East African Court of Justice and the Supreme Court of Kenya – A Case of Two Judicial Monologues

By *Tomasz Milej*[*] and *Alvin Kubasu*[**]

Abstract: Adherence to the Rule of Law is one of the fundamental principles of the East African Community (EAC), anchored in the Treaty establishing the Community. The main judicial organ of the EAC—the East African Court of Justice (EACJ)—and the Supreme Court of Kenya, one of the EAC's Partner States, are in disagreement regarding the competence of the EACJ to review decisions of the Supreme Court of Kenya for compliance with the rule of law principle. The Supreme Court resists the EACJ's case law assuming such competence and the manner in which the EACJ exercises it. We argue that both courts should abandon their orthodox positions and engage in judicial dialogue. The Supreme Court should acknowledge that the EACJ may determine the international responsibility of a Partner State for a violation of the Rule of Law principle, even if such a violation originates from a decision made by a court of that State, including the Supreme Court of Kenya. On the other hand, the EACJ should adopt an adequate standard of deference toward the judicial organs of Partner States.
Keywords: East African Court of Justice; Supreme Court of Kenya; Judicial Dialogue

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A. Introduction

When examining the relationship between an international court within a regional community or treaty system and the highest courts of national jurisdictions that are part of that system, the concept of "judicial dialogue" naturally arises. However, the very term "dialogue" presupposes that the when deciding similar issues or even the same issue, one court identifies the arguments used by another court and offers them some *bona fide* consideration, even if it ultimately disagrees with them. Such a dialogue would also require a degree of moderation in the exercise of jurisdiction, ensuring that one court does not excessively encroach on the jurisdiction of the other. This approach allows for the mapping of overlapping jurisdictional areas and the design of mechanisms to prevent conflicts.

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A conflict which the East African Court of Justice (EACJ) and the Supreme Court of Kenya emerged against the background of the principles of the East African Community (EAC) Treaty. The case in point involved allegations of electoral irregularities. While the Kenyan Judiciary, and ultimately the Supreme Court, dismissed the case, the EACJ came to the conclusion that the Kenyan courts violated the Treaty. In an advisory opinion that followed the EACJ judgment, the Supreme Court claimed that the EACJ was usurping appellate jurisdiction which it does not have and also failed to adopt any standard of deference to the national judiciary. The EACJ's consistent position is that it adjudicates solely on the international responsibility of the EAC Partner States. According to the EACJ, this responsibility arises irrespective of whether the wrongful act violating the EAC Treaty principles was committed by the executive, legislative, or judicial organs of the Partner State.

We argue that both the EACJ and the Supreme Court could have demonstrated greater willingness to engage in a judicial dialogue, which would ultimately strengthen the rule of law in the EAC. Rather than engaging with each other, both courts appear more dismissive of each other's jurisdiction, effectively engaging in two monologues rather than a dialogue. Our objective is to examine the arguments advanced by both courts to claim and defend their jurisdictional space, particularly when adjudicating matters related to the principle of the rule of law enshrined in the Treaty establishing the EAC (EAC Treaty). We also aim to provide insights that could help shape a future judicial dialogue.

The EAC is one of the eight regional blocks in Africa. Located on the eastern side of the African continent, the EAC currently has a membership of 8 states. Its main objectives include fostering economic growth and promoting rule of law.[1] The EACJ is the judicial organ of the East African Community EAC. The EAC Treaty mandates the EACJ to ensure adherence to the law in the interpretation, application and compliance with the Treaty. The EACJ has both contentious and advisory jurisdiction, primarily interpreting and applying the Treaty in both instances.[2] The EACJ is a two-chamber court consisting of the First Instance Division and the Appellate Division. This allows parties to appeal a decision from the First Instance. However, the decisions of the Appellate Division are final and binding upon the parties. Furthermore, decisions of the EACJ take precedence over national courts decisions.[3] Currently, the EACJ is located in Arusha, Tanzania, this location is deemed temporary since the Summit (the highest EAC organ composed of the Heads of States) has not determined its permanent seat.

The Supreme Court is the apex court in Kenya. Established under Article 163 of the Constitution of Kenya, the Supreme Court has exclusive original jurisdiction to hear and

1 Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255 [Treaty], Article 5.

2 Treaty, Articles 27 & 36.

3 Treaty, Article 33(2).

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determine presidential election petitions.[4] Additionally, the Supreme Court is the final appellate court for any civil, criminal or constitutional matter,[5] and it may give advisory opinions on certain issues at the request of the national government or any State organ.[6]

The present article is subdivided into six parts. In the first part, we present the case in point that led the Supreme Court of Kenya to turn against the East African Court of Justice. The dispute originated from an electoral petition filed by Martha Karua, a distinguished Kenyan lawyer and politician, whose case was dismissed on a technicality. This triggered a protracted legal back-and-forth within Kenya's domestic courts, which ultimately avoided deciding the case on its merits. Frustrated by this outcome, Karua turned to the EACJ, setting the stage for the institutional tension at the center of our analysis. In the second part, we provide the necessary context, as both courts—the EACJ and the Supreme Court—operate within distinct institutional, political, and historical frameworks. We explore the sensitivity of electoral justice in Kenya, which has historically been a matter of life and death, a reality the Supreme Court of Kenya cannot overlook. This section also examines the EACJ's broadly framed jurisdiction and its evolution from a politically contested institution into a proactive hub for public interest litigation. We further contrast the less competitive and transparent process of judicial appointments to the EACJ with the more rigorous system governing the Supreme Court, a disparity that shapes their interaction. In the third part, we address the core of the contention: the EACJ's case law on the principle of the rule of law, as enshrined in the EAC Treaty. We argue that the scrutiny standards applied by the EACJ—which the Supreme Court now contests—did not emerge suddenly but reflect a well-established jurisprudence developed in response to specific rule of law challenges in the East African region. However, we identify a critical weakness in this jurisprudence: the absence of a doctrine, similar to the margin of appreciation doctrine of the European Court of Human Rights, that would set the standard of deference the EACJ should afford to national courts. This gap renders the EACJ's case law monologic, leaving little room for judicial dialogue. In the fourth part, we turn to the second monologue—the position of the Kenyan Supreme Court—explaining why its criticism of the EACJ is only partly merited. We place this position in a comparative perspective in the fifth part, uncovering the structural deficits underlying regional integration in Africa and demonstrating why judicial dialogue is not just desirable but necessary. In the final sixth part, we engage directly with the legal arguments presented by both the EACJ and the Supreme Court. We identify positions that each court should reconsider to pave the way for a genuine judicial dialogue.

4 Article 163(3)(a) of the Constitution of Kenya (2010)

5 Article 163(3)(b) of the Constitution of Kenya.

6 Article 163(6) of the Constitution of Kenya.

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B. The Case in Point: Supreme Court's Advisory Opinion of 31 May 2024

The genesis of this case traces back to the 2017 general election in which Ms. Martha Karua was a candidate for the position the Governor in on of Kenyan counties—Kirinyaga. Upon losing to her rival, Karua lodged an election petition at the High Court alleging that the polls were not free and fair. According to her, there was widespread cheating, voter bribery, tampering with ballot boxes and violation of constitutional requirements during the voting, counting, tallying and votes transmission process. The High Court struck out her petition on a technicality stating that her petition did not state the election results and the date these results were announced. Although the Court of Appeal initially directed the High Court to hear the case on merit, Karua's case at the High Court and her subsequent appeals at both the Supreme Court and Court of Appeal were again dismissed, this time for being time-barred. This stems from the Election Act of 2011, which establishes a six-month statutory timeline for lodging, hearing, and resolving election petitions. The Court of Appeal affirmed this six-month rule as a constitutional imperative that cannot be modified, even though the delay in this case was caused by procedural delays attributable to the wrongfulness of the initial High Court decision.[7] In past rulings, the Supreme Court has underscored the importance of strict timelines in election disputes, framing them within Kenya's electoral history. Delays in resolving such disputes, the Court observed, undermine both the people's franchise and the integrity of the democratic process. Therefore, the strict timeline accords the electorate finality within a reasonable time saving them from being held captive to endless litigation.[8] In the Martha Karua case, the Supreme Court highlighted that the six-month rule was strictly applicable whether or not the delay was the fault of the petitioner.[9]

Aggrieved by the Supreme Court's decision, Karua moved to the EACJ. In her reference, she argued that despite the statutory restrictions, the Supreme Court failed to consider the special circumstances of the situation where exceeding the statutory timelines was not her fault, but a consequence of the time taken to hear and determine her petition. She thus contended that the Supreme Court had violated her right to a fair trial, consequently failing to uphold the principle of the rule of law enshrined in the Treaty.[10]

The EACJ held that the Supreme Court violated her right to access justice by failing to grant her a fair trial, therefore violating its commitment to the principle of the rule of law under Article 6(d) and 7(2) of the Treaty by failing to properly interpret and give effects to the Constitution.[11] The Appellate Division upheld this decision. Consequently,

7 Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] KE-CA 41 (KLR).

8 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.

9 Karua v Independent Electoral and Boundaries Commission & 3 others [2019] KESC 26 (KLR).

10 Hon. Martha Karua v Attorney General Republic of Kenya, reference no. 20 of 2019, First Instance.

11 Ibid.

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Kenya was ordered to pay Ms. Karua damages amounting to USD 25,000. It is with regard to this Supreme Court decision, that the Attorney General sought an advisory opinion of the Supreme Court on, "whether the EACJ had appellate jurisdiction over decisions made by the apex courts of member states."[12] The Supreme Court's competence to deliver the advisory opinion is outside of the scope of the present article.

C. The Context

Electoral justice and the rule of law are important pillars of good governance in East Africa. While the Supreme Court of Kenya has played a significant role in strengthening the electoral justice, the East African Court of Justice has gone through struggles defining its role in upholding the fundamental principles of the EAC.

I. Electoral Justice in Kenya

Despite elections being one of the three cornerstones of sovereignty and constitutional democracy, electoral justice remains a far cry for most Kenyans.[13] Historically, instead of electoral justice being served on a silver platter, Kenyans have had to endure significant hardships under regimes determined to retain power at any cost.[14] The 2007/2008 post-election violence is a prime example of the fatal consequences that election injustice can bring. The Commission of Inquiry on Post-Election Violence reported that 1,133 lives were lost and thousands of others were subjected to different forms of violence, including sexual while others were internally displaced.[15] A heavily contested presidential election, Kenyans divided along ethnic lines, winner declared in unclear circumstances and the absence of a transparent and reliable complaint mechanism culminated in people turning against each other out of discontent about the election process.[16]

The promulgation of the new Constitution of Kenya in 2010 was a turning point and offered a ray of hope towards the realization of electoral justice in Kenya. The Constitution empowered courts to listen to election petitions offering the much-needed complaint and dispute resolution mechanism.[17] Additionally, the Independent Electoral and Boundaries

12 Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024) (Advisory Opinion).

13 *Ben Sihanya,* Electoral justice in Kenya under the 2010 Constitution implementation enforcement reversals and reforms, Sihanya Mentoring and Innovative Lawyering 1 (2017), p. 3.

14 Ibid.

15 Commission of Inquiry into Post-Election Violence (CIPEV), Report of the Commission of Inquiry into Post-Election Violence (2008) ('Waki Report') 304.

16 *Muna Ndulo / Sara Lulo*, Free and fair elections, violence and conflict, Harvard International Law Journal 51 (2010), p. 12.

17 *Yash Pal Ghai / Jill Cottrell Ghai*, Kenya's Constitution: An instrument for Change, Nairobi 2011, p. 66.

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Commission was established with the mandate of conducting and overseeing free, fair, and verifiable elections.

That notwithstanding, both the 2013 and 2017 general elections were marred with irregularities.[18] Notably, in 2017, the Supreme Court made history by becoming the first court in Africa to nullify a presidential election. The court found that the irregularities and illegalities that took place in that election were not only substantial but also significant, affecting the integrity of the election and ultimately the results.[19] The Supreme Court was of the view that elections are not an event but rather a process that involved getting a voter to freely cast their vote and having that vote count equally with the rest.[20]

The nullification of the presidential elections in 2017 breathed life into the role of courts as facilitators of electoral justice, instilling confidence in the electorates on the realization of electoral justice in Kenya.[21] Therefore, the decision by the Supreme Court in 2019 to strike out Karua's petition which was raising substantial questions on the electoral process on a technicality can be likened to the proverbial one step forward three step backwards in the realization of electoral justice in Kenya.

II. Jurisdiction of the EACJ

Article 27(1) of the Treaty grants the EACJ jurisdiction over the interpretation and application of the Treaty. Furthermore, Article 27(2) provides for an extension of the court's jurisdiction which the Partner States are under the obligation to operationalize at a later date, and which is to include original appellate or human rights. Although nearly 25 years have passed since the entry into force of the EAC Treaty, the Partner States have failed to extend the EACJ's jurisdiction, despite the EACJ declaring the failure of the Partner States to adopt a protocol operationalizing the extension a violation of the EAC Treaty.[22] On the other hand however, the Treaty under Article 6(d) provides for a set principles of the EAC to include "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". Additionally, Article 7(2) calls upon the Partner States to abide by the principles of good governance

18 *Jeffrey Steeves*, The 2017 election in Kenya: Reimagining the past or introducing the future?, Commonwealth & Comparative Politics 54 (2016), p. 480.

19 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

20 Ibid.

21 *Victoria Miyandazi,* Historic Judgment: Kenya's Presidential Election Declared Null and Void and Fresh Election Ordered, Oxford Human Rights Hub, 2 September 2017, https://ohrh.law.ox.ac.uk/historic-judgment-kenyas-presidential-election-declared-null-and-void-and-fresh-election-ordered/ (last accessed on 20 October 2025).

22 Hon. Sitenda Sebalu v The Secretary General of the East African Community and Others, EACJ Ref. 1 of 2010, p. 42.

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including "adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights." Even a cursory look at the EACJ case law reveals that there is hardly any case in which the EACJ would not rely on those two provisions. The foundational stone for this case law was laid in the 2007 Katabazi case,[23] where the EACJ established that despite the failure of the Partner States to operationalize the human rights jurisdiction, the Court "will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegation of human rights violation." Most notably, this jurisdiction includes the principles of "rule of law" and "maintenance of universally accepted standards of human rights" as they are already provided for in the Treaty.[24]

Regarding access to the court, Article 30 of the Treaty grants any EAC resident the locus standi to approach the court subject to its jurisdiction to determine, "the legality of any Act, regulation, directive decision or action of a Partner State on grounds that the decision is unlawful or infringes upon the provisions of the treaty".[25] This broad jurisdiction and even broader *locus standi* has positioned the court to be vital in public interest litigation across the East Africa Community.[26] To put this into context, any action by a Partner State being complained of may be a cause of reference to the EACJ provided it violates the EAC principles provided under Articles 5, 6 and 7 of the Treaty. At that point, the action would amount to a Treaty infringement, effectively involving the Court's jurisdiction. [27]Additionally, the Treaty does not require the petitioner to show that they have been directly affected by the action being challenged. .[28]

Furthermore, Article 34 of the Treaty provides that, "where a question is raised before a national court of a Partner State concerning the interpretation or application of the Treaty, that court shall request the EACJ to give a preliminary ruling on the question, if that court considers that a ruling on the question is necessary to enable it to give judgement". The rationale behind this is to ensure consistency and uniformity in the interpretation of the

23 James Katabazi and 21 Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, EACJ Ref. No. 1 of 2007.

24 This case law of the EACJ attracted much scholarly attention, see *James Thuo Gathii*, Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice, Law and Contemporary Problems 37 (2016), p. 55, *Tomasz Milej*, Human rights protection by international courts; what role for the East African Court of Justice?, African Journal of International and Comparative Law 26 (2018), p. 108, *Tasco Luambano*, Litigating Human Rights Through the East African Court of Justice: Overview and Challenges, Journal of Law, Policy and Globalization 71 (2018), p. 76.

25 Article 30 of the Treaty.

26 *Milej*, note 24, p. 113.

27 Ibid, p. 111.

28 Ibid, p. 114.

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treaty within the Partner States.[29] Unfortunately, this provision has been relied upon only once in the case between the Attorney General of Uganda and Tom Kyahurwenda.[30]

III. Political Backlash Against the EACJ

Despite Treaty provisions expressly granting the court its powers and mandate, the court has been subjected to intimidation and backlash from Partner States and their institutions,[31] which became fully manifest in the famous Anyang Nyong'o case. To put the case into context, Article 9 of the Treaty establishes the East Africa Legislative Assembly (EALA) as the legislative organ of the EAC. Article 50 of the Treaty stipulates that the Parliament of each Partner State shall elect nine members who shall as much as possible represent the various political parties, shades of opinion specific interest groups.

However, in 2006 the Kenyan Parliament engaged in what can best be described as an appointment process. Names were proposed and unanimously endorsed without any debate, deliberation or election.[32] Prof. Anyang' Nyong'o, a prominent politician and an opposition leader at that time, filed a case against Kenya at the EACJ challenging this "election".[33] The EACJ held that the process was inconsistent with the EAC-Treaty, as it failed to ensure equitable representation of various interest groups. The Kenyan parliament was directed to conduct fresh elections in compliance with the EAC Treaty.[34]

This ruling sparked tension between the EACJ and Government of Kenya, with the latter describing the judgment as an overreach by a regional court into a national parliamentary process.[35] Consequently, Kenya spearheaded a motion to amend the EAC Treaty and introduced an appellate division where decisions from the first instance court can be reviewed (appealed). Similarly, the amendment introduced the procedure on removal of a judge from office and introduced a punitive two-months' time limit for filing of individual

29 *Mbori*, note 12, para. 7.

30 The Attorney General of the Republic of Uganda v Tom Kyahurwenda [2011] UGSC 1.

31 *Owiso Owiso*, Supremacy Battle between the Supreme Court of Kenya and the East African Court of Justice: A Reply to Dr Harrison Mbori, Afronomics Law, 7 June 2024, https://www.afronomicslaw.org/category/analysis/supremacy-battle-between-supreme-court-kenya-and-east-african-court-justice-reply (last accessed on 28 April 2025).

32 Prof. Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya [2009] EACJ 3.

33 *A P van der Mei,* The East African Community: The Bumpy Road to Supranationalism – Some Reflections on the Judgments of the Court of Justice of the East African Community in Anyang' Nyong'o and others and East African Law Society and others, Maastricht Faculty of Law Working Paper 2009-7 (2009).

34 Ibid.

35 *James Thuo Gathii*, International Courts as Coordination Devices for Opposition Parties: The Case of the East Africa Court of Justice, Oxford 2020, p. 55.

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references with the EACJ.[36] It has been argued that these changes aimed at invoking fear among EACJ judges, curtailing the independence of the court and discouraging the EACJ's proactivity in upholding the rule of law.[37]

The backlash following *Anyang' Nyong'o* is one of the very few global examples of State Parties amending a treaty to penalize a judicial body for a decision they disliked and opposed**.** It showed that the strategic space within which the EACJ operates is quite constrained in that politicians are prepared to respond to bold judicial decisions by attempts to bring the Court under their control, ultimately undermining its independence and legitimacy.[38] Significantly, the national judiciaries in the EAC Partner States are also under pressure coming from politicians.[39] What is thus required is judicial solidarity within the region, rather than infighting, such as the current clash between the EACJ and the Supreme Court of Kenya. Mutual supportiveness and the embedding of regional jurisprudence within domestic legal frameworks play a crucial role in strengthening the credibility of Treaty commitments.[40]

Beyond these institutional dynamics, however, the Treaty framework itself reveals a critical vulnerability within the EACJ, one that persists even though the political backlash against the EACJ is unwarranted. It is the regulation of the procedure for the appointment of EACJ judges which is too vague and cursory. Article 24 of the Treaty provides that the judges will be appointed by the Summit (Heads of State) among persons recommended by the Partner States who are of proven integrity, impartiality and independence. Additionally, the persons are supposed to fulfil conditions required in their own countries for holding such a high judicial office, or who are jurists of recognized competence in their respective Partner State. However, the Treaty does not put in place any vetting system for the EACJ judges. This gap predisposes the court to politically motivated appointments. The Heads

36 The provisions amended were, Articles 23, 25 (1), 27 (2), and 140. See also *Mary Wandia,* Stop manipulating and bullying the EA court to serve the interests of regional elites, The East African, 12 May 2012, https://www.theeastafrican.co.ke/oped/comment/Stop-manipulating-and-bullying-the-EA-court-/434750-1404590-aae67k/index.html (last accessed on 20 October 2025).

37 *Gathii*, note 35, p. 57

38 Another method of bringing the Court under control is the politicization of judicial appointments discussed further below.

39 For Kenya, see *Tomasz Milej / Evans Ogada*, Upholding judicial independence in Kenya. Challenges, context and solutions, Friedrich Naumann Foundation for Freedom, September 2024, https://ir-library.ku.ac.ke/server/api/core/bitstreams/469a7006-dd5f-4186-9e9d-fb4f7700d9f4/content (last accessed on 3 January 2025). For Uganda see *Musinguzi Blanshe / Julian Pecquet*, Uganda Supreme Court rebel hires US lobby shop in showdown with Museveni, The Africa Report, 9 January 2024, https://www.theafricareport.com/332351/uganda-supreme-court-rebel-hires-us-lobby-shop-in-showdown-with-museveni/ (last accessed on 3 January 2025), see also Centre for Human Rights of the University of Pretoria, Centre for Human Rights condemns unlawful interference with judicial independence in Uganda, 12 April 2023, https://www.chr.up.ac.za/latest-news/3359-press-statement-centre-for-human-rights-condemns-unlawful-interference-with-judicial-independence-in-uganda (last accessed on 3 January 2025).

40 *Milej*, note 24, p. 127.

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of State may decide to opt not for individuals with a track record of professionalism and independence but rather those who are likely to dance to the tunes of the appointing authority shaping case law in line with its expectations. The process of appointment of judges to the Supreme Court judge in Kenya is much more rigorous. In addition to meeting the constitutionally prescribed qualifications,[41] candidates undergo a highly competitive and publicized vetting process by the Judicial Service Commission. The crucial difference in the appointment process may well shape the Supreme Court's view of the EACJ. While the far less competitive and transparent appointments to the EACJ cannot be the sole reason for the Supreme Court's backlash against the regional court, the connection remains too significant to overlook.

D. The Core of Contention: Case Law of the EACJ

The core of contention between the EACJ and the Supreme Court is the former's long-established case-law regarding the principle of the rule of law. This case law boils down to the claim that since the principle of the rule of law as enshrined in the EAC Treaty requires adherence of the State authorities to domestic law, any violation of the domestic law amounts to the violation of the principle of the rule of law and accordingly also of the EAC Treaty.

I. The EACJ's Rule of Law Doctrine: From Kyarimpa to UTC Mall

The EACJ's leading case is Henry Kyarimpa v AG of Uganda. In this case the petitioner acting in the public interest challenged the legality of a Memorandum of Understanding (MoU) concluded between the Government of Uganda and a Chinese investor concerning construction of a power plant. The applicant alleged a violation of the Public Procurement & Disposal of Assets, which is a piece of Ugandan legislation, and the disregard of orders made by Ugandan courts.[42] According to Ugandan authorities, the selection of the investor and the ensuing conclusion of the MoU was effectuated based on an arrangement between Uganda and China, an arrangement, however, which the Ugandan authorities failed to produce before the EACJ. It was this inter-governmental arrangement that justified the conclusion of the MoU outside of the domestic statutory framework. The State organ which according to the applicant was responsible for the violation was the Cabinet of Uganda. Also listed was the Permanent Secretary in the Ministry of Energy and the Ministry's committees. The case was therefore about the abidance of the rule of law by the executive branch.[43]

41 Article 166(3) of the Constitution of Kenya.

42 Kyarimpa, paras. 10-11.

43 Ibid., para. 20.

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The EACJ's First Instance Division endorsed the definition of the rule of law laid out by the applicant's counsel in reference to a number of leading cases according to which "the law in our society is supreme; no one, no politician , no government, no Judge, no union, no citizen is above the law."[44] Summarizing its position on the rule of law as a principle of the EAC Treaty, the Court stated that "the activities of Partner States must be transparent, accountable and undertaken within the confines of both their municipal laws and the Treaty".[45] However, in examining the case, the Court underlined that "it is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case".[46] On the issue of the disobedience of the court orders, the First Instance Division stated that it is first for the Ugandan courts to address it,[47] and as the Ugandan courts were not seized, the First Instance Division dismissed the reference.

It is important to note that while the EACJ's First Instance Division endorsed the idea that the principle of the rule of law is justiciable and that it implies that the Partner States must act "within the confines of municipal law", but it sought it fit to intervene only, if the violation is "obvious and blatant". In other words, although the Court did not exclude testing the Partner State's actions on compliance with its own domestic legislation—the Court suggested that such compliance is an element of the principle of the rule of law—, it limited the scope of the review to "obvious and blatant" violations. This limitation is not explained in detail. As its rationale, the EACJ's First Instance Division merely states that its role is "not to superintend" the Republic of Uganda. The First Instance division did not, however, specify whether according to the bench, there was no violation at all or such a violation did occur but it was not obvious or blatant. The applicants appealed and the EACJ Appellate Division disagreed with the First Instance on both issues.

The Appellate Division went to great lengths to emphasize the importance of the principle of the rule of law. According to the judges:

> *"Observance of the Rule of law restrains the arbitrary will of the strong, it is the sure protection of all, it equalizes the unequal, it is the antithesis of arbitrariness, and it is the nemesis of anarchy. Without the Rule of Law, justice, peace and security would be mere chimeras. In light of that, it is clear that observance of the Rule of Law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration. If laws are disregarded and court orders treated with contempt,*

44 Ibid., para. 29.
45 Ibid., para. 32.
46 Ibid., para. 53.
47 Ibid., para. 58.

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> *we will march back to the dark cold days of Thomas Hobbes' state of nature when life was solitary, poor, nasty, brutish and short."*[48]

The Appellate Division examined whether procuring of the contractor was "in contravention of the Internal Laws of Uganda". This being the case, and given that the government failed to produce the inter-governmental arrangement, the Appellate Division arrived at the conclusion that "the principles of the rule of law, transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty" have been offended.[49] Without explicitly rejecting the "obvious and blatant" standard advanced by the First Instance Division, the Appellate Division abandons it, claiming "that any conduct in breach of the rule of law is conduct which is likely to jeopardize the achievement of the objectives of the Treaty and, accordingly, offends Article 8(1)(c) thereof"[50].

With regard to the disobedience of the court orders, the Appellate Chamber was of the opinion, that:

> *"[…] if pertinent facts about the existence of National Court orders and a State's subsequent contrarian conduct are brought to the attention of this Court, the Court does not need, let alone require, the assistance of the National Court, in any form or shape, to determine whether the Treaty has been breached in those circumstances."*

Since the Kyarimpa judgment, EACJ jurisprudence has firmly established that violations of national legislation breach the rule of law principle and thus constitute violations of Article 6(d) of the EAC Treaty. For example, in the 2020 case of Attorney General of Rwanda v UTC Mall, the EACJ reiterated the principle of the Kyarimpa judgment and emphasized that:

> *"[…] where the complaint is that the action was inconsistent with internal law, and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of the rule of law, it is the Court's inescapable duty to consider the internal laws of such Partner State in determining whether the conduct complaint of amounts to a violation or contravention of the Treaty."*[51]

It is, however, important to note that also the UTC Mall case concerned the violation of national legislation by the executive branch of government. The key issue in the UCT Mall case was whether a Rwandese government agency referred to as "District Commission's Committee in Charge of Unclaimed Property" and the Rwanda Revenue Authority auctioned a property (the UTC Mall) in violation of a piece of Rwandese legislation, Law

48 Henry Kyarimpa v Attorney General of Uganda [Kyarimpa Appeal], Appellate Division, Appeal no. 6 of 2014, para. 82.

49 Ibid., para. 72.

50 Ibid.

51 UTC Mall v. Attorney General of Rwanda (Reference No 10 of 2013, EACJ, 26 November 2020), para. 83.

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No. 28/2004 – that allowed a takeover of abandoned property, which the applicants alleged and the Attorney General of Rwanda denied. After the First Instance Division decided in favour of the applicants, and the judgment was confirmed on appeal.[52]

II. Extending Scrutiny to Judicial Decisions: Burundi Journalist Union, EACSOF and Martha Karua

In Kyarimpa and UCT Mall, the EACJ did not address whether the standards of scrutiny applied to executive actions extend to domestic judicial decisions. However, prior to Martha Karua, the Court had already engaged with this question in Burundi Journalist Union vs AG of Burundi,[53] and more comprehensively in EACSOF vs AG of Burundi. In short, the EACJ believes that there is no difference whatsoever.

The EACSOF case concerned a petition challenging the confirmation of presidential election results in Burundi by the country's Constitutional Court. The Appellate Division found that the Constitutional Court's decision violated the relevant EAC Treaty provisions, including the principle of the rule of law.[54] The applicants argued the Partner State (Burundi) violated the principle of the rule of law because the Constitutional Court violated Burundi's own laws.[55] Among those laws were provisions of the Constitution of Burundi relating to the elections of the President.[56] The Appellate Chamber relied on the international law rules on state responsibility and highlighted the principle of "undifferentiated attribution".[57] Accordingly, the EACJ Appellate Division argued, it "matters not if it is executive, legislative, or judicial act or omission which is complained of".[58] The Court further emphasised that any wrongful act engenders international responsibility. Such an act does not have to be "outrageous, done in bad faith, or with wilful neglect, or to be a blatant miscarriage of justice."[59] This crucial determination resulted in EACJ's comprehensive rejection of deference to national authorities, domestic courts included. It is also a reaction to a claim made by the EACJ First Instance Division in the same case. Citing a nearly 100 years old arbitral award between a US national and Mexico, the First Instance Division held that revaluation of issues decided by a national apex court is possible only

52 Attorney General of Rwanda v. Union Trade Centre LTD (Appeal no. 10 of 2020). The Appellate Division upheld the judgment of the First Instance Division.

53 Burundian Journalists Union v. Attorney General of the Republic of Burundi (East African Court of Justice, First Instance Division, 15 May 2015) Reference No 7 of 2013, paras. 40-41.

54 East African Civil Society Organizations' Forum v Attorney General of the Republic of Burundi and Others (EACJ Appellate Division, 24 May 2018) Appeal No 2 of 2018 (EACSOF), paras. 96-97.

55 Ibid., para. 20.

56 Ibid., paras. 21-22.

57 Ibid., para. 73.

58 Ibid.

59 Ibid., para. 74.

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when such decision reflect a "clear and notorious injustice, visible, to put it thus, at a mere glance".[60] Hence, the Appellate Division overruled an excessively loose standard of scrutiny advanced by the First Instance Division, and replaced is for an excessively strict standard. This strict standard allows the EACJ to apply the EAC Treaty's rule of law principle to comprehensively re-evaluate the national courts' case assessment and, more precisely, to determine whether a judgment of a domestic court is complies with the substantive domestic laws of the Partner State concerned, including its constitution. And this is exactly what the EACJ affirmed in the Martha Karua case. While disagreeing with Kenyan Judiciary's interpretation of Kenyan Constitution, the EACJ proposed a different interpretation, which in the EACJ's opinion was aimed at giving full effect to the right of access to justice.

Summarising its caselaw concerning scrutiny of domestic courts' judgments against the Treaty's rule of law principle in Martha Karua, the EACJ was keen on pointing out a difference between its case law based on the rule of law principle and an appellate jurisdiction. According to the Appellate Chamber, the EACJ does not exercise any appellate jurisdiction, because it has no powers to "revise, review or quash" the domestic judgments.[61] What the EACJ is doing is different: it merely determines the Partner States' international responsibility under international law.[62]

The argument of the EACJ is too formalistic and conceals the crucial problem, which arises if an international standard requires from a State compliance with its domestic laws, as the rule of law principle enshrined in the EAC Treaty does. In this case a determination to be made by an international court such as the EACJ about the international responsibility of a State requires from this court a very similar type of analysis as would be required from a domestic court of that State sitting on appeal. In both situations, the court would have to review a decision of the domestic trial court on whether it accurately applied the domestic laws to a given set of facts. The fundamental issue here is that the domestic court, by virtue of its composition, way of appointment and appointment requirements, may legitimately claim to be better equipped or even more competent to conduct this type of analysis than an international court, which on its part may claim superior expertise in international law. The issue is even more glaring, when the case has already been adjudicated not only by one domestic court, but by two; the trial court and a court of appeal, or even by three domestic courts, as was the case in the Martha Karua saga. By substituting its own legal analysis for that of Kenya's Supreme Court, the EACJ effectively positions itself as better suited to properly apply Kenyan law to the legal issues raised by the applicant. And such an assumption is highly problematic, given the vetting which the Kenyan Supreme Court judges, but also even the High Court Judges and Judges of the Court of Appeal had to

60 East African Civil Society Organizations' Forum v Attorney General of the Republic of Burundi & Others (EACJ First Instance Division, Reference No 2 of 2015), 29 September 2016, para. 44.

61 Martha Karua Appeal, paras 52& 54, citing EACSOF.

62 Ibid., paras. 54-55.

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undergo and the amount of experience in applying Kenyan law they have accumulated.[63] By leaving those very crucial issues unaddressed, the EACJ exposes itself to legitimate criticism from Kenyan judiciary. And the more politisised the practice of appointment of EACJ judges becomes, the more justified such criticism will be.

As previously emphasized, the judicial appointment procedure for EACJ judges represents a significant institutional vulnerability for the Court. A worrying recent example was the appointment of Dr. Zablon Mokua a former member of county assembly, to the EACJ by Kenya. Following the resignation of Justice Nyachae in January 2024, the executive unilaterally and arbitrarily nominated Dr. Mokua to take up the position. The Law Society of Kenya moved to court to challenge this decision, terming it unconstitutional and a mockery of the rule of law.[64] On the other hand, the Kenyan executive, through the cabinet secretary in charge of the EAC docket, argued that the nomination of a judge to the EACJ was a preserve of the Head of State and he enjoyed the discretion to nominate a candidate who would be appointed by the summit.[65] The High Court intervened and quashed the nomination of Dr. Mokua. In his decision, Justice Chacha Mwita stated that the Judicial Service Commission was the entity responsible for determining whether a person fulfilled qualifications for appointment to a high judicial position in Kenya. Furthermore, the Constitution required openness and transparency in appointments to public positions.[66]

While the High Court rightly stopped this appointment, this is the consequence of the unfortunate gap in the Treaty, which, as discussed above, fails to provide for any procedure of vetting for the EACJ judges. The establishment of an EAC-affiliated regional judicial service commission may cure it, but, as of now, there are no specific plans to establish such a body.

III. Deference vs. Intervention: The Missing Doctrine

A short look at history may shed some more light on the dilemma. The EACJ is not the first regional judicial organ in East Africa. Its predecessor, the Court of Appeals for Eastern Africa (CAEA) used to have what the critics say the EACJ is usurping: the appellate jurisdiction. The legacy of the CAEA is, however, somewhat mixed. On the one hand, the Court is credited for high level of independence in the increasingly authoritarian political environment and the last bastion of protection of individual freedom.[67] On the other hand, the Court had a colonial heritage having been established by British Order in Council in

63 Article 166(2) and (5) read together with Article 172(1)(a) of the Constitution of Kenya.

64 *Luke Anami*, Lawyers lobby fault nomination of Kenyan as judge to regional court, The East African, 29 April 2024, https://www.theeastafrican.co.ke/tea/news/east-africa/lawyers-lobby-fault-nomination-of-kenyan-as-judge-court--4605268 (last accessed on 13 January 2025.)

65 Ibid.

66 Law Society of Kenya v Attorney General & 2 others; East Africa Law Society & another (Interested Parties) [2025] KEHC 641 (KLR).

67 *Milej*, note 24, pp. 173-174.

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1902 to facilitate a cost-efficient administration of justice in the East African territories under the British rule. Later, the court exercised its jurisdiction based on the domestic codes of procedure of Kenya, Tanzania and Uganda. It was eventually abolished in 1977.[68] One may see the CAEA as a post-colonial relic, but one may also see is as a quite unique East African heritage of a regional appeal mechanism which as we see still tends to shape the imaginations about what functions a regional court can perform.

The discussion in this part may be summarised by stating that the EACJ fails to adopt what Kermit Roosevelt refers to as "doctrine".[69] Writing in the context of the US Constitutional law, Roosevelt observes that doctrine primarily reflects the Court's decision to defer, or not to defer, to another governmental actor.[70] Transposing this thought to a relationship between national and international judiciary, the doctrine would mean the decision of the international court to defer, or not to defer to the national court. In the context of the EAC, this decision would reflect the EACJ's judgment, whether the national actors, including the national judiciary, may be relied upon or trusted to identify and observe the limits which the principle of the rule of law places on the organs of the Partner States.[71] As pointed out by Roosevelt, governmental action carries with it at least the implicit judgment of the governmental actor that what has been done complies with the Constitution.[72] Hence, "the Court is in part reviewing the governmental action, but it is also in part reviewing the judgment of the governmental actor".[73] Similarly, the EACJ should recognize that the Partner States' organs under review have already assessed whether their actions comply with the rule of law principle, including adherence to national legislation. For example, the Rwanda Revenue Authority must have evaluated whether the auctioning of the UCT Mall was compliant with the Rwandese law on abandoned property. The same applies even more clearly to the evaluation of the Martha Karua petition by the Kenyan Supreme Court.

The problem is whether the EACJ can rely on these evaluations when the cases come up before it, or such evaluations conducted by the Rwanda Revenue Authority, the Kenyan Supreme Court or any other organ of the Partner State, to borrow from John Hart Ely, can be trusted. The answer will depend on a number of factors. One may argue, for example, that the judiciary of a Partner State can be more trusted than non-judicial organs, because the application of domestic law is their core business and the key element of their training. However, what if the independence of the Judiciary is in doubt? The situation in this regard may vary and indeed does vary from Partner State to Partner State. Can it be then said that the Judiciary of one Partner State can be more trusted than the Judiciary of another Partner

68 Ibid.

69 *Kermit Roosevelt*, The Myth of Judicial Activism, London 2006, p. 43.

70 Ibid.

71 Ibid., p. 53.

72 Ibid., p. 24.

73 Ibid.

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State? What would be the consequences for the Court if it dismisses a particular judiciary as not trustworthy?

What makes such judgments even more difficult is the all-encompassing character of the rule of law principle. As we have seen, the principle may mean compliance with national procurement laws, but also compliance with constitutional guarantees of access to justice. Should the EACJ apply uniform standard of deference to Partner States' assessments of rule of law compliance? This question gains complexity given that even national courts usually calibrate their scrutiny, granting greater leeway in specialized areas like economic policy while exercising stricter review in fundamental rights cases, such as freedom of expression.[74] Answering all those questions will go well beyond the scope of the present analysis, but our point of critique is that the EACJ does not address these questions at all. Moreover, by replacing the analysis of the national organs by its own and rejecting any qualifiers for the wrongfulness of the state action complained of, it seems to apply by default the strictest standard of deference, leaving hardly any room for trusting or relying on the judgments of the national actors.

In the caselaw examples given, either the counsels for the Partner States or the First Instance Division of the EACJ proposed various doctrines which may be used to determine the level of scrutiny to be applied by the EACJ while reviewing judgments of domestic courts. They were mostly derived from dated classics of international arbitration and assumed a high level of deference to the domestic courts (or low level of scrutiny of the decisions of the same), allowing the EACJ to intervene e.g. in cases of "obvious and blatant" violations, no matter the circumstance. The 2024 Supreme Court Advisory Opinion develops this analysis further.

E. The Judicial Backlash: Position of the Supreme Court

The Supreme Court's reasoning may be divided into two parts. In the first part, the Court is keen on stressing the supremacy of the Constitution of Kenya, 2010 and its "final judicial authority" under the same.[75] In the second part, the Supreme Court calls the EACJ to exercise judicial restraint and elaborates on the doctrine of margin of appreciation developed by the European Court of Human Rights (ECtHR).

The argument in the first part proceeds in two steps. First, the Supreme Court invokes the principle of subsidiarity. While the Court derives this principle from ECtHR case law, the argument relies heavily on the outdated concept of reserved domain ("domaine reserve"). Accordingly, the Supreme Court claims that "a State's electoral laws and pro-

74 *Philomena Apiko / Bruce Byiers*, The East African Court of Justice: The hard road to independent institutions and human rights jurisdiction, ECDPM, https://ecdpm.org/application/files/3516/5546/8772/EACJ-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf (last accessed on 28 January 2025).

75 Reference No E001 of 2022; Hon Attorney General v Hon Martha Karua, SC [2024] KESC 31 (31 May 2024) (Advisory Opinion), paras. 57& 74.

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cedures fall squarely within the municipal competency of its courts",[76] suggesting that electoral laws are an area of state activity that is beyond any international judicial scrutiny.

In the second step, the Court argues that the EACJ is barred from interpreting national laws. This would be "outside the purview of the Treaty" and beyond the EACJ's jurisdiction.[77] While regional courts would be empowered to conduct "procedural reviews" of national court's decisions and "call attention to violations", the EAC Treaty would limit the EACJ's mandate to "interpretation and application of the EAC Treaty only".[78] In the same vein the Supreme Court claims that the national courts would not be vested with "jurisdiction to deal with the interpretation or application of the EAC Treaty".[79] These two claims taken together basically deny the existence of any interactions between Kenyan national law and the Treaty. The reasoning of the Supreme Court represents therefore a quite radical version of the dualist approach to the relationship between national and international law.

The Supreme Court seems to be equating interpretation of national laws by the EACJ with "appellate jurisdiction"[80] and "merit review jurisdiction"[81] which the EACJ would arrogate to itself. It goes on to suggest that in so doing, the EACJ would assume "judicial supra-nationality" which should be "categorically provided for in the Treaty".[82] The Supreme Court is apparently of the opinion that this is not the case.

It is worth noting that the dualistic approach to the relationship between the national and international law conceptualized by the German scholar Hans Tripel has been the foundation for Kenyan case law regarding international law for decades. It was only the Constitution of Kenya, 2010 that seemed to have brought about a paradigm change. While reaffirming the supremacy of the Constitution,[83] Article 2 of the Constitution of Kenya provides that general rules of the international shall form part of the laws of Kenya,[84] and that any treaty or convention ratified by Kenya form part of the laws of Kenya.[85] These provisions were regarded by some commentators,[86] as a shift from a dualistic approach to international law towards the monistic one. However, in a quite surprising turn of events, the Supreme Court stated in the Mitu-Bell case in 2021 that the cited provisions are of no

76 Ibid., para. 56.

77 Ibid., para. 64.

78 Ibid., para. 74.

79 Ibid., para. 64.

80 Ibid., paras. 56 & 74.

81 Ibid.

82 Ibid.

83 Article 2(1) of the Constitution of Kenya.

84 Article 2(5) of the Constitution of Kenya.

85 Article 2(6) of the Constitution of Kenya.

86 *Kabau Tom / Ambani John*, The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism? Africa Nazarene University Law Journal 1 (2013), pp. 36-55.

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consequence on the monism-dualism distinction and only mean that the Kenyan courts may apply international law, as long as the same is not in conflict with "the Constitution, local statutes, or final judicial pronouncement".[87] International law norms were thus reduced to filling gaps and a means of interpretation of national law and precedents.

While the first part of the Supreme Court's reasoning seems to incorrectly (as will be discussed below) deny the EACJ any authority to review domestic court decisions for compliance with national law, the second part makes a more nuanced point: it correctly identifies the absence of any established doctrine in EACJ case law that defines the boundary between domestic and international judicial competence. The Supreme Court calls out the EACJ for subverting the authority of national courts. As said, it proposes instead the doctrine of margin of appreciation, granting national courts the discretion to apply municipal law calibrating it to the circumstances of the case at hand.

F. The Position of the Supreme Court in a Comparative Perspective

The judicial resistance against the EACJ displayed by the Supreme Court is a new phenomenon in the EAC. Generally, there are not many instances in which the national courts would directly engage with the case law of the EACJ. A formal avenue for a judicial dialogue is provided through the preliminary reference procedure in Article 34 of the EAC Treaty, but it is rarely used as already stated. By asking the Supreme Court for an advisory opinion the Government of Kenya chose a rather unique way to challenge the EACJ caselaw, particularly the Martha Karua judgment. In the past, the governments used to defy the EACJ openly, as the Anyang' Nyong'o saga demonstrates. However, fifteen years later, with the EACJ having cemented its authority within the region, an open assault on the Court, would appear politically too costly. The nature of cases in the EACJ docket is also an important factor. Most of the cases concern human rights and rule of law.[88] They may be used by private individuals in the national courts as precedents, but given the large body of human rights case law, it actually rarely happens. The Tanzanian judiciary for example sometimes refers to the EACJ cases but cites them along case law from the entire Commonwealth to prove the existence of a certain common law principle, with no reference to a particular regional context.[89] However, as the EACJ's case law expands and its docket diversifies, national courts will likely need to engage with its rulings more often.

87 Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR, para. 133.

88 *Japhet Biegon,* State Implementation and Compliance with the Human Rights decisions of the East African Court of Justice, in: Prof. CA Maimela (ed.), Special Focus: Implementing Regional Human Rights Standards in East and West Africa Challenges and Remedies, Pretoria 2021, pp.411-412; *Mbori*, note 12, pp. 3, para. 7.

89 See for example Song Lei vs Republic (Criminal Application No. 102/06 of 2019) [2024] TZCA 597 (18 July 2024) or Deogratius Martin Kachangaa and 2 Others vs Director of Public Prosecutions (Criminal Application No. 1 of 2013) [2017] TZCA 1144 (13 December 2017).

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For example, with the growing intra-community trade, more cross-business transactions might come under the scrutiny of both the EACJ and national courts, necessitating a judicial dialogue.

Because of the political costs of an open attack on the EACJ, the Partner States' governments choose silent defiance. If very uncomfortable with a particular EACJ judgment, they would just ignore it, rather than asking a national court whether they should implement it, as the government of Kenya did regarding the Martha Karua decision. The worrying implementation record of the EACJ judgments confirms this point. An up-to-date comprehensive study is yet to be completed, but from the available data, it occurs that only half of the judgments are actually implemented.[90] Unfortunately, this figure reflects the broader practice of non-implementation of court orders, also those made by the domestic courts.[91] This shows that the national courts and the EACJ have a common cause to fight, rather than fighting each other.

On a positive note, the EACJ frequently incorporates domestic precedents into its own reasoning.[92] The domestic courts of the Partner States also show no hostility or reluctance toward substantive EAC laws. The comparative study by Emmanuel Sebijjo Ssemmanda, gives a number of examples from Uganda, Tanzania, Kenya and Rwanda demonstrating a positive reception of EAC law, even if the majority of cases cited concern the application of the East African Customs Management Act (EACMA) which is a rare example of a directly applicable piece of EAC legislation.[93] The courts in Kenya and Uganda only made clear that the EAC law must comply with the national Constitution. In the case *Uganda v Gurindwa & others*,[94] the petitioner argued that some penal provisions of the EACMA would violate Uganda's Constitution presumption of innocence. The High Court did not share this view, but indicated that should such a violation occur, the Constitution would have to take precedence.

90 *Biegon*, note 88, p. 425.

91 For Kenya see *Milej* / *Ogada*, note 39, for Tanzania see The Citizen, Valambhia family battles Tanzania government for Sh280bn payout, 5 September 2018, https://www.thecitizen.co.tz/tanzania/news/national/valambhia-family-battles-tanzania-government-for-sh280bn-payout-2654532 (last accessed on 14 July 2025). In Uganda, President Museveni came up with a theoretical framework to justify non-compliance with court orders, see *Kenneth Kazibwe*, Museveni Defends Security Agencies on Defying Court Orders, Nile Post, 22 September 2022, https://nilepost.co.ug/news/143463/museveni-defends-security-agencies-on-defying-court-orders (last accessed 14 July 2025).

92 See for example the Burundi Journalists Union case in which the EACJ extensively relies on the domestic case-laws of the Partner States, including Kenya.

93 *Emmnauel Ssemanda*, Push And Pull: Application Of Community Law In The Partner States Of The East

African Community, East Africa Community Law Journal 1 (2021), pp. 174-176, see also *Augustus Mutemi Mbila*, Implementation of East African Community Law by Partner States: A review of relevant Laws, Strathmore Law Review (2021), pp. 124-137.

94 Uganda v Gurindwa & others [2012] UGHC 166. Ssemanda, p. 177.

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To find a comparably skeptical approach to that of Kenya's Supreme Court, one must look outside the East African region. In 2016, the High Court of Ghana refused an application to enforce a judgment of the Economic Community of Western African States (ECOWAS) Court of Justice.[95] It this Judgment the ECOWAS Court of Justice awarded the applicant damages of 800,000 USD against the Republic of Ghana on account of human rights violations. It is important to note that, in contrast to the Supreme Court of Kenya, the High Court of Ghana did not suggest that the judgment of the ECOWAS Court of Justice would be in any form *ultra vires*. It rather relied on a formalistic approach to the Ghanaian domestic framework and went on to conclude that it does not provide for a procedure for enforce a judgment made by an international court. On a lighter note, one may observe that the Supreme Court of Kenya could not hide between formalistic reasoning and had to engage substantively with the limits of the EACJ's jurisdiction, because, as opposed to Ghana, the Kenyan legal framework is quite clear about the enforceability of regional court's judgments.[96] More specifically, the High Court of Ghana stated that the relevant treaty instrument obligating the ECOWAS Member States to give effect to the judgments of the ECOWAS Court of Justice has not been incorporated into the Ghanaian law by an Act of Parliament, and given the dualistic nature of Ghanaian legal order, the High Court of Ghana would not have a legal basis to grant an application for enforcement. While commenting on the decision, Richard Frimpong Oppong deplores a lost opportunity to develop the common law in a way that would facilitate the domestic enforcement of the regional court's judgments.[97] Oppong juxtaposes the position taken by the High Court of Ghana with the decision of the South African Constitutional Court in *Government of the Republic of Zimbabwe v. Fick and Others,*[98] concerning the enforcement of a costs order made by the South African Development Community (SADC) Tribunal with regard to its judgment in *Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe*.[99] In this highly controversial judgment, the SADC Tribunal found that Zimbabwe had violated the provisions of the SADC Treaty by expropriating white farmers without compensation. Zimbabwe failed to comply with the judgment which eventually led to the suspension of SADC Tribunal operations in 2010 following a political campaign against the Tribunal led by the Government of Zimbabwe. It is for this reason that the original applicants of the

95 In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS

against the Republic of Ghana and In the Matter of Chude Mba v. The Republic of Ghana, High Court of Ghana, Suit No. HRCM/376/15.

96 See in particular Article 2(6) of the Constitution of Kenya. For avoidance of doubt, Kenya unlike Ghana has an Act of Parliament domesticating the regional treaty framework, Treaty for the Establishment of the East African Community Act, Cap. 4C of the Laws of Kenya.

97 *Richard Frimpong Oppong*, The High Court of Ghana declines to enforce an ECOWAS Court Judgment, African Journal of International and Comparative Law 25 (2017), p. 131.

98 Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22.

99 Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe [2008] SADCT 2.

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SADC case sought enforcement in South Africa. The Constitutional Court of South Africa allowed for it despite the lack of an explicit provision in South Africa on enforcement of international tribunals' judgments. In a display of judicial solidarity, the South African court relied on a broad interpretation of the principles applicable to execution of foreign judgments, arguing that the right of access to courts and the concomitant right to an effective remedy are essential parts of the rule of law and there is a need to ensure lawful judgments are not evaded with impunity.

The formalistic stance of the High Court of Ghana should be seen in a broader context of the ECOWAS system. Like in the EAC, the ECOWAS Treaty framework provides for the procedure of preliminary references which a national court can submit to the ECOWAS Court of Justice. And like in the EAC, the procedure does not play any major role in the integration project. It has actually never been used.[100] Samuel Ebobrah explains that this is due to the elitist character of ECOWAS which was conceived by the governments without much public participation and without providing for individual access to the ECOWAS Court of Justice. The 2005 treaty amendments, which introduced individual human rights complaints to the Court, aimed to strengthen the ECOWAS Court of Justice's role in regional integration. Yet, as Ebobrah contends, two decades later, the "disconnect between ECOWAS community law and the daily realities of citizens and officials in Member States" remains.[101] Moreover, the national courts do not perceive themselves as actors in the regional integration project,[102] the lower courts are reluctant to refer cases to organs outside of their own constitutional frameworks, and the apex courts are determined to preserve their privileges.[103] As argued elsewhere,[104] the challenges in the EAC and other African Regional Economic Communities, in particular the inter-governmental and elitist character of the regional integration process, are quite similar. However, as said, this situation is likely to change as the regional integration progresses, and it is likely that at some point the national and regional judges will realise that promoting regional integration actually requires a judicial dialogue and that regional and national courts need each other as allies to curb executive excesses or call out executive inaction.

100 *Solomon Ebobrah,* The preliminary reference procedure of the ECOWAS Community Court of Justice: why would the courts not play?, African Journal of International and Comparative Law V32 (2024), p. 437.

101 Ibid, p. 450.

102 Ibid, p. 448.

103 Ibid, p. 450.

104 *Tomasz Milej*, East African Community (EAC) – Inspiring Constitutional Change by Promoting Constitutionalism?, International Organizations Law Review 20 (2023), p. 166.

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G. Discussion

I. The EACJ's Proactive Role

Any discussion of the EACJ caselaw must first acknowledge the positive role which the Court has been playing in radically broadening the access to justice in the East African region, otherwise severely limited by a number of constrains. These include high cost of access, lengthy proceedings, perception of corruption, challenges concerning judicial independence and the lack of social entrenchment of the judiciary or missing sense of social ownership.[105] Facing political pressures, East African judiciaries often struggle to develop assertiveness and to uphold rule of law standards. Against this backdrop, the robust stance of the EACJ and its proactive interpretation and application of the Treaty's fundamental principles is good news. It must be seen in the context of Court's efforts to improve access to justice and to position itself as a public interest court. As already mentioned,[106] this includes a very liberal approach to the question of locus standi, granting of access without the need to exhaust local remedies, a fee and costs regime that does not discourage public interest litigants, online filing, establishment of sub-registries across the community, holding of court sessions also outside of Arusha (in the capitals of the Partner States) and lately also awarding of monetary compensations for Treaty violations.[107] On the negative side one can mention the punitive 2-months' time limit for filing of references introduced by the Treaty amendment following the intimidation campaign against the Court in the wake of the Anyang' Nyong'o case discussed above.

Unsurprisingly, it is the Kenyan Judiciary that the EACJ clashes with. Since the 2010 Constitution of Kenya came into force, the Kenyan Judiciary has transformed. Despite ongoing challenges, it has built a reputation for enforcing constitutional standards against both executive and legislative branches, as evidenced by its extensive case law.[108] However, it is important to note that the Kenyan Judiciary's levels of assertiveness and its active role in promoting the rule of law standards are quite unique in the East African region. For East Africans in Partner States where local judiciaries lack the kind of independence seen

105 *Joe Oloka-Onyango*, Human Rights and Public Interest Litigation in East Africa: a Bird's Eye View, The George Washington International Law Review 781 (2015), p. 47; *Apiko / Byiers*, note 74; *Teddy Musiga / Hanningtone Amol / David Sigano* (eds.), Simplified Manual for the East Africa Court of Justice, 2020, p. 3.

106 *Milej*, note 4.

107 *Harrison Mbori*, EACJ First Instance Court Decides Martha Karua v Republic of Kenya: The litmus Test for EACJ Jurisdiction and Supremacy, Afronomics Law, 30 November 2020, https://www.afronomicslaw.org/2020/11/30/eacj-first-instance-court-decides-martha-karua-v-republic-of-kenya-the-litmus-test-for-eacj-jurisdiction-and-supremacy (last accessed on 24 January 2025).

108 Ibid., see also *Milej / Ogada*, note 39.

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in Kenya,[109] the EACJ may not only be the last, but also the only resort when it comes to protecting their rights against government's overreach.

J. EACJ Usurping Appellate Jurisdiction and Supra-Nationality?

The EACJ and the Supreme Court hardly engage in judicial dialogue. What is observable are two monologues. While the EACJ fails to adopt any doctrine of deference to the national authorities, the Supreme Court fails to recognize the EACJ's jurisdiction over the principle of the rule of law and its implications. This is because the EACJ, by refusing to exercise appellate jurisdiction, fails to recognize the similarities between appellate jurisdiction and its jurisdiction under Article 6. On the other hand, the Supreme Court does not distinguish between the EACJ's adjudication based on the Treaty's Article 6 principle of the rule of law and the concept of an appellate jurisdiction.

The Supreme's Court suggestion that the EACJ would usurp "appellate jurisdiction" and "judicial supra-nationality" is definitely not persuasive. Despite some suggestion in caselaw that the EACJ could nullify legal acts of national authorities,[110] this line of reasoning has not been pursued as of recently and nowhere did the EACJ suggest that is has a competence to set aside judgments of national courts which exercising appellate jurisdiction would require. The EACJ uses the missing competence to "revise, review or quash" to emphasize that its case-law does not constitute appellate jurisdiction. The problem is, however, that the similarity between the EACJ's case law and appellate jurisdiction may justify a higher level of deference to the national judiciaries than the one the EACJ actually applies, meaning no deference at all. Therefore, while the first part of the Supreme Court's argument may be misplaced, the second part does hold some merit.

The idea of the EACJ exercising appellate jurisdiction may be seen as an aspect of the more general concept of supranationalism. However, the EACJ has carefully avoided any references to this concept. It even took special care to ensure that its prescribed remedies are aligned with established (classic) international law principles of state responsibility. This is particularly true for the Martha Karua case, where the EACJ limited its remedies to declaration of incompatibility of the actions of the Respondent State acting "through its judicial organ" with the principles of the EAC guaranteed under the Treaty and the right to access to justice. In so doing, it did not go beyond what international organs are commonly mandated to do. Also, in ordering damages, the EACJ was keen on staying within the realm of classic international law anchoring the order in the law of state responsibility and the ILC Draft Articles, rather than for example referring to a special nature of the legal order of the EAC. This is in line with the EACJ's previous case law. Despite some allusions to the

109 Judges & Jurists Forum, Report on The State Of Judicial Independence In East Africa: Contemporary Threats And Mitigation Strategies Webinar, 1 February 2024**,** https://africajurists.org/report-on-the-state-of-judicial-independence-in-east-africa-contemporary-threats-and-mitigation-strategies-webinar/ (last accessed on 12 February 2025).

110 British American Tobacco (U) Ltd v Attorney General of Uganda [2018] UGSC 21, para. 33.

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EU cases, especially Van Gend en Loos, the EACJ has stopped short of declaring the East African Community law to be an autonomous legal order distinct from the classical public international law, as of now.[111] Also nowhere has the Court suggested that there has been a transfer of sovereign powers, and the EACJ has acquired some of the powers previously exercised by the domestic judiciaries. As much as the principle of the rule of law gives the EACJ a very broad standard of review against which the actions of the state organs of the EAC Partner States may be evaluated, the Court emphasizes its position as an international court, when it comes to ordering remedies, as far-reaching as they might be.

This does not, however, mean that the Treaty does not offer any potential to pursue the concept of supra-nationality as an integration path. This potential remains, however, largely unexplored. For instance, the preliminary reference procedure outlined in Article 34 of the Treaty has the potential to introduce supranational characteristics to the EAC's institutional framework. Yet, for the EACJ to achieve true supranational status, the preliminary reference procedure must be mandatory. Specifically, national courts should be required to refer cases involving EAC law to the EACJ for interpretation and application and then be bound by the EACJ's ruling. Only through such a mandatory referral system would national courts effectively transfer their interpretative powers over EAC law to the EACJ, thus establishing it as a supranational institution. We will discuss the mandatory character of preliminary references in the following section.

K. The role of Preliminary Rulings Procedure

The Treaty's regulation regarding the preliminary reference procedure in Article 34 sheds some light on the problems discussed here. Unfortunately, neither the case law of the EACJ concerning the rule of law principle nor the Advisory Opinion of the Supreme Court give much attention to this provision. Especially the silence of the EACJ is quite surprising, given that the EACJ has elaborated upon Article 34 of the Treaty in the 2015 preliminary ruling in the case of AG of Uganda vs Tom Kyahurwenda.[112]

The first and most evident consequence of the preliminary reference procedure is that the Treaty inherently presupposes a form of interaction between the domestic legal orders of the Partner States and the Treaty, including other instruments such as Protocols and Acts of the Community, an interaction which the Supreme Courts effectively denies. And as the EACJ correctly points out in Tom Kyahurwenda, the fact that decisions of the EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter as per Article 33(2) of the Treaty, presupposes some areas of concurrent jurisdiction between the EACJ and the domestic courts.[113]

111 *Milej*, note 24, p. 592.

112 The Attorney General of the Republic of Uganda v Tom Kyahurwenda [2011] UGSC 1.

113 *Harrison Mbori,* Hidden in plain sight: Kenyan Supreme Court Shooting its own Foot on Merits Review and Appellate Jurisdiction in Continuing Supremacy Battle with the East Africa Court of Justice (EACJ), Afronomics Law, 3 June 2024, https://www.afronomicslaw.org/category/an

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The consequences of the preliminary reference procedure for the division of powers between the EACJ and national courts require special attention, particularly because all domestic court applications of national law fall under the rule of law principle. Unlike in the European Union Law, save for some exceptions, the applicability of the Treaty does not require any cross-border elements.[114] Any case of application of domestic law to purely domestic scenarios; for example in the Kyarimpa and UTC Mall cases, may be scrutinized by the EACJ on the compatibility with the rule of law principle. And the gist of the scrutiny may be, as demonstrated above, the accuracy of the application of domestic law by a domestic court. Hence, going by the wording of Article 34, one can easily imagine a situation in which a domestic court seeks EACJ's guidance on the interpretation of domestic law in cases involving purely domestic scenarios. In other words, because every case of application of domestic law by domestic courts is a case of application of the rule of law principle of the Treaty, in every such case, EACJ's guidelines can be sought. For example, the Burundi Constitutional Court could have stayed the proceedings and asked the EACJ whether President Nkurunziza's bid for a third term was constitutionally permissible. Similarly, the High Court of Kenya could have stayed the proceedings in Marta Karua's electoral petition and asked the EACJ whether the right of access to justice under the Constitution of Kenya requires the High Court to proceed with the petition. Can it then be that the Treaty envisages an EACJ that acts as an advisor to the domestic courts on any case of application of domestic laws? If it does not, it would mean that EACJ's case law on the rule of law principle is misconstrued, as it grants to the EACJ powers which it should not have, if the consequences of the preliminary reference procedure are to be considered.

The idea of a domestic court being under obligation to seek EACJ's guidance each time it applies domestic law would be absurd, alone for practical reasons. The wording of article 34 of the Treaty is not conclusive, to what extent such obligation exists. On the one hand, the provision uses the word "shall" implying an obligation, but on the other hand, it gives the national court some leeway. The obligation arises only if the national court "considers that a ruling on the question is necessary to enable it to give judgment". Based on the wording alone, it would be for the national court to decide whether the guidance of the EACJ is necessary or not.

In the Tom Kyahurwenda decision, the EACJ distinguishes between application and interpretation of the EAC-law, and claims a monopoly for the latter.[115] The court also observes, that the preliminary references 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 the

alysis/hidden-plain-sight-kenyan-supreme-court-shooting-its-own-foot-merits-review-and (last accessed on 20 January 2025.)

114 *Mbori*, note p. 6, para. 15

115 Kyahurwenda, para. 45.

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Partner States of the East African Community."[116] As the questions of the interpretation of domestic law in purely domestic scenarios have hardly any impact on the uniform interpretation of the Treaty, there can be no obligation to consult the EACJ in the type of rule of law cases discussed here. As already mentioned, the hierarchy established by Article 33 of the Treaty between the EACJ decisions and the decisions of the domestic courts assumes some area of concurrent jurisdiction. The EACJ's exclusive jurisdiction and the resulting mandatory reference requirement would only apply when uniform interpretation of the Treaty is necessary. As an example, the EACJ points to cases involving the invalidation of Community Acts, which are the EAC's main form of secondary legislation (borrowing terminology from EU law), despite their limited practical use.[117] The fact that the case law of the EACJ is as of now rarely preoccupied with cross-border legal disputes, and most of the cases focus on internal rule of law and human rights issues, explains why the preliminary reference procedure is rarely used. This is why Tom Kyahurwenda is still the only case decided using the Article 34 procedure and has not (yet) become the foundation stone for the advancement of supra-nationality in the EAC.

Even if the use of the preliminary reference procedure would rarely be mandatory, and such obligation would not apply if a national court applies domestic law to domestic scenarios, the question remains if the national court may apply for EACJ for such guidance, even if under no obligation to do so. The idea may seem extravagant at first blush, given the superior expertise of the national court on domestic law, as opposed to an international court such as the EACJ. The mere existence of the preliminary reference procedure might be even advanced as an argument that the Treaty does not envisage the kind of jurisdiction which the EACJ has assumed based on Article 6(d) and 7(2) in purely domestic scenarios. This might sound true from the perspective of Kenyan judiciary which, as said, has managed to cement a relatively independent position within the system of the division of powers and maintain a remarkable degree of professionalism. In some of the other Partner States, the situation might be very different. The judicial systems suffer under shortage of qualified lawyers, underfunding, corruption and above all political interference.[118] And as said, also in Kenya, the executive has undertaken numerous attempts to erode judicial independence and repeatedly fails to respect court orders.[119] Accordingly, the position of the judge vis-à-vis the government might experience a not insignificant boost, if the judicial decision is supported by the authority of the EACJ. This may be particularly true for constitutional human rights guarantees corresponding to international human rights treaties. When confronted with politically sensitive scenarios, even of a purely domestic character, a judge may consider seeking EACJ's advice to be an attractive option. And finally, there is nothing in the Treaty that would prevent judges from making use of it.

116 Ibid., para. 48.

117 Ibid.

118 *Roosevelt*, note 47, p. 53, see also Advisory Opinion, note 75.

119 *Milej / Ogada*, note 39.

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In summary, the preliminary reference procedure is evidence that the Treaty contemplates a judicial dialogue between the domestic courts and the EACJ and sometimes even requires the same. There is also nothing in the Treaty that would preclude national courts from seeking EACJ's preliminary ruling in cases of compliance with the rule of law, and by extension, with domestic legislation. It is through mutual supportiveness, rather than through battles over superiority, that respect for judicial decisions can be secured in the face of widespread executive overreach, ultimately strengthening the rule of law in East Africa.

L. Reserved Domain?

By denying EACJ's jurisdiction concerning elections in the Martha Karua case, the Supreme Court seems to limit the applicability of the principle of the rule of law enshrined in the Treaty. By virtue of the ratification of the Treaty, the observance of the rule of law principle is Kenya's obligation under international law. It is also the provisions of the same Treaty that establish the jurisdiction of the EACJ over the interpretation and application of this principle. Why would then the "electoral laws and procedures" fall outside of the EACJ's jurisdiction, if it is alleged that the operation of those laws and procedures violates the principle of the rule of law?

As suggested above, one way to understand this claim would be through the concept of a reserved domain. Accordingly, electoral laws and procedures would be an area of State activity immune from international scrutiny and confined to the "competency" of the domestic courts by its very nature. Such an area, one could argue in support of Supreme Court's claim, is a reserved domain inherent in the state sovereignty to which international law does not apply. However, such an understanding of the reserved domain would be at odds with the current state of international law's development. As pointed out by von Rütte,[120] the content of the reserved domain is determined by international law and not by the states unilaterally. A matter would fall under the reserved domain, only if international law allows it to.[121] Accordingly, there can be no argument that the electoral proceedings are by their very nature immune from international scrutiny. This would be the case only if the Treaty would exclude them from the scope of applicability of Article 6. Yet, the Treaty does not contain any such provision.

Another way to understand the Supreme Court's reasoning would be to claim that that the principle of the rule of law is not precise enough, or to use the Supreme Court's vocabulary, not "categorical" enough to grant the EACJ jurisdiction concerning elections. It is, however, unclear how this "categorical provisions" should be framed, and what level of precision international norms must achieve to justify limiting the reserved domain, as suggested by the Supreme Court. International law as any legal system consists of different

120 *Barbara von Rütte*, Domaine Réservé? Statehood, Sovereignty and Nationality, in: Barbara von Rütte, The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law, Leiden 2022, chapter 3.

121 Ibid.

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types of norms, not only of rules, but also principles. Of course, if powers of state organs were to be transferred to the EAC, the law would need to clearly define which powers are being transferred, which organs would assume them, and the procedures for their implementation, including the scope and limitations of the transfer. But as already noted, no such transfer has taken place. The subject of Supreme Court's objections are norms of the Treaty falling under the *rationale materiae* jurisdiction of the EACJ, most notably those spelling out EAC's fundamental and operational principles. These norms do not transfer sovereign powers but instead establish Kenya's obligations under public international law. By their nature, legal principles provide direction and establish legally binding commitments to certain values, which does not, however, diminish their normative and justiciable character. The justiciability of the EAC principles was confirmed by the EACJ in its landmark ruling in the Katabazi case.[122] In the light of this case law, one may regard the robust set of justiciable principles as an original contribution of East Africa to the law of regional integration which pursues an agenda going well beyond the establishment of a common market.

In a nutshell, what the Supreme Court seems to suggest is that a particular state activity, namely holding of elections, should be removed from the scope of the applicability of the EAC Treaty's principle of the rule of law. But there is hardly any viable argument that would speak for it. The problem is not the EACJ interfering with Kenya's reserved domain. One cannot claim that the EACJ does not have jurisdiction to review even court judgments against the principle of the rule of law. This is because the EACJ has no power to set such judgments aside. Also, no Kenyan court is under the obligation to seek a preliminary ruling of the EACJ while ruling on purely domestic scenarios. The problem is only the way in which the EACJ exercises its jurisdiction, and most notably its failure to adopt an adequate standard of deference to national courts and authorities.

M. Conclusion

In the evolving dance of judicial governance within the EAC, it is high time the Supreme Court of Kenya abandons its radical dualism and the EACJ carves out a doctrine that respects the competence of national courts while championing regional integration. This is not a battle for dominance but a symphony in which both courts must find their unique notes to play. By recognizing their shared commitment to the rule of law, these institutions can transcend monologues and foster a judicial dialogue that secures justice and rule of law across the region and enables the national judiciaries and the EACJ to provide an effective

122 James Katabazi and Others v Secretary General of the East African Community and Another, EACJ Reference No 1 of 2007 (1 November 2007).

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check on judicial overreach and face the actual challenges to their position and to the rule of law.

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