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Nurturing Integration through Dialogue: The Role of Courts in Supranational Contexts

by

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Abstract

Taking the Court of Justice of the European Union (especially its procedure of the reference for a preliminary ruling) as providing a suitable model to emulate for courts of other regional economic communities, the work will examine how the attraction of that model and its case law on integration in the EU has contributed to the development of judicial dialogue within these regional economic communities in Africa. The model's evident utility for these Community courts has assisted them in their own tasks of interpreting Community primary and secondary laws as well as in furthering regional integration through judicial dialogue. This work will examine their pertinent case law instrumental in nurturing judicial dialogue with both national courts as well as with the Luxembourg Court, thereby showing elements of both horizontal and vertical transjudicial communication.

Keywords

Regional economic communities in Africa, migration of law, Court of Justice of the European Union, use of EU principles beyond the Union, judicial dialogue, transjudicial communication

1. Introduction

The export of legal models is typically based on various pre-existing factors, e.g., language, legal culture, education, judicial and legal networks, etc. (Tatham 2013: 30-39, 41-63). In this way, the Court of Justice of the European Union ('CJEU') model has provided a readily accessible paradigm for the courts of other regional economic communities ('RECs') that are able to draw on it, e.g., to enhance their own legitimacy (Pollack 2018) and that of their decisions in moulding their own REC legal system.[1] This, in turn, reinforces the notion of the CJEU as the purveyor of a highly evolved and successful regional integration culture, and the law and values underpinning it. The present article will look at how this role for the CJEU has played out so far with respect to various REC courts in Africa, by examining these courts' use of some of the CJEU's formative constitutional case law. Since judicial dialogue in the EU has evolved through the strategic use of references for a preliminary ruling (under what is now Article 267 TFEU), relevant REC laws as well as cases from the African REC judiciaries will be examined together with how the CJEU-created principles of primacy and direct effect of EU law have been used by drafters of REC primary law and the said judiciaries in their own task of nurturing regional integration (Tatham 2015).

2. Focus of research and methodology

This work will accordingly concentrate on the influence of the CJEU's case law beyond the confines of Europe as well as the transfer of aspects of its model, focusing on the courts of several RECs in Africa. It seeks to show how these latter courts have deployed relevant case law of the CJEU in their own decisions as a means of reinforcing, confirming or legitimising their own jurisprudence aimed at deepening integration in their own supranational regional legal orders. This horizontal judicial dialogue or transjudicial communication between the CJEU and African REC courts is likewise complemented by the vertical dialogue or communication between the relevant supranational and national

courts prompted by use of the preliminary reference procedure and also forms part of the present investigation (Slaughter 1996: 38).

Within the overall context of doctrinal research, the chosen methodology for the present short study is that of comparative legal research. Such an approach will enable the work to draw inferences about the similarities and differences from among the case law of the various jurisdictions under comparison and develop arguments as to how the relevant REC courts in Africa use CJEU rulings in their own decision-making. It will also highlight the approach taken by REC courts in their own regional communities as to how they have used (or, in some circumstances, have not needed to use) that CJEU 'constitutional case law'[II] to reinforce and legitimise their own evolution of their respective supranational regional legal orders.

As doctrinal research, an emphasis has necessarily been placed on a combination of using primary sources of law in the form of the actual decisions of the relevant REC courts (available through the courts' own websites or through that of '*l'Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français*' or 'AHJUCAF'[III]) combined with the use of relevant secondary materials in the form of books, journals, edited volumes and monographs in both English and French, with a special reliance placed on those produced by academics and professional commentators from Africa who are specialist in the relevant REC laws and doctrines.

The five REC courts from Africa have been chosen, from the institutional perspective, due to their having been designed following the CJEU model and, from a jurisprudential perspective, due to their emulation of CJEU rulings – to a greater or lesser extent – in their case law (Fall 2021). This selection is additionally underlined by commonalities in the form of language, legal culture and legal education as well as more practical expressions of such common approaches, e.g., in the mode of the REC courts' reasoning in their decision-making, following either the (English) common law or civil (French administrative) law approaches, both of which have had varying levels of influence on that of the CJEU (Dehousse 1998: 9-12; Jacob 2014).

The first REC court to be considered is that for the East African Community ('EAC'), being the still largely anglophone Court of Justice ('EACJ').[IV] The EAC was re-established in 2000 and already possesses a functioning customs union. Membership now also encompasses Burundi and Rwanda (both Belgian colonies before independence) as well as

more recently South Sudan, the Democratic Republic of Congo and Somalia. In July 2010, it launched the East African Common Market Protocol, expanding the customs union that would lead to the free movement of labour, capital, goods and services within the EAC. Thereafter, the Member States had intended to move to a common currency by 2012 and eventual political federation in 2015. However, a combination of insuperable political problems and the deterioration in the economic outlook led to a delay in implementing this timetable.

The next REC court is the Court of Justice of the Common Market for Eastern and Southern Africa ('COMESA CJ').[V] This REC was formed in December 1994[VI], replacing a Preferential Trade Area which had existed since 1981 between the original signatory States. As the title of the organisation indicates, its membership is spread across the length of the continent, from Egypt in the north to Zimbabwe in the south and including the African island nations in the Indian Ocean.

Three mainly francophone regional courts complete the group under consideration in this brief study. First is the UEMOA Court of Justice ('UEMOA CJ')[VII] which services the West African Economic and Monetary Union (known by its French acronym 'UEMOA'[VIII]). UEMOA is a customs and monetary union that comprises mostly francophone countries in West Africa. It promotes economic integration between its Member States through the use of a common currency, the CFA franc,[IX] and seeks to create a common market. The Union also aims at harmonisation of laws and convergence of macroeconomic policies and indicators as well as of fiscal policies. However, following the recent consolidation of coups in Burkina Faso, Guinea, Mali and Niger, current anti-French sentiment – expressed by coup leaders and in public demonstrations – has prompted a fresh look at the legacy of French colonial rule in West Africa (Brooke-Holland 2023) and, with it, the CFA franc and consequently UEMOA.

The CEMAC Court of Justice[X] ('CEMAC CJ') is the regional tribunal of the Economic and Monetary Community of Central Africa[XI] (as with the other courts, usually known by its French acronym, 'CEMAC'[XII]). This Community of mainly francophone Central African nations has similar aims to those of the UEMOA for West Africa, viz., promoting regional economic and monetary integration by use of the Central Africa CFA franc.

Lastly is the OHADA Common Court of Justice and Arbitration ('OHADA CCJA').[XIII] The Organisation for the Harmonisation of Business Law in Africa (generally referred to by

its French acronym, 'OHADA'[XIV]) was set up in 1993 by 14 mostly francophone States in Central and West Africa.[XV] OHADA's principal objectives are to harmonise and modernise business laws in Africa so as to facilitate commercial activity, attract foreign investment and secure economic integration in Africa. Its activities are seen as complementary to a number of the other groups, e.g., UEMOA and CEMAC, although the possibility of conflict of jurisdiction between the courts of such regional organisations is more than theoretical (Kamto 1998: 147-150).

3. Migration of laws and models

This research is conducted against the backdrop of the constant transjudicial communication (Slaughter 1996: 38) or transnational dialogue between domestic, regional and international courts. A powerful component of this judicial dialogue (Martinico and Pollicino 2012) is evidenced by the citation of judgments or doctrines from other jurisdictions in courts' own decision-making (Law 2015). Moreover, within and beyond the EU, the pervasive influence of the CJEU model is a pivotal element in such communication and acts to reinforce the 'migration' of its rulings.

Such 'migration' of legal ideas (Choudhury 2006: 21) encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas than that expressed in the concepts 'legal transplantation' (Watson 1974) or 'cross-fertilisation' (Bell 1998: 147). The benefits of this migration metaphor may accordingly be summarised (Walker 2006: 320-321):

> Migration … is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike the other terms current in the comparativist literature such as 'borrowing", "transplant" or "cross-fertilization", it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather … it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

Migration also serves this role by allowing the movement of ideas across legal orders without necessarily connoting control on the part of the originating order. Migration may thus be the most sensitive description of how courts and judges interact with each other across jurisdictions. In fact, there is already clear evidence of the existence of the horizontal transjudicial communication of case law between Africa and Europe at the regional/continental level. The 1950 European Convention on Human Rights and the model and case law of the European Court of Human Rights have played a pivotal role in the drafting and creation of a similar convention and court (Ben Achour 2020), as well as the evolution of that court's jurisprudence in Africa, in the form of the African Court on Human and Peoples' Rights and its application of the African Charter on Human and Peoples' Rights 1981.[XVI] In this field of inter-regional judicial dialogue, the European Convention and Court have directly impacted on their African counterparts in institutional set-up and jurisprudential development (Diop 2020). In comparison, the present work also looks at such horizontal communication, this time between the CJEU and courts of the same status in African RECs and the way in which these African REC courts have further sought to create the framework for vertical judicial dialogue in their own RECs (Thuo Gathii 2011).

4. The nature of the migration of the CJEU model and its case law

It is important to note that any potential case law and institutional export to African RECs represents a qualitatively different manner for emulation of the CJEU than that experienced vis-à-vis courts in EU Member States and those in associated or candidate countries of the Union, or even the EFTA Court and the ECtHR. Unlike its relations with these courts, the CJEU's relations with regional courts in Africa are subject to no (formal treaty) requirement to follow or even to take account of its institutional set-up, procedural rules or case law. The relationship then is one not of compulsion but rather of horizontal communication or dialogue between equals.

In these circumstances, a certain degree of reticence needs to be displayed when considering any attempt at the migration or transposition of the EU institutional and legal framework in view of the fact that the drafters of the treaties and related instruments of RECs beyond the Union can sometimes overlook the incremental nature of the process of regional integration in Europe (Ziller 2005: 6). Even the EU has itself been reluctant to

endorse its model. In the mid-1990s, it listed several necessary factors for the success of regional economic integration schemes (European Commission 1995: 9-10): (a) the existence of genuine common interests; (b) compatible historic, cultural and political patterns; (c) political commitment; (d) peace and security; (e) the rule of law, democracy and good governance; and (f) economic stability. Recreating the world in the EU's image was basically not a feasible proposition, given the absence of certain of the above factors in other regional organisations. The Commission argued (European Commission 1995: 8):

> The efforts of the EU to promote and support regional integration among developing countries should not at all be interpreted as an attempt to "export" the European integration model. Clearly, there are different approaches towards integration and economic development. It should be recognised that the European model, shaped by the continent's history, is not easily transferable nor necessarily appropriate for other regions. On the other hand, to the extent that the European model of integration has become an unavoidable "reference model" for virtually all regional initiatives, the EU should share with other interested parties its experience on: improving the functioning of regional institutions … and sharing the benefits from integration.

Consequently, the EU does not seek to promote its model but rather the general lessons drawn from its experience (Smith 2008: 79): e.g., regional economic agreements to liberalise trade to encourage growth and development; and regional institutions as a means to overcome historical grievances and to enhance good governance and the rule of law. In these ways, the EU seeks to use these methods as a way of underpinning peace and security for States in regional groupings (Santander and Ponjaert 2009: 283).

Despite this official reluctance to seek the express export of the EU model, nevertheless (Fawcett 1995: 23) 'there are few regions of the world where the apparently spectacular progress of the European Community towards economic and political union has failed to evince a response. The EU itself, in its external affairs, groups countries together on a regional basis: this is 'a striking and unusual feature of its foreign relations; no other international actor does this to the same extent' (Smith 2008: 76).

With these arguments in mind, it is necessary to view the nature of a model (Klug 2000: 599) as 'a general source of ideas, concepts, examples, and even specific constitutional arguments' rather than it being considered as a mere copy or reproduction of what has

occurred elsewhere. Transplanting a particular (successful) model into alien soil by simply adopting or cloning it is no sure way of replicating that success in a new context (Klug 2000: 599-600). Instead, a court – within the limits of the relevant treaty or protocol establishing it – whose jurisdiction and operation are based on a particular (earlier) model, may seek to emulate the jurisprudential evolution of that model as a means of reinforcing its own legitimacy and clothing its rulings in the protective garb of comparative case law.

5. The CJEU model and its emulation in African RECS

The leitmotif of EU integration since its inception in the 1950s has been its use of law as a prominent tool to achieve its aims (Ziller 2004: 44), the so-called 'integration through law' paradigm (Cappelletti, Seccombe and Weiler 1986: 3). Although this approach is considered less fashionable than it was (Auer, Bergsen and Kundnani 2021), it nevertheless still expresses the crucial point that the rule of law and rule by law are immutable components of the very foundations – as well as in the manner of development – of the Union (Voßkuhle 2017: 146). The pivotal element of such approach is the CJEU, created as a permanent and independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical international courts, Member States may bring actions before it[XVII], the CJEU is also accessible by Union institutions such as the European Commission and European Parliament[XVIII] and even, where they are the ultimate addressees of EU rules and decisions, companies and individuals.[XIX]

More importantly for the present discussion is the preliminary reference procedure under Article 267 TFEU which was, at the time of its creation, a novel concept under international (and REC) law. In exercising its duty to apply EU law before it, this procedure allows a national court (and, if it is the court of last resort, requires it) to ask the CJEU the meaning of any provision of EU law if that national court is uncertain of its meaning or it wishes to question the validity of EU secondary law. The reference for a preliminary ruling is thus a mechanism by which a national court initiates a dialogue with the CJEU. In posing its questions, the domestic tribunal accordingly promotes two functions of the procedure (Blumann and Dubois 2016: 761): first, it acts as a way of maintaining the unity of application of EU law by encouraging a judge-to-judge collaboration; and, secondly, it forms an

instrument of protection of litigants, in particular private parties whether individuals or companies.

By locating the CJEU as the final arbiter of what EU law means, the drafters of the founding Treaties attempted to ensure that a level-playing field would be maintained across the Community and later the Union, so that uniformity of interpretation of EEC/EU law would guarantee the same rights under that law across all domestic courts in the Union. Moreover, in their judicial work, in applying such EEC/EU law in cases before them (whether or not occasioning a reference), all national judges were to be considered as EEC/EU judges (Rosas 2014) as well, although this has led, in certain instances – e.g., in protecting national (constitutional) identity – to challenges in the overriding application of EU law in domestic cases (Tatham 2013; Tatham 2022).

Through the judicial dialogue initiated by means of the Article 267 TFEU reference procedure, the CJEU – by an expansive and teleological interpretation (Lenaerts and Gutiérrez-Fons 2013) of the Treaties (and secondary EU law) – has been able to create and mould many of the basic principles of the EU legal order, including the primacy of EU law and its direct effect. These two principles form part and parcel of the 'constitutional case law' of the CJEU, including *Van Gend en Loos*,[XX] *Costa v. ENEL*,[XXI] *Simmenthal*,[XXII] *Internationale Handelsgesellschaft,*[XXIII] *CILFIT*[XXIV] and *Factortame*,[XXV] through which cases the CJEU converted the founding Treaties under international law into the 'basic constitutional charter' of the Community and subsequently the Union.[XXVI]

The success of the CJEU model (Ziller 2004: 44-49) has been based on and enhanced by *inter alia* a developed system of independent national and EU courts; an expert, active legal profession; the proper implementation and enforcement of CJEU rulings before national courts by their agreement or acquiescence (since no Union power exists to compel domestic judges to obey CJEU rulings); and the development in legal processes and, in fact, in the various legal cultures in the Union, whether based on the common law or civil law and their different permutations.

It goes without saying that such factors are unlikely to be precisely replicated in the circumstances of regional organisations located in Africa (Sermet 2018b). Yet, the environment for migration or cross-pollination or transplantation from the CJEU to REC courts in Africa provides fertile ground for such types of reception of rulings from the Luxembourg Court. For example, there is broad agreement between academics and judges

that the CJEU has been the inspiration for the model of REC courts in Africa (Kamto 1998; Kazadi Mpiana 2014).

In addition, although these African REC courts encompass other distinct jurisdictions (whether derived from international courts or arbitration tribunals), they nevertheless contain at their core the unmistakeable influence of the CJEU, through the presence of their own procedures for references for preliminary rulings and thus the potential for judicial-led integration that this implies. Not only have the REC courts to be discussed in this work been shaped by the CJEU but also, as will be seen, the members of their benches have likewise looked to the case law of the CJEU for inspiration and emulation. The judges sitting on the REC courts in Africa benefit in their decision-making from being members of a network or epistemic community where common languages, legal culture, legal education and training, and received judicial interpretation and reasoning (Sow 2016; Fall 2021: 372-394) together provide ample opportunities for the migration – in whole or in part – of European (legal) integrationist concepts, as developed by the CJEU within the context of the EU.

Turning specifically to the topic of this brief study, there are two main competences which set the CJEU model apart from classic international courts and which have, in general, been imported or emulated by RECs in Africa. First, the possibility of direct actions before the regional courts for judicial review of acts of the regional organisation's organs is available before all the courts listed.[XXVII] Secondly, perhaps most importantly, the preliminary reference procedure from national courts (Virzo 2011: 292-296, 305-308) – either to request the interpretation of REC law or to test its validity or (usually) both – is available in all five jurisdictions.[XXVIII] Indeed the CJEU model for this procedure, under Article 267 TFEU, more specifically provides that all courts may make such a reference but those courts, against whose decisions there is no judicial remedy, must make a reference: of these regional courts, the UEMOA CJ, the CEMAC CJ and the COMESA CJ are particularly faithful in following this distinction (Fall 2021: 113).

Of further interest in the development of judicial dialogue is the fact that the COMESA CJ has an additional jurisdiction under Article 26 COMESA. This procedure allows natural and legal persons – resident in a Member State – to refer (for determination by the COMESA CJ) the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an

infringement of the provisions of the COMESA Treaty, provided that such persons have already exhausted local remedies in the national courts or tribunals of their Member State.

The impact of (anglophone) common law and (francophone) civil law approaches in legal reasoning, citation, structuring and general formulation of judgements in informing the way in which they express and render their decisions, is quite evident from a perusal of the judgements of the five REC courts considered in the next part of the article (Fall 2021: 384-394). Even with the enlargement of the EAC to include several civil law systems, the common law approach is still used in the drafting and formulation of its rulings. Despite these differences in approaches, however, they have all used CJEU constitutional case law in their decisions (Martial Zongo 2016). In the next part, then, REC court cases will be examined in turn, dealing with references for a preliminary ruling, the primacy of REC law and its direct effect.

6. Influential CJEU constitutional case law in African REC court judgements

6.1 References for a preliminary ruling

The embryonic African REC case law, that offers guidance to national courts on the use of references, is only slowly emerging and knowledge of this procedure – so vital for the establishment of vertical judicial communication or judicial dialogue between the REC court and domestic courts – still remains to be more widely diffused via the relevant REC legal networks (Sermet 2018a: 149). Nevertheless, in those cases already decided, there is a clear indication that the African REC courts have evinced a clear understanding on the implicit importance of the reference procedure in the formation of African REC law (Ugirashebuja 2017). In the cases discussed below, the focus is on the competence and duties of the national judge to refer cases to the relevant REC court.

In its case law, the CEMAC CJ has dealt with the issue of when a national court is to refer a question to it and the exceptions to this requirement. Its decision in *Société First Trust Saving and Loan c. Siakam*[XXIX], the CEMAC CJ – expressly relying on CJEU case law 'which serves as a reference' – considered that it was not enough for a party in domestic proceedings to maintain that the dispute before a national court of last resort posed a question of

Community law so that that court was automatically bound to carry out a preliminary reference. In fact, the CEMAC CJ noted that the CJEU had determined three ways according to which such courts could dispense with making a reference.

The first was that if the question was not relevant, i.e., if the response that the Court could give would have no impact on the solution of the dispute, for which point the CEMAC CJ cited to the *CILFIT* case in support. According to the Court, this exception left national judges – who were the only ones to have direct knowledge of the facts of the case as well as the arguments put forward by the parties – the task of assessing the relevance of the questions of law raised, as well as the need for a preliminary question, citing to the *Pigs Marketing Board*.[XXX]

Secondly, referral to the Court was also not obligatory every time whenever the question raised was materially identical to a question already having been the subject of a preliminary ruling in a similar case, the so-called '*acte éclairé*', support for which point the CEMAC CJ found in the *Da Costa* ruling of the Luxembourg Court.[XXXI]

Thirdly, as regards the so-called '*acte clair*', the CEMAC CJ cited again to *CILFIT*[XXXII] as acknowledging the fact that the obligation of compulsory referral – imposed on the courts of last resort – could also be lifted whenever the correct application of Community law was imposed with such obviousness that it left no room for any reasonable doubt as to how to resolve the question posed.

This approach was similarly displayed by the EACJ in *Attorney General of Uganda v. Tom Kyahurwenda*.[XXXIII] Initially, the Court discussed the meaning of the phrase 'court or tribunal' in the preliminary reference procedure under its own Article 34 EAC vis-à-vis to what is now Article 267 TFEU, referring extensively to pertinent CJEU case law. In fact, the EACJ noted:[XXXIV] 'In determining what "any court or tribunal" is, for purposes of the mechanism of preliminary reference, the Court draws inspiration from the jurisprudence of the European Court of Justice [« ECJ »], which is also in possession of the mechanism.' Nevertheless, the EACJ also noted the differences between Article 34 EAC and Article 267 TFEU.[XXXV] However, subsequently in its ruling, the EACJ impliedly adopted the approach of the CJEU in *CILFIT* as to when national courts need not make a reference to Luxembourg, when it stated:[XXXVI]

> The Court is of the view that the discretion to determine whether a question is necessary or not will in the great majority of cases be exercised in favour of the ruling on the question being necessary, unless: the Community law is not required to solve the dispute (an irrelevant question); or, this Court has already clarified the point of law in previous judgments (*Acte eclair*); or, the correct interpretation of the Community law is obvious (*Acte clair*).

In *Legal Brains Ltd. v. Attorney General of Uganda*,[XXXVII] the EACJ used CJEU rulings to exclude – from its jurisdiction under Article 36 EAC to make advisory opinions – opinions requested based on hypothetical or speculative cases, quoting relevant paragraphs from both *Edouard Leclerc-Siplec*[XXXVIII] and *Robards*.[XXXIX]

6.2 Primacy of REC law

The issue of primacy of REC law – whether primary or secondary – is dealt with in different ways in the various REC treaties and the case law of the relevant REC courts.

For the francophone RECs, the relevant founding Treaty has pre-empted the need for the relevant REC court to stray into the field of judicial activism or even migration of constitutional ideas by having already incorporated the CJEU notion of primacy of EU law – as detailed, e.g., in *Costa v. ENEL*[XL] and *Simmenthal*[XLI] – as an express provision. Thus, in Article 10 OHADA, it states: 'Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law.' Such wording follows, in part, that which is provided for EU Regulations under Article 288 TFEU.

Article 6 UEMOA provides similar wording but covers more secondary legislation of the UEMOA institutions: 'The Acts adopted by the institutions of the Union for the achievement of the objectives of this Treaty and in accordance with the rules and procedures laid down by the latter, are applied in each Member State contrary notwithstanding any domestic legislation, before or after.' Article 44 CEMAC reproduces the same provision.

In addition, Article 7 UEMOA and Article 4(1) CEMAC reproduce what is now Article 4(3) TEU, therefore implying the possible migration of CJEU case law interpreting this provision (formerly Article 5 EEC and Article 10 EC) to aid the UEMOA CJ and the CEMAC CJ in their jurisprudential development of the relevant Articles. For example, Article 7 UEMOA states:

> Member States shall contribute to the achievement of the objectives of the union by adopting any general or specific measures necessary to ensure the fulfilment of their obligations under this Treaty. for this purpose, they shall abstain from any measures likely to impede the implementation of this Treaty and of acts adopted for its implementation.

Within this context, it will not come as a surprise that the OHADA CCJA has held[XLII] that 'the mandatory force of the [OHADA] uniform acts and their superiority over the provisions of national laws' – which is equally called 'a rule of supranationality' directly derived from Article 10 OHADA – in view of the fact that that Article[XLIII] 'contains a rule of supranationality because it provides for the direct and mandatory application in the Contracting States of the uniform acts and establishes, moreover, their supremacy over the antecedent and later provisions of domestic law.' This rule of supranationality is thus extended by the OHADA CCJA beyond the limits provided in the OHADA Treaty to include other types of acts and treaties and putatively its future case law (Tchantchou 2009). The UEMOA Court for its part, obviously in line with and informed by the CJEU case law (Chevalier 2006), has ruled that:[XLIV]

> [I]t is important to underline that the Union [UEMOA] constitutes in law an organisation of unlimited duration, endowed with its own institutions, with legal personality and capacity and above all with powers born of a limitation of competences and of a transfer of responsibilities of Member States which have intentionally granted to it a part of their sovereign rights in order to create an autonomous legal order which is applicable to them as it is to their nationals.

The close wording of the UEMOA CJ's *dictum* to that of the CJEU in *Costa v. ENEL* is quite apparent although it appears that the UEMOA CJ is usually somewhat reticent in referring expressly to CJEU rulings in its own judgements. For example, this Court has even repeated the expression that the CJEU used in the *Les Verts* case,[XLV] referring to the UEMOA Treaty as the 'constitutional charter of the Union',[XLVI] without expressly acknowledging the inspiration for this concept in its decision. In a further case,[XLVII] the UEMOA CJ clearly laid down the principle of primacy of Community law over the national laws of the Member States, recognising in it an absolute character. According to the Court:[XLVIII]

> Primacy benefits all Community norms, both primary and derived, immediately applicable or not, and is exercised with respect to all national administrative, legislative, jurisdictional and even constitutional norms because the Community legal order prevails in its entirety over national legal orders.

Underlying the general duty of Community loyalty incumbent on Member States in putting Community law into effect,[XLIX] the Court noted: 'The States have the duty to ensure that a norm of domestic law incompatible with a norm of Community law which meets the commitments that they have undertaken, cannot legitimately be in conflict with Community law.' The Court evidently understood that the duty of Community loyalty included national judges applying the principle of primacy and thus, in case of a conflict between UEMOA law and a national legal rule, the judge was required to 'give precedence to the former over the latter by applying the one and disapplying the other', thereby following the CJEU in *Simmenthal*.

Like the treaties governing UEMOA, CEMAC and OHADA, that of the EAC similarly provides an express provision on primacy, under Article 8(4) EAC, that states: 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. The COMESA Treaty is notably much weaker in this matter, providing under Article 29(2) COMESA that: 'Decisions of the [COMESA] Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts.' Moreover, Article 8(1) EAC provides a much looser version of the provisions set out in Article 4(3) TEU on sincere cooperation as does Article 5 COMESA.

Nevertheless, the issue of primacy of EAC law has also come before the EACJ for interpretation in several cases (Ruhangisa 2017: 153-158). For example, in *Professor Peter Anyang' Nyong'o v. Attorney General of Kenya*, the EACJ – having issued an interim injunction in 2006[L] to prevent the swearing in of the Kenyan members as EAC Assembly members on the grounds that the Kenyan selection rules were prima facie contrary to Article 50 EAC[LI] – proceeded to confirm the interim ruling in a final decision in 2007.[LII] In that latter decision, the EACJ considered the basic principle of international law that a State Party to a treaty could not invoke the provisions of its domestic law to justify its failure to perform its treaty obligations and noted:[LIII]

> We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen [1963] ECR 1; Flaminio Costa vs. ENEL [1964] ECR 585; and Amminstrazione delle Finanze dello Stato vs. Simmenthal [1978] ECR 629). In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either case where there is conflict between the Community law and the national law the former is given primacy in order that it may be applied uniformly and that it may be effective.

The EACJ then turned,[LIV] for the purposes of illustration, to the *Factortame* litigation[LV] in which the CJEU had ruled that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court, seised of a dispute governed by Community law, from granting interim relief. Compared to *Factortame*, the EACJ opined, the Attorney General of Kenya appeared to be on weaker ground.

In concluding its judgement, the EACJ was forced to observe first that the lack of uniformity in the application of any EAC Treaty Article was a matter of concern since it was bound to weaken the effectiveness of EAC law and, in turn, undermined the objectives of the Community. Secondly, it noted that the Partner States had to balance individual state sovereignty with integration:[LVI] 'While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them to play a role.'

Evidently, the EACJ found it necessary to rephrase *Van Gend en Loos* and *Costa v. ENEL* in this last paragraph to indicate the implicit consequences of the integration proposed by the EAC Treaty, aims which the Partner States had clearly accepted when drawing it up and vesting a regional court with jurisdiction to interpret it. Moreover, the EACJ appears to accept that the EAC should move in this direction of integration through its reference to the CJEU constitutional case law and using it as an inspiration and support for the EACJ's reasoning.

In a later case, *Samuel Mukira Mohochi v. Attorney General of Uganda*[LVII], the applicant was a Kenyan citizen, lawyer and human rights defender. In April 2011, he had travelled to Uganda

but on arrival at Entebbe International Airport, he had been restrained, confined and detained in the offices of the Ugandan immigration authorities before having been deported back to Kenya. The immigration authorities had not informed him as to why he had been denied entry as well as to why he had been declared a prohibited immigrant and subsequently returned to Kenya. When he sought redress, the case had eventually come before the EACJ. In determining the position of EAC law vis-à-vis national law, the Court opined:[LVIII]

> 52. The import of these provisions [of the EAC Treaty and the Common Market Protocol] is that by accepting to be bound by them, with no reservations, Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of the Partner States, becomes qualified and governed by the same and, therefore, could no longer apply domestic legislation in ways that make its effects prevail over those of Community law.
> 53. Sovereignty, therefore, cannot not take away the precedence of Community law, cannot stand as a defence or justification for non-compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol.
> 54. We are of the view, therefore, that while Uganda can declare a citizen of a Partner State a prohibited immigrant and deny him/her entry, it is clear from the foregoing that such declaration or denial of entry can only be valid if it complies with the requirements of Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol.

In support of their reasoning in finding EAC law primacy over conflicting national law, the EACJ quoted[LIX] the CJEU in *Costa v. ENEL* when the latter had noted[LX] that the transfer by the States, from their domestic legal system to the Community legal system, of the rights and obligations arising under the Treaty carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act – incompatible with the concept of the Community – could not prevail.

6.3 Direct effect

The judicial discussion of direct effect in the various African REC courts is even more muted when compared to those on preliminary rulings and primacy of REC law. Nevertheless, there are several cases of note, perhaps most importantly from the COMESA CJ. In its seminal ruling on the free movement of goods within the Community, *Polytol Paints*

& Adhesives Manufacturers Co. Ltd. v. Republic of Mauritius[LXI], the Court defended the direct effect of provisions of the COMESA Treaty that had created the common market. Using the terms employed by the CJEU in *Van Gend en Loos*, the COMESA CJ – having cited to Article 26 COMESA mentioned earlier – stated:[LXII]

> The content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give space in the COMESA territory not only for the Member States but also for individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States.

However, the COMESA CJ subsequently quoted[LXIII] directly from the *Van Gend en Loos* ruling, before concluding on this point[LXIV] that residents in the COMESA Member States likewise had an enforceable right before it under Article 26 COMESA 'whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty.'

The COMESA CJ appears to have expounded most on the issue of direct effect from among the African REC courts under consideration although this is not exclusively so. The EACJ, for example, in recognising the primacy of EAC law vis-à-vis conflicting national law, has emphasised the necessary ability of individuals and companies to invoke rights conferred by the EAC Treaty and related instruments (like the Common Market Protocol) before national courts which, in turn, are called upon to guarantee their full effectiveness (Ruhangisa 2017: 149-153). In *East African Law Society v. Secretary General of the EAC*, the EACJ acknowledged:[LXV]

> As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impracticable if their national courts had no jurisdiction over disputes arising out of the implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.

It then referred to a couple of relevant passages from the CJEU ruling in *Van Gend en Loos* to support this reasoning before continuing: 'Put differently, if the Common Market Protocol confers rights onto the individuals within the EAC, these individuals should be entitled to invoke them before their national courts.'

In a similar vein in *Attorney General of Uganda v. Tom Kyahurwenda*[LXVI], the EACJ – with respect to the justiciability of certain provisions of EAC primary law before national courts – expressed itself in almost identical terms, referring to both *East African Law Society v. Secretary General of the EAC* and *Van Gend en Loos*: 'This Court agrees with the postulation of the law by the First Instance Division of this Court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them'. In affirming the decision of First Instance in the *East African Law Society* case, the Appellate Division in *Kyahurwenda* decided that:[LXVII] 'Articles 6, 7 and 8 of the Treaty are justiciable before national courts. Accordingly, those Articles do confer legal authority to the national courts of the Partner States to entertain allegations of their violation'.

Thus, through its interpretations provided in these cases, the EACJ has recognised the direct effect of the EAC Treaty and its Protocols (EAC primary law) and the concomitant competence of national courts' jurisdiction to entertain cases for infringement of directly effective provisions of that primary law.

7. Conclusion

The main part of this brief study has examined the way in which courts of African RECs use rulings from the CJEU as means of emulation in order to nurture their own brand of judicial dialogue. In particular, by employing the CJEU's interpretations of Article 267 TFEU as well as its own developed principles of primacy and direct effect of EU law, the benches of the relevant REC courts have seemingly drawn the necessary lessons from the CJEU's long experience and used its constitutional case law as a source of inspiration and guidance in their own work in moulding regional integration.

With these African REC courts, it is clear that the use of CJEU rulings in their own case law is regarded somewhat as a given. Imbued with a similar strategic mission, these REC courts – together with the support of the respective legal academic communities through

articles and monographs – have essentially incorporated CJEU decisions into the body of REC case law, without necessarily acknowledging their source in Luxembourg. That these African regional courts should do so reflects, in part, the way in which both judges and legal academia weave the established case law of the CJEU into their own work: such outcomes, in many instances, stem from judges and court staff having studied EU law as part of their studies in French universities or at the universities in their own particular regional community where the relevant REC law is almost invariably taught as part of degree courses in law (Sow 2016).

For these reasons, African REC judges are comfortable using the decisions of the Luxembourg Court in their construction of and/or confirmation of the supranational nature of their own Community laws and their direct effect in national systems, together with the requirements for making references to them. Citation, both express and implied to CJEU rulings, resonates within their regional Community systems and can be seen as similarly reinforcing their independence vis-à-vis other institutions. In other words, since the treaties – as with the TEU and TFEU – have endowed these African regional courts with the same or similar powers to the CJEU, the signatory States were already well aware of the judicial development of EU law and could not actually object when such Community courts started to develop regional integration along similar lines. This proposition is even more forceful when viewing the primacy given to REC law expressly provided for in the CEMAC, UEMOA and OHADA Treaties. Indeed, use of CJEU case law could arguably be regarded as inevitable since none of these African regional courts had to 'reinvent the wheel', i.e., they were not obliged to create the constitutional underpinnings of a regional legal order from scratch.

As a consequence, despite the vagaries of politics and security impinging upon the further evolution of the RECs, it will become more interesting in the future to see – as a result of further deepening and expansion of judicial dialogue within the African RECs – to what extent the domestic courts in these Communities follow the example, e.g., of the French courts (Tatham 1991), in their protection of national constitutional identity in the face of further encroachments upon the sovereignty of their States.

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I Some of the cases and ideas set out in this study were previously discussed in Tatham 2015.

II For an explanation of this term, see below in section 5.

III For some of the relevant cases from francophone REC courts, see <https://www.ahjucaf.org/grands-arrets-des-cours-supremes-francophones>.

IV The EACJ was established under Art. 9 of the 1999 East African Community Treaty; its jurisdiction is dealt with in chapter 8 of that Treaty (Arts. 23-47). The EAC Treaty is available at: <www.eacj.org>.

V The provisions dealing with the COMESA CJ are set out in Arts. 19-44 COMESA.

VI 1993 Treaty establishing the Common Market for Eastern and Southern Africa. Relevant materials on COMESA are available through <www.comesa.int>.

VII The UEMOA Court of Justice was re-established in Arts. 16 and 38 of the 2003 modified UEMOA Treaty (originally signed in 1994) and its jurisdiction is provided in Arts. 5-19 in Additional Protocol No. 1 relating to the UEMOA Supervisory Organs. All relevant materials on UEMOA are available at: <www.uemoa.int>.

VIII In French, 'UEMOA' represents '*l'Union économique et monétaire ouest-africaine*.'

IX The CFA franc, where 'CFA' stands for '*Communauté financière d'Afrique*' ('Financial Community of Africa'), is strictly speaking, two different currencies: the West African CFA and the Central Africa CFA franc. These two CFA francs have the same exchange rate with the euro (1 euro = 655.957 CFA francs), and they are both guaranteed by the French treasury. Such was confirmed by the EU, even though France itself now uses the euro as its currency in Council Decision 98/683/EC of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc: 1998 OJEC L320/58. However, it should be noted that the West African CFA franc cannot be used in Central African countries, and vice versa. A third CFA, with its own separate central bank, exists for the Comoro Islands.

X The relevant rules governing the CEMAC CJ are set out in Art. 29 CEMAC, Acte Additionnel No. 3/21-CEMAC-CJ-CEE-15 and Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15.

XI 1994 CEMAC Treaty (revised in 2009) and related materials is available through <www.cemac.int>.

XII In French, CEMAC signifies '*Communauté économique et monétaire de l'Afrique centrale*'.

XIII The OHADA Common Court of Justice and Arbitration was established under Art. 3 of the 1993 OHADA Treaty (as amended in 2008) and its jurisdiction is set out in Arts. 6-7 and 14-20 OHADA. All relevant treaty materials on OHADA are available at: <www.ohada.org> or <www.ohada.com>.

XIV In French, the acronym 'OHADA' represents '*l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*.'

XV Other States have subsequently joined, with Guinea-Bissau being lusophone.

XVI African Charter on Human and Peoples' Rights, Banjul, 27 June 1981, entered into force 21 October 1986: 1520 UNTS 217.

XVII Arts. 259, 263 and 265 TFEU.

XVIII Arts. 258, 263 and 265 TFEU.

XIX Art. 263 TFEU.

XX ECJ, Case 26/62, *N.V. Algemene Transport - en Expedite Onderneming van Gend en Loos v. Nederlandse administratie der belastingen*, ECLI:EU:C:1963:1.

XXI ECJ, Case 6/64, *Costa v. ENEL*, ECLI:EU:C:1964:66.

XXII ECJ, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49.

XXIII ECJ, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel* ECLI:EU:C:1970:114.

XXIV ECJ, Case 283/81, *Srl CILFIT v. Ministry of Health*, ECLI:EU:C:1982:335.

XXV ECJ, Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. (Factortame No. 1)*, ECLI:EU:C:1990:257.

XXVI ECJ, Case 294/83, *Parti écologiste Les Verts v. European Parliament*, ECLI:EU:C:1986:166, para. 23, p. 1365; ECJ, Opinion 1/91, *Re Draft Treaty on a European Economic Area*, ECLI:EU:C:1991:490, paras. 20–21, p. 6102; and ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission*, ECLI:EU:C:2008:461, para. 81.

XXVII Arts. 28 and 30 EAC; Art. 24 COMESA; Art. 8, Protocol 1, UEMOA; Art. 43, Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15, CEMAC; and Arts. 14-20 OHADA.
XXVIII Art. 34 EAC; Art. 30 COMESA; Art. 12, Protocol 1, UEMOA; Art. 43, Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15, CEMAC; and Art. 14(2) OHADA but, in the last example, the CCJA must only provide a consultative opinion to national courts.
XXIX CEMAC CJ, *Société First Trust Saving and Loan c. Siakam*, No. 7/2015-16 du 3 mars 2016.
XXX ECJ, Case 83/78, *Pigs Marketing Board v. Redmond*, ECLI:EU:C:1978:214.
XXXI ECJ, Joined Cases 28-30/62, 27 March 1963, *Da Costa en Schaake NV v. Nederlandse Belastingadministratie*, ECLI:EU:C:1963:6, p. 38.
XXXII ECJ, Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, para. 16, p. 3415.
XXXIII EACJ, *Attorney General of Uganda v. Tom Kyahurwenda*, Case Stated No. 1 of 2014 of 31 July 2015, paras. 39-49, pp. 15-20.
XXXIV *Ibid*., para. 39, p. 15.
XXXV *Ibid*., para. 45, p. 18; and para. 47, p. 19.
XXXVI EACJ*, Kyahurwenda*, para. 57, p. 23.
XXXVII EACJ, *Legal Brains Trust (LBT) Ltd. v. Attorney General of Uganda*, Appeal No. 4 of 2012 of 19 May 2012 (Appellate Division), pt. 20, pp. 12-13.
XXXVIII ECJ, Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA*, ECLI:EU:C:1995:26.
XXXIX ECJ, Case 149/82, *Robards v. Insurance Officer*, ECLI:EU:C:1983:26.
XL ECJ, Case 6/64, *Costa v. ENEL,* ECLI:EU:C:1964:66, p. 594, in which the CJEU stated: 'The precedence of Community law is confirmed by [Article 288 TFEU], whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.'
XLI ECJ, Case 106/77, *Simmenthal*, ECLI:EU:C:1978:49, para. 24, p. 644, where the CJEU held: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.'
XLII OHADA CCJA, *Avis consultatif, No. 002/99/EP*, du 13 octobre 1999 (Demande d'Avis de la République de Mali).
XLIII OHADA CCJA, *Avis consultatif, No. 001/2001/EP*, du 30 avril 2001 (Demande d'Avis de la République de Côte d'Ivoire).
XLIV UEMOA CJ, *Avis No. 002/2000*, du 2 février 2000 (Demande d'Avis de la Commission de l'UEMOA relative à l'interprétation de l'article 84 du traité de l'UEMOA).
XLV ECJ, Case 294/83, *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23, p. 1365. This was used subsequently in ECJ, Opinion 1/91 *Re Draft EEA Treaty*, ECLI:EU:C:1991:490, paras. 20-21, p. 6102; and ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi*, ECLI:EU:C:2008:461, para. 81.
XLVI UEMOA CJ, *Avis No. 003/2000*, du 27 juin 2000 (Demande d'Avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du traité relatifs aux règles de concurrence dans l'Union).
XLVII UEMOA CJ, *Avis No. 001/2003*, du 18 mars 2003 (Demande d'Avis de la Commission de l'UEMOA relative à la création d'une Cour des comptes au Mali).
XLVIII *Ibid*., p. 7.
XLIX The principle of Union loyalty or sincere cooperation with respect to EU Member States is provided for under Art. 4(3) TEU: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which

could jeopardise the attainment of the Union's objectives.' It extends, *inter alia*, to the judiciary: Case 103/88, *Fratelli Costanzo v. Comune di Milano*, ECLI:EU:C:1989:256.
L EACJ, *Professor Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, Reference No. 1 of 2006 of 26 November 2006.
LI Art. 50 EAC provides: '(1) The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.'
LII EACJ, *Professor Peter Anyang' Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006 of 30 March 2007.
LIII *Ibid*., pp. 41-42.
LIV *Ibid*., p. 42.
LV ECJ, Case C-213/89, *Factortame*, ECLI:EU:C:1990:257.
LVI EACJ, *Nyong'o*, Reference No. 1 of 2006, 30 March 2007, p. 44.
LVII EACJ, *Samuel Mukira Mohochi v. Attorney General of Uganda*, Reference No. 5/2011 of 17 May 2013 (First Instance).
LVIII *Ibid*., paras. 52-54, p. 29.
LIX *Ibid*., para. 55, pp. 29-30.
LX ECJ, *Costa v. ENEL*, ECLI:EU:C:1964:66, p. 594.
LXI COMESA CJ, *Polytol Paints & Adhesives Manufacturers Co. Ltd. v. Republic of Mauritius*, Reference No. 1 of 2012 of 31 October 2013 (First Instance).
LXII *Ibid*., p. 17.
LXIII *Ibid*., pp. 18-19.
LXIV *Ibid*., p. 19.
LXV EACJ, *East African Law Society v. Secretary General of the EAC*, No. 1 of 2011 of 14 May 2013 (First Instance), p. 28.
LXVI EACJ, *Attorney General of Uganda v. Tom Kyahurwenda*, Case Stated No. 1 of 2014 of 31 July 2015 (Appellate Division), para. 54, p. 22.
LXVII *Ibid*., para. 74, p. 29.

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