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# CEDING SOVEREIGN POWERS OF THE PARTNER STATES TO THE EAST AFRICAN COMMUNITY – A VIABLE INTEGRATION MODEL?

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## **Abstract**

As a result of the changing nature of public international law, state sovereignty is increasingly becoming limited in the interests of the broader international community. The central thesis of this paper is that the East African Community Treaty, 1999 envisages the ceding of sovereignty by Partner States to the Community organs, though implicitly. It posits that the integration model adopted by the East African Community (EAC) is rather sceptical compared to other regional blocs whose provisions on pooling of the sovereignty are explicit. The paper thus addresses the legal aspects of transfer of sovereign power and its implications for the growing importance of regional economic integration. It suggests that the commitment to the EAC integration process not only requires the explicit inclusion of elements of ceding sovereignty to the Community in order to facilitate the integration process but also the political will of the Partner States to abide by the decisions resulting from the powers so ceded.

**Key words:** State Sovereignty, Viable Integration Model, Ceding Sovereignty, Principle of Direct Applicability, Principle of Direct Effect, Dualist System

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## 1. Introduction

The link between regional integration and the limitation of the sovereignty of States cannot be understated. Limitation of sovereignty of States may happen in two ways namely: the deliberate consent to rules limiting a State's sovereignty by concluding treaties on areas of corporation or through *jus cogens*,<sup>1</sup> norms and the obligation *erga omnes*.<sup>2</sup> Thus, the limitation of sovereignty comes through the ceding of sovereign powers. This concept of ceding sovereignty has attracted different codenames. While some scholars refer to it as 'transferring sovereignty,' others refer to it as 'pooling sovereignty' or 'ceding sovereignty'.<sup>3</sup> The concept requires the transfer of certain sovereign powers from Partner States to the Community. The Community then uses the powers so ceded on behalf of its members to perform the objectives for which it was established.<sup>4</sup> It must be noted that the transfer of such sovereign powers to an international organ draws its legitimacy from a Partner State's Constitution.<sup>5</sup> Thus the existence of a legal order different from that of the State ceding its sovereignty to another organisation is first conceptualised from a Partner State's constitutional order. Consequently, a new legal order applicable to the Community comes to fore.<sup>6</sup>

In light of the above, this Article proceeds to map out the East Africa Community's model of transfer of sovereign powers as set out in the East Africa Community (EAC) Treaty, 1999. In doing so, the author draws comparison

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<sup>1</sup> Weatherall Thomas, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2017); Hannikainen Lauri and Korkeakoulu Lapin, *Peremptory norms, jus cogens, in international law: historical development, criteria, present status* (Helsinki: Lakimiesliiton Kustannus 1988).

<sup>2</sup> Ferreira-Snyman, *Sovereignty and the changing nature of public international law: towards a world law?* *Comparative and International Law Journal of Southern Africa*, (2007).; Orago, N W, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective' [2013] 13(2) *African Human Rights Law Journal* 415-440.

<sup>3</sup> Simons Shan, *Redefining Sovereignty in International Economic Law* (Oxford 2008)

<sup>4</sup> Azizi, A, 'The Transfer of State Sovereignty: Analysis of Constitutional Change in Macedonia during the EU Accession Process the International Conference European Integration Realities and Perspectives' (Universitatis Danubius, 2014) <<http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1513> > accessed 3 February 2020 – footnote 30

<sup>5</sup> Martinez Magdalena, *National Sovereignty and International Organizations* (The Hague; Boston: Kluwer Law International 1996);

<sup>6</sup> Ferreira Snyman, 'Sovereignty and the changing nature of public international law: towards a world law?' [2007] 40(3) *Comparative and International Law Journal of Southern Africa* 395-424

to the experience of the European Union (EU) Member States who harmonized their constitutions thereby making a proper transfer of sovereign powers to the EU.

## **2. The Constitutional basis for Transfer of Sovereign Powers to the EAC**

Whereas EAC is not a State, it has the State-like features. These features are important in its relationship with its Partner States. In particular, EAC constitutes a legal order with a fully-fledged law making and enforcement powers.<sup>7</sup> For the existence of a legal order within the EAC, it must be noted that rules of conduct,<sup>8</sup> defined entities,<sup>9</sup> source from which one can identify the rules that form part of the legal order,<sup>10</sup> and the obligation to obey the rules of the legal system must exist.<sup>11</sup> Therefore, as a creation of the Partner States, it is important to address the basis of the transfer of sovereign powers to the EAC and its organs in the form of law-making and enforcement powers, which are majorly constitutional.<sup>12</sup>

Sampling the provisions of constitutions of Kenya, Uganda and Tanzania, sovereign power belongs to the people and can only be exercised in accordance with the respective constitutions.<sup>13</sup> According to these constitutions, the people can exercise sovereign power directly or through their democratically elected representatives.<sup>14</sup> It thus follows that sovereign powers under the EAC Partner States constitutions' can be delegated to the parliaments or legislative assemblies, the executive, the judiciary and independent tribunals.<sup>15</sup> It

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<sup>7</sup> Frimpong Oppong, 'Private International Law and African Economic Community: A Plea for Greater Attention' [2006] 55(1) *International and Comparative Law* 911.

<sup>8</sup> They regulate the behaviour and the activities within the legal order.

<sup>9</sup> These are entities to which the rules apply. These are the subjects of the legal system. The legal system confers benefits and imposes obligations on the subjects. These entities include, the Partner States as the primary subjects, EAC institutions, its employees and Citizens at large.

<sup>10</sup> Not every rule can claim a legitimate place within a legal system. Rules external to the legal system and those of other states are treated differently from the internal rules hence the autonomy of the community law.

<sup>11</sup> Kyambalesa, Henry, *Economic Integration and Development in Africa* (Hampshire: Ashgate Publishing Company 2010).

<sup>12</sup> Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2003)

<sup>13</sup> Article 1 of the Constitution of Kenya, 2010; Part IV of the Constitution of the Republic of Uganda, 1995 and Article 1 of the Constitution of the United Republic of Tanzania, 1977.

<sup>14</sup> Kamanga, K. C. *EAC Integration: Progress Achieved, Challenges and Opportunities* (2013).

<sup>15</sup> Article 1(3) of the Constitution of Kenya, 2010.

is against this background that the author has set out to interrogate a new dimension of looking at sovereignty in light of the proliferation of the regional economic blocs.

Whereas various constitutions affirm their supremacy over respective States' territories, the converse is true, especially when it comes to regional integration. This is because Partner States agree to regulate their conduct through a set of regional laws over those of national legal systems for their mutual benefit.<sup>16</sup> Partner States thus recognise how international law is instrumental in achieving the collective goals that necessitated the establishment of the economic community. Unlike Uganda and Tanzania, Kenya has by far appreciated the role of international law (treaties and conventions) in its domestic legal system.<sup>17</sup> The Constitution of Kenya provides that the general rules of international law forms part of Kenya's law.<sup>18</sup> It also provides that any treaties and conventions ratified by Kenya forms part of the law of Kenya.<sup>19</sup> The Treaty Making and ratification Act, which gives effect to Article 2(6) of the Constitution of Kenya, 2010 essentially makes Kenya a monist unlike other EAC founding Partner States.<sup>20</sup> It therefore follows that treaties ratified by Kenya need not be domesticated to gain the force of law like Tanzania and Uganda, which must be domesticated in order to be applicable domestically. In the monist system, once a treaty is ratified, it becomes part of the laws of the Monist State, thereby requiring no supervening acts like domestication.<sup>21</sup> Thus, whatever powers conferred upon the institutions created by the ratified treaties, are impliedly or directly transferred to such international institutions. The transfer is therefore accorded constitutional underpinnings through the ratification and domestication of the treaty.

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<sup>16</sup> Kamanga, 'Fast - Tracking' East African Integration and Treaty Law: *Pacta Sunt Servanda*, Betrayed?' [2010] 67(2) *Journal of African for Comparative International Law* 698-717

<sup>17</sup> Uganda: Ratification of Treaties Act 1998, Chapter 204, and Section 2(a) allows the cabinet to ratify defined treaties without resort to parliament; Article 63 of the Constitution of the United Republic of Tanzania, 1977 respectively.

<sup>18</sup> Article 2(5) of Constitution of Kenya, 2010

<sup>19</sup> Article 2(6) of the Constitution of Kenya, 2010.

<sup>20</sup> Uganda and Tanzania.

<sup>21</sup> Novaković, M Kreća, Basic concepts of public international law: Monism & dualism (Faculty of Law, University of Belgrade, Institute of Comparative Law, Institute of International Politics and Economics 2013)

From the foregoing, the EAC Treaty and Protocols must be implemented nationally through the constitutional procedures.<sup>22</sup> However, the implementation of the Treaties have been met with various challenges, particularly, when it comes to this mode of implementation, namely: a Partner State may not implement the regional treaties at all or may delay in implementing such treaties and protocols.<sup>23</sup> A Partner State may also implement the regional laws partially.<sup>24</sup> However, the EAC Treaty condones this by virtue of the principle of variable geometry.<sup>25</sup> This principle allows for progression in integration at various fields among Partner States within the Community at different speeds.<sup>26</sup> This may act as a defence to the Partner State's lethargy in implementing regional laws.<sup>27</sup> Some regional economic communities have found a way to avoid such crisis that may hinder integration through the creation of the principle of direct applicability.<sup>28</sup> It allows for integration of the community laws into domestic legal systems without intervening national procedures. In *Amsterdam Bulb v Produktschap Voor Siergewassen*<sup>29</sup> the European Court of Justice (ECJ) noted that direct applicability is the entry into force of community law and is independent of any reception measure by the national law.

Comparatively, some EU Member States like France, Germany and Italy had constitutional provisions limiting their sovereignty by transferring it to the international organizations way before they became members of the European Community.<sup>30</sup> The French Constitution allowed France to limit its sovereignty suitably during peacekeeping based on reciprocity principle.<sup>31</sup> On the other hand, Article 11 of the Italian Constitution of 1948 provided that Italy could

<sup>22</sup> Article 63 (3) of the Constitution of the United Republic of Tanzania gives the National Assembly the power to enact legislation where implementation of an international treaty requires legislation.

<sup>23</sup> Thomasz Milej, 'What is wrong with Supranational Law? The Sources of the East African Community Law in light of the EU's Experience' [2015] 75 (1) *Zielona Law Review* 579-617.

<sup>24</sup> Orago, N. W. (2013). The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective. *African Human Rights Law Journal*, 13, 2, 415-440.

<sup>25</sup> Kamanga, 'Fast - Tracking' East African Integration and Treaty Law: *Pacta Sunt Servanda*, Betrayed? [2010] 67(2) *Journal of African for Comparative International Law* 698-717

<sup>26</sup> Article 7(e) of the Treaty Establishing the EAC.

<sup>27</sup> Frimpong Oppong, 'Private International Law and African Economic Community: A Plea for Greater Attention' [2006] 55(1) *International and Comparative law* 911.

<sup>28</sup> Article 288 of the EU Treaty.

<sup>29</sup> [1976] ECR 137 at 146.

<sup>30</sup> Oppong, R. F. (2010). Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges Available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf) (accessed on 6th April 2016).

<sup>31</sup> Paragraph 16 of the preamble to the French Constitution of 1946.

agree to the same terms with other countries to limit the sovereignty to some extent for the sake of justice, security and peace among nations. Also, the German Constitution introduced a provision on Transfer of sovereign powers with the purpose of collective security system.<sup>32</sup> This provision allowed the federation to legally transfer its sovereign rights to international organizations.<sup>33</sup> These constitutional provisions were vital in the European integration process.<sup>34</sup> Does the EU success make it a model? Well, despite the Brexit, EU remains the most successful regional economic community despite its many challenges.<sup>35</sup> This model of a transfer of sovereign powers to international organizations is very effective for its functioning.<sup>36</sup>

From the forgoing, by Kenya, Uganda and Tanzania agreeing to revive the erstwhile EAC, 1977 they consented to the limitation of their Sovereignty. This limitation of sovereignty of Partner States was facilitated through the ratification of the East African Community Treaty, 1999. To legitimise the transfer, they domesticated the Treaty through national legislations namely: Treaty for the Establishment of East African Community Act, 2000 by Kenya, Treaty for the Establishment of East African Community Act, 2001 by Tanzania and East African Community Act of 2002 by Uganda. However, the rest of the Partner States who joined at a later stage acceded to the East African Community Treaty, 1999.<sup>37</sup>

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<sup>32</sup> Article 24 of the German Constitution of 1949.

<sup>33</sup> Azizi, A, 'The Transfer of State Sovereignty: Analysis of Constitutional Change in Macedonia during the EU Accession Process the International Conference European Integration Realities and Perspectives' (Universitatis Danubius, 2014) <<http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1513> > accessed 3 February 2020.

<sup>34</sup> You may want to refer to the Belgium Constitution, Article 34; Luxembourg Constitution, Article 49bis, Netherlands Constitution, Article 92–94. United Kingdom, European Communities Act 1972; Constitution of Poland, Article 91(3).

<sup>35</sup> See the CIA World Fact Book, EU Stands as an Unprecedented Phenomenon in the annals of history. Available at [www.cia.gov/library/publications/the-world-factbook/goes/ee.html](http://www.cia.gov/library/publications/the-world-factbook/goes/ee.html) (Accessed on 7th February 2016).

<sup>36</sup> Lock, T. (2009), *Why the European Union Is not a state: Some Critical Remarks*, Cambridge University Press. Available at <http://epubs.surrey.ac.uk/266406/> (accessed on 12th February 2016).

<sup>37</sup> They include Rwanda, Burundi and South Sudan.

### 3. Is Transfer of Sovereign Powers to the EAC envisaged under the EAC Treaty?

As discussed above, every State has its own legal system. The laws it enacts directly bind its subjects. Such laws cannot be contravened by any other law outside or within the domestic legal system. Rarely do States transfer or surrender these sovereign powers.<sup>38</sup> Most of the constitutional provisions declare the national constitution as the supreme law and thus legally binding within the state's legal system.<sup>39</sup> The idea of a foreign legal system like EAC legal system is to exist independently of the state, yet having the norms directly binding on the states and its subjects being directly applicable and enforceable within the State's legal system or prevailing over contradictory national laws-incompatible with this framework.<sup>40</sup> It is only through the transfer of sovereign powers at the international level, and the legitimization of that transfer at the national level, that such an idea can operate.<sup>41</sup>

The demonstration of ceding of state sovereign powers is to allow for direct application and the autonomy of the laws generated by the community institutions. In a nutshell, ceding sovereign power is more than just delegation or abdication of the decision making powers to external institutions.<sup>42</sup> These decisions made become part of the delegating State's legal system and therefore have a binding effect on it.<sup>43</sup> It is inconceivable to have a Customs Union, Common Market, Monetary Union, Political Federation or even an Economic Union where the Partner States have not ceded sovereign powers to the newly created legal system.<sup>44</sup> The EU's legal system from which EAC draws motiva-

<sup>38</sup> Frimpong Oppong, *Legal Aspects of economic Integration in Africa* (Cambridge University Press 2011)

<sup>39</sup> Haverland, 'National Adaptation to European Integration: The Importance of Institutional Veto Points' [2000] 20(1) *Journal of Public Policy*

<sup>40</sup> Orago, N W, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective' [2013] 13(2) *African Human Rights Law Journal* 415

<sup>41</sup> *Blackburn V. AG* [1971] WLR 1073.

<sup>42</sup> Evarist Mugisa and others, *An Evaluation of the Implementation and Impact of the East African Community Customs Union* (2009) <https://www.theigc.org/project/evaluation-common-external-tariff-cet-east-african-community-eac-uganda-rwandas-perspective-2017/> (accessed 3 February 2020)

<sup>43</sup> Lock T, *Why the European Union Is not a state: Some Critical Remarks* (Cambridge University Press 2009)

<sup>44</sup> Muhika, *Lessons for the Rise and Fall of the East African Community*, (Friedrich Ebert Foundation 1995)



tion exists as a result of the transfer of sovereign powers by the Member States and so is the EAC.<sup>45</sup>

In order to understand the transfer of power as envisaged in the EAC Treaty, it is important to look at the objectives of the EAC and the obligations placed upon the Partner States by the Treaty. In particular, the Partner States undertake the effective implementation of the necessary legislation to give effect to the Treaty. The Treaty provides that Partner States undertake:

...to confer upon the Community the legal capacity and personality required for the performance of its functions; and to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.<sup>46</sup>

The above Treaty provision impose an obligation on the Partner States to enact legislations that give effect to the treaty. It therefore follows that the EAC legislation is not attributed the force of law by virtue of the East African Community Treaty, 1999 itself; but rather through the Partner States who confer the force of law upon the Community's secondary legislations. This is in line with the dualist approach viewing international law and the domestic laws as two distinct legal orders.<sup>47</sup> Accordingly, even if the EAC secondary legislations became directly applicable, it is because the legislators of the Partner States allowed it to and not because the Partner States are subjects of the EAC law. It thus follows that a Partner State wishing not to limit its sovereignty need not enact domestic legislations giving force of law to the EAC laws. This is because East African Community Treaty, 1999 makes applicability of the secondary legislation conditional upon an action by national legislators. It can therefore be presumed that the EAC law does not constitute an autonomous legal order, the subject of which would include not just the Partner States but also the individuals.<sup>48</sup>

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<sup>45</sup> Dan, S. *Transfers of Powers to International Organizations* (Oxford University Press, 2007) Available at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199225774.001.0001/acprof-9780199225774-chapter-7> (accessed on 12th February 2016)

<sup>46</sup> Article 8 (2) of the EAC Treaty.

<sup>47</sup> Mvungi, Legal Analysis of the Draft Treaty for the Establishment of the East African Community in Mvungi, SEA (eds), P 89. in Mvungi (ed), *The Draft Treaty for the Establishment of the EAC: A Critical Review* (University of Dar es Salaam 2002) 89.

<sup>48</sup> Oppong, R. F. *Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges* (2010) Available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf) (accessed on 3 February 2020).

Furthermore, the EAC Treaty to which the Partner States are signatories went ahead to expressly provide for the hierarchy of norms and its institutions in matters pertaining to the integration. To be specific Article 8 of the treaty provides that the:

- (4) Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.
- (5) In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones<sup>49</sup> (*emphasis added*)

The EAC Partner States responded to these obligations by enacting the legislation giving the force of law to the provisions of the Treaty and conferring precedence upon the Community's institutions in matters of cooperation.<sup>50</sup> It is thus evident that the Treaty envisages the transfer of sovereign powers to the Community and its institutions not only by way of ratification of the Treaty but also by requiring the Partner States to enact legal instruments conferring precedence upon the Community Organs, Institutions and laws over similar national ones. By undertaking to do this, the Partner States limits their sovereign powers by transferring them to the Community through the national legislations so enacted.<sup>51</sup>

Whereas the Treaty establishing the EAC does not speak unequivocally about its sovereignty, the silence of the EAC Treaty on sovereignty must be contrasted with that of other Communities, namely the Economic Community of West African States (ECOWAS) Treaty. In its preamble, the ECOWAS Treaty expressly acknowledges that:

...the integration in the Member States into a viable regional community may demand the partial and gradual pooling of national sovereignties to the communities within the context of political goodwill.<sup>52</sup> [*Emphasis added*]

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<sup>49</sup> Articles 8(4) and 8(5) of the EAC Treaty.

<sup>50</sup> Uganda enacted the East African Community Act 2002; Kenya enacted the Treaty for Establishment of East African Community Act 2000 and Tanzania enacted the Treaty establishing the East African Community Act 2001.

<sup>51</sup> Ibid.

<sup>52</sup> See the Preamble of the ECOWAS Treaty.

The fact that the ECOWAS treaty expressly provides for pooling of sovereign powers by the Member States to the Community elevates ECOWAS law a notch higher in terms of clarity compared to the EAC Treaty.<sup>53</sup> However, it is also important to note that ECOWAS Treaty has a minute influence within its Member States.<sup>54</sup> It is rarely invoked before the national courts.<sup>55</sup> This fact brings yet another aspect of community law; that whereas it is important to have the express provisions in the founding treaties, their true effect is dependent on the political will and the circumstances of the particular Member States.<sup>56</sup>

One may also front an argument that a Partner State's declaration to transfer sovereign powers to the Community is unwarranted at the beginning of the integration process.<sup>57</sup> This is because such a Partner State may find the whole integration scheme revolting and opts to walk out at the earliest opportunity.<sup>58</sup> The proponents of this argument essentially want the Partner States to test waters before they can fully participate in the whole integration process by transferring their sovereign powers to the Community.<sup>59</sup> Such fears are the ones that hinder the progress of regional integration in Africa.<sup>60</sup> Many African countries are obsessed with retaining their sovereign powers as opposed to donating some of it to the regional bodies to facilitate economic

<sup>53</sup> Mvungi, *Legal Analysis of the Draft Treaty for the Establishment of the East African Community* in Mvungi, SEA (eds), P 89. in Mvungi (ed), *The Draft Treaty for the Establishment of the EAC: A Critical Review* (University of Dar es Salaam 2002) 89

<sup>54</sup> Bach D, 'Politics of West African Economic Co-operation: CEAO and ECOWAS' [2008] 44(1), *The Journal of Modern African Studies* 538-589.

<sup>55</sup> Kronenberger, 'A new Approach to the Interpretation of the French Constitution in Respect of International Conventions: From Hierarchy of Norms to Conflict of Competence' [2000] 47(1) *Netherlands international law review* 323-389

<sup>56</sup> Oppong, R. F. *Making Regional Economic Community Laws Enforceable in National Legal Systems-Constitutional and judicial Challenges* (2012). Available at <http://paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/MRI2008Chapter7Oppong.pdf> (Accessed on 3 February 2020)

<sup>57</sup> Adede, 'Constitutionalism, Culture and Tradition: African Experiences on the Incorporation of the Treaties into Domestic Law' [1999] 7(1) *African Yearbook of International Law* 239

<sup>58</sup> Mera, 'Obstacles to Regional Integration in Latin America and the Caribbean: Compliance and Implementation Problems' [2007] 7 (8) *Jean Monnet/Robert Schuman paper series* 1-24

<sup>59</sup> MacShane Denis, *Brexit: How Britain Left Europe* (Bloomsbury Publishing 2019); Biondi and others, *Brexit: The Legal Implications* (Alphen aan den Rijn Kluwer Law International 2019)

<sup>60</sup> The African Capacity Building Foundation, *Challenges Facing Africa's Regional Economic Communities in Capacity Building*, Occasional Paper No. 5 (2006) available at <http://www.acbf-pact.org> (Accessed on 3 February 2020)

and regional integration process.<sup>61</sup> This is evident in the wordings and constructions of provisions of their constitutions and treaties establishing such international organizations. Whereas the EAC Treaty acknowledges the need for the Community laws to have a force of law under Article 8, it has left it within the province of the Partner States to give Community laws the force of law by enacting national legislations to that effect.<sup>62</sup> This is unlike the EU that came up with the principle of supremacy of community law, principle of direct effect and the principle of direct applicability which spurred the economic integration.<sup>63</sup>

Comparatively, Germany a member of EU, unlike the EAC Partner States, introduced a new provision to its Constitution known as European Union.<sup>64</sup> Under this provision, it expressly authorized the transfer of state sovereign powers to the EU for the purposes of achieving the objectives of integration. Moreover, with a view to maintaining peace, the said provision provides that the Federal Republic of Germany may enter into a system of mutual collective security. In doing so, the Federation shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.<sup>65</sup> Also, after the Lisbon Treaty, France introduced a new chapter in its constitution Chapter XV. Article 88(1) under the said chapter contains the State's will to participate in the EU. Such express constitutional basis for transfer of power to the Community must not go unnoticed. Thus, a gradual transfer of sovereign powers to the EAC, even when not explicitly provided for in the EAC treaty, is inevitable for the realization of the objectives of the community.<sup>66</sup>

Even though the EAC Treaty is not express on the issue of transfer of sovereign powers, upon ratification of the EAC Treaty by Partner States, they are deemed to have transferred their sovereign powers to the EAC and as such, they are under obligation to observe the community's legal system. Also, the EAC Treaty is unquestionably governed by the Vienna Convention on the Law

<sup>61</sup> Kamanga K.C., 'Fast - Tracking East African Integration and Treaty Law: Pacta Sunt Servanda, Betrayed?' [2010] 44(4) *Journal of African for Comparative International Law* 698-717

<sup>62</sup> Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2007)

<sup>63</sup> Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press: Oxford 2001)

<sup>64</sup> Article 24 of the Constitution of the Federal Republic of Germany, 1949.

<sup>65</sup> Article 24(2) of the Constitution of the Federal Republic of Germany, 1949

<sup>66</sup> Kamanga, K. *EAC Integration: Progress Achieved Challenges and Opportunities*. (2013) Available at <http://www.ippmedia.com/frontend/?l=61095> (accessed on 3rd February 2020)

of Treaties, 1969. This implies the applicability of *Pacta Sunt Servanda* rule.<sup>67</sup> As a result of this fundamental principle, having signed and ratified the EAC Treaty, the Partner States are duty bound to fulfil their respective obligations in good faith. The act of ratification and domestication of the EAC Treaty and Protocols legitimizes the powers of EAC. By undertaking to make the necessary legal instruments to confer precedence on the community organs, institutions and laws over similar national ones and to confer upon the community the legal capacity and personality required for the performance of its functions; can be equated to the transfer of sovereign powers to the EAC.<sup>68</sup> The Partner States have therefore implicitly acknowledged that the Community legal system exists. That this is a constructive transfer of sovereign powers by the Partner States to EAC is arguable.<sup>69</sup>

Interrogating this concept of transfer of sovereign powers further, one can argue that in reality, the sovereign power that is given away mutates into an entirely new and more powerful authority than the ones transferred.<sup>70</sup> It is therefore important to ask whether the concept should be seen in a new light where subjects other than states can hold sovereignty – not just the parts of it that Partner States have transferred to the supranational bodies like EAC, but also what these supranational bodies have created using the transferred sovereign powers. Thus, a new sovereignty is built that is owned by other subjects other than Partner States, even if it was ultimately given such sovereign powers by the Partner States.<sup>71</sup>

Putting this into context, let us think of the EAC Partner States as the ‘building blocks’ with which the EAC is made. To complete the ‘EAC’ you will need more than the ‘building blocks’. During its construction, many ‘other materials’ used are not directly derived from one particular Partner

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<sup>67</sup> Kamanga K.C., ‘Fast - Tracking East African Integration and Treaty Law: *Pacta Sunt Servanda*, Betrayed?’ [2010] 44(4) *Journal of African for Comparative International Law* 698-717; Article 26, 27, and 31 of the Treaty Establishing the East African Community, 1999 are particularly relevant.

<sup>68</sup> Evarist Mugisa and others, *An Evaluation of the Implementation and Impact of the East African Community Customs Union* (2009)

<sup>69</sup> Kamanga K.C., ‘Fast - Tracking East African Integration and Treaty Law: *Pacta Sunt Servanda*, Betrayed?’ [2010] 44(4) *Journal of African for Comparative International Law* 698-717.

<sup>70</sup> Mvungi, Legal Analysis of the Draft Treaty for the Establishment of the East African Community in Mvungi, SEA (eds), P 89. in Mvungi (ed), *The Draft Treaty for the Establishment of the EAC: A Critical Review* (University of Dar es Salaam 2002) 89

<sup>71</sup> Kyambalesa, H. and Hounnikpo, M. *Economic Integration and Development in Africa*. (Hampshire: Ashgate Publishing Company, 2010).

State. It thus follows that when dismantling the building- the EAC, some of the materials would not revert to any Partner State but would simply disappear. This analogy paints a picture of the competence of the EAC and that of a Partner State. Simply put, there are areas where the EAC can act competently than the Partner States and equally there are areas where Partner States can act competently than the EAC hence the need to transfer part of sovereign powers to the Community.<sup>72</sup>

A discussion as to whether it is a viable model cannot be clearly put to rest as many grey areas continue to prop up. This calls for the question as to whether an organization can have its own sovereignty or if it is just the holder of the transferred sovereign powers from the Partner States. This may appear to prompt a theoretical discussion nonetheless it is an important issue worth a debate in the legal cycles. Whereas it appears theoretical, it helps us understand the general situation of East African regional integration and other forms of international organization. If the organizations were to talk of “life of their own” rather than acting as implementers of the decisions of the Partner States, the dynamics of regional integration and international relations may also change. It also goes without say that where an integration body has a strong role, its actions and decisions can shape the integration process decisively.<sup>73</sup>

From the foregoing, the transferred sovereign powers are therefore characterized by the ability of the EAC to make decisions that bind its Partner States and to enact legislations that override the national laws within the Partner States in areas of cooperation.<sup>74</sup> If there is no transfer of sovereign power either directly or impliedly, a Partner State cannot be held to have observed Community laws when such laws have no effect in its legal system or are overridden by its laws. Through this scheme of transfer of sovereign powers, the Partner States no longer retain the traditional sovereign prerogatives of legal supremacy, supremacy of the domestic institutions such as the national judiciaries. The transferred sovereign powers have led to the creation of

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<sup>72</sup> The EAC as a trading block can negotiate better deals with other trading blocs as opposed to a single Partner State. Collectively (EAC), the Partner States have higher bargaining powers as opposed to a single Partner State.

<sup>73</sup> Frimpong Oppong, *Legal Aspects of economic Integration in Africa* (Cambridge University Press 2011)

<sup>74</sup> Mvungi, *Legal Analysis of the Draft Treaty for the Establishment of the East African Community* in Mvungi, SEA (eds), P 89. in Mvungi (ed), *The Draft Treaty for the Establishment of the EAC: A Critical Review* (University of Dar es Salaam 2002) 89

East African Legislative Assembly (EALA), the East African Court of Justice (EACJ), and the East African Customs Union among others. Simply put, the Partner States have ceded powers to these institutions to facilitate the integration process. Therefore, decisions from these organs are binding on Partner States.

#### **4. Whether Transferring States' Sovereign Powers to EAC is a Viable Model**

Contextually, a viable model depicts a phenomenon capable of becoming actual, useful and practicable- working smoothly. It must show a chance of success. At this juncture, it is important to appreciate the history of the East African Community and what led to the collapse of the erstwhile EAC in 1977. It must also be noted that the 1999 Treaty is not the first attempt at integration between Uganda, Kenya and Tanzania. In 1967, the three countries adopted a similar worded Treaty and the organization came down crumbling barely a decade into its existence.<sup>75</sup> Learning from the failures of the erstwhile EAC of 1977 is important for the current EAC.

Also, the EAC Partner States have realized the need to sometimes transfer certain sovereign powers to the Community. This stems from the need to promote economic development through the coordination of regional policies. By virtue of ratification of the EAC Treaty, the Partner States have transferred sovereign powers to the EAC institutions. The Partner States have elevated the Community laws above the national laws in areas of cooperation at the community level. This transfer of the sovereign powers to the Community is a great achievement towards collectively exercising sovereign powers through the distinct Community's institutions.<sup>76</sup> The Partner States must also be willing to abide by the actions of the institutions to which sovereign powers have been transferred otherwise the transfer would not be worthwhile. These tests the political will of a Partner State to the EAC integration even after the supposed transfer of sovereign powers. Are they willing to abide by the directives and

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<sup>75</sup> Muhika, *Lessons for the Rise and Fall of the East African Community*, (Friedrich Ebert Foundation 1995).

<sup>76</sup> Mvungi, *Legal Analysis of the Draft Treaty for the Establishment of the East African Community* in Mvungi, SEA (eds), P 89. in Mvungi (ed), *The Draft Treaty for the Establishment of the EAC: A Critical Review* (University of Dar es Salaam 2002) 89.

decisions of the EAC and its institutions? The answer to this question is what determines whether the transfer of the said sovereign powers to the EAC is a viable model.

So far, the developments are promising. The East African Court of Justice (EACJ) for instance has had the opportunity to render itself on the issues that go to the core of transfer of sovereign powers. This touches on supremacy of the Community law and its applicability at national level.<sup>77</sup> Also, the aspects of the regional laws are already finding their way into the jurisprudence of national courts. This is despite the fact that the EAC Treaty is silent on principle of direct effect of the Community laws. Even so, the Treaty envisages the role of citizenry in the integration process. Perhaps this is why the preliminary reference procedure which allows the national courts to forward questions about EAC law to the EACJ for interpretation was included.<sup>78</sup> The absence of direct effectiveness of the Community law has not deterred national courts from making reference to the Community laws any way. In Uganda for instance, the High Court took judicial notice of the EAC Treaty in *Deepak Shah & others v Manurama Ltd & others*.<sup>79</sup> In the relevant part of the judgment, the court observed that:

Article 104 of the treaty [EAC Treaty] provides for free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under obligations to ensure the enjoyments of these rights by citizens within the community. In this regard, the court is mindful that the treaty has the force of law in each Partner State; and that this treaty law has precedence over national laws”<sup>80</sup> [*Emphasis added*]

This development in the EAC law represents a great leap towards the collective exercise of sovereignty through the national courts. This shows that both the national institutions and the regional institutions are beginning to take seriously the powers accorded to them by the Partner States for the facilitation of the integration process. As an arbiter and final determinant of community’s disputes, the EACJ has also had a couple of judicial integrationist judgments. The Partner States realized that certain matters are better dealt with at regional court instead of the national courts. This means that the Partner States submit

<sup>77</sup> Kamanga, K.C., *Principles of the East African Community: Scope and Legal Implications* (2014).

<sup>78</sup> Article 34 of the EAC Treaty.

<sup>79</sup> Miscellaneous Application No 361 of 2001 (Reported).

<sup>80</sup> The EAC Protocol on the Establishment of the Common Market, entered into force on 1st July 2010.



themselves to the jurisdiction of the EACJ.<sup>81</sup> By creating such a court, the Partner States simply conferred power upon the EACJ to invoke its jurisdiction in the bid to facilitate integration.

Putting this into context, the court's pronouncements have indeed showed the potential of the regional institutions towards fostering regional integration. In the case of *Anyang' Nyong'o v AG of the Republic of Kenya*<sup>82</sup>, the EACJ was called upon to decide on the legal position when an EAC Treaty provision conflicts with the national laws. The court held in apparent disregard of article 8(4) of the EAC Treaty, that the treaty did not provide explicit solution for such conflict. The court looked elsewhere for the basic principles of international law and the ECJ's persuasive authorities for answers. The court thus came to the conclusion that in case of conflict with national law, the Treaty prevailed. There is no better place to seek legitimization than in the legislation which the court avoided.

Even though the court proved its impartiality and independence in the *Anyang' Nyong'o Case*<sup>83</sup>, its decision was not well received by the Summit. In their joint Communiqué of the 8<sup>th</sup> Summit, as a reaction to the said ruling, the EAC Heads of State directed that:

... the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.... A special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard.”<sup>84</sup> [*Emphasis added*]

From the two interventions, it appears that the security of tenure for EACJ Judges was under threat. However, this reaction has not deterred the Judges from acting impartially and independently as evidenced by the successive judgments of the Court. Arguably, as a product of the transferred sovereign powers, it makes the Court an exemplary model, that even amidst inter-

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<sup>81</sup> Article 27 and 31 of the EAC treaty provides that the Court has jurisdiction over the interpretation and application of the Treaty provided that the Court's jurisdiction to interpret does not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States. It has also jurisdiction over disputes between the Community and its employees.

<sup>82</sup> [2008] 3KLR 397

<sup>83</sup> Ibid

<sup>84</sup> Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12. Available at [http://www.eac.int/news/index.php?option=com\\_docman&task=doc\\_view&gid=139&Itemid=77](http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=139&Itemid=77) (accessed on 10<sup>th</sup> February 2016)

ference, it has stood firm to propel integration process forward as envisaged under the EAC Treaty. The transfer of power to the EAC will only be viable if the institutions wielding such powers upon transfer are left to exercise such powers without interference. Therefore, its viability is dependent upon the political goodwill and the relations between the Partner States as well as the relations between national courts and other Community institutions which have shown so far that they have the potential and the zeal to drive the integration agenda forward.

Comparatively, the European Court of Justice (ECJ) has developed jurisprudence which many regional economic communities continue to rely on. The unique role played by the ECJ makes it a model. As result of innovative interpretation of EU treaty by the ECJ, it aided European integration. This confirms that transfer of sovereign powers to the community is not enough.<sup>85</sup> The most notable decisions include: *Van Gend en Loos v Nederlandse Administratie der Belastingen*<sup>86</sup> and *Flaminio Costa v ENEL*<sup>87</sup>. The Van Gend case is often referred to as ground-breaking decision. It held that the European Economic Community law was a sovereign legal order which created rights that could be invoked before domestic courts of member states. It also held that in case of conflict, European Economic Community law would take precedence over domestic laws. Quoting the relevant part of the judgment to the theme of this paper:

To the extent whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions. The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is **more than an agreement** which merely creates mutual obligations between contracting parties. (emphasis added)

In justifying such an interpretation, the court fell back to the preamble, the nature of the European Economic Community Treaty and imposition of obligations upon individuals for validation. The court thus held:

The conclusion to be drawn from this is that the [EEC] constitutes a new legal order of international law for the benefits of which states have limited their

<sup>85</sup> Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2008) 29.

<sup>86</sup> ECJ Case No. 26/62

<sup>87</sup> [1964] ECR 585

sovereign rights, albeit within limited fields, and subjects of which comprise not only of member states but also their nationals. Independent legislations of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon member states and upon institutions of the member states” (emphasis added)<sup>88</sup>

The EAC Treaty does not explicitly provide for the principles of direct effect and direct applicability. However, it is necessary to differentiate the direct effect of the primary law that include the EAC Treaty and the various Protocols from the direct effect of the secondary legislations enacted on the basis of the EAC Treaty. For instance, Article 54 of the Common Market Protocol provide that the Partner States guarantees any person whose rights or liberties as recognised under the Protocol and having been infringed upon the right of redress. However, the redress should be granted in accordance to the Partner States’ constitutions, national laws, administrative procedures and the provisions of the Common Market Protocol.<sup>89</sup> Casually, the provision seem to confer direct effect upon provisions of the Common Market Protocol; however, this is not true as it places conditions upon which direct effect can be invoked. Article 54 thus presupposes that the jurisdiction is established with regard to rights and freedoms recognised under the Common Market Protocol. Therefore, the recognition of such rights and freedoms by the Protocol is a substantive precondition for redress. Moreover, Article 54 of the Protocol makes the jurisdiction subject to national laws and it is not directly applicable itself as it is addressed to the Partner States. This shows that the Partner states have retained a lot of authority with regard to Community issues. Therefore, the principle of direct effect taken alone may now not be a stand-alone East African Community legal order’s pillar.<sup>90</sup>

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<sup>88</sup> Craig and others, *EC Law: Text, Cases and Materials* (Oxford University Press 1996) 152-153; 7. Ferreira snyman, ‘Sovereignty and the changing nature of public international law: towards a world law?’ [2007] 40(3) *Comparative and International Law Journal of Southern Africa* 395-424.

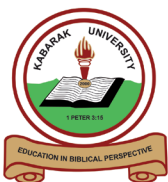
<sup>89</sup> Thorp, T. *Challenges of Incorporating the Economic Acquis Communautaire of The East African Community in A New Common Market* (2010) Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1632439](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632439) (Accessed on 30<sup>th</sup> December 2019)

<sup>90</sup> Thomasz Milej, ‘What is wrong with Supranational Law? The Sources of the East African Community Law in light of the EU’s Experience ‘ [2015] 75 (1) *Zielona Law Review* 579-617.

## **5. Conclusion**

The EAC is a legal order in itself. It is independent of Partner States. The decisions of its organs in matters pertaining to the implementation of the EAC Treaty are binding upon its subjects. By signing and ratifying the EAC Treaty, the Partner States have limited their sovereign powers and actually transferred some of their sovereign powers to the Community organs. Such transfers have been accorded a constitutional basis as the constitutional procedures have been put in place within the Partner States' legal framework. The EAC Treaty also envisages the transfer of sovereign power by placing obligations upon Partner States to legislatively confer powers upon the Community organs and that such organs take precedence over similar national ones. Whether the transfer of power as envisaged in the EAC Treaty is a viable model, cannot be answered in the affirmative yet. It is dependent on several factors including the political goodwill, as transfer of sovereign powers is not the only building block to a successful Community. The transfer of sovereign powers to the EAC is just but the initial stage, the question is- will the Partner States heed to the actions of the Community as a consequence of transferred sovereign powers?





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