A LEGAL ANALYSIS OF THE RELATIONSHIP BETWEEN STATE SOVEREIGNTY AND REGIONAL INTEGRATION

A Comparative Study of the European Union and the East African Community

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DEDICATION

To

my spouse

Adeline IRANZI

&

My Children

Miguel Angel IRISA and Eliora Aila IRIHO

ABSTRACT

This study analyses the relationship between state sovereignty and regional integration by comparing the European Union (EU) and the East African Community (EAC). To this end, it tries to understand the extent to which Partner/Member States must surrender some of their sovereign rights to the Community and, at the same time, without losing or harming their sovereignty altogether.

In order to respond to this question, this study analyses, in both the EU and EAC, three elements that are considered to be the main determinants of the relationship between state sovereignty and regional integration. These are the powers or competences of the Union/Community in comparison with those of their Partner/Member States; the influence of the institutions of the Partner/Member States over those of the Union/Community; and the status of the Union/Community law within the national legal system of the Partner/Member States. After a well-rounded study of these elements, this study concludes that Partner/Member States are still reluctant to surrender their sovereign rights to the Union/Community they belong to. However, this study consistently shows that, they should not fear losing their sovereignty because, surrendering some of their sovereign rights to the community does not mean an absolute loss of sovereignty. Specifically, this study insists that the Partner/Member States are the masters of the treaties and that the Union/Community must act within the limits of the competences which have been transferred to it in the treaties.

The analysis of the three elements also led to the conclusion that the EU and the EAC are both supranational and intergovernmental organisations. However, unlike the EU which has more supranational features and less intergovernmental features, the EAC is more intergovernmental and presents weak aspects of a supranational organisation. To this end, after noting that supranationalism is a good signal of a release of some sovereign rights by the Member/Partner States to the Union/Community, this study proposes some recommendations which may contribute towards enhancing the supranationalism of the EAC.

List of Abbreviations and Acronyms

AFSJ	: Area of Freedom, Security and Justice
ANRT	: *Atelier National de Production des Thèses*
BVerfG	: *Bundesverfassungsgericht*
CFSP	: Common Foreign and Security Policy
CM	: Common Market
CODESRIA	: Council for the Development of Economic and Social Research in Africa
Colum. J. Eur. L.	*: Colombian Journal of European Law*
CU	: Customs Union
DUP	: Dar es Salaam University Press
EAC	: East African Community
EACJ	: East African Court of Justice
EACSO	: East African Common Services Organisation
EAEC	: European Atomic Energy Community
EAEC	: European Atomic Energy Community
EAHC	: East African High Commission
EALA	: East African Legislative Assembly
EC	: European Community
EC	: European Community
ECB	: European Central Bank
ECJ	: European Court of Justice
ECOWAS	: Economic Community of West African States
ECSC	: European Coal and Steel Community
ed.	: Edition
EEC	: European Economic Community
EEC	: European Economic Community
EP	: European Parliament
ERA	: *Europäische Rechtsakademie*

ESM	: European Stability Mechanism
EU	: European Union
FTA	: Free Trade Area
GCC	: German Constitutional Court
JHA	: Justice and Home Affairs
LJIL	: Leiden Journal of International Law
MU	: Monnetay Union
No.	: Number
OHADA	: *Organisation pour Harmonisation en Afrique du Droit des Affaires*
op.cit.	: *opere citato*
p.	: page
para.	: Paragraph
PF	: Political Federation
PSPP	: Public Sector Purchase Programme
PTA	: Preferential Trade Area
PU	: Political Union
PUF	: *Presse Universitaire de France*
QMV	: Qualified Majority Vote
Ref.	: Reference
SADC	: South African Development Community
SEA	: Single European Act
SYbIL	: Spanish Yearbook of International Law
TEU	: Treaty on the European Union
TFEU	: Treaty on the Functioning of the European Union
TGCL	: Tanzanian- German Centre for Eastern Africa Legal Studies
UK	: United Kingdom
VCLT	: Vienna Convention on the Law of Treaties
Vol.	: Volume
VRÜ	: *Verfassung und Recht in Übersee*

Vs.	: *Versus*
WHO	: World Health Organisation
ZERP	: *Zentrum für Europäische Rechtspolitik*

CHAPTER ONE
GENERAL INTRODUCTION

1.1. General background and subject matter of the study

The 21st Century has been characterized by different kinds of challenges in the world. Indeed, as Mwanawima describes it,

> "Terrorism, economic meltdown, poverty, unemployment and demands from the governed such as better living conditions and respect for human rights. It has become evident that state can no longer exist in isolation; there is a greater demand and advantage in entering into regional or international agreements in order to be able to survive in an increasingly interdependent world."[1]

From there, states tried to organize themselves into regional blocs in order to avoid those different challenges and, most importantly, to solve them. In this regard, regional integration was seen as one of the solutions that can help to solve these challenges. This is supported by Joaquin Roy and Roberto Dominguez who consider that:

> "Regional integration processes are meant to provide a peaceful arena in which sovereign countries voluntarily combine their efforts in areas of mutual concern, creating common regional interests and objectives."[2]

Therefore, the aspiration of integration processes is to become a space of conciliation between the creation of regional common goods and national interests, cultures, practices, and policies. However, there is uncertainty related to knowing the extent to which the Member/Partner States must surrender sovereign rights to the community in order to contribute toward successful integration and the extent to which they can do it in order to avoid losing their sovereignty altogether. Indeed, although sovereignty is a

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[1]Ilyayambwa Mwanawima, *Regional Integration versus National Sovereignty: A Southern African Perspective*, in Verfassung und Recht in Ubersee VRU, Vol.44, 2011, p. 465. https://www.vrue.nomos.de/fileadmin/vrue/doc/Aufsatz_VRUE_11_04.pdf .

[2] Joaquin Roy and Roberto Dominguez, *The European Union and Regional Integration: A Comparative Perspective and Lessons for the America,* University of Miami, 2005. See https://eucenter.as.miami.edu/_assets/pdf/the-eu-regiional-text-cover-final.pdf .

concept that is not easy to define, there is a common comprehension that it "(sovereignty) has a double aspect; it is closely related to the state capacity of governing itself and settling its own rules and it is also related to its right of doing what it wishes, without external interference".[3] Therefore, there is uncertainty regarding how these two elements can be conciliated since State sovereignty requires non external interference whereas integration implies, to some extent, that the State leaves a part of their sovereignty to the Community organs.

The uncertainty regarding the extent to which Partner/Member States can transfer sovereign rights to the community organs for a successful realization of the integration process without harming the state sovereignty of the Partner/Member States appeared several times in the process of integration of the European Union and East African Community; and this has been at the center of the slow progression in the integration process. Indeed, in both communities, some member states have been willing to "take back their control". For instance, in the European Union, since its admission to membership in the European Community in 1973,[4] the UK was unenthusiastic and uninclined toward European political Integration,[5] arguing that there was an absence of direct democratic control by its citizens. Clearly, the UK illustrated an unwillingness to "transcend traditional notions of national sovereignty or any criticism on its limits" thereby rejecting some concepts and ideas such as shared sovereignty, European multilevel governance, and supranational democracy.[6] The result was "Brexit", an appellation to indicate the exit of the UK from European Union on 23 June 2016 when its citizens voted, in a referendum, in favor of leaving the Union. Officially, the withdrawal became effective on 31 January 2020. According to the report done by the Directorate General for Internal Affairs Policies in the EU Parliament, some messages used by Brexit defenders like "Take back our control" or "Britain First" influenced the electorate to

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[3] Renata Giannini, *The Rule of Law: State Sovereignty vs. International Obligations,* Graduate Program in International Studies, Old Dominion University, 2010, pp 3-4. https://www.odu.edu/content/dam/odu/offices/mun/2010/legal/issue-brief-2010-the-rule-of-law.pdf.

[4] Alina Kaczorowska, *European Union Law*, Routledge. Cavendish, London and New York, 2009, p.74.

[5] Study conducted by the Directorate General for Internal Policies - Policy Department for Citizen's Rights and Constitutional Affairs, "Brexit *and the European Union: General Institutional and Legal Considerations*", January 2017, p.5.

[6] *Ibidem.*

favor leaving the Union.[7] These campaigns imply the willingness of the UK to keep its sovereign rights in the relationship with the European Union. In order words, these campaigns emphasize the fact that being in the European Union has taken control of the UK from its citizens, and therefore, has undermined the UK's sovereignty.

Besides Brexit, uncertainties can be also noted through an important number of cases in the EU Member States' constitutional Courts concerning sovereignty questions in relation to the European Union. Specifically, several decisions were delivered by constitutional courts in the EU Member States as a response to the request by their citizens challenging the EU legislation, which was seen as an organization stealing some of their sovereign rights. For instance, after the Lisbon Treaty extended the competencies of the European Union, tensions within Member States increased as they felt that the Union was going to undermine their sovereignty. In these perspectives, this Treaty was challenged before different constitutional courts of the EU Member States which had to decide whether it was in conformity with their national laws or whether it breached some of their sovereign rights. Such decisions were delivered by the French *Conseil Constitutional,*[8] the Austrian Constitutional Court,[9] the Czech Constitutional Court,[10] the Latvian Constitutional Court,[11] the German Constitutional Court "*Bundesverfassungsgericht",*[12] the Hungarian Constitutional Court,[13] and the Polish Constitutional Court.[14] Similarly, in a recent case on 5 May 2020,[15] the powers of the European Union's institutions were challenged before the German Constitutional Court. In this case, the German Constitutional Court rendered that the decisions of European Central Bank on Public Sector Purchase Programme exceeded the competences of the European Union.[16] In other words, it indicated that this Bank acted *ultra vires* i.e. beyond the powers expressly conferred to it by the *Bundestag*.

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[7] Study conducted by the Directorate General for Internal Policies - Policy Department for Citizen's Rights and Constitutional Affairs, *op.cit*., p.6.
[8] French *Conseil Constitutionel* , case 2007-560 DC Treaty of Lisbon, 20 Dec. 2007.
[9] Austrian Constitutional Court, case SV 2/08-3 et al Treaty of Lisbon I, order of 30 Sept 2008.
[10] Czech Constitutional Court, Case pl US 19/08 Treaty of Lisbon I, 26 Nov 2008.
[11] Latvia Constitutional Court, case 2008-35-01 Treaty of Lisbon, 7 April 2009.
[12] German BVerfG, case 2 Bv 2/08 et al, Treaty of Lisbon, 30 June 2009.
[13] Hungary Constitutional Court, case 143/2010(VII.14), 12 July 2010.
[14] Polish Constitutional Court, case K 32/09, 24 Nov 2010.
[15] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15.
https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html .
[16] Ibidem. See also Press Release of the German Constitutional Court No. 32/2020 of 05 May 2020.

In the East African Community, the uncertainty regarding how the concepts of state sovereignty and regional integration are conciliated is clearly visible from the Treaty establishing the East African Community. Indeed, a deep analysis of this Treaty reveals an overconcentration of powers of the decision-making and implementation powers on Partner States namely on the Summit, the Council of Ministers and other bureaucrats who answer to the heads of States.[17] This overconcentration of powers has already affected the independence of the community's institutions in their role of facilitating the integration process. For instance, after the East African Court of Justice took a decision in 2006, in the so-called Anyang'o Nyong'o case,[18] the Summit was not happy with the court's decision as the latter was clarifying provisions of the Treaty on how members of the East African Legislative Assembly should be elected. In a final joint communiqué of an extraordinary meeting convened for the same purpose, the Summit made a declaration in which it indicated the intention to amend the Treaty in order to add more grounds for removal of judges. The communiqué indicated that "the procedure for the removal of Judges from office provided in the Treaty should be reviewed with a view to include all possible reasons for removal other than those provided in the Treaty".[19] The treaty was amended immediately in article 23 in order to include these recommendations. In addition to this, the political class in each Partner State has been reluctant to implement decisions of the Community due to the fear of losing power.[20] Despite this reluctance, the East African Court of Justice clarified that, in the integration process, Partner States are expected to cede some amount of sovereignty and that this does not mean their sovereignty is lost. Indeed, it indicated as follows:

> "While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role".[21]

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[17] Joshua M. Kivuva, *The East Africa's Dangerous Dance With the Past: Important Lessons the New East African Community Has Not Learned from the Defunct*, in European Scientific Journal, vol.10, December 2014, p.362.
[18] *Peter Anyang' Nyong'o and 10 others V The Attorney General of Kenya and 5 others,* Reference N° 1 of 2006.
[19] Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.
[20] Jonshua M. Kivuva, *op.cit*., p.362.
[21] *Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others*, Ref. n° 1 of 2006, pp.44.

All these uncertainties, among others, reflect an existence of a range of questions: In the integration process, should sovereignty be shared, limited, or divided for the effectiveness of the integration process? Or should it remain monopolized? If it is to be shared or limited, to what extent should or can this limitation be imposed? Should sovereignty be transferred to the Community in its entirety? In order to respond to these questions, this book analyses the interaction between these two elements, namely state sovereignty and regional integration, in the European Union and in the East Africa Community respectively. With reference to these two communities - European Union and East African Community - this study is built on a general objective of understanding the relationship between state sovereignty and regional integration. Specifically, in the first instance, it determines this relationship in the European Union before it analyzes it in the second instance, within the context of the East African Community. Examples will be used to illustrate how the European Union can help the East African Community to progressively develop by means of elucidating the concept of sovereignty.

1.2. General background to the European Union and East African Community

What should be understood by European Union (EU)and East African Community (EAC)? The EU is a family of States which comprises 27 States. They are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain and Sweden. Macedonia and Turkey are candidates for membership.[22] The United Kingdom has been a Member since 1973 until it withdrew on 31 January 2020.[23] The EU was originally founded in 1957 by six States, namely Germany, Belgium, France, Italy, Luxembourg, and Netherlands[24] -at the time, the current European Union was called European Economic Community (EEC)- through the Rome Treaty of 1957.[25] Other countries joined later at different periods thereby enlarging the Community to 27 member States.[26] The objectives of the creation

[22] http://europa.eu/about-eu/countries/index_en.htm. Visited on 20.04.2020.
[23] http://europa.eu/about-eu/countries/index_en.htm. Visited on 20.04.2020.
[24] Hartley, *The foundations of European Community Law*, 6th ed., Oxford University Press, 2007, p. 3.
[25] The Rome Treaty was signed on 25 March 1957 and entered into force on 1 January 1958. See Hartley, *op.cit.,* p.3.
[26] http://europa.eu/about-eu/countries/index_en.ht.

of the EU are specified in the article 3 of the Treaty on the European Union.[27] The founders of the European Union foresaw that tasks given to the Union should be carried out by the following institutions: the European Parliament, the European Council, the Council of Ministers, the European Commission, and the Court of Justice of the European Union.[28]

The EAC, on the other side, is another Regional Economic Community that aims to strengthen the economic, social, and political integration among its six Partner States - Kenya, Tanzania, Uganda, Rwanda, Burundi, and South Soudan.[29] One of its aims is to "establish a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation".[30] Furthermore, in this Community, organs have been established by the EAC Treaty in order to facilitate the realization of the objectives of the EAC. They are namely "the Summit, the Council, the Co-ordination Committee, Sectorial Committees; the East African Court of Justice, the East African Legislative Assembly, the Secretariat, and such other organs as may be established by the Summit".[31]

1.3. Brief review of current knowledge

With the advent of regional blocs, scholars started being interested in understanding regional integration mechanisms. This explains the existence of a significant number of publications in this area.

However, one would note the existence of shortage of publications on the relationship between the concepts of state sovereignty and regional integration, and most importantly, an absence of literature in a comparative method between EU and EAC. Whereas the issue of state sovereignty attracted the attention of many scholars in the

[27] It includes, among other, the promotion of peace, EU's values and well-being of its peoples; the establishment of an area of freedom, security, and justice without internal frontiers to its citizens; the establishment of an internal market, an economic and monetary union whose currency is the Euro. See article 3 of the Treaty on the European Union.
[28] Article 19 of the Treaty on the European Union.
[29] Grail Research, *The East African Community (EAC): It's Time for Business to Take Notice,* January 2012, p.6 Available on http://www.grailresearch.com/pdf/ContenPodsPdf/Grail-Research-The-East-African-Community.pdf.
[30] Art 5(2) of the Treaty for the Establishment of the East African Community.
[31] *Art* 9 of the Treaty for the Establishment of the East African Community.

case of the European Union, the situation is very different in the case of the East African Community. In other words, the question of state sovereignty has been analysed in the EU but not in comparison with the EAC. Indeed, there is a significant number of publications on this matter, specifically in the context of the European Union. It is therefore not easy, even possible to explore all of them. In the following paragraph, this research tries to highlight some few examples in order to provide a general overview on the current literature in the EU and EAC on this legal issue.

In the European Union, the literature on the question of the relationship between State sovereignty and regional integration focuses mainly on the legal status of the European Union within its member states and the relationship between national institutions and community institutions. However, these books do not focus specifically on the relationship between regional integration and State Sovereignty but dedicate only some sections to this matter.

Indeed, most of the authors who discuss the European Union Law raise the question of the relationship between European Union law and national laws. In this regard they largely explore the role of the European Court of Justice in determining this relationship as it was this court which created the principles of Direct effect and supremacy of the European Union law. They explore the famous judgements in the *Van Gen en Loos* and *Costa* wherefrom these principles originated. Almost all the scholars on European Union Law mention this contribution by the European Court of Justice in defining the legal status of the European Union. They underline the importance of preliminary rulings in the development of the European Union Law. Thus, authors like Bruno De Witte,[32] Joe Shaw,[33] Paul Graing and Grainne De Burca,[34] Hartley,[35] Alina Kaczorowska,[36] among others intervened in describing this input brought but the ECJ in the definition of the EU law, and establishment the principle of direct effects and supremacy of the EU law. These books helped in the establishment of a well-rounded comparative study with the

[32] Bruno De Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in Paul Craig & Crainne de Burca, *The Evolution of the European Union Law*, 2nd ed., Oxford University Press, 2011, p. 324.
[33] Jo Shaw, *Law of the European Union*, 3rd ed., Palgrave, pp 422-428.
[34] Paul Graig and Grainne De Burca, *EU Law, Text, Cases and Materials,* 5th éd., Oxford, 2009.
[35] TC Hartley, *The foundations of the European Community Law: An introduction to the Constitutional and Administrative Law of the European Community*, 6th ed., Oxford University Press, 2007.
[36] Alina Kaczolowiska, *European Union Law*, Routledge. Cavendish, London and New York, 964 p.

East African Community regarding the determination of the legal status of the East African Community law within national legal system.

Alan Dashwood, Michael Dougan, Barry Rodge, Eleonor Spaventa and Derrick Wyatt[37] dedicate a section in their books to the principles which guide the integration process whereas Paul Graing and Grainne De Burca[38] describe the development of the European Integration, the European Union's institutions, and their powers. Robert Schütze,[39] in describing different institutions of the European Union and their role, tries to analyze the evolution of the EU Parliament and its powers. These books explain, equally, the competence of the Union together with the European Union's instruments and the hierarchy of norms. All these books are general and none of them deal with all these aspects in a comparative way that shows the relationship between the sovereignty of the EU Member States and regional integration.

Johannes Döveling introduces an overview of the relationship between German Law and European Law describing how Germany contributes to the effectiveness of European Law and at the same time protects its constitutional identity.[40] He looks at some general aspects of the relationship between the European Union Law and national law in the eyes of the European Union Law before he analyses the impact of the European Union Law at the German national level. In his article, he describes the openness of the constitution of the Federal Republic of Germany toward the European integration process. He indicates that this openness was also confirmed by the German Constitution Court in the decision on Maastricht Treaty and the decision on Lisbon Treaty. Döveling's study is of great importance for our research. In fact, it facilitated the comprehension of some aspects of the relationship between community law and national laws. Therefore, it served as a starting point that helped with the development of a well-rounded comparative study with the East African Community on different aspects of sovereignty.

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[37] Alan Dashwood et alii, *Wytt and Dashwood's European Union Law*, 6th éd., Oxford and Portland, Oregon 2011.
[38] Paul Graig and Grainne De Burca, *EU Law, Text, Cases and Materials,* 5th éd., Oxford, 2009.
[39] Robert Schutze, *An introduction to European Law*, Cambridge University Press, Cambridge 2012, p. 314.
[40]Johannes Döveling, *How Germany contributes to the Effectiveness of the European Union Law and simultaneously preserves its Constitutional Identity*: An Overview of the Relationship between German Law and European Law, Josaphat L. Kanywanyi*, Regional Integration and Law: East African and European Perspectives,* Dar es Salaam University Press, Dar es salaam, 2014, pp.233-265.

Olivier Dubos discusses the relationship between the French Constitution and the European Union.[41] Significant aspects of the state sovereignty were developed in his article. Indeed, Dubois realized that, in its role as a constitutionality reviewer of treaties, the Constitutional Council is at the same time a guardian of the national sovereignty[42] and a guardian of the constitutional identity.[43] In fact, under the constitutionality review of treaties mechanism, the French Constitutional Council rules on the constitutionality of a Treaty before it comes into force - a *Priori* Review[44] - or even when it has already come into force, a *Posteriori* Review.[45]

On the side of the East African Community however, there are no scholars who dedicate their research to this relation between state sovereignty and regional integration, and most importantly in comparison with the EU. Below are some examples scholars who are interested on the EAC integration but who really do not focus their research on cohabitation between the concepts of sovereignty and regional integration.

Oppong[46] discusses the implementation of Community Laws in Africa.[47] He tries to clarify the notions of direct applicability of community law, direct effects of Community law, the "automatic enforceable" community law and the protection of the implementation of Community laws.[48] He also discusses the implementation of national laws and community laws and emphasizes the relationship between national laws and the community,[49] as well as the national judicial philosophy versus Community Law.[50] Oppong's book has the merit of describing the sensitive points on the issue of sovereignty but not in the East African Perspective but in a broader way as he analyses them in the context of the African Integration. This study tries to address and fill this gap

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[41] Olivier Dubois, *The French Constitution and the European Union: The Alchemy of Sovereignty and Integration at the Service of the Constitutional Council?* In Josaphat L. Kanywanyi*, Regional Integration and Law: Est African and European Perspectives,* Dar es Salaam University Press, Dar es salaam, 2014, pp.197-2019.
[42] *Idem*, pp.201-203.
[43] *Idem*, pp.214-219.
[44] *Idem*, pp.201-210.
[45] *Idem,* pp.210-214.
[46] Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa*, Cambridge University Press, 2011.
[47] *Idem*, p.188.
[48] *Idem*, pp.190-203.
[49]*Idem*., pp.203-215.
[50] *Idem*, pp.215-222.

by means of paying specific attention to the East African Community and the European Union.

Mwapachu[51] explains how the role of the East African Court of Justice in regional integration is highly limited through its jurisdiction which is only related to the interpretation and the implementation of the Treaty. He underlines the efforts that have been done to extend its jurisdiction in order to include other matters involving human rights matters and highlights how weak the support has been from Partner States regarding these efforts. However, he also mentions that the Court has found itself exercising the jurisdiction on matters that include the human rights dimension. Another limitation of the EACJ to the promotion of integration that he underlines is that matters in commercial disputes which also fall under Customs Union and Common Market Protocols are handled by national bodies. In his work, Mwapachu failed to underline that these shortcomings are due to the maintenance of the sovereignty by Member States and to give recommendations on what should be done in order to empower the EACJ so that it can play a pivotal role in promoting integration like that of the ECJ.

Mangachi is silent on a very important point in his discussion of the East African Experience in Regional Integration[52] as he does not discuss about state sovereignty as one of the major problems of the integration process in East Africa. Indeed, his book focuses more on the history of integration in East Africa from its beginning until the new East African Community.

In his book, Johannes Döveling[53] analyses the legal instruments and implementation mechanisms of the East African Community. Although his book touches some aspects of state sovereignty namely the relationship between the East African Community Law and that of the Partner States, as well as the powers of the community organs in the EAC integration process, it does not answer all the questions existing on this issue . The

[51] Juma V. Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics pf Policies, Politics and Transformations in the East African Community*, E & D Vision Publishing, Dar es Salaam, 2012, p.140-142.
[52] Msuya Waldi Mangachi, *Regional Integration in Africa: East African Perspective*, Safari Books Ltd, 2011.
[53] Johannes Döveling, *Das Recht der Ostafrikanischen Gemeinschaft: Eine Kritische Analyse*, Mohr Siebeck, Tübingen, 2019.

matters developed in this work will be supplemented by a comparative perspective of the European Union.

To conclude, existing research shows clearly that there is no study that describes these two concepts (sovereignty and integration) in a comparative way involving both the European Union and the East African Community. For instance, if one wants to understand the link between state sovereignty and regional integration, it is imperative that one looks at the nature of the Constitutions of the Member States in relation with the community law. In the context of East African Community, this aspect is left untreated, and no scholars have, so far, analyzed the degree of openness or flexibility of the Constitution of the EAC Partner states for the realization of the integration process. Scholars also failed to demonstrate the relationship between institutions at the EAC level and national institutions. This leads to a situation where competences of the Community remain unclear in comparison with those of its Partner States. This study will try to discuss all these unstudied aspects in a comparative approach with the European Union by trying to bring together the discussions in these two communities.

1.4. Data Collection Methods

In carrying out this research, the data collection entailed the use of two methods: documentary review and interviews.

1.4.1. Documentary Review

The documentary review is motivated by the essence of the study which aims to review and assess the relationship between state sovereignty and regional integration with a comparative study between the European Union and the East African Community. Thus, the documentary review method helped to collect necessary materials related to the study. In this regard, this method involved the visit of different libraries namely, the main library of the University of Bayreuth (*Zentralbibliothek*), the Library of the Faculty of Law and Economics of the University of Bayreuth (*RW-Bibliothek*), the Library of the Tanzanian-German Centre for Eastern Africa Legal Studies (TGCL) at the University of

Dar es Salaam, the main library of the University of Dar es Salaam (Tanzania), the Information Centre of the East African Community Secretariat (Arusha- Tanzania), the Library of the East African Court of Justice (Arusha), the documentation centre of the Burundian Ministry in charge of the East African Community, the Central Library of the University of Burundi (in Burundi). Herein, this study analysed different documents namely, legal instruments governing international relations, legal instruments governing the European Union and the East African Community, national constitutions, case law from both the European Court of Justice and the East African Court of Justice together with their commentaries, judicial decisions of national constitutional courts from both sides (the European Union and the East African Community), books, journal articles, reports by different community organs from both the European Union and the East African Community), newspapers, and other relevant materials.

For instance, at the national level, given that state sovereignty is generally a matter of national constitutions, this research analyzed the relationship between some national constitutions and community laws. With regard to the European Union, it briefly analysed all the constitutions of the EU Member States in order to find out how open they are to the EU integration process. In connection with this, there was an analysis of the decision of Germany Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) on the Maastricht Treaty and the Treaty of Lisbon, and the position of the French Constitutional Council with regard to European Union Treaties. In the East African Community, this study considered the position of the constitutions of the EAC Partner States on the regional and international treaties. It specifically analysed some articles from national constitutions related to the relationship with community laws in both the European Union and the East African Community. For instance, article 23 of the German Basic Law limits the conferral sovereignty powers of the Federal Republic of Germany. This article indicates that the Federal Republic of Germany will participate in the development of the European Union that is committed to democratic, social and federal principles, as well as the rule of law, the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law.[54] It concludes that, to this end, the federation may transfer sovereign power by a

[54] Article 23 (1) of the German Basic Law or Constitution.

law with the consent of the Bundesrat.[55] Furthermore, it recognizes the right to challenge a legislative act of the European Union by the Bundestag and the Bundesrat when it infringes the principle of subsidiarity.[56] It also indicates how the Federal Government must take the position of the Bundestag into account during the negotiations while participating in legislative acts of the European Union.[57] Most importantly, this article evokes the respect of the German's constitutional identity. Specifically, it clarifies that, "the establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement the Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of article 79".[58]

In France, article 54 of the French Constitution establishes the Constitutionality review of treaties. If the Constitutional Council has held that international undertaking contains a clause contrary to the Constitution, authorization to ratify or to approve the international undertaking involved may be given only after the constitution is amended.[59] Similar provision exists in the Constitution of Burundi. Article 296 reflects similarities with the Constitution of France when it specifies that if the Constitutional Court has proclaimed that an international agreement contains a clause contrary to the Constitution, the authorization to ratify that agreement cannot intervene before the amendment of the Constitution. With reference to different constitutions, all these issues regarding the relationship between Community law and national laws are developed in this study.

At the community level, all the instruments governing the institutional framework of the East African Community and European Union were analyzed. This helped the researcher to construct a well-rounded analysis on the interference of Partner States in the community's decision-making bodies. Indeed, this study examined the decision-making process in the European Union and East African Community through community institutions with the goal of determining the influence of Partner States due to the

[55] Article 23 (1) of the German Basic Law or Constitution.
[56] Article 23 (1a) of the German Basic Law or Constitution.
[57] Article 23 (3) of the German Basic Law or Constitution.
[58] Article 23(1) sentence 3 of the German Basic Law or Constitution.
[59] Article 54 of the French Constitution.

reluctance of surrendering their sovereignty to the Community level. In the case of the European Union, these institutions are the European Parliament, the Council of the European Union, the Commission and the European Court of Justice. In the case of the East African Community, these organs are the East African Legislative Assembly, the Council of Ministers, the East African Court of justice and the Summit.

1.4.2. Interviews

In order to conduct a well-rounded study, this study involved interviews in the EAC. In the case of EU, existing works or publications were used. Unlike in the EAC where there are very few publications on this community and specifically on the sovereignty issue in the context of integration, the situation is different in the EU. There is a significant number of publications on the European Union which were found significant and sufficient for the realization of this comparative study.

1.4.2.1. Methodology of the interview

In order to get a practical perspective of the study, interviews with stakeholders who are involved in the daily management and implementation of the integration process in the East African Community were conducted. This data collection process employed a semi-structured interview method. In fact, a semi- structured interview is a mixture of a structured and an unstructured interview which puts the interviewer in position to ask for more clarifications during the interview whenever he finds it necessary or when he feels that some points need to be elucidated. This method is flexible and helps the interviewees to express their ideas freely. In the interview, I suggested central themes for discussion with the interlocutors instead of using a strict pre-established list of questions. In this way, I was able to gather the conversation in accordance with the information I was looking for by asking sub-questions during the conversation. At the start of the interview, I dealt with the question of confidentiality. Specifically, I had to know whether the interviewees would like to be recorded or even quoted by name in the book. Most of them did not wish to be recorded or quoted. This is the reason why this

book does not quote names; I resolved to keep the identities of the interviewees anonymous.

1.4.2.2. Objectives of the interview

The interaction with our respondents was based on three main objectives:

1) To determine the powers or competences of the Community in comparison with those of its Partner States,
2) To find out whether there is an influence of the national institutions in the decision-making process at the Community level and,
3) To determine the status of the East African Community law within the Partner States.

These themes are the main drivers of the relationship between state sovereignty and the integration process. During the interview, the discussion with the respondents took into consideration some views from the European Union literature on the same matters.

1.4.2.3. Identification of the Respondents

The interview targeted key informants of different decision-making bodies of the EAC, and institutions of the East African Community Partner States directly involved in the activities of the EAC. Specifically, the interview targeted officials who are immediately implicated in the matters related to the topic under analysis.

At the Community level, I contacted the key informants of the Secretariat, the East African Legislative Assembly, and the East African Court of Justice. In the Secretariat, the interview was focused on the team of senior and junior legal counsels in the department of the Counsel to the East African Community. These interviewees were of great importance for my research. In fact, they constitute a group of the principal legal advisers of the community. Therefore, they participate directly in the daily life of the community through different activities of the Secretariat as they review or elaborate recommendations of the best legal practice for the realization of the integration process.

Through the Secretariat, they participate in the initiation of studies and research projects, and they advise the community on the necessary criteria for the achievement of the objectives of the community. In this regard, the information they provide is believed to be accurate and reliable. As for the East African Legislative Assembly, the interview was done with Senior and junior clerk assistants, the Legal researchers, and some Members of the Parliament. These officials were targeted because of their experience in running the activities of the Parliament. Indeed, they actively participate in the administration of the EALA, in the legislative procedure of EALA acts, and in drafting different legislations. They follow every debate regarding the community that occurs in the House of Representatives. In the East African Court of Justice, the informant which were interviewed were legal officers and Judges of the Court. These are professionals of the court who know very well the activities of the Court in practice and all the challenges it has been facing.

At the national level, I visited the Ministries in charge of East African Community Affairs of every Partner States except for the South Soudanese Ministry due to security reasons. In every Partner State, the interview was targeting Permanent Secretaries and Legal Officers of the abovementioned Ministries. These officials are the technicians or practitioners who are involved in the preparation of bills to be submitted by the Council of Ministers to the EALA and in their introduction into national laws after they have been adopted. The legal officers of the national assemblies and Members of national parliaments belonging to the Committee on the EAC integration were also interviewed. Lawyers from the constitutional court of Burundi were also interviewed. I also had an opportunity to visit borders shared by East African Community Member States to get a practical view on the implementation of the Common Market protocol. In this regard, I visited the Kobero border (between Burundi and Tanzania); Kanyaru border (between Burundi and Rwanda) and Namanga border (between Tanzania and Kenya). There the interview targeted the immigration officers, passengers, and trucks drivers.

1.5. Outline of the chapters

This study is divided into five main chapters. The first chapter sets the stage for the discussion in the subsequent chapters. It introduces other chapters, trying therefore to define the problem of the study and the methodology. The second chapter defines some keys concepts that are used in this study. Specifically, it gives a general background to the concept of state sovereignty and regional integration. It also tries to describe the evolution of these two communities - the European Union and the East African Community - and most importantly the legal basis of the obligation to Member States to give up some sovereign rights to the community organs in these two communities.

The 3rd chapter addresses the problem of the relationship between state sovereignty and regional integration in the European Union. To understand this relationship, this chapter analyses successively the competences of the European Union, the influence of national institutions on the decision-making bodies of the Union and the relationship between the national laws and community law. In this last point, this study provides an analysis of some constitutions and decisions by constitutions courts with regard to the Union law. Analyzing these aspects in the case of the European Union is essential for a comparative purpose with the East African Community as it helps to illustrate some deficiencies of the organizational institutional framework of the latter.

The 4th chapter focuses on the relationship between state sovereignty and regional integration in the East African Community. For a well-rounded comparative study, this chapter tries to develop the same points as described in the case of its sister community, i.e. the European Union. With this chapter, this study establishes a parallelism between the European Union and East African Community regarding the correlation between state sovereignty and regional integration.

The 5th chapter gives a general conclusion and recommendations for the improvement of the relationship between state sovereignty and regional integration. Indeed, this chapter offers a kind of guide highlighting what the East African Community can learn from the European Union in terms of handling the issue of sovereignty in the integration process.

CHAPTER TWO
GENERAL BACKGROUND TO STATE SOVEREIGNTY AND REGIONAL INTEGRATION

State Sovereignty and regional integration are key concepts for this study. It is, therefore, important to understand them in order to conduct a well-rounded research. The purpose of this chapter is to explain them.

2. 1. Concept of State Sovereignty

For the purpose of this study and in order to conduct a well-rounded analysis, it is important to understand the concept of state sovereignty. State sovereignty can be defined using 3 dimensions namely, the theory of state, international law, and constitutional law. It will also be defined in the context of contemporary situation.

2.1.1. The concept of State sovereignty in accordance with the general theory of State

The concept of sovereignty can be defined in accordance with the general theory of state. To understand the meaning of State sovereignty in this context, one needs to have a background on the history of this concept and on the meaning of a State.

2.1.1.1. Definition of a State

As indicated in the Montevideo Convention on Rights and Duties of States, "States as a subject for international law possesses [...] a defined territory, a population, a government and a capacity to enter into relations with other States"[1] Therefore, a sovereign State should have all these elements as conditions for its existence. Sovereignty is the fundamental characteristic for a State.[2] It is, therefore, important to understand this concept of state sovereignty.

[1] Art I of the Montevideo Convention on Rights and Duties of States.
[2] Michel De Guillenchmidt, *Droit Constitutionnel et Institutions politiques*, Economica, Paris, 2005, p.7.

2.1.1.2. Historical evolution of State sovereignty

The concept of sovereignty finds its origins in the sixteenth century and kept changing its meaning and content in accordance with the political situation of the moment. There is a common agreement that the concept of State sovereignty was invented by Jean Bodin in his book *"Les Six Livres de la République"* and that he is the one who made it a fundamental and defining criteria for a State.[3] He developed this concept as a solution to "secure and consolidate the legislative power of the monarch against the rival claims of estates, corporations and the church".[4] Indeed, after France passed through a Hundred Years War from 1350 to 1450, there was a need to create a unitary national state;[5] and Jean Bodin was the first to develop the concept of state sovereignty as a contribution to the unification of the France. In his understanding, he considers state sovereignty as the absolute and perpetual power of state. According to him,

> "the concept of sovereignty primarily entails the absolute and sole competence of law making within the territorial boundaries of a state and that the state would not tolerate any other law-creating agent above it".[6]

He therefore concludes that:

> "sovereignty, as the supreme power within a state, cannot be restricted except by the laws of God and by natural law. No constitution can limit sovereignty and, therefore, a sovereign is regarded to be above positive law".[7]

Understood in the way it was defined by Jean Bodin, state sovereignty could be seen as supreme powers of a state that cannot be limited; the kind of power with which the state could do whatever it wishes without any limitations except in case such limitations

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[3] Olivier Beaud, *Théorie de la Féderation*, PUF, Paris, 2007, p. 48.
[4] Wolfgang Friedmann, *Legal theory*, 5th ed, Columbia UP 1967, p.573 Cited by Dinah Shelton, *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford 2013, p. 382.
[5] HJ van Eikema Hommes, *Hoofdlijenen van de Geschiednis der Rechtsfilosofie*, 2nd, Kluwer 1981, p. 63 cited by Dinah Shelton, *op.cit.*, p. 382.
[6] MP Ferreira-Snyman, *The evolution of state sovereignty: Historical overview*, In *Fundamina*, vol 12-2, 2006, p.5. see http://journals.co.za/docserver/fulltext/funda/12/2/81.pdf?expires=1497290069&id=id&accname=guest&checksum=913FCB7FA748839309A6034F00759149 , visited on 08.06.2020.
[7] *Ibidem.*

come from God or natural law. Trying to analyse these competences under the concept of sovereignty as defined by Jean Bodin, Danish Shelton summarizes them in the adage *"Summa in cives ac subditos legibusque soluta potestas* meaning that "Sovereignty is the supreme power over citizens and subordinates, which (supreme power) is not subject to the law".[8]

It is important to underline that, by considering the monarch as not being bound by the law or sovereignty as an absolute power, Bodin was not concerned with constructing a principle of absolute power of governments (or of the monarch) in the sense of limitless or even arbitrary power.[9] After experiencing years of war, Bodin's main intention was "the centralization of the public authority in the monarch and doing away with competing power groups or authorities such as the church and the nobility".[10]

The first change of the meaning of this concept appeared with the Peace Treaty of Westphalia in 1648, a treaty which was created to end the Third-Year war in Europe.[11] The innovation brought by this treaty was the recognition of the equality of states as a principle of international law.[12]

Another important historical development was the recognition of the principle of sovereign equality in the international relations by the UN; a principle that was established under the UN charter in article 2.

Michel De Guillenchmidt considers the concept of state sovereignty as a situation where a state is an absolute master on his territory, his population wherein this absolute power is also exercised, not only on its permanent residents, but also on whomever is living

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[8] Dinah Shelton, *The oxford international Human Rights Law*, Oxford University Press, oxford, 2013, p.382.
[9] Jost Delbruck*, International Protection of Human Rights and State Sovereignty*, Indiana Law Journal: Vol.57: Iss.4, Article 3., 1982, pp.569-570.
[10] *Idem*, p.*570.*
[11] Goodman, L.W. "*Democracy, Sovereignty and Intervention"* am *U.J. Int'l Law Policy*, 27., (1993- 1994), p. 27. See Mahaadhi Juma Maalim, *The United Republic of Tanzania in the East African Community: Legal challenges in Integrating Zanzibar,* D U P, Dar es salaam, 2014, p. 39.
[12] Vlad Alexandru VOICESCU and Nicu-Razvan DOBARCEANU, *Sovereignty and integration in modern era-Perspectives,* p.4 See http://www.internationallawreview.eu/fisiere/pdf/SOVEREIGNTY-AND-INTEGRITY_voicescu.pdf

there.[13] According to Charles Cadoux, sovereignty means that states have the competence of the competence - a capacity to determine freely the limits and modalities of their powers - powers that are assigned to them by themselves.[14] Clearly, this implies that sovereign states establish their powers and are the sole determiners of limitations related to those powers.

Dinah Shelton distinguishes the following dimensions of state sovereignty in its contemporary meaning:

> "(a) a political independence, (b) exclusive control of the sovereign state over the persons and objects within its territory and under its control, (c) territorial integrity, or the inviolability of national borders; and (d) immunity of the sovereign state and certain high-ranking state officials from the exercise of jurisdiction by the courts of other or international tribunals".[15]

From these dimensions of state sovereignty, one would understand that complete sovereignty has two main aspects: an internal and an external sovereignty. With the internal sovereignty, a state has a political independence and exclusive competence within its national borders whereas with the external competence, it has an independence from foreign states or international institutions.

MP Ferreira-Snyman distinguishes theses aspects of sovereignty as follows:

> "the internal sovereignty may be described as the competence and authority to exercise the function of a state within national borders and to regulate internal affairs freely. Internal sovereignty thus comprises of the whole body of rights and attributes that a state possesses in its territory. External sovereignty is traditionally understood as legal independence from all foreign powers, and as impermeability, thus protecting the state's territory against all outside interference".[16]

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[13] Michel De Guillenchmidt, *op.cit*., p.7.
[14] Charles Cadeaux, *Droit Constitutionnel et institutions politiques : Théorie générale des institutions politiques*, 3éd., Cujas, Paris 1988, p. 38.
[15] Dinash Shelton, *op.cit,* p. 383.
[16] MP Ferreira-Snyman, *op.cit,* p.4.

2.1.2. The concept of state sovereignty under constitutional law

Every constitution defines the relationship between the state it serves and the international community or other states and determines which powers that are originated from it. Specifically, "it defines the receptivity for a transfer of powers conclusively for purposes of domestic order. Not only courts, but also the legislative and executive branch must respect the constitution on the transfer of powers.[17]

For instance, the constitution of Belgium indicates that all the powers emanate from the Nation and that they are exercised in a manner stipulated by the constitution.[18] This implies that the state sovereignty as understood under this concept, considers the constitution as the only source of law and that this law is supreme. Thus, State sovereignty is used "to connote the idea that state's legal system is supreme and independent from other legal systems - it is sovereign - such that no norm outside of it can claim to be directly applicable, enforceable or effective within it, or override its norms".[19] Therefore, every state has its own legal system and enacts laws that bind its subjects in accordance with the constitution. Consequently, they cannot be subordinated to any other legal system.[20]

This supremacy of the constitution as a source of law is clearly stated by some constitutions themselves. For instance, the constitution of Uganda expresses it as follows:

> "This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void".[21]

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[17] Mathias Herdegen, *The Concept of Sovereignty*, in Lubos, Tichy et al., *Sovereignty and integration: Paradoxes and Development within Europe Today*, Centre for Comparative Law, Law Faculty of Charles University in Prague, Praha 2010, p.30.
[18] Art 33 of the Constitution of Belgium:
[19] Richard Frimpon Oppong, *op.cit*, p.88.
[20] *Idem*, p.89.
[21] Art.2 of the constitution of Uganda of 1995.

Article 8 (1) of the constitution of Poland also indicates that it shall be the supreme source of law of the Republic of Poland. The constitution of Kenya provides more detail regarding the supremacy of the constitution as source of law. It reads as follows:

> "(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. (2) No person may claim or exercise State authority except as authorised under this Constitution. (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ. (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. (5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".[22]

It is evident from these examples that the constitution as supreme source of law means firstly, that all institutions are bound by it in their actions and that the state's authority is exercised under the constitution. Secondly, any act or law in contradiction of the Constitution is invalid. Lastly, it means that conventions or treaties, once ratified by a given country are part to the constitution.

Another aspect of sovereignty under constitutional law is the sovereignty of the people. In monarchies, this sovereignty resides in the King whereas in modern democratic theory, sovereignty resides in the people.[23] This notion means that all the sovereign powers attributed to the State find their origins in the people who exercise them in accordance with their constitution. In many countries, constitutions express the will of the people to whom belong the sovereign power in their preambles and, most of the time, they reserve a provision which expresses this aspect of sovereignty. For example, the preamble of the Constitution of Kenya stipulates that - "[we], the People of Kenya […] adopt, act and give this Constitution to ourselves and to our future generations".[24] This is followed by a specific provision which indicates the origin of the sovereignty of people and its nature in the following terms:

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[22] Art.2 of the constitution of Kenya of 2010.

[23] Issa G. Shivji et al*, Constitutional and Legal System of Tanzania*, Mkuki na Nyota Publishers Ltd, Dar es salaam, 2004, p. 41.

[24] Preamble of the Constitution of Kenya of 2010.

> "(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. (2) The people may exercise their sovereign power either directly or through their democratically elected representatives. (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution–– (*a*) Parliament and the legislative assemblies in the county governments; (*b*) the national executive and the executive structures in the county governments; and (*c*) the Judiciary and independent tribunals. (4) The sovereign power of the people is exercised at––(*a*) the national level; and (*b*) the county level".[25]

The German Basic Law indicates the same in the preamble which states that the "German people, in the exercise of their constituent power, have adopted this Basic Law".[26] In its article 20, the German Basic Law insists on the fact that state authority and the way this authority should be exercised is derived from the people. It reads as follows:

> "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice".[27]

In its preamble, the constitution of France starts by indicating that "the French People proclaim their attachment […] to the principles of national sovereignty as defined by the Declaration of 1789." Like the above-mentioned constitutions, in addition to the preamble, a specific provision is reserved to clarify the notion of the sovereignty of the people. Article 3 indicates that:

> "National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No section of the people or any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute".[28]

[25] Art. 1 of the Constitution of Kenya of 2010.
[26] See the Preamble of the German Basic Law.
[27] Art. 20 (2) and (3) of the German Basic Law.
[28] Art. 3 of the Constitution of France.

Like its sister constitutions, the constitution of Burundi indicates that it finds its origins in the people of Burundi indicating in its preamble as follows: "[w]e the People of Burundi … solemnly adopt the present constitution that is the fundamental law of the Republic of Burundi". In article 7, the constitution determines the nature and the extent of the sovereign power attributed to the people of Burundi. It indicates as follows:

> "the national sovereignty belongs to the people that exercise it, either directly through a referendum, or indirectly by their representatives, and that no party of the people or individual may claim to exercise this power".[29]

All these examples show implicitly that constitutions are an emanation of the people, and that the national or state sovereignty belongs to them. This sovereignty is exercised either directly by referendum or indirectly through their representatives.

This aspect of sovereignty - exercised by the people - is important for the study under analysis. The principle of democracy exercised directly or indirectly by the people to defend their sovereign rights has been at the center of a significant number of decisions by national constitutional courts in the European Union. For instance, the central point of the *Maastricht*[30] and *Lisbon*[31] judgements by the German Constitutional Court (*Bundesverfassungsgericht)* was the principle of democracy, unalterably anchored in article 20 of the Basic Law under which it is mentioned that "all State authority emanates from the people." This point emphasises the violation of article 38 of the Basic law which allow them to participate in the election of the German Parliament, the applicants complained against the denial by the Maastricht and Lisbon Treaties of the exercise of their sovereign powers established by art 20. In fact, these two treaties significantly extended the area of integration by moving some sensitive fields from the governmental to the supranational level. This pushed German citizen to challenge acts approving them arguing that they violate their sovereign rights by moving them to the supranational level.[32]

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[29] Art.7 of the Constitution of Burundi.
[30] BVerfGE 89, 155 – Treaty of Maastricht.
[31] BVerfGE 123, 267 – *Treaty of Lisbon.*
[32] These two judgements will be discussed in detail in the next chapter.

2.1.3. State sovereignty under international law

In international law, the concept of sovereignty is closely related to the concept of statehood in that all independent states are sovereign.[33] Specifically, sovereignty is the power possessed by independent states and the right or ability to exercise it[34]. The exercise of this power means that States have exclusive jurisdiction over their territories and individuals. This ability for states to decide, on their own, without external interference is also recognized in the UN charter which indicates that:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll".[35]

To define the concept of state sovereignty, Brownlie identifies first its corollaries which are namely:

> "1°) a jurisdiction, *prima facie* exclusive over territory and the permanent population living there; 2°) the duty of non-intervention in the area of exclusive jurisdiction of other state and; 3°) the dependence of obligations arising from customary law or from treaties".[36]

It is notable that state sovereignty, as defined by Brownlie, is primarily about the relationship between a given state with other states and international organizations. All these corollaries indicate how the relations should be between states.

A state should not only govern itself without interference from any other state or organization, but also should not intervene in any other state's exclusive competence. The ultimate dependence should be upon consent by the concerned state in accordance with international law.

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[33]Wade Mansell and Karen Openshaw, *International Law: A Critical Introduction*, Hart Publishing, Oxford and Portland, Oregon, 2013, p.29.
[34] Wade Mansell and Karen Openshaw, *op.cit.*, p.29.
[35] Art.2(7) of the United Nations Charter.
[36] Ian Brownlies, *Principles of International Law*, 8éd, Oxford University Press, Oxford 2012, p.448.

Trying to understand the meaning of the concept of state sovereignty, Robert Araujo finds in it "a tricky balance between one state exercising its jurisdiction or authority and parallel exercises by other states"[37] and a possibility of conflict between these exercises.[38] This potential conflict was suspected by the fathers of the United Nations Charter and it pushed them to introduce, in the charter, the concept of "sovereign equality of all its members.[39] Under this principle, all states have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.[40] Specifically, this principle provides that :

> "(a) States are judicially equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable;(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States".[41]

2.1.4. Sovereignty today

There is a discussion among scholars as to how sovereignty could be understood today considering the developments prevailing international relations where States are called to cooperate with others. In fact, this issue has divided scholars to the extent that some of them argue that sovereignty should be abandoned. The authors who plead for the abandonment of sovereignty argue that it has lost its object and, therefore, no longer has any explanatory value for the current situation.[42] For them, all that remains from sovereignty is a variety of claims of powers and authority which can be distributed at different levels and by different carriers but can no longer be meaningfully bundled in

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[37] Robert Aruajo, *Sovereignty, Human Rights and Self-determination: The meaning in international law*, in Fordham International Law Journal, Vol.24, Issue 5, 2000, p.1488.
[38] *Ibidem.*
[39] Art.2 of United Nations Charter.
[40] Para 6 (1) of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (Gar 2625).
[41] Para 6 (2) of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (Gar 2625).
[42] Dieter Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin University Press, Berlin, 2009, p.99.

the concept of sovereignty.[43] In other words, they believe that the concept of sovereignty ,as understood from its inception, is incompatible with current notions of political rule or, that the thing it denotes has disappeared and therefore must be erased from the legal and political vocabulary.[44] To this end, they argue that it would be obsolete to consider it as a key to understanding States in the international order.

Another group of scholars, that seems to be greater in numbers than the previous group, does not agree with those who reject the concept of sovereignty. Instead, they consider that this term should be adapted to conditions of the moment which they agree, have changed.[45] Even though they are yet to find a consensual definition, they agree that the concept of sovereignty still holds explanatory value and fulfills functions such as public authority, sovereign rights, monopoly of the use of force.[46] However, they are of the view that today's sovereignty must move away from the full possession of public authority. This can be done by reducing the requirements of indivisibility or by accepting divisibility or by developing a different concept of sovereignty.

The logical point of the discussion at this stage is to know whether Sovereignty can be shared, divided, or limited. Following the above-mentioned ongoing discussion among scholars, one needs to distinguish between the narrow and broad sense of sovereignty. In its narrow sense, sovereignty would mean the supreme self-determining power. Consequently, this narrow sovereignty cannot be restricted, shared, or divided. Its major characters are non-restrictedness and indivisibility. No Member States wish to give up this kind of sovereignty; instead, they always want to keep a final say on crucial matters of national and constitutional self-determination. In its broad sense, sovereignty means the sovereign rights altogether. In this sense, sovereignty can be limited as States can transfer certain rights to the community. This view is shared by a number of authors who understand that "sovereignty is rarely absolute". According to Alexander Cooley and Hendrik Spruyt, "sovereignty consists of bundle rights and obligations that are

[43] Dieter Grimm*, op.cit.* p.99.
[44] *Ibid.,* p.100.
[45] *Ibidem*.
[46] *Ibidem.*

dynamically exchanged and transferred between states".[47] In this sense, the "elites might grant some sovereign rights to other states or international organizations because they perceived gain from the transaction"[48]. By accepting to grant "some sovereign rights" to the international organizations, they simultaneously keep the most sensitive rights in their hands and prevent from transferring them to other international organs. In other words, under this meaning of sovereignty, contracting parties are reluctant to surrender control over "hot button" items.[49] Similarly, Wolfgang F. Danspeckgruber opines that "sovereignty can be understood as 'partial' or 'limited' sovereignty".[50] He considers that "the term sheds the light on the will of the government to have certain rights on certain agenda and the readiness of the central government to grant these rights".[51]

The notion of hybrid sovereignty in the context of integration process is also developed indirectly in constitutions of some European countries. Specifically, some constitutions are opened toward international and supranational bodies. For instance, the German Basic law has been open toward international bodies and tries to create favorable environment to any appearance of new international agreement. From the very beginning Germany's integration process in the European Union has been based on article 24 which indicates that "the Federation may by a law transfer sovereign powers to international organizations".[52] At the advent of the Maastricht Treaty, there was a dispute regarding whether article 24(1) would cover the scope and the deepened level of integration as foreseen by the draft of this treaty which led to an amendment of the constitution in 1992 to avoid the ratification of the new treaty to be declared unconstitutional.[53] Thus, article 23 was introduced to frame and limit the conferral powers. This way the German Constitutional Court keeps its final say with regard to the

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[47] Alexander Cooley and Hendrik Spruyt, *Contracting States: Sovereign Transfer in International Relations*, Princeton University Press, New Jersey, 2009, p.4.
[48] *Ibidem.*
[49] *Ibid*., p.15.
[50] Wolfgang F. Danspeckgruber, *Self-governance plus regional integration: a possible solution to self-determination claims*, in Marc Weller and Stefan Wolff, *Autonomy, Self-governance and Conflict Resolution: Approaches to institutional design in divided societies*, Routledge, London and New York, 2005, p.33.
[51] *Idem.,* p.33.
[52] Art. 24 (1) of the German Basic Law-
[53] Johannes Döveling, *How Germany contributes to the effectiveness of European Law and simultaneously preserves its constitutional Identity: An Overview of the Relationship between German Law and European Law,* In Josaphat L. Kanywanyi et ali, *Regional integration and Law: East African and European Perspectives*, Dear es salaam University Press, 2014, pp. 241- 242.

determination as to whether there is a violation of the legal framework of the power transfer as set in the Constitution.

The question regarding whether the Sovereignty could be shared, limited, or divided was also raised in the jurisprudence of the constitutional courts of the European Members States. The main question was about knowing the extent to which Member States could transfer sovereign rights to international organizations without losing their sovereignty. For instance, in the Maastricht Treaty, the German Constitutional Court indicates that the ratification of this Treaty will not impact on the sovereignty of the Federal Republic of Germany. In other words, it considers that Germany would remain sovereign as a Member of the EU but that the latter would exercise its sovereignty powers to the extent that sovereign rights had been transferred.[54] In the Lisbon judgement, the German Constitutional court indicated that the transfer of sovereign rights was subjected to certain conditions. Indeed, the Community does not have the *Kompetenz-Kompetenz*. In other words,_the Community does not have_the right to act beyond the rights which were transferred to it by the Member States.[55]

In this way, the European Union has the obligation to act in accordance with the principle of conferral, otherwise it acts *ultra vires* which can be checked by the constitutional court under the *ultra vires review* procedure.[56] In line with this review, the German Constitutional Court recently declared for the first time of its history that the decisions of two institutions of the European Union namely the European Central Bank (ECB) and the European Court of Justice were rendered *ultra-vires.*[57] Specifically, it found that the decisions which were rendered by the European Central Bank on the Public Sector Purchase Programme (PSPP) "must qualified as *ultra-vires* acts" despites the decision of the European Court of Justice to the contrary.[58] The German Constitutional Court, therefore, concluded that to this end, this decision of the European

[54] BVerfGE 89, 155 (1993), 186.
[55] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 , para 324. http://www.bverfg.de/e/es20090630_2bve000208en.html .
[56] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 241. http://www.bverfg.de/e/es20090630_2bve000208en.html.
[57] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15
[58] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 117 https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

Court of Justice itself constitutes an *ultra vires* act and that has no binding act in Germany.[59] The most important part of the decision of the German Constitutional Court in this regard reads as follows:

> "In light of Art.119 and Art.127 et seq. TFEU as well as Art. 117 et seq. ESCB Statute, the ECB Governing Council's Decision of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2464, (EU)2016/702 and (EU) 2017/100 must be qualified as *ultra vires* acts.
>
> […]
>
> In its judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competence. This view manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the division of competences, and is no longer tenable from a methodological perspective give that it completely disregards the actual effects of the PSPP. Therefore, the Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon it in Art. 19 (1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this extent, the CJEU Judgment itself constitutes an ultra vires act and thus has no binding effect [in Germany]".[60]

Similarly, in the decision on Lisbon Treaty, the *Conseil constitutionnel* in France accepts the transfer of the certain competences to the European Union which should be done in a way that preserves the fundamental conditions necessary to the exercise of the national sovereignty.[61]

To sum up, under the integration process, sovereignty should be looked at from two perspectives: the broad and the narrow senses. In the broad sense of sovereignty, Member States must be ready and willing to limit it by transferring some sovereign rights to the community but, at the same time, in the narrow sense, they don't want to and do not need to give up the sovereignty altogether. Member States remain sovereign

[59] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 119 https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html
[60] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 117 & 119" https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html
[61] DECISION N° 2007-560 DC – December 20th 2007, para. 16.

since the community does not have the *Kompetenz-Kompetenz* and must not act *ultra-vires*. They remain the "Masters of the Treaties" and keep a final say on certain questions of constitutional identity like the identity control of the German Constitutional Court. This means, as the German Constitutional Court explains, that Member States "don't waive the sovereignty contained in the last instance in the German Constitution ("*die in dem letzten Wort der deutschen Verfassung liegende Souveränität*")".[62] In the same context, Grimm understands that today, sovereignty finds its most important function in the protection of the democratic self-determination of a politically united society.[63] Additionally, Member States still have the right to exit from the Community whenever they feel that their sovereignty is undermined by the integration process. This is the case of the "Brexit", an expression the indicate the exit of the UK from the European Union which became effective on 31 January 2020 following a referendum that decided in favor of leaving on 23 June 2016.

2.2. Concept of Regional Integration

Studying regional integration presupposes a clear understanding of the concept of "Regional integration". As a result, in order to carry out a well-rounded study of this topic under analysis, it is very important to have a general background of what regional integration means. This section aims to provide a comprehensive explanation of regional integration, different theories on regional integration, and the stages of regional integration.

2.2.1. Definition

In order to establish a well-rounded research on this study, one needs to understand the concept of regional integration, to analyse all the theories surrounding it and to know all its stages. This is the object of this section.

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[62] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 240. http://www.bverfg.de/e/es20090630_2bve000208en.html.

[63] Dieter Grimm, *op. cit.,* p.123.

2.2.1.1. Defining Regional Integration: its complexity

Scholars converge on the fact that "integration" is a concept that is not easily defined. In fact, as Mangachi indicates, "there has not been clear consensus on the meaning of regional integration".[64] Mahadhi underlines the fact that the concept of integration means different things to different people and that it can have different meanings in different disciplines.[65] This complexity of defining Regional Integration is also reiterated by Claude N'kodia. N'Kodia asserts that "the definition of regional integration is complex and not easy to understand"[66] as it can involve many subjects.[67]

These views show an absence of unanimity when it comes to defining regional integration. Its different aspects lead to different definitions. Indeed, when defining regional integration, some authors limit their definition to political aspects, ignoring other important aspects that are part and parcel of the concept of regional integration.

2.2.1.2. Attempt to define the Concept of Regional integration

Some definitions of regional integration focus only on the political aspects of integration ignoring the existence of other relevant aspects. In this category, one would indicate Haas's definition as an example. It defines integration as:

> "a process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand jurisdiction over pre-existing national states. The result of a process of political integration is a new political community, superimposed over the pre-existing ones".[68]

A deep analysis of this definition reveals that it has nothing to do with economic or other dimensions but limits the concept of Regional integration on political aspects only. In

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[64] Msuya Waldi Mangachi, *op.cit*, p.3.
[65] Mahadhi Juma Maalim, *The United Republic of Tanzania in the East African Community: Legal challenges in integrating Zanzibar*, Dar es Salaam University Press, 2014, p.27.
[66] Claude N'KODIA, *L'Intégration économique : Les enjeux pour l'Afrique Centrale*, Le Harmattan, Paris, 1999, p.16.
[67] *Ibid.,* p. 17.
[68] Haas, Ernest (1968, first published in 1958), *The Uniting Europe*, Stanford University Press, Stanford, p.16.

addition to the political dimension in the concept of regional integration, some scholars have shown that this concept also comprises an economic dimension. Indeed, Balassa, considered by some writers as a father of regional integration theories,[69] defines integration as "both a process and a state of affairs".

> "Regarded as a process, it encompasses measures designed to abolish discrimination between economic units belonging to different national states; viewed as a state of affairs, it can be represented by the absence of various forms of discrimination between national economies".[70]

Balassa's definition mainly focuses on the economic dimension of regional integration setting aside the political aspect. Although the latter aspect does not seem to appear in Balassa's definition, the role of politics in the integration process cannot be denied and it is mostly the political goals that are central to the origin of the integration process. Balassa himself recognized this when he declared that:

> "[t]here is no doubt that – especially in the case of Europe – political objectives are of great consequence. The avoidance of future war between France and Germany, the creation of a third force in world politics, and the reestablishment of Western Europe as a world power are frequently mentioned as political goal that would be served by economic integration. Many regard these as primary objectives and relate economic considerations to the second place".[71]

From Balassa's statement, it can be noted that in matters related to regional integration, political and economic dimensions are interdependent, and so, one cannot exist without the other. Indeed, this is true because where political factors are not stable, sustainable development cannot be achieved either at national or community level. Therefore, in order to ensure a strong integration of a given community, one needs to deal with political factors. Henry Kyambalesa and Mathurin C. Hungnikpo also insist on the economic aspect in their definition. They define integration as a "formation of the inter-governmental organization (IGO) by three or more countries to create a larger and more

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[69] Manone Regina Madyo, *The importance of regional integration in Africa*, submitted in fulfillment of the requirements for the degree of Masters of Commerce in Economics, University of South Africa, Jully 2008, p.14.
[70] Bela Balassa, *The theory of Economic Integration*, Yale University, London, 1961, p.1.
[71] Bela Balassa.*op.cit,* p.6.

open economy expected to benefit member- countries".[72] Likewise, these authors focus their definition on the economic aspect of integration. In this definition, the economic dimension is seen as the main goal of the regional integration; this is "[…] to create a larger and open economy".

In addition to the economic dimension in the definition of regional integration, Marie-Angèle Ahin adds new elements to her definition. She defines regional integration as:

> "a union of a group of states willing to unite their forces in order to form an economic development and ameliorate the standards of life of their population at the regional level through an intensive cooperation whose principles are established in a document ratified by those states called a Treaty".[73]

Like the previous authors, Ahin's definition retains more attention on the economic aspect of integration. In addition to this aspect, this definition comes with another input; it underlines a legal basis of the whole process of integration. She indicates that the cooperation between states has to be based on principles that are agreed upon by the states by way of Treaty. The introduction of rules in the definition of regional integration is very important to the understanding of the meaning of this concept. As it was expressed by Cicéron, " *ubi societas ibi jus"*, meaning that wherever there is a society, there must be necessary law or rules[74] which guide its members and, if necessary, which foresee sanctions to every member who would violate the Convention. As clarified in Ahin's definition, in the case of regional communities, those rules are set in the Treaty establishing them; the same applies to a Treaty for the Establishment of the East African Community [75] in the case of the East Africa Community, a Treaty on the European Union, and a Treaty on the Functioning of the European Union.[76]

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[72] Henry Kyambalesa et ali, *Economic Integration and Development in Africa*, Ahsgate , Burlington 2006, p.1.

[73] Marie-Angèle Ahin, *Communauté économique de l'Afrique de l'Ouest – Groupe Andin : Analyse juridique et réflexions pour une relativisation institutionnelle du processus d'intégration régionale*, Thèse pour le doctorant en droit, Atelier National de Reproduction des Thèses (ANRT), Lille CEDEX France 1997, p.9.

[74] Antoine Leca, *La genèse du droit : essai d'introduction historique au droit*, 3è éd, Librairie de l'Université d'Aix-en-Provence, Aix-en-Province, 2002, p.37.

[75] See Treaty for the Establishment of the East African Community, 1999.

[76] The Treaty on the European Union and the Treaty for the Functioning of the European Union are the main instruments on which the European Union is being driven.

Another author whose definition deserves attention is Victor Murinde. He defines integration as:

> "an attempt to link together the economies of two or more countries, typically with some geographical proximity, through the removal of economic barriers such as tariffs and immigration controls, aimed at raising the living standards as well as achieving peaceful relations among the participating countries".[77]

Murinde's definition is also interesting in some aspects. Firstly, it recognizes economic, political and social dimensions in the concept of regional integration. According to Murinde, in addition to the removal of economic barriers, the economic integration aims at raising the living standards and peaceful relations among participating countries. I do agree with him on the importance of the social aspects in the integration process. If a peaceful relationship between member states is not ensured, other aspects cannot be easily achieved. This is because the social aspect is key for the achievement of integration. Secondly, he underlines the fact that the participating countries in the integration process must have some geographical proximity. This is also important for integration. The closer the concerned countries are to each other; the more effective integration is likely to be. The treaty for the establishment of the East African Community preaches this aspect and considers geographical proximity of the Partner States as one of the conditions to be taken into account by Partner States in the process of considering the application by a foreign country to become a member of the community.[78]

Philipe de Lombaerde, Luk Van Langenhove and Ginkel bring another element to the concept under analysis. They define regional integration as follows:

> "Regional integration means that states in a certain geographical area agree to interact concerning issues of common interests (especially economic, political and social matters) and the establishment of common rules, policies and regional institutions".[79]

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[77]Victor Murinde, *The Free Market for Eastern and Southern Africa*, Ashgate 2001, p.4.

[78] Art 3, d of the Treaty for the Establishment of the East African Community.

[79] Philippe de Lombarde and Luk Van Langenhove, *"Regional Integration, Poverty and Social Policy* » in volume 7 N°3 Global Social Policy, 2007, pp.377-383, cited by Harald Sippel, *Regional Integration in East Africa: A Legal Historical Overview*, in Kennedy Gastorn et al, *Process of Legal Integration in the East African Community*, Dar es salaam University Press, 2011, p.27.

This definition introduces another aspect which has not been identified by anyone among the above-mentioned authors. In addition to the geographical proximity of the cooperating countries, the economic, political and social dimensions attributed to the integration process by the previous writers, Philipe, Luk and Ginkel add the establishment of common rules, policies and regional institutions. The legal aspect of the integration process is also mentioned by Mvungi when he indicated that "the term integration can have different meanings in economics and in law" and that "a proper definition should include both the economic and legal aspects".[80] This is an important element for the realization of integration. A full integration cannot be achieved if there are disparities of laws, policies, and institutions. The Treaty for the establishment of the East African Community considers this area as important for the realization of the objectives of the Community and, thus, foresees a harmonization of judgements of courts within the community and laws appertaining to the Community.[81]

2.2.1.3. Concluding observations and definition

From the above-mentioned definitions, it is clear that it is difficult to have a consensus on how regional integration can be defined. Based on its different dimensions, regional integration can have different definitions. It is therefore important to try to find a definition that can cover the various dimensions of regional integration as highlighted above. Analyzing all the above definitions, it can be highlighted that the following elements in the concept of regional integration should always exist:

- The existence of two countries or more countries within close geographical proximity.
- An agreement contained in a document called a "Treaty" where principles on how cooperating states will handle issues concerning their common interests in different aspects;
- Sectors or activities covered by the agreement: political, social, and economic sectors;

[80] Mvungi, S.E.E., *Constitutional Questions in the Regional Integration Process: The Case of the Southern African Development Community with references to the European Union*, Hamburg, Institut fur Internationale Angelegenheiten Rothenbaumchausee, p.22; cited by Mahadhi Juma Maalim, op.cit., p. 28.
[81] Art 126, 1 & 2 (b) of the Treaty for the establishment of the East African Community.

- Establishment of common rules, policies, and regional institutions.

From these elements, one can define regional integration as a creation of a supranational organization by two or more countries with ideally geographical proximity which agree in a Treaty wherein they set principles that guide how they will interact in some areas of common interest, namely in political, social or economic matters and in the establishment of common rules, policies, and regional institutions. Haltenborn is of the same view with the suggested definition when he indicated that

> "the success of regional integration depends on the common economic and political aims of the member states. Social similarities in their history, culture, language, lifestyle, and consumption habits, together with stable political, economic and legal structures, and consensus in the economic policy and legal development of the member states, are necessities for success of regional integration".[82]

2.2.1.4. Distinction between Regional integration and some neighboring notions

Having defined regional integration, it is important to distinguish it with some notions that are close to it namely cooperation, economic cooperation, and normal international organizations.

The concept of regional integration is different from cooperation. Firstly, cooperation is more diplomatic and does not necessarily lead to the suppression of economic differences as it is in the case of integration. This idea is shared by Balassa when he considers that the difference between integration and cooperation is qualitative and quantitative.[83] According to him, co-operation includes actions aimed at lessening discrimination whereas the process of integration comprises of measures that entail the suppression of some forms of discrimination.[84] Secondly, although all these two concepts have a common aspect of being characterized by efforts of collaboration between states, they are different on another aspect. Whereas regional cooperation is

[82]Haltenborn Markus, *Rechtsgrundlagen und aktuelle Entwicklungestendenzen der regionalen Wirtschaftsintegration in Subsahara- Africa*, vol.59, Heidelberg Journal of International Law, 1999, pp.213- 239 at p.218; See also Harald Sippel, *op.cit*., p.28.
[83] Bela Balassa, *op.cit*., p.2.
[84] *Ibidem.*

punctual and temporary with a contractual formula established in the scope of projects presenting mutual interests between contracting states, regional integration on the other side is made to stay permanently.[85] Lastly, the collaboration in the case of regional integration requires a sharing of sovereignty between partners by establishing supranational institutions. Partner states accept, indeed, certain obligations such us payment of contribution, suppression of trade barriers, suppression of the obstacles to the free movement of persons, etc.[86] This element is very important for the integration process. In fact, as long as States are still reluctant to share some of their sovereign rights and surrender them to the supranational organs, it will not be possible for the community to achieve common goals. In contrast, in the case of cooperation, there is respect for the sovereignty of all partners in presence.[87]

There is also a difference between regional and economic integration. Indeed, the concept of regional integration is not only limited to the economic dimension of integration but can also go further to include the intervention in public sectors such as the environmental management, cooperation in security affairs, human rights, education, research and technology or natural resources management. For the economic integration however, the cooperation concerns only economic aspects between States which are not necessarily neighbors, contrary to the regional integration where the geographical proximity of the partners is a precondition for its establishment.[88] It is, therefore, clear that the economic integration is a sub-stage of the regional integration as it does not cover all aspects of integration.

It is also important to analyze the difference between regional integration and international organization. The International Law Commission defines an international organization as "an organization established by a treaty or other instruments governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other

[85] Réal Lavergne, *Intégration et coopération régionales en Afrique de l'Ouest*, Karthala-CRDI, Paris, 1996, p.12.
[86] *Ibidem.*
[87] Maurice Flory, Droit *International du Développement,* PUF*,* Paris 1977, p.120.
[88] Réal Lavergne, *op.cit.,* p. 66.

entities".[89] This definition presents interesting differences with the regional integration. Firstly, in the case of international organizations, some entities other than states can be admitted for membership or can even create such organization. Indeed, Eric David confirms this fact by indicating that an "international organization is created by States and/or, eventually, International Organizations".[90] In contrast, as already explained, regional integration concerns only States. Secondly, the instrument that establishes an international organization does not need to be a Treaty. It can be another instrument, the only condition being to be "governed by international law". A commentary on the draft articles on the responsibility of international organizations indicates that this wording "a treaty or other instrument governed by international law" is intended "to include instruments, such as resolutions adopted by an international organization or by a conference of States".[91] Lastly, another aspect of this definition is the insistence on the fact that an international organization should have its "own" international legal personality meaning an international legal personality distinct from that of its members. This is an important aspect to highlight the separation between some behavior attributed to both the organization and its members. This excludes the situation of supra-nationality, a situation that is foreseen in the case of regional integration. In fact, supra-nationality requires liberation of some sovereign powers by Member States to supranational organs or institutions. Indeed, a supranational mode of governance is characterized by centralized governmental structures. Thus, "organizations constituted at supranational level possess jurisdiction over specific policy domains within the territory comprised by the member states. In exercising that jurisdiction, supranational organizations can constrain the behavior of all actors, including the member states within those domains".[92]

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[89] United Nations, *Report of the International Law Commission*, (U.N. GAOR, 66th Sess., Supp.10 A/66/10, 2011) p.54; See Stephen Bouwhuis, *The International Law Commission's Definition of International Organizations,* in *International Law Review* 9 , 2012, p.453.

[90] Eric David, *Droit des organisations internationales,* Bruylant, Bruxelles, 2016, p.27.

[91] United Nations, *Report of the International Law Commission*, (U.N. GAOR, 66th Sess., Supp.10 A/66/10, 2011), p. 73.

[92] Wayne Sandholz and Alec Stone Sweet, *European Integration and supranational Governance,* Oxford University Presss, Oxford, 1998, p.8.

2.2.2. Theories on Regional integration

Theoretical approaches have been developed in order to explain the concept of regional integration and its mechanisms. Most of those theories sought to explain the integration process in the European Union.[93] This section will discuss briefly the most dominant theories which are namely the "functionalism", the Neo-functionalism, and the intergovernmentalism.

2.2.2.1. Functionalism

This theory was developed early in the first years of the European Integration. According to the supporters of this theory, the integration process identifies "specific, discrete economic areas, usually those perceived as "non-contentious" in which Member States are encouraged to cooperate".[94] For them, technicians, specialists in the given areas would be managed for the interest of the community as a whole which would be different in the case of politicians who would focus on their personal interests influenced by the need to retain powers.[95] They insist that in a "world of economic interdependence, common economic interests create the need for international institutions and rules".[96] For them, every authority should be affected to its own activities so that the link between an authority and a territory is broken.

2.2.2.2. Neo-functionalism

Developed in the 1950s, this theorem complements the functionalist one and is more interested in the process of integration than the result of integration.[97] Supporters of this theory recognize and reaffirm the importance of States in the process of integration as they establish its general conditions. However, they also admit that States should not

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[93] Mahadhi Juma Maalim, *op.cit,* p.39.
[94] Josephine Steiner et al., *EU Law*, 9th ed., Oxford University Press, 2006, p.15.
[95] *Idem*, p.16.
[96] David Mitrany, *The Functional Theory of Politics*, London School of Economics and Political Sciences, London 1975. See also, Anadi, Sunday Kachima McDonald, *Regional integration in Africa: The case of ECOWAS,* thesis presented to the faculty of Arts of the University of Zurich for the Degree of Doctoral Philosophy, Zurich, 2005, p.117.
[97] Mahadhi Juma Maalim, *op.cit.,* p.31.

be the sole determinants of the direction, level, and resulting changes in the cooperation and integration, and therefore recognize non-state actors like the secretariat and other regional organizations or even social movements as suitable drivers for integration.[98] The most prominent and influential neo-functionalist writers are Ernest Haas and Leon Lindberg who wrote in response to the establishment of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC).[99]

Haas defines integration as:

> "The process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possesses or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones".[100]

Lindberg, without exactly using the same wording, provides a definition that closely resembles Haas's definition. It reads as follows:

> "(1) The process whereby nations forego the desire and ability to conduct foreign and domestic policies independently of each other, seeking instead to make joint decisions or delegate the decision-making process to new central organs: and (2) the process whereby political actors in several distinct settings are persuaded to shift their expectations and political activities to a new centre".[101]

Neo-functionalists seem to have understood the issue of state sovereignty in the integration process. Indeed, involving States in the integration process would delay it or even stop it. They are unlikely to give up their sovereign powers to the common interests which would make the process impossible.

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[98] Biswaro, J.M. (2011), *The Quest for Regional Integration in the Twenty First Century*, pp.20-22

[99] Antje Wiener and Thomas Diez, *European Integration Theory,* 2nd ed.,0xyford University Press, Oxford 2009, p.45.

[100] Ernest B. Haas, *The Uniting of Europe*, Stanford University Press, Stanford, 1958, p.16..

[101]Leon N Lindberg, *The Political Dynamics of European Economic Integration*, Stanford University Press, Stanford,1963, p.6.

2.2.2.3. Inter-governmentalism

Another theory that was developed as an approach for integration was the inter-governmentalism. The inter-governmentalist theorists reasserted the primacy of the nation state within the EU institutions.[102] In contrast to the neo-functionalist theory that supports continuous and growing integration which will lead to the European Community becoming a State in its own right, this new theory insists on the importance of states arguing that the integration is driven by interests and actions of the nations or member states.[103] In the integration process supported by inter-governmentalists, the central players are national executives of member states who bargain with each other to produce common policies - a bargain that is shaped by the relative powers of the member states, but also by some preferences which emerge from the pulling and hauling among domestic groups.[104] That is why, according to Wayne Sandholz and Alec Stone Sweet, these preferences are given agency as negotiating positions by national executives in EC organization such us the council of ministers.[105] Clearly, this theory is unsupportive of the supranational institutions where states would put their trust and surrender some of their responsibility or sovereign rights. Explaining this reluctance by member state to surrender some of their sovereign rights, Keohane indicates that "governments put high value on the maintenance of their own autonomy, so it is usually impossible to establish international institutions that exercise authority over states".[106]

For the purpose of this study, it is important to have a background on this theory. Indeed, a deeper analysis of it would justify the reason why the concept of sovereignty impacts the process of integration. The supporters of this theory seem to support the empowerment of the Member States in the detriment of the Union. This can also be justified by the fact that during the development of this theory, member governments of the European Community made it clear that they would resist the gradual transfer of

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[102] Erik Jones et al., *The Oxford Handbook of the European Union*, Oxford University Press, 2012, p.1.

[103] Borzel, T. A., Goldtermann, L . et al. (eds), *Roads to Regionalism: Genesis, Design, and Effects of Regional Organisations*, Ashgate Publishing Limited, England, 2012, p.5. See also, Mahadhi Juma Maalim, *The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar*, DUP, p. 33.

[104] Wayne Sandholtz and Alec Stone Sweet, *op.cit.,* p.8.

[105] *Ibidem*.

[106] Robert o. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press, Chichester, 1984, p.88.

sovereignty to the Community and that the European Community's decision-making would reflect the continuing primacy of the nation state.[107]

2.2.2.4. Concluding observations

Having understood these theories which were used to explain the integration process and its mechanisms, some concluding observations need to be outlined.

Among all these 3 theories, the neo-functionalism theory seems to have covered all aspects of the integration process, and therefore, proves to be more relevant to explain the process. Neither the functionalist nor the inter-governmentalist theory fits with the definition of integration. They limit their justification to some of its elements. For instance, as described above, the functionalist theory supports integration that is focused on "specific, discrete economic areas", specifically those seen as "non-contentious". In contrast, a real regional integration covers not only some non-contentious economic areas, but all areas regardless of whether they are contentious or not. Furthermore, regional integration does not only focus on economic aspects, but on some other aspects including the social and political ones. For the inter-governmentalist theory, they insist on the importance of the Member States' actions or role in the integration process putting aside the option of supranational governance. This would lead to a game of interests by actors who are, in this case, Member States.

The neo-functionalism, however, seems to cover the definition of regional integration. It covers, not only all aspects of regional integration namely the economic, social and political ones, but it also recognizes the creation of supranational institutions which have precedence over national ones. For the realization of integration, this theory insists on the transfer of some sovereign rights to the supranational institutions. This study will be inspired by this theoretical framework traced by neo-functionalists since it analyses the relationship between state sovereignty and regional integration.

[107] Erik Jones et al., *op.cit.,* p.9.

2.2.3. Stages of Regional integration

Integration is not done at once. It is a process. Decades and even centuries can pass before a full integration is achieved. Regional integration is promoted piecemeal through gradual steps of building a web of functional relations in economic, social and political fields.[108] Economists developed steps recognized as stages through which every integration process must pass. Each stage is recognized as a precondition for reaching the next as it provides the required achievements for further regional integration.[109] They are a Preferential Trade Area (PTA), a Free Trade Area (FTA), a Customs Union (CU), a Common Market (CU), a Monetary Union (MU) and a Political Federation or Political Union (PF or PU).

2.2.3.1. Preferential Trade Area (PTA)

Also known as Preferential Trade Arrangements[110] by some scholars, the PTA is the lowest stage in the process of regional integration. At this stage, participating countries scale down barriers to the movement of goods in their trade with each other.[111] Although some of the scholars do not give much importance to this stage or do not even mention it as a stage for the integration process, it represents itself as a milestone to the whole process of integration. Indeed, one can consider that at this stage, cooperating countries try to get to know each other preparing themselves for a greater integration once the latter is fully established by giving each other better trade preferences relative to the rest of the world.

At this stage, participating countries open their borders to each other for certain types of goods (it may also include services) without having a general liberalization scheme.[112] While classifying stages for integration, Balassa calls this stage "sectoral integration" indicating that it occurs when there is a removal of barriers to trade in one economic

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[108] Bela Balassa, *The Theory of Economic Integration*, Routledge, 1961. See also, Msuya Waldi Mngachi, *op.cit*. p.5.

[109] Wolff-Christian Peters, *The Quest for an African Economic Community: Regional integration and its Role in Achieving African Unity – The Case of SADC*, Peter Lang, Frankfurt am Main, 2010, p.52.

[110] Henry Kyambalesa and Mathurin c. Houngnikpo, *op.cit*., p.1.

[111] *Ibidem.*

[112] Mahadhi Juma Maalim, *op.cit.,* pp. 45-46.

sector.[113] As example, he refers to the European Coal and Steel industry in the case of the European Union.[114]

2.2.3.2. Free Trade Area

A Free Trade Area is the stage that comes immediately after the Preferential Trade Area. Unlike a Preferential Trade Area, a Free Trade Area is characterized by internal trade liberalization where customs tariffs are abolished between countries which have decided to form a community.[115] The internal trade liberalization concerns only contracting countries but not third countries. Indeed, each country retains its own tariffs against non-members states;[116] its objective is the abrogation of international tariffs.[117] This stage has some positives effects of increasing the intra-regional trade and, consequently, the investment within the region since the volume of goods and services will grow when their prices decrease due to their availability in many countries of the region.[118]

2.2.3.3. Customs Union

A Customs Union is an advanced Free Trade Area. Besides the removal of the trade barriers among themselves, member states adopt a common external trade policy with all non-members states.[119] Clearly, a Customs Union does not only liberalize its internal trade, but also unifies the external customs tariffs of its members.[120] Specifically, taxes on goods among the Member States are removed and the latter agree to have the same import taxes on goods from outside territories.[121] It is simply a Free Trade Area plus the

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[113] Bela Balassa, op. cit. p.2. see also, Victor Murinde, *op.cit*, p.5.
[114] *Ibidem.*
[115] Wolff-Christian Peters, *op.cit.*, p.52.
[116] Bela Balassa, *op.cit.* , p.2.
[117] Wolff-Christian Peters, *op.cit.*, p.53.
[118] *Idem*, p.52.
[119] Henry Kyambalesa and Mathurin C. Houngnikpo, *op.cit,* p.1
[120] Wolff- Christian Peters, *op.cit*, p.54.
[121] Mahadhi Juma Maalim, *op.cit.,* p.48.

application by each partner country of a common external tariff against all third countries.[122]

Somme countries ignore the two first stages (the Preferential Trade Area and the Free Trade Area) and prefer to start immediately from the Customs Union. In the East African Community for instance, an establishment of a Customs Union was the first stage and was supported by a document called "the East African Community Customs Union protocol".

2.2.3.4. Common Market

At this stage, not only trade restrictions are abolished, but also restrictions on factor movements.[123] Specifically, at this stage, there is freedom of factors of production (labor and capital) as well as enterprises.[124] As a result, member states develop a common visa policy and a common agreement to the right of residency.[125]

This is an interesting and important stage in the process of integration. When there is free movement of capital, services, labor, freedom of establishment in certain region in addition to the movement of goods, citizens will feel more attached to the community in general in their respective countries. This will develop a willingness among them to integrate into the community. In the East African Community, this stage was supported by the East African Community Common Market Protocol which was adopted in November 2009[126] and entered into force on 1st July 2010.

It is worth noting that this stage is sovereignty related because it affects many aspects of State sovereignty as it requires a huge amount of harmonization in relation with some states' sovereign rights. For example, in the case of the European Union, article 114 of

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[122] Organisation for Economic Cooperation and Development (OECD), *Regional Integration and Development Countries,* Head of Publications, Paris, 1993, pp.22- 23.
[123] Balassa, *op.cit*., p.2.
[124] Dashowood. A, Dougan, M. et al., *Wyatt and Dashwood's European Union Law*, 6éd., p. 392.
[125] Adepoju, Aderanti (2001), *Regional Organisation and Intra- regional Migration in Sub-Saharan Africa: Challenges and Prospects*, International Migration, 39(6) , 2001, p. 43. See also, Gosa Setu Tafese, *SADC: Achievements, Challenges and prospects- The Achievements of SADC*, Lambert Academic Publishing, 2012, p.17.
[126] See the East African Community Common Market Protocol, 2009.

the Treaty of the functioning of the European Union empowers community institutions to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Members States which have as their object the establishment and the functioning of the internal market.[127] In the case of East African Community, article 5 of the Common Market Protocol establishing the scope of Co-operation in the Common Market obliges Partner States to remove quite a number of restrictions and to harmonize, among others, "labour policies, programs, legislation, social services, provide for social security benefits, establish common standards and measures for association of workers and employers, establish employment promotion centres and eventually adopt a common employment policy".[128]

2.2.3.5. A Monetary Union

The following stage is a Monetary Union. A monetary union is a common market with a central authority which controls the economic policies of member countries together with a common currency.[129] The objective of this stage is to remove all discriminations that were caused by disparities of national economic policies by means of establishing a certain harmonization.[130] This leads to the creation of a supranational central Bank.[131] So far, this stage has been successfully achieved in the European Union where the EURO is used as the main currency since 2002 in most of the Member States of the European Union.[132] In the East African Community, this stage is not yet effective. However, a protocol for the establishment of a Monetary Union was signed on 30 November 2013.[133] Wollf Christian Peters realizes that it is at this stage some national states are often unwilling to give up or transfer parts of their sovereignty, such as their monetary authority, in order to be indoctrinated into the regional organization.[134]

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[127]Art 114 of the Treaty on the Functioning of the European Union, (former art 94 of the European Community Treaty).
[128] Art 5(2) C of the Protocol on the Establishment of the East African Community Common Market.
[129] Victor Murinde, *op.cit*., pp. 4-5.
[130] Balassa, *op.cit*., p2.
[131] Henry Kyambalesa and Mathurin C. Hungnikpo, *op.cit*., p1.
[132] One should recall that, despite of her membership, the UK has never entered in the Euro Zone.
[133] See the Protocol on the Establishment of the East African Community Monetary Union, 2013.
[134] Wollf- Christian Peters, *op.cit*, p.58.

I do agree with Wolff and I think that it was the reason the UK was unwilling to take part in the euro zone.

It is also important to mention that the harmonization that occurs at this stage is sovereignty related. This can be illustrated by problems created by the introduction of the Euro as a common currency in the European Union. Since 2009, EU Member States using the Euro as their currency have been at the center of budgetary, financial, and economic crisis. Due to the need for structuring inadequacies of the Economic and Monetary Union (EMU), EU member states reacted by introducing significant changes of norms regarding fiscal matters. Those reforms attempted to make some changes that would:

> "strengthen the budgetary constraints that guide state fiscal policies, endow the EU with new mechanisms of financial stabilization, and set up a framework for economic adjustment aimed at driving countries in serious economic difficulties out of the crisis though a *had hoc* program assistance".[135]

In 2012, specifically, Member States of the Euro zone put in place a treaty establishing the European Stability Mechanism (ESM) with the following purpose:

> "to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".[136]

For this purpose, the ESM was "entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties".[137] In the agreement, it was foreseen that the maximum landing and loans guarantee capacity was initially set at 500 billion Euro with

[135] Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective,* in Berkeley Journal of International Law, Vol. 32:1, 2014, p.64.
[136] Art 3 of the Treaty establishing the European Stability Mechanism.
[137] Art 3 of the Treaty establishing the European Stability Mechanism.

possibility of being increased by ESM Member States.[138] Furthermore, it was agreed that any bonds issued by the ESM on the capital market were to be collectively of individually guaranteed by the Euro zone member governments.[139]

These legal measures by Member States to rescue countries in times of difficulties were challenged in most of constitutional courts on the basis that they violated the principle of budgetary sovereignty of parliaments and the principle of parliamentary democracy. For instance, the German Constitutional Court was seized in order to know if there was a violation of the above mentioned principles after Germany gave consent for a contribution of 190 billion Euro to the permanent euro rescue fund, the ESM and even unlimited liability for the debts of other Eurozone governments. The court held that this contribution was compatible with Germany's parliamentary budgetary autonomy provided only that the Bundestag itself agrees to the assumption of further liabilities and itself authorizes loans beyond the initial ESM ceiling, even if these increases were unlimited.[140]

2.2.3.6. Political Union

Also dubbed a political federation,[141] Wolff finds this stage as encompassing not only all the economic advantages outlined in the previous stages, but also combines them with the formal power of a politically unified entity.[142] Henry Kyambalesa and Mathurin c. Houngnikpo define it as:

> "a stage whereby cooperating countries in a monetary union eventually create a regional bloc that is akin to a nation-state or federal government by creating centralized political institutions, including a regional parliament".[143]

The above-mentioned authors introduce a new important element, that is a politically unified entity with supranational political institutions. They also mention the existence

[138] Gunnar Becker, *The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair- Weather Rhenomenon*, In European Public Law 20, n°.3 (2014), p. 540.
[139] Gunnar Becker, *op.cit*, p.540.
[140] *Idem,* p.554.
[141] Art.5 of the Treaty for the establishment of the East African Community. See also Victor Murinde, *op.cit*., p5.
[142] Wolff- Christian Peters, *op.cit*, p.59.
[143] Henry Kyambalesa and Mathurin c. Houngnikpo, *op.cit*, p.2.

of a regional parliament at this stage. However, the experience has shown that the parliament is not necessarily established at this stage. It can be put in place at the early stages. For instance, the East African Community and the European Union have their own parliaments and these two communities are yet to reach the stage of political union or political federation.

Some scholars do not even insist on the establishment of a federal parliament at this stage while defining a political federation. For instance, Maria Apoo Oitamong defines it as follows:

> "Political federation, federalism or federating refers to a union of groups, bound by one or more common objectives but with each retaining their district group character for other purposes. Federating parties retain their sovereign status but require a certain degree of direct surrender of their political jurisdiction to a federal or a central authority".[144]

In addition to the establishment of organs and institutions at the community level, at this stage, competences of the Community are extended to sensitive policy areas. These include areas of foreign, security, justice, and home affairs policies. For instance, the Treaty of Maastricht - a treaty that made the first stage of political federation in the European Union - introduced a cooperation in the area foreign and security policy (2nd Pillar) where the defense matters were treated, and in justice and home affairs (3rd pillar), which comprises the area of asylum, immigration, judicial cooperation in civil and criminal matters, and police cooperation.[145]

It is worth noting that a political federation or Union is not necessarily the ultimate stage for all regional economic communities depending on each community's objective. Some of them limit their cooperation to the economic aspect only without aspiring to the creation of a political union. For example, the Treaty for the Establishment of the West African States (ECOWAS) does not foresee a political federation as the ultimate stage of the ECOWAS' integration strategy. The treaty states that the main aim of this community will be economic cooperation. It indicates that "the aims of the Community are to promote cooperation and integration leading to the establishment of an economic union

[144] Maria Apoo Oitamong, *The Revised East Africa Community: Fast-Tracking the political federation*, Lambert Academic Publishing, Saarbrucken, 2012, p.12.
[145] Art. K. 1 of the Treaty on the European Union.

in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent".[146] It is, therefore, clear that the aim of the ECOWAS is an economic union leaving aside political aspects.

Unlike ECOWAS, the East African Community specifies that the ultimate goal for the EAC integration will be a political federation and it reads as follows:

> "[...]Partner States undertake to establish among themselves and in accordance with the provisions of this treaty a customs union, a common market, subsequently a monetary union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which will be equitably share".[147]

Although it has not yet reached a full political union, the European Union tried to reach this stage or, at least, has significant features of this stage. Indeed, with the ratification of the Maastricht Treaty, the European Union was provided a single supranational institutional framework. At least, with the establishment with the first Pillar, there is an appearance of supranationality. It is important to mention the difference between this pillar and two other pillars (Pillar 2 and pillar 3).[148] In fact, the first one is based on supranationality or the so called "community method" whereas the two are based on inter-governmental cooperation.[149] These two pillars were abandoned in the Treaty of Lisbon.

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[146] Art.3 (1) of the Revised Treaty of the Economic Community of the West African States (ECOWAS).
[147] Art.5 of the Treaty for the establishment of the East African Community.
[148] It is important here to underline that the Maastricht Treaty was constructed on 3 pillars. Pillar 1, called also, "Community Pillar" was dealing with existing policies in the previous Treaties and introduced important amendments to the EC Treaty. For instance, to underline the supranational aspect of this pillar, the European Economic Community was renamed to be called TEU; the word "Economic" was removed from the appellation European Economic Community to be renamed "European Community". Pillar 2, also called "the Common Foreign and Security Policy Pillar "is an inter-governmental co-operation on common foreign and security policy (CFSP) whereas Pillar 3 or "[t]he Justice and Homme Affairs Pillar" covers inter-governmental co-operation in the fields of justice and home affairs (JHA). See Alina Kaczorowska, *op. cit*., pp.26-27.
[149] Alina Kaczorowska, op.cit., p.27.

2.3. Historical evolution of integration in the EU and EAC

An analysis of the impact of State Sovereignty on regional integration in both the EU and EAC requires a good understanding of the evolution of the integration process of the two communities. Indeed, the nature and the extent of this impact cannot be understood without reference to its historical origin. A study or an analysis of the impact of State sovereignty on regional integration in the EU or EAC without considering their historical evolution would lead to a very limited and superficial understanding of the study. In this perspective, the study of their historical evolution will be put into context of State sovereignty in order to get a picture of what has been the impact of this concept on the integration process. This section discusses this historical evolution background in the European Union on one hand and that of the East African Community on the other hand in order to arrive at some concluding observations.

2.3.1. Evolution of the integration in the EU

The history of the European integration in the EU is not easy to describe as it involves a series of historical facts. As Neil indicates, there is always a problem in knowing precisely where to start with the story of a subject in a chronological sense.[150] According to him, it is not easy to know how far back it is necessary to go to be able to properly describe and understand the process of integration in the European Union since there have been many cooperative intergovernmental ventures established in Western Europe in late 1940s.[151] The European Union has its foundations in three European Communities that were established by treaties: the European Coal and Steel Community (ECSC), The European Community (EC), and the European Atomic Energy Community (Euratom, EAEC).[152]

[150] Neil Nugent, *The Government and politics of the European Union*, 6éd., Duke University Press, Durham 2006, p.2.
[151] *Idem*, p.23.
[152] Koen Lenaerts and Piet van Nuffel, *Constitutional law of the European Union*, Sweet and Maxwell, London 1999, p.3.

2.3.1.1. The European Coal and Steel Community

The integration of the European Union started by the establishment of the European Coal and Steel Community in April 1951 by six countries namely Italy, Belgium, Luxemburg, Netherland, France, and Germany.[153] The idea of creating this community was revealed for the first time by the French Foreign Minister Robert Schuman in his declaration made on 9 May 1950 in the following wording:

> "Europe will not be made at once, or according to a single, general plan. It will be formed by taking measures which work primarily to bring about real solidarity. The gathering of the European nations requires the elimination of the age-old opposition of France and Germany. The action to be taken must first of all concern these two countries. With this aim in view, the French Government proposes to take immediate action on one limited point. The French Government proposes that Franco German production of coal and steel be placed under common [Commission], within an organization open to the participation of the other European nations. The pooling of coal and steel production will immediately ensure the establishment of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of arms, to which they themselves were the constant victims".[154]

This declaration clearly set out the future of Europe in terms of integration. Indeed, it indicates the goal of creating a European Federation through an establishment of an open organization to all European nations on the production of coal and steel by France and Germany. Four other countries accepted the invitation and joined Germany and France in the establishment of a Treaty on Coal and Steel in 1951, a Treaty that entered into force on July 23, 1952.[155] This commitment between 6 countries was to be made for a period of 50 years after the entry into force the ECSC treaty[156] and had specific objectives. For the realization of their objectives, Member States agreed to transfer their sovereignty to a community organ, an independent supranational institution called "High Authority" which was conferred power to make decisions that were binding on

[153] Koen Lenaerts and Piet van Nuffel, *op.cit*., p3.
[154] Schuman Declaration (Paris, 9 May 1950). See also, Robert Schutze, European Union Law, Cambridge University Press, p. 12.
[155] Koen Lenaerts and Piet van Nuffel, *op.cit,* p. 3.
[156] Art 97 of the Treaty establishing the European Coal and Steel Community.

them.[157] Their main objectives were an establishment of a Common Market for Coal and Steel by prohibiting and abolishing with the Community:

> "(a) import and export duties, or charges with an equivalent effect, and quantitative restrictions on the movement of coal and steel.
> (b) measures or practices discriminating among producers, among buyers or among consumers, specifically as concerns prices, delivery terms and transportation rates, as well as measures or practices which hamper the buyer in the free choice of his supplier.
> (c) subsidies or state assistance, or special charges imposed by the state, in any form whatsoever.
> (d) restrictive practices tending towards the division of markets or the exploitation of the consumer".[158]

It is worth noting that, the Treaty Establishing the European Coal and Steel Community, put in place supranational institutions namely a "High Authority"[159] - a Common Assembly - the Assembly" -, a Special Council -the Council- and a Court of Justice.[160] Among all these institutions, the commission (or the High Authority) was at the heart of the community while the others were peripheral to its functional.[161]

The success of the ECSC led to a proposal of cooperation in the defense and foreign policy under the umbrella of a supranational institution. This idea was synchronized by the establishment of a second European Community, the Defense Community with a treaty signed in 1952 in Paris.[162] The objective of this community was, exclusively defensive[163] and, therefore, aimed "to ensure the security of Member States within the framework of the North Atlantic Treaty and by accomplishing the integration of the defense forces of the member states and economic utilization of their resources".[164] The contracting parties committed also to "institute among themselves a European Defense

[157] Art 2 of the Treaty establishing the European Coal and Steel Community.
[158] Art 1 of The Treaty establishing the European Coal and Steel Community.
[159] The name of « High Authority » was changed to « Commission » in the wake of the 1965 Merger Treaty. See art 9 of the Treaty establishing a Single Council and a Single Commission of the European Communities.
[160] Art 7 of the Treaty establishing the European Coal and Steel Community.
[161] Robert Schütze, *European Constitutional Law*, Cambridge University Press, 2012, p.14.
[162] *Ibid.,* p.16.
[163] Art.2 (1) of the European Defense Community Treaty.
[164] Art.2 (2) of the European Defense Community Treaty.

Community, supranational in character, consisting of common institutions, common armed forces and common budget".[165]

A deep analysis of these provisions would identify important information that proves a commitment to transfer important sovereign powers by member states to a common authority. Indeed, reading through the lines of these provisions, one can deduce two important elements. Firstly, the defense and security of any member state had to be placed under the community's responsibility which would consequently lead to a creation of a European army and the suppression of the national ones. Secondly, not only member states were to place their contingents to the community's disposal, but also, they were committed not "to recruit or maintain national armed forces"[166] except in circumstances enumerated under article 10 of the same treaty. This can also be proven by the fact that "any armed aggression directed against any one of the member states in Europe or against the European Defense Forces shall be considered as an attack directed against all of the member States".[167]

All these elements specified in the treaty give a clear view of how sovereignty in the matter of defense was strongly affected. This led to the failure of the establishment of this defense community. Failure to meet consensus on what would have been the nature and the form of this supranational organization in defense by Member States, this community could not be successful. This ended up in a proposal to create a European Community aimed at merging the European Coal and Steel Community and the European Defense Community.[168]

Following the failure of the European Defense Community, the European integration returned its way in the economic aspects. Since some countries were interested in the cooperation in the matters of nuclear energy and others in creating a common market for all economic aspects,[169] the consensus was reached to create two additional

[165] Art.1 of the European Defense Community Treaty.
[166] Art.9 of the European Defense Community Treaty.
[167] Art 2(3) of the European Defense Community Treaty.
[168] Robert Schütze, *op.cit*, pp.16-17.
[169] Robert Schütze, *op.cit*, p.18.

communities: the European Atomic Energy Community and the European Economic Community.[170]

2.3.1.2. The European Economic Community (EEC) and the European Atomic Energy Community (EAEC)

The European Economic Community Treaty was signed in Rome on March 25, 1957 and entered into force the following year on January 1st, 1958.[171] The aim of this community was an establishment of a Common Market and a progressive approximation of the economic policies of Member States, as well as the promotion of a harmonious development of economic activities.[172] Clearly, Member States committed to a creation of a common market between themselves. As previously explained, in Common Market cooperation Member States establish a freedom of factors of production. The same was applied in the case of the EEC. According to the Treaty on the EEC, in addition to an abolition of all customs duties and of quantitative restrictions with regard to the importation and exportation of goods and all other measures with equivalent effects, Member States established a common external policy and a free movement of persons, services, and capital.[173]

As explained above, this treaty was signed together with the European Atomic Energy Community (EAEC). The aim of the latter was not far from the first as both intended to ensure the growth of the economic relations. It aimed at "contributing to the raising of conditions of life of its Member States and at developing commercial exchanges with other countries by the creation of conditions necessary for the speedy establishment and growth of nuclear industries.[174] To accomplish this, Member States committed themselves to develop research related to nuclear energy, to establish and to ensure the application of uniform safety standards to protect the health of workers and of general

[170] *Ibidem.*
[171] Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, 2nd éd , Sweet and Maxwell, 2006, p.6.
[172] Art. 2 of the Treaty establishing the European Economic Community.
[173] Art 3 (a), (b) et (c) of the Treaty on European Economic Community.
[174] Art 1 of the Treaty establishing the European Atomic Energy Community.

public, to encourage facilities in the development of nuclear energy in the community and to establish a common market with regard to the usage of nuclear energy.[175]

It is worth noting that, as the EEC has considerably changed its original objectives adding other aspects, it reached a point where the community was working out of its original scope of study. That is why the adjective "economic" was, at a certain period, removed from the name of the Community to be simply called "European Community"[176]. The central idea of the "EC" was a common market covering all economic sectors other than those falling in the purview of the ECSC or Euratom Treaties.[177]
Despite being in the image of the ECSC, the institutional framework of the two treaties of 1958[178] had only two institutions in common with the former, namely the Assembly[179] and the Court of justice.[180] However, with the Merger Treaty of 1965, two other institutions were merged. Indeed, the High Authority, executive body of the ECSC was merged with the Euratom Commission to form the Commission; the Council of Minister of ECSC was merged with the Council of the EEC and Euratom to form a single council.[181] Since this time, these three communities have continued to work together with shared institutions but as different entities.[182]

2.3.1.3. Enlargement of the European Union

The European Economic Community survived for quite a long time despite many changes regarding its initial objectives. During its existence, it was enlarged with accession by other countries. Sixteen (16) years after the foundations of the Economic Community, team of three countries joined the community on 1 January 1973, United Kingdom, Denmark and the Republic of Ireland, through the signature of the Treaty of accession bringing the Community member states to nine (9) countries at this time.[183] Greece joined on 28 May 1979 followed by Spain and Portugal on 1 January 1986,

[175] Art 2 of the Treaty establishing the European Atomic Energy Community.
[176] Watt at al, *European Union Law*, 4ed, Sweet et Maxwell, 2000, p.7.
[177] *Idem*, p.8. See also art 305 (ex 232) E.C.
[178] Treaty on EEC and Euratom
[179] It was subsequently renamed the "Parliament".
[180] Josephine Steiner et ali, *EU Law*, 9ed. Oxford University Press, Oxford, 2006, p.3.
[181] *Idem*, pp.3-4.
[182] *Ibidem.*
[183] *Idem.*, p.4.

bringing the Community to 12 Members.[184] Subsequently accession was completed by Austria, Finland and Sweden on 1 January 1995.[185]

Another major enlargement occurred on 1 January 2004 with the accession by Poland, Hungary, Czech Republic, Slovenia, Lithuania, Latvia, Cyprus, Slovakia, Malta, and Estonia[186]. Romania and Bulgaria followed on 1 January 2007.[187] The last to join the Union was Croatia which joined on 1 January 2013.[188] Thus, from six (6) founder States, the Union was enlarged to twenty-eight member states. However, this number was reduced to twenty-seven member states on 31 January 2020 after the United Kingdom withdrew from the Union. The withdrawal of the UK is undoubtedly a sign that Member States have not lost their sovereignty to decide whether they want to be member or not. As indicated previously, one of the features of the state sovereignty is the prerogative of State to make independent decisions.

It is also worth noting that the enlargement of the European Union has not yet reached its end. There is a list of countries which are already candidates for membership namely Albania, Montenegro, Serbia, the Former Yugoslav Republic of Macedonia, and Turkey.[189]

2.3.1.4. The Single European Act

Following a white paper that was produced in 1985 by the commission, it was realized that there were still many barriers to the realization of a Single Internal Market. Specifically, various technical and administrative barriers to the free movement and the decision-making system which were still founded on the unanimity were at the center of the blockage.[190] All these reasons led to the establishment of a Single European Act in

[184] Josephine Steiner et ali, *op.cit*., p.4.
[185] Sean Van Raepenbusch, *Droit Constitutionnel de l'Union Européenne*, Larcier, Bruxelles, 2011, pp. 48-49.
[186] *Idem.,* pp.50- 51.
[187] *Idem.*, p.55.
.[188] https://europa.eu.
[189] https://europa.eu .
[190] Antoine Masson et Paul Nihoul, Droit *de l'Union Européenne, droit institutionnel et droit matériel : Théorie, exercices et éléments de méthodologie*, 3éd. , Larcier, Bruxelles, 2011, p.12.

1985 aiming at the elimination of those remaining barriers by 1992.[191] To accomplish this, the Single European Act clarified the notion of internal market; established the monetary and the economic union, extended the competences of the Union to the question related to research, environment, regional policy, and some social questions.[192] The Single European Act also mentioned, for the first time, the cooperation in external policy.[193] Apart from this, the SEA established an accelerated decision-making procedure by initiating a qualified majority vote as a mode for decision making.[194] This was a very important stage for the realization of the integration process as it created flexibility in the decision-making process.

2.3.1.5. Treaty of Maastricht

Signed on 7 February 1992 and entered into force on 1 November 1993, the Treaty of Maastricht (formerly Treaty on the European Union) created a European Union that is based on three (3) pillars: the supranational pillar, common foreign and security policy (CFSP) and justice and home affairs (JHA).[195]

Since the creation of the European Communities, the Maastricht Treaty was surely the one that gave the Union its current structure and physiognomy and extended considerably its competences.[196] With the first pillar, member states established a "single institutional framework" to which they committed themselves to transfer some of their sovereign rights in order to promote the common interest. This single institutional framework was "to ensure the consistency and the continuity of the activities carried out in order to attain the community's objectives while respecting and building upon the *acquis communautaire"*[197]*.* With the second pillar, the Union committed itself to establish "its own identity" through the "implementation of a

[191] Josephine Steiner et al., *EU Law*, 9éd., Oxford University Press, 2006, p.6.
[192] Antoine Masson et Paul Nihoul, *op.cit.*, p.12.
[193] *Ibidem*.
[194] Josephine Steiner et al, *op.cit*., p.6.
[195] Antoine Masson et Paul Nihoul, *op.cit*., p.13.
[196] Philippe Manin, *L'union Européenne : institution- ordre juridique-contentieux*, Nouvelle édition, Pédone, Paris 2005, p.47.
[197] Art C of the Treaty of Maastricht (Treaty on the European Union).

common foreign and security policy" including the eventual framing of a common defense policy with a goal of leading in time to a common defense.[198]

However, this extension of competences brought many tensions between member States which felt that the Union was going to undermine their sovereignty. This Treaty was challenged by EU citizens before their respective constitutional courts.[199] It was also the first time in the life of the Community that the realization of a community project did not involve all member States. Two were given a special derogation.[200]

This controversy over the establishment of this treaty can be justified by the extension of the powers given to the Union, implying in the view of some member states a loss of their sovereignty. Indeed, these three pillars are constructed on the sensitive areas that affect the sovereign powers of member states.

To conclude, the Treaty of Maastricht somehow paved the way towards a political Union. In addition, the establishment of a "single institutional framework", Maastricht Treaty introduced some important innovations which are in direct relation with the political Union. Specifically, it introduced the notion of citizenship of all EU member states nationals[201] and a number of political rights were recognized to them namely,

> "the right to vote and to stand as a candidate at municipal elections in another Member State, the right to vote and to stand as a candidate in elections to the European Parliament in another Member State and the right to the protection by diplomatic or consular authorities of any Member State".[202]

[198] Art B of the Treaty of Maastricht (Treaty on the European Union).
[199] For instance, see the Decision of the German Federal Constitutional Court on the Maastricht Treaty of October 12, 1993 Cases 2 BvR 2134/92, 2 BvR 2159/92.
[200] Philippe Manin, *op.cit*, p.47.
[201] See old Art G(C) introducing art. 8 (1) EC.
[202] See old Art G (C) EU introducing art 8 a to 8 c EC.

2.3.1.6. Treaty of Amsterdam

On 2 October 1997, a new Treaty, "Treaty of Amsterdam" was signed and came into force on 1 May 1999.[203] The adoption of this Treaty was motivated by a significant enlargement of the Union. In 1995, three (3) countries namely Austria, Finland, and Sweden had just acceded to the Union[204] and an enlargement of another group of ten (10) countries were expected, which created the necessity of amending the institutional structure existing within the treaties in order to accommodate a larger EU.[205]

The main features of the treaty of Amsterdam were the extension of the objectives of the EU and the EC.[206] The community employment policy, the reinforcement of the guarantees to the basic human rights, the foreign policy and the common security, the extension of the powers of the Parliament were also other elements appeared in the Treaty of Amsterdam.[207]

2.3.1.7. The Treaty of Nice

Signed on 26 February 2001 and entered into force on 1st February 2003[208] in order to complete the treaty of Amsterdam, the Treaty of Nice modified the weighting of votes in the Council with the purpose of ensuring, in the respect of the enlargement, that every decision receives a support from all members States which represent a large majority of the population.[209] Thus, the composition of the European Parliament, the Council and the Commission was also clarified in the Protocol on the Enlargement of the European Union.[210]

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[203] Alina Kaczorowska, *op.cit.,*p.28.
[204] Jean Paul Jacqué, *Droit Constitutionnel de l'Union Européenne*, 8éd, Dalloz, Paris, 2015, p9.
[205] Antoine Massson et Paul Nihoul. , *op.cit.*, p.14.
[206] Alina Kaczorowska, *op.cit*, p.28.
[207] Antoine Masson et Paul Nihoul, *op.cit.*, p. 14
[208] *Ibidem.*, p.15.
[209] Jean Paul Jacqué, *op.cit*, p.12.
[210] Robert Schütze, *European Constitutional Law*, Cambridge University Press, 2012, p.36.
Art 2, 3 and 4 on the enlargement Protocol determine this composition successively in the Parliament, the Council and the Commission.

2.3.1.8. A Constitution for Europe that never worked

The commitment to move the European Union forward was a further development that remained intact among EU leaders after the Treaty of Nice.

Indeed, in the same year (December 2001), an interesting idea came out from the Laeken Summit. It was a "Declaration on the Future of the European Union" with strong commitments to make Europe "more democratic, transparent and effective and to pave the way towards a Constitution of Europe".[211] The task to analyse all these aspects was given to a special body "European Convention" which produced a "Draft Constitutional Treaty" in 2003 and which was agreed on 2004.[212] It was agreed that the Treaty establishing a Constitution for the Europe would be called "Constitution" of the new European Union, with legal personality, which would take the place of the European Community and the European Union.[213] Thus, the Draft Constitution created "*one* Union, with *one* legal personality, on the basis of *one* Treaty"[214] as it "melted" the EU's three Treaties into one.[215] This Constitution contained specific and interesting innovations. The most important innovations were the incorporation of the Charter of Fundamental Human Rights of the Union, a clear definition of power between the EU and Members States, an

> "explicit statement of the principle of primacy of Union law over the law of Member States, the fact that the co-decision procedure was to become the 'ordinary legislative procedure' and the introduction of new legislative instruments for the Union such us 'European laws' and 'European framework laws' corresponding to the present regulations and directives respectively".[216]

The constitution was to come into force after it was ratified by four fifths (4/5) of the Member States. The mode of ratification was given to Member States, meaning that the Treaty could be approved by national parliaments or directly by nationals of Members

[211] Alina Kaczorowska, *op.cit*. p.37.
[212] Robert Schutze, *op. cit,* pp.33-34.
[213] Koen Lenaerts and Piet Van Nuffel., *op.cit.,* pp. 62.
[214] Robert Schutze, *op. cit*., p34.
[215] Alina Kaczorowska, *op.cit*. p38.
[216] Koen Lenaerts and Piet Van Nuffel., *op.cit.*, p. 63.

States who could approve or disapprove it by referendum. Unfortunately, referendums organized in France and Netherlands rejected the Constitutions, which created a period of uncertainty that led to the abandonment of the project of the constitution in favor of a modified Treaty exempted from the name "constitution".[217]

The establishment of a Constitution would have been an interesting stage in the development of the integration process of the European Union. Indeed, all these innovations deal with sensitive aspects which affect Member States' sovereignty. As described while defining sovereignty, the Constitution is the most determinant element of the concept of sovereignty as it the sole source of powers.

2.3.1.9. The Treaty of Lisbon

Following a failure of the establishment of a Constitution for Europe, member states tried to find how they can keep some elements from the failed constitution. They opted to maintain the original treaties and to introduce, in the form of amendments some main proposals of the failed Constitution.[218] It is in this perspective that the Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 January 2009.[219] It amends the existing treaties, the treaty on the European Union and the Treaty establishing the European Community which was renamed the Treaty on the Functioning of the European Union (TFEU).[220]

The main objectives of the Lisbon Treaty were to render the functioning of the European Union as more democratic, to simplify the decision making process, to give to the charter on the fundamental rights a certain recognition, to permit the accession of the European Union to the European Convention of Human Rights and to reinforce the power of the European Union.[221]

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[217] Antoine Masson and Paul Nihoul, *op.cit.* p.16.
[218] Jean Paul Jacqué, *op.cit.,* p.19.
[219] Koen Lenaerts and Piet Van Nuffel*, op.cit.*, p.65.
[220] *Ibidem*.
[221] Antoine Masson et Paul Nihoul, *op.cit.,* p.16.

It is also important to mention that the Treaty of Lisbon has achieved the supranationalisation of the second and the third pillar. The Common Foreign and Security policy that constitutes the 2nd Pillar was integrated into the (new) TEU and was strengthened with regards to the Union's defense policy.[222] The new Treaty on the European Union indicates that "the common security and defense policy shall include the progressive framing of the common Union defense policy" which "will lead to a common defense when the European Council so decides".[223] The treaty also created a mutual assistance clause for all member states in case of armed aggression towards any Member State. It prescribes that in case one of the Member States is victim of armed aggression, all other member States will have an obligation to aid or assist it by all means within their powers in accordance with article 51 of the United Nation Charter.[224] With regard to the third pillar, it was incorporated into the Treaty on the Functioning of the European Union under the supranational roof of Tile V of Part Three.[225]

2.3.2. Historical evolution of the integration in the East African Community

After a compressive description of the evolution of the European Integration, it is also important to understand this evolution in the case of the East African Community for the purposes of a comparison. In the case of the East African Community, this evolution will be analyzed into two main periods, the precolonial and colonial period as well as the post-colonial period.

2.3.2.1. Pre-colonial and colonial period

As previously explained, with regional integration, States agree to manage together some area of common interests which may have political, economic or social aspects. We should also remember that regional integration is not achieved at once, and therefore, the process passes through certain stages that were identified to be a Preferential Trade Area, a Free Trade Area, a Customs Union, a Common Market, and a Political Union.

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[222] Robert Schutze, *op.cit,* pp 38- 39
[223] Art 42(2) of the (new) Treaty on the European Union.
[224] Art 42(7) of the (new) Treaty on the European Union.
[225] Robert Schutze, *op.cit*., p.39.

All these aspects in the case of the East African Community find their origin in the precolonial period. Mangachi agrees with this idea when he indicated that the three first founder countries of the East African Community - Kenya, Uganda, and Tanzania - shared a common history that dates back to the pre-colonial period and that regional integration in East Africa is one of the oldest regional integration schemes in Africa.[226]

In the early colonial period, the current east African region was divided into two main territories namely the German East Africa, comprising of Tanzania main land (i.e. Tanganyika), Rwanda and Urundi; the British territory which was comprised of Kenya (known as East African Protectorate), and the British Protectorate of Uganda.[227] Most of the efforts for integration were done in the British territory. The process for integration seems to have been started with the establishment of the Uganda Railway from Uganda to Mombasa (in Kenya), in order to connect Uganda and the East Africa Protectorate (Kenya) in the 1890s (1895-1903) by the British Colonial administration.[228] This was followed by many other common activities between these countries with the support of the British colonial administration. Some of these activities were:

> "The East African Posts and Telegraphs (EAPT-1890), the East African Currency Board (EACB-1905, the Customs Union (1917), the East African Income Tax Board (EAITB-1940), and the East African Airways (EAA- 1946)".[229]

After the 1st World War, Germany lost her colonies and consequently, Tanganyika was given to the British. The latter tried to create a unified policy to all her colonies, a project that failed for many reasons. It primarily failed due to:

> "African opposition, particularly from Buganda Kingdom, the idea of federation because they perceived it as not being in their interest and therefore, they did not expect to benefit

[226] Msuya Waldi Mangachi, *op.cit.*, p.15.
[227] Harald Sippel, *Regional Integration in East Africa: A legal historical overview*, in Kennedy Gastorn et al, *Processes of legal integration in the East African Community*, DUP, 2011, p.28.
[228] International Democratic Watch, *The Democratization of international organization*, Centre for Studies on Federalism, see http://www.federalist-debate.org/index.php/component/k2/item/919-democracy-in-international-organizations , Visited on 02.03.2018.
[229] *Ibidem*.

> from it. In the view of this opposition by Africans as well as Tanganyika's mandate status, the British concluded that the time was not ripe to establish an East African Federation".[230]

Another interesting stage was the establishment of the East African High Commission (EAHC) in 1948 which established a unified income tax in addition to the customs union.[231] With a main objective of strengthening the existing common services in transport and communication, education, the EAHC also established a common external tariff, currency and postage.[232] The EAHC lasted 12 years and ended with the colonial period.

2.3.2.2. Post-colonial period

Like in many other African countries, the East African Community countries followed the movement for independence in early 1960s. After their independence from the British, the EAHC was replaced by the East African Common Services Organization (EACSO) which lasted 5 years from 1961-1966.[233] During the EACSO's period, Partner States tried to organize together some common services. Ndengwa highlights the following services which were under ECSO:

> "East African Railways and Harbours, East African Posts and Telecommunications, East African Airways, East African Cargo and Handling Services, the East African External Telecommunications company, General Fund Services which included the East African Customs and Excise Department, the East African Income Tax Department, the Meteorological Department, the East African Literature Bureau, the Directorate of Civil Aviation, the East African Aptitude Testing Unity, eleven separate research institutions and the administrative machinery for the whole organization".[234]

During EACSO, Partner States also attempted to create a political federation. By the way of a joint declaration made by these three countries on 5 June 1963, they indicated their

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[230] Msuya Waldi Mangachi, *op.cit.*, p.12.
[231] Stefan Reith and Maritz Boltz, *The East African Community: Regional integration between aspiration and reality*, Kas International Reports, p.91.
[232] Harald Sippel, *op.cit,* in Kennedy Gastorn et al., *Processes of legal integration in the East African Community,* DUP, p.30.
[233] See the Preambule of the Treaty for the establishment of the East African Community.
[234] Ndengwa Philip, *The Common Market and Development in East Africa*, Nairobi, East African Publishing House, 2nd ed., 1968, p.177. See also Harald Sippel, *op.cit*, in Kennedy Gastorn, *Process of Legal Integration in East African Community*, DUP, pp.31-32.

intention to create a federation by governments of East Africa.[235] Some of the most important elements of the declaration reads as follows:

> "Within this spirit of Pan- Africanism and following the declaration of African Unity at recent Addis Ababa Conference, practical steps should be taken wherever possible to accelerate the achievements of our common goal.
> We believe that the East African Federation can be a practical step towards the goal of Pan- African Unity. We hope that our action will help to accelerate the efforts already being made by our brothers throughout the continent to achieve Pan-African Unity.
>
> […]
>
> We believe a political federation of East Africa is desired by our people. There is throughout East Africa a great urge for unity and an appreciation of a significance of federation.
>
> […]
>
> We believe, in fact, that some of these territorial problems can be solved in the context of such an East African Federation
> We are convinced that time has now come to create such central political authority".[236]

This statement clearly shows the intention by the then East African member states to create a political federation. However, for political reasons, the federation desired by these countries did not succeed and the EACSO was dissolved in 1966.[237]

One would wonder what these political reasons could be. Scholars do not enumerate them, but again, one would link the failure of this federation to its nature. A political federation is something that is interrelated and connected to sovereignty. Acceptance of a political federation would mean a loss of political powers and decision making at national level. In other words, giving such consent would take some sovereign powers from states and affect them to the regional political organs. This surely brings fear to contracting countries which prevent them to get more involved in the political integration process.
In his reaction to the reasons of the failure of this political integration appeared in this declaration; Harald indicates the fact that there was no agreement on the repartition of

[235] Declaration of Federation by the Government of East Africa, 1963.
[236] Declaration of Federation by the Government of East Africa 1963; See Annex to Harald Sippel, *op.cit.,* in Kennedy Gastorn et ali, *Process of legal integration in the East Africa*, DUP, pp. 42-43.
[237] Msuya Waldi Mwangachi, *op.cit*., p.16.

powers between the intended federation and the Partner States. Indeed, Uganda was scared of being dominated by Kenya and Tanganyika and there was also an egocentrism of Members States which were willing to a separate independence from the colonial powers.[238]

The dissolution of EASCO did not discourage EAC leaders who remained with their willingness to unite East Africa. In the replacement of the EASCO, they created the East African Community in 1967 founded on the Treaty for the East African Cooperation.[239] Through this Treaty, contracting parties "established among themselves an East African Community" and as an integral part of it an "East African Common Market".[240]
The aim for the community was:

> "to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities the benefits whereof shall be equitably shared".[241]

However, despite being a key stage in the historical development of East Africa, this Community did not last for long. Ten years after its creation, it collapsed in 1977. There were many factors that were associated to its failure. Stefan and Moritz summarize them into four main raisons:

> "firstly, its lack of steering functions; secondly, the unequal distribution of benefits; thirdly, the purely intergovernmental – i.e. interstatal – structure; and, fourthly, the irreconcilable differences of opinion between leading players, especially between the Ugandan dictator Idi Amin and the Tanzanian president Julius Nyerere".[242]

Analyzing these factors, one could note the existence of selfishness by Partner States who were reluctant to surrender their sovereignty in favor of the common interest. Rather partner states were more concerned about developing their national identities, losing sight of the desired community integration. Sircar referred to this as "inner-

[238] Harald Sippel, op.cit, in Kennedy Gastorn et al, *Progress of legal integration in the East Africa*,DUP,pp. 32-33.
[239] See the Treaty for East African Community cooperation Act 1967, N° 31 of 1967.
[240] Art 1.1 of the Treaty for East African Cooperation 1967.
[241] Art 2, 1 of the Treaty for East African Cooperation 1967.
[242] Stefan Reith and Moritz, *op.cit*., pp.92-93.

integration" i.e., nation-building concentrated on strengthening national identities.[243] The collapse of the Community in 1977 did not take away the spirit of cooperation between these three countries. Indeed, between 1993 and 1997, the three former member states tried to revive the community by putting in place a commission "the Tripartite Commission for Cooperation", in 1993 which came up with a Treaty for the establishment of the East African Community in November 1999.[244]

This new East African Community appeared as a resurrection of the old East African Community formerly established under the 1967 Treaty on the East African Cooperation[245] and seems to cover many sectors area of cooperation. Indeed, the Community was to develop the cooperation among partner states in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit.[246] As mentioned above, in order to accomplish these objectives, four stages need to be followed namely a Customs Union, a Common Market, a Monetary Union, and ultimately a Political federation.[247] A deep analysis of these provisions reveals that the objectives of this community reflect a multidimensional aspect of cooperation including the political federation in spite of its failure in the past period of the EACSO.

One would ask why the reappearance of this concept of political federation of the new Treaty seems not to have caused many controversies as it was during the EACSO. The justification for this contrast is likely to be the difference to the limitation in time given to the political federation by these two communities. Indeed, in the case of EACO, the political federation was foreseen to be implemented immediately without delay which of course would bring immediate attention to the contracting countries with regard to its implementation. However, things seem to be different in case of the new East African Community. The treaty establishing it considers the political federation as a final goal to be implemented after some other crucial stages namely a customs union, a common

[243] Sircar, Parbatti Kumar, *Development through integration: Lessons from East Africa,* Delhi, Kalinga Publications 1990, p.129.
[244] Stefan Reith and Moritz Boltz, *op.cit*., p.93.
[245] Richard Frimpong Oppong, *op.cit*, p.24.
[246] Art.5 (1) of the Treaty for the establishment of the East African Community.
[247] Art5 (2) of Treaty for the establishment of the East African Community.

market and a monetary union, have been successful implemented. There is a very long way to go for one to start thinking about the stage of political integration. It is therefore, in my view, too early to foresee the consequences that may be generated by this sensitive stage, taking into consideration on its undoubtable linkage to the concept of state sovereignty.

Like in the case of the EACSO, the issue of sovereignty was and is still prominent in the case of the new EAC. Indeed, in the report by a Committee on Fast-tracking the East African Federation which was put in place in 2004 "to examine ways and means to expedite and compress the process of integration", the Committee identified fear of erosion of sovereignty among the political elite as a major obstacle to the EAC federation.[248]

Stefan and Moritz find that the realization of a political federation in the East African Community is illusive.[249] They base their arguments on the fact that even a customs union and a common market, which are early stages, seem to have failed or go very slow because of the same problem identified regarding state sovereignty. As an example, they highlight the fact that since the common market came into force in 2010; its national implementation is still faltering; and the fact that the customs union introduced in 2004 still faces many problems of removal of non-tariff barriers.[250]

It is worth noting that the Community as established by the 1999 treaty stands until now and has been enlarged to a number of six Member States: Uganda, Tanzania, Kenya, Rwanda, Burundi and South Sudan. Rwanda and Burundi acceded in 2007 whereas South Sudan joined recently in 2016.

[248] Jonshua M. Kivuva, *East African's dangerous dance with the Past: important lessons the new East African Community has not learned from the defunct,* in European Scientific Journal, Vol. 10, December 2014, p.365.
[249] Stefan Reith & Moritz, *op.cit*, p.95.
[250] *Idem*, p.94.

2.3.3. Summary table on different phases of the evolution of the EAC[251]

Phase	Some of the entities established	Year
Phase I: 1903-1947	Customs collection Centre	1900
	Customs Union	1917
	East African Currency Board	1919
	Governors' Conference	1926
	East African Posts and Telegraphs	1933
	East African Airways	1946
Phase II: 1948- 1961	East African High Commission	1948
	East African Central Legislative Assembly	1948
Phase III: 1961-1967	East African Common Service Organization	1961
Phase IV:1967-1977	EAC I Treaty signed	1967
	EAC I disintegrate	1977
	East African Community Mediation Agreement	1984
	Permanent Tripartite Commission for East African Cooperation	1993
Phase V:1999-	EAC II Treaty signed	1999
	EAC II Treaty enters into force	2000
	Customs Union Protocol signed	2004
	Customs Union comes into effect	2005
	Rwanda and Burundi become members	2007
	Common Market Protocol signed	2009
	Common Market comes into effect	2010
	Monetary Union protocol signed	2013

This table was published in Open Society Foundations, *The Civil Society Guide to Regional Economic Communities in Africa*, African Minds, New York, 2016, p. 11.

[251] Open Society Foundations, *The Civil Society Guide to Regional Economic Communities in Africa*, African Minds, New York, 2016, p. 11.

2.3.4. Concluding observations

The purpose of this section was to understand the evolution of the integration process in both European Union and East African Community in relation with the concept of sovereignty. Under this section, it was understood that, in both communities, integration happened gradually, and each stage was supported by an agreement in form of a Treaty.

Also, their evolution was not achieved without any challenges. Several times in both Europe and East Africa, the issue of sovereignty has affected the development of regional integration. At some stages, States were reluctant to implement some commitments refusing to surrender some of their sovereign powers to the common institution which sometimes have brought the integration down even to the collapse of the concerned community.

In both Europe and East Africa, it is also noted that there are some projects which are likely to bring controversies whenever they appeared in the process. There are objectives which imperatively oblige states to give up some aspects of their national identity for the benefit of the Community. The most important to be identified are the establishment of the common defense and security, the common foreign policy and an intention to establish a political federation. For instance, in the case of Europe, the project for the establishment of the European Defense Community failed after the success of the ECSC, the extension of the European Union's powers by the Maastricht Treaty to include the common foreign and security policy brought many tensions, so much so, that different national constitutional courts had to analyse the constitutionality of this Treaty. The project for the establishment of the Constitution for Europe did not get the consensus between EU member States.

Like the EU, the declaration of the establishment of a political federation by the then East African Partner States was not realized. The collapse of the EAC in 1977 due to the so called "inner-integration" by Partner States is another example of the manifestation of state sovereignty in the process of integration. It was therefore noted that there are complexities around political union and state sovereignty.

Overall, this section has shown that some areas of cooperation, especially sovereign related areas or those affecting national identities have brought tensions and have somehow blocked some crucial parts of the integration process.

2.4. Obligation to Member States to surrender a part of their sovereignty to the community organs

Having understood the notions of State Sovereignty and Regional integration and their evolution in both the European Union and the East African Community, it is also important to know the legal basis of the relationship between these two elements. This paragraph analyses the legal basis of the obligation of states to surrender some of their sovereign rights to the community institutions either in the European Union or the East African Community in order to come up with some concluding observations.

2.4.1. In the European Union

In the European Union, there are no specific provisions stating clearly that Member States should relinquish their sovereignty to the community organs. However, it can be understood that, by ratifying the founding treaties, EU member states accepted to transfer some of their sovereign powers to a supranational body and, therefore, accepted to be subjected to a new legal order distinct and superior to their own. This was reiterated by the European Court of Justice in its famous case Van Gend en Loos. The Court indicated that:

> "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".[252]

[252] Case 26/62 (1963) ECR 1, (1963) CMLR 105, § 74.

Another source of limitations of sovereign powers is art 24 (3) of the TEU. It obliges States to support the Union's policies in loyalty and solidarity and to comply with the Union's action in the area of external and security policy. States are also required to abstain from any action that contradicts the union's interests or that is likely to impair its effectiveness. This article reads as follows:

> "The Member States shall support the **Union**'s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity **and shall comply with the Union's action in this area.**
> The Member States shall work together to enhance and develop their mutual political solidarity.
> They shall refrain from any action which is contrary to the interests of the **Union** or likely to impair its effectiveness as a cohesive force in international relations".[253]

This provision creates a positive obligation towards Member states of supporting the Unions' external and security policy and complying with the Union's action in this area.It also establishes a negative obligation preventing them from taking any measures that can impede the Union's objectives in its external policy.

The obligation for EU Member States to limit their sovereignty can also be presumed in article 4(3) of the Treaty on the European Union which calls the Member States to assist the Union to implement the Union law, to fulfil the Union obligations and to refrain from any action that can jeopardise the objectives of the Union. It reads as follows:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".[254]

[253] Art.24 (3) of the Treaty on the European Union.
[254] Article 4 (3) of the Treaty on the European Union.

In whole, Member States have an obligation to not only do whatever possible to prevent their actions from hindering the implementation of the Union law, but also to create conducive environment for the realization of the integration.

2.4.2. In the East African Community

Like the European Union, there is no specific provision indicating how States' sovereign powers should be transferred to community organs. However, some provisions give an impression of the existence of this obligation of transferring sovereignty to the common institutions at regional level.

This obligation can be specifically seen through the general undertakings specified under article 8 of the treaty for the establishment of the East African Community where contracting States recognize their duties and obligations. The provision of the treaty reads as follows:

> "1. The Partner States shall:
> (a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty; (b) co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and (c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.
> 2. Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.
>
> 3. Each Partner State shall (a) designate a Ministry with which the Secretary General may communicate in connection with any matter arising out of the implementation or the application of this Treaty, and shall notify the Secretary General of that designation; (b) transmit to the Secretary General copies of all relevant existing and proposed

> legislation and its official gazettes; and (c) where it is required under this Treaty, to supply to or exchange with another Partner State any information, send copies of such information to the Secretary General.
> 4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.
> 5. In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions, and laws over similar national ones".[255]

Through this article, contracting states have agreed to limit their actions and to transfer them to the community level. They were committed to be bound by three main limitations.

First, Partner States are limited in their activities. Indeed, while accomplishing their activities, Partner States should create not only favorable conditions for the realization of the Community's objectives, but they should also coordinate these activities in a manner that is favorable for the same objectives or that can render them realistic.
Secondly, their limitations appear in the establishment of their laws. Partner States accept not only to give effect to Community laws through their legislations by acknowledging the Community's legal capacity and personality, but to also confer upon them force of law within their territories. Furthermore, Partner States commit themselves to communicate to the community institutions about their legislations.
Thirdly, Partner States accept the Supremacy of community laws, organs and institutions. In this perspective, they must take all necessary regulations to give community legislation precedence over similar national ones.

2.4.3. Concluding observations

The aim of this section was to illustrate the legal basis of the obligation of contracting countries to surrender a part of their sovereignty to community organs in both the European Union and the East African Community. This study has shown that, although there are no specific provisions that oblige contracting States to give up their

[255] Art 8 of Treaty for the establishment of the East African Community Treaty.

sovereignty, there are some provisions that imply the limitation of state sovereignty for the benefit of community organs in general and integration in particular.

CHAPTER THREE

STATE SOVEREIGNTY AND REGIONAL INTEGRATION IN THE EUROPEAN UNION

Having understood the general concepts of sovereignty and integration and their evolution in both the European Union and East Africa Community, this chapter will analyze the relationship between sovereignty and integration in the European Union. The analysis will focus on three aspects of the European Union: the competences and principles of the European Union, the relationship between the institutions of the union and national institutions, and the relationship between European Union law and national laws. Finally, a concluding observation of the chapter will be provided.

3.1. Competences and Fundamental Principles of the Union

This section analyses the competences which are attributed to the Union and the fundamental principles which guide their exercise.

3.1.1. Competences of the Union

For an understanding of these competences, an analysis of their evolution precedes the exploration before a concluding observation is provided.

3.1.1.1. Brief overview of evolution of competences of the European Union

The competences of the European Union were not attributed all at once. Indeed, the integration process followed a gradual approach. Thus, concretely this means that it was done step by step in a progressive manner. At every stage, depending on the circumstances of the moment or the need of moving the community to a further stage, competences of the Union could be extended and were indeed extended. Furthermore, as described in the previous chapter, it has been noted that any attribution of new competences to the Union could bring certain tensions within Member States as it could affect some of their sovereign rights.

It is also worth mentioning that the founding treaties of the European Community did not systematize or classify the competences as they are now. Competences were established in a vague manner and lacked a clear framework of their repartition. In other words, there was no catalogue of the competences in the treaties, thus translating into an absence of an express enumeration of competences as in fully-fledged federal states drawing a clear distinction between national and community competences.[1] The division of the competences between the European community and the Member States began to cause controversies in the mid-1980s, a period that witnessed significant changes in the decision-making bodies of the community.[2]

3.1.1.2. Types of competences

The Treaty of Lisbon establishes three divisions of competences between the EU and its Member States namely exclusive competences, shared competences and supportive competences.

3.1.1.2.1. Exclusive competences

This paragraph explores the meaning of the exclusive competences in the context of the EU integration before it analyses the areas in which these competences can be exercised.

3.1.1.2.1.1. Meaning and scope of exclusive competences

The European Union enjoys exclusive competences in some areas. Article 2 of the Treaty on the Functioning of the European Union specifies the meaning of the exclusive competences of the EU. It states that:

[1] Martin Trybus and Luca Rubini, *The Treaty of Lisbon and the Future of the European Union Law Policy*, Edward Elgar, Cheltenham UK & Northampton USA, 2012, p. 119.
[2] Diamond Ashiagbor et al, *The European Union after the Treaty of Lisbon*, Cambridge University Press, 2012, p.47.

> "when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts".[3]

This provision attributes all powers to legislate to the Union in the areas where treaties have conferred on it, competences to do so. This means a lot with regard to powers allocated to the Union. Member States are prevented from intervening or legislating in these areas regardless of the Union's actions. In other words, they cannot intervene in these areas even in the absence of action by the union. Concretely, article 2 of the TFEU establishes a general rule; there is a negative obligation of non-intervention by Member States to legislate in the areas where the Union has exclusive competences. This provision, however, establishes two exceptions. First, Member States can intervene only when empowered by the Union. The empowerment indicated in this provision is interpreted by TC Hartley as the delegation of power by the union to the concerned Member States.[4] Secondly, the exclusivity mentioned in this provision does not concern legislations adopted at national level with purposes of implementing the Union's acts. This is plausible because implementing acts does not change the content of the legislation; it only confers them effects into the national legal system.

3.1.1.2.1.2. Area of exclusive competences

Besides the definition of the concept of exclusive competences and its scope, the treaty of Lisbon established expressly fields of the Union's exclusive competences. Specifically, Article 3 of the TFEU indicates that:

> "the Union shall have exclusive competence in the following areas: customs union; the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and common commercial policy".[5]

[3] Art. 2 (1) of the Treaty on the Functioning of the European Union.
[4] TC Hartley, *The foundations of the European Union*, 7ed., Oxford University Press, Oxford, 2010, p.116.
[5] Art.3 (1) of the Treaty on the Functioning of the European Union.

It is worth noting that the ECJ had already qualified the field of "customs union, common commercial policy and conservation of marine biological resources under the common fisheries policy" as exclusive.[6]

The Treaty of Lisbon also established the notion of exclusive external competence which comprises some fields of external relations. It provides that:

> the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope".[7]

This is also comprehensible since an agreement which would engage the Union would logically not be concluded by subjects who will not implement it.

3.1.1.2.2. Shared competences

In the next paragraph, this study will analyse successively the meaning of the concept of shared competences and the area concerned with these competences.

3.1.1.2.2.1. Meaning and scope of shared competences

In some areas, the Union shares competences with member states. In this regard, the Treaty for the Functioning of the European Union stipulates that "the Union shall share competences with the Member States where the treaties confer on it a competence which does not relate to the areas referred to in articles 3 and 6".[8] This provision

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[6] Jean Paul Jacqué, *op. cit.,* p.174- 175.

[7] Art 3(2) of the Treaty on the Functioning of the European Union.

[8] Art 4 (1) of the Treaty for the Functioning of the European Union.
Art 3 reads as follows:"1.The Union shall have exclusive competence in the following areas: (a)customs Union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a

establishes a general rule on how shared competences can be understood. Through this provision, it can be understood that in the absence of an express attribution of exclusive competences or supportive competences to the Union in a given area, competence will be shared between the Union and member states. Therefore, both "the Union and the Member States may legislate and adopt legally binding acts".[9]

The above premise begs the question of whether the Union and Member States are simultaneously competent to act in these areas or not. However, this is not the case because member states lose their ability to intervene once the Union has undertaken actions and, specifically, once it has decided.[10] Member States exercise their competences only to the extent that the Union has not exercised its competences,[11] which means that they cannot intervene and exercise their competences where the Union has made its decision. This is in the application of the principle of pre-emption.[12] According to this principle, once the Union has intervened, any Member State's intervention is prohibited in the areas that are covered by this intervention. These areas are said to be pre-empted by the Union.[13] To explain this concept, Jean Paul Jacqué indicates that they become "exclusive competences by exercise" in contradiction with the "exclusive competences by nature". Whereas in the case of exclusive competences by nature, Member States no longer have a chance to legislate, except when the treaty is revised, for the competences which have become exclusive by pre-emption in a particular area, it is always possible to modify or abrogate the legislation existing, which allows Member States to recuperate their competences.[14]

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legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope".

Article 6 reads as follows: "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, youth, sport and vocational training; (f) civil protection; (g) administrative cooperation.

[9] Art 2 (2) of the Treaty on the Functioning of the European Union.

[10] Jean Paul Jacqué, *Droit institutionnel de l'Union Européenne*, 8éd., Dalloz, 2015, p. 177.

[11] Art 2 (2) 2nd sentence of the Treaty on the Functioning of the European Union.

[12] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction*, 2nd Revised ed., Oxford and Portland, Oregon, 2012, p. 23.

[13] Jean Paul Jacqué, *op.cit.*, p.177.

[14] *Ibidem.*

Given the fact that the right to intervene by Member States depends on the extent of the area of pre-emption, it is always important to determine areas that are pre-empted because it helps to know exactly in which areas Member States are no longer allowed to intervene. This is further clarified by the protocol on the exercise of the shared competences wherein it indicates that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore do not cover the whole area".[15]

3.1.1.2.2.2. Areas of shared competences

The TFEU indicates the fields in which the Union has shared competences with Member States. Specifically, as article 4(2) states:

> "Shared competences between the Union and the Member States applies in the following arears: (a)internal market; (b) social policy, for the aspects defined in this Treaty; (c)economic, social and territorial cohesion; (d)agriculture and fisheries, excluding the conservation of marine biological resources; (e)environment; (f)consumer protection; (g)transport; (h)trans-European networks; (i)energy; (j)area of freedom, security and justice; (k)common safety concerns in public health matters, for the aspects defined in this Treaty".[16]

In contrast to the fields of exclusive competences which are enumerated in an exhaustive manner by the treaty, fields of shared competences seem not to be exhaustively indicated in article 4(2). The concept of "principal areas" gives the impression that there are secondary areas that are not specified in the provision. It is also clear that when an area is not found either in the areas of exclusive competences nor in the supportive competences, it will be considered immediately as to be in the category of shared competences.[17]

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[15] See the Sole Article of the Protocol on the exercise of the shared competences, 2007,
[16] Art 4(2) of the Treaty on the Functioning of the European Union.
[17] Jean Paul Jacqué, *op.cit*., p. 179.

3.1.1.2.3. Supportive competences

In this paragraph, this study will analyse successively the meaning and the scope of the concept of supportive competences and the areas which are concerned with these competences.

3.1.1.2.3.1. Meaning and scope of supportive competences

In addition to the exclusive and shared competence, the TFEU confers to the Union another category of competences namely, the supportive competences. Article 2(5) of this treaty indicates that "the Union shall have to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competences in these areas.[18] The second sentence of this provision further states that "legally binding acts of the union adopted on the basis of the provisions of the treaties relating to these areas shall not entail harmonization of Member States' laws or regulations".[19]

It is, therefore, clear that in the areas that are concerned by supportive competences, the Union acts only to support, coordinate, or supplement the action of the Member States. It results from these provisions of the TFEU that actions of the Union in the exercise of its supportive competence are limited. Not only can the Union not replace Member States' competences, but it also cannot harmonize their laws or regulations in these areas.

3.1.1.2.3.2. Areas of supportive competences

The TFEU enumerates areas where the Union shall have as supportive action. These are "protection and improvement of human health, industry; culture; tourism; education, youth, sport and vocational training; civil protection, and administrative cooperation".[20] These areas seem to have in common, activities that directly affect the identity of states.

[18] Art 5 (2), 1st sentence of the Treaty on the Functioning of the European Union.
[19] Art 5(3) 2nd sentence of the Treaty on the Functioning of the European Union.
[20] Art 6 of the Treaty on the Functioning of the European Union.

They can be classified into 4 categories namely: education, culture, civic training, and health of the Member States.

3.1.1.3. Concluding observations

The objective of this section was to determine the areas of the Union's competences and to which extent it can intervene. It was noted that the union enjoys the exercise of 3 main competences: exclusive competences, shared competences, and supportive competences. For the exclusive competences, only the Union can act. Member states can intervene when authorized by the Union. This is very important with regards to the integration process. In fact, as explained in introduction chapter, for the realization of integration, Member States need to accept supranational institutions of the Union by transferring some of their sovereign rights to them. In this sense, by attributing the so-called exclusive competences to the Union - competences where Member States cannot intervene by definition -, EU Member States have shown their willingness to the integration in the Union.

For the shared competences, the union acts in the areas which are neither in the exclusive or supportive competences. In these areas also, through the doctrine of the pre-emption which foresees that, if the union has acted, EU Member States have shown their commitment to the realization of the integration. In other words, if Member States accept some areas to be pre-empted, this implies that they indirectly accept to surrender a degree of their sovereign rights they have on them.

With regard to supportive competences, the union acts to support, coordinated or supplement Member States without replacing them.
It is also worth noting the merit of the EU Member States of having established a repartition of competences between themselves and the Union in the treaties. This is very important for the integration process. In fact, it helps to avoid conflict of interests between the Union and its Member States which, undoubtedly facilitates the integration process.

What is also important to mention in this section, is that some of the competences of the EU have a final structure. A prime example is the competence of the EU relative to harmonisation of the internal market. This competence is specified under article 114 of the Treaty on the Functioning of the European Union. This provision allows the Union through the European Parliament and the Council acting in accordance with the ordinary procedure to adopt the measures for the approximation of national laws which have as objective the establishment and the functioning of the internal market.[21] The use of this provision brought many controversies among Member States. In fact, in the view of Member States, there is a risk that the Union goes beyond its competences and operates out of measures regarding the establishment and the functioning of the internal market.[22]

It is also worth mentioning that, beside the provisions on the competences explained in this section, the treaty on the Functioning of the European Union mentions specific legal bases. In this regard, article 2(6) which indicates that "the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area". This is the example of article 114 of the Treaty on the Functioning of the European Union which suggests the intervention of the council and the EU Parliament in the harmonisation of the internal market laws as above mentioned.

3.1.2. Fundamental principles governing the exercise of the Union's competences

Although the Union enjoys the exercise of a certain number of competences including the exclusive ones; at the same time, it faces specific and non-negligible limitations established through some principles defined by the EU treaties. They are the principle of conferral, the principle of sincere cooperation, the principle of subsidiarity, the principle of proportionality and the respect of state's national identity.

[21] Art 114(1) of the Treaty on the Functioning of the European Union,

[22] Malin Wallgren, *Exploring the Outer Limits of Article 114 TFEU – towards a general power? An analysis of non-market objectives and measures having as their object the establishment and functioning of the internal market* ", Master's Thesis in European Union Law, Uppsala Universitet, Department of Law, 2016, p.16

3.1.2.1. Principle of conferral

One of the limitations of the exercise of the Union's competences is the principle of conferral. Under this principle, each EU Institution is obliged to act within the limits of prerogatives established by treaties. This is specified under the Treaty on the European Union in the following wording:

> "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".[23]

This provision would be understood as having two meanings. Firstly, the union has powers to act only in the case of competences conferred to it by the treaties. Consequently, powers not indicated in treaties as to be exercised by the Union remain within Member States' competences.
Secondly, the wording of this provision would also indicate that the Union cannot confer powers on itself or, in other words, does not have what the German Constitutional Court – *Bundesverfassungsgericht* - calls *Kompetenz-Kompetenz* (the power to confer power on yourself or - what comes to the same thing - to determine conclusively the limits of yourself).[24]

Clearly, not only does the Union not have the right or competence to decide about the scope of its own competences, but also it cannot create additional rights or competences to itself. In this regard, a significant number of national constitutional courts argued that *Kompetenz-Kompetenz* is a sovereign - related power and that, therefore, the Union should in no way exercise it. For instance, in its judgement on the Treaty of Lisbon, the German Constitutional Court held that

> "the Basic Law does not authorize the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the

[23] Art. 5(2) of the Treaty on the European Union.
[24] TC Hartley, *The Foundation of the European Union, An introduction to constitutional and administrative law of the European Union*, 7ed, Oxford University Press, 2010, p.110.

> European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz)*".[25]

This also implies that:

> "European Union and its institutions such as the Council, the Commission, the Parliament, and the Court of Justice may exercise only those powers expressly transferred to them by the *Bundestag*, otherwise they act *ultra vires*".[26]

To this end, the German Constitutional Court found that it will reserve itself the ultimate right to decide which powers have been transferred by the Bundestag instead of the European Court of Justice.[27] It made it clear in the decision on the Lisbon Treaty when it indicated that "an application of constitutional law that is open to European law requires that the *ultra vires* control (…) is incumbent on the Federal Constitutional Court alone"[28]. In other words, the assessment of whether "legal instruments of the European Institutions and bodies do not keep within the boundaries of sovereign powers accorded to them by way of conferred power"[29] belongs to the German Constitutional Court.

This court, therefore, recognized the right of German citizens to challenge any act of the Union whenever they suspect it to be *ultra vires.*[30] In this regard, through a constitutional complain, decisions of the European Central Bank (ECB) on the Public Sector Purchase Programme (PSPP) were challenged as the complainants argued that they were *ultra vires* acts.[31] In response to this complaint, the German Constitutional Court found indeed that these decisions of the European Central Bank on the Public Sector Purchase Programme exceeded the European Union competences despite the

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[25] BVerfG, Judgment on the second Senate of 30 June 2009- 2 BVE 2/08, para 233.
[26] Joachim Wieland, *Germany in the European Union-The Maastricht Decision of the Bundesverfassungsgericht, in* European Journal of International Law, Vol.5, 1994, p. 263.
[27] Joachim Wieland, *op.cit,.* p.263.
[28] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para.241, http://www.bverfg.de/e/es20090630_2bve000208en.html
[29] Peter M Huber, *The EU and National Constitutional Law*, Boorberg, Stuttgart, 2012, p.18.
[30] Joachim Wieland, *Germany in the European Union-The Maastricht Decision of the Bundesverfassungsgericht, in* European Journal of International Law, Vol.5, 1994, p. 263.
[31] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15, para 1. https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

decision of the European Court Justice to the contrary.[32] The German Constitutional Court went further by declaring this decision of European Court of Justice in this regard *ultra vires* too and, thus, having no binding effects in Germany.[33]

Concretely, looking at the significance of the principle of conferral and its implication in the Union's life, it would not be a mistake to conclude that it (the principle of conferral) is a limitation established by EU Member States to protect themselves from any violation of their sovereign rights by the Union. The absence of the use of the *Kompetenz-Kompetenz* by the Union and its obligation to respect member states' national identity are clear aspects of the protection from such violation.

3.1.2.2. The principle of subsidiarity

The principle of subsidiarity is defined under article 5(3) of the Treaty on the European Union. This article indicates that under the principle of subsidiarity

> "in areas which do not fall within its exclusive competence, the Union shall act only if, and insofar as, the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".[34]

Whereas the principle of conferral limits the competences of the Union to what exactly was defined by treaties, the principle of subsidiarity governs the use of the Union's competences.[35] In other words, the principle of subsidiarity is one of the operational principles as it determines how the powers conferred to the union should be exercised. It implies that "the smaller and the nearer unit shall act, and that the next hierarchical unity shall only act in the case the former is not capable of doing so itself".[36]

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[32] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15, para., para 117. https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

[33] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15, para., para 118. https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

[34] Art 5(3) of the Treaty on the European Union.

[35] Art 5(1) of the Treaty on the European Union.

[36] Hermann-Josef Blanke and Stelio Mangiameli, *The European Union after Lisbon: Constitutional Basics, Economic order and External Action*, Springer, Erfurt and Rome, 2011, p.314.

Thus, it can be clearly understood that the principle of subsidiarity requires three conditions in order to be effective. Firstly, it applies only in matters where the Union does not have exclusive competences. This condition of application means that the principle of subsidiarity is applied only in the case of shared and supportive competences. This makes sense. Indeed, as previously explained, exclusivity means that no other institutions, except the Union itself, can intervene in the matters which have been placed under its exclusive competences. Applying the principle of subsidiarity on them would undermine the character of exclusivity conferred upon them by treaties.

Secondly, under the principle of subsidiarity, the Union can act only in the situation where the objectives desired cannot be achieved by Member States.[37] This means that, if the objectives can be achieved at the lower level, the Union must reserve itself although it would have competence to act. It is only when Member States have failed to solve an issue that the union would intervene.

Thirdly, the circumstances must be such that they could be better achieved at the union level.[38] This condition obliges the Union to react only in the situation where the issue cannot be sufficiently solved at the central or regional and local level. Therefore, even if the Union would be competent to act, it would not do so if sufficient results can be obtained at the lower level. The Union would react only when there are clear and good reasons justifying that better results would be achieved at the Union level and cannot be obtained at lower level by Member States.

Since the principle of subsidiarity supports the intervention of the lowest level in all situations, it is therefore clear that the Union will not act, especially in cases where it would obtain the same results with those which would be obtained at the national level.

It is worth mentioning that since the control of the respect of the principle of subsidiarity is not easy, the EU has foreseen for a procedural solution. In this regard, the protocol (N°2) on the application of the principles of subsidiarity and proportionality

[37]TC Hartley, *op. cit.,* p.122.
[38] TC Hartley, *op. cit.,* p.122.

was put in place as a system of monitoring its applications.[39] Under this protocol, national parliaments are given a significant role in the EU legislative process, making them good monitors of the respect of this principle. Specifically, institutions at the Union level involved in the legislative process, namely the commission, the council and the Parliament are obliged to forward their draft legislative acts and their amendments to national parliaments[40] which in their turn can send their reasoned opinions if there is an infringement of the principle of subsidiarity.[41]

3.1.2.3. Principle of proportionality

The Treaty on the European Union establishes another operational principle of the Union. It recognizes the principle of proportionality as another principle that governs the use of Union competences.[42] This principle means "that the content and the form of Union's action shall not exceed what is necessary to achieve the objectives of the treaties".[43] The entire meaning of this principle can be deduced from the adjective of modality "necessary" which appears in the definition. "Necessity" in the sense of this principle requires "the use of the softest means, especially with regard to the instruments of action, form and content".[44] Thus, the principle of proportionality calls up on the choice of the content and the form of the European Union action.[45] For instance, the union is obliged to "use no-binding measures before binding legal acts (e.g. directives, recommendations or resolutions before regulations or directives)".[46] In the same line, protocol 2 on the application of the principles of subsidiarity and proportionality also evokes the measurement of the financial and administrative means; it insists on the use of adequate financial and administrative means compared to the target aim. Indeed, article 5 of the said protocol stipulates:

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[39] See the Preamble of the Protocol (N°2) on the application of the principles of subsidiarity and proportionality (2007).
[40] Art 5 of the Protocol (N°2) on the application of the principles of subsidiarity and proportionality.
[41] Art 6 of the Protocol (N°2) on the application of the principles of subsidiarity and proportionality.
[42] Art.5, 1 of the Treaty on the European Union.
[43] Art 5, 4 of the Treaty on the European Union.
[44] Hermann- Josef Blanke and Stelio Mangiameli, *op. cit.*, p. 316.
[45] Albrecht Weber, *Article 5 [Principles on the Distribution and Limits of Competences] (ex-Article 5EC)*, in Herman-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU): A commentary*, Springer, 2013, p.266.
[46] *Ibidem*.

> "Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved".[47]

It is important to understand the difference between the principle of subsidiarity and the principle of proportionality. Although both the principles are articulated around the same philosophy of "hierarchy", they differ in one aspect. Indeed, the elements to be considered regarding the objects of measuring this hierarchy are not the same. Whereas the principle of subsidiarity is interested in the hierarchy of institutions taking actions, the principle of proportionality is based on the hierarchy of means used to achieve the Union's objectives. Whilst applying the principle of subsidiarity, one needs to respond to the question: who is the lowest and best person (in this case, institution) to take actions? On the other side, the principle of proportionality responds to the question of knowing the lowest and best means to be used in taking actions. It is, thus, clear that these two principles are interconnected. The principle of proportionality can be understood, to some extent, as a logical consequence of the principle of subsidiarity. It is after the institution's ability to act has been identified under the principle of subsidiarity that the means or instruments can be determined under the principle of proportionality.

It is worth mentioning the recent conflict between the European Court of Justice and the German Constitutional Court on the interpretation of the principle of proportionality. Indeed, in the case on the decisions of the European Central Bank (ECB) on the Public Sector Purchase Programme (PSPP), the German Constitutional Court found that "the

[47] Art.5 of the Protocol 2 on the application of the principles of subsidiarity and proportionality.

manner in which the European Court of Justice applies the principle of proportionality in this case renders the principle meaningless for the purposes of distinguishing, in relation to the PSPP, between economic and monetary policy".[48] In fact, the European Court of justice considers that the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies[49]. In contrary, in the view of the German Constitutional Court, "the PSPP's proportionality requires that the programme's monetary policy objectives as well as the programmes' economic policy implications be identified, weighted and weighted up against each other".[50] It insists that, in pursuing the objective of a monetary programme without taking into account the economic policy effects resulting from the programme, the European Central Bank manifestly disregards the principle of proportionality.[51]

3.1.2.4. Principle of sincere cooperation

The principle of sincere cooperation is another principle which was developed in the European Union to guide its integration process. In this section, the origin and the application of this principle in the European Union will be analysed.

3.1.2.4.1. Origin and neighbouring notions of the principle of sincere cooperation

Known also as the principle of loyal cooperation or good faith, the principle of sincere cooperation has its origin in international law. Specifically, it was introduced in the United Nations Charter, article 2. This article states that:

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[48] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 127 https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

[49] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 128 https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

[50] German Federal Constitutional Court, *ECB decisions on the Public Purchase Program exceed EU Competences,* Press Release No. 32/2020 of May 2020. See https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html

[51] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 165 https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter".[52]

and that,

> "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".[53]

From the wording of this provision of the United Nations Charter, one would retain two important words which summarize the whole content of the principle under analysis. They are "good faith" and "assistance". Not only are Member States of the United Nations required to use good faith in their actions, but also, they are asked to give assistance to the UN's actions and refrain from giving assistance to any state against which the UN is taking action.

The principle of good faith is also foreseen as a guiding principle in the Vienna Convention on the Law of Treaties. It is set forth in article 26 of this convention stating that "every Treaty in force is binding upon the parties to it and must be performed by them in good faith".[54] Defining the notion of good faith, the International Law Commission finds that it requires, *inter alia*, "that a part to a treaty shall refrain from any acts calculated to prevent the due execution of the Treaty or otherwise to frustrate its objectives".[55]

3.1.2.4.2. The Principle of Sincere cooperation in the European Union

Originally established in international law under the appellation "good faith", the principle of sincere cooperation was incorporated in the European Union at the very early stage of its inception. The Treaty establishing the European Coal and Steel Community (ECSC) indicated that:

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[52] Art.2 (2) of the United Nations Charter.
[53] Art.2 (5) of United Nations Charter.
[54] Art 26 of the Vienna Convention on the Law of Treaties.
[55] United Nations Yearbook of International Law Commission, Vol II, 1977, p.7.

> "The Member States bind themselves to take all general and specific measures which will assure the execution of their obligations under the decisions and recommendations of the institutions of the Community and facilitate the accomplishment of the Community's purposes.
> The Member States bind themselves to refrain from any measures which are incompatible with the existence of the common market referred to in Articles 1 and 4.
> To the extent of their competence, the Member States will take all appropriate measures to assure the international payments arising out of trade in coal and steel within the common market; they will lend assistance to each other to facilitate such payments".[56]

A similar provision was introduced in the Treaty establishing the European Economic Community. This treaty indicates that member states were called:

> "to take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community, to facilitate the achievement of the Community's aims and to abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty".[57]

Without mentioning expressly, the term "sincere cooperation", the abovementioned provisions highlight two aspects of this principle. They reveal an existence of both a positive and a negative obligation towards Member States. Under the positive obligation, Member States undertake to take measures to facilitate the fulfilment of their obligations and the Union's actions. Under the negative obligation, Member States undertake to refrain from any measure that can undermine or is incompatible with the achievement of the Union's objectives.

Another important development of the principle of sincere cooperation was driven by the European Court of Justice in several of its decisions. Interpreting article 5 of the treaty establishing the European Economic Community, the ECJ indicated that "this provision is the expression of the more general rule imposing on member states and the community institutions mutual duties of genuine cooperation and assistance".[58] In the case between the Commission and Belgium, the court held that "by [those] acts and omissions which impeded the achievements of the commission's tasks, the Belgian

[56] Art 86 of the Treaty Establishing the European Coal and Steel Community.
[57] Art 5 of the Treaty establishing the European Economic Community.
[58] Case 44/84, Hurd V Jones (ECJ 15 January 1986), para 38.

government failed to fulfil its obligations of loyal cooperation and assistance, … article 5 requires of all Member States".[59]

The principle of sincere cooperation was also later incorporated in the Treaty of Lisbon. Article 4 (3) of the Treaty on the European Union stipulates as follows:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".[60]

Thus, as with the previous treaties, this provision of the Treaty of Lisbon obligates the member states to assist the Union in implementing the Union law, to fulfil their obligations arising from the Union law and not to jeopardize the achievement of the Union's objectives. All in all, the principle of sincere cooperation requires both "cooperation and respect".[61]

3.2.1.5. Respect of states' national identity

The use of Union competences is also guided by the principle of respect for the national identities of Member States. This principle was introduced in the treaty of Maastricht (also called treaty on the European Union). Article F (1) of this treaty states that "the union shall respect national identities of its Member States, whose systems of governance are founded on the principle of democracy".[62] It was also shortly reintroduced in the treaty of Amsterdam under article 6.3 which indicates that "the Union shall respect the national identities of its Member States".[63] Later, this principle

[59] C-374/89 Commission V Belgium (ECJ 15 February 1990), para 15.
[60] Art 4 (3) of the Treaty on the European Union,
[61] Hermann-Josef Blanke, *Article 4[The Relations between the EU and Member States] (ex-Article 6.3, 33 TEU, ex-Article 10 EC)*, in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer-Verlag, Berlin Heidelberg, 2013., p.233.
[62] Art F (1 of the Treaty of Maastricht (Treaty on the European Union).
[63] Art 6(3) of Treaty of Amsterdam (Treaty on the European Union).

appeared also in the failed constitution for Europe under article I-5.1. It was this provision that was reproduced in the Lisbon treaty under article 4.2 of the treaty on the European Union. It reads as follows:

> "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".[64]

Although this provision is still unclear about what should be the content of the national identities of the Member States, it gives, however, a more detailed and comprehensive definition of the concept of national identity comparably to the previous treaties. Whereas the Treaty of Maastricht and the Treaty of Amsterdam deliver just a superficial declaration of respecting national identities of Member States, the Lisbon Treaty (in its part of the Treaty on the European Union) tries to go further by indicating in general what should be considered as its content. First, as article 4.2 TEU indicates, under this principle, the Union is required to respect "the identity inherent in the fundamental structures, political, and constitutional (of Member States) inclusive of regional and local self-government". This additional clarification of the treaty on the European Union (in the Lisbon Treaty) can be interpreted as an obligation to the Union to respect the system of governance of every Member State established in their successive constitutions because constitutions are the sole source of governance. Secondly, article 4.2 of the TEU also indicates that the Union has an obligation to respect "essential states' functions". It insists on the "territorial integrity of the states, maintaining law and safeguarding national security". All these areas constitute what Hermann-Josef Blanke calls "*domaine réservé*" of Member States.[65]

Although the treaty on the European Union gives some clarifications on the meaning of national identities, it does not show, however, areas which can be considered as being

[64]Art 4 (2) of the Treaty on the European Union.
[65] Hermann-Josef Blanke, *Article 4[The Relations between the EU and Member States] (ex-Article 6.3, 33 TEU, ex-Article 10 EC)*, in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer-Verlag, Berlin Heidelberg, 2013, p.195.

concerned in this category. In its final recommendation, while analysing the same article in the Treaty of Amsterdam (art.6.3) in order to reincorporate it in the constitution for Europe, the working group V on the Convention on Europe indicated that the national identities comprises of, among others,

> "the fundamental structures and essential functions of Member States notably their political and constitutional structures, including regional and self-government; their choice of language; national citizenship; territory; the legal status of churches and religious societies; national defence and the organization of armed forces".[66]

Thus, the working group tried to add some elements which are part of the national identities of Member States and which help to get a picture of what the expression means.

These areas can be summarized into three categories. They concern areas of politics, judiciary and culture. This classification is also established by Fausto de Quadros. He defines national identity as the "political, judicial and cultural identity".[67] According to him, the political identity means that Member States keep their individuality in their political affairs even if their sovereignty is progressively limited by the gradualism of integration.[68] Under the political identity, the respect by the Union of national identity of Member States imposes the Union to respect the political governance of every member state. This clearly means that the respect for the right of every Member State to define its political and internal administrative organizations, the respect by the Union and the Member States of the political borders of every Member State, and finally, the respect of each Member State's right and duty to guarantee its internal security, external defence, and to adapt their external relations in accordance with their specific interests.[69] This is in line with the provisions of article 72 of the Treaty in the European Union, which indicates that the exercise of the responsibilities regarding the

[66] Conv 375/1/02 REV 1, p 12.
[67] Fausto de Quadros, *Droit de l'Union Européenne : Droit Constitutionnel et Administratif de l'Union Européenne*, Bruyant, Bruxelles, 2008, p.65.
[68] *Ibidem*.
[69] *Ibidem*.

maintenance of law and order as well as the safeguarding of internal security incumbent upon Member States.[70]

The respect of the juridical identity on the other side means that the union has to respect the specificity of national rights of Member State which implies that the harmonization of juridical national order with the community law must be done in respect of specific characters of national juridical systems.[71] The cultural aspect of the national identity, in turn, obliges the union to respect the language including traditions and the culture of every Member States.[72]

Blanke distinguishes five categories of provisions in the Treaty of Lisbon which are concerned with the protection of national identity. According to him:

> "The first category contains a number of provisions that spell out the obligation to respect individual national characteristics, especially in the economic core of European Integration: e.g. art 36 TFEU. The second are so called *going beyond* clauses in the field of the internal market (art.114.5 and art. 6 TFEU), consumer protection (art.169.5 TFEU) and environment (art.193 TFEU). As third category he names the restrictions to supporting action on part of the Union while excluding harmonization, especially in the areas of education (art.168 TFEU). The Fourth are those reservations to integration under Title V of the TFEU (AFSJ). The last category includes the primary law opt-outs, e.g. for the UK and Ireland (protocol N°21)".[73]

To this category of provisions, one could also add article 194 (2) which indicates that measures taken by the European Parliament and the Council in the energy sector shall not affect Member State's choice of energy sources.

In conclusion, it is noticeable that all the parts of the Member States' national identity are sovereign-related. In fact, they are all sensitive areas affecting one way or another, the sovereign character of member states. The sensitive aspect of these areas was also

[70] Article 72 of the Treaty on the European Union.
[71] Fausto de Quadros, *op.cit.*, pp.65-66.
[72] Fausto de Quadros, *op.cit.*, p.66.
[73] Hermann-Josef Blanke, *Article 4[The Relations between the EU and Member States] (ex-Article 6.3, 33 TEU, ex-Article 10 EC), in* Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer-Verlag, Berlin Heidelberg, 2013, p. 194.

explained by the German Constitutional Court. Indeed, in its judgement on the Lisbon Treaty, the German Constitutional Court indicated that:

> "European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that no sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions".[74]

It considers those areas as:

> "areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology".[75]

In France, the *Conseil Constitutionnel* also identifies some of these areas as not transferable. There is namely justice, taxation, monetary policy, border control, defence, and security.[76] It considered that a limitation or transfer of these areas would violate the essential conditions of the sovereignty.[77]

This leads us to conclude that, through the principle of respect of member states' national identity Member States have framed a way to keep some of their sovereign rights in their hands. This undoubtedly constitutes a blockage or somehow slows the

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[74] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para. 249 , http://www.bverfg.de/e/es20090630_2bve000208en.html

[75] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para. 249 , http://www.bverfg.de/e/es20090630_2bve000208en.html

[76] Sophie Boyron, *The Constitution of France: A Contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon, 2013, p. 221.

[77] *Ibidem*

integration process; a process which requires flexibility of all member states in terms of surrendering some rights to the community organs.

It is also worth noting that the respect of the identity review, in the case of Germany, is controlled through the so-called "identity review" by the Federal constitutional Court. Indeed, in its decision on the Lisbon Treaty, this court indicated that "an application of constitutional law that is open to European law requires that (…) the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone".[78] This means that the Constitutional court is the judicial organ which reviews whether the core content of the constitutional identity is respected.

It is also important to mention that the principles of conferral and the respect of national identity are interconnected. In the view of the German Constitutional Court, the principle of conferral contains an obligation of the Union to respect the Member States' National Identity as defined in article 4 (2) of the Treaty on the European Union.[79] This idea by the German Constitutional Court is unequivocal. Indeed, if the Union has an obligation or is limited to intervene in matters indicated in treaties, its intervention in matters that affect Member States' national identity would be a violation of this limitation established under the conferral principle.

3.1.2.6. Concluding observations

The objective of this section was to determine and analyse the principles which guide the exercise of the Union's competences. Specifically, the main goal was to understand the impact of those principles on the integration process. It was discovered that the competences of the Union face some limitations framed through some principles established in the treaties. These principles are the principle of conferral, the principle of sincere cooperation, the principle of subsidiarity, the principle of proportionality and the respect of national identities. They all limit, in one way or another, the exercise of the competences of the Union by putting in place preconditions for the union to fully

[78] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para.241, http://www.bverfg.de/e/es20090630_2bve000208en.html

[79] BVerfG, Judgment on the second Senate of 30 June 2009- 2 BVE 2/08, para 234.

enjoy their exercise. For instance, the principles indicate some prerequisites without which the Union cannot act, or if it acts, it limits its intervention on some aspects. This is another element which shows how Member States keep their hands in the Union's organization and this constitutes, somehow, a breakdown to the integration process. Specifically, through these principles, Member States have shown their reluctance to transfer some of their sovereign rights to the community organs. The German Constitutional court also understood these principles as protectionism mechanisms. It considers that "provisions concerning the exercise of competences are intended to ensure that the powers conferred at European level are exercised in such a way that the competences of the Members States are not affected".[80] This is in line with the definition of the sovereignty which consider that transferring or limiting sovereignty does not mean losing sovereignty altogether.

3.2. Influence of National Institutions on the Union's decision-making bodies

The manifestation of State sovereignty in the integration process can also be seen through the relationship existing between the institutions of the Member States and the institutions at the community level. Specifically, one needs to examine the independence of the community institutions towards the ones at the national level. In this regard, I will briefly focus on the democratic life of EU before further analysing whether the intervention of national institutions in the EU decision-making process affects the Union's independence. This will assist us in defining the characterization of the nature of the EU, followed by a concluding observation.

3.2.2. Overview on the decision-making process and the democratic life in the EU

[80] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 304 , http://www.bverfg.de/e/es20090630_2bve000208en.html .
The court indicates that "The provisions concerning the exercise of competences include the precept of respecting the Member States' national identities (Article 4.2 Lisbon TEU), the principle of sincere cooperation (Article 4.3 Lisbon TEU), the principle of subsidiarity (Article 5.1 second sentence and 5.3 Lisbon TEU) and the principle of proportionality (Article 5.1 second sentence and 5.4 Lisbon TEU)". See para 304.

This paragraph briefly describes the historical evolution of the decision-making process and the democratic life in the EU and analyses the current situation of these two aspects.

3.2.1.1. Historical evolution

The EU democratic life has been at the centre of discussion amongst scholars. Indeed, since its early stages of existence, there was an issue of understanding what kind of democracy existing in the EU system. The problem was to understand whether the EU meets the standards of a democratic society. There was an agreement that the Union was suffering a lack of democracy which could be noted through the expression "democratic deficit".

For instance, since its creation the Union has had an assembly. However, it took a very long time for the assembly to be directly elected. For a long time, the representatives consisted of delegates who were designated by representative Parliaments from among their Member States in accordance with the procedures laid down by each Member State".[81] Their election was, therefore, not done directly by the EU citizens. Furthermore, despite its formal place in the treaties, until the 1970s, the European Parliament has been ranked far behind the commission and the council in terms of decision-making process at the Union level, making it an "auxiliary" organ.[82]

It was in this way of thinking that in the declaration of the Laeken Summit of December 2001[83] on the future of the European Union, member states expressed their willingness to increase the democratic legitimacy of the Union. After noting this democratic deficit, they solve themselves to respond to a list of questions in order to handle this challenge. These questions were formulated as follows:

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[81] Art 138 of the Treaty for the European Economic Community. See also art. 21 of the Treaty establishing the European Coal and Steel Community.

[82] Robert Schütze , *op.cit.,* p.154.

[83] It is important to clarify the context of the Laeken Declaration. In fact, Intergovernmental Conference held in Nice in December 2000 launched the 'Debate on the future of the European Union. One year after, the Laeken Declaration of 15 December 2001 redrafted and giving tangible form to the issues raised in Nice regarding a reform of the institutions.

> "The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions. How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? Can the two systems be combined? Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?
>
> A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?
>
> The third question concerns how we can improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States. How could the Union set its objectives and priorities more effectively and ensure better implementation? Is there a need for more decisions by a qualified majority? How is the co-decision procedure between the Council and the European Parliament to be simplified and speeded up? What of the six-monthly rotation of the Presidency of the Union? What is the future role of the European Parliament? What of the future role and structure of the various Council formations? How should the coherence of European foreign policy be enhanced? How is synergy between the High Representative and the competent Commissioner to be reinforced? Should the external representation of the Union in international fora be extended further?"[84]

All these questions proved that a problem in the EU's decision-making process as well as democratic deficit did exist. Through these questions, it was indirectly accepted that the Union was suffering from a serious problem of its legitimacy and democratic

[84] Laeken Declaration on the Future of Europe, 15 December 2001.

nature.[85] The declaration also pointed out that "citizens undoubtedly supported the Union's broad aims but that they did not always see a connection between those goals and the Union's everyday actions".[86] It was, therefore, a good moment to analyse how these two aspects – the EU's decision-making process and democratic legitimacy - could be improved. This led to an elaboration of a draft constitution of Europe in 2004, a constitution which unfortunately failed.[87] Some of these questions were finally responded to in the Lisbon Treaty. It indicates clearly that the European Union is "founded on a representative democracy" and all aspects of this democracy were specified in it. This is specified in article 10 of the TEU in the following wording:

> "1. The functioning of the Union shall be founded on representative democracy.
> 2. Citizens are directly represented at Union level in the European Parliament.
> Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
> 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
> 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union".[88]

Presently, this provision appeared as a concretization of what was discussed in the Laeken Summit by expressly introducing the notion of representative democracy as a foundation of the functioning of the European Union.

What should be understood as the meaning of representative democracy principle? The central feature of this principle is that citizens elect and remove those who govern them.[89] Indeed, this provision indicates not only that, citizens are directly represented

[85] Inga Daukšienė and Sigita Matijošaitytė, *The Role of National Parliaments in the European Union after Treaty of Lisbon,* in *Jurisprudencija/Jurisprudence,* Vol.19, Issue 1, 2012, p.36.
[86] *Ibidem.*
[87] See the second chapter.
[88] Art 10 of the Treaty on the European Union.
[89] Porras Ramirez, *Article 10[Representative Democracy],* in Hermann-Josef Blanke and Sterio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer-Verlag, Berlin Heidelberg, 2013, p. 418.

at the Union level in the parliament,[90] but also acknowledges the right for every citizen to participate in the democratic life of the Union.[91]

In addition to this, article 11 of the TEU gives effect to the principle of participatory democracy. Through this principle, the Union institutions have a duty to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.[92] This also constitutes another aspect of the decision-making and democratic life of the Union as it recognizes the right for EU citizens to discuss opinions with the institutions, thus indirectly allowing them to participate in the decision-making process.

The Treaty of Lisbon also introduced the so-called European citizens' initiative. Article 11(4) of the TEU precisely indicates that

> "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[93]

3.2.1.2. A new European democratic life: an assessment of its implementation

After noting the willingness by the TEU under article 10 to build the Union on a representative democracy, we analyse how the latter is implemented. Specifically, what are the changes brought by the new treaty (Lisbon Treaty) in the EU democratic life? Can one still use the terminology of democracy deficit to indicate its ineffectiveness?

The democratic legitimacy and decision-making of the European Union suffer from its political structure. Firstly, it is not easy to conciliate the decision-making process of the EU with its political life, a life which is itself an apanage of the sovereignty of its member states. Indeed, "the EU is a mixture of intergovernmental and supranational institutions.

[90] Art 10(2) of the Treaty on the European Union.
[91] Art 10 (3) of the Treaty on the European Union.
[92] Art 11(1) of the Treaty on the European Union.
[93] Art.11(4) of the Treaty on the European Union.

Whereas the European Council and the Council of Ministers are intergovernmental, the European Commission, European Court of Justice and the European Parliament are all supranational institutions.[94] Consequently, the Union system finds itself in a situation where the conciliation between its two side - the sovereignty of its members and the supranational aspect of the Union itself - needs to be obtained. For example, the European Parliament, a supranational institution exercises legislative and budgetary functions jointly with the council,[95] a more intergovernmental institution.

Secondly, in the same line of thinking, the concept of democratic principle must be conciliated with the federal principle for the good functioning of the Union. Whereas the democratic principle requires that each citizen of the Union has equal voting power in accordance with the principle of "one person, one vote", the federal principle, in turn, insists on the political equality of states.[96] There was, therefore, a necessity of creating a compromise between these two pre-established principles. The solution was the introduction of the national 'quotas' for the seats in the European Parliament. The consequence was the rejection of a purely proportional distribution in favour of a degressively proportional system which unfortunately established that a Luxembourg citizen has ten times more voting power than a British, French, or German citizen.[97]

Although significant changes have been done along the evolution of the European Union, the decision making and democratic life in this union is still being undermined by some "antagonistic interests and philosophies (e.g., supra-nationalism v. inter-governmentalism, enhanced democratization v. preservation of national sovereignty, interests of small countries v. those of large countries)".[98] This antagonism results from the nature of the Union itself. In fact, although it has some aspects of a state; the EU is not a real State. It is, however, an association of sovereign states animated with a spirit

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[94]Richard Rousseau, *The « democratic deficit » and legitimacy problems of the European Union: Elements of the debate*, In *On-line Journal Modelling the New Europe*, Issue n°12/2014, pp.13-14.

[95] Art 14 (1) of the Treaty on the European Union. "The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote" art 16 (2) of the TEU.

[96] Robert Schutze, *op.cit*., p. 156.

[97] *Ibidem*.

[98] Laurent Pech, *The Institutional Development of the EU post-Lisbon: A case of plus ça change…?* UCD Dublin European Institute Working Paper 11-5, December 2011, p. 14.

of protecting their own interests. The German Constitutional Court – *Bundesverfassungsgericht* - in its decision on the Lisbon treaty indicated the same. It clarified that the "European Union is designed as an association of sovereign states (*Staatenverbund)* to which sovereign powers are transferred".[99] In the view of the German Federal Constitutional Court:

> "the concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of Member States and in which the peoples, i.e. the citizens of the Member States, remain the subjects of democratic legitimation".[100]

It is, thus, clear that being composed with sovereign states, the union is not a state and, therefore, cannot easily have a democratic life and decision-making process that is comparable to that one of a real State. Personal interests of States play a significant role.

3.2.2. The European Parliament (EP)

The European Parliament (EP) is one of the EU's institutions established under the Treaty of Lisbon to "promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions".[101] It is therefore important to understand its role in the EU democratic life and, most importantly, its powers in the EU. An analysis of the election of its members will be provided before an assessment of its powers.

3.2.2.1. Election of the European Parliament

[99]BVerfG, Judgement of the Second Senate of 30 June 2009- 2 BvE2/08- para.229.

[100] BVerfG, Judgement of the Second Senate of 30 June 2009- 2 BvE2/08- para.229.

[101] Art 13 (1) of the Treaty on the European Union.

This article also indicates that "The Union's institutions shall be: – the European Parliament, – the European Council, – the Council, – the European Commission (hereinafter referred to as the «Commission"), – the Court of Justice of the European Union, – the European Central Bank, – the Court of Auditors". Art 13 (1) sentence 2 of the TEU.

Rules for electing the European Parliament (EP) kept changing over the years. In the beginning, it was not elected directly. For the first time, in 1979, the EP was elected by universal suffrage and with full-time members[102] after the adoption of the Act of 20th September 1976 concerning the election of the representatives of the European Union. General rules for the election of the EP are provided by the Treaty on the European Union. It indicates that "the Parliament shall be elected for a term of 5 years by direct universal suffrage and secret ballot".[103] In accordance with article 223 of the Treaty on the Functioning of the European Union, the European Parliament sets a "proposal to lay down the provisions necessary for the elections of its members by direct universal suffrage or in accordance with the principles common to all Members States".[104] Acting in accordance with a special legislative procedure, the Council lays down appropriate provisions which it recommends to Member States for adoption in accordance with their respective constitutional requirements.[105]

Furthermore, the TFEU recognizes to "every citizen of the Union residing in a Member State of which he is not a national the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State".[106] Specific and more precise rules are however clarified by the Election Act of 20th September 1976 as amended by Decision 2002/772/EC, Euratom of the Council of 25th June 2002 and of 23rd September 2002.[107] This Act establishes that elections should be done on the basis of proportional representation.[108] It establishes also that the parliament is composed in accordance with Member States. Specifically, it indicates that "Member States may set a minimum threshold for the allocation of seats" and that "this threshold should not exceed 5 per cent of votes cast".[109] As of now, the European Parliament composed of 705 Members

[102] Richard et al, *The European Parliament*, 8ed., John Harper Publishing, London, 2011, p.4.
[103] Art 14 (3) of the Treaty on the European Union.
[104] Article 223 (1) of the Treaty on the Functioning of the European Union.
[105] Article 223 (1) of the Treaty on the Functioning of the European Union.
[106]Art 22(2) of the Treaty on the Functioning of the European Union.
[107] Robert Schutze , *op.cit.,*p.157.
[108] Art. 8 of the Act concerning the election of the Members of the European Parliament by direct universal suffrage.
[109] Art 3 of the Act concerning the election of the Members States of the European Union by direct universal suffrage.

elected in the 27 Members States.[110] Before *Brexit* and in accordance with the 2014 elections, this Parliament was composed of 751 Members. With the withdrawal of the UK, 27 of its 73 seats were redistributed to the remaining Member States making, therefore, a total of 705 members of the EU Parliament. The remaining 46 UK's seats were kept in reserve for the potential enlargement.[111] The table below indicates the composition of the parliament before end after *Brexit*:

Member State	Number of Seats Before Brexit	Number of Seats after Brexit	Change made
Cyprus	6	6	No change
Luxembourg	6	6	No change
Malta	6	6	No change
Estonia	6	7	+1
Latvia	8	8	No change
Slovenia	8	8	No change
Lithuania	11	11	No change
Croatia	11	12	+1
Ireland	11	13	+2
Denmark	13	14	+1
Finland	13	14	+1
Slovakia	13	14	+1
Bulgaria	17	17	No change
Austria	18	19	+1
Sweden	20	21	+1
Belgium	21	21	No change
Czech Republic	21	21	No change
Greece	21	21	No change

Here were are using the [Consolidated version incorporating the Act of 20 September 1976 (OJEC L 278 of 08.10.1976, p. 5) and amendments introduced by Article 10 of the Act of Accession of Greece to the European Communities, by Article 10 of the Act of Accession of Spain and Portugal to the European Communities, by Decision 93/81/Euratom, ECSC, EEC of the Council of 1 February 1993 (OJEC L 33 of 09.02.1993, p. 15), by Article 11 of the Act of Accession of Austria, Sweden and Finland to the European Union and by Article 5 of the Treaty of Amsterdam of 2 October 1997 (OJEC C 340 of 10.11.1997, p. 1) and by Decision 2002/772/EC, Euratom of the Council of 25 June and 23 September 2002 (OJEC L 283 of 21.10.2002, p. 1).]

[110] Members of the European Parliament , See https://www.europarl.europa.eu/meps/en/home, visited on 23.03.2020.

[111] European Parliament Press Release, Distribution of seats in the European Parliament after Brexit, See https://www.europarl.europa.eu/news/en/press-room/20200130IPR71407/redistribution-of-seats-in-the-european-parliament-after-brexit, visited on 23.03.2020

Hungary	21	21	No change
Portugal	21	21	No change
Netherlands	26	29	+3
Romania	32	33	+1
Poland	51	52	+1
Spain	54	59	+5
United Kingdom	73	0	-73
Italy	73	76	+3
France	74	79	+5
Germany	96	96	No change
Total	**751**	**705**	**46 not redistributed**

Source: Elaborated by the author in accordance with the data collected on the website of the European Parliament under the following link: https://www.europarl.europa.eu/news/en/press-room/20200130IPR71407/redistribution-of-seats-in-the-european-parliament-after-brexit; visited on 23.03.2020

The effectiveness of the EP elections has been affected by some challenges. In fact, although the EP is directly elected by EU citizens,[112] specific elections procedure is left to individuals Member States.[113] This obviously creates significant differences regarding the EP election procedure. For instance, whereas most Member States function as single constituencies, some other countries are divided into regional constituencies. One would also underline the differences existing with regards to the age-limit for electing. As for most of the Member States, this age is fixed at 18 years; however, in Austria the age is fixed at 16 years. This implies that a certain category of EU citizens, specifically those with age between 16 and 18 years do not have the same electoral rights.

Another challenge to the election of the EP is a low voter participation of the EU citizen in these elections. Indeed, not only the turnout for the EP elections is low compared to national elections, but also it decreases over time. For instance, whereas it was 63% for the first direct universal election in 1979, it was decreased to 46% in the 2004

[112]Art 1 (3) of the Act concerning the election of the Members of the European Parliament by direct universal suffrage (Consolidated Version).
[113] Art 8 of the Act concerning the election of the Members of the European Parliament by direct universal suffrage.

elections,[114] to 42.97 % in 2009 and 42.61% in 2014.[115] It increased a bite in 2019 and became 50.66%.[116] The decrease of the turnout has surely some impact on the activities of this representative institution. Certainly, the more the turnout decreases, the more the confidence by the people it represents decreases. As a result, its decisions are likely to not produce the necessary effects.

3.2.2.2. Powers of the European Parliament

The powers of the European Parliament are established in the TEU under article 14(1). It reads as follows:

> "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission."

It can be clearly noted that the EP has four types of powers: legislative, budgetary, supervisory, and elective.

3.2.2.2.1. Legislative powers

At the beginning, the EP had no legislative powers. Its participation in the legislative process was purely advisory and consultative.[117] It had no prerogatives in the legislative process; it had neither the power to initiate a Bill which was attributed to the Commission, nor the power to decide, a power which belonged to the Council.[118] Significant changes occurred with the treaty of Maastricht with the introduction of the co-decision procedure.[119] The Lisbon Treaty reinforced this idea by establishing two ways of participation by the Parliament in the EU legislative process: the "ordinary legislative procedure" and the "special legislative procedures".

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[114] Vernon Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A federal Trust Report, January 2007, p. 8.
[115] 2009 European elections, see https://europarl.europa.eu/election-results-2019/en/turnout/; visited on 23.03.2020.
[116] *Ibidem*.
[117] Elspeth Berry et al, *EU law: Text, Cases, and Materials,* Oxford University Press, 2013, pp.28-29.
[118] Guy Isaac and Marc Blanquet, *Droit Général de l'Union Européenne*, 10éd, Sirey Dalloz, Paris 2012, p.173
[119] Stelio Mangiameli, *Article 14 [The European Parliament] (ex-Articles 189, 190 EC), in* Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer, p.594.

The ordinary legislative procedure consists "in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission".[120] Clearly, under this procedure, there is power-sharing between these two institutions - the European Parliament and the Council - in this decision-making procedure. Interpreting the use of this procedure, Mangiameli indicates that it can apply to many policies regarding immigration, energy, Justice and Home Affairs, and agriculture.[121] Special legislative procedures established under the Lisbon Treaty are of two kinds: the consent procedure and the consultation procedure. Under "the consent procedure", the Parliament must give its consent before the Council can adopt legislation.[122] Regarding the consultative procedure, the Parliament is only consulted to give a recommendation on ongoing legislative procedure.[123]

What is the difference between the consent procedure and the consultative procedure? The difference is quite clear. Under the former, the Parliament can use its veto power and, therefore, block a legislative process. Indeed, as long as it has not given its consent, the Council cannot move further on a given legislation procedure. The Parliament's consent is a condition for legislation to pass. In the case of consultative procedure however, this consent is not needed, the parliament's intervention is consultative.

3.2.2.2.2. Budgetary powers

Another power that was instituted by the Treaty of Lisbon to the European Parliament was the budgetary. However, this power is not entirely attributed to this institution. In its exercise, the European Parliament has equal rights alongside the Council.[124] In fact, the wording of article 314 of the TFEU on the procedure for the establishment of an annual budget indicates that this procedure is conducted by both the Parliament and

[120] Art.289 (1) of the Treaty on the Functioning of the European Union.
[121] Stelio Mangiameli, *Article 14 [The European Parliament] (ex-Articles 189, 190 EC), in* Hermann-Josef Blanke and Stelio Mangiameli, *op. cit*., p.594.
[122] Robert Schütze, *op.cit*, p.165. As example of application of this procedure, Schütze refers to art 19 TFEU which indicated that "the council, acting unanimously with a special legislative procedure and after the consent of the European Parliament may take appropriate action to combat the discrimination based on sex, racial or ethnic origin, religion or relief, disability, age or sexual orientation".
[123] *Ididem.*
[124] Elspeth Berry et al, *op.cit*, p.29.

the Council in accordance with a special legislative procedure.[125] The involvement of the council in the budgetary decision procedure is not surprising. Indeed, the budget is something which impacts on the sovereign life of States. Therefore, with the intervention of an executive body - the council - in this process, it can be understood as a way of protecting Member States' sovereign rights. Concretely, this shows the reluctance of member states of the Union to surrender some of their sovereign powers to the community institution.

3.2.2.2.3. Supervisory powers

The EP does not only participate with regards to the legislation and the establishment of the budget, it also supervises other institutions principally the Commission.[126] Like a classic parliament, this supervision comprises the power to debate, to question and to investigate.[127]

Regarding the power to debate, pursuant to art 249 (2) the commission has an obligation to report and publish annually to the European Parliament in an open session on its general activities.[128] In the framework of the power to question, the treaty on the EU establishes that the commission shall be heard and, therefore, reply to questions put to it by the Parliament or by its members.[129] It is also possible for the European Council and the Council to be heard by the European Parliament, but only in accordance with the conditions laid down in their Rules of procedures.[130] The power to question allows the European Parliament to formulate committees of inquiry whenever there is a suspicion of maladministration.[131]

[125] Art 314 of the Treaty on the Functioning of the European Union.
[126] Paul Graig and Grainne de Burca, *EU Law: Text, Cases, and Materials*, 6ed, Oxford University Press, 2015, p.55.
[127] Robert Schütze, *op.cit*.,p.166.
[128] Art 249 (2) of the Treaty on the Functioning of the European Union.
[129] Art 230 sentence2 of the Treaty on the Functioning of the European Union.
[130] Article 230 sentence 3 of the Treaty on the Functioning of the European Union.
[131] Paul Graig and Grainne de Burca, *op.cit*., p. 55.

3.2.2.2.4. Elective powers

The European Parliament participates in the appointment of the members of the EU's institutions. Specifically, it is involved in the appointment of some officials in the executive namely, the commission. In this regard, the Treaty on the European Union stipulates:

> "Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Union a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose new candidate who shall be elected by the European Parliament following the same procedure.
> The council, by common accord with the President-elect, shall adopt the list of other persons whom it proposes for appointment as members of the Commission. […..]
> The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as body to a vote of consent by the European Parliament".[132]

From this provision, it is made clear that, the EP participates not only in the appointment of the President of the Commission, but also in the appointment of other commissioners. This implies that the Commission is responsible to the Parliament.[133] Indeed, a vote of mistrust can be conducted towards the Commission, and if this vote is successful, this institution resigns as a body.[134]

It is also made clear in this provision that the parliamentary elections results are taken into account by the council when it is proposing a candidate for the Presidency of the Commission. This led to many controversies as to how this candidate should be nominated before he is brought to the Parliament. "In order to europeanise the elections and to boost the democratic legitimacy of the EU decision making", political parties at the European Union were asked to nominate their "*Spitzenkandidaten" or*

[132] Art 17(7) of the Treaty on the European Union.
[133] Art 17 (8) of the Treaty on the European Union.
[134] Robert Schütze, *op. cit,*, p.168.

"lead candidates".[135] Although this *Spitzenkandidaten* process was applauded by some experts, it also received significant criticisms from governments arguing the loss of the control over their nomination process which undermines the treaty provisions.[136] Others wondered to what extent Member States would be bound by this process which does not involve them. In fact, this election process was not successful in the 2019 election of the President of the Commission as it faced the opposition from EU leaders namely the Heads of States.

Having understood this, one could ask himself what constitutional system the European Union represents. Robert Schütze considers it as to be somewhere in between the parliamentary and the presidential system.[137] This is plausible consideration because a part of the executive - the Commission - is responsible to the Parliament whereas the Council[138] - another executive institution - is not.

Besides the appointment of the Commission, the European Parliament is consulted with regards to the appointment of the members of the Court of Auditors[139] and the Executive Board of the European Central Bank.[140]

[135]European Parliamentary Research Service, Role and election of the President of the European Commission, July 2014, p.3 www.europarl.europa.eu/EPRS/140829REV1-Role-of-the-President-of-the-European-Commission-FINAL.pdf Visited on 22.12.2019 .
[136]*Ibidem.*
[137] Robert Schütze, *op.cit*, p.168..
[138] It is important to note that the "Council consists of representative of each Member State at ministerial level, who may commit the government of the Member State in question and caste its vote" Art.16 of the TEU.
[139]Art 286 (2) of the Treaty on the Functioning of the European Union.
[140] Art 283 (2) of the Treaty on the Functioning of the European Union.

3.2.2.3. European Parliament and National Parliaments

This part intends to analyse the relationship between the European Parliament and National Parliaments. To reach this goal, I will discuss the role of the National Parliament in the EU legislation process and in the protection of national interests in the legislation process.

3.2.2.3.1. Role of National Parliaments in the EU legislation process

The Treaty of Lisbon made significant changes in terms of recognizing the importance of the national parliaments in the EU legislation process. Indeed, article 12 of the Treaty on the European Union indicates in a very clear language that "national parliaments contribute to the functioning of the European Union"[141] enumerating, thereafter, their main domains of participation. In summary, it recognizes the right of national parliaments to be informed on legislative drafts by EU institutions; the right to watch over the respect of the principle of subsidiarity and the principle of proportionality; the participation in the evaluation mechanisms in the areas of freedom, Security and Justice; the political monitoring of Europol and Eurojust, the participation in the revision of treaties; and finally, the rights to be informed on applications for accession to the Union and the participation in the inter-parliamentary cooperation between national parliaments and the European Parliament.[142] In all these areas, national parliaments are entitled to be involved and therefore influence decisions affecting them.

A question may arise regarding the reasons the above areas were specifically targeted and retained as to be partly left in the hands of national parliaments. The treaty of Lisbon does not clarify the reasons, but an answer can be presumed. Looking at these domains of intervention by national parliaments, it can be noted that these areas are exceptionally sensitive and, therefore, directly connected to the notion of state sovereignty. Thus, it is reasonable to suggest that this is a way for Member States to keep their hands in the integration process, specifically in areas which affect their sovereignty. In this regard, they become reluctant to surrender some of their sovereign

[141] Art 12 of the Treaty on the European Union.
[142] Art.12 of the Treaty on the European Union.

rights to the Union's organs. The report done by the Directorate-General for international Policies of the European Parliament does not go far from this justification. It indicates that the willingness to give a say to national parliament "was based both on the democratic quality and the proximity given to national parliaments and on their capacity to identify and promote national interests and features in a period where the EU was suspected of neglecting them".[143] Clearly, this report recognizes that one of the reasons was to protect national interests and undoubted states' sovereignty.

In addition to article 12 of the Treaty of Lisbon, a protocol on the role of national parliaments was adopted.[144] After insisting on the desire of Member States to encourage greater involvement of national parliaments in the activities of the EU and to enhance their ability to express their views on draft legislative acts of the European Union in its preamble,[145] this protocol focuses on the modalities of information for national parliaments[146] and the inter-parliamentary cooperation.[147]

Article 5(3) of the Treaty on the European Union also grants power to national parliaments to ensure the application of the principle of subsidiarity. It indicates that "the institutions of the Union have to apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality" and, in this regards, national parliaments have to ensure compliance with that principle".[148] This power seems to us as of great importance as it empowers national parliaments with the role of "*guardians*, *sentinels* or *watchdogs* of subsidiarity".[149] This role will be discussed in the following section.

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[143] Directorate-General for Internal Policies of the European Parliament- Policy Department C Citizens' Rights and Constitutional Affairs, *The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges*, study, Brussels, 2017, p.10.

[144] See Protocol (N°1) on the Role of National Parliaments in the European Union.

[145] Preamble of the Protocol (N°1) on the role of national parliaments in the European Union (2007).

[146] Art 1- 8 of the Protocol (N°1) on the role of national parliaments in the European Union (2007).

[147] Art 9& 10 of the Protocol (N°1) on the role of national parliaments in the European Union (2007).

[148] Art.5(3) of the Treaty on the European Union.

[149]Marco Olivetti, *Article 12[The Role of National Parliaments*], in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU), A commentary,* Springer-Verlag, Berlin Heidelberg, p.488.

3.2.2.3.1. Role of National Parliaments in protecting national interests through the control of the respect of the principle of subsidiarity

Another aspect of interventionism by Member States in Union matters appears through protectionism of national interests operated by national parliaments through their role of ensuring the respect and application of the principle of subsidiarity. The use of this competence by national parliaments is regulated by Protocol N°2 on the application of the principles of subsidiarity and proportionality. As it appears from the preamble, the establishment of this protocol was motivated by the willingness of ensuring that "decisions are taken as closely as possible to the citizens of the Union" and the establishment of conditions for the application of the principle of subsidiarity and proportionality as well as a system for monitoring their application.[150]

The implementation of these objectives of the protocol is first done through the so-called "Early Warning System", a system through which, on the basis of the information they have received, "national parliaments have eight (8) weeks to submit to the Presidents of the European Parliament, of the Council and of the Commission their reasoned opinions on the reasons for which they believe that the draft does not comply with the principle of subsidiarity".[151] These reasoned opinions will, therefore, be submitted to the institutions where the draft was originated from[152] with a purpose of taking them into account. Concretely, the Early Warning System constitutes of one of the ways used by Member States to protect their interests, and therefore, to avoid EU legislations which can contradict them. In fact, as Richard, Francis and Michael indicate, "in practice this eight-week period gives national parliaments the opportunity to shape the position that their country's minister will take when they attend council meetings, irrespective of subsidiarity concerns".[153]

[150]Preamble of the Protocol N°2 on the application of the principles of subsidiarity and proportionality (2007).
[151] Marco Olivetti, *op.cit*., p.489.
[152] Article 7 (1) of the Protocol 2 indicates that "the European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national parliaments or by a chamber of a national parliament".
[153] Richard Corbett et ali, *The European Parliament*, 8ed, John Harper Publishing, London, 2011, pp.233-234.

The second way of monitoring the EU legislation process by national parliaments involves, what is called, the "Yellow Card" procedure. Under this procedure, "if a third of national parliamentary chambers (one vote per chamber in bi-cameral national parliaments, two votes for a unicameral national parliament)[154] object to a proposal on grounds of subsidiarity, the commission is obliged to review it".[155] The threshold is lowered to a quarter (14 out of 54) if the draft legislative act concerns areas of freedom, security and justice.[156] The consideration of a lower threshold for these areas can be justified by their sovereign-related character. In fact, EU Member States have been attentive and, therefore, reluctant to leave to the Union full powers in the management of the areas of freedom, security and justice. They consider them as an integral part of their sovereignty. That is why they prefer to use a lower threshold so that a small number of Member States can block a legislation which can ultimately affect their national interests in these areas.

However, it is important to note that, although national parliaments can intervene by using this system, their intervention does not obligate the group it is addressed to (these are namely Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank of European Investment Bank if the legislative act originates from them) to change their position in this regard. These groups may decide to maintain, amend, or withdraw; they only need to explain their decision.[157]

The third mechanism refers to, what is called, the "Orange Card" procedure. This mechanism applies in the case of the ordinary legislative procedure (co-decision between the council and the EP) and foresees that, if a simple majority of votes (28 votes out of 54) allocated to the national parliaments object a draft legislative act with reasoned opinions of the non-compliance with the principle of subsidiarity, the proposal must be reviewed.[158] Again, this review does not oblige the commission to

[154]If one considers the current configuration of the European Union, this represents 18 votes out of 54 given to 27 national parliaments.
[155]Richard Corbett et al, *op.cit* , p.234.
[156] Art 7(2) of the Protocol 2 on the application of the principles of subsidiarity and proportionality (2007).
[157] Art 7(2) of the Protocol 2 on the application of the principles of subsidiarity and proportionality (2007).
[158] Art 7(3) of the Protocol 2 on the application of the principles of subsidiarity and proportionality (2007).

consider the opinions of the national parliaments; it may decide to maintain, amend or withdraw the proposal, but if it maintains it, justification has to be given.[159] The only thing that can block the draft legislative act is the situation when 55% of the members of the council or a majority of the votes cast in the European parliament consider that the proposal is not compatible with the principle of subsidiarity.[160] In this situation, no further consideration can be given to the proposal.

In conclusion, considering all these mechanisms, although the reasoned opinions of the national parliaments do not bind the institutions, they undoubtedly create pressure on them, which therefore influences their decision especially when they are adopting a legislation which is not compatible with national interests.

3.2.3. The Council of the European Union: Areas of national influences

The Council is one of the institutions established by the Treaty on the European Union under article13.[161] It consists of "representatives of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote".[162] The powers of the Council are summarized in the same treaty as follows:

> "The council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policymaking and coordinating functions as laid down in the Treaties".[163]

From this provision, it can be noted the existence of national influences in the Union's activities through the council's actions. Indeed, looking at its composition and configuration, the council comprises officials who belong, in their nature, to the executive since they represent their Member States at the ministerial level. Despite of

[159] Art 7(3) of the Protocol 2 on the application of the principles of subsidiarity and proportionality (2007).
[160] Art 7(3)b of the Protocol 2 on the application of the principles of subsidiarity and proportionality (2007).
[161] Art 13 of the Treaty on the European Union establishes the institutions of the European Union which aim "to promote the Union's values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and to ensure the consistency, effectiveness and continuity of its policies and actions. The Union's institutions shall be: -the European Parliament, the European Council, the Council, the European Commission […], the Court of Justice of the European Union, the European Central Bank and the Court of Auditors":
[162] Art 16 (2) of the Treaty on the European Union.
[163] Art.16 (1) of the Treaty on the European Union.

this, the provision above attributes to them the power to co-legislate with the Parliament. Thus, the council becomes a second chamber of a bicameral parliament.[164] Clearly, this brings modifications to the principle of separation of powers preached by Montesquieu as a model of good governance and which considers that the three powers should not be united in the same person.

According to Montesquieu:

> "When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything when the same man or the same body to exercise these three powers".[165]

Another area that calls for more attention with regard to national influences concerns the council's decision-making process. The Treaty of Lisbon clarifies that all the decisions of the council should be taken by a qualified majority except where the Treaties provide otherwise.[166] Thus, this treaty establishes the qualified majority as a rule for decisions of the council.

What does this notion of qualified majority vote mean exactly in the Council? A qualified majority vote (QMV) is a combination of thresholds of weighted votes, the number of Members States and the percentage of the EU population.[167] Concretely, this vote differs from the classic one. Indeed, it generally takes into consideration the demographic situation of the Union's Member States as their population determines the majority.

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[164] Picot (2010), para 9, cited by Hermann-Josef Blanke and Stelio Mangiameli, *op.cit*., p.651.

[165] Montesquieu, *De L'Esprit des Lois*, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn 199, p.23; Cited by Tej Bahadur Singh, *Principle of Separation of Powers and concentration of Authority*, in I.J.T.R, U.P., Lucknow, March 1996, p.1. http://www.ijtr.nic.in/articles/art35.pdf visited on 15/12/2017. See also Gilbert Hagabimana, *Role of Regional Courts in the Promotion of Regional Integration: A Case Study of the European Court of Justice and the East African Court of Justice*, A dissertation submitted in Partial Fulfillment of the Requirements for the Degree of Masters of Laws of the University of Dar es Salaam, September 2014, p.64.

[166] Art 16 (3) of the Treaty on the European Union.

[167] Wim Van Aken, *Voting in the Council of the European Union: Contested Decision- Making in the EU Council of Ministers (1995-2010)*, Swedish Institute for European Policy Studies-SIEPS, Stockholm, September 2012, p.20.

Thus, Member States have different number of votes, a number that is predetermined by the EU treaty (see the table below). Over years, the voting weight has been changing to accommodate newcomers in the Union.[168] Before the advent of the Treaty of Lisbon, in order to pass a proposal in the council of twenty-seven (27) Member States, a majority of 255 out of 345 weighted votes or 73.91% of the Member States' weighted votes was required.[169] Besides this, some other conditions had to be simultaneously fulfilled. Specifically, even if the majority of weighted vote could be obtained, the proposal could not pass if it faces a blocking majority of 90 out of 354 weighted votes and if it did not receive a support from the majority of the Member States (14 Member States out of 27).[170] Also, any state was entitled to ask whether Member States which have attained the qualified majority represent 62 % of the Union population.[171] Thus, under this legislation, the qualified majority had to meet a triple majority: a simultaneous majority of the weighted votes, majority of member states and majority of the population of the Union.[172]

The advent of the Treaty of Lisbon, in contrast, introduced a new qualified majority. Instead of a qualified majority that focuses on a triple majority, the new one under the Lisbon Treaty invented a double majority: it comprises a majority of the member states and a majority of the population. Article 16 (4) stipulates as follows:

> "As of 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union. A blocking majority must include at least four Council members, failing which the qualified majority shall be deemed attained. The Arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the Union".[173]

Thus, with the amendments brought by the Lisbon Treaty, there was an abandonment of the weighting vote and a focus on the majority of Member States and the majority of

[168] This refers to the accession of Member States occurred successively in 1995, 2004 and 2007.
[169] Wim Van Aken, *op. cit.,* p.20.
[170] *Ibidem.*
[171] Hermann-Josef Blanke and Stelio Mangiameli, *op. cit*., p.675.
[172] Robert Schütze, *op.cit,* p. 181.
[173] Art 16(4) of the Treaty on the European Union.

the population. Thus, from 2014, a qualified majority would be reached when at least 55 per cent of Member States agreed to a proposal (15 out of 28 Member States before Brexit, 15 out of 27 Member States after Brexit[174]) and these states representing at least 65 per cent of the EU population (72 per cent where the proposal does not emanate from the commission or the High Representative).[175] A blocking minority also has to include at least four Member States, failing to which the qualified majority will be deemed attained.

Having understood the mechanism of the qualified majority and looking at it in the context of this study, this voting system seems to be justified on one side. Indeed, it tries to accommodate all stakeholders involved in the decision-making process. For instance, by considering a certain percentage of the population, the qualified majority vote system makes the Union more democratic. Therefore, the decisions will be deemed to reflect the willing of the population. Furthermore, by considering a certain number of states to reach the required majority, this voting system aims to protect smaller countries where it is probable that they can suffer due to a smaller population.

On the other side, it impacts on both the sovereignty of member states and the integration process. Indeed, it can be argued that it brings modifications to the principle of sovereign equality of States established under paragraph 1 of article 2 of the United Nations Charter.[176] This principle means that all States have equal duties and rights, regardless of differences in economic, social, political, demographic, geographic, etc.[177] In this context, by weighting EU member states' votes and considering states in accordance with their demographic size, it can be argued that the qualified majority vote violated this internationally recognized principle. The qualified majority system does not only impact on the sovereignty of states, but also on the integration process. Indeed, this system would influence, in one way or another, the willingness of member states to cooperate for the realization of the integration. For instance, in the past, the

[174] https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en#what-does-the-council-do? Visited on 20.04.2020.
[175] Elspeth Berry et al, *op.cit*., p.33.
[176] United Nations Charter, art 2(1) stipulates that "the organization (UN) is based on the principle of the sovereign equality of its Member States".
[177] Behrooz Moslemi and Ali Babaeimehr, *Principle of Sovereign Equality of States in the Light of the Doctrine of Responsibility to Protect,* In International Journal of Humanities and Cultural Studies, December 2015, p. 691.

weight of vote has been attacked from both sides namely from the smaller Member States as well as from the bigger Member States. Whereas smaller Member States were claiming that this system favours bigger States and insisted that the votes should be at least cast by the majority of members States, the bigger States were arguing that it favours the smaller ones and that votes should be cast by the percentage of the population.[178]

Table: Evolution of the QMV in the EU Council (1995-2017)[179]

	1995-2004 EU-15 01/01/1995	2004-2007 EU 25 01/05/2004 Nice 01/11/2004*	2007-2014 EU27 01/01/2007 31/10/2014	2014 Onwards Lisbon 01/11/2014**	Pop (000,0)
Austria	4	10	10	1	8, 404,252
Belgium	5	12	12	1	10,951, 665
Germany	10	29	29	1	81751,602
Denmark	3	7	7	1	5,560, 628
Spain	8	27	27	1	46, 152,926
Finland	3	7	7	1	5, 375,276
France	10	29	29	1	65, 048,412
Greece	5	12	12	1	11, 309,885
Ireland	3	7	7	1	4, 480,858
Italy	10	29	29	1	60, 626,442
Luxemburg	2	4	4	1	511,840
Netherlands	5	13	13	1	16, 655,799
Portugal	5	12	12	1	10, 636,979
Swede	4	10	10	1	9, 415,570
United Kingdom	10	29	29	1	62, 435,709
Cyprus		4	4	1	804,435
Czech Republic		12	12	1	10, 532,770
Estonia		4	4	1	1, 340,194
Hungary		12	12	1	9, 985,722
Lithuania		4	4	1	3, 244,601
Latvia		7	7	1	2, 229,641

[178] Robert Schütze, *op.cit*, p.181.

[179] Wim Van Aken, *op.cit,* p. 21. The original source of this table is the population date from Eurostat(2012) on 1 January 2011.

Malta		3	3	1	417,617
Poland		27	27	1	38, 200,037
Slovakia		7	7	1	5, 435,273
Slovenia		4	4	1	2, 050,189
Bulgaria			10	1	7, 504,868
Romania			14	1	21, 413,815
Qualified majority	62/87	232/321and 13 MS 62% pop	255/345 And 14MS 62% pop	15/27and 65% pop	502,477,005. 000 62%(311,535.74) 65%(326,610,05)
Qualified Majority***	10/15 MS	17/25	18/27MS	20/27MS	
Blocking Majority	26	90	91	at least 4 MS or 35% of participating MS+1 MS	

Legend: * transition period from 01/05/2004 to 01/11/2004 whereby a QMV represents 88 out of 124 votes under the previous voting weights; **transition period from 01/11/2014 to 31/03/2017: a Member state can request that the voting rule for a particular decision reverts to the rules under the Nice Treaty; *** QMV for an act not proposed by the Commission; MS=Member States, pop. =population
Sources: population data on 1 January 2011 from Eurostat (2012).

It is also important to mention that, beside the qualified majority voting system, the Council has another majority voting system; that is the simple majority vote. This is seen in article 238 of the TFEU which indicates that "where it is required to act by a simple majority, the Council shall act by a majority of its component members".[180] This voting majority is utilized very rarely.[181] However, for sensitive political questions and when required in the treaties, decisions are taken by a unanimous voting which requires the consent of all national ministers.[182] For instance, on the request of the Court of Justice, the Council, acting unanimously may increase the number of Advocates-General.[183] Other sensitive topics like foreign policy and taxation require a unanimous

[180] Art 238 (1) of the Treaty on the Functioning of the European Union.
[181] Robert Schütze, *op.cit*, p.180.
[182] *Idem*, p.179.
[183] Art 253 of the Treaty on the Functioning of the European Union.

vote[184]. Although this voting system is not often applied, it is undoubtedly not compatible with the integration process spirit. In fact, if every country is entitled to oppose its veto power in the decision-making process, it would not be easy to pass a regulation because an opposition by one-member state is enough to block it.

In summary, voting in the council can be operated in three ways namely by unanimity, simple majority or qualified majority. Firstly, as discussed above the unanimous voting is used for politically sensitive questions, for example, "common foreign, security and defence policy, taxation and social security".[185] This shows EU states' reluctance in surrendering some of their sovereign rights to the community organs when it comes to the decision-making in the areas which affect their sovereign identities. It is clear that this obviously impacts on the integration process. Secondly, the council can use the simple majority voting. This voting system is rarely used. It is normally used for less serious decisions like "administrative proposal such as adoption of the agenda, approval of the minutes or to give public access to council documents".[186] The Council uses it equally to decide on the organization of its general secretariat or to adopt its rules of procedures.[187] Thirdly, the council uses, most frequently, the Qualified Majority Vote. Indeed, through the wording of article 16(3) of the TEU indicating that "the Council shall act by a qualified majority except where the Treaties provide otherwise", the qualified majority is considered as a general rule of voting whereas other decisions procedures would appear as exceptions. It is the commonly used voting system when deciding in "many areas including most internal market measures and other areas such as environment, agriculture, competition, consumer protection, asylum, immigration, and judicial cooperation in civil and criminal matters".[188]

[184] https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en#what-does-the-council-do? Visited on 20.04.2020.
[185] Elspeth Berry et al, *op.cit*., p.33.
[186] Wim Van Aken, *op.cit,* p. 22.
[187] Guy Isaac et Marc Blanquet, *Droit Général de l'Union Européenne*, 10éd., Dalloz, Paris, 2012, p.130.
[188] Elspeth Berry et al, *op.cit*., p.33.

3.2.4. The European Court of Justice: its relationship with national institutions

Empowered with the role of ensuring that the interpretation and the application of the Treaties the law is observed,[189] the Court of Justice of the European Union comprises the General Court (formerly known as the Court of First Instance), and the specialized courts (formerly the judicial panels).[190] To assess the relationship between this union judicial institution and other national institutions, this section will focus on the appointment of its judges and the effectiveness of the preliminary rulings procedure as elements which determine the degree of independence of the court.

3.2.4.3. Appointment of Judges

One of the elements which contribute in the determination of the independence of judges is the process of their appointments. The court of Justice consists of one judge from each Member State, whereas the General Court includes, at least, one judge per Member State.[191] Although the judges of the ECJ are appointed by the Council, there is, at least, an independent panel which has to check their ability to fulfil their duties. Specifically, article 255 of the TFEU indicates that, "the panel comprises of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom proposed by the European Parliament". This appointment procedure is undoubtedly favourable to the independence of the court, and therefore, prevent from the interference of the executive.

It is worth mentioning that the intervention by an independent panel in the appointment of judges of the ECJ has not always been the case, but it developed over time. This innovation was established by the Treaty of Lisbon. Before, in the previous

[189] Art 19 (1) of the Treaty on the European Union.
[190] Elspeth Berry et al, *op.cit*., p.42.
[191] Art.19(2) of the Treaty on the European Union.

system each member states' government communicated the name of the candidate of its choice.[192]

3.2.4.2. Effectiveness of the preliminary ruling's procedure

In the EU system, preliminary rulings can be understood as decisions by the European Court interpreting EU law or a provision of a treaty at the request of a national court after it noted confusion on its interpretation during a proceeding before it. The legal basis for the preliminary rulings is article 267 of the TFEU which stipulates as follows:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".[193]

Clearly, it results from this provision that, if a court or a tribunal of a member state is in a situation where it needs an interpretation of treaties or validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, it may refer the case to the ECJ for the purpose of interpretation. From the wording of this provision "may […] request the court to give a ruling thereon", it can be presumed that the court or tribunal do not have an obligation to refer the case to the union court. They have a discretionary

[192] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis,* Cambridge University Press, Cambridge 2010, p.232.
[193] Art 267 of the Treaty on the Functioning of the European Union.

power to decide the necessity of reference. However, this does not mean that they are not bound by the decision of the ECJ once they have decided to refer the case to it. Indeed, if this court "renders a preliminary ruling, the judgement is binding on the body that sent the question in the sense that it must observe the solution".[194] Preliminary rulings have effects not only on the court or tribunal which referred the question to the ECJ, but also on other Member States courts or tribunals. In fact, whenever they will face the same question, they will be obligated to apply the interpretation which was already given by the ECJ on the matter. This is very important for the integration process. In fact, from this aspect, it can be concluded that preliminary rulings contribute to the harmonization of EU law in the sense that it avoids contradicting judgements. It is worth mentioning that, as the TFEU indicates, "where such a question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law",[195] that court or tribunal has the duty to refer the matter to the ECJ.[196]

In the EU, national courts seem to have understood the importance of preliminary rulings. Indeed, most of the important cases which made significant changes in the EU integration were delivered as a response to preliminary references submitted by them to the ECJ. For instance, the landmark cases *Van Gend en Loos*[197] and *Costa*[198] through which the principle of direct effects and supremacy of the EU law were born, were a result of preliminary rulings.

3.2.5. The European Council

The European Council is another institution of the European Union established under article 13 of the TEU. It "consists of the Heads of States or Government of the Member States, together with its President and the President of the Commission".[199] It results

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[194] Judgment of 30 September 2003 in case C-224/01 Köbler, cited by Iuliana-Mădălina LARION, *The effects of preliminary rulings*, In Challenges of the Knowledge Society, p. 448.
[195] Art 267 of the Treaty on the Functioning of the European Union.
[196] Art 267 of the Treaty on the Functioning of the European Union.
[197] *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62)[1963] EC1.*
[198] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.
[199] Art 15(2) of the Treaty on the European Union.

from this provision that the European council is the highest level of the EU as it is mostly composed with personalities with high ranking at national level.

The composition of the European Council is also interesting at one point. Indeed, in contrast with the council of ministers - where the presidency is held by each Member State rotation for six months[200] - the Presidency of the European Council is in the hands of an additional person who is not at the Head of any member state or government. In fact, the TEU indicates that the President of the European Council should not hold a national office.[201] I think this is a very important administrative method as it may contribute to the independence in the administration of the institution. The treaty also mentions the president of the commission as a member of the European council. However, these two officials - the President of the European Council and the president of the commission - do not have the right to vote where the European Council decides by vote.[202] In contrast, the High Representative of the Union for Foreign Affairs and Security Policy, who is also member of this institution, takes part in its work.[203]

With regards to the tasks of the European Council, they are specified in the Treaty on the European Union in the following wording:

> "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions".[204]

Through this provision, we deduce two main elements. Firstly, the European Council has a task to define the European Union's priorities. By determining priorities and directions, the European Council seems to be an institution which does not take important decisions. However, it is seen to be "the EU's most highly restricted negotiation venue designed to encourage exchange of views and resolve issues too

[200] Elspeth Berry et ali, *EU Law –Text, Cases and Materials*, Oxford University Press, Oxford, 2013, p.34.
[201] Art 15(6) of the Treaty on the European Union.
[202] Art 235(1) of the Treaty on the Functioning of the European Union.
[203] Art 15(2) of the Treaty on the European Union.
[204] Art 15 (1) of Treaty on the European Union.

politicized or decisive to be handled elsewhere".[205] Commenting on the above-provision Vérane Edjaharian indicates some examples of these issues handled by the European Council. According to them, "the European Council's power of general direction is particularly significant in the external action, foreign policy and defence.[206] In this regard, it identifies, through a unanimous decision on the recommendation of the council, the strategic interests and objectives of the Union related to the Common Foreign and Security Policy (CFSP) and to other areas of the external action of the Union.[207] The European Council's action is also visible in the areas of freedom, security and justice (AFSJ). Within this area too, the "European Council defines the strategic guidelines for legislative and operational planning".[208] It is important to note that all these areas of intervention by the European Council have something in common. In fact, looking at them, one would note that they are sensitive in nature as they concern the Union's external policy in general on one hand and security and justice on the other hand. This shows how EU member states are still reluctant to surrender some of their sovereign rights to the community organs for the benefits of the Union's integration.

Secondly, it is clear from the provision of the TEU that the European Council does not have legislative role in the EU decision-making process. This implies specifically that its decisions do not have a force of law despite their binding nature.

With regard to the voting system, the TEU indicates that "except where the Treaties provides otherwise, decisions of the European Council shall be taken by consensus".[209] Clearly, the TEU establishes a general principle through which the consensus is recognized as the ordinary decision mode of the European Council. However, in some situations, the European Council can decide on a qualified majority vote,[210] in which case the Council's rules on this voting system applies *mutatis mutandis.*[211] Most of the decisions concerned with this voting are related to institutional and constitutional

[205] Erik Jones et al, *The oxford handbook of the European Union*, Oxford University Press, 2012, p.327.
[206] Vérane Edjaharian, *Article 15 [The European Council]*, in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union: A commentary,* Springer-Verlag, Berlin Heidelberg, 2013, p.619.
[207] *Ibidem.* See also art 22 (1) of the Treaty on the European Union.
[208] Art 68 of the Treaty on the Functioning of the European Union.
[209] Art 15(4) of the Treaty on the European Union.
[210] Robert Schütze, *European Union Law*, Cambridge University Press, Cambridge, 2015, p.170.
[211] *Ibidem.*

duties.[212] Like its sister the Council, the European Council can decide by a simple majority vote. However, this procedure is used to decide on simple matters like in case of the procedural questions and the adoptions of its Rules of Procedure.[213] It is also important to recall that the unanimity decision procedure is an arm of decision-making mechanism used by the European Council in the matter of common foreign and security policy.[214] The European Council can also determine on a unanimous vote the existence and persistence of a breach of the values of the Union by Member States.[215]

3.2.6. The European Commission

The European Commission is one of the European institutions established under article 13 of the Treaty on the European Union. It is a college of commissioners consisting of "one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents".[216] The European Commission is a supranational body representing the Union's interests as it participates in the legislation and have several enforcement mechanisms[217]. Indeed, in its role as representative of the European Union's interests, the European Commission can take any appropriate measure in this regard.[218]

In its participation in the legislation, the European Commission has the exclusive right of initiative except for the areas of Justice and Home Affairs.[219] Attributing the right of initiative to the commission is reasonable. The commission is, indeed, the Union's institution which supervises or takes care of the daily life of the Union. It is therefore in

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[212] Vérane Edjaharian, *Article 15 [The European Council]*, in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union: A commentary,* Springer-Verlag, Berlin Heidelberg, 2013, p.632; Hermann-Josef Blanke and Stelio Mangiameli give some examples of the institutional and constitutional duties: "The decision establishing the list of the Council Configurations (art 236 lit. b TFEU), the decision on the Presidency of the Council (art 236 lit. b TFEU), the proposal of the President of the Commission to the EP and the appointment of the Commission (art 17.7 TEU) as well as the election of its own President (art 15(5)TEU).

[213] Art 235(3) of the Treaty on the Functioning of the European Union.

[214] See above, precedent page.

[215] Art 7(2) of the Treaty on the European Union.

[216] Article 17 (3) of the Treaty on the European Union.

[217] Armin Cuyvers, *The Institutional Framework of the EU*, in Emmanuel Ugirashebuja et al., *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* Brill Nijhoff, Leiden/Boston, 2017, p.92.

[218] Article 17 (1) of the Treaty on the European Union.

[219] Article 17(2) of the Treaty on the European Union.

the right position to propose any legislation that it might seem necessary for the realisation of the integration. This is a different with the case of the Secretariat of the East African Community. Unlike the Commission, the Secretariat does not have even the right for initiative.

The Commission is the guardian of Union law as it monitors the proper implementation, and observance of the European Union.[220] This monitoring concerns both the primary and the secondary union law. With regard to the enforcement mechanisms, the European Commission can bring a Member State before the European Court of Justice. If the European Commission considers that a Member State did not comply with the EU law, it can give a notice to the concerned Member State showing the non-compliance with the law. If the Member State does not take necessary measures, the Commission can file the case to the European Court of Justice.[221] Over years, the avoidance of the abuse of the Union law has been the main role of the commission's tasks.[222]

The Commission also has the role of representing the Union in its relationship with other international organisations or partners and it is the responsibility for the Commission to deal with all the Union's diplomatic missions outside and within the EU.[223] The Commission negotiates with other international partners of the Union or non- member States. The commission runs the administrative functions of the Union. It is an executive body of the Union. In fact, as Klaus-Dietter Borchardt indicates, this is happening specifically in:

> "the field of competition law, where the Commission acts as a normal administrative authority, checking facts, granting approval, or issuing bans and, if necessary, imposing penalties".[224]

[220] Klaus-Dietter Borchardt, *The ABC of European Union law*, Publication office of the European Union, Luxembourg, 2010, p.64.
[221] Article 258 of the Treaty on the Functioning of the European Union.
[222] Klaus-Dietter Borchardt, *op.cit*., p.64.
[223] *Idem.,* p.65.
[224] Klaus-Dietter Borchardt, *op.cit*., p.65.

3.2.7. Institutional nature of the European Union: a supranational or an intergovernmental nature?

The understanding of the role of EU institutions in the decision-making process is the key element which can guide in the determination of the nature of the European Union. The European Union is a structure whose nature is not easy to classify. In other words, it is not easy to know whether the EU is a supranational or an intergovernmental organization.

As Stone Sweet and W. Sandholtz explain, "a 'supranational' mode of governance is one in which centralized governmental structures (those organizations constituted at the supranational level) possess jurisdiction over specific policy domains within the territory comprised by the member states".[225] They insist that "in exercising that jurisdiction, supranational organizations are capable of constraining the behavior of all actors, including the Member States, within those domains".[226] Clearly, a supranational aspect of an organization is used to insist on the centralized characteristics of its institutional framework. Considering this definition, the European Union has significant features of a supranational organization. Certainly, it is vested with supranational institutions namely, the Commission, the Parliament, and the European Court of Justice whose decisions are binding to all member states. These institutions have almost the same characteristics of the similar ones at national level. Member States are obligated to implement their decisions.

On the other side, some other EU institutions make it intergovernmental. "Intergovernmental" refers to the retention and exercise by Member States of their autonomous sovereign power in acting upon legislation, setting policies or taking decisions, even though the States may often voluntarily collaborate in promoting the

[225] Alec Stone Sweet and Wyne Standholtz, "European Integration and Supranational Governance" (1997), Yale Law School Faculty Scholarships, paper 87, p. 303 http://digitalcommons.law.yale.edu/fss_papers/87 Visited on 27/07/2018 ; See also in *Journal of the European Public Policy*, Vol 3., pp297-317.
[226] Alec Stone Sweet and Wyne Standholtz, *op.cit*., p.303.

common goals of the EU"[227]. Considering this definition, the intergovernmental aspect of the EU appears. Indeed, the EU Member States hide themselves behind the Council of the European Union and the European Council, refusing therefore to transfer some of their sovereign powers to the supranational organization of the Union. In fact, as explained earlier, these two institutions are more intergovernmental in structure as they are composed with national officials representing Member States' interests.

Analysing the two classifications at hands, one would consider the European Union as partly supranational and partly governmental as it has the two features. However, its supranational characteristics are more visible than the intergovernmental ones and can be attributed to it. In fact, as already mentioned, in both institutions, whether intergovernmental or supranational, the decision-making process is sanctioned by the qualified majority vote. A vote that passes under this voting system, in the institutions with intergovernmental features, engages those who voted against the will of the majority. To sum up, as Roger Goebel indicates, although the EU has no features of a nation-state and its component Member States are bound to retain most of their sovereign characteristics, it is perfectly plausible to refer to the EU as a *sui generis* supranational legal structure unlike any other in the world.[228]

3.2.8. Concluding observations

The objective of this section was to determine the relationship between the European institutions and national institutions. It was noted that since its creation, the European Union was suffering from a democratic deficit resulted from national institutions' hands in the governance of the Union. It was with the advent of the Treaty of Lisbon that some improvements were made. This treaty tried to change this picture by increasing some powers of the institutions of the Union. The main changes were the involvement of the Parliament in the elaboration of EU laws (at task which was mainly at the council's hands) and the abandonment of the unanimity voting system for the benefit of a

[227] Roger Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon,* In *Columbia Journal of European Law (Colum. J. Eur. L.) ,* Vol.20, Issue 1, 2013, p.82 Also Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/577 , Visited on 27/07/2018
[228]Roger Goebel, *op.cit.,* p.82.

moderated qualified majority voting system in the council. It was also noted that the existence of an efficient court of justice with a guaranteed independence and which delivers integrationists judgements resulted from preliminary rulings. All these improvements contributed significantly to the current achievements EU integration process.

However, even if some improvements were made through the Lisbon Treaty, one could also not say that the democratic life of the European Union has reached the classic standards comparable to the national one. It was seen through this section that the structure of the Union and the powers attributed to some of its institutions - namely the Council and the European Council – give an impression of a blockage to its full realization. For instance, as above described, being a co-legislative body of the Union together with the Parliament- the Council of Ministers- seems to be a brake to the effectiveness of the EU democratic life. All these are the consequences of the fact that member states are still reluctant to release some of their sovereign rights for the benefit of the Union specifically when it comes to deciding in some sensitive areas. This leads us to conclude that the democratic life of the EU has not reached its final point, and is therefore, still missing some important elements. On the other side however, the powers of the Council and, thus of the Member States, is democratically legitimised through the parliaments of the Member States.

Furthermore, even if the EU has some features of an intergovernmental organization, it has an advanced supranational legal structure which cannot be compared to any other one in the word.

3.3. Relationship between the European Union Law and National Laws

This section will be divided into two parts. It will analyse successively the European perception of the relation between EU law and National Laws before coming to the national perceptions of this relationship.

3.3.1. The relationship between EU law and National Laws looked at from the European Union perspective

The relation existing between the EU law and national laws of its Member States is also an important determinant of the relationship between the regional integration and state sovereignty in the EU. This helps us to understand to which extent the latter impacts on the former. Specifically, it is important to know whether the EU law is directly applicable or has direct effects into national legal systems of the EU Member States or whether it has supremacy over the national ones. A well-rounded comprehension of all these aspects in the case of EU gives a picture of how flexible or open are member states towards the implementation of the EU law. For one to measure this flexibility, it is of great interest to have a general background on how the international law is received and accepted by partner states before we analyse this receptivity in the EU through some relational principles and their impacts on the in EU's integration process and the sovereign status of member states. In the conclusion of this section, an observation will be provided.

3.3.1.1. Implementation of international law into national legal systems: a general overview

It is in the Vienna Convention on the Law of Treaties (VCLT) where the observance of treaties by parties to it, is described. In fact, the implementation of treaties is guided by the so-called *pacta sunt servanda* principle*,* a principle which is established under article 20 of the VCLT. This provision clarifies that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".[229] In addition to this, it is

[229] Art. 20 of the Vienna Convention on the Law of Treaties.

accepted that "even if they are designed for the protection of individuals, provisions of treaties bind only the states at an intergovernmental level and in the absence of implementation, cannot be domestically invoked or enforced by citizens"[230]. Clearly, because the international law cannot be invoked by citizens, this makes it clear that, normally, it does not have direct effects.

Furthermore, it is worth noting that, in the classic international law, domestic effects of international agreements or treaties is determined by the constitutional law of each country part to it.[231] This implies an existence of differences between contracting countries in giving effects to treaties they are part to. Therefore, depending on the constitutional system they belong to, the acceptance, the effectiveness or the implementation of international law differ from country to country. In this regard, theorists of international law identified two categories of constitutional systems: monism and dualism. "Monist countries make international law part of their domestic legal order".[232] Consequently, international law will directly apply as if it was a domestic law".[233] Clearly, this means that, for monist countries, a ratification of a treaty makes it automatically part of national law without any other process of recognition or incorporation of it into national law. Consequently, this makes it directly applicable.

In contrast, dualist countries consider international law as separate from domestic law. For them, whereas "international law is viewed as the law between states, national law is the law within state".[234] This implies that, under the dualism system, treaties are only binding on states not in the state. It is only when they have been incorporated into national system in accordance with a pre-established national process that they become binding and applicable by individuals.[235]

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[230] Selin Ece Guner, The European Court of Justice in the integration process of the European Union, a thesis submitted to the graduate school of the Middle East Technical University, June 2005 p.36.
[231] Selin Ece Gruner, *op.cit*., p. 36.
[232] Robert Schütze, *European Constitutional Law*, Cambridge University Press, Cambridge, 2012, p.306.
[233] *Ibidem*.
[234]Robert Schütze.*op.cit.,* p.306
[235] Jean Combacau et Seige Sur, *Droit international public*, 7ed, Montchrestien, Paris 2006, pp.181-182.

3.3.1.2. Implementation of EU law in Member States' national legal orders: Relational principles

Having understood the classic process of acceptance of international law by member states, it is now, important and of great significance, to have a look at the one of EU law by its member states. In this section, I will analyse what can be called relational principles. These are direct applicability, direct effect, and the supremacy the European Union law.

3.3.1.2.1. Direct applicability of the EU law

As previously described in the introduction chapter, the European Union comprises of 27 member states which, obviously, have different constitutional systems. It has undoubtedly monist and dualist countries as well. One would think that the process applied in the applicability of the international law in Member States would apply in the case of the European Union. Specifically, in the respect of the monist and dualist theories, EU Member States with dualism system would, logically, need to incorporate EU law into their national legal order for it to become applicable. The situation is however different for this Community.

Indeed, the European Union developed a different system by introducing the principle of direct applicability of the EU law in the legal system of all member states. This principle "ensures that the community law is incorporated in the municipal law of the member states without the need for its specific implementation".[236] Specifically, in contrast with the process followed in the case of international law where the applicability of treaties in national system requires specific procedures of their incorporation, in the case of the EU, community law is immediately and directly applied in all member states from the date of their entry into force. Thus, this principle allows for the integration of community law into member states' legal system without

[236] Alina Kaczorowska, *op.cit.,* p. 290.

intervening national implementation procedures and measures[237] in contrast with other international treaties.

The ECJ tried to justify this difference between the applicability of the international law and EU law in member states' legal order. In the view of the court:

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".[238]

In its justification, the ECJ recalls that the EU is a new legal order different from the international one. It argues, therefore, that as an organization with its own legal capacity, states have limited some of their sovereign rights. Curiously, the incorporation process of international treaties applied by dualist countries is among of these rights that EU Member States have limited, accepting therefore the EU law to be directly applicable without any other process of acceptance.

Analysing this principle of direct applicability of community laws, one would note that it appears as a system of harmonization of the applicability of EU law in domestic legal order of Member States. In other words, direct applicability of the EU law is a conciliating principle between the monism system and the dualist system on how the community law is applied into national legal system of its Member States since it ignores the normal process used in the international law. In fact, looking at it well, in monism system, direct applicability of EU laws is obvious and self-evident considering the fact that there is no other process of incorporation required for them to be applied to member states' legal system. It is, therefore, clear that accepting EU laws as directly

[237] Richard Frimpong Oppong, *op.cit*, p.43.
[238] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.

applicable to all EU member states oblige states with dualism system to use the practice of monist countries.

Having understood the principle of direct applicability of the EU law, a question remains not responded. If this principle is applicable for EU treaty provisions, it is also important to know whether it is extended to other types of EU measures namely regulations, directives, decisions, recommendations, and opinions. The TFEU partly responds to this question. In the case of regulations, article 288 second paragraph made it very clear that "they shall be binding in their entirety and applicable in all Member States",[239] that is to say, that they do not need to be incorporated into different national orders existing in the Union. As it can be noted from this provision, the direct applicability of regulations is expressly stated in the treaty unless the regulations themselves separate their date of entry into force and the date of applicability.[240] For directives, although the treaty does not indicate it expressly, it can be presumed from the 3rd paragraph of art 288 that they can only be applicable after each country has defined its implementation procedure. Indeed, according to this article, "a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods".[241] With regard to decisions, regardless to whom they are addressed - member states or natural or legal person -, they are directly applicable.[242] The TFEU is not clear in the case of recommendations and opinions. However, since they are not binding measures,[243] it can be presumed that they cannot be directly applicable.

Talking about the applicability of the EU law in Germany, Robbers considers "that the law of the European Union and politics on European scale are of decisive importance for the development of the law of Germany".[244] According to him, the EU law is directly applicable in the German legal system through the so-called "regulations"

[239] Art 288 §2 of the Treaty on the Functioning of the European Union.
[240] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction*, Hurt Publishing Ltd, Oxford and Portland, 2002, p. 76.
[241] Art 288 § 3 of Treaty on the Functioning of the European Union.
[242] Alina Kaczorowska, *op.cit.,* p.296.
[243] Art 288 § 5 of Treaty on the Functioning of the European Union.
[244] Gerhard Robbers, *An Introduction to German Law*, 6ed, Nomos, Baden-Baden, 2017, p.54.

(*Verordnungen*)[245] which in the German legal theory are comparable to a statute.[246] It is, therefore, clear that the German legal system is receptive to the EU law and that, consequently, these two legal systems are interconnected. This implies that you cannot understand the German Law without considering the EU law.

Furthermore, by allowing the transfer of sovereign rights to the European Union, that is to say the opening up of the German legal order for a superior community, article 23 of the German Constitution[247] has accepted the direct applicability of the EU law in the German legal system. This view is shared by the Peter M. Huber and Andreas L. Paulus when they indicate that the German Federal Constitutional Court is bound by the principle of *offene Staatlichkeit* (Open Statehood).[248] According to them the principle of openness of German constitution towards the European Law enshrined in article 23 obligates the Constitutional Court to give wide-ranging regard to Union law in order to avoid conflicts between the later and the national one.[249]

3.3.1.2.2. Direct effect of the EU law

It took quite some time for the ECJ to determine the status of the European Union law. In the famous case *Van Gend en Loos,*[250] this court was asked to interpret the then article 12 of the EEC (now article 30 of the TFEU) which prevents "member states from introducing between themselves any new duties on imports or any charges having equivalent effects and from increasing those which they already apply in their trade with each other".[251] After being charged an import duty on a chemical product from Germany, which was higher than duties on earlier imports, *Van Gend en* Loos – a Dutch

[245] It is important to underline that in the EU decision-making process; regulations are enacted my means of one of the legislative procedures. Therefore, there are considered as to be binding to all Member States.
[246] Gerhard Robbers, *op.cit*., pp.54-55.
[247] More details about this openness will be discussed later in this chapter.
[248] Peter M. Huber and Andreas L. Paulus, *Bundesverfassungsgericht der Bundesrepublik Deutschaland*, in XVI. Kongress der Konferenz der Europäischen Verfassungsgerichte, *Die Kooperation der Verfassungsgerichte in Europa: Aktuelle Rahmenbedingungen und Perspektiven*, Vol.1, Verlag Osterreich, 2014, p. 217.
[249] *Idem,* pp.217-218.
[250] *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62)[1963] EC1.*
[251] Article 30 of the Treaty on the Functioning of the European Union (ex-art 12 of the EEC Treaty).

transport company – filed a case before a Dutch court claiming a violation of article 12 of the EEC.[252]

The Dutch Court referred the matter to the ECJ on the basis of the then article 177 of the EEC treaty (article 234 EC treaty, now article 267 of the TFEU)[253] questioning whether this application was acceptable or, in other words, if individuals can invoke the above-mentioned article 12 of the EEC treaty (now article 30 of the TFEU) before the national courts.[254] Clearly, the issue at the ECJ was to know if EU law has direct effects in a way that individuals can claim rights recognized by the EU treaty before national courts. The ECJ replied in the affirmative. The most attractive and conclusive part of the judgment reads as follows:

> "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition, the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

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[252] Klaus- Dieter Borchard, *The ABC of European Union*, Publications Office of the European Union, Luxemburg, 2010, p.117.

[253] Art 177 of the EEC treaty (now art 267 of the TFEU) reads as follows: "The Court of Justice shall be competent to make a preliminary decision concerning:(a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide. Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice".

[254] *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62)[1963] EC1.*

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[255]

From this statement by the ECJ, the court confirmed the direct effect of EU law by stating that the community law creates not only obligations on individuals, but also confers upon them rights which national courts must protect. The ECJ based its argumentation on three main points.

Firstly, in the view of the court, the fact that the Union has institutions endowed with sovereign rights affects undoubtedly member states and their individuals as well, either natural or legal persons. This makes sense in my view. Indeed, the sovereign character of institutions which take necessary decisions to maintain the union's legal order impacts on individual rights either positively or negatively. It was, therefore, important to establish a way of checking system of the Union institutions' actions by the way of courts. Secondly, the court indicated that nationals of member states are called to cooperation to the functioning of the community. Such involvement of national individuals in the Union's functioning would not remain without creating upon them obligations and rights. Thirdly, the court based its argumentation also on the treaty itself. Indeed, according to the court, the EEC treaty would not have foreseen the preliminary rulings procedure if individuals were not allowed to invoke European Union law before national courts. It is when a provision of a treaty has been claimed to be violated that a national court would stand and request the ECJ's interpretation of the unclear provision.

[255] *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62)[1963] EC1.*

All these reasons pushed the ECJ to conclude that this community is different from others, and that, therefore constitutes a new legal order of international law where individuals have their rights and obligations which can be protected by national courts. From all these arguments, it would be understood that the direct effect means that, as Alina Kaczorowska explains, "some provisions of the community law may give rise to rights which individuals (natural or legal persons) can enforce before national courts".[256] These rights are directly established by the Community law and are "entirely independent of national law" because "individuals can rely on directly effective provisions of community law in the absence of, or against a national provision".[257] In other words, direct effect is a kind of nationalization of rights created at the community level by making national courts and individuals their potential enforcers. Paul Craig and Grainne De Burca understand direct effect in two different senses: a broad sense and classical one. In the former sense, it means that "provisions of binding EU law which are sufficiently clear, precise, and unconditional to be considered justiciable *can be invoked and relied on* by individuals before national courts".[258] In its classical sense, they defined it "in terms of the capacity of a provision of EU law *to confer* rights on individuals".[259] In my view, these two senses complement each other. Indeed, it is when the EU law has conferred rights on individuals that the latter can invoke it and rely on it in before their respective national courts.

It is also worth noting that direct effect applies in two ways, the vertical direct effect, and the horizontal direct effect. In the former- vertical direct effects-, individuals rely on a community law to invoke its violation by member states or its institutions. This was the case in the judgement of Van Gen den Loos above explained. In the latter -horizontal direct effects-, individuals file a case before a national court to claim a violation of the community law by another individual. This was recognized by the ECJ in *Defrenne II* case,[260] a case that was opposing an individual Gabrielle Defrenne and a private *Société Anonyme Belge de Navigation Aérienne* SABENA. *Van Gend en* Loos case clarified only the

[256] Alina Kaczorowska, *op.cit.,* p.299.
[257] *Ibidem.*
[258]Paul Graig and Grainne de Burca, *EU Law: Texts, Cases and Materials*, 6th ed., Oxford University Press, Oxford 2015, p. 186.
[259] Alina Kaczorowska, *op cit,* p.299.
[260] Case 43/75 Defrenne (Defrenne II) [1976] ECR 455.

direct effect of treaty provisions. Can this principle be extended to other measures taken in the light of article 288 of the TFEU[261] which allow EU institutions to decide through regulations, directives, decisions, recommendations, and opinions? The ECJ tried to answer to this question over the time since its existence. After a significant number of decisions in this regard, this court concluded that:

> "all binding forms of EU law are capable of direct effects, and while other types of non-binding law are not said to have direct effect, they are influential in other ways and may have what has become known as indirect effect through the principle of harmonious interpretation".[262]

From this declaration by the Court, it can be argued that among all the measures which can be taken by the union or its institutions, it is only recommendations and opinions that do not have direct effects, reason being that they have no binding force.[263] Other measures like regulations, directives and decisions can be invoked and relied upon by individuals before national courts in the sense of direct effects since they have a binding nature. Through its previous decisions, the ECJ had already proven some aspects of this conclusive declaration. For instance, yet in the judgement of 1971 in the case 43/71 opposing the *Politi S.A.S, Robecco sul Naviglio* and the Ministry for finance of the Italian Republic, the ECJ made it clear that "regulations have direct effect and are, as such, capable of creating individual rights which national courts must protect".[264] In the same way, in the Judgement of 1970 opposing *Grad* and *Finanzamt Traunstein* in the case 9/70, the ECJ ruled on the direct effects of decisions. It indicated that:

> "in cases where, for example, the Community authorities by means of a decision imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*'l'effet utile'*) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law".[265]

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[261] Art 288 of the TFEU indicates that « to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions".
[262] Case 322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407. See also, Paul Graig and Grainne de Burca, *op. cit.,* p.198.
[263] See Treaty on the Functioning of the European Union, art 288 last sentence.
[264] Case 43/71 [1973]ECR 1039, *Politi SAS v Ministero delle Finanze.*
[265] Case 9/70 [1970]ECR 825 , Franz Grad, Linz-Urfahr (Austria) v *Finanzamt Traunstein.*

With regards to directives, the ECJ indicated that "in order for Directives to have a useful effect, they must be capable of producing direct effects, subject to the nature and wording of the Directive in question".[266] In contrast, the court established that recommendations do not confer rights upon individuals which they can rely on before national courts, but that national courts are bound to take them into consideration while deciding on disputes submitted to them specifically when they are interpreting provisions of national or community law.[267]

Having understood the direct effects principle and the principle of direct applicability, it is now important to establish their differences. The concept of direct applicability is broader than the concept of direct effect since it refers to the internal effects of a European norm within national legal orders whereas direct effect refers to the individual effect of a norm in specific cases.[268] Furthermore, these two concepts are interconnected. It is only when an EU norm has been accepted as to be applicable into national legal order that it can produce direct effects. In other words, direct effects cannot occur before the concerned norm has been recognized into the national system.

3.3.1.2.3. Supremacy of the EU law

The above-mentioned principles, particularly the principle of direct applicability, describe how EU law is introduced and implemented into national legal orders. However, having learned this, a question remains unsolved. Indeed, an introduction of a law elaborated by an external organ (i.e. European Union in our case) into another system (national legal order) would certainly produce divergences and controversies regarding how this law would be perceived compared to the existing one. Concretely, the issue is knowing, in the case of conflict between EU law and national law, which one prevails over the other. The principle of supremacy intends to solve this problem in case it is found in due course of the integration process. Under this principle, in the view of

[266] Elspeth Berry et al, *EU law: Text, Cases and Materials*, Oxford University press, Oxford, 2013, p.81.
[267] Case C-322/88 [1989] ECR 4407 Grimaldi v Fonds des Maladies Professionnelles.
[268] Robert Schutze, *op.cit.,* p.81.

the ECJ, "community law must take priority over, and supersede any national provision which clashes with community law".[269]

It was in the famous *Costa* judgement[270] that the ECJ gave a catalogue of clarifications and motivation of this principle. Ruling on a request from an Italian Court to know if the latter had to apply national law, the ECJ replied in the favour of the supremacy of the EU law. The court used the following 3 main arguments to justify its reasoning.

Firstly, like in the Van Gen den Loos judgement, the Court recalled the difference existing between the European Community (now European Union) and the international community as regards to their status. According to the court,

> "by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply".[271]

Through this argument, once again, the ECJ recalls the special character of the European community with effects resulting from it, namely, the fact that its law has to be a part of the legal systems of its member states and the obligation for national courts to apply it. This argument is of great significance because these elements of argumentation recall the principles of direct applicability and direct effects as they focus on the implementation of community law into national systems and their enforceability by national courts. This is important because, in my view, looking at the meaning of these two principles – direct applicability and direct effects - they would be useless if every member state could enact laws that are supreme over the community ones. Even the court itself insisted on this aspect by indicating that the art 189 of the EEC treaty (now 288 of the TFEU) which indicates that a 'regulation shall be binding in its entirety and directly applicable in all member states' "would be quite meaningless if State could

[269] Alina Kaczorowska, *op.cit*., p.331.
[270] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.
[271] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.

unilaterally nullify its effects by means of a legislative measure which could prevail over Community law".[272]

Secondly, the ECJ indicated that the supremacy of the EU law flows immediately from the contract which EU Member States made through their commitment to join this Community. In the view of the court:

> by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[273]

The third argument of the court was mainly found on the harmonization of laws in the community. Indeed, the ECJ indicated that if the law applied in the community varies from country to country, this would undermine the achievement of the objectives of the community set out in Article 5 (2) and, consequently, would rise to the discriminations prohibited by Article 7 of the Treaty.

3.3.1.3. Impact of the relational principles on the state sovereignty and regional integration

Having understood the principles which found the relationship between the EU law and national laws, it is important, for the purpose of the realization of the objective of this study, to analyse whether or not the said principles impact on some sovereign rights of Member States. Also, their impacts to the integration process needs to be addressed.

[272] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64..
[273] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.

3.3.1.3.1. Impact of the relational principles on the EU Member States' sovereignty

To find out the existence of this impact, one needs to go back and recall the meaning of state sovereignty. As described in the second chapter, state sovereignty means, at some points, specifically under constitutional law, that the constitution is the sole source of law and that no other legal system is supreme or can replace it. It is used "to connote the idea that state's legal system is supreme and independent from other legal systems - it is sovereign - such that no norm outside of it can claim to be directly applicable, enforceable or effective within it, or override its norms".[274] Therefore, it would be, reasonably, right to affirm that the relational principles oblige Members States to surrender some of the sovereign rights to the community organs.

In fact, looking at it well, all these principles converge on the same philosophy of bringing the community law into national legal systems of Member States so that it can be applicable and enforceable. Indeed, the direct applicability, direct effect and the principle of supremacy are constructed in such manner that the EU law is, successively, recognized, implemented by Member States and given supremacy over the national law. Interestingly, as strongly supported and clarified as it is by the ECJ, the EU law belongs to a legal order distinct from the one of its Member States. Therefore, this leads to the conclusion that, the idea of a foreign legal system, such as EU legal system, existing independently of states, and yet having its norms directly binding on states (and their subjects), being directly applicable and enforceable within the state's legal system or prevailing over contradictory national laws limits some member states' sovereign rights.[275] Accepting the EU law as part of national law implies a violation of some state sovereign rights recognized even in most of the constitutions of Member States. In other words, this acceptance is a manifestation of a surrender of parts of sovereignty by Member States. Thus, through these principles, EU Member States have the merit of accepting the surrender of some of the sovereign rights to the Union organs.

[274] Richard Frimpon Oppong, *op.cit*, p.88.
[275] *Ibidem.*

3.3.1.3.2. Impact of the relational principles on regional integration

By limiting some sovereign rights belonging to member states, these relational principles contribute to the realization of the community's integration.

As indicated in the second chapter, regional integration is not only limited to economic aspects. It becomes more effective with an establishment of "common rules, policies and institutions".[276] Analysing the relational principles as developed in the EU, one would understand that they all advocate for the establishment of a harmonized legal system.
Firstly, the complexity of the process which is normally observed for an international law to become binding on member states by the way of incorporation into national system, is made flexible by accepting the principle of direct applicability of EU law. It is through this flexibility of the process that the integration process is made feasible. Secondly, through the direct effect principle, the EU Member States accepted the EU law to produce rights upon individuals which national courts can protect. This is also important for the realization of the EU integration process. In fact, the more the union law produces rights to individuals, the more EU citizens put confidence in the Union as all individuals become more cooperative to the realization of its objectives. Most importantly, if EU law creates rights upon individuals, this increases the public awareness of it, which is, surely, another cornerstone for the integration process.
Finally, by ruling in the favour of the supremacy of the EU law, the ECJ advocated for the harmonization of the EU law within the union as it avoids contradictory laws. As described, the harmonization of laws is a key for the realization of integration.

3.3.1.4. Concluding observations

The purpose of this section was to understand the relationship between the European Union law and national laws of its member states with an ultimate goal of determining how the problem of sovereignty of EU member states was solved in order for this relationship to be strengthened. It was noted that, in contrast with the practice of the classic international legal order, EU member states have limited their sovereign rights

[276] See chapter two.

for the purpose of facilitating the applicability of the EU law. Whereas in the international legal order, each country depending on its constitutional system, determines the effects it would give to an international treaty, the EU adopted a different approach. Indeed, the ECJ considered the EU as a new legal order for the benefits of which member states have limited their sovereign rights. Therefore, any EU law has direct applicability within different national legal orders without any specific process of its incorporation. Furthermore, in contrast with the international law, the ECJ ruled that the EU law should produce rights up on individuals which national courts are entitled to protect. Finally, another development with regard to the relationship between the EU law and national law was that the former was declared supreme towards the EU member states national laws.

All these considerations led to the conclusion that, through these principles, EU member states have committed to surrender parts of their sovereign rights to the Union. In fact, the introduction of laws from an external legal order into national legal order, most importantly, entitled of being directly applicable and enforceable, and finally, of prevailing over internal laws which are conflicting to them, is surely a pure manifestation of a surrender of some of the sovereign rights to community organs as endorsed by the integration process.

3.3.2. Relationship between EU law and National Laws looked at from the national perspectives: Enabling Constitutions

As described in the second chapter, constitutions are the cornerstone determinants of the sovereignty of states were elaborated for. They indicate what attention should be given to any norm from an external legal order either at the community or international level. In other words, they clarify the relationship existing between the states they serve and the international community. For the purpose of this study, it is important to analyse this aspect in the EU Member States' constitutions. We propose to have a look at the general overview on the role of national constitutions, the role played by national constitutional courts in the EU's integration process, the German Federal constitution

law and the EU integration process, and the Constitution law of France and the EU integration process.

3.3.2.1. General overview on the role of national constitutions in the EU's integration process

Under this section, a general background on how EU national constitutions are adapted to the EU's integration process will be developed before drawing a summary table showing how EU Member States introduced in their constitution's provisions dealing with EU integration.

3.3.2.1.1. Constitutions adapted to the EU's integration process

The relationship between the constitutions of EU member states and EU integration touches undoubtedly the crucial issue of sovereignty. Similarly to other regional organizations, in the early stages of the EU integration, this relationship was characterized by an existence of specific provisions in different constitutions of member states dealing with the transfer of sovereign rights to international organizations.[277] For instance, since some years back in 1949, article 24 of the Constitution of Germany was ready to deal with the issue of transfer of sovereign powers to international organization.[278] Article 92 of the Netherlands constitution (former article 67.1) was there since 1956 to indicate that legislative, executive and judicial powers may be conferred on international institutions subject to some conditions.[279] Article 20 of the Danish Constitution also indicates how and in which context powers vested in the

[277] Armin von Bogdandy and Jürgen Bast, *Principles of the European Constitutional Law*, Revised 2nd Ed, Hart Publishing & Verlag CH Beck oHG, Oxford, 2011, p. 96.

[278] Article 24 of the Basic Law of the Federal Republic of Germany reads as follows: "**(1)** The Federation may by a law transfer sovereign power to international organisations. **(1a)** Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions. **(2)** With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. **(3)** For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration".

[279] See Art 92 (former Art 67.1) of the Netherlands Constitution. It stipulates as follows: "Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3."

authorities of *Realm* can be delegated to international authorities.[280] Many other Constitutions of the EU member states have similar provisions dealing with the same issue. One can cite, among others, Article 90 of the Constitution of Poland, article 94 and 95 of the Constitution of Finland and article 10a of the Czech Republic. Concretely, at the beginning, the legal basis for the relationship between EU law and national constitutions was the general provisions in constitutions dealing with the transfer of some rights to international relations.

As the time went on, many countries in the European Union realized that it was no longer possible to rely on those general provisions guiding classic international relations and satisfy, at the same time, the Union's interests. Specifically, they noted a need for "an adequate constitutional basis for transferring sovereign rights within the framework of increasing European Integration".[281] In this regard, most of the European countries introduced specific provisions to deal with the European Union integration in addition to the general provisions. For instance, at the entry into force of the Maastricht Treaty, the Constitutions of Germany, France, Ireland, Spain, Luxemburg, and Portugal were amended with a main purpose of enabling those countries to participate in economic and monetary union.[282] To be specific, in France, every amendment of treaties at the EU level (Maastricht, Amsterdam, Nice, and Lisbon) was accompanied with constitutional amendments:

> "which can be found in Articles 88-1 to 88-7 of the Constitution which are now the constitutional anchor of EU membership, to be interpreted in consistency with several more general provisions such as Article 3 on French sovereignty, and Article 55 on the force of international agreements within the French legal order".[283]

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[280] See article 20 of the Danish Constitution. It reads as follows: (1) Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation. (2) For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Parliament shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in Section 42".

[281] Armin von Bogdandy and Jürgen Bast, *op.cit*., p.96.

[282] Koen and Piet Van Nuffel, *European Union Law*, 3ed, Sweet and Maxwell, London, 2011, p.40.

[283] Directorate General for Internal Policies of the European Parliament – Citizens' Rights and Constitutional Affairs, "*National Constitutional Law and European Integration",* a study, Brussels 2011, p.16.

With the advent of the Maastricht Treaty which had established wide competences to the Union, article 24 of the German Constitution dealing with international institutions was seen as insufficient to the realisation of the European integration.[284] It was in this context that article 23 was introduced as a specific provision on the EU, specifically to facilitate the integration process. When Sweden joined the EU, the Swedish Constitution was amended in its chapter 10 Article 5 with an aim of opening the transfer of powers to the EU.[285] The table below briefs on the content of different national constitutions with regards to the EU's integration process.

3.3.2.1.2. Summary table on the role of constitutions in the EU integration process

Member State	Provisions and their content		
	Transfer of powers to international organizations	Specific provision on EU	Provisions on the relational principles between EU and National law and/or between international law and national law
Austria	Art 9(2) allows a transfer of specific Federal competences to other states or intergovernmental organizations by a law or a state treaty.	- Art 23(a): Procedure for election of the members of the EU Parliament: Usage of proportional representative based on equal, direct, personal, free and secret suffrage Determination of the conditions of participation to the election - Art 23 (b): Determination of incompatibilities with the exercise of the function of member of the EU parliament - Art 23 (c): Determination of the relationship between Austrian	Art 9(1): Direct applicability: It provides that the generally recognized rules of international law are regarded as integral parts of Federal law.

[284] *Idem*, p.48.
[285] Directorate General for Internal Policies of the European Parliament – Citizens' Rights and Constitutional Affairs, *op.cit.*, p.21.

		Institutions and EU institutions - Art 23 (d): Obligation of the federation to keep the Laender informed on all projects within the framework of the EU to give them opportunity of intervention Determination of intervention of Laender when their interests are affected - Art 23 (f): Right of Austria to participate in the Common Foreign and Security policy of the European Union	
Belgium	Art 34: The exercise of determined power can be attributed by a treaty or by a law to institutions of public international law.	- Article 168: Right for the Houses to be informed any negotiation concerning revision of the treaties establishing the European Community and the treaties and acts which have modified or complemented them - Art8: It foresees for a law to regulate the right to vote of Union citizens who do not have Belgian citizenship - Art 117: Determination of the day of election of parliamentarians in the EU	Art 167 (2) & (3): Treaties have effects only after they have been approved by the Houses of Representatives
Bulgaria	Art 85 (2°): Commitment of the Republic of Bulgaria to participate in the international organizations through ratification by the National	- Art 4(3): commitment of the Republic of Bulgaria in the building and development of the EU - Art 22(1): accession of the Republic of Bulgaria to the EU - Art 42 (3): foresees a law to regulate members of the parliament of the EU and the participation of EU citizens in the elections for local authorities - Art 105 (3): Right of the National	Art 5(4): Direct applicability of all treaties ratified and promulgated in accordance with the Constitution

	Assembly	Assembly to be informed by the Council of Ministers on the obligations of the Republic of Bulgaria resulting from its membership in the EU - Art 105(4): information of the Council of Minister to the National Assembly on its actions to the EU	
Croatia	Art 140 (former art 139): transfer of powers to international organizations Accession to international treaties	- Art 9: Cooperation in the extradition in the EU zone - Art 45: Determination of the motilities or conditions for electing EU members of Parliaments - Art 133: Right to local and regional self-government by EU nationals in compliance with the Law and EU *acquis communautaire* - Art 143: Legal grounds for memberships and transfers of constitutional powers to the EU: To ensure lasting peace, liberty, security and prosperity and to attain other common objectives in keeping with the founding principles and values of the EU Commitment to transfer powers to the EU - Art 144: Participation in the European Institutions: EU parliament Report of the government to the national parliament on the draft regulations and decisions at EU level Oversight of the Croatia parliament on the government action in the EU actions	Art 145: EU law - Rights provided for by the EU law are equally exercised like those provided by the Croatian law - Direct applicability in Croatia of all legal acts or decisions of the EU accepted by Croatia Direct effects of EU law: protection by Croatian courts of all subjective rights based

		- Art 152: Impossibility to amend the Constitution for the purpose of changing the provision on extradition in compliance with the *acquis communautaire*	on the European *acquis communautaire* - Right to Croatian government institutions apply EU law directly Art 146: Rights of European Union Citizens
Cyprus	Art 50: Allows for the participation of Cyprus in international organizations	- Art 1 A: No provision of the constitution can nullify an act or any instrument elaborated by the union or its institutions. It cannot neither prevent such acts or instruments from having legal effect in Cyprus Republic	Precedence of the EU law over Cyprus law: Art 1 A: - Prohibition of laws or any other decisions at national law that can invalidate or prevent regulations, directives, or other acts of binding measures of the Union - Prohibition of

			national inconstant laws with EU law
Czech Republic	Art 10 (a) 1 & 2: Provide for transfer of certain powers to international organizations	- Art 62: Provides for a referendum of access to the European Union - Art 87 (m): Highlights the role of the Constitutional Court to check whether the referendum of access to EU was done in accordance with the law	Art 10: Direct applicability of EU law: Promulgated treaties form part of the legal order
Estonia	Art 121(3): The right of the Parliament to ratify or to denounce treaties by which the Republic of Estonia joins international organizations or unions	On 14 December 2003, adoption of the Constitution of Republic of Estonia Amendment Act (CREAA): Art 1 of the Act: Provides that Estonia may belong to the EU in accordance with fundamental principles of the constitution of Estonia	Art 2 of the CREAA: In case of access to the Union, the constitution should take in account the rights and obligations arising from the Accession Treaty
Finland	Section 1, sentence 3: Participation in international cooperation for the protection of peace and human rights and for the development of the society	Section 1 sentence3. Finland is a member state of the EU - Section 94. sentence 2 – transfer of authority to the EU (procedure of deciding in the parliament) - Section 94 sentence 4. Amendment of EU treaties attaching Finland's sovereignty has to be approved - Section 95: bringing into force of international obligations	No provision

	Section 94, sentence 3- International obligation shall not endanger the democratic foundations of the constitution	- Section 96 Participation of the Parliament in the national preparations of European matters - Section 97: Parliamentary rights to receive information on international affairs (including EU affairs)	
France	**<u>Constitution of 27 October 1984</u>** Preamble, § 15, Willingness to limit its sovereignty to the extent necessary for the organization and defence of peace Art 27 ratification of international treaties	New constitution: - Art 88-1. Commitment to participate in the EU - Art 88-2 Execution of European Arrest Warrant - Art 88-3 Voting rights of the non-French EU citizens for municipal elections - Art 88-4 Frances rights to participate in the EU decision making - Art 88-5 Procedure for the ratification of a treaty of accession to the EU - Art 88-6 Participation of the Parliament in the EU decision-making process - Art 88-7 Possibility for the parliament to oppose any modification of the rules governing the passing of acts of the EU	Art 55: Prevalence of treaties and agreements duly ratified by France over Acts of the Parliament

Germany	Art 24. Commitment of Germany to transfer powers to international organizations	- Preamble.: the determination to promote word peace as an equal partner in a united Europe - Art 23. Commitment to the participation in the European integration - Art 88 transfer of responsibilities and powers of the Federal Bank to the European Central Bank	- Art 25: International law is part of the federal law, Precedence of International law over national law, Direct effects of international law - Art 23 opens up towards direct applicability and precedence of EU law
Hungary	Art Q1: cooperation with countries of the world Art Q2: Ensuring harmony between international law and national law Art Q3: Acceptance of generally	- In the constitution of 1989 (before Hungary joined), art 79 foresaw a probable referendum on the accession to EU to be held in 2003 - The constitution after 2003; • art 2/A: Acceptance to exercise certain constitutional powers jointly with others EU Member States and in accordance with EU treaties • Art 6 (4): Constitutional commitments to the European	Art E (3) and (4): Binding nature of the European Union Law

	recognized rules if international law	Integration: indicating the grounds for integrating in the EU - New constitution of 2011: • Art E contains a European clause • Art XXII: Participation to vote of Hungarian citizens at the EU level • Art 19, sentence 1: Right for the parliament to express its position on any decision-making at the European Union level • Art 19 sentence 2: Obligation to the government to take the Parliament's position in the EU decision-making process	
Ireland	Art29(1): Friendly cooperation for international peace, justice and morality Art 29(3): Acceptance of generally recognized principles of International law	- The Third Amendment of the Constitution Act 1972, art 29(4)3° allows Ireland to participate in the 1st founding European Communities - From Art 29(4)3° to article 29(4)10°: Ireland's participation in the EU decision making process	Art 29(4)6°: Prohibition of laws contradicting EU law

Italy	Art 11. Commitment to the limitation of sovereignty for the realisation of international peace and security Art 117: Legislatives powers to be exercised in respect of the EU law and international organizations	Art 117: Intervention of Italy in the EU Decision making process Also, an Act on Norms on the participation of Italy in forming and carrying out the norms and policies of the European Union of 24 December 2012 was adopted.	No provision
Netherlands	Art 90. the duty to promote international legal order Art 92 conferral of legislative, executive and judicial powers to international organizations	No explicit reference to the European Union	Art 93 Direct effects of treaties and decisions of international organizations Art 94 Priority of directly effective international provisions over conflicting national provisions

Poland	Art 90 (1): allows the delegation of powers to international organization and institutions	No specific provision on EU	Art 91(1): direct applicability of international law: international agreements constitute part of the domestic legal order and shall be applied directly Art 91(2): Supremacy of international treaties Art 9: Respect of international law binding upon Poland
Denmark	Art 20: Transfer of the powers of the Realm to international authorities	No explicit reference to the European Union	No specific provision
Greece	Art 28 (2): allows the transfer of powers to international organizations Art 2(2): Duty for the country to	Art 28 (Interpretative clause): This article constitutes the foundation for the participation of the country in the European integration process	Art 28 (1): - Direct applicability and direct effects of rules of international law

	adhere to the generally recognized rules of international law		- Precedence of international law over Greek law
Latvia	Constitution of 2003 Art 68, par 2: Latvia may delegate its states institutions competences to international institutions	- Art 68 para3 & 4: referendum to decide membership to the EU - Art 79: Specifications of the rules on decisions regarding membership of Latvia in the EU or substantial changes to it in a referendum	Art 13 of the Law of International Treaties of 1994: Precedence of international law over Latvia law
Lithuania	Art: 136: provides for the participation of Lithuania in international organizations that are not in conflicts with interests and independence of the State Art 138(5): Ratification of international treaties	The Constitutional Act on Membership of Lithuania in the EU of 13 July 2014 considered as part of the Constitution pursuant to art 150 of the Constitution Art 1 of the Act: Transfer of competences Lithuanian competences to the EU	Art 2 of the Act: - Direct applicability of the EU norms - Supremacy of EU law over Lithuania laws

Luxemburg	Art 49 bis: allows the transfer of the exercise of legislative, executive and judicial competences to "institutions of international law" by treaty	No specific provision on EU	Art 37: Approved treaties by a law and published in the form specified for the publication of laws will have effects in Luxemburg
Malta	Art 65(1): Malta makes laws in accordance with international and regional obligations	Art 65 (1): obliges the parliament to make laws in accordance with Malta's international and regional obligations specifically those generated by its accession to EU	European Union Act: Art 3(1) prescribes the binding nature of EU law and its direct applicability starting from May 2004 Art 3(2): Any law or provision incompatible with EU law is without effects and unenforceable

Portugal	Art 8(3): rules issued by international bodies to which Portugal belongs become integral part of the Portuguese law	Art 7(5): Reinforcement of the European identity and strengthening European States' actions Art 7(6): cooperation with EU institutions to construct and deepen the EU	Art 8(1): The rules and principles of general or common international law shall form an Integral part of Portuguese law. Art 8(4): EU law applies in Portuguese internal law in accordance with the Union law Art 277 (2): Direct applicability of international treaty provisions
Romania	Art 11 (1): Fulfilment of international law in good faith	Art 148: on the integration to the EU Art 148 (1): Transfer powers to community institutions	148 (2): precedence of Union law over the opposite provisions of international laws Art 11(2): Treaties ratified by Romania

			form part to the domestic legal order
Slovakia	Art 7(2): Implementation of EU and international treaties	Art 7(2): Transfer of rights to the European Communities and EU Art 30 (1): grants to vote and stand in local elections for non-national residents	Art 7(2), sentence 2: Primacy of EU law
Slovenia	Art.3 a: transfer by Slovenia of the exercise of part of sovereign rights to international organizations	Art 43: Implementation of the European Arrest Warrant	Art 8. Laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia Art 3(a) § 3: Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of sovereign rights are applied in Slovenia

Spain	Section 93 authorizes the transfer of exercises of competences derived from the constitution to international organization by treaty	No specific provision	Section 96: Treaties are part of the internal legal system
Sweden	Chap 10 of the instrument of the government, art 7: It authorizes the transfer of some sovereign rights to international organizations	- Chapter 10 of the instruments of the government, part 4, article 6: • It recognizes the right of the *Riksdag* (parliament) to transfer the decision-making to the European institutions the decision-making authority which does not affect the basic principles of the Sweden - Chapter 10 of the instruments of the government, part 6, art 10: • It establishes on obligation to the government to keep *Riksdag* informed on the development within the framework of the European Union. - Chapter 10 of the *Riksdag* acts deals with the conduct of Sweden in the European Business	Chapter 10 of the instruments of the government, article 9: It specifies that international agreement have validity as Swedish law

Source: This table is my own compilation after an analysis of the constitutions of all EU member states and other acts implementing EU law in EU national legal systems

Through this table, it can be noted that national constitutions of the EU Member States are generally adapted to the EU integration process. Indeed, it shows that out of the 27 European Union Member States, 22 of them representing 81.48 % have incorporated in their constitutions provisions which deal with European Union matters. They are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Greece, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, Slovenia, and Sweden. Some of them have even gone further by inserting in their constitutions, provisions which insist on the status of the EU law in their national legal systems. Specifically, they indicate that the EU is directly applicable, has direct effects or takes precedence over national contradicting laws. Twelve (12) out of the 27 states members of the European Union have done such clarifications. These are Croatia, Cyprus, Czech Republic, Estonia, Hungary, Ireland, Lithuania, Malta, Portugal, Romania, Slovakia, and Germany.

Besides that, all the 27 Member States representing 100% of the EU Member States have, at least, a provision which allows the transfer of some sovereign rights to international organization and the institutions they belong to. This means that, even for those countries which do not have specific provisions on the European Union, they can still deal with their relationship with EU on the basis of this general provision on international organizations.

To sum up, most of EU Member States constitutions have provisions that regulate the relation between them and the Union in addition to a general provision dealing with their relationship with international organizations. It is also important to know that some of them clarify the status of the EU law into their national legal orders. Specifically, they indicate that EU law is directly applicable or even has direct effects in their legal systems. Thus, looking at all these developments existing in the EU member states' constitutions, it can be affirmed that national constitutions in the EU are supportive to the integration process.

3.3.2.2. National constitutional courts and the European Integration process: handling the sovereignty problem to enable integration

Beside different national constitutions, there are also national constitutional courts which played a non-negligible role in the EU integration process. In the course of the EU integration process, there was a manifestation of fear in different Members States that powers conferred up on to the Union through different treaties would lead to a confiscation of their sovereignty. For several times and in different countries, constitutional courts, considered as interpreting organs of constitutions had to decide and, most of the time, they were supportive to the integration. An important number of cases were delivered in this perspective.

For instance, the adoption of the Lisbon Treaty was challenged before different constitutional courts of many EU member states with a central idea that the Union was going to be attributed a lot of powers which, in the view of the applicants, would mean a loss of sovereignty of their respective countries. An example, in its judgement of 3 November 2009 on the Lisbon Treaty, the Czech Constitutional court ruled unanimously that the Treaty of Lisbon, and its ratification, does not contravene the constitutional order.[286] After it had clarified its understanding on the concept of sovereignty, the Czech Constitutional Court found that Czech Republic will remain sovereign after the ratification of the Treaty of Lisbon.

It also concluded that Czech Republic would lose its sovereignty if the EU were conferred the competence to determine its own competence which was not the case in the view of the court. On the same treaty, the German Constitutional Court responded in the same way indicating that there was no loss of sovereignty because the Treaty of Lisbon did not establish a Federal European State.[287] In Poland, a group of right-wing members of the *Sejm*[288] challenged the ratification of the Lisbon Treaty arguing that it will impact on the sovereignty of Poland, highlighting the powers granted under the

[286] Damian Chalmers, *A Few Thoughts on the Lisbon Judgement*, in Andreas Fischer-Lescano et al, *The German Constitutional Court's Lisbon Ruling: Legal Political Science Perspectives,* Zentrum für Europäische Rechtspolitik (ZERP), Discussion Paper, Universität Bremen, 2010, p. 12.
[287] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. 229- 231.
[288] The low chamber of the polish parliament.

Treaty to the EU institutions to enact legislative acts without the consent of the Polish government.[289] To this complain, the Polish Constitutional court strongly affirmed that the ratification of the Lisbon Treaty was in conformity with the Constitution,[290] specifically article 90[291] which was the legal basis of the application.

The Latvia Constitutional Court also had to analyse the impact of the ratification of the Treaty of Lisbon on the Latvia's sovereignty after an application claiming that this ratification violates article 101 of the Constitution of Latvia was filed before it.[292] Specifically, the applicants claimed that they were denied the rights to participle in the works of State enshrined in article 101 of the *Satversme* (Constitution of Latvia)[293] because they were not given the possibility to participate in a national referendum regarding the Treaty of Lisbon provided for in article 77 of the *Satversme* in conjunction with article 2 of the *Satversme* which provide that "the sovereign power of the State of Latvia is vested in the people of Latvia".[294] After explaining all aspects surrounding these provisions enumerated by the applicants, the Latvia constitutional Court found that "the Law on the Treaty of Lisbon Amending the Treaty of European Union and the Treaty establishing the European Community" had been adopted in conformity with the procedures established in the *Satversme* of the Republic of Latvia and, consequently, complies with the first part of Article 101 of the *Satversme*".[295] In a similar case on the Lisbon Treaty before the Hungarian Constitutional Court,[296] the latter came to the conclusion that even if reforms made in this treaty are of great importance, Hungary

[289] Wladyslaw Czaplinski, *Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgements of the Polish Constitutional Court*, In *Europäische Rechtsakademie* ERA, Vol.12, 2011, p. 198.
[290] *Idem*, p.201.
[291] Art 90 of the Polish Constitution frames the transfer of powers to the European Union. It reads as follows: "**1.** The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.**2.** A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. **3.** Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125. **4.** Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies".
[292] Latvia Constitutional Court, case 2008-35-01 Treaty of Lisbon, 7 April 2009
[293] Article 101 provide for the basic rights to participate in the works of the State.
[294] Latvia Constitutional Court, case 2008-35-01 Treaty of Lisbon, 7 April 2009, para 9.
[295] *Idem,* para 20.
[296] Hungary Constitutional Court, case 143/2010(VII.14), 12 July 2010.

maintains and enjoys her independence, her rule of law character and her sovereignty.[297]

In conclusion, these examples among others reveal how significant the role played by national constitutional courts has been in the EU's integration process. Indeed, as noted in all these judgements, these courts gave enough credits to European Union removing, therefore, any mistrust which motivated different applicants to challenge EU treaties. Thus, serious questions in relation with states' sovereign rights were analysed and explained for the satisfaction of the European Union's integration. Consequently, all the courts converged on the same point that, although the treaty of Lisbon had granted important powers to the Union, this does not affect its member states' sovereignty.

From all the above explanation, it can be noted that EU national constitutional Courts understand the State sovereignty in a narrow sense. Indeed, they consider that transferring certain sovereign rights to the European Union does not necessary mean that the concerned Member State has given up its sovereignty altogether and is no longer a sovereign state. However, they also consider that they will keep a final say in certain crucial aspects as will be discussed in the next section for the case study of the Germany Constitutional Court.

In the next sections, I propose to analyse, in detail, the role of national constitutional law in Germany and France in the integration process as examples for this community.

[297] Hungary Constitutional Court, case 143/2010(VII.14), 12 July 2010. See also the press release on the constitutionality of the act of promulgation of the Lisbon Treaty found at http://hunconcourt.hu.

3.3.2.3. German Federal Constitutional Law and the European Integration

Two main features characterize the relationship between the German Federal constitutional law and the EU law. These are the openness of the German Federal Constitution towards the EU integration and the role played by the German Constitutional Court (*Budesverfassungsgericht*) in the EU integration process.

3.3.2.3.1. Openness of the German Federal Constitution towards the European integration

The German Federal Constitution has the merit of demonstrating its openness to the European integration. Firstly, the existence of this constitution seems to have been motivated by the willingness of the German people of making a United Europe. In fact, in its very short preamble, the constitution indicates that by elaborating it, the German people were mainly "inspired by the determination to promote the world's peace as an equal partner in a united Europe".[298] An introduction of this statement in the preamble of a constitution is of great significance in my view. Indeed, a preamble is an instrument of persuasion of the community it is addressed to as it highlights the grounds on which the law that it supports is elaborated. This was supported by Kent Roach when he indicated that "the wise lawmaker will use preambles because 'he doesn't give orders until he has in some sense persuaded'. If the actual law was a "tyrannical command", the preamble or prelude to the law was included in order to persuade so that "he who receives the law uttered by the legislator might receive the command - that is, the law - in a frame of mind more favourably disposed and therefore more apt to learn something".[299] Concretely, in the same way of thinking, if the preamble of the constitutional court of Germany preaches for a united Europe, this calls for persuasion and awareness of the people of Germany to act in the sense of supporting the European Integration. This awareness is also created in the core German legislators who have to

[298] See the Preamble of the Basic Law of the Federal Republic of Germany.
[299] Kent Roach, *The Uses and Audiences of Preambles in Legislation,* In Mc Gill Law Journal/Revue de Droit de McGill, Vol.47, 2001, p.139.

make sure that all laws they elaborate are not in contradiction with the constitution,[300] a constitution that is made to support a united Europe according to its preamble. In other words, national laws also have to be elaborated in a way that they should not jeopardize the integration process.

Secondary, besides the preamble, some provisions of the same constitution are supportive to the European Union's integration process. For instance, article 23 of the German Constitution is devoted to the participation of Germany in the European integration process. Recalling the commitment of the Germany to the establishment of a united Europe, the first paragraph specifies the extent to which it will participate in the integration process without leaving behind the respect of its constitutional identity. In this context, it indicates that:

> "with a view to establishing a united Europe, the Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law".[301]

In the first part of this provision, the constitution starts recalling its commitment for a united Europe which was specified in the preamble and broadly in article 24.[302] Jo Eric Khushal Murkens describes this achievement of the Constitution as a transformation into a constitutional commitment and state objective of European integration which was merely authorized by article 24 of the German Constitution.[303] The provision continues by clarifying the German's commitment to the European integration in the areas it indicated as long as it respects the principles herein enumerated namely "the democratic, social, federal and subsidiarity principles, the rule of law, and the protection of basic rights comparable to that of the basic law". It results from this second part of the first sentence that, by posing this condition of respecting the above-mentioned principles, the German Constitution established some "material guarantees to safeguard

[300] One should remember that, under the constitution is considered as to be the sole source of law belonging to a given state and that, therefore, all laws have to be in the right line with it.
[301] Art 23, (1) first sentence of the Basic Law of the Federal Republic of Germany.
[302] Article 24 allows a transfer of sovereign powers to international organizations.
[303] Jo Eric Khushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871,* Oxford University Press, Oxford 2013, p.169.

the structure of the Basic Law".[304] This also implies that "these principles have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law".[305]

Commenting this article in the book "*Handbuch Ius Publicum Europaeum*", Karl-Peter Sommermann insists on the significance of the introduction of the principle of subsidiarity in the Basic Law for the first time.[306] He explains that by introducing this principle in the Basic law, German has understood its importance in guiding different competences from the supranational level to the lowest level.[307]

In its second sentence, this provision indicates that in cases where all these conditions all fulfilled, "the Federation may transfer sovereign powers by a law with the consent of the Bundesrat".[308]

Most of the judgements delivered by the German Constitutional court followed the same way of thinking by analysing, first, if the right claimed for, guarantee a certain level of protection of basic rights as accepted by the German Constitution. In the famous *SolangeI* judgement, for instance, the German Constitutional Court considered that the protection of basic rights by the community law was not comparable to the one by the Constitutional Court underling an absence of a directly elected parliament and a bill of rights at the community level. It, therefore, declared the former (the community law) not applicable.[309] It was after some time, in the *Solange II* judgement that this court noted that the Community has reached the standards of the protection of basic rights comparable to those afforded by the Basic law. It, therefore, concluded that, in the matter regarding human rights violation, it will no longer analyse the conformity of a Union provision with the Basic law.[310]

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[304] *Ibidem.*

[305] European Parliament-Directorate General for Internal Policies, *National Constitutional Law and European Integration*, Bruxelles, 2011, p. 13.

[306] Karl-Peter Sommermann, *Offene Staatlichkeit: Deutschland,* in Armin von Bogdandy et al , *Handbuch Ius Publicum Europaeum*: *Offene Staatlichkeit- Wissenschaft vom Verfassungsrecht*, Brand II, C.F. Müller Verlag, Heideberg, 2008, pp 23-24.

[307] *Ibidem*

[308] Art 23 (1) second sentence of the Basic Law of the Federal Republic of Germany.

[309] BVerfGE 37, p. 271 – *Solange I* – at p. 285.

[310] BVerfGE 73, p. 339 – *Solange II.*

This second sentence has also another merit. It conditions the transfer of sovereign powers to the consent of the Bundesrat. This implies the respect by the German Constitution of the principle of an ever-closer union to the peoples established in the TEU, according to which, decisions are taken as openly as possible and as closely as possible to the citizen.[311]

In the third sentence, article 23(1) establishes a safeguard clause for the German State[312]. It reads as follows:

> "The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79".[313]

Clearly, any amendments of the EU treaties or related regulations which can amend or supplement the Basic law have to respect the article 79 in its 2nd and 3rd paragraphs. The 2nd paragraph of article 79 obliges a two third of the members of the Bundestag and two third of the votes of the Bundesrat.[314] The 3rd paragraph, the so-called "eternity clause", establishes fundamental principles which can never be amended in any way, even by the representatives of the people. Concretely, the 3rd sentence of article 23 is a kind of defence which was created by the Basic Law against any changes which may occur at the Union level and, therefore, which can affect in a way or another some sovereign aspects of the Republic of Germany. This way, in the view of one commentator, while on one hand article 23 opens the way to Germany for participation to the integration process, on the other hand, it restricts the possibilities of integrations by substantive requirements.[315]

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[311] Art 1 of the Treaty on the European Union.
[312] Jo Eric Khushal Murkens, *op. cit*., p. 170.
[313] Art 23(1) sentence 3 of the Basic Law of the Federal Republic of Germany.
[314] Art 79 (2) of the Basic Law of the Federal Republic of Germany.
[315] Karl-Peter Sommermann, *Offene Staatlichkeit: Deutschland,* in Armin von Bogdandy et al , *Handbuch Ius Publicum Europaeum*: *Offene Staatlichkeit- Wissenschaft vom Verfassungsrecht*, Brand II, C.F. Müller Verlag, Heideberg, 2008, p.22.

The remaining paragraphs of article 23 clarify the participation modalities of the main German decision-making bodies namely the Bundestag, Bundesrat and the Federal Government in the EU decision-making process.[316] The paragraphs appear as to be elements to dilute this transfer of sovereignty for it not to be done at its maximum by establishing mechanisms of involvement by German organs in the process. Specifically, they indicate the role of the Bundestag and Bundesrat in challenging a violation of the principle of subsidiarity before the ECJ,[317] the participation of the Bundestag and the Bundesrat in the matters concerning EU,[318] the Communication between the Federal Government and the legislative bodies (Bundestag and Bundesrat) in the case the former has to participate in the legislative acts of the European Union, the role of the Bundesrat when interests of *Länder are* affected[319] and the role of the Bundesrat when legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected.[320]

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[316] Art 23 (1a) (2)(3)(4)(5)(6)(7)Basic Law of the Federal Republic of Germany stipulates : "The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions from the first sentence of paragraph (2) of Article 42, and the first sentence of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union. **2)** The Bundestag and, through the Bundesrat, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time. **(3)** Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law. **(4)** The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*. **(5)** Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required. **(6)** When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole. **(7)** Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat".

[317] Art 23 (1a) of the Basic Law of the Federal Republic of Germany.

[318] Art 23 (2), (3) & 4 of the Basic Law of the Federal Republic of Germany.

[319] Art 23 (5) of the Basic Law of the Federal Republic of Germany.

[320] Art 23 (6) of the Basic Law of the Federal Republic of Germany.

Looking at all these aspects developed by article 23 of the Basic Law, it can be seen as a bridge that connects the Republic of German to the European Union. Commenting on this provision, Michael Kloepfer and Holger Greve qualify it as a basis for the regulations of the constitutional questions of the European Integration.[321] According to them, not only this provision was introduced to facilitate the integration process, but also it implements the principle of subsidiarity provided for in art 5(3) of the Treaty on the European Union.[322]

It is not only article 23 (1) that advocates for the European Integration, but also article 88. It focuses on another important area in which it proclaims the readiness of the Federal Republic of Germany to surrender some of its sovereign rights to the Union organs. This area concerns the establishment of a Monetary Union. Indeed, this provision indicates that within the framework of the European Union, responsibilities and powers of the Federal Bank may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.[323] This is a crucial aspect of state sovereignty. The issue related to note-issuing and to currency is normally in hands of the concerned country's central bank.[324] Therefore, according to this competence to the Union Bank undoubtedly reflects the openness of the German Constitution to the European Integration. That is why, by seizing the German Constitution Court on the Maastricht Treaty, the applicants considered that this transfer of competences to the Central Bank of the Union breaches their rights, noting that art 38 (1) of the same constitution was infringed by the then monetary policy.[325]

It is worth noting that besides being opened to the European Union integration process, the German Constitution has been also flexible and favourable towards the integration into international organizations by allowing a transfer of some sovereign rights to them. This is clearly stipulated under article 24 which indicates that "the Federation may, by a

[321] Michael Kloepfer and Holger Greve, *Staatsrecht Kompakt: Staatsorganisationsrecht-Grundrechte-Bezüge zum Völker- und Europarecht,* 2.Auflage, Nomos, Berlin 2016, p. 294.
[322] Michael Kloepfer and Holger Greve, op.cit., p.294.
[323] Art 88 of the Basic Law of the Federal Republic of Germany.
[324] In the case of Germany, see art 88, first sentence of the Basic Law of the Federal Republic of Germany.
[325] BVerfG, Order of the Second Senate of 31 March 1998 - 2 BvR 1877/97 – paras 62-64, http://www.bverfg.de/e/rs19980331_2bvr187797en.html.

law, transfer sovereign powers to international organisations".[326] This provision has been guiding the Germany's integration process in the EU until the amendment of the constitution that introduced article 23 in order to avoid the Treaty of Maastricht to be declared unconstitutional. As Jürgen Schwarze indicates, even before the advent of article 23 in 1992, the German openness to European Integration process was based on article 24 which allows the transfer of sovereign rights to international organisations.[327] To conclude, the German Constitution has developed a new principle; that is the principle of openness not only towards international law, but also towards the European Union law.

3.3.2.3.2. The German Constitutional Court and the European Integration

Besides the openness of the German Constitution towards the integration process, the Federal Constitutional Court – *Bundesverfassungsgericht* - has also been favourable to the European Integration process through its work of reviewing the constitutionality of treaties, clarifying therefore, the relationship between the German Law and EU law. In this paragraph, I will analyse the legal basis of the constitutionality review by German constitutional court before I discuss the developments made by this Court to further the integration process.

3.3.2.3.2.1. Legal basis of the constitutionality review

Like for many other constitutions, the legal basis for the constitutionality review in Germany is indicated in the same constitution, and can, firstly, be seen in article 93 dealing with the jurisdiction of the constitutional court and article 100 dealing with the concrete judicial review. Three main categories of review namely abstract judicial review, constitutional complaint and concrete judicial review are provided for in the Basic Law.

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[326] Art 24 (1) of the Basic Law of the Federal Republic of Germany.

[327] Jürgen Schwarze, *Zukunftsaussichten für das Europäischen Öffentliche Recht : Analyse im Lichte der jüngeren Rechtsentwicklung in den Mitgliedstaaten und der Europäische Union*, Nomos, Baden-Baden, 2010, p.25.

The abstract judicial review is defined in art 93 (1) n°2 of the German Federal Constitution. It indicates that the Federal Constitutional Court shall rule:

> "in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law, or the compatibility of *Land* law with other federal law, on application of the Federal Government, of a *Land* government, or of one fourth of the Members of the Bundestag".[328]

Through this provision, it can be understood that, under this review, at the request of the Federal government, State government or one fourth of the Members of the Bundestag, the German Constitutional Court can determine the compatibility of the federal law or the land law with the basic law as well as the compatibility of the land law with other federal law. Applicants for this procedure are public authorities- namely the Federal Government, the Land Government of one fourth of the Bundestag - and, most importantly, this procedure enables the constitutional court to examine the constitutionality of a law without reference to a specific case. This constitutionality review also applies towards the European Union acts and has been used to review the conformity of EU treaties with the German Constitution. In practice, as Wolfgang Zeidler indicates, "the party requesting an abstract judicial review is frequently the political opposition in the Bundestag or a state government ruled by the opposition party".[329] This makes sense because members of the ruling party are likely not to challenge laws that they have adopted to support their government's program.

The situation in the case of the constitutional Complaint procedure is different. In contrast with the abstract judicial procedure, the application for this procedure is made by individuals who claim for a violation of one of his basic rights by a public authority. This procedure is provided for under article 93 (1) 4° (a) which indicates that:

> the Constitutional court shall rule on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of

[328] Art 93 (1) n° 2 of the German Basic Law.

[329] Wolfgang Zeidler, *Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, in Notre Dame Law Review, Vol.62 Issue 4, 1987 p. 505.

> Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority".[330]

Clearly this procedure appears when an individual feels that some of his basic rights provided for in the constitutions are violated. For instance, it was the constitutional complaints procedure which applied in the constitutional court case of 15 December 2015 on the European Arrest Warrant.[331] In this case, a US citizen felt that the decision of the High Court in Düsseldorf to extradite him to Italy in accordance with a European Arrest Warrant issued by Italy was in contradiction with the German Federal Constitution. The concerned person submitted a constitutional compliant to the Constitutional Court claiming that there was:

> "a violation of his fundamental rights under article 1, article 2 section 1 and section 2 sentence 2, article 3 and article 103 section 1 GG, of his fundamental right to a fair trial (article 2 section1 in conjunction with article 20 section 3 GG, article 6 sec. 3 ECHR), a violation of the minimum standards under international law, which are binding pursuant to article 25 GG, as well as a violation of article 6 section 3 ECHR".[332]

Under this complaint procedure, it is important to underline the role played by article 38 of the German Federal Constitution in reviewing EU Treaties. Indeed, in most of the cases submitted to the German Constitutional Court in the context of reviewing the EU treaties - namely the Maastricht and Lisbon treaties-, the applicants claimed that the ratification of these treaties would violate their democratic rights recognised under article 38 (1) of the Constitution.

Lastly, the concrete judicial review occurs when, during a court proceeding, the concerned court is convinced that a law violates the Federal constitution. In this case, the court in question has the duty to suspend the proceeding and, consequently, to refer the case to the constitutional court which in return gives a clear interpretation of the

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[330] Art 93(1) n°4a German Basic Law.
[331] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - paras. (1-126), http://www.bverfg.de/e/rs20151215_2bvr273514en.html.
[332] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 – para 25, http://www.bverfg.de/e/rs20151215_2bvr273514en.html

controversial law. The legal basis for this review process is article 100 (1) of the Basic Law. It reads as follows:

> "If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law".[333]

It is worth noting that the Federal Constitutional Court does not only review national laws; it does also review acts of public international law. This is stated under article 100 (2) of the Basic law which reads as follows:

> If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.[334]

Therefore, on the basis of this provision, EU law can be reviewed.

[333] Art 100 (1) of the German Basic Law.
[334] Art 100 (2) of the German Basic Law.

3.3.2.3.2.2. The constitutionality review of EU law in practice: The German Constitutional Court and the European Integration process

While reviewing European Treaties in accordance with the provision of the Constitution above mentioned, the German Federal Constitutional Court developed important theories which explain well the relationship between the German Law and the Union Law. Indeed, on the one side, it contributes to the integration process but, on the other, it protects the constitutional identity.

3.3.2.3.2.2.1. Contribution of the GCC to the EU integration process: A remarkable support to principle of openness of the Constitution to EU integration

This section analyses how the GCC defines the EU as an association of States (A), defines the concept of State sovereignty in the light of the EU integration (B) and clarifies the relationship between the Republic of Germany and EU in the light of democracy (C).

A. Development of the theory of the European Union as an association of states

One of the merits of the German Constitutional Court was to clarify the status of the European Union. Indeed, in the development of the European Union, new treaties were put in place in accordance with the necessity of the moment. Some of them namely the Maastricht Treaty and the Lisbon Treaty were contested before the German Constitutional Court on the ground that they would lead to the creation of a European state. For instance, in the case of the Maastricht Treaty, the applicant Mr Brunner, basing on important innovations brought by the new treaty,[335] argued that the latter – the Maastricht Treaty- "would fundamentally change the German State by transferring almost all of the decision making competences from the State to the European level".[336]

[335] Specifically, the Treaty of Maastricht significantly extended the competences of the newly created Union as it included in the integration agenda the area of justice and home affairs, an economic and monetary Union, and a common foreign and security policy.

[336] Stephan Hobe, *The Long and Difficult road towards integration: the Legal debate on the Maastricht Treaty in Germany and the judgement of the Constitutional Court of October 12, 1993*, In Leiden Journal of International Law (LJIL), Vol7, n°1, 1994, p.28.

To this complain, the German Constitutional Court clarified that the Treaty would not lead to the formation of a new European State but that the new European Union is an association of states – *Staatenverbund* - which would pay tribute to the identity of the European States.[337] This implies, as Wiegandt explains, that "the EU's status as European State remains dependent upon the authorization of the sovereign states".[338]

With the arrival of the Lisbon Treaty in 2009, almost the same issue was raised in the Constitutional Court by a group of parliamentarians under the constitutional complaint procedure to challenge the Act approving the Treaty of Lisbon. Indeed, significant changes were incorporated in this treaty. Specifically, for the first time this Treaty explicitly pursues the objective of enhancing the Union's democratic legitimacy,[339] and consequently, introduces in title II of the Treaty on European Union "provisions on democratic principles"[340] in which the notions of "democratic equality",[341] "representative democracy"[342] and "participatory democracy"[343] were invoked. The institutional framework of the Union was reformed for the purposes of giving more powers to the Union's institutions in accordance with the desire which was already expressed in the preamble.

For instance, the European Parliament competences in the area of law-making were increased in order to allow it to act in tandem with the Council,[344] the European Council was upgraded to an institution of the European Union as a single entity vested with legal personality,[345] the qualified majority voting system was declared in the council,[346] the commission was recognized autonomous executive law-making with its own legal form of 'non-legislative acts,[347] a position of 'High Representative of the Union for

[337] Stephan Hobe, *op. cit*., p. 32.
[338] Manfred H. Wiegandt, *German's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops,* In *American University International Law Review*, Vol.10, Issue2, 1995, p.898.
[339] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 32.
[340] Title II (art. 9 to art. 12) of the Treaty on the European Union.
[341] Art 9 of the Treaty on the European Union.
[342] Art 10 of the Treaty on the European Union.
[343] Art 11 of the Treaty on the European Union.
[344] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08- para. 40.
[345] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, - para. 43.
[346] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08- para. 45.
[347]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08- para. 47.

Foreign Affairs and Security Policy' was introduced with various functions in this area, a clear categorization and classification of the competences of the Union were established.[348] Concretely, this Treaty significantly extended the powers of the Union in such manner that member states were obliged to surrender some of their sovereign rights to the benefit of the Union.

All these aspects were challenged in the Constitutional court. To deal with this question, the GCC had to determine again the status of the European Union by defining with more clarity the notion of *Statenverbund*. Indeed, trying to persuade that the Federal Republic of Germany does not lose its sovereignty by ratifying the Act Approving the Treaty of Lisbon, the GCC characterizes again the EU as an association of sovereign states (*Staatenverbund)* to which sovereign powers are transferred[349]. This characterization is full of information and reflects the picture of what should be the relationship between member states and the Union. As it can be deducted from this definition, the most important aspect of this relationship is the subsistence of the sovereign character of Member States of the association. In order to show the nature, extent and importance of this character, the GCC went on by defining the notion of *Verbund* (association). It defines it as:

> "a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation".[350]

From this definition, the court concluded that the supranational powers of the European Union do not originate from the Union itself but from its Member States which are the masters of the treaties and which remain sovereign.
The important aspect to retain in this definition is that Member States of the association remain sovereign. This implies that the court rejected the allegations of the applicants such participation to the EU would violate the sovereign character of the Republic of Germany.

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[348] Art 2 (5), art 3 & art 4 of the Treaty on the Functioning of the European Union.
[349]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08- para 229.
[350] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08- para 229.

Also, one can argue that through this definition of European Union as an association of states, the GCC has developed a new theory for the European Integration.

B. Defining the notion of State Sovereignty in the light of EU integration

In most of the cases brought to the German constitutional court for the purpose of reviewing the constitutionality of EU treaties, applicants were claiming the violation of the sovereignty of the Federal Republic of Germany. The GCC had therefore to clearly define the concept of sovereignty in the light of EU integration. The GCC understands the sovereignty of Germany basing on the role played by the EU in promoting peace. According to the court, the Basic Law abandons the old definition of state sovereignty that it is considered as a "self-serving and self-glorifying sovereignty" to a definition that it considers as "freedom that is organized by international law and committed to it"[351]. This definition was a result of a deep analysis and a discovery by the GCC of Germany's willingness and commitment to support the world's peace as an equal partner in a United Europe. The Constitutional Court discovered this willingness through the openness of the Germany Basic Law towards the European Integration[352], international organizations[353], mutual collective security[354] and the ban on the war of aggression.[355]

All these aspects developed by the Basic law make the definition diluted and break all forms of "political Machiavellianism" that used to render the notion of sovereignty very rigid. However, this does not mean that Germany loses its sovereignty. In contrast, the GCC considers it as a direction of the German Constitution towards opening the sovereign state to a peaceful cooperation of nations and towards European Integration.[356] The sovereignty that is foreseen by the Basic Law is more flexible and, therefore, in accordance with the circumstances of the moment, specifically the need for cooperation for international peace in a United Europe.

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[351]Martitz, *Internationale Rechtshilfe* in *Strafsachen*, Vol. I, 1888, p.416; See also in BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 223.
[352] Art 23.1 of the Basic Law of the Republic of Germany.
[353] Art 24.1 of the Basic Law of the Republic of Germany.
[354] Art 24.2 of the Basic Law of the Republic of Germany.
[355]Art 26 of the Basic Law of the Republic of Germany.
[356] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 220.

This way, the German Constitutional Court has understood sovereignty in a narrow sense considering the transfer of some rights to the Union as not to be a loss of Sovereignty altogether but as a moderated sovereignty to the situation of the moment. Indeed, in its decision on the Lisbon Treaty, it considers that Germany keeps its final say contained in the constitution (- *die in dem letzten Wort der deutschen Verfassung liegende Souveränität)*[357]*.* This means that the German Constitution consents to the German integration into other international community, but "does not waive the sovereignty contained in the German constitution as a right of the people to take constitutive decision concerning fundamental questions as its own identity".[358]

C. Clarification of the relationship between the Republic of Germany and EU in the light of democracy

In most of the cases filed before the German Constitutional Court for constitutionality review of the EU treaties, - either in the Maastricht or Lisbon judgements, applicants claimed that their ratification would violate their democratic rights recognized under art 38 (1) of the Basic Law.[359] In their view, as Germans, this provision offer them the right to vote in the election of the Bundestag and, therefore, to take part in the litigation of state authority on the federal level and to influence its exercise. In the Maastricht Treaty, for instance, the applicants claimed that the rights to participate in the exercise of the state powers was violated by the transfer of significant power to the European Union which would lead to the situation where states powers are exercised by the EU but not by the German State itself.[360] The Constitutional Court rejected all these allegations indicating that the democratic principle was not violated in any way. In its argumentation, the Court reminds the meaning of the principle of openness of the Constitution of Germany towards EU integration and international organizations as

[357]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 340. http://www.bverfg.de/e/es20090630_2bve000208en.html

[358] *Ibidem*.

[359] Article 38 (1) stipulates that "Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience".

[360]Johannes Döveling, *How Germany contributes to the effectiveness of the European Law and simultaneously preserves its constitutional identity: An Overview of the Relationship between German Law and European Law,* In Jossphat L. Kanywanyi et al, Regional Integration and Law: East African and European Perspectives, Dar es Salaam University Press, 2014, p.246.

posed successively in article 23 and 24 of the same constitution. According to the court the transfer of powers to a supranational organization – resulting from the principle of openness of the Germany to EU and international organization - "necessary entails that the use of these powers no longer depends on the will of one state alone".[361] In other words, through this argument, the Court talks of a shared democracy between all Member States of the Union. Thus, an individual democracy focused on a single state would be meaningless. Moreover, in the view of the court, "the supranational community finds its democratic legitimation in the national legislation act assenting the accession to the community".[362]

Similarly, in the Lisbon judgement, the applicants claimed that the Act Approving the Treaty of Lisbon violates the right under article 38 of the Basic Law. They argued that, the right to vote in particular was infringed by the transfer of sovereign powers to the European Union, but also, they considered that the principle of democracy in general was violated in two aspects.[363] First, according to them, the competences of the German Bundestag were undermined by the transfer of its powers to the Union organ. Secondly, in their view, the EU lacks the democratic legitimacy pointing out that the council does not have sufficient legitimacy from all the people of the union, the introduction of unanimity as a norm and the absence of the democratic equality in the election of the European Parliament.[364] The applicants also enumerated some other individual provisions in the Treaty which they consider as they violate the principle of democracy. Specifically, the treaty allegedly places the people of the Union on the same level of the peoples of the Members States (art 14.2 Lisbon TEU). The treaty allows its amendment without the approval of the Bundestag (art 48.6 Lisbon TEU and art 311 of the TFEU) and the change from unanimous decision process to the majority decision in the council (art 48.7 Lisbon TEU) without the participation of the Bundestag.[365]

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[361] Manfred H. Wiegandt, *German's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops,* In *American University International Law Review*, Vol.10, Issue2, 1995, p. 895.
[362] *Ibidem.*
[363] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 100.
[364] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 101.
[365] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 102.

To all these submissions, the Court in Karlsruhe replied in negative by confirming that the Act approving the Treaty of Lisbon did not violate the principle of electoral democracy. In its argumentation, the court started by clarifying the content of the right to vote as defined under article 38 of the Basic which is considered as a reflection of principle of electoral democracy. According to the court the right to vote establishes:

> "a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people".[366]

It, therefore, came to the idea that the review of the violation of this right comprises encroachments on the principles codified in article 79.3 of the Basic law as the identity of the Constitution.[367]

After highlighting the importance of the right to vote as the most fundamental and important right for the democratic participation protected by the constitution, the court went on by clarifying in which aspects of the right to vote can be considered to have been violated. In the view of the court, the right to equal participation in democratic self-determination (democratic right of participation) can be violated if the organization of state is being changed in a such manner that the will of the people does not appear in the sense of article 20.2 of the Basic Law[368] and the citizens cannot rule in accordance with the will of the majority.[369] This is important because, as previously described,[370] the organizational structure of a state is one of the elements which constitute the core content of its identity.

Regarding the right of the representation rule of the people, the court indicated that this is violated when the rights of the Bundestag are considerably curtailed.[371] Insisting on the importance of the principle of democracy, the court made it clear that this principle

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[366]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 208.
[367] *Ibidem.*
[368] Art 20.2 of the Basic Law stipulates that « All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies".
[369] *Idem*, para.210.
[370] See supra, the section on the respect of national identity as one of the principles guiding the EU integration.
[371] *Ibidem.*

is inviolable and, consequently, cannot be balanced with other legal interests.[372] The Constitutional Court considered that any amendment of the constitution affecting it is inadmissible and is considered as a violation of the identity of the constitution protected by the so-called eternity clause article 79.3 of the Basic Law.

At the end, the Constitutional Court concluded that the principle of electoral democracy was not infringed in any of its aspects above specified. By contrast, it indicated that the Basic Law allows for the objective of integrating the Germany into an international and European order. According to the court as long as the principle of constitutional identity is respected, the principle of democratic self-determination and of participation in public authority rest unaffected by the openness of constitution of Germany towards international law and to the contribution to peace and European Integration.[373] Concretely, in this argumentation the court insists that the sovereignty of Germany is a sovereignty which is shaped in a way that is favourable to the world's peace and European integration. It, therefore, indicates that the safeguarding of this sovereignty demanded by the principle of democratic constitutional system prescribed by the Basic law in a manner that is open to integration and to international law does not mean that some sovereign rights should remain in the hands of the state.[374] Indeed, in the view of the court, the participation of Germany established in the Basic Law to the European integration is not limited to economic aspects only but also includes the political union. The intervention of a political union requires, indeed, an existence of public and legislative authority.

Furthermore, the Court indicated that the principle of democracy manifested with the right to vote was not violated by the Act Approving the treaty of Lisbon for some other reasons. Firstly, according to the court, the right to vote is still being exercised efficiently by the German people who still decide on essential political issues in the Federation and *Länder* through a free and equal election of the members of the Bundestag and the corresponding election in the *Länder*, supplemented by the

[372] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 , para 216.
[373] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 219.
[374] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08– para 219.

possibility of participation in the European Institutions.[375] Secondly, in the view of the court, the status of the EU even at the entry into force of the Treaty of Lisbon does not reflect a level of legitimation of a democracy constituted as a state[376] for several reasons. Indeed, according to the court, not only the democratic basic rule of equal opportunity of success ("one man, one vote) does not apply within a supranational representative body where peoples are linked to each other by treaties,[377] but the EU system also lacks the character of equality of all citizens when making the use of their rights to vote.[378] Also, the court indicated that looking at the way seats are allocated in the EU Parliament; it is clear that this representative institution is a representation of the peoples of the Members States and that the principle of degressive composition of it stands between the principle of equality of member states under international law and the state principle of electoral equality.[379] The court also noted an absence of compensation of the deficit of European public authority.

3.3.2.3.2.2.2. Preservation of the German constitutional identity

In its famous cases, the Court has been showing its severity in the respect of the German Constitutional Identity. This way, it reaffirmed the absence of *Kompetenz-Kompetenz* to the EU and established the *ultra-vires* review as its mechanism of control (A), indicated the non-transferrable areas to the EU, recalled the respect of the Constitutional Identity and the Identity Review (B),

A. Clarification of the principle of conferral, *Kompetenz- Kompetenz* and *Ultra-vires* review

Another merit of the German Constitutional Court was the definition of the principle of conferral. Indeed, in the course of the development of the European Union, there was a fear among the public that the national identities of its Member States were going to be lost. For instance, in the Maastricht case, the applicants challenged article F (3) which

[375] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 –, para 275.
[376] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 –, para 276.
[377] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 –, para 279 - 281.
[378] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 –, para 282-283.
[379] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 284.

stipulates that "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies".[380] They argued that this provision gives all the powers to the Union and vests it the *Kompetenz-Kompetenz.* The Constitutional Court rejected categorically this argument. It insisted that this provision does not confer unlimited powers to the Union, but that it only expresses its political intentions.[381] The Court consequently indicated that the limited character of the Union's powers resides in the role of the national parliament which needs to approve any transfer of powers indicated in the TEU and in its intervention in the new institutional structure established in the Treaty.[382]

Again, in the decision on the Lisbon Treaty, the German Constitutional Court came back on this notion. It insisted that the European Union does not have ability to decide on its own competences (*Kompetenz-Kompetenz*). According to the Court, article 311.1 TFEU[383] – this provision is identical to article F3 of the Maastricht Treaty - "must continue to be considered as a statement of intent regarding policies and programmes which does not establish a competence, and certainly not a *Kompetenz-Kompetenz*, for the European Union".[384] It also reiterated that "the Basic Law does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union".[385] To make this applicable, the GCC came again on the respect of the principle of conferral insisting that any competence of the Union should have been conferred to it in the Treaties. According to the court, it is through the respect of this principle that the Member States' national identity would be respected. In fact, in the view of the court,

> "the principle of conferral is not only a principle of European law, just like the European Union's obligation to respect the Member States' national identity (Article 6.3 TEU; Article

[380] Art F (3) of the Treaty on the European Union (Maastricht Treaty).
[381]Joachim Wieland, *Germany in the European Union-The Maastricht Decision of the Bundesverfassungsgericht, In* European Journal of International Law, Vol.5, 1994, p.264
[382] Mathias Herdegen, *Maastricht and the German Constitutional Court: Constitutional restraints for an "ever closer union",* in Common Market Law Review, Vol 31., 1994, p245
[383] Article 311.1 of the TFEU stipulates that "the European Union shall provide itself with the means necessary to attain its objectives and carry through its policies"; it is identical with article F (3) of the Maastricht Treaty
[384]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 , para 324, http://www.bverfg.de/e/es20090630_2bve000208en.html
[385] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 233.

4.2 first sentence Lisbon TEU), it includes constitutional principles from the Member States".[386]

To preserve the respect of the principle of conferral, the GCC established a control system known as *ultra vires* review. It, first, appeared in the Maastricht Treaty. In this judgement, the Court claimed "the ultimate jurisdiction 'to see whether the European institutions remain within the limits of the sovereign rights conferred on them or transgress them'".[387] In the Lisbon judgement, the same court indicated that an application of a constitutional law that is open to the European Integration requires an *ultra vires* review that is done by the Constitutional Court alone.[388] This review was materialised in the case on the decisions of the European Central Bank (ECB) on the Public Sector Purchase Programme (PSPP). In this case, as developed earlier, the German Constitutional Court decided for the first time that an institution of the European Union – the European Central Bank - acted *ultra vires.*[389]
Thus, through this reasoning of the court, it can be noted, that the Republic of Germany maintains significant powers in the integration process considering the fact that every action of the Union is framed by the principle of conferral.

B. Definition of Non-Transferrable State competences, the Constitutional Identity and the Identity review

In its role of reviewing the constitutionality of European Treaties, the German Constitutional court while being in favour of the openness of the Basic law to the EU integration, it also found that some domains are inalienable and, therefore, non-transferrable to the Union's competences. Specifically, in the Lisbon judgement, it indicated that:

[386] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, para 234.
[387] Daniel Thym, In *the name of sovereign statehood: A critical introduction to the Lisbon judgement of the German constitutional court,* in Common Market Law Review, Vol 46, 2009, p.1806
[388]BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 241.
http://www.bverfg.de/e/es20090630_2bve000208en.html
[389] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 117 & 119
https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

> "the principle of democracy and subsidiarity which are also required by art 23(1) first sentence of the Basic Law requires restricting the transfer and the exercise of sovereign powers to the EU in a predictable manner".[390]

It consequently enumerated those areas where a transfer of powers to the union is not possible. In the view of the court:

> "Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia* , by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)".[391]

Analysing these areas, one would note that they have something in common. Indeed, they are all sensitive as they reflect the sovereign state's functions. Thomas Giegerich characterizes them as the "necessary state competences".[392] This appellation implies their importance. The refusal of the German Constitutional Court to transfer the exercise of these rights to the Union shows how Germany is also reluctant to release some of its sovereign rights to the union institutions specifically when they affect the state's interests.

In the same judgement on Lisbon Treaty, the Court insisted on the respect of the constitutional identity. In the Lisbon judgement, this Court understands this identity codified in article 79.3 of the Constitution as to be at the same time an encroachment upon the constituent people;[393] to this end, no constitutional body has powers to change

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[390] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 251, http://www.bverfg.de/e/es20090630_2bve000208en.html

[391] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 252, http://www.bverfg.de/e/es20090630_2bve000208en.html

[392] Thomas Giegerich, *European Integration v. the Inalienable Core of German Statehood*, in Peter-Christian Muller- Graff et alii, *European Law and National Constitutions*, Berliner Wissenschafts-Verlag (BWV), Berlin, 2016, p. 18.

[393] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 218. http://www.bverfg.de/e/es20090630_2bve000208en.html

the principles established under this identity. The Constitutional Court found that it is the one that is in charge of monitoring this respect.[394] In this regard, it indicated that, on the matter concerning the constitutional identity, Germany still has the final say that is contained in the Constitution - " *die in dem letzten Wort der deutschen Verfassung liegende Souveränität".*[395] In the view of the court , the German Constitution consents to the integration of Germany into other communities but that, at the same time, "does not waive the sovereignty contained in the last instance in the German Constitution as a right of the people to take constitutive decisions concerning fundamental questions as its own identity".[396] Through this statement, the German Constitutional Court reiterated the perception of the sovereignty which considers that limiting or transferring sovereignty does not mean giving up sovereignty altogether.

Six years later, in the case on the application of the European Arrest Warrant,[397] the GCC gave more clarifications on the constitutional identity. It recognized, first, the supremacy of the EU law towards the national law. According to the Court, by calling upon the Republic of Germany to transfer powers to the European Union under article 23 section 1 sentence 2, the Basic Law has endorsed the precedence application of the EU law by the Acts of Assent to the Treaties.[398] The GCC indicated that by national law, one should also consider the constitutional law which was a subject of matter under this case. The Constitutional court came then to the assessment that "as a rule, in case of conflicts between EU law and national law, this results in the latter being not applicable in the specific case.[399]

However, the German Constitutional Court made it clear that the precedence of European Union is not absolute. Indeed, according to the court, the scope of precedence

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[394] *Idem,* para.218
[395] *Idem*, para.340.
[396] In the language of the court: "*Das Grundgesetz erstrebt die Einfügung Deutschlands in die Rechtsgemeinschaft friedlicher und freiheitlicher Staaten. Es verzichtet aber nicht auf die in dem letzten Wort der deutschen Verfassung liegende Souveränität als Recht eines Volkes, über die grundlegenden Fragen der eigenen Identität konstitutiv zu entscheiden"*. See BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para 340. http://www.bverfg.de/e/es20090630_2bve000208en.html
[397] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - paras. (1-126), http://www.bverfg.de/e/rs20151215_2bvr273514en.html
[398] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14, para 39.
[399] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14, para 39.

of application of the European Union is limited by constitutional identity stipulated under article 79 sec 3 of the German Constitutional Court. This implies that every national legal order giving effect to EU law by the way of Assent may only be accepted if the identity of the constitution described in art 79 (3) of the Constitution is not undermined.[400] Clearly, the German Constitutional Court insisted that, in whatever precedence of EU law might occur, the unamendable constitutional guarantees, and which constitutes the identity of the constitution, should be respected.

A question that comes in this line of thinking is how to know whether or not the constitutional identity of Germany is violated. The constitutional Court responded to this question by recognizing an "identity review", a review that is done by the constitutional Court itself and which consists of reviewing whether or not the principles established by the German Constitution under art 79(3) are not affected by the EU law.[401] This was materialised in the recent case on the decisions of the European Central Bank on the Public Sector Purchase Programme (PSPP). The German Constitutional Court reviewed whether the PSPP does not affect the constitutional identity of the Basic Law in general and the overall budgetary responsibility on the German *Bundestag* in particular.[402] Thus, the identity review can, therefore, be interpreted as an instrument to safeguard the constitutional identity of Germany against the pre-established supremacy of the EU law.

To sum up, it is noticeable that even if the constitutional court accepts the precedence of the EU law, it is also reluctant to make it absolute. It foresees an identity review to check whether or not the core principles of the constitution are not violated. This is another element which shows how member states refuse to leave their sovereign rights when the integration process involves sensitive areas.

[400] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14, para 40.
[401] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14, para 43-50.
[402] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2BvR 859/15, para. 227 & 228. https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html

3.3.2.3.2.2.3. Concluding observations

The main objective in this section was to understand the position of the German Constitutional Court on the relationship between German and the European Union. It was noted that this court contributes to the integration process by supporting the principle of openness of the German Constitution to the EU integration process. However, at the same time, it does not allow this openness to be absolute. Indeed, it highlighted significant limitations which should be respected. Specifically, the principle of conferral has to be respected. Consequently, the GCC indicated that the Union cannot in any way be allowed of *Kompetenz-Kompetenz,* otherwise the same Court would exercise an *ultra-vires* review. The later consists for the Court to review the action of European Institutions to ensure if they remain within the limits of the competence attributed to them. The GCC also insists on the respect of the German Constitutional identity. Clearly, it clarified that whatever powers should be transferred to the European Union, it should be made sure that the core identity of the constitution remains untouched. Thus, the GCC interpreted that the transfer of powers to the EU indicated in article 23 of the German Constitution are limited by the inviolable rights specified under art 79 (3) in conjunction with art 20(1) and (2).

3.3.2.4. The Constitution of France and the European Integration

Under this section, two main points will be analysed. We will look at the constitution of France and see whether or not it enables the European integration before we will analyse the role that has been played by the Constitutional council in the integration process. A concluding observation will follow.

3.3.2.4.1. The constitution of France: An adapted constitution to the European Integration

France, being one of the founders of the European Economic Community (now European Union),[403] has been trying to conform its constitution to the European Union's objectives, enabling, therefore, the EU integration process. Indeed, when this community was founded, there were no specific provisions related to the integration of France in the European Union in the French constitution. Provisions of the constitution of 27 October 1946 on which France based its accession to the EU are of general applicability to any other accession to an international Treaty. The most relevant constitutional basis to the accession to EU was the preamble and article 27 of the then constitution.[404] Specifically, through the preamble, France already expresses its willingness to consent on the limitations of sovereignty necessary to the organization and the defence of peace.[405] Article 27 was dealing with the ratification of treaties.[406]

Since the adoption of the Treaty of Maastricht, France found necessary to include in its constitution provisions on the European Union. Indeed, the decision of the

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[403] One should recall that the co-founders for the European Community were France, Belgium, Germany, Italy Luxemburg and Netherlands. See also Philippe Manin, *L'Union Européenne : Institutions – Ordre Juridique-Contentieux,* Nouvelle édition, Pedone, Paris, 2005, p. 34 ; *See* also Chapter two .

[404] Directorate-General for Internal Policies-Policy Department C Citizens' Rights and Constitutional Affairs, *National Constitutional Avenues for further EU Integration*, Study, Brussels, 2014, p.94.

[405] See the § 15 of the Preamble of the Constitution of France of 27 October 1946: "Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace".

[406] Art 27 of the constitution of France of 1946 stipulates «Treaties relative to international organization, peace treaties, commercial treaties, treaties that involve national finances, treaties relative to the personal status and property rights of French citizens abroad, and those that modify French domestic laws, as well as those that call for the cession, exchange, or addition of territories, shall not become final until duly ratified by a legislative act".

Constitutional Council on the Maastricht Treaty of 9 April 1992 made it clear that there was a need to change the constitution before France ratifies this treaty.[407] The treaty was since then adapted to the EU's objectives. Specifically, a whole title - title XV (article 88-1 to article 88-4) - entitled "on the European Communities and the European Union" was adopted through the constitutional act n° 92-554 of 25 June 1992.[408] Thus, the Constitution was adapted to the integration process of the European Union and the main amendments in this regard can be summarized as follows. Article 88-1 indicates the commitment of the Republic of France to participate in the European Communities and in the European Union in accordance with the Treaty on the European Union and the Treaty establishing the European Community signed on 13 December 2007.

Yet, this provision is of great significance in the European integration process. It points some kind of joint exercise of sovereignty in the Union. In fact, through this provision, France aimed to "introduce into the French legal order the fundamental doctrines of the European law such us supremacy".[409] An introduction of such doctrines implies an open up of the French Constitution to the integration process. Through this, it releases some of the France's sovereign rights to the benefit of the Union organs.

In article 88-2 France commits itself not only "to transfer necessary powers for the establishment of the European Economic Community and Monetary Union, but also to transfer "powers necessary for the determination of rules concerning freedom of movement for persons and related areas". Article 88-3 confers to all EU citizens the right to vote in municipal elections. Article 88-4 provides for the communication between the government and the parliament on the matters pertaining to the European Union affairs.

Having done this, later with the advent of the Treaty of Lisbon, it was found necessary to adapt again the constitution to this treaty. Thus, this was done in accordance with the

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[407] Constitutional Council, Decision no 92-312 DC of December 1992, Cited by Armin von Bogdandy and Jürgen Bast, *op.cit.,* p.96.

[408] See Loi Constitutionnelle n° 92-554 du 25 juin 1992 ajoutant à la Constitution un titre : « Des Communautés européennes et de l'Union Européenne ».

[409] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, Hart Publishing, Oxford and Portland, Oregon 2013, p. 224.

Constitutional act n°2008-103 of 4 February 2008 modifying title XV of the Constitution[410]. Concretely, not only the existing four provisions under title XV were adapted, but also other provisions, namely article 88-5 to 88-7, were added. The most prominent adaptation of the article 88-1 was that the constitution made it clear that "the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union".[411] Again, this provision clarifies the understanding of the European Union in the view of France. It understands the European Union as a sharing of some powers between Member States which decides to put them in common. This can be interpreted that the Union as whole does not have sovereign powers comparable to those of Member States; it is however, constituted by States which remain sovereign. Interpreting this provision, Sophie Byron indicates that "this insistence on the intergovernmental character of the organization ensures unequivocally the superiority of the French Constitution".[412]

Article 88-5 provides for a referendum before the ratification of a treaty of accession in the EU whereas article 88-6 introduces the review of the principle of subsidiarity by the parliament. Finally, article 88-7 foresees a possibility for the parliament by way of motion to oppose any modification of the rules governing the passing Acts of the EU.

In conclusion, France has been responsive to the EU's integration process. Indeed, whenever it occurred that the constitution was in contradiction with the spirit of EU integration, a consequent amendment was introduced.

[410] Loi constitutionnelle n° 2008-103 du 4 février 2008 modifiant le titre XV de la Constitution.
[411] Constitution of France of 4 October 1958 as amended by the Constitutional Act no. 2008-724 of July 23, 2008.
[412] Sophie Boyron, *op.cit*., p.231.

3.3.2.4.2. The *Conseil Constitutionnel* and the European Integration

Besides the Constitution, the *conseil constitutionnel*[413] as a judicial body in charge of ensuring the conformity of the legislation with the constitution[414] plays a significant role in interpreting the European agreements and, therefore, checking their conformity with the French Constitution. This section analyses the role of this constitutionality review before it provides a conclusion.

3.3.2.4.2.1. The *Conseil Constitutionnel* and the constitutionality review of Treaties

Under this section, I will analyse the legal basis of the constitutionality review of treaties and the practice of the constitutional council in reviewing European treaties.

3.3.2.4.2.1.1. Legal basis of the Review

The *Conseil Constitutionnel* was established by the Constitution of 4 October 1958 with the competence, among others, of reviewing the constitutionality of treaties and statutes.[415] Circumstances and the scope of the exercise of this competence by the *conseil constitutionnel* are clearly explained in the Constitution of France. In this regard, article 54 stipulates as follows:

> "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution".[416]

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[413] The "*Conseil Constitutionnel"* is a French expression which can be literally translated in English as a "Constitutional Council" and represents what is known as "Constitutional Court" in many countries.
[414] Camille White, *National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht,* Civitas: Institute for the Study of Civil Society, November 2014, p.5.
[415] Olivier Dubos, *The French Constitution and the European Union: The Alchemy of Sovereignty and Integration at the Service of the Constitutional Council*, in Josaphat L. Kanywanyi et al, *Regional Integration and Law: East African Perspectives*, Dar es salaam University Press, 2014, p. 197.
[416] Art.54 of the Constitution of France.

Thus, it is under this provision that a room for checking whether international agreements conform or not with the Constitution is established. It is the *Conseil constitutionnel* that has the competence to do this checking as is it can be deduced from this provision. The latter insists that in case a provision of the agreement is declared contrary to the constitution, this agreement cannot be ratified until the amendment of the constitution has intervened. From this, it can be understood that, if this kind of agreement is declared unconstitutional, France has two options: either it decides to change the constitution so that it conforms to the agreement before it ratifies it, or it opts for non-ratification if it considers it cannot change the constitution to accommodate it with the treaty in question. It is also worth noting that, in contrast with previous constitutions which allowed the referral to the *conseil constutitionnel* by the President of the Republic, the Prime Minister and the Presidents of the two Houses only, the constitutional reform of 1974 broadened this scope of referral to 60 members of one of the two houses for the review of statutes.[417] It was again broadened to the same number of one of these chambers for the review of treaties by the reform of 1992.[418]

Since this discussion is focussing on constitutionality review, it is also important to underline the provisions that guide the review of statutes. Article 61 stipulates that:

> "Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the House**s** of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.
>
> To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.
>
> In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days.
>
> In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation".[419]

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[417] Olivier Dubos, *op.cit.,* p. 197.
[418] *Ibidem.*
[419] Art. 61 of the Constitution of France.

Like in the case of article 54, this provision provides for a constitutionality review before the instruments in question come into force. A reform of the constitution made in 2008 introduced a possibility for the *conseil constitutionnel* to review a legislative provision that infringes the rights and freedoms guaranteed by the constitution after it is already into force. In this regard, article 61-1 was added and reads as follows:

> "If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period. An Institutional Act shall determine the conditions for the application of the present article".[420]

Thus, this provision installed a post-constitutionality review of a legislative act. The post-constitutionality review intervenes when a legislative act had already come into force, and most interestingly, when it is being applied by a court of law. This time, the referral to the constitutional council is done by the *Conseil d'Etat* or by the *Cour de Cassation* when, during proceedings, a provision was noted to violate the constitution. If this violation is found by a given court, the latter referred it to the relevant Supreme Court, either the *Conseil d'État* or the *Cour de cassation*, which determines whether the case should be taken to the *Conseil.*[421]

However, another question is still unsolved. It is about to know whether this post-review can apply to the international treaties which bind already the Republic of France, that is to say, which have been already ratified by France. The ordinance n° 58-1067 constituting an institutional act on the Constitutional Council[422] seems to solve this question.

Art 23(2) 3° of the ordinance indicates as follows:

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[420] Art 61-1 of the Constitution of France.

[421] Camille White, *op.cit.,* p.5.

[422] This ordinance dates from 1958 but has been being amended several times. For the purpose of this study, we refer to the new version of 14 April 2011. It was *amended by Ordinance n° 59-223 of February 4th 1959 and Institutional Acts n°s 74-1101 of December 26th 1974, 90-383 of May 10th 1990, 95-63 of January 19th 1995, 2007-223 of February 21st 2007, 2008-695 of July 15th 2008, 2009-403 of April 15th 2009, 2009-1523 of December 10th 2009, 2010-830 of 22 July 2010, no. 2011-333 of 29 March 2011 and no. 2011-410 of 14 April 2011.*

> "In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the *Conseil d'État* or *Court of Cassation.*"

Article 23 (3) sentence 1 adds:

> "When the application for a priority preliminary ruling is transmitted, the court shall stay its ruling until receipt of the decision of the *Conseil d'État* or *Court of Cassation* or of the Constitutional Council, if the matter has been referred to the latter."

Under this ordinance, it can be noted that the constitutionality review of treaties can occur after their ratification.

In conclusion, the constitutionality review of treaties in France can be done at two different moments: prior to their ratification or after they have come into force. This means that at any time an agreement is presumed unconstitutional, it can be placed under review before the constitutional council.

3.3.2.4.2.1.2. Constitutionality review of EU instruments in Practice

Like its sister the German Constitutional Court, the *Conseil Constitutionnel* has been interpreting European Treaties and agreements with a purpose of giving a go ahead the Republic of France to get involved into European matters. Based on article 54 and article 61 of the Constitution, a quite significant number of cases have been brought to the *Conseil Constitutionel.* Most importantly, as it was analysing the conformity of these instruments with the French Constitution, sensitive points regarding the sovereignty France were analysed.

Indeed, for instance, in 1976, after a reference made by the President of the Republic in accordance with article 54, the *Conseil Constitutionnel* had to check the conformity with the Constitution of the decision of the council of the European Communities of 20

September 1976 on elections to the European Parliament by direct universal suffrage.[423] It - the *Conseil Constitutionnel*- considered that the election of the Members of the European Parliament by direct universal suffrage do not create either sovereignty nor institutions whose nature would be incompatible with the respect of the national sovereignty or which would undermine the powers and attributions of the institutions of the Republic namely the Parliament.[424] The *Conseil* found that there was no provision in the decision of the council of the EC which violate the principle of indivisibility of the Republic reaffirmed by article 2 of the then constitution.[425] It, therefore, concluded that the entire decision of the council of the European Community does not violate the Constitution.

Similarly, responding to the request of the President of the Republic exercising his competences granted to him under article 54, the *Conseil constitutionnel* indicated that the Constitution of France needed to be revised before France could ratify the Treaty on the European Union signed at Maastricht on 7 February 1992.[426]

In the same line of reviewing EU treaties, at the request of the President of the Republic pursuant to Article 54, the *Conseil Constitutionnel* ruled on the Treaty of Lisbon. It found that some provisions of this Treaty require a modification of the Constitution for them to be applicable. The main provisions enumerated by the *Conseil Consititutionnel* are the provision regarding the respect to powers and functioning of the Union namely with regards to the transfer of powers in new areas,[427] with regards to the new manners of exercising powers already transferred applicable when the treaty comes into force,[428] respect of the adoption of qualified majority voting,[429] and the simplified revision

[423] Conseil Constitutionnel, Décision n°76-71 DC du 30 décembre 1976, Décision du Conseil des Communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct.
[424] Conseil Constitutionnel, Décision n°76-71 DC du 30 décembre 1976, Décision du Conseil des Communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct, para 4.
[425] *Idem*, para 5.
[426] Constitutional Council - Decision N° 92-308 DC of 9 April, Treaty on the European Union.
[427] Constitutional Council-Decision N°20076-560 DC- December 20th, 2007, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, para 18 & 19.
[428] Constitutional Council-Decision N°20076-560 DC- December 20th, 2007, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, para 20-22.
[429] Constitutional Council-Decision N°20076-560 DC- December 20th, 2007, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, para 23-25.

procedures.[430] It found also that the constitution was incompatible with the new powers vested national parliaments in the framework of the Union and that, therefore, needs to be revised on this aspect.[431]

Several other EU instruments have been analysed by the *Conseil Constitutionnel.* For example, it found the Treaty on stability, Coordination and Governance in the Economic and monetary Union of 2 March 2012[432] and the Act approving the application of the Schengen visa Accords of 14 June 1985 between Members of the Economic Union of BENELUX, the Federal Republic of Germany and the Republic of France relating to the gradual suppression of border controls[433] not contrary to the constitution.

To sum up, all these examples confirm how the *Conseil Constitutionnel* has been playing a significant role in supporting the integration process by ensuring that there is no contradictory provision of the constitution to the EU law. Every advent of a new Treaty was followed by an intervention of the *conseil consititutionnel* to check its constitutionality. This observation is shared by Gundel who indicates that the preventive constitutional control has meant that the case law of the *Conseil Constitutionnel* on the constitutional prerequisites and limits of European integration has followed the rhythm of treaty amendments.[434] It also contributes in the interpretation of some legal aspect in connection with integration namely sovereignty and transfer of powers to the European Union.

3.3.2.4.3. Concluding observations

[430] Constitutional Council-Decision N°20076-560 DC- December 20th, 2007, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, para 26 & 27.
[431] Constitutional Council-Decision N°20076-560 DC- December 20th, 2007, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, para 28 & 29.
[432] Consitutional Council- Decision n°.2012-653 DC of August 2012, Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.
[433] Conseil Constitutionnel - Décision n°91-295 DC du 25 July 1991 Loi autorisant l'approbation de la convention d'application de l'accord de Schengen du 14 juin 1985 entre les gouvernements des Etats de l4union économique Benelux, de la République Fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes.
[434] Jörg Gundel, *Verfassungsgerichtliche Gesetzekontrolle in Frankreich mit der neuen "question prioritaire de constitutionnalité : Konsequenzen für den Status des Unionsrechts in der französischen Rechtsordnung* ? in Jörn Bernreuther et al, *Festschrift für Ulrich Spellenberg,* Sellier.european law publishers, Bayreuth/Hamburg , März 2010, p.578.

The objective of this section was to determine the relationship between the French constitutional law and the European Union Law. Two main points can be captured as main features of this relationship. Firstly, it has been realized that France tries to adapt its constitution with integration process. Every advent of a new treaty was followed by an amendment of the constitution with a purpose of adapting it to the new developments occurred in the Treaties. That is why, even, the Constitution of France contains a whole Title dealing only with the European Union matters. Secondly, another important aspect of this relationship is the role played by the *Conseil Constitutionnel* in ensuring that the EU law is in conformity with the Constitution of France. In this regard, for an agreement at the Union level to be ratified by France, it needs to be checked by the *conseil Constitutionnel* in order to verify whether it is not contradictory with the constitution. If an unconformity is found, this ratification cannot occur until the Constitution is ratified. I find this very crucial for the realization of integration as it avoids contradictions between French law and the Union law. Mathias Wendel characterizes the French revision procedure as a classic example of the mutual interaction and interdependence of national and supranational constitutional law.[435]

3.4. Concluding observations of the chapter

The main objective of this chapter was to understand the relationship between the sovereign character of Member States and regional integration in the European Union. To conduct a well-rounded study of this objective, it was split into three other sub-objectives: the determination of the competences and principles of the European Union, the determination of the relationship between the institutions of the European Union and national institutions and the determination of the relationship between European Union law and national laws.

With regards to the first sub-objective, it was noted that the EU Treaties have systematised and grouped competences of the EU into categories. Important is that the exercise of these competences by the Union is not absolute. In fact, significant preconditions for this exercise are framed through different principles stated in the

[435] Mattias Wendel, *Lisbon before the Courts: Comparative Perspectives*, in *European Constitutional Review*, Vol 7, Issue 1, 2011, p.104.

treaties. These principles are namely the principle of conferral, the principle of proportionality, the principle of subsidiarity, the principle of sincere cooperation and the principle of respect of states' national identities. These principles lead to an assumption that although they have given some competences to the Union, Member states of the European Union are still reluctant to surrender completely their sovereign rights to the Union. They established protectionist mechanisms through the above-mentioned principles. These principles can be interpreted as claw-back instruments of powers that Member States have attributed to the Union.

The second sub-objective dealt with the relationship between the institutions of the European Union and national institutions. The analysis of this sub-objective was motivated by the presumption that the determination of this relationship would help to understand how flexible Member States are in giving up their sovereign character enshrined in their institutional framework to the Union's institutions. First of all, it was noted that since its creation, the European Union has been suffering from a democratic deficit due to the absence of the willingness to strengthen union institutions. It was somewhere in 2001 that EU leaders started questioning this deficit. This led to the draft constitution of Europe, a draft which introduced the principle of representative democracy and the principle of participatory democracy. Unfortunately, because of the interests of some Member States, this constitution did not work. It was in the Treaty of Lisbon that the willingness to enhance the unions' institutions became effective. Powers of certain institutions were increased in the sense that some influences from national institutions were avoided.

The attributions of powers to the Union institutions as described in the new Treaty – Treaty of Lisbon-, led us to an analysis of the nature of the European Union: is EU inter-government of Supranational? It was noted that EU as whole is supranational in nature but that this supra-nationality is weakened by the standing of some institutions namely the Council of Ministers and the European Council which present features of a governmental institutions. In conclusion, like the first sub-section, EU Member States have foreseen protectionist mechanisms to a void a full supranational Union. These two

institutions- the Council of Ministers and the European Council- can be interpreted as claw-back institutions of the sovereign rights which they have transferred to the Union.

The third sub-objective was to understand the relationship between the European Union Law and National Laws. Under this sub-section, it was realised that, from the European perspective, the implementation of EU law into national law is guided by some relational principles namely the principle of direct applicability, direct effect, and supremacy of EU law. In contrast with the international law where some aspects regarding the constitutional systems (monism or dualism system) of the member states need to be taken into consideration for these principles to be implemented, the European Union constitutes a new legal order. In other words, in the EU, the classic formula of implementing international law does not apply. EU law is directly applicable, has direct effects and is supreme. This was developed by the European Court of Justice.

From national perspectives, this sub-objective looked at two main aspects: the position of national constitutions towards EU law and the interpretation of the EU law by national constitutional courts. It was discovered that most of national constitutions are responsive to the European integration process. In fact, generally they comprise provisions dealing with the EU affairs. Some of them have even reproduced the relational principles –direct applicability, direct effects, and supremacy of EU law- as guiding principles in the implementation of EU law into their legal systems.

However, besides this positive reaction of the EU national constitutions, they also have some claw-back provisions which establish some limitations indicating untouchable states sovereign rights. In other words, they indicate that the transfer of sovereign rights in certain areas to the Union organs or institutions is inacceptable. In practice, national constitutional courts support this openness of constitutions towards EU law, but also insist on the respect on the national identities. They recall that the respect of the principle of conferral which the union to acts within the competences conferred to it by treaties. In other words, as Möstl concludes, the endowment of competences that the Union receives through the founding treaties or their subsequent amendments is not based on an act of original European Constitutional powers detached from the Member

States, rather the Union is and remains the work of sovereign democratic states.[436] In this sense, the constitutions and constitutions courts of the European Member States understood that transferring or limiting some of their sovereign rights does not mean giving up all the sovereignty altogether since the Member States remain the Masters of the Treaties. Therefore, in relation to the concepts of sovereignty as defined in the previous chapter, constitutions and constitutional Courts of the EU Member States understand the concept of sovereignty in its narrow sense.

[436] Markus Möstl, *Vertrag von Lissabon : Einführung und Kommentierung; Konsolidierte Fassung der Verträge und deutsche Begleitgesetzgebung*, Olzog Verlag, München 2010, p.17.

CHAPTER FOUR
STATE SOVEREIGNTY AND REGIONAL INTEGRATION IN THE EAST AFRICAN COMMUNITY

For a well-rounded comparative study of the European Union and the East African Community as regard to relationship between state sovereignty and regional integration, these two concepts – state sovereignty and regional integration - need to be understood in the context of the East African Community too. Thus, under this chapter, the following aspects will be analyzed: the competences of the EAC and principles governing its integration process, the relationship between national institutions and the ones at the East African Community level and the relationship between the East African Community Law and National Laws followed by a conclusion.

4.1. Competences of the Community and Principles governing Regional Integration in the East African Community

The objective of this section is to understand the competences of the EAC and the principles governing the integration process in this community with an ultimate aim of determining whether or not the sovereign character of the Partner States has any impact on these two elements guiding the integration process in the EAC.

4.1.1. Competences of the East African Community

The understanding of the competences of the East African Community certainly contributes to the determination of the powers this community has in the integration process and therefore, its implication on the sovereign character of its Partner States.[1] The expression "competences", in the situation under analysis, is to be understood as the ability of the East African Community to legislate in certain areas of cooperation. Considered from this perspective of view, the observation which can be made is that the Treaty for the Establishment of the East African Community presents significant

[1] It is important to note that, in contrast to the European Union treaties which use the expression "Member States" as to indicate the states parties of the Union, the Treaty for the Establishment of the East African Community refers to the expression "Partner States".

weaknesses compared to the European treaties (Treaty of Lisbon which comprises the Treaty on the European Union and the Treaty on the Functioning of the European Union). Indeed, as described earlier, the Treaty on the Functioning of the European Union clearly establishes the competences of Union and a list of areas where these competences can be exercised. Specifically, it indicates which areas the Union will have exclusive competences, shared competences, or supportive competences. It even highlights the conditions of the exercise of all these different competences.[2]

Unlike the European Union Treaties, this distinction is not provided for in the Treaty for the Establishment of the East African Community. Under this Treaty, there is no clear definition or clarification of the competences of the Community. Certainly, the Treaty for the establishment of the East African Community highlights only areas of cooperation without being specific on the role which should be played by the Community in the implementation of this cooperation process. The most important articles in this regard are from article 74 to article 131. These provisions indicate that the cooperation concerns trade liberalization and development (art. 74 to art. 78), investment and industrial development (art. 79 and art. 80), standardization, quality insurance, metrology and testing (art. 81), monetary and finance (art. 82 to art. 88), infrastructure and services (art. 89 to art. 101), development of human resources, science and technology (art. 102 and art. 103), free movement of persons, labour, service, rights of establishment and residence (art. 104), agriculture and food security (art. 105 to art. 110), environment and natural resources management (art. 111 to art. 114), tourism and wildlife management (art 115. and art. 116), social and cultural activities (art. 117 to art. 120), enhancing the role of women in socio-economic development (art 121 and art 122), political matters (art. 123 to art. 125), legal and judicial affairs (art. 126), the private sector and the civil society (art. 127 to art. 129), relations with other regional and international organizations and development partners (art. 130) ,and other fields (art. 131).

Hence, the Treaty of the establishment of the East African Community just enumerates areas of cooperation without mentioning anything with regard to the delimitation of the

[2]See chapter 3, section 3.1.1.

community's competences in the exercise of the activities related to these areas. The situation is different in the case of the European Union treaties. In contrast, as explained earlier, the treaty on the functioning of the European Union has classified most of the above-mentioned areas in the three main competences of the Union. Specifically, the TFEU does not only enumerates areas of cooperation, but also it determines competences of the Union in those areas by indicating which ones fall in the category of the Union's exclusive competences, shared competences, or exclusive competences. As a matter of facts, areas of trade liberalization and development which comprise the establishment of a Customs Union, the monetary and financial policies, and other necessary competition rules would have fallen in the category of the exclusive competences of the Community if one refers to the European model. Whereas all activities connected to the common market, the environment and natural resources management, agriculture, security and justice were placed in the category of shared competences, activities of tourism and wildlife, investment and industries, development of human resources, science and technology, as well as social and cultural activities are all put in the category of supportive competences.

In contrast, the Treaty for the defunct East African Community – Treaty for the East African Co-operation - seems to have understood the importance of defining competences of the Community though it does not systematize and group them as it is in the European Union. Indeed, in a non-clear classification, the 1967 Treaty for the East African Cooperation establishes exclusive competences to the Community. Specifically, in article 43 (1) (2) and (3) on "the functions of the Community", this Treaty provides for areas where the Community will act "on behalf of the Partner States":

> "1. The Community shall, **on behalf of the Partner States**, through its appropriate institutions, perform the functions given to it, and discharge the responsibilities imposed upon it, by this Treaty in relation to the establishment, functioning and development of the Common Market.
> 2. (a) The Community shall, **on behalf of the Partner States**, administer the services specified in Part A of Annex IX to this Treaty, and for that purpose shall, subject to this Treaty, take over from the Common Services Organization such of those services as are in existence at the date of the coming into force of this Treaty.

(b) The Authority may by order from time to time amend or add to Part A of Annex IX, to this Treaty.

3. The Corporations[3] shall, **on behalf of the Partner States** and in accordance with this Treaty and -the laws of the Community, administer the services specified in Part B of Annex IX to this Treaty, and for that purpose shall -take over from the Common Services Organization the corresponding services administered by the Common Services Organization at the date of the coming into force of this Treaty".[4]

Through the wording "on behalf of the Partner States", it can be assumed that the activities which are targeted in this article are exclusively reserved to the Community and, therefore, Partner States are not allowed to exercise them. The services enumerated in part A of Annex IX mentioned in this provision as to be exclusively administrated by the Community are generally the secretariat of the Community including services relating to the Common Market and the Chambers of the Council to the Community, civil aviation, metrology, customs and Excise department, Income Tax Department, Industrial Council, Literature Bureau, Auditor-General's Department, Community service, Legislative Assembly, Agriculture and Forest Research organization, Freshwater Fisheries Research Organization, Marine Fisheries Research Organization, Trypanosomiasis Research Organization, Veterinary Research organization, Leprosy Research Centre, Institute of Malaria and Vector-Borne Diseases, Institute of Medical Research, Virus Research Organization, Industrial Research Organization, Tropical Pesticides Research Institute, Tuberculosis Investigation Center, Services arising from the operations of the East African Currency Board, services for administration of grants or loans, and statistical services for the purposes of coordinating the economic activities of partner States.[5] Equally, some features of shared competences existed under the Treaty for the East African Cooperation of 1967. Indeed, it indicated that "the Community and the corporation may, with the approval of the Authority, enter into arrangements with any government or international organization for providing services, and provide and administer such services accordingly".[6]

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[3]Corporations in the context of this Treaty are enumerated in article 71 (2). This provision indicates that "the corporations shall be the East African Railways Corporation, the East African Harbours Corporation, the East African Posts and Telecommunications Corporation, and the East African Airways Corporation".

[4]Art 43(1), (2) and (3) of the Treaty for the East African Cooperation of 1967.

[5] See Part A of the Annex IX to the Treaty for the East African Cooperation of 1967. It enumerates services to be administrated by the Community or by the Corporations.

[6] Art 44(1) of the Treaty for the East African Corporation of 1967.

To sum up, the Treaty for the establishment of the East African Community does not establish a repartition framework of competences between the Community and its Partner States as it is in the case of the European Union. That said, an issue arises has to do with the reason for the absence of a clear attribution of competences. Neither the Treaty nor any other community document gives reasons of this absence. This is certainly the effects of the sovereign character of the Partner States which blocks their openness to the integration process. In fact, conferring competences to the Community means an abandonment of some sovereign rights by Partner States to the Community. Thus, Partner states become reluctant to confer serious powers to the Community. The inexistence of systematized and grouped competences of the Community is a clear reflection of the reluctance of Partner States to surrender sovereign rights to it.

4.1.2. Principles governing the integration process in the East African Community

Under this section, this study establishes a general overview on the Principles for East African Integration before it analyses every principle specified in the Treaty.

4.1.2.1. A general overview of the principles governing the integration in the EAC

Like for many other regional communities,[7] the East African Community is vested with principles enshrined in the Treaty and which constitute the basic framework within which the integration process is done. Upon examination of the provision of the EAC Treaty in its part regarding the principles, some observations call for attention.

First, the EAC Treaty distinguishes two categories of principles: the "fundamental principles" and "the operational principles". According to the Treaty, whereas the former "govern the achievement of the objectives of the community",[8] the latter "govern

[7]For example, see art 4 of the Revised Treaty for the Economic Community of West African States (ECOWAS), art 4 of The Declaration and Treaty of the Southern Africa Development Community (1992), art 5 of the Treaty on the European Union.

[8]Art 6 of the Treaty for the Establishment of the East African Community.

the practical achievement of the objectives of the community".[9] These two definitions are, rather vague. In fact, there is a repetition of principles which co-exist in both categories. On one side, according to the Treaty, the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

> "(a) mutual trust, political will and sovereign equality; (b) peaceful co-existence and good neighbourliness; (c) peaceful settlement of disputes; (d) **good governance** including adherence to the **principles of democracy**, **the rule of law**, accountability, transparency, **social justice**, equal opportunities, gender equality, a s well as **the recognition, promotion and protection of human and peoples right s in accordance with the provisions of the African Charter on Human and Peoples' Rights**; **(e) equitable distribution of benefits**; and (f) co-operation for mutual benefit".[10]

On the other side, the EAC Treaty indicates principles that shall govern the practical achievement of the objectives of the Community:

> "1. (a) people-centered and market-driven co-operation; (b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;(c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology; (d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration; (e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds; (f) **the equitable distribution of benefits accruing or to be derived from the operations of the Community** and measures to address economic imbalances that may arise from such operations; (g) the principle of complementarity; and (h) the principle of asymmetry.
>
> 2. The Partner States undertake to abide by the principles of **good governance**, including adherence to the **principles of democracy**, **the rule of law**, **social justice** and **the maintenance of universally accepted standards of human rights."[11]

[9]Art 7 of the Treaty for the Establishment of the East African Community.
[10]Art 6 of the Treaty for the Establishment of the East African Community.
[11]Art 7 of Treaty for the Establishment of the East African Community.

As it can be noted, the two categories of principles comprise a lot of repetition of principles. For instance, principles of good governance, democracy, rule of law, social justice and respect of human rights and equitable distribution of benefits existent in both categories. This leads to uncertainties with regard to the meaning of the two categories of competences. In other words, the troubling aspect of this prospect becomes how to distinguish the two categories.

An exploration of the two types of principles would lead to a conclusion that the first category of principles - fundamental principles - are of general applicability and are interested in circumventing the problems which were at the center of the failure of the defunct East African Community.[12] This idea is shared by the Open Society Foundation which indicates that fundamental principles of the EAC "are laid down with a clear focus on avoiding some of the challenges that befell the EAC I".[13] In fact, they focus more on the relationship between Partner States as a way to strengthen their cooperation. As it can be noted from the wording of article 6 enumerating them, more emphasis is given to "mutual respect, political will and sovereign equality combined with expectations of equal distribution of benefits and the need to cooperate fully for mutual benefit".[14] In the case *Samuel Mukira Mohochi Vs the Attorney General of Uganda*, the EACJ indicated that the fundamental character attributed to these principles make them "foundational, core and indispensable to the success of the integration agenda and were intended to be strictly observed".[15] In the view of the court,

> "Partner States do not merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation….[…]; each of these principles were carefully thought out, negotiated, appropriately weighted, individualized and crafted the way they are for a particular effect".[16]

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[12] As explained in the first chapter, the most important reasons of the failure of the first East African Community were political and economic aspects. In fact, inequitable distribution of benefits and the absence of agreement on the repartition of powers between the intended federation and the Partner States were at the center of this collapse. Indeed, Uganda was scared of being dominated by Kenya and Tanganyika and there was also an egocentrism of Members States which were willing to a separate independence from the colonial powers. See Chapter One

[13] Open Society Foundations, *The Civil Society guide to Regional Economic Communities in Africa*, African Minds, New York, 2016, p.12.

[14] *Ibidem.*

[15] Samuel Mukira Mohochi Vs The Attorney General of Uganda, Ref N° 5 of 2011, para 36 (ii).

[16] Samuel Mukira Mohochi Vs The Attorney General of Uganda, Ref N° 5 of 2011, para 36 (i).

In another words, the integration depends on them. The understanding of the court of the fundamental principles is that "these are rules that ***must*** be followed or adhered to by the Partner States in order that the objectives of the community are achieved".[17]

Overall, it can be understood that these principles are pillars or basic rules without which the integration process is no longer possible. This is where their fundamental character resides. Insisting on the binding force of these fundamental principles in its response to the reference for preliminary ruling under article 34 of the Treaty made by the High Court of Uganda in the proceedings between the Attorney General of Uganda and Tom Kyahurwenda, the EACJ analysed the wording of article 6 of the Treaty[18] under which these principles are stated. In the view if the Court, "the use of the emphatic word "shall" is evidence that the designers of the Treaty to make binding the provisions which articulate the principles [...] of the Treaty".[19]

In contrast, the second category of principles- operational principles- comprises principles which guide the implementation, or the exercise of different activities related to the integrations process. They are of specific application as "they are aimed at guiding the operations of the Community".[20] In order words, these principles contain the cornerstone philosophies or ideologies which inspire any institution or organ of the community while implementing the objectives of the Community. For the purpose of this study, these principles are of great importance. In fact, they can be compared with the principles guiding the exercise of the European Union's competences. They will be developed further in the next section.

4.1.2.2. Main principles guiding East African Community integration process

[17]Samuel Mukira Mohochi Vs The Attorney General of Uganda, Ref N° 5 of 2011, para 36(i).

[18]The *chapeau* of article 6 reads as follows: "the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include….".

[19]Reference for preliminary ruling under article 34 of the Treaty made by the High Court of the Republic of Uganda in the proceedings between the Attorney General of Uganda Vs Tom Kyahurwenda, Case Stated N°1 of 2014, Para 67.

[20]Open Society Foundations, *op.cit.*, p. 13.

The following are the main principles guiding the integration process: People- centered and market-driven co-operation, the principle of subsidiarity, the principle of variable geometry, Equitable distribution of benefits, the principle of complementarity and the principle of asymmetry.

4.1.2.2.1. People-centered and market –driven co-operation

The history of integration of the East African Community tells us about the collapse of the first EAC in 1977. Among the main reasons that contributed to this collapse was the "lack of strong political will", and, most importantly, the "lack of strong participation of private sector and civil society in the cooperation activities"[21] as indicated in the preamble of the Treaty for the establishment of the "new" East African Community of 1999. Indeed, the Treaty establishing the defunct East African Community - Treaty for the East African Cooperation[22] - reveals an absence of this key principle in the integration process insisting, therefore, that the community should be "people centered". In order to avoid the same mistake, the fathers of the new East African Community[23] seem to have understood this problem and envisaged the Treaty to include people-centeredness as one of the "principles that shall govern the practical achievement of the objectives of the community".[24] This principle was, therefore, introduced in the Treaty as one of the solutions to the main issues that led to the downfall of the former East African community.

Parallel to the people-centered principle, the EAC Treaty also puts the principle of market-driven cooperation at the center of the integration process. Economics use the term market driven to refer to "learning, understanding, and responding to stakeholders' perceptions and behaviors within a given market structure".[25] In this sense, a market driven co-operation is a co-operation where "the business orientation is

[21]Preamble of the Treaty for the Establishment of the East African Community.
[22]This Treaty should be understood as a Treaty that was guiding the cooperation process in the former East African Community before it collapsed.
[23]The Community established by the Treaty of 1999, The Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and on 20th August 2007).
[24] Art 7(1) (a) of the Treaty for the establishment of the East African Community.
[25]Bernard Jaworski et ali*, Market-Driven Versus Driving Markets,* in Journal of Academy of Marketing Science, winter 2000, p. 47.

based on understanding and reacting to the preferences and behaviors of players within a given market".[26] It can be understood that in this kind of co-operation, the starting point for the implementation of integration agenda is an understanding of the situation of stakeholders with regards to their preferences. It is, after the later has been understood, that consequent actions can be taken as responses.

The two principles - people-centered and market-driven - have in common the fact of putting the stakeholders- especially people- at the center of the integration process. They consider them as the main drivers of the integration. In this sense, their ideas constitute the starting point without which the integration process would not succeed. Their participation is imperative as rightly put by the EACJ. In the *Timothy Alvin Kahoho vs the Secretary General of the East African Community case,* this court clarified that "if the People of East Africa are at the centre of the entire process, then it follows that their input is not just necessary but imperative".[27] In reality, the involvement of the people or all stakeholders would establish a popular legitimacy of the decisions taken by the community's institutions. For instance, as previously discussed, starting from the beginning until the adoption of the Lisbon Treaty, there was an agreement between scholars that the EU was suffering from a democratic legitimacy.[28] This could be justified by an absence of a directly elected parliament.

The idea of people's participation in the integration process as an element for the legitimation of the decisions of the community was supported by Louise M. Mdachi who indicates that

> "the stronger a particular national population's interest is in deepening integration the more impetus a relevant government will have to push its national interests at the regional level, simply because the government enjoys the popular legitimacy to do so".[29]

This said, despite this willingness to make the East African Community people-centered and market-driven by the Treaty, there is no clear framework in this treaty regarding

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[26] *Idem*, p. 46.
[27] Timothy Alvin Kahoho vs the Secretary General of the East African Community, Ref N° 01 of 2012, para 58.
[28] See chapter 3.
[29] Louise M. Mdachi, *Regional Integration and People-Centeredness: An Assessment of the Mechanisms of Popular Involvement in the Decision-Making of the East African Community,* City University of New York (CUNY) Academic Works, 2014, p.79. Available at http://academicworks.cuny.edu/cc_etds_theses, visited on 5/11/2018.

how this principle will be implemented. The Treaty simply limits itself to the declaration recognizing them as some of the principles guiding the EAC's integration process**.** Therefore, what needs to be clarified is whether or not these principles are well implemented in the practice of the EAC. In fact, the level of the participation of the people in the integration process of a society can be analyzed through the role of civil society organizations and the intervention of the people's representatives commonly known as parliament.

In this aspect, the EAC Treaty requires the Secretary General to "provide the forum for consultations between the private sector, civil society organizations, others interest groups and appropriate institutions of the Community".[30] The wording of this provision shows already that the intervention by civil society organizations is consultative and not binding. This means that the decision-making powers remain in the hands of the political elite, leaving aside the real will of the people. In practice, although they can debate and make recommendations on some issues to the community organs, civil society organizations cannot submit reports directly to the summit.[31] For the Parliament, it is indeed established under article 9 of the EAC treaty as one of the organs of the Community under the name of the East African Legislative Assembly.[32] Generally, parliaments, either at the national level or at the regional level, are supposed to be the most people-centered institutions. However, in the case of the EAC, some signals give an impression of an absence of this feature. Firstly, members of this community organ are not directly elected by EAC citizens. Article 50 (1) of the EAC treaty indicates that they are elected by respective national parliaments not from its members, but that they shall represent as much as it is feasible the population of their country as they have to be representative of the various political parties represented in the National Assembly, shades of opinion, gender, and other groups of interests.[33] This is contrary to the European Parliament where Members of the Parliament are directly elected by the EU citizens.

[30]Article 127(4) of the Treaty for the Establishment of the East African Community (As amended on 14th December 2006 and on 20th August 2007).
[31]Louise M. Mdachi, *op.cit*., p.54.
[32]Art. 9 of the Treaty for the Establishment of the East African Community (as amended on 14th November 2006 and on 20th August 2007).
[33]Art 50 (1) of the Treaty for the Establishment of the East African Community (as amended on 14th November 2006 and on 20th August 2007).

Similarly, in the European Union, the framers of the Treaty on the EU insisted in the preamble on the commitment "of creating an ever closer Union among the people of Europe, in which decisions are taken as closer as possible to the citizen in accordance with the principle of subsidiarity".[34] Thus, although not categorized among the fundamental principles of the EU, the people-centered principle is put at the center of the integration process as an objective motivating the establishment of this Union. In the EU, the people-centered principle in the EU has the merit of being more effective if one considers the features of the EU Parliament.

4.1.2.2.2. Principle of subsidiarity

The principle of subsidiarity is introduced by article 7 (d) as one of the operational principles of the East African Community. In contrast to the Treaty on the European Union, the EAC treaty does not give a clear definition or conditions of the applicability of this principle. It only indicates that the principle of subsidiarity places "emphasis on a multi-level participation and involvement of a wide range of stake-holders in the process of integration".[35] A careful examination of this definition by the EAC treaty leads to an observation that it focuses on the aspect of the participation of as many people as possible in the EAC decision making process. On this aspect, the EAC Treaty understands this principle in the same sense with the Treaty on the European Union. Indeed, the Treaty on the European Union considers that "the process of creating an ever-close Union among the peoples of Europe in which decisions are taken as closely as possible to the citizen is done in accordance with the principle of subsidiarity".[36]

However, this definition is very superficial in nature. Indeed, compared to the clarifications given by the Treaty on the European Union on the principle of subsidiarity, the EAC treaty limits itself in indicating only the general philosophy of the principle. In fact, unlike the European Union, some of its aspects remain unexplained in the case of EAC. Specifically, the scope, limitations and mechanisms of its application are not well

[34]Preamble of the Treaty on the European Union.

[35]Art 7(1) (d) Treaty for the establishment of the East African Community (as amended on 14th November 2006 and on 20th August 2007).

[36]Preamble of the Consolidated Version of the Treaty on the European Union, In Official Version of the European Union, C326/16.

clarified in the EAC legal framework. The situation is, however, different in the case of the European Union. As discussed earlier[37] and as specified in the Treaty on the European Union, the principle of subsidiarity applies only in areas which fall within shared and supportive competences. Furthermore, it is indicated that under the principle of subsidiarity, the Union can only act when the objectives proposed cannot be sufficiently achieved by Member States, but can rather, by reason of scale or effects of the proposed action, be better achieved at the Union level.[38]

Consequently, the absence of a clear legal framework as regard to the implementation of this principle is likely to delay the integration process. In fact, unwilling Partner States can invoke it to jeopardize the move of the community even in areas where it was not supposed to apply. Thus, in creating such a blur, the Partner States refuse to surrender their sovereign rights for the interest of the community.

4.1.2.2.3. Principle of Variable Geometry

The Treaty for the Establishment of the East African Community mentions the "principle of variable geometry" as one of the operational principles of the community. What means exactly this principle? The Treaty indicates that it "allows for progression in a co-operation among groups within the Community for wider integration schemes in various fields and at different speeds".[39] Thus, as the definition indicates, the main objective of this principle is to facilitate the integration process as it allows a group of East African Community Partner States to move forward with an activity while leaving behind other states which are not ready to do it. Therefore, as Kamanga and Possi specify, "the main aim of the principle of variable geometry is to ensure that integration agenda proceeds, even if unwilling states are reluctant to implement integration activities".[40]

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[37] See Chapter Three.

[38] Art 5(3) of the Treaty on the European Union.

[39] Art. 7(1)(e) of the Treaty for the Establishment of the East African Community.

[40] Khoti Chilomba Kamanga and Ally Possi, *General Principles Governing EAC Integration*, in Emmanuel Ugirashebuja et ali, *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* Brill Nijhoff, Boston, 2017, p. 209.

Similarly to the previous principle, this definition by EAC Treaty is not clear on some points. In effect, it does mention that the principle is applicable for the integration in "various fields and at different speeds". However, this language seems to be unclear. Certainly, it leaves rooms for confusion with regard to the determination of what are those fields concerned. Should it be any activity that may occur from any area of cooperation? If yes, in which context should this principle apply? Which number of Partner States is it required for the principle of variable geometry to be acceptable? What is the highest speed limit should the concerned Partner States not exceed when implementing this principle? Can they finish the implementation of the activities under the principle of variable geometry before the remaining states have joined them in the course of their activities? What will happen if the remaining countries do not join at all and, therefore, do not prefer to get engaged in the activities already began by their fellow brothers? All these questions, among others, remain unanswered and can create room for confusion in the course of the integration process. As a matter of fact, in the quest for advisory opinion to the East African Court made in 2008, the Council of Ministers -one of the deciding bodies of the Community - affirms that the genesis of the application for the court's advisory opinion was the dilemma it had regarding the application of the Principle of Variable Geometry as provided in the Treaty and its application via-à-vis the requirement of the consensus decision-making.[41] Certainly, there is no clear framework in the EAC treaty on the application of the principle of variable geometry.

This may lead to dangerous consequences. Though this principle contributes to rendering the integration process smooth and flexible, it can also be an important factor for its delay. In fact, all these unclarified aspects may be used by unwilling Partner States to delay the integration process. It can also bring tensions among Partner States. For instance, invoking the application of the principle of variable geometry stipulated in the Treaty, three EAC Member States namely Kenya, Rwanda and Uganda came together and formed what was called "coalition of the willing" to "discuss topics ranging from progress made in the customs union consolidation, Common Market implementation,

[41]Application N°1 of 2008, in the matter of a request by the Council of Ministers of the East African Community for an advisory opinion, First Instance Division, p.1.

regional investment, infrastructure development, to the removal of non-tariff barriers (NTBs)".[42] This caused tensions in the community as the then remaining countries – Burundi and Tanzania - felt excluded from the process claiming that they were not invited or informed about the projects. This misunderstanding was mainly caused by the absence of clear definition of the scope and condition of the applicability of this principle in the Treaty. Specifically, the issue here is to know whether the three Member States were allowed by the Treaty to apply the principle of variable geometry or, in other words, to know whether conditions for its application were fully reached for them to invoke it. On this point, one may argue that the philosophy of this principle is that it applies to projects and activities which have been agreed on by all Partner States in their classic way of deciding. It is after they have reached a consensus on the importance or necessity of the projects in the community through their adoption that States which are ready can implement them by applying the principle of variable geometry. This view is shared by Elisa Tino who elucidates that:

> "it (variable geometry) operates when binding (conventional or organic) act, produced within the institutional structure of an organisation to pursue its aims, is submitted for consideration to member states which are free to accept it and then to incorporate it into their national law systems with a further approval given in accordance with their domestic law".[43]

Clearly, variable geometry applies on legally binding community acts adopted at the community level in accordance with pre-established deciding system. This was not the case for the situation that appeared in 2013 with the so-called "coalition of the willing". As Gerald Ajumbo indicates, the presidents of the three Partner States were having monthly meetings to discuss regional matters to the exclusion of Burundi and Tanzania.[44]

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[42]African Development Bank*, Is Variable Geometry Leading to the Fragmentation of Regional Integration in East Africa?* Article by Gerald Ajumbo available at https://www.afdb.org/en/blogs/industrialisation-and-trade-corner/post/is-variable-geometry-leading-to-the-fragmentation-of-regional-integration-in-east-africa-12524/, published on 07 November 2013, visited on 29/08/2018.

[43]Elisa Tino, *The Variable Geometry in the Experience of Regional Organisations in Developing Countries*, In *the Spanish Yearbook of International Law (SYbIL),* Vol.18, (2013-2014), p.143.

[44]African Development Bank*, Is Variable Geometry Leading to the Fragmentation of Regional Integration in East Africa?* Article by Gerald Ajumbo available at https://www.afdb.org/en/blogs/industrialisation-and-

While interpreting this principle in response to a request by the council of ministers, the EACJ was with the same view that it does not apply in the decision-making process, but rather in the implementation process. In the Court's expression:

> "The Court finds that the principle of variable geometry, as its definition suggests, is a strategy of implementation of Community decisions and not a decision-making tool in itself. Indeed, as already noted, it appears in Article 7 of the Treaty only as one of the operational principles "…**that shall govern the practical achievement of the objectives of the Community…".**[45]

It continued to argue that:

> "Variable geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so".[46]

Thus, through this interpretation, the East African Court of Justice suggests that countries which are not ready for the implementation of the activities concerned with the principle of variable geometry participate not only in the decision-making process regarding them, but also they need to give their consent to the group willing to go further for its implementation. We do support this idea raised by the Court. In fact, collaboration with the unwilling group of states would enhance trust among Partner States and, would, therefore, prevent tensions which can lead to some misunderstandings similar to those of 2013. Addressing this issue of coalition of the willing in the East African Community, Gordon Onyango Omenya points out a list of areas where Tanzania and Burundi are still behind in the perspectives of the coalition of the willing. These are "the development of a single tourist visa, the establishment of a

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trade-corner/post/is-variable-geometry-leading-to-the-fragmentation-of-regional-integration-in-east-africa-12524/ published on 07 November 2013. Visited on 29 .08. 2018.

[45] Application N°1 of 2008, in the matter of a request by the Council of Ministers of the East African Community for an advisory opinion, First Instance Division, p.33.

[46]Application N°1 of 2008, in the matter of a request by the Council of Ministers of the East African Community for an advisory opinion, First Instance Division, p. 34.

single customs territory, the progress of the EAC political federation, and the use of national ID cards as travel documents for nationals of the bloc".[47]

In the European Union, though this principle is applied in many activities by executive bodies, there is no specific provision that defines or directs to it in clear terms. Its existence can be deduced from the wording of some provisions in the EU treaties which allow some Member States that are ready to move forward for the implementation of activities in some areas to do so, leaving behind the other group. For example, in the areas of common security and defense policy, the treaty on the European Union evokes indirectly the use of the principle of variable geometry. In this sense, article 44 stipulates as follows:

> "1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.
> 2. Member States participating in the task shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1. In such cases, the Council shall adopt the necessary decisions".[48]

Even if it does not mention the expression "variable geometry", this provision explains it well, and even more than it is in the treaty for the establishment of the East African Community. Indeed, it explores all the questions around this principle which brought controversies in the EAC as explained above. Firstly, it indicates that the principle applies in the process of implementation of a given activity. This means that it does not apply in all the field areas of cooperation. Secondly, through the expression "the council may entrust the implementation of a task to a group of Member States", this provision suggests that Member States which use the principle of variable geometry not do it for

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[47]Gordon Onyango Omenya, *Coalition of the Willing as a Pathway to then African Future Integration: Some Reflections on East African Community,* CODESRIA (Council for the Development of Economic and Social Research in Africa), Senegal, June 2015, p. 8.

[48]Article 44 of the Treaty on the European Union.

their own interest, but for the interest of the whole union. In other words, they receive delegation from the council. Commenting on this provision, Fischer specifies that "the missions of the group of Member States remain mission of the whole union"[49] reading through the lines of the expression "within the Union framework" in the provision. To this end, according to him, the respect of the Union's value as set in the preamble and article 2 of TEU, the objectives of the Union in general as defined in article 3 of the TEU and the objectives of the Union's action on the international scene indicated in article 21 of the TEU need to be respective to the willing countries.[50] Thirdly, this provision insists on the communication between the implementing countries and the council on one side, and the non-participant countries on the other. Thus, the participating Member States need to keep the Council and the non-participating Member States informed on their progress regarding the tasks attributed to them under this principle. Non-participating countries always have the right to ask for information on the progress. Fourthly, sanctions may be pronounced by the council if the implementation is not done in accordance with the directives indicated in the decision of implementation.

Besides the application of the variable geometry principle in the areas of common security and defence policy, the Treaty of Lisbon established a similar legal concept under the appellation "enhanced cooperation".[51] Like the principle of variable geometry, the enhanced cooperation can be summarised as "a procedure by which some Member States may integrate - under certain conditions - their policies within the EU without all the other members necessarily being involved, at least at the first state".[52] Article 20 of the Treaty on the EU and article 326-334 of the TFEU define the condition of the application of this principle. In fact, firstly, as article 20 of the TEU indicates, at least nine Member States must participate in the implementation of the project.[53] Secondly, not only shall the participating countries "aim to further the objectives of the Union",[54]

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[49]Mathias G. Fischer, "*Article 42[CSDP: Goals and Objectives; Mutual Defence],* in Hermann-Josef Blanke and Stelio Mangiameli, *Treaty on European Union (TEU): A Commentary*", Springer, Berlin Heidelberg 2013, p.1221.
[50] *Ibidem.*
[51] See article 20 of the TEU and art 326- 334 of the TFEU.
[52] Carlo Maria Cantore*, We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU*, in *Perspectives on Federalism*, Vol.3, issue 3, 2011, p.4.
[53] Article 20 of the Treaty on the European Union.
[54] Article 20 (1) of the Treaty on the European Union.

but also, they must receive an authorisation by the Council of ministers following a proposal by the Commission.[55]

Concretely, the Treaty of Lisbon has the merit of responding to some of the questions around the principle of variable geometry which remains unexplained in the case of the East African Community Treaty. I believe the reason behind the absence of the explanation of the principle of variable geometry is the reluctance of the EAC Partner States to surrender some of their sovereign rights for the benefit of the community. Their intention is certainly to make sure that they have consensus on every project undertaken by the Community. This way, they can manage to weight the impact of the community's work on their interests before they engage themselves in their implementation.

4.1.2.2.4. Equitable distribution of benefits

The principle of equitable distribution of benefits was established for the first time in the EAC´s legal framework by the Treaty of the establishment of the 2nd EAC as one of the solutions to the facts that led the 1st EAC to the collapse. Indeed, in its preamble, the EAC Treaty indicates that one of the main reasons which contributed to the collapse of the East African Community of 1977 was, among others, "the continued disproportionate sharing of benefits of the Community among Partner States due to their differences in their levels of development and lack of adequate policies to address this situation".[56] Several commissions were put in place to help redress this problem, but in vain as the Partner States were unable to agree on a system of distributing the benefits of cooperation;[57] this led to its collapse in 1977.[58]

4.1.2.2.5. Principle of Complementarity

[55] Article 329 (1) of the Treaty on the Functioning of the European Union.
[56]Preamble of the Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and on 20th August 2007).
[57] Ssbunya Kasule, *Regionalism in Africa: A case Study of the East African Community*, VDM Verlag Dr. Müller, Saarbrücken, 2009, p.
[58]*Ibidem.*

Established in international law as a principle to regulate the relationship between international and national institutions,[59] the Principle of Complementarity regained its importance with the adoption of the Rome Statute on the International Criminal Court in 1998 in which it was conceived as a reshape of the principle of primacy of jurisdiction recognized in the statutes of the two earlier *ad hoc* tribunals, the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR respectively).[60] Under this branch of law - International Criminal Law -, the principle of complementarity is understood as a "functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction".[61] Specifically, it proposes that national judicial organs will continue hearing and prosecuting perpetrators of human rights within their jurisdictions, and that the International Criminal Court will act when national organs have failed to do so.[62]

On the other side, the EAC Treaty explains the principle of complementarity as "a principle which defines the extent to which economic variables support each other in economic activity".[63] Two main elements can be highlighted from this definition. Firstly, whereas the principle of complementarity as defined under the international criminal law focuses on the judicial aspect, complementarity in the EAC integration as defined in the Treaty emphasizes the economic aspect. Secondly, the definition of complementarity in the EAC is both horizontal and vertical. In fact, through the wording "economic variables", drafters of this Treaty intended to indicate that Partner States would also support each other in terms of economic development. A horizontal support directly from the Community itself to the Partner States is not excluded in the definition. Kamanga and Possi, interpreting this principle in the context of the EAC, extend this relationship to other regional economic communities. According to them:

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[59]Khoti Chilomba Kamanga and Ally Possi, op.cit., Emmanuel Ugirashebuja et ali, *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* Brill Nijhoff, Boston, 2017, p.210.

[60]Xavier Philippe, *The principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?* In *International Review of the Red Cross*, Vol 88, N° 862, June 2006, p. 380.

[61]*Ibidem*.

[62]Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem,* In *Santa Clara Journal of International Law 1*, Vol.8, 2010, p.166.

[63] Art 1 of the Treaty for the Establishment of the East-African Community.

> "The principle of complementarity in the EAC Treaty does not only cover the relationship between the Community itself and its Partner States, but also attempts to create a bridge between the work of the EAC and other African institutions performing activities and functions similar to those of the EAC".[64]

4.1.2.2.6. Principle of Asymmetry

The Principle of Asymmetry is another principle established by the EAC treaty in the category of operational principles. Its legal basis is article 7(1) (h). Article 1 of the Treaty defines it as a "principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective".[65] Clearly, under this principle, the EAC Treaty recognises inequities in terms of size and economic development existing among Partner States. The Principle of asymmetry tries to adapt the disadvantaged members.[66] This view is shared with the East African Court of Justice when it indicated that "the operational principle of asymmetry […] relates to the acknowledged economic imbalances for whose rectification the parties have, by appropriate protocol, set a formula and time-frame".[67] In other words,

> "It seeks to redress this by recognising the need to defer or exempt certain areas of the economy from harsh discipline of a trade liberalization commitment regime based on the capacity of each partner member in the particular trade bloc".[68]

As a matter of fact, this principle is at the centre of the implementation of the East African Customs Union protocol as it recognises that the EAC Partner States are at different levels of the development.[69] If they (Partner States) "are expected to liberalise their economies at the same rate, then moves toward free trade areas can generate

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[64] Khoti Chilomba Kamanga and Ally Possi, *op.cit.,* Emmanuel Ugirashebuja et ali, *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* Brill Nijhoff, Boston, 2017, p.210.
[65]Art. 1. of the Treaty for the Establishment of the Establishment of the East African Community
[66]Kariuki Joyce Nyawira, *National Interests as a constraint to regional integration: A case study of Kenya in the East African Community,* a research project submitted in partial fulfilment of the requirements for the degree of Master of Arts in International Studies, University of Nairobi, 2008, p. 57.
[67]Prof. Peter Anyang' Nyong'o and others Vs The Attorney General of Kenya, the Clerk of the East African, Legislative Assembly and the Secretary General of the East African Community, Reference N° 1 of 2006, p. 32.
[68]African Law Centre, *The Principle of Asymmetry in the East Africa Community Integration*, see http://africalawcentre.blogspot.com/2014/04/the-principle-of-assymetry-in-east.html Visited on 07.09.2018.
[69]See the Preamble of the Protocol on the Establishment of the East African Customs Union.

economic difficulties for the less developed partner".[70] Therefore, the implementation of the integration process takes into consideration this aspect by means of an asymmetrical basis. In line with this and in accordance with article 75 of the EAC Treaty,[71] the Protocol on the Establishment of the East African Customs Union contains provisions on the application of the principle of Asymmetry. For instance, article 11 of this protocol suggests that the establishment of the Customs Union shall be progressive during a transitional period of five years from coming into force of the same protocol.[72] Consequently, during this period, Kenya was asked to remove its tariffs on imports from Tanzania and Uganda starting from the date of the entry into force of the protocol whereas, for example, some goods from Kenya to Tanzania and Uganda have a phase out tariff reduction period of five years for all products.[73] As the protocol specifies, for the products from Kenya will gradually decline percentages in a way that, at the end of the five years, it will be of 0%.[74] Elizabeth Wanyanga explains that, "this is meant to enable Tanzania and Uganda to adjust to the effects of the removal of internal tariffs and recover some losses in revenue".[75] In the same line of thinking, safeguard measures are foreseen under article 19 and 36 of EAC Customs Union Protocol to deal with any serious injuries which may be caused by the implementation of the same protocol.

Despites all these efforts in the implementation of the principle of asymmetry, some criticisms can also be formulated with regard to its ignorance by EAC instruments in some areas. In effect, the Treaty foresees that "the budget of the Community shall be funded by equal contributions by the Partner States".[76] On this aspect, the framers of the EAC Treaty did not consider the asymmetrical basis preached by itself as one of the guiding principles for the implementation process. In fact, if the principle of asymmetry recognises inequities between Partner States in terms of development, it would not

[70]African Law Centre, *The Principle of Asymmetry in the East Africa Community Integration*, see http://africalawcentre.blogspot.com/2014/04/the-principle-of-assymetry-in-east.html Visited on 07.09.2018.
[71]Article 75 of the EAC Treaty suggests the use of the principle of asymmetry in the implementation of the protocol on the establishment of the East Africa Customs Union.
[72]Article 11(1) of the protocol on the establishment of the Customs Union protocol.
[73]Article 11(2), (3) and (4) of the protocol on the establishment of the Customs Union protocol.
[74]It indicates that the tariffs rates reduction is of "10% in during the first year, 8% during the second year, 6 % during the third year, 4 % during the fourth Year, 2 % during the fifth year and 0% thereafter". See article 11 (4)of the Customs Union Protocol.
[75]Elisabeth Wanyanga, *Revival of Regional Integration in East Africa: An analysis of the East African Community in light of the World Trade Organisation's rules*, LAP- Lambert Academy Publishing, Saarbrücken, 2011, p.70.
[76]Article 132 (4) of the Treaty for the Establishment of the East African Community.

make sense that Kenya, which is considered as a powerhouse of the Community, should pay the same contribution as other States having low economy. In this regard, a proportional contribution would be more reasonable. To this concern, some of the respondents working in the EAC indicated that the equal treatment of EAC Partner States in contributing to the community's budget is wanted and supported by countries with small economies. Indeed, they consider that a proportional contribution to the community's finances would make them loose certain sovereign rights or would, therefore, impact on the sovereign equality character of Member States, specifically in the decision-making process.

The situation is different in the European Union. In fact, EU Member States are conscious of the economic differences existing between themselves and try to support members with low economy. In fact, unless the Council acting unanimously decides otherwise, contributions by Member States are done in accordance with the gross national product scale.[77] This way, depending on the economic growth of the Member States, some countries contribute more than others in order to support countries with law income.

4.2. Influence of national institutions on the EAC decision-making process

As discussed earlier in the chapter on the European Union, one of the determinant elements of the sovereign character of Member States in a regional community is the interference of national institutions in the decision-making process at the community

[77] Article 41 (2) of the Treaty on the European Union.

level. This part will trace a general overview on the decision-making process in the EAC before it analyses the role of every EAC institution and the involvement of national institutions in their decision-making process.

4.2.1. Overview on the decision-making process and democratic life in the EAC

In order to conduct a well- rounded study on the influence of national institutions on the EAC decision-making process, it important to understand the decision-making process and the democratic life of the EAC.

4.2.1.1. The decision-making process in the EAC

The decision-making process of the EAC organs suffers from the sovereign character of its Member States. In fact, the decisions of the community at its different levels are made by consensus. For one to understand the severity of the influence of Partner States in the EAC decision-making process, a description of this process is necessary. In fact, depending on the matter to be decided on, a proposal of a community act or any kind of important decision starts to be discussed in the meeting of experts or technicians - sectoral committees[78] - of the concerned ministries of Partners States who have to decide by consensus.[79] Later, the Sectoral committee's reports and recommendations are submitted to the next level for discussion; that is the Co-ordination Committee[80] level, whose reports are, again, concluded by consensus.[81] The next step would be the Council of Ministers.[82] In fact, reports or recommendations of

[78]See article 20, 21 and 22 of the Treaty for the Establishment of the East African Community.

[79]Rule 3 of the Rules of procedure of the Co-ordination Committee indicates that the "rules of procedure set forth herein shall apply *mutatis mutandis* to all sectoral committees and any other committees that may be established". Consequently, Rule 13 of the Rules of procedure of the Co-ordination Committee which stipulates that "Recommendations of the Co-ordination Committee shall be made by consensus" applies *mutatis mutandis* in the case of the sectoral committees.

[80]"The co-ordination Committee consists of the Permanent Secretaries responsible for East African Community Affairs in each Partner State and such other Permanent Secretaries of the Partner States as each Partner State may determine", see article 17 of the Treaty for the Establishment of the East African Community

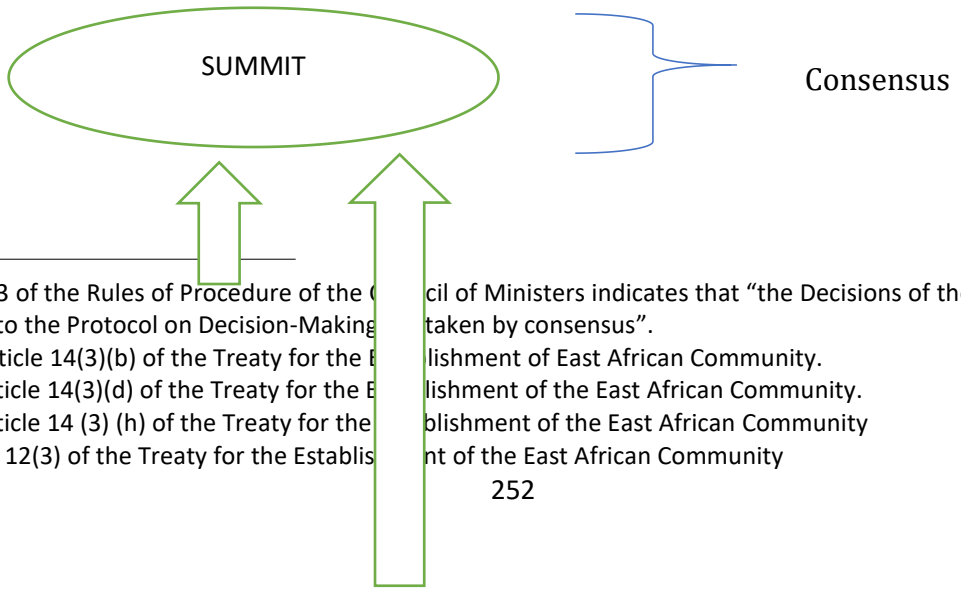
[81]Rule 13 of the Rules of Procedure of the Co-ordination Committee.

[82]Article 13 of the EAC Treaty indicates that "The Council shall consist of: (a) the Minister responsible for East African Community affairs of each Partner State; (b) such other Minister of the Partner States as each Partner State may determine; and (c) the Attorney General of each Partner State".

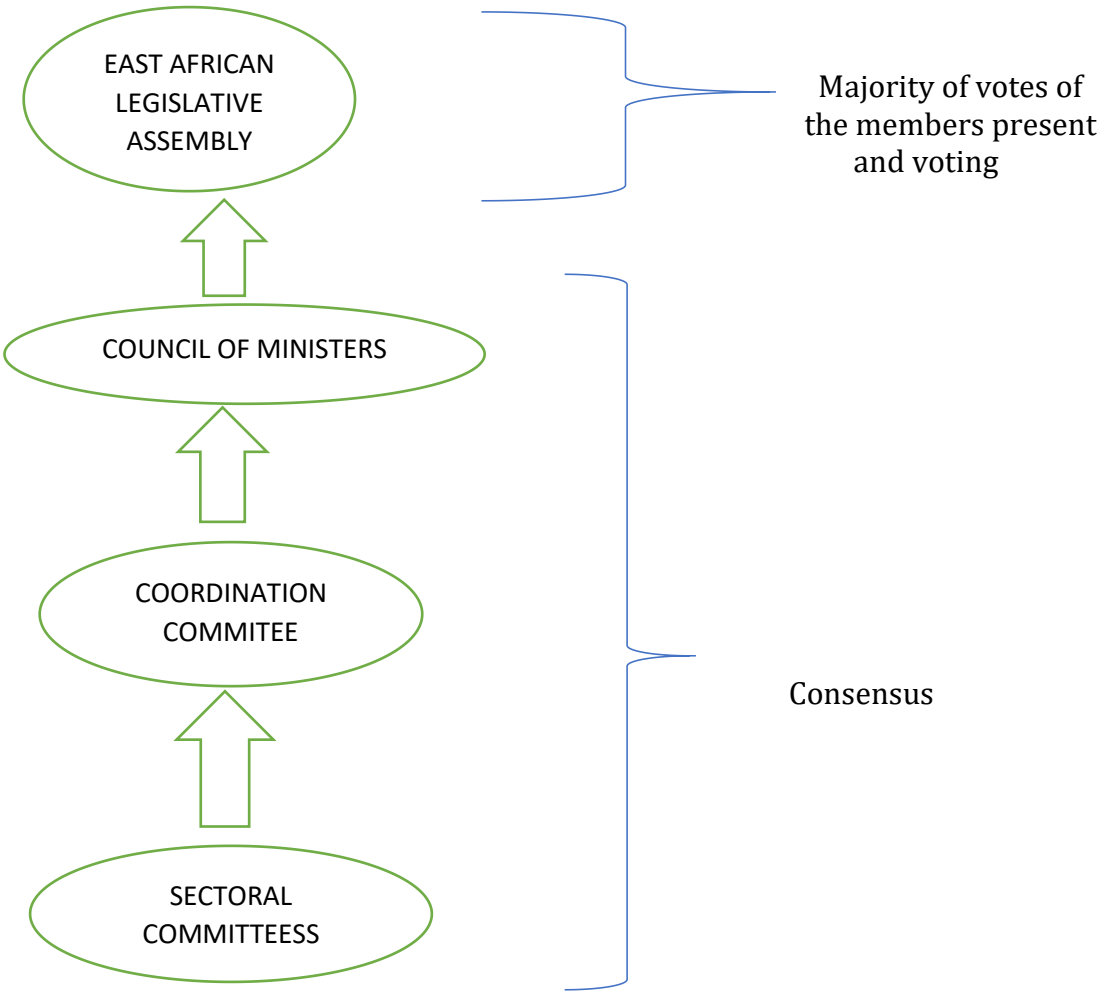
Co-ordination Committee are sent to another level of scale consisting of the Council of Ministers which, like its predecessors, decides by consensus.[83]

The decisions of the Council are almost conclusive as they lead to the last stage and can take different forms. Indeed, the Council can organise them into Bills that it initiates and submits to the East African Legislative Assembly[84] or can issue regulations, directives, take decisions, make recommendations, and give opinions in accordance with the provisions of the Treaty.[85] It can also organise them into reports to be submitted to the Summit as it prepares the agenda for the meetings of the Summit.[86] At the Summit level again, regardless to the way they have passed through to reach its office, this highest organ of the community must decide by consensus. Concretely, if the decisions of the Council were converted into Bills and passed in the Parliament, their final stages will be the Assent by the Summit which requires a signature of each Head of State member of the EAC. The seriousness of the consensus at the Summit level can be seen through the fact that, even the role of assenting to bills is considered as a personalised function. Indeed, whereas a member of the summit, when unable to attend an meeting of the Summit, can delegate a Minister of his government to attend the meeting as clearly expressed under article 10 (2) of the Treaty, article 11(9) (d) of the same Treaty classifies the role of "assenting to Bills" among the functions of the Summit which cannot be delegated. Thus, although nominated by his President to represent him, he is limited in his powers to decide as regards to assent to Bills. On the other hand, if a council ministers' report or recommendation goes directly to the Summit, for a decision to be taken in this highest organ of the community, consensus is required.[87]

Figure1. Illustrative figure



[83]Rule 13 of the Rules of Procedure of the C cil of Ministers indicates that "the Decisions of the Council shall, subject to the Protocol on Decision-Making taken by consensus".
[84]See Article 14(3)(b) of the Treaty for the E lishment of East African Community.
[85]See article 14(3)(d) of the Treaty for the E lishment of the East African Community.
[86]See article 14 (3) (h) of the Treaty for the blishment of the East African Community
[87]Article 12(3) of the Treaty for the Establis nt of the East African Community



From all this process, some observations can be formulated. The most important is that all the decisions of the community from the lowest to the highest organ, at the exception of the East African Legislative Assembly, are taken by consensus. To get the extent of the consequences of this decision-making process, one needs also to understand the meaning of the concept of consensus in the EAC context. To this end, some questions need to be answered: How is consensus interpreted in the EAC? What are its implications or how is it applied in the light of the objectives of the EAC?

The Treaty for the establishment of the EAC does not give a clear definition of this concept or clarify the conditions for its application. In the absence of this clarification in the Treaty, we had to visit EAC stakeholders on the field to find out how the consensus is interpreted in the daily life of the community. Most of the respondents we met were influential stakeholders participating in the decision-making process of the community

through its main organs.[88] They all share the view that, in practice, consensus is considered as unanimity in the EAC context. Legally speaking, unanimity means that, for a decision to pass, all participants must be in total agreement on the decision that is to be taken. Similar process is followed in the EAC. Decisions of the EAC organs at their different levels are made in such a way that every Partner State must give its consent. This implies that every Partner State can use its veto to block a process engaged in the elaboration of a certain decision.

Considering consensus as unanimity in the decision making of the EAC organs has been at the centre of the EAC's life for years and is still receiving the same interpretation. However, despite this interpretation, the East African Court of Justice made it very clear that "consensus does not mean unanimity either from ordinary English meanings or from legal dictionaries and it does not imply unanimity when used in the Treaty, the Protocol on Decision Making or the Rules of Procedure of the various organs".[89] Indeed, consensus and unanimity are two different concepts. However, it is important to distinguish between a unanimous consensus and a simple consensus. In the former, consensus can be reached by unanimity. This happens when the participants have a common understanding and agree altogether on the matter they are discussing. This way, a unanimous consensus can be said to have been reached. A simple consensus on the other side does not require a unanimous agreement of all participants.

The use of consensus as unanimity in the EAC decision making process is not without problems and consequences. In fact, "unanimity rule may be difficult to apply in settings where interests are categorically opposed".[90] Personal interests of unwilling Member States can delay or even block the process. Therefore, a single member can block a proposed decision despite its potential positive impacts on the development of the Community or in the achievement of the objectives of the community. My visit to some stakeholders revealed that significant and important acts or instruments of the

[88]For recall, our interview was directed to either directly or indirectly the key informant of the Secretariat, the East African Legislative Assembly, members of the Coordination Committee, the Council of ministers and the East African Court of Justice. Attention was also directed to legal officers of all these organs since there are significantly involved in the elaboration of different acts and decisions of the community.

[89]In the matter of a request by the Council of Ministers of the East African Community for an Advisory opinion, Application N°1 of 2008, p.37.

[90]A. Georges L. Romme, *Unanimity Rule and Organisational Decision Making: A simulation Model,* in *Organisation Science*, Vol.15, N°6, November-December 2004, p.707.

Community were not given any effects because of the veto power opposed by a single Partner State playing around its individual interests without considering the general ones. As a matter of fact, EALA bills can lose their meaning through absence of consent of one Head of State who opts not to assent to them, therefore, affecting the management of the sector which was to be regulated. To sum up, "in some instances, Partner State exhibit proclivity to cooperate on issues lacking regional consensus".[91]

After having understood the elements surrounding the concept "consensus" in the EAC, a question that arises is to understand the reasons why EAC Partner States stick on this system as a decision-making mode despite its negative implications on the integration process. In effect, this is a clear manifestation of the reluctance the EAC Partner States to surrender some of their sovereign rights to the community organs. The application of consensus as rule of unanimity[92] in the international relations of States is a clear manifestation of the absolute conception of state sovereignty.[93] Accepting another voting system other than consensus in the EAC main organs would take out some of their sovereign rights for the benefit of the Community. As explained by some of our respondents, most of the decisions where consensus is not obtained concern sensitive matters which directly affect Partner States' personal interests.

The situation is different in the EU. As discussed in the 3rd chapter, the European Union has the merit of finding an alternative and appeasing solution to the contested consensus among scholars. In its early stages of existence, the EU was using unanimity[94] and consensus as decision-making system until some time when the qualified majority vote was introduced as a response to all the problems that were caused by this system. In the first years of its application in the EU, this vote consisted of a triple combination of thresholds of weighted votes, the number of Members States and the Percentage of

[91]Sebastiano Rwengabo*, Consensus and the Future of the East African Community*, ACODE Policy Brief EAC-Series 36, Kampala, 2016, p.9.

[92] We should keep in mind that in the EAC's practice, Consensus is equivalent to Unanimity.

[93] Philippe Sands Q.C. and Pierre Kein, *Bowett's Law of International Institutions*, 6th ed., Sweet & Maxwell, London, 2009, p.269.

[94]Rachael Wanjiku Ndungu, *Towards Expedient Integration of the EAC: Navigating the Dichotomy between Implementation of the Variable Geometry Approach Versus Adoption of the Consensus Approach*, A thesis submitted in partial fulfilment of the Requirements for Master of Laws Degree at the University of Nairobi, 2014, p. 50.

the EU population.[95] Later, in the course of the development of the EU, it was changed into a double majority consisting of the majority of Member States and the majority of the population[96] leaving aside the weighted votes. With the qualified majority vote, EU was able to avoid individual veto from its Member States which could block the implementation of its policies through the consensus.

Unlike the EAC, the EU has another merit with regards to the decision-making system. As previously discussed, even if the qualified majority vote is the most used as a voting mode,[97] it does not apply to all matters; other voting systems are foreseen in the treaties. Distinction is done in accordance with the nature and the scope of the decision to be taken. When it is about to decide on non-sensitive questions like administrative proposals, a simple majority is required.[98] For some politically sensitive matters, a unanimous decision is needed. This distinction is very important for the realisation of the integration process. In fact, it prevents the blockage of community's activities because of the absence of consensus on non-serious issues. As noted, the situation is very different in the EAC where every decision must be taken by consensus regardless to whether it is sensitive or not. This way, an issue which was not supposed to be a source of delay becomes an inhibitor due to the absence of consensus. It is worth mentioning that, unlike the EAC, consensus is not interpreted as unanimity in the EU. It is a general consent between the participants which does not necessary requires the full agreement of every participant. In fact, when deciding by consensus, there is no formal voting during plenary session; the president makes a proposal and if there is no objection to it, it is declared passed.[99]

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[95]Wim Van Aken, *Voting in the Council of the European Union: Contested Decision- Making in the EU Council of Ministers (1995-2010)*, Swedish Institute for European Policy Studies-SIEPS, Stockholm, September 2012, p.20. See also chapter Three. For recall, to pass a proposal in the council of 27 member States, a majority of 255 out of 345 weighted votes or 73, 91% of the Member States' weighted votes was required. Besides this majority, the vote had to reflect the majority of member states –that is 14 Members States out of 27- and the qualified majority had to represent 60 % of the EU 's population; See Wim Van Aken, *op.cit*. p.20.

[96]As discussed in 3rd chapter, starting from 2014, the EU engaged into a new qualified majority which combines at least 55 % of the Member States – that is 14 out of 27 Member States- and at least 65 % of the EU population.

[97]Article 16(3) of the TEU indicates that "the Council shall act by a qualified majority except where the Treaties provide otherwise".

[98] See above, chapter Three.

[99]Stephanie Novak, The opacity of consensus : Decision making in the EU Council; See https://www.theeconomyjournal.eu/texto-diario/mostrar/715479/opacidad-consenso-toma-decisiones-consejo-ue visited on 26.03.2020.

Besides the consensus, another aspect in the EAC decision-making process which needs to be underlined is the quorum required for meetings to be held. All the meetings which are organised at the community level by the community organs deciding on community issues are valid only when representatives from of all the six Partner States are present. This is clearly specified in the Rules of procedure of the organs of the community. For instance, in the case of the Summit, Rule 11 of its Rules of Procedure indicates that "the quorum of the summit shall be all members of the summit".[100] The same is stipulated in the Rules of Procedure of the Council of Ministers. Under Rule 11, it is indicated that the "Quorum of a session of the Council shall be all States representation".[101] Similarly, the Rule of Procedure of the Co-ordination Committee specifies the same clarifying that the quorum of a meeting of a co-ordination committee shall be all Partner States representation.[102] Thus, so considered in the context of the EAC, this quorum cannot be without any problem. Its effects are not far from the ones generated by the consensus. In fact, understood in the sense of all States representation, the quorum can contribute to the delay or even the blockage of the decision-making process. In practice, if a single Partner State is absent to a meeting of one of the different decisional organs of the community, this meeting ceases to be held. Otherwise, if it is held, it would lose its legitimacy and, therefore, cannot take valid decisions. For example, due to the lack of quorum caused by the absence of the Republic of Burundi, the Summit which was supposed to take place on the 30th of November 2018 was postponed.[103] Looking at the importance of the issues which were to be discussed in this meeting, it would not be a mistake to state that the postponement of this meeting caused a delay in the integration process as it was to decide on serious issues. In fact, the summit was scheduled to assent:

> "to various Bills passed by the East Legislative Assembly, namely: the EAC Polythen Materials Control Bill, 2016; the Administration of the East African Court of Justice Bill,

[100] Rule 11 of the Rules of Procedure for the Summit of the Heads of States of Government.
[101] Rule 11 of the Rules of Procedure for the Council of Ministers of the East African Community.
[102] Rule 12 (1) of the Rules of Procedure for the Co-ordination Committee of the East African Community.
[103] EAC Press Release, 20th Ordinary Meeting of the EAC Heads of State Postponed to a later date, see https://www.eac.int/press-releases/1301-20th-ordinary-meeting-of-the-eac-heads-of-state-postponed-to-a-later-date , visited on 2nd January 2019.

2018; the EAC Monetary Institute Bill, 2018, and; the EAC Customs Management (Amendment) Bill, 2018".[104]

Unlike the EAC, the EU has adopted a different approach. In fact, in this community, the quorum in its different institutions does not require the representation of all Member States. For instance, the presence of two thirds of the members of the European Council is required to enable the European Council to vote.[105] In the Council, only the presence of the majority of the members of the council who are entitled to vote is needed.[106] Certainly, within the EU, a single Member State cannot play around its veto and block the Union organs' activities using its absence to the meetings.

To sum up, all the aspects developed under this section show clearly that Partner States are reluctant to surrender some of their sovereign rights to the Community organs. However, the East African Court of Justice had directed the Partner States that this is not in the spirit of the objectives of the EAC Treaty. In fact, in the famous Anyang'o Nyong'o case, it indicated that "by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the community and its organs albeit in limited areas to enable them their role".[107] It also worth mentioning that, considering these two communities - the European Union and the East African Community-, the concept of consensus may have two different meanings. On one side, it might mean unanimity whereas on the other side, it does not.

4.2.1.2. The democratic life in the EAC

The democratic life of a society can be defined through the involvement of its people in the decision-making process. In its real sense, the word "democracy" comes from Greek and is made of two words namely "*demos*" meaning people, and *kratein* meaning to

[104]EAC Press Release, 20th Ordinary Meeting of the EAC Heads of State Postponed to a later date, see https://www.eac.int/press-releases/1301-20th-ordinary-meeting-of-the-eac-heads-of-state-postponed-to-a-later-date , visited on 2nd January 2019.
[105] Article 6 (3) of the Rules of Procedure of the European Council.
[106] Article 11(6) of the Rules of Procedure of the Council.
[107] Peter Anyang'o Nyong'o and 10 others Vs the Attorney General of Kenya and others, Ref No. 1 of 2006, p.44.

govern, to rule.[108] Literally, this concept of democracy means "the government of the people or the government of the majority".[109] Concretely, democracy implies that decisions are made by the people in respect of the will of the majority. In the EAC, one can distinguish two main periods of this community's democratic life. In fact, whereas the Treaty establishing the defunct Community of 1967 (EACI)[110] did not mention the principle of democracy as one of the principles guiding its functioning, the Treaty for the establishment of the revived community (EACII) of 1999 made it as both fundamental and operational principle. According to article 6, "the fundamental principles that govern the achievement of the objectives of the Community by the Partner shall include: […] (d) good governance including adherence to the principle of democracy, […]".[111] On the other side, article 7 defining the operational principles the Treaty insists that "Partner States undertake to abide by the principle of good governance, including adherence to the principle of democracy, […]".[112] At this point, some questions as regards to how this principle is observed in the East African Community appear. In other word, is the will of East African citizen observed? In which way the East African Citizen participate in the EAC decision-making process? Is this participation reasonably enough to affirm that the democratic legitimacy is ensured? Below are some ideas that can help to answer to these questions.

Firstly, the representative organ of the EAC Citizens – the East African Legislative Assembly- lacks its legislative legitimacy. Looking at its nature and its attributions as a legislative organ, the representation of the EAC citizens through this organ is visibly artificial and does not meet all the prerequisites of a parliament. Not only are its members not directly elected by the EAC people, but also, they are not even elected among the already existing and elected members of national parliaments to acquire certain legitimacy. The EAC Treaty is very clear on this. Article 50 (1) indicates that they are elected by national assembly of each the Partner States "not among its members" […] "in accordance with such procedure as the National Assembly of each Partner State may

[108]Konrad-Adenauer-Stifftung, *Concepts and Principles of Democratic Governance and Accountability*, published under the project: "*Action for Strengthening Good Governance and Accountability in Uganda*" by the Uganda Office of the Konrad, p.2.
[109]*Ibidem.*
[110]The defunct community was established by the Treaty for the East-African Co-operation of 1967.
[111] Article 6 of the Treaty for the Establishment of the East African Community.
[112] Article 7 of the Treaty for the Establishment of the East African Community.

determine."[113] As previously discussed, the absence of legitimacy of the Assembly was at the centre of the discussion in the Laeken Summit of 2001, a summit that lightened the attempt to the constitution of the Europe in 2004.

Secondly, the EAC Treaty does not define the nature of the democracy it refers to. Unlike the EU, the EAC Treaty limits itself by considering democracy as one of its fundamental and operational principles without indicating what kind of democracy it refers to. The situation is different in the case the EU. Certainly, the TEU clarifies that the European Union is founded on a representative and participatory democracy. Under the representative democracy, the TEU distinguishes two ways of the representation of the EU citizens: through Member States and members of the Parliament. According to article 10 (2) "citizens are directly represented at Union level in the European Union". Additionally, the representation of the Member States to the European Union institutions finds its legitimacy from the EU Citizens. Indeed, as article 10 (2) of the TEU indicates "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens".[114] Concretely, under the representative democracy, citizens can elect or remove those who govern them. Unlike the EU, the EAC´s representative democracy seems to refer only to the representatives at the EALA. Thus, the EAC Treaty does not refer to representatives of the Partner States in the EAC Institutions and therefore does not indicate that they are accountable to their citizens. Under the participatory democracy, article 11 (1) of the TEU indicated the place that is given to citizens and representative associations to publicly exchange their views on the Union's action.

Thirdly, the people-centered principle enshrined in the EAC Treaty is not clearly defined with regard to how it should be implemented. As previously explained, not only is democracy posed as a principle of the EAC, but also through the so-called "people-centred" principle under article 7(1) (a), the EAC Treaty intends to insist on the importance of the people in the community's decision-making process. In other words, theoretically the community is owned by the EAC citizens who have to decide its future.

[113] Article 50(1) of the Treaty for the Establishment of the East African Community
[114] Article 10 (2) of the Treaty on the European Union.

Decisions of the Community at its different levels are to be taken at the satisfaction of the people whose opinions have to be considered. As Protas and Theophil indicate "the Community may be made people centred through how its established organs such as the Summit, the Council, East African Legislative Assembly (EALA) and EACJ operate".[115] In this regard, the EAC Treaty indicates how EAC citizens can be involved or consulted through these organs. For instance, article 127(1) (a) and (b) indicates that, Partner States undertook to:

> "a) promote a continuous dialogue with the private sector and civil society a t the national level and at that of the Community to help create an improved business environment for the implementation of agreed decisions in all economic sectors; and
> b) Provide opportunities for entrepreneurs to participate actively in improving the policies and activities of the institutions of the Community that affect them so as to increase their confidence in policy reforms and raise the productivity and lower the costs of the entrepreneurs".[116]

The Treaty also directs the Secretary General to provide for a forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.[117] The respondents did mention that the consultations and dialogues are not done in a way that is sufficient to conclude that east African citizens are involved in the elaboration of the decisions of the Community.

In contrast, the EU has developed another approach. As described earlier in the previous chapter, it has a merit of allowing its citizens to give impetus to matters related to the Union in the so-called European citizens' initiative. In fact, article 11(4) gives to not less than one million of EU citizens who are nationals of a significant number of Member States to take initiative by inviting the commission to submit a proposal when they consider that a legal act is necessary for the purpose of the implementation of the treaties. Despite the importance of this practice in the creating venue for people to have a say in the businesses of the Community, it does not exist in

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[115]Petro Protas and Theophil Romward, *Reflections on "People Centered Principle" in the East African Community: The Current Legal Controversy",* in *Eastern African Law Review*, Vol 42, Issue 2, p.5.
[116] Article 127(1) a et b of the Treaty for the Establishment of the East African Community.
[117] Article 127 (4) of the Treaty for the Establishment of the East African Community.

the case of the EAC. On the other side however, even in the European Union, this process should not be overstated if one considers its minor practical significance.

4.2.2. Aspects of State Sovereignty through East African Community organs

The East African Community is currently composed with 7 organs namely, the Summit, the Council, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.[118] Depending on their powers and structures, some of these organs suffer from the Partner States' sovereign character. This section will focus on the Summit, the Council, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat. An analysis of the nature of the East African Community will follow.

4.2.2.1. The Summit

The Summit is one of the organs of the EAC established under article 9 of the Treaty for the Establishment of the East African Community. The interference of the Summit in the activities of the Community can be seen through several aspects.

First, even if it operates at the Community level, the Summit is governmental in nature and this affects the Community's activities. In fact, it consists of the Heads of States of the States[119] who are at the centre of the executives of the respective Partner States. Furthermore, as Stefan Reith and Moritz Bolz describe it, the summit "is at the heart of the EAC".[120] Therefore, it becomes difficult for the Summit to conciliate the two positions, the one at the national level on one hand and the one at the Community level on the other hand. As the highest organ of the Community with members who are at the highest level in the respective Partner States, it becomes difficult for the Summit to release some the sovereign rights to the community level specifically when national interests are put on the balance at the community level. Practically, as it appeared from

[118] Article 9 of the Treaty for the Establishment of the East African Community.
[119] Article 10 (1) of the Treaty for the Establishment of the East African Community.
[120] Stefan Reith and Moritz Bolz, *The East African Community: Regional Integration between Aspiration and Reality,* in *KAS International Reports*, 2011, p.96.

conversations with different EAC stakeholders, the summit uses its powers to control all the activities of the Community. The Heads of States tend to protect the interests of their States in all their action. As a matter of fact, very often, they block different activities undertaken by other organs if they note that they are against their individual interests. For instance, in its role as a reviewer of the Council of Ministers reports, the Summit can approve or disapprove them.[121] Similarly, in practice the Summit also interferes in the East African Court of justice's activities. The debate which occurred in the Summit's meeting that was held on 30 November 2007 after the Court has delivered a decision in the famous *Anyang'o Nyong'o* case[122] is a real example of this interference as developed later.[123]

Secondly, the hierarchy of the EAC organs is built in way that the summit seems to be at the top of all organs, controlling or approving, therefore, most of their activities. Activities of the East African Legislative Assembly are sanctioned by an assent to all the bills it has passed by the summit.[124] The assent to bills by the summit is not a big issue; the fundamental problem in this regard is that, for a bill to pass and become an act of the Community, all the six (6) head of states must assent to it. If a Head of State withholds assent to a Bill, the Bill lapses.[125] This is another way that was established by EAC Partner States to keep their sovereign power in some areas where they feel that they cannot give competence to the community. This way, if a Heads of State feels that a bill that has passed in the EALA is in contradiction with the interests of his country; he blocks it by refusing to assent.

In practice, this research revealed that important projects undertaken at the community level have failed for the only reason that they missed an assent from one Head of State who considers that some of the sovereign rights of his country would be limited if the competence is left to the community organs. For instance, in 2016, Kenya refused to

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[121] "The Summit shall consider the annual progress reports and such other reports submitted to it by the Council as provided for by this Treaty", see article 11 (2) of the Treaty for the Establishment of the East African Community.

[122] *Peter Anyang' Nyong'o& 10 others vs. The Attorney General of Kenya & 5 others,* Reference No. 1 of 2006

[123] See bellow, pp. 262-267

[124] Article 63 (1) of the Treaty for the Establishment of the East Africa Community; It indicates that "The heads of State may assent to or withhold to a Bill of the Assembly"

[125] Article 63 (4) of the Treaty for the Establishment of the East African Community.

assent to the EAC Polythene Materials Bill; a Bill that was aiming at providing an East African Community legal framework on the environmental management through the prohibition of manufacturing, sale, importation and the use of polythene materials. To the question of the reason behind the Kenya's refusal to assent to this bill, our respondents disclosed that Kenya understood the Bill as a tool to ban some of its industries considering the Kenyan's advanced stage in the sector of industrialisation. Similarly, in the 3rd EALA, Tanzania withheld assent to 3 important bills namely the East African Community Cultural and Creative industries Bill 2015, the East African Community Electronic Transactions Bill 2015 and the East African Community Forests Management and Protection Bill 2015. All these Bills represent a certain importance with regard to the realisation of the integration process if one considers the areas they were made to legislate. It is quite unfair that a single Partner State can block such important projects just for the sake of its individual interests. While analysing Tanzania's behaviour, specifically in blocking important projects, some observers have even criticised it as lacking the commitment to the integration process.[126]

Unlike the EAC, the EU has adopted another approach with regard to the EU acts. It empowered the president of the European Council – who is structurally not even among the heads of state as explained below - to sign them. As article 15 of the Rules of procedure of the European Council stipulates:

> "the text of the acts adopted by the Council and that of the acts adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure shall be signed by the President in office at the time of their adoption and by the Secretary-General".[127]

Through this provision, EU Partner States have the merit of understanding the need of surrendering the right to sign bills to a Union representative, the president of the European Council. Not only does this solution avoid delays of the process, but also it prevents from blocking strategies by unwilling Partner States which may play around this final signature hiding behind their personal interests. Indeed, the signature by the

[126] Open Society Foundations, *op.cit.*, p. 44.
[127] Article 15 of the Rules of procedure of the European Council, December 2018.

President of the European Council does not even imply assent, it is simply a symbol of recognition that an act is duly adopted and therefore accepted. In fact, he does not have the right to withhold the act.

Thirdly, another aspect that calls for more attention as regard to the Summit's intervention in the activities of the Community is its decision-making process and mode. In fact, as Rule 11 of the Rules of Procedure for the Summit of the Heads of State or Government indicates, "the quorum of a Summit shall be all members of the Summit". The quorum of one hundred per cent is another expression of the absence of the willingness by EAC Partner States to release some of their sovereign rights. For instance, if a Head of one state or government is absent to the summit, the meeting cannot be held or take valid decisions. This is what happened in November 2018 when the Summit failed to meet the quorum in its 20th ordinary meeting because of the absence of the Heads of State representing the Republic of Burundi. A press release by the EAC Secretariat announced the postponement of the 20th ordinary Summit to a later date by the Heads of States who were present at the venue meeting in Arusha[128] on the 30th November 2018 due to the lack of quorum caused by the absence of the Republic of Burundi.[129] In its early stages, the EU experienced such kind of blockages when in 1965 did the empty chair in the Council of Ministers. This was against the Commission´s proposal for a supranational Common Agricultural Policy.[130] However, this did not last long as after some few months a compromise was found.

Beside the quorum, decisions of the Summit are made by consensus.[131] Just like the quorum, one of the six (6) Heads of States can oppose his veto when deciding on a specific matter in the summit's meeting. Thus, as a community organ that discusses

[128]Five Partner States were present: " President Yoweri Museveni of Uganda; President Uhuru Kenyatta of Kenya; President Dr. John Pombe Magufuri of Tanzania; Hon. Paul Moyom Akec, Ministry of Trade, Industry and EAC Affairs representing South Soudanese President Salva Kiir Mayardit , and; Hon. Dr. Richard Sezibera Ministers of Foreign Affairs and International Cooperation, representing Rwandan President Paul Kagame". See EAC Secretariat, *The 20th Ordinary Meeting of the EAC Heads of State Postponed to a later date*, Press Release, *Arusha, Tanzania, 30th November, 2018 at* https://www.eac.int/press-releases/ .

[129] EAC Secretariat, *The 20th Ordinary Meeting of the EAC Heads of State Postponed to a later date*, Press Release, *Arusha, Tanzania, 30th November, 2018,* https://www.eac.int/press-releases/ .

[130] N. Piers Ludlow, *Challenging French Leadership in Europe: German, Italy, the Netherlands and Outbreak of the Empty Chair Crisis of 1965-1966*, in *Contemporary European History*, Vol. 8, No. 2, 1999, p.231

[131]Rule 13 of the Rules of Procedure for the Summit of the Heads of State or Government of the East African Community

business submitted to it by the council and any other matter which may have a bearing on the Community,[132] the Summit can be blocked in its activities by unwilling Heads of State who would feel that their interests are in danger. In fact, as explained earlier, the EAC stakeholders interpret the term "consensus" as "unanimity". Unlike the EAC, the consensus in the EU Council does not mean unanimity. It rather means a common understanding on an issue without considering that each Head of State has the right to oppose his veto.

In the EU, the intergovernmental character of the European Council is weakened or diluted by its administration. In fact, despite its composition with head of states or governments, the presidency of the Summit is in the hands of an additional person who is not at the Head of any state or government. This contributes significantly for the independence of this institution. A different organisational aspect was adopted in the case of the East African Community. In this community, the chairmanship of the Summit is done on a rotational basis among its members for a one-year period. With regard to the quorum and the voting system, the European Council has the merit of limiting its powers through the avoidance of the veto of every head of State or government. In fact, the presence of two thirds of the members of the European Council is required to unable the European Council vote.[133] On the other hand, its decisions are made by consensus.[134] It is important to note that the consensus in the European context is understood and applied differently with the one in the EAC context. In fact, in the EU, it is weakened by the fact that the quorum in the European Council does not require the representation of all States. This implies that it will be easy to reach the consensus as it will not require all states participation. Furthermore, unlike the EAC, in the EU, consensus does not mean Unanimity or everyone's consent. In contrast, looking at the practice of the EU institutions in the decision-making process, it is understood as a cooperative mechanism where members agree on a decision which benefits more the whole group. In other words, they decide for the interest of the whole group. They do

[132] Natujwa Umbertina Mvungi, *Challenges in the Implementation of the East African Community Common Market Protocol,* Verlag der Gesellschaft fur Unternehmensrechnung und Controlling m.b.H. (GUC m.b.H), Chemnitz,2011, p.138.
[133] Article 6 (3) of the Rules of the European Council.
[134] Article 6(1) of the Rules of the European Council.

not need to vote in the plenary sessions, if no one objects on a proposal, it is therefore declared to have passed.

Lastly, some provisions of the Treaty for the Establishment of the East African Community empower the Summit to make laws. For instance, an implicit interpretation of article 11(6) of the Treaty would lead to the conclusion that that the Summit can make laws. It reads as follows "an Act of the Community may provide for the delegation of any powers, including legislative powers, conferred on the Summit by this Treaty or by any Act of the Community, to the Council or the Secretary General".[135] This provision makes it very clear that the summit makes laws at some points. Likewise, article 11 (8) of the same Treaty indicates that the Summit can make rules or orders to be published in the Gazette and that are enforceable on the date of their publication. By allowing an executive organ to make law, EAC Partner States have expressed their unwillingness to surrender some sovereign rights to the community level in accordance with the regional integration spirit. In contrast, the European Council does not have any legislative power. Article 15(1) of the Treaty on the European Union clarifies that "it [the European Council] shall not exercise legislative functions". Its first sentence limits the role of the European Council to "the definition of the general political directions and priorities thereof".

In summary, unlike the Summit in the case of the East African Community, the European Council does not have decision-making powers. As Olivier Dubos asserts, "the refusal to confer such a legislative function simply means that it has no decision-making powers".[136] At this point, I do support the European Strategy. Giving legislative powers to an executive organ composed by personalities with plenipotentiaries to decide on behalf of their respective Countries such the Summit/European Council would undermine the integration process.

4.2.2.2. The Council

[135] Article 11(6) of the Treaty for the Establishment of the East African Community.

[136] Olivier Dubos, *The Different Incarnations of the Member States in Legal Harmonisation Processes: A Comparative Study of the EAC, EU, and OHADA*, in Johannes et ali, *Harmonisation of Laws in the East African Community: The state of Affairs with Comparative Insights form the European Union and other Regional Economic Communities*, TGCL Series 5, LawAfrica, Nairobi, 2018, p. 99.

The Council of Ministers – hereafter named the Council - is another organ established under article 9 of the Treaty for the Establishment of the East African Community. The interference of the EAC Partner States at the community level through this organ is noticeable in different aspects.

Firstly, it starts early from its composition and structure. The EAC Council of Ministers consists of "ministers responsible for East African Community affairs of each Partner State, such other minister of the Partner States as each Partner States may determine and the Attorney General of each Partner State".[137] Thus, like its sister the Council of Ministers of the European Union, the Council of Ministers of the East African Community is composed with officials who belong to the Executive of the Partner States in nature and who are influential in their respective governments since they represent Partner States in the Community at the ministerial level. This leads to the situation where every minister works for the satisfaction of his country whenever some of its interests are put on the balance at the community level. It is also another sign indicating how Partner States still want to keep their hands in the community affairs, refusing to release some of their sovereign rights to the community to the community organs.

Secondly, the Council's powers can also be a bridge for Partner States to retain their sovereign powers. The Council of Ministers is not only is "the policy organ of the Community", but it also "monitors and keeps under constant review the implementation of the programmes of the community and ensures the proper functioning and development of the Community".[138] For the purpose of the implementation of this mandate, this organ is vested with many powers. Kaahwa, the former Counsel to the Community summarised the keys functions of the Council into four categories as follows:

> "(a) **advisory roles** *vis-à-vis* all other organs and institutions e.g. to the Summit with regard to the salaries and other terms and conditions of service of the Judges of the Court and Members of the Assembly; the appointment of Deputy Secretaries General of the

[137] Article 13 of the Treaty for the Establishment of the East African Community.
[138] Article 14 (2) of the Treaty for the Establishment of the East African Community Treaty.

Community; and expansion of country membership of the Community (art Articles 3(6), 25(5), 51(2) and 68(2).

(b) **binding supervisory roles** in the sense that *"Subject to the provisions of the Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.";(* Article 16).

(c**) Power to establish institutions** such as those necessary to administer the Common Market and those like specific sectoral councils and sectoral committees (Article 14(3)(i)) and (Article 76(3)); and

(d**) Power to consider and approve policy rationalization and harmonization undertakings** in the various areas of co-operation (form eleven to chapter Twenty-Seven)".[139]

As it can be noted, unlike the Council of Ministers of the European Union which has the power to legislate together with the European Parliament, the Council of ministers in the East African Community does not have such powers. Its intervention in the enactment of laws is limited to the power to initiate and submit bills to the sole legislative organ of the community, the East African Legislative Assembly.[140] At this point, comparatively with the EU, the EAC has the merit of trying not to interfere in the EALA's legislative role. However, behind the power to initiate and submit Bills to the EALA is hidden sovereign character of the Partner States. In fact, according to the EAC Treaty, the initiation of bills belongs also to the members of the EALA who are, therefore, entitled "to introduce any Bill in the Assembly".[141] Nevertheless, this prerogative to the EALA MPs was limited by the Council to non-sensitive matters which do not reflect the Partner States' sovereign character. In a report submitted to the Council in 2004, the EALA reported the existence of pending Private Members Bills as they were under reading and, thus, in process of being adopted. The Bills were namely the East African Community Trade Negotiations Bill (2004), the East African Community Budget Bill, the East African Immunities and Privileges Bill and the Inter-University

[139] Wilbert T.K. Kaahwa, *The institutional Framework of the EAC*, Emmanuel Ugirashebuja et alii, *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Leiden/Boston, 2017, p. 58, This book can be found online under https://www.jstor.org/stable/10.1163/j.ctt1w76vj2, visited on 28/01/2019.

[140] Article 14 (3)(b) of the Treaty for the Establishment of the East African Community.

[141] Article 59(1) of the Treaty for the Establishment of the East African Community.

Council for East Africa Bill.[142] At its 9th meeting held on the 24th November 2004, in response to this report, "the Council expressed the view that enactment of legislations by the EALA should take into account the policy interest of the Community and the Partner States".[143] It therefore decided that "policy oriented bills, such as those that have implications on the Partner States' sovereign commitments and financial issues, ought to be initiated and submitted to the legislative Assembly by the Council under article 14.3 (b) of the Treaty as opposed to being proposed by way of private Member's motions under Article 59 of the Treaty".[144] Consequently, the council decided to suspend the four Private Members Bills which were pending so that it can take responsibility of their submission to the Assembly. Through the sectoral council meeting held on 13th to 16Th September 2005, the Council went further by deciding to withdraw some of the bills from the Assembly in order to make them in the sense of the protocol rather than legislation in the way of acts of the community.[145] In response to the author of these bills – Members of the EALA- who challenged the interference of the Council in the work of the Assembly in *Calist Andrew Mwatela case,*[146] the East African Court of Justice held that it (the Council) had no powers to take over the Bills. The most crucial part of the judgement reads as follows:

> "Accordingly, we see no basis, upon which the view that the four Bills had been taken over by the Council, can be supported because the Treaty has not bestowed any power on the Council to take over Bills without observance of the Assembly Rules and we hold that the only lawful way of withdrawing Bills which have become property of the Assembly, as the four Bills had become, is under Rule 34 of the Assembly Rules which provides for a Motion to be introduced in the Assembly for that purpose".[147]

On the question of knowing whether the decisions of the Council are binding on the Assembly, the EACJ made it clear that the "decisions of the Council have no place in

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[142] EAC Secretariat, *Report on the 9th Meeting of the Council of Ministers*, Ref: EAC/CM/09/2004, AICC, Arusha, Tanzania, November 21st -24th, 2004, p. 159

[143]EAC Secretariat, *Report on the 9th Meeting of the Council of Ministers*, Ref: EAC/CM/09/2004, AICC, Arusha, Tanzania, November 21st -24th, 2004, p. 159.

[144] EAC Secretariat, *Report on the 9th Meeting of the Council of Ministers*, Ref: EAC/CM/09/2004, AICC, Arusha, Tanzania, November 21st -24th, 2004, p. 159.

[145] The process for protocols to become effective is very long more than an Act of the EALA as they require the ratification from Partner States.

[146] Calist Mwatela and 2 others Vs East African Community, Ref no. 1 of 2005.

[147] Calist Mwatela and 2 others Vs East African Community, Ref no. 1 of 2005, p. 18.

areas of jurisdiction of the Summit, Court and the Assembly".[148] The observation is that this behaviour by the council towards the work of EALA is a real manifestation of sovereign character of EAC Partner States. They feel as if there are untouchable areas where the legislation at the community level is not possible without their intervention because they affect their sovereignty. The Council's attitude in this matter also shows how this organ is a true executive arm that was put in place by Partner States to safeguard their sovereignty so that it cannot be lost for the benefit of the community. Unlike the EAC, in the EU the initiation of laws is the monopoly of the Commission. In fact, as article 17 (2) of the TEU indicates "the union legislative acts may be adopted only on the basis of a Commission proposal except where Treaties provide otherwise".[149] It is also the Commission that supervises the implementation of the EU law by the Member States.[150] Thus, these important roles are attributed to an independent body which carries out its activities in complete independence from any government or other institution, body, office or entity.[151] Therefore, this contributes to the avoidance of the interference of the executive bodies in the legislative process of the community acts.

Thirdly, in addition to this, some of the EAC Council of Ministers' powers would qualify this organ as having legislative features even if they cannot be compared with the ones of the Council of Ministers in the EU which co-legislates together with the Parliament. In fact, in its binding supervisory role, under article 16 of the EAC Treaty, it can make regulations, directives and decisions that are binding on the Partner States, all other organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdiction.[152] Article 11(6) of the Treaty also provides that powers conferred on the Summit, including legislative powers may be delegated to the council by an act of the community.[153] In this regard, the Council of Ministers can be qualified as a lawmaker. It is important to compare the legislative powers conferred to the Council in the EAC and the ones conferred to the Council in the EU. In fact, powers

[148] Calist Mwatela and 2 others Vs East African Community, Ref no. 1 of 2005, p.21.
[149] Article 17(2) of the Treaty on the European Union.
[150] Article 17(1) of the Treaty on the European Union.
[151] Article 17(3) of the Treaty on the European Union.
[152] Article 16 of the Treaty for the Establishment of the East African Community.
[153] Article 11(6) of the Treaty for the Establishment of the East African Community.

that are fully conferred to the council in the EU seem to be weakened by the intervention of the EU Parliament at some aspects. For instance, as discussed earlier, under the ordinary legislative procedure, regulations, directives or decisions on the proposal from the commission are made in a joint adoption by the European Parliament and the Council.[154] Unlike the EU Council, similar instruments – regulations, directives or decisions - in the EAC are made unilaterally by the council without the intervention of the Parliament. At this point, EAC Partner States have shown their reluctance to surrender their sovereign power to a more legitimate community organ - the EALA - by giving more powers to a more executive and intergovernmental organ, the Council. On the other side, under "the special legislative procedure", either the EU parliament gives the consent ("consent procedure") or can be consulted ("consultative procedure") before the Council can legislate on something.[155] Such a process does not exist in the EAC. In the areas where the EAC Council of Ministers is entitled to legislate, it does not consult the Parliament.

Fourthly, the decision-making process in the EAC Council of ministers comprises significant elements showing the presence of the Partner States' sovereign character. The quorum and the deciding majority in the Council are the core determinants of the interference of the Partner States in community affairs under the umbrella of Sovereignty. They all reflect sovereign features of the Partner States. Indeed, rule 11 of the EAC Council of Ministers rules of procedure indicates that the quorum for participation in the council's meeting "shall be all Partner States representation". This provision shows clearly how EAC Partner States has created room for every Partner State to keep a say in the Council's decision-making process. In the absence of one of them, a meeting cannot be legally constituted. In considering this quorum, the Partner States showed their unwillingness to cede some of their sovereign rights to the community organs. This way, they feel that whenever the council meets, every country's interests should be represented. Besides the quorum, the deciding majority in the council is also a clear manifestation of the Partner States' sovereign character. According to Article 15 (4) of the Treaty, decisions of the Council are to be made by

[154] Article 289 (1) of the Treaty on the functioning of the European Union.
[155] See chapter 3.

consensus. This provision is reiterated by the rules of procedures of the council of Ministers. Specifically, Rule 13 of the Rules of procedure of the Council of Ministers indicates that "the decisions of the Council shall, subject to the Protocol on Decision Making, be taken by consensus".[156] Clearly, if it happens that the quorum is obtained, it is not guaranteed that consensus would be obtained in the Council's meetings. In fact, every Partner State has veto power in the EAC council's meetings. An opposition of one Partner State on a proposal immediately lead to its failure. As previously explained, in the EAC stakeholder's understanding, consensus means unanimity[157] despites the clear interpretation by the East African Court of Justice that:

> "consensus does not mean unanimity either from ordinary English meanings or from legal dictionaries and it does not imply unanimity when used in the Treaty, the Protocol on Decision Making or the Rules of Procedure of the various organs".[158]

It is obvious that both the quorum and the consensus affect the integration process in the East African Community. In practice, unwilling Partner States can play on their veto power to render the process impossible whenever they feel that their personal interests are in danger or are going to be in the Community's hands.

Unlike the EAC, this matter of consensus in the council has been solved in the case of the EU. The consensus was replaced with the qualified majority vote so that a single country cannot block the whole process using its veto.

4.2.2.3. The East African Court of Justice

The relationship between State Sovereignty and regional integration can also be assessed through regional court's activities. Specifically, its independence will depend on the Partner/Member States' willingness to surrender their sovereign rights to the judiciary of the community. Under this section, we will analyse the following points: the

[156] Rule 13 of the Rules of procedure of the Council of Ministers

[157] This result from our observation from the field through different interviews we conducted the key informants of the East African Community

[158] In the matter of a request by the council of ministers of the East African Community for an advisory opinion, Advisory Opinion to the Council of Ministers, Advisory opinion N° 1, 2010, p.37.

appointment of the judges of the East African Court of Justice, the application or implementation of the preliminary reference principle and the establishment of Parallel Judicial bodies to the East African Court of Justice. I will start the discussion with an overview on the role of the Court.

4.2.2.3.1. Overview on the role of the Court

According to article 23 of the Treaty for the Establishment of the East African Community, the East African Court of Justice (EACJ) is a judicial body which ensures the adherence to law in the interpretation and application of and compliance with the Treaty. This role is reiterated by article 27 of the same treaty when it stipulates that "the court shall initially have jurisdiction over the interpretation and application of this Treaty". Concretely, the focus of the role of the Court is the "interpretation" and "application" of the EAC Treaty. However, despite the importance of these two terminologies – interpretation and application -, as they summarize the functions of the Court, the EAC Treaty did not define them. With reference to a preliminary ruling made by the High Court of the Republic of Uganda in the proceedings between the Attorney General and Tom Kyahurwenda,[159] the EACJ tried to distinguish them. According to this judicial organ, "whereas "interpretation" is the preserve of the EACJ, the same is not necessarily the case for the application of the Treaty by national courts to cases before them".[160] In the view of the Court "the national courts seek interpretation from this Court in order to be empowered to apply the Treaty provisions to the facts of the case(s) before them".[161] This way, the EACJ clarified that whereas the application of the Treaty can be also done by national courts, the interpretation cannot be made by any other court except the EACJ. In the view of the court, if the interpretation could be given to national courts, this would defeat the purpose of the preliminary reference mechanisms established under article 34 of the Treaty.[162]

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[159] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda, Case stated N°1 of 2014.

[160] *Idem*, para 51.

[161] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda, Case stated N°1 of 2014; para. 52.

[162] *Idem*,para 51..

4.2.2.3.2. Influence of the Partner States on the Court's activities as consequence of the system for the appointment of judges

Established by the Treaty for the Establishment of the East African Community, the East African Court of Justice is a judicial body of the community.[163] The interference of Partner States in the Court's business starts with the appointment of its judges.

Indeed, article 24 (1) of the Treaty indicates that judges of the EACJ are appointed by the Summit among persons recommended by the Partner States. Here we shall keep in mind that the Summit is a purely executive organ of the Community composed by the Heads of States and governments. Likewise, in contrast to the practice of the Court of Justice of the European Union where President of the Court is elected by the judges themselves, the president and the Vice-President of the East African Court of Justice are designed by the Summit among the judges.[164] The involvement of an executive body such as the Summit has significant impact on the independence of the Court. Specifically, this research has shown that when a case touching Partner States' personal interests is filed before this court, the Summit tends to react with an intimidating language towards the court's decision. Such a situation was seen after the decision of the Court *on Anyang'o Nyong' o case.*[165] In this case, Peter Anyang'o Nyong'o and his colleagues contested the election of the nine (9) representatives of the Republic of Kenya to the EALA arguing a violation of Article 50 of the Treaty by the Kenyan National Assembly in the process of their election.[166] In an interim injunction held on 27th November 2006, the EACJ restrained the Attorney General of Kenya and EALA "from recognising the then elected persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference".[167] The summit was unhappy with this decision. Specifically, through its President Mwai Kibaki, Kenya considered the court's interim decision as interference in a domestic political

[163] Article 23 (1) of the Treaty for the Establishment of the East African Community.
[164] Article 24 (4) of the Treaty for the Establishment of the East African Community.
[165] *Peter Anyang' Nyong'o& 10 others vs. The Attorney General of Kenya & 5 others,* Reference No. 1 of 2006.
[166] *Peter Anyang' Nyong'o& 10 others vs The Attorney General of Kenya & 5 others,* Reference No 1 of 2006, p.2
[167] *Peter Anyang' Nyong'o& 10 others vs The Attorney General of Kenya & 5 others,* Reference No 1 of 2006, Interim order of 27th November 2006, p.10.

issue and, therefore, a violation of their sovereignty. Consequently, in his statement in the 8th Summit of the EAC, President Kibaki made strong criticisms against the ruling of the court in Anyang'o Nyong'o case as it appears in the Summit report. The report reads as follows:

> "Regarding the ruling in the East African Court of Justice Reference N°1 of 2006, the Chairperson [President Kibaki was the chairperson of the Summit] observed that while judicial independence must be observed, courts should not lose sight of wider aspirations of the integration process. In this context, he understood the need for the Community and all its organs and institutions to respect the national sovereignty of the Partner States. He observed that attempts by one organ to exceed its powers or disregard national sovereignty at this point in the integration process will undermine the Treaty and the vision of the peoples of the East Africa. He added that it is only through such respect for national sovereignty and strict observance of the Treaty's provision for each organ's powers that confidence building, and commitment will be sustained for the good of the integration process".[168]

Thus, by indicating that EAC organs and institutions have to respect national sovereignty of the Partner States, Kenya expressed his intention of not surrendering its sovereignty to the community level. This was in contradiction with the principle which was developed later in the same case by the EACJ under which this court indicated that

> "by the virtue nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role".[169]

After his statement, President Kibaki started a campaign against the EACJ seeking for a greater control over the judges.[170] Kenya increased its pressure on the Court by intimidating the two Kenyan national judges, members of the EACJ, who resolved to recuse themselves from this case in its following hearings.[171] In the public hearing on

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[168] EAC Secretariat, *Report of the 8th Summit of the EAC Heads of State (Ref EAC/SHS/08/2006)*, AICC, Arusha-Tanzania, 30th November 2006, p. 10.
[169] *Peter Anyang'o Nyong'o and 10 others vs Attorney General and others*, Ref N° 1 of 2016, para 44.
[170] Philomena Apiko, *Understanding the East African Court of Justice: The hard road to independent institutions and Human Rights jurisdictions,* European Centre for Development Policy Management (ECDPM*)*, 2017, p.12.
[171] *Idem*, p.13.

the recusal motion, Kenya went far by using severe expression like "to wash the dirty laundry" of the Kenyan judges[172] to express its intention to remove them from office.

In support to the Kenyan's reaction, the Summit reacted brutally by taking severe measures going in the sense of intimidating the EACJ. In fact, three days later after the Court's decision on the 30th of November 2006, in its joint communiqué, the Summit indicated that it:

> "Endorsed the recommendation of the Council of Ministers to reconstitute the East African Court of Justice by establishing two divisions, namely a Court of First Instance with jurisdiction as per present Article 23 of the Treaty and an Appellate Division with appellate powers over the Court of First instance,
> Directed that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty,
> Directed that a special summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard".[173]

Such a statement from an executive body is very strong and constitutes a clear interference in the work of the Court. Consequently, significant amendments occurred to comply with this statement. The Treaty for the establishment of the East African Community was amended for the first time before the end of the year on 14th December 2006.[174] In fact, in a two week period, an extra-ordinary summit was convened on 14th December 2006 with a single point on the agenda: "[c]onsideration of proposals by the council of ministers for the amendment of the treaty for the establishment of the East African Community"[175] which was preceded by an extraordinary meeting by the Council of Ministers held on 8th December to consider the directive by the 8th Summit of Heads

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[172]Karen J. Alter et alii, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences,* in *The European Journal of International Law (EJIL),* Vol.27, N°2, 2016, p.303.
[173] EAC Secretariat, *Joint Communiqué of the 8th Summit of the EAC Heads of State*, AICC, Arusha-Tanzania, 30th November 2006, p.12.
[174] See the Treaty for the Establishment for the East African Community, signed on 30th November 1999, entered into force on 7th July 2000; and amended on 14th December 2006 and on 20th August 2007. This treaty is the one that is still into force until now.
[175] EAC Secretariat, *Report on the 4th Extraordinary Summit of Heads of State (Ref EAC/SH/EX/4/2006),* Nairobi, Kenya, 14th December 2006, p.2.

of State of 30th November 2006 with regard to amendments of the EAC Treaty.[176] Referring to the speed or the short timeline this meeting of the summit was organised, one of the respondents, a former official of the East African Court of Justice[177] described how complicated the organisation of the meeting of the Summit is. According to him, the organisation of such a meeting requires too much time to get everything ready for it to be held. He, therefore, concluded that the speed used to organise this extraordinary Summit has proven how furious was the summit to break the independence of the Court.

Two most important amendments that occurred can be summarised as follow. Firstly, the court was restructured to include the First Instance Division and the Second Instance Division. Specifically, on the proposal of the Council of Ministers, the Summit decided to amend article 23 of the Treaty by:

> "a) Numbering the existing provision as paragraph 1;
> b) Inserting new paragraphs immediately after paragraph1;
> 2. The Court shall consist of a First Instance Division and an Appellate Division
> 3. The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with the Treaty".[178]

Here, the question involves what motivated the Summit to restructure the Court. It can be presumed that the Heads of States were shocked by the fact that this decision was final and could not be challenged at another level. They therefore felt the need of an appellate Division. In fact, if this division was there, the Respondents could have appealed against this decision which obviously disappointed the Summit.

Secondly, regarding the proposal of reviewing the procedure for removal of Judge from the office in order to include "all possible reasons for removal other than those provided in the treaty", the main amendments made were as follows:

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[176] EAC Secretariat, *12th Extraordinary Meeting of the Council of Ministers (Ref EAC/CM/EX/12/2006),* AICC, Arusha-Tanzania, 8th December 2006, p.1. It is also important to mention that the Summit, (either Ordinary or Extraordinary) has to be preceded by the Council of Ministers which prepared its Agenda and all the documents necessary for its realisation.

[177] He preferred to remain anonymous

[178] EAC Secretariat, *Report on the 4th Extraordinary Summit of Heads of State (Ref EAC/SH/EX/4/2006),* Nairobi, Kenya, 14th December 2006, pp.3-4.

"Article 26 of the Treaty is amended by deleting paragraph 1 and replacing it with the following new paragraph —

1. A Judge shall not be removed from office except by the Summit —

(a) for misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body:

Provided that a Judge shall only be removed from office under this subparagraph if the question of his or her removal from office has been referred to an *ad hoc* independent tribunal appointed for this purpose by the Summit and the tribunal has recommended that the Judge be removed from office for misconduct or inability to perform the functions of his or her office; or

(b) in the case of a Judge who also holds judicial office or other public office in a Partner State-

(i) is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; or

(ii) resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason;

(c) if the Judge is adjudged bankrupt under any law in force in a Partner State; or

(d) if the Judge is convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a Partner State".[179]

Through this amendment of article 26 of the Treaty, some observations can be formulated. The summit has concentrated all the powers for removal of judges in its hands by asserting that "a judge shall not be removed from office except by the Summit". This constitutes a special warning to the EACJ judges, a reminder to them that they have to work to the satisfaction of the Summit unless they want to be removed from office since it is the only one with powers to decide on their removal. Another observation is the use of vague expressions and not clearly defined. Specifically, expressions like "misconduct", "inability to perform the functions of the office for any reason", "dishonesty", "moral turpitude" - all these concepts are not defined under the EAC Treaty and can be misused to challenge a judge's activities when some of his/her work has made the Heads of State unhappy.

Certainly, this example is a clear proof of the reluctance of the EAC Partner States to surrender some of their sovereign powers to the community organs. As a judicial organ

[179] EAC Secretariat, *Report on the 4th Extraordinary Summit of Heads of State (Ref EAC/SH/EX/4/2006),* Nairobi, Kenya, 14th December 2006, pp.6-7.

of the community, the East African Court of justice needs total independence from other institutions or organs either national or regional. Otherwise, if an organ that was put in place to interpret community instruments is not given enough independence to state the law, the integration will never reach its final stage. In general, as explained in the first chapter, if a group of countries have decided to come together and set common objectives, for the sake of their achievement, they need to cede a certain authority to regional institutions. A release of this authority is, of course, concretized by an acceptance of all types of decisions made at the community level.

Unlike the EAC, this research has not found any such kind of interference the European Council in the work of the Court of Justice of the European Union.

4.2.2.3.3. Ineffectiveness of the preliminary reference procedure

Under its role of interpreting the East African Community instruments, the EACJ can deliver a preliminary ruling on the request of a national court. Specifically, article 34 of the Treaty indicates:

> "where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question".[180]

Thus, through this provision, it is made clear that, whenever national courts or Tribunals are confused with the meaning of a provision of the Treaty, they can request the EACJ to deliver an interpretative judgement of the provision. Through the expression, "if it considers that a ruling on the question is necessary to enable it to give judgement" in article 34, the framers of the Treaty established a discretionary power to national courts or tribunals to determine whether or not it is necessary to refer the question the EACJ for purpose of interpretation and application of the Treaty. However, this does not mean that they are not bound by the interpretation of the court. Indeed, in

[180] Article 34 of the Treaty for the Establishment of the East African Community.

the *Tom Kyahurwenda* case, the EACJ held that not only the EACJ's preliminary ruling "is binding on the national court or tribunal which has sought a preliminary ruling", but also it "is binding *erga omnes* (towards all)".[181] This means that "it is binding on all national courts and tribunals in all Partner States".[182]

Understood this way, preliminary rulings are of great importance. They contribute to the harmonization of the East African Community law. This is where even the significance of a preliminary ruling procedure stands. As the EACJ explains, preliminary ruling procedure "is the keystone of the arch that ensures that the Treaty retains its community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all Partner States of the EAC".[183] This makes sense. In fact, if every court or tribunal at the national level was to be given the power to interpret the community law, there would be a disparate or contrasting jurisprudence on the community issues. Therefore, the uncontrolled differences of interpretation and application of the EAC law would lead to the destabilisation of the integration process.

Having understood the meaning and the scope of the preliminary ruling procedure in the East African Community context, it is then time to understand the practice of this community in the implementation of this procedure. This research has proven that, despite its importance in the integration process, the preliminary ruling procedure is not applied effectively in the East African Community. In fact, this procedure is quasi-inexistent in the practice of the EAC. The EACJ heard its first case in 2005. However, it had to wait for nine (9) years until 2014 to be seized for preliminary ruling in the reference made by the High Court of the Republic of Uganda in the proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda.[184] It is the only one case of this kind that the EACJ has ever heard since its existence.

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[181] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between *the Attorney General of the Republic of Uganda and Tom Kyahurwenda*, Case stated N°1 of 2014, para 58.

[182] *Ibidem*.

[183] *Idem*., para 48.

[184] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between *the Attorney General of the Republic of Uganda and Tom Kyahurwenda*, Case stated N°1 of 2014.

This quasi-inexistence of the preliminary rulings pushed us to reflect on the reasons of this situation. In this regard, some questions need to be responded to. For instance, why is the preliminary ruling procedure not used in the EAC? In order words, why do national courts of tribunals of the EAC Partner States not look for preliminary rulings from the EACJ? Does it mean that all the provisions of the EAC Treaty are sufficiently clear in a way that they do not need interpretation? These questions were discussed with our respondents. They converge on the idea that the main reason is the lack of awareness of the EAC law among the general public and national judiciaries as well. On this, one of the EACJ officials indicated that despite its significant role in promoting regional integration in the EAC, very few east Africans, even among lawyers, know about the EACJ and its jurisdiction. The consequence of this situation is clear. In fact, if the jurisdiction or the mandate of a court is not known by the people it was created for; the law it is supposed to interpret will not be challenged and, therefore, will remain vague and unclear. It is only when the EAC law is known by EAC citizens and lawyers, that it can be invoked before national courts so that the latter can seize the EACJ for preliminary reference if necessary. Another version from the national perspective argues that national courts are sufficiently independent and do not need an external judicial organ to interpret a community law that has been already integrated into national judicial system. At this point, it appears the reluctance of the EAC Partner States in releasing some of their judicial powers to the judicial organ of the Community. As explained earlier, preliminary rulings contribute to the harmonisation of the community law. Harmonisation is not possible if involved States do not surrender some of their sovereign rights to the community organs. Thus, reluctance in seizing the Community Court for preliminary decisions is indeed a refusal of this harmonisation and, implicitly, a refusal to surrender some of the powers for the benefits of the community.

Unlike the EACJ, the Court of Justice of the European Union has made the preliminary reference procedure one of the catalysts for the European integration process. In fact, as discussed earlier,[185] important cases which made significant positive changes in favour

[185] See chapter Three.

of the EU integration process were delivered as a result to a request for preliminary rulings by EU national courts. For instance, famous cases like *Costa*[186] which framed the principle of direct applicability of the EU law and *Van Gend en Loos*[187] which defined the principle of direct effect of the EU law were delivered as a response to preliminary references.

4.2.2.3.4. Existence of Parallel quasi-judicial bodies

The interference in the EACJ's work by different institutions closely connected to Partner States appears also through the establishment of parallel quasi-judicial bodies to deal with disputes arising from the implementation of the Customs Union protocol and the Common Market protocol. Indeed, the protocol on the establishment of the East African Customs Union (CU Protocol) confers powers a special committee - the East African Community Committee on Trade Remedies - to handle matters pertaining to this protocol. Specifically, article 24 of the EAC Customs Union protocol indicates that this committee will deal with matters pertaining to:

> "a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to this Protocol;
> (b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;
> (c) Subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;
> (d) Safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;
> (e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and
> (f) any other matter referred to the Committee by the Council".[188]

Paragraph 5 of the same article adds that the decisions of this committee are final. It reads as follows:

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[186] Judgment of the Court of 15 July 1964. - *Flaminio Costa v E.N.E.L.* - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.
[187] *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62)[1963] EC1.*
[188] Article 24(1) of the Protocol on the Establishment of the East African Customs Union.

> "Except as otherwise provided under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, or under any other regulation under this Protocol, the decisions of the Committee with respect to the settlement of disputes shall be final".[189]

This provision of the Customs Union protocol reflects some aspects of the Partner States' sovereign character. Firstly, the composition of this committee and the way it is put in place may raise some questions. Article 24 (2) of the CU Protocol indicates that it -the committee- shall be composed of nine members and that each Partner State has to nominate three members to the committee.[190] As discussed already, nomination by Partner States of officials acting at the community level is not a good idea as this can affect the independence of the nominees. This was the case for the EACJ judges when they held a decision that opposed some of the Kenyan interests.

Secondly, by establishing a committee to deal with questions that arise out of the implementation of the customs union protocol, the EAC Partner States ignored the role of the EACJ as judicial organ of the community. Indeed, as clearly expressed in article 23 (1), the role of the EACJ is "to ensure the adherence to law in the interpretation and application of and compliance with the Treaty". In respect to this, the EAC Customs Union protocol forms an integral part of the treaty as indicated in article 152 of the Treaty.[191] Therefore, as a part of the Treaty, the Customs Union protocol is, in my view, under the EACJ's jurisdiction with regard to its interpretation. Giving this competence to another judicial organ is a kind of denial of the EACJ's role or a revocation of its powers. However, the EACJ has a different view on this matter and seems to consider the Committee as a parallel judicial organ. In response to the applicant in the case, this court did not totally agree with the interpretation of the Respondent in the case *The East African Law Society vs the Secretary General of the East African Community* [192] of 14th

[189] Article 24(5) of the Protocol on the Establishment of the East African Customs Union.
[190] Article 24 (2) of the Protocol on the Establishment of the East African Customs Union; It is worth mentioning that when this protocol was adopted, the East African Community was still composed with three countries namely Tanzania, Uganda and Kenya. That is why the treaty says that the committee will be composed with 9 members of which each Partner States has to nominate three
[191] Article 151(4) of the Treaty for the establishment of the East African Community indicates that "The Annexes and Protocols to this Treaty shall form an integral part of this Treaty"
[192] *The East African Law Society vs the Secretary General of the East African Community,* Reference N° 1 of 2011

February 2013 who argued that the EACJ lacks jurisdiction in the areas specified under article 24 of the CU Protocol. It indicated that:

> "While we agree with him generally on that interpretation, we think, however, that should an issue of the interpretation and application of the Treaty, the Protocol itself or any of its Annexes arise in course of the exercise of the Committee's mandate, nothing would stop an aggrieved party from coming before this Court to seek for authentic interpretation. We are of the decided view that the finality of the decisions of the Committee provided under Article 24(5) of the Customs Union Protocol does not take away the right of parties, including the Committee itself, who would wish to seek for the Court's interpretation of the Treaty, including the Protocol and Annexes".[193]

Looking at this statement, it would be clear that the Court seems to accept the jurisdiction of both the court and the committee. By indicating that nothing would prevent the Committee to seek for "authentic" interpretation, the EACJ suggests that some interpretation can be done by committee.

Similarly, the disputes settlements arising from the implementation of the Common Market protocol are handled in accordance with national laws and by national judicial organs as provided in article 54 of the Protocol in the following terms:

> "1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.
> 2. In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that: (a) any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress".[194]

This provision of the EAC Common Market protocol suggests that, not only disputes arising from the implementation of this protocol are handled by national judicial bodies, but also, that they are subjected to national constitutions, laws and administrative

[193] *The East African Law Society vs the Secretary General of the East African Community,* Reference N° 1 of 2011, p.27.
[194] Article 54 of the Protocol on the Establishment of the East African Community Common Market

procedures. In my view, subjecting the implementation of community laws to national law is another clear manifestation of the unwillingness of the EAC Partner States to surrender some of their sovereign powers to the community organs. The EACJ interprets this reference to national judicial organs as an alternative judicial mechanism rather than a parallel one. In fact, in the case opposing the East African Centre for Trade Policy and Law and the Secretary General of the East African Community, the EACJ specified that:

> "While this would appear as if it is a parallel dispute resolution mechanism under the Treaty complained about in this reference […], our view is that, these dispute resolution mechanisms are merely alternative dispute resolution mechanisms intended for speedy and effective resolution of trade disputes by experts in technical and specialized areas. Otherwise, the Court would be bogged down with nitty gritty of disputes such as those in the area of trade, customs immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the protocols".[195]

In conclusion, as explained above, the EACJ interprets disputes settlement mechanisms established under the Customs Union protocol and the Common Market protocol as an alternative solution to the EACJ's activity in this regard. This interpretation can be subject to some criticism. If judicial organs can be applied alternatively, then applicants are likely to be confused with regards to knowing which organs they can approach in cases of conflicts. Furthermore, if every judicial organ at the national level can deliberately decide on a matter that involves community aspects, this can be a big challenge as regards to the harmonisation of the interpretation of Community laws.

4.2.2.4. The East African Legislative Assembly

4.2.2.4.1. The East African Legislative Assembly and the election of its members

The East African Legislative Assembly is a legislative organ of the EAC established under article 9 of the Treaty. Article 48 provides for its membership. According to this

[195] *East African Centre for Trade Policy and Law Vs the Secretary General of the East African Community*, Ref No. 9 of 2012, para 80.

provision, EALA consists of nine members elected by each Partner State and *ex-officio* members.[196] The *ex-officio* members are the Ministers in charge of East African Affairs from each Partner States, the Secretary General, and the Council to the Community.[197] Looking at the current configuration of the EAC,[198] the EALA has 54 elected members and 8 *ex-officio* members[199] totalling a membership of 62. The appointment of EALA members somehow reflects a stranglehold of the Partner States.

Firstly, the nine members are elected by national assemblies of each Partner State in accordance with such procedure as the National Assembly of each Partner State may determine.[200] Therefore, not only are EALA members not directly elected by citizens through the way of the direct universal suffrage, but they are also not necessarily elected from members of national parliaments[201] who have acquired a certain legitimacy through the local elections. The situation is different in the European Union. As discussed earlier, members of the EU Parliament are elected by the way of direct universal suffrage in a free and secret ballot.[202] This has even contributed to enhance the legitimacy of these representatives and EU Member States, or their organs cannot therefore influence them.

The election of EALA members by national parliaments has some impacts on this regional elective organ. As a matter of fact, the interview with members of some EAC national parliaments revealed that election of EALA members is mostly not objective as political interests among the members of national parliaments play a significant role. Specifically, ruling parties try to use their majority in their respective parliaments to appoint militants from their political blocks as members of EALA so that they can protect their interests at the community level. This is even substantialised by an increase of cases in the East African Court of Justice on the overuse of powers by

[196] Article 48 (1) of the Treaty for the Establishment of the East African Community.
[197] Article 48(1) (b) of the Treaty for the Establishment of the East African Community.
[198] The EAC is currently composed with 6 Partner States namely Burundi, Rwanda, Kenya, Tanzania, Uganda and South Soudan.
[199] The 8 *ex-officio* members are the 6 Ministers in charge of the East African Community Affairs, the Secretary General and the Council to the Community.
[200] Article 50 (1) of the Treaty for the Establishment of the East African Community.
[201] Article 50 (1) of the Treaty for the Establishment of the East African Community.
[202] Article 14 (3) of the Treaty on the European Union. See also article 223 of the Treaty on the Functioning of the European Union.

politicians in the election of EALA members. Some examples like *Anyang' Nyong'o case,*[203] *Democratic Party and Mukasa Mbidde case,*[204] *Anthony Calist Komu case,*[205] *Among A. Anita case*[206] *and Abdu Katuntu case*[207] can justify this increase. In all these cases, the applicants challenge the violation article 50 of the Treaty on the election of EALA Members claiming the exclusion of the opposition in the election process. Another impact caused by the indirect election of EALA members is the lack of their legitimacy and, therefore, of the institution in general. As Peter Wanyande indicates, the election mode of the members of an Assembly is one of the elements for the determination of its legitimacy. According to him,

> "legitimacy of a regional parliament such as the EALA can be function of at least free factors. The first relates to the method of its coming into being, and more particularly the method use in recruiting its members. The second is the mode of operation or of conducting its official business. Finally, and related to this, is the issue of its performance".[208]

Secondly, there is an absence of harmonized election procedures of the EALA members among EAC national parliaments. In effect, according to article 50 (1) of Treaty, the election of members of the EALA members is done by the National Assembly of each Partner State and "in accordance with such procedure as the National Assembly of each Partner State may determine".[209] The shocking aspect of this difference of rules of procedure is that Partner States tend to elaborate them in a way which satisfies their personal interests for them to protect some of their sovereign rights. While deciding on Anyang'o Nyong'o case, the East African Court Justice realised this problematic issue connected to the absence of the willingness of EAC Partner States to cede some of their

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[203] Prof. Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others, Ref N°1 of 2006 & Appeal N° 1 of 2009.

[204]Democratic Party and Mukasa Mbidde v The Secretary General of the EAC and the Attorney General of Uganda, Ref. N°.6 of 2011.

[205] Anthony Calist Komu Vs The Attorney General of The Republic of Tanzania, Ref N° 7 of 2012.

[206] Among A. Anita Vs Attorney General of Uganda and the Secretary General of The East African Community, Ref N°6 of 2012.

[207]Abdu Katuntu Vs The Attorney General of Uganda and The Secretary General East African Community, Ref N° 5 of 2012.

[208]Peter Wanyande, *The Role of the East African Legislative Assembly*, in Rok Ajulu, *The Making of A Region: The Revival of the East African Community,* Institute for Global Dialogue Midrand(IGDM), South Africa, 2005, p. 65.

[209] Art 50(1) of the Treaty for the Establishment of the East African Community.

sovereign rights and called up on harmonisation of these rules of procedure. The most crucial part of the Court's statement on this point reads as follows:

> "Before taking leave of this reference we are constrained to observe that the lack of uniformity in the application of any Article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under Article 126 of the Treaty the Partner States commit themselves to take necessary steps to inter alia "harmonise all their national laws appertaining to the Community". In our considered opinion this reference has demonstrated amply the urgent need for such harmonization
>
> […]
>
> While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role".[210]

Through this declaration, two main points emphasized. Firstly, the court observed a lack of uniform rules of procedure for the election of EALA Members with EAC Partner States. In the view of the court, this undermines the achievement of the objectives of the community. It recommended that the Partner States should harmonise their laws with the EAC Treaty. Despite this recommendation made by the EACJ early in 2007, until now, these rules of procedures have never been harmonised as each country still uses its own procedure when appointing EALA members. Secondly, the court justified this absence of harmonisation of laws in general and rules of procedure as a clear manifestation of the sovereign character of the Member States. It therefore reminded that Partner States need to cede a certain amount of sovereignty in order to facilitate the achievement of the objectives of the Community.

Unlike the EAC, the EU has adopted a different approach. In fact, beside the use of the direct universal suffrage in the election of the members of the European Parliament, article 223 (1) of the TFEU made it clear that this suffrage has to be done "in accordance with a uniform procedure in all Member States or in accordance with principles

[210] *Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others*, Ref. n° 1 of 2006, pp.43-45.

common to all Member States".[211] Though not yet implemented sufficiently, this provision exists in the EU. This is very important in my view. In fact, it prevents the EU Parliament from some Member States' sovereign character that would wish to elaborate these rules in way that can help them to nominate members of the EU parliament whom they can manipulate.

Thirdly, the designation of *ex-officio* members in the parliamentary work is also another manifestation of maintenance of Member States' sovereign character. In fact, these members are officials belonging directly to the national governments and are members of the council of ministers, another executive body of the Community. Even if they do not vote in EALA's meetings,[212] their participation is influential as they can act as watching dogs monitoring the activities of this elective organ. Unlike the EALA, the European Parliament does not comprise any executive official; all its members are directly elected by EU citizens.

Fourthly, whereas the EU understood that the principle of sovereign equality in the appointment of the members of the European Parliament can, at some extent, undermine the integration process, this classic principle of international law is still playing a very significant role in the election of the EALA members. Specifically, in the EAC, the classic democratic principle "one man one vote" has turned into a new principle "one Partner State one vote" when it comes to the election of the EALA members. Therefore, without taking into consideration the Partner State's size or population, the EAC Treaty established an equal number of representatives in the EALA.[213] Hence, Burundi with 10 million inhabitants has the same number of EALA members with Tanzania known as having a big population of over 50 million.[214] Unlike the EAC, in the EU, representation of citizens is degressively proportional, with a

[211] Article 223(1) of the Treaty on the Functioning of the European Union.
[212] See article 58(2) of the Treaty for the Establishment of the East African Community.
[213] For recall, each Partner State has to elect 9 members of the EALA as indicated in article 48 of the Treaty for the establishment of the East African Community.
[214]Tomasz P. Milej*, Legal Harmonisation in the Regional Economic Communities- The Case of the European Union*, In Johannes Doverling et ali, *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities*, TGCL Series 5, LawAfrica Publishing (K)Ltd, Nairobi, p. 140.

minimum threshold of six members per Member States and no Members States can be allocated more than ninety-six-seats.[215]

4.2.2.4.2. Powers of the East African Legislative Assembly

The interference of the EAC Partner States in the EALA's business can be tested through the powers conferred to EALA and the independence it has to perform its duties. Reading through the Treaty, it can be noted that EALA has 3 main functions namely the legislative, representative and oversight powers. However, it misses the elective powers.

Firstly, the EALA is vested with legislative powers. The Treaty for the Establishment of the East African Community attributes to the EALA a legislative in the following terms: «The Assembly shall be the legislative organ of the Community».[216] Thus, as the legislative organ of the Community, the EALA legislates on all matters relating to the operationalization of the Treaty for the Establishment of the East African Community.[217] Concretely, in all the areas where the Community has the competence to legislate, the EALA can make an Act setting general rules which have to be followed by the Partner States. In this regard, the treaty establishes that bills can be initiated either by the Council or Private Members of the Parliament. Unlike the EU where the EU Parliament does not have full power to legislate since it co-legislates with the Council or cannot legislate without the Council's consent,[218] the situation is totally different in the case of the EAC. When legislating, EALA is totally independent and does not co-legislate with the Council of Ministers. We find this as a very important achievement on the side of the EAC in terms of safeguarding the Parliament's independence and, most importantly, it is in respect of the principle of separation of powers preached by Montesquieu. In so doing, the framers of the EAC Treaty prevented the EALA form the interference by Partner States which could block its activities through Council of Ministers, an organ that is executive in nature than legislative. The role of the Council in the EAC legislative process is limited to initiating Bills. Another intervention of an organ of the executive in

[215] Article 14 (2) of the Treaty on the European Union. See also Jean Paul Jacqué, *Droit institutionnel de l'Union Européenne*, 8éd., Dalloz, Paris, p.267.
[216] Article 49 (1) of the Treaty for the Establishment of the East African Community.
[217] http://www.eala.org/assembly/category/achievements.
[218] See Chapter 3.

the legislation process is the stage of the assent. As explained earlier, any act of the community needs to be assented to by the Heads of State. It is also important to mention that, in its role of making laws, EALA has another significant limitation. In fact, the "Assembly cannot proceed on any Bill, including on an amendment to any Bill that makes provision for the imposition of any charge upon any fund of the Community; or for the payment, issue or withdrawal from any fund of the Community of any moneys not charged thereon or the increase in amount of any such payment, issue or withdrawal; or for the remission of any debt due to the Community".[219] Similarly, it cannot proceed upon any motion, including any amendment to a motion which has the same affects as above described.[220] In summary, the EALA does not fully enjoy the elective power attributed to it by the Treaty. The same treaty established a clawback clause that limits this power by imposing EALA not to legislate on some aspects because of their sensitive character.

Secondly, the EALA has supervisory powers. In fact, article 49 (1) (d) of the Treaty gives the power to the EALA "to discuss all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty".[221] In this regard, the Council as an executive body of the Community can be subjected to the questions by the Assembly if necessary.[222] Specifically, questions related to matters of the Community may be put to the Council. Besides the questions, this legislative organ not only debates and approves the budget of the Community,[223] but it also has control role over the implementation of the budget as stated in Rule 74 of the EALA Rules of Procedure as follows:

> "(1) The Assembly shall monitor the implementation of the budget of the Community through the Committee responsible for budgetary control and other relevant Committees.
> (2) No expenditure of any resources of the Community shall be made without approval of the Assembly as provided for in Article 132 of the Treaty.
> (3) Resources under this rule include resources as provided for under Articles 132 and 133 of the Treaty.

[219] Article 59 (2) (a) of the Treaty for the Establishment of the East African Community.
[220] Article 59 (2) (b) of the Treaty for the Establishment of the East African Community.
[221] Article 49 (2) (d) of the Treaty for the Establishment of the East African Community.
[222] See Part VI, from Rule 18 to Rule 20 of the Rules of Procedure of the East African Legislative Assembly.
[223] Art 49 (2) (b) of the Treaty for the Establishment of the East African Community.

> (4) Each year the Assembly shall consider, before the presentation of the budget for the following financial year, the problems involved in the implementation of the current budget, where appropriate on the basis of a motion for a resolution tabled by the relevant Committee".[224]

In general, the budget of the community is despatched between the organs and institutions for the Community, save for self-accounting institutions.[225] Through the provision above stated (art 74 of the EALA Rules of Procedure) which refers to article 132 of the Treaty, it can be noted that EALA controls even the budget assigned to each organ and institution.

Thirdly, the EALA has a representative function. Elected by representatives of the citizens at national level, the EALA has undoubtedly a representative mandate. What is not clear in the Treaty is whether its members have a regional mandate or a national mandate to represent only their compatriots at the national level. In practice, Partner States seem to opt for the second scenario. As example, after the 2015 Burundi's political turbulences, 5 (five) EALA members representative from Burundi were accused by their government of being in the opposition as they had shown their different position towards the then prevailing political situation. Consequently, the Government of Burundi wrote an official communication to the EALA Speaker requesting for their removal from office as EALA Members arguing that they were no longer representing the Burundian interests.[226] In his response, however, the speaker made it clear that an EALA members do not have a national mandate but that they represent community interests.[227] In considering EALA members as representing national interests, EAC Partner States want to maintain their sovereign character on this legislative organ of the community. This can obviously undermine the integration process. The situation is different in the case of the European Union. Article 14(2) of the Treaty on the European Union indicates clearly that members of the European Parliament are "representatives of the Union's Citizens". EAC Members States should understand the difference between national Members of the Parliament and members

[224] Rule 74 of the EALA Rules of the Procedure.
[225] Article 132 (1) of the Treaty for the Establishment of the East African Community.
[226] I was not able to access these communications as I was informed that they are confidential. However, an anonymous source from the office of the speaker of EALA confirmed them.
[227] Information collected from the officers of the EALA.

of the Parliament at the regional level. In general, the former, "by definition, represent their own country and people, whereas a regional assembly is supposed to act in the interest of all the peoples of its region".[228]

Finally, "unlike a national system, the EALA can make "recommendation" on an executive arm on how things should be done regarding the activities of the EAC".[229] This is unique because a normal parliament directs rather than recommending things to be done.[230]

It is worth mentioning that, in contrast with the European Parliament, EALA does not have elective powers. As discussed earlier, on the proposal of the European Council, the European Parliament elects the President of the Commission. Consequently, this subjects him to a vote of consent by the Parliament whenever necessary and therefore, to be answerable to this legislative organ of the Community. This elective power is missing in the EAC. Similar position – that is the Secretary General - is appointed by "the Summit upon nomination by the relevant Head of State under the principle of rotation".[231] This makes the Secretary General responsible and answerable to the Summit, an executive organ of the Community where all powers are concentrated. By refusing this elective power to the Parliament, Partner States intended to keep their hands in the EALA's work which, in turn, limits its role as a check and balance player.

4.2.2.4.3. EALA and national Parliaments

In order to ensure popular participation, the Treaty for the Establishment of the East African Community envisages the involvement of national assemblies in the EALA's legislation process. Specifically, on matters related to the achievement of the objectives of the Community, debates in the respective National Assemblies and the EALA are

[228]Adams GR Oloo, *The EALA and the National Assemblies of Partner States: Conflict or Harmony?* in Rok AJuku, *The Making of a Region: The Revival of the East African Community*, Institute for Global Dialogue, Mindrand, South Africa, 2005, p.89.
[229]Sifuni E. Mchome, *The Treaty of the EAC: Is it Equivalent of a National Constitution?* In Kennedy Gastorn et ali, *Progresses of Legal Integration in the East African Community*, Dar es Salaam University Press, Dar es salaam, 2011, p.84.
[230]*Idem*, p. 85.
[231] Article 67(1) of the Treaty for the establishment of the East African Community.

organised.[232] To foster the cooperation between the two categories of Assembly four (4) main ways are foreseen by the treaty as follows:

> "(a)the Clerk of the Assembly shall as soon as practicable transmit to the Clerks of the National Assemblies copies of the records of all relevant debates of the meetings of the Assembly to be laid before the National Assemblies, by the respective Ministers responsible for East African Community affairs;
> (b) the Clerk of the Assembly shall as soon as practicable transmit to the Clerks of the National Assemblies copies of the Bills introduced into the Assembly and Acts of the Community to be laid before the National Assemblies for information.
> (c) the Clerks of the National Assemblies shall as soon as practicable transmit to the Clerk of the Assembly copies of the records of all relevant debates of the meetings of their National Assemblies other than those with respect to the matters laid before their National Assemblies in pursuance of the provisions of sub-paragraph (a) of this paragraph; and
> (d) the Clerk of the Assembly shall as soon as practicable transmit to the Secretary General copies of all the records of debate refer red to in subparagraphs (a) and (b) of this paragraph for information to the Council".[233]

Concretely, this provision suggests that the EALA should keep national assemblies informed on its activities including debates and Bills, and vice-versa. We do support this organisational aspect of the EALA enshrined in the EAC Treaty as it allows national assemblies to be updated on the state of integration process and, most importantly, it prevents them from adopting contradictory laws to the EALA acts. However, the Treaty does not clarify whether national parliaments need to give recommendations or their views on the documents submitted to them so that the EALA can consider them in its work as a legislator. The research has shown that some national assemblies do not even discuss on those communications in their meetings.[234] The reality on the ground is that the communication of documents between EALA and national parliaments is purely informative and does not have any contributory feature. Unlike the EAC, EU national Parliaments may submit "to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on

[232] Art. 65 of the Treaty for the Establishment of the East African Community.
[233] Art.65 of the Treaty for the Establishment of the East African Community.
[234]For instance, some of the Members of the Burundian Parliament informed the researcher that there they were not even aware of these transmission of documents between EALA and National Assemblies.

the application of the principles of subsidiarity and proportionality".[235] Put differently, there are kind of watch dogs in respect of these two principles.

All in all, our observation is that, unlike the EU, the EAC did not put much attention to the role of national assembly in the East African affairs. A single provision in the EAC Treaty evokes only the transmission of documents between the EALA and national assemblies. Comparatively, the EU seems to have understood the important role of national assemblies in the integration process. They are seen "as a possible institutional solution to the problem of consolidating and even enhancing the democratic credentials and legitimacy of the EU".[236] So acknowledged as tools to solve the problem of democratic deficit, a specific protocol on their role in the European Union was adopted under the name "protocol (N°1) on the Role of National Parliaments in the European Union".

When talking about the relationship between EALA and National Assemblies, it is important to mention that some of the East African Community Partner States have shown an intention to cooperate in the EAC integration process through their Parliaments. For instance, some national parliaments have put in place specific committees to deal with East African affairs. As a matter of fact, the Kenya has a "Committee on Regional Integration"[237] in the Assembly and the "National Cohesion, Equal opportunity and Regional interaction committee" in the Senate.[238]

4.2.2.4. The Secretariat

The Secretariat is another organ established by the Treaty for the Establishment of the East African Community. As an executive organ of the Community,[239] the secretariat oversees the day-to-day running of the affairs of the Community.[240] In fact, most of its

[235]Article 3 of the Protocol (N°1) on the Role of National Parliaments in the European Union (2007).
[236]Inga Daukšienė, Sigita Matijošaitytė, *The Role of National Parliaments in the European Union after Treaty of Lisbon,* in *Jurisprudencija/Jurisprudence,* Vol 19, Issue 1, 2012, p. 33.
[237] http://www.parliament.go.ke Visited on 25/1/2019.
[238] http://www.parliament.go.ke/index.php/the-senate/committees/senate-committee visited on 25/1/2019
[239] Article 66 (1) of the Treaty for the Establishment of the East African Community.
[240] Open Society Foundations, *op.cit.*, p.22.

activities can be perceived as a bridge linking all other organs and institutions to the integration agenda. Indeed, it is the Secretariat that organises the meetings of the different organs and serves as a meeting point of all the communications which must be shared between themselves. It also handles communications with other external stakeholders who have interests in the activities of the Community[241] such as non-Partner States, other regional economic communities, Non-Governmental Organisations, etc.

With regard to the composition, as article 66 (2) of the EAC Treaty indicates, "the Secretariat comprises the Secretary General, Deputy Secretaries General, the Counsel to the Community and such other offices as may be deemed necessary by the Council". To assess the independence of these officials, one needs to look at their appointment process and their powers.

The process for the appointment of the top officer of the Secretariat does not have all the features to guarantee his/her independence. In fact, "the secretary general is appointed by the Summit upon nomination by relevant Head of State under the principle of rotation".[242] The appointment of the Secretary General on a rotational basis reflects indeed an absence of the Partner States' willingness to surrender their powers or sovereign rights to the community organs. On this point, lessons could be learnt from the European Union. In this Community, the president of a similar institution to the EAC Secretariat – that is the Commission- is elected by the European Parliament by majority of its component members.[243] The name for the candidacy to this position is proposed to the European Union by the European Council acting by a qualified majority, taking into account the elections to the European Parliament and after having held enough consultations.[244] Concretely, even if European Council intervenes in the election of the president of the Commission, it does not have a final say; its intervention is consultative. An important role belongs to the Parliament; it is the one that decides on the name proposed by the European Council. The election for this position by the European

[241] *Ibidem.*
[242] Article 67(1) of the Treaty for the Establishment of the East African Community.
[243] Article 17 (7) of the Treaty on the European Union.
[244] Article 17 (7) of the Treaty on the European Union.

Parliament is certainly a guarantee for the independence this office towards other institutions either at the Union level or the national level.

In relation to the powers of the Secretary General, the Open Society Foundation summarises them in one sentence. It interprets it as "the executive officer of the Community, hence the accounting officer of the Community".[245] Although the role of this organ seems not to attract the attention of many scholars, it is certainly at the centre of the EAC integration process. In fact, being the only organ working on the permanent basis at the EAC Headquarters, the secretariat intervenes as a coordinating organ which links and puts other organs in a permanent communication. In Timothy Alvin Kahoho case, insisting on the important role of the Secretariat in the integration process, the EACJ compares it with a Captain driving a ship. This Court describes it as follows:

> "The Community, in our view, is like a giant ship owned by shareholders (the people of the East Africa); the Summit is like a Board of Directors and the Council, is like the Management. The Captain is the Secretary-General and the Crew are the staff in the Community. To call the Captain and the crew, useless, and denigrate their role in keeping any ship on the high seas on course, is to say that the shareholders or the Board of Directors can single-handedly and without any input from those that physically man the ship, sail that ship from the distance. […]. Without the Captain and the Crew, the ship can barely survive the storms and other perils that are prevalent in the high seas including attacks by pirates. […] the secretariat is the only Organ created by Article 9 of the Treaty to steer the ship of integration by implementing decisions of all other Organs and its crucial role thereby ought to be recognised and supported".[246]

Hence, as the EACJ puts it out indirectly, without the secretariat, the integration process would be impossible. In fact, EAC organs would miss the harmony in their activities.

Despite this clear interpretation by the court asserting the important role of the Secretariat in moving the Community, this organ is a powerless institution simply devoted to limited activities such as organisation of meetings and the drafting of their minutes. It misses the teeth necessary to meet the executive authority given to it by the

[245] Open Society Foundations, *op.cit.*, p. 22.
[246] Timothy Alvin Kahoho Vs The Secretary General of the East African Community, Ref no. 1 of 2012, para.49

treaty. As Kaawa indicates, "it lacks the administrative mechanism and resources mechanism and resources to police the Partner States in their general undertaking as to the implementation of the Treaty".[247] Joshua M. Kivuva puts it rightly when he states that "rather than offering direction for national bureaucrats, the secretariat has become a forum where technocrats from partner states negotiate to harmonise their national positions and interests".[248] In all, it lacks the supranational character necessary for it to overcome the Partner States' sovereign character. Johannes Döveling sees the Secretariat as an organ missing the legal powers necessary to counterbalance the Summit and the Council which are more oriented to the protection of national interests.[249] This is true because, for example, in its role as a monitor for the compliance with the Treaty by the EAC Partner States, the Secretariat does not fully enjoy the control in the use the infringement procedure foreseen in the Treaty. Under this procedure foreseen under article 29 of the Treaty, when the secretariat considers that a Partner State has failed to fulfil an obligation of the Treaty or have violated one of its provisions, it can refer the matter to the Court.[250] However, it needs to ask for authorisation for referral from the council which must decide whether it is necessary to refer the matter to the Court or not.[251]

The situation is very different in the case of the European Commission from several aspects. It is the Commission itself that identifies, at least at the first level, the general interest of the Union and pursues it in permitted forms according to the Treaties".[252] In general, it is the commission that oversees the promotion of the general interest of the Union and therefore take appropriate initiatives to this end.[253] In addition to this, the commission oversees the application of the Union law, executes the budget, ensures the

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[247]Wilbert T.K. Kaahwa , *The institutional Framework of the EAC,* In Emmanuel Ugirashebuja et ali , *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Leiden/Boston , 2017, p.63.

[248] Jonsua M.Kivuva , *East Africa's Dangerous Dance with the Past : Important Lessons the New East African Community has not Learned From the Defunct*, In *European Scientific Journal*, Vol. 10, N° 34, December 2014, p.366.

[249] Johannes Döveling, *op.cit.,* p.94

[250] Article 29 of the Treaty for the Establishment of the East African Community.

[251] Article 29 (2) of the Treaty for the Establishment of the East African Community.

[252] Gianfrancesco, *Article 17[The European Commission],* In Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on the European Union (TEU): A Commentary,* Springer, p.684.

[253] Article 17 (1) of the Treaty on the European Union.

Union's external representation, and has the monopoly of initiative of the union acts.[254] When implementing all its activities, the independence of the Commission is guaranteed as it can "neither seek nor take instructions from any government or other institution, body or entity".[255] Thus, for example, the commission does not to seek for authorisation from the Council to apply the infringement procedure.[256] Certainly, as Johannes Döveling indicates, unlike the Secretariat of the East African Community, the Commission acts in total independence and does not require the consent of the Partner States.[257] In this regard, the Commission can be defined as "supranational instance *par excellence*" and "integrative process engine".[258]

4.2.2.5. Concluding observations: Does the EAC institutional arrangement reflect a supranational or an intergovernmental nature?

After we have understood the institutional framework of the EAC, it becomes easy to describe or to define its nature. In fact, the composition of the different EAC organs, their nature, their role in the EAC decision-making process and the scope of their powers in moving the Community are key elements for the determination of the nature of the EAC. In another words, from the analysis of all the developments made on the EAC organs, one can determine whether the EAC is a supranational or an intergovernmental organisation.

As described in the third chapter, one of the features of a supranational organisation is the centralisation of powers into the community institutions, which makes the Community capable of constraining all actors including the Partner or Member States. As for the intergovernmental feature, it refers to the retention by Partner States of the sovereign powers in the legislation, settlement of policies and decision-making process in matters concerning the Community. From this point of view, unlike the EU which is visibly both intergovernmental and supranational but with more features of the

[254] Article 17 (1) & (2) of the Treaty on the European Union.
[255] Article 17 (3) of the Treaty on the European Union.
[256] Article 258 of the Treaty on the Functioning of the European Union.
[257] Johannes Döveling, *op.cit.*, p. 90.
[258] Gianfrancesco, *op.cit*, p.684.

supranational aspect,[259] the EAC is more intergovernmental and presents very weak aspects of a supranational institution. This results from the relationship between the community organs and the Partner States. Indeed, all the EAC organs are, in one way or another, instruments of the Partner States which they use to protect their individual interests of their sovereign rights. Certainly, looking at different aspects of the Community organs namely their establishment, composition, decision-making mode and powers in the implementation of the integration agenda, it is evident that the EAC organs are framed in way that leaves room for interference of the Partner States. Generally, they are all established and composed by the government officials of the Partners states and, therefore, subjected to an intensive control from Partner States. Their decision-making mode is generally consensus. Combined with the quorum of participation, which is fixed to all States representation, this decision-making mode of the EAC organs gives veto all Partner States to reject any project that could affect their sovereignty rights.

Overall, as indicated by Joshua M. Kivuva:

> "there is still an overconcentration of decision-making and implementation powers on partner States- on the Summit, the Council of Ministers and other bureaucrats- who answer to the Heads of States. The political class in each partner state is afraid of losing power and have been reluctant to amend the Treaty to give executive powers to the Community's Secretariat or any of its organs".[260]

With regard to their powers, they are limited to certain areas with no impact on the sovereign character of the Partner States. In this regard, while weighing the role of each organ in East African Community in the integration process, Johannes Döveling observed that "the Summit and the Council are the most powerful political organs of the East African Community".[261] He, therefore, concludes that "the decision- making

[259] See chapter 3.
[260] Joshua M.Kivuva , *East Africa's Dangerous Dance with the Past : Important Lessons the New East African Community has not Learned From the Defunct*, In *European Scientific Journal*, Vol. 10, N° 34, December 2014, p.361.
[261] Johannes Döveling, *op. cit*., p.93.

structures of the East African Community must be regarded as having a strong dominance of the executives of the Member States".[262]

In contrast, as explained in the 3rd chapter, though it is embedded with intergovernmental characteristics through the European Council and the Council of Ministers, the European Union presents tremendous aspects of its supranational feature. Specifically, some of its institutions namely the Commission, the Parliament and the European Court of Justice are supranational in their nature.

4.3. Relationship between the East African Community Law and National Laws

This section analyses consecutively the perception by the East African Community framers of the relationship between the East African Community law and national law before analyzing the national perceptions of this relationship, a concluding observation will follow.

4.3.1. The relationship between the East African Community law and national laws look at from the East African perspective

[262] *Ibidem.*

4.3.1.1. Significance of the determination of the EAC perception of this relationship

One of the elements that needs to be clarified by the constitutive treaties of a Community is the definition of the relationship between the Community and its member states. In this regard, the European Union has established what we called in this book "relational principles" to regulate this collaboration.[263] The purpose of this section is to analyse this aspect in the case of the East African Community. An analysis of the relationship between the EAC law and national laws is of great significance for the realization of this research.

Firstly, the East African Community is a mixture of countries which have with different constitutional backgrounds. Certainly, some of them are dualists whereas other are built on a monist constitutional system. Consequently, the biggest challenge that arises is how to make the community laws binding and enforceable within national legal systems with two different legal constitutional systems or backgrounds. An absence of a clear definition of a harmonized linkage or transcription of the community law into national legal system leads to a disharmony in the implementation of the community law. The result would be a failure of the integration agenda. For the sake of the realization of a well-rounded integration process, it is of great importance that a harmonized system as regards to the reception or effects of the East African Community within national legal systems be clearly established. This is the task of the constitutive treaty. Accordingly, our concern is to understand what foresees the instruments at the East African Community level as to how the Community law should be perceived or considered in national legal systems. In other words, what is the position of the East African Community Treaty on the relationship between the East African Community law and national legal system? This section intends to respond to this question.

Secondly, an understanding of the relationship between the East African Community law and national laws is the key element for the determination of the relationship between State sovereignty and regional integration in the context of the East African

[263] See chapter 3.

Community. This will certainly contribute to the measurement of the powers of the East African Community law to overcome the sovereign behavior of the Partner States. Indeed, it is through the relational principles established under the Treaty that one can determine the nature, the status and scope of the East African Community law. Therefore, for a well-rounded study, it is important to understand the conceptualization of these aspects under the EAC Treaty. This is the objective of the next section.

4.3.1.2. Relational principles in the EAC context

The commonly accepted relational principles among scholars to deal with the integration process are the principles of direct applicability, the principle of direct effects and the principle of supremacy. They will be consecutively analyzed in the context of the East African Community.

4.3.1.2.1. Direct applicability of the EAC law

As explained earlier, the principle of direct applicability of the community law is a creation of the European Court. It simply means that community law is different with the ordinary international law as it considered that, under the former, the entry into force of a Treaty becomes integral part of the legal systems of the Member States.[264] Thus, in the understanding of the Court of Justice of the European Union, regardless to whether a country is monist or dualist, the ratification of a community treaty integrates it immediately into the national legal system without any further process. It is worth recalling that the European Treaties did not mention the principle of direct applicability. This principle was a creation of the East African Court of Justice.

In the EAC, the Principle of direct applicability is provided neither by Treaty for the Establishment of the East African Community nor introduced by the East African Court of Justice. In contrast, this Treaty seems to provide for a further translation or

[264] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64; See also chapter Three

incorporation of a community law into national legal systems. Article 8 (2) of the EAC Treaty seems to prove this aspect. It stipulates as follows:

> "Each partner State shall within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular-
> a) to confer upon the Community the legal Capacity and personality required for the performance of its functions; and
> b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory".[265]

Reading through this provision, it can be noted that beside the signature to the Treaty, the Partner States are required to incorporate it into their respective national legal systems within a twelve-month period. Under this provision, it can be deduced that, in the absence of such incorporation, not only would the Treaty be without any effect, but also other legislations, regulations and directives issued by the Community would not have the force of law within its territory. Certainly, this provision suggests that the incorporation of the East African Community law makes it applicable and, consequently, confers to it the value that any law is supposed to have within its jurisdiction. In other words, by the virtue of the EAC Treaty, the East African Community law is not attributed "the force of law". It is the responsibility of the Partner States to confer the "force of law" upon the EAC secondary legislation.[266] In accordance with this provision, EAC Partner States enacted laws which integrate the EAC Treaty into their legal system. For instance, in Burundi it is the Law N° 1/08 of 30 June 2007 on the ratification by the Republic of Burundi of the Treaty for Accession of Burundi to the East African Community signed in Kampala on 18th June 2007.[267] Similar laws exist in Kenya, Uganda and Tanzania.[268] It is also important to underline that ratification does not mean necessarily incorporation or direct applicability. In fact, most of the time, beside the ratification, there are general

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[265] Article 8(2) of the Treaty for the Establishment of the East African Community Treaty.

[266] Tomasz P. Milej, "*What is Wrong about Supranationality Laws? The Sources of East African Community Law in Light of the EU's Experience*, in *Zeitschrift fur Auslanisches öffentliches Recht and Völkerrecht* (ZaoRV) Vol 75 (2015), p. 587.

[267] Loi N°1/08 du 30 Juin 2007 portant ratification par la République du Burundi du Traité d'Adhésion du Burundi à la Communauté Est Africaine, signé à Kampala, Ouganda, le 18 Juin 2007.

[268] In Uganda, the Treaty for the Establishment of the East African Community Act 2002, in Kenya the Treaty for the Establishment of the East African Community Act 2000, in Tanzania the Treaty for the Establishment of the East African Community Act 2001.

provisions on direct applicability. This is the example of Kenya which stipulates under article 2(6) that "any treaty or convention ratified by Kenya shall form part of the law of Kenya".[269]

In the reference *Samuel Mukira Mohoch Vs The Attorney General of the Republic of Uganda,* the EACJ tried to explain the implication of the incorporation:

> "Like in any other Partner State, once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became directly enforceable within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and protocol".[270]

This statement of the EACJ suggests that, once the Community law is given a translation within Partner States, it is then vested with the force of law within their territories and becomes preferable than the national ones. Furthermore, this statement shows the position of the EACJ with regard to the applicability of the EAC law within Partner States. Indeed, unlike the Court of Justice of the European Union which preached the direct applicability of the EU law arguing the extraordinarily character of the EU Treaties, the EACJ developed a different point of view. In fact, the wording of this statement advocates for a special procedure to make EAC law enforceable in each EAC Partner State. Taking into account this statement, one would assume that the EACJ do not consider the EAC as constituting "a new legal order system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply". The EACJ's suggestion implies that the legal order of the EAC is similar to the international order where the parameters of dualism and monism still play a big role as regards to the applicability of any international treaty.

Having understood the position of the EAC law instruments regarding the applicability of the EAC primary law, a question remains not clear: What is the effect of secondary measures like regulations, directives, decisions, and recommendations? Although the Treaty does not give an explicit clarification of this aspect, it paths some hints for a

[269] Article 2 (6) of the Constitution of Kenya, 2010.
[270] *Samuel Mukira Mohoch Vs The Attorney General of the Republic of Uganda, Ref* Ref. No.5 of 2011, para 50

teleological interpretation. In fact, article 16 of the EAC Treaty can guide us to understand the consideration that could be given to these measures as regard to their applicability. It reads as follows:

> "Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed".[271]

This provision clarifies that regulations, directives and decisions of the council are not only binding on Partner States, but also on other community organs which certainly implies that they are of direct applicability. However, the direct applicability stipulated under this provision is restricted and concerns only measures "subjected to the provision of the Treaty and in pursuance of the provisions of the Treaty". The EAC Treaty specifies that treaties need to be given the force of law within each Partner State. It is, therefore, obvious that the direct applicability of these measures is only binding to Partner States which have made such incorporation or translation.

It is worth mentioning that this research established that community laws – law enacted by the East African Legislative Assembly commonly called acts of the Community – are not subjected to any incorporation or domestication into different national legal systems. The practice is that if they have obtained assents from relevant Heads of States, they become automatically applicable into national legal systems without specific translation. Most of our respondents believe that, and we share their view, it is not necessary for community acts to be translated into national laws. In fact, they consider that community acts acquire their legitimacy through their adoption by a legislative body representing the Citizens of the community and their assent by the Head of State of every Partner State.

4.3.1.2.2. Direct effects of the EAC law

[271] Article 16 of the Treaty for the Establishment of the East African Community

Direct effect of community law enables individuals to invoke it before national court[272]. This implies that community law creates individual rights to citizens of the Community which national courts can enforce. It determines whether community law creates enforceable rights within national legal system.[273] Oppong puts it rightly when he mentions that "it – direct effect - integrates community law into member states' legal systems by turning national courts and individuals into enforcers of community law".[274] As explained previously, the direct effect of the EU law was a creation of the Court of Justice of the European Court of justice. Our Concern in this section is to understand the situation of the EAC law. Does it have direct effect? In other words, can individuals invoke it before national courts? Or does community law create rights to individuals which they can enforce before national courts?

The Treaty for the Establishment of the East African Community is silent as to whether the East African Community law has direct effects. Clearly, it does not indicate explicitly the status of the EAC law as regards to its effectiveness. However, some provisions of the treaty leave room for presumptions of the direct effects of the EAC law. Indeed, some procedures foreseen under the treaty would not be possible without the direct effect aspect of the EAC law. This is the case of the preliminary ruling procedure established in the Treaty under article 34. According to this article:

> "Where a question is raised before any court or tribunal of a Partner State concerning the interpretation of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that Court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgement, request the Court to give a preliminary ruling on the question".[275]

A deep analysis of this provision would lead to the conclusion that courts or tribunals of the partner states are entitled to apply EAC law in their activities and, therefore, enforce rights granted to citizens by the Treaty. Under this provision, there is an assumption

[272] Richard Frimpong Oppong, *Legal Aspect of Economic Integration in Africa*, Cambridge University Press, Cambridge, 2011, p.45-46.
[273]Richard Frimpong Oppong, *Making Regional Economic Community Laws enforceable in national legal systems- constitutional and judicial challenges*, in Anton Bösl et ali, *Monitoring Regional Integration in Southern Africa Yearbook*, Vol 8, Tralac, Stellenbosch, South Africa, 2008, p. 155.
[274] *Ibidem.*
[275] Article 34 of the Treaty for the establishment of the East African Community.

that issues of community law can be invoked by individuals before national courts. In fact, national Courts cannot ask for interpretation of the community law if they were not seized on a matter that involves community issues. It is after it has been seized by individuals who claim for a violation of the rights established under the treaty or any other community instruments that a national court can request for interpretation to the EACJ.

Though not explicit, article 33 of the Treaty also provides for jurisdiction of national courts of Partner States to deal with community matters. In its first part, it stipulates that "except where jurisdiction is conferred on the Court by this Treaty, disputes to which Community is part shall not on that ground alone, be excluded from the jurisdiction of the national courts on similar matter".[276] This provision insinuates that, in the absence of a clear conferral of the jurisdiction on the EACJ by the Court, national courts are then given possibility to handle matters involving community law. The second part of the same provision (art 33, 2) gives more convincing elements of the effect of the EAC law in national legal system. In fact, by indicating that "decisions of the court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on similar matters", it proves that both the national courts and the community court guarantee the rights provided under the Treaty and, therefore, can decide on the matters pertaining to the Treaty. In other words, national courts and the EACJ can interpret and apply the EAC Treaty concurrently. In interpreting or applying community law, national courts undeniably enforce rights recognised and provided in the EAC instruments. This is the essence of the direct effects of Community law.

Additionally, some protocols part to the EAC Treaty contain provisions which would be interpreted as advocating for the direct effect of the law they provide for in some of their aspects. For instance, article 54 of the Common Market Protocol stipulates as following:

> "[…] Partner States guarantee that:

[276] Article 33 (1) of the Treaty for the Establishment of the East African Community.

> (a) any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress".[277]

Reading through this article, one would realise that conditions for the community law to be directly effective are met. Firstly, this provision indicates expressly that infringement of rights and liberties recognised by the Common Market Protocol to individuals is prohibited. It insists on the responsibility for Partner Stater to ensure that they are guaranteed and respected. Moreover, individuals are entitled to redress in case of infringement. The obligation to Partner States to guarantee these rights and liberties, considered together with the right for individuals to redress, is the key milestone feature for the effectiveness of the EAC law. The only way opened for individuals to seek redress is to invoke violation of the rights and liberties before competent authorities. Secondly, this provision indicates bodies allowed to rule on the rights of individuals seeking for redress. They can be judicial, administrative, or legislative or any other authority. What is important is that all these bodies are under control of the Partner States and belong to their circumscription. In other words, they are locally located. Their national character makes them enforcers of the common market protocol; consequently, it brings to individuals, rights created by the Community under the Common Market Protocol. This is what preaches the direct effect of the community law.

Besides the inexplicit provisions of different community instruments on the direct effects, the EACJ gave an explicit view on this issue. In the *Reference n°1 of 2011 opposing the East African Law Society and the Secretary General of the East African Community,*[278] the court had to answer the question of knowing whether the dispute settlement mechanisms under the Common Market protocol does not exclude the jurisdiction of the Court over disputes arising thereunder.[279] It indicated as follows:

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[277] Article 54 (2) of the Protocol on the Establishment of the EAC Common Market.

[278] East African Law Society Vs the Secretary General of the East African Community, Ref. N° 1 of 2011.

[279] In his submission, the applicant contested art 54(2) of the Common Market Protocol which "provides that the Partner States shall guarantee in accordance with their Constitutions, national laws, and administrative procedures that, "the competent judicial, administrative or legislative authority shall rule on the rights of the person who is seeking redress" for infringement of rights under the protocol". The applicant considers that this

> "We wish to reiterate that we had said earlier in this judgment that the primary responsibility to implement community legal instruments lies with Partner States. As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impracticable if their national courts had no jurisdiction over disputes arising out of the implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts".[280]

Under this statement, the EACJ removes all controversies or confusions as to whether East African Community law can be enforced by national courts. Through the expression "community law would be helpless if it did not provide for the right of individuals to invoke it before national courts", the EACJ insinuates that the most important feature of the community law is to produce direct effect. Without this feature, it would be meaningless and therefore insignificant. In the reference for preliminary ruling in the case opposing the Attorney General of the Republic of Uganda and Tom Kyahurwenda, this court reiterated this decision of the first instance indicating that "it would be absurd if national courts and tribunals were excluded from the application of the Treaty provisions should the occasion arise before them".[281]

To sum up, the direct effect of the EAC law is not provided explicitly by the EAC Treaty or anywhere else in the EAC instruments. However, some implicit provisions give assumption for the direct effect of the rights and liberties provided for in the Treaty and its subsequent instruments. It is the EACJ that has made it clear that the EAC law produces direct effect as individuals can invoke it before national courts.

4.3.1.2.3. Supremacy of the EAC law

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provision is "in contravention with article 33 (2) and 8(1) (a) and (c) of the EAC Treaty as they purport to grant partner states, national courts, administrative and legislative authorities or Committees precedence over the East African Court of Justice in matters relating to the interpretation and application of the Treaty Establishing the East African Community". He consequently concludes that; this provision excludes the jurisdiction of the East African Court of Justice over disputes arising from the implementation of the Common Market Protocol. See East African Law Society Vs the Secretary General of the East African Community, Ref. N° 1 of 2011, pp.1-6.

[280] East African Law Society Vs the Secretary General of the East African Community, Ref. N° 1 of 2011,

[281] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda, Case stated N°1 of 2014, para. 54.

Regional economic integration creates and operates within a vertical relation that exists between the community and its Member States[282]. The Treaty or basic instruments establishing regional communities must define and frame this relationship in a very clear method. They indicate which one of the two categories of laws or organs - Community law and the law of Partner States on one hand and community institutions and national institutions on the other hand - prevail in cases of conflict. This prevents the community from unnecessary conflicts of system of laws which may occur based on this vertical relation and which, consequently, may delay the integration process. Certainly, "where these relationships are not clearly defined, structured and managed, they can result in uncertainty, jurisdictional conflicts, non-uniform application of community law, and ultimately, destabilisation of the Community".[283]

The EAC has the merit of having defined and framed this relationship. In fact, without mentioning the principle of supremacy, some provisions of the EAC Treaty make it very clear that Community law takes precedence over the national one. This is the case of article 8 (4) & (5) of the Treaty which indicates as follows:

> "4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.
> 5. In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones".[284]

This provision provides for the supremacy of the East African Community in two aspects. Indeed, not only the supremacy of the EAC concerns its organs and institutions, but also the law governing their activities. In fact, as it can be noted from the wording of the above-mentioned provision, both the community organs, institutions and laws prevail over the national ones on the matter pertaining to the implementation of the East African Community Treaty. It implies that decisions taken by organs and

[282] Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa*, Cambridge University Press, 2011, p.92.
[283]Richard Frimpong Oppong, *op.cit.,* p.92.
[284] Article 8 (4) & (5) of the Treaty for the Establishment of the East African Community.

institutions of the Community take precedence over decisions taken by organs and institutions on similar matters. This is confirmed by article 33 (2) of the Treaty which provide for precedence of the decisions of the EACJ in the interpretation and application of the EAC Treaty in the case of decisions on the similar matters by national courts in the following terms: "decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter"[285]. The principle of precedence of the EAC law is repeated in article 253 of the EAC Customs Management Act as regards to this act. It underlines that "this will take precedence over Partner States' laws with respect to any matter to which its provisions relate".[286] Commenting on this provision of the EAC Customs Union Management Act, Milej considers this as a restatement puzzling since the Customs Union Management Act is supposed to prevail by the virtue of article 8 (4) of the Treaty for the Establishment of the East African Community.[287]

The philosophy behind the preliminary ruling reference is also certainly another reflection of the supremacy of the EAC law. In fact, by giving an obligation to national courts or tribunals to request the EACJ for interpretation of a confusing provision,[288] the framers of the Treaty wanted to insinuate that decisions of the EACJ are supreme and, therefore, have precedence over the national ones. As discussed earlier, preliminary reference obliges national judicial bodies to respect the decisions of the EACJ. Consequently, it requires them not to decide when they are unsure of the meaning of the EAC law while applying it on a given situation. The issue of supremacy of the EACJ over national courts was discussed and clarified in reference for preliminary rulings filed by the High Court of Uganda in the case opposing the Attorney General of the Republic of Uganda and Tom Kyahurwenda.[289] The EACJ held as follows:

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[285] Article 33 (2) of the Treaty for the Establishment of the East African Community.
[286] Article 253 of the EAC Customs Management Act.
[287] Tomasz P. Milej, "*What is Wrong about Supranationality Laws? The Sources of East African Community Law in Light of the EU's Experience*, in *Zeitschrift fur Auslanisches öffentliches Recht and Völkerrecht* (ZaoRV) Vol 75 (2015), p. 587
[288] See article 34 of the Treaty for the Establishment of the East African Community
[289] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda, Case stated N°1 of 2014

> "The Court holds that by resorting to the use of the word **"shall"** in Article 34 and having regard to the *raison d'etre* of the preliminary ruling procedure expounded above, it was the intent and purpose of the framers of the Treaty to grant this Court the exclusive jurisdiction to entertain matters concerning interpretation of the Treaty and annulment of Community Acts".[290]

In our view, the exclusivity given to the EACJ in the matters relating to the interpretation and the application of the treaty as result of the preliminary ruling confers to it the supremacy. As the Court indicates, it is the *raison d'etre* of the preliminary ruling.

At the end of the Judgement, the EACJ insisted on the supremacy of its decisions in concluding as follows:

> "i) Reading Articles 27, 33 and 34 of the Treaty together, this Court has exclusive jurisdiction on the interpretation of the Treaty and invalidation of the Community Acts, directives, regulations or actions,
> ii) The preliminary rulings of this Court are binding on all national courts and tribunals of all Partner States of the Community;
> iii) The purpose of a preliminary ruling is to enable national courts to apply this Court's interpretation to the facts of a case before a national court; and to enable that court to make a judgment;
> iv) If the Partner States have decided to contract out of the above general principle and accord concurrent jurisdiction in the Treaty to both this Court and the national courts and tribunals, the interpretation of this Court takes precedence over that of the national courts and tribunals on similar matters".[291]

Similarly, in *Anyang'o Nyong'o* case, the East African Court of Justice does not doubt about its supremacy resulting from the preliminary ruling procedure established in article 34 of the Treaty. It asserted that:

> "under article 33(2), the Treaty obliquely envisages interpretation of the Treaty provisions by national courts. However, reading the pertinent provision with article 34 leaves no

[290] *Idem*, para 50.

[291] Reference for a preliminary ruling under article 34 of the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda, Case stated N°1 of 2014, para 61.

> doubt about the primacy if not supremacy of this court's jurisdiction over the interpretation of the provisions of the Treaty".[292]

The recognition of the EACJ's supremacy certainly implies that the law produced by this judicial organ produces the similar effects.

4.3.1.2.4. Concluding observations

The objective of this section was to analyse how the relational principles are implemented in the EAC context with a final aim of understanding how friendly EAC Partner States are to the integration process. It is, indeed, when these relational principles are accepted and well implemented that we can conclude whether the community can move and achieve its objectives. This depends on the degree of flexibility of Partner States to release some of their sovereign rights to the community organs by accommodating the above-mentioned relational principles. As demonstrated in this section, in the EAC, these principles do not have a legal basis in the Treaty. The Treaty for the establishment of the East African Community does not foresee them explicitly. Whereas there are no traces of direct applicability in the treaty and its supplementary documents - protocols-, one can see a very timid expression of direct effect and supremacy of EAC law in the treaty and protocols presented in a non-explicit manner. Mostly, the timidity of this expression was removed by an interpretation which was made by the East African Court of Justice.

The absence of explicit provisions on the relational principles in the EAC Treaty is certainly related to the reluctance for Partner States to surrender some of their sovereign rights to the community level. In fact, all these principles, what they have in common is to strengthen the community law on the detriment of national laws. Either they render the community law part of national laws, make it effective by national bodies or superior to national laws. All these actions weaken the national laws at some extend. To this end, Partner States prefer not to codify them in the Treaty so that they do not lose their sovereignty.

[292] Anyang' Nyongo and Others vs The Attorney General of Kenya and Others, EAC Ref. No. 1 of 2006, p. 20.

4.3.2. The relationship between the East African Community law and national laws looked at from the national perspectives

4.3.2.1. National laws and EAC law

4.3.2.1.1. Overview: Non-adapted national constitutions to the EAC law

The implementation of Community law in member states is greatly influenced by national constitutions and the judicial philosophy on the relationship between international and national law.[293] This philosophy is framed in the constitutions of the Partner States. They are the ones which define the place that will be given to the community law in their national system. Consequently, the success of the regional integration process depends on the openness of the Partner States to the community law expressed in the constitutions which indicate their position as regard to the relationship between community law and national law. To this end, they specify the status of the community law in terms of its applicability, its effects and its ranking in their legal system. In redressing these issues, Partner states consent or disagree to surrender some of their sovereign powers or rights to the community level. In the case of consent, they are said to be open to the community law. To understand the relationship between EAC law and national laws of the Partner States, it is certainly important to have a look at all these issues.

Unlike the European Member States which operated significant amendments of their constitutions as a response to the European integration process,[294] none of the constitutions of EAC Partner States defines the relationship between its national law and the community law. None of them advocates or foresees a transfer of some sovereign rights or powers to the community institutions as a way of recognition or acceptance of the EAC law. This observation is also shared by Thomas Milej who noted that "the integration with the EAC is not subject to constitutional regulations".[295] The next section will draw an overview on the position of some constitutions of the EAC Partner States selected based on their legal systems. Whereas Kenya, Tanzania and

[293] Hilf and Petersmann (1993); and Jyranki (1999) cited by Richard Frimpong Oppong, *op.cit*, p.203.
[294] See chapter Three.
[295] Tomasz P. Milej, "*What is Wrong about Supranationality Laws? The Sources of East African Community Law in Light of the EU's Experience*, in *Zeitschrift fur Auslanisches öffentliches Recht and Völkerrecht* (ZaoRV) Vol 75 (2015), p. 593.

Uganda are believed to belong to the common law system, Burundi is following the civil law tradition. Kenya also presents some other features. In fact, historically known as dualist country, it manifested a shift to monism with the constitution of 2010. All these disparities guided the author in his choice for a well-rounded conclusive study.

4.3.2.1.2. Kenyan national legal system and the EAC law.

4.3.2.1.2.1. Introduction

Despite its feature as a supreme law of the Republic of Kenya and which binds all persons and all States at both levels of government,[296] the constitution of Kenya of 2010 does not contain any provision on the relationship between the Kenyan and the EAC law. This is not the case with the constitutions of the EU members States. As demonstrated earlier, in the EU, constitutions do not only mention their reference to the EU, but also, they do have a certain number of provisions clarifying the place of EU law in their legal systems. The Kenyan Constitution does not have such reference. A question which may arise is certainly to know why the Kenyan constitution does not determine the impact of the EAC law in Kenya. It is undoubtedly because of the fear of losing her sovereignty that Kenya does not refer to the EAC law.

4.3.2.1.2.2. Applicability of the EAC law in the Kenyan national legal system

In the absence of the provisions on the EAC law in the Kenyan constitution, one needs to refer to the status of the international law within the Kenyan legal system for him to understand the applicability of the EAC law in Kenya. Certainly, a reference to the provisions on the applicability of the international law in the Kenyan legal system would help us to get the picture with regard to the position of the Kenyan Constitution towards the EAC law. The legal basis for the determination of the place of the international law in Kenya is defined under article 2 of the Constitution. In fact, article 2 (5) stipulates that "the general rules of international law shall form part of the law of Kenya" whereas article 2(6) provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution". At first glance, this

[296] Article 2 of the Constitution of Kenya of 2010.

provision seems to answer a couple of questions but, at the same time, it leaves room for some confusion as some of the questions remain unanswered. In fact, under the provisions of article 2(5) & (6), the Kenyan Constitution of 2010 established the direct applicability of the international law within the Kenyan legal system. It establishes that only ratification is enough to render any treaty or convention applicable as a Kenyan law within the Kenyan law system. This is the real essence of the direct applicability. As explained earlier, this concept means that as long as an international agreement or convention is duly ratified, it does not require any further process for incorporation. This raised the question of knowing whether Kenya has turned to a monist system with the new constitution of 2010.[297] In fact, like other East African Common Law countries, Kenya has been following the dualist system until the 2010 Constitution brought some monistic thoughts in introducing the direct applicability of international law. The court of appeal of Kenya made the same observation in the case *Kereni Njeri Kandi Vs Alssane Ba and Shelter-Afrique*[298] when it indicated as follows:

> "It is not in dispute that prior to the promulgation of the Constitution of Kenya 2010, Kenya was a dualist state, meaning that the treaties it ratified were not self-executing and did not automatically become part of the law of Kenya. Any treaty executed by the State still required domestication by way of a local statute, passed by the Legislature that would incorporate the treaty".[299]

While interpreting the applicability of the international law in Kenya in *the case David Njoroge Macharia Vs. Republic* [2011] eKLR, Kenyan Court of Appeal recalled the traditional dualism Kenyan system highlighting at the same time a shift to the monism with the new constitution as follows:

> "Kenya is traditionally a dualist system; thus, treaty provisions do not have immediate effect in domestic law, nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or

[297] The Constitution of Kenya of 2010.
[298] Karen Njeri Kandie Vs Alssane Ba and Shelter-Afrique, Civil Appeal N° 20 of 2013, See http://www.kenyalaw.org
[299] Karen Njeri Kandie Vs Alssane Ba and Shelter-Afrique, Civil Appeal N° 20 of 2013, p.7

existing legislation. However, this position may have changed after the coming into force of our new Constitution".[300]

Later, the Court of Appeal of Kenya removed all controversies by affirming without hesitation that Kenya is now a monist country. Indeed, in the case *Kereni Njeri Kandi Vs Alssane Ba and Shelter-Afrique,* this Court indicated as follows:

> "What was then a draft was on 27th August 2010 promulgated as the Constitution of Kenya, 2010. It emphatically decrees the place of international law in Kenya's juridical set up as follows; ***"Article 2(5) the general rules of international law shall form part of the law of Kenya….(b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".***
> There can be no doubt therefore that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute".[301]

This way, the Kenyan Court of Appeal has removed all controversies with regards to the system adopted by Kenya. It agrees that Kenya has been a dualist country but that with the 2010 Constitution, it shifted to the monism system. As discussed earlier, the monism implies the direct applicability of international law within the country that follows this system. Therefore, once an international treaty or agreement is duly ratified, it automatically becomes part of the Kenyan laws without the necessity of its domestication. Being part of international law, the EAC law certainly falls within this category of international agreements which are directly applicable.

4.3.2.1.2.3. Effects of the EAC law in the Kenyan national legal system

After having understood the applicability of International law in general and the EAC law in particular, another question needs to be clarified as one of the determinants of the relationship between the EAC and the Kenyan law; that is the effect of the EAC law within the Kenyan law system. As explained, "Direct effect determines whether

[300] *David Njoroge Macharia Vs. Republic* [2011] eKLR, Criminal Appeal no. 497 of 2007
[301] *Kereni Njeri Kandi Vs Alssane Ba and Shelter-Afrique,* Civil Appeal N° 20 of 2013, pp.7-8.

community law creates enforceable rights within the national legal systems".[302] Thus, "a provision of regional law has direct effect if it grants individuals rights which they can rely on and must be upheld in the national courts".[303] The 2010 Kenyan Constitution is silent on this issue. However, by establishing that any treaty or convention ratified shall form part of the law of Kenya,[304] it established significant foundations for direct effects. In fact, logically any Kenyan law produces certainly rights and liberties that are enforceable before Kenyan national courts and tribunals. In practice, in some situations, Kenyans enjoy the rights enshrined in the Treaty and can invoke them before national courts. For example, in the case *Monica Wamboi Ng'ang'a and others Vs Council of Legal Education and 4 others*[305] which was filed before the High Court, the applicants invoked the violation of rights granted to them by the Treaty for the establishment of the East African Community Treaty. Under this case, applicants were denied admission to the Advocates Training Programme (ATP) in Kenya on the ground that they are not Kenyans and have not done their Bachelor of Laws (LL. B) at a Kenyan University.[306] They made the following submissions:

> "In any case, it was submitted that East Africans are not considered foreigners in the eyes of the East African Treaty which Kenya signed, ratified and by virtue of Articles 2(5) and 2(6) of the Kenyan Constitution which domesticates international treaties that Kenya is a signatory to and become part of the Kenyan Laws. Article 1 of the East African Treaty defines a foreign State to mean a state that is outside the east African Community which is not a party to the East African Community Treaty. On the same note, the definition of who is a foreigner within the meaning of the East African Treaty can be inferred from the definition of what a foreign state is to mean that a foreigner is person whether natural or artificial who is not a citizen of any of the member states of the East African Community. In verbatim, Article 1 states that "foreign country" means any country other than a Partner State. "Partner States" means the Republic of Uganda, the Republic of Kenya and the United

[302] James Otieno-Odek, *Law of Regional Integration: A case Study of the East African Community,* in Johannes Döveling et ali, *Harmonisation of Laws in the East African Community: The State of affairs with comparative insights from the European Union and other Regional Economic Communities*, TGCL Series 5, LawAfrica, Nairobi, 2018, p.47.
[303] *Ibidem.*
[304] Article 2(6) of the Constitution of Kenya.
[305] *Monica Wamboi Ng'ang'a and others Vs Council of Legal Education and 4 others,* Petition nos. 450, 448 and 461 of 2016 (consolidated)
[306] The students were awarded their Bachelor of Laws (LL. B) from Uganda Pentecostal University

> Republic of Tanzania and any other country granted membership to the Community under Article 3 of this Treaty."[307]

Therefore, the petitioners concluded that:

> "this definition of what a foreign state and a foreigner is negates the allegation by the Council of Legal Education of alleging that Ugandans are foreigners and that such interpretation by the Council of Legal Education contravenes the desire and spirit of the East African Treaty which demands for equality and non-discrimination of the citizens of any of the members of the East African Member states".[308]

Looking at the philosophy surrounding the concept of direct effect of community law, it can be said that, under this case, this concept was applied. Indeed, in this case filed before a Kenyan court – the high court of Kenya -, the petitioners invoked the violation of rights that are enshrined in the Treaty for the Establishment of the East African Community. Similarly, in the matter *Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR* before the High Court of Kenya, "the interested party […] referred to the Treaty establishing the East African Community which allows free movement of persons and labour and added that Kenya is a signatory to the Treaty".[309] Although the court did not delve deeply into the EAC Treaty in its decision, it did "agree with the position of the Kenyan School of Law that the action to bar foreign nationals offends the provisions of article 126 of the Treaty Establishing the East African Community".

4.3.2.1.2.4. Doctrine of supremacy of EAC law in the Kenyan national legal system

Despites the clear stipulation in the Treaty for the Establishment of the East African Community of the precedence of organs, institutions, and laws of the community over

[307] *Monica Wamboi Ng'ang'a and others Vs Council of Legal Education and 4 others,* Petition nos. 450, 448 and 461 of 2016 (consolidated), para 32.
[308] *Monica Wamboi Ng'ang'a and others Vs Council of Legal Education and 4 others,* Petition nos. 450, 448 and 461 of 2016 (consolidated), para 33.
[309] *Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR,* p.5.

national similar ones,[310] the Kenyan practice considers that EAC law cannot override the Kenyan national law. In fact, over years since the inception of the East African Community, Kenyan Courts understand and interpret Kenyan law as having supremacy over the East African community Law. Until now, no judicial organ at the national level has ever recognized the precedence of the EAC law in the Kenyan legal system as indicated in the EAC Treaty. Some cases illustrate this refusal of the supremacy of the EAC law.

Under the defunct East African Community which was established by the Treaty for the East African Cooperation, the supremacy of EAC law in Kenya was denied by the High Court of Kenya. The most prominent case in this regard is *Okunda v. the Republic of Kenya.*[311] Under this case, the Attorney General of the Republic of Kenya filed a case against two persons charging them with certain offenses against the then official Secrets Act (Act 4 of 1968) of the East African Community. However, this prosecution was not instituted with the consent of the Counsel to the Community as it was the requirement of section 8(1) of the said Act which stipulates that "a prosecution for an offense under this act shall not be instituted except with the written consent of the Counsel to the Community".[312] At the same time, section 26 (8) the constitution of Kenya - Kenyan Constitution of 1969 - was stipulating that, "in the exercise of the functions vested in him […], the Attorney General shall not be subject to the direction or control of any authority".[313] Furthermore, subsection 3 of the same constitutional article insisted that "the Attorney General shall have power in any case in which he considers it desirable so to do – (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any other offence alleged to have been committed by that person".[314] Therefore, the issue was to know which instrument between the East African official Secrets Act and the Constitution of Kenya should take precedence in case of such conflict. Put differently, was the Attorney General entitled to

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[310] See article 8 (4) & (5) of the Treaty for the Establishment of the East African Community. See also above

[311] *Okunda v The Republic,* constitutional Ref N° 2 of 1969 in, American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), pp 556-560

[312] Section 8(1) of the Official Secret Act (Act 4 of 1968) of the East African Community; *Okunda v The Republic,* constitutional Ref N° 2 of 1969 in, American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), p556

[313] Article 26 (8) of the Constitution of Kenya of 1969, cited in *Okunda v The Republic,* constitutional Ref N° 2 of 1969 in, American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), p.557.

[314] Article 26(3) of the Constitution of Kenya of 1969, cited in Okunda *v The Republic,* constitutional Ref N° 2 of 1969 in, American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), p.556.

institute the prosecution against the two persons based only on the Constitution ignoring therefore the requirements of the East African Community Secrets Act? In the view of the Counsel for the Community, there was a clear conflict between the two laws. He insisted that "it be resolved in favour of the Community's legislation because the community's power to legislate springs from the Treaty for East African Cooperation which was freely entered into by three East African countries".[315] In his argument, the council indicated that article 95 of the Treaty for the East African cooperation requires "each of the Partner States to take all steps within its powers to pass legislation to give effect to the Treaty, and in particular to confer upon Acts of the Community the force of law within its territory".[316] He added the undertaking under article 4 of the Treaty[317] that the East African Partner States "agreed to surrender part of their sovereignty".[318] To all these submissions, the High Court of Kenya held that the Attorney General did not violate the EAC law arguing that the latter is part of the Kenyan law. In other words, this court recognized the supremacy of the Kenyan Constitution over the community law.

4.3.2.1.3. Uganda national legal systems and the EAC law.

Like the 2010 Constitution of Kenya, the Ugandan Constitution does not show its openness towards the East African Community law. It ignores completely the Treaty the East African Community as it does not refer to it anywhere in the provisions or provide for conferral of sovereign rights or powers to the EAC Community institutions or organ established under the Treaty. It only vaguely indicates, the promotion of regional and pan-African cultural, economic and political cooperation and integration" as one of its foreign policy objectives[319] without being specific on its relationship with the EAC. In

[315] *Okunda v The Republic,* constitutional Ref N° 2 of 1969, in American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), p.557.
[316] *Ibidem,* citing article 95 of the Treaty for the East African Cooperation of 1967.
[317] Article 4 of the EAC Cooperation of 1967 stipulates: "The Partner States shall make every effort to plan and direct their policies with a view to creating conditions favourable for the development of the Common Market and the achievement of the aims of the Community and shall co-ordinate, through the institutions of the Community, their economic policies to the extent necessary to achieve such aims and shall abstain from any measure likely to jeopardize the achievement thereof".
[318] *Okunda v The Republic,* constitutional Ref N° 2 of 1969, in American Society of International Law, *International Legal Materials*, Vol. 9, N° 3 (May 1970), p.557.
[319] Objective XXVIII (iii) of the Constitution of the Republic of Uganda, 1995.

the absence of explicit reference to the EAC Treaty, the study of the relationship between Uganda national legal system and the EAC law will certainly refer to the status of the general international law within the Ugandan system.

Forming part of the British Commonwealth, Uganda uses dualism[320] as a reception system of the international law in its legal system. As explained earlier,

> "dualists view international and national law as distinct legal orders. For international law to be applicable in national legal order, it must be received through domestic measures, the effect which is to transform the international rule into a national one".[321]

In this regard, the international law in Uganda is not directly applicable. A translation process must be followed after the ratification of an international treaty or agreement to become applicable with the Ugandan system; it needs to be incorporated into the Ugandan law. In other words, ratification does not make a Treaty or an international agreement applicable in Uganda. Beside the ratification, a treaty has to be translated. As Kabumba explained, "to be applied in Uganda Courts, a Treaty must be ratified in accordance with the Ratification of Treaties Act (Cap 204) and then domesticated by an Act of Ugandan Parliament".[322] Thus, article 123(2) of the Ugandan Constitution vests the Parliament the powers to "make laws to govern ratifications of treaties, conventions, agreements or other arrangements" elaborated in accordance with international law.[323]

With regard to the ranking of the international law, it is clearly specified that the Constitution of Uganda is the supreme law. In fact, article 2 of the constitution indicates it in the following:

> "This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

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[320] Judy Obitre-Gama, *The Application of International Law in National law: Policy and Practice*, A Paper Presented at the WHO international Conference on Global Tobacco Control Law: "Towards a WHO Framework Convention on Tobacco Control", from 7th to 9th 2000, New Delhi, India, p. 6

[321] Richard Frimpong Oppong, Re-*Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, In Fordham International Law Journal, Vol 30, Issue 2, 2006, pp 297-298

[322] Busingye Kabumba, *The application of International Law in the Ugandan Judicial system: A critical enquiry*, in Magnus Killander (Editor), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press (PULP), Pretoria, 2010, p. 84.

[323] Article 123 (2) of the Constitution of the Republic of Uganda, 1995.

> If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."[324]

Therefore, considering that an incorporation of the international law makes it part of the national law, it becomes obvious that any inconsistent international treaty or agreement is void. In other words, in case of conflict between the international law and the Ugandan law, the latter prevails.

In Uganda, there is not much case law on the relational principles between the East African Community law on the basis of which one can rely on to understand the practice of the Ugandan national courts in this regard. However, some of the cases already held by the high court of Uganda can trace the picture on the perception of the status of the EAC law within the Uganda law by Ugandan national courts. *Deepak k. Shah and others Vs Manurama Limited and others*[325] is a typical example of the few existing cases. In this case, the defendants - who were residents of Uganda -, applied for an order requesting the plaintiffs - ordinarily resident of Kenya - to pay security costs. In the view of the defendants, "the fact of Plaintiffs' residence abroad, is *a prima facie* ground for ordering payment of costs" as they "may escape payment of security" since they reside outside the jurisdiction of the court.[326] The Plaintiffs categorically rejected this request. They consider the ground of residence not relevant since they are resident of one of the East African Community Partner States. In its response, the High court of Uganda rejected the requested order for payment of security costs thereby excluding the argument that the plaintiffs were not residing in Uganda. This Court refereed to a decision of the English Court *Landi en Hartog B v. Stopps [1976] FSR 497 w*here the court refused to order payment for security costs for the ground that the plaintiff was resident in the European community, and thus presumed that members of this community will honour orders made by the Courts in England.[327] Consequently, the High Court of Uganda highlighted quite a significant number of similarities between the two communities -

[324] Article 2 of the Constitution of the Republic of Uganda, 1995.
[325] Deepak K. Shab and others v. Manurama Limited and others, case N° 361 of 2001 (Arising from H.C.C.S N°354 of 2001.
[326] *Ibidem*.
[327] Landi *en Hartog B v. Stopps [1976] FSR 497.*

the EC and the EAC - in terms of undertaking and objectives. Specifically, the Court invokes article 5 of the Treaty which provides for the need to "develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit".[328] Accordingly, the court ruled that:

> "Article 104 of the Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under obligation to ensure the enjoyment of these rights by their citizens within the Community. In this regard, Court is mindful of the fact that the Treaty has the force of law in each Partner State (Article 8 (2) (b)); and that this Treaty law has precedence over national law (Article 8(5))".[329]

Though not expressly clarified, this concluding statement of the High Court of Uganda seems to have recognized the three main relational principles. In fact, by recalling the obligation of the Partner State to ensure that their citizens are enjoying the rights provided for under the treaty, this court made a clear reminder of the direct effect of the EAC law. Equally, it reminded that the EAC law has "the force of law" within the Partner States as stated in the treaty. Under the expression "this Treaty law has precedence over national law", the court intends to insinuate the supremacy of the EAC law over the Ugandan law.

In *Akidi Margaret v. Adong Lilly and Electoral Commission*[330], the High Court of Uganda expressed the binding feature of international treaties or protocol to which Uganda is part of as far as democracy and good governance is concerned. Among the treaties enumerated by the court is the Treaty for the Establishment of the East African Community. Specifically, this court quoted article 123 of the EAC Treaty which provides for "the development and consolidation of democracy and the rule of law and respect of human rights and fundamental freedoms".[331] Equally, the high court reminded the

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[328] Article 5 of the Treaty for the Establishment of the East African Community Treaty; Cited in Deepak K. Shab and others v. Manurama Limited and others, case N° 361 of 2001 (Arising from H.C.C.S N°354 of 2001).
[329] Deepak K. Shab and others v. Manurama Limited and others, case N° 361 of 2001 (Arising from H.C.C.S N°354 of 2001).
[330] *Akidi Margaret v. Adong Lilly and Electoral Commission,* Election Petition N° 0004 of 2011.
[331] *Akidi Margaret v. Adong Lilly and Electoral Commission,* Election Petition N° 0004 of 2011.

binding nature of the decisions of the EACJ, a judicial body established by the Treaty "to ensure the adherence to the law in the interpretation, application and compliance with the Treaty".[332] It, therefore, concluded that the decisions of this community court bind all Partner States.

4.3.2.1.4. Burundi national legal system and the EAC law

Unlike other Constitutions of the EAC Partner States which do not mention anywhere the East African Community, the 2018 constitution of Burundi has the merit of referring to the EAC Treaty at least in its preamble. It indicates that the Republic of Burundi "affirms its commitment to the respect of the Treaty for the Establishment of the East African Community[333]. However, the willingness of the 2018 Constitution of Burundi to the respect of EAC Treaty is limited to this statement in the preamble. In fact, there are no further developments in main body of the Constitution as regard to enforcement of this respect. It does not specify whether the EAC Treaty or the EAC law in general will be directly applicable, have direct effect or supremacy of the Burundian national law. This way, the Constitution of Burundi does not consider the East African Community as a new legal order different from the international one. Thus, in the absence of all these clarifications as regard to the status of EAC law within the Burundian legal system, one needs to refer to the status that is given to the international law.

Burundi follows the monist tradition in the determination of the status of international treaties. In fact, article 279 of the Constitution of Burundi specifies that international treaties take effect upon ratification. There are no further steps or processes required for their incorporation into the Burundian national legal system. This way, it can be concluded that international law, and by extension the East African Community law are directly applicable in Burundi. The ratification for the Establishment of the East African Community which occurred on 30th of June 2007[334] made it directly applicable.

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[332] *Akidi Margaret v. Adong Lilly and Electoral Commission,* Election Petition N° 0004 of 2011.

[333] Préambule de la Constitution de la République du Burundi du 7 juin 2018.

[334] Loi N°1/08 du 30 juin 2007 portant ratification par la République du Burundi du Traité d'Adhésion du Burundi à la Communauté Est Africaine, signé à Kampala, Ouganda, le 18 Juin 2007 ; See also Instrument de Ratification par la République du Burundi du Traité d'Adhésion de la République du Burundi à la Communauté Est Africaine, signée à Kampala, Ouganda, le 18 Juin 2007

The constitution of Burundi is silent with regard to the direct effect and supremacy of the international law. This is different with other constitutions of the EAC Partner States. Whereas other Constitutions of the East African Partner States provide for their supremacy over any other law,[335] the constitution of Burundi does not say anything in this regard.

4.3.2.2. Summary table on the role of national constitutions in the EAC integration

Partner States	Provisions and their content		
	Transfer of powers to international organizations	Specific provisions on the powers transfer to the EAC	Provisions on the relational principles between EAC and national law
Burundi	- Preamble reaffirms the attachment to the unity in accordance with the constitutive act of the African	Preamble: affirmation of the respect of the EAC Treaty	No provision

[335] Article 2 of the Constitution of Uganda: "This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void" ; article 2 (1) of the Constitution of Kenya: "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government"; Art 3(1) of the Constitution of South Soudan: "This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country"., Article 64 (5) of the Constitution of Tanzania "Without prejudice to the application of the Constitution of Zanzibar in accordance with this Constitution shall have the force of law in the whole of the United Republic, and in the event any other law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void"; Article 3(1) of the Constitution of Rwanda: "The Constitution is the supreme law of the country".

	Union - Art 278: it allows the State of Burundi to enter into international organization		
Rwanda	- Article 168: Duly ratified international treaties have the force of law as national legislation - Article 170: An international treaty or agreement containing provisions which contract the constitution or organic law cannot be ratified until the constitution or the organic law is amended	No provision	No provision
Tanzania	- No provision	No provision	No provision
Uganda	Article 123: - Duty for the President to make Treaties, conventions, agreements or other arrangements with other countries or organizations - Ratification of treaties by the Parliament	No provision	No provision
Kenya	- Article 2 (5): The general rules of international law shall form part of the law of Kenya - Article 2(6): Any Treaty or convention ratified by Kenya shall form part of the Kenyan	No provision	No provision

	Law under this constitution		
South Sudan	Article 43: -promotion of international cooperation within the UN, African Union and other international and regional organizations -achievement of African economic integration - Respect of international law and treaty obligations -Enhancement of economic cooperation among countries of the region -Combating international and transnational organized crime, piracy, and terrorism	No provision	No provision

Unlike the EU, this table shows clearly how the constitutions of the EAC Partner States are not adapted to the EAC Treaty. In fact, among the 6 Partner States, none of them has dedicated even a single provision to deal with the EAC matters or to determine the relationship between the EAC law and national laws. Only Burundi of Burundi has made a step by referring to the EAC Treaty in its preamble without reserving any provision to support this reference in its main body. This is different with the European Union. As discussed earlier, in the EU, 22 Member States out of the 27 have incorporated specific provisions dealing with European Union matters. Some of them have even established the status of the EU with their national legal system through the relational principles.

This reluctance to integrate the EAC Treaty into national constitutions is certainly a reflection of the unwillingness of Partner States to surrender some of their sovereign rights to the community. On this aspect, the EU Member States have the merit of showing the willingness to adapt their constitution to the prevailing moments at the community level. At every amendment of the EU treaty member states had to amend their constitutions in order to align them with the EU Treaties. Certainly, as the time went on, they realized that it was necessary to establish a constitutional basis for the transfer of rights to the Union. This spirit does not exist in the EAC Partner States. In fact, after the coming into force of the current EAC Treaty on the 7th day of July 2000, almost all the Partner States amended their constitutions but none of them took that occasion to insert a provision to deal with EAC matters.

4.3.2.3. Concluding observations: does the East African Community law reflect a supranational or an intergovernmental nature?

Specifically, the main idea is to understand whether the East African Community law has a supranational nature. In other words, what is the place that is given to the East African Community law within the legal framework of the EAC Partner States? In fact, for a community law to be recognised supranational, member states surrender their sovereign rights to the community level by accepting the community law as having effects within their territory and, therefore, by giving it its primacy. Under this section, it was discovered that that EAC Partner States do not recognise the EAC law as a supranational law. In fact, unlike the European Union, EAC Partner States do not establish the place of the EAC law in their constitutions. It is, indeed, in the constitutions that a country can determine its relationship with the community law. Without a harmonised legal framework as regard to the conception of the EAC law within the EAC partner States, the EAC law cannot have a supranational nature. Every partner state has its own conception of the applicability and the effects of EAC law within its legal system.

4.4. Concluding observations on the Chapter

The main objective of this chapter was to determine the relationship between State sovereignty and regional integration in the East African Community. The findings of the chapter were that East African Community Partner States are reluctant to surrender some of their sovereign rights to the community organs. This could be reflected through an absence of a clear legal framework of competences of the community in the Treaty establishing the East African Community, and a noticeable influence of national institutions on the decision-making process at the community level. The EAC Partner States are also still reluctant to give necessary effects to the East African Community law in their national legal order. All these reluctances to surrender certain sovereign rights to the community make the East African Community less supranational.

In short, the findings for this chapter is that there is a gap between what the East African Community aspires to be and what it is. In fact, it aims to be a supranational organization, but it does not in reality. On this point, the European Union has the merit of having reached a significant step ahead of supranationalism in comparison with the East African Community. Partner States do not show their willingness to give up certain sovereign rights as they fear of losing their sovereignty. However, it was also noted that, they should not fear because, as explained by the East African Court of Justice, surrendering certain sovereign rights does mean losing the sovereignty altogether.

CHAPTER FIVE
CONCLUDING OBSERVATIONS

5.1. The Current State of Affairs

The main objective of this study was to understand the relationship existing between "state sovereignty and regional integration". Questioning the coexistence of these two concepts is based on the uncertainties which occur from their definitions. Indeed, as clarified earlier, whereas State sovereignty implies the capacity for states to govern themselves by settling their own rules without interference any external actors, regional integration implies, at some extent, for states to surrender some of their sovereign rights to the community organs and institutions. Therefore, the study was founded on a question about the extent to which Member/Partner States should surrender their sovereignty to the community for the realisation of a successful integration and also, the extent to which they could do it without losing their sovereignty altogether.

After exploring the two concepts - State Sovereignty and regional integration - in the context of the European Union and the East African Community, the finding of the book is that, there is a reluctance among Member/Partner States to surrender sovereign rights to the Community. To assess this observation, three main points believed to be the main determinants of the relationship between state sovereignty and regional integration were analysed: the competences of the community and the principles governing them, the relationship between institutions at the community level and national institutions and the relationship between community law and national laws. This study has shown consistently that in all aspects of the three elements of study, Member/Partner States are hesitant to surrender some of their sovereign rights to the community level for a good realisation of the integration process. Where attempts have been made, some limitations framed in the way of clawback principles or provisions have been put in place by the founding treaties, making the necessary surrendering of sovereign rights to the community incomplete, inadequate or founded on uncertain assumptions for them to contribute to the realisation of the integration process.

Certainly, as it was consistently observed, Partner/ Member States have the right to protect their sovereignty understood in its narrow sense since they do not need to surrender their sovereignty in its entirety. However, on the other hand, Partner States mostly in the EAC tend to overuse this prerogative by refusing to give up some sovereign rights necessary to render the integration process successful. Indeed, if one considers the three main elements of evaluation under this study, there remain some limitations established under different instruments at the community level and national level or even undressed issues which do not fall in the prerogatives of the Partner/Member States to protect their sovereignty and which, therefore, render the surrendering unable to produce its effects in terms of letting the integration process move forward.

Furthermore, in order to establish a well-rounded comparative assessment between the European Union and the East African Community with regard to the relationship between state sovereignty and regional integration, this study had to, consistently, weight the commitment of the Partner/Member States to surrender their sovereign rights to the community level. This is an unequivocal element to check whether a community is supranational or intergovernmental. To assess this, the study analysed systematically the competences of these two communities – East African Community and the European Union – the interaction of their institutions with national institutions in the decision-making process and most importantly the place of community law within the Partner/Member States. After expounding all these aspects in the context of the two communities, the findings of this study are clear: the European Union and the East African Community are, at the same time, supranational and intergovernmental. However, some clarifications need to be provided on this point: whereas the European Union presents many genuine supranational features and less features of an intergovernmental organisation; in contrast, the East African Community presents very weak features of a supranational organisation and strong intergovernmental characteristics. Therefore, this study recommends that the EAC should borrow some goods examples from the European Union to make it more supranational. Some of them are indicated in the next section.

However, on the other side, States do not need to fear losing their sovereignty because the findings of this study showed that, it is possible to cede some sovereign rights to the community without losing the sovereignty in its entirety. Indeed, on one hand, it was seen in this study that, if the integration is to work and to be effective, Member States must be ready to limit their sovereignty by transferring some of their sovereign rights. This transfer of sovereign rights is done through the acceptance of the competences of the community, the supremacy of the community law over the national ones in certain fields and the supranational modes of decision-making. On the other hand, it was consistently shown that Member States do not need to surrender their sovereignty entirely. In contrast, they remain sovereign as they are the ones which decide on the powers of the Community. The latter does not have the right to decide on its own competences; it does not have what the German Constitutional court called *Kompetenz-Kompetenz* and cannot act beyond the competences established by the Member States. Otherwise, it acts *ultra vires* which the Member States still have the powers to control through their constitutional court under what is called *ultra-vires* review. In addition, the Member States keep playing a major role in the decision-making and democratic life of the community, they retain a final say on certain matters that affect the constitutional identity which can be checked under the identity review process and, they retain competences in certain sensitive matters which are sovereign-related. This was generally the findings in the European Union. Nevertheless, this is not far from the conclusion of the East African Court of Justice which indicated in Anyang' Nyong'o case that ceding some amount of sovereignty to the community and its organs does not mean that they lose their sovereign equality. The court indicated in in the following terms:

> "While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role"[1]

Thus, States should not be afraid of surrendering some of their sovereign rights since this transfer does not mean necessarily the loss of sovereignty altogether. In this sense, the findings of this book go in line with the definition of the sovereignty which considers sovereignty as having both a broad and a narrow sense. In the former, sovereignty can

[1] *Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others*, Ref. n° 1 of 2006, pp.44.

be shared, limited, and divided, which means that Member States limit their sovereignty by transferring certain sovereign rights to the community. In the latter, States retain a final say on sensitive national questions and constitutional self-determination. Member States do not want to give up this kind of sovereignty; it cannot be shared, limited, or transferred as it remains in the hands of the Member States.

5.2. The way forward

5.2.1. Overview

Under the following section, this book suggests a way forward for the realization of the regional integration. It argues that, Member/Partner States should not be afraid of surrendering some of their sovereign rights to the community organs because, as this study has proven it, sharing some powers with the community does not mean that they lose their sovereignty in its entirety. They remain sovereign as they keep a final say on certain crucial sovereign related matters like questions of constitutional identity and the Community does not have the *Kompetenz Kompetenz;* this means that the Community does not have the competence to determine its own competences. Indeed, Member/Partner States do not lose control as they remain the masters of the treaties. They also retain the possibility to control whether the Union did not act *ultra-vires* under what is called *ultra vires* control and, also the right to leave the Union when they find that some of the sovereign rights have been breached.

Therefore, as it was evidenced at any of the 3 main points developed in this book namely the competences of the Community, the relationship between national institutions and community institutions, and the relationship between community laws and national laws; Member/Partner States should break down the stereotype that they can lose sovereignty. Instead, they should redefine their perception on the transfer of powers to the Community since it does not harm sovereignty in its entirety. Therefore, they should be ready to give up some of their sovereign rights to the Community.

5.2.2. With regard to the Competences of the Community and the Principles governing the integration process

Competences of the community are one of the important elements to test the level of the integration process and, therefore, to indicate whether states have surrendered their sovereign rights to the community level. The finding of this study on this issue is that unlike the Treaty of Lisbon which has made a clear repartition of competences, the EAC Treaty does not establish such repartition. The study argued that the absence of stigmatised and grouped competences in the context of the EAC is a clear manifestation of the reluctance of the Partner States to surrender some of their powers to the community. In other words, they are the ones which decide on what to do and, therefore, dictate the secretariat in its activities. In this sense, the integration process cannot move forward since every state tries to protect its interests. To this end, a definition of the competences of the Community is recommendable.

On the other hand, the principles governing the integration process in the EAC as defined by Treaty for the establishment of the East African Community do not reflect the real sense of a supranational community. This Treaty, as it stands now, does not define clearly the scope, limitations and mechanisms for the implementation of the principles it set; leaving, therefore, room for unwilling Partner States to keep the sovereign rights they were supposed to surrender to the Community level for the sake of the integration process. Though these principles advocate for an ever-closer Union to the citizens (see the People-Centred and market-driven cooperation principle, and the Principle of Subsidiarity) or the participation strategies of the EAC Partner States to the integration process (Principle of Variable Geometry, Principle of Complementarity, and the Principle of Asymmetry), they are not clearly explained. Thus, Partner States use these explanation weaknesses to protect their interests, delaying or slowing therefore the integration process. In this regard, it would be important if the Partner States could amend the Treaty to define well the guiding principles for the integration process in taking reference to their brothers in the European Union.

5.2.3. With regard to the decision-making process and the institutions

The decision-making process and institutional structure of the East African Community need to be reconsidered and organized in a way which could help the Community move forward. This section focuses on some of the recommendations in this regard.

5.2.3.1. With regard to the decision-making process

This study discussed the decision-making process in European Union and East African Community. The findings were that the decision-making process at East African Community level suffers from the sovereign character of its Partner States. The EAC Partner States' unwillingness to surrender some of their sovereign rights in the decision-making process is visible at two different points: the quorum and the deciding majority. In fact, as discussed earlier, the quorum for any meeting at the community level requires the representation of all Partner States.[2] Beside the quorum, the majority required for deciding of the community organs – except the East African Court of Justice and the East African Legislative Assembly – is consensus. This study found that the EAC stakeholders interpret it as unanimity. This implies that, in all these organs of the community, for a decision to pass, it requires an agreement of all participants in addition to the quorum that is "all States representation". This way, through these organs, the Community became "an agent of the Partner States who are the principals"[3] and as James Otieno-Odek puts it rightly, "an agent cannot be greater that the principal".[4] Our findings were that these two concepts - the quorum and the deciding majority - played a significant role in blocking the EAC's integration process. Understood this way, the concepts of quorum and consensus makes the East African Community intergovernmental as Partner States keep their hands the decision-making at the community level. Therefore, the supranational nature seen as a reflection of the commitment of the Partner States to surrender some of their sovereign rights is missed in this community if one considers its decision-making system.

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[2] See chapter Four.

[3] James Otieno-Odek, *Law of Regional Integration: A Case Study of the East African Community*, In Johannes Döveling et alii, *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities*, LawAfrica, Nairobi, 2018, p. 42.

[4] *Ibidem.*

The EAC Partner States need to reconsider the decision-making process of the EAC institutions. On this matter, the EAC can learn from the European Union. This Community understood that the principle of "one country, one vote" constitutes a breach for the integration process. They therefore introduced the qualified majority vote as a deciding mode. Understood as a combination of thresholds of Member States and the majority of the population,[5] it prevents from the veto of the Member States which can play around their interests and therefore block the integration process. This voting system can be borrowed by the East African Community as way to let the community move forward.

5.2.3.2. With regard to the Institutions

5.2.3.2.1. Rethinking of the enhancement of the supranational features of the Institutions of the EAC

The EAC Partner States need to reconsider the institutional structure of the East African Community. In fact, one of the findings of this study is that, as compared to the EU, the EAC suffers from a lack of strong supranational institutions. The Unanimity rule and the quorum as they are set now render the institutions of the EAC very weak. Besides this, there is a subsistence of a clear democratic deficit in the EAC compared to the European Union. Even if the Treaty for the Establishment of the East African Community foresees to make the Community "People-Centred",[6] there is no clear framework in the same treaty as to how it will be implemented. This situation makes the democratic like of this community uncertain, and therefore, puts the institutions of the Partner States at the centre of the decision-making process of the Community leaving aside the institutions established at the Community level. Indeed, as the results of our research revealed, the consequence is that the supranational nature that is needed to let the integration process moving forward, is sacrificed. Therefore, the East African community appears more intergovernmental in comparison to its supranational characters. Certainly, there is an absence of connection between the objective of the community and community´s

[5] Article 16(4) of the Treaty on the European Union.
[6] Article 7 (1) (a) of the Treaty for the Establishment of the East African Community.

everyday action. To this end, there is a need to rethink enhancing the supranational characteristics of the EAC´s institutions.

In order to solve this issue, EAC Partner States need to find solution to some questions in the perspectives of enhancing the EAC's democratic life: How to increase the democratic legitimacy of the EAC institutions to make them supranational? Subsequently, the EAC Partner States need to study how the authority and the efficiency of the Secretariat can be enhanced. How can the Secretary General be appointed? By the Council of ministers? by the East African Legislative Assembly? Should the Secretary General still be appointed by the summit upon nomination by relevant Head of State under the principle of rotation or should he be elected directly by the EAC citizens?

To enhance the democratic legitimacy of the EAC, the Partner States need also to reconsider the structure and the powers of the East African Legislative Assembly: How can the members of the East African Legislative Assembly be elected? Should they still be elected by the respective national assemblies? How can the functions of the East African Legislative Assembly be strengthened? What should be the powers of the East African Legislative Assembly? What should be the role of national Assemblies in the legislative process of the EALA? How can the independence of the East African Court of Justice be guaranteed? Who can appoint the judges of the East African Court of Justice and how can they be appointed? How can the EAC institutions which are intergovernmental in nature and composition be separated with other institutions? In other words, how can the Council of Ministers and the Summit be limited from the activities of the Secretariat, the East African Court of Justice and the East African Legislative Assembly?

All these questions are fundamental to the realisation of the EAC's integration. Indeed, answering them will contribute for the improvement of the supranational feature of this Community. It is, certainly, through the powers of the institutions at the Community level that one can assess the supranational feature of the community, and therefore the willingness of the Partner States to surrender their sovereign rights for the sake of the integration process. In fact, as argued by some theorists of Regional integration

supranational institutions are engines of integration.[7] This was proven in the case of the European Union where the Union's supranational institutions played significant role in the integration process. This was possible because member States were able to surrender certain powers and functions to the community level and therefore empowered the institutions of the Union. As Jonas explains, "one of the distinguishing features of the EU in comparison to other international organisations is the degree to which its member governments have delegated powers and functions to the central institutions".[8] In line with the findings of this research, Roger J. Goebel finds that , "the European Union is certain never to become a nation-state, and its component are bound to retain most of their sovereign characteristics, but it is preferably plausible to refer to the EU as *a sui generis* supranational legal instrument unlike any other in the world".[9] Even if not fully supranational, it can certainly serve as example to the East African Community which is still presenting significant features of an intergovernmental organisation. As this study found, EAC Partner states still exercise their autonomous sovereignty upon legislation or elaboration of policies or decisions undertaken at the Community level. In this community, "there is still an overconcentration of decision-making and implementation powers on partner states-the Summit, the Council of Ministers and other bureaucrats, who answer to the Heads of State".[10] Therefore, there is a need to amend the Treaty in order the enhance the powers of the institutions and organs of the community.

5.2.3.2.2. The Summit

This study set out also to examine the powers of the Summit and their implication on the EAC integration process. The findings were that there is an overconcentration of powers in the hands of this organ of the Community. As discussed in this study, "decisions are taken by consensus so that the head of state of a member country can

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[7] Jonas Tallberg, *European Governance and Supranational Institutions*, Routledge, London and New York, 2013, p.1.
[8] *Idem*, p.2-3.
[9] Roger Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After Lisbon*, in *Columbia Journal of European Law*, Vol 20, 2013, p. 82.
[10] Jonshua M. Kivuva*, East Africa´s Dangerous Dance with the Past: Important Lessons the New East African Community has Learned from the Defunct*, In European Scientific Journal, Vol 10., Issue No 34, December 2014, p.362.

block almost all the EAC's activities".[11] It was found that different projects failed several times because of this concentration of powers which makes the unwilling Partner States to refuse surrender some of their sovereign rights to the community. To let the East African Community moving forward, there is a need to limit the Summit´s powers.

Some lessons can be learnt from the European union. Indeed, the Summit of the East African Community corresponds to the European Council of the European Union though the former is more powerful.[12] In the EU, the European Council is led by an independent person who does not even belong to it.[13] He is the one who deals with administrative issues and this prevents from delays that can occur in the implementation of the Union´s policies. This could be a good example for the EAC where an act of the community needs to be assented to by every Head of State before it becomes enforceable. Furthermore, as it appears from the findings of this study, the European Council is limited in its activities and cannot intervene in any legislative activity at the community level.[14] It only provides the Union with necessary impetus for its development and defining the general political directions and priorities.[15] Like the European Council, the EAC Partner States need to understand that conferring legislative powers to an executive organ like the Summit constitutes a blockage to the realisation of the integration process. Lastly, the quorum for the meetings for the Summit needs to be revised. In fact, as discussed in this study, the quorum of all states representation can block the community´s policies since in the case of absence of one Head of State leads to meeting cannot take place.

5.2.3.2.3. The Council of Ministers

The findings of this study established that the Council of Minister is another arm of the executive used by Partner States to block the integration process. Indeed, as described, the composition, powers and deciding majority make the Council of Ministers intergovernmental. As it was consistently explained in this book, for a good realisation

[11] Stefan Reith, The East African Community: Regional Integration between Aspiration and Reality, in KAS international Reports, 2011, p. 96.
[12] *Ibidem*.
[13] Art 20 of the Rules of the procedure of the European Council, December 2018.
[14] Article 15(1) of the Treaty on the European Union.
[15] Article 15(1) of the Treaty on the European Union.

of the integration process, institutions at the community level need to be given significant supranational features. Their supra-nationality renders them independent from the Partner States. This said, there is a need to review the powers and the decision-making process of this community organ. Some good lessons could be learnt from the European Union. As for example, after EU Member States noted the blockage that was caused by the unanimity voting system in the Council of Ministers, they seated together and solved to change for the qualified majority voting system.

However, one should also not ignore the important role of the Council of Ministers in the integration process. Indeed, as indicated in this study, despite of being an executive body in nature and structure, the Council of Ministers of the European Union co-legislates together with the European Parliament. As Armin Cuyvers notes, "no legislation can be adopted without the council even though, in most cases, the Council needs the European Parliament to pass a law".[16] One could maybe think that it is an interference of the EU Member States in the work of the European Parliament since legislative activities belong to the parliament in general. Nevertheless, in the integration process, the intervention of the Member States in the legislative activities of the Communities they belong to, is inevitable. Certainly, regional communities are not structured like nation-states where the separation of powers must be strictly respected. In regional integration or federal States system, the principle of separation of powers existing in nation-states cannot indeed be absolute. What is important in this governing system, is the establishment of community institutions which present significant supranational features necessary to let the integration process move forward.

5.2.3.2.4. The East African Court of Justice

As a Judicial body in charge of interpreting and applying the EAC law, the East African Court of Justice should be given place as a supranational judicial body.

[16] Armin Cuyvers, The Institutional Framework of the EU, in Emmanuel Ugirashebuja et ali, *East African Community: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Leiden/Boston, 2017, pp.88-89.

Firstly, the independence of the East African Court of Justice from other organs of the Community needs to be more guaranteed. In fact, our findings were that, the influence of the Partners on this judicial organ finds its origin in the appointment of the judges of the court. They are appointed by the Summit among persons recommended by the Partner States.[17] This study showed that, as a consequence of this appointment procedure, Partner States tend to influence them when doing their activities as judges interpreting and applying EAC law. This said, it would be of a great importance if this appointment process is reviewed with a purpose to avoid the interference of the Summit. For a good functioning of the judiciary, the judges need to be chosen on a competition basis. Lessons could also be learnt from the European Union. In fact, judges of the European Court of Justice are selected by an independent panel.

Secondly, referring to the Court of Justice of the European Union, this study found that the preliminary rulings are of great importance for the realisation of the integration process. In fact, the integrationist principles which are at the centre of the integration process – these principles are the principle of Direct Applicability, the Principle of Direct effects and the Supremacy of the EU law – were developed by the ECJ as result of the preliminary rulings.[18] Taking an example from this European judicial organ, the East African Community Partner States need to learn from it by making the East African Court of Justice active. Indeed, as discussed earlier, despite the provision of the EAC Treaty which foresees for preliminary rulings, the Preliminary ruling procedure is not applied. EAC national courts should recognise the supremacy of the EACJ and, therefore, use of this prerogative of the treaty in order to avoid disparities in the interpretation of the EAC law. EAC citizens should be sensitised on their right to invoke then EAC Law before their national courts.

Thirdly, EACJ is established as a judicial body in charge of the interpretation and the application of the Treaty in accordance with article 23 (1) of the Treaty.[19] As a

[17] Article 24(1) of the Treaty for the Establishment of the East African Community.
[18] See *Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62) [1963] EC1 and*
Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.
[19] Art 23(1) indicates that "the Court shall be a judicia l body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty".

supranational judicial body, it should be given all opportunities to do its work without any interference of any other judicial organ. Therefore, the parallel disputes settlement mechanisms established under the Customs Union and the Common Market Protocols[20] are a kind of denial of the EACJ as a supranational court. EACJ should be given priority in the interpretation of any contentious community law.

3.1.2.4.3. The East African Legislative Assembly

There is a need to work towards an increase of the legitimacy, powers, and the independence of the East African Legislative Assembly. Indeed, as indicated in the previous chapter, not only are members of EALA not elected in the way of direct universal suffrage, but they are also not necessarily elected from the members of national parliaments who have acquired a certain legitimacy through local elections. As consequence, their legitimacy becomes questionable because it does not originate directly from the citizen of the EAC. This study equally found that the election of the member of EALA by national parliaments of the Partner States is not objective as Partner States tend to appoint persons who they think they can protect their interests. As this study elucidated, this makes the elected members ignorant of their status as having a regional mandate instead of the national one. The EALA misses some important powers which are necessary for a good realisation of the integration process like powers to elect the Secretary General or other high positions of the Community.

On these different aspects, some lessons can be learnt from the European Union. Certainly, as Gundel indicates, the European Parliament is not and will not be comparable to a national Parliament due to the special structures of an association of sovereign states.[21] Nevertheless, it presents significant features which makes it playing an important role in the integration process. Indeed, as this study revealed, the legitimacy of the European Parliament results from the fact its members are directly elected by the EU Citizens. Furthermore, the EU Parliament participates in the

[20] Article 24 (5) of the Customs Union protocol and article 54 of the East African Common Market protocol.
[21] Jörg Gundel*, Das Europäische Parliament als Volksvertretung zweiter Klasse? - Die Entscheidung des BVerfG zur 3-%- Kausel des Europawahlgesetzes*, in *Bayerische Verwaltungsbläter (BayVBl.)* 19/ 2014, p. 589.

nomination for high positions of the community like the President of the Commission (comparable to the Secretary General in the case of EAC) and other commissioners.

5.2.3.2.5. The Secretariat

The findings of this study disclosed that the overconcentration of powers in the Executive bodies namely the Summit and the Council of ministers made the Secretariat as a dependent organ without prerogatives. As described earlier, the secretariat oversees the day-to-day life running life of the community. Therefore, the Partner States need to give the Secretariat supranational powers it needs to implement the decisions of Community. In other words, EAC Partner States need to cede some of their national sovereign powers to the Secretariat so that it can do its work with full independence.

Lessons should be learnt from the commission of the European Union. In doing its activities, the Commission is completely independent[22] since its members can "neither seek nor take instructions from any government or other institution, body, office or entity".[23] Furthermore, the Commission has the monopoly of initiative. This competence should be given to the Secretariat too. Indeed, being an organ that supervises and implements the daily work of the Community, the Secretariat is in a good position to know how realistic projects of the community would be and therefore needs to be given the possibility of initiative. Like the European Commission, the Secretariat should also be given supervisory powers over the implementation of the East African Community law. Indeed, in its role to ensure the implementation of the European Union treaties and law, the commission can take the Member States and even EU institutions to the European Court of Justice. In so doing, it does not need to consult any other organ or institution as it is the case for Secretariat.

[22] Article 17(3) of the Treaty on the European Union.
[23] Article 17(3) of the Treaty on the European Union.

5.2.4. With regard to the relationship between community law and national laws

One of the sub-objectives of this study was to understand the relationship between the community law and national laws following the lead of the EU and the EAC. In other words, it was important to determine the place that it is given to the Community law within the national legal systems of the Member/Partner States.
This study found that, unlike the EU where the European Union Law is considered as a new legal order distinct from the international law and, therefore, to which member states have limited some of their sovereign rights,[24] there is no such specification in the case of East African Community law. This makes the EAC law weak and leads to unharmonized regional legal system since every state tends to interpret it on its own. Consequently, the driving relational principles namely the direct applicability, direct effects, and supremacy of the EAC law are defined differently in the Partner States which makes this community law missing supranational features necessary for the realisation of the integration process.

To this end, EAC Partner States need to recognise the EAC Law as a legal order enforceable within their legal system and, therefore, which deserves a certain recognition as having effects into national legal systems. In this regards, Partner States should learn from the Member States of the European Union. As discussed in this study, the national constitutions of the European Union Member States are responsive to the European integration process. Most of them introduced provisions to define their relationship between the European Law and their national legal system. Some of them even reintroduced relational principles (direct applicability, direct effects, and supremacy of the EU law) as a way of insisting on the importance of the EU law. With reference to this example, there is a need for all East African Partner States to introduce such provisions in their constitutions. Through these provisions, they could indicate how they intend to transfer some of their sovereign rights to the East African Community.

[24] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: *Giudice conciliatore di Milano* - Italy. - Case 6/64.

Another element that needs to be brought to the attention of the EAC Stakeholders is the position of the EAC treaty on the relationship between the EAC Law and National Law. The findings on this matter were that the Treaty is silent on some of the relational principles namely the principle of direct applicability and direct effect of the Community law. In contrast, some of its provisions tend to confer powers to Partner States to give effects to the Community law in accordance with their constitutional procedures[25]. Therefore, there is a need for an introduction of a provision in the EAC Treaty proclaiming for direct applicability and direct effects of the EAC law. Even if the EU treaties do not mention it openly,[26] a teleological interpretation of some of its provisions give an impression of the direct applicability of the EU law. This is the example of article 288 of the Treaty on the Functioning of the European Union which indicates that "a regulation shall have a general application" and that "it shall be binding in its entirety and directly applicable in all Member States".[27]

[25] See article 8 (2) of the Treaty for the Establishment of the East African Community: "Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular -
(a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory."

[26] It is worth recalling that the principle of Direct applicability and Direct Effect were developed in the EU by the ECJ.

[27] Article 288 of the Treaty on the Functioning on the European Union.

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