

What Is Wrong about Supranational Laws? The Sources of East African Community Law In Light of the EU's Experience

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Abstract

The Article examines the system of sources of law in the East African Community (EAC) drawing a comparison to the European Union Law. It shows that the integration model adopted in East Africa uses a rule-sceptical approach: It is driven by deals or transactions between national elites rather than being based on a common normative framework stringently implemented within national legal orders of the EAC Partner States. Having compared the costs and benefits of such an approach, the paper concludes that the former prevail. It is thus suggested that the initial commitment of the Partner States to a people-centred integration requires in-

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producing more elements of supranationality into the EAC framework. This includes stronger and democratically accountable Community institutions as well as broader use of directly applicable and directly effective laws.

I. Introduction

Piercing the shield of Member States' sovereignty by directly applicable laws capable to produce direct effect within their national legal orders and enjoying primacy over national laws – such laws will be referred to as supranational laws – are a key feature of the European Union integration process. In case of the EAC, this features are not very visible: The founding treaties are ambivalent, the national case law is largely not favourable and the actual body of supranational laws is modest; one is inclined to speak about an integration model based on a rule-sceptical approach. Such a rejection of one of the European Union's (EU's) crucial concepts by the EAC Partner States is quite puzzling and warrants a closer look, since the conventional wisdom holds that due to the particularly high degree of integration the European Union serves as a model for other economic communities.¹ Venturing such a closer look, the present paper also examines the reasons for the EAC's rule-sceptical approach and its potential impact on the dynamism of the integration process within this Community.

The EAC as it stands now is composed of five Partner States; yet originally it was established by just three: Kenya, Tanzania and Uganda. The founding Treaty was concluded in 1999 and entered into force in 2001.² Rwanda and Burundi joined in 2008. The present EAC is not the first integration project in Eastern Africa. The history of regional integration in Eastern Africa dates back to pre-colonial times. A common, non-tribal cultural identity, which also includes a common language, known as Kiswahili, has been forged for centuries.³ However, it was not until the end of the 19th century that the British established first common institutions. On the basis of these institutions, the newly independent Kenya, Tanzania and Uganda

¹ See *M. Herdegen*, Principles of International Economic Law, 2013, 277.

² All EAC laws are quoted after the EAC website: <www.eac.int>.

³ For a more detailed historical overview of the regional integration in Eastern Africa see *S. E. A. Mvungi*, Legal Analysis of the Draft Treaty for the Establishment of the East African Community, in: *S. E. A. Mvungi*, The Draft Treaty for the Establishment of the East African Community, 2002, 66 et seq. and *S. Fitzke*, The Treaty for East-African Cooperation: Can East Africa Successfully Revive One of Africa's Most Infamous Groupings?, *Minn. J. Global Trade* 8 (1999), 132 et seq. See also *R. F. Oppong*, Legal Aspects of Economic Integration in Africa, 2011, 24 with further references.

founded the first EAC in 1967. It was in operation for ten years before it collapsed in 1977.

Regarding the key legal concepts here examined, for the purpose of this paper the direct effect will be understood as obligation of a court or another authority to apply the relevant provisions of European Union (EU) law or Eastern African Community law, either as a norm, which governs the case or as a standard for legal review.⁴ In the European Union law, though, the reason, for which the EU law can be invoked by individuals before national courts is the fact that it constitutes an autonomous legal order, the subjects of which comprise not only the Member States but also their nationals. This is one of the cornerstones of the EU law articulated by the European Court of Justice – now the Court of Justice of the European Union – (CJEU) in the *Van Gend en Loos* case as early as in 1963.⁵ For a provision to take a direct effect, it is required that it is unconditional and sufficiently precise.⁶

The autonomous character of European Union law is also a basis for another distinctive feature, which is the direct applicability. Accordingly, the validity of EU law, as a matter of principle, is not conditional on its incorporation into the domestic law. This holds true – at least from the CJEU perspective – for most of its sources. The CJEU held quite early that national authorities must apply Community law – now EU law – as Community law and not as national law.⁷ Obviously, in some of the Member States, such as Germany or the United Kingdom, national parliaments had to pass laws in order to assure the direct applicability of Community Law within their jurisdictions. This was, however, done to meet the requirements of the national constitutional law only. From the point of view of the EU law, its direct applicability as a matter of principle does not depend on national enactments.

In its first part, the present paper analyses the provisions of the EAC founding treaties and domestic law of the Partner States looking for answers, whether and to what extent the EAC law is capable of producing direct effect and being directly applicable. This analysis includes also the relevant case law. The conclusions of the first part form a basis for the second part, which examines their theoretical implications focussing the role of law

⁴ See P. J. G. Kapteyn, *The Application and Enforcement of Community Law in National Legal Systems*, in: P. J. G. Kepteyn/A. M. McDonnell/K. J. M. Morletlans/C. W. A. Timmermans (eds.), *The Law of the European Union and the European Communities*, 4th rev. ed. 2008, 517 with further references.

⁵ CJEU, Case 26/62, *Van Gend en Loos*.

⁶ P. J. G. Kapteyn (note 4), 515.

⁷ See *Van Gend en Loos* (note 5), but also CJEU, Case 9/65, *Acciaierie San Michele SpA (in liquidation) v High Authority of the ECSC*.

in the process of regional integration in East Africa. The third part addresses the reasons for the adoption of an integration model based on rule-scepticism within the EAC as well as the question of costs and benefits of this approach.

II. Distrust Towards Supranational Rules in the EAC

1. Decentralised Implementation of the EAC Law

Up to now, only very few Community Acts have been adopted pursuant to the provisions of the EAC Treaty.⁸ This is due to the integration model, which emerges from the Treaty text and which heavily relies on the idea of harmonisation of laws and the principle of variable geometry.

The substantive treaty provisions – that is provisions regarding various Community policies – only very rarely provide for Community Acts as an implementation mechanism. Instead, they set out obligations to harmonise laws, co-ordinate policies or take up not nearly defined facilitating measures to achieve certain goals.⁹ Accordingly, the entire discourse about the progress towards the achievement of a common market within the EAC is focussed on domestic legislation and actions to be taken by national governments.¹⁰ It is about identifying national laws hindering the enjoyment of fundamental market freedoms, amending national laws or drafting new national laws.¹¹ Moreover, the Partner States deliberately focus on national law rather than on supranational law as a means of implementation, in order

⁸ See the overview “Resume on EAC Legislation” at the official EAC website <www.eac.int>.

⁹ See e.g. Art. 83 para. 3, Art. 84 paras. 1 and 2, Art. 89, Art. 91, Art. 92 paras. 1 and 2, Art. 93 para. a, Art. 94 para. a, Art. 98, Art. 101 or Art. 103 EAC Treaty.

¹⁰ A former EAC Secretary-General, *Juma V. Mwapachu*, makes a following remark: “If one issue had the potential of dislodging the agreement reached over the common market Protocol, it was the question of free movement of persons and the right of establishment. It conjured the *en masse* migration of citizens of one country to another in search of land. Tanzania was particularly against this aspect of ‘free movement’ forming part of the common market Protocol and was the only embraced as part of the Protocol when consensus was reached to subject it to national laws.” See *J. V. Mwapachu*, *Challenging the Frontiers of African Integration. The Dynamics of Policies, Politics and Transformation in the East African Community*, 2012, 103.

¹¹ See World Bank. *East African Community Secretariat*, 2014. *EAC Common Market Scorecard 2014: Tracking EAC Compliance in Movement of Capital Services and Goods*, 2 and 5. As an example see also The Republic of Uganda Consultancy to Align Laws with the East African Community (EAC) Common Market Protocol, PO 20120551, Final Assignment Report, May 2013, 37.

to slow down the integration process in certain areas. Most notably, this strategy was employed with regard to the free movement: Art. 5 of the common market Protocol (CMP) limits the Protocol's scope of application "to any activity undertaken in cooperation by the Partner States to achieve the free movement of goods, persons, labour, services and capital and to ensure the enjoyment of the rights of establishment and residence of their nationals within the Community". Art. 5 para. 2 defines those Partner States' activities imposing on them some specific obligations, e.g. to remove restrictions on free movement in certain areas. Accordingly, it is the activity of the Partner States, which determines the scope of action of the EAC. In other words, the states were aware that the boost to regional integration could be given through supranational legislation and it was a matter of deliberate choice not to provide for it.

Another method of pursuing Treaty objectives is by conclusion of further international treaties – the protocols. According to Art. 151 paras. 3 and 4, the protocols, once signed and ratified, form an integral part of the EAC Treaty. Using the EU law terminology, one would speak about implementation of one piece of primary law by another piece of primary law. The most important protocols, which have been adopted so far, are the Customs Union Protocol (CUP), the above-mentioned CMP and the Monetary Union Protocol (MUP). Regarding the sources of law, the said Protocols do not add many novelties. References to supranational sources of laws are vague and do not provide for clear competence titles in designated areas: The CMP broadly speaks about co-ordination, harmonisation and co-operation (Art. 4 para. 3 CMP), yet provides also for some implementation mechanisms in the annexes. Art. 27 MUP generally vests in the Council¹² the power to adopt "regulations" for the effective implementation of the protocol. Similarly, according to Art. 51 CMP, the Council shall make regulations, issue directives and make decisions as may be necessary for the effective implementation of the protocol "from time to time". According to Art. 22 MUP, there is a duty to harmonise "policy, laws and systems"; the Council is, however, entitled to make directives to this end.

Most importantly, neither the EAC Treaty nor the Protocols make any attempt to delimitate the spheres of action of the Community on one hand and the Partner States on the other. The integration goals are very diverse and numerous. They encompass nearly the entire range of state activities, which is in line with the ultimate Treaty goal being the establishment of a

¹² The Council is one of the EAC Organs. It consists of designated Ministers – Members of each Partner State's government and the respective Attorney General of each Partner State (Art. 13 EAC Treaty).

political federation.¹³ A delimitation of law-making powers is yet not really necessary, given that the law-making decisions are to be made unanimously anyway. This aspect will be addressed in one of the following sections (I. 3.).

2. Ambiguities in Respect of EAC's Community Laws Having Direct Effect

There is a common sense believe that the involvement of national actors – above all national courts – can give a significant boost to the integration process; when the institutions of the given regional community interact with national ones, the national state ceases to act as a uniform entity within the integration framework, which in turn helps the community law to penetrate national legal systems.¹⁴ Postulates to this effect have been voiced by the East African academia in the course of drafting the new EAC Treaty.¹⁵ The integration concept based upon these assumptions was, however, implemented only partially¹⁶ and is constantly under challenge. Instead, the care of the EAC's common interest is entrusted upon organs remaining largely under control¹⁷ or under pressure of Partner States' bureaucracies; the letter holds true even for the East African Court of Justice (EACJ), which had its jurisdiction ousted after delivering judgement in *Anyang'*

¹³ According to the preamble of the EAC Treaty the Partner States declare to be “determined to strengthen their economic, social, cultural, political, technological and other ties for their fast balanced and sustainable development by the establishment of an East African Community, with an East African Customs Union and a common market as transitional stages to and integral parts thereof, subsequently a Monetary Union and ultimately a Political Federation.” The establishment of the latter is further declared in Art. 5 EAC Treaty as an objective of the Community which the Partner States are obliged to pursue. See also Arts. 11 and 123 of the EAC Treaty.

¹⁴ L. R. Helfer/A.-M. Slaughter, *Toward a Theory of Effective Supranational Adjudication*, Yale L. J. 107 (1997), 289.

¹⁵ See most notably S. E. A. Mvungi (note 3), 89.

¹⁶ An important platform for involvement of national actors into the integration process is provided for by a preliminary reference procedure, which was included into the EAC Treaty framework by virtue of Art. 33 para. 2 (see also p. 605). In the context of the EU, the preliminary reference procedure is regarded as an important instrument of co-operation between the Court of Justice of the European Union and the national courts. See *T. de la Mare/C. Donnelly*, *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in: P. Craig/G. de Búrca, *The Evolution of EU Law*, 2nd ed. 2011, 376 et seq. with further references to the CJEU case law.

¹⁷ On the institutional setting see p. 599 et seq.

Nyong'o case.¹⁸ It was observed that the same applies to the most cases of regional integration processes in Africa, which are highly centralised and organised around state-led or intergovernmental institutions.¹⁹

a) Relevant Provisions

One must distinguish between the direct effect of the primary law, which includes the EAC Treaty and the subsequent protocols on one hand, and direct effect of secondary legislation enacted on the basis of the founding treaties on the other hand. The first aspect is addressed, even if only indirectly, in the protocols. The second aspect is dealt with in the EAC Treaty.

According to Art. 54 CMP

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

¹⁸ See EACJ, case 1/2006, *Prof. Peter Anyang' Nyong'o and 10 Others v. The Attorney General of the Republic of Kenya and 5 Others* questioning the democratic character of elections to the EAC Legislative Assembly. The Partner States reacted to this judgement with an amendment to the EAC Treaty which apart from limiting the EACJ's jurisdiction, also split the Court into two chambers – the first instance and the appellate division; furthermore, it introduced very questionable regulations on removal and suspension of judges (see amended Art. 16 EAC Treaty). On this case and subsequent development see most recently *K. J. Alter/J. T. Gathii/L. R. Helfer*, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences* (8.4.2015), presented 14.4.2015, Law and Globalization Seminar, Yale Law School, iCourts Working Paper Series, No. 21, 13 et seq. Available at <SSRN: <http://ssrn.com>>; the case is also discussed in one of the following sections – I. 2. b) – from a different angle). Generally, the EACJ has jurisdiction over interpretation and application of the EAC Treaty, but it can be extended to other matters by virtue of subsequent protocols (see Art. 27 EAC Treaty). It may deliver advisory opinions (Art. 38 EAC Treaty). In contentious cases, the reference to the Court can be made by the Partner States (Art. 28 EAC Treaty), the EAC Secretary-General (Art. 29 EAC Treaty) and also by natural and legal persons (Art. 30 EAC Treaty), unless the jurisdiction is reserved to the institutions of the Partner States (Art. 30 para. 3 EAC Treaty); besides, any national court may ask the EACJ for a preliminary ruling (Art. 34 EAC Treaty). The EACJ is composed of a maximum of 15 judges (Art. 24 para. 1 EAC Treaty). At the moment, there are five judges serving at the First Instance Division and five judges serving at the Appellate Division, but only the President of the Court and the Principal Judge of the First Instance Decision work full-time. The awareness of the EACJ's activities is rather low and the court is not frequently used. On the jurisdiction and legacy of the EACJ see *R. F. Oppong* (note 3) and *J. V. Mwapachu* (note 10), 140.

¹⁹ *K. Gastorn*, *The East African Community and the Sovereignty Relinquishment Trail in the Constitution Making Process of Tanzania*, *Nyerere Law Journal* (2014), 52.

The redress should be granted “in accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol”. At first glance, this provision seems to confer direct effect upon the provisions of the protocol. However, this does not have to hold true for every provision, as the conditions for the direct effect – the norm concerned must be sufficiently precise and unconditional – must be fulfilled. And even though the jurisdiction for the action is vested with the national court by Art. 54 CMP, the provision invoked by the claimant may fail to meet the requirements for the direct effect. In other words, the national court may affirm jurisdiction according to Art. 54 CMP, but at the same time, it may decline to apply relevant substantive provisions. Even the wording of Art. 54 CMP clearly presupposes, that the jurisdiction is established with regard to the rights and freedoms “recognised by the Protocol”. The recognition of rights and freedoms by the Protocol is thus a substantive precondition for redress. Furthermore, Art. 54 CMP makes the jurisdiction subject to national laws and it is not directly applicable itself as it is addressed to the Partner States. The said norm taken alone can thus hardly be regarded as a cornerstone of an autonomous EAC legal order. Having said this, one should not overlook that the drafters of the protocol in fact did contemplate its provisions to take direct effect and provided for jurisdiction of national courts, if this should be the case.

Regarding the direct effect of the EAC secondary legislation, the key provision is Art. 8 EAC Treaty imposing on the Partner States the obligation to enact “such legislation as is necessary to give effect to this Treaty”, and in particular “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”. One must see that the EAC legislation is not attributed “the force of law” by virtue of the EAC Treaty itself; it is rather for the Partner States to confer “the force of law” upon the EAC secondary legislation. This is in line with the dualistic tradition originally prevailing in Eastern Africa, which views the international law and national law as two separate legal orders.²⁰ Accordingly, even if the secondary legislation becomes directly applicable, it is only because the legislators of the Partner States ordered so, and not because the nationals of the Partner States are subjects of the EAC law, as was the position of the CJEU in the *Van Gend en Loos* case.²¹ In other words, the applicability of the EAC secondary leg-

²⁰ This has, however, changed since the conclusion of the EAC Treaty with the accession of monistic civil law jurisdictions of Rwanda and Burundi and the adoption of the new Kenyan Constitution in 2010, which also follows a monistic model.

²¹ *Van Gend en Loos* (note 5).

islation is not unconditional, as it is the case of EU law. This can only be different, when a particular protocol or a particular piece of secondary legislation provides for its direct applicability. Yet, in general, it is not just the constitutional requirement in certain Partner States, but the EAC Treaty itself that makes the applicability of the secondary legislation conditional upon action of national legislators. Taking this into account, it must be assumed that, contrary to what was said in *Van Gend en Loos*, the EAC law does not constitute an autonomous legal order, the subjects of which would include not just the Partner States, but also the individuals.

An exception to this general rule mentioned earlier is provided for in Art. 39 CUP. According to this provision, customs law of the Community comprising – pursuant to Art. 39 para. 1 CUP – not only the protocol itself, but also *inter alia* the relevant secondary legislation, provisions of the EAC Treaty or even the relevant principles of international law shall apply uniformly. In the wording of this provision, there is no reference to national implementation or enabling enactments whatsoever. A uniform application is also hardly possible if made conditional on such enactments, which may diverge from Partner State to Partner State. Moreover, a uniform application must be something more than just an obligation for the Partner States to ensure the force of law to the Community's customs law as such an obligation exists already by virtue of Art. 8 para. 2b EAC Treaty. Accordingly, the object and purpose of Art. 39 CUP consists in making the Community's customs law independent of national enabling legislation. Art. 39 must be therefore seen as providing for direct applicability of the body of law which it refers to. Yet, it does not provide for its supremacy.

As regards the issue of supremacy, according to Art. 8 para. 4 EAC Treaty, Community laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty. This principle is restated in Art. 253 of the EAC Customs Management Act with regard to this Act. The need for this restatement is somehow puzzling, as the Customs Management Act should prevail already by virtue of Art. 8 para. 4 EAC Treaty. The normative content of Art. 253 can be established only if read together with Art. 8 para. 5 EAC Treaty, the latter norm stipulating that it is for the Partner States to ensure the precedence of Community laws over similar national ones. For Art. 253 EAC Customs Management Act not to be an unnecessary duplication of what is already set out in the EAC Treaty, it must be concluded, that the EAC Customs Management Act should take precedence over similar national laws irrespective of domesticating measures envisaged by Art. 8 para. 5 EAC Treaty. One may also add that the supremacy of the Community laws envisaged in Art. 8 para. 4 EAC

Treaty is not unconditional: It is limited to the laws implementing the treaty and subject to the test of “similarity”. Both conditions for the Community legislation to take precedence need further clarification by case-law, which is not yet in place.

In relation to the direct applicability of the EAC primary law, there is no specific obligation to confer upon it a “force of law”, as the Treaty can hardly be conceived as “legislation of the Community” within the meaning of Art. 8 para. 2b EAC Treaty. If the contracting parties wanted to refer to the Treaty text, they would do so explicitly, rather than treating it just as an unspecified piece of legislation. There is thus only a general obligation to give effect to the Treaty provisions provided for in Art. 8 para. 2 EAC Treaty. The decision on how to fulfil this obligation is left to the Partner States accordingly. The question whether “giving effect” requires transforming the primary sources to the national law, is left open.

One may ask though, if the EAC Treaty and the protocols could produce direct effect if domesticated by national legislation. This is not always the case, as the primary law generally fails to meet the requirements of sufficient precision and, above all, unconditionality. True, there are provisions forcefully and unequivocally enunciating even individual rights, which could be invoked in the court without any further act of implementation, most of them in the protocols. For example, the wording of Art. 10 CMP seems to entail a clear-cut right of every worker – citizen of any of the Partner States to take up employment in other Partner States. Quite similarly, from the European Law perspective, the guarantee of free movement of workers enshrined in Art. 45 Treaty on the Functioning of the EU (TFUE) has a character of fundamental freedom, which is of direct effect for every court of the EU Member States.²²

Such a straightforward interpretation of Art. 10 CMP would, however, misapprehend the normative context of this regulation. Most notably, the free movement of workers is subject to implementation by East African Community common market (Free Movement of Workers) Regulations constituting Annex II to the CMP. These regulations deal with various aspects of the movement for workers, such as the procedures for acquiring a work permit (Regulation 6). Moreover, according to the Regulation 15 the implementation of these regulations is subject to a detailed schedule, which forms part thereof. The annexes and schedules to the CMP seek to identify the barriers to free movement within the fundamental freedoms and set out deadlines for their elimination. These deadlines may differ with regard to particular states.

²² See already CJEU, Case 48/75, *Jean Noel Royer*.

The said provisions must be seen as an exemplification of general operational principles of the CMP. One of these principles is anchored in Art. 2 para. 5 CMP, stating that the establishment of common market shall be progressive. Reference is also made to the operational principles of the EAC stipulated in the EAC Treaty. In the present context, most relevant principles are the principle of asymmetry and the principle of variable geometry, which according to the treaty definition “allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds”.²³ Obviously, enforcement of the general freedom of movement of workers by national courts from day one after the entry into force of the CMP would run counter to the principles of progressive implementation, asymmetry and variable geometry. In the case of CMP, one should also bear in mind the limitation of its scope of application to activities “undertaken in cooperation by the Partner States” provided for in Art. 5 CMP. This limitation can be interpreted as an obstacle to the direct applicability, as it presupposes joint implementation actions to be taken by the Partner States. On the other hand, once such actions are taken, Art. 5 CMP does not exclude the direct effect of the guarantees of free movement, which could be invoked as a standard of review. These issues have, however, not yet been addressed in the case law of the EACJ pertaining to the applicability of the EAC law by domestic courts.²⁴

On the other hand, there still remains some limited space for direct effect and direct applicability of EAC primary law in a particular aspect, if the wording of the provision concerned fulfils criteria of precision and unconditionality and there are no other norms, for example schedules or specific regulations in annexes, providing for progressiveness, asymmetry or variable geometry in the process of implementation. Furthermore, there is no reason whatsoever to prevent courts to apply the fundamental freedoms directly, once all scheduled deadlines operationalising the principles of progressiveness, variable geometry and asymmetry have already expired. In such a case, the state concerned is simply in breach of its obligations under international law and there is nothing inappropriate in taking it to court. The prospect of being taken to court provides the national authorities with an incentive to implement the integration schemes on time. The individual would thus be positioned as a guardian of timely implementation. This idea is also not unfamiliar in European law.²⁵

²³ The definition is included in Art. 1 EAC Treaty. See also p. 612.

²⁴ See p. 591 et seq.

²⁵ *Van Gend en Loos* (note 5).

Yet one must admit that such provisions capable of producing direct effect are not numerous. They are located rather in the protocols implementing the EAC Treaty, than in the EAC Treaty itself. Most of the EAC Treaty provisions establish obligations to be fulfilled by the Partner States, which makes them conditional and thus void of direct effect. These obligations amount to coordination of policies, harmonisation of laws or the taking of facilitating measures²⁶ to achieve a multitude of objectives, which are provided for in rather general terms. In order to achieve some of them, the Partner States are called upon to conclude a protocol. And even if some more precise provisions can indeed be found in protocols, the space for direct effect is rather limited; the CMP was for example characterised as “basic legal framework that outlines what needs to be done”.²⁷ This is also the case of the MUP, which imposes on Partner States only an obligation to harmonise policies, laws and systems as means of implementation (Art. 22 MUP). The same holds true even for many provisions of the CUP, notwithstanding the general obligation to apply the Community’s customs law uniformly, as discussed earlier.

In conclusion, it must be said that the EAC Treaty and the subsequent protocols do not provide for their direct applicability. The secondary legislation becomes applicable only if the national legislation provides for its general incorporation pursuant to Art. 8 of the EAC Treaty. By virtue of the same norm, national Parliaments are obliged to do so. The direct effect of both the primary and the secondary sources of law is neither expressly provided for, nor is it excluded. Bearing in mind the governing principles of the EAC Treaty and, in most cases, also the wording of the provisions, the direct effect is an exception rather than a rule. This may be different with regard to secondary legislation. The direct effect depends on the wording of each particular piece of it, which can be sufficiently precise and unconditional or may even explicitly provide for direct effect. The necessity of supranational laws for regional economic integration is to some extent recognised in the area of EAC’s customs law.²⁸

²⁶ A good example of this technique is Art. 93 para. a EAC Treaty: “The Partner States shall promote the co-ordination and harmonisation of their maritime transport policies and establish a common maritime transport policy.”

²⁷ *J. T. Gathii*, African Regional Trade Agreements as Legal Regimes, 2011, 199.

²⁸ See for example Art. 244 para. 2 of the EAC Customs Management Act which provides for a fine not exceeding five thousand for using “any unlicensed vessel for the conveyance of any goods subject to Customs control, or [...] any unlicensed vehicle for the conveyance of goods to which any legislation of any of the Partner States applies”. This provision generates direct effect.

b) Position of the EACJ

As for now, the EACJ has not yet ruled explicitly on the issues of direct applicability or direct effect with regard to the EAC Treaty. Yet, in the *Anyang' Nyong'o* judgement of 2006,²⁹ the EACJ made some remarks, which are relevant in the present context. A couple of years later, in the *East African Law Society* case³⁰ and in *EACTPOL* case³¹ – both decided in 2013 – the EACJ pronounced itself more clearly, even if incidentally, referring to Art. 54 CMP, which was discussed above. In those decisions, the issue before the EACJ was, however, not the direct effect of the provisions of the protocol as such, but the question, whether the jurisdiction of the EACJ established by the EAC Treaty is unduly limited by the jurisdiction of the domestic courts established in Art. 54 CMP. Both 2013 decisions do not pertain to the direct applicability or direct effect of the EAC Treaty provisions as they are limited to the jurisdiction over the CMP.

In the *Anyang' Nyong'o* judgement, the EACJ was sought to rule on the compatibility of rules for elections of members of the Legislative Assembly adopted by the National Assembly of Kenya in 2001 (the 2001 Rules) with Art. 50 EAC Treaty. The EACJ was to examine whether or not the procedure provided for in the 2001 Rules constituted “elections” within the meaning of the EAC Treaty; the question, which was eventually answered in the negative.

What is striking about the judgement is the fact that it lacks any reference to Art. 8 para. 4 EAC Treaty, which explicitly addresses the issue of EAC law supremacy. The court claimed that within this regard the EAC Treaty provides no solution for conflicts between the Treaty text and national rule; this position has been subject to some criticism.³² Instead, the court relied on Art. 27 of the Vienna Convention on the Law of Treaties (VCLT), which stipulates that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. From a legal methodology's point of view, the EACJ's position is not necessarily wrong. The key question about the wording of Art. 8 para. 4 EAC Treaty is, whether the EAC Treaty can be regarded as a part of “Community laws” to which this provision makes reference. As said, one may reasonably claim, that, if the Partner

²⁹ EACJ, Case 1/2006, *Prof. Peter Anyang' Nyong'o and 10 Others v. The Attorney General of the Republic of Kenya and 5 Others*.

³⁰ EACJ, Case 1/2011, *The East African Law Society v. The Secretary General of the East African Community*.

³¹ EACJ, Case 9/2012, *The East African Centre for Trade Policy and Law v. The Secretary General of the East African Community*.

³² *R. F. Oppong* (note 3), 97.

States wanted to decide on supremacy of the entire EAC Treaty over national legislation, they would refer to the Treaty explicitly rather than contemplating it as a part of “laws”. But more importantly, the EACJ’s reference to Art. 27 VCLT as the decisive collision rule, makes clear, that the EACJ views the EAC Law not as an autonomous legal order, but simply as a part of public international law as any other. As Art. 27 VCLT is a norm of public international law, it cannot be regarded as precluding the hierarchy of norms within other legal systems than public international law. Otherwise one would have to assume that this norm presupposes the supremacy of international law norms within all national legal systems. Such an assumption would be contrary to the object and purpose of Art. 27 VCLT, which is to determine whether a violation of an international treaty has occurred or not. This is eventually the essence of statement by the EACJ, when it concludes, that Art. 50 of the EAC Treaty was infringed.³³

Even if the EACJ refers to the principle of effectiveness in the EU law and quotes the respective case law of the CJEU, it does so only on the assumption, that the above mentioned 2001 rules were enacted by the National Assembly of Kenya as implementation of EAC Treaty provisions (its Art. 50) and this implementation was flawed. The general statements that integration makes it necessary to cede sovereignty to the Community are noteworthy, but constitute hardly more than *obiter dicta*.

In the *East African Law Society* case and *EACTPOL* case – both cases referring to Art. 54 CMP –, the EACJ is more outspoken. A direct reference to the CJEU’s *Van Gend en Loos* case³⁴ in the *East African Law Society* judgement is of particular interest. The EACJ quotes the lines, in which its European counterpart established the direct effect of – at that time – European Economic Community (EEC) law. The Eastern African judges, however, stop short of declaring the EAC law to be an autonomous legal order. Instead they conclude:

“ [...] if the common market Protocol confers rights onto the individuals within the EAC, these individuals should be entitled to invoke them before their national courts.”³⁵

Also, the court makes it clear that Art. 54 confers jurisdiction upon national courts in those cases, in which CMP provisions establish individual rights. The EACJ does not claim that those provisions actually establish such rights. Quite on the contrary, in the *EACTPOL* case, it even suggests

³³ Prof. Peter Anyang’ Nyong’o and 10 Others (note 29), 43.

³⁴ *Van Gend en Loos* (note 5).

³⁵ *The East African Law Society* (note 30), 28.

that in the present stage of integration it does not necessarily have to be the case. The EACJ seems to view the resolution of disputes arising from the Protocol by national courts as a relief for EACJ's docket, which may get fuller in the future, as the integration process advances.³⁶ On balance, the EACJ seems to be willing to incorporate at least some elements of the concept of supranationality into the EAC framework, which, however, in its view does not differ much from other international law instruments. The Court also suggests that supranationality may play a more significant role at later integration stages.

c) National Law of EAC Partner States

At the outset, it must be stated that none of the EAC Partner States provides for the conferral of sovereign rights, or more specifically, law-making powers to the EAC organs or any international organisation (opening clause).³⁷ The integration within the EAC is not subject to constitutional regulations. Explicit references to the EAC were included in the earlier drafts of the Kenyan constitution but were ultimately dropped and do not form a part of the final text.³⁸

The new Tanzanian draft constitution does also not mention the EAC, setting out only vague commitments to promote regional integration.³⁹ The same holds true for the constitution of Uganda, which vaguely mentions the promotion of "regional and pan-African cultural, economic and political cooperation and integration" as a foreign policy objective.⁴⁰ Keeping the EAC integration process outside the constitutional regulations is astonishing, given that this process, according to the EAC Treaty, aims at the establishment of a political federation. An access to such a federation implies decisions on allocation of sovereign powers, which in turn inevitably involves fundamental constitutional choices.⁴¹ Thus, also from the point of view of national constitutional law, the EAC law can only be regarded as a piece of public international law. Its implementation within national jurisdiction, in

³⁶ *The East African Centre for Trade Policy and Law* (note 31), 39.

³⁷ Art. 291 of the Burundi Constitution allowing the Republic of Burundi to establish jointly with other States international organisation for the purpose of common management and coordination can hardly be regarded as an opening clause.

³⁸ *R. F. Oppong* (note 3), 210.

³⁹ *K. Gastorn* (note 19), 64.

⁴⁰ Art. XXVIII para. (iii) of the Constitution of Uganda.

⁴¹ On the lack of willingness to cede sovereignty to the EAC, see more generally *K. Gastorn* (note 19), 50 et seq.

particular the “force of law” to be conferred upon the EAC secondary legislation, can accordingly only be ensured by domestic provisions and instruments pertaining to public international law in general.

In this respect, a national constitution can adopt either a dualistic or a monistic stance.⁴² A dualist approach views national and international law as two separate legal orders. Any international law must therefore be transformed into national law or incorporated into its body in order to become effective. From a dualistic perspective, the direct applicability and the direct effect of international law norms depend on the action of a legislator, who can so order. Such an order – a domesticating act – would have to refer to the founding treaties, the protocols and all future EAC legislation conferring upon it as stipulated in Art. 8 EAC Treaty, a force of law. In a monistic legal order the primary law would be directly applicable and conditions for the primary law taking direct effect would be so created. However, regarding the secondary legislation, there would still be a need to confer the force of law upon it, as the force of law of the secondary legislation is not directly established by the EAC Treaty, which, as said, only requires the Partner States to take appropriate action for this purpose. The issue of supremacy does not directly depend on the adopted approach, even if monistic states tend to recognise some form of superiority of international law and dualist states principally treat the domesticating acts as any other piece of national legislation.

As the original members of the EAC – Kenya, Tanzania and Uganda – followed a long-standing common law tradition, their legal orders were based on a dualistic approach, which is more or less vehemently criticised in the academic writings.⁴³ This is still the case with Uganda and Tanzania. The 1995 constitution of Uganda generally stipulates in Art. 123 that the president shall have power to conclude treaties, leaving the details to the ordinary legislator. It does not stipulate that international treaties form a part of domestic legal order. A similar provision can be found in the Tanzanian constitution: Art. 63 para. (3)(e) vests the power to ratify a treaty with the National Assembly, while para. (3)(d) of the same provision authorises the National Assembly “to enact law where implementation requires legislation”. As for Kenya, the constitution of 2010 accomplished a major shift from a dualistic towards a monistic approach: According to Art. 2 para. (6)

⁴² On monism and dualism see generally e.g. *M. Dixon*, Textbook on International Law, 6th ed. 2008, 88 et seq.

⁴³ *L. O. W. Oluoch*, Legitimacy of the East African Community, *Journal of African Law* 53 (2009), 214; *C. M. Fombad*, Internationalization of Constitutional Law and Constitutionalism in Africa, *Am. J. Comp. L.* 60 (2012), 447 et seq.

any treaty or convention ratified by Kenya shall form part of the law of Kenya. However, the Kenyan constitution does not explicitly provide for supremacy of international law. The latter is denied by the Kenyan High Court, which tends to maintain a traditionally reserved approach. This applies also to direct applicability of international treaties' provisions, which the Kenyan High Court eventually treats as interpretative aid for statutory law.⁴⁴ It is only the constitution of Rwanda, which provides that international treaties rank higher than organic laws and ordinary laws.⁴⁵ In Rwanda and Burundi the international treaties become a part of the law of the land upon publication (Rwanda)⁴⁶ or ratification (Burundi)⁴⁷. Save for the constitution of Burundi, all constitutions of the EAC Partner States provide for the supremacy of the constitution within the national legal order.⁴⁸

It is important to note that none of the EAC Partner States' constitutions provides a legal basis for a direct applicability or a direct effect of secondary legislation. Conversely, such references are not uncommon in the Member States of the EU.⁴⁹

As for the domesticating acts in the states following dualistic tradition (Tanzania, Uganda and Kenya before 2010), all of them stipulate that secondary legislation of the Community shall have the force of law as required by Art. 8 para. 2b EAC Treaty.⁵⁰ However, all the domesticating acts refer to the "Acts of the Community". This is not a full implementation of the mentioned EAC Treaty provision, as it requires that the force of law should be given not just to the Acts of the Community, which are only one specific form of the EAC secondary legislation but to "legislation, regulations and

⁴⁴ See High Court of Kenya decision of 23.7.2012, *Beatrice Wanjiku and Stanley Kariuki v. Attorney General and Commissioner of Prisons*, paras. 20-21 and para. 24. The reserved approach of the High Court is partly due to the fact that the treaty making in Kenya remained within the sphere of the powers of the executive. Accordingly, the court places itself as a guardian of the separation of powers principle, as it calls for caution regarding domestic applicability of the treaty law (see para. 20 of the quoted decision).

⁴⁵ Art. 190 of the Constitution of Rwanda.

⁴⁶ See Art. 190 of the Constitution of Rwanda.

⁴⁷ Art. 292 of the Constitution of Burundi.

⁴⁸ See Art. 64 para. 5 of the Constitution of Tanzania, Art. 2 para. 2 of the Constitution of Kenya, Art. 2 para. 2 of the Constitution of Uganda and the Preamble of the Constitution of Rwanda.

⁴⁹ See for example Art. 3a para. 2 of the Constitution of Slovenia, para. 2 of The Constitutional Act On Membership of the Republic of Lithuania in the European Union, either referring explicitly to the EU law or Art. 91 para. 2 of the Constitution of Poland referring to laws enacted by the international organisations in general.

⁵⁰ See Art. 8 para. 1 of the Kenyan East African Community Act of 2000, Art. 8 para. 1 of the Tanzanian East African Community Act of 2001 and Art. 9 para. 1 of the Ugandan East African Community Act of 2002.

directives of the Community and its institutions as provided for in this Treaty”.

Regarding the primary law it must be first noted, that the domesticating acts apply both to the EAC Treaty and the Protocols, as the latter constitute by virtue of Art. 151 para. 4 EAC Treaty an integral part of the former. There is one important difference between the domesticating act of Uganda on the one hand and the domesticating acts of Tanzania and Kenya on the other. The Ugandan act is the only one explicitly stipulating in its title and preamble that “the force of law” is conferred upon the Treaty, thus providing for the EAC Treaty’s direct applicability in Uganda. According to the title of Kenya’s act the domesticating act is intended “to give effect to certain provisions of the Treaty [...] and for connected purposes”. Similarly, the Tanzanian act aims at “giving effect to the provisions of the Treaty”. Both acts go on to explain that it is expedient to make provisions to give effect to “certain provisions”, which are “contained” (Kenya) or “specified” (Tanzania) in the EAC Treaty. On the basis of these formulas, one is bound to assume that the EAC Treaty is not incorporated as a whole, although its complete text is reproduced in the schedule of either act. Nationally applicable are only those provisions to which the provisions of the relevant domesticating act make reference. And such references are rather vague and not numerous. Given that the Kenyan constitution of 2010 adopted a monistic approach, and the EAC Treaty is applicable in Kenya by virtue of Art. 2 para. 6 of the Kenyan constitution, it is only in Tanzania, where the EAC Treaty provisions are not applicable, save for those to which the domesticating act refers.

The existing body of national case law is quite modest, which is partly due to the scarcity of secondary legislation and partly to the fact that the wording of primary law is, as said, of a kind that produces direct effect only exceptionally. Out of the few judgements, which can be quoted in the present context, some legal dogmatic explanations are provided in the ruling of the Kenyan High Court in the *Anyang’ Nyong’o* case decided in 2007.⁵¹ It must be noted that this case was decided prior to entry into force of the 2010 “monistic” constitution. However, it illustrates quite well the dualistic perspective, which was prevailing when the EAC Treaty was concluded. Accordingly, the High Court raised the point just aforementioned, claiming that the Kenyan domesticating act contains only nine sections while the EAC Treaty contains 153 Articles. On this basis, the High Court clearly rejected the application of the treaty, depicting the petitioners’ argument to

⁵¹ High Court of Kenya, Case 49/2007, *Prof. Peter Anyang’ Nyong’o and Others v. The Attorney General and The Minister for Foreign Affairs*.

this effect as “serious misdirection”. Regarding the question of whether or not the Treaty produces direct effect, the court reiterated a formula from a British judgement handed down in 1876 (!), according to which “individuals cannot enforce any rights under a Treaty because the State is not their agent or trustee”. The antiquated strict dualism adopted by the High Court eventually leading to vigorous rejection of direct effect and direct applicability is also entirely at odds with the idea that the Community law could constitute an autonomous legal order, distinct from the general public international law.

A different attitude is taken by the Ugandan High Court, which shows willingness to apply the EAC Treaty directly. Having said this, one must, however, bear in mind that the Ugandan body of case law is also too modest to discern general trends. Still, the existing decisions can be seen in light of the wording of the Ugandan domesticating act conferring the force of law upon the treaty, even if the High Court of Uganda does not invoke this act. In the first decision, *Shah v. Manurama*,⁵² the High Court refused to make an order for payment of security for costs rejecting the argument that the defendants are not residents of Uganda. This fact was not relevant for the court as the defendants were residents of Kenya, which is a Partner State of the EAC as is also the case of Uganda. The High Court suggested that such an order would constitute an obstacle to free movement rights. It also suggested that the Treaty having the force of law, which would amount to its direct applicability and to a direct effect in the given case, is a condition for an effective securing of the rights enshrined therein.

“Art. 104 of the Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under obligation to ensure the enjoyment of these rights by their citizens within the Community. In this regard, the Court is mindful of the fact that the Treaty has the force of law in each Partner State (Art. 8 (2) (b)); and that this Treaty law has precedence over national law.”⁵³

The court further invokes the objectives of the EAC, which according to Art. 5 of the Treaty include a widening and deepening of the cooperation.

This judgement was handed down before the domesticating act entered into force, and the freedom of movement was invoked before the CMP was signed. Art. 104 EAC Treaty can be seen neither as a directly applicable norm, nor as a norm having direct effect as it merely imposes an obligation

⁵² High Court of Uganda, Case 354/2001, *Deepak K. Shah and Others v. Manurama Limited and Others*.

⁵³ *Deepak K. Shah and Others* (note 52).

on the Partner States “to adopt measures to achieve the free movement” (para. 1) and to adopt a Protocol to this end (para. 2). The conclusion that Art. 8 para. 2b of the Treaty refers to the EAC Treaty itself, is, as said earlier, not covered by the wording of this provision. The same applies to the thesis that the force of law is acquired without the Partner States taking implementing measures. Even if the judgement of the High Court is supportive to the integration process and raises so much missed awareness of international law, it fails to address important issues, which had to be addressed as a matter of technique of legal reasoning. The consequences of the judgement could be far-reaching as it suggests, that domestication of EAC Treaty in Uganda is obsolete.

Similarly vague are statements of the High Court of Uganda in the case *Akidi v. Adong and Electoral Commission*.⁵⁴ The court accepted Art. 123 of the EAC Treaty and the case law of the EACJ as a standard for review of the national election process. The court held:

“As far as democracy and good governance is concerned we are bound by international protocols which emphasise among other things that our elections should be free and fair. See: The East African Treaty; SADC Treaty; African Charter on Democracy Election and Governance.

Let me talk more about the East African Country [sic!] Treaty. Art. 123 of the Treaty provides for the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms. The treaty further provides for the establishment of the East Africa Court of Justice, which is a judicial body, which ensures the adherence to the law in the interpretation, application and compliance with the treaty. It is therefore not true that we are not bound by the decisions of the EACJ. All states parties are bound by the decisions of the EACJ in respect of the Articles of the Treaty such as Article 123.”⁵⁵

Again, the High Court seems to regard Art. 123 as a directly applicable norm. Yet, this norm enunciates rule of law and consolidation of democracy as one of the common foreign and security policy objectives (Art. 123 para. 3c). The court does not aptly explain how the fairness of national elections can be reviewed against this provision without any implementation measures. It does not even refer to the domestication act, restraining itself to vague statements such as “I would like to state that Electoral process and good governance is a matter of concern to the citizens of this country” or “I must also add that the world is now a global village”. The lack of sound line

⁵⁴ High Court of Uganda, Case 4/2001, *Akidi Margaret v. Adong Lilly and Electoral Commission*.

⁵⁵ *Akidi Margaret* (note 54).

of legal reasoning clarifying the applicability of EAC law or at least public international law within domestic legal order makes both of these judgements appear as a reflection of the judges' political convictions and thus as a judicial activism.

3. Lack of Strong Supranational Institutions of the EAC

The status of EAC law is also determined by the EAC's institutional architecture. And as compared to the EU, the institutions of the EAC are weak and this weakness is very visible in the legislative procedure aiming at enactment of Community Acts. Two features of this process are particularly relevant. First, as for now there are no exceptions to the unanimity rule⁵⁶ and second, the stakeholders at the Community level lack direct democratic legitimacy; this also includes the members of the EAC Legislative Assembly. In pursuance of the said unanimity rule, a bill, which is passed by the Legislative Assembly, must be assented to by the Heads of States. It is thus not even for the Summit, which is a Community organ composed of the Heads of States, to give the assent, but for the Heads of States in this very capacity, every one of whom has a discretionary power to give the assent or to withhold it. This regulation amounts to a simple pooling of traditional law-making powers of the Heads of States rather than vesting them with the Community. The idea of pooling the national organs' powers is also visible in the regulations of the Legislative Assembly elections. Accordingly, it is for the national parliaments to conduct the elections taking their political composition into account.⁵⁷ This idea is even more visible in the early practice of these elections, which was heavily criticised by the EACJ in the *Anyang' Nyong'o* case as resembling a delegation of political appointees.⁵⁸ One must of course not forget that abandonment of the unanimity rule was a gradual process also in the case of the EU, and this process is still far from being completed. Also the direct elections of the European Parliament were introduced only in 1979. However, from the very beginning the power of proposing bills was vested exclusively with the European Commission, which was designed as a strong political organ serving the Community in-

⁵⁶ The treaty text uses the term "consensus" both with regard to the decisions of the Summit (Art. 12 para. 3) and the Council of Ministers (Art. 15 para. 4). As for the Council of Ministers, the said provision paves the way to a different solution, which can be adopted by a protocol on decision-making. As for now, no protocol to this effect has been adopted.

⁵⁷ Art. 50 para. 1 EAC Treaty.

⁵⁸ *Prof. Peter Anyang' Nyong'o and 10 Others* (note 29), 32 et seq.

terest. This is not the case with the EAC. The bills may be introduced by the Council made up of national ministers or by the Legislative Assembly members. The heavy reliance on the national actors is thus not counterbalanced by involvement of EAC servants. Finally, the procedure outlined above applies only to Community Acts and the Community Acts are not the only form of secondary legislation. The remaining forms are regulations and directives and in this regard the EAC Treaty does not contemplate any detailed and uniform procedure for their enactment. There are only some specific provisions dispersed across the EAC framework. For example, according to Art. 27 of the Protocol on Monetary Union it is for the Council to make regulations for the effective implementation of this Protocol. As the making of regulations is a competence vested in the Council, this provision means *a contrario* that the Legislative Assembly is not to be involved. The power to make directives and regulations, which is provided for in the protocols – and the Art. 27 MUP is just one example, – can thus effectively lead to an exclusion of parliamentary participation in the law-making process on the EAC plane.

This institutional design of the EAC makes it difficult to enact legislation, which would be more than just a common denominator of the national elites' interests and accordingly capable of generating a strong pull towards integration. What is missing, is a strong institution which is designed to serve the Community interest exclusively. This is e.g. the case of the European Commission and the European Parliament. In Europe, the high level of legalisation is considered to be a result of the institutional design, which aims at establishing of a supranational entity.⁵⁹

4. Conclusion

The EAC Treaty adopts a broad range of integration goals, but fails to give teeth to the community institutions and to provide for effective legal implementation mechanisms. This is quite the opposite of what has been done in Europe, where the EU started with quite modest integration objectives but with effective implementation instruments at its disposal. In other words, the East African integration model opts for a broad framework with lenient implementation rather than for a strictly implemented narrow framework, the latter being the model adopted at the inception of the European integration.

⁵⁹ K. J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, in: K. J. Alter, *The European Court's Political Power. Selected Essays*, 2009, 186.

III. Function of Law in the Integration Process within the EAC

According to *J. T. Gathii*, highly legalised integration projects are not necessarily better than those not highly legalised.⁶⁰ The EAC, *Gathii* argues, would provide for an alternative mode of cooperation around discrete projects, which would be mutually beneficial in long-term perspective.⁶¹ It is further claimed that the integration obligations are often based on assumption, that their enforcement will not be strict,⁶² an idea being conceptualised in the academic writing as “disassociation from law”⁶³ and “consensus of non-enforcement”.⁶⁴

The problem about this line of reasoning is the very fact that the Partner States do resort to international law as an integration instrument. Taking this into account, it seems highly problematic to set out rules – which are *per definitionem* binding – just to claim that the observance of these rules is not really expected. Besides, the specific projects targeted under the umbrella of the EAC, i.e. a Customs Union, a common market and Monetary Union, let alone a political federation are not likely to work without some level of rule adherence. The gap between “law on the books” and “law in action” can also hardly be justified as a re-interpretation of EAC Treaty obligations in the light of subsequent state practice, as contemplated by the Art. 31 of the VCLT,⁶⁵ which insofar reflects customary international law. Writing on the Southern African Development Community (SADC), where the elements of supranationality are similarly weak if not weaker, *L. G. Dirar* brings up a concept of “politization of law” as an element of state practice. The aforementioned “consensus of non-enforcement”, the example of which is the mutual failure of member states to bring disputes among themselves to regional courts, is depicted as an aspect of such “politization”.⁶⁶ The author goes further and calls for a “broader conception of integration”, claiming that regional integration in the African context is a much more sophisticated discourse.⁶⁷ *Dirar* suggests that it should be viewed as emancipa-

⁶⁰ *J. T. Gathii* (note 27), 15.

⁶¹ *J. T. Gathii* (note 27), 4.

⁶² *J. T. Gathii* (note 27), 5.

⁶³ See *L. G. Dirar*, Rethinking and Theorizing Regional Integration in Southern Africa, *Emory Int'l L. Rev.* 28 (2014), 152 with further references.

⁶⁴ *L. G. Dirar* (note 63), 153 et seq.

⁶⁵ *L. G. Dirar* (note 63), 151.

⁶⁶ *L. G. Dirar* (note 63), 152 et seq.

⁶⁷ *L. G. Dirar* (note 63), 156.

tion from colonialism, neo-colonialism and racial domination⁶⁸ rather than pure trade integration, the success of which is measured solely by level of intra-regional trade.⁶⁹

As a matter of socio-political analysis, the concept of “consensus of non-enforcement” may be indeed highly thought-provoking, but it can hardly be applied as a legal principle within the EAC framework as it is. First and foremost, the duty to give effect to the provisions of the EAC Treaty is explicitly provided for in Art. 8, while Art. 6 declares the rule of law as one of the fundamental principles of the EAC. The role of trade integration may also not be played down: The preamble of the EAC Treaty contemplates the Customs Union, the common market as transitional stages and integral parts of the Monetary Union and ultimately of a political federation; the role of the Customs Union and the common market as integral parts of the EAC is further reinforced in Art. 2 EAC Treaty, while the conclusion of respective protocols is prescribed in Arts. 75 and 76.

Looking at the subsequent state practice, it cannot be claimed that the Partner States somehow deliberately abandoned the integration path outlined by the aforementioned provisions. Quite on the contrary, the respective protocols establishing the Customs Union, the common market and recently also the Monetary Union have indeed been adopted and some endeavours to give effect to these protocols have been taken up. The policy of regional integration, as contemplated by the treaty is thus pursued, but it is pursued only deficiently. Presenting these deficiencies as a virtue or as an adherence to a different integration model as the one encapsulated in the provisions of the EAC Treaty would be at odds with the prevailing political discourse. Accordingly, the claim that the subsequent state practice provides a basis for a “consensus of non-enforcement” or a legally relevant disassociation of the regional integration in East Africa from the EAC Treaty is not convincing.

In order to amend valid international obligation, the states must show some will to do so. A failure of implementation alone does not result in a change of law. Even if some form of a tacit consensus on non-implementation exists among the governing elites of the EAC Partner States, it can be regarded only as an evidence of a gap between words and deeds or a contradictory behaviour (*venire contra factum proprium*). A will to modify valid international obligations has not been proved, and the enactment of above-mentioned protocols combined with at least a verbal commitment of the elites to the regional integration make such a proof very

⁶⁸ L. G. Dirar (note 63), 156 et seq.

⁶⁹ L. G. Dirar (note 63), 135.

unlikely to be successful. Moreover, allowing the governing elites to tacitly abandon the integration model would frustrate the Community's operational principle of people-centred and market-driven co-operation as provided for by Art. 7 para. 1a EAC Treaty; and furthermore there is no evidence that the consensus of non-enforcement has a broad societal basis. True, the principle of Art. 7 para. 1a EAC Treaty remains a challenge as governing elites fear to lose their sovereignty⁷⁰, or, more properly speaking, their political power and economic position;⁷¹ and as said, it is government officials, who as a matter of fact drive the integration process. However, founding the EAC on the principles of people-centeredness, rule of law and democracy⁷² was a deliberate decision resting upon past experiences with the centralistic and public sector based model of integration, which is a part of the first EAC's heritage;⁷³ the experience of the first EAC will be explored in one of the following sections (III. 2.). What the new EAC Treaty required was a shift in the way of thinking about regional integration. Therefore, the narrative, according to which the integration process has dissociated itself from the 1999 EAC Treaty text, does not really fit. The crucial point is, that it is rather the text of the EAC Treaty itself, which in its more specific provisions does not adequately develop its basic principles by failing to provide for effective instruments for enactment and implementation of common EAC rules. In addition, the key political actors, fearing the loss of sovereignty, have not adjusted their thinking to the ideas on which the EAC Treaty is founded. Hence, the problem can be described as a failure to move away from old integration ideas, which did not prove viable during the first EAC, rather than looking for new integration concepts which differ from those to which the 1999 EAC Treaty adheres.

⁷⁰ *K. Gastorn* (note 19), 51. However, one must add that *de jure* the concept of strict sovereignty, which was adopted by the Organization of African Unity to protect "the hard earned independence" (*C. M. Fombad* (note 43), 449), has been gradually abandoned since the adoption of the Constitutive Act of the African Union. See *C. M. Fombad* (note 43), 471.

⁷¹ As *G. M. Fimbo* points out, due to an "unusual state formation in the Third World", the dominant societal class was formed by the heavy involvement of state apparatus. Therefore societal relations depend more on political than on economic power. See *G. M. Fimbo*, *Multipartyism, Constitutions and Law in Africa*, 2013, 35 et seq. with further references. As the economic position depends heavily on the political one, the loss of sovereignty in the course of regional integration poses also a serious threat to the economic position of governing elites. This point is captured also by *K. Kimbugwe/N. Perdikis/M. T. Yeung/W. A. Kerr*, *Economic Development Through Regional Trade. A Role for the New East African Community?*, 2012, 214 et seq.

⁷² See Art. 6 para. d EAC Treaty.

⁷³ This view is shared by *J. V. Mwapachu* (note 10), 32.

A comparative look at the experience of European integration helps to understand the need to create instruments allowing for enactment and implementation of common rules within a regional economic community. Firstly, making of such rules has been a cornerstone of the European integration for practical reasons, also known as a maxim “rules not money”: It has been assumed that law is not expensive, that it is easier to make rules than to mobilise public funds for integration projects in infrastructure and the politicians are generally more willing to give up the law-making powers than the power to distribute public funds.⁷⁴ Secondly, the integration paradigm adopted in Europe is based on the assumption that differences between national legal systems constitute an obstacle to the proper functioning of a common market.⁷⁵ The common European legislative framework aims at eradicating those differences (negative harmonisation), setting out new rules, which replace national policies by a common policy (positive harmonisation) at the same time.⁷⁶ As the structure of a common market should ideally resemble a market of a single state, its creation necessitates similar legislative action, which provides *inter alia* for equal and equivalent conditions of competition for businesses established throughout the common market’s territory.⁷⁷ Given that national laws reflect some substantive national policy choices on the regulation of the national market regarding e.g. taxation, level of the consumer protection, ecodesign for industrial products etc., the creation of common market must then involve some common policy choices. Different rules in different states do not only discourage market participants to move beyond national borders, but they also constitute a risk that common policy choices will not be implemented. In other words, without common legislation, the chance for a common market to emerge would be only limited and the pursuance of public policy goals would be at jeopardy. The CJEU was consequently right in pointing out in the seventies that national encroachments on the community’s sphere of action would imperil the effectiveness of obligations undertaken by the Member States and would thus also imperil the very foundations of the Community.⁷⁸ It is further accepted that having common rules in place does not

⁷⁴ H.-J. Wagener/T. Eger, *Europäische Integration. Wirtschaft und Recht, Geschichte und Politik*, 2nd ed. 2009, 483.

⁷⁵ B. de Witte/A. Greelboed/J. Inghelram, *Legal Instruments, Decision-Making and EU Finances*, in: J. G. Kepteyn/A. M. McDonnell/K. J. M. Morletlans/C. W. A. Timmermans (note 4), 306 et seq.

⁷⁶ B. de Witte/A. Greelboed/J. Inghelram (note 75), 307.

⁷⁷ C. W. A. Timmermans, *The Basic Principles*, in: J. G. Kepteyn/A. M. McDonnell/K. J. M. Morletlans/C. W. A. Timmermans (note 4), 2008, 127.

⁷⁸ CJEU, Case 106/77, *Simmmenthal*.

guarantee the achievement of common market, if these rules are not uniformly applied. Differences between national legal orders even abolished at the level of the content of legal provisions could come up again at the level of their implementation. Therefore, it is essential for the common rules to be applied uniformly and effectively. This rationale is one of the leitmotifs even in the early case law of the CJEU.⁷⁹ It is also a foundation stone of preliminary reference procedure provided for in Art. 24 TFUE.⁸⁰

As the EAC Treaty also envisages preliminary reference procedure,⁸¹ it can be hypothesised that uniform interpretation of common rules was a point of concern to the State parties. This was explicitly acknowledged by the EACJ, which on this occasion pointed out that provisions pertaining to preliminary reference procedure aim *inter alia* at avoiding uncertainty in the interpretation of the Treaty provisions.⁸² Taking this into account, it cannot be said that the idea of uniformly applied common rules within the jurisdiction of Partner States is at odds with the EAC Treaty. When it comes to the implementation of this idea, the EAC Treaty stops, though, halfway and so do also the legislators of the Partner States.

IV. Reasons for Supranational Rules Scepticism in the EAC

Various reasons have been brought forward in favour of the adoption of a rules-sceptical integration model. In the following section, some of them will be analysed. At the outset, it must, however, be noted, that having assumed that rule-setting is at least a useful tool to foster regional integration, the reasons for not making use of this tool must be particularly weighty, given the fact that the integration goal pursued by the EAC is more ambitious than the one pursued by the EU. What is ultimately at stake, is the establishment of a political federation, a historical and unique integration goal set already in the beginnings of the decolonisation process.⁸³

⁷⁹ See already CJEU, Case 93/71, *Leonesio*.

⁸⁰ CJEU, Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

⁸¹ Art. 33 para. 2 EAC Treaty.

⁸² *Prof. Peter Anyang' Nyong'o and 10 Others* (note 29), 21

⁸³ A political program for the establishment of an East African Federation was outlined by *Julius Nyerere* in 1960. According to *Nyerere*, the federation would be formed on a voluntary basis. See *J. Nyerere, Freedom and Unity/Uhuru na Umoja*, 1966, 85 et seq. Most notably, its establishment would also involve a conferral of sovereign powers upon the federation. *J. Nyerere* (note 83), 89. See also *S. E. A. Mvungi* (note 3), 74 et seq.

1. Problems with Rule of Law and Separation of Powers

P. K. Kiplagat writing in 1995 on the attitude of courts in the developing countries with a special focus on Eastern and Central Africa referred to the low self-esteem of the courts which do not see themselves as players capable of making impact outside their jurisdiction.⁸⁴ He further deplores a low degree of sophistication both with regard to the domestic legal systems and to the courts' appreciation of own powers. The fact is, that the capability of the courts in the region to impose constraints on the government is rather limited. According to the rule of law index compiled within the World Justice Project in 2014, Tanzania ranks highest in the category Constraints on Government Powers, but it is only rank 52 out of 99 states covered by the survey. Kenya occupies rank 62 and Uganda is close to the bottom (rank 81); Rwanda and Burundi were not covered.⁸⁵ The overall rule of law ranking is likewise not encouraging, as the Partner States rank rather low: Tanzania – rank 69, Kenya – rank 86 and Uganda – rank 90. On this basis, one is inclined to think that the law is not an effective instrument of integration, as its steering capacity is low. On the other hand, a law-based integration project, if supported by true political will and well-equipped international institutions may be regarded as a chance to improve the rule of law record in the region. And the adherence to the rule of law is, as said, one of the fundamental principles of the EAC. This means in particular that low ranks in the rule of law index must not be put forward as an argument for a low level of legalisation, but as a challenge, which – by virtue of the EAC Treaty principles – must be vigorously tackled.

To sum up, there is hardly any alternative integration model being pursued by the EAC. It is rather a model pursuing similar objectives as the model adopted by the EU, however, suffering from deficient implementation and lack of more specific operational principles and EAC Treaty provisions providing for effective implementation mechanisms, in particular for a broad use of supranational laws.

⁸⁴ *P. K. Kiplagat*, Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A look at the COMESA Process, *Den. J. Int'l L. & Pol'y* 23 (1995), 281.

⁸⁵ The World Justice Project, Rule of Law Index 2014, 14 et seq., available at <<http://worldjusticeproject.org>>.

2. Experience of the First EAC and Common Law Tradition

J. T. Gathii seems to argue that a high level of legalisation – “integration legislated *ex nihilo*” – contributed to the collapse of the first EAC.⁸⁶ Hence, should it be inferred that the scarcity of directly applicable Community norms is a lesson learned from the failed integration process? The past experiences point rather to the opposite.

Historically, it would be rather the common law tradition giving some reason for supranational rules scepticism: It considers law as a “local” phenomenon arising out of real disputes between members of a given community.⁸⁷ And in this regard, it must be admitted, that there could be indeed some tension between the traditional common law approach to the very concept of law and regional integration processes, which does require some degree of centralised law making. This tension is exemplified by a dualistic approach to the public international law, which has been traditionally shared by States enrooted in the common law tradition. If this holds true, the said tension is likely to be intensified, rather than alleviated by integration processes conceived as deals or transactions between national elites with low degree of popular participation. In order not to make the EAC law-making appear as a remote and centralistic exercise, it would be advisable to enhance the popular participation by increasing the powers of the Legislative Assembly and strengthening the accountability of its members by the introduction of a direct election.⁸⁸ One should add that the direct representation of the peoples at regional level has been introduced not only in the EU, but also in the Mercado Común del Sur (MERCOSUR), where a first direct election of MERCOSUR MPs is going to take place in 2015.⁸⁹

This claim fits well into the ideas lying at the foundations of the new EAC, which have already been mentioned. At its start, the new EAC was guided by the ambition to include more rather than fewer elements of supranationality and popular participation. Clearly, “people-centred and mar-

⁸⁶ *J. T. Gathii* (note 27), 4.

⁸⁷ *S. K. Harding*, *Comparative Reasoning and Judicial Review*, *Yale J. Int'l L.* 28 (2003), 453 et seq.

⁸⁸ See also *L. O. W. Oluoch* (note 43), 219. In order to ensure a “representation of various interest groups and stakeholders”, *L. O. W. Oluoch* also suggests to increase the number of the Summit members to 15 from each Partner State elected in a transparent and democratic process.

⁸⁹ This is provided for in Art. 6 of the MERCOSUR Parliament Constitutive Protocol of 2005 (Montevideo Protocol). See also “Voters will elect Parlasur members in October”, *Buenos Aires Herald* of 30.12.2014.

ket-driven co-operation” ranks at the top of the operational Community as enunciated in Art. 7 EAC Treaty. This principal commitment, which is, as seen, only insufficiently fulfilled in the remaining EAC legal framework, reflects the lessons learned from the collapse of the first EAC. The first EAC suffered from deficiencies of popular participation as did the political systems of the Partner States, to say the least. This was in line with the concept of “developmentalism” prevailing at that time, according to which the state-driven development took precedence over other values, such as broad political participation and democracy.⁹⁰ The heavy dependence of the first EAC on the willingness of political leaders to cooperate made it vulnerable; ultimately, the first EAC collapsed over ideological differences, the split between the leaders of Tanzania and Uganda being the last straw.⁹¹ Another factor leading to the demise of the first EAC were disputes over costs and benefits of jointly run services, upon which the integration project to a large extent was then founded.⁹² Quite tellingly, the immediate cause for the dissolution of the first EAC was the closing down of unprofitable routes in Tanzania by East African Airways – a company established by the Partner States.⁹³ The common services approach was different than the “law not money” maxima adopted by the European Union. Accordingly, the success of the integration was measured not only by the trade creation, but also, if not predominantly, by “visible signs of success”, such as joint infrastructural projects and jointly run services.⁹⁴ It cannot be excluded that the regional integration might still be affected by this kind of thinking. Regarding the third factor invoked as a source of first EAC’s problems – the trade imbalance in favour of Kenya –, one must see that although it still remains an issue,⁹⁵ it was already addressed within the first EAC’s framework.⁹⁶

All those factors must be seen in the context of the first EAC’s institutional settings. The EAC emerged out of regional agencies established by

⁹⁰ See *K. Kimbugwe/N. Perdakis/M. T. Yeung/W. A. Kerr* (note 71), 89 et seq. and *G. M. Fimbo* (note 71), 21 et seq. with other references.

⁹¹ *M. W. Mangachi*, *Regional Integration in Arica. East African Experience*, 2011, 111.

⁹² See *M. W. Mangachi* (note 91), 157.

⁹³ See *S. E. A. Mvungi* (note 3), 80.

⁹⁴ See the speech delivered in 1970 by Tanzanian president *Julius Nyerere* “East-African Cooperation Is Alive”, transcript in: *J. Nyerere, Freedom and Development/Uhuru na Maendeleo*, 1973, 241.

⁹⁵ See *M. W. Mangachi* (note 91), 173 et seq.

⁹⁶ In this context, *S. E. A. Mvungi* mentions community sponsored actions aimed at distribution of industrial project and transfer of taxes levied on goods, in which trade imbalances occur. See *S. E. A. Mvungi* (note 3), 79. The normative framework for these measures was set out in Arts. 19 et seq. of the 1967 EAC Treaty (Treaty for East-African Cooperation, cited after *Kenya Law Reports 1967*, No. 31).

the colonial authorities to deliver common services in the region.⁹⁷ On independence, those common services were retained and a new organisation, the East African Common Services Organization – an immediate predecessor of the first EAC – was established.⁹⁸ The mechanism of decision-making within the first EAC had a similarly bureaucratic character as it had in the colonial times. The East African Legislative Assembly, which was composed exclusively of political appointees, passed the Acts of Community,⁹⁹ while the design of the procedure of appointment of the Assembly members was left to the Partner States alone.¹⁰⁰ Moreover, all bills passed by the Assembly had to be submitted to the Heads of States, who could – jointly or separately – withhold their assent.¹⁰¹ The bureaucratic character of the law-making was highlighted by the formula added to the texts of Community Acts:

“Enacted by the President of the United Republic of Tanzania, the President of the Sovereign State of Uganda and the President of the Republic of Kenya on behalf of the East African Community, with the advice and consent of the East African Legislative Assembly”.¹⁰²

In the new EAC Treaty, the formula was dropped, but the concept of law-making limited to deals between national bureaucracies, as explained earlier, was in essence not abandoned.

Regarding the powers and the composition of the East African Assembly within the first EAC, Professor *Mvungi* concludes:

“This left the Community in the same situation of isolation and alienation from the mainstream of communal and grassroots politics as was the case with its predecessor the EASCO”.¹⁰³

The lack of democratic control at the Community level and the integration being a large extent based on the common administration of public services must have aggravated the problem of inequitable distribution of integration cost and benefits,¹⁰⁴ as the forum to address and debate this problem

⁹⁷ S. E. A. *Mvungi* (note 3), 66 et seq.

⁹⁸ S. E. A. *Mvungi* (note 3), 72.

⁹⁹ See Art. 56 para. 2 and Art. 49 et seq. 1967 EAC Treaty.

¹⁰⁰ See Art. 57 para. 1 1967 EAC Treaty.

¹⁰¹ Art. 60 para. 1 1967 EAC Treaty.

¹⁰² Art. 59 para. 3 1967 EAC Treaty.

¹⁰³ S. E. A. *Mvungi* (note 3), 77.

¹⁰⁴ For example, with regard to the East African Railways, *M. W. Mangachi* points out: “Most of the problems related to the inequitable sharing of the revenue among the three partner states, Kenya, which collected most of the revenue, was reluctant to transfer the share of revenue due to Uganda and Tanzania.”, *M. W. Mangachi* (note 91), 84.

was missing. Accordingly, the experience of the first EAC suggests rather a strengthening and not weakening of the Community institutions and a focusing on common rules rather than on common services.

3. Quest for Equitable Distribution of Integration Gains

It has been claimed that legalisation may not necessarily serve the best interest of the EAC Partner States.¹⁰⁵ This argument cannot really convince without referring to what is actually being legalised. The extent to which a legal rule is flexible or enforceable, is just a formal aspect of the rule. Of course, one cannot deny that this has an impact on interests of the states concerned. However, what seems to be more important is what a given rule actually provides for. Indeed, some political choices embodied in the legal rules may be more beneficial for some actors, if they remain of a general character. But there can be no argument that this is always the case, notwithstanding the nature of the political choice or – in other words – of what has actually been decided. Overemphasising the formal aspect of legal rules would result in a claim that political decisions serve the best interest of the states concerned only if there is no obligation to take them seriously. Is this really the fundament of regional integration in East Africa?

4. Regard for Different Stages of Development

Incrementalism, progressiveness and variable geometry are the responses of the EAC Treaty to the challenges posed by different stages of development of the Partner States. This approach is disputable, as it implies that the common market can be “achieved” at a certain point of time. Such an assumption is illusory. The process of establishing of the European common market proves that attaching legal strings to a deadline for accomplishment of the common market is problematic and artificial.

In the history of European integration two deadlines for the accomplishment of a common market were set. Originally, Art. 8 European Economic Community (EEC) Treaty provided for a twelve years transition period for the establishment of a common market. This period was subdivided into three stages; a particular set of actions was assigned to each stage. It is important to note that the principles of direct applicability and direct effect

¹⁰⁵ *J. T. Gathii* (note 27), 15.

became operational before all measures necessary for the establishment of a common market became effective. The transitional period elapsed in the year 1969, but this year can hardly be regarded as a date on which the common market was launched. It was the Single European Act of 1985,¹⁰⁶ which provided for a number of measures to be adopted in order to close the gap in the completion of a common market. The new deadline set for the adoption of those measures was 31.12.1992. The elapse of this deadline was, however, not intended to produce any legal effect.¹⁰⁷ And even though the European Common Market may be regarded as since then “completed”, it is still subject to various adjustments and reforms.

Whereas there is no reason at all to theorise that direct applicability and direct effect of secondary legislation presuppose the completion of the common market, the European experience suggests that the same hold true for the primary law. The judgements of the CJEU on fundamental freedoms proved supportive to various policies aiming at removing obstacles to the operability of the common market. These judgements resulted out of preliminary reference procedures in which domestic courts could apply fundamental freedoms in local factual settings. The CJEU’s answers to the questions submitted by domestic courts provided for policy guidelines in core areas of integration law.¹⁰⁸ The European Community (EC) Treaty norm providing for free circulation of goods and prohibiting not only tariff, but also non-tariff barriers to trade (NTBs) was one of the first declared by the CJEU as directly applicable and having a direct effect.¹⁰⁹ Later, the *Dassonville* judgement of 1974 was a key facilitator in establishing policy guidelines with regard to the removal of NTBs. The *Cassis de Dijon* judgement handed down in 1979 articulated the principle of mutual recognition and paved the way to a new approach within the European harmonisation policy.¹¹⁰ And it is precisely the persistence of NTBs, which is regarded as one of the key obstacles to growth of intra-African trade and the operability of African common markets.¹¹¹

True, in Europe, the common market and later the internal market as an ampler version of the former, were not achieved overnight. On the other

¹⁰⁶ See A. Dashwood/M. Dougan/B. Rodger/E. Spaventa/D. Wyatt, *European Union Law*, 2011, 12 et seq.

¹⁰⁷ See C. W. A. Timmermans (note 77), 136 et seq.

¹⁰⁸ See *T. de la Mare/C. Donnelly* (note 16), 363.

¹⁰⁹ *Van Gend en Loos* (note 5).

¹¹⁰ See CJEU, case 120/78, *Cassis de Dijon*; K. J. Alter/S. Meunier, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, in: K. J. Alter, *The European Court’s* (Anm. 59), 148 et seq.

¹¹¹ *J. V. Mwapachu* (note 10), 83.

hand, the legal instruments and key legal concepts aiming at the implementation of the founding Treaties policy objectives, such as direct applicability, direct effect and supremacy of the European law, were available if not already by the time of the establishment of the EEC, then just a couple of years later.¹¹² Over time, their value was gradually enhanced by expanding the area of majority voting and targeting barriers for the free circulation by secondary legislation.

The fundamental freedoms within the EAC, if endowed with direct effect, would similarly allow the EACJ and the national courts to test for example the proportionality or at least the reasonableness of restrictions to fundamental freedoms in various factual settings. As said, one cannot *a priori* assume that such court actions would jeopardise the progressiveness of lifting barriers. In any case, it would provide for a strong incentive to lift barriers on time, as both the national and international judge would be in a position to challenge them, once the agreed deadline for their removal has already expired.¹¹³

In this context, the EAC Treaty assumes that different states can progress towards an achievement of common objectives at different speeds. The idea is encapsulated in the principle of variable geometry,¹¹⁴ which is a concept bearing some risks. Most obviously, it can serve as a deception from the fact that pursuing common objectives, which are formulated in very general terms, is a matter of substantial policy choices and these choices may differ from country to country. In other words, the national stakeholders may differ not only as to when a particular objective is going to be achieved, but also how it should happen. Accordingly, the integration is not just a matter of speed but also a question of political will. A failure to adopt a common rule may thus simply demonstrate that no substantial political decision on how the integration should proceed has been made. *Mvungi* who claims with regard to the first EAC that it constituted “an agreement to disagree rather than a feasible economic community”,¹¹⁵ rightly makes this point. Such an approach aggravates the frangibility of the entire integration project, mentioned earlier. Variable geometry is also at variance with the idea of uniform application of a community law, which is, as said earlier, crucial for the functioning of a common market. If national interests of particular

¹¹² According to *B. de Witte* the direct effect and supremacy of the EEC law were largely ignored in the foundation years. The major turn came 1963 and 1964 with *Van Gend en Loos* and *Costa* judgements. See *B. de Witte*, Direct Effect, Primacy and the Nature of the Legal Order, in: P. Craig/G. de Búrca (note 16), 324 et seq.

¹¹³ See p. 589.

¹¹⁴ Art. 7 para. e EAC Treaty

¹¹⁵ *S. E. A. Mvungi* (note 3), 83.

states or different stages of development have to be specifically addressed, the common market paradigm would require doing so only exceptionally. Such exceptions are not unfamiliar to the European Union law, just to mention the provisions on enhanced cooperation and (highly disputed) transitional periods in the EU accession treaties. Hence, what is an exception within the EU context, is an operational principle of the EAC law.

There remains a claim of a more general character, which is, that inflexible rules do not adequately address the heterogeneity of the EAC Partner States.¹¹⁶ Such a thesis seems to presuppose at least to some extent that a legal system can function well only in a homogeneous setting. Although there is some reason in saying that a high degree of cultural, political and social convergence facilitates a proper functioning of a legal system, one must bear in mind that a homogeneous society, let alone any form of homogeneous political organisation, is largely a myth. Any legal system, be it national or international is inevitably confronted with diversity. One may even argue that the very reason for a legal system to exist is to manage a diversity and to address disparities between social groups or regions. At least one of the EAC Partner States, the United Republic of Tanzania can serve as an example of a diversity management accommodating 120 different ethnic groups. Hence, advancing diversity as an argument against the enforceability of legal rules amounts to questioning the very idea of regulatory ability of law. Given that the EAC was initially designed as an integration facility for just three states, the weight attached to adequate diversity management by watering down the force of legal obligations is even more puzzling. The success of the common market does not depend on deficient implementation of rules or even on the absence of such rules, but rather on clever choices of a positive integration policy, which are hard to make when the law of the EAC remains the lowest common denominator of what are the preferences of national bureaucracies.

5. The Futility of Common Market Paradigm in an African Context

There is some scepticism, whether a free trade and common market can be a panacea for the African predicaments. It is argued, that free trade would not generate mutual benefits for the Partner States without structural changes to their economies; there is some doubt, whether the Vinerian inte-

¹¹⁶ See *J. T. Gathii* (note 27), 18.

gration model, developed in an industrial context, would work in an African setting, as lifting of trade barriers would not necessarily create more trade, given that African economies generate similar products.¹¹⁷ However, stressing this fact as an argument against enforceability of international law provisions or enactment of secondary international legislation would mechanically equate rule-based integration with a common market paradigm. This kind of link does not have to be compelling. Nevertheless, the argument calls for explanation, for what reason the common market Protocol, or, most recently, a Protocol on the Establishment of an Eastern African Monetary Union have actually been concluded. And the answer given by the political processes in the region is quite clear: For years, the stakeholders have been regarding the deplorably low level of intra-regional trade as an obstacle to economic growth, which should and could be remedied by regional economic integration.¹¹⁸

To promote regional trade or not to promote it is a matter of political choice, which has already been made by concluding the CMP at the latest. Invoking the futility of common market paradigm amounts to questioning legally embedded political choices at the stage of their implementation. This is too late; and it undermines the credibility of integration commitments and international law. Obviously, the rule of law does not exclude that political choices once made are corrected and updated. But, as said, the EAC integration as it stands now equates to deliberately creating and upholding a cleft between words and deeds. And such a cleft is at variance with the very idea of compliance with the law.

¹¹⁷ *J. T. Gathii* (note 27), 8.

¹¹⁸ The re-launch of the EAC must be seen as an offspring of the Lagos Plan Action adopted by African leaders in 1980 proclaiming self-reliance and self-sustaining development as principles for a reconstruction of African economies to which regional integration projects should have contributed. The specialisation in primary production for exports to the industrialized states was seen as a cause for African problems, which the African leaders wanted to overcome. See *M. W. Mangachi* (note 91), 152 with further references. As the new EAC came into being, the Partner States were pursuing programs of economic reconstruction which aimed at giving a larger role to the pro-market and pro-private and pro-liberalisation policies (*M. W. Mangachi* (note 91), 154). Against this background, boosting of intra-regional trade appears as a deliberate policy choice firmly anchored in the founding treaty as a basis for the development scenario envisaged by the contracting states. This objective of the integration agenda remained unchanged. However, more recent studies underline that the trade liberalisation must go hand in hand with investment in infrastructure, active industrialisation policy and support for the private sector. The RECs “provide a foundation for enhancing policy, legal and institutional capacity at national and regional levels”. See United Nations Conference on Trade and Development (UNCTAD): *Economic Development in Africa. Report 2013. Intra-African Trade: Unlocking Private Sector Dynamism*, 120 et seq., available at: <<http://unctad.org>>. See also *J. V. Mwapachu* (note 10), 49 and 79 et seq.

As concerns the law on the books, the Eastern African States seem to adhere to the same model of development of the common market as the European Economic Community did from its inception. Accordingly, it is just the way of implementation of the treaty provisions, which makes the difference. This focus on (too often flawed) implementation rather than on the content of the rules governing the integration process raises serious doubts.¹¹⁹ As said, deficient implementation alone does not amount to adherence to a different development model.

V. Cost of the Rules Scepticism

The fact that the integration commitment is not credible does not seem to be regarded as a flaw. Quite on the contrary: It has been argued that obligations are often assumed “on the understanding, that compliance will not be stringently enforced”.¹²⁰

The lack of credibility of the integration commitments, however, does not only endanger the integration. It also undermines the legitimacy of international law as such. And the record of Partner States’ fulfilment of integration commitments is, as said, rather not encouraging. As for the implementation of the CMP, despite of some progress, the Partner States not only fail to meet the deadlines for the elimination of barriers to free circulation of goods, labour, services and capital, but even introduce new barriers.¹²¹

Looking at this situation from a more general perspective, one has to bear in mind, that the entire edifice of modern public international law from the beginnings of the 20th century is based upon the conviction that international relations should be rule-based, as only a rule-based system, as opposed to a power-based system, has a capacity to counterbalance, at least to some extent, the arbitrary of the stronger.¹²² The East African integration model points to the opposite, if assumed, that it rests upon the premise, according to which enforceability of international law rules forms an obstacle to equitable distribution of gains of international cooperation. It conveys a mes-

¹¹⁹ See p. 602.

¹²⁰ *J. T. Gathii* (note 27), 5.

¹²¹ See most recently World Bank; East African Community Secretariat. 2014. EAC Common Market Scorecard 2014: Tracking EAC Compliance in Movement of Capital Services and Goods, 5. The implementation of the integration framework is very critically assessed by *L. O. W. Oluoch* (note 43), 216 et seq. On the negative impact of the intra-EAC trade barriers on the economic growth in the Partner States, see *K. Kimbugwe/N. Perdikis/M. T. Yeung/W. A. Kerr* (note 71), 91 et seq.

¹²² See *C. H. Brower*, Arbitration, in: MPEPIL, 2010, para. 32.

sage that the weaker cannot be adequately protected by enforceable rules of international law, but should rather resort to flexible mechanisms of negotiations. Such a premise remains unproved and questionable.

Obviously, it is not uncommon for an international law instrument to set policy goals rather than to provide for clear-cut rules of conduct, assuming that such a distinction can be made at all. But even when the technique of abstract policy goals is adopted, their credibility calls for adoption of some parameters serving as a basis for assessment of progress, which is made towards the achievement of the goals set by a given treaty. And once a procedure for a progress assessment is made operational, its outcomes can form focal points for a public debate. Those focal points shed light on the flaws of implementation and provide for positive examples of integration measures; in this way, they enhance the steering capacity of the underlying legal provisions. Also, the debate thus generated puts more pressure on the states to stick to their commitments, for no state is willing to be identified and exposed as violating the law.¹²³

It is not to claim that integration projects can only be successful if based on fully enforceable rules of public international law providing for supranational legislation and supranational institutions. It cannot be excluded that firm political commitments can produce tangible effects if backed by true political will and rigorous implementation. Such projects will usually, though, take a form of international treaties. What is problematic about the East African project is rather the fact, that it contains many vague political announcements formulated, if not even disguised, as legal obligations. And even when the treaty texts get more specific the implementation mechanisms are weak. The borderline between legal obligations and mere political declarations of will is thus blurred.

VI. Conclusion

On balance, the risks of rule scepticism outweigh the benefits which are, moreover, not self-evident, to say the least. There is no argument, which could help to bridge the gap between the far-reaching and wide-ranging integration objectives on one hand and the scarcity of implementation instruments combined with the weakness of supranational institutions on the other.

¹²³ See *T. Milej*, *Entwicklung des Völkerrechts. Der Beitrag internationaler Gerichte und Sachverständigengremien*, 2014, 329 et seq. with further references.

It is not argued here that the progressiveness paradigm should be abandoned. What is rather suggested is the necessity of bringing new actors into the EAC integration process. These actors should not only include strong supranational institutions, but also the individuals and the national courts. Letting them join the “complex and long march” as the integration process was aptly characterised,¹²⁴ would fill it with new dynamism, which it needs desperately, if it is intended not just to feed pan-African affections but to live up to its promises. This is perfectly in line with the EAC Treaty objective of a people-centred Community. It is the EAC Treaty itself, which recognises that the integration process in order to be successful cannot be left alone at the mercy of national governing elites.

¹²⁴ J. V. Mwapachu (note 10), 71.

