

**THE ADEQUACY OF THE LEGAL FRAMEWORK FOR A POLITICAL FEDERATION
OF THE EAST AFRICAN COMMUNITY: AN EXAMINATION OF THE COMMON
MARKET PROTOCOL**

A Thesis

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BY

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DECLARATION A

"I Muyinga Samuel hereby declare that the work presented in this thesis entitled The Adequacy of the Legal Framework for a Political Federation of the East African Community: An Examination of the Common Market Protocol is my original work and that it has never been presented for any degree or any other award of a similar nature in any other institution"


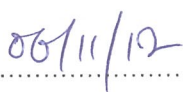
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DECLARATION B

This is to acknowledge that this thesis entitled "The Adequacy of the Legal Framework for a Political Federation of the East African Community: An Examination of the Common Market Protocol" was done under my supervision as the university supervisor".

MR. GODARD BUSINGYE

SIGNATURE.......... DATE..........

APPROVAL SHEET

This thesis entitled "The Adequacy of the Legal Framework for a Political Federation of the East African Community: An Examination of the Common Market Protocol" was prepared and submitted by Muyinga Samuel in partial fulfillment of the requirements for Master of laws and has been examined and approved by the panel on oral examination with a grade of _____

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Date of comprehensive Examination: _____

Grade: _____

Name and Sig. of Director, SPGSR

Name and Sig. of DVC, SPGSR

DEDICATION

This book is dedicated to my beloved grandmother Mrs Mary Ssali, mother Frista Vnanozi, aunt Kezia Nantongo Ssali and Mr Tumwineho Stephen and in memory of Miricah Nagawa Ssali(RIP).

ACKNOWLEDGEMENT

wish to acknowledge with sincere thanks the guidance and contributions of all persons who greatly contributed to the success of this thesis.

First, my gratitude goes to my supervisor Mr. Godard Busingye, for his guidance, encouragement and support towards the accomplishment of this thesis.

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My deep gratitude also goes to my friends who helped me towards the completion of this work.

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2. East African Law Society et al. v The Attorney General of Kenya et al Application No.9 of 2007.
3. Emmanuel Mwakisha Mjawasi & 748 Others V The Attorney General of the Republic of Kenya. Appeal No. 4 of 2011.
4. European Parliament v The Counsel of the European Communities. Case N.C-70 of 1988.
5. Hon. Sitenda Sebalu v the Secretary General of the East African Community et al Reference No. 1 of 2010.
6. Timothy Alivin Kahoho v the Secretary General of the East African Community. Application No. 5 of 2012.
7. Hon. Sitenda Sebalu v Hon. Sam K. Njuba and Electoral Commission of Uganda. Petition Appeal No. 6 of 2009.
8. Jacob Oulanya v The Attorney General of Uganda, Constitutional Petition No.28 of 2006.

9. James Katabazi & 21 others v Secretary General of the East Africa Community and the Attorney General of the Republic of Uganda. Reference No. 1 of 2007.
10. Prof. P. Anyang' Nyong'o et al. v Attorney General of the Republic of Kenya et al Ref. No.1 of 2006.
11. The Democratic Party & Mukasa Fred Mbidde V The Secretary General of the East African Community & The Attorney General of Uganda. Application No 6 of 2011.

LIST OF ACRONYMS

CET:	Common External Tariff
CM:	Common Market
COMESA:	Common Market for Eastern and Southern Africa
CU:	Customs Union
EAC:	East African Community
EALA:	East African Legislative Assembly
ECOWAS:	Economic Organisation of West African States
EU:	European Union
FTA:	Free Trade Area
NTB:	Non Tariff Barriers
SADC:	South African Development Cooperation

LIST OF STATUTES

The Treaty for the Establishment of the East African Community.

The Common Market Protocol

The Constitution of Uganda 1995

The Mediation Agreement of 1984

The Vienna Convention

ABSTRACT

The import of this thesis is to explore the possibility and the benefit of an East African political federation this thesis discussed the history of the East African Community in general the factors that led to its collapse in 1977 and what the current Partner States have put in place to protect the Community from collapsing again. In the statement of the problem as stated that the adequacy of the legal framework for a political federation of the East African Community: An Examination of the Common Market Protocol the thesis discussed the objectives of the Partner States.

Chapter 1 that regard this thesis discussed the objectives which included the discussion on the benefits and problems of the adequate legal framework associated with the formulation of a Political Federation of the East African Community.

The specific objectives of this study gave a critique of the process of the Political Federation of the East African Partner States and discussed the means of providing redress to the lacunae in the political federation of the East African Community.

The Chapter on literature review discussed the related studies and explained the relations between the thesis and the previous studies. The chapter also discussed the opinions, concepts and ideas of the various authors relating to regional integration, common market and political federation.

The methodology described the research methodology of the thesis as such the research was based on descriptive survey and qualitative research. It also discussed the research design which was descriptive survey with qualitative research population sample size which identified the population that was used in this study, sampling procedure also explained the procedure that was used to select the sample size, research instrument explained the instruments used to carry out the research, validity and reliability of the instrument, it also discussed the data gathering procedures data analysis ethical consideration and the limitations of study.

The Chapter on data analysis, presentation and interpretation also discussed the concept of a Common Market and the political federation of the East African Community giving the general provisions of the East African Community, advantages and disadvantages of the Common Market and a political federation to the East African Community. It also discussed the human rights and freedoms under the Treaty for the Establishment of the East African Community as the thesis discovered that the Treaty for the Establishment of the East African Community does not specifically provide for human rights; however the Treaty confers an obligation on Partner States in so governing their States to apply principles of good governance.

The Chapter on the findings, conclusions and recommendations discussed the discussed the findings of the research which included the benefits of the Common Market and a political federation. This Chapter of the thesis also explained and gave a conclusion that the Partner States have benefited from the East African Community arrangement. The research also gave a recommendation for further research to be carried out on the challenges of implementing a political federation.

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CHAPTER ONE

THE PROBLEM AND ITS SCOPE

Background of the Study

The legal framework for the political federation of the East African Community has become an issue of great concern in the Partner States. This is aimed at protecting the economic interests of the East African Community Partner States. The legal framework is codified in the Treaty for the Establishment of the East African Community and the Common Market Protocol. In the East African Community there are various legal regimes that were put in place to cater for matters of law as such rule of law is administered through the many available regional laws which have been developed under the auspices of the Treaty for the Establishment of the Community. The Treaty establishing the East African Community has the hallmarks of a constitution including a preamble that highlights the historical and political context, the aspirations of the people and the fundamental principles and rules that define the powers of the various organs of the Community. The East African Community Treaty is unique in Africa and perhaps in the world because its objectives are premised on the development of policies and programmes specifically aimed at widening and deepening cooperation among the three Partner States in the political, economic, social and cultural fields.¹

The draft Treaty for the establishment of the East African Community was published in 1998, after which it was circulated in the three countries for debate. After the debates in the Partner States, the Heads of state finally signed the treaty into force on 30 November 1999. These include the Secretariat, the East African Legislative Assembly (EALA), and the East African Court of Justice.²

J. Kamanyi, *The East African Political Federation: Progress, Challenges and Prospects for Constitutional Development*. p.2.

P. A. Kasaija, *Regional Integration: A Political Federation of the East African Countries?* *African Journal of International Affairs*, p.28.

he Common Market Protocol is one of the laws that have been adopted to steer the political federation process. There are, however, other Protocols which include the Customs Union Protocol, the Protocol on Cooperation in Defence Affairs, 2012. The Lake Victoria Management framework, and the general framework governing the East African Court of Justice, which is the organ responsible for resolving disputes arising out of the interpretation of the provisions of the Treaty.

he legal framework for the political federation of the East African Community has long history and traced way back as early as the colonial period.³

he pre-colonial and early post independence history of the Partner States of the East African Community has enabled Kenya, the United Republic of Tanzania and Uganda to enjoy a long history.

The former three Partner States signed the Treaty of East African Economic Cooperation in June 1967 that established the East African Community. The Treaty outlined the objectives of East African Community as "to strengthen and regulate the industrial, commercial and other relations of the Partner States, to accelerate, harmonious and balanced development and sustained expansion of economic activities the benefits whereof were to be equitably shared". The treaty for the Establishment of the East African Community covered: legal and legislative affairs; economic matters; and management of joint organizations.

However, because of perceived inequality in the distribution of benefits, ideological differences and differences in levels of development and lack of political will to solve real or imagined problems the Community collapsed in 1977.⁴

There are various factors that lead to the collapse of the former East African Community in the early years of its formation in the year 1977.

The collapse of the former East African Community in 1977 dealt a major blow to the East African region and was widely regretted, particularly so since the former

Supra note 2 p.28.

The East African Community Secretariat "Study on the Establishment of an East African Community Common Market" August 2007, p.8.

community had made great strides and was considered the world's model of successful regional integration and development. At its height, the East African Community was, in all but name, a federal government.⁵

There are many reasons that have been cited for the eventual collapse of the earlier federation of 1977, they include:

structural problems which impinged on the management of the common services; this was as a result of poor management of the common services of the former collapsed East African Community.

Low private sector and civil society involvement in the running of the community coupled with low levels of involvement of the people in the decision-making processes; in this respect the collapsed East African Community had limited low private sector and civil society involvement in the decision making process to run the affairs of the Community. This resulted into mistrust and thus the eventual collapse of the former East African Community.

The inequalities in the sharing of the costs and benefits of integration also facilitated the collapse of the former East African Community, this was because the outcomes of the integration process was shared on the basis of the levels of economic strength of each Partner State.

Ideological differences; and lack of mechanisms to address differences within the former East African Community arrangement this was as a result of the different development ideologies, political beliefs and economic development differences as such that led to the eventual collapse of the former East African Community.

The other factors responsible for the collapse of the former East African Community included;

The governance challenges, including lack of mechanisms to address corruption, this facilitated the collapse of the former East African Community as it lacked a clear legal

⁵ Supra note 4 p.10.

mechanism to prevent and punish victims of corruption with the administration of the community.

lack of respect for rule of law, impunity and governments' high handedness; this was characterized with abrogation of the Constitution in Uganda, arrests without trial that resulted into firing squads and the continued abuses of human rights.

Foreign influence for economic reasons, the continued intervention of the foreign countries on the basis of economic reasons also facilitated the collapse of the former East African Community as a result of the goods and services of the foreign Countries flooding the markets of the former Partner States.

The collapse brought about mistrust and suspicion amongst the member countries.

The former Partner States later came up with measures to protect and conserve the East African Community. For the purpose of determining and dividing the East African Community assets and liabilities, the Mediation Agreement was signed in 1984. The agreement included a provision for exploring ways to resume regional cooperation.⁶

At a side meeting during the Common Wealth Heads of State and Government Meeting (CHOGM) held in Harare in 1991, the Heads of State of Kenya, Uganda and Tanzania agreed to revive cooperation in the region. This led to the signing of the 1993 agreement for the establishment of the Permanent Tripartite Commission for East African Cooperation and in March 1996, the Secretariat of the East African Cooperation was launched in Arusha. The Treaty establishing the East African Community was signed on 30th November 1999 and entered into force on 7th July 2000.⁷

To ensure that the revived Community does not face the pitfalls that led to the collapse of its predecessor, a number of measures were built into the Treaty to provide safeguards. These were largely informed by lessons learnt from the weaknesses identified in the previous arrangements. They include:

⁶ Supra note 4 p.12.

⁷ B. Kiraso, EAC Integration Process and the Enabling Peace and Security Architecture, EAC Peace and Security Conference Kampala, Uganda 2009. p.4.

gradual approach to regional integration this involved the adoption of measures such as the adoption of the Customs Union, a Monetary Union, a Common Market Protocol and the eventual political federation. To this end Article 5 (2) of the Treaty Establishing the East African Community stipulates that:

Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.

Decentralization of powers from the Summit to the Council of Ministers this has resulted into the eventual respect of the principle of rule of law. In that regard Chapter 5 of the Treaty for the Establishment of the East African Community is on the Council Article 13 provides that;

The Council shall consist of the Ministers responsible for regional co-operation of each Partner State and such other Ministers of the Partner States as each Partner State may determine.

People-centered and private-sector driven integration this has resulted into the representation of the interests of each Partner State in the matters and affairs of the East African Community. This can be seen through the election of the 9 members into the East African Legislative Assembly by each Partner State.

The increased involvement of the civil society as key stakeholders in the management of the affairs of the East African Community has also facilitated the development of the community.

Stringent withdrawal procedures on the running of the activities of the East African Community have also improved the relationship amongst the 5 Partner States.

Consensus as a confidence building tool and the application of a Variable geometry have also improved the strength of the relation of the East African Community.⁸

supra note 4 p.13.

that regard the Partner States agreed to devise means of catering for the interests of their former employees of the collapsed then East African Community as such the steps that were taken by the former Members of the East African Community to protect were as follows.

The Mediation Agreement for the division of assets and liabilities of the 1st East African Community signed in 1984 had a provision to explore ways to resume regional cooperation this helped to cater for the interests of the former Partner States of the East African Community. In March, 1996 – the Secretariat of the East African Cooperation was established in Arusha this was also aimed at the running of the affairs of the East African Community. On the 30th of November, 1999 – the Treaty establishing the East African Community signed this is to create a legal framework to govern the activities of the East African Community and eventually on the 7th of July, 2000 the Treaty entered into force.

The 15th of January, 2001 witnessed the formal launching of East African Community by the three Heads of State.⁹

Immediately after the collapse of the East African Community the Partner States came up with measures to protect and safeguard the interests of the former employees of the East African Community. This was achieved through the signing of the Mediation Agreement of 1984. In line with the objective of the former Partner States of the East African Community the Mediation Agreement provided that:

Each State shall:

- (a) Pay its nationals employed by Corporations or GFS and retired from active services by the division date the pensions and other benefits due to them on account of such employment.
- (b) Make provision for the pension rights and entitlement to other benefit accrued as of the division date in favour of its nationals in active service with such Corporations or GFS at that date.¹⁰

A presentation on Cooperation in Political Affairs Governance, Peace and Security and Foreign Policy coordination p.10-11.

⁹ Article 10.05.

1 the case of **Emmanuel Mwakisha Mjawasi & 748 others V the Attorney General of the Republic of Kenya** the appellants were Kenyan citizens and former employees of the defunct East African Community that had collapsed in 1977, subsequent to the dissolution of the defunct East African Community in 1977, the Partner States executed a Mediation Agreement for the division of the assets and liabilities of the defunct Community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct Community's assets, the pensions and other terminal benefits of its respective nationals who had been employed by the East African Community and its institutions prior to the division date of the assets.

In this case the Kenyan Government devised a somewhat novel way of dealing with the situation which arose out of the consequential signing of the Mediation Agreement of 1984. In that regard, the ex-employees who were still in active service on the division date were given the option to take their East African Community pension directly; or to join the Kenyan Public Service, including its Parastatals and State corporations. Through this latter option, many ex-employees of the defunct East African Community were absorbed into the employment of the Kenyan Public Service. Conversely, those who took the option to retire were paid at once all their benefits, including additional pensions on the basis that their offices had been abolished in the East African Community.¹¹

The issue in this case was that the respondent's refusal, failure and neglect to pay their terminal benefits constituted a violation of the Article 6(d) and Article 7(2) of the Treaty for the Establishment of the East African Community.

The East African Court of Justice held that this did not constitute a violation of the East African Community as the Treaty does not provide for retrospective remedies.

It is noted that basing on the principle of non retroactivity, Article 28 of the Vienna Convention provides as follows:

¹¹EACJ Appeal 4 of 2011.

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or, any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

that meant that the applicants could not get any remedies under the current East African Community Treaty.

Article 5 (2) of the Treaty Establishing the East African Community stipulates that:

Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation. The East African Community has achieved the Common Market and all the other stages are mutually reinforcing.

Regional integration which is the unification of nations into a larger whole as such referred to as a dynamic process that entails a country's willingness to share or unify to a larger whole. In that respect the process of regional integration of the East African Community means the 5 Partner States come together to form a single regional block. This issue has now become a matter of policy and various communities have come together to form a global village. There are various blocks all over the world. The regional blocks may be formulated on the basis of economic, social, cultural and financial aspects.¹²

The present legal framework for the political federation of the East African Community is aimed at addressing a number of issues including establishing a Common Market through the Common Market Protocol. A political federation occurs when two or more states come together to form a supranational entity under a single Political Authority. In that regard therefore States are coming together to formulate a regional block that will facilitate a Common Market in terms of employment, sale of goods and services, free movement of persons, free movement of capital, free movement of labour and factors of production from one country to another. Under this Protocol, the Partner States

M, Schiff & LA Winters 2003 Regional Integration and Development, World Bank p.45.

guarantee the free movement of workers, who are citizens of the Partner States, within their territories.¹³

Creation of the East African Community Common Market has been envisaged to deepen and widen the East African Community integration, accelerated economic growth and promoted development. The East African Community cooperation has strengthened coordinated and regulated the economic and trade relations among Partner States in order to promote their accelerated harmonious and balanced aim of development. It is hoped that the Common Market will sustain expansion and integration of economic activities, whose benefit shall be equitably distributed.¹⁴

In accordance with the provisions of Articles 76 and 104 of the Treaty, the Protocol on East African Community Common Market provides for: Free movement of goods; free movement of persons; free movement of labour; Right of establishment; Right of residence; free movement of services; and free movement of capital. The Common Market Protocol was signed in November 2009.

In the issue of the East African Community stages of integration the Treaty for the establishment of the East African Community provides that The Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.¹⁵

The ultimate stage is the political federation, which occurs when two or more states come together to form a supranational entity under a single Political Authority. This involves ceding sovereignty and some powers by the federating States to the supranational entity State. The Treaty is not explicit on the time frame on this, but Article 123 (6) provides that "the Summit shall initiate the process towards establishment of the Political Federation of the Partner States by directing the Council of Ministers to undertake the process".

Article 10(1) Common Market Protocol.
Supra note 12 p.45.
Article 5(2).

Chapter 23 of the Treaty for the Establishment of the East African Community elaborates measures that Partner States are obliged to undertake in the areas of Defence, Foreign Policy Coordination, Political Affairs and Inter State Security to create the right environment for stability and development. The Chapter equally recognizes the need for cross sectoral coordination among the identified sectors¹⁶.

For purposes of guiding Partner States, Article 6 of the Treaty provides for the fundamental Principles to guide the integration. Article 6(d) clearly elaborates on the principle of good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' rights.

The commitment by the Partner States to preserve the provisions of the Treaty for the Establishment of the East African Community is reiterated in Article 7(2) which emphasizes that:

The Partner States undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.' as such each Partner State is under an obligation to protect its national against any form of violation of human rights.

Institutions such as European Union (EU) ECOWAS and South African Development Cooperation (SADC) support democratization within their respective sub-regions by demonstrating their opposition to armed conflicts and dictatorships and by expressing support for democratic transitions and constitutionalism.

To that end the Constitution of Uganda in Chapter Four provides for the protection of fundamental and other human rights and freedoms as such it provides that:

¹⁶supra note 12 p.46.

Fundamental rights and freedoms of the individual are inherent and not granted by the State.

The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.¹⁷

The rationale for a federation is based on many grounds, among them:

The need for a central authority for efficient and effective coordination and implementation of directives and decisions of the policy organs and avoid duplication.

The need to enhance consolidation of achievements and benefits of integration processes.

The need for a mechanism for channeling the benefits of economic integration more equally among the Partner States.

The need to harness the diversity of East Africans for a common goal;

The need to enhance legitimate participation of Partner States in conflict management in the region (the potential to minimize the occurrence of violent conflicts).¹⁸

Therefore, as the integration widens and deepens, the inherent peace and security challenges call for structured and institutionalised cooperation arrangements that are embedded in responsive legal and institutional frameworks. In that regard, the sectors responsible for Inter State Security, Foreign Policy Coordination and Political Affairs must develop appropriate instruments that will enhance collective action for sustainable development.

Currently, the East African Community consists of five Partner States, namely Kenya, Tanzania, Uganda, Burundi and Rwanda have joined after signing the Treaty, in addition to examining the tenets of the Treaty and the Common Market Protocol, the study

Article 20(1) and (2).
Supra note 12 p, 50.

examines how the legal framework for the political federation is supported by that of partner States.

Federalism is the political philosophy that underlies a system of government in which sovereignty is constitutionally divided between a central governing authority and constituent political units such as states creating what is called a federation. Federation entails the surrender of some powers by federating units to the center and vice versa. Where a federation is constructed of states that are already sovereign (as is the case for Uganda, Tanzania and Kenya) it requires them to surrender some of their sovereignty.

Federalism is a political system under which every citizen is subordinated to at least two state organisations (institutions) and is in immediate connection with each of them. The larger organisation is the federation and the small organisation is the member state of the federation. A federation has a constitution, which provides for representation in a two chamber system.¹⁹

Statement of the Problem

The relationship between the legal framework and a political federation of the East African Community can be traced through the drafting of the necessary laws and amendments carried out on already existing laws, signing of memorandas of understanding, putting in place social, economic, financial and economic ties as free movement of persons within the community.

It should however be noted that negative effects of a regional political integration initiated might result into boarder threats, poor balance of payments, security threats, unemployment and brain-drain, economic sabotage due to differences in exchange rates; power struggles and cultural differences.

In that regard the causes of the problem include: - poor government policies as an example of a restriction of free movement of persons, free residence, the

¹⁹Supra note 12 p, 5.

problem of issuing of work permits in the case of Kenya, Uganda might also derail the process of political federation through the delayed issuing national identity cards.

The problem of the study therefore is how to analyse the Common Market Protocol in a manner that informs readers that it is one of the pillars of the East African Community political federation.

Purpose of the Study

The purpose of the study is to discuss the problems and benefits under the Community Common Market Protocol as the East African Community Partner States move towards a political federation.

Research Objectives

General objective

The general objective of this study was:-

To discuss the adequacy of the legal framework under the East African Community Common Market Protocol in relation to the East African Community political federation.

Specific objectives

The specific objectives of this study will be:-

- i. To critique the tenets of the Common Market Protocol in relation to the Political Federation of the East African Community Partner States.
- ii. To discuss means of improving avenues of cooperation under the East African Community Common Market protocol in relation to the political federation of the East African Community.

Research Questions

- i. What are tenets of the Common Market protocol that are in relation to the Political Federation of the East African Community Partner States?
- ii. What are the means of improving the avenues of cooperation under the East African Community Common Market protocol in relation to the political federation of the East African Community?

hypothesis

The study discussed in details the benefits and problems of regional integration of a Political Federation of the East African Community. In that regard this study discussed the import of a Political Federation and a legal framework on regional integration. This study to that end explained how the available laws have helped to establish a Political Federation of the East African Community.

scope of the study

geographical scope

This study was conducted within the East African Community. In that respect it covered the five countries of the East African Community.

the time scope

The time scope discussed the period collapse of the East African Community to the period of the Treaty for the Establishment of the East African Community and Common Market Protocol.

the subject scope

The content scope discussed the various factors that facilitated the formation of a political federation within the East African Community through a regional integration. As such it discussed the government policies, the legal frameworks of the member countries, the benefits and problems of a Political Federation of the East African Community. This study also analyzed the differences in the political ideologies of the state members of the East African Community.

he other element of the content was the problem of regional integration.

Significance of the Study

This study will benefit various categories of persons as discussed below. The beneficiaries are Partner States of the East African Community, researchers, academicians and regional blocks.

Researchers

The researchers benefitted from this study as it discussed the various benefits and problems associated with regional integration enshrined in the Common Market and the political federation of the East Africa Community.

Academicians

The Academicians benefitted from this study as they study the doctrine of regional integration as this helped them to assess the contribution of Political federations in regionalism.

Government

The government benefitted from this study through devising means and methods of solving the problems that may arise from regionalism.

Regional blocks

The member states of the various regional blocks benefitted from the study as it discussed the numerous problems and benefits of regional integration and also promote regionalism.

Operational Definitions of Key Terms

ryan (1999) defines legal to mean of or relating to law; falling within the province of law.

Hornby (2010) framework is a set of beliefs, ideas or rules that is used as the basis for making judgments and decisions.

Smith et al (2010) legal framework refers to the set of rules that govern a particular society as such this includes the Constitution, Statutes, Regulations and customs that are consistent with the Constitution.

ryan (1999) defines integration to mean the process of making whole or combining into one.

Hornby (2010) integration is the actor process of combining two or more things so that they work together.

Hornby (2010) regional refers to of or relating to a region.

Boon (2003) regional integration is the unification of nations into a larger whole as such referred to as a dynamic process that entails a country's willingness to share or unify into a larger whole.

framework is a set of beliefs, ideas or rules that is used as the basis for making judgments and decisions.²⁰

legal is defined to mean of or relating to law; falling within the province of law.²¹

legal framework refers to the set of rules that govern a particular society as such this includes the Constitution, Statutes, Regulations and customs that are consistent with the Constitution.

Integration can be understood to mean the process of making whole or combining into one.²²

Integration is the actor process of combining two or more things so that they work together.²³

²⁰A. Hornby, Oxford Advanced Learner's Dictionary of Current English 2010 p 591.

²¹B. Garner, Blacks Law Dictionary 1999 p, 912.

²²Ibid note 20 p 824.

he term regional refers to of or relating to a region as such this describes the whole
lea of coming together to formulate a Common Market Protocol.
egional integration is the unification of nations into a larger whole as such referred to
s a dynamic process that entails a country's willingness to share or unify into a larger
whole.

³supra note 20 p.776.

CHAPTER TWO

REVIEW OF RELATED LITERATURE

Concepts, ideas and opinions from authors and experts

The idea of regional integration as a means to collective integration has been around in Africa for a long time and some regional groups for promoting economic cooperation and integration such as the East African Community existed before independence²⁴.

Regional integration refers to the co-operation of several countries for sake of enjoying economic benefits. In a Common Market arrangement all elements of a Customs Union are embodied and in addition factors of production like capital and labour are free to move within the region²⁵.

Regional integration is seen as the process through which States within a region form trading blocks or federate²⁶.

Regional integration can be defined along three dimensions:

(i) Geographical scope illustrating the number countries involved in an arrangement.

(ii) The substantive coverage or width that is the sector or activity coverage.

(iii) The depth of integration to measure the degree of sovereignty a country is ready to surrender, that is from simple coordination or cooperation to deep integration.

Legal framework refers to the set of rules that govern a particular society as such this includes the Constitution, Statutes, Regulations and customs that are consistent with the Constitution.

Sovereignty means supreme dominion, authority or rule²⁷.

Integration is defined to mean the process of making whole or combining into one²⁸.

Integration is the act or process of combining two or more things so that they work together²⁹.

²⁴C. Ake, A Political Economy of Africa.1992 p.168.

²⁵B. Mugisha, Basic Economics. 2007 p.264.

²⁶M. Odhiambo, Towards Greater Civil Society Participation in the East African Community Challenges and Prospects 2010. p 34.

²⁷supra note 20 p,1430.

²⁸supra note 20 p.680.

he term regional refers to of or relating to a region³⁰.

he East African Community Treaty defines a common market to mean the Partner states markets integrated into a single market in which there is free movement of capital, labor, goods and services;³¹.

Common Market is a merger/union of two or more territories to form one common territory in which there is free movement of goods, labor, services and capital, and the right of establishment and residence with common usage.

- A smoothly functioning customs union including complete elimination of all tariff and non tariff barriers plus a common external tariff,
- Free movement of persons, labour, services and right of establishment and residence,
- Free movement of capital within the Community
- Enhanced macro-economic policy harmonization and coordination particularly with regards to fiscal regimes and monetary policy
- Setting up, strengthening and empowering the necessary institutions/organs to support the common market operations (in the case of the EAC these include the East African Court of Justice and the East African Legislative Assembly)

The establishment of the East African Community Common Market is in line with the provisions of the East African Community Treaty. It provides for "Four Freedoms", namely the free movement of goods; labour; services; and capital, which will significantly boost trade and investments and make the region more productive and prosperous.

³⁰supra note 20 p,776.

³¹Ibid p.1226.

¹Article(1)(1).

he islands did not start on the federal road in a fit of idleness. They started because it was clear that a federation is the only possible solution of their parents³².

heoretical perspectives

This chapter discusses the theory on which the study is based. In that regard this study was based on the realism and liberalism theory as proposed by G. H. L. J. van der Meer in 1957, cited in C. Rousseau in 1979 and repeated in Odhiambo³³ that this theory helped to explain the cooperation of sovereign States. This theory was in that aspect helpful to explain the issue of international institution. The evolution of the modern nation States and the consequent development of an international order founded upon a growing number of independent and sovereign territorial units inevitably gave rise to questions of international cooperation. This recognizes the sovereignty of States as such it encourages cooperation in the formation of regional blocks.

Such studies benefited my study insofar as they pointed to the essential requirements of formulating an organized and legalized regional block. These findings also were important to my study because they addressed the various problems of regional integration and also talked about the theories that were used, the challenges and prospects of the East African regional block.

Related studies

The East African Court of Justice as an opportunity in the context of the Common market

It is a reality that when people come closer to each other they are likely to get into confrontation with each other – that is human nature – unfortunately. Courts are purposely created to address this natural problem. Similarly, the more East Africa gets integrated the more disputes of a transboundary nature are likely to happen. The

E. Sooner, Building Strong Economies Depends on You and Me. p.1
Supra note 26. P.35.

founders of the East African Community pre-empted this situation and decided to create the East African Court of Justice to address such situations.

The East African Court of Justice constitutes indeed a huge opportunity for the East African Community integration in that it is the main judicial organ of the Community, accessible and independent.

Article 5 (2) of the Treaty for the Establishment of the East African Community states:

The Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.

Common Market this is when two or more states come together to trade as a block thereby creating a bigger consumer base for their products and services.

Political Federation this is when two or more states come together to form a super-state under a single political authority.

In such an arrangement, federating states cede their sovereignty and some of their powers to the super-state.³⁴

The common market means common rules of the market that have similar meanings across borders. The European Single Market, for example, is a regulatory construction that goes beyond common rules into regulatory quality, institutions, capacities, and practices. The Common Market Protocol and its Annexes imply a wide range of regulatory reforms needed to implement the commitments of the Common Market protocol. These regulatory reforms are needed both at the East African Community level, and at the domestic level in the five Partner States. This report maps out steps that can be taken to promote better regulatory practices at both levels.³⁵

Mwambi (2010) conducted a study on the challenges and prospects towards a greater civil society participation in the East African Community, his findings were to the effect

Supra note 9 p.18.
Ibid p, 20.

hat to achieve civil society participation in the East African Community there should be civil society consultation within the East African Community.

The legal framework for the establishment of the East African Community Common Market Protocol every legal system uses a defined set of legal instruments, called regulations” in this review, that are developed using defined procedures.

The procedures define the quality of the regulations by building in various levels of expertise, quality control, transparency, administrative and judicial review, and accountability for results. Although much of this review focuses on the procedures used to develop the East African Community regulations, this section focuses on defining the instruments themselves. The primary source of East African Community law is the Treaty for Establishment of the East African Community, which was signed on 30th November 1999 and which entered into force on 7th July 2000 following its ratification by the original 3 Partner States – Kenya, Uganda and Tanzania. 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 from 1st July 2007. The mandate for the Partner States to adopt the East African Community Common Market is derived from article 5(2) of the Treaty states “the Contracting Parties shall establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community,” and specifically from the following articles:

Article 76(1) states, “There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment”; Article 76 (4) states, “For purposes of this Article, the Partner States shall conclude a Protocol on a Common Market.” Article 104 (2) of the Treaty states that “For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, services and rights of Establishment and residence at a time to be determined by the Council”.

Under the Treaty, the legal framework for the East African community is based on the principle of sovereignty for the Partner States. The legal framework provides for consensus by the five Partner States on all meaningful policy issues, meaning that each state can veto any detail of regulations implementing the Treaty. Supra-regional authority is vested to a small extent in the Court of Justice, which has tested the limits of its authority. The Legislative Assembly and the East African Community Secretariat have no supranational authority. All of their actions are approved or adopted by Partner states.

The interpretation of sovereignty as consensus on all issues is under pressure for practical reasons. In a 2009 case referred by the Council of Ministers for the East African Community on whether consensus was needed on every decision or whether the principle of variable geometry could be used, the East African Community Court of Justice decided that consensus does not necessitate unanimity of the Partner States. In other words, under the Treaty, no Partner State need have a veto power when it comes to decision-making at the East African Community. This means that the East African Community Council must define a more flexible view of consensus for purposes of policy-making, which it has not yet done. Regulatory quality and speed will improve when the Council takes this step.

There is a tension here. Sovereignty might be politically necessary at this stage of integration. However, the common market might require a formal reduction of sovereignty over regulatory matters. This step was taken in the European Union. The Treaty of Nice signed in 2001 facilitated regulation relating to free movement and residence by introducing qualified majority for decision making in the Council.³⁶

³⁶ Regulatory Capacity Review East African Community p 18-19.

Indifa (2009) conducted a study in East Africa about combating corruption his findings stated that public and good governance in East Africa is based on promoting and strengthening anti-corruption initiatives.

Smith (2003) conducted a study on the necessity of laws on the management of international oil companies, his findings were to the effect that for international oil companies to operate effectively in territories of their host countries there must be valid laws. In that regard he agitated for ratification of international laws into national laws.

In that regard therefore the literature reviewed above gives a strong background towards the development of the East African Community into a regional arrangement as discussed in the common market protocol and the political federation.

The literature reviewed above points out the advantages of a regional integration arrangement as economic strength.

The literature reviewed above discusses the contribution of the common market protocol towards the achieving a political federation as stated in the Treaty for the establishment of the East African Community.

CHAPTER THREE

METHODOLOGY

Research Design

This chapter discussed in details the methodology that was used in the study.³⁷ This study basically used the descriptive research design which was also involved qualitative and quantitative research methods. Descriptive research is a process of collecting data in order to test the hypotheses or to answer questions concerning the current status of the subjects in the study.³⁸ The qualitative methods were used for this study because they are concerned with real experiences while the other element of the research design was a descriptive survey. In that respect therefore the thesis gave a thorough description of the legal framework for the East African Community Common Market through the East African Community Common Protocol and the eventual formation of the East African Political Federation.

Research Population

This research population for this study comprised of the entire five member Countries of the East African Community. It is upon this target population that the researcher got the benefit of discussing the legal framework of the East African Community.

According to Amin (2005) in research, the sample is a representation of the population. This means that as much as possible, most characteristics of the population should be represented in the sample selected.

Research Instrument

Under this section the research instrument used was the descriptive research method and this was used to describe the research and findings of this study. According to Suzanne (1998) making a choice among different data gathering techniques involves considering their appropriateness and relative strengths and weaknesses. As stated

³⁷D. Asiimwe, Social Research Methodology p.255.

³⁸O. Mugenda, & A. Mugenda, Research Methods Qualitative & Quantitative Approaches p.160.

Above the research used the descriptive method for a research instrument and as such it described the various laws, treaties and case law.

Data Gathering Procedures

The researcher before analyzing the legal framework for the Common Market and the eventual formation of the political federation of the East African Community examined the earlier East African Community which eventually collapsed in 1977. The researcher also discussed the efforts of the new East African Community to cater for the shortcomings of the prior collapsed East African Community.

During the examination of the available benefits of the laws to the East African Community the thesis also discussed the disadvantages that will come along with the eventual regional integration.

Data Analysis

This section presented the manner in which data was analysed this thesis also discussed the benefits, the advantages and disadvantages. This section also explained how the findings of the research generated in the study was organized and analyzed. This section also explained the various techniques that were used for the discussion of the findings of the research. The data also was presented in the descriptive form to explain the legal framework of the East African Community regional arrangement and the eventual regional integration.

Ethical Considerations

This section of the study dealt with the manner in which the confidentiality of the findings collected was protected and acknowledgement of the literature of the various authors was treated. The issue of ethical consideration as clearly indicated in the thesis the concepts, ideas and writings of other legal writers, researchers and scholars. In that regard therefore as indicated works of other the researchers, writers and authors have been acknowledged through foot noting and referencing works of the various authors.

n doing this the researcher obtained clearance from the ethics committee and sought the consent of the respondents.

Limitations of the Study

This section of the research also explained the available limitations of this study. The issue of East African Community coming together as a regional block is susceptible to certain shortcomings in that regard this research was limited by the fact that the East African Community is so large as such the size selected was inadequate to support the whole population size of the East African Community. This would hinder the proper examination of the advantages and disadvantages and the eventual benefits of the East African political arrangement hereafter referred to as the East African Community. The other issue that limited this study was the conflict of the national laws of the Partner States and the Treaty for the Establishment of the East African Community.

However this did not limit the research this was because the sample size was a generalization of the whole population size. The available cases and the Treaty for the Establishment of the East African Community explain the legal framework for the regional integration.

CHAPTER FOUR

DATA ANALYSIS PRESENTATION AND INTERPRETATION

Introduction

In order to understand the East African Community's quest for integration, it is important to examine the Community's history, tracing the first integration efforts, the collapse and the revival of the East African Community.³⁹

The research was particularly based on descriptive research and qualitative research as presented in the whole research paper. The East African Community (EAC) is an intergovernmental organization comprising five of speeding up the process of integration so as to achieve a political federation as this paper discussed the Common Market Protocol.⁴⁰

Data Analysis

The whole process of regional integration process and the eventual formulation of the East African Community can be traced from the other stages of regional integration.

The other stages of regional integration is the Customs Union, A Customs Union is a group of States that agree to have the same taxes on imported goods.⁴¹ The Protocol on the Establishment of the East African Customs Union provides that;

In order to promote the objectives of the Community provided under Article 5 of the Treaty and in accordance with the provisions of this Protocol, the Partner States hereby establish a customs union as an integral part of the Community.⁴²

The Customs Union Protocol further emphasizes the role of the Customs Union.

Within the Customs Union:

- (a) customs duties and other charges of equivalent effect imposed on imports shall be eliminated save as is provided for in this Protocol;

³⁹ B. Kiraso, Deputy Secretary General, East African Community at the EAC Peace and Security- Kampala, Uganda. 2009. p.4.

⁴⁰ en.wikipedia.org assessed on 18th Oct 2012.

⁴¹ A. Hornby, Oxford Advanced Learner's Dictionary, p.362.

⁴² Article 2(1).

- (b) non-tariff barriers to trade among the Partner States shall be removed; and
- (c) a common external tariff in respect of all goods imported into the Partner States from foreign countries shall be established and maintained.⁴³

Common market is an area without internal frontiers in which free movement of goods, persons, labour, services and capital is ensured. A common market is defined to mean a group of Countries that have agreed on law taxes on goods traded between countries in the group, and higher fixed taxes on goods imported from countries outside the group.⁴⁴

The mandate for the Partner States to negotiate the East Africa Community Common Market is derived from Article 5(2) of the Treaty and more specifically from; Article 6(1) which states that "There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment"; and, Article 76(4) of the Treaty for the establishment of the East African Community states that "For purposes of this Article, the Partner States shall conclude a Protocol on a Common Market".

Further, Article 104 (2) of the Treaty states that "For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council."

The East African Community Common Market Protocol has incorporated the key pillars of such a market including the four freedoms. For the Partner States, and their nationals, the opportunity to access a single, community-wide market is one of the primary reasons for membership in a common market. The free movement provisions in the Treaty and the Common Market Protocol is therefore designed to create within the

Article 2(4).
supra note 41. p.291.

Partner States a single market, free of all internal restrictions on trade; and basic principle of free competition. The free play of market forces within the market is expected to increase economic efficiency, widen consumer choice, and enhance the Community's competitiveness in world markets⁴⁵.

This fundamental principle, enshrined in the Common Market Protocol seeks to establish, in the interest of economic efficiency, "an internal market," characterized by the abolition of obstacles to the free movement of goods, persons, labour, services and capital between Partner States. This is reinforced by provisions and measures to ensure uniform standards of worker protection and the principle of equal pay for equal work for men and women. The basic principles relating to the free movement of persons and labour; and the freedom to provide services are adequately provided for in the Common Market Protocol.⁴⁶

The Partner States in the establishment of the Community agreed on the political federation.

In order to promote the objectives of the Community provided for under Article 5 of the Treaty and in accordance with the provisions of this Protocol, the Partner States hereby establish a common market as an integral part of the Community.⁴⁷

Whereas Article 5 of the East African Community Treaty clearly provides for the establishment of a political federation there is no subsequent article that elaborates on the provisions for the establishment of a political federation. Therefore, there are no answers to several key questions related to the establishment, operation and growth of an East African Political Federation.⁴⁸

⁴⁵supra note 39 p.45.
⁴⁶ Ibid note 39 p.48.
⁴⁷Article 2 of the Common Market Protocol.
⁴⁸supra note p.48.



The Common Market represents the second stage of the regional integration process as defined by the Treaty for the Establishment of the East African Community), following the Customs Union, which became fully-fledged in January 2010. The Common Market Protocol is a significant step towards the achievement of the next milestones in the integration processes namely the Monetary Union and the East African Community Political Federation.

In that respect as stated in the earlier chapters the overall objective of the East African Community Common Market is to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States and their citizens.

The specific objectives of the Common Market are:

to accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital; to strengthen, coordinate and regulate the economic and trade relations among the Partner States in order to promote accelerated, harmonious and balanced development within the Community, to sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States, to promote common understanding and cooperation among the nationals of the Partner States for their economic and social development; and to enhance research and technological advancement to accelerate economic and social.

Discussions

The Protocol on the Establishment of the East African Community (EAC) Common Market entered into force on 1 July 2010, following ratification by the entire five Partner States: Burundi, Kenya, Rwanda, Tanzania and Uganda.⁴⁹

⁴⁹ www.eac.int/commomnmarket/cm-background.html assessed on the 18th Oct 2012.

On 1 July 2010 Kenyan President Mwai Kibaki officially launched the East African Common Market Protocol, an expansion of the bloc's existing customs union that entered into effect in 2005. The Protocol has led to the free movement of labour, capital, goods and services within the East Africa Community. Member States will have to change their national laws to allow the full implementation of some aspects of the Common Market such as immigration and customs.

In line with the development motive of the East African Community Treaty the benefits of the Common Market as discussed below.

The scope of co-operation under the Common Market is provided in Article 5 of the Protocol and applies to any activity undertaken in cooperation by the Partner States to achieve the free movement of goods, persons, labour, services and capital and to ensure the enjoyment of the rights of establishment and residence of their nationals within the Community.

The scope of cooperation under the Common Market is provided in Article 5 of the Protocol and applies to any activity undertaken in cooperation by the Partner States to achieve the free movement of goods, persons, labour, services and capital and to ensure enjoyment of the rights of establishment and residence of their nationals within the Community.

In furtherance of this goal, Partner States agreed to eliminate tariff, non –tariff and technical barriers to trade, harmonise and mutually recognize standards and implement Common trade policy for the Community, and ease cross-border movement of persons and adopt an integrated border management system.

In addition, this protocol will further incorporate cooperation by the Partner States in the following twelve areas:

Protection of cross border investments, economic and financial sector policy coordination, competition and consumer welfare, commercial policy, Coordination of transport policies, environmental management, statistics, research and technological

development, intellectual property rights, industrial development, and agriculture and food security.

The Protocol is further expected to facilitate trade through the harmonizing of customs duties on goods and creating a more predictable tariff structure for external trade partners.

The Partner States will benefit from the Common Market and the Protocol in various ways as discussed below.

Trade opportunities/ larger markets, improved competitiveness and higher returns to investment, free movement of persons, free movement of labour/workers, cross border capital movements will also spur the growth of industrialization driven by an expanding and more productive agricultural sector and service suppliers, providers and consumers from across the region will be guaranteed equivalent treatment to local providers.

The establishment of the East African Community Common Market is in line with the provisions of the East Africa Community Treaty. It provides for “Four Freedoms”, namely the free movement of goods; labour; services; and capital, which will significantly boost trade and investments and make the region more productive and prosperous.

To that end the Treaty for the East African Community provides for the establishment of the common Market Protocol; the EAC Protocol provides that: For the purpose of this Article, the Partner States shall conclude a Protocol on a Common Market.⁵⁰

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

The establishment of the Common Market shall be progressive and in accordance with schedules approved by the Council.⁵¹

⁵⁰Article 76(4).

The major elements of Common Market Protocol are the “four freedoms” involving free movement of goods, labour, services and capital. The freedoms granted to the members of the East African Community under the Common Market Protocol comprise the right to freely leave, or enter and reside in a Partner State for the purpose of work, or establishment, or provision of services.

The East African Court of Justice as an opportunity in the context of the Common market

It is a reality that when people come closer to each other they are likely to get into confrontation with each other – that is human nature – unfortunately. Courts are purposely created to address this natural problem. Similarly, the more East Africa gets integrated the more disputes of a transboundary nature are likely to happen. The founders of the East African Community pre-empted this situation and decided to create the East African Court of Justice to address such situations.

The East African Court of Justice constitutes indeed a huge opportunity for the East African Community integration in that it is the main judicial organ of the Community, accessible and independent.⁵²

Though the East African Community Treaty is bereft of a Chapter on Human Rights, nonetheless, it contains the hint of such rights in a number of its provisions. The Hon Mr Justice James Ogoola, Judge of Appeal, East African Court of Justice and Lord Justice Common Market for East and Southern Community Court of Justice, in his speech: “*Where Treaty Law Meets Constitutional Law*”⁵³, observed as follows:

The East African Community Treaty is emphatic in its intention under Article 27(2) to extend human rights jurisdiction to the East African Court of Justice, at a suitable subsequent date. One possible interpretation of this is to say that the Treaty’s “hints” on

¹Article 76(1) &(2)

²H. Nsekela, The role of the East African Court of Justice in implementing the common market in the East African Region. 2012. P.12.

³ Presented at the University of Dar es Salaam on 18th May 2012.

human rights are ineffectual. Another, and more plausible view, is to hold that there is a layer of inchoate human rights in the Treaty, waiting for practical implementation and operationalisation via the channel envisaged in article 27(2)".

Under Article 36, the Court also has jurisdiction to give advisory opinions where the Summit, the Council or a Partner State requests the Court to do so, regarding a question of law arising from the Treaty, which affects the community and the Partner States.⁵⁴ The Court also entertains requests by national Courts to give preliminary rulings where a question is raised before a national Court or tribunal concerning the interpretation or application of the provisions of the Treaty or the validity of the regulations, directives, decisions or actions of the community.⁵⁵

The East African Community Treaty mandates the Partner States to create an East African Court of Justice. This is provided for under Article 27 of the Treaty which provides

The Court shall initially have jurisdiction over the interpretation and application of this Treaty;

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner State,

The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

In the case of **Fanuel Mantiri N'gunda v Herman Mantiri Ng'unda and 20 Others**

the Court stated as follows –

The basic question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial ... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.⁵⁶

⁵⁴ Please note that a request for an advisory opinion can only be lodged to the Appellate Division as Rule 5 of the Court's Rules provides.

⁵⁵ Article 34 of the Treaty for the Establishment of the East African Community.

⁵⁶ CAT Civil Appeal No. 8 of 1995.

On the element of harmonization of the laws of the Partner States to comply with the Treaty for the Establishment of the East African Community the Partner States embarked on Constitutional developments.

However, the role of the East African Court of Justice in the settlement of Common Market related disputes does not come out clearly. Although Article 54(1) of the Common Market Protocol implicitly confers upon the Court jurisdiction to determine such disputes, this jurisdiction is arguably very limited.

The Common Market further provides that -

in accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.⁵⁷

Article 52 (1) of the Treaty for the Establishment of the East African Community, and Rules 15 and 16 of the East African Legislative Assembly Election Rules, 2001 made by the National Assembly of Tanzania in May, 2001

In March 2005 two bills, the Constitution of Kenya [Amendment] Bill and the Constitution of Kenya Review [Amendment] Bill, were framed setting out a new programme of Constitutional review. In July 2005 the Constitution of Kenya (Amendment) Bill was enacted with provisions for a mandatory referendum through which the people of Kenya were to approve their Constitution. In Uganda the key benchmarks in the road map were the 2005 Constitutional Amendment Bill and the 2005 Referendum Bill to decide the political system under which Uganda is to be governed.

⁵⁷ Article 54 (2) of the Common Market Protocol

however, by March 2005 several laws that had to be amended in order for presidential and parliamentary elections to take place had not been amended.⁵⁸

In the case of **The Democratic Party & Mukasa Fred Mbidde V the Secretary General of the East African Community & The Attorney General of Uganda** the facts of this case were that pending the determination of their reference filed in this Court, an interim order be issued against the respondents restraining the East African Legislative Assembly, the Attorney General and the Parliament of the Republic of Uganda, from conducting and carrying out any elections, assembling, convening, recognizing any names of nominees as duly nominated and elected to the East African Legislative Assembly (EALA), administering the Oath of office and ultimately sending the representatives of Uganda to the East African Legislative Assembly until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedures of the Parliament of Uganda, 2006 are amended to conform to the provisions of Article 50 of the Treaty. The issue hereof was whether the amendment of the election laws to the East African Legislative Assembly was a violation of the Treaty for the Establishment of the East African Community. The East African Court of Justice held that the East African Legislative Assembly, the Attorney General and the Parliament of the Republic of Uganda carrying out any elections, assembling, convening, recognizing any names of nominees as duly nominated and elected to the East African Legislative Assembly (EALA) administering the Oath of office and ultimately sending the representatives of Uganda to the East African Legislative Assembly was a violation of the Treaty for the Establishment of the East African Community.⁵⁹

To this end the benefit of the East African Court of Justice towards a political federation of the East African Community and Common Market is to safe guard the rights and freedoms of all nationals of the Partner States.

⁵⁸Supra note 52 p.8.

⁵⁹Application No. 6 of 2011.

n their judgments the justices of the East African Court of Justice cited the case of **Jacob Oulanya v the Attorney General of Uganda** which was before the Constitutional Court of Uganda, the Court held, inter-alia, that the aforesaid Rules of procedure infringe several Articles of the Constitution of the Republic of Uganda. It is his stance that no election would be held until the aforesaid Rules are amended by the Parliament of Uganda.⁶⁰

n the case of the **European Parliament v The Counsel of the European Communities**, where the European Court of Justice intervened in a matter where Parliamentary Procedures were infringing the European Community Treaty.⁶¹

n the case of **Hon. Sitenda Sebalu v the Secretary General of the East African Community et al**

This Reference was brought before the East African Court of Justice (EACJ) by way of Notice of Motion under Articles 6, 7(2), 8(1)(c), 23, 27(1) (*sic*) and 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1(2) and 21 of the EACJ Rules of Procedure ("the Rules") on the delay to implement Article 27(2) by the Council of Ministers and that the delay has a negative effect on good governance, democracy, rule of law and human rights in East Africa as stated by the Applicant. The issue in this case was whether this was a violation of the Treaty for the Establishment of the East African Community.

The East African Court of Justice held that this was a violation of the Treaty for the Establishment of the East African Community.

The issue in this case was whether the acts of the 1st respondent in delaying to convene the Council of Ministers as stipulated under Article 27 of the Treaty to create the East African Court (*sic*) as an appellate court stated that it was an infringement of

⁰ Constitutional Petition No.28 of 2006.

¹ Case N.C-70 of 1988.

articles 7(2), 8(1) (c) and 6 of the Treaty for Establishment of The East African Community.⁶²

The Treaty for the Establishment of the East African Community provides that;

The Council shall meet twice in each year, one meeting of which shall be held immediately preceding a meeting of the summit. Extraordinary meetings of the Council may be held at the request of a Partner State or the Chairperson of the Council.⁶³

Subject to the provisions of Article 27 of this Treaty, any person who is 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.⁶⁴

In November 2006 the East Africa Community Court of Justice delivered an interim ruling in the case of **Prof. P. Anyang' Nyong'o et al. v Attorney General of the Republic of Kenya et al**⁶⁵ preventing nine Kenyan parliamentarians from being sworn in as members of the East African Legislative Assembly the ruling met hostility and the Partner States responded in a manner that did not reflect great respect for the notion of an independent judiciary: they amended the East African Community Treaty with a view to inter alia extending the grounds for removing judges from the Court of Justice! Amidst all the political turmoil, and in spite of the huge political pressure, however, the Court kept its back straight and concluded in two subsequent judgments, namely **Prof. P. Anyang' Nyong'o et al. v Attorney General of the Republic of Kenya et al**⁶⁶

⁶² Supra note 52. p.10.
⁶³Article 15(1).
⁶⁴Article 30.
⁶⁵ Ref. No.1 of 2006.
⁶⁶ ibid note 65.

and East African Law Society et al. v The Attorney General of Kenya et al⁶⁷
that both the Kenyan election rules and the treaty amendment infringed the East African Community Treaty.

In November 2006 the East Africa Community Court of Justice delivered an interim ruling in the case of **Prof. P. Anyang' Nyong'o et al. v Attorney General of the Republic of Kenya et al** preventing nine Kenyan parliamentarians from being sworn in as members of the East African Legislative Assembly (EALA) on the ground that the Kenyan rules for electing members of the East African Legislative Assembly were prima facie at odds with the East African Community Treaty. The ruling met hostility and the Partner States responded in a manner that did not reflect great respect for the notion of an independent judiciary: they amended the East African Community Treaty with a view to inter alia extending the grounds for removing judges from the Court of Justice! Amidst all the political turmoil, and in spite of the huge political pressure, however, the Court kept its back straight and concluded in two subsequent judgments, namely **Prof. P. Anyang' Nyong'o et al. v Attorney General of the Republic of Kenya et al** and **East African Law Society et al. v The Attorney General of Kenya et al** that both the Kenyan election rules and the treaty amendment infringed the East African Community Treaty.

Whereas Article 7 (2) of the Treaty requires Partner States to abide by the principles of democracy, the rule of law and maintenance of human rights standards, it is not clear how the East African Community, given the fact that it is the cardinal implementer of the Treaty, should advocate for these issues, especially in view of the fact that one of the objectives for integration is political.

Whereas the Treaty for the Establishment of the East African Community is bereft with a Chapter on human rights Article 7 (2) of the Treaty requires Partner States to abide

⁶⁷Application No.9 of 2007.

by the principles of democracy, the rule of law and maintenance of human rights standards.

In the arena of the rule of law, much is left to be desired when it comes to understanding and respecting the fact that an individual is innocent until proven guilty; the right not to be imprisoned without trial; and that all individuals regardless of their status enjoy the same rights before the law, or that nobody is above the law.

In that respect the national laws of the Partner States harmonise the situation. The Constitution of Uganda in Chapter four provides for the protection and promotion of fundamental and other human rights and freedoms. In that regard the Constitution of Uganda is to the effect that:

Fundamental rights and freedoms of the individual are inherent and not granted by the State. The rights and freedoms of the individual and groups enshrined in this Chapter shall be and promoted by all organs and agencies of Government and by all persons.⁶⁸

In the case of **James Katabazi & 21 others v Secretary General of the East Africa Community and the Attorney General of the Republic of Uganda** this was a reference by sixteen persons against the Secretary General of the East African Community as the 1st respondent and the Attorney General of Uganda as the 2nd respondent. The story of the claimants is that: During the last quarter of 2004 they were charged with treason and misprision of treason and consequently they were remanded in custody.

However, on 16th November, 2006, the High Court granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and the fourteen were rearrested and taken back to jail. On 24th November, 2006, all the claimants were taken before a Military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the General Court Martial.⁶⁹

⁶⁸Article 20(1) & (2).
⁶⁹Reference No. 1 of 2010.

In this case the claimants in this case contended that the act of surrounding the High Court by armed men to prevent enforcement of the Court's decision was an infringement of Articles 7(2), 8(1)(c) and 6 of the Treaty for the Establishment of the East African Community.

The court held that this was a violation of the Treaty for the Establishment of the East African Community in Articles 7(2), 8(1)(c) and 6.

The independence of the judiciary needs to be further secured in the Partner States with regard to the terms and conditions surrounding the appointment of judges that would shield them from undue and improper personal and political pressure. Dismissal by the executive undermines the institution of the judiciary. Judges must be protected against unwarranted removal. The integrity of the judicial system must be protected and accorded control over its own procedural and administrative affairs.⁷⁰

In that regard the on the matter of protection of the judiciary and the independence of the Judiciary on the national laws level of the Partner States, the Constitution of Uganda provides that:

In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.⁷¹

The issue of independence of the judiciary was discussed in the case of **Constitutional Rights Project and Civil Liberties v. Nigeria** in that matter Chief Abiola, among others, was detained and the Federal Government of Nigeria refused to honour the bail granted to him by court.⁷² In the said Communication the African Commission on Human Rights stated that the fact that the government refuses to release Chief Abiola

⁷⁰Supra note 52. p.16.

⁷¹Article 128.

⁷²Communication 143/95, 150/96 AHG/222 (XXXVI) Annex V p 63.

Despite the order of his release on bail made by the Court of Appeal is a violation of Article 26 which obliges State parties to ensure the independence of the judiciary.⁷³

On that regard the jurisdiction of the East African Court of Justice the Treaty for the Establishment of the East African Community in Article 27 is framed in the following terms: The Court shall initially have jurisdiction over the interpretation and application of this

Treaty:

provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, Partner States shall conclude a protocol to operationalise the extended jurisdiction.⁷⁴

Articles 27 (2) and 151 of the Treaty for the Establishment of the East African Community together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market are on the enhancement on the jurisdiction of the East African Court of justice.

In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited** Nyarangi, J. A. stated thus –

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.⁷⁵

In the case of **Fanuel Mantiri N'gunda v Herman Mantiri Ng'unda and 20 Others** the Court stated as follows –

The basic question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial ... It

⁷³ supra note 72 p 67.

⁷⁴ Article 27 of the Establishment of the East African Community.

⁷⁵ [1989] KLRI at p.14.

is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.⁷⁶

On the issue of the role of the East African Court of Justice and the responsibility on the settling of disputes arising within the East African Community Partner States, such responsibility is subjected to the question of jurisdiction.

On the specific issue of non retroactivity, Article 28 of the Vienna Convention provides as follows:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or, any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

That Article helps in establishing the intention of the parties where this intention is not explicitly expressed in a particular Treaty. Such is the case with the East African Community Treaty in the instant case.

This Court, therefore, needed to interpret the Treaty in order to establish whether the East African Community founders manifested any intention to make their Treaty retroactive. Moreover, further guidance in this lies in Article 31 of the Vienna Convention which provides, inter alia, as follows:

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.

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 other parties as an instrument related to the treaty.

Consistent with the above guidelines, this Court interpreted the provisions of the East African Community Treaty: it placed them against the objectives and purposes of the Treaty. We find that the intention of the framers of the new East African Community

⁷⁶ Civil Appeal No. 8 of 1995.

Treaty of 2000 was to turn the page of the past and to build a new project for the future.

In conclusion, we rule that although the Court has the jurisdiction to hear the Reference and that it is not barred by the doctrine of res judicata or the rule of exhaustion of local remedies, nonetheless, it cannot entertain the Reference on account of the non retrospective application of the Treaty.

Article 54 of the Common Market Protocol did not extend the jurisdiction of the Court to handle disputes under the Common Market Protocol.

To that end the Common Market Protocol does not confer upon the East African Court of Justice it only provides for the settlement of disputes. The Common Market Protocol provides that;

Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.

In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.⁷⁷

In the case of **Alcon International limited v the Standard Chartered Bank of Uganda and 2 others** the appellant company was contracted by the National Social Security Fund, Uganda (NSSF) to construct 'Workers House', in Kampala. NSSF terminated the agreement and this set in motion arbitration proceedings under the contract. The appellant company was paid damages for breach of contract.⁷⁸

⁷ Article 54.

⁸ EACJ Appeal NO. 2 of 2011.

However the appellant company brought an action against the respondent to the East African Court of Justice in breach of contract.

The issues inter- alia was whether the appellant had rights under the Protocol on the Establishment of the East African Community Common Market in respect of acts which arose prior to the coming into force of the Protocol.

It should be noted that Article 54 of the Common Market Protocol did not extend the jurisdiction of the Court to handle disputes under the Common Market Protocol. Article 27 of the Treaty was not amended to cater for the purported extended jurisdiction.

The Court held that the Court had no such powers to try a matter that arose before the coming into force of the East African Treaty because the issue of retrospectively provided for in the present Treaty.

Where a public official of a Partner State fails to honour his obligation/duty, statutory or legal, to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has jurisdiction to enforce that obligation or duty expeditiously.

In the case of **Timothy Alivin Kahoho v the Secretary General of the East African Community** the applicant filed a reference praying for orders that the Summit directives set out in paragraphs 6 and 10 of the Comminque issued at the Ordinary Meeting in Bujumbura, Burundi be declared null and void as they issued in breach of Article 6, 7 and 123(6), 73 and 138 of the Treaty.

In this case the East African Court of Justice was obliged to give its opinion on the reference. As such Court stated this was not in violation of the Treaty.

In the three partner states acceptance and support of political pluralism is still wanting. There is a general resistance to diversity in political thinking and 'veiled' restrictions limit certain freedoms such as freedom of speech. The recent onslaught by Kenya

government security agencies on The Standard and Kenya Television Network (KTN) are indicative of the scope of press freedom.⁷⁹

Whereas progress in freedom of association has been registered under the multi-party politics dispensations in Burundi, Kenya, Rwanda, Uganda and Tanzania, a lot needs to be done in terms of creating an environment conducive for political parties to grow. Existing regulatory frameworks could be viewed as being restrictive. For example, under the prevailing multiparty political system dispensation efforts to expand a political pluralist culture needs to be financially resourced. Credible parties that have been established should be provided with funds by the state. The Chama Cha Mapinduzi in Tanzania and the National Resistance Movement in Uganda are much better resourced than their opposition and as a result there is a danger that 'one political party rule' will stifle the growth of political pluralism and of multi political parties.⁸⁰

The Constitution of Uganda provides that;

A political party in the multiparty political system shall conform to the following principles—

- (a) every political party shall have a national character;
- (b) membership of a political party shall not be based on sex, ethnicity, religion or other sectional division;
- (c) the internal organisation of a political party shall conform to the democratic principles enshrined in this Constitution;
- (d) members of the national organs of a political party shall be regularly elected from citizens of Uganda in conformity with the provisions of paragraphs (a) and (b) of this article and with due consideration for gender;
- (e) political parties shall be required by law to account for the sources and use of their funds and assets;
- (f) no person shall be compelled to join a particular party by virtue of belonging to an organisation or interest group.⁸¹

With this backdrop how should the organs of the East African Community such as the East African Legislative Assembly and the East African Court of Justice advance on these issues both prior to the establishment of the political federation and thereafter. The biggest challenge is the limitation of the East African Community to implement the

⁷⁹Supra note 52 p.16.

⁸⁰Supra note 52 p.12.

⁸¹Article 71.

Treaty because of the absence of an East African Community jurisprudence. Although Article 8(2) obliges Partner States to recognize the Treaty as part of their national law, an enabling law is yet to be enacted that is all encompassing. Unlike the European Community where Community laws are paramount and binding on all member states, East African Community Partner States are not limited by such restrictions.

General provisions

There are general provisions in the Protocol that touch on the following: Institutional framework needed to operationalize the East African Community Common Market; Approximation and Harmonization of Policies, Laws and Systems, Safeguard Measures, Measures to address imbalances, Monitoring and Evaluation, Regulations, Directives and Decisions, Annexes, Amendment of the Protocol, Settlement of Disputes, Entry into force and depository and registration.

The implementation of the East African Community Common Market Protocol will be guided by the relevant Annexes which are integral parts of the Protocol. So far, 6 Annexes are in place to guide the implementation of the various Articles of the Protocol. The Annexes are discussed in length below.

Free movement of persons within the East African Community

The annex on the Free Movement of Persons provides that:

A citizen of a Partner State who seeks to enter or exit the territory of another Partner State, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.⁸²

The free movement of people in the East African Community is set to be improved with the introduction of "third generation" ID cards. These cards will identify the holder as a dual citizen of their home country and of "East Africa". Third generation cards are already in use in Rwanda with Kenya set to introduce them and the other countries

⁸² Regulation 5(1).

Following afterwards. Mutual recognition and accreditation of higher education institutions is also being worked towards as is the harmonization of social security benefits across the East African Community.⁸³

The free movement of persons however is subjected to certain limitations as certain Partner States have come up with national ID Cards. This will be a limitation for the eventual political federation.

Without prejudice to these Regulations, a host Partner State may require citizens of other Partner States who are in its territory, to register with the competent authorities, in accordance with the national laws of the Partner State.⁸⁴

Free movement of workers within the East African Community

The Annex on the Free Movement of Workers provides that

A citizen of a Partner State who seeks to enter or exit the territory of another Partner State as a worker, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.⁸⁵

It should however be noted that the freedom of movement of workers within the territory of the partner states is subjected to restrictions as the limitations on the same freedom as The Annex on the Free Movement of Workers⁸⁶ provides that;

A citizen of a Partner State who seeks to enter the territory of another Partner State as a worker shall:

- (a) present to the immigration officer a valid common standard travel document or a national identity card where a Partner State has agreed to use a machine readable and electronic national identity card as a travel document;
- (b) declare all the information required for entry and exit; and
- (c) present a contract of employment to the immigration officer.

This limitation on the free movement of workers within the territories of the Partner States restricts the success of the East African Community.

⁸³en.wikipedia.org assessed on the 20th Oct 2012.

⁸⁴Regulation 9.

⁸⁵Regulation 5(1).

⁸⁶Regulation 5(1).

The creation of a Common Market as enshrined in the Common Market Protocol has faced various challenges. The challenges of a Common Market are discussed below⁸⁷ as it has resulted into trade diversion that is replacement of international trade of low cost source of production by a high cost source as a result of change in restrictions on a geographical basis.

The movement of goods maybe in one direction leaving other countries as net importers with balance of payment problems and thus this limits the formation of a political federation.

The Common Market arrangement may compel countries to buy commodities of poor quality within the arrangement instead of importing better ones from the third countries.

There can be uneven distribution of industries as a result of transport viability and good infrastructure.

The political problems tend to affect the community for example the change in leadership leads to change in policies because of weak institutions.

The free movement of factors of production would lead to competition and unemployment in some areas.

The removal of tariffs has resulted into loss of revenue as the Partner States tend to remove trade barriers for Partner States.

Common Market as a regional arrangement has benefited the East African Community as it has created a trade effect as it has replaced the international trade of high cost source of production by a low cost source of production as a result of change in tariffs and quotas.

The Common Market has also widened the market size of the East African Community for agricultural and industrial products.

The Common Market in line with the Partner States' aim of federating politically has resulted into reduction in costs of production through the allowing the free of

⁸⁷ B. Tayebwa, Basic Economics p. 266-267.

movement of factors of production in the region. This has also in turn resulted in reasonable prices for raw materials, labour and capital.

It is that regard therefore the legal framework for the formation of a political federation or the East Africa Community has achieved the reasons for its formation. The Common Market has promoted the free movement of factors of production in the East African Community which has facilitated development.

According to the East African Community Treaty, the East African Community intends to achieve a political federation starting with a common market and a monetary union. Therefore at the moment, the cooperation between the three East African countries can be categorised as being in a state of becoming, which in the long run is aimed at achieving a political federation. In other words, the integration process in East Africa is to be achieved incrementally. The argument has always been whether the logical conclusion of any integration process is political or economic unity.⁸⁸

³⁸ P. Kasaija, Regional Integration: A Political Federation of the East African Countries? African Journal of International Affairs, p.23.

CHAPTER FIVE

SUMMARY OF FINDINGS CONCLUSIONS AND RECOMMENDATIONS

Introduction

This chapter is a summary of the various discussions that came up during the research.

This research discussed in part the importance and problems associated with regional integration. In that respect it pointed out the benefits and problems associated with regional integration.

This chapter has presented an overview of regional integration.

Summary of findings

The thesis discussed the general and specific objectives of the of the Statement problem as presented in chapter one as such the thesis discussed the benefits and problems of the adequate legal framework associated with the formulation of a political federation of the East African Community.

The specific objectives where discussed in length as summarized below.

The first objective was to give a critique of the political federation of the East African Community. In that respect this paper discussed in length the problems associated with the regional block of the East African Community and the Partner States. In that regard this paper pointed out the problems of the community.

The objectives of the East African Community

The second objective was on giving an assessment of the contribution of a political federation to the East African Community in relation to a common market. In that regard the study discussed the contribution of the federation to the Community which included among others the benefit of free movement of labour, capital, goods and services.

In that regard the thesis discussed devising means of providing redress to the lacunas in the political federation of the East African Community.

The thesis also discussed and gave an assessment of the levels of rule of law in the East African Community Partner States.

The overall objective of the East African Community Common Market is to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States and their citizens.

Article 5 of the Treaty for the Establishment of the East African Community provides for the objectives of the East African Community.

Main Objective is to develop policies and programmes aimed at widening and deepening integration in political, economic, social and cultural fields, science and technology, defence, security, legal and judicial Affairs.

Further elaborations on the objectives of the East African Community are set out in Article 5(2) and (3) and areas of cooperation in the sectors outlined from Chapter 11 to 17 of the Treaty.

The fundamental principles that guide achievement of the objectives of the Community: Mutual trust, political will and sovereign equality, peaceful co-existence and good neighbourliness, peaceful settlement of disputes, adherence to the principles of good governance, democracy and rule of law, transparency and accountability, promotion of human rights and social justice.

These principles form the benchmarks for integration and for admission of new members to the East African Community.

The other element of the East African Community is the East African Court of Justice in implementing the Common Protocol.

The East African Court of Justice was created by the Treaty Establishing the East African Community (hereinafter referred to as the "Treaty"). The cardinal role of the Court is provided for in the Treaty establishing the East African Community which

provides that the Court is a judicial body tasked with ensuring that adherence to law in the interpretation and application of and compliance with the Treaty.⁸⁹

The thesis discussed the cooperation of the East African Community arrangement in political matters.

On that regard Chapter 23 of the Treaty for the Establishment of the East African Community provides for cooperation in political matters to that end Article 123(1) provides that In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty particularly with respect to the eventual establishment of a Political Federation of the Partner States, the Partner States shall establish common foreign and security policies.

The thesis discovered that the Regional integration by its nature is a political process by virtue of the need for ceding political sovereignty and the high level of political will, political responsibility and political courage.⁹⁰

Interventions under this sector included institutional and capacity development towards the East African Community Political Federation.

The consolidation of good governance, democracy, rule of law and protection of human rights, including cooperation among Partner States' institutions of governance and/or statutory bodies both at national and regional levels.

The institutions include, National Anti-corruption agencies, Ombudsman, National Electoral Commissions, National Human Rights Commission, Judiciary, Sectors responsible for upholding rule of law, access to justice and law reform

To facilitate harmonization/approximation of laws, policies, strategies, practices and programmes on democracy and good governance.⁹¹

The East African Community Development Strategy 2006- 2010 provided for development of an East African Community comprehensive regional framework of good

⁸⁹Article 23.

⁹⁰supra 88. p.20.

⁹¹ibid note 90.

governance. However there are many challenges of governance as political instability, mismanagement of public resources, abuse of human rights, public office, political transition, conflicts among others.

The potential benefits of the East Africa Community common market (actually benefits of regulatory reform) are well elaborated, both in theory and in practice across many other regional arrangements. The benefits of the East African Community Common Market should come through increased inter-regional trade of goods, services, labour, and capital. The benefits should be realized through static and dynamic channels: depend on private sector investment responses and on governments' non-interference with economic adjustment processes." The degree to which Partner States can resist such interference has yet to be proven.

One way to estimate the potential gains, and limits, of the Common Market Protocol is to look at the results of the East African Community.

Customs Union (CU), which has been implemented for five years, on inter-regional trade. A zero tariff regime on most internal trade was adopted in 2005, with a progressive tariff reduction program on some products from Kenya imported into Tanzania and Uganda. These tariffs fell by 0% by January 2010. By contrast, the East Africa Community Common External Tariff (CET) had differential effects on Partner States.

An early analysis found that Uganda's trade-weighted average tariffs rose by 14% points to 6.7% (compared to her 2003 tariffs), while those of Tanzania fell by 36% points to 5.6% and Kenya's declined drastically by 66% points to 5.9%. For these three States, the reduction of Kenya's and Tanzania's average tariffs more than compensated for the impact of the rise in Uganda's average tariffs. The Customs Union's net effect was found to be a 40% decline in average tariffs from 10% to 6%.

The effect of these internal and external tariff reductions on interregional trade, the most obvious indicator of impact, seems to be positive, although analysis for 2009 was not published. The Director of Customs in the East African Community Secretariat said in 2010 that there was a "tremendous increase" in trade. From 2005 to 2008, East

Africa Community intra trade rose by 49%. Tanzania and Uganda in particular benefited their export growth to the region more than doubled since 2005. This is of particular significance given the sensitivity of both countries to the potential economic dominance of Kenya in the common market.

The extent to which this is new or diverted trade is unclear. The economic benefits of increased interregional trade would be lower or even negative if trade was diverted rather than generated. For example, in Tanzania, for some sensitive products (used clothing; palm oil), the Common External Tariff was substantially higher than the 2003 national Most Favoured Nations tariffs, resulting in higher protection of intra-East African Community production, higher consumer prices and trade diversion. In January 2010, the Director of Customs wrote that some continuing inter-regional trade effects might actually be the result of trade diversion on a static level, reducing the costs and risks of all aspects of production, including transport, which increased business productivity.

On a dynamic level, increasing market competition in previously fragmented markets, which will stimulate dynamic effects such as incentives for innovation and market entry; The thesis discovered that Treaty for the Establishment of the East African Community is bereft with express provisions on the human rights and freedoms.

The East African Community Treaty is emphatic in its intention under Article 27(2) to extend human rights jurisdiction to the East African Court of Justice, at a suitable subsequent date. One possible interpretation of this is to say that the Treaty's "hints" on human rights are ineffectual. Another, and more plausible view, is to hold that there is a layer of inchoate human rights in the Treaty, waiting for practical implementation and operationalisation via the channel envisaged in article 27(2)".⁹²

⁹² Supra note 90. p.30.

Conclusions

The signing of the East African Community Treaty and the Common Market Protocol and its Annexes by the East Africa Community Heads of State was a step towards achieving a political federation. Now that it has been ratified, the Common Market Protocol will set the stage for substantial economic restructuring and market differentiation in the region that should, over the medium-term, increase economic opportunities and income for the 120 million citizens of the five Partner States of Kenya, Tanzania, Uganda, Rwanda, and Burundi.

The promotion of a Common Market remains an important aspect of a Political Federation of the East African Community. All these initiatives and programs lay a fertile foundation for the East African Community's ultimate goal of a Political Federation as provided for under Article 5(2) of the Treaty. Federating is not a single event but a process; requires addressing imperatives for a firm Peace and Security foundation. The Partner States in their struggle to achieve a political federation should take into considerations the interests of all the member states.

In so doing the Partner States should promulgate laws that will help the eventual success of the East African Community Political.

There is a need for a central authority to coordinate the implementing decisions made by various organs of the East African Community and to ensure that they are implemented efficiently and effectively.

The Political Federation will enhance the consolidation of what has so far been achieved through the integration process.

The Political federation will be used as a mechanism for channeling the benefits of economic integration more equitably among the Partner States

The basic problem with the strategy of the East African Community political federation is that it presupposes a considerable degree of regional economic integration which the East African Community has tried for a long time to promote but still has limited success.

Political Integration quickens economic integration because it is easier to coordinate one planning unit than several sovereign ones.

A central political authority will generate savings through consolidating rather than duplication of efforts.

There will be higher revenues from the bigger unit. The higher revenues will be more equitably accessible to all citizens under a Political Federation.⁹³

In that regard the difficulties in the way of the East African Community achieving a political federation are considerable.

In the first place is the element of political differences which include differences in the development ideologies of member countries and their fear for compromising their control over their territories.

The disparity of the size and economic development of the members which tends to cause monopolization of the benefits of economic integration of the East African Community. In that regard it will be the more developed members who will benefit from the common market.

The members of the regional arrangement are export oriented as for the primary producers whose primary products are in limited demand on the regional arrangements would look further for better markets.

According to the East African Community Treaty's preamble, one of the reasons why the 1967 East African Community collapsed in 1977 concerned "the lack of strong participation of the private sector and civil society in the cooperation activities".

Article 7 of the East African Community Treaty stipulates that one of the principles governing the practical achievement of the East African Community objectives is "people centered and market-driven co-operation".

⁹³ Supra 88 note p.20.

The Treaty on the Establishment of the East African Community is not explicit on the time frame for the establishment of the various stages of integration with the exception of the Customs union which was set at 4 years after the signing of the Treaty the Common Market has been achieved and the political Federation is yet to be achieved. However, in Article 123 (6) it is provided that "the Summit shall initiate the process towards the establishment of the Political Federation of the Partner States by directing the Council of Ministers to undertake the process.

The Treaty for the Establishment of the East African Community provides that; The Partner States agree that peace and security are pre-requisites to social and economic development within the Community and vital to the achievement of the objectives of the Community. In this regard, the Partner States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations on issues pertaining to peace and security of the Partner States with a view to prevention, better management and resolution of disputes and conflicts between them.⁹⁴

It should also be noted that the effort in regional integration has offered significant opportunities for promoting economic and social development in the East African Community region.

However, a wide range of challenges, many of which have proved to be stumbling blocks in the previous effort toward the establishment of the East African Community, still remain. These include: Implementing existing agreements: Phasing out tariffs within the region in order to implement an FTA and a common external tariff (CET) and removing non-tariff barriers (NTBs) and agreeing to future terms for cooperation and external trade.⁹⁵

The challenges for advancing a legal framework for the East African Community Common Market and the eventual political federation are many because of the differences in the Constitutionalism and the democratisation processes in each of the

⁹⁴Article 124(1).

⁹⁵ Taking East African Regional Integration Forward A Civil Society Perspective. p.10.

ve Partner States. While progress has been registered in Burundi, Kenya, Rwanda, Tanzania and Uganda, much more still needs to be accomplished if all the five Partner States are to be brought to par in terms of meeting the minimum standards for the respect for rule of law, the approximation of some national laws essential for a political federation to take root, securing judicial checks and balances on the executive, protecting human rights and freedoms, and creating a conducive environment for the evolution of democratic governance.

Recommendations

Following the admission of the Republic of Burundi and the Republic of Rwanda into the East Africa Community and their accession to the Treaty, an issue regarding rights and obligations pertaining to admission and accession deemed to have accrued.

The desire for regional integration of the East African Community should deal with in a manner that is accommodative so as to achieve the desired political federation. The question in this regard is how a common market can promote a political federation in East Africa Community. This can be achieved through harmonizing the available laws.

Further more the Member States ought to open up on the various barriers that still exist in the Community.

Insofar as the Common Market Protocol is concerned the attributes referred to in the East African Community Treaty, namely the fact of the East African Court of Justice being the main judicial organ of the Community that is accessible and independent contribute to the predisposition that the East African Court of Justice is the right court to ensure the implementation and enforcement of the Common Market Protocol.⁹⁶

In addition to the East African Court of Justice, national courts of the Partner States are envisaged to play an important role in the East African integration process. Thus, the Treaty stipulates that, unless the Treaty provides otherwise, disputes to which the East

⁹⁶ Supra note 95. p.12.

African Community is a party shall not on that ground alone be excluded from the national courts' jurisdiction.⁹⁷

While progress has been registered in Kenya, Tanzania and Uganda, much more still needs to be accomplished if all three Partner States are to be brought to par in terms of meeting the minimum standards for the respect for rule of law, the approximation of some national laws essential for a political federation to take root, securing judicial checks and balances on the executive, protecting human rights and freedoms, and creating a conducive environment for the evolution of democratic governance.⁹⁸

On that regard I recommend that further research should be carried out on the challenges of implementing all the institutions of a political federation. The challenges at hand are on the process of supporting the political federation arrangements.

The political arrangement and political governance is a cross-cutting issue among all the stages of East African Community integration as such the challenge of implementing political federation should be dealt with involvement of the civil society involvement in implementing in governance which is a prerequisite for a successful integration.

Also further consultations with the stakeholders including political parties, civil society, and local government is important to a successful political federation.

⁹⁷Art. 33(1) East African Community Treaty.

⁹⁸Supra note p.15.

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