An East African Federation and the Constitution of Kenya. A critical look at the proposed creation of an East African Federation vis-a-vis the Constitution of Kenya

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Project paper submitted to the University of Nairobi in partial fulfilment of the degree of Master of Laws

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Declaration

I Moses Gatitu Wang'oo do hereby declare that this is my original work and that it has not been submitted for a degree in any other university.

Signed.....
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This project paper is submitted for examination with my approval as university supervisor.

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Dedication

In loving memory of my father, the Late Paul Gerishom Wang'oo.

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Abbreviations and Acronyms

Cap……Chapter

EA……East Africa.

EAC……..East African Community

GATT……General Agreement on Trade and Tariffs

HCK……..High Court of Kenya

HCCC……High Court Civil Suit

KLR……...…Kenya Law Reports.

OS……Originating Summons

RTA……...Regional Trading Arrangement

Treaty……The Treaty for the Establishment of the East African Community, 1999.

Treaty Act…….The Treaty for the Establishment of the East African Community Act , 2000 (Kenya)

US ……United States

WTO……..World Trade Organisation

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Table of Statutes

Constitution of France, 1992

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Constitution of Kenya (Rev.1992)

Constitution of Uganda, 1995

Constitution of Kenya Review Act Chapter 3 A of the Laws of Kenya

Treaty for the Establishment of the East African Community Act , 2000 No.2 of 2000 (Kenya)

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Abstract

Economic integration is in vogue in East Africa. The three East African countries, that is, Kenya, Uganda and Tanzania have entered into the Treaty for the Establishment of an East African Community, 1999.[1] The objective of the East African Community is economic integration through the formation of a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.[2]

The logic of political integration as a policy of economic integration is in ascendance in East Africa replacing the purely economic integration measures and rejecting an incremental process. The East African Political Federation envisaged would mean that the three East African countries would have common foreign and security policies and a central federal government under an East African President.[3] An East African Federation is to be in place with a new Federal Constitution by 2010.[4]

A Political Federation as a policy of economic integration brings into sharp focus the issue of the constitutionality of such fundamental alteration of the constitutional order in Kenya. This is mainly because there are express and implied constitutional limits on the power of the Executive to enter into such a treaty and in the pursuit of economic integration. Under the operational East African Community certain constitutional conflict areas are already evident. In brief, these conflict areas;

First, each of the three East African countries has a hierarchy of norms which emphasizes the supremacy of their respective Constitution. In Kenya, the Constitution as the supreme law, does not attempt to deal with treaty making and the effects that this would have on a treaty that has as its objective the altering of the laid down constitutional order. It follows, therefore, that even if the Treaty declares it is supreme over national

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[1] See The Treaty for the Establishment of the East African Community, 1999 at <www.eac.int/treaty.htm > (accessed 10 January 2005).
[2] *Ibid.*, note 1, art. 5.
[3] See "Joint Communiqué for the East African Heads of State Summit in Nairobi, 27-29 August 2004," at <www.eac.int/news_2004_08_communique.htm > (accessed 10 January 2005).
[4] *Ibid.*

Constitutions of the Member States, each of the Constitutions would still retain the declaration of itself as the supreme law of its territory.

Secondly, the East African Legislative Assembly has been given legislative power at par with the Parliament of Kenya and in some aspects is superior on matters that affect Kenyans.[5] This is not delegated legislation as Article 4 of the Treaty gives it precedence over similar provisions of the national laws.[6]

Thirdly, the Council under the Treaty has executive power as it has the responsibility of making decisions on key economic policies of the Member States such as taxation and initiation of Bills to the East African Legislative Assembly.[7]

Fourthly, the East African Court of Justice has original jurisdiction on matters touching on interpretation and compliance with the Treaty. The jurisdiction of this court is also to be extended to include appellate and human rights jurisdiction.[8]

Lastly, the current conflicting position is to be extended and magnified by the formation of an East African Political Federation.[9] The East African Federation is to have a central Federal government and a single East African President.[10]

Therefore, there is an existing limited sharing of executive, legislative and judicial power that is to be made all encompassing in an East African Federation. It is thus evident that there is currently an emergent new constitutional order in East Africa and under an East Africa Federation there will be a complete dislocation of the current executive, legislative and judicial powers.

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[5] *Ibid.*, note. 1, art. 48
[6] *Ibid.*, note. 1, art. 4 and 5.
[7] *Ibid.*, note. 1, art. 13, 14 and 16.
[8] *Ibid.*, note. 1, art. 27.
[9] *Ibid.*, note. 1, art. 5 (2).
[10] See "The East African Heads of State Summit in Nairobi, 27-29 August 2004," at <www.eac.int/news_2004_08_communiqué.htm> (accessed 10 January 2005).

The extension and broadening of the East African Community into an East African Federation may therefore exacerbate the constitutional problems and democratic legitimacy of the resultant state.

This research paper looks at the Treaty for the Establishment of the East African Community, 1999 in so far as it seeks to create an East African Federation. This is in the light of the legal reception of treaties in Kenya and the supremacy of the Constitution. It reflects on whether the creation of an East African Federation is an unconstitutional change of the constitutional order in Kenya.

The paper concludes with recommendations for a constitutional process for the creation of an East African Federation. This must take cognizance of the express and implicit constitutional limits. It must also give due consideration to the people of East Africa's constituent power. The leadership must change the legitimating basis of the federation from being based on the member states to being based on a single East African people. This would end up turning the East African Community into an East African State.

Research Proposal

0.1 Introduction

This research paper addresses itself to regional integration efforts in East Africa and the Constitution of Kenya. First, the research paper looks at the Treaty for the Establishment of the East African Community, 1999 and in particular its objective of creating an East African Political Federation. It further analyses the impact of the creation of the proposed East African Federation on the current constitutional order in Kenya

Second, the research paper also looks at the proposed creation of an East African Federation in the light of the legal position of treaties in Kenya and the supremacy of the Constitution of Kenya. It analyses the relationship between the Treaty for the Establishment of the East African Community, the Constitution of Kenya and the implications this has on the creation of an East African Federation. It thus mainly examines whether the effect of the Treaty for the Establishment of the East African Community,1999 in creating the proposed East African Political Federation is to alter the constitutional order in Kenya unconstitutionally.

Finally, the research paper gives recommendations on constitutional means of creating an East African Federation and other necessary legal reforms to facilitate regional economic integration.

0.2 Research Question

The research problem is whether the proposed creation of an East African Federation under the Treaty for the Establishment of the East African Community, 1999 amounts to an unconstitutional alteration of the constitutional order in Kenya and if so, how can an East African Federation be created constitutionally.

0.3 Research Objectives

The general objective of this research is to critically look at the proposed creation of an East African Federation under the Treaty for the Establishment of the East African Community, 1999 in the light of the Constitution of Kenya.

In pursuit of this, the research has three specific objectives. The first is to examine the proposed creation of an East African Federation under the Treaty for the Establishment of the East African Community and the impact on the Constitution of Kenya.

The second objective is to establish the legal implication of both treaty application in Kenya and the supremacy of the Constitution of Kenya on the creation of the proposed East Africa Federation.

The third objective is to recommend constitutional changes and processes to facilitate the creation of a constitutional East African Federation.

0.4 Statement of the Problem

The East African Community (EAC) was first established in 1967 by the Treaty of East African Co-operation and dissolved in 1977.[1] It was revived by the Treaty for the Establishment of The East African Community of 30th November 1999.[2]

The Government of Kenya through the Treaty for the Establishment of the East African Community, 1999 has been fast tracking the creation an East African Federation comprising of the Republics of Kenya, Uganda and Tanzania. The Regional integration efforts are at fever peak with one newspaper headline reading, "East Africa to become a single state in 2010."[3] The Executive, which is a creature of the Constitution, in exercising its treaty making power has therefore ratified a treaty that seeks to create an East African Federation.

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[1] A. Hazelwood, "The End of the East African Community: What are the lessons for the regional integration schemes?" *Journal of Common Markets Studies* (1979/80) Vol.18.

[2] The Treaty for the Establishment of the East African Community, at <www.eac.int/treaty.htm> (accessed 10 January 2005).

The East African Community, which is operational, and that is to be extended and magnified into an East African Federation, already faces constitutional hurdles to its operation.

First, each of the three East African countries has a hierarchy of norms which emphasizes the supremacy of the respective Constitutions.[4] In Kenya, the Constitution as the supreme law, does not attempt to deal fully with treaty making and the effects that this would have on a treaty that has an objective of altering the laid down constitutional order. It follows, therefore, that even if the Treaty declares it is supreme over national Constitutions of the Member States, each of the Constitutions still retain the declaration of itself as the supreme law of its territory. This negates the hierarchy of laws and the supremacy of the Constitutions.[5]

Secondly, as per section 23 of the Constitution of Kenya the executive authority vests in the President of Kenya.[6] The Executive has the exclusive competence to exercise economic sovereignty, that is, to choose and implement economic policies beneficial to Kenya. Contrary to the aforesaid provisions of the Constitution of Kenya, the Treaty for the Establishment of the East African Community, 1999 in Article 13 and 14 creates the Council. This organ has the power to make economic policy decisions, initiate Bills to the East African Legislative Assembly, make regulations and give directions affecting Member States.[7] Consequently, executive power is no longer to be exercised as envisaged under the current Constitution of Kenya but one that is to be mediated through Member States.

Thirdly, section 60 of the Constitution of Kenya creates the High Court of Kenya which has unlimited and original jurisdiction in Kenya. Contrary to this, Article 23 of the Treaty for the Establishment of the East African Community 1999 creates the East African Court

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[3] *Saturday Nation* (Nairobi) "East Africa to become a single state in 2010." 27 November 2004, p.1.
[4] Sec.3, Constitution of Kenya Cap.1, Laws of Kenya.
[5] *Supra* note 2, art. 4 and 5.
[6] *Ibid.*, note 4, Sec.30.

of Justice. This is a judicial body with original and exclusive jurisdiction to ensure the adherence to law in the interpretation and application of and compliance with the Treaty. The court is also to have original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable date.[8]

Fourthly, section 30 of the Constitution of Kenya creates the Parliament of Kenya that exercises legislative power in Kenya and has parliamentary sovereignty. In conflict with this is Article 48 and 49 of the Treaty for the Establishment of the East African Community,1999 which creates the East African Legislative Assembly with power to legislate for the Community which includes Kenya. A creature of Parliament has legislative power at par with Parliament as the Acts of the Community are to have precedence over similar national Acts.[9]

Lastly, the Constitution of Kenya can only be reviewed by the people of Kenya and thus the formation of an East African Federation with a federal constitution enacted by the legislatures of the three East African states is unconstitutional.[10]

The current conflicting status under the East African Community is to be extended and magnified by encompassing the political sphere and forming an East African State.[11] Thus in November 2004, the three Heads of States of East Africa received a report of findings from the Committee on fast tracking of the East Africa Federation chaired by Kenya's Attorney General Amos Wako, which they had commissioned.[12]

In their report, the Committee recommended that the East African Political Federation should come into existence in 2010 and that the period between 2010 and 2012 would be

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[7] *Supra* note 2, art.13 and 14.
[8] *Supra* note 2, art. 23, 24 and 27.
[9] *Supra* note 2, art. 48, 49 and 59.
[10] *Njoya and Others* v. *Attorney General and Others* Case No.82/04 (OS0 (Uneported).
[11] *Supra* note 2, art. 5 (2).
[12] See "Joint Communiqué for the East African Heads of State Summit in Nairobi, 27-29 August 2004," at <www.eac.int/news_2004_08_communique.htm > (accessed 10 January 2005).

a consolidation phase in which the Presidency of the East African Federation would be on a rotational basis before East Africans elect their first President directly.[13]

The Heads of State appear determined in their new attempt to fast track the creation of an East African Political Federation. President Mwai Kibaki of Kenya is quoted to have been excited about the prospects, calling the report wonderful and expressing hope that the East African Federation can be realized in his life time. He said that the leaders were determined to bring about an East African Federation "at the risk of losing the current sovereignty."[14]

The former President of Tanzania, Benjamin Mkapa, urged East Africans not to be egoistic in the regional quest for unity. President Jakaya Kikwete of Tanzania has also said that Tanzania is not opposed to the creation of the East African Federation.[15] The Presidents were reported to have regarded the findings as "a realistic plan of implementation."[16]

Further, in May 2005, the three Heads of State reaffirmed their commitment to the principle of acceleration that would expedite and compress the process of integration so that the ultimate goal of an East African Political Federation is achieved through a fast track mechanism.[17] They committed themselves to fast tracking the creation of an East African Political Federation and although the target date for the East African Federation is 2010, they nevertheless could decide on a date earlier than 2010 to effect the Political Federation.[18]

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[13] See "Joint Communiqué for the East African Heads of State Summit in Nairobi, 27-29 August 2004," at <www.eac.int/news_2004_08_communique.htm > (accessed 10 January 2005).
[14] See "Press Release," at <www.eac.int/news.htm>(accessed 10 January 2005).
[15] See Simon Kasyate "Kikwete urges EA Federation as he ends Uganda visit" *Daily Nation* (Nairobi) 24 March 2006, p.19.
[16] *Ibid.*, note 14.
[17] See "Joint Communiqué for the East African Heads of State Summit in Nairobi, 29-30 May 2005," at <www.eac.int/COMMUNIQUE_3RD_EXTRA_ORD_SUMMIT_DAR_29-30MAY05.pdf> (accessed 3 June 2005).
[18] *Ibid.*

The extension and broadening of the East African Community into an East African Federation may therefore exacerbate the constitutional problems and democratic legitimacy of the resultant state. There will certainly be a new location of the executive, judicial and legislative power under an East African Federation and hence the emergent of a new constitutional order.

The Executive may therefore be using its treaty making power through the Treaty for the Establishment of the East African Community, 1999 to knowingly or unknowingly pursue the fashioning of a new constitutional order in Kenya albeit unconstitutionally. The idea of a super state is thus foremost in the minds of the leaders of the East African countries. The construction of this single state is bound to raise a myriad of constitutional questions and most likely a constitutional crisis in Kenya.

0.5 Theoretical Framework

In order to look at the construction of an East African Federation there is need to look at dualism and monism theories. This is so as to understand the relationship between the Treaty for Establishment of the East African Community and the Constitution of Kenya.

The basis of the relationship between states in regional integration is bilateral and multilateral treaties. The legality of treaties is based on the doctrine of *pacta sunt servanda* or that pacts are made to honoured. [19] In the municipal or domestic law sphere, the supreme law is the Constitution.

The main theories on the relationship between international law and municipal law are dualism and monism. Dualism theory is also known as parallelism and stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other.[20]

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[19] Lord McNair, *The Law of Treaties* Oxford University Press, Oxford, 1961.
[20] See J.G. Starke, *Introduction to International Law* Butterworths, London 1989 (10th ed).

The dualist maintain that international law and municipal law are separate, distinct and independent systems of law. They hold the position that it is only by sufferance that the municipal law allows the rules of international law to apply in its sphere and vice versa.

Key proponents of positivism among them Jeremy Bentham,[21] John Austin,[22] Hans Kelsen,[23] H.L.A Hart.[24] Triepel and Strupp when they consider the relationship of international law to municipal law, they do so upon the basis of the supremacy of the state, and the existence of wide differences between the two functioning orders.[25]

This is because of the fundamentally different nature of interstate and intra-state relations and the different legal structure employed on the one hand by the state and on the other hand as between states. Where municipal legislation permits the exercise of international law rules, this is on sufferance as it were and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere.[26]

Under the dualist theory, the Treaty for the Establishment of the East African Community, 1999 would have to be "transformed" by the municipal law rules in order to have the force of law in the municipal law sphere.

Monist theory is also known as Internationalism, it is the acknowledgement of the primacy of international law over municipal law. [27] Under the monist theory, treaties made under certain conditions automatically become the law of the land.[28] Thus the Treaty for Establishment of the East African Community 1999 would automatically have the force of law in Kenya upon ratification.

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[21] See M.D.A. Freeman, *Introduction to Jurisprudence* Sweet & Maxwell, London 2001, p. 200-207.
[22] See John Austin, *The Province of Jurisprudence Determined and the Uses of the study of Jurisprudence* Wieden & Icolson, London, 1955, pp.363-393.
[23] *Supra* note 21, pp. 199-220.
[24] See H.L. A. Hart, *Concept of Law* Clarendon, Oxford, 1961.
[25] See Malcom Shaw, *International Law* Grotius Publications, Cambridge, 1997 (4th ed) pp. 98-122.
[26] *Ibid.*, note 25, pp. 98.
[27] *Supra* note 12, pp. 253-330.

The monists hold the view that international law and municipal law form a single unitary system of law. The method by which Kelsen elucidates his theory of monism utilizes the philosophy of Kant as its basis.[29] Law is regarded as constituting an order which lays down patterns of behaviour that ought to be followed, coupled with provision for sanctions which are employed once an illegal act or course of conduct has occurred to be embarked upon. Since the same definition appertains both within the internal sphere and the international sphere, a logical unity is forged.[30]

In my view, and in order to successfully pursue regional integration, the monist theory must be the preferred approach as it in essence identifies the international legal system with the internal one. Under a monist legal system in Kenya, treaty obligations will be given primacy and this would facilitate the creation of an East African Political Federation based on the Treaty.

Under the monist approach the choice of primacy rests on juridical logic whereas dualism has been mainly retained where international society is practically non existent.[31] Dualism is retained where states jealously close themselves to the outside world and keep their foreign relations under strict control, then hardly any international rules are allowed to penetrate the municipal shell. Dualism is a fair reflection of the ideal of a state rejecting legal integration essentially because there is no social integration and no intention of bringing it about.[32]

Kenya cannot therefore successfully pursue regional integration and especially the creation of an East African Political Federation under a dualist approach. It should adopt a monist approach coupled with other constitutional safeguard mechanisms like Parliamentary approval before ratification of a treaty.

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[28] *Supra* note 12, pp. 253- 330.
[29] *Supra* note 25, p. 99.
[30] *Supra* note 23, pp. 288.
[31] *Supra* note 25, p. 99.

0.6 Literature Review

The literature review that follows is in four parts. First, is a brief review of the literature on the jurisprudence of the relationship between international law and municipal law so as to understand the relationship between a treaty and a constitution in general. Second, is a review of the literature on the supremacy of the Constitution of Kenya so as to relate the positions of the Constitution of Kenya and the Treaty within the municipal jurisdiction. Third, is a review of the literature on the rationale and workings of regional economic institutions so as to establish the legal regime of the East African Community that is the successor of the East African Federation. Lastly, is a review of the literature specifically on the East African Community and its stated objective of creating an East African Federation.

First, a basic understanding of the relationship between international law and municipal law is necessary so a to understand the relationship between the Treaty for the Establishment of the East African Community,1999 and the Constitution of Kenya. *International Law* [33] by Malcom Shaw describes the theories that explain the relationship between international law and municipal law as dualism and monism.

These theories basically view the legal systems as either two distinct separate systems or one unitary system, respectively. He also provides the practical approach that countries have adopted in the relationship between international law and municipal law where treaties are only incorporated into the municipal law by "transformation" which is mainly by a domestic legislation. On the other hand customary international law is incorporated directly into the municipal law.

J.G.Starke in *Introduction to International Law* [34] advances the view that supremacy of international law over municipal law rests only in particular rules and principles of

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[32] *Supra* note 25, pp. 97-122.
[33] *Supra* note 25.
[34] *Supra* note 20.

international law. He uses the example of federal constitutions and concludes that just like the federal states enjoy areas of autonomy not bound by the central government, so does the state. The state enjoys some areas of autonomy not regulated by areas of international law.

M.D.A. Freeman in *Introduction to Jurisprudence*[35] expounds on Hans Kelsen theory that law is a hierarchy of norms and suggests that international law is a more basic norm than municipal law. Hans Kelsen theory of norms leads to the conclusion that both international law and municipal law form a single legal system.

Luis G. Franceschi F. in his thesis *The Constitutional Regulation of the Foreign Affairs Powers: The Kenyan Experience* [36] has looked at the Kenyan application of international law in the municipal sphere and deduced that it is a dualist legal system. Therefore, many early and modern writers have basically discussed the above two theories of dualism and monism and the practice of states that has evolved over time.

Second, on the review of the literature on the supremacy of the Constitution of Kenya, Section 3 of the *Constitution of Kenya* provides *inter alia* that, "if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void". The supremacy of the Constitution of Kenya has further been repeatedly upheld by the courts in Kenya. For instance, in the case of *Okunda and Anor.* v. *Republic* [37] the court held that the Kenya Constitution is the instrument which brought into being the entire state and government machinery and that it prescribes the basis for the economic and social institutions of the country. Its influence and power are all pervading.

The case of *East African Community* v. *Republic* [38] further cements the view that the Constitution of Kenya has primacy over treaty law and is the supreme law of Kenya. The

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[35] *Supra* note 21.
[36] Luis G.Franceschi F, *The Constitutional Regulation of the Foreign Affairs Powers: The Kenyan Experience* LL.M thesis, University of Nairobi,1999.
[37] *Okunda and Anor* v. *Republic* [1970] EA 453.

recent case of *Njoya and Others* v. *Attorney General and Others* [39] upheld the supremacy of the Constitution of Kenya and stated that its source and reason emanated from the relationship between a Constitution and the powers of Government which is a relation of an original and a dependent or derivative power, between a superior and a subordinate. The import of the decision was that Parliament in the exercise of legislative power cannot fundamentally alter or abrogate the Constitution of Kenya by the enactment of a new one.

The above positions are supported by the articles of William Marbury entitled, "Limitations upon the amending power" [40] and George Skinner's entitled "Intrinsic limitations on the power of constitutional amendment" [41] by their positions on the "unamendable constitution". They both question the legality of fundamental constitutional changes made in the name of amendment. They argue that the framers of the Constitution could not have contemplated an amendment of the Constitution that would alter the basic constitutional order. They further argue that there are limits on the power of amendment and for example a Unitary government should not through amendment be made a Federal government.

The books by S.P. Sathe *Fundamental Rights and Amending the Constitution* [42] and *Constitutional Amendments 1959-1988: Law and Politics* [43] puts forward a "basic structure doctrine" and argues that the power of constitutional amendment cannot be exercised so as to change a democracy into a totalitarian government or to substitute a theocratic rule in place of a secular state.

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[38] *East African Community* v. *Republic* [1970] EA 458.
[39] *Supra* note 10.
[40] William Marbury, "Limitations upon the amending power," Vol.33 *Harvard Law Review* 1919, pp. 223-243.
[41] George Skinner, "Intrinsic Limitations on the power of constitutional amendment," Vol.18 *Michigan Law Review,* 1919-1920, p. 24.
[42] S.P.Sathe, *Fundamental Rights and Amending the Constitution* University of Bombay, Bombay, 1968.
[43] S.P.Sathe, *Constitutional Amendments 1959-1988: Law and Politics* Bombay Tripathi Press, Bombay, 1989.

Githu Muigai also in his thesis "*Constitutional Amendments and the Constitutional Amendment process 1964-1977: A study in the Politics of the Constitution,*" [44]argues that there are express and implicit constitutional limits to the power to amend the Constitution and that fundamental amendments that violate the basic structure of the Constitution could lead to a loss of legitimacy of the Constitution and eventually a constitutional crisis. He is of the view that the constitutional amendments in Kenya since independence have been radical and profound, and that the present Constitution bears little resemblance to the independence Constitution.

The issues of creating an East African Federation raises the question of the proper scope of the exercise of the constitutional power to make treaties and the explicit and implicit constitutional limits in the pursuit of a range of economic measures by the executive in Kenya. This is because the current pursuit of the creation of an East African Federation is purportedly under the guise of regional economic institutions law.

The Constitution should have a basic structure that the executive in its treaty making power should not contemplate or act towards changing. There are some enduring values of the Constitution like sovereignty which are sacrosanct and which the architects of the East African Federation must bear in mind.

All the above academic arguments and judicial decisions on the supremacy of the Constitution give a legal framework within which to consider the constitutionality of the proposed creation of an East African Federation.

Third, on the review of the literature on the rationale and workings of regional economic institutions, the article on the workings of the global trading system by World Bank Legal Vice Presidency and World Trade Organization World Bank Institute titled "Regional Trade Arrangements: The interplay of regionalism and multilateralism in the trading

[44] Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process 1964-1977: A study in the Politics of the Constitution* Ph.D thesis, University of Nairobi, 2001.

system," [45] discusses the legal framework of regional trade arrangements and the interplay of regionalism and multilateralism in the trading system. The regional trade arrangements are on the basis of the exercise of economic sovereignty by a state and the need to reap the benefits of trade.

Bernard M. Hoekman and Michel M. Kostecki in *The Political Economy of the World Trading System, The WTO and Beyond* [46] gives a legal framework of regionalism in the global set up and the multilateral rules governing trade. This is under Free Trade Areas or Customs Unions.

Penaherrera Germanico Salgado in his article "Viable Integration and the Economic Co-operation Problems of the Developing World" [47] restates the need for economic integration to be, among other reasons, the need to expand trade, increase the capacity to negotiate with third parties and improvement of political relations.

D.W. Boweet in his book *The Law of International Institutions* [48] suggests the distinction between organizations founded on a treaty between states and a treaty between governments. The inter-state treaty form embraces the totality of the state's institutions, that is, its legislative and judicial machinery as well as the administrative, whereas the inter-governmental treaty form embraces only the administrative. The author emphasis the nature of a treaty being a contract and can be void or voidable. He views a distinction between treaties for economic co-operation as inter-governmental and not inter-state treaties. In my view, a treaty for economic co-operation should be restricted to the inter-governmental treaty and it thus rules out the creation of a Political Federation under economic co-operation because by its nature a Political Federation involves the whole system of government of a state.

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[45] World Bank Legal Vice Presidency and World Trade Organization World Bank Institute, "Regional Trade Arrangements: The interplay of Regionalism and Multilateralism in the Trading System," *Legal Aspects of International Trade seminar series* session V, 2002.

[46] Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System:The WTO and Beyond* Oxford University Press, London 2000 (2nd ed.).

42 Penaherrera, Germanico Salgado, "Viable Integration and the Economic Co-operation Problems of the Developing World," Vol.19 *Journal of Common Market Studies,* 1983, p.175.

[48] D.W. Boweet , *The law of International institutions,* Oxford University Press, London, 1972.

Berhanykun Andemicae, in his book *Regionalism and the United Nations* [49] provides the constitutional basis, the institutional origins and linkages and fields of activity of the international organizations. The author holds the view that solving particular problems in isolation is an obsolete method of intergovernmental action and requires a holistic approach like a Political Federation.

The European Union is a good example of successful regional integration and the East African Federation is meant to be fashioned in the same spirit. However, the creation of the European Union is not embodied in a treaty like the proposed creation of an East African Federation.

Michiel Brand in "Affirming and refining European constitutionalism towards the establishment of the first Constitution for the European Union"[50] discusses Europe's functional method of piecemeal engineering and result based masterminding. He argues that the functional approach has always been the followed approach in the European integration process. The functional approach has led to an unwarrantable process without any blue print for Europe's finality. Instead of mentioning the exact direction and finality of the European integration, like in East Africa under the Treaty for the Establishment of the East African Community 1999, it speaks of an ever-closer union among the peoples of Europe.

J. Wouters in *Understanding the European Union* [51] discusses the Treaty for Establishing the European Community and the Treaty on the European Union which instead of mentioning the exact direction and finality of European integration, speaks of an ever closer union among the peoples of Europe.[52] This is unlike the regional integration in East Africa which has a Treaty that clearly states its objective as the creation of a Political Federation.

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[49] Berhanykun Andemicae, *Regionalism and the United Nations,* Oxford University Press, London, 1980.
[50] Michiel Brand, *Affirming and Refining European Constitutionalism towards the Establishment of the First Constitution for Europeean Union* European University Institute Florence, Department of Law, 2004.
[51] J. Wouters, *Understanding the European Union* Longman, London, 2000.

Christian Joerges in "Rethinking of European law's supremacy" [53] calls European law as a kind of supranational conflict of laws based on American conflict of laws methodology. He argues that the rejection of the European Constitution treaty by the French and the Dutch electorates reflected in part the uneasiness of the European citizen with Europe which they perceive to govern "from above" with insufficient legitimacy and without adequate balance of free market and social concern. The author brings it to light that the European Constitution is a new and emerging constitutional order and that the location of executive power in the union, sharing of the executive power and legislative power is complex and contentious. That under the principle pragmatism the European Union institutions have grown outside the strict letters of the treaties and the functional approach has lead to an incremental process without any blue print for Europe's finality.

He highlights the difficulties that were encountered on the discussions relating to the legislative power and more so on the executive power in drafting the Constitutional treaty. The creation of an East African Federation will thus encounter similar problems in the dislocation and location of the executive, judicial and legislative powers and this may lead to the rejection of a Constitution for an East African Federation.

D. Grimm in his article, "Does Europe need a Constitution?" [54] discusses the view that Europe should not, and in principle is not, able to have a constitution. This he calls the *no demos theory* and is based on the need for homogeneity in order to have a constitution for a state. He says Europe has rejected the federal state model and instead chosen to present the distinct peoplehood of its peoples and complement Member States. He says Europe can only be a Federation organized as states and not a Federal state based on the people of one European nation. In his view a Federal State predicates the existence of a single people. The author gives an example of the European Parliament which in his view is

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[52] See Preambles to Treaty Establishing European Community and the Treaty of European Union and art. I

[53] Christian Joerges, "Rethinking of European law's supremacy, " at <www.iue.it/pub/laws > [assessed 10th January 2004].

[54] D. Grimm, "Does Europe need a Constitution ?" Vol.1 *European Law Journal* p.282.

actually not a real Parliament and that extending its powers would probably even exacerbate the problems of the European democratic legitimacy.

The European integration process clearly makes it evident that the process essentially leads to an emergent new constitutional order whose fashioning is problematic. That the workings of regional integration institutions raises borderline constitutional issues which the creation of the East African Federation is not exempt.

Lastly, on the review of the literature on the East African Federation, there is a dearth of scholarly works due to the fact that the move towards the creation of a Political Federation has only gathered momentum in East Africa. However, the following articles from journals and newspapers give a scholarly insight into the regional integration efforts.

A. Hazelwood in his article "The end of the East African Community: What are the lessons for regional integration schemes?" [55] and Colin Leys and Peter Robson in their book *Federation in East Africa: opportunities and problems* [56] trace and show the growth of East African Community and its' goals. They also discuss the controversies generated in the regional integration efforts from common services in the 1900 to the East African Community dissolution in 1977 and eventual revival in 1999.

Otieno Odek in his article "Re-appraising the framework of regional economic integration in Africa"[57] states that the history of integration testify that few integrations are created by aggregation of previously independent units, except under the influence of some external and powerful force. He is of the view that there is a problem of sovereignity which arises because integration creates the inability of the Member States to pursue totally independent economic policies. However, this has the long term solution

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[55] A. Hazelwood, "The End of the East African Community: What are the lessons for Regional integration Schemes?" Vol.1 *Journal of Common Market Studies* 1979/80, p.18.

[56] Colin Leys and Peter Robson, *Federation in East Africa Opportunities and Problems* Oxford University Press, Nairobi, 1965.

[57] Otieno Odek, "Re-appraising the framework of regional economic integration in Africa," Department of Public Law Faculty of Law, University of Nairobi, pp. 1-35, available at University of Nairobi law school.

in the enlightenment of the leaders and the peoples of the region. He is skeptical of the efforts for integration in Africa and doubts whether the European example can be imitated and replicated in Africa.

I.G. Stewart's, "Customs Union in East and Central Africa"[58] and P.K. Omas, in his article "The Report of the East African Economic and Fiscal Commission" [59] give a critical appraisal of the benefits of the East African Community as constituted in the early 1960's and show that some regions or states experienced negative net gains.

N, Orloff, *"Economic Integration in East Africa: The Treaty for East Africa Co-operation* "[60] discusses loss of sovereignty as one of the four major problems encountered by integration efforts in East Africa.

Dani Wadada Nabudere the Director of Afrika Study Center in an article, "Go for Political EA Unity First" [61] argues that placing economic consideration first as the basis for an eventual political integration will not lead to a successful creation of a Political Federation. He argues that there should be no anxiety over the loss of sovereignty when borders are abolished considering that the Maasai of Laikipia in Kenya and the Maasai of Ngorongoro crater in Tanzania ignore this sovereignty when they move across the borders of the two countries for economic reasons.

He argues that bold political action should be taken by Parliaments in East Africa to pass binding and irrevocable resolutions to the effect that as of January 2006, the borders separating the peoples of East Africa be abolished. This will then give the people of East Africa an opportunity to define statehood which will then decide the political units to which powers will devolved. He proposes completely ignoring the Constitutions which

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[58] I.G. Stewart, "Customs Union in East and Central Africa," Vol.9 *Scottish Journal of Political Economy* February 1962, p. 65-72.
[59] P.K.Omas, "The Report of the East African Economic and Fiscal Commission," Vol.8 *East African Economic Review*, .June 1961, p.14-23.
[60] N,Orloff, "Economic Integration in East Africa :The Treaty for East Africa Cooperation," Vol.1 *Columbia Journal of Transnational law* 1968, p. 302-326.
[61] Dani Wadada Nabudere, "Go for Political EA Unity First," *East African* (Nairobi, Kampala, Dar-es-Salaam) 13-19 December 2004, p.20.

create the three Republics and proposes that the legislatures should act in a manner contrary to the Constitution.

The writer represents the enthusiastic but rash manner in which most of the proponents of the creation of an East African Political Federation, in the guise of economic integration, are supporting the elitist political class. He is therefore a proponent of "seek first the political kingdom and the economic integration will follow."

Chachange Seithy L.Chachange, a professor of sociology at University of Dar es Salaam, in an article entitled, "Unite first; The rest will follow,"[62] argues that East African integration should learn from the unification of Germany and Vietnam. That most of the genuine experience of unification or integration demonstrates the fact that a people have first to unite as a means of overcoming other problems and differences. He is opposed to the economic thinking which seems to dominate the issues as far as integration is concerned while the real historical issues at stake are not centrally placed.

The problem with his thesis is that East Africa is said to be pursuing economic integration and not political integration. If the regional economic integration is for the purposes of accelerated economic growth, then it is proper for economics to be at the centre of the integration efforts.

The Attorney General of Kenya, Amos Wako in his speech as the Chairman of the EAC Committee on Fast Tracking the East African Federation enthusiastically supported the speeding up of the East African Community objectives and advised the formation of an East African Federation by 2010.[63]

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[62] Chachange Seithy L.Chachange, "Unite first; The rest will follow," *East African* (Nairobi, Kampala, Dar-es-Salaam) 6-12 December 2004, p.14.
[63] Amos Wako, "Lets speed up EAC," *Saturday Nation* (Nairobi) 27 November 2004, p.11.

Nzamba Kitonga a former Chairman of the East African Law Society in an article titled "Federation will be a hollow edifice if it's not 'sold' to the people," [64] argues that the citizenry in East Africa must be consulted and the East African Federation must not be a venture by the elitist political class. He acknowledges the need to have a sound institutional framework for the Federation and not merely making it a political venture by the elite political class. However, he supports the Fast Tracking Committee in what seems to be only an appreciation that it gave an avenue to the citizenry to participate but does not legally critic the content of their report or the roadmap proposed.

Nguvi Kitali, the Managing Director, Bruce Trucks (EA) Ltd in his article "EAC Secretariat must change direction," [65] argues that it is a delusion to suppose that a group of people and technocrats can single handedly create a sustainable political and economic union in a mounting sea of corruption, poverty and ethnic diversity. This shows that there are grave questions of the sustainability of an East African Political Federation created by the elite political class and there is bound to be a backlash. He argues that at a point, a regional referendum will become necessary and the people of East Africa will reject the direction taken by the leaders.

Omuga Ratego, a scholar in international politics in an article entitled, "Why we need East African Federation," [66] argues that the benefit being preached by the political leadership can be achieved through a serious regional economic block without forming a Political Federation. He argues that the formation of a big state may not be viable or sustainable. According to him, this is because both Uganda and Kenya are grappling with constitutional crisis in that President Yoweri Museveni of Uganda is pushing for a third term which is out of step with democratic practices in Kenya and Tanzania while Kenya has been struggling to change its' constitution for the past 12 years. It then seems strange for Kenya to be expected to struggle that long to come up with a new constitution, only for it to be rendered irrelevant or outdated by a federal constitution by 2010.

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[64] Nzamba Kitonga, "Federation will be a hollow edifice if it's not 'Sold' to the people," *East African* (Nairobi, Kampala, Dar-es-Salaam) 6-12 December 2004, p.15.
[65] Nguvi Kitali, "EAC Secretariat Must Change Direction," *Daily Nation* (Nairobi) 23 December 2004, p. 9.
[66] Omuga Ratego, "Why We Need East Africa Federation," *Stardard* (Nairobi) 30 December, 2004, p. I.

A poll conducted found that East Africans believe an East African Federation would improve movement of labour, regional governance, trade and economy of members. 81% of East Africans polled supported integration.[67]

The Treaty for the Establishment of the East African Community, 1999 and the Treaty for the Establishment of the East African Community, Act 2000 give the legal framework for regional integration in East Africa and the objective of creating an East African Political Federation. Government policy papers have also been analyzed to gauge the Government of Kenya commitment to regional integration and the creation of an East African Political Federation. The Ministry of Trade and Ministry of East African Co-operation have most of their material and reports wholeheartedly in support of the creation of an East African Federation.

0.7 Justification of the study

This research is justified on the grounds that it attempts to look at the constitutional basis of an East African Federation. This is to prevent the likely constitutional crisis that could be created by a rashly formed single state of the Republics of Kenya, Uganda and Tanzania.

The research is also justified as it seeks to interrogate the issue of whether the regional economic integration efforts under the East Africa Community and its goal of creating an East African Political Federation are constitutional. This is necessary so as to prevent the likely violation of the Constitution of Kenya in pursuit of economic integration. This is because if an East African Federation is created unconstitutionally, and is unconstitutional, the resultant state of things will be lacking in legitimacy and democracy.

Under the existing operations of the East African Community, the East African Legislative Assembly has legislative power at par with the Parliament of Kenya, and even

[67] "East Africans Want a Union Now says poll," *Stardard* (Nairobi) 6 January 2005, 28. Steadman's Managing Director George Waititu stated a total of 2,264 people were interviewed, through a structured face-to-face questionnaire. A random sampling methodology was used.

superior on some matters affecting Kenya.[68] This is not delegated legislation as Article 4 of the Treaty gives it precedence over similar national laws.[69] Secondly, the Council under the Treaty has executive power as it has the responsibility of deciding key economic policies of the Member States such as taxation and initiating Bills to the East African legislative Assembly.[70] Thirdly, the East African Court of Justice has original jurisdiction on matters touching on interpretation and compliance with the Treaty. The jurisdiction of this court is also to be extended to include appellate and human rights jurisdiction.[71]

The current conflicting position is to be extended and magnified by the formation of an East African Political Federation.[72] The East African Federation is to have a central federal government and a single East African President.[73]

Therefore, it is evident that there is an existing limited sharing of executive, legislative and judicial powers and that is to be made all encompassing in an East African Federation. It is thus evident that there is currently an emerging new constitutional order in East Africa. Under an East Africa Federation there will be a complete dislocation of the current executive, legislative and judicial powers.

This research is thus justified as it seeks to shed light into what is constitutionally feasible and what may be open to constitutional challenge in economic integration under the East African Community. It aims at provoking thought on the constitutional issues raised by this pursuit of a single East African State before further action is taken.

Lastly, the proposed creation of the East African Federation is also to be principally achieved through the Treaty for Establishment of the East African Community, 1999.This research will thus focus on whether in light of treaty application in Kenya, that is, a

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[68] *Supra* note 2, art. 48.
[69] *Supra* note 2, art. 4 and 5.
[70] *Supra* note 2, art. 13, 14 and 16.
[71] *Supra* note 2, art. 27.
[72] *Supra* note 2, art. 5 (2).
[73] *Supra* note 49.

dualist legal system, the supremacy of the Constitution of Kenya and of the decided constitutional cases in Kenya, which have held, *inter alia,* that a treaty cannot amend the Constitution,[74] and also that not even Parliament has the mandate to fundamentally alter the constitutional structure of Government in Kenya,[75] are the goals of the East African Community and the treaty obligations of creating a Political Federation constitutional?

The research is therefore justified, as it will shed light on the legal issues surrounding treaty application in Kenya, recommend changes and assist in the drawing of a roadmap towards a constitutional East African Federation.

0.8 Hypotheses

This research paper will test the following hypotheses;

1. That the creation of an East African Federation amounts to a fundamental alteration of the constitutional order in Kenya and hence the proposed East African Federation would be unconstitutional.

2. That the proposed creation of an East African Federation, under the Treaty for the Establishment of the East African Community of 1999, is contrary to the provisions of the Constitution of Kenya, its spirit, principles and values as enshrined therein.

0.9 Research Methodology

This research paper is both theoretical and historical. It therefore relies mostly on secondary material and library research. In this endeavor the libraries used are the Faculty of Law Parklands Campus Library, University of Nairobi and the Jomo Kenyatta Memorial Library at the University of Nairobi. The internet will also be used as a source of data on the progress and developments toward an East African Federation. Economic policy papers, books and journals, the Treaty for the Establishment of the East African Community, 1999 will be critically examined with the aim of discovering the aim of the East African Community, the historical background and the recent developments towards

[74] *Supra* note 37.
[75] *Supra* note 10.

the creation of an East African Political Federation. Newspaper articles on the current local occurrences on this will also yield relevant data.

Second, given that the proposed creation of an East African Federation is a governance issue, interviews with the ministry officials at the Ministry of East African Co-operation will be conducted. Thirdly, because the research paper looks at elements of trade and foreign affairs, informal interviews with officials and policy papers from the Ministries of Foreign Affairs and Trade and Industry will be used. Unstructured interviews with people undertaking trade in the region will also be used to obtain the interest in the creation of the East African Federation and their views on its feasibility.

0.10 Challenges to the Research

This research has the challenges of costs, time and availability of resources. I hope to borrow money from relatives to meet the costs for the research and also budget wisely so as to overcome the high costs. Secondly, I will budget my time wisely and take leave from my employer so as to accomplish the research. Thirdly I shall engage a research assistant so as be able to obtain all the data necessary.

0.11 Chapter Breakdown

This research paper contains four Chapters:

Chapter One

This Chapter gives a background of the Treaty for the Establishment of the East African Community,1999 and traces the origins of the East African Community, the legal basis and the main objectives of the Treaty.

Chapter Two

This Chapter looks at the proposed creation of an East African Federation and the impact this would have on the constitutional order in Kenya.

Chapter Three

This Chapter looks at the legal system in Kenya in relation to treaty application and the implication on the creation of an East African Federation. The Chapter also looks at the supremacy of the Constitution of Kenya and the implication on the creation of an East African Federation.

Chapter Four

This Chapter contains recommendations for legal changes to facilitate the creation of a constitutional East African Federation.

Chapter 1

The Treaty for the Establishment of the East African Community, 1999

1.1 Introduction

This Chapter traces the historical background of the Treaty for the Establishment of the East African Community, 1999 that seeks to create an East African Federation. It thus looks at the East African Community, its noble vision and origins, its dissolution and eventual revival in the Treaty for the Establishment of the East African Community, 1999.

1.2 Historical background of the East African Community

The East African Community is a regional trading bloc made up of the Republic of Tanzania, the Republic of Kenya and the Republic of Uganda. These countries have enjoyed close historical, commercial, industrial, cultural and other ties for many years.

The formal economic and social integration in the East African region commenced with common services under the British colonial government. This involved the construction of the Kenya-Uganda Railway in 1896 to 1901, the establishment of the Customs Collection Centre in 1900, the East African Currency Board in1905 and the Postal Union in 1905.[1]

Other areas of integration were the Court of Appeal for Eastern Africa in 1909, the Customs Union in 1919, the East African Governors Conference in 1926, the East African Income Tax Board in 1940 and the Joint Economic Council in 1940. [2] In order to consolidate and give a legal framework for the common services, provision was made by the East Africa (High Commission) Orders in Council, 1947 to 1961 establishing the East Africa High Commission.[3]

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[1] A. Hazelwood, "The End of the East African Community: What are the lessons for Regional integration Schemes?" Vol.18 *Journal of Common Market Studies* (1979/ 80).
[2] *Ibid.*
[3] *Ibid.*

At this time the three East African countries were under the British colonial rule and it was only practical that common economic and foreign polices were pursued. The Head of state then was the Queen of England and thus the political leadership in East Africa was already unified.

Upon the independence of the three East African countries and from 1961 to 1967 the East African Common Services Organization Agreements was the legal framework establishing the East African Common Services Organization.[4] The declaration of the sovereign Republics of Kenya, Uganda and Tanzania meant that a comprehensive legal framework was necessary to crystallize the existing cooperation inherited from the colonial governments. In 1967, the Treaty for East African Cooperation formally established the East African Community based on a treaty.[5]

The treaty and the agreements were only made after there was already cooperation in certain areas and after the need arose due to the independence of the three East African countries. The structural measures at regional cooperation introduced before the independence of the three East African countries were been initiated or directly introduced by the colonial office in London either on the basis of Orders in Council or were mere instructions by the colonial secretary.

When discussing the Treaty for the East Africa Co-operation Bill of 1967, Tom Mboya, Minister of Economic Planning and Development said,

> "Members will now be aware that our two sister states, the government of the Republic of Tanzania and the Republic of Uganda, have already brought a similar Bill before their National Assemblies. The point is that the three National Assemblies should individually take such action as would bring into legal existence the agreement signed by the three Heads of States on 6th June 1967 at Kampala... what we have called the East Africa Common Market, for example, was merely in existence as a result of gentleman's agreement and as a result of certain traditional arrangements that we have inherited during the course of many years of living together under one colonial master ....We seek in this Bill and in the treaty to replace the gentleman's agreement with a stronger arrangement based on legal responsibilities and authority, individually and collectively between the Partner States, so that in future the Common

[4] Colin Leys and Peter Robson, *Federation In East Africa: Opportunities and Problems,* Oxford University Press, Nairobi, 1965, pp. 4-25.
[5] "The History of the East African Community," at <www.eac.int/history.htm> (accessed on 10 January 2005).

> Market shall not be dependent on the whims of any one Partner State or temporary problems in any one Partner State. It will be regulated by a legally binding document and arrangement to which all the partner State subscribe and to which they are all equally and collectively responsible. This aspect is important, Mr Deputy Speaker, because, over the years, we have all learnt to talk about the East African Common Market but in fact legally there has never been one except in so far as certain aspects or our common trade or trading relations are concerned. There were piecemeal pieces of legislation enacted either by the Central Legislative Assembly or by the Individual legislatures to facilitate trade."[6]

The aforesaid institutions were therefore the successive joint organizations of the three countries to control and administer certain matters of common interest. They were also to regulate the commercial and industrial relations and transactions between the three East African countries and by means of a central legislature.[7]

In 1977, the Treaty for East African Co-operation establishing the East African Community, was officially dissolved.[8] The main reasons contributing to the collapse of the East African Community in 1977 were:

First, there were different ideological positions with Tanzania leaning towards communism and Kenya and Uganda leaning towards capitalism. Tanzania aligned itself with the communist bloc and adopted socialism which was akin to communism. Kenya and Uganda adopted capitalism and were aligned with the West in terms of ideology. This situation was exacerbated by the cold war between the communist bloc and the West. This made cooperation between the East African countries unworkable.[9]

Second, there was a lack of a strong political will to promote cooperation. The Tanzanian President Nyerere could not sit at a table with the President of Uganda Idi Amin. This hindered the political leadership of the Community. There was mutual suspicion and lack of political goodwill with the Tanzanian President Nyerere calling Kenya "a man eat man society" and the Ugandan President Idi Amin threatening to redraw the boundary between Kenya and Uganda. The Ugandan President Idi Amin was also unhappy with the Israel jets fuelling in Kenya during the raid on Entebbe in 1976

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[6] Republic of Kenya, *The National Assembly official Report*, Vol XIII (part I) 30 Oct., 67- 10 Nov. 67, Columns 1901-1903.

[7] *Supra* note 4, pp. 4-25.

[8] *Supra* note 4, pp. 4-25.

[9] Khoti Kamanga, "Some constitutional dimensions of East African Cooperation," at <www.kituocha katiba.co.ug/khoti.2001.htm> (assessed on 10th January 2005).

and the asylum granted to Milton Obote by President Nyerere. In fact the Tanzanian President Nyerere refused to recognize Idi Amin as the President of Uganda.[10]

Third, there was a lack of strong participation of the private sector and civil society in the co-operation activities. The Community failed to effectively involve the people of East Africa in the Community affairs.

Fourth, the Community collapsed because of the continued disproportionate sharing of benefits of the Community among the Partner States. This was partly due to their differences in their levels of development and the lack of adequate policies to address these situations. [11] Tanzania and Uganda felt that Kenya was benefiting more from the trade in the region and the industries were been developed more in Kenya than in Tanzania and Uganda. There were no rules to correct the imbalances.[12]

Upon the dissolution of the East African Community, the three East African countries signed on the 14th May 1984 at Arusha in Tanzania the East African Community Mediation Agreement, 1984.[13] This was for the division of the assets and liabilities of the former East African Community. They also agreed to explore and identify areas for future co-operation and to make arrangements for such co-operation.[14] This was the beginning of the renewed efforts to revive the East African Community.

Other efforts at cooperation began and on 30th November 1993, provision was made by the Agreement for the Establishment of a Permanent Tripartite Commission for Co-operation between the three East Africa countries for the establishment of

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[10] *Supra* note 1.
[11] *Supra* note 1, p. 18.
[12] *Supra* note 1, p. 50.
[13] EAC Secretariat, "The History of the East African Community," at <www.eac.int/history.htm> (accessed on 10 January 2005).
[14] See Article 14.02 of the Mediation Agreement, at <www.eac.int/history.htm> (accessed on 10 January 2005).

the Permanent Tripartite Commission for Cooperation.[15] This was to be responsible for the co-ordination of economic, social, cultural, security and political issues among them. A declaration was also made by the Heads of State of the three countries for closer East African Co-operation.

On 26th November 1994, provision was made by the Protocol on the Establishment of a Secretariat of the Permanent Tripartite Commission for Co-operation between the three East African countries for the establishment of the Secretariat of the Permanent Tripartite Commission for Co-operation to act as the Secretariat of the Tripartite Commission.[16]

On the 29 April 1997 at Arusha in Tanzania the Heads of State of the three East African countries directed the Tripartite Commission to embark on negotiations for the upgrading of the Agreement establishing the Tripartite Commission into a treaty.[17]

The revival of the East African Community culminated in the Treaty for the Establishment of the East African Community which was signed on 30th November 1999 (the Treaty).[18]

1.3 **The Treaty for the Establishment of the East African Community, 1999**

The objectives of the Treaty are contained in Article 5 of the Treaty that states;

> "The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.In pursuance of the provisions of paragraph 1 of this Article, the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social and political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared."

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[15] See the Preamble of the Treaty for the Establishment of the East African Community 1999, at <www.eac.int/treaty.htm > (accessed 10 January 2005).
[16] *Ibid.*
[17] *Ibid.*
[18] See The Treaty for the Establishment of the East African Community 1999, at <www.eac.int/treaty.htm > (accessed 10 January 2005).

The ultimate objective of the Treaty is therefore the formation of an East African Political Federation of the Partner States. Consequently, the Government of Kenya has international obligations under the Treaty to act towards the creation of an East African Federation.

This is further restated in Article 123 that states;

> "In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty particularly with respect to the eventual establishment of a Political Federation of the Partner States, the Partner States shall establish common foreign and security policies...(f) Enhance the eventual establishment of a Political Federation of the Partner States."

1.4 **Transformation of the Treaty for the Establishment of the East African Community into the municipal law of Kenya**

After the Treaty was negotiated, signed and ratified, it required adoption into the municipal legal order in Kenya.

In line with the doctrine of "transformation" in a dualist legal system, which I discuss in detail in the next chapter under dualism, the Treaty has force of law in Kenya as it is transformed, that is, made law by the law of Kenya. This is through the Treaty for the Establishment of the East African Community Act, 2000 (the Treaty Act). This Act was given Presidential Assent on 11th July 2000. The Treaty Act clearly sets in its preamble,

> "An Act of Parliament for giving effect to certain provisions of the Treaty for the Establishment of the East African Community and for connected purposes."

This clearly makes the Treaty part of Kenya's law through statute. The statute further states,

> "WHEREAS The Treaty for the Establishment of the East African Community (which is set out in the schedule to this Act) was signed on the 30th November, 1999 on behalf of the Governments of the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya at Arusha, Tanzania. AND WHEREAS it is expedient to make provision for the giving effect to certain provisions contained in the said Treaty which shall come into operation when the said Treaty comes into force."

The Treaty for the Establishment of the East African Community of 1999 is made the first schedule of the Treaty for the Establishment of the East African Community Act, 2000. The Treaty Act in section 8 (1) further states;

> "The provisions of any Act of the community shall, from the date of publication of that Act in the Gazette, have the force of law in Kenya."

This is in line with the provisions of Article 8 (2) b of the Treaty which provides,

> "Each partner state shall, within twelve months from the date of signing this Treaty, secure the enactment the effective implementation of such legislation as necessary to give to this treaty, and in particular; to confer upon and the legislation, regulations and directives of the community and its institutions as provided for in the Treaty, the force of law within its territory."

Therefore, the Executive in Kenya has statutory obligations to act towards the creation of an East African Political Federation which is the ultimate objective of the Treaty. The Government of Kenya is thus statutorily bound to implement the Treaty provisions.

Article 2 of the Treaty establishes the East African Community (Community). The East African Community is given efficacy in the three East African countries by Article 4 of the Treaty. Article 4 provides that the Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty.

Article 5 of the Treaty further provides that the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones. The East African Community is intended to be the predecessor of an East African Federation. The key organs of the East African Community are:

The Summit

This is created under Article 10 of the Treaty and consists of the Heads of State or Government of Partner States.

The main function of the Summit is the giving of the general directions and impetus as to the development and achievement of the objectives of the Community.[19] As I have discussed later in this chapter, it is the precursor of a rotational Presidency in the initial creation of an East African Federation and eventually a single Presidency for an East African State by 2013.

[19] *Supra* note 18, Article 11(1).

In as far the Summit aims to be the leadership of an economic institution it would be perfectly within the Constitution but the extension and magnification of its role in an East African Federal State would raise a conflict with the Constitution of Kenya.

The Council

The Council consists of the Ministers responsible for regional cooperation in each partner state and such other Ministers of the Partner States as may be determined. Its core function is to be the policy organ of the Community.[20]

The Council is essentially the executive arm of the Community. It initiates Bills to the East African Legislative Assembly (EALA), considers the budget, makes policy decisions, regulations and directions.[21] Under the East African Customs Union it has exclusive power to determine the Common External Tariff for Kenya and other Member States.

The Council is the precursor of the executive arm of government of an East African Federation. Similarly, contrary to the Constitution of Kenya the Council seems to be enjoying the powers to decide on economic policy and taxation matters for Kenya. This would be a usurpation of the powers of the executive in Kenya enshrined in the Constitution. The locating of the executive power on the Summit and the Council would be an alteration of the location of the executive power enshrined in the Constitution of Kenya.

The East African Court of Justice

This is established under Article 23 of the Treaty. It is to ensure the adherence to the law in the interpretation of and compliance with the Treaty. The jurisdiction of the court is to be extended so as to have other original, appellate, human rights and other jurisdiction to be determined by the Council at a subsequent date in a Protocol.[22]

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[20] *Supra* note 18, Article 14.
[21] *Supra* note 18, Article 15.
[22] *Supra* note 18, Article 27(2).

As I have discussed in Chapter two on the proposed creation of an East African Federation, the East African Court of Justice is the precursor of a federal judicial system composed of federal judges under an East African Federation Chief Justice.

The vesting of the East African Court of Justice with exclusive jurisdiction on matters of the Treaty and the intention to extend its' jurisdiction is an interference with the original, unlimited jurisdiction enjoyed by the High Court of Kenya under the Constitution.

The locating of the judicial power in East Africa on an East African Chief Justice and Federal judges or on the East African Court of Justice would be an alteration of the constitutional order in Kenya.

The East African Legislative Assembly

The East African Legislative Assembly (EALA) is established under Article 48 of the Treaty. It is the legislative organ of the Community. The Acts of the Community are to have the force of law in the Partner States.

In Kenya, section 8 of the Treaty Act gives the Acts of the Community the force of law in Kenya. Curiously, this is not delegated legislation because the Acts of the Community have precedence over similar Acts of Parliament on matters regarding the Treaty.[23]

The Assent of the Bills from the EALA is by the Heads of State and the operation of the Acts of the Community is clear evidence that it is not delegated legislation. The courts have also held that the Acts of the Community that had been created under the Treaty for East African Cooperation 1967 were not delegated legislation.[24]

The EALA is the precursor of an East African Federation Parliament. Already, the EALA has substantial powers to legislate for Kenya. The legislative power currently enjoyed by the EALA is even at par with the legislative power enjoyed by the Parliament under the

[23] *Supra* note 18, Article 4.
[24] *East Africa Community* v. *Rep* [1970] EA 458.

Constitution of Kenya. It has already usurped some of the Parliamentary power to legislate in Kenya and this power is to be substantially increased. Under an East African Federation the location of legislative power is intended to be exercised by the successor of the EALA, that is, the East African Federation Parliament.

The idea of the East African Community created by the Treaty is such that, the Customs Union, which is the first landmark for the Treaty, would be followed by a Common Market, a Monetary Union and ultimately a Political Federation. The current organs of the East African Community are to be magnified and extended in operation to constitute the executive, legislative and judicial organs of an East African Federation.

This is in marked contrast to the European integration process. Europe has followed a functional method of piecemeal engineering and result based masterminding.[25] The functional strategy in Europe can be said to have borne fruit so far as the European Union is considered a success story.[26]

This functional approach in Europe has led to an unwarrantable process without any blue print for Europe's finality.[27] This is unlike the current East African integration process under the Treaty for Establishment of the East African Community,1999 that envisions its' finality as an East African Federal State.

Instead of talking or mentioning the exact direction and finality of the European integration, the European process of integration speaks of an ever-closer union among the peoples of Europe.[28] Both the Treaty for Establishing the European Community and the Treaty on the European Union instead of mentioning the exact direction and finality of European integration only speak of an ever closer union among the peoples of Europe.[29]

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[25] Michiel Brand, *Affirming and refining European constitutionalism towards the establishment of the first Constitution for European Union* European University Institute Florence , Department of Law, 2004.
[26] *Ibid.*
[27] *Ibid.*
[28] J. Wouters, *Understanding the European Union* Longman, London, 2000.
[29] See preambles to Treaty Establishing European Community and the Treaty of European Union and art. I, at <www.iue.it/pub/laws > (assessed 10 January 2004).

This has avoided a direct conflict of the European integration process with the constitutions of the Member Sates. The European law has therefore been called as the kind of supranational conflict of laws based on American conflict of laws methodology.[30]

In-fact an attempt to create a blue print for European integration in a European Constitutional treaty failed.[31] The European Constitution would have brought a new and emerging constitutional order in Europe as it tried to clarify the location of executive power in the union, the sharing of the executive power and legislative power which are complex and contentious. There were a lot of difficulties encountered on the discussions relating to the legislative power and more so on the executive power in drafting the Constitutional treaty in Europe.[32]

Under the principle of pragmatism or functional strategy, the European Union institutions have grown outside the strict letter of the treaties and the functional approach has lead to an incremental process, as I have said, without any blue print for Europe's finality or any thorough discussion to determine the ultimate objective of European integration.[33]

The quest for an East African integration should appreciate the constitutional issues bound to arise in the pursuit of a Political Federation. For example, there has been the view that Europe should not, and in principle is not, able to have a constitution. [34] This is called the *no demos theory.* [35] It is based on the view that to have a European State would require, as a prerequisite, a homogenous society and this is unattainable. The proponents of this view argue that Europe has already rejected the federal state model and instead chosen to present the distinct peoplehood of its people and complement Member States.[36]

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[30] Christian Joerges, "Rethinking of European law's supremacy, " at <www.iue.it/pub/laws > (assessed 10th January 2004).
[31] *Ibid.*
[32] *Ibid.*
[33] *Supra* note 25.
[34] D. Grimm, "Does Europe need a Constitution?" Vol.1 *European Law Journal* p.282.
[35] *Ibid.*
[36] *Supra* note 25.

The proponents also argue that Europe can only be a Federation organized as states and not a federal state based on the people of one European nation. A federal state predicates the existence of a single people. The proponents give an example of the European Parliament which they state is actually not a real Parliament and that extending its powers would probably even exacerbate the problems of the European democratic legitimacy.[37]

In contrast, the integration efforts in East African have a clear blue print in the Treaty for the East African Community and are aimed at creating an East African Federation conceptualized as a single federal state. At the Arusha Summit meeting in 2004, the three Partners States reiterated their commitment to the implementation of the Customs Union.

On January 1, 2005 the Customs Union came into force.[38] This is the first step towards attaining the objectives of the East African Community that should culminate in an East African Political Federation.

The need for regional integration is mainly premised on strategic trade theory, that is, strategic reasons and the comparative trade theory. Nations enter into regional economic blocs due to the need to realize economies of scale, increase bargaining power by pooling of economic resources, for regional security and due to historical ties / colonial ties. Also to facilitate freedom of movement and right of establishment, to control frontier traffic and due to trade creation effect versus trade diversion effect. [39]

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[37] *Supra* note 25.

[38] See "East African Customs Union," at <www.eac.int/EAC_Customs_U.htm> (accessed 2 February 2005).

[39] See Regional Trading Arrangements, at <www.wto.org > (accesed on 10 January 2005>. Regionalism is normally regarded as actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions. In the WTO context, regional trade agreements (RTAs) have both a more general and a more specific meaning: more general, because RTAs may be agreements concluded between countries not necessarily belonging to the same geographical region; more specific, because an RTA is understood as establishing an element of preference in the trade between the parties to the agreement. By definition, parties to an RTA offer each other more favourable treatment in trade matters than to the rest of the world, including WTO Members. The coverage and depth of such preferential treatment varies from one RTA to another. It may involve only a few products/sectors, or it may stretch well beyond traditional tariff elimination to areas such as standards, services, intellectual property and competition. Barriers may be completely abolished in intra-RTA trade, or merely reduced.

The legal basis for regional economic co-operation in the international sphere is elaborate and clearly well defined under the World Trade Organization. [40] In the international sphere, regional economic groupings are allowed if they are either Free Trade Areas or Customs Unions or Common Markets and that the agreements cover substantially all the trade or they are groupings of the developing countries to promote trade and development.

The cornerstone of the WTO Agreement is non discrimination, a principle which finds expression, *inter alia*, in Article 1 of the GATT 1994, which obliges WTO Members to grant unconditionally to each other any benefit, favour, privilege or immunity affecting customs duties, charges, rules and procedures that they give to products originating in or destined for any other country.

On the face of this rule, members of the WTO like Kenya, Uganda and Tanzania would be in breach of their WTO obligations were they to grant preferential treatment to products originating only in a selected group of countries.

Nevertheless, the WTO, as did previously the GATT, allows its members, like Kenya, Uganda and Tanzania have done under the East African Community, to enter into regional trading arrangements, albeit under it's rules.[41]

The creation of the Customs Union and Common Markets by the East African Community is thus well established under international regional economic law and is firstly on the basis that every state has and enjoys economic sovereignty and secondly on the basis of the WTO Agreements.

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[40] See Article XXIV of the GATT *1994* complemented by the *Understanding on the Interpretation of Article XXIV of the GATT 1994,* known as the "Understanding", for customs unions and free-trade areas covering trade in goods. The 1979 GATT Decision on *Differential and Most,' Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,* known as the "Enabling Clause," which deals with preferences in trade in goods granted between developing countries and Article V of the General Agreement on Trade in Services, GATS, governing economic integration agreements liberalizing trade in services, for both developed and developing countries. Contrary to the goods area, the special and differential treatment provided for developing countries is contained in the body of Article V itself.

As part of restating economic sovereignty, the United Nations General Assembly passed the resolution 3.2.8.1 named the Charter of Economic Rights and Duties of States in 1975. Article IV of the Charter stipulates that every state has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social system.

In pursuit of international trade, every state is thus free to choose the forms of organization of its foreign economic relations and to enter into bilateral and multi lateral arrangements consistent with its economic needs. Article VII of the Charter restates the constitutional mandate of the government by stipulating that all states have the primary responsibility to promote the economic, social and cultural development of its people.

The exercise of economic sovereignty within the municipal law is by the executive. The executive has the exclusive competence at the international level to engage in economic integration or impose economic sanctions. [42] Therefore, the Executive in Kenya has the competence to enter into treaties on economic integration so as to reap benefits of expanded trade. In the exercise of this power, the Executive in Kenya is acting constitutionally in pursuing regional economic integration through the East African Community. This constitutional mandate to pursue a range of economic policies includes seeking to integrate Kenya's economic system with another country's.

In fact, the courts as an independent arm of Government distinct from the Executive cannot question the choice of economic policies. The Executive in Kenya cannot be questioned by the courts on the choice of economic policies they undertake unless the choice is contrary to the Constitution of Kenya.

This is the case in many countries and, for example, in the case *Banco Nacionale de Cuba* v. *Sabbatino* [43] the Supreme Court of the United States of America observed that

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[41] See Bernard M. Hoekman and Michel M. Kostecki, "*The Political Economy of the World Trading System:The WTO and Beyond,*" Oxford University Press, Oxford, 2000 (2nd ed) pp. 1-100.
[42] *Diggs* v. *Schultz* US AC DC 313 (1952).
[43] *Banco Nacionale de Cuba* v. *Sabbatino* 376 US 398 (1964).

the exercise of economic deprivations is an aspect of economic sovereignty which cannot be questioned by the courts even if it results to expropriation of a foreign investment. It is therefore difficult to challenge constitutionally the Treaty or the Establishment of the East African Community of 1999 in so far as it aims at the creation of a Customs Union, a Common Market or a Monetary Union as they are principally economic measures.

A Political Federation, on the other hand, as a tool of economic integration is not contemplated under the World Trade Organization (WTO) rules. Member states are however allowed to form any trading arrangement that is not contrary to their obligations under the WTO rules. As I have discussed, the WTO rules generally provide for Free Trade Areas, Customs Unions and Common Markets..

However, a Political Federation attains a preferential trade arrangement in the trading among the states that merge to become a Federal state. It is only implied that if states merge into a single state then the issue of trade discrimination ceases to arise and the integration becomes WTO compliant. In my view, a Political Federation is a radical and an uncommon economic integration policy.

1.5 **Conclusion**

The creation of an economic trading bloc in East Africa is an important and viable economic policy. Generally, economic integration under the World Trade Organization is undertaken in the form of Free Trade Areas, Custom Unions and Common Markets. The objectives of the Treaty to create a Custom Union and a Common Market and also the Monetary Union are basically economic measures and acceptable modes for regional trading arrangements.

However, the East African Political Federation that is being pursued under the Treaty for the Establishment of the East African Community, 1999 may not be merely an economic measure but may be tantamount to political re-organization of the framework of Government in Kenya. I therefore, in the next Chapter, look at the proposed creation of an East African Federation and the impact it would have on the Constitution of Kenya.

Chapter 3

Dualism, Supremacy of the Constitution of Kenya and an East African Federation

3.1 Introduction

This Chapter looks at the implication of a dualist legal system and the supremacy of the Constitution of Kenya on the creation of an East African Federation. I look at the legal position, in Kenya, of the constitutive instrument of the proposed East African Federation and the legal implications thereof. Both dualism and the supremacy of the Constitution, as I have discussed in this Chapter, are constitutional impediments that should be addressed in the creation of an East African Federation.

3.2 Supremacy of the Constitution of Kenya

The starting point on the supremacy of the Constitution of Kenya is in its provisions. Section 3 of the Constitution states:

> "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

This is the express restatement of the supremacy of the Constitution of Kenya. Apart from the express statement of the Constitution of Kenya as the supreme law in Kenya, the source and reason of the Constitution's supremacy emanates from the characteristic of a constitution which basically are as follows:

First, the constitution establishes, or constitutes, the system of Government. Thus it is prior to the system of Government, not part of it, and its rules cannot be derived from that system. [1]

[1] F.F. Ridley, "There is no British Constitution: A dangerous case of the emperor's clothes," *Cases and Materials On Constitutional and Administrative Law* Blackstone press Limited, Blackstone, 2000,6 ed., pp. 5-6.

Second, the constitution involves an authority outside and above the order it establishes. The Constitution as the basic norm so far as the legal system is concerned must be extra legal since *ex hypothesis* it does not rest upon another legal norm. The legal order must rest on the assumption that it is by and large efficacious in the sense that people do conduct themselves in conformity with it.[2] This raises the notion of the Constituent power and in democracies that power is attributed to the people their ratification is important for a constitution to be legitimate.

Lastly, the Constitution is a form of law superior to other laws because it originates in an authority higher than the legislature which makes ordinary law and the authority of the legislature derives from it and is thus bound by it.

The Constitution is thus supreme and is entrenched because its' purpose is generally to limit the powers of Government, but also again because of its origin in a higher authority outside the system. It can thus only be changed by special procedures.[3]

The Constitutional Court in Kenya has interpreted the constitutional power, under section 47, to alter the Constitution to be limited to making amendments and not a review of the Constitution.[4] For major changes of the Constitution of Kenya it requires reference back to the people to exercise the Constituent power. It is therefore clear that there is impliedly a basic structure of the Constitution that should not be altered unless by reference to the people and this has been regarded as the "unamendable constitution."[5]

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[2] Lloyd and M. D. A Freeman *Introduction to Jurisprudence* Sweet &Maxwell London, 2001 pp.203.

[3] See Constitution of Kenya. In Kenya, there are special procedures for the amendment of the Constitution under section 47. Under section 47 of the Constitution Parliament may alter the Constitution provided that the Bill to alter the Constitution is supported, on the second and third readings, by the votes of not less than sixty five per cent of all the Members of the National Assembly excluding ex official members. Other Bills to make laws require only a simple majority of the Members of Parliament present and voting

[4] *Njoya and Others* v. *A.G and Anor.* Nairobi High Court case no.82/04 (O.S) (Unreported).

[5] *Marbury* v. *Madison* 1 Cranch, 2L.Ed.60, at p.177. In the USA, the Supreme Court upheld the supremacy of the Constitution and argued if Congress could define its powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." it would be "on a level with ordinary legislative acts, and like other acts...alterable when the legislature shall please to alter it."

A similar position, to the one in Kenya, on the supremacy of the constitution prevails in Uganda. Section 2 of the Constitution of Uganda states,

> " Supremacy of the Constitution 2 (1) This Constitution is the supreme law of Uganda and shall have binding force all authorities and persons throughout Uganda.
> (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

In fact the Ugandan Constitution criminalizes any attempt to alter the Constitution and the established constitutional order. Section 3 states,

> " (1) It is prohibited for any person or group of persons to take or retain control of the Government of Uganda, except in accordance with the provisions of this Constitution.
> (2) Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this Constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law...
> (4) All citizens of Uganda shall have the right and duty at all times-
> (a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to overthrow the established constitutional order: and
> (b) to do all in their power to restore this Constitution after it has been suspended, over thrown, abrogated or amended contrary to its provisions.
> (5) Any person or group of persons who, as required by clause (4) of this article, resists the suspension, overthrow, abrogation or amendment of this Constitution commits no offence."

It is therefore expressly provided in the Constitution of Uganda that an attempt to change the constitutional order in Uganda is an illegality and unconstitutional. It is provided that the Ugandan people are to resist such a change of the constitutional order by all means necessary. In my view, the attempt by the Ugandan President, Yoweri Museveni, to pursue and commit to the creation of an East African State, that would alter the constitutional order in Uganda, is unconstitutional.

In my view, in the efforts to create an East African Federation, the Bill to "transform" the Treaty with its objective of altering the constitutional order established by the current Constitution should not have been passed. The Treaty, even if it has already been ratified, cannot be put into effect in Kenya if the result is to review the Constitution of Kenya.The Executive, which needs no Parliamentary approval to sign a treaty, and which also lacks the Constituent power, would have exercised a unilateral faculty of changing the Constitution through the treaty making power.

3.3 **Dualism in Kenya and an East African Federation**

The relationship between the Treaty for the Establishment of the East African Community, 1999 and the Constitution of Kenya must be seen in the context of the dualist legal system in Kenya.

The rules governing the conclusion of treaties and the conferment of legal force to the treaty provisions in the municipal legal system are laid down in two ways. First, by national constitutions and practice which varies from one country to another. Second, by customary international law supplemented by the 1969 Vienna Convention on the Law of Treaties.[6]

National constitutions embody two approaches to the conferment of legal character to those treaties requiring internal application. These are dualist and monist approach. The monist approach states that international law and municipal law are part and parcel of a universal legal order. The monists are united in accepting a unitary view of law as a whole and are opposed to the strict division posited by the dualist.[7] In monist systems, treaties become law of the land automatically.

The dualist approach provides that international law and municipal law form two distinct and separate systems of law where neither has the power to affect the other.[8] It is a concept of historical reality, and is the acknowledgement of the co-existence of the two independent juridical orders, that is, international and constitutional. Consequently, treaties require special legislation before they become law of the land.

Where municipal legislation permits the exercise of international law rules this is on sufferance as it were and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law

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[6] The 1969 Vienna Convention on the Law of Treaties, UKTS No.58 (1980) Cmnd 7964: 8 ILM 679, 1969. In force since 1980.
[7] See J.G Starke, *Introduction to International Law* Butterworths, London, 1989 pp.71-91 (10th ed.).
[8] See Malcom Shaw, *International Law* Grotius Publications, Cambridge, 1997, pp. 97-124 (4th ed).

within the internal sphere.[9] This, as I have discussed later in this Chapter, is the approach adopted by the legal system in Kenya.

On the other hand, customary international law and Article 27 of the 1969 Vienna Convention on the Law of Treaties, a state cannot plead the provisions of its own law or deficiencies therein in answer to a claim against one for an alleged breach of international law obligations.[10] This was the position first stated in the *Alabama Arbitraton* [11] in which the court held that the municipal law provision was not a defence against international obligations under a treaty. The main aim of this Convention is giving legal force to the principle that pacts are made to be honoured.[12]

However, the provisions that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty cannot be without exception.[13] In my view, under a dualist legal system, there is the exception that unless the internal rule violated is the constitution of the state and the violation is manifest, that is, the violation was objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.[14]

The argument is, that under a dualist legal system, the international and the municipal legal systems are independent and it is only by sufferance and the use of the constitutional machinery that international law is allowed in the domestic sphere. However, this sufferance of the international law by the municipal law cannot be to the point of violation of the basic domestic law or the constitution of the country.[15]

This is because the dualist view essentially holds that international norms do not have primacy over municipal ones. This is based on the juridical logic that, the state's "will"

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[9] See I. Oppenheim, *International law* Vol.1 Longman Publishers, London, 1955, pp.37 (8th ed).
[10] See Ian Sinclair, *The Vienna Convention on the Law of Treaties* Manchester University Press, Manchester, 1984 (2nd ed.).
[11] *Alabama Arbitraton* Moore, International Arbitration Vol.1, pp. 495-653.
[12] Ian Sinclair, *The Vienna Convention on the Law of Treaties, Supra* note 9.
[13] The Vienna Convention, *Supra* note 6, Article 27.
[14] See Shaw, *International Law, Supra* note 8.
[15] See Shaw, *International Law, Supra* note 8.

is determined by the will of its laws, hence, the juridical order of the state, and its activity both internal and external, is founded in its national law. And if one upholds that this juridical will of the state is absolute then it follows that national law has primacy. This situation can therefore lead to the unconstitutionality of a treaty, under a dualist legal system, if a treaty demands the fulfillment of a condition that permanently alters in character a fundamental constitutional tenet, in the municipal law.

Looking closely at the legal system in Kenya, the Constitution of Kenya does not expressly state the approach to the conferment of legal character to those treaties requiring internal application in Kenya. This is in contrast to the Constitutions of countries like France,[16] Germany or even Uganda.

However, and as I have earlier stated, the legal system in Kenya is dualist in it's approach. This is evidenced by the following: First, Kenya like countries that are in the Commonwealth borrows heavily from the British legal system. They borrow both the mode of treaty making, that is, treaty making is an exclusive executive function, and the dualist approach that requires "transformation" in order to give a treaty the force of law within the internal legal order. In the British system there is a clear distinction between the making and the performance of the obligations constituted by a treaty.

Within the British system there is a well established rule that the making of a treaty is an Executive act, while the performance of its obligations, if it entails alteration of the existing domestic law, it requires legislative action.

The rationale for adopting dualism in Britain seems to turn more upon the particular relationship between the executive and the legislative branches of government than upon any preconceived notions of international law.

[16] See Article 55, Constitution of France, 1992, provides that in the event of a conflict between a law and a treaty, the treaty prevails. It provides "Duly ratified or approved treaties or agreements shall, upon their publication, override laws, subject, for each agreement or treaty, to its application by the other party".

One of the principle cases in English law illustrating this situation is the case of *Parlement Belge*.[17] This involved a collision between the ship and a British tug, and the subsequent claim for damages brought by the latter vessel before the probate, divorce and admiralty division of the High Court. The *Parlement Belge* belonged to the king of the Belgians and was used as a cargo boat.

During the case, the Attorney General intervened to state that the court had no jurisdiction over the vessel as it was property of the Belgian monarch and that further by a political agreement of 1876 between Britain and Belgium, the same immunity from foreign legal process as applied to warships should apply also to this packet boat.

In determining the case, the court concluded that only public ships of war were entitled to such immunity and that such immunity could not be extended to other categories by a treaty without parliamentary consent. Indeed, it was stated that this would be a use of the treaty making prerogative of the Crown without precedent, and in principal contrary of the law of the Constitution.

The Crown in Britain retains the right to sign and ratify international agreements, but it is unable to legislate directly. Before a treaty can become part of English law, an Act of Parliament is essential.

The stipulations of a treaty duly ratified do not within the Commonwealth, by virtue of the treaty alone, have the force of law. If a national executive or the government of the day, decides to incur the obligations of a treaty that involves alteration of the law, it has to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. [18]

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[17] *Parlement Belge* (1880) 5 PD 197.
[18] Geoffrey Wilson, *Cases and Materials on Constitutional and Administrative Law* Cambridge University Press, Cambridge, 1966, p.452.

Similarly, in Kenya treaty making is an Executive act and Parliament must pass the requisite statutory law to give effect to the treaty provisions.[19] Treaty making is an Executive act because foreign affairs power in Kenya are vested in the Executive.[20]

Although the Constitution of Kenya does not expressly vest the foreign affairs power in any organ the principle of residual powers applies. Only the Executive possesses "residual powers" and this means that any power not expressly vested either in the legislature or in the judiciary, falls by default on the Executive.[21]

Treaty making is also partly an exclusively Executive act in Kenya because treaty making is the innermost characteristic of an executive itself, that is, foreign policy. Section 23 (2) and 11 of the Constitution are the only constitutional clues as to which organ the exercise of the foreign affairs belongs, and they exclusively refer to the Executive.[22]

This practice is also supported by historical facts based on concept of royal prerogative turned into a presidential prerogative. There has been a continuous practice in Kenya whereby the Executive alone exercises the treaty making power. This is further supported by the fact that several Acts of Parliament vest in the Executive, specifically in the Minister of Finance, the responsibility of committing the Government of Kenya through loan agreement.[23]

After a treaty has been negotiated, signed and ratified, it requires adoption into the municipal legal order. The Kenyan practice in respect of conferring legal character on treaties requiring such "transformation" is highly influenced by the policy guideline released by the Ministry of Foreign Affairs in conjunction with the Attorney General's Chambers in 1973.[24]

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[19] *See* Luis G. Franceschi F. *The Constitutional Regulation of the Foreign Affairs Powers: The Kenyan Experience* LL.M thesis, University of Nairobi, 1999, pp.100-200.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

This executive policy guideline provides *inter alia* that:

> "(a) No ratification is necessary for permissive treaties, the carrying out of whose provisions would not be inconsistent with any law in force in Kenya.
> (b)For all those treaties which require an act or omission not expressly authorized by the laws of Kenya, an Act of Parliament would be required to give such treaty legal effect in Kenya.
> (c) Where any of the treaties contain a provision or provisions not catered for by existing legislation, then the relevant ministry should introduce a Bill in Parliament to give legal effect to such provision(s)."[25]

Therefore, the executive policy and practice on the adoption of treaties into the Kenyan law is clear evidence of a dualist legal system in Kenya.

Second, one expression of the dualist position in Kenya has been the doctrine of "transformation". This is based upon the perception of two quite distinct systems of law, operating separately. It maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically "transformed" into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.

The Kenyan practice has been first to express consent to be bound by a treaty and then to table the treaty before Parliament so as to bring domestic law in line with international obligations.

The position of the Parliament in Kenya with respect of treaties may be explained by the following extract from the speech of Honourable Martin Shikuku while discussing the Geneva Conventions Bill that contained the four Geneva Conventions,

> "Mr Speaker, Sir, whereas it is just a formality of the foregone conclusion that this house should be used as a rubberstamp, which I admit we are going to be used as in this case, [I would suggest] that we just give our approval to whatever has been agreed in Geneva." [26]

Therefore, Parliament only rubberstamps a treaty and is bound to even pass an unconstitutional treaty to avoid embarrassing the Government. This is because it has no power to amend a treaty. This then results in an Act of Parliament that is unconstitutional.

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[24] *Supra* note 19.
[25] *Supra* note 19.

An example of the doctrine of "transformation" in Kenya is with regard to the Warsaw Convention which has force of law in Kenya as it is "transformed" through the Carriage by Air Act, 1993 No.2 of 1993. This Act clearly states in its preamble,

> "An Act of Parliament to give effect to the convention concerning International carriage by air, known as the "Warsaw Convention as amended by the Hague Protocol,1955," to enable the rules contained in that convention to be applied, with or without modifications, in other cases and in particular, to non-international carriage by air; and for commercial purposes."

This clearly makes the Convention part of Kenya's law through statute. The statute further states,

> "AND WHEREAS it is deemed expedient to make provision for the direct application of the rules contained in the Convention for the Unification of certain rules relating to International Carriage by Air, signed at Warsaw on the 12th October 1929, and as amended by a Protocol signed at the Hague on the 28th September, 1955."

The Convention is in fact made the first schedule of the Carriage by Air Act 1993. The Convention therefore applies to air transport contracts in Kenya as the provisions of the Convention are part of our statutes.

Similarly, the Treaty for the Establishment of the East African Community,1999 was "transformed" and its provisions made to apply to Kenya by the enactment of the Treaty for the Establishment of the East African Community Act, 2000.

Lastly, Kenya has a dualist legal system as evidenced by the decisions of the courts .The courts in Kenya have held that a treaty must be "transformed" by having its provisions made part of the law in Kenya through an Act of Parliament. Furthermore, primacy is attributed to the Constitution of Kenya by the courts rather than the provisions of a treaty. These are both expressions of a dualist legal system.

The leading case is *Okunda and Another* v. *Republic.* [27] In this case, it is was argued and upheld that the East African Community had been set up by Parliament, so far as Kenya was concerned, under the Treaty for East African Co-operation Act 1967.

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[26] Republic of Kenya, *The National Assembly Official Report,* Vol. XVI (2 Sep, 1968-4 Oct.1968) col. 1241.

This was the sole source of the legislative and other powers of the Community. Parliament itself was a creation of the Constitution and for this reason, a provision in a law passed by the Community cannot possibly override a provision in the Constitution.

In an appeal of the case, that is, the case *East Africa Community* v. *Rep* [28] the court held that treaties do not become part of the law of Kenya until made so by the law of Kenya. Having been made the law of Kenya, any such treaty which is in conflict with the Constitution is void. Sir Charles Newbold said,

> "First, it is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict. The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are integrated by the courts. Secondly, in one sense the Constitution is an Act of Parliament but it is a very special Act of Parliament. While the validity of any other Act of Parliament or law may be called in question in the courts, the validity of the Constitution, or any alteration thereof being made in accordance with the Constitution, cannot be questioned." [29]

He continued to state the circumstances in which a treaty could be declared as void and said,

> "...Thirdly, the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the Law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such, provisions are void."[30]

The rationale of adopting dualism in Kenya, as in Britain, is to prevent the Executive using its treaty making power to legislate without the Legislature. [31] It follows that were treaties to be rendered applicable directly within the state without any intermediate stage after signature and ratification and before domestic operation, the Executive would be able to legislate without the Legislature.

In my view, the adoption of a dualist legal system in Kenya may, however, hamper the fulfillment of international obligations. This is because there is no possibility of giving

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[27] *Okunda and Another* v. *Republic* [1970] EA 453.
[28] *East Africa Community* v. *Rep* [1970] EA 458.
[29] *Ibid,* p. 459.
[30] *Ibid,* p. 459.
[31] See Shaw, *International Law, supra* note 8, pp. 97-116.

internal effect to a treaty, for example, the ratified Treaty for the Establishment of the East African Community, 1999, unless it is consistent with the existing Constitution and a statute is passed by Parliament on the same.

I have stated that dualism implies the involvement of the legislature by passing statutory law for making a treaty internally operative. The problem of the legal position of a treaty in the municipal legal order is therefore solved by the legislature itself. Once the treaty is made into a statute it automatically becomes a norm of the rank Parliament has given to it.

Therefore, in Kenya the Treaty for the Establishment of the East African Community, 1999, is conferred on legal character by making its provisions into an Act of Parliament. It therefore acquires the rank of statutory law in Kenya. On this legal position of a treaty in the hierarchy of laws in Kenya, Mwendwa C.J. stated in *Okunda and Another* v. *Republic* thus,

> "If we did have to decide a question involving a conflict between Kenya law on the one hand and principles or usages of international law on the other, this is how the counsel for the Community has put the matter to us, and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed. What we have just said applies with greater force if the Kenya law being considered is the Constitution of Kenya because if we allowed the treaty or the Treaty Act or the Official Secrets Act to prevail, we would in effect be allowing an amendment of the Constitution otherwise than in the manner laid down in s. 47. That cannot be done either by us or by any other tribunal." [32]

This ruling reinforced the position that Kenya has a dualist legal system as it recognized the supremacy of the domestic law over the treaty and reiterated the doctrine of "transformation".

On the same footing with the dissolved East African Community, which was created by the Treaty East African Cooperation of 1967, the constituting instrument of the current East African Community, in as far as the legal position in Kenya is concerned, is an Act of Parliament. This is the Treaty for the Establishment of the East African Community Act, 2000. The East African Community in Kenya is thus a creation of the Parliament. By

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32 *Supra* note 27, pp. 456.

extension the East African Federation that is envisioned as the successor of the East African Community would be a creation of Parliament.

In fact, the Executive in Kenya would have been embarrassed regionally by an inability to create the East African Community or give internal effect to the ratified Treaty for the Establishment of the East African Community,1999, if Parliament had failed to pass its treaty provisions into an Act of Parliament.

In my view, the issue is therefore aggravated where the Executive seeks, as I submit is the case with regard to the objective of creating a Political Federation under the Treaty and the Treaty Act, and gets Parliamentary approval by the passing of an Act of Parliament to implement the Treaty containing a clause or objective contrary to the Constitution.

Parliament in Kenya, as I have discussed later in this chapter, has a limited power of amending the Constitution. It follows *ipso facto* that the East Africa Community, being a creation of Parliament, cannot undertake the alteration of the constitutional order in Kenya as even the Parliament in Kenya lacks such mandate.[33]

Therefore, in so far as Kenya has a dualist legal system, that ranks the Treaty as an Act of Parliament, and in so far the Treaty proposes a fundamental alteration of the Constitution of Kenya, which an Act of Parliament cannot purport to do, the Treaty is unconstitutional. [34] The proposed roadmap for the creation of an East African Federation would thus lead to an illegitimacy of any consequent political order.

In my view, when a treaty is overridden by the Constitution, like the Treaty for Establishment of the East African Community, 1999, its implementation becomes impossible in international law. The ideal situation would be that, once the Treaty is overridden by the Constitution, such a state requests the termination or amendment of the

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[33] *Supra* note 27.
[34] Judicature Act, Cap 8 Laws of Kenya.

Treaty. This is also because the Treaty is in essence a contract between two states and the options open to contracting states is to renegotiate or to terminate a contract entered into *ultra vires*.

3.4 **An East African Federation vis-a-vis the Constitution of Kenya**

The proposed creation of an East African Federation, as I have discussed in Chapter 2, would entail an alteration of the constitutional order in Kenya. The constitutionality of such fundamental changes like a single East African State, a single President for the three East African States and a federal legislature and judiciary raises the questions whether the essential features of the Constitution of Kenya can be altered by a treaty, or at all, to create an East African Federation as envisioned.

It is my submission that the Constitution of Kenya does not permit the constitutional mandate of the Executive to pursue any range of economic policies in the exercise of economic sovereignty to be interpreted to mean a licence to alter the constitutional order of the country. There are constitutional limits to the executive power in the making of such a treaty.

There are generally three possibilities of qualifying a treaty as unconstitutional; first, when a treaty does not satisfy the internal requirements for it's making, that is, procedural inadequacy, for example, Parliament was not consulted when consultation is required by the national constitution. Second, a treaty is unconstitutional if its objectives are illegal from an international law perspective. Third, and which is the main concern of this study, is when a treaty contains a provision contrary to the country's Constitution, that is, inconsistency with the basic law of a country.

Looking at the proposed creation of an East African Federation and the Constitution of Kenya, the following is the current constitutional law in Kenya:

(a) ***The Constitution of Kenya cannot be altered by a treaty.***

The Constitution of Kenya cannot be altered at all by the Treaty for the Establishment of the East African Community,1999. As I have earlier discussed in this Chapter on the

supremacy of the Constitution, section 3 of the Constitution of Kenya states that the Constitution of Kenya is the supreme law in Kenya and any law inconsistent with it is void to the extent of the inconsistency. Case law in Kenya is also in support of this position and Mwendwa C.J in *Okunda and Anor* v. *Rep.* said;

> "It is not inapposite here to state one or two facts which are liable to be lost sight of. The Kenya Constitution is the instrument which brought into being the entire state and government machinery that exists today. The legislature, the executive, and the judiciary owe their existence to the Constitution. Parliament has the power to make laws by a simple majority but it may not amend the Constitution unless the amending Act receives the percentage of votes specified in s. 47. Through the fundamental rights and freedoms which it guarantees to individuals the Constitution prescribes the basis for the economic and social institutions of the country. Its influence and power are all pervading." [35]

In fact on the issue of the then treaty and treaty Act purporting to have primacy over the Constitution, he said,

> "That while Parliament itself could not pass an Act overriding the Constitution without observing the strict provisions of s. 47, it could authorise the EA Community to override it by its own Act.That is not a possibility to be considered seriously. Even if we held that the expression 'Act of Parliament' in s. 10 of the Treaty Act included the Constitution of Kenya Act, we would be bound to hold that that section was *ultra vires* in so far as it referred to the Kenya Constitution." [36]

The supremacy of the Constitution in Kenya has recently been restated in the case of *Njoya and Others* v. *A.G and Anor.*[37] where the court upheld the view in *Ndyanabo* v. *Attorney General* [38] that;

> "We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme... The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document." [39]

And in the same ruling, the court also said:

> "We hold that, due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution."[40]

This view on the primacy of a constitution over a treaty is also supported in other jurisdictions. In France, a treaty in conflict with the Constitution cannot be given the

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[35] *Supra* note 27.
[36] *Supra*.note 27.
[37] *Supra*.note 4.
[38] *Ndyanabo* v. *Attorney Genera* [2001] 2 EA 485.
[39] *Ibid.*
[40] *Ibid.*

approval by Parliament for ratification until the Constitution is revised. Article 54 of the 1958 Constitution of France provides:

> "If, upon the demand of the President of the Republic, the Prime Minister or the President of one or other Assembly or sixty deputies or sixty senators, the Constitutional Council has ruled that an international agreement contains a clause contrary to the Constitution, the ratification or approval of this agreement shall not be authorized until the Constitution has been revised."[41]

In Germany, a treaty in conflict with the Basic Law cannot take effect for being unconstitutional.[42] On this same contention of the primacy of a constitution over a treaty, H. Lauterpacht supported by the International Law Commission, proposed that a treaty is voidable at the option of the party concerned, if it has been entered into in disregard of the limitations of its constitutional law and practice.[43] I have also suggested, in Chapter 4, that this would be the prudent way forward for Kenya with regard to the Treaty in light of a conflict between the Treaty obligations and the Constitution..

Therefore, the Constitution of Kenya has primacy over the Treaty for the Establishment of the East African Community, 1999 and the Treaty Act. In light of this, the Treaty and the Treaty Act must embody and reflect the values in the Constitution otherwise they are both void to the extent of their inconsistency with the Constitution.. This is especially with regard to the location of governmental powers and authority in Kenya. Further, any contemplated alteration to the Constitution must be as provided by section 47 of the Constitution.

(b)*The Constitution of Kenya cannot be abrogated by the enactment of a new Constitution by either Parliament or the Executive.*

The Constitution of Kenya cannot be abrogated by the enactment of a new Constitution by Parliament or the Executive. Neither the Executive, in the exercise of its treaty making power in the Treaty, nor the Parliament in the exercise of its legislative power in the Treaty Act, can fundamentally alter the Constitution.

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[41] Constitution of France, (1992) Article 54.

[42] See Constitution of Germany, 1949 Article 25: "The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory" Those treaties which refer to norms of jus cogens can be automatically integrated.

[43] H.Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States,"28 BYIL 220 1951

This is the position supported by the constitutional enunciation by Ringera J. in *Njoya and Anor.* v. *A.G and Anor.* He said,

> "I must begin by affirming that the court's most sacrosanct duty is to uphold the supremacy of the Constitution. The court must follow the clear command of the Constitution. And what is the clear command of the Constitution in this aspect of the matter ? I have come to the unequivocal conclusion that Parliament has no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place...The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. [44]

The ruling in *Njoya and Anor.* v. *A.G and Anor.* has been criticized as having been influenced by the political climate prevailing at the time, which was in favour of giving the process already adopted legitimacy, and as having been *per incuriam*. The dissenting judge in the case, Kubo J. was of the view that the constitutional power under section 47 to alter any provision of the Constitution meant Parliament could alter as many provisions as it desired although he was in agreement on the constituent power been a primordial power and the essence of sovereignty.

However, the majority decision remains unchallenged and it is the constitutional law position in Kenya. It essentially means that the power to review the Constitution is reposed in the Kenyan people and not delegated to the legislature. The court held that some of the essential features of the Constitution were worthy of eternal preservation.

Therefore, the creation of an East African Political Federation cannot be undertaken as a legislative process or a mere economic integration policy because it entails the enactment of a new constitution. If the creation of an East African Federation entails the reconstitution of the form of Government in Kenya, as I have discussed in Chapter two, the said objective and actions are unconstitutional if undertaken as a executive policy or a legislative process.

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[44] *Supra* note 4.

The Kenyan Executive cannot purport to commit to fundamentally alter the Constitution of Kenya. It cannot aim at a new Federal Constitution by 2010 without the mandatory requirement to consult the people of Kenya who exercise the constituent power to constitute and reconstitute their frame of government.

It is my submission that the Treaty and the Treaty Act are constitutionally flawed and void as the tools for achieving the East African Political Federation. It is necessary for the Partner States to first amend the respective Constitutions to allow the respective executives to commit to alter the constitutional order.

(c) The fundamental location of the executive, legislative and judicial power under the Constitution of Kenya can only be changed by the people.

Only the people of Kenya, in the exercise of the constituent power, can fundamentally redesign the Constitution of Kenya. An East African Community that is a creation of the Parliament in Kenya cannot fundamentally redesign the constitutional order in Kenya.The Executive also has no power to commit to alter or abrogate by the enactment of another federal constitution the Constitution of Kenya.

On the review of the Constitution of Kenya or the fundamental redesigning of it, the courts in Kenya have held that such a review could only be by the people. Rejecting Parliament's attempt to review the Constitution of Kenya, Ringera J. in *Njoya and Anor.* v. *A.G and Anor* said,

> "It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of Government, in other words, make a new constitution. That being so, it follows ipso facto that parliament being one of the creature of the Constitution it cannot make a new constitution. Its power is limited to the alteration of the existing Constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples sovereignty; (ii) constitutionalism betokens limited powers on the part of any organ of Government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ. It follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution, no more and no less." [45]

[45] *Supra* note 4.

The proposed creation of an East African Federation will entail a fundamental alteration of the Constitution of Kenya by the executive and this would be unconstitutional. The garb of economic integration obligations cannot be used by the Executive to change the current unitary government in Kenya into a federal government of East Africa.

This is also because the Constitution constitutes the nation and it imposes real limits not only on the procedure through which the Constitution can be changed but also on the substance of valid changes.[46] Even the constitutional power of amendment entails implicit limitations on any fundamental amendment or alteration of the basic structure of the Constitution.[47] On this I wish to quote Ringera J. in *Njoya and Others* v. *A.G and Anor.* when he stated very clearly ,

> "All in all, I completely concur with the dicta in the Kessevananda [48] case that Parliament has no power and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle. It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya could cease to be a sovereign republic and become an absolute monarchy, or that all the legislative, executive, and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no " this Constitution of Kenya." In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity." [49]

The objective of the Treaty and the Treaty Act to create an East African Political Federation and the proposed roadmap amounts to an affirmation that Kenya could cease to be a sovereign republic and other absurdities which would result in there being no "this Constitution of Kenya" or its supremacy. It is my position that the framers of the Constitution could not have contemplated or intended such an absurdity to be possible and it would be unconstitutional.

The executive cannot in the pursuit of economic goals and under the pretence of the exercise of the treaty making powers subvert the structure, spirit and theory of

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[46] George Skinner, "Intrinsic limitations on the power of constitutional amendment,'' Vol.18 (1919-1920) *Michigan Law Review*, p. 24.
[47] S. P. Sathe , *Fundamental Rights and Amending the Constitution* University of Bombay, Bombay, 1968.
[48] *Kessevananda* v *Rep* [1973] AIR 9 SC 1461.
[49] *Supra* note 4.

government in Kenya.[50] Such fundamental changes of creating an East African Federation conceptualized as a single federal state may negate constitutionalism and lead to a crisis of legitimacy of the Constitution if undertaken unconstitutionally.[51]

In light of the ruling by the constitutional court, only the people of Kenya can make a new Constitution for Kenya or a Federal Constitution. The objective of creating an East African Federation under a federal constitution as envisioned in the Treaty, the Treaty Act and the road map by the Committee on Fast Tracking an East African Federation is thus contrary to the Constitution.

3.5 **Conclusion**

As I have discussed in Chapter two, the proposed creation of an East African state will entail the complete dislocation of the Executive, Legislative and Judicial powers. It will entail the abolition of the sovereign Republics of Kenya, Uganda and Tanzania as constituted under their respective Constitutions.

The place of the East African Community and its organs in the constitutional set up in Kenya is unclear and constitutionally precarious. To magnify and extends the influence of the East African Community by the creation of an East African Federation must of necessity deal with both the supremacy of the Constitution and dualism.

It is evident, as I have discussed in Chapter 2, that the Treaty and the Treaty Act are in effect requiring the Executive in Kenya to entertain and act towards a replacement of the Constitution of Kenya with a new federal constitution for an East African Political Federation.

It is also evident, as I have shown in this Chapter, that dualism and the supremacy of the Constitution are constitutional impediments to the creation of the East African Federation.

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[50] *Ibid.*, p.25.

[51] Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process1964-1977: A study in the Politics of the Constitution*, Ph. D thesis, University of Nairobi, 2001, pp. 1-50.

First, dualism in Kenya means that an East African Federation which is founded on the Treaty for the Establishment of the East African Community, 1999 and the Treaty Act has its constituting instrument ranked as an Act of Parliament in Kenya.

Secondly, the supremacy of the Constitution of Kenya means the Treaty for the Establishment of the East African Community, 1999 and the Treaty Act are unconstitutional and void in as far as they envision locating the executive, legislative and judicial powers in institutions other than the one enshrined under the Constitution of Kenya.

Chapter 4

Conclusions and Recommendations

4.1 **Introduction**

This Chapter states the conclusions of the study and recommends legal ways to facilitate the creation of an East African Federation. It also offers the possible ways of redeeming and perpetuating the dream of creating an East African trading bloc.

4.2 **Conclusions**

The location of the executive, legislative and judicial powers which are the essential features of a constitution are normally sacrosanct.[1] The Constitution of Kenya is the supreme law of Kenya and any amendment or alteration to the Constitution must be as provided by the Constitution under section 47 and even then, the power to amend the Constitution does not also include the power to destroy it.[2]

In a dualist legal system the international and the municipal legal systems are independent. It is only by sufferance that international law is allowed in the domestic sphere. However, the sufferance cannot be to the point of violation of the basic domestic law of the country or the Constitution.

It is clear that Kenya has a dualist legal system which means that international law does not have primacy over domestic law. This situation leads to the unconstitutionality of a treaty that demands the fulfillment of a condition, which permanently alters in character a fundamental constitutional tenet, in the municipal law.

The Treaty for the Establishment of the East African Community, 1999 prescribes the creation of an East African Political Federation, a political order other than the one

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[1] *Njoya and Anor.*v. *A.G and Anor.* Nairobi High Court case No 82/04 (OS) Unreported.

[2] See William Marbury, "Limitations upon the amending power," Vol.33 *Harvard Law Review* 1919, pp. 223-243.

enshrined in the Constitution of Kenya, and hence not only an economic order but a political structure for Kenya as well.

The creation of the proposed East African State entails a dislocation of the legislative, executive and judicial powers from the current constitutional order. The proposed creation of an East African Federation as a single East African State would thus be an alteration of the Constitution of Kenya.

Therefore, the attempt by the executive to exercise its treaty making power to alter the constitutional order and thus the Constitution of Kenya is unconstitutional and may lead to an illegitimacy of any consequent political order.

In the proposed creation of an East African Political Federation, both the Treaty and the Treaty Act attempt to alter the constitutional order in Kenya. They are both unconstitutional is so far as they purport to have the objective of altering the Constitution of Kenya.

It is my hope that this study will disabuse the Executive in Kenya that the creation of an East African Political Federation is merely an economic policy within the exclusive competence of the Executive. Proceeding as if it is, is an ominous exercise in Constitution demolition and is truly a decision which will go forth without authority and come back without respect.

There must be an acknowledgement of the fact that the proposed creation of a Political Federation will entail fundamental alteration of the Constitution of Kenya and it behoves the Executive to facilitate the exercise of the constituent power of the people of East Africa in the creation of an East African Federation.

Therefore, the enthusiastic Executive in Kenya must recognize and acknowledge that in pursuing the benefits of economic integration it must pursue only what is permissible under the Constitution and not what may amount to a replacement or fundamental alteration of the Constitution of Kenya. The exercise of economic sovereignty must not derogate from the political sovereignty enshrined in the same Constitution.

4.3 Recommendations

4.3.1 Creation of an East African Federation

The creation of an East African Federation can be grounded on two premises. First, it can be on the premise that the creation of an East African Federation is not a mere legislative process or executive policy but entails the exercise of the constituent power that reposes in the people of East Africa. This would entail complying with the accepted modes of facilitating the exercising of the constituent power. This is through a Constituent Assembly or a Referendum.

Second, the creation of an East African Federation can be based on the premise that acknowledges that the creation of an East African Federation amounts to a revolution. This would entail undertaking it in the most civil manner possible through the National Assemblies and Presidents.

(a) *Constituent Assembly and Referendum*

The current approach, in the roadmap by the Fast Tracking Committee, is in essence an adoption of a "top down" approach. This is whereby the political leadership would declare an East African Political Federation on the basis of an interim Federal Constitution with a rotational Presidency. The leadership will then work out a more comprehensive constitution and other enabling laws and policies after the fact. Although this may look attractive it is not constitutional or legally sustainable and will face constitutional challenge and even an outright rejection of the East African Federation.

A "bottom up" approach of ensuring consensus each step of the way before moving ahead is mandatory. Despite the obvious inconvenience, emergent controversies or

possible attendant delays, a broad based, consultative approach is a constitutional prerequisite. This is in view of the constituent power and the effect of the proposed creation of an East African Political Federation being a fundamental alteration of the Constitution of Kenya.

The creation of an East African Federation should stem from the making of a constitution for the East African Political Federation and the ratifying of the same by the people of East Africa. It is the constitution that brings into existence and sustains a state. On this, Mwendwa C.J. stated,

> "The Kenya Constitution is the instrument which brought into being the entire state and governmental machinery that exists today...the Constitution prescribes for the economic and social institutions of the country. Its influence and power are all pervading." [3]

In fact the United States of America, which is a Political Federation, came into being after the Constitutional Convention of 1776 enacted the Constitution of the United States of America.[4] Before the enactment of the Constitution of the United States it did not exist as a nation. The creation of an East African Political Federation amounts to a review of the Constitutions of Kenya, Uganda and Tanzania and the benchmarks for reviewing the Constitutions of Kenya, Uganda and Tanzania become the prerequisites for creating an East African Federation.

In my view, the constituent power should be the basis of any new constitution of an East African Federation or review of the Constitutions of the Partner States. [5] All this calls for an appreciation of what is the constituent power of the people. The most elaborate definition of constituent power of the people is by B.O Nwabueze who defines it as,

> "The nature and importance of the constituent power need not be emphasized. It is a power to constitute a frame of Government for a community, and a constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. In implementing a community's constituent power, a Constitution not only confers powers of Government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the Community. This fact at once establishes the relation between a Constitution

[3] *Okunda and Anor* v. *Rep.* [1970] EA 457.
[4] Colin Leys and Peter Robson, *Federation in East Africa opportunities and problems* Oxford University Press, Nairobi, 1965, pp. 4-25.
[5] *Supra* note 1.

and the powers of Government; it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the Constitution's supremacy." [6]

On the constituent power, Ringera J. in *Njoya and Anor.* v. *A.G and Anor.* [7] said,

"With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people... The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power, the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualized the sovereignty of the people and their constituent power, they would do so only *ex abundant cautela* (out of an excessiveness of caution). Lack of its express textualization is not however conclusive of its want of juridical status. On the contrary, its power, presence and validity is writ large by implication in the framework of the Constitution itself as set out in sections 1, 1A, 3 and 47."

The constitutional case of *Patrick Ouma Onyango and Others* v. *Attorney General and Others* [8] also reiterated the people's power to make a constitution and stated,

"Power to make a constitution is not vested in Parliament, but in the people of Kenya. The people's power to make a constitution is not derived from the constitution. Courts can adjudicate on all disputes except a dispute on the constituent power of the people."[9]

The process of reviewing the Constitutions of the Partner States, or enacting a new constitution for an East African Federation, would require the processes of review to be entrenched in the respective Constitutions. There should also be an enactment of statutory laws to facilitate the review of the Constitutions so as to create an East African Federation.

Having recognized the constituent power as the basis of crafting a constitution for an East African Federation, the recognized modes of exercising the constituent power are through a constituent assembly or a referendum.[10]

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[6] B.O. Nwabueze, *Presidentialism in Commonwealth Africa*, L. Hurst & Co, London, 1974, p. 292.
[7] *Ibid,* note 3.
[8] *Patrick Ouma Onyango and Others* v. *Attorney General and Others* Nairobi High Court Case No 677/05 (OS) Unreported.
[9] *Ibid.*
[10] *Supra* note 1.

Constituent Assembly

This is an important mode of exercising the constituent power.[11] It will entail electing representatives from Kenya, Uganda and Tanzania with the express mandate to make a new constitution for an East African Federation.

The members of the constituent assembly must be elected and given the mandate to write a constitution. Ideally, the people should, in the exercise of the constituent power write their own constitution for an East African Federation but this would not be practical for the nearly 90 million people in East Africa.

Therefore, in representative democracies like Kenya, Uganda and Tanzania, this can be done by representatives with a clear mandate to write the Constitution. The constituent assembly is to draft the constitution for the East African Federation on the basis of the views of the people of East Africa.

The collecting of views, correlation of views and the popular consultation can be undertaken by a commission appointed by the Heads of States of the Partner States. It is notable that the current Constitutions of Uganda and Tanzania were enacted through constituent assemblies.[12]

In Ghana, Parliament converted itself into constituent assembly and enacted the country's constitution. The authority to do so reposed in the Ghana Parliament, not because of the name constituent assembly but because the Parliamentarians were representatives of the people and the Constitution was legitimate as the people had spoken through their representatives and the Constitution was accepted without any referendum

Referendum

A referendum would be the best way to legitimize the Constitution for the East African Federation. A referendum has been defined as a direct vote of electors upon a particular

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[11] *Supra* note 1.

matter."[13] I strongly recommend for the constitution of an East African Federation to be subjected to a referendum.

A referendum is a continuation of the recognition of the constituent power, that is, the ordinary East African must at every stage play the central role in the creation of an East African Federation. It is an effective tool to achieve the participation of East Africans in the creation of the Federation. A referendum would be legitimate only if the ordinary citizens of East Africa played the central role in all the stages of the production of the Constitution for the East African Federation.

If the state is a creation of the people by means of a constitution, and derives its powers of law making from them it may be wondered why people who constitute and grant this power cannot act directly in a referendum or otherwise, to give the Constitution the character and force of law.[14]

(b) *Revolutionary Means*

The most radical way of creating an East African Federation is through what can be regarded as a revolution. The most civil way possible to do this is through a declaration by the Presidents and the National Assemblies of the East African Community Partner States of an East African Federal State.

The new constitution for the East African Federation can be drafted by the National Assemblies or by a committee of experts and given the force of law through the declaration.

In undertaking this mode, there should be no pretensions that it is complying with the existing legal order. However, if successful the eventual constitutional order, if without rival, will be valid.[15]

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[12] Constitution of Tanzania, at <www.kituochakatiba.co.ug/Tanzaniacontitution.pdf> (assessed on 20 May 2006).
[13] *Supra* note 1.
[14] *Supra* note 8, p. 394.
[15] *Uganda* v. *Comr. of Prisons, Ex p. Matovu* [1966] EA 514, 535.

This recommendation is borne out of the acknowledgement of the fact that the creation of an East African Federation will entail the ceasing to exist of the independent states of Kenya, Uganda and Tanzania. The overthrow of the supremacy of the Constitutions of Kenya, Uganda and Tanzania is the result of the creation of an East African Federation and may therefore necessitate revolutionary measures. Most of the genuine experiences of unifications or integration demonstrate the fact that a people have first to unite by whatever means before working out their other differences.[16] It is difficult, under democratic principles, to perceive a constitutional process whereby a republic would cease to exist, lose its sovereignty completely, redraw its borders, give up its sovereign legislature and judiciary in pursuit of better trade terms only.

A bold political action can thus be taken by Parliaments in East Africa to pass binding and irrevocable resolutions to the effect that as of January 2010, the borders separating the peoples of East Africa be abolished. This will give the people of East Africa an opportunity to define statehood which will then decide the political units to which powers will be devolved.[17]

It is a historical fact that in many countries, and indeed in many countries that are or have been under British sovereignty, there are now regimes which are universally recognized as lawful but which derive their origins from revolutions.

The 1966 Ugandan Constitution is an example of a constitution which did not come into being through the exercise by the people of their constituent power but through a revolution, yet the court found it legitimate.

In Uganda, the Prime Minister of Uganda, Milton Obote, issued a statement on 22nd February 1966 declaring that in the interests of national stability and public security and

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[16] Chachange Seithy L. Chachange, "Unite first: The rest will follow," *East African* (Nairobi, Kampala, Dar es Salaam) 6-12 December 2004, p.1.

[17] Dani Wadada Nabudere, "Go For Political EA Unity First," *East African* (Nairobi, Kampala, Dar es Salaam) 13-19 December 2004, p.20.

tranquility he had taken over all powers of the Government of Uganda. He was completely successful. The High Court had to consider the legal effect in an elaborate judgment in *Uganda* v. *Comr. of Prisons, ex parte. Matovu* where Sir Udo Udoma, C.J. said,

> "We hold, that the series of events, which took place in Uganda from February 22 to April 1966 when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy but deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force form both the President and the Vice-President on the grounds mentioned in the early part of this judgment... our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its *de facto* and *de jure* validity. "[18]

Sir Udo Udoma C.J. further stated, "The Government of Uganda is well established and has no rival."[19] The court accepted the new Constitution and regarded itself as sitting under it.

Pakistan affords another example of a Constitution enacted under revolutionary means. The President of Pakistan issued a proclamation annulling the existing Constitution. This was held to amount to a revolution and the new Constitution valid. In the *State* v. *Dosso*, Muhamed Munir C.J. said,

> "It sometimes happens, however, that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order."[20]

The Chief Justice of Pakistan, Muhammed Munir, concluded by saying, "Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change."[21]

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[18] *Supra* note 15.
[19] *Supra* note 15, p. 533.
[20] *State* v. *Dosso* [1958] 2 P.S.C.R.180.
[21] *Ibid*, p. 185.

In the Zimbabwean case of *Madzimbamuto* v. *Lardner Burke and Anor*, [22] their lordships similarly held that they would not accept all the reasoning in the judgments in the Ugandan and Pakistan cases but they saw no reason to disagree with the results. It would be very different if there had been in existence two rivals contending for power.

Therefore, it is legally possible to abrogate and enact a new federal constitution for Kenya, Uganda and Tanzania and create the East African Federation through revolutionary means.

The Parliaments of the East African countries can therefore ignore both the legislative process and the equally complicated constitutional review procedures, claiming that the political will against remaining independent political units have given it authority to override the Constitutions.

This claim is of course subject to challenge, and given the extraordinarily broad standing provisions of the current Constitutions, any citizen has the right to dispute it before the Constitutional Courts. This means, in turn, that anything the East African Federation government does would be under a legal cloud.

Any citizen who feels himself aggrieved by a future law or an East African Federation government decision, or who is unhappy with the outcome of an East African Federation created by the Parliaments without complying with the Constitution, can petition to have it annulled. Given that someone almost certainly will be aggrieved, an East African Federation is likely to be only justified under Hans Kelsen's theory of revolutionary legality.[23]

Kelsen, one of the leading exponents of the positivist school of legal philosophy, argued that a successful revolution destroys the former legal order and creates its own legality.[24] Kelsen wasn't so much concerned with how or by whom a new legality is declared as with whether it exists. As a legal positivist, he believed that the ultimate basis of law was

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[22] *Madzimbamuto* v. *Lardner Burke and Anor.* [1968]3 All.E.R 561,570.
[23] See M.D.A. Freeman, *Introduction to Jurisprudence* Sweet & Maxwell, London 2001, p. 282-307.
[24] *Ibid.*

power, and that a legal system not backed by an effective system of enforcement wasn't really law at all.

Kelsen viewed the fundamental law of the state in terms of a *Grundnorm* or basic norm.[25] Once a *Grundnorm* was effectively overthrown, then it ceased to exist, and all law emanated from the new one. As such, a successful revolution created its own legality, independent of any prior legal system, by establishing a new *Grundnorm*.[26]

This may be termed as the jurisprudence of successful treason and many post-colonial common-law courts have relied on Kelsen's doctrines to legitimize coups and revolutions.[27] However, the common law of revolution has evolved and any extra-constitutional seizure of power or change of government outside regular circumstances must not only be successful but be accepted by the people.[28] The new constitution of an East African Federation, and the laws and institutions created by it, are only valid because they are products of the people's will.[29]

However, it must be clearly stated that to choose this path to create an East African Federation is full of peril. The validity of the consequent legal order or the East African Federation only lies in its efficacy and since the efficacy of the resultant East African Federation cannot be guaranteed, it can thus be an ominous exercise in demolitions of the Constitutions, a decision that goes forth without authority and is only valid if victorious but may come back without respect.

4.4 Other Legal Changes

(a) *Adoption of a monist legal system and Parliamentary approval to ratify Treaties*

There is need to adopt both a monist approach in treaty application to Kenya and also Parliamentary approval of treaties before ratification. A monist approach, as I have discussed in Chapter three, states that municipal law and international law are part and parcel of a universal legal order. Under a monist approach treaties become law of the land

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[25] *Supra* note 23.
[26] *Supra* note 23.
[27] *Supra* note 23.
[28] *Supra* note 23.
[29] *Supra* note 23.

automatically. Kenya, as I have discussed, has a dualist legal system which is an acknowledgement of the coexistence of two independent juridical orders, that is, international and constitutional. Under dualism treaties require special legislation before they become law of the land and primacy is attributed to the municipal law in the municipal jurisdiction.

First and as a necessary antecedent to all efforts of regional integration I recommend amending the Constitution of Kenya to clarify and streamline the treaty making processes in Kenya.

In this regard, I would recommend that Kenya adopts expressly in the Constitution a monist legal system. It is necessary to assert and to admit the fact that international law and internal law form a logical unity. This leads us to substitute the dualist theory with the monist, which in essence identifies the international legal system with the internal one. Under a monist legal system in Kenya treaty obligations will be given primacy and facilitate the effective creation of an East African Political Federation based on the Treaty.

Under the monist approach, the choice of primacy rests on juridical logic whereas dualism has been mainly retained where international society is practically non existent.[30] Dualism is retained where states jealously close themselves to the outside world and keep their foreign relations under strict control, then hardly any international rules are allowed to penetrate the municipal shell. Dualism is a fair reflection of the ideal of a state rejecting legal integration essentially because there is no social integration and no intention of bringing it about.[31]

Kenya cannot therefore successfully pursue regional integration and especially the creation of an East African Political Federation under a dualist approach of treaty

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[30] Malcom Shaw, *International Law*, Grotius Publications, Cambridge, 1997, pp. 97-124, (4th ed) pp. 97-123.
[31] *Ibid,.*

application. It should adopt a monist approach coupled with other constitutional safeguard mechanisms like Parliamentary approval to ratify a treaty.

Further, as there is no constitutional obligation to compel the Government of the day to submit treaties to Parliament before ratification, Parliament should be given, not arbitrarily but in all cases, an opportunity for the examination, consideration and, if need be, the discussion of all treaties before they reach the final stage of ratification. [32] This should be expressly stated in the Constitution of Kenya.

Kenya, having borrowed from the British legal system, should also follow the current practice in Britain where although the conduct of foreign affairs is the Crown's prerogative, the experience has developed a custom whereby the Crown seeks parliamentary involvement for certain kinds of treaties.[33] This avoids embarrassment to the Executive, for example that the Crown ratifies a treaty and Parliament rejects to pass a statute, and also guarantees the internal execution of treaties as may be necessary. This is done under the Ponsoby Rule where a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for discussion of the treaty in question.

There is also in England the routine presentation of treaties to Parliament, which since 1892 has taken the form of publication in the "Treaty Series." [34]

An opportunity for Parliament in Kenya to debate and seriously consider the implications of a treaty coupled with the power to amend provisions of a treaty before it is ratified would provide a screening process and a critical safeguard against unilateralism by the Executive. It would also give an opportunity to cross check the treaty in the light of the Constitution of Kenya.

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[32] Luis G. Franceschi F. *The Constitutional Regulation of the Foreign Affairs Powers:The Kenyan Experience,* LL.M thesis, University of Nairobi,1999, pp. 98-200.
[33] Wilson, Geoffrey. *Cases and Materials in Constitutional and Administrative Law*, Cambridge University Press, Cambridge, 1966, p. 453.

This is in order also to achieve a stable practice, which will improve the quality of Kenya's international relations in economic integration efforts. A sensible balance must be achieved and maintained between public participation, Parliament's involvement and Executive decision making.

Currently there is a lot of legal confusion in Kenya on the way regional co-operation is to be undertaken constitutionally. Some Members of Parliament have differed over which Government organ is supposed to ratify the Protocols. Hon. Koech, the Minister for East African Co-operation maintaining that a Cabinet approval will suffice for the Customs Union to take legal effect, while Mbita Member of Paliament Hon. Otieno Kajwang' insisting that any treaty that will change the country's laws must get parliamentary approval.[35] Hon. Kajwang' said,

> "It is mandatory that the home parliament is not only given the chance to own it, but also to amend the Finance Act to blend with the protocol. Otherwise, national parliaments all over the world are generally hostile to international obligations that they feel could be used against the national interest."[36]

The latter's position was also supported by the Assistant Minister for Foreign Affairs, Hon. Moses Wetangula, who noted that the Protocol touches on sovereignty and that the Cabinet can only approve it and bring a Sessional Paper to Parliament for debate or acclamation, depending on the urgency of the matter.[37]

Hon. Wetangula, however, noted that it would not be irregular for the Customs Union to take off as scheduled in January 2005 while awaiting ratification by the Kenyan side, since there is no way any of the three countries can go back on the Protocol with the three Presidents having signed the agreement on 2nd March 2004.[38]

All this issues on how to legally set up the institutions of the East African Community and give legal effect have much to do with the treaty making and application procedures in respective Member states.

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[34] *Supra* note 32.
[35] *East African* (Nairobi, Kampala, Dar es Salaam) "Cabinet too busy to meet on customs union," 6-12 December 2004, p. 4.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

Uganda has already provided, in a minor way, for the conflicts of international treaty obligations and its Constitution. It declares among the National Objectives and Directive Principles of State Policy, Principle XXVII, that the foreign policy of Uganda shall be based on the principles of respect for international law and treaty obligations. This principle would provide general support for any international commitment that Uganda may enter and by not complying with such commitment the state would be violating the Principle.[39]

Further, in the case of conflict between this principle and the section 2(2) on the supremacy of the Constitution of Uganda, which I discussed in Chapter 3, it shall be the responsibility of the courts to declare the correct position of the law.[40]

Kenya should therefore adopt expressly in the Constitution a monist approach of treaty application coupled with the safeguard availed by parliamentary approval before ratification of a treaty.

(b) ***Amendments to the Treaty for the Establishment of the East African Community***

When a treaty is overridden by internal law, like the Treaty for Establishment of the East African Community, 1999 in as far as it aims at creating an East African Political Federation, its implementation becomes impossible in international law. The ideal situation would be that, once the Treaty is overridden by an internal law, such a state requests the termination or amendment of the treaty and this is what Kenya should urgently undertake other than to pursue an objective contrary to its constitution.

It is my recommendation that there should be an amendment of Article 5 (2) of the Treaty for the Establishment of the East African Community by the deleting of "Ultimately a Political Federation" or the objective of creating a Political Federation so that East African integration process ends with the creation of a Monetary Union.

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[39] See Constitution of Uganda, 1995, at < www.kituochakatiba.co.ug/Ugcons.htm> (assessed 20 May 2006).

[40] *Ibid.*

Similar amendments should be done to the Treaty Act. Article 123 of the Treaty should also be amended by the deleting of Article 123(f) on the enhancement of the eventual establishment of a Political Federation of the Partner States.

As I have stated in Chapter two, the three Presidents in East Africa have endorsed the so called roadmap for creating an East African Political Federation that would merge Kenya, Uganda and Tanzania into a single state called the East African Federation by the year 2010.

These leaders seem overwhelmingly more interested in a Political Federation than in other processes of East African Community integration. The urgency and empirical need for an East African Federation rather than purely economic integration begs for an answer and is may be more likely to be merely political grandstanding.

I recommend that the objective of creating a Political Federation should be done away with and the purely economic integration objectives of the Treaty for the Establishment of the East African Community,1999 and the Treaty for the Establishment of the East African Community Act, 2000 retained.

It is possible to have regional integration of East African Community in terms of having a common foreign policy, a common economic policy, a common defense policy and addressing regional security issues like the European Union without necessarily forming a single state called East African Federation.[41]

The main aim of regional integration should be economic integration not political integration. This is especially because the political leaders have a limited constitutional mandate to pursue a range of economic policies but not to pursue political reorganization which may amount to a fundamental alteration of the Constitution of Kenya.

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[41] Ernst B.Haas, "'International Integration;The European and Universal Process," *International Organization,* Vol.15 1961,389.

The executive is only constitutionally mandated to pursue economic policies that benefit its citizens. This does not mean that the Executive can interpret the exercise of economic sovereignty implied in the constitution to mean a license to alter the Constitution. The economic policies pursued by the executive must be constitutional. The economic policies must be within both the implied and express limits of the Constitution of Kenya.

I believe East Africans want good constitutions, devolution of power, sound policies, economic and social development and good governance, this does not necessarily mean a Political Federation or a single East African state. My submission is supported by a poll conducted by Steadman Research Services International which found that only 33 per cent of East Africans supported the East African Federation having a common President.[42] In essence the people of East Africa do not subscribe to the Political Federation but to purely economic integration. The poll found that the concept of a Political Federation was considered impracticable and believed it would endanger the political stability of the three Member States.

Alternatively, I recommend a mandatory phased approach to implementation of the Treaty for the Establishment of the East African Community. The Treaty for the Establishment of the East African Community, 1999 and by extension the Treaty for the Establishment of the East African Community Act, 2000 should provided that economic integration only be undertaken in phases and not through a fast track mechanism.

The Treaty and the Treaty Act should expressly state that a market led economic integration is the way forward and not the seeking to build a single East African State. The aim should be to try and imitate and replicate the European Union where todate there are twenty five countries that make up the European Union.[43]

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[42], "East Africans want a union now says poll," *Stardard* 6 January, 2005,28. Steadman's Managing Director George Waititu stated, "A total of 2,264 people were interviewed, through a structured face-to-face questionnaire. A random sampling methodology was used."

[43] Otieno Odek, "Re-Appraising the Framework of Regional Economic Integration in Africa" Department of Public Law, School of Law, University of Nairobi, p. 1.

The process of creating an economic or political union requires a process of education and bargaining and even compromise both between the would be union members and as well as between groups within each state.[44] There is supposed to be a progress towards a terminal condition called the political community. [45]

An East African Political Federation should be attained after progressive steps.This is because economic integration involves ceding economic sovereignty and the balance of what economic sovereignty to legitimately cede for the sake of economic integration can only be achieved through phases.

In fact the initial conceptualization of the East Africa Community, like the European Union, is an implementation of the economic integration in phases starting with a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation. The Treaty and the Treaty Act should be amended to make it mandatory to implement the objectives of the Treaty in phases.

The European Union has shown that to form an economic bloc, and under the particular circumstances of East Africa, it is necessary, for those who are major actors, to possess a firm sense of direction, combined with readiness to adopt flexible strategies and to recognize the need and opportunities of ephemeral alliances and temporary compromises.

It has to be accepted that the vision of the ultimate goal could re-main vague for a considerable period, and that the speed of progress could not be entirely controlled. The art of preserving options, keeping channels open, accepting temporary setbacks or regressions, while not losing the sense or direction, is always a hallmark of those who contributed to a successful economic block.

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[44] *Ibid.*
[45] *Supra* note 41.

This is why the European Union law has been referred to as a kind of supranational conflict of laws.[46] After the successful integration in the economic field, a people driven attempt at creating a Political Federation may be feasible. This should be undertaken with a clear understanding that it is a political integration process and not merely the creation of a trading bloc.

[46] Christian Joerges, "Rethinking of European law's supremacy, " at <www.iue.it/pub/laws > [assessed 10th January 2004].

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