# 3. Researching Judges as Political Actors

> "Different paradigms lead us to ask different questions, use different methods to study those questions, analyse our data in different ways, and draw different types of conclusions from our data. They are so powerful and often taken for granted" (Willis, Jost, and Nilakanta 2007, xx).

The above extract highlights the often-overlooked influence of research approaches. In the field of *Law and Courts*, long-standing debates on objectivity, subjectivity, and the universality of research have teased out the complexities of conducting ethical, valid and reliable studies (Trubek and Esser 1989; Silbey and Sarat 1987; Sarat 1990; Halliday and Schmidt 2009). Even though epistemological leanings have not converged, there is a consensus that researchers ought to explicitly articulate their underlying methodological assumptions. Indeed, the entire research process is epistemologically driven, and it behoves the researcher to clearly state the epistemological understanding behind their methodology, as it gravely influences the study's findings.

This chapter offers a reflexive "research openness" (Kapiszewski and Wood 2022), which discusses the collection of evidence that supports the arguments raised in the study whilst accounting for the epistemological approach and its implications for the study. It follows suggestions for reporting on selecting research participants, interview attributes, transcription rules, and analysis used to develop categories (Kuckartz 2014, 155–58). The chapter justifies the case selection and delves into the research design and data collection methods. It concludes by reflecting on researching courts as political avenues, pondering research ethics, positionality, and the peculiar circumstances of studying legal elites[76] in close-knit circles. A notable contribution of the chapter is that it draws on the author's field[77] experience to

76 The elite category is not a monolith, even if it remains useful in articulating the peculiarities of speaking with educated and authoritative individuals as research participants, recognising that these experiences are "fraught with variable challenges related to positionality (Glas 2021, 438).

77 I use the term "field" here very loosely, cognizant and appreciative of debates that debunk the idea of the field that is "out there," citing an ambiguity in the boundary between the field and home (Amit 2000, 8). The boundaries of the field are as elastic, mobile, and intermittent as the prevailing circumstances surrounding it. I am

highlight the potential of the informal dimension of fieldwork – "hanging out" – in traversing some of the limits of researching legal and judicial elites.

### 3.1 Case Selection

The selection of the East African Court of Justice (EACJ) is predicated on recognising that not all Regional Economic Communities in Africa possess or maintain a functional judicial body. The African Union (AU) recognises eight Regional Economic Communities (RECs)[78] as building blocks in accelerating the establishment of the African Economic Community (AEC).[79] The eight RECs acknowledge the *economic* aspect of integration as their principal objective, which distinguishes them from the plethora of similar organisations on the continent, whose explicit security and political agendas are more pertinent. Out of the eight RECs, only four effectively operate permanent judicial organs, namely the East African Court of Justice (EACJ), the COMESA Court of Justice (CCJ), the ECOWAS Community Court of Justice (ECCJ), and the SADC Tribunal (SADCT).[80]

As alluded to in the introduction, these REC courts have trodden different paths, with the SADC Tribunal suspended and later dissolved prematurely after facing fatal backlash (Ndlovu 2011; Lenz 2012; Nathan 2013; Alter, Helfer, and Madsen 2016; Brett and Gissel 2020). Since its dissolution, it was transformed into the SADC Administrative Tribunal (SADCAT) in

cautious of the demarcation between the field and "home," especially as the binary does not suit my circumstances.

78 The Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (CEN–SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

79 "The Community shall be established mainly through the coordination, harmonization and progressive integration of the activities of regional economic communities" (Art. 88 (1) AEC Treaty). This goal is meant to materialise "gradually in six (6) stages of variable duration over a transitional period not exceeding thirty-four (34) years" (Art. 6 (1) AEC Treaty).

80 The AMU Tribunal/Maghreb Court of Justice, despite being established by the community's founding treaty of 1989, is still "inactive" while CEN-SAD and IGAD do not provide for a permanent judicial organ (CEN-SAD, IGAD) due to their strictly intergovernmental character (Gathii and Otieno Mbori 2020, 344).

2014, which is no longer politically influential as it only handles SADC employee grievances.[81] Thus, this case would not be suitable for the question raised in the study, as it seeks to examine the emerging political relevance of Africa's REC courts through a close analysis of their judicial empowerment strategies. Likewise, the CCJ has tended to adjudicate disputes between COMESA and its employees and thus lacks overt political relevance (Gathii 2018).

On the other hand, both the ECCJ and EACJ have emerged as outstanding examples of politically relevant sub-regional jurisdiction (Gathii 2020b) and have even amassed support networks to defend themselves against blatant threats of disbandment (Alter, Gathii, and Helfer 2016). Similarly, both courts have emerged consequential in dealing with megapolitical jurisprudence (Akinkugbe 2020; Gathii 2020a), defying leading rationalist expectations. Both courts have an impressive human rights record (Ebobrah 2009; Gathii 2013). However, while the ECCJ was granted human rights jurisdiction in 2005 (Ebobrah 2007) following mobilisation by judicial allies (Alter, Helfer, and McAllister 2013), the EACJ has had to craftily forge its human rights (Possi 2015; Gathii 2016b; Taye 2019). While both courts remain relevant, the EACJ has adjudicated a range of matters from human rights (Taye 2019) despite not having an express mandate to do so, has adjudicated environmental disputes (Gathii 2016a), survived backlash and emerged even more politically vibrant (Alter, Gathii, and Helfer 2016; Gathii 2020b).[82]

Even though these international judiciaries could be understood as specialised REC courts with similarities in composition, jurisdiction and finality of judgements, there are distinct differences in structural, economic, jurisdictional and support-network constraints within which they operate. Scholars have shown that among these four international judiciaries, the EACJ stands out as one of the most robust courts in terms of its jurisprudence, fighting off interference and forging political relevance given its structural, jurisdictional and support-network limitations (Gathii 2013; Alter 2014; Alter, Gathii, and Helfer 2016; Madsen, Cebulak, and Wiebusch 2018). The EACJ's evolution, survival amid backlash, and emerging as even more politically relevant amidst challenges imposed by REC developments

81 South African Development Community (SADC). n.d. "About SADC. SADC Institutions: SADCAT." https://www.sadc.int/institutions/sadc-administrative-tribunal-sadcat (Accessed August 2, 2021).

82 See Kleis (2016) and Murungi and Gallinetti (2010) for more details.

make it a suitable case study for understanding the evolution of African REC courts.

Furthermore, researching sub-regional court relations in multilevel systems of judicial governance warrants a focus on the national-level systems. The EACJ is based in Arusha, Tanzania, where only the President (chief of the Appellate Division) and the Principal Judge (chief of the First Instance) reside; however, all other judges serve on an ad hoc basis. Therefore, accessing serving and former judges and relevant national actors across multiple sites in selected EAC countries was crucial. Consequently, I followed the court from Tanzania[83] to Kenya, Uganda and Burundi to allow for comparative dimensions within the single case study.[84] Except for the latter, all other EAC countries have a common law background, are classified as hybrid regimes, and have had a longer interaction with the court, having been part of its inception from the outset. Thus, the inclusion of Burundi served as a least similar case, providing insights that would not have been achieved otherwise.

Given the scope of fieldwork, especially one conducted during an unprecedented health pandemic, exhaustive fieldwork across multiple sites was only possible with one REC court. Given that African countries usually belong to overlapping regional bodies, research in one country often yielded insights about another REC judicial institution. Moreover, as countries belonging to more than one REC, they would have to select judges for more than one regional court, adding an extra analysis lens to the study. Take the example of Tanzania, which sends judges to the EACJ and the SADCT (not the CCJ), while Uganda, Burundi, and Kenya send judges to the CCJ and the EACJ, respectively (not the SADCT). Thus, the selection of the EACJ favoured multi-sited research so as to understand the factors that affect institutional complexities and actors' preferences across REC judiciaries as well.

83 I also visited the EACJ headquarters in Arusha, where I conducted extensive research with judges and court staff, used the court library and searched for relevant documents.

84 At the time of research, the EAC comprised only six countries (between September 2021 and June 2022). Currently, the EAC comprises eight partner states. Except for Burundi and Kenya, which were not part of the initial research plan, all others have a Common Law background, are classified as hybrid regimes and each of them sends judges to two of the courts under study: Burundi, Uganda and Kenya (to the COMESA court and the EACJ but not the SADC Tribunal) and Tanzania (the EACJ and the SADC Tribunal – not the COMESA court since they left COMESA in 2000).

### 3.2 Multi-methods Research Design

Since the crux of the research problem is to generate meaning and describe and interpret the attitudes, perceptions, practices, and strategies of the social construction of judicial power, the study relies *primarily* on qualitative methods to collect, interpret, and analyse data. It draws on political scientists whose work is interpretivist with sympathy for critical paradigms(Willis, Jost, and Nilakanta 2007; Ellett 2011; 2015; Fujii 2012; 2017; Bourke 2014; Yanow and Schwartz-Shea 2015; Glas 2021). Like these scholars, I reject the "detached" researcher narrative and advocate for a reflexive research process that understands that "total control is an illusion" (Fujii 2017, 91).

The research design follows an "empirical-descriptive methodology" (Lauer 2021, 43) whose goal is not to generalise but to generate meaning and make sense of political phenomena. As such, the study employs a qualitative research design that combines relational interviews (Fujii 2017) with participant observation and its variations alongside archival and secondary sources.

*Table 1: Types, Functions, and Sources of Original Data*

| **Type of original data** | **Functions** | **Sources** |
|---|---|---|
| Universe of EACJ Case Mapping Dataset | Identify repeat lawyers, the types of cases the court handles, and observe trends in jurisdiction across benches and across time | Online case law database of the EACJ and other certified legal databases |
| Semi-structured relational interviews with judges, legal elites, REC, government officials, and issue area experts | Provide narratives of EACJ litigation, actors' perspectives, attitudes and strategies for (dis)empowering the EACJ within a strategic space | Six months of fieldwork in selected EAC states (between Sept 2021- June 2022); online interviews (June 2020 – Aug 2021) |
| Archival data: newspaper records, EACJ documents, reports and judicial CVs | Corroborate and complement interview data on how judges navigate the strategic space and forge institutionalisation | Libraries of the EAC, EACJ, newspaper archives, EACJ website |
| Participant observation: relevant EACJ events and court sessions | Observe decision-making processes and activities to reveal the dynamics of judicial diplomacy | About two months in Bujumbura and Arusha (Sept 2021- July 2022) |

Source: Author's compilation (following Pavone 2022, 28)

Taken together, in-depth relational interviews, participant observation at relevant court events, and relevant court documents permit a multifaceted

understanding of the attitudes, perceptions, and strategies of the social construction of judicial power in the EACJ. The following sub-sections will justify the choice of each method.

### 3.2.1 Case Mapping

The author conducted a thorough case-mapping exercise[85], considering all cases brought to the EACJ from its establishment in 2001[86] to July 2022. The study limits itself to judicial leadership (judges) and, by extension, the court's output until July 2022 for methodological reasons. Firstly, fieldwork for the project was conducted between September 2021 and July 2022. For that reason, the work defines its scope as covering judges who had served on the court before and during the time that fieldwork was completed.[87] Secondly, the work prides itself on referencing judicial experiences with *only* those judges, court leadership, and registrars with whom I engaged, without extending the study experiences, findings, and analysis beyond its original scope. Thirdly, twenty years is an opportune and *ample* time frame within which to assess variations and evolution in the court's progress.

To systematically record all cases, a comprehensive list of all cases found in the EACJ databank,[88] was compiled in an Excel document.[89] Each row in the dataset consists of a single case and its corresponding information. For each case, we collected *primary data* such as case number, date of filing, date of delivery, the applicant(s), the respondent(s), country of origin and document length. *Legal Representation data* was also specified. *Court-specific data* like the EACJ division, case type, presiding judicial

85 I am grateful to the student assistants, Charlotte Rohrer and Amanda Rachel Ainengonzi, for their research assistance in compiling this dataset.

86 The court did not receive any cases until the first one was filed in 2005.

87 Leonard Gacuko and Bonny Cheborion Barishaki, appointed in July and August 2022, respectively, are omitted. Similarly, Kasanda Ignace Rene Kayembe and Omar Othman Makungu, appointed in May and June 2023, respectively, are not included in the study for similar reasons.

88 Missing cases were found in EACJ case reports, the African Legal Information or the African Human Rights Law Case Analyser databanks, providing viable alternatives for case file retrieval.

89 The spreadsheets are labelled as follows: the *Cover Page* offers a detailed description of the entire dataset, *Coding Rules* delineate relevant variables, acronyms, and additional pertinent information, and subsequent tabs include relevant statistical computations.

data,[90] and the related Treaty Articles and Rules were also collected. Lastly, the *case outcome data*[91] was also recorded. As will be elucidated, a close examination of the entire universe of cases that the EACJ has issued whilst paying attention to politically salient cases that generated high socio-political attention at the national level reveals how the EACJ is forging political relevance.[92] The dataset was also used to identify and observe trends in jurisdiction across benches and time, as well as to identify judicial constituencies by highlighting the "repeat lawyers,"[93] civil society organisations, national governments, and REC body representatives.

### 3.2.2 Interviews

> "Interviewing is not simply a mode of secondary fact-checking or validation, but rather it is critical at every stage of the research process and can also corroborate information and reconstruct events" (Ellett Forthcoming, 19).

90 Instead of recording all judges on the case, I opted for the leaders of the court at First Instance, the Principal Judge or Vice Principal Judge and at Appellate, the Judge President or Vice President. This is because court leaders direct the bench in the adjudication of cases, including distributing cases amongst judges as well as presiding over all hearings. Consequently, a discernible correlation can be established between the presiding judge and the nature of rulings rendered by the bench. The same approach was employed in coding the lawyers involved in a case, particularly when Applicants or Respondents enlisted multiple lawyers. In such instances, the database records only the name of the first lawyer mentioned in the case documentation. This practice aligns with the hierarchical culture inherent in legal proceedings, where names are traditionally organized based on seniority, reflecting leadership roles and their consequential impact on the presentation of the case.

91 In the First Instance Division (FID), the respondent was almost always the partner state governments or institutions or the EAC itself, whereas applicants vary from private litigants to employees of the EAC. For the respondent to win at the FID, cases were coded for reasons like "no treaty violation" or "no procedural irregularities" or the action by the government was "neither discriminatory nor a violation "of the Treaty. Whereas, for the applicant to win, explicit declaratory orders to Treaty violations by member states were stated using words like "unlawful" or "violated" the Treaty, among others and at times even issuing mandatory orders. A similar approach was taken to cases at the appellate division.

92 See Table 13 in the Appendix for a summary of the 264 decisions across divisions and benches, as mapped in the EACJ Cases Dataset (available with the author).

93 I draw on his concept of "repeat players" (McGuire 1995) to refer to reputable and influential lawyers who frequently litigate in the EACJ and have played a huge role in influencing judicial decision-making and expanding the reach of the court.

Interviews are undoubtedly vital tools for collecting, situating, and corroborating data throughout the research process, especially in judicial research. Judicial interviews shed light on whom the judges rely upon for support, unravel the subtleties of how judges tactfully respond to interference, and unearth the circumstances under which judges exercise their agency to fend off this interference and avoid potential backlash. Thus, to understand the motivations and rationale of relevant actors in the construction of judicial power in the EACJ, relational interviewing (Fujii 2017) was the preferred approach. Relational interviews are an *interactive form of interviewing between the researcher and the interviewee*, grounded in a *'humanist' ethos* that prioritises "the ethical treatment of all participants and continuous *reflexivity*" (my emphasis, Fujii 2017, 22). When understood this way, the benefit of interviews can be found not only in the information gathered during the interview process but also in the conclusions drawn from the interactions themselves – how we engage our research participants, how we position ourselves, and how we make sense of our own role in these interactions.

In this study, interviews proved helpful in getting closer to the situated knowledge that reveals the perceptions and meanings judges and their constituencies attach to the performance and role of the REC court. Specifically, to understand how they actively negotiate the limitations and challenges they face and how that shapes the current realities of the court. After all, "the real additive value of elite interviews is to uncover the informal or hidden processes" (Tansey 2007, 767), which may not be readily observable. Thus, interviews help us better understand the judges' socio-political embeddedness in networks and provide contextual support, which promises new insights into the court's political role in regional integration processes.

Interviews were used in process-tracing (George and Bennett 2005) key events such as the treaty-making process, establishment of the EACJ, and understanding key points of litigation and their aftermath. Interviewing first-hand participants in these events was vital in obtaining information about key political actors primarily involved in setting up, institutionalising, and empowering the EACJ. Moreover, during interviews, participants shared documents that they deemed relevant to explaining the phenomenon at hand, and at times, lawyers even shared confidential submission documents to enlighten my understanding of resulting judgements. These documents were usually reserved for internal deliberation and are not part of publicly available information at the court. They proved helpful as additional information about individual cases, thereby supplementing,

throwing insights, and expounding the discussions I witnessed in the publicly recorded court sessions and resulting judgements.

#### 3.2.2.1 Selecting Research Participants

As an organ of the East African Community, the EACJ has its roots in regional integration processes, and its primary aim is to aid the partner states in applying and interpreting the Treaty.[94] Thus, it is a *supranational* court that serves partner state institutions[95], the Community and its employees[96], and private individuals[97] in pursuit of dispute resolution pertaining to matters of the Treaty. For the EAC, the rule of law is not only a means to achieving integration but also an end in itself, as it is envisioned to consolidate democracy and enhance the bloc's ambitions to achieve a political federation (Ruhangisa 2011). Therefore, to understand the rationale of relevant actors in constructing the institutional and political relevance of the REC judicial arm, the study considers *key* actors in the court and regional integration processes. Interviewees were categorised by their occupations, with a specific focus on levels of governance, namely, national or sub-regional levels, since this is central to the analysis. I sought diverse actors across the two levels of governance to achieve a balanced view of how they mobilise and strategically empower the court. Serving and former judges and their key constituencies were central to the study. As mentioned earlier, key judicial constituencies were identified by analysing the entire universe of cases the court has handled. Some of these actors included repeat lawyers, civil society organisations, national governments, and REC body representatives. The study also included national judges to understand how they may be involved in empowering the REC court.

For purposes of relational interviewing, a researcher is not restricted by sampling requirements but is free to select research participants intentionally and purposefully based on already-set or developing research criteria (Fujii 2017). In this kind of selection, the researcher allows themselves the freedom to "learn more about the setting and the actors in it" and thus include participants as the study develops to reflect the "constraints, obstacles, and opportunities" that come with the research process (Fujii

94 Art. 27 (1) EAC Treaty.
95 Art. 28 EAC Treaty.
96 Art. 29; 31 EAC Treaty.
97 Art. 30 EAC Treaty.

2017, 38). Likewise, understanding how power emerges in REC courts using relational interviewing is not so concerned with sampling for generalisation purposes but instead perceives interview material as a product of the circumstances surrounding and producing the exchange. The resulting interpretation ought to take the interview context into account (Lynch 2013, 33).

While the study uses relational interviewing, which is not preoccupied with notions of validity and universalist reliability ideals (Fujii 2017, 91), this is not to say that the study did not strive to corroborate interview information. On the contrary, I relied on interviewing a diverse range of informants (based on their experience and expertise) and triangulating the data through multiple methods, as well as cross-validating interview information with field observations to circumvent limitations from unreliable individual responses and to achieve a representative picture of the phenomenon. Consider, for instance, the problem of "exaggerated roles" (Berry 2002, 680), where research participants tend to speak hyperbolically about their involvement in certain situations or simply provide unverifiable information. Informal conversations with similarly positioned individuals were also used to remedy the issue.

#### 3.2.2.2 Interview Methods Appendix

The entire interview process was thoroughly documented, from the preparation for interviews to conducting and analysing them (Kuckartz 2014, 155–58). Detailed information about individual interviews was recorded in an "Interview Methods Appendix" (Bleich and Pekkanen 2013).[98] Interview formats varied but mainly followed a semi-structured format, starting with the introduction of the project aims and a clear explaination of the research agenda. Predominantly, open-ended questions were raised to elicit longer and more open-ended answers. Conducting relational interviews involves cautiously framing questions while remaining open to the messiness of the interview process.[99]

98 An excerpt of the "Interview Methods Appendix," containing a descriptive list of interviews conducted and all vital aspects of the interviews, is available in the Appendix. The complete "Interview Methods Appendix" is available on file with the author.

As part of ethical considerations, seeking the participant's informed consent was essential (MacLean 2006). Entirely voluntary, a consent form[100] was available in print, and participants were given the option to sign one or offer their consent verbally.[101] Interviews were tape-recorded, and concurrent notes were taken. Where possible, supplementary notes were taken within the hour. On average, interviews lasted one hour, primarily drawing on pre-set questions but also freely withdrawing from the structure and following the flow of the respondents' thought process.

#### 3.2.2.3 Interview Summary

I conducted 103 semi-structured interviews with REC judges, national judges, lawyers, REC and government officials, and issue area experts.[102]

Since my study does not intend to be generalisable, it also avoids the pitfalls of representativeness. However, since it sets out to capture a comprehensive picture of how respondents perceive judicial strategies of empowerment in a strategic space, I conducted purposive sampling to interview an illustrative sample of research participants across categories from each of the selected partner states. For instance, EACJ judges interviewed in Tanzania comprised 66.66 % of the total number of judges from that country who served at the REC court; in Burundi, 60 %; and in Uganda, 57 %.[103] In sum, the aim of the interviews was not to produce generalisable

99 Thus, unstructured or informal conversations were often preferred to protect confidentiality or if research participants were uncomfortable with the seriousness of the interview situation.

100 Developed in agreement with the European Union's General Data Protection Regulation (GDPR) legal regime, which came into effect on May 25, 2018. The project takes the legal requirements to ensure the protection of personal information and participants' identities under the EU's GDPR seriously. See https://gdpr.eu/what-is-gdpr/.

101 Initial interviews revealed that verbal consent was preferred, and the author continued to use this approach.

102 While the study focuses on Eastern Africa, the author also conducted interviews in Malawi as part of a joint project of which the study was part. See "Multiplicity in Decision-Making of Africa's Interacting Markets" (MuDAIMa) project. https://www.politik.uni-bayreuth.de/en/research/mudaima/index.html.

103 Percentages are calculated with regard to the total number of *living* EACJ judges that have ever served on the court. Kenya was only included on a whim to expand the comparison to all three original EAC partners. I spent only two weeks in Nairobi; hence, only 33.3% (2/6) of the living judges were interviewed. Malawian interviews included here are part of the larger project design (see *supra* note 103).

findings about all actors, but to interview the most relevant political players who participated in the political events under study (Tansey 2007, 766).

*Table 2: Interview Summary*

| Country | REC judges | National judges | Lawyers | Academics | REC Officials | CSO Reps | Gov't Officials | Interviews |
|---|---|---|---|---|---|---|---|---|
| Uganda | 4 | 4 | 8 | 3 | 6 | 2 | 3 | 30 |
| Tanzania | 5 | 3 | 7 | 3 | 2 | 4 | | 24 |
| Kenya | 2 | 1 | 5 | 1 | 2 | 2 | | 13 |
| Malawi | 4 | 7 | 2 | 4 | 2 | | 3 | 22 |
| Burundi | 3 | 1 | 2 | 1 | 1 | 1 | | 9 |
| SSD | 1 | 1 | 2 | 1 | | | | 5 |
| Total | 19 | 17 | 26 | 13 | 13 | 9 | 6 | 103 |

Source: Author's compilation.[104]

### 3.2.3 Participant Observation

In addition to semi-structured interviews, I conducted participant observation[105] at relevant court events. My entry point into participation with the intention to build rapport was an invitation from the court registrar and president to visit the court and its stakeholders at an exclusive event: the High-Level Judicial Symposium in Bujumbura.[106] This event, commemorating twenty years of EACJ existence, would be the first time the court would sit outside Arusha to hold court sessions. This invitation came at an opportune moment when entrée into the legal and judicial space was proving more cumbersome than I had anticipated. I seized the opportunity to follow the court to Bujumbura, where I attended the Symposium, alert to chances for rapport building. Formal events led by former and

104 The number of interviews is more than the number of interviewees because legal elites usually occupy various roles, a clear distinction of functions is not clear-cut in some cases, and some individuals may appear in different capacities here. I sometimes interviewed the same individual for different reasons (e.g., once as a litigating lawyer before the EACJ and the second time as the head of a civil society organisation). Also, EACJ judges are usually also serving at the national level.

105 At times, I was a "direct non-participant observer" (Portillo et al. 2013, 7) with a passive role in the engagement.

106 EACJ Symposium, *supra* note 62.

current EACJ judges and court staff advanced my understanding of the court's mandate, its role in promoting the rule of law, cross-border trade and investment, and its growing jurisprudence through broad, bold, and intentional interpretation of the EAC Treaty. Likewise, I was granted access to formally organised social gatherings, which paved the way for a deeper understanding of the people behind the formalistic legal profession and challenged my assumptions of them through one-on-one conversations. For instance, I was invited to the judicial farewell dinner for former EACJ judges,[107] which provided an opportunity for participants to interact informally. Over dinner, without being consumed by research-oriented questions, I could foster working relationships that would later open up room for investigating those queries.[108]

Similarly, I strategically positioned myself where I could get close to litigating lawyers in the EACJ. After gaining visibility within the judicial and legal circles, I negotiated my way into legal public talks, conferences, professional meeting points, and other gatherings that would get me in the same room as my desired interviewees. One such memorable event is the one-day lawyers' trial advocacy course.[109] Through an interview, I learnt about an upcoming workshop that the East Africa Law Society (EALS) would host to instruct lawyers on litigation before regional courts and tribunals, focusing on practice before the EACJ. Even though the event was closed to non-members, I managed to secure a place to attend.[110] As a participant observer, I participated in practical exercises intended to provide the delegates with "a first-hand feel of actual litigation" before the

107 Held at Kiriri Gardens Hotel, November 5, 2021, Bujumbura. Images taken during this event remain confidential.

108 Amidst participation in social interactions of "hanging out", I regularly wrote "field notes" (Sanjek 1990) in diverse forms, ranging from audio phone recordings made after a night out to handwritten notes taken a few days later. My interactions served the critical role of building connections, first and foremost, and the notes taken were intended only as general reflections or clarifications of aspects pertaining to the formal interview process.

109 East Africa Law Society capacity building: Trial Advocacy Training for Regional Courts 2021. The EACJ and the Uganda Law Society hosted a one-day course on trial advocacy before regional courts and tribunals for EAC lawyers with a focus on practice before the EACJ. October 20, 2021. Skyz Hotel, Kampala. https://twitter.com/ealawsociety/status/1452632041158291467.

110 I reached out to the EALS headquarters in Arusha via telephone and convinced them that I was an interested member of the public: a researcher who cared to learn more about the practice before the EACJ. Again, my positionality and privilege opened up this space. I leveraged my connections to the facilitators and was granted access, even after meeting a deadlock with the organisers in Kampala.

EACJ. We were taken through the court's jurisdiction and admissibility of applications, written proceedings, preparation and filing of pleadings, their amendment, withdrawal, and practical exercises in drafting, preparing, and filing documents. Such formal activities provided an extra avenue for gathering supplementary data.

Even though I took part in all these very instructive, albeit unfamiliar legal proceedings, with keen interest, the most enlightening aspect was becoming privy to the pragmatic questions that participants asked, listening to the rationale given by the trainers (who themselves were "repeat lawyers" at the court) on what types of cases they decide to litigate, and how legal elites tactfully confront and mitigate pressures from the executive upon filing politically salient claims. Attendance of the training provided raw insights into the legal, economic, social, and political considerations that lawyers who appear before the court grapple with in their daily routine. Most rewarding were the informal conversations during the breaks – when questions, doubts, and reflections were shared. Such informal interactions allowed me to introduce myself, explain my research objective and seek the research participants' consent and participation in more formalised interviews.

Finally, although I had met with judges and lawyers on separate occasions, attending EACJ court sessions in Bujumbura[111] and Arusha[112] was also essential. Steady attendance of these sessions in different locations made me a regular figure at the court, aided in building rapport with legal elites and litigants, and familiarised me with court processes. Conversations with the court staff as they set up and cleared the courtroom before and after sessions offered a "behind the scenes" view of court processes. At such opportunities, I inquired into different aspects of courtroom formality and protocol, chatted informally about the concluded sessions, and became aware of personal anecdotes on lawyers' and judicial courtroom behaviour and its implications. Even if it remains confidential, this information broadened my perception of the court and its constituencies. Observing courtroom dynamics enabled me to understand the core questions before the

111 In November 2021, the EACJ held court sessions at the Supreme Court in Bujumbura. The fact that we were all visitors and not in their familiar territory came with a certain sense of freedom that I imagine played in my favour – it brought a shared sense of camaraderie and gave me a chance to speak to the relevant legal elites who were rather open to engaging a researcher.

112 While at the seat of the EACJ in Arusha, February-March 2022, I also frequently "hang out" in places that potential interviewees frequent in a bid to cross paths and initiate an informal conversation that would result in an interview opportunity.

court, go beyond the formality, and engage the lawyers and litigants after the sessions to clarify issues raised in the hearings and arrange interviews. These methodological considerations, which go beyond the formalised interview and take informal encounters seriously, promise new insights into explaining judicial power in underexplored ICs in Africa.

## *3.3 Navigating Access Limitations*

Having commenced the research during the COVID-19 epidemic, travel was heavily restricted and almost impossible for the first year of my research project. Within this time, the project drew on our existing professional capital – colleagues based in Bayreuth[113] and elsewhere[114] to make initial contacts with research participants across multiple locations. I also conducted introductory online meetings to garner contacts for future research and establish early connections with research participants. Amidst travel restrictions, I was unable to undertake the "pilot trip" as intended. Instead, I conducted preliminary interviews with judges, lawyers, and experts on different issue-areas to gain initial insights and orientation on the study. However, sometimes access was much more complicated than in person. The process was time-consuming and, at times, proved impossible. Conducting in-depth interviews with participants posed challenges, especially those we did not know. Aside from the expected internet connectivity issues, a figurative firewall prevented participants from opening up to a stranger about their journey, especially in judicial interviews where protocol, formality, and hierarchical relations are core values. In sum, though insightful, online research was not as fruitful as fieldwork, where we could go beyond formal interviews to appreciate informal encounters, which made for a comprehensive and consistent analysis of socio-political structures in REC court processes.

113 I am appreciative of Prof. Thoko Kaime for his guidance while preparing to enter the field, for taking an interest in our research, and for opening his networks to us at the relevant research sites.

114 Likewise, I am grateful to Professors James Thuo Gathii and Chris Maina Peter, who indulged my curiosity at the start of the project, suggested very practical ways in which I could conduct the study despite the challenges brought on by the pandemic, and whose encouragement and wisdom still guide my thoughts in this PhD journey. I am beholden to my academic mentor, Dr. Rachel Ellett, for her guidance, connections and insights throughout the entire research journey.

Despite the pandemic, such initial contact established "working relationships" (Fujii 2017, 90), granting me access to the region's closed judicial and legal elite circles. A working relationship entails taking human participants' expert knowledge seriously and imbuing them with respect, dignity, and gratitude for their time. For instance, I conducted an online meeting with the former Registrar of the EACJ, and we continued regular email exchanges before my trip to Kampala. Upon arrival in the field, this working relationship proved helpful when my attempts to access judges and lawyers were met with silence or rejection.[115] Recognising the challenges posed by my positionality, I drew inspiration from informal techniques that draw on ethnographic approaches (Geertz 1998). For a profession that thrives on formality and discretion, the cold email approach would not bridge the hierarchy or create the rapport I needed to ask the types of politically sensitive questions I intended to pose to the supposedly apolitical judges. I needed to spend extended periods following judges across multiple locations while engaging in informal and sociable interactions outside the professional realm. Rather than the formalised interviews where I had to go through several judicial gatekeepers to access the judges, who were often isolated in their chambers, the setup of a bar, restaurant, cocktail gathering or hallway dissipated the researcher-judge constellation, allowing for rapport-building.

Equally, my experience researching judges and other legal elites has shown that rapport is not an end in and of itself, not necessarily to create room for the formal interview as the researcher would wish, but it certainly opens communication lines with participants that may yield other desired results. Take, for example, my visit to a Tanzanian judge who seemed interested in my topic but did not grant me an interview. We established a good rapport and chatted informally several times. He always asked about the progress of my work and even referred me to his colleagues, who granted me formal interviews. Of course, our informal conversations

115 I am indebted to His Worship Yufnalis Okubo, whose readiness to assist in my research, ample kindness and genuine interest in my work have not only opened doors in the usually closed legal networks but have also spurred my confidence in my project, knowing that it behoves me to tell this story respectfully and critically. I choose to disclose the identity of this interlocutor for four reasons: 1) because I have his consent to do so, 2) he would have been identified anyway given that only he held that position at the said time, 3) because of the public manner in which he intervened in my research (on social media), and 4) to show gratitude for that intervention as I view him as a co-producer of knowledge that should be acknowledged publicly.

proved valuable in providing contextual information and furthering my access. This encounter highlighted the importance of informal encounters and conversations for a comprehensive and consistent analysis of socio-political structures and processes. My experience shows that while these informal approaches have been underestimated, especially in qualitative judicial research, they have proven more fruitful as they highlighted the role of the informal in a predominantly formalistic judicial culture. I discuss this approach at length in a working paper (Kisakye 2023) and blog entry (Kisakye 2024), where I draw attention to the advantages of "hanging out" while studying "up." The reflections on my field experience exemplify the messy, unpredictable, and challenging route of studying "up" and highlight the role of the informal in researching individuals in a predominantly formalistic professional culture.

## *3.4 Analytic Approach*

This study perceives data collection and analysis as interrelated processes that employ a reflexive approach to data management (Corbin and Strauss 1990). Interview data were collected through an iterative process of analysis while incorporating new questions and issues that emerged in subsequent interviews (and participant observation). Once collected, the data was transcribed and stored on a password-protected computer; only my research project team[116] could access it.

Likewise, given that my study focuses on a small pool of elites in East Africa's legal arena, I deemed it necessary to keep my interview partners anonymous unless it was relevant to the argument to identify them. For most interview participants, anonymity was important, even if certain individuals may have chosen not to be anonymous. This is because, as Ellett reminds us, when looking at a small pool of elites, people tend to know each other (Ellett Forthcoming, 18). As such, I used pseudonyms or an anonymised short description of the interviewee's function, which cannot be used to identify the particular individual (e.g., Ugandan commercial lawyer). As the profession, country of origin, references to university education, and career history are relevant to the contextual background of my study, I have chosen to include them unless otherwise instructed. I kept the relevant biographical details and only obscured them if necessary. However,

116 The Political Science team of the MuDAIMa project, *supra* note 103.

for the REC judges who informed the crux of the study and whose personal and professional information is relevant to the study's argument, I obtained informed consent to quote them and use their interview data.[117]

A vital aspect of the analysis was to generate patterns and draw logical arguments from the diverse strands of collected data. For the thematic analysis of interview data, I relied on the analysis software MAXQDA to import audio recordings and written transcripts, analyse developing trends, categories, and code for themes (Kuckartz and Rädiker 2019). Categories were coded through an inductive and data-driven thematic analysis (Silver and Lewins 2014, 23–33) based on the study objectives and particular emphasis on answering the research questions. This type of analysis, primarily thematic, is intended to identify common concepts from the data to generate meanings and interpret findings and, thus, does not necessitate verbatim transcription (Halcomb and Davidson 2006, 40). Since interviews were usually audio-recorded while taking concurrent notes, I either transcribed in summary form (excerpt transcription) or took verbatim notes (complete transcription) where I had already identified analytical relevance.

As such, interviews were analysed two-fold: first, through a closer reading of interview notes (containing critical points raised in interviews), which were used to supplement the transcripts or interview summaries. Additionally, a critical appraisal of crucial interview transcripts was conducted, accompanied by listening to the audio recordings to identify major themes systematically. Recognising terms and concepts that recurred, tracking relationships between actors, and paying attention to "silences" in the data to decode people's explanations for why something happened the way it did (Fujii 2017, 78) were also fundamental at this stage. Notes from the field and observations were also crucial to developing patterns, identifying gaps and making sense of the data. Since analysis occurs in tandem with theoretical and conceptual reflexivity, I coded the emergent themes along three key aspects (judicial agency, extrajudicial agency, and judicial allies) and other sub-themes that inform the study. These ideas emerged through observation, transcription, coding, and later analysis. Questions related to pressures, backlash, strategies of resistance, and implications for regional integration had already been raised, paving the way for further analysis.

Content analysis of archival data (newspaper records, EACJ documents, reports, and social media content) was done to corroborate and complement interview data and reveal evidence of strategies in the social construc-

117 Similar reasons apply to the registrars and lead judicial allies, such as heads of the East Africa Law Society.

tion of court power. Moreover, such data presented appropriate examples of practical strategies for judicial empowerment and could be systematically coded to support the earlier identified themes. As previously stated, while field observations enabled me to understand the core questions being brought before the court, archival documents, such as bar association reports, EACJ reports, and social media content provided context, clarified legal terminology, and offered practical insights into the construction of judicial power.

Lastly, an iterative process of analysing the universe of cases was done in several stages. Initially, this was meant to identify "repeat lawyers" and organisations I wanted to contact for data collection. Later, the data was analysed using Excel data analytics, such as pivot tables, charts, graphs, and simple formulas, to identify the types of cases the court handles and observe trends in jurisdiction across benches and over time.

## *3.5 Reflections on Positionality*

Previous scholarship explicitly states that "judges dislike being measured and ranked by academics who do not understand anything about what qualities make for a truly great judge" (Knight and Gulati 2017, 2). Indeed, the hurdles of researching judges are intensified for *Law and Courts* field investigators, where the profession's cherished virtues – protocol, hierarchy, and decorum – may impede access to interviewees. Conducting research within elites presents unique methodological challenges (Beckmann and Hall 2013), despite some scholars problematising the elite-non-elite binary (Fujii 2012; 2017; MacLean 2006; Smith 2006). However, if we nuance the location of power during interviews as relational, multi-directional and complex, it is worth advancing discussions on methodological considerations in the study of *Law and Courts* to offer a reflexive account of researching members of the secretive and supposedly 'apoliticised' judicial profession.

Interpretivist political scientists agree that the relational dynamics between interviewer and interviewee significantly impact research (Fujii 2012; 2017). Above all, the challenges of researching legal elites, particularly for early-career women scholars, are widely acknowledged (Ortbals and Rincker 2009; Ellett Forthcoming). Active reflexivity is a virtue because all research interactions are "rooted in power and social relationships"

(Mosley 2013, 9).[118] Positionality theory recognises that people have multiple overlapping identities, and knowledge production is not devoid of those identities; rather, meaning-making is a result of various aspects of human identity (Bourke 2014). Undeniably, a researcher's positionality influences who accepts being interviewed, and their access determines what information participants are willing to share and directly bears on "the knowledge claims the researcher can advance" (Fujii 2017, 15–16).

Accordingly, I reflected on my positionality during the collection and analysis of interview material to factor in the impact that my subjectivity will bear on my research project findings.[119] Even if my experience emerges while studying "up" amongst mostly legal elites, it resonates with the experiences of other early-career female scholars navigating the field (Debele 2017). In my experience, reflexivity enriched the research process and stressed what I had already sought – the coproduction of knowledge with the human participants I studied.

118 I use reflexivity to imply "sustained reflection on how the researcher and her positionality affect evidence generation, on the implications of ethical principles in the research setting, and on the consequences of both for research practices and the research process" (Kapiszewski and Wood 2022, 950).

119 For a separate and more detailed account of this discussion on positionality, see a previously published working paper (Kisakye 2023).