enforceable" thirty days after promulgation, as well as issue "directives" authorizes its Council to act by binding regulations, and to request advisory opinions; and empowers its Secretary-General to, among other things, "...ensure the implementation of the decisions of the Assembly".

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[106] John Ruhongiso, 'The Making of a Region; The Revival of the East African Community'; Institute for Global Dialogue; Midrad, South Africa, 2005 at pg 49.

[107] Ibid

The treaty provisions establishing these African institutions anticipate international organizations charged with discharging the kinds of plenary executive, legislative, and even judicial powers once associated exclusively with national governments[108].

Older regional organizations, such as the Organization of American States (OAS) and the Organization for Economic Cooperation and Development (OECD) do not evince, on the face of their respective charters, the same grand ambitions as these African institutions, designed to create a "common market" among their members. Nonetheless, the OAS Charter permits its institutional organs to make recommendations, present drafts of international instruments, and engage in various forms of dispute settlement comparable to what is authorized under Chapter VI of the UN Charter. The Council of the OECD, which comprises all of its 29 members, has the power to take both binding decisions and recommendations, but decisions must be based on a unanimous vote. And even the North American Free Trade Agreement (NAFTA), an arrangement that generally avoids establishing the permanent institutions and secretariats characteristic of formal international organizations, permits the three NAFTA parties, when acting together, to issue authoritative interpretations of their treaty that will be binding on certain NAFTA dispute settlers[109].

Jose Alvarez in his book[110] argues that if one defines real legislation or law-making as requiring the power;

(1) To take binding action backed by at least the possibility of real coercive enforcement;

(2) Affecting all relevant actors (including all states as well as any non-state actors that need to be reached for purposes of effective enforcement); and

(3) Capable of repeated application across time in comparable instances, it would seem that IO legislation does not exist. This has certainly been the view of many who have imported the Austinian view of law to the international realm[111]. Since IOs are never given explicit power to adopt resolutions and decisions regarding the behavior of all

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[108] Jose Alvarez; International Institutions as Treaty Makers, 2006 at pg 116

[109] Ibid at pg 117

[110] International Institutions as Law Makers,2005 at pg 116

[111] Lori Fialer Damrnsch et al., International Law at 16-19 (St. Paul, MN: West, 2001)

states (and not just members) and since they are rarely accorded options to coercively enforce any of the rules that they adopt, it follows that international institutional law, and naturally global governance, does not exist. However, most public international lawyers have resisted this conclusion since under such a standard, public international law itself would not exist. International institutional law is more commonly seen as some species of "law" consisting of the rules produced by IO organs pursuant to authority specifically granted in their respective institutional charters. It also includes other forms of "secondary" legislation not based on specific treaty powers conferred but that are "reasonably necessary" to permit the organization and its officials to act effectively.

For similar reasons, Bernhardt[112] concludes that international legislation does not exist. International Community and the term 'legislation' is much more appropriate in reaction to some exceptional situations in which international organizations have been given powers to enact in particular technical regulations, by less than unanimous consent with an immediate binding effect of all their members. However, even in these cases legislation is only a fanciful description or it remains creating processes which ultimately are still based on the consent of sovereign states.

The positivistic doctrine of sources continues to define the field of public international law. This is so, even though Article 38 of the Statute of the ICJ, in which these sources are enshrined and defined, was, by its own terms, intended only to instruct international judges as to what sources to consult for purposes of settling disputes before them and not as defining for all time the entire scope of legitimate sources of international legal obligation. The debate common among scholars writing in the immediate wake of the establishment of IOs in the mid-20' century, about whether the "internal" law promulgated by IOs was public international law at all. Some of those willing to concede that the growing number of such internal rules, which no one denied governed the actions of states inter se as well as the behavior of their institutionalized agents, were some species of public law, did so only on the condition that these rules of procedure and

[112] Rudolf Bernhardt, "International Organizations, Internal Law and Rules," At 1314 Amsterdam and New York, North-Hafland, (1992-2003).

process were categorized as belonging to a legal order *sui generis* and not part of public international law properly understood. After all, they reasoned, such institutional rules were not mentioned in Article 38 sources[113].

Treaty Law

Under Article 2 of the Treaty of the EAC, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community). The EAC Law is established as a treaty.

A treaty is an agreement concluded among a number of countries acting in their joint interest, intended to create a new rule and adhered to by member states either through formal action in accordance with the provisions of the treaty or by tacit acquiescence in and observance of the new rule. In view of the sovereign nature of the modern state, such treaty is obligatory on such states that signed and acceded to it.

Independent states may enter into forms of co-operation by consent and on an equal basis. By treaty other structures for maintaining co-operation may be created. Treaty law as a decentralized legal order is a system in which power and authority are diffused among states. It exhibits sharp differences from the centralized arrangements of familiar domestic system.

Treaties derive their binding force from states' initial agreement to be bound. The 1969 Vienna convention on the law of treaties deals in some details with the various ways in which a state can show its consent to be bound by a treaty. Article 12(1) provides that;

'The consent of a state to be bound by a treaty is expressed by the signature of its representative when;

a) The treaty provides that the signature shall have effect.

[113] Jose E. Alvarez, 'International Organizations as Law Makers', OUP(2005) at pg 118

b) It is otherwise established that the negotiating states were agreed that signature should have that effect; or

c) The intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation'.

Sovereignty of States in a Regional Organization

'The state' is a territory-based political organization. It has legal supremacy and its uninterrupted jurisdiction over a certain area of the earth's surface. The international legal definition of the sovereign state is a defined bordered territory, with a permanent population under a supreme government that is independent of all other governments[114].

The relationship between municipal and treaty law presents the theoretical issue as a clash between dualism (or pluralism) and monism. Both these schools of thought assume that there is a common field in which the international and municipal legal orders can operate simultaneously in regard to the same subject matter, and the problem then is, which is to be master?

A state cannot plead provisions of its own laws or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. An example is the *Free Zones* case[115] the permanent court observed '... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations...' The advisory opinion in the *Greco-Communities* case[116] contains the statement ; '...it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty...' The same principle applies where the provisions of a constitution are relied upon; in the words of the Permanent Court[117]:

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[114] Ronald Tinnevelt and Gert Verschraegen, 'Between Cosmopolitan Ideals and State Sovereignty, Studies in Global Justice', Palgrave Macmillan, [2006] at pg 136

[115] [1932], PCIJ, Ser. A/B, No. 46, p. 167

[116] Ibid

[117] *Polish National in Danzig* [1931], PCIJ, Ser. A/B, No.44, pg 24.

> 'It should ... be observed that... a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under ... treaties in force'.

Arising from the nature of Treaty obligation there is a general duty to bring internal law into conformity with obligations under international law. A breach occurs when a state concerned fails to observe its obligations on a specific occasion.[118]

However the treaty law lacks effective institutional machinery for enforcing its laws. It lacks the means to ensure compliance with the law on the occasion when the law is challenged. But the practical limits on even their power mean that the law can sometimes be defied with impunity[119].

The Supremacy of EC Law

The Treaty signed in Rome on 25 March 1957 establishing the European Economic Community did not explicitly establish the supremacy of Community law over the laws of member states. None of the subsequent amendments to the Treaty have altered this position. The European Court of Justice has, however, firmly established the primacy of Community law in its case law. The landmark decision was *Costa v ENEL*[120] in which the Court gave priority to Community law over provisions of Italian law. The court's comments on the nature of the Community are worthy of full citation:

> 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or transfer of powers from the States to the community, the Member States have limited their sovereign rights, albeit within limited fields,

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[118] Ian Brownlie, 'Principles of Public International Law', 6th Ed, Oxford at pg 35
[119] J.G. Merrills B.C.L, M.A, 'Anatomy of International law; A study of the Role of International Law in the Contemporary World' 2nd Ed, London, Sweet & Maxwell [1981] at pg 4
[120] Case 6/64 [1964] ECR 585. The reasoning of the Court is discussed in Ch. 6, at pg 193

and have thus created a body of law which binds both their nationals and themselves'.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity[121].

As an interpreter of the treaty it has had to adjudicate questions concerning the proper sphere of the community as against that of the member states. The court has also been seen as playing a 'political' role through law, by rendering the treaty effective even when its provisions had not been implemented as required by the community and in rendering secondary legislation effective even when it has not been properly implemented by member states. It adopted an active part in the creation of the internal market through the litigation which came before it, by the negative means of requiring the removal of national barriers to trade, at a time when progress towards completing the single market through positive legislation harmonization was hindered by institutional inaction.[122]

Lord Diplock in the case of *Garland Vs British Rail Engineering Ltd*[123], pointed out that the European Courts should interpret treaty establishing the European Union to give effect to what it conceives to be the spirit rather than the letter of the treaty. He viewed the communities as living and expanding organisms and the interpretation of the provisions of the treaties as changing to match their growth

The EU Court is conscious that the Community is unique. It goes beyond traditional international agreements establishing relations between contracting states and instead creates lawmaking institutions that can create rights and obligations for the nationals of the member states. By 14th December 1991 the Court referred to the EC Treaty as the 'constitutional charter of a Community based on the rule of law'. The Court also modified

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[121] Ibid at pg 593
[122] Supra 72 at pg 207
[123](1982) 2 All E.R. 402, ECJ and HL

its statement in the *Costa* case about the 'limited fields' within which states limit their sovereign rights to a statement that such rights are limited in 'ever wider fields'. The Court here was conscious of the extension of Community competence agreed in the Single European Act and of the further extension agreed, subject to ratification at the Maastricht summit on 9th December 1991, although the latter is not specifically mentioned in the Opinion. At that point in the evolution of the Community the Court maintained that two of the essential provisions of the Community constitution that had been firmly established were the primacy of Community law over the law of the member states and the direct effect of a whole series of Community law provisions[124].

The Jurisprudence of the European Court on Supremacy

Having established the principle that Community law has supremacy over ordinary national laws in *Costa v ENEL*[125] the EU Court was confronted, in the *Internationale Handelsgesellschaft* case,[126] with the question of whether community law takes primacy over the constitutions of member states and in particular over the fundamental rights provision contained therein. The Court emphasized the need to preserve the 'uniformity and efficacy of Community law' in all the member states. This would be sacrificed if member states could use their constitutions as a means to circumvent Community law obligations. The Court concluded that '...the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure'.

So Community legislation has primacy over national constitutional law. Shortly afterwards the Court made the simple point that 'no provision whatsoever of national law may be invoked to override' Community law[127]. It was still an open question whether a

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[124] Stephen Weatherill & Paul Beaumont, 'EU Law; The Essential Guide to the Legal Workings of the European Union', Pinguin Books, [1999] at pg 173

[125] Case 6/64 [1964] ECR 585

[126] Case 11/70 *Internationale Handelsgesellschaft V Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125

[127] Case 48/71 *Commission v Italy* [1972] ECR 527, 532

member state could reserve to a particular national court, e.g. a constitutional court, the power to display national law in favor of Community law. This issue was dealt with by the European Court in the *Simmenthal* case[128]where the court stated that;

> "...Even a lowly court of first instance, like the *Pretore di Susa* in this case, is obliged to apply provisions of Community law, if necessary refusing of its own motion to apply conflicting provisions of national law. The national court must not wait for such provisions of national law to be set aside by legislation or by a constitutional court. Here the European Court is not requiring the national court to annul the provisions of national law that conflict with Community law but simply stating that it must not apply them'.

This principle was reiterated in *Albako* v *Balm*[129], in which the Court held that where a national agency is implementing a Community decision, national courts should not apply any provisions of national law that hinder the implementation of such a decision in order to uphold the principle of the primacy of Community law.

In the *Factortame*[130] case the European Court decided that national courts must be capable of protecting putative Community law rights over clear provisions of national law pending the European Court's ruling on the precise nature of the Community law rights.

However, national courts are not obliged to raise of their own motion the question of whether directly effective provisions of Community law have been breached in a civil suit unless those courts must or may raise of their own motion points of law based on binding domestic rules which have not been raised by the parties. On the other hand, if the national procedural rules are constructed in a way that makes it virtually impossible in

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[128] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

[129] Case 249/85 [1987] ECR 2345, 2360

[130] No.2 (1991)1 All E.R. 70, ECJ and HL

practice in a particular case for the litigants to raise a question of the compatibility of national law with Community law before a national court which is competent to refer the case to the European Court for a preliminary ruling, then the first national court which is competent to make such a reference should be able to raise the question of Community law of its own motion[131].

In a further clarification of the limits of the *Simmenthal*[132] case the Court has recently reiterated that it does not mean that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering the national rule non-existent. The national court is obliged not to apply the national law rule and in principle, is required to repay charges levied in breach of Community law. However, in the absence of Community rules governing the matter, member states are free to lay down special detailed rules governing legal proceedings to challenge the imposition of charges and other levies, which could impose a limitation period on these claims, as long as these provisions are not less favorable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law[133].

So the principles of equivalence and effectiveness are the bedrock upon which the Community ensures that unharmonized national procedural laws and rules do not undermine the ability of individuals to enforce Community law rights even against conflicting national laws. However, the European Court accepts that national procedural laws can place real limits on the ability of individuals to enforce Community law rights. The alternative is to undermine legal certainty by having no limit on when Community law remedies can be sought. Whilst harmonization of national procedural laws might seem attractive to increase the effectiveness of Community law it may have unwanted

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[131] Supra note 48 at pg 435

[132] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

[133] Ibid

side effects in relation to the removal of the distinctiveness and integrity of the legal systems within the European Union[134].

The supremacy of Community law is tempered by the fact that EC legislation must comply with international law or, if the international law does not meet the requirements of Community law it should be construed, as far as possible to be consistent with international law. It must be remembered that supremacy of Community law has its full impact in relation to directly effective Community law.

The theoretical possibility still exists of a rebellion by the Constitutional Courts in Germany and Italy if they become dissatisfied with the general protection of fundamental rights in the Community legal order. That is an extremely unlikely eventuality, because of the development of the protection of human rights in the Community by the European Court and the political difficulties that such a decision would entail. In 1993 the threat of German rebellion was reawakened by the judgment of the German Constitutional Court in Bumper which reserved the right not to apply Community law whenever the Constitutional Court considers that the Community institutions have exceeded their competence. This is a very serious threat to the supremacy of Community law and may, for some time, have the effect of inhibiting the jurisprudence of the Court of justice. Likewise, there is a theoretical possibility that the United Kingdom Parliament may repeal section 2(4) of the European Communities Act and thus undermine the supremacy of Community law. This will not happen for the foreseeable future, as all the major political parties in the United obligation to refer questions to the European Court incumbent on courts against whose decisions there is no appeal was a violation of the principle enshrined in Article 3(2) of the Austrian Federal Constitution that nobody may be deprived of access to his proper judge[135].

The European Court is not indulging in empty rhetoric when it talks of the primacy of Community Law over the law of member states being one of the essential characteristic

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[134] Supra note 48 at pg 437
[135] Supra note 121 at pg 45

of the Community legal order. It is remarkable that the constitutional provisions, legislatures and judiciary in each of the member states by their acceptance of the principle have made it a reality. This has not been brought about by coercion or threat of financial sanctions, but rather by the political and legal will to found a Community established on the principle of respect for the rule of law[136].

The Court has helped to make supremacy of Community law a reality in the member states by developing protection of fundamental rights and development of the Community's competence. A situation where the application of Community law varies significantly from member state to member state would be a denial of the rule of law and would make the Community untenable. However, the European Court's attempt to accommodate differences in national procedural law means that some variations will occur[137].

[136] Ibid
[137] Ibid

CHAPTER 4

IMPLEMENTATION OF THE EAC TREATY

In this chapter, I focus on the case of **Peter Anyang' Nyong'o and 10 others Vs The Attorney General of the Republic of Kenya**[138] (herein after referred as the **Nyong'o** case) which illustrates the independence or lack thereof of the EACJ when handling a matter that involves the member states and various organs.

The East African Community's Court of Justice is beginning to experience challenges as Kenya, one of the community's member states expressed great discomfort with a supranational court exercising authority on a matter that it argued was within its exclusive competence. The controversy arose following a decision issued by the EACJ in the **Nyong'o**[139] case temporarily stopping the swearing in of Kenyan members to the East African parliament, one of the bodies of the East African community. The decision stirred up criticism of the court's decision for undermining Kenya's sovereignty[140].

The EAC treaty defines the role of the court as ensuring "adherence to the law in the interpretation and application of and compliance" with the treaty. The role of the judiciary is to adjudicate on disputes which arise out of the laws established. The treaty establishing the East African community vests jurisdiction initially only on the interpretation and application of the treaty and specifically provides that in a subsequent period its jurisdiction could be extended to confer on it original, appellate, human rights or other types of jurisdiction[141].

The case involved the following claimants; Prof. Peter Anyang' Nyong'o, Abraham Kibet Chepkonga, Fidelis Mueke Nguli, Hon. Joseph Kamotho, Mumbi Ngaru, George Nyamweya, Hon. John Munyes, Dr. Paul Saoke, Hon. Gilbert Ochieng Mbeo, Yvonne

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[138] No. 1 of 2006 available at http://www.ealawsociety.org
[139] Ibid
[140] East African Law Society, "No Integration Without the Rule of Law", Monday December 4, 2006 (Press Release) available at http://www.ealawsociety.org
[141] Article 27.2 Treaty for the Establishment of the East African Community

Khamati, Hon. Rose Waruhiu. The respondents included the Attorney General of Kenya, Clerk of the East Africa Legislative Assembly and the Secretary General of the East African Community.[142]

The claimants sought to invoke the EACJ's jurisdiction under Article 27 of the Treaty by contending that the process of electing Kenya's nine members of the East African Legislative Assembly (herein after referred as the Assembly), and the rules made by the Kenya National Assembly infringe the provisions of Article 50 of the Treaty.

Background of the case

Under Article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community) and under Article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty-seven elected members and five ex-officio members.

Article 50 of the Treaty provides that the National Assembly of each Partner State shall **elect** nine members of the Assembly in accordance with such procedure as it may determine.

The Committee of the Kenya National Assembly that was formed to elect members to the EAC assembly, amended the previously approved list of KANU nominees, and approved; Tsungu Safina Kwekwe,Kimura Catherine Ngima, Karan Clarkson Otieno, Lotodo Augustine Chemonges, Akhaabi Gervase, Bonaya Sarah Talaso, Nakuleu Christopher,

[142] http://www.ealawsociety.org visited on 25/7/08

Abdi Abdirahin Haither, and Reuben Onserio Oyondi as "duly nominated to serve" in the Assembly and "further resolved that the list be tabled before the House" in accordance with the Election Rules[143].

The list was accordingly tabled in the National Assembly in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business. Thereafter the names were remitted to the 3rd Respondent as members of the Assembly elected by the National Assembly of Kenya.

On 9th November 2006, nearly three weeks before the 2nd Assembly was due to commence, the claimants filed the reference with an *ex parte* interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference. By order of the Court the interlocutory application was heard *inter partes* and the Court granted the interim injunction restraining the 3rd and 4th, respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

Pleadings and Issues

The claimants contended that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravened Article 50 of the East African Community Treaty, in so far as no election was held nor debate allowed in Parliament on the matter. The claimants also contended that any such rules that may have been invoked by the Kenya National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representatives is null and void for being contrary to the letter and spirit of the Treaty.

The response of the respondents was premised on the following propositions;

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[143] Ibid

That in 2001, the Kenya National Assembly, pursuant to Article 50 of the Treaty, determined its own procedure for election of the nine members of the Assembly in form of the election rules, which embody the democratic principle of proportional representation.

In October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through the process of electing the nine members to the 2nd Assembly, and that neither the election rules nor the process of electing the nine members constitute an infringement of the Treaty or are otherwise unlawful.

The claimant urged the court to apply what they referred to as the principle of equivalence, which ensures that in the interpretation and application of rights and obligations created under a treaty there is equivalence in the states that are bound by the treaty. In other words, treaty provisions must be uniformly interpreted and applied in the states that are parties to the treaty.

The respondents urged the Court to exercise its jurisdiction with care bearing in mind the historical perspective of the Treaty with particular reference to the recitals in its preamble in which the Partner States recall the causes of the collapse of the former East African Community in 1977 and in which they resolve to act in concert to strengthen their co-operation adhering to fundamental and operational principles set out in the Treaty. The submission by the learned counsel for the 3 interveners stressed the fundamental principle in international law of sovereign equality of states, under which any matter over which a state does not expressly relinquish sovereignty, remains within its sovereignty.

The respondents also maintained that the claimants failed to show that they have a right conferred by the Treaty, which was contravened. That Article 30 does not confer any right on any of the claimants. It is only a procedural provision for enforcing rights conferred under other provisions of the Treaty. Since under Articles 34 and 52 the Treaty vests interpretation jurisdiction in the national courts also, the substance of the reference

should be dealt with by the High Court of Kenya under Article 52. If the EACJ ruled on the legality of the contentious election it would be usurping the power of the High Court of Kenya.

Out of the pleadings, the Court had to determine whether the election was undertaken within the meaning of Article 50 of the Treaty and whether the Kenya Election Rules i.e. The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, complied with Article 50 of the Treaty.

The Treaty describes the role and jurisdiction of the Court in two distinct provisions. In Article 23 the Treaty provides, 'The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.' It then provides thus in Article 27(l); 'The Court shall initially have jurisdiction over the interpretation and application of this Treaty'.

The court held that the EAC Treaty being an international treaty among three sovereign states is subject to the international law on interpretations of treaties, the main one being "The Vienna Convention on the Law of Treaties." The three partner states acceded to the convention on different dates; (Uganda on 24th June 1988, Kenya on 9th November 1988 and Tanzania on 7th April 1993). The Articles of the convention that are of particular relevance to this reference are Article 26 that embodies the principle of *pacta sunt servanda.* Article 27 prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties. Article 31 reads:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty for the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The EACJ discussed the case of **Auto Garage vs. Motokov**[144], a decision of the Court of Appeal for East Africa, Spry V.P, who described a common law cause of action thus: -

> "If a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.[145]"

That description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it.

The court held that the action was brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to the Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to the Court for

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[144] No.3 (1971) EA 514
[145] Ibid at pg 6

adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State may also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

Article 30 provides that;

> "Subject to the provisions of Article 27 of this Treaty, any person resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

In Article 30, however, the Treaty confers on any person resident in a Partner State the right to refer the specified matters to the Court for adjudication and hence it creates a cause of action.

The claim that the substitution of the 3 interveners was unlawful raises the question whether the 3 interveners were elected members of the Assembly and the question is squarely within the parameters of Article 52(1), which provides: -

> "Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question."

Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation,

however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there any other provision directly conferring on the national courts jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. The court did not therefore agree with the notion that before bringing a reference under Article 30, a litigant has to "exhaust the local remedy".

On the issue of the legality of the process under of Article 50 of the Treaty, which provides that member states "shall elect" the EACJ held that it can only mean "shall choose by vote". That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced not only in all three Partner States, but also in international democratic practice worldwide. Under the Constitution and electoral laws of Kenya that govern the elections of the President, and of the Speaker, Deputy Speaker and Members of Parliament, election means election through voting. The provision in the Treaty that, the National Assembly "shall elect" therefore, does not import a concept that is unknown to or that differs from that envisaged and practiced by the Republic of Kenya.

Significantly, when introducing the nine names to the House, the Vice-President, who is also Leader of Government Business, said, as his predecessor had said on the equivalent occasion in 2001, that the nine persons were "appointed". Both leaders knowing the difference between "elected" and "appointed", used the latter word because what had transpired in the House Business Committee was not an election but an appointment of the nine persons.

Furthermore, though under Article 6 of the Treaty the Partner States are committed to adhere to "democratic principles", no specific notion of democracy is written into the Article or the Treaty. Besides, while Article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, it gives no directions on how the election is to be done, except for the stipulations that the nine must not be elected from members of the National Assembly and that as far as feasible, they should represent

specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in Article 50 is that "the National Assembly of each Partner State shall elect nine members of the Assembly ... in accordance with such procedure as it may determine."

The Assembly of the EAC is differently constituted. Its composition is prescribed in Article 48. It is the only organ composed of two categories of membership, namely, 27 elected and 5 ex officio members. In Article 50, the Treaty prescribes how the first category of membership is to be constituted, and qualifications of members.
Article 50 states that:-

> "The National Assembly of each Partner State shall **elect,** not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine".

It is also significant that unlike in respect of the other organs, the Treaty does not leave it to each Partner State to appoint or nominate for appointment or otherwise determine the members of the Assembly. Each Partner State is unconditionally assigned the function of electing nine members of the Assembly. In other words Article 50 constitutes the National Assembly of each Partner State into "an electoral college" for electing the Partner State's nine representatives to the Assembly.

The EACJ stated that;

> "In our considered view, the decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people's representatives. The National Assembly, being an institution of people's representatives, is next to the people themselves, the

second best forum for electing such representatives. We are therefore not persuaded by the submission of counsel for the interveners that the discretion of determining the procedure of electing the representatives includes an option for the National Assembly to assign the function to any other body".

In answering what is meant by the word "election" in the context of the treaty as a whole the EACJ quoted from a book by Prof. George Swarzenberger[146], commenting on Article 31 of the Vienna Convention on the Law of Treaties,

> "In accordance with the general rule on interpretation in the Vienna Convention, the object of treaty interpretation is to give their 'ordinary' meaning to the terms of the treaty in their context and in the light of its object and purpose. Unfortunately, almost any word has more than one meaning. The word 'meaning' itself has at least sixteen different meanings. Thus if parties are in dispute on any term of a treaty, each one of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty."

What is in contention is whether the parties to the Treaty intended the choice or selection to be done through a process of voting or through any other process to be determined by each of the three National Assemblies.

Two trite rules of international law, which emanate from the principle of *pacta sunt servanda,* are of particular relevance here. One is that treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law[147].

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[146] Stevens & Sons, "International Law and Order", under 'Treaty Interpretation', London at pg 7-11

[147] Prof. Max Sorensen, 'Manual of Public International Law', Uganda Publishing House Ltd (1968) para 4.30 and 4.31

The objectives set out in Article 5 is developing and strengthening co-operation in specified fields for the mutual benefit of the Partner States; and further establishing among themselves into several stages of integration up to a Political Federation, in order to attain *inter alia* raised standard of living and improved quality of life for their populations. Article 6 outlines five sets of fundamental principles that the parties chose to govern their achievement of the Community objectives.

This entails the principles of mutual trust, political will and sovereign equality; good governance including adherence to the principles of democracy. It would therefore be unlikely that in adopting Article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. The National Assembly of Kenya therefore did not undertake or carry out an election within the meaning of Article 50 of the Treaty.

In formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under Article 50. This was particularly borne out by the evidence from the Hansard reports of the debate in the National Assembly in 2001. The evidence clearly indicated that the rules were adopted notwithstanding that their inconsistency with Article 50 was articulated by a number of contributors to the debate.

The court referred to Article 27 of the Vienna Convention on the Law of Treaties, which reads, "A party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty."

The court referred to the *Factortame*[148] cases, in this case Spanish fishermen who owned Wettish registered fishing boats challenged in the British courts new English legislation for being, discriminatory in breach of European Community law. They applied for an interim injunction to postpone the operation of the new legislation pending a preliminary ruling on a reference made to the European Court of Justice (ECJ) to determine if the law

[148] No.21 [1991] A.C. 603

was contrary to Community law. The House of Lords dismissed the application on the ground that under the English law the courts cannot issue an injunction against the Crown. That decision was also referred to the ECJ which held that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting an interim relief.

The EACJ held that the National Assembly was bound to make rules that conform to the primary purpose of the Article that conferred the power, which primary purpose is to provide for the election of nine members of the Assembly by the National Assembly of each Partner State. That purpose is defeated by the provision of rule 7 of the election rules, which provides for a fictitious election in lieu of a real election.

The court found that the election rules of the Kenya National Assembly infringe Article 50 to the extent of their inconsistency with it and declared that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty.

Following the EACJ's **Nyong'o** decision in November 2006 an extraordinary meeting of the Attorneys general of the constituent states of the East African community was quickly convened in early December 2006 at which amendments to the Treaty establishing the East African Community were agreed on and submitted to the Assembly of the East African for approval[149].

The amendment had the apparent effect of weakening the independence and authority of the Court. For example they provide that a Judge who has been removed from judicial office in his or her home state for misconduct or resigned from such office following allegations of misconduct would automatically lose his or her seat at the East African Court of Justice, thereby amending Article 26 of the Treaty establishing the East African Community. In addition the amendment provides for the removal of a judge for inability to perform the functions of their office pursuant to a recommendation of an independent

[149] James Thuo Gathii, 'The Promise of the African Economic Community', Paper Prepared for the University of Minnesota Conference on Developing Countries in the WTO Legal System, pg 9

tribunal established for that purpose. The amendment also creates an Appellate division of the Court and confer appellate jurisdiction to the Court[150].
It is ironical that at the time when the amendments were proposed two Kenyan judges sitting on the EACJ that issued the orders against the Kenyan government that were suspended from their judicial positions on the Kenyan bench in 2003 following allegations of corruption against them.

While Justice Moijo Ole Keiwua challenged the suspension in a tribunal appointed to inquire into the veracity of the corruption allegations that led to their suspension, the other Kenyan justice sitting in the EACJ, Justice Kassanga Mulwa opted to resign from the Kenyan bench. Since both Justice Mulwa and Ole Keiwua heard and decided the Nyong'o case the amendments have the appearance of having been tailored to remove these Justices from the court.

What adds to its appearance is not only the fact that the Kenyan government lost in the Nyong'os case but also that the amendments were proposed soon thereafter in an extraordinary meeting of the community's Attorney general by the Kenyan Attorney General who then sought to have them approved at a hurriedly unscheduled meeting of the East African Assembly alongside an unrelated summit involving the East African heads of states.[151]

In the case of the *Attorney General of the Republic of Kenya* and *Prof. Anyang' Nyong'o & 10 Others,*[152]Justice Moijo Ole Keiwua challenged his suspension in a tribunal appointed to inquire into the veracity of the corruption allegations that led to his removal.

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[150] Thereby amending Article 23 and 35A respectively to the Treaty Establishing of the East African Community
[151] Supra note 1 at pg 13
[152] Application No. 5 of 2007; In the matter of Kenya Representatives to the East Africa Legislative Assembly

The tribunal was to investigate allegations that Justice Moijo Ole Keiwua was involved in corruption, unethical practice, and absence of integrity in the performance of his office; that Justice Moijo Ole Keiwua and Kasanga Mulwa failed to disclose to the parties a material fact, namely, the fact that they were related to the Republic of Kenya in a manner which rendered it impossible for them to give a fair hearing as on 15th October 2003 Justice Kasanga Mulwa was suspended from the performance of his functions of a Judge of the High Court and a tribunal to investigate his conduct was appointed. That the conduct of Justice Moijo Ole Keiwua and Justice Kasanga Mulwa, by failing to disclose those facts to the parties, has undermined and eroded the confidence of the people of East Africa in the Court and Justice even if done, will not be seen to be done by the people of East Africa.

The claimant pleaded that the Party States were aggrieved by the immense consequences of the ruling, Justice Moijo Ole Keiwua and Justice Kasanga Mulwa were automatically disqualified from hearing the reference and applications and failure to disqualify themselves rendered the ruling null and void. That the proceedings that resulted in the ruling of the Court in issue violated both the rules of natural justice and provisions of the Treaty.

The pleadings stated that by virtue of the rule in *Pinochet's*[153] case the two judges were "automatically disqualified" from hearing the reference, and that failure to disclose their interests and to remove themselves from the proceedings, violated the rules of natural justice and provisions of the Treaty, thus rendering the resultant ruling null and void.

This was in consequence of the EACJ drawing its attention to two documents. The first document was a copy of the Kenya Gazette[154] dated 22nd March 2004, in which H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya amended Gazette Notices Nos.8829 of 2003 and 378 of 2004 by deleting the

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[153] No.2 (1999) 1 All ER 577

[154] No.2128 and 2129

name of Justice Kasanga Mulwa from the list of Puisne Judges whose conduct was to be investigated by a Tribunal. The second is a letter from Office of the President dated 26th March 2004 and addressed to Justice Kasanga Mulwa through the Hon. Chief Justice Evans Gicheru. In the letter, Ambassador Francis K. Muthaura, Permanent Secretary to the Cabinet and Head of the Public Service wrote that H.E. the President had considered and accepted the request of Justice Kasanga Mulwa to retire early from the Judicial Service with benefits in accordance with his terms of service.

The court considered that the Solicitor General's call on the President in the morning of 22d January 2007, fell far short of the accepted practice for it was more akin to intimidation than to an effort to discover the judge's response to the alleged apprehension concerning his impartiality.

The court stated that judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favor of or against any party to the dispute. It is in that context that Article 24 of the Treaty ordains that:-

> "Judges of [this] Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence".

There are two modes in which the courts guard and enforce impartiality. First, a judge, either on his own motion or on application by a party, will remove himself from hearing a cause before him, if there are circumstances that are likely to undermine, or that appear to be likely to undermine his impartiality in determining the cause. Secondly, through appellate or review jurisdiction, a court will nullify a judicial decision if it is established that the decision was arrived at without strict adherence to the established principles that ensure judicial impartiality. The first is that "a man ought, not to be a judge in his own cause". The second, which additionally is intended to preserve public confidence in the judicial process, is that "justice must not only be done but must be seen to be done".

Of the first principle, Lord Browne-Wilkinson said in *Pinochet's*[155] case:-

> "This principle, as developed by the courts, has two very similar but not identical applications. First it may be applied literally: if a judge is a party to the litigation or has a financial or proprietary interest in its outcome or he is sitting as a judge in his own cause. In that case mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial".

The court held that a judicial officer is required to disclose facts that may raise apprehension of possible bias on his part, in order to show that he has no actual bias and to give opportunity to a party who considers that he might be prejudiced, to exercise the right to apply for the judge to remove himself or to waive that right. The disclosure is not a pre-condition for the application to be made.

The court considered the decision of the case of *King Woollen Mills Ltd & Another Vs Standard Chartered Financial & Another*[156] where it observed with approval that in a previous decision it had emphasized that "...delay in bringing the removal application did not defeat the duty or obligation of the respondent in that application".

The court noted that the amendment to the treaty was a direct reaction to the ruling of the Court and is tantamount to abuse of court process. However, in the peculiar circumstances of this case, it thought it is prudent to consider if on the facts complained

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[155] No.2 (1999) 1 All ER 577

[156] Civil App. No. 102 of 1994

of, Justice Moijo Ole Keiwua ought to have removed himself from the hearing on 24th November 2006, and/or to remove himself from any further hearing of the reference and applications therein.

The court stated that:

> "...a reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single handedly deny the applicant a fair hearing, or justice. We think a reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity".

The court found that the applicant did not prove that Justice Moijo Ole Keiwo, was disqualified from sitting in the proceedings of the Court held on the 24th and 25th November 2006 and from participating in the resultant ruling of 27th November 2006.

Accordingly the prayer that the two judges disqualify themselves from further hearing of the reference and applications was rejected. The court dismissed the application with costs to the respondents.

The East African Law Society[157] challenged the amendment to the EAC Treaty. The Reference is to the effect that the amendments of the Treaty and ratification thereof by the three Partner States, namely the Republic of Kenya (1st Respondent); the United Republic of Tanzania (2nd Respondent) and the Republic of Uganda (3rd Respondent) were illegal, unconstitutional and, of no legal effect since they were made in contravention of Articles 150 and 38 of the Treaty.

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[157] In The East African Court Of Justice At Arusha, Application No 9 Of 2007(Arising From Reference No.3 Of 2007)

Prof Ssempebwa submitted that the respondents in purporting to amend the Treaty contravened Article 150 and deprived the rights of East Africans to participate in the process.

The conditions for the grant of the interlocutory injunction were stated in the often cited case of *Giella v Gasman Brown & Co. Ltd*[158] Spry, V.P. as follows: -

> "The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on the balance of convenience".

The court however held that what has been done so far, even if it were unlawful, cannot be undone in the interlocutory proceedings. That whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by the Court. The application was dismissed.

From the above case analysis it can be concluded that such conduct of the government officials trying to influence the decisions of the judiciary result in the weakening of the judicial authority creating uncertainty within the system.

[158] [1973] E.A. 358 at pg 360

CHAPTER 5

CONCLUSION

Individual economies lack the capacity to cope with the challenges of globalization unless they come together to enhance their bargaining power against developed nations and multinational corporations. This is where harmonizing the activities of the regional courts and other similar initiative becomes very important. Constitutionalism or the rule of law is basic to regional integration. East Africans were no doubt adversely affected by the collapse of the community. What is important now is that the leaders of the partner states have realized the need to re-integrate, with the ultimate aim of a political federation.

In Article 6 of the Treaty the Partner States agreed to include among the fundamental principles to govern the achievement of the objectives of the Community, the principle of the Rule of Law. In addition, they agreed to establish the EACJ which they mandated under Article 23 to be the judicial body that "shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty." One of the cardinal rules of the doctrine of the Rule of Law is respect of court decisions. If that rule is deviated from then the principle becomes hollow and remains on paper only. In the case of the Community, the Treaty and all it seeks to achieve will stand on sinking sand.

The eventual success of the regional integration initiatives greatly depend on the existence of an independent judicial system. Given the current institutional limitations of the EACJ I propose that the EAC would benefit from the establishment of an independent judiciary. Indeed, any integration, if it is to have a chance of lasting success, must be achieved and maintained through legal means. The EACJ should provide an effective system of judicial safeguards to ensure adherence to law, thereby contributing to the effective participation of EAC in the global economy. By so doing, the East African Court of Justice will be playing its part in a long-desired attempt to build a continent-wide coalition among the African states. Centrality of law with the independent judiciary

as custodians of the rule of law and regulators of competing interests are part of the solution[159].

There should be a regional court of appeal for East Africa. These clear demands can be found in the speech by the president of the EAMJA at the association's annual general meeting, held in Dar Es Salaam in January 2004. He said:

> "We in the EAMJA believe that in order to fulfill the objective of the Community, especially those under Article 126 (c) of the Treaty which include, *inter alia* '... the harmonization of legal learning and the standardization of judgments of courts within the Community' the formation of the East African Court of Appeal is a necessary and overdue step. We ... need a court of the highest resort in East Africa **whose decisions bind all our national courts**. The world trend now is to use international norms and standards to interpret national laws ... And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead".

Of course the Court must remain vigilant to ensure that member states do respect the principles of equivalence and effectiveness so that an acceptable minimum floor of remedies for breaches of Community law is created and maintained.

The partners should also demonstrate a strong political will towards the regional integration initiatives as it renders credibility to the regional initiatives, the eyes of foreign investors, international institutions and international interlocutors.

As expressed in a fundamental legal principle, 'justice need not only be done, it must manifestly be seen to be done'. By playing its role effectively, the court is expected to enhance the observance and upholding of human rights through good governance and

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[159] J.G. Merrills B.C.L, M.A, 'Anatomy of International law; A study of the Role of International Law in the Contemporary World' 2nd Ed, London, Sweet & Maxwell [1981] at pg 47

democratic institutions in the region. Issues perceived as sensitive at the national level might be better dealt with at the regional level, where they might be less sensitive.

I conclude by quoting from the decision of the EACJ in the case of **Peter Anyang' Nyong'o and 10 Others Vs The Attorney General of the Republic of Kenya and Five Others**[160] where the court stated that;

> "We also are constrained to say that when the Party States entered into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed forward towards that destination and not backwards or away from the destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role".

The member states of the EAC must respect the EACJ and allow it to carry out its role independently. This is fundamental to the EACJ and the success of regional integration process within the region.

[160] No. 1 of 2006 available at http://www.ealawsociety.org