

JUSTICE WITHOUT BORDERS: HOW AFRICA'S REGIONAL COURTS ENHANCE ACCESS TO JUSTICE – A FOCUS ON THE EAST AFRICAN COMMUNITY

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ABSTRACT

This study examines the impact of regional institutions of Africa in enhancing access to legal systems, with a particular focus on the East African Community (EAC). The objectives include evaluating the East African Court of Justice's role, identifying obstacles to legal access, and analyzing relevant legal frameworks. Utilizing qualitative research, data collection involved primary sources; interviews with key informants, and secondary sources from literature. A sample size of 16 participants, included government officials, business people, civil society members, and EAC officials. Theoretical frameworks applied include Legal Pluralism, Social Contract Theory, and Neo-Functionalism. The findings highlight the establishment, jurisdiction, and operational challenges of the EACJ, emphasizing its role in resolving transboundary disputes. Key conclusions indicate the necessity of institutional support and legal reforms to enhance accessibility. Ethical considerations such as confidentiality and informed consent were integral to the research process.

Keywords: Access to Justice, Regional Institutions, East African Court of Justice (EACJ), East African Community (EAC), Human Rights

1.0 BACKGROUND OF THE STUDY

In contemporary times, the dual phenomena of globalization and regionalization have profoundly influenced international dynamics. Globalization has fostered a more interconnected global economy and society, with diminishing trade barriers and a waning emphasis on the nation-state. Concurrently, regionalization has seen increased cooperation among states, particularly in the administration of justice¹. Regional economic integration in East Africa predates the post-colonial sovereign states that now constitute the East African Community (EAC). EAC's integration objectives are outlined in its foundational treaty, encompassing cooperation in political, economic, social, cultural, security, legal, and judicial domains. These objectives aim to establish a customs union, a common market, a monetary union, and ultimately a political federation².

The 1999 Treaty for the Establishment of the East African Community delineates these objectives' principles, emphasizing good governance, democracy, and human rights. Articles 6(d) and 7(2) of the treaty enshrine guidelines on governance, the rule of law, gender equality, and human rights recognition and protection. Modern legal systems face growing scrutiny

¹ Mariotti, "Win-Lose' Globalization and the Weaponization of Economic Policies by Nation-States."

² Ugirashebuja, East African Community Law, 2017.

regarding their effectiveness, costs, and beneficiaries³. Critics from the social sciences highlight the need for creative responses to these challenges, contributing to the ongoing struggle for access to justice. This struggle is mirrored in regional African institutions, which play a crucial role in ensuring justice access, a cornerstone of democratic governance. The East African Court of Justice (EACJ), established under Article 9 of the EAC Treaty, has been pivotal in the EAC's integration agenda, influencing national court decisions and developing a robust legal framework. Despite its critical role, there remains a dearth of research on the EACJ's impact on justice access. This study seeks to elucidate the EACJ's influence on access to justice, identifying its challenges and contributions⁴.

Access to justice is widely recognized as essential for democracy, good governance, and equitable development. The United Nations' Sustainable Development Goal 16 (SDG16) underscores this by advocating for peaceful, inclusive societies with accessible justice systems and accountable institutions at all levels. The UNDP also regards access to justice as a fundamental human right⁵. The EACJ has significantly contributed to promoting regional integration and cooperation in East Africa. However, despite its efforts, there exists a critical knowledge gap concerning its strategies, impact, and challenges in advancing access to justice. This research aims to investigate the EACJ's role in enhancing justice access within the EAC, focusing on its institutional mechanisms, obstacles, and outcomes.

1.1 Objectives

- i. To determine the East African Court of Justice's importance in improving access to justice.
- ii. To discover the obstacles to obtaining justice within the Eastern African Economic Communities.
- iii. To find out the key legal and policy frameworks required to enhance access to justice in the East Africa Economic Community
- iv. To analyze the prospects of access to justice in EAC.

2.0 THEORETICAL REVIEW

2.1 Social Contract Theory

Social contract theory, a foundational concept in political philosophy, was developed by Thomas Hobbes (1651), John Locke (1689), and Jean-Jacques Rousseau (1762). The theory posits that individuals collectively agree to form a society by consenting to surrender certain freedoms to a governing authority in exchange for the protection of their remaining rights. Hobbes emphasized the necessity of a strong sovereign to prevent anarchy, Locke underscored natural rights and the need for government accountability, and Rousseau highlighted collective will and popular sovereignty as the basis for legitimate governance. These principles form the foundation for modern democratic and legal systems by emphasizing mutual obligations

³ Hagabimana, "A Legal Analysis of the Relationship between State Sovereignty and Regional Integration."

⁴ Ekutu, "The Prospect of Monetary and Financial Co-Operation."

⁵ Keilitz, "The Trouble with Justice in the United Nations Sustainable Development Goals 2016-2030 7 William & Mary Policy Review 2015-2016."

between the state and its citizens. In the context of Africa's regional institutions, social contract theory offers a lens through which to understand the EAC Jole in enhancing access to justice. Member states effectively enter a regional social contract by delegating certain legal powers to the EAC's institutions. This agreement is designed to strengthen collective governance and promote justice across borders. The EAC, through institutions like the East African Court of Justice (EACJ), provides mechanisms for resolving disputes that transcend national jurisdictions, embodying principles of shared governance and mutual accountability akin to the theoretical foundations of the social contract. The impact of this regional social contract is evident in the EAC's efforts to harmonize legal frameworks and enhance access to justice for individuals and communities. By fostering collaboration among member states and promoting adherence to shared legal standards, the EAC advances the rule of law and mitigates the challenges posed by legal pluralism. The principles of social contract theory are reflected in the EAC's initiatives to balance national sovereignty with regional integration, ensuring that justice is accessible and equitable within the regional cooperation framework. Critics of Social Contract Theory argue that it is overly idealistic and assumes a hypothetical agreement that may never have existed in reality. It often overlooks the inequalities and power imbalances present in society, which can undermine the legitimacy of the "contract." Additionally, the theory may fail to account for the diversity of cultural and moral perspectives, limiting its applicability in pluralistic societies.

2.2 Neo-Functionalism Theory

Neofunctionalism is a theory of regional integration that downplays globalization and reintroduces territory into its governance. Neofunctionalism is often regarded as the first European integration theory developed by Ernst B. Haas (1958). Neofunctionalism argues that when countries agree to cooperate in a given sector, this cooperation creates incentives to cooperate in other similar and/or related areas. Secondly, neo-functionalism holds that economic integration almost always leads to an increase in interaction between actors in the integrating region⁶. Consequently, sub-state actors begin to cooperate politically across borders to lobby their political leaders. Interest groups begin to flourish at a regional level, and domestically, interest groups lobby their governments to further integrate. Thirdly, the supranational body designed to oversee integration begins to pursue strategies to deepen integration in already integrated sectors and expand integration to other sectors (and in doing so further its interests). Supranational bodies can achieve this by continuously promoting the benefits of further integration and building or supporting regional and domestic interest groups that will press for further integration⁷.

In the context of access to justice, as African countries integrate through legal harmonization or the establishment of regional courts, this fosters improved cooperation in other sectors such as human rights, enhancing access to justice. The theory also emphasizes the role of supranational institutions, like the East African Court of Justice (EACJ), to facilitate regional integration. These institutions help standardize legal practices, promote accessibility to justice systems, and foster collective identity among member states. However, critics of neo-functionalism argue that such integration may sometimes overlook local contexts and

⁶ Macmillan, "THE APPLICATION OF NEO(NEO)FUNCTIONALIST THEORY TO JUSTICE AND HOME AFFAIRS."

⁷ Dolgicer, "Applying the Neo-Functionalist Paradigm to Assess the Integrative Consequences of the European Court of Justice's Human Rights Jurisprudence."

disparities, centralizing power within regional institutions at the expense of national sovereignty. This critique is particularly relevant as the research seeks to explore the link between regional institutions, like the EACJ, and their role in promoting access to justice across the region.

2.3 Empirical Review

The origins of international adjudication trace back to the 1899 Convention for the Pacific Settlement of International Disputes, followed by the establishment of the Central American Court of Justice in 1907, marking the foundation of international courts aimed at conflict resolution and control⁸. Initially, international courts served as neutral forums for state-to-state dispute resolution. Over time, their role expanded to encompass treaty enforcement and the facilitation of regional integration efforts⁹. Regional integration in Africa has its roots in the immediate post-independence period of the 1960s, fueled by pan-African ideologies and the formation of the Organization of African Unity (OAU) in 1963¹⁰.

In West Africa, initial steps toward regional economic cooperation began in 1964, with the Treaty of Lagos 1975 establishing the Economic Community of West African States (ECOWAS). However, judicial mechanisms were initially absent, with disputes referred to ad hoc arbitration until the establishment of the ECOWAS Court in 1991¹¹. In East and Southern Africa, integration efforts included the formation of the Preferential Trade Area (PTA) in 1981, evolving into the Common Market for Eastern and Southern Africa (COMESA) in 1994. In Southern Africa, integration efforts culminated in the Southern African Development Community (SADC) in 1992, following the transformation of the Southern African Development Coordination Conference (SADCC). Despite advancements, the SADC Tribunal faced challenges related to legitimacy and was suspended¹². In North Africa, the Arab Maghreb Union (AMU), established in 1989, has remained largely inactive. The Community of Sahel-Saharan States (CEN-SAD), created in 1998, serves as a broader integration framework but lacks robust judicial mechanisms¹³. The absence of judicial enforcement mechanisms during the early phases of African integration is attributed to several factors. Economic integration was initially perceived as technical and devoid of political stakes, making arbitration sufficient for conflict resolution¹⁴. Authoritarian governance across Africa during the post-independence era limited the emphasis on judicial processes. Traditional African reconciliatory methods of dispute resolution favored arbitration over contentious litigation. The global wave of democratization in the late 20th century also catalyzed the establishment of judicial frameworks, such as the ECOWAS Court, the COMESA Court (1998), and the EAC Court

⁸ Crawford, "Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture | Journal of International Dispute Settlement | Oxford Academic."

⁹ Adeyemo, "From Diplomatic Protection to Modern Arbitration."

¹⁰ Hersi and Akinola, "Pan-Africanism and Regional Integration | SpringerLink."

¹¹ Alabi, "Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa."

¹² Muntschick, "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework | SpringerLink."

¹³ Magu, "Community of Sahel-Saharan States (CEN-SAD): All Our Northern Brethren | SpringerLink."

¹⁴ Kiplagat, "Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience 15 Northwestern Journal of International Law & Business 1994-1995."

(2002). The African Court on Human and Peoples' Rights, adopted in 1998, and the Court of Justice under the African Union Protocol in 2003 further reflect this trend¹⁵.

Several comparative studies have examined the role of judicial mechanisms in advancing integration. The ECOWAS Court has become a central mechanism for enforcing treaty obligations and enhancing regional integration.¹⁶ A study by the Danish Institute compared access to justice and legal aid in Kenya, Uganda, and Tanzania, highlighting barriers like illiteracy, poverty, and complex legal systems that hinder equal access to justice¹⁷. Another comparative study on the Southern African Development Community Tribunal (SADCT), the European Union Court of Justice (ECJ), and the Andean Court of Justice (ACJ) revealed varying integration outcomes. While the ECJ successfully fostered integration, the SADCT struggled due to legitimacy issues, and the ACJ faced challenges from weak institutional frameworks¹⁸. Barriers to justice in Sierra Leone, Tanzania, and Zambia, including systemic inequalities and socio-economic challenges, underscore the need for stronger judicial systems¹⁹. Judicial frameworks are integral to fostering effective regional integration in Africa. While historical and political factors delayed their establishment, the growing complexity of integration efforts necessitates robust judicial mechanisms²⁰. The European Court of Justice serves as a model, demonstrating how courts can shape policy and integration trajectories. Despite advancements, African regional courts face challenges related to legitimacy, problem pressure, and institutional capacity, underscoring the need for continued investment in legal frameworks and governance structures²¹.

2.4 Conceptual Framework

This framework illustrates the interplay between national judicial systems and regional institutions in providing access to justice. It questions whether these two approaches compete with or complement each other while emphasizing their shared goal of achieving substantive and procedural standards in justice. The framework outlines key dimensions—such as legal awareness, availability of services, adjudication processes, enforcement mechanisms, and transparency—that underpin access to justice. The comparison analyzes the strengths and gaps of both classical (national) and alternative (regional) systems in ensuring justice for all.

¹⁵ Taye, "INSTITUTIONAL CAPACITIES AND THE CHALLENGES OF CONTINENTAL INTEGRATION: A CRITICAL STUDY OF THE AFRICAN UNION COMMISSION AS AN INTEGRATIVE TOOL."

¹⁶ Alabi, "Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa."

¹⁷ Odhiambo, "Placing Access to Justice at the Centre of Legal Education in Kenya."

¹⁸ Lenya, "Refubium - Supranational Courts as Engines for Regional Integration?"

¹⁹ Kanyako, "Civil Society and Peacebuilding in Sierra Leone: Donors, Government, And ..."

²⁰ Oppong, "Legal Aspects of Economic Integration in Africa - Richard Frimpong Oppong - Google Books."

²¹ Stone, "The European Court of Justice and the Judicialization of EU Governance by Alec Stone Sweet :: SSRN."

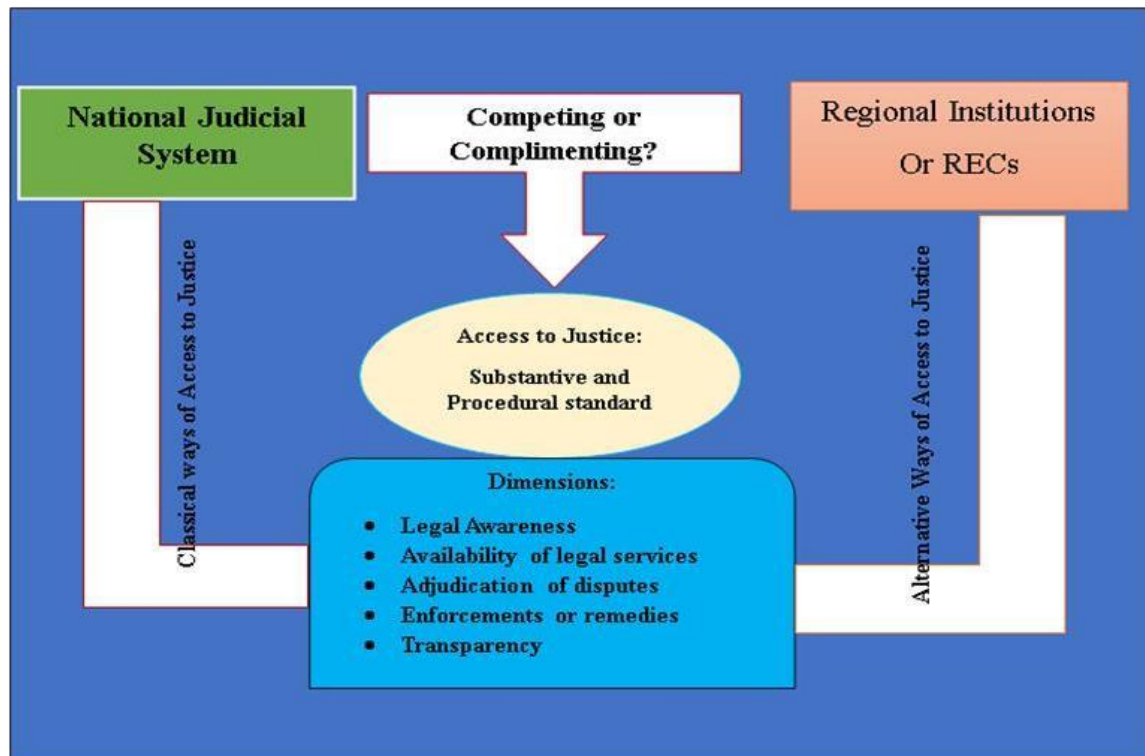


Figure1.1 Conceptual framework of the study

This figure illustrates the interaction between the National Judicial System, Regional Economic Communities (RECs), and their impact on access to justice. It highlights two pathways: classical ways through the National Judicial System and alternative ways via Regional Institutions. At the centre of the framework is the concept of "Access to Justice," defined by substantive and procedural standards. The framework outlines key dimensions necessary for access to justice, including legal awareness, availability of legal services, adjudication of disputes, enforcement of remedies, and transparency. The model raises the question of whether these systems are competing or complementing each other in delivering justice.

3.0 METHODOLOGY

This study adopts a qualitative research methodology to explore the role of the East African Community (EAC) in enhancing access to justice. Qualitative research is ideal for understanding complex social phenomena, gathering participants' experiences, and addressing "how" and "why" questions. The study incorporates empirical investigations and analytical legal research to examine the gap between legal ideals and social realities, considering law's social, political, economic, and cultural dimensions. A descriptive survey design further facilitates the exploration of variables and generalizations across the population. Data collection included primary data from interviews and secondary data from literature sources. Key informant interviews provided in-depth insights and cultural sensitivity, while case studies illustrated legal principles, trend analysis, and cross-jurisdictional comparisons.

The target population included government officials from EAC member states, business people, civil society members, students, journalists, academicians, and EAC Secretariat

officials. Specifically, respondents include integration officers from EAC ministries, cross-border businesspeople, and members of the East African Court of Justice. The study selected a sample size of 16 individuals, ensuring equal gender representation (8 men and 8 women) and diversity across the region. This sample includes 2 officials from the EAC Secretariat in Arusha, 2 businesspeople along Kenyan border points, 2 members of the East African Court of Justice, and 2 representatives of civil society organizations operating across the EAC region. The sample size was chosen for its ability to reflect varied perspectives and experiences within the EAC framework while maintaining feasibility and focus for qualitative analysis. Data validity was ensured through the split-half method and expert review, and qualitative analysis involved systematic organization and thematic exploration presented through narratives and direct quotes. Ethical considerations focused on confidentiality, informed consent, cultural sensitivity, and minimizing risks.

4.0 DISCUSSION AND FINDINGS

4.1 Establishment of the East African Court of Justice

It is a reality that when people interact, they will likely get into differences and disagreements. That is human nature. Courts of law are purposely created to address this natural eventuality of human relationships. Similarly, the more East African countries get integrated, the more disputes of a transboundary nature are likely to happen²². The visionary founders of the EAC foresaw this situation and decided to create the East African Court of Justice. EACJ was established under Article 9 of the Treaty for the establishment of the East African Community²³. The Court's major responsibility is to ensure adherence to the law in the interpretation and application of and compliance with the Treaty²⁴.

The Court is composed of; the First Instance Division and Appellate Division. The first instance division is composed of not more than ten judges, whereas the appellate division is comprised of five judges. The Treaty before it was amended provided for a maximum of six judges, two from each of the three partner states, appointed by the Summit from sitting judges of any national court of judicature or from jurists of recognized competence²⁵. However, on November 30, 2006, the Summit approved the division of the Court into two chambers, the First Instance Division and the Appellate Division. Article 27 gives the Court initial jurisdiction over the interpretation and application of the treaty. It is remitted until extended [Art. 27(2)]. and is primarily related to the enforcement of the treaty²⁶.

4.2 Legal Institutional Framework of EACJ

²² Paul, "Human Rights Law Meets Private Law Harmonization: The Coming Conflict 30 Yale Journal of International Law 2005."

²³ Gathege, "Dispute Settlement within the East African Community: The East African Court of Justice and Its Jurisdiction."

²⁴ Adjolohoun, "A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights."

²⁵ Adjolohoun.

²⁶ Ahmed, "The Enforcement of Settlement and Jurisdiction Agreements and Parallel Proceedings in the European Union: The Alexandros T Litigation in the English Courts: Journal of Private International Law: Vol 11, No 3."

The legal and institutional framework governing EACJ operations is largely drawn from the Treaty for the Establishment of EAC. The Rules deal with several issues such as the Registry; preparation, lodging, time of lodging, amendment, modes of service of documents; they also deal with appearance and representation, court vacation and holidays, the institution of proceedings at the Court, written proceedings, third-party interventions; amendment of pleadings; withdrawal and discontinuance; oral proceedings; judgment and orders; appellate processes; costs and fees²⁷. 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 the jurisdiction conferred by the Treaty on organs of Partner States. It also has jurisdiction over disputes between the community and its employees. Initially, the Court's jurisdiction was limited to ensuring adherence to law in the interpretation and application of the treaty²⁸. However, to ensure conflict resolution and confidence building in the region, it has always been envisaged by the Treaty that the Court shall have such other original, appellate, human rights, and other jurisdiction as should be determined by the Council at a suitable date²⁹. In 2015, the Court's jurisdiction was extended to cover trade and commercial disputes and disputes arising out of the implementation of the Protocol on the Establishment of the East African Monetary Union³⁰.

EACJ exercises its jurisdiction on the entire territory of its member states but only receives complaints relating to any act, regulation, directive, decision, or action of a member state or an institution of the Community because such act, regulation, directive, decision, or action is contrary to the EAC Treaty (Art. 30 of the Treaty). Looking at other forms of EACJ jurisdiction, they are clear and more progressive. Like most other contemporary international courts, the EACJ has gone beyond the old model of international judicial bodies, which were primarily created to settle disputes between states³¹.

4.3 Accessibility of the EACJ.

In the past, states were more inclined to resolve international conflicts through diplomatic efforts rather than through acrimonious litigation. This was because most global tribunals and courts at the time were unwilling to enable individuals to gain direct access. As a consequence of friendly nations' unilateral unwillingness to prosecute one another to justice, international judicial entities fell into dormancy³². In this sense, African sub-regional courts were not an exception, and the vast majority of them were mainly quiescent in the initial stages. Individuals have been granted direct access to the ECOWAS Court and the EACJ, providing individuals with an opportunity to access justice within a short period. As far as they are residents in any of the partner states, the EAC Treaty provides both natural and legal persons to lodge disputes

²⁷ Andrews, "The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England | SpringerLink."

²⁸ Duncan, "Treaty Interpretation and The Incorporation Of Extraneous Legal Rules | International & Comparative Law Quarterly | Cambridge Core."

²⁹ Cerone, "Jurisdiction and Power."

³⁰ Munyangabe, "An Assessment of East Africa Community Dispute Resolution Mechanisms and Prospects of Sustainable Peace (2012-2018)."

³¹ Ally, "The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community - ProQuest."

³² Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice."

directly before the EACJ (Art. 27), unlike the European Union Court of Justice. EACJ applications do not have to pursue all available domestic remedies before being filed with the court. Although the EACJ determined that the EAC Treaty does not provide any requirement before one may present a case, the Treaty is silent regarding whether one must go through local remedies before reaching the EACJ.

Concerning the prerequisite of being a victim of a violation for filing a case before the EACJ, the treaty is similarly muted. The EACJ's flexibility in accepting cases presented by individuals directly is a significant advancement in ensuring access to justice, whereas such a right of direct action by persons is permitted only exceptionally before the CJEU³³. Advocates are required to be granted the authorization to appear in court. Both written pleadings and oral hearings constitute components of the court's proceedings (The Treaty). EACJ cannot receive cases between individuals (legal and natural persons). The EACJ can only find the conduct of governments and EAC institutions to be inconsistent with the EAC Treaty or its Protocols³⁴. Apart from dealing with individuals, the EACJ can handle cases of dispute between the community and its employees, (Article 31) cases originating from an arbitration clause agreement, and special agreements binding the disputing parties where there is a clause conferring jurisdiction on the Court (Article 32). When faced with a question regarding an interpretation of the EAC Treaty, a national court may refer the matter to the EACJ for interpretation. (Article 34). This requirement is discretionary. Also, the EACJ can give an advisory opinion upon being requested by the Summit, the Council, or a Member State whenever there is a question of law arising from the EAC Treaty (Article 36). Advisory opinions are determined by the Appellate Division of the Court. (Rule 75(4) of the East African Court of Justice Rules of Procedure (2013). Unlike other international courts, no exhaustion of local remedies is required to access the EACJ, as long as a matter is instituted within a two-month limitation period. Furthermore, there are no fees charged for filing a case in EACJ, which makes it ease of burden and a factor in enhancing access to justice for the EAC community. Litigation fees discourage the poor from claiming infringement of rights; as a result, litigation fees are one of the drawbacks to the enhancement of access to justice.

4.4 Sub registry

The EACJ established sub-registries in an attempt to bring justice closer to the people. The EACJ opened sub-registries for each member state after the Court's request to open sub-registries was approved by the Council in 2010 (source interview). The idea of opening sub-registries dominated the Court from its inception, owing to the presence of a provision for sub-registries that was inserted in the Court's Rules of Procedure. The Court always had in the back of its mind the fact that the only registry in Arusha was too far away from its stakeholders, and as a result, there was unease about its accessibility (source interview). The Court has established sub-registries in the capital cities of the partner states to "bring justice closer to the people" and reduce travel costs for litigants, which is mostly one of the determinants of access to justice. Each sub-registry has a court clerk employed by the EACJ who handles cases for

³³ Munyangabe, "An Assessment of East Africa Community Dispute Resolution Mechanisms and Prospects of Sustainable Peace (2012-2018)."

³⁴ Ally, "Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice."

both decisions and receives and files cases brought to the Court. These cases are immediately transmitted to the main registry via the electronic case management system.

4.5 Time Limit

Article 30(2) of the EAC Treaty mandates the filing of complaints before the EACJ within two months of the enactment, publication, directive, decision, or action that violates the EAC law, or the day the complainant becomes aware of a specific breach (the Treaty). The introduction of a 60-day time limit within which to file cases before the EACJ has effectively blocked access to justice for individuals who would wish to have their cases ventilated before the EACJ³⁵. It also denied the Court an opportunity to pronounce itself on fundamental cases of human rights and governance, which would enrich its jurisprudence. *Attorney General of Uganda v. Omar Awadh* is the leading case regarding the time restriction rule. The court's decision determined that the detention the petitioner had complained about was part of a precise sequence of actions. The court based its judgment on the fact that the applicant was fully aware of the act of claim. As a result, the execution day of arrest and imprisonment marked the beginning of the two-month statute limit under Article 30(2)³⁶.

The court stated that the express language of Article 30(2) does not compel any conclusion to exempt continuing violations from the two-month limit. The nature of the particular violation alleged in the instant case, however, does not demonstrate any intent on the part of the treaty's drafters to treat unlawful arrest and rendition as continuous violations for purposes of Article 30(2)'s time limit. The court concluded that because the reference was filed more than one year after the events complained about, the cause of action was time-barred for non-compliance with Article 30(2) of the Treaty³⁷. In this case, the EACJ took the position that the strict application of the two-month rule is necessary for legal certainty. The court established that it could not uphold the principle of continuing violation since it is a human rights principle, and the Court does not have the jurisdiction to deal with human rights cases. The court narrowly linked the continuing violation doctrine solely to human rights, but it supports the doctrine whenever there is a violation of the rule of law, such as in the case of unlawful detention.

The relationship between an international/regional court and a state is relevant to the requirement of exhausting local remedies. International law founded the doctrine of exhaustion of local remedies on the principle that states should have the opportunity to rectify an alleged wrong within their domestic legal system before questioning the international responsibility at the international or regional level³⁸. However, it is crucial to emphasize that the EACJ does not require the exhaustion of domestic remedies before filing a petition, a principle often mandated in international law. While people have "direct access" to the Court, the issue of time limitations for filing a case is still a matter of discontent. The complainant can only raise the timeframe by two months once they have identified potential violations. The applicant has a limitless amount of time to acquire knowledge, and the grace period can "last as long as it takes for the complainant to gain the essential knowledge." The research suggests that the presence

³⁵ Lando, "The Domestic Impact of the Decisions of the East African Court of Justice."

³⁶ Ugirashebuja, *East African Community Law*, 2017.

³⁷ Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice."

³⁸ Amerasinghe, "Local Remedies in International Law - Chittharanjan Felix Amerasinghe - Google Books."

of the EACJ is essential for upholding the rule of law and justice. Even though individual access is permissible to the EACJ, this time limit is becoming a huge barrier to accessing justice.

4.6 Relation of the National Court and EACJ

According to Article 33(1) of the treaty, the national courts of partner states shall have jurisdiction over cases to which the community is a party. However, Article 33(2) specifically grants the EACJ precedence over national courts when it comes to court rulings related to the application and interpretation of the treaty. According to the principle of *res judicata*, an appeal is the only way to reopen a case once it has passed through judgment. It is a fact that EACJ does not require a prior petition of remedy in a national court to open a case in EACJ. However, if the case has been entertained by the classical courts and pertains to the interpretation of EACJ rules, and the court does not refer the case for a primary ruling due to the ultimate discretion of the national court, the only avenue for review is through an appeal.

Where there is concurrent jurisdiction as contemplated in Article 33 of the Treaty, the EACJ also lacks superiority over the national courts of the member states. The absence of explicit clauses that solidify the Community law's and the court's stance against member state laws not only puts the court in conflict with member state courts but also fosters ambiguity about the law's application and multiple interpretations of a single treaty provision, given that national courts also consider treaty interpretations. Member states have enacted laws to make the EAC Treaty have direct application in their respective countries. However, the constitutions of the member states still recognize the supremacy of their municipal law as opposed to any other laws. Nevertheless, the EACJ is vocal in declaring a national law in conflict with EAC law.

4.7 EACJ Influence in National Court

Given the history and nature of the Anyang' Nyong'o case, Article 50 of the EAC Treaty, which stipulates that the National Assembly of each member state must elect nine members to the East African Legislative Assembly (EALA) according to its procedures, forms the core of the reference. It also stipulates that the elected members, as far as is feasible, shall be representatives of specified groups and sets out the qualifications for election. Under this provision, the Kenya National Assembly enacted the Treaty for the Establishment of the East African Community (Election of Members of the Assembly)

Rules 2001, also known as the 2001 Election Rules. These rules led to the election of the first nine Kenyan members of the EALA, whose terms ended on 29 November 2006. Following the election of Kenya's representatives to the second Assembly in 2006, a dispute arose, prompting the applicants to refer the matter to the EACJ. They argued that the National Assembly of Kenya's nomination and election process violated article 50 of the EAC Treaty by not holding an election or allowing any debate in Parliament on the matter.

Furthermore, they contended that the 2001 Election Rules did not allow for direct election of nominees to the EALA by citizens, residents of Kenya, or their elected representatives and, therefore, were null and void because they were contrary to the letter and spirit of the EAC Treaty. In addition to the reference, the applicants successfully filed an interlocutory application for injunctive orders, barring the swearing-in of the Kenyan nominees until the reference is finalized. The respondents, argued that only the High Court of Kenya had the

jurisdiction to determine questions of the legality of elections conducted in Kenya and that an assumption of jurisdiction thereon by the EACJ would be a usurpation of the national court's functions. Furthermore, Kenya's government contended that only the Attorney-General could file a suit in the public interest, so the applicants had no locus standi before the Court.

In its final decision, the Court held that the 2001 Election Rules did not provide for a voting procedure for choosing or selecting the representatives to the EALA and were therefore inconsistent with Article 50 of the EAC Treaty. The Court based its reasoning on the fact that the Rules did not allow for actual parliamentary debate and approval of party nominees to the EALA, implying that the ensuing process did not qualify as an 'election' as envisaged by the Treaty. As a result, Kenya violated Article 50 of the EAC Treaty by holding a 'fictitious election instead of a real election'. The Rules merely turned the national assembly into a rubber-stamping entity, approving the names of nominees submitted to it without any inquiry into their suitability for the position. In terms of locus standi, the EACJ decided that Article 30 of the EAC Treaty gave the applicants enough grounds to find a cause of action and that the applicants did not have to use up all of their local options before bringing their case to the EACJ.

By issuing an injunction preventing the EALA from swearing in the elected members of the Kenyan Parliament, the Court began establishing its primacy. Given the second opportunity to probably do similarly in the same matter in the Democratic Party case, the EACJ did not shy away from giving the same verdict as in the Peter Anyang' Nyong'o case. This case not only demonstrated the Court's unwavering resolve, but it also marked the first instance where the Court tested and upheld the primacy of Community law over domestic legal provisions under Art. 8 of the EAC Treaty. Notably, in its decision, the EACJ referred to EU case law, which established the primacy of EU law over domestic law: *Flaminio Costa v. ENEL* and *Van Gend en Loos v. Nederlandse Administratie der Belastingen*. When the Kenyan and Ugandan Parliaments amended the EALA election rules in accordance with the EAC Treaty, they demonstrated the primacy of the EACJ³⁹. The immediate effect of the decision was that, since the Kenyan nominees to the EALA could not validly take office, the EALA could not conduct its business as it was not fully constituted as required by the EAC Treaty.

According to these rules, Parliament must debate and approve the nominees for the position of EALA members. Fresh 'elections' of Kenya's nominees were therefore conducted under these new rules. However, despite Kenyan authorities adhering to the new election rules, the decision has significantly impacted other member states, as evidenced; notably, by the EACJ's ruling in this case, has a ripple effect that extends beyond Kenya's boundaries, prompting litigants in Uganda and Tanzania to file similar cases at the EACJ, challenging elections to the EALA. After this decision, two cases were brought: *Democratic Party and Mukasa Mbidde v Secretary-General of the East African Community* and the Attorney-General of the Republic of Uganda; and *Media v Attorney General of Tanzania & Others*. Both of these cases led to changes in the laws of the member states that affected how members of the EALA were elected. Therefore, we confidently conclude that the decision not only influenced private citizens in the two other member states to pursue similar claims before the EACJ, ensuring justice for the

³⁹ Milej, "East African Community (Eac) – Inspiring Constitutional Change by Promoting Constitutionalism? In: *International Organizations Law Review* Volume 20 Issue 2 (2023)."

claimant but also contributed to legal reform in their respective jurisdictions, thereby enhancing respect for democracy and the right to political participation.

The use of this decision as a legal precedent in litigation before national courts provides further evidence of its national impact. A notable example in this regard was the reliance on the Anyang' Nyong'o decision by the Ugandan Constitutional Court in *Jacob Oulanyah v Attorney-General*, in which the petitioner argued that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda to the extent that independent candidates were denied the right to be elected to the EALA⁴⁰. The Constitutional Court found that the rules were not only inconsistent with the Constitution but also with Article 50 of the EAC Treaty. It is worth mentioning that this was the first instance in which a national court in a member state referred to a decision of the EACJ in its judgment, thus signifying the legal value attached to EACJ's decisions by national courts.⁴¹

4.8 EACJ and Human Rights

The founding principles of the EAC provide the foundation that the EACJ can apply when establishing the EAC legal order. For example, as far as human rights are concerned, article 6(d) of the EAC Treaty makes reference to the African Charter on Human and Peoples' Rights as a guiding normative framework for EAC member states in promoting and protecting human rights⁴². Human rights are not included in the EAC's objectives. They serve as guiding principles for achieving the community's goals. Furthermore, when considering a new member of the EAC, we take into account their recognition and respect for human rights. This reflects the commitment of EAC members to have a region that respects human rights⁴³. The African Court on Human and Peoples' Rights should hear any human rights cases originating from member states, according to the EAC treaty, which excluded human rights jurisdiction. Furthermore, member states have argued that they have sufficient national constitutional safeguards to protect human rights without the need for a sub-regional human rights court⁴⁴.

In conformity with Article 5 of its Protocol, the African Court is competent to receive petitions from the African Commission, certain African States, and African intergovernmental institutions. The Court can also receive petitions filed by individuals and NGOs with observer statutes before the African Commission, but only if the state concerned has accepted their direct access to the Court by making a declaration under Article 34 of the Protocol. Unfortunately, African states voted to deny automatic standing to individual victims of human rights abuses and NGOs. According to the terms of the final merger agreement, individuals and NGOs only have direct access to the Court if the state against which they are complaining has lodged a special declaration accepting the Court's competence to hear human rights cases brought in this way. NGOs face the additional hurdle of requiring accreditation from the AU or to its organs. It constitutes a major difference between this Court and the European Court of Human Rights,

⁴⁰ EACJ, "Prof. Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others."

⁴¹ EACJ.

⁴² Viljoen, "Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness: South African Journal of International Affairs: Vol 18, No 2."

⁴³ Ally, "The East African Court of Justice."

⁴⁴ Okoth, "The Domestic Effect of the East African Community's Human Rights Practice - ProQuest."

where direct access for individuals (and NGOs and other entities that can show they are a 'victim' of human rights abuse) is compulsory⁴⁵.

Individuals and NGOs could attempt to seize the court by filing a petition with the African Commission if the state did not accept this right. Individuals can only access the African Court directly if their respective states have declared to allow them to do so. In terms of East African Community member states, only Rwanda and Tanzania have previously made declarations allowing their citizens direct access to the African Court. However, both states sent notifications of withdrawal in 2016 and 2018, respectively⁴⁶.

The common market protocol encompasses two rights and four freedoms. The freedoms include the right to establishment and residency, as well as the free movement of capital, workers, goods, and services (Article 2(4) of the EAC's common market protocol). However, the lack of a human rights legal framework jeopardizes the enjoyment of the stated freedom and rights. This is mainly due to the inability of citizens of the EAC to directly file applications before the EACJ regarding violations of human rights⁴⁷.

A debate has centered on whether the Court's human rights role mandates it to adjudicate human rights disputes. Article 27(2) of the EAC Treaty seems to expressly limit the EACJ to adjudicating human rights cases until the adoption of a protocol to that effect. The EAC Treaty fails to explicitly provide that the EACJ possesses jurisdiction regarding human rights issues. Article 27(1) grants the EACJ extensive jurisdiction concerning "the interpretation and application of the Treaty", yet the treaty lacks a Bill of Rights⁴⁸. Although the Treaty is quite clear that human rights are not among the Community's goals, the EAC's fundamental values include respect for democracy, the rule of law, and human rights to accomplish the Community's goals (Art. 6 of the Treaty). Article 6(d) stipulates obligations for Member States: The article requires Member States to adhere to 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 peoples' rights under the provisions of the African Charter on Human and Peoples' Rights (The Treaty).

This contribution advances two key arguments. First, the EAC Treaty contains human rights norms that the EACJ cannot escape from interpreting. Second, the EACJ finds itself caught between advancing EAC norms and adhering to the Treaty's restrictions on adjudicating human rights, due to the ongoing restrictions on adjudicating human rights. The Court has not fully fulfilled this undertaking. This is because there is a thin line between human rights and EAC norms, such as the rule of law, good governance, and environmental issues, which the Court has relied upon in deciding human rights- related cases so far⁴⁹. Treaties should be interpreted

⁴⁵ Edwards, "Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs 18 Michigan State University College of Law Journal of International Law 2009-2010."

⁴⁶ Amol, "The Effects of Regional Integration on State Sovereignty."

⁴⁷ Munyangabe, "An Assessment of East Africa Community Dispute Resolution Mechanisms and Prospects of Sustainable Peace (2012-2018)."

⁴⁸ Ally, "Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice."

⁴⁹ Ally.

in compliance with their preamble and annexures; moreover, under the concept of *pacta sunt servanda*, a principle enshrined in Article 26 of the Vienna Convention treaties should be interpreted in good faith. Furthermore. As a result, there are three fundamental methods for interpreting treaties under international law. The first method emphasizes the treaty's actual phrases, the second method examines the parties' intended outcomes, and the third method focuses on the treaty's object and purpose.

The first approach, which emphasizes the actual phrases, simply refers to a literal interpretation of the phrases in the treaty. Judges are likely to define the object and purpose of a treaty using the second method. At this point, it's possible that a judge-made law will soon be implemented. It is a clear fact that any interpretation of a treaty under international law must consider all aspects of the agreement, from the phrase included to the intention of the parties and the objective of the specific document. Therefore, it can be argued that the inclusion of the human rights principle in the EAC treaty was not solely for show.

When discharging its interpretative duties, the EACJ is duty-bound to consider the object and purpose of the EAC Treaty. On the one hand, because the context of treaty interpretation includes the whole text of a treaty, together with the treaty's objectives and purposes, one can easily advance an argument that there is no reason for the EACJ to refrain from directly interpreting the human rights provisions in the EAC Treaty, even if there are limitations imposed under Article 27(2) of the EAC Treaty⁵⁰. However, Article 27(2) of the EAC Treaty currently suspends the EACJ's jurisdiction if it bases its conclusions on human rights. Unless member states promptly provide the EACJ with a clear human rights mandate, article 27(2) of the EAC remains applicable. The treaty could potentially cause friction between the EACJ and member states, as the Court is obligated to address human rights issues in the course of performing its duties, as human rights are integral to the EAC principle.

Whether or not human rights standards are considered principles, the Community's organs and its member states must comply with the reference to "human rights" in the EAC Treaty. Because Article 27(2) of the Treaty puts limits on what the EACJ can do, it doesn't like to interpret parts of the Treaty that directly affect human rights, especially if the case involves claims of human rights violations (*Ibid.*). However, the EACJ did not abstain from using its interpretation jurisdiction under Article 27(1) of the EAC Treaty, nor did it assume jurisdiction to decide cases involving human rights concerns.

The court has been exercising its interpretative powers, even though the matter at hand has elements of human rights. In the case of *James Katabazi and 21 others v. Secretary-General of the East African Community and the Attorney General of Uganda*, the High Court of Uganda granted bail to James Katabazi and others facing treason charges. Immediately after the bail was granted, Ugandan security agents arrested them on the court premises⁵¹. This was explicitly an infringement of the right to liberty, and the Constitutional Court of Uganda declared that the security agents' acts were unconstitutional; nevertheless, the agents were unwilling to release any of the defendants. The EACJ assessed and interpreted the case based on an abuse of the

⁵⁰ Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice."

⁵¹ EAC, "James Katabazi and 21 Others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda | East African Court of Justice."

rule of law and the fundamental principles of the EAC Treaty rather than human rights considerations.

The history of the European Union is comparable in this regard. The Rome Treaty of 1957, which established the European Economic Community, remained silent on cases related to human rights and fundamental freedom, inserting only a few provisions containing labor rights⁵². Inspired by the constitutional values of some European countries and the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention) of the Council of Europe, in the 1950s litigants started to take cases that touched on human rights before the European Court of Justice⁵³. This marked the beginning of the ECJ's establishment of a human rights legal order in the European Communities. When allowed to uphold human rights and fundamental freedom in the European Community, the ECJ did not disappoint; on several occasions, the ECJ stated that human rights and fundamental freedoms formed part of the Community's principles, regardless of the limited human rights provisions in the community treaties.

Therefore, this confidently asserts that the absence of explicit human rights provisions in the EAC treaty is not exclusive to the EAC treaty; the European Court of Justice (ECJ) has also traversed this path. Furthermore, the EACJ's commitment to human rights protection may serve as a bridge to explicit jurisdiction in the EAC treaty. EACJ has shown courage to entertain human rights cases without explicit provisions concerning human rights cases. Moreover, to ensure compliance with the EAC Treaty objectives, the court expands its functions to include implied powers. Treaty provisions include provisions of any other international instruments included in the treaty, whether directly as in Article 6(d) or indirectly as in Article 7(2) (The Treaty). Despite not yet claiming to have human rights jurisdiction, the reasoning behind it indicates it is very close to that. Despite the fact that human rights were not explicitly identified as one of the EAC's objectives, it is reasonable to assume that the two are inextricably linked. Therefore, the activities of the EACJ aimed at achieving human rights will undoubtedly not be considered *ultra vires*⁵⁴

The ratification of international human rights treaties by EAC partner states is fairly impressive. All EAC Partner States have ratified at least seven out of the nine "core international human rights treaties". Court efforts to establish a broad network of lawyers and civil society groups in Arusha, Tanzania, and throughout East Africa, along with support from civil society groups across Africa and beyond, as well as their Western donors, played a significant role in achieving this⁵⁵. In addition, well-organized civil society groups, such as the East African Law Society, its constituent members, and the national bar associations of each EAC member state, supported this turn every step of the way. The EAC member states, however, perceive the EACJ's self-proclaimed human rights jurisdiction as a subversion of their sovereignty

⁵² Kimilu, "The Use of Reconciliation by the East African Court of Justice (Eacj) in Dispute Resolution by Member States."

⁵³ Emmert and Carney, "The European Union Charter of Fundamental Rights vs. the Council of Europe Convention on Human Rights on Fundamental Freedoms - A Comparison."

⁵⁴ Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice."

⁵⁵ Twinomugisha, "Cross Border Legal Practice in an Integrated East African Community."

As such, Africa needs to have a strong regional human rights system. When direct access to individuals and non-state actors is unhindered, international courts and tribunals are more likely to uphold human rights and the rule of law successfully. The withdrawal of Rwanda and Tanzania, two of the ten members who were granted direct access to the African Court, indicates a lack of readiness among members to prioritize human rights protection, a stance that runs counter to their stated commitment. The country's commitment is going backward; however, the practice and courage of the EACJ are becoming like picking diamonds in the ocean.

Despite lacking express jurisdiction to hear and determine human rights complaints, the EACJ has committed to protecting human rights by applying the interpretation of the rule of law, good governance, and similar principles stated in the treaty. The immediate amendment that resulted after a petition of the Anyang' Nyong'o case clearly shows the nations' fear from the courage of the EACJ judges' commitment. The farm EACJ creativity and courage need to be guarded, as the countries are not ready to fully protect human rights, which are fundamental issues for the citizens. EAC's creativity in claiming for itself a limited human rights jurisdiction has seen it hand down several progressive and binding decisions that over time have influenced the member states' national human rights frameworks. It is noticeable that the incident that was supposed to make EACJ a Dog without teeth bite is letting it to grow teeth step by step. However, the necessity for an explicit human rights jurisdiction provision in the EAC remains undisputed⁵⁶.

4.9 Inherent Power

The doctrine of inherent powers originated almost entirely in the common law legal tradition. Despite the 'notoriously elusive' legal basis for the application of inherent powers by international courts, these courts frequently use them to administer justice, even when the law does not explicitly grant them. The inherent powers of most international courts do not flow from their founding instruments but rather from their judicial functions. Courts use inherent powers simply because they are 'inherent'⁵⁷. Regardless of the elusiveness of the sources of inherent powers of most international courts, the general principles of law: implied powers, identity of powers of courts as judicial bodies, and judicial functions provide the legal basis for international courts to apply inherent powers. Statutes empower some courts to determine the scope of their jurisdiction, but generally not their inherent power. Many international courts apply the doctrine of inherent powers to administer justice and prevent abuse of the court process⁵⁸.

Rule 1(2) of the EACJ rules entrusts the EACJ with invoking its inherent powers (the treaty). The EACJ has frequently used its inherent powers to prolong the exchange of court documents between parties⁵⁹. In the Sebalu case, when called upon to determine whether the failure by the Council of Ministers to implement the order by the Court in Reference No. I of 2010 amounted

⁵⁶ Lando, "(PDF) The Domestic Impact of the Decisions of the East African Court of Justice."

⁵⁷ Ananian-Welsh, Rebecca ---, "'The Inherent Jurisdiction of Courts and the Fair Trial' [2019] SydLawRw 20; 41(4) Sydney Law Review 423."

⁵⁸ Liang, "The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals on JSTOR."

⁵⁹ EAC, "Rules of Procedures 2013 | East African Court of Justice."

to contempt of court, the EACJ stated as follows: “There is no specific provision under the Treaty or in the Rules of this Court that empowers the Court to deal with cases of contempt. However, we are of the considered view that the Court has inherent power to deal with such cases under Rule 1(2) of its Rules of Procedure”⁶⁰. The EACJ, on the other hand, has rejected exercising its inherent competence to prolong the time frame for filing a case with the Court. The principle of inherent power is based on administering justice; however, as far as the extent of the time limit is concerned, EACJ surprisingly denies exercising inherent power. Even though the strict application of the two-month rule is hindering access to justice, exercising inherent power to extend the time limit would have been necessary and would have greatly enhanced access to justice in the EAC.

Vulnerable groups face significant structural inequalities related to gender, race, ethnicity, and social class, resulting in disproportionate risks of poverty, unemployment, homelessness, and poor health. The Resolution adopted by the General Assembly on November 30, 2012, emphasizes the need for equal access to justice, including legal assistance for marginalized populations, to address these inequities. The Declaration of the High-Level Meeting on the Rule of Law reaffirmed member states' commitment to providing fair, transparent, and effective justice services⁶¹. The Convention on the Rights of the Child and various East African initiatives, such as the Bujumbura Declaration, further underscore the importance of protecting children's rights and promoting gender equality as fundamental principles, aiming to harmonize laws and policies to eradicate discrimination and uphold human rights.

4.10 The EACJ ensures the impartiality and independence of its judges

Since its establishment on November 30, 2001, the EACJ has included judges from the highest courts in the Partner States, as well as jurists of recognized competence, on its bench. This is quite a statutory guarantee of the Court's independence and impartiality (interview with Mr.). Respect for impartiality is the bedrock of a democratic judicial system. A sitting judge must be free from any kind of bias, animosity, or sympathy towards either of the parties in a dispute. A judge should not have an interest or stake in a particular dispute and should not have a preformed opinion about it or the parties involved in a dispute. The law and facts should determine disputes without any limitations. The EAC Treaty tries to promote the judicial impartiality of the EACJ and prohibits the Court's judges from holding office or being involved in politics in their home country, or from engaging in trade or any professional activity that may be likely to cause a conflict of interest when discharging their duties at the Court (the Treaty).

In adhering to the Rule of Law, the Court has so far proved practically to be an independent and impartial body. Indeed, while discharging its noble duty as the Temple of Justice, the Court has experienced and survived apparent intimidation. What transpired shortly after the Court delivered a ruling on a matter under its jurisdiction aptly illustrates this. The EAC Heads of State, in response to the Court's ruling and temporary injunction in the Anyang' Nyong'o case, issued a joint communiqué at the 8th Summit, which included several directives. This is one of many cases in which international judges face threats from member states. However, this

⁶⁰ EAC, “PLAXEDA RUGUMBA v THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & ANOTHER.”

⁶¹ EAC, “James Katabazi and 21 Others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda | East African Court of Justice.”

unfortunate reaction from the Summit did not deter the judges from acting impartially and independently, as it transpired in the subsequent Court decisions. Arguably, this makes the EACJ an exemplary model for the Court that stands to propel the integration process as provided for in the EAC Treaty. The issue of impartiality and independence of East African judges is far from a vital organ. As previously discussed, the court's courage and commitment to justice, even in the face of pressure from the member state, have been outstanding; however, the tribunal's impartiality and independence are essential for ensuring a fair and impartial trial. Impartiality and court independence are critical components of ensuring access to justice.

A mechanism needs to be put in place concerning the appointment and removal of EACJ judges. At present, the Summit is solely responsible in that regard. Instead, there should be an independent body commissioned to appoint and discipline judges. It is odd to attempt to rely, in this modern age, on a flimsy rule describing one of the grounds leading to the removal of a judge from office as being "the inability to perform the functions of the office for any reason (The Treaty). A judicial officer cannot and should not be removed from office simply for "any reason." Well-codified and justifiable grounds should be formulated to discipline judges. It should be recalled that the rules governing the removal of EACJ judges were given as part of the intimidation strategy for the hasty 2007 amendments. The circumstances surrounding the treaty amendments indicate a deliberate attempt to intimidate the then- judges. Since then, the amended rules have been in effect.

5.0 LEGAL AID AND INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights (UDHR), though not legally binding, is considered part of international customary law⁶², setting a universal standard for all nations but providing limited guidance on legal aid. The International Covenant on Civil and Political Rights (ICCPR) mandates states to provide legal assistance in criminal trials when necessary (Art. 14)⁶³. The Convention on the Rights of the Child (CRC) requires states to ensure legal aid for children in criminal cases (Art. 40). Regional treaties, such as the African Charter on Human and Peoples' Rights (Banjul Charter), also emphasize the right to legal defense, particularly in capital punishment cases.⁶⁴ Barriers to legal aid include the cost of small claims, delays in litigation, and individuals' lack of legal competence, which disproportionately affect the underprivileged⁶⁵.

5.1 EACJ and Legal Aid

EAC Legal Aid Conference: among the items on the agenda are to enhance established links between civil society legal aid providers, including paralegals, NGOs, and state justice actors in the East Africa region, as well as establishing additional measures that can ensure that the expertise of non-state actors is shared with other legal aid providers, including employees of

⁶² Waltz, "Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights: Third World Quarterly: Vol 23, No 3."

⁶³ Thomas and Saskia, "Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace."

⁶⁴ Possi, "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice."

⁶⁵ Gathege, "Dispute Settlement within the East African Community: The East African Court of Justice and Its Jurisdiction."

state-run legal aid schemes and members of the legal profession. The conference included an agreement on a mechanism to monitor and report on progress in the enhancement of access to justice through both formal and informal legal aid systems in East Africa; an agreement on a Memorandum of Understanding to guide the establishment of the East Africa Regional Legal Aid Network; and a conference report that includes an outcome document with recommendations agreed upon by formal and informal justice actors on the development of state-funded legal aid systems in their respective jurisdictions⁶⁶.

There are no court fees for proceedings before the Court of Justice. On the other hand, the Court does not meet the fees and expenses of the lawyer entitled to practice before a court of a Member State by whom the parties must be represented. Despite legal aid being a fundamental aspect of access to justice, the EACJ does not provide legal assistance. However, EACJ has demonstrated its commitment to the community by offering free case filing. The fact that EACJ doesn't require a litigation fee is a significant advantage for EAC, as litigation payment is one of the barriers to access to justice and a hindering factor of justice delivery. A legal aid system is one of the fundamental aspects of access to justice. EACJ so far doesn't have legal aid assistance. However, as stated above, there is an ongoing discussion about establishing legal aid assistance in the community.

5.2 Arbitration

Developing countries have been promoting alternative dispute resolution ("ADR") processes, particularly mediation, under the banner of access to justice in recent years. There is nothing new about the use of informal and non-adversarial dispute resolution in African states. Many of them have a long tradition of using customary dispute resolution processes, including negotiation, mediation, and arbitration, to resolve legal and social conflicts (Ibid.). It is a well-established truth that an arbitrator cannot settle any issue unless the parties to a business agreement designate him or add a provision stating that, in the event of a disagreement, the parties shall submit to the jurisdiction of that particular arbitrator for arbitration (The Treaty). The governments have not been able to utilize the free services of the Court as far as arbitration is concerned but find it easier to go to France and London for exorbitant arbitration and leave out an institution of their creation. Since April 2009, the EACJ has started a sensitization campaign to create awareness of its arbitration jurisdiction among its stakeholders. It transpired from the interventions of the participants in these campaigns that this jurisdiction was almost unknown. It is high time the people of East Africa, especially the business community, learned to use this regional mechanism. (Source Interview). The EACJ has the necessary capacity and competence to entertain arbitration cases. The judges of the court attended a seven-day intensive tailor-made course on arbitration under the tutorship of Professor Julian Lew QC, an international expert in arbitration and member of the Chartered Institute of Arbitration, London. During the training, the judges were able to familiarize themselves with modern principles and techniques of international arbitration.

5.3 Judgement

The most generic challenge faced by many international courts is the level of obedience by their member states. The EACJ is not an exception to this general observation. Essentially,

⁶⁶ EAC, "Rules of Procedures 2013 | East African Court of Justice."

international courts are influential only when their decisions are easily complied with and executed by states. If not, as with the case of the EACJ, then such an international court will become a toothless bulldog and ineffective. Since 2005, the EACJ has dealt with about 190 cases. What is intriguing in those judgments is tracking the extent to which they have been complied with by member states. The EACJ has not sanctioned Member States for their failure to comply with its decisions⁶⁷. It is a fact that EACJ judgments are declaratory, and this tends to attract non-compliance. According to the EAC Treaty, a judgment that imposes pecuniary obligations is enforced according to the rules of the civil procedures in place in a member state. By using a member state's rules of civil procedure, the intention is to enforce EACJ judgments as domestic judgments and not foreign judgments (The Treaty). The risk of recognizing a judgment of an international court as a foreign judgment is that the judgment might be denied where it would seem to be contrary to a country's public policy. However, a state cannot abdicate from adhering to its international obligations by merely relying on the existence of its domestic laws and policies.

The EACJ does not offer damages or compensation. Declining to award damages discourages litigants from the commercial sector. There is no excuse for EACJ to keep acknowledging its inability to award damages without doing anything about it. There is no provision in the treaty explicitly permitting or not permitting the EACJ to award damages or compensation; however, it has opted not to award any damages. In contrast, it awards damages in employment cases. The Court primarily issues declarations as to whether particular acts or pieces of legislation infringe on rights or provisions of the EAC Treaty. It has also recommended specific amendments to legislation to bring it in conformity with the Treaty, which also contemplates the Court making financial awards (the Treaty).

This declaratory nature of judgment is not only an EACJ feature; but also applies to EUCJ. If the Court finds a violation of EU law by the law of the Member State, it is not authorized to declare the national law null and void. The judgment is only declaratory, yet this does not mean that there is no imminent legal consequence: If the Court, in the infringement procedure, finds a violation of EU law, the State concerned shall be required to take the necessary measures to comply with the judgment, and there is the possibility that the Court imposes a lump sum or penalty payment (Ibid.). EACJ is the only judicial organ of EAC; its role in enhancing justice and an effective justice system is undeniable. Given its judgment, a declaratory nature undermines EACJ's impact in the region. A binding judgment can enhance the influence of the EACJ and serve as a safeguard against injustice. The countries have signed and granted the EACJ the authority to decide cases, and member states are expected to accept this supranational power and accept the interference of the EACJ as a means to achieve the EAC's objectives, which include upholding the rule of law and promoting good governance.

5.4 Enforcement

Any verdict bearing a pecuniary damages obligation will be enforced following the civil procedure rules of the member state in which the judgment is enforced. Article 39 further enables the Court to pass on binding interim orders. The EACJ lacks an execution framework, so it relies on national legal systems to carry out and implement its orders, particularly those

⁶⁷ Ally, "Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice."

that pertain to some form of national enforcement (The Treaty). Judgments that impose a pecuniary obligation on a person are executed as per the rules of civil procedure of the member state concerned, thereby enforcing the EACJ's judgments in the same manner as decisions of national courts. Those that do not impose pecuniary obligations are implemented under the broad framework of article 38(3) of the EAC Treaty, which requires the Council of Ministers or the member states to take measures to expeditiously implement the Court's decisions, thus to a large extent hindering compliance with the political goodwill of member states. Procedures to sanction a party that fails to implement a judgment against it.

It is within the Office of the Secretary-General that compliance with EACJ decisions should be tracked. In all fairness, the office is seen to underperform in this respect. Admittedly, it is very much occupied with the overall supervision of the wellbeing of the community. Giving it the task of tracking compliance with EACJ judgments would be to overwhelm it with work. If we refer to EUCJ procedure on the matter of enforcement, the Court of Justice has to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is allowed to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.

The action may be brought by the Commission—as, in practice, is usually the case—or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned once the initial judgment establishing a failure to fulfill obligations has been delivered. The EACJ lacks enforcement mechanisms. This critique is based particularly on the cases in which applicants genuinely sought damages. The Court sees such cases as not being tortious or contractual and hence does not award damages.

5.5 Harmonization Attempt

Article 126 of the EAC Treaty mandates partner states to harmonize their national laws with community laws, particularly in legal training and certification. While Rwanda, Kenya, and Burundi advocate for explicit legislation prioritizing EAC laws over domestic ones, Tanzania and Uganda believe this precedence is inherent. A Subcommittee on Approximation of National Laws was created to aid harmonization, focusing on areas like migration, corruption, and commercial law, but progress has been slow and inconsistent. The differing legal systems—Rwanda and Burundi's civil law versus the common law of Kenya, Tanzania, and Uganda—pose additional challenges. Rwanda has been transitioning to a hybrid legal system, and the EACJ has facilitated cross-border legal practice, potentially easing future harmonization efforts.

5.6 Public Trust

The EACJ did not get off to a very active start. Officially established in 2001, the court lay dormant for the better part of the next five years. Finally, in 2005, a single case was brought

before it, filed by a group of private citizens. The case, Calist Mwatela and Others vs. the East African Community challenged the EAC on the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs and the decisions that came out of it. Nearly a year after the case was filled, the EACJ issued its first decision, ruling largely in favor of the applicant⁶⁸. The ruling was praised as a significant advancement for the rule of law in the area. East African Law Society praises the court's "fair and comprehensive ruling that will enlighten, empower, and embolden the various EAC organs as they go about their mission of delivering a meaningful, beneficial, and people-centered integration for the people of East Africa. Since 2005, the number of cases has increased dramatically. Cases that did not stand the competence test of the Court and were referred to national courts are also inspirational as to how some people believe more in the justice of the regional Court than that of their national courts.

To date, the Court should be credited with having generated not only regional jurisprudence but also public confidence in the integration process. The public needs to know that the partner states and the organs and institutions of the community cannot avail of impunity for any wrongdoing under the treaty. The Court's decisions in Prof. Peter Anyang' Nyong'o & 10 others v. Attorney General of Kenya & 2 others and Democratic Party and Mukasa Mbidde v. Secretary General of the East African Community⁶⁹ & Attorney General of Uganda are of particular significance to institutional development as they are examples of the Court upholding the rule of law within the Community's institutional framework. Transparency throughout the justice system guards against abuse of power by officials, such as court personnel destroying court records or judges altering the outcome of cases or making judgments that contradict evidence. Consider transparent case-tracking mechanisms, which make it difficult to tamper with files, and transparent trial processes, which prevent judges from ruling in favor of power brokers when the evidence should lead to conviction. EACJ information can be normally viewed on its website starting from its beginning to date. The court adjournment is open, and the process and outcome of the case are announced publicly on its website. However, EAC's relation with the media is poor; poor coverage of media, which is the reason that the existence of EACJ may not have reached the ears of most residents of the community (Source Interview).

5.7 Challenges

5.7.1 Illiteracy

Information and illiteracy are identified as significant causes in the EAC for the overall absence of access to justice. For an assortment of reasons, few citizens are aware of the law. For instance, an extensive number of illiterate people only interact with the informal legal systems they are acclimated to because they perceive formal legal systems as overwhelming. Similar to this, being adjacent to informal country mechanisms diverts focus from official metropolitan institutions, which are perceived as outdated and inflexible (Source interview). Information and illiteracy are identified as major contributors to the general lack of access to justice. Few people are aware of the law for a variety of reasons, few people know the law. For example, many illiterate people only engage with the informal legal systems to which they are accustomed because they find formal legal systems to be too complex. In a similar vein,

⁶⁸ EACJ, "CALIST ANDREW MWATELA & 2 OTHERS v EAST AFRICAN COMMUNITY | East African Court of Justice."

⁶⁹ EACJ, "Prof. Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others."

residing close to unofficial national mechanisms serves to deflect attention from official metropolitan institutions, which are thought to be antiquated and rigid (source interview). The vacuums left by formal procedure are filled by the informal legal system, especially the disadvantageous and those living in rural areas with a rare access to regular courts. Because the informal system made them feel confident as they were mostly established on their local languages and vernacular.

5.7.2 Language Barrier

EACJ's official language is English. Some of the member states have familiarity with swahili, and the member state chose Kiswahili to be the French lingua for the community; however, it is of concern that in Burundi, with some parent French speakers, the country does not face barriers; furthermore, recently we have the Somalia membership approval in EAC, the country of one language and one ethnicity (Source interview). The EACJ making English an official language is a credible choice considering the combination of the member states, which includes hundreds of local languages. English could open the door to understanding at one table. However, in almost all states, English is spoken by the Elites; in other words, the accessibility of and understanding of its procedures and objectives is becoming hard for the illiterate. In addition, those who understand their rights and make a petition to EACJ have to deal with the judges and explain their stand in English, or they are forced to assign a lawyer, which will also create a financial barrier as a legal cost.

5.7.3 Working on an Ad Hoc Basis

The court operations are on an ad hoc basis. The fact that the Court works on an ad hoc basis is an element that undermines its efficiency. None of the ten (10) judges composing the Court resides at the seat of the Court, including the President. It hasn't proven easy to compose a panel of judges to sit on a particular case due to their commitments within their respective home countries. EACJ operates on an ad hoc basis. One of the things that make the Court less effective is the fact that it operates on an ad hoc basis. Not even the President lives at the Court's seat out of the ten (10) judges that make up the Court. The responsibilities of the judges' home countries have made it challenging to assemble the panel of judges to hear a certain case (interview). It is also a sad fact that the registrar, not the court's president, is primarily responsible for organizing the court's judicial work. During the transitional stage, the Court will meet on an as-needed basis until the Council of Ministers decides there is enough activity to warrant full functioning. This implies that judges merely meet to perform court business when necessary and are not compelled to live permanently in Arusha, the location of the court's temporary seat (interview).

For the President to perform his administrative and supervisory functions as envisaged by Article 24 (7)(a) read together with Article 45 (4) of the Treaty for the Establishment of the East African Community, he must be resident in Arusha. An ad hoc president can hardly perform the administrative mandate of heading and leading the court effectively and efficiently, giving it the guidance it deserves, especially during these formative stages and also attending high-level meetings with the secretariat and sister organs. The current position where the registrar is attempting to fill the void is inappropriate. Under the treaty, the headship of the Court is duly vested in the President of the Court. The registrar is the accounting officer. He cannot give policy direction to the Court.

6.0 CONCLUSION

A tremendous deal has happened since the Anyang' Nyong'o case. The EACJ is getting busier, and its registry continues to receive cases touching on different legal issues. Overall, there is a sense of growth in the Court's stature. The Court has grown in terms of experience. And its impact on improving access to justice is far more obvious. The court has contributed to the development of the EAC's legal system. The court's performance decisions have also had an impact on member states. In the past years of the court journey, the EACJ has had a significant influence. Moreover, the EACJ has provided relief to EAC citizens by reducing court fees. However, there is a need for legal assistance in the region, as access to justice and legal aid are inseparable aspects. The EAC treaty amendment, which resulted in a month's rule restriction of lapse of time, is hindering access to justice in EAC. The introduction of the two-month rule is in direct opposition to the objectives of the EAC. The two-month rule didn't take into account the capacity of EAC citizens or their lifestyles. Furthermore, EACJ is the only judiciary arm of the EAC; its impact in achieving EAC objectives is undeniable; however, its judgment is still declaratory, and EACJ lacks its method of enforcement.

It's important to keep in mind that numerous allegations of human rights violations exist within the region. However, the same region does not allow its citizens to approach regional courts regarding claims involving human rights violations. To expand the Court's jurisdiction to include cases relating to human rights, international crimes, and crimes against humanity, the extraterritorial application of the EAC Treaty is necessary. It is necessary to emphasize that, while remarkable achievements have already been attained, they are still at the beginning. Much work remains to be done to make the justice system truly effective. Challenges that are identified in this research—illiteracy, language barriers, and the working style of the court are becoming barriers in enhancing access to justice. The EACJ quality of its judgments is fairly steady. Despite the growing number of cases, the EACJ is still relatively new and largely unknown to the ordinary citizens of the partner states who are the Court's primary users. EACJ needs media help from the community to increase awareness among the EAC, EACJ needs community media assistance.

6.1 Recommendation

While plenty has been done at the international and African levels, a lot still needs to be done regarding effectiveness and awareness of access to justice. Daily challenges have impeded this access, particularly since the introduction of the two-month case petition rule. There is a need to consider the merit of the case before the rejection. In the majority of the cases before the EACJ, the applicants are natural persons or bar associations of the partner states. Litigation by the business community or commercial corporate entities is very limited before the Court. There is a need to encourage the private sector to be active before the Court. There is a need to expand the Court's jurisdiction to include cases relating to human rights, international crimes, and crimes against humanity.

Legal aid should be introduced in the EACJ legal system, the introduction of legal aid in the legal system of the (EACJ) is essential to ensure that all individuals, regardless of their financial circumstances, have access to justice. By providing legal assistance to those who cannot afford it, the EACJ can promote fairness and equality before the law.

There is a need for collaboration among the member states to enhance access to justice by eliminating the barriers, which are language barriers, illiteracy, and the ad hoc nature of the court.

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