

**THE CONSTITUTIONAL IMPLICATIONS OF
ESTABLISHING AN EAST AFRICA FEDERATION**

By

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DECLARATION

I, **Joshua Kiptoo**, declare that this Research Paper is my original work and has not been submitted for the award of a degree in any other university.

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APPROVAL

This Research Paper, entitled, 'THE CONSTITUTIONAL IMPLICATIONS OF ESTABLISHING AN EAST AFRICA FEDERATION,' has been written and for examination with my approval as the candidate's supervisor.

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DEDICATION

I dedicate this study to all East Africans, whose desire is to see the realisation of full political integration. I specifically dedicate the study to all the stakeholders, who firmly believe in the full integration of the region and have put their efforts in realising this goal.

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LIST OF ABBREVIATIONS

EAC	EAST AFRICAN COMMUNITY
COMESA	COMMON MARKET FOR EAST AND CENTRAL AFRICA
SADC	SOUTHERN AFRICA DEVELOPMENT CO-OPERATION
USSR	UNION OF SOCIALIST SOVIET REPUBLICS
USA	UNITED STATES OF AMERICA
NEPAD	NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT
APRM	AFRICAN PEER REVIEW MECHANISM
EADC	EAST AFRICAN DEMOCRACY CENTRE

LIST OF CASES

The Senate of the Republic of Kenya AND The Speaker of the Senate v The Hon. The Attorney-General and The Speaker of the National Assembly (2013), Supreme Court of Kenya, Advisory Opinion reference No. 2 of 2013.

Machano v Serikali ya Mapinduzi Criminal Application No. 8 of 2000, TZCA 1 (21 November 2001).

LIST OF NATIONAL STATUTES

Constitution of the German Reich (Weimar Constitution) 1919.

Constitution of German Democratic Republic 1949.

Basic Law for the Federal Republic of Germany 1949.

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Articles of Confederation of the United States 1781.

Constitution of the Federal People's Republic of Yugoslavia 1946.

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The Constitution of the Federation of Nigeria 1960.

The Constitution of the Federal Republic of Nigeria 1963.

The Constitution of the Federal Republic of Nigeria 1979.

The Constitution of the Federal Republic of Nigeria 1999.

Kenya Constitution 1963 (Independence Constitution).

Constitution of Kenya (Amendment) Act, 1964.

Constitution of Kenya 2010.

Constitution of the Republic of Uganda 1962.

Constitution of the Republic of Uganda 2006.

Constitution (Amendment) Act of Uganda 2005.

Independence Constitution of Tanganyika 1961.

Republican Constitution of Tanganyika 1962.

Interim Constitution of the Republic of Tanganyika and Zanzibar 1964.

Union of Tanganyika and Zanzibar Act 1964.

Constitution of the United Republic of Tanzania 1977.

Articles of Union of Tanganyika and Zanzibar 1964.

The Tanzania Constitutional Review Act 2012.

Constitution of the Republic of Rwanda 2003.

Constitution of Burundi 2005.

Ratification of Treaties Act, Cap 204 of Republic of Uganda 1998.

Treaty Making and Ratification Act No. 45 of 2012 of Republic of Kenya.

LIST OF CONVENTIONS AND INTERNATIONAL AGREEMENTS

Protocol on the Establishment of the East African Common Market 2010

Protocol on the Establishment of the East African Customs Union 2004

Vienna Convention on State Succession in Respect of Treaties 17 ILM (1978).

The German Unification Treaty 1990.

Arusha Peace and Reconciliation Agreement for Burundi 2000.

Treaty for Establishment of the East African Community 1999.

CHAPTER ONE

INTRODUCTION

1.1 Background

Regional cooperation of East Africa traces its origin to the colonial period, when Kenya, Uganda and Tanganyika¹ were all under the British administration.² A Customs Union was first established in 1917 between Uganda and Kenya, with Tanganyika later joining in 1927.³ The three states territories established the East African High Commission in 1948, whose primary objective was the unification of income tax.⁴ The Commission was succeeded in 1961 by the formation of the East African Common Services Organisation that lasted up to 1967.⁵

The three East African territories gained independence with Tanganyika leading the way in 1961. Uganda and Kenya followed suit in 1962 and 1963, respectively. At that time their burning desire for the formation of a political federation was captured in their leaders' "Declaration of Federation by the Governments of East Africa", issued in Nairobi on 5th June 1963. They stated:

We the leaders of the people and governments of East Africa assembled in Nairobi on 5th June 1963, pledge ourselves to the political Federation of East Africa. Our meeting today is motivated by the spirit of Pan-Africanism and not by mere regional interests. We are nationalists and reject tribalism, racialism, or inward looking policies. We believe that the day of decision has come, and to all our people we say there is no more room for slogans

¹ Tanganyika was initially colonized by Germany up to 1918 when it was placed under the League of Nations after the defeat of Germany in the 1st World War. It was later placed under the mandate of United Nations after the end of 2nd World War in 1945.

² Reith Stefan and Moritz Boltz, 'The East African Community: Regional Integration Between Aspiration and Reality' (2011) KAS International Reports, <http://www.kas.de/wf/doc/kas_28725-544-2-30.pdf> (accessed 10 February 2014).

³ East Africa Community, 'History of the EAC: From Co-operation to Community' <http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54> (accessed 10 February 2014).

⁴ Ibid., p. 2.

⁵ Ibid.

and words. This is our day of action in the cause of the ideals that we believe in and the unity and freedom for which we have suffered and sacrificed so much.⁶

The Nairobi Declaration was backed by a resolution to establish a specific ‘Working Party’ tasked with the responsibility of formulating the federation’s draft constitution.⁷ The idea of a draft federal constitution was out of the realization that such an entity required a comprehensive constitutional framework. However, no mention was made as to the structuring of the respective national constitutions, to accommodate the envisaged federation. Consequently, all the national constitutions of the three East Africa states only recognized national sovereignty. The three Heads of State failed to adopt the findings of the Working Party, as the penultimate conference earmarked for the signing of the draft constitution aborted.⁸ The states were more concerned with the pressing matter of economic imbalances, which took centre stage, at the expense of political federation.

The Independence Constitution of Uganda recognized Uganda as consisting of federal states, Mbale territory, and districts.⁹ There was no specific mention of the East Africa federation within this Constitution, but only a clear definition of Uganda as a national sovereign state. The Kenyan Independence Constitution of 1963 divided Kenya into eight distinct regions, namely, Nairobi Area, Western region, Coast region, Nyanza region, Rift Valley region, Central region, Eastern

⁶ Anthony Hughes, ‘The Search for Unity: Kenya, Tanganyika, Uganda and Zanzibar’ (Penguin African Library 1963).

⁷ Nabudere Dani, ‘The Fast-Tracking of Federation and Constitutionalism in East Africa’ 5
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCYQFjAA&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D162%26Itemid%3D136&ei=z7H4UurUKMm8ygPazIKoBg&usg=AFQjCNFDnqGp5ii1Y6RVvtnbF_DmM8gupg&sig2=la85kgLPek-ri4Pu65S8aw&bvm=bv.60983673,d.bGQ> (accessed 10 February 2014).

⁸ Ibid., p. 6.

⁹ Constitution of Uganda 1962, (ch 1, s 2(1)(2)(3))
<<http://www.uganda.com/const62m.htm>> (accessed 10 February 2014). The federal States were; Kingdom of Buganda, the Kingdom of Ankole, the Kingdom of Bunyoro, the Kingdom of Toro and the territory of Busoga, while the districts included; Acholi, Bugisu, Bukedi, Karamoja, Kigezi, Lango, Madi, Sebei, Teso and West Nile.

region and North Eastern region.¹⁰ However, in December 1964, through a constitutional amendment, Kenya became a Republic.¹¹ The constitutional amendment that came into force on November 28 1964, defined Kenya as a ‘Sovereign Republic as from 12th December 1964 and shall effectively cease to form part of Her Majesty’s Dominions.’¹² The Kenyan Constitution failed to mention the position of the East Africa federation within the State’s governance structure.

The constitutional history of Tanzania, before establishment of EAC in 1967, is characterized by the adoption of a total of four constitutions from 1961 to 1965. Tanganyika got her independence in 1961 from Britain through a negotiated Independence Constitution of 1961; adopted as the Tanganyika (Constitution) Order in Council 1961.¹³ The Independence Constitution was fashioned on the Westminster model system that effectively proclaimed Tanganyika a dominion under the British monarchy.¹⁴ The Queen was recognized as the official head of state while executive authority remained vested in the Prime Minister.¹⁵

In 1962, Tanganyika adopted a new constitution referred to as the Republican Constitution of 1962. The new Constitution effectively defined Tanganyika as a Republic headed by an Executive President; a position assumed by Dr. Julius Nyerere.¹⁶ Zanzibar, on the other hand, gained its independence in December 1963 with its Independence Constitution modelled on the Westminster model, same as Tanganyika’s Independence Constitution. However, a revolution orchestrated by the dominant Afro- Shirazi Party toppled the existing government and repelled

¹⁰1963 Kenya Constitution (Independence Constitution), s 91.

¹¹Constitution of Kenya (Amendment) Act, 1964, No. 28 of 1964.

¹²Ibid., Section 4.

¹³ University of Minnesota Human Rights Library, ‘Tanzania Human Rights Jurisprudence’ <<http://www1.umn.edu/humanrts/research/TanzaniaB.html>> (accessed 11 February 2014).

¹⁴International IDEA, ‘Tanzania - Country Constitutional Profile’ (2010) CONSTITUTIONNET <<http://www.constitutionnet.org/country/tanzania-country-constitutional-profile>> (accessed 11 February 2014).

¹⁵ Ibid.

¹⁶Supra, note 13.

the constitution. In its place, the Zanzibar Revolutionary Council adopted numerous Presidential decrees that bestowed all the executive powers on the President.¹⁷ This set the stage for a merger between Zanzibar and Tanganyika in the same year.

The union between Tanganyika and Zanzibar in April 1964 ushered in an interim Constitution referred to as the ‘Interim Constitution of the United Republic of Tanganyika and Zanzibar’.¹⁸

The Union was later christened as the Republic of Tanzania, after the adoption of the interim Constitution by the two states. The 1964 Constitution provided for the governments of Zanzibar and Tanganyika as established under the Articles of the Union.¹⁹ The two governments were the national Union government and the semi-autonomous Zanzibar which had a President and a Parliament of its own. In 1965, a further modification through an amendment was carried out on the Interim Constitution; that entrenched a single party political system for both Zanzibar and Tanzania. The Afro-Shirazi Party and the Tanganyika African National Union were then officially recognized as the sole parties of the republic of Tanzania and Zanzibar, respectively.²⁰ The 1965 version was, therefore, held as the Interim Constitution of the United Republic of Tanzania that lasted up to 1977.

An analysis of the EAC partner states’ Independence Constitutions reveals that none among them mentioned the East Africa federation. All the three Constitutions were clear in recognizing the national sovereignty of each of the partner states. The constitutional outlook paints a far different outlook from the federation slogan adopted in the Nairobi declaration by the leaders of

¹⁷Supra, note 14.

¹⁸Supra, note 13.

¹⁹ The Union matters were classified to include The constitution and government of the United Republic; External Affairs; Defense; Police; Emergency powers; Citizenship; Immigration; External trade and borrowing; The Public Service of the United Republic; Income tax, Corporation tax, Customs and excise duties, and harbours, civil aviation, posts & telegraph; Haroub Othman, ‘The Articles of Union between Tanganyika and Zanzibar’ Development Studies, University of Dar es Salaam

<<http://www.mzalendo.net/wp-content/uploads/2011/01/The-Articles-of-Union.pdf>> (accessed 11 February 2014).

²⁰Supra, note 13.

the EAC states. This showed lack of seriousness and concern on the question of federating East Africa region. As fate would have it, the Nairobi Declaration was a mere political talk that was not backed by the requisite constitutional framework.

The EAC Partner States' current constitutions do not envisage a political federation. Each of the respective national Constitutions recognizes respective states as national sovereign republics. It is evidence of a clear lack of supportive constitutional framework, as well as political goodwill towards realization of the EAC federation. Kenya's Constitution declares it to be a sovereign Republic,²¹ with its territory divided into 47 counties.²² Any amendment to the Constitution on the sovereignty of Kenya can only be effected through a national referendum, but after such amendment gets absolute majority of the legislature and the President's assent.²³

The Ugandan Constitution expressly defines Uganda as a Sovereign State and a Republic.²⁴ The republic is divided into regions administered by regional governments, Kampala and the districts of Uganda.²⁵ Any constitutional amendment as to either the sovereignty of Uganda or administrative boundaries of the country can only be possible through a parliamentary majority backing and a national referendum.²⁶ Change in the administrative boundaries would further require ratification by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda.²⁷ These constitutional provisions clearly project the national identity of Uganda with no hint whatsoever for an EAC federation.

²¹Constitution of Kenya 2010, Art 4.

²²Ibid., Art 6.

²³Ibid., Art 255(1).

²⁴Constitution of the Republic of Uganda, Art 5(1).

²⁵Ibid., Art 5(2).

²⁶Ibid., Art 260.

²⁷Ibid., Art 261(1)(b).

The Tanzania Constitution declares to it be a unitary state and a sovereign United Republic²⁸ with its territory consisting of Mainland Tanzania and Tanzania Zanzibar.²⁹ Any constitutional alteration on the existence of the republic can only be successful if ratified by at least two-thirds of all Members of Parliament from Mainland Tanzania and two-thirds of all Members of Parliament from Tanzania Zanzibar.³⁰ The new draft of the Tanzanian Constitution has maintained the same provisions with no mention whatsoever on the question of EAC political federation.³¹

Burundi and Rwanda national constitutions replicate the other EAC Partner States' position on national sovereignty. The former's Constitution provides that Burundi is an independent, sovereign, secular, democratic, and unitary Republic,³² with its national territory of Burundi being inalienable and indivisible.³³ Rwanda, in its Constitution, defines itself as an independent, sovereign, democratic, social and secular Republic.³⁴ Further, it provides that the national sovereignty of the Republic belongs to the people who exercise it directly by way of referendum or through their representatives.³⁵ Any amendment of the Rwandan Constitution on the issue of national sovereignty and system of governance must be ratified through a referendum, after adoption by the two-chambered legislature.³⁶ Both countries' constitutions make no mention on establishment of EAC political federation.

²⁸Constitution of the United Republic of Tanzania 1977, Art 1.

²⁹Ibid., Art 2.

³⁰Ibid., Art 98(1)(b).

³¹ Draft Constitution of the United Republic of Tanzania (Dr. Mapunda G. (tr), English Translation), art 1. <http://www.constitutionnet.org/files/tanzania_draft_constitution_2013-english.pdf> (accessed 25th October 2014).

³² Constitution of Burundi 2005, Art 1.

³³Ibid., Art 2.

³⁴Constitution of the Republic of Rwanda, Art 1.

³⁵Ibid., Art 2.

³⁶Ibid.,Art 193.

The East Africa Community was first established in 1967 under the banner of ‘The Permanent Tripartite Commission for East African Co-operation.’³⁷ The question of a political federation had fizzled out preceding this formation of EAC. The Community lasted up to 1977 when it collapsed due to various challenges and problems, including, deep seated mistrust and suspicion among the three national leaders, perceived economic and industrial development imbalances among the Partner States, as well as clear ideological and political differences between the partner states. The collapse of the Community signalled the death of the independence idea of a political federation.

Efforts to establish a new East Africa Community began in earnest in 1993 when the Heads of State of Kenya, Uganda, and Tanzania established the Permanent Tripartite Commission for East African Co-operation.³⁸ The Commission’s secretariat was subsequently launched in Arusha in 1996 and tasked with the responsibility of formulating a treaty. The Treaty Establishing the East Africa Community was signed in 1999 by the three states and came into force in July 2000, after its ratification by the partner states.³⁹ Two other States, Rwanda and Burundi, joined the East Africa Community and officially became EAC members in July 2007. Under Paragraph 1 of Article 5, the partner states undertook to provide a clear framework of establishment of the ultimate objective of a political federation. After 10 years, the primary objective of the EAC, the establishing of a political federation, still remains unachieved.

³⁷ Regional Economic Communities (REC), ‘East Africa Community: History & Background’ <<http://www.africa-union.org/root/au/recs/EAC.htm>>(accessed 10 February 2014).

³⁸Ibid.

³⁹Supra, note 36.

the foundation of establishing a political federation. A cursory glance at the various EAC economic integration processes points at reasons for the slow integration of EAC. Two important protocols on economic integration have been concluded and ratified by the partner states, namely, the Common Market and the Customs Union. The EAC Common Market came into force in July 2010, with its key objective being consolidation of the Community into a single free trade area with a market area of up to 130 million people.⁴² The Common Market was expected to attain free movement of capital, labour mobility and right of residence for citizens within EAC. However, the Common Market has not yet been fully implemented nationally by the partner states. Inhibitive regulatory and legal frameworks continue to exist that eventually hamper movement of labour.⁴³ Further, the partner states have failed to harmonise their respective labour policies for labour mobility to be achieved. A Similar scenario applies to the national social policies of the partner states as they all differ, hence, hamper realization of the free trade area.⁴⁴

The EAC Customs Union Protocol was first signed in January 2005 among the three founding partner states, with Rwanda and Burundi adopting the protocol in 2009.⁴⁵ The Protocol officially

⁴² Penny Simba, 'EAC Common Market' *Trademark East Africa* (April 2012)
<<http://www.trademark.com/wp-content/uploads/2012/09/EAC-Common-Market-Apr-2012.pdf>> (accessed 14 February 2014).

⁴³ Friedrich Ebert-Stiftung, 'The East African Community Common Market Protocol for Movement of Labour: Achievements and Challenges of Implementation of the Protocol' (Conference Report, Nairobi Safari Club, Kenya, 1 -2 November 2012)
<<http://www.feskenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/CMP%20Conference%20Report%20November%202012%20Nairobi.pdf>> (accessed 14 February 2014).

⁴⁴ Victor Ogalo, 'Achievements and Challenges of Implementation of the EAC Common Market Protocol in Kenya: Case of Free Movement of Labour' (July-October 2012) 22
<<http://www.feskenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/Papers/CMP%20Implementation%20in%20Kenya.pdf>> (accessed 14 February 2014).

⁴⁵ IDC, 'EABC Study on Impact of the EAC Customs Union on businesses' (August 2008)
<http://www.eabc.info/uploads/EABC_Study_on_Impact_of_EAC_CU_on_Businesses.pdf> (accessed 14 February 2014).

came into effect in July 2009 within the whole Community.⁴⁶ The key objective of the protocol is to achieve trade liberalization and increased regional trade among the partner states, which was to be achieved through elimination of trade barriers and harmonization of external tariffs. Full implementation of the Customs Union is far from being realized due to various challenges, including retention of national borders hampering free movement of goods, delay or lack of harmonization of the respective domestic tax regimes, multiple membership in other regional trade blocs by partner states, non-compliance with Common External Tariff and continued existence of Non-Tariff barriers among the partner states.⁴⁷

Establishment of a political federation among the partner states would come with political, legal and economic consequences. The federation would directly impact the sovereignty of the independent partner states as each partner state would have to cede their respective national sovereignty. The sovereignty issue would present the partner states with the hardest test yet in their quest for political integration due to their long period of existence as independent political entities. The current slow pace of economic integration has been blamed on the continued clinging on national laws by the partner states, a fact that shows the challenge that lies ahead for the question of losing national sovereignty.⁴⁸ Would the partner states be ready to cede sovereignty for a single political entity?

⁴⁶ Penny Simba, 'EAC Customs Union: Uniform Laws to Enhance Both Regional and External Trade' *Trademark East Africa* (April 2012) <<http://www.trademarka.com/wp-content/uploads/2012/09/EAC-Customs-Union-Apr-2012.pdf>>(accessed 14 February 2014).

⁴⁷ Kenneth Bagamuhunda, 'EAC Customs Union: Achievements and Challenges' <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&ved=0CGAQFjAJ&url=ftp%3A%2F%2Fwww.psfuganda.org%2Fnew%2Fimages%2Fstories%2Fdownloads%2Fecac%2520customs%2520union%25201.ppt&ei=Lq_9UtzsBrCnyAO0uYHAAw&usg=AFQjCNE94NI8gSc7NWNnLelqFsAngInd-w&bvm=by.61190604.d.Yms>(accessed 14 February 2014).

⁴⁸ Ibid.

Establishment of political federation affects the respective partner states' national defence and foreign policies.⁴⁹ Each state has its own foreign and defence policy, a fact attributed to national sovereignty. Adoption of a single federation would, therefore, call for relinquishing of individual national defence and foreign policies to the single common federation. Foreign policy, which involves countries' membership to international and regional organizations, would be a preserve of the federation. This may mean that the new entity will take up a single seat for the partner states, replacing the individual membership of the states in those organizations.

Adoption of a federal constitution precedes any federation process and this would also be a requirement for the EAC.⁵⁰ The constitution acts as the basic legal framework for the establishment of a governance structure. The EAC federal constitution would have to define the constitutional matters handled by the federal agencies exclusively as well as the relation between the federation and the constituent states. All existing world federations, including USA, Germany, Nigeria, Russia, India and Brazil, have a single federal constitution that define the inter-relation between the federal government and the constituent states.⁵¹ The EAC federal constitution would have to be approved through a referendum by citizens of the whole Community.

⁴⁹ East Africa Community, 'Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&ved=0CDYQFjAC&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D142%26Itemid%3D136&ei=XQ-UuW4CqTMygPn6YCgCw&usg=AFQjCNGUuTrKp-Wv6yqsO1p6rxXdNbS1Xw&sig2=oC0x6jaf7urWSoEFhyXEZQ&bvm=bv.61190604.d.bGQ>(accessed 10 February 2014).

⁵⁰ Tom Ojienda, 'Integration of the EAC; A Comparative Study on the Structures and Functioning of Federations' (June 2009) Research Paper on Integration of the East African Community,
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDQQFjAB&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D158%26Itemid%3D136&ei=XhP-UoX9O-TQygPH_oKgBw&usg=AFQjCNFTWa2EEY4Ry3sB5IkzpAQd5JtgMQ&sig2=uZrVy1x4GkSOH-etGT-Gxg&bvm=bv.61190604.d.bGQ> (accessed 10 February 2014).

⁵¹ Ibid.

Establishing a federation creates economic consequences for the respective partner states. The EAC partner states have already embarked on the process of economic integration, which is a natural consequence of the federation. A federation leads to the elimination of existing trade barriers and, in its place, a single trade policy, referred to as the Customs Union is adopted. The federation would also force the EAC partner states to quit from other regional customs unions, including COMESA and SADC. At present, none of the partner states has taken the step to relinquish their membership from other customs unions, which presents a clear challenge to the establishment of the federation.⁵² A federation will result in adoption of a single monetary and fiscal policy among the existing partner states. EAC states' proposal to ratify and implement a protocol for a single Monetary Union is at its infancy. The full implementation of such protocol would be a key component of a political federation.

A political federation is an emotive political and legal process that excites huge interest among citizens of the Partner States. This is a pointer of the critical role the citizens play towards its realization. The EAC integration exercise has largely been shadowed by the accusation that it is more of an elitist agenda and not people-driven. The lack of involvement of the greater citizenry explains the lack of awareness of its implications by the citizens. Most talk and resolutions touching on political integration have been handled by the EAC Summit of the Heads of State. This has led it to be labelled as the Summit's agenda rather than the people's agenda. Lack of involvement of EAC citizens denies the process the momentum needed to push the process. Little effort has been made by the EAC Secretariat to sensitize the public on the political

⁵²Dr. Mugisa Evarist, Mr. Onyango Chris and Dr. Mugoya Patrick, 'An Evaluation of the Implementation and Impact of the East African Community Customs Union' (March, 2009), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCYQFjAB&url=http%3A%2F%2Fwww.customs.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D84%26Itemid%3D106&ei=Xb88VMeuLevMyAP75YLADQ&usg=AFQjCNFTZqJsxjegNbU-j3tuEM4Xjq3Kow&sig2=6Rb8KSP-mfFkxgIbGpybPg&bvm=bv.77412846.d.bGQ (accessed 10th February 2014).

integration and its subsequent consequences. This may later prove fatal, especially during the anticipated constitutional referendum as citizens may end up rejecting the federal constitution.

1.2 Statement of the Problem

Establishment of an East African political federation is a constitutional process that requires a clear supporting constitutional framework. An enabling constitutional framework clearly provided for, by the partner states' national laws, is fundamental in realizing the establishment of the federation. The key issue for determination remains being the extent to which individual EAC partner states have made provisions for a federation, in their respective constitutional and legal frameworks. EAC partner states have national constitutions that define them as national sovereignties, with no mention of a federation. The envisaged EAC federation cannot be a reality due to lack of a constitutional provision in each Partner State's national law.

1.3 Theoretical Framework

This research study is guided by legal positivism theory, in an attempt to explain the implications of national constitutions to the EAC federation building process. Legal positivism refers to the school of jurisprudence whose advocates believe that only legitimate sources of law are those written rules, regulations and principles that have been expressly enacted, adopted or recognized by a government entity or political institution, including administrative, executive, legislative and judicial bodies.⁵³ Legal positivism firmly identifies written law as the primary source of legitimate law, the constitution being the most important legal text recognized as a source of law.

⁵³The Free Dictionary, <<http://legal-dictionary.thefreedictionary.com/Legal+Positivism>>(accessed on 29 January 2014).

Legal positivism identifies codified law as the ultimate source of law. Codified law would therefore, be regarded as the sole valid law. The legal positivist theory guides this research study in determining whether the existing national legislations of EAC Partner States, provide for the establishment of an East African political federation. The envisaged federation can only be a reality if it is anchored on codified law. Legal positivism insistence on codified law as the ultimate legal source would dictate the choice of national constitutions and EAC legal texts as the primary sources of data.

Hans Kelsen, a modern legal positivist, espouses a legal system as ‘a complex series of interlocking norms which progress from the most general ‘oughts’ to the most particular.’⁵⁴ He holds that in every legal order, no matter with what proposition one may begin, a hierarchy of ‘oughts’ is traceable back to some initial, fundamental “ought” on which the validity of all others rest, referred to as the grundnorm.⁵⁵ Grundnorm is the reason for the validity of the constitution and marks the fact that a constitution is accepted by the legal system.⁵⁶ Kelsen’s hierarchical doctrine of the legal system, therefore, places the constitution as only second to the grundnorm.⁵⁷

This research study will use Kelsen’s hierarchical concept of legal system to explain the importance of a constitution in establishing a federation. The respective national constitutions of the EAC member states form the basis of this study, which seeks to investigate the status of federation within the constitutions. The hierarchical doctrine identifies the constitution as the primary legal text that gives validity to all existing laws. This, therefore, means that any legal

⁵⁴Wacks Raymond, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press, Oxford 2005), p. 89.

⁵⁵ James Harris, ‘Kelsen’s Concept of Authority’ (1977) 36 CLJ, p. 353; Stanley Paulson, ‘Constraints on Legal Norms; Kelsen’s views in the Essays’ (1975), CHLR 768, p. 42.

⁵⁶Hopton T.C, ‘Grundnorm and Constitution: The Legitimacy of Politics’ (1978) 24 McGill Law Journal <<http://lawjournal.mcgill.ca/userfiles/other/6042331-hopton.pdf>> (accessed 29 January 2014).

⁵⁷Wacks Raymond, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press, Oxford 2005), p. 90.

institutions draw their mandate from the constitution. A federation cannot, therefore, be established without solid enabling constitutional provisions.

The study will also rely on the theory of federalism. Federalism explains the system of government having two levels of authority coupled with shared sovereignty between the two centers of power. This study would, therefore, use federalism to explain ceding of sovereignty as a key constitutional requirement for achieving the East Africa federation. Rwekaza Mukandala argues that at the regional level, federalism is the call for the coming together of independent nations or states to form a federal government.⁵⁸ In line with this argument, the study would seek to justify the need for enacting enabling constitutional provisions necessary for the new East Africa federation.

Federalism incorporates political integration as a form of political federation. Ernst Haas defines political integration as the ‘process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national states. The end result is a new political community, superimposed over the pre-existing ones.’⁵⁹ Accordingly, regional integration is a process transferring loyalty, expectations and political decision making power. This definition explains the likely consequences of the EAC federating process as regards the partner states.

In line with Haas’ definition, the study would seek to explain the requirement of the EAC partner states to create federal institutions, whose jurisdiction will supersede existing national institutions. The establishment of a federal government, together with federal institutions, can

⁵⁸ Rwekaza Mukandala, ‘Political Cooperation’ (1st Ministerial Seminar on East African Cooperation on Perspectives on Regional Integration and Cooperation in East Africa, Arusha Tanzania, 25–26, March 1999), p. 89.

⁵⁹ Ernst Haas, ‘The Uniting for Europe, Social and Economic Forces’, (1950-1957) (Stanford University Press, Stanford 1958), p. 16.

only be achieved through adoption of a federal constitution. Therefore, the need for federal institutions would automatically call for adoption of a necessary constitutional framework. Transfer of loyalty and political decision making power by partner states would only be possible through constitutional means. The study would, therefore, seek to explain the constitutional implications of the federation to the EAC partner states.

1.4 Literature Review

Various scholars and legal experts have done research and studies on the East African Political integration.

An EAC 2011 report on the fears, challenges and concerns of the East Africa Federation, addressed key constitutional and political concerns of the federation.⁶⁰ The report identified the absence of a constitutional model for the envisaged federation as a major concern.⁶¹ The existing treaty, under Article 5(2) mentions federation as the final stage of the integration. The report, therefore, recommends negotiation of a Treaty establishing the Political Federation. Such a treaty should be able to define the federal mode for the East Africa Federation.⁶²

The Report acknowledged that, fear of losing sovereignty among the Partner States was a key legal and political concern.⁶³ In its analysis, it pointed out that the realisation of the federation will necessitate address of the sovereignty issue. It described the envisaged federation as a ‘coming

⁶⁰ EAC, ‘Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation’, (October 2011)
<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Federation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D143%26Itemid%3D136&ei=6pFLVOz7PITaPJ-dgJgP&usq=AFQjCNHwc4GpWL8xTO5OxQbgtSZDu29IKA&sig2=vO4H3RmFBHT5iDW9i83BGQ&bvm=bv.77880786.d.ZWU&cad=rja> (accessed 25th October 2014).

⁶¹ Ibid., p vi.

⁶² Ibid., p 6.

⁶³ Supra., note 59.

together' kind of federation, where the constituent States pool their sovereignty.⁶⁴ The report analysed sovereignty in three dimensions, namely, supremacy of power within a territory, international legal personality and holder of sovereignty.⁶⁵ It, however, identifies ceding of international legal personality as the key challenge.

To address the sovereignty issue, the report recommends that Partner States ought to be willing to cede their respective international legal personality status.⁶⁶ There should also be the gradual ceding of national sovereignty, through vesting of more powers to the EAC Secretariat.⁶⁷ Further, citizen sensitization on the ceding of sovereignty should be undertaken. The East Africa citizens should be told that ceding of sovereignty will be a reality in the federation process.⁶⁸

The EAC Report identified the disparity in governance practices, including, rule of law, human rights and constitutionalism among the Partner States, as a concern for the federation process.⁶⁹

The disparity in the States' Constitutions and Political systems may hinder the integration process. A case in point is the divergence of States' election cycles, which may disrupt the States' economies and the political integration process.⁷⁰ The report pointed out that despite constitutional reform exercise in Kenya (2010) and Uganda (2005), none of them sought to implement convergence of political systems, as they were not guided by the Treaty establishing the Community.⁷¹

⁶⁴ Ibid., p. 3.

⁶⁵ Ibid., p. 4.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid., p. 8.

⁷⁰ Ibid.

⁷¹ Ibid.

The Report concludes by insisting on the need by the Community to establish mechanism to incorporate citizens into the process. This, it proposes, may be achieved through strengthening of the EALA and its link to the EAC citizenry. It avers that most concerns and fears emanate mainly from citizens' non-participation in the integration process.⁷²

Tom Ojienda in his study on prospects for the Federation analyses constitutional arrangement of the Partner States, in relation to the envisaged Federation.⁷³ He reckons that sovereignty lies at the heart of any political integration process. He avers that, traditionally, the constituent units cede some sovereign authority to the Federal entity.⁷⁴ He, however, clarifies that a federation does not wholly take the constituent States' sovereignty. A 'coming together' federation, as is the case for East Africa rather involves pooling of sovereignty.⁷⁵ The Partner States will, therefore, delegate some of their sovereign powers concerning matters of joint interest.

Ojienda identifies convergence of political systems among the Partner States. All the States share similarity on matters, including, presidential system, election of President through universal suffrage, separation of powers, law making procedures and superior courts.⁷⁶ However, divergence also exist on matters, including, presidential term limit, cabinet appointment, existence of Prime Minister, nature of Parliament, justice systems and nature of judicial independence.⁷⁷ He recommends harmonisation of common interests' areas among the States,

⁷² Ibid., p. ix.

⁷³ Supra, note 50.

⁷⁴ Ibid., p. 8.

⁷⁵ Ibid., p. 12.

⁷⁶ Ibid., p. 33-34.

⁷⁷ Ibid.

including, defence, foreign policy, fiscal and monetary policy, and, institutionalised authority through a federal constitution.⁷⁸

He concludes by noting that the current treaty is inadequate to usher in the federation as it does not provide a structure or model for the federation. Further, the existing EAC organs are inadequate and lack powers to shepherd the federation process.⁷⁹ He proposes the adoption of a federal constitution to replace the current treaty.⁸⁰ This Constitution should design a clear structure of the East Africa federal government.

Dani W Nabudere argues that the main reason for the collapse of the EAC 1967 was that the independence leaders put economic integration ahead of the political unification.⁸¹ On the future of the proposed federation, he stresses the importance of making the federation process a more people-centred and private sector driven for it to achieve success. He criticizes the recommendations of The Committee on Fast Tracking East African Federation established by the EAC Summit in August 2004 for making the old mistake of placing economic considerations ahead of political unity as a basis for an eventual federation. He further blames the Heads of State for failing to sensitize and mobilize the East Africa people on the benefits of a political federation. The leaders are just keen to adopt hasty road maps, but lack genuine commitment to make the federation a reality. Nabudere concludes by stating that the federation can only happen if the political unity of the East Africa people is made paramount and the '*sovereignties*' of the three countries ceded through dissolution of the current borders.

⁷⁸ Ibid., p. 35.

⁷⁹ Ibid., p. 49.

⁸⁰ Ibid., p. 50.

⁸¹ Dani Nabudere, 'The Fast Tracking of Federation and Constitutionalism in East Africa' (2006) 2-7
<http://federation.eac.int/index.php?option=com_content&view=article&id=52:askhere&catid=34:highlights>
(accessed 13 November 2013).

Phillip Apuuli Kasaija discusses the viability of the federation by arguing that there is political will among current leaders to bring the East Africa Federation to fruition.⁸² However, he calls for change in the approach where the process has been more of leader-led instead of being people-led. Kasaija only concentrates on the history and the problems that will mitigate against the ideas of a federation. He concludes by stating that the conditions of a political federation do not exist at the moment regardless of the political will.

Kamanyi Judy reviews the constitutional developments of the three initial EAC partner states.⁸³ Her study back in 2004 only focused on Kenya, Uganda and Tanzania, who were at various stages of their respective constitutional reviews. She reckoned that the regional organization needed to play a critical role in ensuring that the partner states adopted modern constitutions premised on constitutionalism, rule of law and democracy, as important foundation of the future federation. Judy opines that the EAC ought to establish a replica of ‘The New Partnership for Africa’s Development (NEPAD) African Peer Review Mechanism (APRM) on ‘Democracy and Governance’. Its objective would be to steer and consolidate the process of constitutionalism and democratization within EAC partner states as political integration takes shape.⁸⁴ She concludes by stating that the federation can best be achieved through the participation and genuine ownership by the East African people, through their institutions of choice.⁸⁵ She emphasizes that

⁸² Phillip Apuuli Kasaija, ‘Regional Integration: A Political Federation of the East African Countries?’ (2004), 7(1&2) African Journal of International Affairs, p. 21.

⁸³ Judy Kamanyi, ‘The East African Political Federation: Progress, Challenges and Prospects for Constitutional Development’ (10th Annual Sir Udo Udoma Symposium, Makerere Law Society, Makerere University Kampala, April 2006) 4
<http://www.federation.eac.int/index.php?option=com_content&view=article&id=52:askhere&catid=34:highlight> (accessed 29 January 2014).

⁸⁴ Ibid., p. 13.

⁸⁵ Ibid., p. 7.

‘the ultimate decision of when and how to federate must be put to East Africans in a referendum to endorse or reject a widely negotiated federal constitution.’⁸⁶

Mwesiga Baregu and Ally Bashiru identify clear disparity as to the respective state structures of the EAC partner states which in the long run would impact negatively on the envisioned political federation.⁸⁷ The two authors discuss the role of political parties in state governance within the EAC which would play a role in the federation process.⁸⁸ They reckon that political parties are the primary political players whose impact to the establishment of the federation would be critical. They further vouch for the creation of a transitional agency; East African Democracy Centre (EADC), whose key role would be to promote the creation of the federal constitution.⁸⁹ EADC would also be responsible for the coordination of the activities of critical players that include political parties, in the political integration process.⁹⁰ The proposed EADC would therefore be expected to act as a transitional agency tasked with delivering the EAC political federation.

The authors hold that failure to specify the roles of political parties under the future East Africa Federal Constitution would hamper establishment of the federation.⁹¹ They conclude by suggesting key components of the envisioned East Africa constitution, as a means of achieving a workable federation, namely, clarification of the citizenship issue in the federal arrangement and prescribe how it will affect the formation and organization of political parties, prescription of the conditions for party registration with a view of ensuring that political parties with parochial

⁸⁶Ibid.,7, citing; Donald Deya, ‘The Emerging East African Federation and Its implications for Civil Society, Governance and Accountability, Particularly in Tanzania’ (2006).

⁸⁷MwesigaBaregu and Ally Bashiru, ‘Political Parties in Regional Integration’(30 March 2009) 5-9 <http://www.federation.eac.int/index.php?option=com_docman&task=cat_view&gid=94&Itemid=136> (accessed 29 January 2014).

⁸⁸Ibid., p. 10-18.

⁸⁹Ibid., p. 27.

⁹⁰Ibid.

⁹¹Ibid., p. 26.

objectives are not created, provision of mechanisms for enabling the creation of alliances among likeminded political parties across countries and provision of mechanisms for enhancing the participation of political parties in federal matters.

The above writings on the East Africa Federation fail to interrogate the constitutional implications of establishing the federation. They fail to discuss the necessary constitutional steps involved in the federation process. They have merely identified the possible need of ceding sovereignty and adoption of a federal constitution. None has identified the federation's implications on the individual partner states' Constitutions. This research therefore seeks to address this concern by discussing the constitutional implications of the federation process, vis a vis the partner states' national identities. This research will further critically analyse key constitutional principles, including, need for an enabling treaty, federal constitution and question of sovereignty. The study's approach goes beyond the existing literatures which merely mention the issues without in-depth analysis.

1.5 Objectives of the Study

This study seeks to;

- i. critically analyse the constitutional implications of East Africa political federation to the partner states; and
- ii. highlight the lack of provisions by the respective partner states national Constitutions catering for an East Africa political Federation

1.6 Hypotheses

This research study is based on two major hypotheses. The first hypothesis is that EAC partner states through the treaty provide for federation but have failed to make respective national

constitutional provisions for its establishment. The second hypothesis is that the East Africa political federation is not people-driven but rather the EAC Summit's idea, with no clear legal framework formulated to achieve the envisaged federation.

1.7 Research Questions

This research paper seeks to investigate and answer the following questions:

- I. What are the key constitutional implications of establishing the East Africa Political Federation among the partner States?
- II. Do the EAC partner States' respective constitutions provide for the envisaged federation?
- III. What are the constitutional options for the realization of the East Africa Political Integration?

1.8 Research Methodology

The study will rely on secondary sources of data which include books on EAC, research papers and theses on EAC Federation, as well as scholarly journals by leading scholars. Other secondary sources of data included cyber space notes and information from the EAC website.

The methodology employed by the study was predominantly desktop research mode. This involved conducting a research using the computer, compiling secondary data acquired from soft copy books using the computer and analyzing the said data to come with a research report.

The study relied on library research for acquisition of data. This involved seeking information from books, research papers and scholarly writings on the East African Community stored in a library. The relevant information for the study would then be noted down for later analysis and compilation.

Analysis involved literature review of scholarly works and writings that have dealt with the research question previously. This involved analyzing the writings and isolating the relevant areas applicable to the current research study. Analysis was also through comparative analysis. It involved making comparison of various related articles or writings or models. This research study also primarily relied on comparative analysis of other world federations including USA, Germany, Nigeria and the former Yugoslavia.

1.9 Limitations

Lack of a vast pool of written literature on East Africa political integration stands out as a major limitation to this study. Few scholarly works and publications exist on this topic and would thus deny the study a rich source of materials. Inadequate literature limits in-depth critique and comparative analysis of this contemporary topic.

1.10 Chapter Breakdown

Chapter One – Introduction

Chapter one is composed of the research proposal. The first part of the chapter is the background to the research topic, which is a brief description of the topic. Other components of this chapter include aims and objectives of the research, hypothesis, statement of research, literature review and the research methodology.

Chapter Two – Comparative Federalism: Experiences of other world federations

This chapter analyses the constitutional implications of a federation. To achieve this, an analysis of formation of world federations including USA, Germany and Yugoslavia, would suffice. The

identification of the key constitutional requirements for the federation process provides insight to the constitutional implications of this process.

Chapter Three – Case Study of EAC Partner States Constitutions

This chapter analyses the respective national constitutional provisions on the question sovereignty and investigate whether the concept of East Africa political federation has been catered for.

Chapter Four – Constitutional Implications of the East Africa Political Federation

This chapter analyses the constitutional implications of a federation. An analysis on the constitutional options necessary to achieve the federation is the focus of this chapter. Discussion revolves around adoption of enabling treaty, federal constitution, and constitutional alternative to the federal structure in the form of a confederation.

Chapter Five - Conclusions and Recommendations

This chapter provides the conclusion of the study in a holistic manner and makes recommendations to the study in the form of the best possible constitutional approach to realize East Africa political integration.

CHAPTER TWO

COMPARATIVE FEDERALISM: EXPERIENCES OF EXISTING WORLD FEDERATIONS

2.1 Introduction

A number of world nations are governed as federations with their governance structure based on federalism. A critical study of the constitutional formation of such federations offers valuable lessons for the envisaged East Africa Federation. It is of utmost importance to understand the constitutive instrument of a political federation, especially where independent States came together to form one. Further, an understanding of the governance structure of a federal system stands out as a key area. The unique feature of federal systems is the existence of two-layered units, federal and state unit. How then does such a system balance the two units in terms of roles and powers? An analysis of the Yugoslavia, Germany, USA and Nigeria federations' formation and respective constitutional systems may offer lessons to the East Africa Federation on these matters.

2.2 Federal Republic of Germany

The German constitutional history offers best lessons to the envisaged East Africa federation. The establishment of the Germany in the late 19th century was characterized by the coming together of constituent states.⁹² The Germanic states consisted of twenty one entities, with Prussia being the most powerful and catalyst of the united government. However, it should be noted that the twenty one States formed a confederation and not a federation, which is

⁹²HergenhanJutta, 'German Federalism and European Integration' (Jan 2000) 5 European Issue. <<http://www.eng.notre-europe.eu/011-753-German-Federalism-and-European-Integration.html>> (accessed 30 January 2014).

distinguished by the fact that the former is considered a union of states, with such sovereign states being the direct subjects of customary international law.⁹³ The previously sovereign states, however, lost their respective sovereignties to the Unified Germany. The formation of this German empire was preceded by adoption of a constitution formulated in Frankfurt in 1849. This constitution recognized the empire as a confederation headed by an Emperor and consisted of a two chambered legislature.⁹⁴ Though the empire was considered confederation, its constitutional operation suggested it to be a federation. The constituent states lost their sovereignty, an important component distinguishing federation from confederation.

The Empire's power distribution and the functioning are of critical interest in the understanding of such an early form of a federation. The government was responsible for formulation of laws while their implementation was left to the member states.⁹⁵ This particular arrangement made the constituent states more powerful as compared to their counterparts in modern day federations. Current federations formulate federal laws and have implementation mechanism for the same federal matters. The Constitution provided the federal's roles to include legislating on empire's defence, communication services, diplomacy and foreign affairs. Any other matter or power was left to the exercise of the states, referred to as *Länders*, most importantly issues on education, religion and taxation.⁹⁶

The second German federation was established after the end of World War I and its constitutional formation was unique from the previous federation. The second German Republic was a mixture of two governance systems, the unitary state and federal state. Its two chambered

⁹³State Concepts & MSP, 'Federalism and Peace Mediation' (January 2009)
<http://peacemaker.un.org/sites/peacemaker.un.org/files/FederalismMediation_Swisspeace.pdf> (accessed 30April 2014).

⁹⁴ Supra, note 1.

⁹⁵ Ibid., p. 1.

⁹⁶ Ibid.

legislature comprised of the federal house and the other representing the *Länders*. Division of powers between the two houses was designated by demarcation of exclusive federal matters and concurrent matters. The federal matters, referred to as Republic matters, included foreign affairs, defence, trade, communication services, colonial affairs, immigration and currency.⁹⁷ The *Länders* were then given free hand in exercising power over any matter outside the exclusive federal matters.⁹⁸ The 1919 federal constitution conferred upon the federal government more powers and jurisdiction as compared to the 1849 constitution. It, was, therefore considered to be more of a unitary state than a federation, with the key indicator being concentration of central power and marginalization of the *Länders*.

The modern day federal Germany traces its formation to two important periods, post World War II period and end of the Cold War. The establishment of the German federation in both periods was occasioned by critical constitutional steps and actions.

The defeat of Nazi Germany in World War II occasioned its occupation by the Allied Powers and subsequent split into two distinct States. The territory occupied by the Western Allied Powers consisted of the sixteen *Länders* in the previous Weimer Republic of 1919.⁹⁹ The remaining areas were administered by the Soviet Union and was later renamed German Democratic Republic. Of the two, the former offers critical lessons on the constitutional formation and organization of a federation. The formation of a federal State by the sixteen *Länders* under Western occupation was preceded by a critical constitutional undertaking, formulation of the constitution. The intention of the Allied Powers was that the federation

⁹⁷Constitution of the German Reich (Weimar Constitution), Section 1, <<http://www.lwl.org/westfaelische-geschichte/que/normal/que843.pdf>> (accessed 30 April 2014).

⁹⁸ Ibid.

⁹⁹ Supra, note 1.

should be a break from the preceding Nazi Reich which was a more centralized state.¹⁰⁰ Further, the adoption of the federal constitution had to be based on the fact that it would be temporary pending unification with the German Democratic Republic.¹⁰¹

The *Länders* under the control of the Western Allied Powers adopted a new constitution, referred to as Basic Law.¹⁰² This legal text set the stage for the official formation of the Federal Republic of Germany that would be guided by the same Basic Law. This reiterates the commonly held legal fact that a federation is preceded by a constitutive instrument, either a constitution or a treaty. The process of formulating the Basic Law involved the coming together of national delegates from the sixteen *Länders*. The uniqueness of this process was that the previous German regime, Third Reich, was not used as a benchmark. The Basic Law formulation was a clear manifestation of the role played by member states in the constitutional formation of a federation.

The Basic Law's provisions describe how a federation operates, with the focus being on the administrative structure. The complexity of a federation is brought about by the existence of distinct constituent states and the need to adopt a joint workable system. The Basic Law recognized the critical role of the constituent *Länders* in the effective operation of the German federation. The member states of the federation play a critical legislative role in both levels of state administration. The Bundesrat, the federal legislative council, consists of representatives from the state governments. Bundesrat is conferred with both absolute and suspending veto powers, exercisable at the federal level. The absolute veto applies to all matters designated by the Basic Law as of the *Länders'* exclusive jurisdiction. The suspending veto on the other hand

¹⁰⁰ Supra, note 1, p. 14.

¹⁰¹ Ibid.

¹⁰² Frans von der Dunk and Peter Kooijmans, 'The Unification of Germany and International Law' (1991) 12 Michigan Journal of International Law, 510
<<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1006&context=spacelaw>> (accessed 30 April 2014).

applies to matters of concurrent jurisdiction to both levels of government. The Basic law has also demarcated the different jurisdictions, exclusive and concurrent, applicable to both the federal and state governments.

The Basic Law recognizes federal law as supreme over *Land* law hence make states subordinate to the federal institutions. Where a *Länder* fails to comply with its obligations under the Basic Law and other federal laws, the federal government, with the consent of Bundesrat, is entitled to take necessary steps to compel the former undertake its obligations.¹⁰³ However, the Constitution recognizes that as regards matters exclusively within the jurisdiction of the *Länders*, the exercise of power and functions over such matters will be entirely left to them.¹⁰⁴ The Basic Law has systematically demarcated the jurisdiction and powers of the two levels of governments, with the effect of ensuring co-existence of the federal government and the *Länders*.

The most intriguing power or role, relates to foreign affairs jurisdiction. The federal government is recognized as having jurisdiction on foreign affairs, especially on concluding treaties with foreign regimes.¹⁰⁵ However, two additional aspects were included that enjoined the *Länders* to foreign affairs issues. In concluding a treaty with a foreign power that has an effect on the special circumstances of a particular *Länder*, the federation is obliged to consult the latter.¹⁰⁶ Most importantly, *Länders* may indeed conclude treaties with foreign states, but with consent of the federal government. These two concessions imply that constituent states enjoy some aspects of sovereignty even though such sovereignty had been ceded to the federal government. Concurrent jurisdictions between the two levels of government are mostly important in the coming-together kind of federations. This is because the constituent states of such a federation were previously

¹⁰³Basic Law, Art 37.

¹⁰⁴*Ibid.*, 30.

¹⁰⁵*Ibid.*, Art 32 (1).

¹⁰⁶*Ibid.*, Art 32 (2).

independent and sovereign states with full competencies of states as provided by international customary law.

The critical role of the Basic Law lies in its definition as the sole and supreme law governing the German federation. Being at the centre of the federation's existence and operation, the Basic Law's provisions are binding on the *Länders*, over and above the latter's respective state laws.¹⁰⁷

The absolute authority of the Basic Law is illustrated by the adoption of the eternity clause during its formulations. All the *Länders* agreed to the adoption of the eternity clause¹⁰⁸ within the Basic Law, which effectively meant they ceded their sovereignty to a single federal unit. The eternity clause provides that no *Länder* can quit or leave the federation, hence, there is no option for the disintegration of the German federation.¹⁰⁹ Through this clause, the *Länders* submitted their will to the authority of a single federation; a distinguishing constitutional characteristic of a federation.

The German unification of 1990 provided an unprecedented lesson on the constitutional formation and operation of a federation. The German Democratic Republic and Federal Republic of Germany were two sovereign states with distinct systems of governance, communism and western democracy, respectively. To achieve the unification, critical constitutional steps had to be undertaken due to the fact that both states had respective distinct national laws. An important factor for the success of the process was the fact that both states' constitutions at the end of

¹⁰⁷Basic Law, Art 31.

¹⁰⁸Ibid., Art 79(3).

¹⁰⁹ Ibid.

World War II presupposed that Germany existed as a single nation, Articles 23 and 146 of Basic law.¹¹⁰ This, in essence, meant that the two states constitutionally provided for the re-unification.

Re-unification of Germany into a single federation was first preceded by negotiation and conclusion of a treaty between the two states. The unification treaty of 1990 provided the legal framework and constitutional basis for the process between German Democratic Republic and Federal Republic of Germany. The treaty provided for accession of German Democratic Republic to the Federal Republic of Germany in accordance with Article 23 of the Basic law and its respective Länders become part of the latter.¹¹¹ The treaty in its provisions outlined the following, namely, international treaties the two states were bound to, harmonization and extension of federal law, public assets and debts of German Democratic Republic, economic assistance to former German Democratic Republic territories, and transitional matters. As regards international treaties; treaties binding to Federal Republic of Germany were to automatically be adopted as binding to the new federation while those of German Democratic Republic were subject to further negotiations between the two states.

This process was undertaken in line with Article 23 of the Basic Law governing Federal Republic of Germany. The Article provided that the Basic Law would be applicable to other parts of Germany upon their accession to it. Effectively, German Democratic Republic acceded to the Basic Law through the unilateral action of its parliament; devoid of citizens' participation.

The accession had the effect of converting German Democratic Republic territory into

¹¹⁰ Ulrich Preuß, 'German Unification: Expectations and Outcomes' (2009) Hertie School of Governance- Working Papers, No. 48
<http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/48.pdf> (accessed 8 May 2014);
Article 23: "Article 146: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect."

¹¹¹ Unification Treaty, Art 1. The said Länders were; Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia.

constituent *Länders* under the Basic Law. Further, Article 143 was introduced into the Basic Law, giving the German Democratic Republic a period of 27 months to align its national laws to the Basic law.¹¹² This could only be achieved through constitutional amendment of German Democratic Republic's national law. The German Democratic Republic's Legislature therefore undertook the amendments that ensured conformity of the national laws to the Basic Law.

2.3 United States of America Federalism

The path to the establishment of the United States of America federation offers lessons on constitutional formation of a federation. Formation of the United States of America federation offers a unique precedent as it was first modelled in the form of a confederation and later a federation.

The United States of America was administered by the British as a colonial territory, comprising thirteen units up to the late 18th century. The administration of the United States of America colonies was made complex by the great distance between Britain and the respective colonies. This saw the promotion of local self-governance by the respective colonies where they would form governments and enact local laws as long as they were not in conflict with English law.¹¹³ Therefore, it could be interpreted that this was federation by operation rather than by design.¹¹⁴

The existence of local governments with respective laws formed the basis of the formation of the America federation in late 18th century. The actual practice of constitutional self-governance

¹¹² Basic Law, Art 143 (1): "The law in the territory specified in Article 3 of the Unification Treaty may deviate from provisions of this Basic Law for a period extending no later than 31 December 1992 in-so far and so long as disparate circumstances make full compliance impossible. Deviations may not violate paragraph (2) of Article 19 and must be compatible with the principles specified in paragraph (3) of Article 79."

¹¹³ Michael Burgess, 'Comparative Federalism; Theory and Practice', (1st edn, Routledge 2006), p. 52
<http://www.untagmd.ac.id/files/Perpustakaan_Digital_1/FEDERALISM%20Comparative%20Federalism,%20Theory%20and%20practice.pdf> (accessed 5 May 2014).

¹¹⁴ Donald Lutz, 'The Articles of Confederation as the Background to the Federal Republic' (1990) *Publius: The Journal of Federalism*, p. 20 & 57.
<<http://publius.oxfordjournals.org/content/20/1/55.full.pdf+html>> (accessed 5 May 2014).

during the colonial years created the federal structure that would be the modern day United States of America.¹¹⁵

The establishment of the United States of America Confederation was preceded by the declaration of independence in 1776 and subsequent enactment of Articles of Confederation in 1777. The Articles were then held as the inaugural constitution that would guide the thirteen Confederate states; recognizing them as independent states under the confederation.¹¹⁶ The constitutional implication of a confederation is that the member states retain full sovereignty and are regarded as independent legal persons under international customary law. The central Confederate government only consisted of the Congress having limited jurisdiction, powers over foreign affairs, war and currency regulation but with no enforcement mechanism of these powers.¹¹⁷ Subsequently, the Philadelphia Convention of 1787 held at Pennsylvania and attended by delegates from the initial thirteen states appreciated that the Articles were inadequate for an envisaged federation.

The constitutional deficiencies of the USA Confederation government were highlighted to include, lack of security against any foreign aggression due to inadequate enforcement authority, lack of compelling power over member states to honour agreements of international nature, absence of a permanent administration, lack of constitutional power essential for arbitrating on disputes between the union and the state and most importantly, the Confederation Articles were less superior to the respective national Constitutions of the thirteen states.¹¹⁸ Rigorous debates and discussions among the delegates yielded a new Constitution that would be considered the

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ The US Constitution,

<<http://www.history.com/topics/constitution>> (accessed 4May 2014).

¹¹⁸ Supra, note 23.

first federal Constitution of USA. The new constitution of 1787 provided for a new federal government consisting of three arms; judiciary, executive and the two-chambered legislature.¹¹⁹ The Executive was headed by the Presidency while the two-chambered Congress comprised of the Senate and House of Representatives. The Senate provided an equal representation of all states at the federal level, irrespective of their different sizes.¹²⁰ It further demarcated the roles of the two levels of government, with the federal government having more powers than the previous confederation. The new federal government acquired new powers of tax collection and trade regulation, functions that were previously exercised by the states. The enforcement of this new constitution, however, could only be achieved through ratification by at least 9 states and this was achieved by 1781.¹²¹

The constitutional steps taken to realize the modern day USA federation are of great interest. Unlike the German federation, the USA federation was characterized by the principle of equality of the member states. All states acknowledged their equality and respective independent sovereignties. The federating of the USA was also preceded by the formation of a confederation at first instance, which later transformed to a federation.¹²² The establishment of the federation was then undertaken primarily through modification of the Articles of Confederation into a federal constitution that created a whole new federal structure.¹²³ The constitutional formation of the federation could then be completed by the need for ratification of the new federal Constitution by the member states. The ratification of the constitution, therefore, stands out as the foundation of the American federalism. The ratification effectively meant that the member

¹¹⁹ Supra, note 23.

¹²⁰ Ibid.

¹²¹ Supra, note 22.

¹²² Ibid., n. 28.

¹²³ Ibid.

states of the former confederates ceded their sovereignty to the newly established USA federation.

The federal constitution of USA defines the distinct roles of both the federal government and the state governments. Such separation of powers and roles is a critical constitutional requirement for a functioning federation. The roles of the federal government as administered under the jurisdiction of the Congress have been outlined to include¹²⁴ taxation, external debt, trade, citizenship, currency regulation, communication, foreign affairs, defence, Constitution amendments, and admission of new states.¹²⁵ Article I (Section 9) of the US Constitution further prohibits the States from exercising any of these functions, with stronger emphasis on prohibition against treaty ratification with foreign powers. However, the US Constitution states that ‘powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’¹²⁶

2.4 Former Yugoslavia

The Yugoslav was established as a federation in 1946 through the adoption of the Federal People’s Republic of Yugoslavia Constitution.¹²⁷ The Yugoslavia comprised of the republics of Macedonia, Serbia, Montenegro, Slovenia, Croatia and Bosnia & Herzegovina, as well as two autonomous provinces of Kosovo and Vojvodina.¹²⁸ The 1946 Constitution recognized the republics as the constituents of the federation, but defining their sovereignties was less clear. The

¹²⁴USA Constitution, s 8.

¹²⁵Ibid., Art iv, section 3.

¹²⁶ Amendment 10 - Powers of the States and People (12/15/1791).

¹²⁷MatejAccetto, ‘OnLaw and Politics in the Federal Balance: Lessons from Yugoslavia’ (2007) 32 Review of Central and East European Law 191, 198

<<http://www.pf.uni-lj.si/media/accetto.-on.law.and.politics.in.the.federal.balance.pdf>> (accessed 7 May 2014).

¹²⁸Constitution of the Federal People’s Republic of Yugoslavia, Art 2.

foundation of Yugoslavia federation was on the free volition principle by the Republics.¹²⁹ This was evidenced by the provision of right to self-determination and secession right. However, the key question was whether the Republics had individual sovereignties or these had been usurped by the federal government.

Article 1 of the 1946 Constitution stated that Yugoslavia was a federation made of republics who had exercised their rights of self-determination and right of separation in forming the federation. This provision created confusion as to whether it empowered the constituent states the right to secede from the federation if need arises, as well as the right to exercise national sovereignty within the federation. The provisions of Article 9 and 10 further fuelled the interpretation crisis of national sovereignty since it recognized the federation as the sole custodian of national sovereignties of all Yugoslav citizens.¹³⁰ Further, Article 11 provided that each of the republics would have its own constitution reflecting their respective special characteristics, but that must conform to tenets of the federal constitution. The political reality during this period, however, tended to favour exclusive exercise of sovereignty by the federation and not the Republics. Perhaps this apparent misunderstanding as to the sovereignty of the Republics was the underlying cause of the federation's future disintegration.

¹²⁹Matej Accetto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia' (2007) 32 *Review of Central and East European Law*, p. 191, 198: The author quoted Šnuderl who stated that, 'Without free volition there can be no true federation.'

¹³⁰ Constitution of the Federal People's Republic of Yugoslavia, Art 9; "The sovereignty of the people's republics composing the Federative People's Republic of Yugoslavia is limited only by the rights which by this Constitution are given to the Federative People's Republic of Yugoslavia. The Federative People's Republic of Yugoslavia protects and defends the sovereign rights of the people's republics. The Federative People's Republic of Yugoslavia protects the security and the social and political order of the people's republics," and Art 10, "Any act directed against the sovereignty, equality and national freedom of the peoples of the Federative People's Republic of Yugoslavia and their people's republics is contrary to the Constitution."

Subsequent constitutions of 1966 and 1974 reiterated the right to self-determination of the Republics. Under their respective introductory basic principles,¹³¹ the constitutions provided that the republics had a right to secession and right of self-determination. Croatia and Slovenia, later, relied upon this Article to adopt republican constitutions advocating for secession in 1990.¹³² The contention on right to national sovereignty was never fully resolved among the republics till the collapse of the federation. A counter argument to provisions for these rights was based on other provisions of 1974 constitution. Article 203 of the constitution prohibited use of the constitutional rights in any way that threatened the federation's existence; secession threatens nation's existence. Further, Article 244 guaranteed territorial integrity to the Yugoslavia federation. Provisions on boundary alteration also implied the federation's overall sovereignty over the individual republics. Article 5 stipulated that any alteration of the federation's borders would require all the republics and provinces' consent. Similarly, Article 283 conferred upon the Yugoslavia federal Legislature power of any boundary alteration between states under the federation. The latter meant that a state could only secede from Yugoslavia if the federal government approved through the legislature.¹³³ Towards the end of 1990, the federal presidency conceded the republics' right to secede and the right to self-determination.¹³⁴

The Yugoslavia federation had a clear demarcation as to the respective roles of both the federal government and the republics. The federal government was tasked with constitution implementation and amendments, admission of new republics, boundaries delimitation, foreign affairs, national defence, international trade, transport and communication, citizenship, economic

¹³¹ Federal People's Republic of Yugoslavia Constitutions of 1963 & 1974, Art 1.

¹³² Iglar F Richard, 'The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede' (1992), 15(1) (Boston College International and Comparative Law Review)

<<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1537&context=iclr>> (accessed 7 May 2014).

¹³³ Ibid., 7.

¹³⁴ Ibid.

planning, federal budget, implementation of federal laws and federal judiciary.¹³⁵ A new constitution adopted in 1966 retained all these federal functions. The 1974 constitution retained majority of these functions, but strengthened the republics' roles and institutions. The 1974 constitution exhaustively listed the federal authorities' competences and provided that whatever was not listed was a competence of the republics and autonomous provinces.¹³⁶

The Yugoslav Constitution of 1974 introduced constitutional changes which altered the structure and exercise of power of the federal legislature. The previous bicameral legislature, was abolished, with the lower house assuming a degree of autonomy through the change of roles and composition.¹³⁷ The two houses, henceforth, discussed issues independently as distinct but interdependent bodies. However, in some instances, the two operated as a bicameral legislature in respect of joint issues.¹³⁸ The representation of Yugoslav people in the legislature was made to be based on the principle of equality where the constituent republics had equal number of members. This was however with the exception of the two autonomous provinces.¹³⁹ These changes, indeed, represented a true characteristic of a federal system; application of equality principle. There was a clear recognition that the constituent republics enjoyed sovereign equality.

¹³⁵ 1946 Constitution, Cap VI.

¹³⁶ Matej Accetto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia' (2007) 32 (Review of Central and East European Law) p. 191, 201, as cited from Jovičić M, 'Elements of Confederalism in the Yugoslav Federal Order' (Gradina, Niš 1987) 160.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

2.5 Nigerian Federation

The formation of Nigeria as a State is traced back to the amalgamation of Northern and Southern Protectorate by Lord Frederick Lugard in 1914.¹⁴⁰ This marked the creation of the Nigerian State by the British, who administered it as a colonial Protectorate.

The partition of Nigeria into regions was first undertaken by Sir Hugh Clifford in 1922.¹⁴¹ He partitioned the new Protectorate into Northern and Southern provinces, subsequently introducing a single elective legislative council for the Southern province.¹⁴² The establishment of the federal Nigeria is however traced to the political developments of 1939. Sir Bernard Bourdillion partitioned the Protectorate into three distinct regions, namely; Eastern region, Northern region and Western region.¹⁴³ The division of Nigeria into the three regions effectively set it on the path to federalism and to its current federal structure. The partition effected by Sir Bourdillion was formally enshrined into the Nigerian Constitution of 1946, a process overseen by Sir Richard Arthur. The new federal structure was further refined in 1951 by Sir Macpherson through the introduction of quasi-federalism.¹⁴⁴ This was indeed achieved through the establishment of both a central legislative council and regional councils for the three regions.¹⁴⁵

The formal federal Nigeria was officially adopted in the London Constitutional conference of 1953.¹⁴⁶ The Lyttelton constitution of 1954, a product of the London Conference, entrenched the

¹⁴⁰ 'Federalism in Nigeria- Problems Facing Nigeria Federalism' (13 April 2013)
<<http://www.doublegist.com/problems-facing-nigeria-federalism/>> (accessed 8 July 2014).

¹⁴¹ Ibid., para 5.

¹⁴² Ibid.

¹⁴³ Irabor Peter Odion 'A Critical Assessment on Nigerian Federalism: Path to a True Federal System' (The 4th Annual National Conference Potiskum, Yobe State, 31 October- 4 November 2011)
<<http://community.vanguardngr.com/forum/topics/a-critical-assessment-on-nigerian-federalism-path-to-a-true>>
(accessed 11 July 2014).

¹⁴⁴ Supra., note 49.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

Nigerian federal structure and was officially adopted as Nigeria's independence constitution in 1960.¹⁴⁷ This constitution demarcated the powers exercisable by the federal and regional governments, hence the formal embrace of the current federal Nigeria.¹⁴⁸ The 1960 constitution was amended in 1963, where an additional fourth region, Midwestern region headed by Abubakar Tafawa Balewa, was created out of the three existing regions.¹⁴⁹ Amid successive military regimes and rule, the federal structure of Nigeria was constantly changed. The 1967 federal administration, headed by General Yakubu Gowon, split the existing four regions into twelve states.¹⁵⁰ The junta leadership of 1976 added a further five states bringing the number to nineteen states.¹⁵¹ In 1996, the then military ruler, General Sani Abacha, created six more states and until present, Nigeria consists of 36 states.

The choice to federate Nigeria during its independence emanates mainly from the Colonial heritage that introduced the federal concept to the newly created State in 1914. However, Irabor contends that the independence leaders of Nigeria were chiefly motivated by the desire to protect the interests of each of the federating units.¹⁵² The independence Constitution recognized this desire by allowing the respective federating states to have individual constitutions. Irabor further insists that the three regions making up the federation 'were in all intent and purpose independent entities.'¹⁵³ This could be adduced by the fact that the three regions got their respective independence at different times. The Eastern and western regions attained their

¹⁴⁷ Ibid.

¹⁴⁸ Supra., note 137.

¹⁴⁹ DedeBabalola, 'Nigeria: Federalism Works' *Think Africa Press* (1 April 2014)

<<http://thinkafricapress.com/nigeria/utility-federalism-national-conference>> (accessed 11 July 2014).

¹⁵⁰ supra., note 52, para 7.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid., para 4.

independence in 1957 while the Northern region attained independence in 1959.¹⁵⁴ However, this argument may be challenged on the basis that the administration of the Nigerian Protectorate remained centralized. The regions had some autonomy but never attained full sovereignty, to the level of being recognized as independent sovereign States.

The formation of the Nigerian federation offers an insight on the importance of political will of its leaders. Political goodwill plays a significant role in determining a country's political system. The years leading to the independence of Nigeria in 1960 were critical in the political development of the federation. Leading Nigerian nationalist Nnamdi Azikiwe advocated for a federal Nigeria that consisted of eight regions, formed on the basis of ethnicity.¹⁵⁵ Another independence crusader, Chief Obafemi Awolowo argued for a federal Nigeria stating that it would be the only political model fit for the ethnically diverse Nigeria.¹⁵⁶ Dele Babalola, a Nigerian federal scholar, argues that Nigerian independence leaders actively vouched for a federation during the Constitutional conferences preceding Nigeria's independence.¹⁵⁷ The Ibadan and London constitutional conferences of 1951 and 1954 acted as the venues where the idea of Nigerian federalism was wholly adopted by the entire leadership.

Constitutionalism lies at the heart of the formation and effective functioning of a federation. An analysis of Nigerian constitutional developments since independence provides an insight into the critical role constitutionalism played. The 1979 and 1999 constitutions are regarded as the key constitutions that firmly established the federal character of present day Nigeria.

¹⁵⁴ Ibid.

¹⁵⁵ Dele Babalola, 'The Origins of Nigerian Federalism: The Rikerian Theory and Beyond' (2013) 8(3) Federal Governance, 50

<<http://library.queensu.ca/ojs/index.php/fedgov/article/view/4549/4724>> (accessed 10 July 2014).

¹⁵⁶ Ibid., para 2.

¹⁵⁷ Ibid.

The 1979 Constitution is christened as the Constitution that established the 2nd Nigerian Republic. Section 2 defined Nigeria as a single indissoluble and indivisible sovereign federal state hence affirming its federal identity.¹⁵⁸ The federation was organized into three levels of government, namely, federal government, state governments and local government councils. The federation consisted of nineteen state governments, namely, Niger, Ogun, Ondo, Oyo, Plateau, Rivers, Sokoto, Anambra, Bauchi, Bendel, Borno, Cross River, Imo, Kaduna, Kano, Kwara, Lagos, Benue and Gongola.¹⁵⁹

The Second Schedule of the Constitution set out the exclusive functions exercisable by the federal government and the concurrent roles shared by both the State and federal governments. Part I of the Schedule listed inter alia exclusive federal functions, namely: trade and commerce, aviation, federal finances, census, infrastructure, citizenship and immigration, currency, defence and foreign affairs. Part II subsequently lists concurrent functions for both the federal and state governments, namely: agriculture, education, electricity, tax collection and electoral law.¹⁶⁰ The local government councils were tasked with roles such as making recommendations to State governments on economic development and planning of States, local rates collection, maintenance of local social amenities, local trade licences, construction and maintenance of infrastructure prescribed by the State governments and registration of births, marriages, and deaths.¹⁶¹

¹⁵⁸ The Constitution of the Federal Republic of Nigeria 1979, <http://www.constitutionnet.org/files/nig_const_79.pdf> (accessed 11 July 2014).

¹⁵⁹ Ibid., section 3.

¹⁶⁰ Ibid.

¹⁶¹ Ibid., section 4.

The constitution vested executive authority in the Presidency, as the head of the Federal Nigeria. Each of the State had its executive authority vested on an elected Governor.¹⁶² The federal legislative authority was vested on the two chambered federal legislature, comprising the Senate and the National Assembly. The federal judiciary comprises of courts having jurisdiction over the whole federation, with the highest court being the Supreme Court. The Supreme Court was vested with original jurisdiction over disputes between the federal and state governments, where the dispute concerned a question on which the extent or existence of right depended on.¹⁶³ The court was further vested with exclusive appellate jurisdiction to hear appeals from the federal court of appeal.¹⁶⁴ The Federal Court of Appeal was vested with exclusive jurisdiction to hear appeals from the Federal High Court, High Court of a State, Sharia Court of Appeal of a State and the Customary Court of Appeal of a State. The State High Court was then vested with exclusive jurisdiction over electoral disputes within the State¹⁶⁵ as well as general jurisdiction over civil and criminal proceedings.¹⁶⁶

The 1999 Constitution reiterated the federal character of Nigeria through its definition of Nigeria as an indissoluble and indivisible Federal Republic.¹⁶⁷ Section 3 defined Nigeria to consist of thirty six States, with seventeen additional States to the 1979 constitution, namely; Nasarawa, Osun, Taraba, Yobe, Zamfara, Enugu, AkwaIbom, Adamawa, Abia, Bayelsa, Delta, Ebonyi, Edo, Ekiti, Gombe, Jigawa, Katsina, Kebbi, and Kogi. The three tier level of government and their respective functions were retained as provided for by the 1979 constitution. The exercise of

¹⁶²Ibid., Art 162 (2).

¹⁶³Ibid., Art 212(1).

¹⁶⁴ Ibid.

¹⁶⁵Ibid., Art 236.

¹⁶⁶Ibid., Art 237.

¹⁶⁷ The Constitution of the Federal Republic of Nigeria 1999, section 2, <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> (accessed 12 July 2014).

legislative, executive and judicial authority by both the Federal and the State governments are also similar to the 1979 constitution.

The position of the third level of government in both the 1979 and 1999 constitutions raises concern on justifiability of its existence. Both constitutions provide for the creation of Local Government Councils under section 7 (1). Under this section, existence of democratically elected Local Government Councils is guaranteed. The Councils' mandate is outlined under the Fourth Schedule. A critical look at its prescribed functions, however, points at a body conferred only with advisory roles,¹⁶⁸ where they only recommend to the State governments for implementation. Further, the wording of section 7 (1) reinforces their subordinate status: "...the Government of every State shall...ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils." This has led some scholars, namely, Abu Tom Usman and Canice Esidene Erunke to question the locus of their existence, due to their total subordination to both the Federal and State governments.¹⁶⁹

2.6 Conclusion

Analyzing the existing world federations offers valuable lessons to the envisaged East African Federation. The key feature of federation formation, as evidenced by the above federations, is that they all emanated from organic units, rather than sovereign units. None of these world

¹⁶⁸ Akinyemi Bolaji, 'Federalism, Intergovernmental Relationship, Partisan Politics and Development: A Critical Assessment of Nigeria (1999-2004)' (The First Intergovernmental Quarterly Roundtable on Development, Lagos State House of Assembly, 23 November, 2004).

<<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CEMQFjAF&url=http%3A%2F%2Fprofbolajiakinyemi.com%2FProf%2520Bolaji%2520Publications%2FINTERGUARD.doc&ei=hC2-U6PJMkLS0QWRmYHQBQ&usg=AFQjCNER0TRKqNYUJFc3cRSTCDihr12IZw&bvm=bv.70138588,d.d2k>> (accessed 10 July 2014).

¹⁶⁹ Abu Usman and Esidene Erunke, 'State-Local Government Relations in Nigeria's Fourth Republic: An Assessment of the 1999 – 2010 Experience' (2012) 8(20) European Scientific Journal, <<http://eujournal.org/index.php/esj/article/viewFile/328/357>> (accessed 11 July 2014).

federations were established by constituent independent sovereign entities. Their respective constituent units had some level of autonomy and had co-existed among themselves more closely. The unique case, however, was the unification of Germany, which was achieved through the ‘absorption’ of East Germany into the Federal Republic of West Germany. The German unification perhaps offers the closest option available for the East Africa Community. However, the fact that the two German States were a single entity previously offered the strongest motivator for the unification. A similar occurrence cannot be said of the East Africa Community as the Partner States developed as independent sovereign entities and have never been a single entity.

The constitutions of the federations have clear provisions defining their respective federal characters. These constitutions, further, describe the federal structure of governance, consisting of either two-tier or three-tier levels of government. The division and distribution of the functions of each of the governance levels is also a key feature of the federal constitutions. The formation of all these federations was preceded by constitutional processes where the enabling constitutional provisions were effected. The best case study was the formation of the unified Federal Germany in 1990 as East Germany had to adopt the Basic Law as its national law. Constitutional amendments were carried out that ensured East Germany’s national laws conformed to the Federal Basic law.

The East Africa Community partner States have individual constitutions and national laws. This gives rise to the need for analysis of these respective national constitutions, to ascertain whether they envisage an East Africa federation. A critical analysis of the respective national constitutions would focus on whether key provisions enabling the formation of a federation are clearly enunciated. The next chapter of this study focuses on the analysis of the constitutions of

Kenya, Uganda, Tanzania, Rwanda and Burundi. Do these national constitutions envisage the formation of an East Africa federation, having these respective States as constituent units?

CHAPTER THREE

EAST AFRICA COMMUNITY PARTNER STATES' CONSTITUTIONS AND THE QUEST FOR FEDERATION

3.1 Introduction

East African Community partner states have, through the treaty establishing the Community, envisaged political integration as a key objective.¹⁷⁰ Political integration is expected to be concluded through the establishment of a political federation, comprising of the partner states. The political federation formation is a constitutional process that impacts on the respective partner states' constitutions.¹⁷¹ A political federation is a new form of government, different from the existing national governments of partner states. This process will, therefore, impact the partner states' sovereignty, structure of government, form of government and legal personality status. To what extent, then, have the partner states' constitutions catered for an East African federation?

3.2 The Republic of Kenya

The Kenya Constitution declares Kenya as sovereign Republic with a multi-party democracy form of government.¹⁷² This definition identifies Kenya as an independent sovereign state governing itself on its own and not subject to another sovereign entity. Sovereignty presents an important element in identifying the independence and self-determination of state entities. It has

¹⁷⁰ Treaty for the Establishment of the East African Community (1999), Preamble: "DETERMINED to strengthen their economic, social, cultural, political, technological and other ties for their fast balanced and sustainable development by the establishment of an East African Community...ultimately a Political Federation." *See also* Article 5(2) of the Treaty.

¹⁷¹ Rwekaza Mukandala, 'Political Cooperation' (1st Ministerial Seminar on East African Cooperation on Perspectives on Regional Integration and Cooperation in East Africa, Arusha Tanzania, 25–26 March 1999), p. 89.

¹⁷² Constitution of Kenya 2010, Articles 4 (1) and (2).

been held to constitute a matter of supreme authority with the holder of sovereignty considered superior over all authorities under its jurisdiction.¹⁷³ A state claiming sovereignty possesses the right to self-determination and is fully responsible and accountable for its own affairs. Kenya's definition of a sovereign state therefore, recognizes the national state as its constitutional basis and sole legal identity. The Constitution further defines the extent of Kenyan sovereignty to consist of '...the territory and territorial waters comprising Kenya on the effective date, and any additional territory and territorial waters as defined by an Act of Parliament.'¹⁷⁴

Sovereign power has been declared to belong exclusively to the people of Kenya¹⁷⁵ and its exercise delegated to specific national institutions. The Constitution specifies that the Parliament and legislative assemblies in the county governments, the national executive and the executive structures in the county governments, and the Judiciary and independent tribunals are the organs bestowed with sole authority to exercise sovereign power.¹⁷⁶ In the exercise of this sovereign power, the Constitution provides that the Kenyan state is comprised of two levels of government, national level and county level.¹⁷⁷ These definitions of sovereignty give Kenya a unitary outlook and not a federal outlook.

The constitutional structure of the Kenyan Republic is of interest to the question of federation. Kenya consists of a two tier level government, national and county government, with each level having its distinct roles.¹⁷⁸ The national government's mandate includes; foreign affairs, immigration, defence, police services, Courts, national economic policy and planning, monetary policy, intellectual property rights, labour standards, education policy, transport and

¹⁷³ Dan Philpott, 'Sovereignty' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2014).

¹⁷⁴ *Supra*, note 3, Article 5.

¹⁷⁵ *Ibid.*, Art 1(1).

¹⁷⁶ *Ibid.*, Art 1(3).

¹⁷⁷ *Ibid.*, Art 1(4).

¹⁷⁸ *Ibid.*

communications, public investment, health policy, and housing policy.¹⁷⁹ The county governments are conferred with jurisdiction over agriculture, county health services, control of pollution, cultural activities, county transport, animal control, county trade, county planning, pre-primary education and village polytechnics, county public works and services, and control of drugs and pornography.¹⁸⁰ The two levels of government are described as distinct but are inter-dependent as regards performance of their duties and roles.¹⁸¹ Their relationship is dictated by consultation, mutual correlation and cooperation. The recognition of these two governments impliedly locks out any other form of government including federation. Kenya can only be part of the East African federation if the current constitutional structure is changed to adopt a federal structure.

The Kenyan national government is structured in line with the democratic principle of separation of powers. The government is made of three arms, executive, judiciary and the legislature, each of which exercises delegated sovereign authority.¹⁸² The Kenyan legislature is a two-chambered parliament made of the Senate and the National assembly.¹⁸³ Parliament plays crucial roles including exercising legislative authority, representing and exercising the people's sovereignty, undertaking constitutional amendments, and protection of the Constitution.¹⁸⁴ However, the two houses exercise distinct legislative powers, having an effect on both county and national governments.

The National Assembly is vested with jurisdiction over representation of citizens' interests in the Assembly, deliberation on issues of concern to the citizens, enactment of national legislations,

¹⁷⁹ Ibid., Schedule Four (Part 1).

¹⁸⁰ Ibid., Schedule Four (Part 2).

¹⁸¹ Ibid., Art 6 (2).

¹⁸² Ibid., Art 6(3).

¹⁸³ Ibid., Art 93(1).

¹⁸⁴ Ibid., Art 94.

determination of national revenue allocation as between the two levels of government, funds appropriation of national government expenditure, impeachment of the President and Deputy President, exercise of oversight authority over state organs, and approval of declaration of war and state of emergency.¹⁸⁵

The Senate exercises jurisdiction over representation and protection of County governments' interests, legislation of county related laws, county revenue allocation, and oversight over state officers including the President and Deputy President.¹⁸⁶ In exercising their respective mandates, the two houses cooperate especially in matters that are of concurrent jurisdiction. However, the current predicament facing Parliament is the vicious battle of supremacy between the two houses, especially on matters of concurrent jurisdiction.¹⁸⁷ This struggle has found its way into constitutional courts where the senate sought an advisory opinion on the exercise of legislative powers over county revenue allocation. The Supreme Court found in favor of the Senate ruling that the National Assembly speaker had erred in by-passing Senate and the mediation process. Senate was found to have a clear mandate of national revenue allocation to county governments.¹⁸⁸ The current legislative framework does not provide for a federal parliament but only provides for a national parliament as the sole custodian of the state's legislative sovereignty.

¹⁸⁵ Ibid., Art 95.

¹⁸⁶ Ibid., Art 96.

¹⁸⁷ East African Centre for Law and Justice, 'Supremacy Battle between the Senate and National Assembly (28 May 2013)

<<http://eacj.org/constitution/20-constitution-feature-articles/136-supremacy-battle-between-the-senate-and-national-assembly.html>> (accessed 13 May 2014).

¹⁸⁸ 'The Senate of the Republic of Kenya & the Speaker of the Senate vs The Hon. The Attorney-General & The Speaker of the National Assembly', (2013), Supreme Court of Kenya, Advisory opinion reference no. 2 of 2013 <<http://www.judiciary.go.ke/portal/supreme-court-rules-on-the-senate-case-division-of-revenue-bill-2013.html>> (accessed 13 May 2014).

The Executive arm of Kenyan government consists of the President, Deputy President and the Cabinet.¹⁸⁹ The presidency acts as the head of the executive and is the single most important office of the Republic. The Constitution recognizes the President as the Head of State and Head of Government as well as the Commander-in-chief of the Kenya Defence Forces.¹⁹⁰ He exercises overall executive authority over the Republic and safeguards the State's sovereignty. The importance and immense roles bestowed upon the Presidency makes it the ultimate office of the land. This means therefore that the Kenyan President cannot be subject to another sovereign power, a fact that comes along with a federation. The current constitution framework only recognizes Kenya as a sovereign republic headed by the President and is not envisaged to be part of federation.

Judiciary serves as the third arm of the Kenyan Republic but only restricted to the national level of government. The Constitution outlines the judiciary to consist of the national court system and judicial tribunals which are vested with judicial authority.¹⁹¹ The judiciary operates under the cardinal doctrine of judicial independence,¹⁹² a key element of a modern functioning judiciary. Judicial independence implies that the Kenyan judiciary would be answerable to the law and the Constitution, and not any other institution. This is meant to ensure that the other organs of state cannot lord over or control judiciary. The Supreme Court has been established as the highest court of the land with its decision deemed final and not subject to any appeal within the Republic of Kenya.¹⁹³ This means that the Supreme Court portrays the national identity of Kenya since no other court is above it. Even though the East Africa Community has its own court, The East Africa Court of Justice, this regional court is not superior to the Kenyan Supreme court. The

¹⁸⁹ Ibid., Art 130.

¹⁹⁰ Ibid., Art 131.

¹⁹¹ Ibid., Art 159(1).

¹⁹² Ibid., Art 160 (1).

¹⁹³ Ibid., Art 163.

Supreme Court is not bound by the decisions of The East Africa Court of Justice and no appeal from the Supreme Court can be taken to the former.

Establishment of the East Africa Federation would only be a reality if the Kenyan constitutional provisions on governance structure and system are amended to reflect the new form of governance. Provisions on national sovereignty, exercise of sovereignty by state organs, structure of the state and form of government are important constitutional considerations for such a process. This would call for constitutional amendments of the Kenyan supreme law. Chapter Sixteen of the Kenyan Constitution outlines the various mechanisms for constitutional amendments, depending on the subject matter of the amendment. Amendment regarding the, territory of Kenya, sovereignty of Kenyan people, term of office of the President, judicial independence, parliamentary functions and structure of devolved governments, can only be undertaken through a national referendum.¹⁹⁴ Further, such an amendment can only be successful if ‘...at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum...’¹⁹⁵ Establishment of the federation would therefore necessitate constitutional amendments requiring approval by referendum; a tedious and politically emotive task.

3.3 The Republic of Uganda

The Ugandan Constitution declares Uganda as a single sovereign state and republic¹⁹⁶ whose sovereignty shall be exercised exclusively by the Ugandan people.¹⁹⁷ The effect of this declaration is that the constitution identifies Uganda as a national government and not under any

¹⁹⁴ Ibid., Art 255 (1).

¹⁹⁵ Ibid., Art 255 (2).

¹⁹⁶ Constitution of the Republic of Uganda, Art 5(1).

¹⁹⁷ Ibid., Art 1.

other form of government, including a federation. As a republic, the constitution clearly delineates Uganda's territory under Schedule Two, recognizes its national boundaries, and reinforces the unitary, and not the federal identity of Uganda. The country has been demarcated into administrative units including regions administered by regional governments, Kampala, and the districts of Uganda.¹⁹⁸ The national sovereignty belonging to all Ugandan citizens is then held to be exercised in trust by the three organs of government, the Executive, the Judiciary and the Legislature.¹⁹⁹

A critical look at the Uganda's governance structure further offers insight of what is in store in form of the envisaged East African Federation. Uganda is administered through national, regional and district governments. The districts and the regional governments have been regarded as the key institutions within the state. Districts, otherwise referred to as local governments, are the lowest tier level of the Ugandan state.²⁰⁰ The First Schedule of the Constitution has listed 75 districts for Uganda whose boundaries may be set or altered by the Ugandan Parliament.²⁰¹ The national Parliament also has the mandate of creating new districts within Uganda.²⁰² The districts only exercise functions delegated to them by the national government or may carry out functions not listed for national government.²⁰³ The regional governments are composed of one or more districts which voluntarily join up to form a single regional entity.²⁰⁴ However, districts are not compelled to form a regional government as it a discretionary matter and can only do so voluntarily.²⁰⁵ There are five regional governments²⁰⁶ that

¹⁹⁸ Ibid., Art 5 (2).

¹⁹⁹ Ibid., Art 1(3).

²⁰⁰ Ibid., Art 5(2), 177 & 179.

²⁰¹ Ibid., Art 179 (1).

²⁰² Ibid.

²⁰³ Ibid., Art 189 (1) & (2).

²⁰⁴ Ibid., Art 178 (1).

²⁰⁵ Ibid., Art 178 (2).

all commenced their operations on 1st July 2006²⁰⁷ and whose roles are clearly outlined under the Constitution.²⁰⁸ The respective capitals of the above governments are also outlined under the Constitution.²⁰⁹

The national government represents the upper tier level of government and exercises major roles as outlined in the constitution.²¹⁰ The national level of government is comprised of the three governmental organs, the Executive, the Judiciary and the Legislature. The Uganda legislature comprises of a single house parliament, created by the Constitution. The Parliament is bestowed with exclusive legislative power and authority within the territory of Uganda.²¹¹ In the exercise of such legislative authority, the Parliament is said to be subject to the Constitution and no other organ or body.²¹² The Ugandan Parliament is not subject to any higher authority in the exercise of legislative authority, including the East Africa Legislative Assembly, the EAC parliament. This means that a federation has no consideration in the Ugandan Constitution, especially as regards legislative authority.

The Executive arm of government comprises of the President, Vice-President, Prime Minister and the Cabinet. The Presidency is vested with executive authority over the Ugandan state as the President is declared to take precedence over all persons in Uganda.²¹³ The President is the Head of State, Head of Government and Commander-in-Chief of Uganda's Defence forces.²¹⁴ The powers vested in the Presidency make it the single most powerful institution in Uganda hence

²⁰⁶ Ibid., Art 178 (3): Busoga, Bunyoro, Acholi, Langi & Buganda.

²⁰⁷ Ibid., Art 178 (13).

²⁰⁸ Ibid., Fourth Schedule.

²⁰⁹ Ibid., Art 178(2): Buganda- Mengo Municipality, Bunyoro- Hoima Municipality, Busoga- Jinja Municipality, Acholi- Gulu Municipality and Lango- Lira Municipality.

²¹⁰ Ibid., Sixth Schedule

²¹¹ Ibid., Art 79 (2).

²¹² Ibid.

²¹³ Ibid., Art 98(2).

²¹⁴ Ibid., Art 98 (1).

reinforcing the national character of Uganda. The presidential term limit was previously restricted to two terms but a constitutional amendment in 2005 abolished the fixed term limits.²¹⁵ Removal of term limits on presidential tenure raised a constitutional storm both domestically and internationally. This move banished the democratic credentials of the Ugandan leadership as it differed from those of other existing EAC partner states. It raises the question whether the Ugandan national leadership would be ready to cede authority to a new single federal unit, complete with sovereign authority. With the President at the apex of the Executive and the country, no other superior authority is recognized beyond the presidency. This clearly implies lack of a provision for the envisaged federal government, comprising of five partner states of EAC.

The Judiciary exercises sovereign judicial authority over Uganda,²¹⁶ in line with doctrine of judicial independence.²¹⁷ The Constitution expressly states that the judiciary shall not be subject to control of any other person or authority.²¹⁸ This therefore reinforces the national sovereignty of Uganda and has no provision for a federation. The Supreme Court is established as the highest court of the state and provided as the last court of appeal.²¹⁹ This implies the court as not answerable to or bound by the decision of any other court. The jurisdictional power of the Supreme Court further proves the national sovereignty of Uganda as a republic and not within a federation. The Ugandan Supreme Court is not bound by decisions of the East Africa Court of Justice irrespective of the latter being a regional court.

²¹⁵Constitution (Amendment) Act, 2005, Act No.11 of 2005.

²¹⁶Constitution of the Republic of Uganda, Art 126 (1).

²¹⁷ Ibid., Art 128.

²¹⁸ Ibid.

²¹⁹ Ibid.

Constitutional amendments of the Ugandan constitution must precede any attempt of establishing the East Africa Federation. Establishment of the federation would mean a change in the existing Uganda's political system. Article 74 of the Uganda Constitution provides that a change of the country's political system can only be effected through a national referendum. This should however be preceded by a request from half the membership of Parliament, request by majority of membership of at least one half of the district councils or request from one tenth of registered voters from two thirds of the constituencies.²²⁰ The right to determine the choice of a political system is further stressed by the Constitution to be only exercisable by Ugandan people through referenda.²²¹ The East Africa Federation will have a direct impact on Uganda's sovereignty, as it will be transferred to the new political entity. The Ugandan Constitution, under Article 260(2) (b) provides that any change in the country's sovereignty can only be effected through a national referendum. The federation also has a direct consequence as to the functioning of Uganda's districts and regional governments. In order to effect any amendments on the roles and composition of these two bodies, a two-thirds approval by both parliament and district councils is mandatory.

3.4 United Republic of Tanzania

Tanzania is described by its Constitution as a single sovereign united republic whose territory comprises of Mainland Tanzania and Tanzania Zanzibar.²²² The Tanzanian political system model is unique to the extent that it has two governments, consisting of Mainland Tanzania and Zanzibar. The Constitution vests executive authority on both governments,²²³ with each having

²²⁰ Ibid., Art 74.

²²¹ Ibid., Art 69(1).

²²² Constitution of the United Republic of Tanzania 1977, Art 1; 'Proclamation of the United Republic Act No.15 of 1984', Art.6. *See also* Art 2; 'The territory of the United Republic'.

²²³ Constitution of the United Republic of Tanzania 1977, Art 4.

its jurisdiction defined. Each of the two governments will further have respective organs able to exercise executive authority, judicial authority and legislative authority.²²⁴ The executive authority is vested in both the Government of the United Republic and the Revolutionary Government of Zanzibar. Legislative authority is vested in the Parliament of the United Republic and the House of Representatives while judicial authority is vested in the court system of both Governments.²²⁵ These constitutional provisions portray Tanzania as a national state and not part of any federation, a fact that contradicts the formation of the East Africa Federation.

The two governmental system of Tanzania is a form of a quasi-federation, with Zanzibar and Mainland being the two constituents of the Union. The unique structure of the Union Government complicates the formation of the envisaged East Africa Federation. The Zanzibar government and the Union government have distinct roles as outlined by the Articles of Union, the treaty establishing the United Republic of Tanzania.²²⁶ The Government of the United Republic is conferred with authority over all union matters, covering the entire republic, as well all matters of the Mainland Tanzania.²²⁷ The Union matters include Constitution, Foreign affairs, defence and security, citizenship and immigration, external borrowing and trade, taxation, transport and communication, industrial licensing and statistics, mineral oil resources, and Court of Appeal.²²⁸

The Executive organ of the Republic is headed by the President who is held as the Head of State and Head of Government.²²⁹ The Constitution provides that, ‘...all the authority of the

²²⁴ Ibid.

²²⁵ Ibid., Art 4(2).

²²⁶ International IDEA, ‘Tanzania - Country Constitutional Profile’ (2010) CONSTITUTIONNET <<http://www.constitutionnet.org/country/tanzania-country-constitutional-profile>> (accessed 20 May 2014).

²²⁷ Ibid., ‘The Government of the United Republic and its Authority Act No.15 of 1984’, Art. 9.

²²⁸ Ibid., Fourth Schedule; Union Matters.

²²⁹ Ibid., Art 33(2).

Government of the United Republic over all Union Matters in the United Republic and also over all other matters concerning Mainland Tanzania shall vest in the President of the United Republic..²³⁰ The president wields executive power, with various constitutional provisions outlining the extent of such authority. Article 34(4) states that ‘the authority of the Government is exercisable by the President himself or by persons delegated with such authority.’ Further, it provides that executive functions of the Union Government are discharged by government officers on behalf of the President.²³¹ The President is further vested with executive authority enabling him ‘to constitute and abolish any office in the service of the Government of the United Republic.’²³² These provisions portray a powerful national presidency of Tanzania, a fact that does not take into consideration any other higher office in form of a federation.

The Executive arm of the Union Government comprises the President, Vice President, Prime Minister and the Cabinet. The Vice President is provided as the principal assistant to the President, with his key role being assisting the former with the day to day implementation of the Union matters. Of interest, however, is the fact that the holders of these two offices cannot be from one part of the Republic. If the President comes from the mainland, the Vice President must hail from Zanzibar and vice versa.²³³ Such a provision would be a stumbling block to the envisaged East Africa Federation as it would upset Tanzania delicate power balance between Zanzibar and the mainland Tanzania. The Prime Minister is appointed by the President, with the former being a member of parliament from the party with the majority in Tanzania National Assembly.²³⁴ The Prime Minister is vested with authority ‘to control, supervise and execute day-

²³⁰ Ibid., Art 34(3).

²³¹ Ibid., Art 35(1).

²³² Ibid., Art 36(1).

²³³ Ibid., Art 43(7).

²³⁴ Ibid., Art 51(2).

to-day functions of the Government.²³⁵ He is further held to be the Leader of Government business in the Tanzanian National Assembly.²³⁶ The Cabinet comprises the Vice-President, the Prime Minister, the President of Zanzibar, and Ministers. The composition and structure of the Executive arm of government bears the national identity of Tanzania and does not provide for subordination to any other authority.

The legislative authority of Tanzania is vested in Parliament, comprising the Presidency and the National Assembly.²³⁷ The country's 'legislative power in relation to all Union Matters and power in relation to all other matters concerning Mainland Tanzania is vested in Parliament.'²³⁸ The National Assembly, therefore, deals with Union matters which also cover Zanzibar, except for non-union matters of Zanzibar. Laws enacted by the Parliament only apply to Zanzibar if they concern Union matters and they expressly state that they apply to Zanzibar. The judicial structure of Tanzania is unique due to the two-tier system of government. The Judiciary is vested with absolute and sovereign judicial authority, exercisable within the Republic and is not subordinate to any higher court. The Court of Appeal is the highest court as established under Article 108 of the Constitution, with jurisdiction over both Zanzibar and Mainland Tanzania.²³⁹ However, the Court of Appeal lacks jurisdiction on any matter concerning a dispute between the United Republic Government and the Revolutionary Government of Zanzibar.²⁴⁰ Such disputes are governed by Article 126 which prescribes a Special Constitutional Court as the competent jurisdiction for handling the disputes. The High Court of Tanzania has jurisdiction over mainland

²³⁵ Ibid., Art 52(1).

²³⁶ Ibid., Art 52(2).

²³⁷ Ibid., Art 62.

²³⁸ Ibid., Art 64(1); Legislative Act No.15 of 1984.

²³⁹ Bahame Nyanduga and Christabel Manning, 'Guide to Tanzanian Legal System and Legal Research' (2006) <<http://www.nyulawglobal.org/globalex/tanzania.htm>> (accessed 22 May 2014).

²⁴⁰ Ibid., art 117(2).

Tanzania and not Zanzibar. It handles appeals from subordinate courts within mainland Tanzania.

Chapter Four of the Constitution establishes the Revolutionary Government of Zanzibar, whose authority is described to be over matters not categorized as Union matters.²⁴¹ The Zanzibar government is to operate in accordance with this Constitution as well as the Zanzibar Constitution.²⁴² Article 104 establishes the President of Zanzibar, as the Head of Zanzibar Government, who exercises executive authority over non-union matters. The President of Zanzibar swears allegiance to the Tanzania Constitution, and vows to uphold and protect it.²⁴³ Article 105 establishes the Revolutionary Council, whose principal role is to aid the President in governing Zanzibar. The Zanzibar House of Representatives is held to consist of elected members and the President of the Revolutionary Government, whose legislative authority extends to all non-union legislative matters.²⁴⁴

3.4.1 The Question of Zanzibar

The constitutional question as to the legal identity of Zanzibar, has continuously elicited controversy under the current Tanzanian Constitution. The key question is whether Zanzibar is a sovereign entity or a mere autonomous entity within Tanzania. Yash Pal Ghai discusses whether Tanzania is a federation or not.²⁴⁵ According to Ghai, Tanzania has two strong elements of a political federation, namely, there are two constitutions and the two constituent units have

²⁴¹Constitution of the United Republic of Tanzania, Art 102(1).

²⁴² Ibid.

²⁴³ Ibid., Art 103(2).

²⁴⁴ Ibid., Art 106(2).

²⁴⁵ Shivji, Issa, 'Tanzania: The Legal Foundations of the Union' (2009) African Books Collective.

[http://books.google.co.ke/books?hl=en&lr=&id=bT73m1vXFrUC&oi=fnd&pg=PR5&dq=IG+Shivji+Tanzania:+The+legal+foundations+of+the+Union+\(2009\)+x&ots=MgBie4CuPi&sig=ASmj5ypyl4V0L6yMf6ceWJdNqos&redir_esc=y#v=onepage&q&f=false](http://books.google.co.ke/books?hl=en&lr=&id=bT73m1vXFrUC&oi=fnd&pg=PR5&dq=IG+Shivji+Tanzania:+The+legal+foundations+of+the+Union+(2009)+x&ots=MgBie4CuPi&sig=ASmj5ypyl4V0L6yMf6ceWJdNqos&redir_esc=y#v=onepage&q&f=false) (accessed 17 July 2014).

respective judiciaries.²⁴⁶ The Tanzania Constitution, even though it is the overall Constitution, acts as constitution for the mainland Tanzania. On the other hand, Zanzibar has its own constitution which is subordinate to the Tanzania Constitution. Zanzibar has its own judicial structure except that its Court of Appeal refers to the overall Court of appeal of Tanzania. Ghai summarizes this concept by stating that the fact the relations between Zanzibar and mainland Tanzania are spelt out constitutionally, with two clear orders of Governments, a presumption of a federal Tanzania arises.²⁴⁷ However, he also raises a contrary argument, stating that the unique institutional arrangements of Tanzania negate the presumption of Tanzanian federalism. This is due to the fact that the Union Executive and the Legislature doubles up also as mainland's Executive and Legislature. The question on Zanzibar's sovereignty was determined judicially in the case of *Machano v Serikali ya Mapinduzi*²⁴⁸ where the Court of Appeal established that Zanzibar was not in any way sovereign and was therefore not a State in any form.²⁴⁹

Analysis of Zanzibar's historical constitutional development perhaps may further shed light on the question of its identity. Zanzibar gained self-rule in 1963, with the Arab minority handed the reins of power over the island.²⁵⁰ However, a revolution spearheaded by the African majority in 1963, saw the formation of Zanzibar Revolutionary Government, headed by Abeid Karume.²⁵¹ Through the Articles of Union of 1964, Zanzibar entered into a union with Tanganyika, to form a new sovereign State referred to as the United Republic of Tanzania. However, key questions

²⁴⁶Ibid., p. XXI.

²⁴⁷Shivji, Issa, 'Tanzania: The Legal Foundations of the Union' (2009) African Books Collective. <[http://books.google.co.ke/books?hl=en&lr=&id=bT73m1vXFrUC&oi=fnd&pg=PR5&dq=IG+Shivji+Tanzania:+The+legal+foundations+of+the+Union+\(2009\)+x&ots=MgBie4CuPi&sig=ASmj5ypyl4V0L6yMf6ceWJdNqos&redir_esc=y#v=onepage&q&f=false](http://books.google.co.ke/books?hl=en&lr=&id=bT73m1vXFrUC&oi=fnd&pg=PR5&dq=IG+Shivji+Tanzania:+The+legal+foundations+of+the+Union+(2009)+x&ots=MgBie4CuPi&sig=ASmj5ypyl4V0L6yMf6ceWJdNqos&redir_esc=y#v=onepage&q&f=false)> (accessed 17 July 2014), p. XXI.

²⁴⁸Criminal Application No. 8 of 2000, TZCA 1 (21 November 2001), <<http://www.saflii.org/tz/cases/TZCA/2000/1.html>> (accessed 2nd September 2014).

²⁴⁹Supra, note 78, p. XX.

²⁵⁰Morris Mbondenyi and Tom Ojienda, 'Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa' (Pretoria University Law Press 2013). <http://www.pulp.up.ac.za/pdf/2013_06/2013_06.pdf> (accessed 2nd September 2014).

²⁵¹Ibid., p. 24.

continue to arise as to whether Zanzibar ratified the Articles. The identity of Tanzania revolves around the veracity of the articles of Union. The Articles of Union provided that they would only be applicable if ratified by both Tanganyika and Zanzibar.²⁵² Tanganyika through its legislature ratified the Articles of Union in 1964.²⁵³ However, doubts are said to arise on whether Zanzibar equally did so.

Dourad Wolfgang, Zanzibar's former Attorney General, claims that there is no Zanzibar statute that ratified the Articles.²⁵⁴ Issa Shivji concurs with Dourad, stating that there is no evidence of any notice of ratifying law in the Zanzibar Government Gazette of 1964 to 1965.²⁵⁵ On the other hand, he avers that there is strong presumption of the ratification by Zanzibar. Shivji quotes General Notice No. 243 of 1st may 1964 which states that the 'ratifying law was made by the Zanzibar Revolutionary Council on 25th April 1964'. However, this particular legal notice fails to cite any Zanzibar Government Gazette as evidence to back up this assertion. The Tanganyika Hansard of 1964 offers another form of evidence for Zanzibar's ratification. It records that Karume and Nyerere exchanged ratification documents on the 27th of April 1964, in the National Assembly. Subsequently, five members of the Zanzibar Revolution Council were sworn in as members of Tanganyika National Assembly.²⁵⁶ Shivji concludes that lack of a substantive challenge on the validity of the Articles of Union raises a strong presumption of its ratification in Zanzibar.²⁵⁷

The debate on the status of Zanzibar continues to rage on, especially with the proposal of establishing an East African Federation. The leading opposition party in Zanzibar, Civic United

²⁵² Articles of Union, 'Article (VIII) (a).

²⁵³ Union of Tanganyika and Zanzibar Act, 1964 (No 22 of 1964).

²⁵⁴ *Supra*, note 81, p. 3.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*, p. 32.

²⁵⁷ *Ibid.*

Front, continues to challenge the validity of the Union and insists on review of the 1964 agreement.²⁵⁸ This has led to continued agitation for the review of the Union, thereby occasioning clashes between the opposition and the government in Zanzibar. In the Zanzibar 2000 elections, electoral violence between the opposition and the government resulted in the Civic United Front calling for the non-recognition of the Union government.²⁵⁹ Most opposition parties in Tanzania continue to agitate for a new federal set up, as a way of forestalling the collapse of the Union. However, the ruling Chama Cha Mapinduzi refuses such an option insisting on the current status quo.²⁶⁰ Constitutional challenges are bound to arise and Tanzania has to deal with the Zanzibar controversy.

3.4.2 Recent Constitutional Developments and Review

Tanzania has recently undertaken a constitutional review exercise, whose key objective is to adopt a new Constitution. The review process was enabled and commenced through the adoption of the Constitutional Review Act of 2012. A sneak preview at the Act offers an understanding as to the prospects of the East Africa Federation. Under the Act, some matters have been stated to be inviolable and not subject to any change by the review process. These include the existence of the United Republic, the existence of the Executive, Legislature and the Judiciary, the republican nature of governance and, the existence of Revolutionary Government of Zanzibar.²⁶¹ These matters directly relate to the governance structure and the national identity of Tanzania.

²⁵⁸ Hassan Kaya, 'Electoral Violence, Political Stability and The Union in Tanzania' (2004) 4(2), African Journal on Conflict Resolution,

<<http://www.ajol.info/index.php/ajcr/article/view/39382/30307>> (accessed 18 July 2014).

²⁵⁹Ibid., p. 164.

²⁶⁰Ibid., p. 163.

²⁶¹The Tanzania Constitutional Review Act (Chapter 83 of the Laws), section 9 (2)

<<http://www.agctz.go.tz/forcedownload.php?filename=d94f43d94d381b2a97b35075c30ea816.doc&type=D>> (accessed 18 July 2014).

From the onset, this review process was expected to maintain the status of Tanzania as a Republic, comprising of mainland Tanzania and Zanzibar. The status of Zanzibar was also sought to be retained with no new structural adjustment. This provision clearly portrays that the review process was in no way concerned with the envisaged East Africa Federation. Lack of mention reinforces the fact that adoption of the new Tanzanian Constitution would not in any way provide for the East Africa federation. The present draft Constitution does not alter the governance structure of Tanzania. The draft Constitution identifies Tanzania as a sovereign Federation resulting from the Union of two formerly independent countries, namely, Tanganyika and Zanzibar.²⁶² However, its official name under the draft remains the United Republic of Tanzania. The draft Constitution rules out any recognition of the East African federation. The draft Constitution completely ignores the East African Federation, casting doubt as to its viability and ability, to become a reality.

3.5 Republic of Rwanda

Rwanda identifies itself as an independent sovereign Republic whose sovereignty is exclusively vested in its own people.²⁶³ The state is further organized administratively in provinces, districts, cities and municipalities.²⁶⁴ This defines the national character of Rwanda as a Republic and not part of any federation; a constitutional fact conflicting the envisaged East Africa Federation.

The political and administrative organization of Rwanda as a national democracy offers insight as to the lack of mention of the envisaged federation. The state is governed by the universal democratic principle of separation of powers, where it is divided into three governmental organs, executive, legislature and judiciary. All the three governmental organs are described by the

²⁶²Draft Constitution of the United Republic of Tanzania (Dr. Mapunda G. (tr), English Translation), Art 1.

²⁶³Constitution of the Republic of Rwanda, Art 1.

²⁶⁴Ibid., Art 2.

Constitution as national and have authority to exercise national sovereignty.²⁶⁵ The legislature is made of two chambered Parliament, the Senate and the Chamber of Deputies, with each serving distinct roles. The latter house deals with most legislative matters, but more importantly on state's finance matters.²⁶⁶ All legislative bills also originate from the Chamber of Deputies before they can be dealt with by the Senate.²⁶⁷ The Senate has exclusive authority to elect the President and Judges of the Supreme Court, approval of chairpersons' appointment to National Commissions, ombudsman and State's Auditor General, and approval of other public officials. The Senate also has authority over other legislative matters including defence and security, elections, rights and freedom of citizens, laws on international agreements and treaties and organic laws.²⁶⁸

The executive arm of the Rwandan state comprises the Presidency, Prime Minister, Cabinet and the Civil Service. Executive authority is vested in the Presidency together with the cabinet,²⁶⁹ a mark of Rwanda's national sovereignty. The President is the Head of State,²⁷⁰ a critical role portraying his executive authority. This means that the Rwandan President cannot be subordinate to any other sovereign power. Establishment of the federation would be in conflict with this principle, since a new sovereign head of the federation would be considered superior to the Rwandan President. The current constitutional provisions on the Presidency are therefore incompatible with the envisaged federation.

The Rwandan judiciary is headed by the Chief Justice, who also doubles up as the President of the Supreme Court. The Constitution vests exclusive judicial authority in the Supreme Court and

²⁶⁵ Ibid., Art 60.

²⁶⁶ Ibid., Art 79.

²⁶⁷ Ibid., Art 90.

²⁶⁸ Ibid., Art 88.

²⁶⁹ Ibid., Art 97.

²⁷⁰ Ibid., Art 98.

other courts of Rwanda.²⁷¹ The judiciary enjoys both administrative and financial autonomy from the other two organs of state,²⁷² a principle emanating from the doctrine of judicial independence. Article 144 of the Constitution provides for the Supreme Court as the highest court in the land with its decisions being final and binding to other courts. Such constitutional provision is incompatible with the envisaged federation as the Rwandan Supreme Court cannot be subordinate to its court.

Necessary constitutional changes in Rwanda would be unavoidable in the attempt of establishing East African Federation. Matters on national sovereignty and change of the system of governance would require constitutional amendments. Article 193 of the Constitution provides that any constitutional amendment can only be initiated by either, the President upon the cabinet's proposal, or both chambers of Parliament. However, the latter's initiative must be supported by two thirds majority of members. Changes concerning the system of governance and national sovereignty must be subjected to a national referendum. The constitutional amendments necessary for the federation will, therefore, require national referendum in Rwanda.

3.6 Republic of Burundi

Burundi is defined under of its Constitution as a Sovereign Republic whose boundaries are inalienable and indivisible.²⁷³ Similar to the other East Africa Partner States, Burundi does not recognize itself within any federation but affirms its national character. The Burundian Constitution defines its national sovereignty, which is stated to belong to the Burundian

²⁷¹ Ibid., Art 140.

²⁷² Ibid.

²⁷³ Burundi Constitution of 2005, Art 1 and 2, (William S. Hein (tr), (2012)
<https://www.constituteproject.org/constitution/Burundi_2005.pdf> (accessed 10 July 2014).

people.²⁷⁴ At the onset, such constitutional definition of Burundi fails to mention any aspect of the East Africa Federation, which will have Burundi as a constituent State.

Article 13 describes Burundi as divided administratively into Provinces, Communes, Zones and Collines. The State is said to adopt a multi-party and democratic system of government,²⁷⁵ which recognizes the separation of powers doctrine. The Executive arm consists of the President, two Vice Presidents and members of the government.²⁷⁶ Article 95 of the Constitution exclusively vests executive authority and power in the Presidency. The President is the Head of State, Head of Government and the Commander in Chief of the Armed Forces of Burundi. The definition of the Presidency points at the national character of Burundi, which has no recognition for a Federation. Article 96 restricts the presidential term limit to a five year term, renewable only once. However, this Article has recently caused a fuss due to the current President's desire to seek a third term in office.²⁷⁷

The term limit debate saw the ruling party seeking Parliament's approval, to effect the change. However, this proposal was resoundingly defeated by a clear parliamentary majority.²⁷⁸ The opponents of the initiative to abolish the presidential term limits hold that, such change goes against the principle of the Arusha peace accords.²⁷⁹ The Arusha accords were peace agreement signed by the Burundian warring parties. Successive years of peace negotiations culminated in the signing of the Arusha Peace and Reconciliation agreement on the 28th August 2000 between

²⁷⁴ Ibid., Art 7.

²⁷⁵ Ibid., Art 75.

²⁷⁶ Ibid., Art 92.

²⁷⁷ 'Rejecting Term Limits: Burundi President Seeks Re-Election' *AFRICA REVIEW* (26 March 2014) <<http://www.africareview.com/News/Rejecting-term-limits-Burundi-president-seeks-re-election/-/979180/2257910/-/eaimdz/-/index.html>> (accessed 24 March 2014).

²⁷⁸ Ibid.

²⁷⁹ Arusha Peace and Reconciliation Agreement for Burundi, Art 7(3) <<http://www.issafrika.org/AF/profiles/Burundi/arusha.pdf>> (accessed 24 July 2014). (The Article provides that '...shall be elected for a term of five years, renewable only once. No one may serve more than two presidential terms...').

eighteen Burundian parties.²⁸⁰ The accord's objective was to oversee Burundi's transition from dictatorship to democracy, through provision of a solution to the long drawn civil war.²⁸¹ The preamble of the agreement provided that the parties 'reaffirmed their...determination to put an end to the root causes underlying the recurrent state of violence, bloodshed, insecurity, political instability, genocide and exclusion which is inflicting severe hardships and suffering on the people of Burundi, and seriously hampers the prospects for economic development and the attainment of equality and social justice in our country and, commitment to shape a political order and a system of government inspired by the realities of our country and founded on the values of justice, democracy, good governance, pluralism, respect for the fundamental rights and freedoms of the individual, unity, solidarity, mutual understanding, tolerance and cooperation among the different ethnic groups within our society'.²⁸²

The Arusha accord guaranteed minority's security by addressing the question of Burundian ethnicity and also formulated an effective power-sharing arrangement, which enjoyed the support of regional Presidents of East and Southern Africa.²⁸³ Under the Accords, Burundi's defence, public service and other state organs were to reflect the ethnic diversity of Burundi, comprising of Tutsi, Hutu and Twa.²⁸⁴ The most significant provision concerned the office of the Presidency and Vice Presidency. The President could only serve for a term of five years with an option of

²⁸⁰ Adonia Ayebare, 'Peacemaking in Burundi: A Case Study of Regional Diplomacy Backed by International Peacekeeping and Peace Building' p. 81-86, <<http://responsibilitytoprotect.org/favoritadonia.pdf>> (accessed 9 September 2014).

²⁸¹ Devon Curtis, 'The Peace Process in Burundi: Successful African Intervention?(September 2003) (24) <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0CFQQFjAI&url=http%3A%2F%2Fwww.igd.org.za%2Fdownloads%2FGlobal%2520Insight%2Fgi_24.pdf&ei=CIwOVMGqIojlaI-tgOAG&usq=AFQjCNGibbXpmhtpxZvILIEsRoDKc67g&bvm=bv.74649129,d.d2s> (accessed 9 September 2014).

²⁸² 'Arusha Peace and Reconciliation Agreement for Burundi' 2-3 <<http://www.issafrika.org/AF/profiles/Burundi/arusha.pdf>> (accessed 3 September 2014).

²⁸³ Howard Wolpe, 'Making Peace after Genocide: Anatomy of the Burundi Process' (2011) Peaceworks, p. 70, <http://www.usip.org/sites/default/files/PW_Burundi.pdf> (accessed 9 September 2014).

²⁸⁴ Supra., note 113.

non-renewable five year term.²⁸⁵ The President would be deputized by two Vice Presidents who were to come from different ethnic group from the former.

Notions continue to gain momentum that the current President seeks to discard the Arusha Accords, with an objective of gaining a third term in office.²⁸⁶ The President's key backers have already declared his candidature for next year's elections,²⁸⁷ which shows breach of Constitutional term limit set by both the Constitution and The Arusha Peace Accord. Attempts to abolish the Presidential term limit do not augur well with the region's push for Federalism. A Federation cannot be created in a climate of lack of respect to constitutionalism by individual constituent States.

Legislative power in Burundi has exclusively been vested in the two-chambered Legislature, the Senate and the National Assembly.²⁸⁸ The membership of the National Assembly has been pegged at one hundred whose basis is set upon the country's ethnic identity.²⁸⁹ The ethnic allocation strictly provides for a sixty percent Hutu, forty percent Tutsi and three members from Twa ethnic group.²⁹⁰ This provision has its origin from the Arusha Accord, which recognized ethnic exclusion, as the key factor behind the Country's civil war.²⁹¹ The ethnic allocation system of members to the National Assembly was, therefore, an attempt to fully resolve ethnic disharmony and foster national unity. The National Assembly plays the critical role of

²⁸⁵ Ibid., Protocol II, Democracy and Good governance; Chapter I Constitutional principles of the post-transition constitution, Art 7(3).

²⁸⁶ Gilles Muhame, 'Crisis in Burundi As Vice President Escapes' <<http://chimpreports.com/index.php/special-reports/16715-crisis-in-burundi-as-vice-president-escapes.html>> (accessed 24 July 2014).

²⁸⁷ Stephanie Burchard, 'Nkurunziza Prepares Ground for a Third Term' (2001) *African Argument* <<http://africanarguments.org/2014/04/10/burundi-2015-nkurunziza-prepares-ground-for-a-third-term-by-dr-stephanie-m-burchard/>> (accessed 24 July 2014).

²⁸⁸ Supra., note 276, Art 147.

²⁸⁹ Ibid., Art 164.

²⁹⁰ Ibid.

²⁹¹ Ibid., Art 4(a).

controlling the country's finances, through approval of the State's budget.²⁹² The Senate comprises two elected representatives from each province, three members from the Twa ethnic group and former Burundian Presidents.²⁹³ It plays defined roles which include approval of Constitutional amendments, approval of laws concerning delimitation of territorial boundaries, advising the President, approval of key Executive appointments and, approving judicial appointments.²⁹⁴

The Burundian Judiciary has the Supreme Court as the highest court having ordinary jurisdiction over the Republic.²⁹⁵ Another equally higher court is the Constitutional Court, which has overall exclusive jurisdiction over Constitutional matters.²⁹⁶ The Constitutional Court plays the key role of determining legality of laws as well as interpretation of the Constitution.²⁹⁷ Article 233 of the Constitution establishes the High Court of Justice, comprising the Supreme Court and the Constitutional Court. This Court has the sole jurisdiction of judging treason cases against the President of the Republic as well as the President and Vice-President of both the National Assembly and the Senate.²⁹⁸ The decisions of this Court are not subject to any appeal or recourse, except for pardon.²⁹⁹ The Burundi Constitution does not envisage another higher court than the High Court of Justice. Any change in the Burundian court hierarchy, occasioned by the formation of the East Africa Federation must, therefore, be effected by constitutional amendment.

²⁹² Ibid., Art 177.

²⁹³ Ibid., Art 180.

²⁹⁴ Ibid., Art 187.

²⁹⁵ Ibid., Art 221.

²⁹⁶ Ibid., Art 225.

²⁹⁷ Ibid., Art 228.

²⁹⁸ Ibid., Art 234.

²⁹⁹ Ibid.

The national character and sovereignty of Burundi are constitutional matters that can only be altered through clearly defined process. Establishment of the East Africa Federation has a direct impact on the Burundian sovereignty and national character. Article 291 provides that Burundi can ‘...conclude agreements of association or of community with other States’. This provision allows Burundi to be part of a community of nations as in the current East Africa Community. Burundi, therefore, maintains its national character and sovereignty under any such association prescribed by Article 291. A federation incorporating Burundi however, can only be viable through constitutional amendments. Article 297 provides that a constitutional amendment is initiated either by the President or the two legislative houses through an absolute majority of the members. A proposal for such amendment must be adopted by at least four-fifths of the National Assembly and two-thirds of the Senate.³⁰⁰ Article 298 confers discretion in the Presidency to choose whether to submit an amendment to a national referendum. However, Article 299 provides that some matters may not be subject to amendment including, national unity, secularity of Republic, democracy and integrity of the Burundian people. This poses challenge to the envisaged Federation, since its formation has a direct impact on Burundian system of government and sovereignty.

3.7 Conclusion

The respective constitutions of the East Africa Partner States recognize their national sovereignty and systems of governments. Individually, all the States are national sovereigns and do not provide for any form of federation. This raises question as to their real commitment to the envisaged formation of an East Africa Federation. A clear fact is that the idea of the federation remains the East Africa Community Summit’s and not people’s agenda. At no point have the

³⁰⁰ Ibid., Art 300.

respective Heads of States involve the East African citizens in the federation process. The formation of the Federation would imply that the Partner States have to initiate constitutional amendments on, sovereignty and system of governance. This poses a challenge to the States, as the constitutional amendments can only be effected by a national referendum. Referenda are political processes that require a popular mandate and goodwill of citizens. This further fuels concerns on the East Africa Partner States citizens' active involvement in the integration process.

Constitutional differences exist between the systems of the individual Partner States. The Tanzanian system of governance comprises a quasi-federal system, which may pose a challenge to the envisaged Federation. The issue of Zanzibar's status within Tanzania poses a challenge to the envisaged Federation. Debate continues whether Zanzibar is a sovereign entity and should be part of the Federation as an independent entity. The current review of the Tanzanian Constitution has maintained the status quo, defining Zanzibar as an autonomous entity within the Republic of Tanzania. However, debate rages on the status of Zanzibar within the Republic of Tanzania, and this will wade into the Federation discussion.

The Kenyan governance system adopted under the 2010 Constitution provides for a devolved system of governance, which is unique and not applied in the other East Africa States. The Kenyan devolved system complicates the efforts to form the East Africa Federation, as it would relegate the devolved governments down the governance structure. Will the citizens be ready to cede their new found autonomy in form of county governments to another higher sovereign entity? Uganda, Rwanda and Burundi have strong residential systems of government, in contrast of Kenya and Tanzania. The Presidency wields immense power that may prove a stumbling block to the federation process. Will the respective Presidents be ready to cede their executive authority to a new sovereign entity?

Analysis of the Partner States' constitutions reveals lack of provision for the East Africa Federation. The integration process can only be a success if the Partner States adopt the necessary constitutional provisions. As it stands, lack of the enabling constitutional provisions complicates the process of forming the East Africa Federation.

CHAPTER FOUR

CONSTITUTIONAL IMPLICATIONS OF FORMATION OF EAST AFRICA FEDERATION

4.1 Introduction

Establishment of the East Africa federation is a process with key constitutional implications to the current East Africa partner states. An East Africa federation has a direct effect on the respective partner states' sovereignty, especially due to the existence of the latter as independent states for more than half a century. The partner states' respective constitutions define the states as national sovereignties, with no mention of membership of a future federation.³⁰¹ The East Africa Community treaty envisages a federation as the final stage of integration.³⁰² However, lack of mention of clear constitutional steps towards achieving the federation by the treaty, raises the need to dissect the constitutional implications of this process.

The East Africa federation is unique from other previous established federations in the world. The uniqueness is due to the involvement of independent and sovereign countries teaming up with an aim of forming a single political federation. Such a federation is described as a 'coming together' model of federation.³⁰³ A coming together federation implies delving into the partner

³⁰¹ Constitution of Kenya, art 4 (1) (2); Constitution of the Republic of Uganda, art 5(1); Constitution of the United Republic of Tanzania of 1977, art 1; Proclamation of the United Republic Act No.15 of 1984 arts 6 and 2; Constitution of the Republic of Rwanda, art 1.; Burundi Constitution of 2005, art 1 and 2.

³⁰² The Treaty for Establishment of the East African Community, Cap 5(2) <<http://www.eac.int/treaty/>> (accessed 4 October 2014).

³⁰³ Stepan Alfred, 'Federalism and Democracy: Beyond the U.S. Model' (October 1999) 10(4) Journal of Democracy, p. 19, <http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/journal_of_democracy/v010/10.4stepan.html> (accessed 3 October 2014).

states' sovereignty, a constitutional process pursued through various options. Formation of this model of federation can mostly be achieved through adoption of an enabling treaty.

Formulation and adoption of a federal constitution superior to the respective partner states' constitutions offers a constitutional option for the federating process. A third constitutional option may be the establishment of a confederation. Either of these options has a direct impact on the partner states' sovereignty. The respective constitutions define the States as exclusive national sovereignties, not subordinate to any other political entity. The federation process will have a direct impact on the existing national constitutions of the partner states. This, therefore, would necessitate national constitutional amendments by the partner states.

4.2 Importance of a Treaty to the Federation Process

A coming together federation is usually preceded by adoption of an enabling treaty by the constituent units.³⁰⁴ The German federation that brought together East and West Germany attests to role of an enabling treaty to the federating process. The 1990 unification of Federal Republic of Germany and German Democratic Republic was initiated by the formulation of a unification treaty.³⁰⁵ The unification treaty of 1990 acted as the catalyst of the process due to its clear provision outlining the steps towards attaining a single German federation.

The treaty provided that the single federation would be achieved through the accession of German Democratic Republic to the Basic Law, national law governing Federal Republic of Germany.³⁰⁶ Through the treaty, German Democratic Republic adopted the Basic Law and

³⁰⁴ *Supra*, note 3.

³⁰⁵ The Unification Treaty of 31 August 1990, 30 ILM (1991), 457.

³⁰⁶ The Unification Treaty, Art 1(1).

ensured that all its respective laws conformed to the provisions of the Basic Law.³⁰⁷ The treaty provided for the recognition of the German Democratic Republic territory as part of the new federation. By dint of the unification treaty ratification, different entities within this territory were made constituent states of the new German Federation.³⁰⁸ The unification of the two Republics did not require adoption of a new Federal Constitution, a common precedent for other federations. The Basic law of the Federal Republic of Germany acquired the new status of being a federal Constitution.

The East Africa political federation is envisaged to include the five sovereign partner states. The sovereignty of the respective states gives undeniable need for federation process through adoption and ratification of an enabling treaty. Sovereignty makes the partner states equal players in the federation process as none is subordinate to the other. Establishment of the envisaged federation could, therefore, be made possible through treaty making process. The establishment of the East Africa Community in itself was initiated through the adoption and ratification of the East Africa Treaty.³⁰⁹ Through this treaty, the various steps of integration have been undertaken,³¹⁰ with establishment of a political federation envisioned as the final stage of integration.³¹¹ What treaty making approach offers the best alternative to the federation process?

The East Africa Community treaty is the starting point of the federating process for the partner states. The treaty outlines the need for establishment of the federation to mark the conclusion of

³⁰⁷ The Unification Treaty, art 1(1).

³⁰⁸ Ibid.

³⁰⁹ The Treaty for Establishment of the East African Community 1990, Article 2(1), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.eac.int%2Fnews%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D11%26Itemid%3D70&ei=1CZMVPy4BYHTaPPBgogO&usq=AFQjCNErqCYJxlgaoiWJcd_G64cHz8Ft5w&sig2=zmhUEUhhk_kh7EmfCaZ7mQ&bvm=bv.77880786,d.d2s> (accessed 5th October 2014).

³¹⁰ EAC, 'Ratification of Common Market and Custom Union Protocols' <http://www.eac.int/index.php?option=com_content&view=article&id=46&Itemid=56> (accessed 5 October 2014).

³¹¹ Supra, note 9, Article 5(2).

true East Africa integration.³¹² The treaty, however, does not prescribe the actual constitutional process governing the federation exercise.³¹³ Formulation of a political federation protocol, subsidiary to the East Africa Community treaty, is a sure remedy to the inadequacy of the existing treaty. Formulation of an enabling protocol can be attributed to the precedents set by the partner states, in ratifying protocols for the common market, customs union and the yet to be ratified monetary union.³¹⁴

The protocols for the establishment of common market and customs union were adopted and ratified by the partner states,³¹⁵ as the preceding steps of the East Africa integration. The monetary union protocol has been formulated but is yet to be ratified by partner states, except for Tanzania.³¹⁶ Rwanda has taken significant steps towards ratifying the monetary union protocol, with its parliament having given its tacit support of the ratification.³¹⁷ Uganda explained its delayed ratification of the protocol emanated from the necessity of a constitutional amendment, since the ratification would result in its central bank ceding powers to the envisaged East Africa

³¹²Ibid.

³¹³ Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011), Cap 2,

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D143%26Itemid%3D136&ei=018yVKmzAcS4ygOP0IGACQ&usg=AFQjCNHwc4GpWL8xTO5OxQbgtSZDu29IKA&sig2=5LdFcy5Cki-NWgJvDHZkTg&bvm=by.76802529.d.bGQ> (accessed 4 October 2014).

³¹⁴EAC, 'History of the EAC - Milestones in the EAC Integration Process'

<http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54&limitstart=1> (accessed 6 October 2014).

³¹⁵ EAC, <http://www.eac.int/index.php?option=com_content&view=frontpage&Itemid=1> (accessed 4 October 2014): Common Market Protocol ratified and came into force on 1 July 2010, and Custom Union protocol was ratified and came into force on 1 January 2005.

³¹⁶ Adam Ihucha, 'Dar Ratifies Protocol on Monetary Union' *The East African* (28 June 2014)

<<http://www.theeastafrican.co.ke/news/Tanzania-leads-region-in-ratifying-Monetary-Union-/-/2558/2364788/-/cjt88bz/-/index.html>> (accessed 5 October 2014).

³¹⁷ Adam Ihucha and Emmanuel Rutayisire, 'Rwanda Leads Way in Ratifying Monetary Union Law' *The East African* (7 June 2014)

<<http://www.theeastafrican.co.ke/news/Rwanda-leads-way-in-ratifying-Monetary-Union-law-/-/2558/2340356/-/item/0/-/yigo5c/-/index.html>> (accessed 6 October 2014).

Central Bank.³¹⁸ Kenya and Burundi remain non-committal on their respective timelines of ratifying the protocol.³¹⁹ Slow uptake and implementation of EAC agenda has been cited as a major cause of delays in ratification and implementation of the protocols.³²⁰ The continued existence of non-Tariff barriers despite ratification of Common market and customs union protocols puts in doubt the partner states' commitment to ratifying and implementing the monetary union.³²¹

The envisaged political federation would be no exception to the formulation of a federation protocol under the East Africa Treaty. An ideal political federation protocol under the treaty ought to clearly define the constitutional steps towards formation of the federation. The protocol must first address the question of national sovereignty vis a vis a federation.³²² The current constitutional arrangements of the partner states only provide for respective national sovereignties. An effective federation, as proven by other existing federations, is guaranteed by ceding of sovereignty to the federal government.³²³ The protocol, therefore, may provide for two options for the cessation of sovereignty by the partner states. A specific clause in the protocol may provide that the East Africa Federation will wield sovereign power over the constituent partner states, whose existing sovereignty would be ceded to the former new entity. Such a provision expressly authorizes the ceding of sovereignty by the states to the newly formed federation. The treaty may also provide for the adoption of a federal constitution, with a specific

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Margaret Nantongo Zziwa, 'Press Statement: First Meeting – Third Session Third Assembly' (EAC, 25 August 2014)

<http://www.eac.int/index.php?option=com_content&view=article&id=1630:press-statement-first-meeting-third-session-third-assembly&catid=146:press-releases&Itemid=194> (accessed 8 October 2014).

³²¹ Ibid.

³²² EAC, 'Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011).

³²³ See USA, Nigeria, Germany and Former Yugoslavia federations discussed in Chapter Two.

clause providing for the cessation of sovereign authority to the federal government, by the partner states. This second option, however, must be defined by a treaty provision outlining the federal constitution formulation process.

Adoption and ratification of an enabling protocol by the East Africa partner states necessitates a look at the respective ratification of treaties legal requirements. The respective partner states' Constitutions and ratification of treaties Act detail procedure and rules for adoption and ratification of treaties. The Kenya and Uganda Ratification Acts, a representative sample of the other partner states, provide that treaties are ratified through cabinet and parliamentary approval.³²⁴ Under the Uganda Act, a treaty whose implementation the Attorney General affirms that it requires a constitutional amendment must be approved by the Parliament.³²⁵ The Kenyan Act stresses that any treaty seeking to alter the states' independence or sovereignty must be approved through a referendum.³²⁶

The adoption and ratification of the political federation protocol by the East Africa partner states will involve parliamentary and citizen approval with the latter involving national referendum. A constitutional amendment effected through a referendum requires a majority vote of approval by the respective citizens. The partner states' citizens will be asked whether they agree to join a single federation and cede their national sovereignty. For this amendment to be successful, it must obtain a majority citizen approval in all the respective partner states.

³²⁴ Ratification of Treaties Act (Cap 204 of Republic of Uganda) and Treaty Making and Ratification Act No. 45 of 2012 of Republic of Kenya, section 7 and 8.

³²⁵ Ratification of Treaties Act (Cap 204 of Republic of Uganda), section 2 (b).

³²⁶ Treaty Making and Ratification Act No. 45 of 2012 of Republic of Kenya, section 3 (3).

4.3 The Need for a Federal Constitution

Formulation of a federal constitution is a mandatory requirement for any federation world over. The establishment of the United States of America, Nigeria and Former Yugoslavia were all preceded by the adoption of federal constitutions.³²⁷ The USA and Yugoslavia examples offer the best benchmark for the envisaged East Africa federation. In both jurisdictions, their constituent entities were largely autonomous and exercised some form of sovereignty of their own. Their respective federal constitutions, however, provided for the vesting of such sovereignty to the new overall federal structure.³²⁸ The USA had, on independence in 1776, opted for a confederation system.³²⁹ This effectively retained sovereignty of the constituent thirteen colonies, making up the original United States Confederation. However, the subsequent formulation of the first federal constitution vested sovereign authority in the federal government at the expense of the constituent states making up the federation.³³⁰

The Partner States of East Africa would need to agree on a framework for the drafting of the federal constitution. A federal constitution is critical in defining the governance structure for the envisaged federation.³³¹ At the heart of such governance structure lies the issue of sovereignty of the partner states. A federal constitution sets up the structure of the federal government and, more specifically, vests in it sovereign authority.³³² The federal constitution may, however, state that the respective partner states' sovereign authority would cease to be, once the federation is formed. The federal constitution, in vesting sovereign authority to the newly created federation,

³²⁷ Conclusion, Chapter Two.

³²⁸ Independence Constitution of United States of America of 1781, and Yugoslavia Constitution of 1946.

³²⁹ Michael Burgess, 'Comparative Federalism; Theory and practice', (1st edn, Routledge 2006) 52

<http://www.untagmd.ac.id/files/Perpustakaan_Digital_1/FEDERALISM%20Comparative%20Federalism,%20Theory%20and%20practice.pdf> (accessed 5 May 2014).

³³⁰ Ibid.

³³¹ EAC, 'Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011).

³³² Ibid.

demarcates the jurisdictional relationship between the levels of government. The exercise of authority is determined by the vesting of different authority in the respective federal and state governments, by the federal constitution.

A brief study of existing world federations point at specific fundamental roles vested in the federal government. Federal governments mostly exercise authority over matters, namely, defence, foreign affairs, fiscal and economic policy, final appellate court jurisdiction and immigration.³³³ These roles are normally a preserve of national sovereignties and are a measure of the respective state's sovereign authority. The vesting of these roles to the East Africa federation would effectively signal the transfer of sovereignty from the partner states to the new political and legal entity. Most importantly, such transfer of key sovereign roles impacts the existing international relations of the respective partner states. The partner states are all members of international organizations and have rights and obligations. The vesting of foreign affairs to the new federal entity would require notification of the change to the respective international organizations.³³⁴ The envisaged East Africa federation would take up a single position, in place of various positions held by the partner states. The collapse of the USSR in 1989 saw Russia succeed the former by taking its permanent seat in the United Nations' Security Council.³³⁵

³³³ Tom Ojienda, 'Integration of the EAC; A Comparative Study on the Structures and Functioning of Federations' (Research Paper on Integration of the East African Community, June 2009), p. 9, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDOQFjAB&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D158%26Itemid%3D136&ei=XhP-UoX9O-TQygPH_oKgBw&usg=AFQjCNFTWa2EEY4Ry3sB5IkzpAQd5JtgMQ&sig2=uZrVy1x4GkSOH-etGT-Gxg&bvm=bv.61190604,d.bGQ> (accessed 4 October 2014).

³³⁴ Vienna Convention on State Succession in Respect of Treaties, art 17(1), 17 ILM (1978), 1488 <http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf> (accessed 10 October 2014).

³³⁵ Craven Mathew, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 European Journal of International Law 142 <<http://www.ejil.org/pdfs/9/1/1471.pdf>> (accessed 3 October 2014).

Succession to existing treaties by the newly formed federation deserves constitutional consideration. The Vienna Convention on Succession of States in respect of Treaties of 1978³³⁶ may guide the process. Article 33 of the Convention gives rules for treaty succession where two states unite to form a single new entity. Where two or more states unite to form a single state entity, possibly a federation, and any treaty in respect of the former states continue in force in respect of the successor state entity unless the former and successor states agree otherwise.³³⁷ International customary law also offers rules on succession of treaties by states. On bilateral treaties, newly emerging entities are not automatically bound by treaties previously entered by predecessor state(s).³³⁸ Bilateral treaties binding the individual East Africa partner states will, therefore, need renegotiation by the newly formed federation, for the latter to be bound. Multilateral treaties, on the other hand, governed by international law, necessitate a newly established state entity present a declaration of continuity to the depository of the treaty for it to become bound by treaties binding on the predecessor state(s).³³⁹ The East Africa federation would need to deposit the declaration of continuity for it to be bound to multilateral treaties binding to the partner states.

A challenge arises where partner states have membership in different international and regional organizations. Tanzania is a member of Southern Africa Development Cooperation³⁴⁰ while Kenya, Uganda, Rwanda and Burundi are members of Common Market for East and Central

³³⁶ 17 ILM (1978) 1488.

³³⁷ The Vienna Convention on Succession of States in Respect of Treaties of 1978 , United Nations, Treaty Series, vol. 1946, p. 3, art 33 (1).

³³⁸ Scottish Democratic Alliance, ‘The Succession of States: What Will Happen After the Referendum?’ (August 2012) 2, <<http://www.scottishdemocraticalliance.com/attachments/article/105/State%20succession.pdf>> (accessed 4 October 2014).

³³⁹ Ibid.

³⁴⁰ SADC

<<http://www.sadc.int/member-states/>> (accessed 8 October 2014).

Africa.³⁴¹ Such a scenario demands consensus between the partner states as to which organizations the new federation would succeed and be a member of. Where such disparities arise, the constituent states would have to reach a binding agreement on the choice of membership for the federation.

A more complex challenge may probably arise in the area of bilateral trade agreements entered into by the partner states. The possible large number of such different trade agreements presents a key challenge to the envisaged federation. The partner states will be tasked with determining trade agreements to be succeeded by the federation. This may, therefore, entail renegotiation with the respective bilateral partners. Collective negotiation within the East Africa Community has always proved complex due to the differing economic needs and statuses of the partner states. The current stalemate between the Community and the European Union on EPA trade agreements offers a testimony of difficulties.³⁴²

EPAs refer to trade agreements whose objective is to provide preferential market access to EU by Caribbean, Pacific and African countries.³⁴³ These trade agreements seek to guarantee quota and duty free entry of exports into EU. All African regional trading blocs have already concluded EPA negotiations with EU, except for the East Africa Community.³⁴⁴ The deadlock between EAC and EU revolves around agreement on agriculture and related exports. EAC proposed

³⁴¹ COMESA

<http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121> (accessed 8 October 2014).

³⁴²Gibendi Ramenya, 'Talks Debacle Heightens Crisis on EAC Exports to European Union' *Daily Nation* (3 October 2014)

<<http://www.nation.co.ke/business/EAC-EU-Talks-Exports-Duty-Free-Access-Kenya/-/996/2474682/-/566h6pz/-/index.html>> (accessed 4 October 2014).

³⁴³MwauraGitura, 'EAC Must Remain Together With Kenya on EPA' *The New Times* (4 October 2014)

<<http://www.newtimes.co.rw/section/article/2014-10-04/181603/>> (accessed 8 October 2014).

³⁴⁴NgugiNjoroge, 'Kenya EU Market Hinges on EAC Deal' *East African Business Weekly* (5 October 2014)

<<http://www.busiweek.com/index1.php?Ctp=2&pI=1952&pLv=3&srI=47&spI=28&cI=10>> (accessed 8th October 2014).

exclusion from liberalization of agricultural products, plastics, wines, spirits and chemicals, thereby, occasioning the deadlock.³⁴⁵

Kenya, the key player in the negotiations, lobbied its EAC partners to include special export duty provision, for protection of some sectors with the objective of restricting raw materials sale to Europe.³⁴⁶ This was informed by the desire to avoid making the region a dumping place for cheap products. However, the key challenge is that it is only Kenya among the EAC states that stood to lose out due to its categorization as a developing state.³⁴⁷ The four other states are categorized among Least Developed states, which guarantee duty free entry into the EU market without need of signing the EPA agreements.³⁴⁸ The deadline for conclusion and signing of the agreement was on 1st October 2014, which has since passed.³⁴⁹ Kenya's exports have therefore begun attracting duty, being the first country to do so in Africa.³⁵⁰

4.4 The Confederation Option

An East Africa confederation presents an option that may answer existing fears of establishing a federation. A confederation refers to a lesser form of federalism, where constituent member states retain their sovereignty with the central entity overseeing some agreed functions. A confederation arises where sovereign states join together to form a single common entity but

³⁴⁵ COMESA

<http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121> (accessed 8 October 2014).

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Gibendi Ramenya, 'Talks Debacle Heightens Crisis on EAC Exports to European Union' *Daily Nation* (3 October 2014)

<<http://www.nation.co.ke/business/EAC-EU-Talks-Exports-Duty-Free-Access-Kenya/-/996/2474682/-/566h6pz/-/index.html>> (accessed 4 October 2014).

³⁴⁹ Gibendi Ramenya, 'Now EAC Partners Abandon Kenya Over EU Exports Deal' *Daily Nation* (4 October 2014)

<<http://www.nation.co.ke/lifestyle/smartcompany/East-African-Community/-/1226/2476722/-/12613abz/-/index.html>> (accessed 8 October 2014).

³⁵⁰ Ibid.

retain their respective sovereignty.³⁵¹ A distinguished characteristic of a confederation is that decisions of the central government must be consented to by the constituent entities.³⁵² A confederation is differentiated from a federation by the member states' retention of sovereignty.³⁵³ The treaty forming a confederation usually provides for an opt-out clause to the partner states, an option not available in a federation.³⁵⁴

An East African confederation may turn out to be a practical compromise for the five partner states. Loss of sovereignty tops the list of fears hindering the realization of the envisaged East African Federation. The existence of East Africa partner states as independent states for a half a century explains their reluctance to cede sovereignty.³⁵⁵ Sovereignty lies at the heart of federation formation and failure to resolve it effectively slows down the process. A confederation has less effect on partner states' sovereignty as the latter is retained by the constituent units. Disparity in the respective states' political and constitutional cultures, may, further compound the fear of forming a common federation. Analysts have pointed existing disparities on several constitutional matters, namely, democratic practices, national constitutions, good governance, constitutionalism, rule of law, human rights and anti-corruption policies.³⁵⁶

³⁵¹Swenden Wilfried, 'Federalism and Regionalism in Western Europe; A Comparative and Thematic Analysis' (2006)

<http://www.untag-smd.ac.id/files/Perpustakaan_Digital_1/FEDERALISM%20Federalism%20and%20Regionalism%20in%20Western%20Europe.%20A%20Comparative%20and%20Thematic%20Analysis.pdf> (accessed 4 October 2014).

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ EAC, 'Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011).

³⁵⁶Abdulkarim Harelimana, 'The East African Political Federation; Addressing Fears, Concerns and Challenges', (Symposium of EALA 10th Anniversary, Arusha 2nd June 2011)
<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CE8QFjAH&url=http%3A%2F%2Fwww.eala.org%2Fkey-documents%2Fdoc_download%2F250-the-east-african-federation-challenges-for-the-future.html&ei=xTUuVLTJNl2aofTgsgE&usg=AFQjCNFidZ9C-5JvOxiYOeb5AYTvwSIQyg&sig2=zj-j3WYJlPf8fVk9iOxdfg&bvm=bv.76802529,d.d2s> (accessed 4 October 2014).

Tanzania's political landscape is dominated by a single ruling party, with opposition parties presenting no credible challenge.³⁵⁷ This may be attributed to its Ujamaa system, practised for a long period before introduction of multi-party system. The Zanzibar question continues to linger as its status as part of Tanzania elicits debate and controversy. Rwanda and Burundi are slowly emerging from a violent past, with both countries having experienced devastating civil strife. Uganda's democratic credentials and human rights track record remain questionable. The country's ruling party seems not ready to cede power, with the current president accused of seeking life presidency, with presidential term limits removed from the Constitution.³⁵⁸ Previous violent crackdown of opposition groups in Uganda compounds the situation. Kenya continues to grapple with the question of political ethnicity, a malignant condition that has slowed down constitutional gains over the years. These disparities create fears and suspicion among the partner states and increase reluctance to form a federation. A confederation, therefore, may be a more attractive option in the light of such disparities.

Formation of an East African confederation would be effected through adoption and ratification of an enabling treaty. Previous confederations, including USA and Switzerland, were all established through signing of respective treaties.³⁵⁹ The existing European Union is the only entity closest to a confederation³⁶⁰ a good benchmark for the East Africa Community. The five states should therefore commence negotiations for a Confederation treaty. The treaty would identify the specific roles shifted to the common entity, chief among them, a single economic

³⁵⁷Nyirabu Mohabe, 'The Multiparty Reform Process in Tanzania: The Dominance of the Ruling Party' (2002) 7(2) African Association of Political Science
<<http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/political%20science/volume7n2/ajps007002007.pdf>> (accessed 5th October 2014).

³⁵⁸EAC, 'Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation' (October 2011), p. 18.

³⁵⁹Vienna Convention on State Succession in Respect of Treaties, Article 17(1), 17 ILM (1978), 1488
<http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf> (accessed 10th October 2014).

³⁶⁰Ibid.

policy, common foreign policy and common defence pact. The existing East Africa Community and its respective organs provide a suitable foundation for a confederation. The Community's progressive approach towards integration has so far covered the basic requirements of a confederation. The partner states have previously signed a protocol for coordinated foreign policies.³⁶¹ Ratification and continued implementation of the Common Market and Custom Union points at progress towards a single economic policy.³⁶² The ongoing negotiations for establishing a monetary union take the states a step closer to having a single economic policy.³⁶³

The East Africa partner states have previously negotiated for a common defence pact, but the respective legal instrument is yet to be ratified.³⁶⁴ No partner state has so far ratified this defence protocol.³⁶⁵ Ratification of this common defence pact by all partner states would offer credence to creation of a confederation, as one of its key components would be in place. The existing structures of East African Community, namely, East Africa Legislative Assembly, East Africa Court of Justice, The Summit, Sectoral Committees and The Secretariat organs, may all be the key structures of a Confederation. The retention of sovereignty by the partner states makes the EAC organs suitable structures for a confederation as little changes would be required. A negotiated treaty would provide for a confederation absorbing the existing structures of EAC, with few structural changes.

³⁶¹ EAC, 'History of the EAC - Milestones in the EAC Integration Process'
<http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54&limitstart=1> (accessed 6 October 2014).

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ SID, 'The State of East Africa Report Series; Legal Status of Laws'

<<http://inequalities.sidint.net/soear/intergration-tracker/legal-status-of-laws>> (accessed 6 October 2014).

³⁶⁵ Ibid.

4.4 Effect of Federation Process to National Constitutions

Formation of the envisaged East Africa federation would inevitably trigger national constitutional amendments. All the partner states' constitutions define the respective states as national sovereign entities.³⁶⁶ The federation process involves cessation of sovereignty by the constituent states, which is only possible through an enabling constitutional provision. Adoption of a federation treaty and a federal constitution all vouch for the transfer of sovereignty to a common government. The partner states would be forced to institute amendments allowing ceding sovereignty to the new entity.

Constitutional amendment procedures among the partner states bear some similarities. Among the partner states, constitutional amendments regarding the clause on sovereignty require a two thirds parliamentary approval.³⁶⁷ Further, the proposed amendment must be subjected to a referendum for citizens' approval. This inevitably means the federation formation would trigger national referendum in all the partner states.³⁶⁸ A referendum is by a practice a political process that raises significantly the citizens' role in the federation process. Such an exercise presents the federation formation a key challenge since the integration process has largely been done without citizens' active input. Involving citizens only at the latter stages potentially raises the possibility of rejection of constitutional amendment seeking transfer of sovereignty.

³⁶⁶ Constitution of Kenya, Art 4 (1) (2); Constitution of the Republic of Uganda, Art 5(1); Constitution of the United Republic of Tanzania of 1977, Art 1; Proclamation of the United Republic Act No.15 of 1984 Art 6 and 2; Constitution of the Republic of Rwanda, Art 1.; Burundi Constitution of 2005, Art 1 and 2.

³⁶⁷ See discussion in Chapter 3.

³⁶⁸ Ibid.

An East Africa federation fundamentally alters the legal character of the respective partner states. They are currently referred to as national republics and exercise exclusive sovereign authority.³⁶⁹ Federation, however, would inevitably make the states cease to be referred to as sovereign republics. Such a change of legal identity is effected through enabling constitutional amendments. The respective partner states constitutions would need to be amended to recognize their new identity as constituent states of the new federation. Amendment of this clause in all the states is effected through a two thirds parliamentary approval and subsequent citizens' approval through a referendum.

4.6 Conclusion

Formation of the East Africa political federation presents EAC partner states with key constitutional challenges and implications. The federation formation would have to be preceded by adoption of an enabling treaty and a federal constitution. Both legal texts must grapple with the question of sovereignty, with partner states each defined as a national sovereignty. The treaty establishing the federation may have a provision stipulating that the respective states will cede their sovereignty to the new federation. Alternatively, the federal constitution may have a provision that once it is adopted, sovereignty would be vested on the federal government and not the national governments. Both options will require constitutional amendment since all the partner states' constitutions define them as exclusive national sovereignties. Amendment on sovereignty under the respective constitutions is effected through majority parliamentary approval and approval through national referendum.

³⁶⁹GibendiRamenya, 'Now EAC Partners Abandon Kenya Over EU Exports Deal' *Daily Nation* (4 October 2014) <<http://www.nation.co.ke/lifestyle/smartcompany/East-African-Community-/-/1226/2476722/-/12613abz/-/index.html>> (accessed 8 October 2014).

Adoption of an enabling treaty and federal constitution faces challenges that may hamper the federation process. Existing difficulties on the implementation of common market and custom union protocols portrays lack of full commitment by the partner states. Failure by most partner states to ratify the monetary union further compounds the otherwise slow integration process. Treaty negotiation will call for further negotiation on succession of treaties by the new federal unit, a matter that potentially presents a challenge to partner states. Different individual bilateral treaties binding the partner states will have to be negotiated, to agree on ones to be succeeded by the new federal entity.

The necessary national referendum exercises by the respective partner states to adopt the requisite constitutional amendments for the federation, is a political process. Varying political interests within the respective states would, therefore, make this process challenging and complex. Lack of involvement of East Africa citizens in the integration process, will likely affect negatively the respective referendum exercises. Deep underlying suspicions further compounds this process, making it a difficult feat to achieve. Effecting the constitutional changes necessary to achieve a federation turns out to be a complex and tedious process, making the envisioned federation difficult to achieve.

Pursuit of a confederation option by the East Africa partner states is a more practical and achievable. An East African confederation will retain sovereign authority among the constituent states with ceding of national sovereignty not necessary. This offers a major solution to the sovereignty issue, a thorny political matter that has consistently dogged the integration process. Partner states will no longer struggle with this issue of whether to cede sovereignty or not. A confederation focuses mostly on economic, social and defence unity of the constituent units. The ratification and continued implementation of the customs union and common market, gives the

confederation a solid foundation. Progress towards achieving a single monetary union further boosts the region's economic integration. Ratification of a recently signed common defence pact by the states will cement the region's defence unity.

Adoption of a confederation presents few constitutional challenges compared to a federation. Its establishment would only entail adoption and ratification of an enabling treaty. Non-alteration of the partner states' sovereign character may negate the need for national referendum to effect constitutional amendments. Constitutional amendment to ratify the confederation treaty may be done only through parliamentary approval. These factors therefore make establishment of a confederation an achievable option compared to a federation. The partner states ought to pursue confederation formation at the expense of a federation.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.0 Conclusion

The Treaty Establishing the East African Community under Article 5(2) envisages the formation of an East Africa political federation. The treaty, however, does not provide clear constitutional framework necessary to achieve the federation. The Partner States national laws similarly do not provide for a legal framework for the realisation of the envisaged federation. Establishment of the federation will have critical constitutional impact to the East Africa Partner States.

The negotiation and adoption of a Treaty Establishing the envisaged East Africa federation is the first constitutional implication. Analysis of existing world federations shows that their respective formation was commenced by the adoption of a federal treaty, negotiated by the constituent States. The Treaty Establishing the East Africa Community is inadequate to be considered as a treaty for establishing the federation. The East Africa partner states have to negotiate and adopt an enabling treaty to realise their federation's aspirations. As the case for existing world federations, treaty establishing a federation must address the question of sovereignty. The federal treaty may incorporate a provision requiring ceding of sovereignty by the states to the federal entity.

A Treaty establishing a federation also addresses succession of existing agreements and treaties binding the constituent States. This may be guided by the Vienna Convention on Succession of Treaties of 1978 and rules of international customary law on succession of treaties. The East Africa Partner States are member states to various bilateral and multilateral treaties. In

negotiating a federal treaty, the Partner States must address the succession of existing binding bilateral and multilateral treaties by the new federal entity.

Adoption of a federal Constitution is a constitutional implication that accompanies formation of a federation. All existing world federations adopted a federal constitution as a key step to forming a federation. The East Africa Partner States must, therefore, adopt a federal constitution providing for the new governance structure and defining the jurisdictional relationship between the states and federal governments. The federal constitution is instrumental in providing for the transfer of sovereignty from the Partner States to the new federal entity.

Formation of the envisaged East Africa federation has a direct impact on the Partner States sovereignty. All the East Africa partner states constitutions' define them as national sovereignties with no provision for the envisaged federation. Kenya, Uganda and Tanzania have recently undertaken constitutional review exercises but did not provide for a federation. They all retained their respective national sovereignties. The success of the East Africa partner states' vision to form a federation depends on the states' agreement concerning their respective national sovereignties. Formation of the federation necessitates the ceding of sovereignty by the Partner States to the new federal entity.

Addressing the question of sovereignty has constitutional implications to the East Africa Partner States. The respective national constitutions provide that any amendment to the sovereignty clause is only effected through national referendum and absolute majority of parliamentary approval. Any proposed Treaty Establishing the Federation and the federal constitution both imply transfer of sovereignty and adoption of a new governance structure. Both of these,

therefore, necessitate national referenda to approve constitutional amendments effecting the changes within the five Partner States.

The necessity of national referendum within the partner states to establish the federation presents a challenge. Referendums are political processes dictated majorly by the citizens' participation. The continued sidelining of the East Africa citizens from the integration process by the EAC summit may result in vote defeat to the federation formation. Existence of underlying suspicions among the partner states compound difficulty to the federation process. The suspicions and the states' reluctance to fully implement the other stages of integration due to fear of loss of sovereignty dampen further, the possibility of achieving a full federation

5.1 Recommendations

As a result of the above findings, this study recommends the need to alter the need to establish a federation and efforts be focused towards forming a Confederation. The East Africa partner states ought to commence negotiations for the formation of a Confederation instead of the envisaged federation. The EAC Treaty provisions outlining the various integration steps, favour practical realization of a Confederation at the expense of a federation.

Formation of an East African Confederation would retain the partner states' respective sovereignty. Retention of partner states' sovereignty eliminates a key obstacle to the region's political integration process. The Confederation government exercises exclusive authority over economic policy and defence matters. Ratification and implementation of the Common Market and Customs Union Protocols by the Partner States provides a solid foundation for a Confederation. The continued steps to ratify a single Monetary Union and Common Defence Protocols by the states further, justify the Confederation option.

The study recommends increased efforts by East Africa Partner States to implement the ratified Common Market and Customs Union Protocols. They ought also to ratify the signed single Monetary Union Protocol within the provided time deadline. The three Protocols play a critical role in an attempt to achieve economic integration of the region, a key pillar of a Confederation. The Partner States ought also to ratify the signed Common Defence Protocol to facilitate the formation of the Confederation.

Lastly, this study recommends the increased involvement of the East Africa citizens in the integration exercise. Citizens form a key component of the integration process and its success hinges on their participation and approval. The current East Africa Community organs ought to spearhead integration sensitization campaign within the five Partner States. The respective national governments should sensitize the citizens on the benefits of the integration process. Increased citizens' participation will boost and hasten the integration efforts.

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[tgOAG&usg=AFQjCNGibbrtXpmhtpxZvILIEsRoDKc67g&bvm=bv.74649129,d.d2s](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCYQFjAA&url=http%3A%2F%2Ffederation.eac.int%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D162%26Itemid%3D136&ei=z7H4UurUKMm8ygPazIKoBg&usg=AFQjCNFDnqGp5ii1Y6RVvtnbF_DmM8gupg&sig2=la85kgLPek-ri4Pu65S8aw&bvm=bv.60983673,d.bGQ)>(accessed 9 September 2014).

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