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THE SHADOWS OF CROSS-BORDER LEGAL PRACTICE IN THE EAST AFRICAN COMMUNITY

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Abstract

The Treaty establishing the East African Community (EAC) and the Common Market Protocol advocates for the cross-border legal practice in the EAC. To effectively implement cross-border legal practice, other legal instruments were needed at the EAC level. It has been more than a decade since such instruments were drafted but not adopted. In addition, the Partner States needed to adopt laws that favor cross-border legal practice. So far, some Partner States have tried to do so, while others have not. Such disparities are the subject of this paper which, after taking stock of the status and obstacles to cross-border legal practice in the EAC, formulates recommendations to make cross-border legal practice a reality in the EAC.

Keywords: East African Community, cross-border, legal practice, regional integration, common market

1. Introduction

Nowadays and for a couple of decades, the trends of globalisation are increasing and the effects are remarkable in every aspect of life. Globalisation has created a world that is interconnected and interdependent, fostering relationships between different jurisdictions (Brown, 2018:320 and 344). As globalisation continues, lawyers will inevitably have the need to globalise legal services as the issue of multi-jurisdictional legal practice will continue to evolve and remain an important facet of global economies and legal systems (Brown, 2018:344-45).

In parallel with globalisation, there has been a remarkable increase in regional integration organisations. The two are linked to such an extent that scholars affirm the positive influence of globalisation on the proliferation of regional integration organisations. In an effort to respond to the demands of globalisation while fulfilling its mission of togetherness, the East African Community (EAC) has established a legal framework aimed at the free movement within the Community of labour, goods,

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services, capital and the right of establishment (EAC Treaty, art. 76). Within the framework of the free movement of services, several services are concerned, including legal services. In this respect, the ultimate goal is to create a theoretical and practical framework for cross-border legal practice in the EAC.

To achieve this, stringent measures are necessary, either at the EAC level or at the level of each individual Partner State (PS). So far, the theoretical framework for this is still problematic, leave alone the practice. Although lawyers have traditionally practiced in the country where they graduated from law school or in their home states (Liu, 1997:369; Twinomugisha, 2011:3; Rubasha, 2011:6), there is evidence-based optimism that the practice of law in the EAC will one day cross borders. Indeed, there are signs of cross-border legal practice in the EAC, albeit not yet entirely concrete. On this premise, this paper explores the "shadow" status of cross-border legal practice in the EAC by examining the legal texts that regulate the practice of law or the profession of advocates in each PS of the EAC.

The EAC has indeed succeeded in establishing a basic legal framework that can inform the cross-border practice of law in the Community. In response to the Community agenda, some EAC PS have put in place legal framework that favors the cross-border legal practice. However, as highlighted in this paper, such favorable legal framework still contains several gaps, which justifies the use of the term "shadow". In other words, cross-border legal practice in the EAC is not yet realised and is still difficult to implement. Nevertheless, there are signs that it will one day become a reality.

It is important to note that the issue of cross-border legal practice has two dimensions: The first dimension concerns the case of licensed lawyers who may seek to practice in another PS under the qualifications obtained in their home states. The second dimension concerns the case of non-admitted lawyers who may apply for admission to a bar association or law society of another PS. As cross-border legal practice in the EAC is still in its infancy, this paper analyses cross-border legal practice in general without distinguishing the two dimensions.

The primary motivation for this paper is the fact that each EAC PS wants capital to flow freely within its territory, but not professionals, including lawyers. This goes hand in hand with the belief that the practice of law is more important to economies than ever (Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985) cited in Brown, 2018:343), but also with

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the fact that lawyers are playing an increasingly important role in business transactions (Liu, 1997:370), alongside providing "a necessary service that impacts all aspects of society by framing and guiding social and business relationships" (Brown, 2018:343).

The methodology used in writing this paper is mainly doctrinal. Defined by Hutchinson as research that provides a systematic account of the rules governing a particular legal category, an analysis of the relationship between the rules, explanations of problem areas and possibly predictions of future developments (2006:7), the nature of doctrinal research fits well with the nature of the discussions here and therefore justifies its choice. The doctrinal approach was also favored because of being considered as the famous and most widely used in the legal world of research (Hutchinson, 2015:131). In this regard, various legal documents on the practice of law in the EAC were consulted, such as the legal texts regulating the practice of law, bar associations or law societies in the EAC PSs, court decisions, and scholarly papers on the subject, etc. The data collected have then been critically analysed.

This paper is divided into five sections. The first section introduces the paper. The second section gives an overview of the legal practice in each EAC PS. The third section deals with the obstacles to cross-border legal practice in the EAC. The fourth section proposes a plan to promote the cross-border legal practice in the EAC. The fifth section concludes.

2. The status of cross-border legal practice in the EAC

The EAC is an intergovernmental organisation that was established in 1967 with three members, namely Kenya, Tanzania, and Uganda. Ten years later, i.e. 1977, the EAC collapsed and was revived twenty-two years later, i.e. 1999. Currently, the EAC consists of seven (7) PSs, namely the original PSs (Kenya, Tanzania, and Uganda), Burundi and Rwanda which joined the Community in 2007, and South Sudan and DRC which were admitted in 2016 and 2022 respectively.

The EAC law is headed by the Treaty establishing the Community. Under the Treaty, there are protocols that are intended to supplement, amend or qualify the Treaty (EAC Treaty, art. 1). The Treaty recognises the sovereignty of the PSs (EAC Treaty, Preamble and art. 6(a)) and each EAC PS remains virtually sovereign. Apart from a certain process of legal harmonisation, the EAC PSs follow different legal systems, which have impact on the regulation of cross-border legal practice.

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2.1. Attempted journey at the EAC level

The cross-border legal practice in the EAC is enshrined in article 126(1) of the EAC Treaty, in which the PS undertake to take measures to harmonise their legal training and certification and to promote the standardization of judgments of courts within the Community in order to further the attainment of the objectives of the Community. The same provision provides that the PS, through their appropriate national institutions, shall take all necessary steps to establish a common syllabus for the training of lawyers and a common standard for the examinations for qualification and admission to the bar (EAC Treaty, art. 126(2)). Cross-border legal practice in the EAC is also enshrined in article 76 of the Treaty providing for the Common Market and article 104 of the Treaty, which calls on the PS to take measures to achieve the free movement of persons, labour and services and to guarantee the right of establishment and residence within the EAC.

Within the framework of the Common Market, the free movement of labour, persons, goods, services, and capital as well as the right of establishment and residence in the Community are guaranteed (EAC Common Market Protocol (CMP), art. 2(4)). Some provisions of the CMP refer directly to cross-border legal practice in the EAC. These include art. 5(2)(c) on the removal of restrictions on the free movement of labour, the harmonisation of labour policies, programmes and laws (see also art. 12); art. 5(3)(a) on cooperation for the harmonisation and mutual recognition of academic and professional qualifications (see also art. 11); article 10 on the free movement of workers; article 16 on the free movement of services; etc.

The overall aim was to liberalise legal services by ensuring full freedom of movement within the EAC by 2015 (Trouille and Binda, 2020:87). This was to be achieved through four routes or modes: the cross-border provision of legal services from the territory of one PS to the territory of another PS; the consumption of legal services abroad, i.e. the provision of legal services from the territory of a PS to a consumer in another PS without any discrimination; the commercial presence of the provider of legal services in the territory of another PS; and the presence of a natural person in a PS (Trouille and Binda, 2020:87-88).

On the road to cross-border legal practice, a Bill on cross-border legal practice was presented in 2014. With the aim of enabling cross-border legal practice in the EAC, the Bill drew on article 126 of the EAC Treaty, which requires the PS to take steps to harmonise legal training and certification and to standardise judgments. The Bill also sought to operationalise article 76 of the EAC Treaty, which provides for the free

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movement of persons, and articles 10 and 11 of the EAC CMP respectively on the free movement of workers and the harmonisation and mutual recognition of academic and professional qualifications.

According to the Bill, the cross-border practice of law was defined as "*the professional activities of an advocate enrolled in one PS that is carried out in another PS, whether or not the advocate is physically present in that other PS*" (art. 2 of the Bill). The Bill had four objectives: (a) promoting the cross-border legal practice within the Community, (b) promoting the harmonisation of legal training and certification, (c) providing common standards and rules to govern the cross-border legal practice within the Community, and (d) facilitating the free movement of legal services (art. 3 of the Bill). The Bill also provides for an EAC Law Council to act in collaboration with the national Bars and Law Councils of the PS (art. 4(1) of the Bill). The EAC Law Council would have five functions: (a) to regulate the cross-border legal practice, (b) to advise and make recommendations to the Sectoral Council on policy matters relating to the cross-border legal practice, (c) to advise and make recommendations to the National Bar Associations and Law Councils on matters relating to the cross-border legal practice, (d) to exercise disciplinary control over advocates engaged in the cross-border legal practice, and (e) to exercise any powers or perform any duties authorised or prescribed by the Act. Part III of the Bill provides for the certification of advocates by each national law council, while sect. 16 of the Bill requires a lawyer engaged in cross-border legal practice to comply with the laws of the host PS.

On another note, in 2011 the EAC proposed Regulations on Mutual Recognition of Academic and Professional Qualifications, commonly referred to as Mutual Recognition Agreements (MRAs). Under the MRA, individuals and law firms licensed in one PS would be able to practice in another PS without having to repeat the qualification or licensing process. But like the Bill, the MRA has not yet come into force after more than a decade. In 2017, state attorneys general refused to sign the MRA due to concerns about appropriate signatories, fears that states would not be able to implement the required changes, lack of national laws implementing the CMP, etc, and since then, no further progress has been made (Trouille and Binda, 2020:92).

In brief, with regard to cross-border legal practice, the guiding principle is article 5(2) (a) of the CMP, which proclaims the principle of "equal treatment" by requiring the PSs to "*respect the principle of non-discrimination against nationals of other PS on grounds of nationality*". In

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addition, the status of cross-border legal practice is not the same across the EAC and there is no structured legal practice order at the EAC level. For this reason, a true picture of legal practice in the EAC can only be considered from the perspective of legal practice in the individual EAC PS. Methodologically, the first sub-section concerns those PSs whose laws recognise the principle of equal treatment in one way or another, while the second sub-section concerns those PSs whose laws do not explicitly recognise this principle.

2.2. Pro equal treatment principle

At the time of writing this paper, only three of the seven EAC PS support the principle of equal treatment in one way or another. These are Burundi, Kenya, and Rwanda. In Burundi, the legal practice is governed by the Law No. 17 of 24 July 2023 modifying the Law No. 1/014 of 29 November 2002 on reforming the profession of advocates. This law came into force after the cabinet meeting of 20 October 2022, at which the opening of borders for cross-border legal practice was decided. According to the Cabinet's press release, it was noted that the law on the legal profession in Burundi was anachronistic, so that it needs to be updated to align with Burundi's accession to regional organisations, among other things. Specifically, the Cabinet has decided that Burundi will remain open to the regional communities to which it belongs alongside the EAC (Communiqué of the Burundian Cabinet).

In line with the Cabinet's decisions, the Law No. 17 of 24 July 2023, which regulates the profession of advocates in Burundi, favours the cross-border legal practice. According to article 6(1°) of this law, the prima facie condition for admission to practice law in Burundi is Burundian nationality. Nevertheless, article 7(3) gives a green light to foreigners who can be admitted to practice as advocates by virtue of international agreements or on the basis of reciprocity. In the same vein, advocates from the EAC can practice in Burundi in accordance with the CMP (art. 8(1)). While this article allows lawyers from the EAC to practice in Burundi is commendable, it is not clear whether EAC citizens can apply for admission and be admitted as advocates in Burundi. In other words, while a licensed advocate from the EAC can expand his practice in Burundi, this does not mean that an EAC citizen can apply to commence his/her profession as advocate in Burundi.

In this regard, it should be confirmed that since 2022, Burundi has been open for admission of lawyers from the EAC to practice the legal

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profession in Burundi, provided that these lawyers are already admitted in their respective countries of origin. In this respect, the requirements for equal treatment are therefore not fully satisfied.

In Kenyan, the legal practice is governed by the Advocates Act, Chapter 16 Revised Edition 2012 [1989]. Sect. 12(1)(a) of this Act states that a person wishing to be admitted to the Bar must be a national of Kenya, Rwanda, Burundi, Uganda or Tanzania [although this was later repealed in respect of Burundi and Rwanda as described below]. While this is laudable, listing countries, with reference of course to EAC membership, is not stylistic under the theories of the legislative drafting. This is because membership of a regional community is constantly changing, either through the withdrawal of existing members or the admission of new members. This would therefore mean that every time a new member is admitted or an existing member leaves, a change in the law is immediately required. This logic is illustrated by the fact that South Sudan and the DRC have joined the EAC today but do not appear on the list of sect. 12(1)(a). The same applies to the Federal Republic of Somalia, which is in the process of acceding to the EAC.

As for foreign advocates, these are dealt with in sect. 11 of the Act, which states that a legal practitioner who may appear before the superior courts of a Commonwealth country may practice in Kenya but only for the purpose of appearing, representing or advising in a given particular suit or matter. In other words, such advocate must expressly apply to be authorised to practice only in that particular case or matter. While sect. 12 looks favorable to EAC lawyers, despite the criticisms made above, sect. 11 looks worse as it only concerns lawyers admitted from Commonwealth countries. Strictly interpreted, this would mean that a lawyer from a non-commonwealth country cannot be authorized to practice even for a single specific case. This is problematic because some EAC PSs, e.g. Burundi and the DRC, are not members of the Commonwealth.

Although Kenya was the first EAC PS to give impression of opening in 2012, the admission of EAC lawyers and acceptance of EAC licensed lawyers to practice in Kenya is still problematic. In fact, it has been reported in the media on several occasions that Kenya is blocking lawyers from Burundi and Rwanda from practicing in Kenya. In 2021, Top Africa News reported on the case of thirteen Kenyan lawyers who are registered with the Rwanda Bar Association and thus practicing in Rwanda, who petitioned the Kenyan Parliament to fast track the inclusion of Burundi and Rwanda in the Kenyan Advocate Act. The Kenyan Parliament has also

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tried three times so far to amend the Advocates Act to allow advocates from Burundi and Rwanda to practice in Kenya (Owino, 2023), but so far in vain. The basis for these attempts is that Burundi and Rwanda are members of the EAC and therefore deserve the same treatment as Tanzania and Uganda.

Kenya has also been dragged to court over the admission of lawyers from Burundi and Rwanda or Kenyan nationals trained in those countries. In 2020, Javan Kiche Otieno filed a petition against the Chief Justice and President of the Supreme Court of Kenya (Respondent), the Law Society of Kenya (Interested Party) and the Council of Legal Education (Interested Party) (Petition No. 4 of 2020). The concern of the petitioner, a Kenyan national who was admitted as advocate in Rwanda in 2017, is that he applied for admission as advocate of the High Court of Kenya in 2019 but received a response from the Chief Justice that he could not be eligible pursuant to the Court of Appeal's decision in Case No. 96 of 2014 between the Law Society of Kenya v. Attorney General and 2 others which nullified sect. 12 and 13(1)(d) of the Advocates Act which provided for the admission of advocates to the High Courts of Burundi and Rwanda. The annulled sections have indeed opened the doors for admission of Kenya graduates from Burundi, Rwanda, Tanzania and Uganda as advocates in the High Court of Kenya provided they had qualified (Petition No. 4 of 2020, para. 28). Considering that the law that included Burundi and Rwanda was struck out, the judge found the petition to be without merit and dismissed it.

As far as Rwanda is concerned, the practice of law is regulated by the Law No. 83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organisation and functioning. Article 6 lays down the conditions for admission. With regard to nationality, article 6(1)(1°) stipulates that Rwandan nationality must be prima facie proven. Article 6(2) lays down the principle under which a foreigner may practice in Rwanda, namely reciprocity or in accordance with international agreements to which Rwanda is a party. This provision is supplemented by article 79 of the Internal Rules and Regulations of the Rwanda Bar Association (of 2014). Paragraph five of this article states that a candidate with foreign nationality must not only fulfill the requirements imposed on Rwandan applicants for admission, but must also provide evidence that Rwandan applicants can be admitted to the practice of law in his/her country of origin. Following this requirement, paragraph six clarifies that "*nationals of East African Community countries are exempted from this condition*". In other words, the admission requirements for East African

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Community nationals are the same as for Rwandans, i.e. they are admitted on equal basis.

This provision is complemented by article 7(1), which provides that the President of the Bar Association shall authorise advocates admitted to foreign Bar Associations to practice in Rwanda, usually on a temporary basis for one or more specific cases, subject to reciprocity or international agreements (see also art. 78 of the Internal Rules and regulations of the Rwanda Bar Association). In addition, article 7(2) provides that "*Advocates from States which have concluded a regional integration agreement with Rwanda may practice in Rwanda in accordance with such a regional agreement*". All these provisions mean that EAC lawyers enjoy equal treatment as Rwandan lawyers. In this regard, it is commendable that Rwanda is the only country in the EAC that fully fulfills the requirements of the EAC Treaty.

2.3. Not aligned with equal treatment principle

In contrast to the laws of the above-mentioned PSs that favor the admission of EAC nationals, some other PSs still have laws that prevent the admission of some EAC nationals in legal practice, despite the principle of equal treatment enshrined in the Treaty. These include the DRC, South Sudan, Tanzania, and Uganda.

In the DRC, the legal practice is regulated by the Ordinance-Law 79-028 of 28 September 1979 on the organisation of the Bar, judicial defenders organ, and state attorneys. The conditions for admission to the Bar are laid out in article 7. According to this article, the first condition for admission is the possession of Congolese nationality. However, the same article adds that a person of foreign nationality may be admitted to the practice in the DRC on condition of reciprocity or by virtue of international agreements.

The Ordinance-Law does not contain any specific reference to the EAC, which is obvious since it was enacted before the DRC's accession to the EAC. As in the case of Burundi, this law is outdated and anachronistic in view of the demands of globalisation, technological development and the DRC's accession to regional organisations. As DRC is now a member of the EAC, it is imperative to updates the law to include the EAC. Even though the DRC has been slow to adopt Community programmes, it is hoped that an update of the law will explicitly include the principle of equal treatment. Otherwise, this principle should be inferred from the mention of

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"by virtue of international agreements" in order to consider the EAC instruments as falling within the scope of international agreements.

In South Sudan, the legal practice is governed by the South Sudan Advocates Act, 2013. Sect. 12 of this Act lists the requirements for licensing and enrollment. One of the requirements is the possession of South Sudanese nationality (sect. 12(2)(a)). Paragraph four of sect. 12 allows a foreign advocate to apply to the Council for a special licence for a particular case or matter on condition, inter alia, that he or she appears jointly with a South Sudanese advocate. Like the DRC, the South Sudan Advocate Act was passed before South Sudan joined the EAC, and the same comments about the DRC apply to South Sudan.

Tanzania is another EAC PS that is reluctant to admit lawyers from the EAC to practice in Tanzania as advocates. According to the Tanzania Advocates Act CAP. 341 R.E. 2019, a person who applies for admission as advocate must fulfill the requirements set out in sect. 8. While this section does not specifically mention that the applicant must have Tanzanian citizenship, it also does not refer to East African lawyers having special rights in relation to admission to practice law in Tanzania. Surprisingly, the Act seems to tie the knot with its colonial master. This is evidenced by a specific mention in the Act that a person may apply for admission as an advocate if he/she is practising as a solicitor in a Commonwealth country (Advocates Act, sect. 8(1)(a)(ii)) or a Solicitor of the Supreme Court in England, northern Ireland or the Republic of Ireland, a Writer to the Signet, a solicitor of the Supreme Court of Scotland who is or has been authorised to practice as a solicitor under the Solicitors (Scotland) Act 1933 of the United Kingdom (Advocates Act, sect. 8(1)(a)(iii)). This would mean that a person from Burundi, which is not a member of the Commonwealth, cannot be admitted in Tanzania, whereas a person with similar qualifications from the UK can easily be admitted. The Tanzanian Advocates Act is also favourable to advocates from Kenya, Uganda and Zanzibar, although it imposes an additional condition that they must have practiced continuously for past immediate five years before applying (Advocates Act, Sect. 8(1)(b)(ii)).

In Uganda, sect. 8 of the Uganda Advocates Act Chapter 267 sets out the conditions to apply for admission and enrollment as an advocate. This section states that the person must have a law degree awarded by a university in Uganda (sect. 8(8)(a)) or be a Ugandan citizen with a law degree from a university or institution in a country that operates the common law system (sect. 8(8)(b)(i)) or be enrolled as a legal practitioner

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in a country operating the common law system (Sect. 8(8)(b)(ii)) or have a qualification that would qualify him/her for enrollment in a country operating the common law system (Sect. 8(8)(b)(iii)). Evidently, these provisions of the Uganda Advocates Act give privileges to common law lawyers but not to the east African lawyers except those from countries that typically operate common law system like Kenya and Tanzania.

Like Kenya, Uganda was also dragged to the East African Court of Justice (EACJ) for blocking lawyers trained in Rwanda from practicing in Uganda on the grounds that the Rwandan legal system was different from that of Uganda (Kagire, 2020).[1] This reference followed the decision of the High Court of Uganda refusing to admit Andrew Bataamwe as an advocate of the High Court of Uganda, thereby upholding the Law Council's decision not to recognise his postgraduate diploma in legal practice obtained at the Institute of Legal Practice and Development in Rwanda, a country which is not common law (Andrew Bataamwe, miscellaneous Cause No. 280 of 2019).

3. Hindrances to cross-border legal practice in the EAC

From the overview of the laws and acts regulating the profession of advocates in the EAC, it is clear at first glance that cross-border legal practice in the EAC faces several challenges. Although it would be utopian to provide an exhaustive list of these challenges, the causes can be summarised in two points: Protectionism and anachronistic mindset.

3.1. Protectionism in admission

It is clear from the discussion in the second section that, at first glance, each country in the EAC restricts admission to practice the profession of lawyers to its own nationals. An exception to this is the extension of the criteria to EAC nationals in accordance with the principle of equal treatment. This applies to Rwanda, which restricts admission to Rwandans, but adds that EAC nationals enjoy equal treatment as Rwandans. Burundi also seems to give fair treatment to EAC citizens. In some countries like Uganda, the restrictions go so far as to state studying at a Ugandan university as a requirement (Uganda Advocates Act, sect. 8).

[1]The case was filed on 29 June 2020. It was registered under Reference No. 19 of 2020 between Initiatives pour la Paix et les Droits Humains (iPeace) v. The Attorney General of the Republic of Uganda. At the time of writing this paper the case is still pending.

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It is obvious that the restrictions on admission of EAC nationals are contrary to the spirit of the EAC Treaty and the EAC CMP. Recognising this, a Mutual Recognition Agreement (MRA) was drafted in 2011. A Bill on the cross-border legal practice in the EAC was also presented in 2014. This means that lawyers in the EAC would be able to practice cross-border within the EAC if either the MRA or the Bill is adopted. In other words, a lawyer who is admitted in one of the EAC PS would enjoy a liberty of practicing law in another PS. While in some other sectors, such as accounting and auditing, the MRA has already been passed and is in force, the reasons for the delays to adopt the MRA in the legal profession or the Cross Border Practice Act are not officially disclosed. Nevertheless, some complications are evident, such as fear of aggressive competition (Trouille and Binda, 2020:92); nationalistic tendencies and disparities in the bar associations (Rubasha, 2011:8; Twinomugisha, 2011:4); differences in the legal systems inherited from colonialism as some EAC countries operate a common law system (Kenya, Tanzania, Uganda), others a civil law system (Burundi, DRC) and a sui generis system that mixes elements of the common law and civil law systems with echoes of the traditional legal system (Rwanda). The divergence of the different languages (English, French, Kinyarwanda, Kirundi, Swahili) is also an obstacle.

Without undermining these barriers, issues affecting the operationalisation of cross-border legal practice are not new, as the EU has gone through a similar journey (Trouille and Binda, 2020:92). Just as the EU has managed to overcome these problems, so too can the EAC, especially as some of them are unfounded. For example, the fear of aggressive or negative competition is unfounded as large sectors of law will remain domestic; and knowledge of local practices and language will play a paramount role in the choice of lawyer, especially for private clients or for small local businesses (Trouille and Binda, 2020:102; EALA, Press Release).

Moreover, given the current trend of globalisation in general, protectionist measures seem to be outdated. Nowadays, with the advancement of information technology, some legal works are being done by artificial intelligence tools. Such tools are borderless, one of the goals of globalisation, the ultimate aim of which being the elimination of traditional borders. More than that, despite the protectionism in admission, there are foreign lawyers practicing in the EAC, as elaborated on in the next subsection.

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3.2. Controversy: gate closed to neighbors but open for distants

The legal texts governing legal practice in the EAC PS show that the exclusion of foreigners is a common denominator. While non-EAC citizens are ipso facto foreigners, there is a controversy over the status of EAC citizens with regard to the practice of law in the EAC. Indeed, some jurisdictions have openly excluded EAC citizens from access to the practice of law because they consider that the conditions of the domestic laws are not fulfilled. As mentioned earlier, this is the case in Kenya and Uganda, which have consistently excluded Rwandans and Burundians from admission to practice in Kenya and Uganda pretexting that Rwandan and Burundian lawyers have no training in the common law system. Whether common law versus civil law system, two colonially imported legal monstrosities, is really a valid reason is a debatable question but beyond the scope of this paper.

Worse of that, while neighbors are excluded, those who come from afar are welcome in some cases. This is the case with the Tanzania Advocates Act, which explicitly admits lawyers from Commonwealth countries, England, Ireland and Scotland (see Tanzania Advocates Act Sect. 8(1)(a)). Not only that, although EAC citizens cannot practice in the EAC's neighboring countries, a number of foreign law firms have so far established themselves in the EAC. This is the case with Clyde & Co. in Kenya and Tanzania; Bowmans in Kenya and Tanzania; ENSAfrica in Kenya, Rwanda and Uganda, to name but a few. It is a very controversial practice to restrict neighbors but be open to those who come from afar.

This controversy is due to several factors. One of the reasons for the restriction is that the legal practice in the EAC is generally centred on litigation. While these international law firms are also active in litigation, their primary business is corporate and commercial transactions. In general, it is an established fact that transactions are higher in terms of remuneration than litigation. In other words, such international law firms that focus on transactions can earn a high income compared to domestic law firms that earn little from litigation. In addition, these international firms, having established themselves in the EAC, as in other African countries, hire local lawyers to work for them. From there, they make money and pay a small portion of their earnings to the locals to keep their benefits high, presumably a very high profit. This is an exploitation of the intellectual resources of Africans that could be used to harvest the total but can't because a large portion goes to their masters, firms' owners.

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4. Is there a light at the end of the tunnel?

Cognizant of the need for cross-border legal practice to fully realise the potentials of regional integration (Rubasha, 2011:8), two alternative immediate actions need to be taken to make cross-border legal practice a reality in the EAC. One is the adoption of the Mutual Recognition Agreement (MRA) or the EAC Cross-Border Legal Practice Act. Alternatively, or jointly, the EAC PS need to adjust their domestic laws to the requirements of EAC law. For both options, it may be beneficial to learn from EU best practices. Saying this is obviously easy and propitious. However, practicing this seems difficult and gloomy, as the mobility of lawyers requires harmonisation of legal standards between countries that usually have different legal systems (Liu, 1997:369). Nevertheless, both recommendations are worth a try.

4.1. Fast-track adoption of the MRAand the cross-border legal practice Act

As elaborated on above, the EAC has taken some steps which, if finalised, would have solved the problem of cross-border legal practice. One of these is the MRA, which is in draft form but has not yet been passed. Another is the EAC Cross border legal practice Bill, which was drafted, tabled and discussed in several rounds but is still a draft. The obvious recommendation is to adopt and implement these two instruments.

4.2. Needy legislative amendments

According to article 8(4) of the EAC Treaty, the laws, institutions and organs of the EAC take precedence over comparable domestic ones. According to paragraph 5 of the same article, the PS has undertaken to make the necessary legal instruments to confer precedence of Community institutions, bodies and laws over comparable domestic ones. Similarly, article 16 of the Treaty provides that legal texts and decisions of the EAC are binding on the PS.

In this context, as elaborated on in section two, EAC supreme law is in favor of cross-border legal practice. Even though practices vary and some PSs have domestic laws that are not conducive to cross-border legal practice. In this regard, we commend Rwanda for its explicit provisions granting equal treatment to EAC lawyers. In this regard, PSs such as Kenya, Tanzania, and Uganda, which still have provisions in their domestic laws that in one way or another exclude EAC lawyers from being admitted to practice, are recommended to amend such provisions in recognition of

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the equal treatment of EAC nationals. DRC and South Sudan are recommended to align their laws with their EAC membership.

4.3. Learning from EU's best practices

It is a human nature that it is always difficult to take the road less travelled. In contrast, it is inherently less difficult to take a well-trodden path, unless the traveller wants to reinvent the wheel. In this context, the EAC has been advised several times to learn from the EU, not only because of the EU's progress in terms of regional integration, but also because of the fact that the EAC resembles an African version of the EU (Petersen, 2010:13). The same applies here.

Indeed, the EU has achieved an unprecedented cross-border legal practice. Even though, the EU, like the EAC, encountered resistance from the Member States (MS), which was partly due to the different legal systems (Liu, 1997:382-383). Despite the resistance, the EU eventually succeeded in creating a framework for cross-border legal practice.

Two key factors played a role: the legal framework and the impact of globalisation on the legal profession (Gromek-Broc, 2002:109-130). As far as the legal framework is concerned, the EU eased tensions by passing a series of directives aimed at facilitating the mobility of lawyers within the EU, such as Council Directive 89/48 (1989, OJ L19, p. 16); Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L78, 26/03/1977, p. 17); the Proposal for a European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyers on a Permanent Basis (1995 OJ C128, p. 6); Directive 98/5/EC facilitating practice of the profession of lawyers on a permanent basis in a MS other than in which the qualification was obtained (OJ L77, 14/03/1998, p. 36); Directive 2005/36/EC on the recognition of professional qualifications (OJ L255, 30/09/2005, p. 22); and Directive 2013/55/EU amending Directive 2005/36/EC and Regulation No 1024/2012 on administrative cooperation through the Internal Market Information System (OJ L354, 28/12/2013, p. 132) (Liu, 1997:370; Trouille and Binda, 2020:73-74). In this context, the EAC is encouraged to learn from the EU, which has succeeded in overcoming the resistance of MS by adopting legal texts and case law that strongly guarantee the free movement of legal services (Trouille and Binda, 2020:62). Lawyers in the EAC are also encouraged to globalize their legal practices.

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5. Conclusion

This paper has shown that the main legal instruments of the EAC favor the cross-border legal practice, despite the practice which is different. In this regard, this paper has shown that the EAC needs to shift the tone from top to bottom by adopting additional specific legal instruments in favor of cross-border legal practice, principally the MRA and the Cross-Border Legal Practice Act, which so far remain in draft form after a decade. This would potentially outweighs some of the EAC PSs with laws that push away the cross-border legal practice. On the positive side, some other PSs have so far laws that are favorable. Nevertheless, even for those whose laws appear favorable, this paper has shown that they need to be improved to address the loopholes they contain so far.

Two recommendations can be derived from this. One is theoretical, the other is practical. Theoretically, PSs are recommended to update the laws governing legal practice to include an equal treatment clause. In this context, Rwanda is commended for having an equal treatment clause. While Burundi is commended for including a clause referring to EAC citizens, it is recommended to amend the law to fully comply with the principle of equal treatment. Although lawyers from the EAC who have already been admitted can practice in Burundi, non-admitted lawyers from the EAC must also be given the opportunity to be admitted in Burundi. In other words, the law should be slightly amended so that the application of a Burundian should be treated on par with the application of an EAC national.

Kenya is recommended to amend sect. 12(1)(a) of the Advocates Act to mention the "EAC PS" in lieu of enumerating them. Kenya is also recommended to amend sect. 11 to give lawyers admitted in EAC countries the right to practice in Kenya in addition to lawyers admitted in Commonwealth countries. Given the outdated status of the laws governing the legal profession in the DRC and South Sudan, it is recommended that they be updated to align with the requirements of regional integration. While updating them, it is recommended to include a clear and explicit clause on equal treatment with the EAC citizens. Tanzania and Uganda are categorically recommended to amend their laws to include a clear clause granting equal treatment to EAC lawyers.

The second recommendation is of a practical nature: the PSs are urged to walk the talk. On the one hand, the EAC has been praised on several occasions for having good legal texts. On the other hand, the EAC has been criticized on several occasions for its hesitancy and leeway in

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implementing the EAC legal texts. The recommendation here is therefore to match the practice with the theory.

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