

## Harmonisation of social security laws in the East African Community: a myth or reality?

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### **Abstract:**

*The treaty for the establishment of East African Community (EAC), 1999 (as amended) and the Protocol for Establishment of the East African Common Market (EAC CMP) 2009 provide for harmonisation of national social security laws of Partner States for benefits of EAC citizens. A self-employed person who is in the territory of one Partner State has a right to join a social security scheme of another Partner State in accordance with national laws of Partner States. However, existence of uniform application of EAC law on social security benefits provisioning and the type of harmonisation that is desired by Partner States in addressing conformity to the community law for benefits of labour mobility raises questions. EAC citizens cross national borders for employment under the EAC citizenship right and expect equal social security benefits under harmonised laws. It remains unclear as to what type of harmonisation of social security laws operates under the EAC law. This study uses doctrinal legal scholarship and comparative study methodology to examine tools and type of social security harmonisation that is applied within Partner States under the community law. An overview of national constitutional set-up of EAC Member States regarding treatment of EAC citizens and entrenchment of the right to social security in national constitutions is presented. Some pitfalls in the application of the principle of harmonisation are analysed and finally the author recommends, among other things, for (i) working-out a regional wide model law for social security portability that is likely to govern exportability of benefits across national borders for uniform implementation of social security laws within the EAC and (ii) enactment of similar national laws on social security by all EAC partner states, hinged on the provisions of the Treaty and implementing protocols.*

**Key words:** social security, harmonisation, approximation of laws, EAC law, convergence, standard harmonisation, minimum harmonisation.

### **I. Introduction**

The East African Community (EAC) is one such regional intergovernmental organisation in Eastern Africa which comprises six countries of Kenya, Tanzania, Rwanda, Burundi, Rwanda and South Sudan which are all equal sovereign Member States under the Treaty establishing the East African Community of 1999. The Community was officially re-established in 2001 running under the slogan of ‘one people, one destiny’.<sup>96</sup> Each of the six Member States has a social security system established under different national social security legislations. All EAC countries have variably entrenched the right to social

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<sup>96</sup>EAC: Development Strategy (4<sup>th</sup>) (2011/12 – 2015/16)- *Deepening and Accelerating Integration*, ‘One People, One Destiny’, EAC Secretariat, Arusha-Tanzania, 2011; Also see Stefan and Boltz, Moritz. *The East African Community regional integration: between aspiration and reality*. KAS International Reports, October 9, 2011, p.1.

protection under their national laws. These variations in national constitutions and national legislations range from non-inclusion of social security as a basic human right issue to inclusion of the same social security as a human right issue. Notably, the Republic of Kenya has expressly entrenched the right to social security in her national constitution<sup>97</sup>, while the rest of partner states have either impliedly referred to the right to social security or not entrenched this right at all<sup>98</sup>.

It is internationally agreed that the right to social security constitutes a human right issue governed by principles that set standards of human social protection<sup>99</sup>. The right to social security entails accessing social security benefit regarded as natural human entitlement which should be justified by clear legal recognition. Many decades ago, members of the international community under the Charter of Universal Declaration of Human Rights (UDHR) agreed to include articles on the right to access to social security as a basic right<sup>100</sup>. Under the United Nations framework through the International Labour Organization (ILO), members of the international community agreed to pass the Social Security (Minimum Standards) Convention, 1952 for provision of benefits in the important areas of social security.<sup>101</sup> The EAC Partner States are members of ILO. With the exception of the Republic of South Sudan, the rest five EAC partner states have for decades implemented varied legislation on social security. In principle, social security is recognized as legally financed by national resources even in circumstances where countries have insufficient economic and fiscal capacities. What matters most is social security guarantee at a basic level of social security for all<sup>102</sup>.

Since the right to social security is a human right issue, and since the EAC citizens cross national borders for employment and for establishment of business or trade outside their countries but within the

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<sup>97</sup> See *Constitution of Kenya, 2010*, Art.43.

<sup>98</sup> This is with the cases of Constitution of Rwanda 2003 (as amended up to 2015); Constitution of Uganda 1995 (as amended up to 2005), Constitution of the United Republic of Tanzania, 1977 (as amended).

<sup>99</sup> Universality of protection; Dignity and autonomy; Inclusion of vulnerable groups; Equality and non-discrimination; Gender perspective; Transparency and access to information; Meaningful and effective participation; Access to accountability mechanisms and effective remedies; Respect of privacy; Comprehensive, coherent and coordinated policies; Adequate legal and institutional framework and adopt long-term social protection strategies; Standards of accessibility, adaptability and acceptability; Adequacy of benefits. [<https://socialprotection-humanrights.org/framework/principles/>, accessed 8 September 2020].

<sup>100</sup> UDHR 1948, Articles 22 and 25.

<sup>101</sup> See The 'Social Security (Minimum Standards) Convention, 1952 (No.102).

<sup>102</sup> Nancy J. Altman and Eric Kingson, *Social Security Works for Everyone! Protecting and Expanding America's Most Popular Social Program*, Paperback July 28, 2021.

The Truth About Social Security: The Founders' Words Refute Revisionist History, Zombie Lies, and Common Misunderstandings Paperback – August 14, 2018

Community, it is contended from a human rights-based approach that, their social security rights should be strongly grounded in a strong legal and institutional framework within the Community. It should be noted that harmonising social security laws of partner states forms part of processes of strengthening legal tools for realization of social security benefits by the EAC citizens based on the principles enshrined in the EAC treaty. Consequently, social security laws in the EAC are at different processes and levels of working towards harmonisation<sup>103</sup>. The EAC countries are likely to face challenges related to discrepancies in terms of national legislation on social security laws. The inclusion of the “*principle of variable geometry*” that permits flexibility allowing for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds, has been another area that has posed some challenges<sup>104</sup>. Each country has different social security legislation with varied provisions in relation to alignment of national social security laws with EAC law.

Harmonisation of social security laws constitutes one of the powerful tools to enable functionality of social security systems. The EAC Member States share a common commitment to ensuring the well-being of their citizens through effective social security systems. However, social security legal frameworks of each country in the Community on who and how one is entitled to social security benefits tend to vary significantly depending on national laws. Therefore, harmonisation of social security laws is intended to bring concord or conformity of social security laws with Community law. The background information that follows highlight interplay of factors towards harmonisation of social security laws within the EAC.

## II. Background information to social security law harmonisation in the EAC

The legal framework for social security laws formed by the EAC (*hereinafter referred to as “the EAC law”*) requires Member states to harmonise, among other things, their national social security policies and laws so as to conform to those of the Community law.<sup>105</sup> In order for harmonisation of laws to take place, there should be effective harmonisation instruments. These instruments may be described as a mixture of Treaty, Protocols, Acts, Directives, Regulations and Rules passed by the mandated EAC institutions.<sup>106</sup> Harmonisation is expected to go through a number of stages.

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<sup>103</sup> Kituo Cha Katiba 2010: Towards a Common Formal Social Security and Pension Scheme for the East African Community: an examination of the Legislative Framework, a Report of the Regional Workshop held on 10th December 2010 at Grand Imperial Hotel, Kituo Cha Katiba, Kampala

<sup>104</sup> See *EAC Treaty, 1999*, Art. 7 (1) (e).

<sup>105</sup> Articles 104 (3)(e), 126(2)(b), 131(1) of the EAC Treaty 1999; Article 10(3) of the EAC CMP.

<sup>106</sup> Johannes Jovelings, Hamud I. Majamba, Richard Frimpog Opong, Ulrike Wanitzek (eds), *Harmonisation of laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities*, Nairobi: Law Africa, 2018, p.2.

The first stage involves putting in place necessary institutions for the harmonisation process. While this is provided in the EAC Treaty and the EAC Common Market Protocol, there is no any institution in the EAC that is specifically set for harmonisation of social security laws in the Community member states. It is expected that at this preparatory stage, a series of technical activities including distribution and presentation of the East African legislation or instruments on specific areas of harmonisation of social security laws by following cardinal principles of harmonisation.

The second stage which is missing among East African Partner States is evidence of functioning analytical stage that should have been translating all necessary Community legal acts in in each of the six EAC partner states trying to incorporate the spirit of the EAC law in their national strategic plans for the Adoption of the Acts of the Community in line with the EAC priorities. There is great discrepancy among the partner states.

The third stage involves operational elaboration of the new legislation in each of the EAC partner states that is in line with the already set action plan towards harmonisation of social security laws. This stage may be described as transposition stage where actual approximation of the national legislations of six EAC partner states with the EAC acts is expected to be attained to a certain degree. It is expected that at the transposition stage the national and EAC social security law experts do prepare new draft national laws or propose amendments to the existing national laws and by-laws, but come up with the regional wide model law for harmonisation of social security legislation of national social security laws of partner states. National social security laws have to be harmonised in order to attain compatibility between the legal order in the national jurisdictions and the EAC accumulated legislation, legal acts, and court decisions which constitute the body of EAC *acquis*.

The fourth stage in the EAC legal harmonisation of laws requires adoption of the new laws, amendments of the existing incompatible social security laws through the legislative assembly and working on implementation these harmonised laws in an adequate fashion. This has to do with the pragmatics or functionality of the harmonised laws and their practical effects and effective management of their effect over the existing institutional set-ups. While it is known that the process of harmonisation of laws is gradual, the foregoing stages of harmonisation of laws should be used to assess the state of harmonisation of national social security laws among the EAC partner states and establish if they are fully harmonised in line with the EAC *acquis*.

The extent to which harmonisation or approximation of social security laws of EAC countries has been achieved and archived remains undetermined. The EAC is still faced with many regional integration challenges including those of asserting difficult issues at national level of the Member States including ethnic conflicts, political opposition being at loggerheads with incumbent Governments of the day, and civil wars in some Member States<sup>107</sup>, among others. General mistrust of national leaders of EAC Member States at times becomes another challenge. In 2012 the mistrust occurred in Rwanda and Uganda over clashes in Ituri, DRC<sup>108</sup>. Not only that but also, between 2013 to 2015 Rwanda and Tanzania were engulfed in political mistrusts over the trade wars involving embargo on transit cargo trucks from Tanzania imposed by Rwanda, mostly as a result of military incursion in the DRC under the military assistance of Tanzania to DR Congo. Of recent, Tanzania has been accused of meddling in Kenya's domestic affairs.<sup>109</sup> As a result, one would wonder as to whether the EAC has not put national interests ahead and those of the EAC full integration agenda behind. Among these countries, there are no any signs that exist regarding ceding of their national sovereignty.

Some studies show that all six Member States of the EAC are responsible for the slow progress towards reaching the dream of full integration under the popular slogan one "people, one destiny".<sup>110</sup> Since 2001 when the EAC was effectively put into operation, the Community has had particular problems of implementing agreed decisions particularly within national structural set-ups. Internal political dynamics of these Partner States determine the pace of harmonization. Existence of political will and peaceful environment within Partner states are essential for creating space for working on harmonisation of policies and laws to conform with the laws of the Community. In some EAC countries, the said prerequisites have been lacking. The Republic of South Sudan has been under frequent challenges of civil wars while Burundi has been under constant civil conflicts and engulfed in Constitutional disputes. In these countries, the space and desire to deal with harmonisation of social security laws have been slow.

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<sup>107</sup> See Khadiagala, G. "Regionalism and Conflict Resolution: Lessons from Kenyan Crisis." *Journal of Contemporary African Studies*, 2009, vol.27, No.3, pp.431-444; Also see Kipkemboi, Chemelil, P. "Tanzania's Dilemmas and Prospects in East African Community: A Case of Trepidation and Suspicion", *Developing Country Studies*, Vol.6, No.1, 2016, pp.27-35.

<sup>108</sup> Lansford, Tom. *Political Handbook of the World 2012*, London: SAGE Publications Ltd, 2012, p. 1483ff.

<sup>109</sup> See Government is not meddling in Kenya affairs: Mahiga, available from: <http://www.thecitizen.co.tz/News/Govt-isn-t-meddling-in-Kenya-affairs--Mahiga/...index.html> (accessed 18 August, 2017); also "Tanzania denies meddling in Kenya affairs-Kenyan News", retrieved from: <https://kenyannews.co.ke> › *Daily Nation* (accessed 18 August, 2017); Also see "Tanzanian govt rubbishes misleading Kenyan media report - Azaniapost, available from : [www.azaniapost.com/.../tanzanian-govt-rubbishes-misleading-kenyan-media-report-2\(\(accessed 18 August, 2017\)\)](http://www.azaniapost.com/.../tanzanian-govt-rubbishes-misleading-kenyan-media-report-2((accessed 18 August, 2017))).

<sup>110</sup> Ibid, p. 29; Also see EAC Secretariat: Report of the Committee on Fast Tracking East African Federation, East African Legislative Assembly (EALA). Report of Select Committee on East Africa Federation (Munaka Report), Arusha: East African Community, 2004; *EAC: Report of the Committee on Fast Tracking East African Federation, EAC Secretariat, Arusha Tanzania, 2004.*

The dilemma on the much talked possible constitutional changes among EAC countries to allow extensions of possible presidential terms for presidents create state of mistrust among partner states.<sup>111</sup> Some internal political challenges related to the re-institution and recognition of Kingship, particularly of the Buganda Kingdom<sup>112</sup>, among others, have occasioned unpredictable future for Uganda. The Republic of Rwanda successfully changed her national Constitution to suit the incumbent president for another re-run and the vote gave a landslide approval to the incumbent president.<sup>113</sup> Deep in every day ordinary life, underground ethnic divisions remain a sensitive issue that have impacted on current state of internal domestic politics in Rwanda and Burundi due to the past history of genocide in the former and civil wars in the latter . On the other hand, Tanzania has been under long term period of peace and harmony but it has of recent stumbled in the constitutional making dilemma since 2014/2015. The future of the new Constitution in Tanzania appears to have been shuttered. On another front, the internal political landscape in Kenya has been under the grim of ethnic divisions fuelled by political parties.

It may be inferred from few incidences above that internal dynamics add to other challenges on the inadequacy of harmonisation of national laws and speed of implementation of the EAC development strategy due to domestic problems.<sup>114</sup> Even Trade disputes between Member States such as between Tanzania and Kenya<sup>115</sup>; Rwanda and Tanzania<sup>116</sup>, Kenya and Uganda<sup>117</sup> have been reflected in imposition of various *non-tariff barriers*<sup>118</sup> on goods and services at different times suggesting that Member states are still engaged in nationalistic inclinations and egoistic centred economic wars.<sup>119</sup> Reith and Moritz

<sup>111</sup>See “Uganda seeks constitutional change that would let Museveni extend rule...” available at: <https://www.businessinsider.com/r-uganda/>(accessed 19 August, 2017);Also see “Amending Uganda’s Constitution-Again? Human Rights Watch” ...retrieved from: <https://www.hrw.org/news/2016/09/13/>.accessed 19 August, 2017.

<sup>112</sup> See “The clash of institutions: traditional authority, conflict and the failure... Museveni’s government and the restored Buganda Kingdom deteriorate...” retrieved from: <https://www.tandfonline.com/eprint/9DtD.../full>. (Accessed 19 August, 2017).

<sup>113</sup>See “Rwanda votes to give President Paul Kagame right to rule until 2034”...available at: <https://www.theguardian.com/world/rwanda>. Accessed 17 August, 2017.

<sup>114</sup> Cf. WTO, *Trade Policy Review: East African Community (EAC)*, 2012. Available at: Retrieved, 18.08.2017

<sup>115</sup> See *The Citizen Tanzania News Paper*, Wednesday, July 26, 2017, “Tanzania, Kenya move to avert trade disputes”, retrieved from <http://www.thecitizen.co.tz/News/Tanzania--Kenya-move-to-avert-trade-disputes/> (accessed 19 August, 2017).

<sup>116</sup>See “Relations between Rwanda and Tanzania are strained-Rwanda increasing trade barriers against Tanzania”, available from: [country.eiu.com/article.aspx?articleid=/...country=Rwanda&topic](http://country.eiu.com/article.aspx?articleid=/...country=Rwanda&topic) (accessed 18 September, 2017).

<sup>117</sup>*The East Africa*, Sep 6, 2015, “EAC now backs Uganda on trade disputes with Kenya”, available from: [www.heafrica.co.ke/news](http://www.heafrica.co.ke/news) (accessed 17 August, 2017).

<sup>118</sup> The EAC Treaty, 1999 defines “non-tariff barriers” to mean administrative and technical requirements imposed by a Partner State in the movement of goods.

<sup>119</sup> In 2014 it was reported that a recent survey conducted by Northern Corridor Transit and Transport Coordination Authority gave mixed results, giving positive signals for Rwanda and Burundi but worrying results for Uganda and Kenya. Kenya recorded the highest truck-stops at 1264 stops while Uganda had 362. In Rwanda, drivers were stopped six times, while Burundi and DRC recorded four stops and South Sudan only two, the survey which revealed this trend was released mid-year of 2014. Obtained from See *Daily Nation*, “Business lobby urges removal

have tended to suggest that Kenya's economic superiority threatens the perceived economically weak Tanzania and other EAC member States.<sup>120</sup> The authors argue that Kenya is a classic case of a dominant EAC regional economy that has progressively reformed her economic policies, labour migration policies and legislations on diaspora, dual citizenship and bit of social security laws that are likely to affect both emigrant and immigrant labour.<sup>121</sup>

In terms of legal enforcement of the EAC law, the most domestic governmental structures of Member States still hinder the primacy of the Community law and institutions. All the foregoing challenges have contributed to the slow pace of implementation of the EAC common market protocol and harmonisation of laws and policies in the region. There has been a frequent complainant over the poor or slow pace in the harmonisation of laws and policies which calls for more effort from governments, private sector, civil society and interested stake holders of regional integration process.<sup>122</sup> As a result, even the harmonisation of social security laws for benefits of EAC citizens has not been seriously addressed by the Partner States.

### III. Methodology

The study employed empirical legal research, doctrinal legal approach and comparative study to investigate the roles of EAC law and national legislation in the Community. A systematic investigative approach was used to revise the current state of the literature, knowledge on the subject matter in order to discover new facts through inquiry into methods and processes of harmonisation of social security laws. The approaches were combined to bring insights for evaluation of data using the normative character of law. The description of legal issues and causal character was arrived at through combined legal research methods. The author collected a range of international, regional and national legal instruments, rules, regulations and constitutions focusing on EAC Partner States. These instruments were systematically analysed in order to establish any progress made in respect to domestication and implementation of the East African Community law in the area of harmonisation of social security laws. The author interrogated some experts on Community law and political decision-makers. The information obtained was used to analyze the extent to which the various provisions of EAC Treaty, the EAC CMP and its accompanying regulations touching on harmonisation of social security laws have been translated into national legislation by the member states. The author was able to analyse collected data on the nature and status of

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of barriers to EAC trade", 24 Sept, 2014. Available at <http://www.theeastafrican.co.ke/business/Business-lobby-urges-removal-of-barriers-to-EAC-trade/2560-2465030-view> (Accessed 18 September, 2017).

<sup>120</sup> Cf. Reith, Stefan and Boltz, Moritz. *Op.cit*, pp.100-102.

<sup>121</sup> See *Research Report. "The Biggest Fish in the Sea? Dynamic Kenyan Labour Migration in the East African Community"*. ACP Observatory on Migration & IOM, 2013, pp.45.46.

<sup>122</sup> See *EAC Treaty*, *op.cit*, Art. 7 (1) (d) on principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration.

implementation of the EAC harmonisation instruments and identify potential and actual impediments for effective harmonisation of social security laws. The countries represented were Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.

#### IV. State of literature

Several authors have written on harmonization of laws in Africa, however, less is written on the state of harmonization of social security laws in Africa and beyond. Alexander Aleinikoff has written on “International Legal Norms and Migration where he says that areas where the international consensus is less developed include, among other things, the extent and nature of harmonization of laws for benefits of labour migration for economic purposes. Existence and observance of international legal norms on application of uniform laws among partner’s states in a regional organization play a key role in the harmonization of laws. Also, such as primacy of application of regional and international law over national laws in the subjects of equal employment treatment and legal frameworks to govern the harmonization of social security laws for benefit of immigrants<sup>123</sup>

D.C Moore has argued that international transactions beyond national borders call for harmonisation of laws of cooperating partner states for the benefits of citizens.<sup>124</sup>In the modern world, global trends go beyond national borders. This has direct impact on peoples’ transboundary migration for employment and human development. Olusoji, Elias O., has argued that, crossing national borders is part and parcel of globalisation which operates within certain national, regional and international laws and policies.<sup>125</sup>Simo R.Y contends that harmonisation of laws becomes essential element in any regional organization due to the fact that there are always risks that accompany migration from one country to another or from one regional bloc to another.<sup>126</sup>To ensure social security beyond national borders in any regional organization demands strong legal framework that is harmonized or well-coordinated. Similarly, nearly two decades ago, Lee, Margaret wrote on wrote on “Regionalism in Africa: A Part of the Problem or a Part of the

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<sup>123</sup> T. Alexander Aleinikoff, T. Alexander Aleinikoff, “International Legal Norms and Migration: A Report,” in T. A. Aleinikoff and V. Chetail, Eds., *Migration and International Legal Norms*, The Hague, The Netherlands: Asser Press, 2003, p.2ff.

<sup>124</sup> Dickerson, Claire Moore (2005). “Harmonizing Business Laws in Africa: OHADA Calls the Tune”, *Columbia Journal of Transnational Law*, Vol. 44, No. 1, pp. 17–73; Elias, Olusoji O. (2000). “Globalization, ‘Law and Development’, and Contemporary Africa”, *European Journal of Law Reform*, Vol. 2, No. 2, pp. 259–275

<sup>125</sup>Olusoji O. Elias, Globalisation, ‘Laws and Development’, and Contemporary Africa, 2 *European Journal of Law Reform*, Vol 2 No.2, Kluwer Law international, 2000, p. 259.

<sup>126</sup> Simo R.Y. (2015) *Regional Integration in Africa through the Harmonization of Laws*. In: Elhiraika A.B., Mukungu A.C.K., Nyoike W. (eds) *Regional Integration and Policy Challenges in Africa*. Palgrave Macmillan, London. [https://doi.org/10.1057/9781137462084\\_6](https://doi.org/10.1057/9781137462084_6)

Solution<sup>127</sup> and commented on the aims regionalism that social interaction is one among many aims of the integration. However, Lee does not address the state of harmonisation of social security laws in the East African Community.

Boodman, in his 'myth of harmonisation of laws' argues that most often, many regional integration treaties and other related instruments governing the Community of member States do provide for possible avenues towards harmonisation laws.<sup>128</sup> Such possible avenues would include existence of agreement on exact application of uniform legislation to achieve the common goals within specified time limits under the framework of implementation. Ross Ashcroft<sup>129</sup> contends that the legal harmonisation refers to the principles and practice of adopting harmonised and uniform international laws in the subject matter be it legal, financial, commercial and administration across different regional integrations.<sup>130</sup> Kaufman argues that harmonisation creates a state of consonance or accord by adaptation of certain parts, elements or combination of several things that seem to be related although they are different so as to come up with a consistent, harmonious and stable subject matter that is in an orderly manner and which fulfils the status of removing inequalities,<sup>131</sup> and thereby guiding members relying on it.

In East Africa, Jean Barya<sup>132</sup> has written on social Security and social protection in the East African Community and recommends for a legal mechanism to enable portability of benefits from one scheme to another and from one EAC country to another. However, since 2011 when the study was conducted, there is neither any clear implementation of social security benefits portability scheme in the EAC nor any meaningful harmonisation of social security laws among the six EAC partner states. A recent study was conducted by several researchers in the year 2018 in the book titled *Harmonisation of laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other*

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<sup>127</sup> Lee, Margaret (2002). "Regionalism in Africa: A Part of the Problem or a Part of the Solution", *Polis/R.C.S.P./C.P.S.R.*, Vol. 9. Available at: [www.polis.scienc-espobordeaux.fr/vol10ns/lee.pdf](http://www.polis.scienc-espobordeaux.fr/vol10ns/lee.pdf).

<sup>128</sup> Boodman, "The myth of harmonization of laws", *The American Journal of Comparative Law*, 1991, pp.699-700-701.

<sup>129</sup> Ashcroft, Ross. "Harmonization of substantive legal principles and structures: lessons from environmental laws in a federal system (Australia)," In: Mads Andenas & Camilla Baasch Andersen (eds.), *Theory and Practice of Harmonisation*. Cheltenham, Northampton, Massachusetts: Edward Elgar Publishing Limited, 2011, pp.65-94.

<sup>130</sup> Ashcroft, Ross. "Harmonization of substantive legal principles and structures: lessons from environmental laws in a federal system (Australia)," In: Mads Andenas & Camilla Baasch Andersen (eds.), *Theory and Practice of Harmonisation*. Cheltenham, Northampton, Massachusetts: Edward Elgar Publishing Limited, 2011, pp.65-94.

<sup>131</sup> Cf. Kaufmann, "Social security in the context of French-African and intra-African labour migration", In: Benda-Beckmann et al (eds) *Between Kinship and the State(1988)*, pp.399-400.

<sup>132</sup> Kituo Cha Katiba 2011, Social security and social protection in the East African Community, Kampala, Fountain Publishers.

*Regional Economic Communities*.<sup>133</sup> Despite its detailed content on harmonisation of laws in the EAC, this edited volume does not address the state of harmonisation of social security laws within the East African Community. The process by which member states of the EU change their national laws to enable the free market to function properly. It is required by the Treaty of Rome. Compare harmonization of laws.

## V. Nature of harmonisation (approximation) under the EAC Treaty

In order to understand the legal environment of harmonisation (or approximation) of laws in the EAC Treaty, one has to first make a recap of what really harmonisation. Generally, this is a term that is used as having similar sense with approximation. Approximation exists where there are differences which disturb the function of a given system. Behind any demand for harmonisation there are impeding differences which are regarded as source or cause of some problems towards reaching set objectives regarding conformity or common framework of practice. Essentially, harmonisation is geared at solving all or some of real and perceived problems of conflicting systems by removing such impeding differences. While existence of differences between legal systems of different States is not in itself a problem, the real problem arises only when application of certain policies, laws, regulations, or procedures creates unwanted frictions and prevents progress towards particular intended destination of equal treatment or similar equities agreed by the parties concerned. In such a situation, harmonisation comes in to remove such undesired impediments. This takes us to a discussion on degrees of harmonisation relevant to EAC and their foundations.

### a.) Degrees of harmonisation relevant to EAC

Two approaches of harmonisation relevant for the EAC partner states are described. The first one is *standard harmonisation*.<sup>134</sup> Standard harmonisation requires that all national social security systems should adopt the same standards. This type of harmonisation does not allow Member States to deviate from the regionally set standards.<sup>135</sup> Thus, standard harmonisation of social security laws approximates to unification of social security laws of Partner States. The result of interpretation of harmonised laws must be the same to ensure that harmonising instruments work in practice and provide a foundation for

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<sup>133</sup> Johanes Joveling, Hamud I. Majamba, Richard Frimpog Oppong, Ulrike Wanitzek (eds), *Harmonisation of laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities*, Nairobi: Law Africa, 2018.

<sup>134</sup> Pennings, Frans. *Introduction to European Social Security Law*, (3<sup>rd</sup> edn.), Cambridge: Intersentia Limited, 2003, p. 289.

<sup>135</sup> *Ibid*, pp.88-89.

developing harmonising legislation in member countries of a regional integration. This would also involve co-ordinating methods of application and adopting concordant policies to arrive at the effective internationalisation of social security.<sup>136</sup> The second type of harmonisation that is relevant under the EAC Treaty is *minimum harmonisation*. This refers to the degree of harmonisation envisaged by a regional integration body or Community whereby it advocates for setting a threshold which national social security systems must meet in order to be regarded as compliant with requirements of a regional cooperation that follows harmonisation as part of its path to reaching integration objectives.<sup>137</sup> Under this model, member states are at liberty to exceed the prescribed social security minimum standards of harmonisation as set in their social security provisioning mechanisms.

Harmonisation of social security laws in EAC largely relies on the EAC Treaty, 1999, the provisions the EAC CMP read together with Regulations and Council directives. The secondary instruments have provisions that require legal approximation activities that should be done by partner states to ensure there is a state of conformity or accord with standards fixed by international law through treaties or agreements or conventions or regional instruments. Thus, harmonisation of social security laws must operate where there are harmonisation instruments of the Community. Minimum harmonisation would require enforcement of agreed protocol together with governing rules for implementing the basis of minimum harmonisation. It is imperative that there is always a need to have governing legal instruments that clearly direct the extent to which harmonisation should be done as agreed upon in such instruments. Existence in place of principle instruments containing specific articles, guiding rules and regulations which provide minimum standards has been said to be key criterion for minimum harmonisation<sup>138</sup>.

Although harmonisation steps are normally developed gradually spreading over a considerable period of time, there might still be many challenges in economic integrations which get involved in this endeavour. Notably, under the minimum harmonisation, harmonising instruments provide minimum standards and allow and at times encourage member states to exceed these standards. Member States are at liberty to exceed the minimum standards that are agreed and set in their social security provisioning arrangements. The latter implies that in the EAC it would appear that the harmonisation instruments of the Community which are treaties, protocols, regulations, directives, and another instruments operate on the basis of minimum harmonisation.

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<sup>136</sup> Moles, Ricardo R., (note 32), p.167.

<sup>137</sup>See Mpedi , L.G., “Harmonising social security systems within the Southern African Development Community”, 2009 *Journal of Southern Africa Law*, (697 -708), p.699

<sup>138</sup> See Pennings, F., (note 39).

**b.) Foundations of harmonisation (approximation) of laws**

Article 6 (d) of the EAC Treaty shows that the Partner States have agreed to undertake the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights, 1981 (The Banjul Charter). The African Charter, however, in its principal text, there is no express provision recognizing the right of migrant workers to social security. Due to lack of specific provisions for coverage of migrant rights to social security, the African Commission within its powers conferred to it to interpret the Charter as a quasi-judicial body under Articles 35 and 45 produced the first guidelines through Commission's working group that was established by the African Commission to draft these guidelines and principles regarding the implementation of socio-economic rights.<sup>139</sup> The African Commission also produced the second guidelines on socio-economic rights. In the first guidelines, two important social economic rights were added to the list and these were the right to social security and the right to water and sanitation.<sup>140</sup> Therefore, the right to social security is an internationally accepted human right which African countries have to implement. Thus social security has joined a plethora of international instruments such as the Universal Declaration of Human Rights, 1948(Article 25(2); the International Covenant on Economic, Social and Cultural Rights,1966 (Articles 9, 10, 11 and 12) and several other instruments which recognise the right to social security as a fundamental right which should be enjoyed by everyone.

**VI. National constitutional foundation for harmonisation of social security laws**

The national constitutions of EAC Partner-States have varied provisions on social protection, and social security. With the exception of South Sudan, national constitutions of the rest five member states existed even before the re-establishment of the EAC. The legal position under the Community law, the EAC Treaty does not override national constitutions of Partner States. The next discussion presents some findings on the foundation of harmonisation of social security laws and the state of national constitutions and legal position within the EAC Partner States.

**a.) Constitutional and legislative status in Rwanda**

The Rwanda Constitution of 2003 as Revised in 2015<sup>141</sup> has no any specific provision providing direct mention of the right to social security. However, Article 51 of the constitution of the Republic of Rwanda of 2003 as revised in 2015 provides for the State's duty within the limits of its means to undertake special

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<sup>139</sup>Kabange Nkongolo, Christian-Jr. "The Justiciability of Socio-economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades after Its Adoption", *African Journal of International and Comparative Law*, October, 2014, Vol. 22, Issue 3, pp.499-501

<sup>140</sup>. Ibid, pp. 499-501. These guidelines were termed as the first guidelines.

<sup>141</sup> Rwanda Official Gazette N° Special of 24/12/2015.

actions aimed at the welfare of the needy, elderly and other vulnerable groups. This may be inferred as an indirect or implied legal provision that recognize the duty of the republic of Rwanda in working towards supporting the indigent. It does not create social security as a constitutional right. Rwanda has other additional policies, legislations, and programmes catering for elderly, vulnerable groups, and other needy people.<sup>142</sup> In actual sense, all existing legislations do not have provisions that harmonise national social security laws so as to align them with the EAC harmonising instruments.

Article 15 of the Constitution of Rwanda provides for equality before the law to all persons. The protection from discrimination is provided under Article 16. The latter, however, specifically refers to prohibition of discrimination of Rwandans and there is no mention of any other person who is a non-Rwandan national.

### **b.) Constitutional foundation in Uganda**

The *Constitution of Uganda 1995*<sup>143</sup> as amended up to 2005 provides in Article VII that the State shall make reasonable provision for the welfare and maintenance of the aged. The constitution does not use of the word the right to *social security* for all. Further, Article 21 of the Constitution provides for equality of all persons before and under the law in all spheres of political, economic, social and cultural life and in every other respect. All persons are entitled to enjoy equal protection of the law.<sup>144</sup> However, prohibition of discrimination based on nationality is not specifically provided for under the Constitution of Uganda.<sup>145</sup> Although the Constitution does not mention the right to social security, it provides that the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the constitution are not meant to be regarded as excluding others not specifically mentioned.<sup>146</sup>

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<sup>142</sup>See Law n°05/2015 of 30/03/2015 governing the organization of pension's schemes and Decree law of 22/08/1974 modified and complemented by the Law no 6/2003 of 22/03/2013 governing Occupational Hazards scheme, Law n°29/2017 of 29/06/2017 governing a Long Term Saving Scheme (LTSS) for salaried and non-salaried people, poor and rich people, in formal and informal sector; Law n°003/2016 of 30/03/2016 to compensate all female employees absent from employment because of pregnancy, giving birth and subsequently caring for the newborn child; Law n°24/2001 of 27/04/2001 on the establishment, organization and functioning of health insurance scheme for government employees (OG n°13 of 01/07/2001; modified and completed by law n°29/2002 of 19/09/2002), Law n°03/2015 of 02/03/2015 governing the organization of the Community Based Health Insurance Scheme (CBHI), Law n°08/2012 of 29/02/2012 establishing Military Medical Insurance (MMI) and determining its mission, organization and functioning; National Social protection Policy (2005) and its strategy (2013) as all revised in 2018; Draft policy "National policy on elderly persons" which is under process of approval

<sup>143</sup>Constitution of Uganda 1995 with Amendments, retrieved from: <https://www.constituteproject.org/constitution/Uganda2005.pdf?lang=en> (accessed on 16 August, 2017).

<sup>144</sup> Ibid, Art. 21 (1).

<sup>145</sup> Article 21 (2) provides that a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

<sup>146</sup> See *Constitution of Uganda 1995* (as amended), Art.45.

### c.) Constitutional foundation in Burundi

The *Constitution of Burundi, 2005*<sup>147</sup> in Article 22 provides that all citizens are equal before the law, and this equality assures them an equal protection. The Constitution of Burundi provides in Article 59 that any foreigner who finds himself in the territory of the Republic of Burundi enjoys the protection granted to persons and to assets by virtue of the Constitution and of the law. Therefore, migrant workers finding themselves in Burundi are entitled to equal treatment and guaranteed of protection of the law. The Constitution of Burundi does not, however, directly provide for the right to social security. But *Article 52 provides that every person is entitled to obtain the satisfaction of the economic, social and cultural rights indispensable to their dignity and to the free development of their person. The Constitution is cognizant of the fact that the national efforts may not be sufficient in terms of resources. It is the author's view that the latter would imply that welfare provisioning takes into account the conditions of economic development and availability of resources of the country.*

### d.) Constitutional foundation in Tanzania

*For the case of Tanzania, Article 12 of the Constitution of the United Republic of Tanzania, 1977 provides that all human beings are born free, and are all equal and that every person is entitled to recognition and respect for his dignity.*<sup>148</sup>*The Constitution is also meant to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, where all forms of injustice, intimidation, discrimination, or favouritism among others, are eradicated.*<sup>149</sup>*The Tanzania Constitution defines the word "discriminate" to mean satisfying the needs, rights or other requirements of different persons on the basis of their nationality, tribe, and place of origin, political opinion, colour, religion, sex or station in life. To discriminate would suggest that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications*<sup>150</sup>. Equally, the Constitution of Tanzania, 1977 does not mention social security as a right but Article 11(1) provides that:

*"the state authority shall make appropriate provisions for the realisation of a person's right to work, to self-education and social welfare at times of old age, educational and other sickness or disability and*

<sup>147</sup>*Constitution of Burundi, 2005*, English Translation by William S. Hein & Co., Inc., 2012, retrieved from [www.parliament.am/library/sahmanadrutyunner/burundi.pdf](http://www.parliament.am/library/sahmanadrutyunner/burundi.pdf) (accessed on 17 August, 2017.)

<sup>148</sup>*Constitution of the United Republic of Tanzania, 1977, Art.12 (1), (2).*

<sup>149</sup>*Ibid*, Art. 9(h).

<sup>150</sup> *Ibid*.

*in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood”.*<sup>151</sup>

#### **e.) The Constitutional foundation in the Republic of Sudan**

The *Constitution of South Sudan, 2011*<sup>152</sup> provides that all persons are equal before the law and are entitled to the equal protection of the law without discrimination as to *race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status*. This Constitution does not mention as to whether discrimination based on nationality is prohibited or not. The wording of Article 14 does not use the word ‘including’, which means that the list of prohibited grounds of discrimination is closed. As to the right to freedom of movement and residence, Article 27 (2) of the Constitution of South Sudan provides that every citizen of South Sudan shall have the right to leave and or return to South Sudan. The latter conforms to the right to freedom of movement established under the EAC law. In South Sudan, citizenship is the basis of equal rights and duties for all South Sudanese.<sup>153</sup> South Sudan is therefore founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedom.<sup>154</sup>

#### **f.) Constitutional foundation in Kenya**

The *Kenyan Constitution 2010*<sup>155</sup> under article 43(1) provides that:

*1. Every person has the right--*

*(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*

*(b) to accessible and adequate housing, and to reasonable standards of sanitation;*

*(c) to be free from hunger, and to have adequate food of acceptable quality;*

*(d) to clean and safe water in adequate quantities;*

*(e) to social security; and*

*(f) to education.*

*(2) A person shall not be denied emergency medical treatment.*

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*

Article 20 entrenches the aspect of equality and equity as key values protected and promoted in the interpretation and application of the Bill of Rights. Notably, article 27(1) further provides that: “*Every person is equal before the law and has the right to equal protection and equal benefit of the law*”. The equality of treatment of ‘every person’ under the Constitution of Kenya extends to include, among other

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<sup>151</sup> Ibid, Art.11(1).

<sup>152</sup> See the *Transitional Constitution of the Republic of South Sudan, 2011*, Art.14.

<sup>153</sup> Ibid, Art.45 (2).

<sup>154</sup> Ibid, Art. 1(5).

<sup>155</sup> *Constitution of Kenya, 2010* (Revised 2012), Art. 20 (4)(a).

things, the ‘*full and equal enjoyment of all rights...*’<sup>156</sup> Note also that sub-Article (4) of Article 27 of the Constitution of Kenya provides:

*“The State shall not discriminate directly or indirectly against any person on any ground, including, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.*<sup>157</sup>

Since the phrase in sub-article (4) of Article 27 opens with the words: “*the State shall not discriminate directly or indirectly on any ground, including...*” one should think of other possible prohibited grounds of discrimination that may be contemplated of under clause (4) by the use of the word ‘including’, even if such grounds are not expressly stated.

The portability of social security benefits under the recently passed National Social Security Fund Act, 2013 is seen by many as a precursor to the regional cross-border portability of retirement benefits, and its implementation is keenly anticipated. The other EAC member states have not yet passed laws with similar provisions on portability of social security benefits. So far, there is a proposed Retirement Benefits Sector Liberalisation Bill, 2011 in Uganda which provides, among other things, that an employee may transfer his retirement benefits from one benefits scheme to any other licensed scheme in Uganda or the EAC. The new NSSF Act will come into force on 31st May 2014. However, any progress in achieving social security benefits portability will require the other EAC member states to pass similar national laws on social security or the enactment of a common EAC law to be adopted by all member states, to ensure unified implementation of pension laws within the EAC. Therefore, in each Partner States their national constitutions or legislations use equality and non-discrimination concepts with qualifications as regards to the extent citizens enjoy this right. Thus, harmonisation of social security laws in EAC member States aims at re-enforcing uniformity in the treatment of EAC citizens in order to arrive at equality of treatment of EAC citizens, particularly migrants’ population involved in cross-border movements. Although equality of treatment is already entrenched in these national constitutions, the same is not fully implemented in line with EAC laws regarding social security harmonisation.

Also article 12 (2) of the of the EAC CMP 2009 provides that: “*The Partner States undertake to review and harmonise their national social security policies, laws and systems to provide for social security for self-employed persons who are citizens of other Partner States.*” Furthermore, the Protocol imposes an obligation on all member states to maintain their social security systems at a satisfactory level by making sure that they remove the administrative procedures and practices, resulting from national laws or from

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<sup>156</sup> Ibid, Art. 27(1) and (2).

<sup>157</sup> See *Constitution of Kenya, 2010*, Art.27 (4).

agreements previously concluded between the Partner States, particularly those that from an obstacle to the right of establishment<sup>158</sup>.

It should be made clear that the national social security legislations across the Member States are generally at variance on levels of harmonisation and on specific legal provisions on equality of treatment of the EAC citizens. However, various provisions in national constitutions of Member States provide for certain degree of guarantee of equality and non-discrimination of citizens. Below, it is presented a brief constitutional set-up of the six EAC Partner States regarding the concepts of equality of treatment and entrenchment of right to social security.

## VII Harmonisation and equality of treatment as general principles of EAC Law

The EAC Treaty neither directly defines the word ‘equality’ nor ‘equality of treatment’ in its interpretation section, and it also does not define ‘harmonisation’. Nevertheless, the EAC harmonisation instruments use the words “equitable distribution of benefits”<sup>159</sup>, ‘harmonise’, and ‘harmonisation’. Impliedly, “equitable distribution of benefits” refers to fair and proportionate distribution of benefits.<sup>160</sup> It should also be made clear that ‘equality’ and ‘non-discrimination’ are complex concepts with considerable debate on their meanings and justification. The EAC CMP also uses the words ‘discrimination’ and ‘non-discrimination,’<sup>161</sup> and direct discrimination’. ‘Equality ‘of treatment between nationals and foreign workers or immigrants is implied in Article 3(2) (b) of the Protocol. Other words used are ‘indirect discrimination ‘and ‘equal opportunities. The discussion of equality and discrimination is, therefore, characterised by considerable conceptual and methodological confusion. Hepple and Barnard have concluded that, the concept of equality has been as vague as confusing subject of investigation both in moral and political philosophy.<sup>162</sup> Not only that but also Watson has contended that even court decisions in the European Court of Justice seem to show that the case law and EC legislation are not moving in any clear direction as far as interpretation and application of the principle of equality is concerned.<sup>163</sup> Therefore, there is still deep-seated conceptual confusion and a lack of consistency in interpretation and application of the concept of equality.

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<sup>158</sup> See EAC CMP, op.cit., Art.13 (11) (a).

<sup>159</sup> See EAC Treaty, op.cit., Art.1.

<sup>160</sup> Ibid.

<sup>161</sup> EAC CMP, op. cit, Arts. 3 (2) (a); 10(2).

<sup>162</sup> See Hepple, B.& Barnard, C. Substantive Equality, *Cambridge Law Journal*, 2000, p. 583.

<sup>163</sup> See Watson, Philippa. “Equality of Treatment: A Variable Concept?” *Industrial Law Journal*. March 1995, Vol. 24, No.1 (33-48), at 33f.

Existing scholarship insists that the principle of equality generally demands that identical or comparable situations must be treated alike. Equally different situations must accordingly be treated differently.<sup>164</sup>The same fate befalls a debate on equality and discrimination in the East African Community legal context, particularly under the EAC law that is sought to be addressed through harmonisation. A fair chance exists that the concept of equality is understood and applied differently; hence confusion is also bound to exist. Equality and non-discrimination as contained in EAC Treaty<sup>165</sup> and the EAC CMP<sup>166</sup> is generally supported by the various national legal systems of Member States. The CM Protocol provides in Article 3(2) that: “*Partner States shall observe the principle of non-discrimination of nationals of other Partner States on ground of nationality*”. The EAC law uses the words ‘non-discrimination’, ‘direct discrimination’, ‘indirect discrimination’, ‘equality’, ‘equal treatment’, ‘equal opportunities’,<sup>167</sup> ‘equitable distribution of benefits’,<sup>168</sup> as the key terms indifferent circumstances. These concepts are either directly applied or are impliedly used. At EAC level, the EAC Protocol of 2009 prohibits discrimination of East African nationals on grounds of their nationality in matters within the scope of the EAC Treaty. This is one of the foundational principles of the Community. The prohibition of discrimination has continued to become more attached to citizenship of the EAC and it resembles that of constitutional guarantees contained in national constitutions of Community member states.<sup>169</sup> The EAC Partner States have obligation to implement the EAC law by incorporating the international labour standards on social security and equality of treatment without discrimination as contained in the Community law.<sup>170</sup> Article 10(11) of the CMP states that the free movement of workers in the EAC is permissible subject to certain limitations that may be imposed by the host partner state on grounds of public policy, public security or public health. The Partner States have agreed to such restrictions or limitations to the right of establishment imposed by the host Partner States.<sup>171</sup> The treaty establishing the East African Community does not bestow on citizens of the EAC with a right to move and reside freely within the territory of the Member States without conditions. The equality of treatment of any EAC citizen exists subject to conditions depending on the nature of movement, relocation, residence, and purpose of migration to another State. Therefore, the EAC citizenship under the treaty does not replace national citizenship, rather, it is simply additional, and the basic criterion is to possess national citizenship first.

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<sup>164</sup> Ibid.

<sup>165</sup> For example, Article 75 (6) of the EAC Treaty provides: “The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly *discriminate* against the same or like products of other Partner States.”

<sup>166</sup> See EAC CMP, *op.cit.* Art. 3 (2) (b).

<sup>167</sup> EAC Treaty, *op.cit.* Art. 6(d).

<sup>168</sup> Ibid, Arts. 6 (e) and 7(1) (f).

<sup>169</sup> See Annex II, Regulation 13 (1) (d).

<sup>170</sup> See EAC CMP, *op.cit.* Art.13 (11).

<sup>171</sup> Ibid, Art.13 (8).

### VIII. The foundation for harmonisation of social security laws

The fundamental and operational principles of the EAC are enshrined in Articles 6 and 7 of the EAC Treaty, 1999 (as amended). The harmonisation instruments for social security laws are the *EAC Treaty, 1999*; the *EAC CMP of 2009*,<sup>172</sup> the annexes to the EAC CMP and any other instruments that may be issued by the Council of Ministers for approximation or harmonisation as provided for under Article 131 (1) of the Treaty.<sup>173</sup> The treaty in its various provisions has provided broadly the basis of harmonisation in a range of areas of cooperation. However, there are specific provisions that have expressly used the word “harmonise” or “harmonisation” with respect to Member States policies, laws, regulations, frameworks, programmes, certification, practices, etc. These Articles include Articles: harmonisation of investment and taxation (80(1) (f)); harmonisation of macro-economic policies and convergence framework of the Community (Art.82(1); harmonisation of tax policies (Art.83(2) (e)); harmonisation of banking and capital markets development (Art.85); harmonisation of common transport and communication policies, regulatory laws and frameworks (Art.89); harmonisation of rules, regulations, traffic laws, licensing markings, documents and procedures of road transport (Art.90); harmonisation of railways and rail transport regulations, laws, loading and related matters (Art.91); civil aviation and civil air transport (Art.92); maritime transport and ports (Art.93); inland water ways transport policies, rules, regulations and procedures (Art. 94); multi-modal transport regulations (Art.95); freight forwarders, customs and clearing agents and shipping agents Art.97); harmonisation of postal policies and services (Art.98); harmonisation of telecommunications tariffs (Art. 99); meteorological services (Art.100); 102; 103; and free movement of persons, labour, services, rights of establishment, and residence (Art.104).

Harmonisation instruments are the main sources of authority for the harmonisation of the social security systems of member states in the EAC. The first source for authority for harmonisation is the treaty establishing the East African Community, 1999. It is provided in Article 76 of the treaty that there shall be established the EAC Common Market among the Partner States. It is within this treaty provision that the protocol building foundation for Common Market is established. This framework gives rise to cross-border migration for employment and hence workers crossing border for employment in member States have the right to social security. Article 76 read together with Article 104 of the treaty form the basis for establishment of the harmonisation process due to the consequences of creation of common market. Also,

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<sup>172</sup> Ibid, Arts. 10(3) (f), (4); & 12 (1),(2) and (3).

<sup>173</sup> See EAC Treaty, op.cit, Art.131 (1)-the treaty grants the EAC Council the powers to explore and declare other areas requiring harmonisation.

Article 131(1) of the Treaty forms the basis for the Partner States to explore other avenues for harmonisation.<sup>174</sup>

For purposes of harmonisation of social security laws, the frame establishment is Article 104 of the EAC Treaty which provides for conclusion of protocol for free movement of persons, labour, services, rights of establishment, and residence. Within the Treaty, under article 104 (3) (e) the partner states are required to harmonise their labour policies, programmes, and legislation including legislation on occupational health and safety. Also as regards legal and judicial matters partner states are required to harmonise all their national laws appertaining to the Community.<sup>175</sup> Treaty provides for enhancement of approximation and harmonisation of legal learning and standardisation of judgment within the Community<sup>176</sup>.

The fundamental principles of the Community<sup>177</sup> are enshrined in Article 6 of the Treaty and the operational principles<sup>178</sup> of the Community are contained in Article 7 of the Treaty. While implementing these principles the Partner States undertake to (i) observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality; (ii) accord treatment to nationals of other Partner States, not less favourable than the treatment accorded to third parties; (iii) ensure transparency in matters concerning the other Partner States and (iv) share information for the implementation of the EAC CMP<sup>179</sup>.

The second source or foundation of authority for harmonisation is the EAC Common Market Protocol, 2009. The protocol puts in place the Community legal framework guiding national legal frameworks of member states. It puts a mechanism that should regulate free movement of labour, goods, services, capital, and the right of establishment. The provisions of Article 3 of the CMP establish the principles of the Common Market. The CM Protocol has a framework law that guides Partner States in harmonisation of their domestic policies and laws for implementation of the protocol.<sup>180</sup> The Protocol provides for the scope of co-operation in the common market and provide for harmonisation of social security benefits provisioning mechanism.<sup>181</sup> In Article 10(3) (f), the protocol provides for the rights of EAC citizens

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<sup>174</sup>These articles are already explained in the foregoing parts. See sub-part 4.1 of this paper.

<sup>175</sup> See EAC Treaty, op.cit, Art.126 (2) (b).

<sup>176</sup> Ibid, Art.126 (2) (e).

<sup>177</sup>These principles include: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance, adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities; gender equality; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; equitable distribution of benefits and co-operation for mutual benefit.<sup>177</sup>

<sup>178</sup> EAC CMP, op.cit, art.3 (1).

<sup>179</sup> Ibid, Art.3(2).

<sup>180</sup>See EAC CMP, op. cit, Art.4 (3).

<sup>181</sup> Ibid, Art.5 (2) (c).

migrating from one country to another to enjoy social security benefits as accorded to workers of the host State. It also provides that for the purposes of implementation of the enjoyment of the rights and benefits of social security to the workers of the host Partner State. Moreover, the Protocol mentions the Council as a body that has powers to issue directives and make regulations on social security benefits.<sup>182</sup>

The third source of authority that provides the basis for harmonisation are Community regulations issued by the Council and contained in annexes to the CMP that provide for the free movement of persons<sup>183</sup>, free movement of workers<sup>184</sup>, free movement of goods, services and capital<sup>185</sup>, rights of establishment<sup>186</sup>, rights of residence<sup>187</sup>. The Council directives, regulations, guidelines and decisions may also provide guidance by setting standards for harmonisation. Article 16 of the EAC Treaty provides that the effects of regulations, directives, decisions and recommendations of the Council taken or given in pursuance of the provisions of the Treaty are binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under the Treaty be addressed.<sup>188</sup> In short, all the discussed sources or foundation for harmonisation provide guidance for facilitation of the accomplishment of harmonisation of legal rules or regulations relating to social security, harmonisation of social security schemes; health and safety standards at workplaces across the EAC region.<sup>189</sup> The CMP is mainly meant to provide the Community and member states with an effective instrument for *convergence*<sup>190</sup> and *harmonisation* of social security systems in the region and the co-ordination, where applicable.

Other EAC Treaty provisions containing harmonisation of laws, regulations, procedures, standards, practices etc include Articles:105; 106; 107; 108; 110; 112; 114; 116; 118; 119; 126; and 131. However, for the purposes of this paper, the provisions of Articles 104 and 131 (1) are taken as closely related to the harmonisation of social security laws. Further the EAC CMP has more specific provisions on harmonisation of social security policies and laws. The treaty in Article 104 provides for free movement of persons, labour, services, rights of establishment, and residence<sup>191</sup>. Sub-article 3 (e) of Article 104 provides that Partner States are required to harmonise their labour policies, programmes, and legislation

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<sup>182</sup>See EAC CMP, op. cit, Art. 10(3) (4).

<sup>183</sup>Annex I to the CMP, 2009.

<sup>184</sup>Annex II to the CMP, 2009

<sup>185</sup> Annex VI to the CMP (Schedule for removal of restrictions on free movement of capital), 2009.

<sup>186</sup>Annex III to the CMP, 2009.

<sup>187</sup> Annex IV to the CMP, 2009.

<sup>188</sup> See EAC Treaty, op.cit, Art. 16.

<sup>189</sup>Ibid, Art. 104 (3) (e).

<sup>190</sup> See definition of convergence (note 103) (infra).

<sup>191</sup>See EAC Treaty, op.cit. Art. 104.

including those on occupational health and safety. The EAC CMP has more specific provisions that are directly of relevance to the right to social security<sup>192</sup>. Ancillary provisions include Article 126 which concerns harmonisation of legal and judicial affairs in which partner States are required to harmonise all their national laws appertaining to the Community<sup>193</sup>. Not only that but also Partner States are required to enhance the approximation and harmonisation of standardization of judgments of the Courts within the Community.<sup>194</sup>

The treaty provides that the fields of harmonisation are not closed. This is so because, Article 131 (1) of the treaty provides that the fields of harmonisation may be expanded as partner States may consider necessary from time to time for efficient implementation of the provisions of the treaty. Therefore, from the foregoing highlight, it is clear that harmonisation of EAC social security systems in this case, can be viewed as one of the modes of reducing the inequalities. The purpose of harmonisation of social security systems has already been explained, and one of the purposes is to ensure that the Community migrants from member states retain their social security rights at a level agreed by parties which would be equal in each country. This approach may be described as minimum harmonisation. This type of harmonisation does not require a change in the structure of the various social security schemes that are in existence in the Community Member States but their conformity to the EAC laws is required.

### **IX. Challenges of harmonisation in the EAC**

Firstly, the process of harmonisation of social security schemes has its own hurdles, pitfalls and challenges, as it is the case with harmonisation of all broad range of other sectors listed under the EAC treaty<sup>195</sup>. Harmonisation demands going step by step, and in a gradual process over a considerable period of years taking into account each national specific conditions and circumstances. Harmonisation of social security systems deals with the social realities of the region such as poverty, high levels of unemployment, under-employment, and social insecurity of the majority of the EAC citizens. This implies that, harmonisation should be geared at development of and the widening of the scope of coverage of social security schemes in the region. This is important, particularly when one considers the undeveloped and underdeveloped state of social security systems in each of the EAC member States.

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<sup>192</sup> See EAC CMP, op.cit, arts. 10 (2),

<sup>193</sup> See EAC Treaty, op.cit. Art. 126 (2) (b).

<sup>194</sup> Ibid, Art. 126(2) (e).

<sup>195</sup> See sub-part 4.1 of this paper on EAC Treaty provisions mentioning areas of harmonization.

Secondly, the EAC countries have different levels of economic development and they all face different social, economic and political problems including governance issues. As such even if they are involved in the regional economic integration they are likely to continue facing difficulties of implementation of various agreements, directives, and provisions of the EAC treaty and EAC CMP that drain significant resources from national budgets. The EAC countries are economically different and the extent to which these States can harmonise their systems depends largely on their economic strengths altogether, among other things. Socio-economic and political climate of each regional integration is a sensitive issue, and therefore, as previously described on what is going on in each State of the Community in terms of civil wars, ethnic conflicts, economic development and trade issues affect the harmonisation. This hinders the speed of social security harmonisation and therefore care is needed to move forward. This is one of the reasons as to why harmonisation has been delaying considerably to the extent of creating accusation against each other as hindering the speedier implementation of the EAC integration process. In this regard, countries need to be keen by resisting the temptation of getting entangled in speed-tracking the process of harmonisation of their social security systems in a hurried manner without careful consideration of all aspects involved.

Thirdly, harmonisation of social security has to respect avenues available for each Member State to develop their home-grown national social security systems under the normal course of evolving social society systems. If this is the case, harmonisation does not get the status of playing down the role of Member States to develop comprehensive social security systems in their respective domestic jurisdictions.<sup>196</sup> This translates into the fact that Member states should not dwindle or dwarf their individual efforts to develop their own social security systems for benefits of wider groups including migrant workers. This ought to be done as envisaged under the international treaties or conventions and any regional economic integration protocols or treaties. Fourthly, although the EAC regional integration treaties and other related instruments provide for possible avenues to be followed in order to move towards harmonisation, there are still lots of discrepancies and unequal national legislation in each Member States. National social security laws of member States continue to exist and remain unharmonised. This is because, the old patterns of nationalistic tendencies in legal regimes are yet to be totally dismantled and Member States remain deeply entangled or embedded in egoistic or self-centeredness spirit of nationalism<sup>197</sup>.

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<sup>196</sup> Cf. Kikuchi, Yoshimi. "Structural Reform and Social Security Law", *Review of Population and Social Policy*, 1999, No. 8 (1-9), at pp.4-7.

<sup>197</sup> Cf. Reith, Stefan and Boltz, Moritz. *The East African Community regional integration: between aspiration and reality*. KAS International Reports (pp-91-107), October 9, 2011 at p.100.

Fifthly, the collapse the former EAC in 1977 has had significant aftershocks which negatively affected the old EAC Partner States. Some of these countries such as Tanzania have been acting with extreme keenness resulting from past memories of deeply entrenched inequality and negative consequences of the demised Community. While some progress has been made in some member States such as Kenya towards harmonisation of their National Social Security Fund Act, 2013 under section 64, most of the social security laws of Member States such as those of Tanzania, Burundi, Rwanda, Uganda and some laws in Kenya remain less harmonised. A specific examination of EAC national social security laws will be a subject of another paper, as the space for this paper is not there and the focus is on EAC law.

Sixthly, both the EAC treaty and EAC CMP do not to define the concept of "*harmonisation*" anywhere at all. Even the term coordination that is also used extensively is not defined either in these instruments. However, the term harmonisation has been extensively used throughout the treaty and the EAC CMP as demonstrated in previous discussion.<sup>198</sup> The two regional instruments do not expressly indicate the degree of harmonisation that is envisaged or desired in the EAC. Even the annexes to the CMP do not clarify the steps to be followed in harmonisation. Whether the EAC follows *standard harmonisation* or *minimum harmonisation* is not clear yet, as no where it is stated or elaborated. Even an outline that would adequately or at least sufficiently indicate the process or mechanisms by which this harmonisation is to take place does not exist at all. What exists is the matrix of implementation of the EAC CMP that indicates timeline and matters to be dealt with but lacking specific guiding criteria for harmonising social security systems and laws, among other, things. Essentially, there is clear gap of specific guidance from the EAC law contained in ratified regional instruments. Therefore, each one of the Member State pursues the quest for harmonisation of their social security systems and laws as deemed compliant with EAC harmonising instruments, which instruments merely state the need for harmonisation by Member states. The implementation of the EAC CMP protocol does not state the level of harmonisation desired and one would guess that probably, by implication, the Community pursues *minimum harmonisation* or gradual harmonisation. This pitfall underscores the point that harmonisation of social security systems must be founded on an informed understanding of how the harmonisation of social security systems is supposed to work, and this is another area where EAC faces the problem as it implements harmonisation process.

Seventhly, the EAC treaty (as amended) came into effect in 2001 and several documents explaining the implementation of EAC make reference to macro-economic convergence framework of the Community.<sup>199</sup> Arguably, all the EAC countries may be described as social states because they have

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<sup>198</sup> See sub-part 4.1 of this paper.

<sup>199</sup> See EAC Treaty, op.cit, Art.82 (1).

elements of social welfare goals and social security is one of their paramount issues towards implementation of the EAC CMP and achieving integration objectives. The Community has described the need for working towards macro-economic convergences of its regional framework for facilitation of the integration process.<sup>200</sup> Thus, convergence of social welfare systems of the EAC countries is apparently the result of an international phenomenon of integration such as is the case with the European Union, ECOWAS, Caribbean Community (CARICOM), and the Southern African Development Community (SADC), among others. As a result, the East African Community political discourses, directives, regulations and recommendations given by the EAC points to some aspects of convergences in many areas including social security aspect from perspective of a welfare state model. However, both the EAC treaty and EAC CMP do not mention “*convergence of social security systems*” and this is another pitfall. They have used the term without precise scope of its application in law. Convergence of social security systems or social welfare policies has been described in terms of economic and institutional meanings. The definition given below is simply emanating from social welfare systems similar to the ones in the EAC, thus, convergence simply means:

*“...the adoption of policies to achieve jointly defined objectives for the development of social policies, designed to overcome the differences between the various schemes. Convergence is compatible with the continued existence of different bodies of legislation on the assumption that the effects are convergent in order to achieve previously defined objectives. One of these objectives may be to facilitate coordination between the various schemes.”<sup>201</sup>*

Eighthly, the EAC law has no clear guiding rules as to whether aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States are regulated by what instrument. There is no specific EAC regional wide social security convention or Code that should guide Member States to ensure there is facilitation of exportability of benefits across national borders beyond the host State of a labour migrant, including the payment of benefits in the host country.

Ninthly, there is a fact that operates towards hindering speedier harmonisation, and this is that in all regional economic communities, their Member countries have had discrimination in their social protection systems and this has been in existence for many years. As such, a failure to achieve full harmonisation is not a reason for despair or resentments, as that is part of historical evolution and development of human beings and State. Countries should strive to eliminate discrimination in everyday

<sup>200</sup> For example, see the EAC Treaty, op.cit. Art. 82.

<sup>201</sup> See O’Connor, J., “Convergence in European Welfare Analysis: Convergence of What?”, in Classen J., Siegel N.A., *Investigating Welfare Change, ‘The Dependent Variable Problem’*, in *Comparative Analysis*, Cheltenham, UK, Edward Elgar, 2007, pp. 112-243; Vas Os, Guido; Homburg, Vincent; and Bekkers, Victor, *Contingencies and Convergence in European Social Security: ICT Coordination in the Back Office of the Welfare State*, IGI Global, 2013, pp. 269-270; Bouget, Dennis, *Trends of Social Welfare Systems: From Convergence to Attractiveness. An Exploratory Approach. Working Paper Series No. 9, Reconciling Work and Welfare in Europe*, 2009, pp.6-9.

life. In addition, a stable political climate across the region is lacking in some Member States even if it is not a prerequisite for the harmonisation of social security systems. But social security harmonisation efforts work better if there is peace and harmony both politically and economically in the region. Political stability is still lacking in Burundi and South Sudan.

## **X. Conclusion**

This paper has critically explored the idea, mechanisms and challenges of harmonising social security systems in the East African Community regional bloc under its framework instruments. It has assessed the foundation or sources for harmonisation of social security systems in the Community. The paper has demonstrated that harmonisation of social security laws and systems aims at removing obstacles to achieving equality of treatment of citizens who take part in labour migration in the partner states. It has also shown that national constitutions of the EAC Member State invariably provide for right to equal treatment under the law, and the majority lack uniform provisions on the right to social security. Therefore, the paper has underscored, albeit briefly, the aims, pitfalls and challenges of harmonising social security schemes in the East African Community. Finally, it is recommended that the EAC partner states should come up clearly on the type of harmonisation that is being pursued. Secondly, harmonisation should not be speed-tracked because each country has its own domestic social, political and economic problems hence there is a need to undertake a thorough study and involve various stakeholders, civil society, private sector, and sectoral institutions so as to understand the long term and short-term impacts of chosen type of harmonisation. Thirdly, the harmonisation should be a gradual process and requires slow but sure learning process in each stage of harmonisation. Finally, the EAC countries should work on model regional wide social security portability bill that is likely to govern exportability of benefits across national borders. This will also help in maintenance of migrant workers' acquired social security rights in different countries of employment in the region and aggregation of benefits by counting periods of contributions in different partner States of employment of labour migrants.