
**A CRITICAL ANALYSIS OF THE HUMAN RIGHTS MANDATE
OF THE ECOWAS COMMUNITY COURT OF JUSTICE**

Solomon T. Ebobrah



Research Partnership 1/2008
The Danish Institute for Human Rights

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the ECOWAS Community Court of Justice

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1. Introduction

In May 1975, the original Treaty of the Economic Community of West African States (ECOWAS)¹ was ratified in Lagos, Nigeria by 15 African heads of states.² Founded as a vehicle for economic integration, ECOWAS came into existence at a time the ‘search for an excellent economic performance and social stability led African leaders to seek integration and/or cooperation among their countries’.³ Essentially, the formation of ECOWAS was prompted by the need to forge a collective response to the economic challenges that the states in the West African sub-region were faced with upon gaining political independence. Thus, while they made conscious effort to avoid any sort of collusion with wider continental cooperation, the leaders of the founding member states of ECOWAS pursued the ‘ultimate objective of ...accelerated and sustained economic development of their states’ by adopting the 1975 ECOWAS Treaty.⁴ However, the immediate objective of ECOWAS in 1975 was to promote cooperation and development in all fields of economic activity for the purpose of raising the standard of living of its peoples, increase and maintain economic stability, foster closer relations among member states and contribute to the progress and development of the African continent.⁵ In addition to these economic objectives, Asante has suggested that ECOWAS was also intended to provide a platform ‘to provide the member states with a stronger voice in African affairs and in international affairs’.⁶

Decades after the integration process began, the statistics showed that implementation had not brought about the expected goals. The stages of integration enumerated in the 1975 Treaty were not getting any closer. As some commentators observed, ‘despite the enthusiasm generated at the organisation’s inception, its economic integrative schemes were not as successful as initially anticipated’.⁷ In seeking to explain the reasons that contributed to the difficulty experienced by the ECOWAS integration project, Asante has argued that ‘the road to the economic community was hardened by the incapacity of West African leaders to manage their political and economic divergences and give precedence to the ECOWAS over their respective national interests’.⁸ It is against this background that spill-over began to occur in the ECOWAS integration initiative.

¹ The ECOWAS Treaty of 1975 is reprinted in 1010 UNTS 17, [1975], 14 *International Legal Materials* 1200.

² http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (accessed 23 October 2008). See EM Edi, (2007), *Globalization and Politics in the Economic Community of West African States*, Durham: Carolina Press, p. 28. The founding members of ECOWAS were Benin, Burkina Faso, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde acceded to the ECOWAS Treaty in 1978. However, Mauritania withdrew its membership of ECOWAS in 1999/2000.

³ Edi (2007) p. 25.

⁴ See the sixth preambular paragraph of the 1975 Treaty of ECOWAS.

⁵ Art 2(1) of the 1975 ECOWAS Treaty.

⁶ SKB Asante (1986) cited by Edi (2007) p. 26.

⁷ F Olonsakin and EK Aning, ‘Humanitarian Intervention and Human Rights: The Contradictions in ECOWAS’ 1999, p. 3 *The International Journal of Human Rights*, p. 17

⁸ Asante (1986) p. 93

Commencing with subtle interest in the internal conflicts of some member states and spreading over to the adoption of a declaration on political principles,⁹ up to full blown military intervention in at least three member states,¹⁰ economic cooperation took a new dimension under ECOWAS. Some even saw these events as a ‘transformation of ECOWAS into a political integrative process with a security component’.¹¹ It was in the course of this so-called transformation that human rights seeped in to the agenda of ECOWAS culminating in recognition of respect for human rights as one of the principle upon which the objectives of the organisation would be pursued.

Apart from the allusions to human rights evident in the instruments and documents of ECOWAS, it is possible to locate human rights aspects, issues and concerns in the framework and the activities of the organisation. ECOWAS can be seen both as a human rights actor and as an arena for the vindication of rights. It has even been argued that ECOWAS as a regional integration initiative can be conceptualised as a mechanism for the realisation of the right to development.¹² Either in pursuit of the goals of economic integration or in engaging in the ‘adopted’ role of a security organisation, there is the constant risk that ECOWAS would violate the rights of its citizens. In this regard, ECOWAS takes on the role of a human rights actor. To the extent that it provides institutional platforms of various kind by which its citizens can seek the realisation of their rights, ECOWAS emerges as a human rights arena. In this context, ECOWAS provides several institutional arenas the most visible of which is the ECOWAS Community Court of Justice (ECCJ). It is the nature and quantum of protection available in this later character of the organisation that this paper seeks to explore.

Naturally, sceptics would pose the question whether engagement as an arena for the realisation of all manner of rights would not be exceeding the powers and functions of ECOWAS. Yet, ECOWAS would not be treading on virgin grounds. As Shelton has noted, three of the organisations operating visibly in the field of human rights in Europe can not historically claim exclusive concerns with human rights even though they all now view human rights as essential to the achievement of set objectives.¹³ Be that as it may, in order to appreciate the legality and legitimacy of aspects of an organisation, it may be desirable to seek an understanding of the

⁹ In July 1991, the Authority of Heads of State and Government of ECOWAS adopted Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States. This declaration represents the first clear recognition by ECOWAS that political issues can not be divorced from economic integration.

¹⁰ ECOWAS intervened in Liberia, Sierra Leone and to a lesser extent, Cote d’Ivoire using the ECOWAS Monitoring Group (ECOMOG) as a peacekeeping force.

¹¹ Olonsakin and Aning (1999) p. 17.

¹² N Nwogu, ‘Regional Integration as an Instrument of Human Rights: Reconceptualising ECOWAS’ (2007) 6 *Journal of Human Rights* p. 345

¹³ D Shelton, ‘The boundaries of human rights jurisdiction in Europe’ (2003) *Duke’s Journal of Comparative and International Law*, vol. 13, 95, 96. Shelton refers here to the Council of Europe, the European Union and the Organisation for Economic Cooperation and Development.

practical workings of its institutions in order to apply theoretical considerations to assess its normative foundations. Hence, Beitz has argued that ‘theory has to begin somewhere. ...with the observation that there is an international practice of human rights ...we ask some distinct theoretical questions.... To dismiss the practice because it does not conform to a perceived philosophical construction seems ...dogmatic in the most unconstructive way’.¹⁴ Following the wisdom of this approach, the paper sets out the current human rights practice of the ECCJ and makes some critical theoretical assessment of the practice.

Based largely on desk top research and a field visit to the ECCJ, this paper takes a mixed approach of descriptive and comparative analysis. Considering the historical economic origins of the European Communities (EC) and the European Union (EU), and the expanding involvement of the European Court of Justice (ECJ) in the field of human rights, it is possible to identify some similarity of issues around the practice of human rights before the ECJ and the ECCJ. However, deeper interrogation indicates fundamental differences between the two courts and enhances an understanding of human rights in the mandate of the ECCJ.

The paper therefore critically analyses the mandate of the ECCJ in the field of human rights, taking a close look at the various instruments of the ECOWAS and the case law of the ECCJ. Particular attention is paid to an analysis of the legitimacy of the ECCJ’s human rights mandate, the consequences of the lack of a human rights catalogue in the stables of ECOWAS and the indeterminate nature of the instrument conferring human rights competence on the ECCJ. Where appropriate, comparisons are drawn with the ECJ and the ECJ’s exercise of a human rights mandate. The paper concludes with recommendations it is believed would enhance the relevance and effectiveness of the ECCJ in contributing to the protection of human rights in West Africa.

¹⁴ Beitz, ‘What human rights means’ in Chatterjee (ed.) *The Ethics of Assistance: Morality and the Distant Needy*, Cambridge: Cambridge University Press, cited by S Besson, ‘The European Union and Human Rights: Towards a Post-National Human Rights Institution?’ (2006) 6 *Human Rights Law Review* p. 328. Besson use of the term ‘Post-National Human Rights Institution’ would be used in this paper.

2. ECOWAS: An emerging human rights regime?

The institutional relation between ECOWAS as an international entity and the ECCJ as an institution of ECOWAS necessitates an analysis of the competence of the parent organisation as a basis for investigating the human rights mandate of the ECCJ. The competence of ECOWAS in the field of human rights represents the foundation upon which the exercise of jurisdiction by the ECCJ in that issue area is built. In fact, the question of organisational competence could be described as a 'central issue of principle' and it is unwise to 'take it for granted that the necessary legal principle and constitutional competence exists' in this area of activity.¹⁵ The significance of this preliminary inquiry is in the fact that international organisations, unlike states that create the organisations, do not have the freedom to engage in just any field of activity they desire. In the same vein, an international organisation can neither endow its organs and institutions with powers the organisation itself does not have, nor can it empower such organs and institutions to exercise powers the parent organisation does not have.¹⁶ Thus some have argued that where an international organisation or any of its institutions acts beyond its specific powers, member states of the organisation should 'possess the right' to argue that the organisation has exceeded its purposes and functions. In this regard, an aggrieved member state should be able to 'refuse to collaborate finally or otherwise in its carrying out. Such a member state should be 'entitled to do so on the simple ground of legality' because the limitation of sovereignty can only be applied in the line of activities that they have subscribed to in signing the constitutional document of the organisation.¹⁷ This right, it is argued further, should avail an aggrieved state without the need for such a state to withdraw from the organisation.¹⁸ It is against this background that the foundation ECOWAS offers for the exercise of human rights jurisdiction by the ECCJ will be assessed.

A striking feature of the 1975 ECOWAS Treaty from a human rights perspective is that it does not make any mention of human rights and completely avoids any use of human rights language. Consistent with this posture, even the usual economic freedoms seen as vehicles for economic integration were carefully couched to avoid any link with rights. Hence, while Article 2(1)(d) of the 1975 Treaty recognised the abolition of obstacles to free movement of persons, services and capitals between member states as a means to achieve the aims of ECOWAS, these were not drafted as rights of the citizens of the states concerned. By Article 27 of the 1975 ECOWAS Treaty, there was an undertaking by member states to abolish obstacles to freedom of movement

¹⁵ P Alston and JHH Weiler, 'An 'Ever Closer Union' in Need of Human Rights Policy', (1998) 9 *European Journal of International Law* p. 660

¹⁶ See generally the *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion of 11 April 1949) ("Reparation Case"), (1949) ICJ Reports, p. 174.

¹⁷ M Rama-Montaldo, 'International legal personality and implied powers of International Organisations' (1970) 44 *British Yearbook of International Law* pp. 111, 123.

¹⁸ Rama-Montado (1970) p. 143

and residence of those regarded as ‘Community citizens’, but this was not stated as a right of those citizens. However, the protocols adopted on the platform of the 1975 Treaty contain some rights language and limited reference to specific human right instruments. Thus, in 1979, the Protocol relating to free movement, residence and establishment provided for ‘rights to enter, reside and establish ’of community citizens.¹⁹ From 1985, more frequent use of rights language and reference to human rights instruments became evident in the ECOWAS. A supplementary protocol adopted in 1985 defined fundamental human rights as rights recognised by the Universal Declaration on Human Rights (UDHR) and made generous reference to the fundamental rights of persons falling under the protocol.²⁰ Another supplementary protocol adopted in 1986 defined human rights as in terms of migrant workers and the Conventions of the International Labour Organisation (ILO), granting rights based on the protocol itself and on the ILO Conventions.²¹ By 1991, while still operating under the 1975 Treaty, ECOWAS adopted the declaration on political principles in which the Community fully alluded to human rights under ‘universally recognised international instruments on human rights and in the African Charter on Human and Peoples’ Rights’ without necessarily linking the rights to economic freedoms.²² These represent the place of human rights in ECOWAS under the 1975 founding Treaty.

In contrast to the picture painted above, the 1993 revised ECOWAS Treaty could be said to have revolutionised the perception and reception of human rights in the constitutional framework of ECOWAS. The revised Treaty makes specific reference to human rights right from its preamble.²³ Taking a position radically different from the 1975 Treaty, the revised Treaty further recognises ‘promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights’ as one of the fundamental principles the Community would adhere to in the pursuit of its objectives.²⁴ Under a chapter dealing with cooperation in political, judicial, legal , security and immigration matters, the revised Treaty contains a commitment that ECOWAS member states that are ‘signatory states ...to the African Charter on Human and Peoples’ Rights’ agree to ‘cooperate for the purpose of realising the

¹⁹ Art 2 of the Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment (available at <http://www.sec.ecowas.int>) (accessed 18 August 2008).

²⁰ See arts 1, 3 and 7 of the Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (available at <http://www.sec.ecowas.int>) (accessed 18 August 2008).

²¹ Arts 1, 3, 10, 13, 14 and 16 of the Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of the Persons, the Right of Residence and Establishment. Generally, see also art 18 Decision A/DEC.2/5/90 Establishing a Residence Card in ECOWAS Member States and arts 1, 2 and 4 of the Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on the Free Movement of Persons, Right of Residence and Establishment. All these instruments are available at <http://www.sec.ecowas.int> (accessed 18 August 2008).

²² Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States.

²³ Para 4 of the Preamble to the 1993 revised ECOWAS Treaty.

²⁴ See art 4(g) of the 1993 revised ECOWAS Treaty.

objects' of that instrument.²⁵ In further contrast to the 1975 Treaty, the revised ECOWAS Treaty provides citizens with 'the right of entry, residence and establishment' and records an undertaking by member states 'to recognise these rights of Community citizens'.²⁶ The revised Treaty also contains an undertaking by member states to 'ensure respect for the rights of journalists'.²⁷ Consistent with the more favourable constitutional environment, protocols adopted by ECOWAS in the post 1993 era make clear references to human rights instruments and use relatively unambiguous rights language. The protocol which establishes the ECOWAS mechanism for conflict management for example, alludes to principles contained in the United Nations Charter, the UDHR and the African Charter on Human and Peoples' Rights (African Charter) and protection of human rights, freedoms and international humanitarian law as fundamental principles on which the mechanism is founded.²⁸ Similarly, a supplementary protocol on democracy adopted to strengthen the mechanism on conflict management makes clear reference to the respect for human rights contained in the African Charter and in 'other international instruments' as constitutional principles upon which the supplementary is based.²⁹

Considering the wide differences in the form in which human rights finds expression in the constitutional epochs of ECOWAS (the 1975 and the 1993 constitutional epochs), it becomes interesting to engage the question whether ECOWAS had transformed from an economic integration initiative into a political integration scheme. In this sense, it becomes necessary to ask whether the objectives and purpose of the Community have changed or expanded to embrace Community competence in the field of human rights. In view of the fact that the law of international institution and indeed, the practice of international organisations indicate that a principle of limited powers prevails in that sphere, are the human rights provisions contained in the 1993 revised Treaty of ECOWAS sufficient to confer human rights competence on ECOWAS and to result in legally acceptable transfer of human rights jurisdiction to the ECCJ? Assuming the Treaty provisions are insufficient to base the presence of such competence, would the provisions in the protocols suffice to sustain an argument that ECOWAS does have a human rights competence? In answering these questions, it has to be noted that both the constitutional document of the given organisation and general international law may operate to confer

²⁵ Art 56(2) of the 1993 revised ECOWAS Treaty. It is significant to note that all member states of ECOWAS have signed and ratified the African Charter on Human and Peoples' Rights.

²⁶ Art 59 of the 1993 revised ECOWAS Treaty.

²⁷ See art 66(2)(c) of the 1993 revised ECOWAS Treaty.

²⁸ Art 2 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security

²⁹ See paras 7, 8 and 11, as well as arts 4(h), 22 and 35 of Protocol A/SPI/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

competence on an international organisation.³⁰ However, the focus of this paper is on the internal documents that confer competence.

Generally, the treaty of an international organisation which stands out as the constitutional document of the organisation is the most important source of the authority that the organisation has. The treaty lays out the objectives, functions and powers of the organisation. Hence it has been argued that by the operation of the doctrine of delegated powers in the field of the law of international institutions, only powers ‘expressly enumerated’ in the treaty of an organisation can be exercised. The exception being that the theory of ‘implied powers’ could intervene to allow for the exercise of powers and functions, which though not expressly granted by enumeration in the treaty, can be deemed conferred by reason of being essential for the performance of enumerated powers and functions.³¹ Practical expression of the theory of implied powers comes in the form of an omni-bus provision that allows international organisations to undertake ‘any other activity’ necessary for achieving set objectives.³² Notwithstanding the operation of the theory of implied powers, Rama-Montaldo advises that caution has to be applied in order to avoid giving room for the enlargement of competence ‘by considering as a means for the fulfilment of its original purposes, tasks for which it was not created and are clearly outside the natural interpretation of its constitution and which are opposed by a minority’.³³ Pushing his argument forward, Rama-Montaldo makes the point that there may just be a thin line between assuming a new competence and performing a task not authorised by the constitution but termed a ‘means’ to fulfil an enumerated competence.³⁴ From this perspective, both treaties of ECOWAS do not enumerate the promotion and protection of human rights as a purpose or function of the organisation. Both treaties aim at promoting action to ‘raise the living standards’ of ECOWAS citizens. Further, both treaties do not list the promotion and protection of human rights as means to achieve the goal of ‘raising the living standards of ECOWAS citizens. However, the revised Treaty and several other instruments of the organisation make frequent allusion to human rights protection, possibly as a means of creating conditions necessary to raise the living standards of citizens. In addressing the question whether failure to enumerate human rights protection as a purpose of ECOWAS is fatal to an ECOWAS claim to human rights competence, a basic challenge lies in delineating what should be included in defining constitutional authorisation, especially since treaties need to be interpreted in context, which context includes the preamble and annexes to the treaty.³⁵

³⁰ T Ahmed and I de Jesus Butler, ‘The European Union and Human Rights: An International Perspective’ (2006) 4 *European Journal of International Law* pp. 771, 776.

³¹ Rama-Montaldo (1970) p. 114.

³² See art 3(2)(o) of the 1993 revised ECOWAS Treaty and art 308 of the Treaty of the European Union.

³³ Rama-Montaldo (1970) p. 115.

³⁴ Rama-Montaldo (1970) p. 117.

³⁵ Art 31 (2) Vienna Convention on the Law of Treaties (1969) 8 ILM 679 (1969). Also see Shelton (2003) p. 125.

Looking beyond the enumerated aims in the treaties in order to contextualise interpretation, it is possible to identify clear differences in the two constitutional epochs of ECOWAS. Both in its preamble and in the statement of fundamental principles, the 1993 revised Treaty gives some status to human rights promotion and protection in the ECOWAS agenda. Can it therefore be argued that human rights realisation has become a goal of the organisation or alternatively, that it represents a ‘means’ for achieving organisational goals? A quick answer would be that human rights realisation is not yet one of the goals of ECOWAS as the purposes of an organisation can only be found in the constitutional instrument of the organisation and cannot be implied.³⁶ The answer to the second question is not so obvious as it requires a further enquiry as to whether the economic goals of ECOWAS can be achieved without necessarily addressing the state of human rights in the Community and in the member states. The revised Treaty does not engage the link between human rights realisation and the goal of raising living standards through economic integration. However, the record of ECOWAS under the 1975 Treaty demonstrates the difficulties that the organisation faced in implementing the economic goals without attending to the political issues linked with domestic human rights situations. The effects of domestic conflicts directly or indirectly related to denial of, and demand for human rights protection prevented ECOWAS from achieving set goals and resulted in moving the organisation towards security ends. Thus, while the effect of donor pressure and the change that occurred in the international environment cannot be ignored, it is arguable that the significance of addressing the human rights question in the Community as a condition for achieving set goals was recognised within the era of the 1975 Treaty.

In the face of the link between human rights realisation and the goal of raising living standards through economic integration, recognition of the former as a fundamental principle of ECOWAS becomes even more relevant. Going by Krasner’s definition of principles as ‘belief of fact, causation and rectitude,’³⁷ it is possible to locate an ECOWAS understanding of an interface between rights realisation and goal attainment. This interface can even be stretched to base an argument that realising human rights is an essential means to pursue organisational goals. Such an understanding also fits with Rama-Montaldo’s perception of principles as ‘modalities to which an organisation must adjust when attaining its purpose’. Thus, despite the argument that principles do not impose positive obligations for the organisation since they are not ends in themselves,³⁸ principles could take on special significance in different contexts. In the context of ECOWAS, recognition of the promotion and protection of human rights as a fundamental principle of the organisation takes on the character of a means to the end of the organisation. The

³⁶ Rama-Montaldo (1970) p. 154.

³⁷ SD Krasner, ‘Structural Causes and Regime Consequences as Intervening Variables’ (1982) p.36 *International Organisations* No. 2, 185 at 186.

³⁸ Rama-Montaldo (1970) p. 154

undertaking further expressed by member states to cooperate to guarantee rights in the African Charter thus serves to amplify the significance of the principles.

Notwithstanding the line of argument pursued above, the position that principles in themselves do not impose obligations on member states cannot be taken lightly. For as Seyersted observed, the exercise of authority by an organisation, to make decisions that are binding on member states or to claim and exercise direct or indirect jurisdiction over the territory, nationals or institutions of member states can only be sustained by a 'special legal basis'.³⁹ However, the legal basis for this genre of authority need not be located in the constitutional instrument alone. It could be traced to any other legally acceptable lawmaking instrument recognised by the member states of the given organisation.⁴⁰ This position has to be even weightier where the power of lawmaking resides in the usual representatives of the member states, acting in intergovernmental capacity. In such a capacity, the member states would be deemed to be exercising unlimited competence to enter into agreements of any sort that is not expressly illegal in international law. Seen from this perspective, the search for the human rights competence of ECOWAS cannot be restricted to aims enumerated in the constitutional instrument of the organisation but extends to the entire Treaty and all other validly adopted lawmaking instruments of the organisation. To that extent, there is evidence of some human rights competence in ECOWAS under the 1993 constitutional epoch.

Having come to a conclusion that even though human rights realisation is not one of the goals of ECOWAS, the organisation can claim some competence in that area, it is necessary to explore whether there is sufficient coordinated activity in this area to suggest the presence of a human rights regime. The wisdom in taking a regime approach is that it becomes possible to see a clearer picture through a comprehensive visualisation of the collective that isolated and individualised assessment of provisions and instruments would not sustain.⁴¹ The term 'regime' may take any of several meanings. Seen from the 'eyes' of Krasner, it may refer to 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area'.⁴² Regime may also be recognised as 'an international regulatory system promoting and enacting normative rules'.⁴³ A regime may further be understood as 'norms and decision-making procedures accepted by international actors to regulate an issue –area'.⁴⁴ While there are minor differences in these definitions, they all agree to the extent that a regime requires the presence of rules and means of applying those rules. What is not clear is whether the rules that form part of a

³⁹ F Seyersted (1964) 34 *Nordisk Tidsskrift for International Ret.* p. 29

⁴⁰ Seyersted (1964) pp. 29 - 30

⁴¹ See eg, M Brosig, 'Human Rights in Europe: An Introduction' in Brosig (ed.) *Human Rights in Europe: A fragmented regime?* (2006) Frankfurt: Peter Lang p. 9.

⁴² Krasner (1982) p. 185.

⁴³ Brosig (2006) p. 9

⁴⁴ J Donnelly, 'International human rights: a regime analysis' (1986) p. 40 *International Organisations* p. 602

given regime need to be created exclusively within the regime set-up or such rules or a part thereof, could be 'borrowed' from another regime framework.

In the absence of a strict requirement, a liberal approach to the question of the source of regime rules may be adopted to sustain an argument that a regime could exist even if the applicable rules are a 'mixture' of original and borrowed norms. The critical determination being whether the rules are recognised by the actors within the system and the means of applying the rules operate to bring order to the specific issue-area in relation to the given community it seeks to regulate. From this point of view, ECOWAS under the 1993 revised Treaty has created an emerging human rights regime that consists of constitutional instrument provisions conferring rights, fundamental principles and normative guarantees in other treaties and lawmaking instruments. Taking a stricter approach would lead to undesirable results since overlap in norms and rules appear in all systems of human rights protection.

The origins (or more appropriately the lack) of the human rights competence of ECOWAS is not too different from the evolution of human rights in the EC/EU. Commentators on the EC/EU system seem to be in agreement that the question of human rights was not a consideration at the founding of the original communities. Quinn captures the feeling in suggesting that 'the founders of the EU decided to stay away from high politics and to concentrate instead on the integration of limited but important cross-border economic sectors'.⁴⁵ Hence it has been argued that 'human rights monitoring' is not a classical task of the EU.⁴⁶ However, despite this lacuna, over series of amendments of the constitutional instruments, the Amsterdam Treaty of the EC/EU reflects that the European Union is 'founded upon the principles of liberty, democracy, respect for human rights and the rule of law'.⁴⁷ However, a distinctive feature of the evolution of human rights in the EU is that it was essentially driven by the ECJ, resulting in a 'judiciary driven' mandate. Hence, even though the ECJ has taken the position that there are no provisions in the EU Treaty to warrant a claim of implied human rights competence,⁴⁸ that decision cannot be completely applicable to the ECOWAS regime since the regime operates a 'legislature-driven' mandate in an intergovernmental format.⁴⁹ It is on the basis of this contested but budding human rights regime that the human rights mandate of the ECCJ has to be understood.

⁴⁵ G Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 *McGill Law Journal* pp. 849, 858

⁴⁶ Brosig (2006) p. 16

⁴⁷ Alston and Weiler (1998) p. 661

⁴⁸ See the opinion of the ECJ in Opinion 2/94 (1996) ECR I-1759.

⁴⁹ D Akande, 'The Competence of International Organisations and the Advisory Jurisdiction of the International Court of Justice' (1998) p. 9 *European Journal of International Law* 347, 451 argues that a broad construction of competence should be encouraged where the work of an international organisation is subject to the approval of member states.

3. Human rights in the mandate of the ECOWAS Court: New wine, old skin

In the relatively short lifespan of ECOWAS, the ECCJ can be described as one of the few institutions that have undergone the most transformation to meet new and emerging challenges. Conceived as a community tribunal under the 1975 ECOWAS Treaty,⁵⁰ the judicial organ of the community was born as a Community Court of Justice under its founding 1991 protocol.⁵¹ Since then, the Protocol on the ECCJ has been amended by a supplementary protocol adopted in 2005⁵² resulting in the expansion of the jurisdiction of the ECCJ. At inception, in relation to its contentious jurisdiction,⁵³ the ECCJ was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’.⁵⁴ The ECCJ could only exercise competence in cases between member states of ECOWAS or between member states and institutions of the Community. Where the interest of nationals of member states were involved in relation to ‘the interpretation and application of the provisions of the Treaty’, a member state was authorised to bring an action on behalf of its national, after amicable settlement has been unsuccessful.⁵⁵ In summary, the ECCJ was designed for the purpose of resolving disputes between subjects of international law in the interpretation and application of treaty provisions relating to regional economic integration. This was the old wine which the wineskin was made to accommodate.

Despite not having any opportunity to exercise its original competence in the first few years of its existence,⁵⁶ the relevance of the ECCJ was abruptly challenged by its very first case which involved an individual complaint not contemplated by the Court’s Protocol. Interestingly, this first case (*Afolabi Olajide v Federal Republic of Nigeria*⁵⁷) raised issues around the question of individual access to the Court. The question of individual access related to human rights and fundamental freedoms partly founded on the recognition accorded the African Charter in the 1993 revised Treaty.⁵⁸ While the ECCJ declined jurisdiction in the *Olajide* case, the fallout of the case, linked with the new visibility of human rights in the Community agenda prompted the

⁵⁰ Art 11 of the 1975 ECOWAS Treaty.

⁵¹ Protocol A/P.1/7/91 On the Community Court of Justice.

⁵² Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice.

⁵³ The ECCJ is clothed with an advisory jurisdiction by art 10 (now art 11) of the 1991 Protocol on the Court of Justice

⁵⁴ Art 9 (1) of the 1991 Protocol on the Court of Justice

⁵⁵ Art 9(2)(3) of the 1991 Protocol on the Court of Justice.

⁵⁶ The first set of judges of the ECCJ was appointed in 2001 even though the Protocol establishing the Court was adopted in 1991. The Court was idle from 2001 till 2004 when the case of *Olajide v Federal Republic of Nigeria*, 2004/ECW/CCJ/04 was heard.

⁵⁷ Unreported Suit no. 2004/ECW/CCJ/04

⁵⁸ The *Olajide* case alleged a violation of the right to free movement in art 3(iii) of the revised ECOWAS Treaty and the right to freedom of movement under the African Charter based on the provisions of art 4(g) of the revised ECOWAS Treaty. Interestingly, reliance was place on the Nigerian domesticated statute of the African Charter.

amendment of the 1991 Protocol on the Community Court of Justice. At the time the *Olajide* case was heard by the ECCJ, there was sufficient human rights content in the constitutional and other legislative instruments of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under ECOWAS Community framework.⁵⁹ However, the ECCJ shied away from such judicial activism and gave room for legislative provision of judicial competence in the field of human rights. The relevance of this observation is that the restraint exercised by the judges of the ECCJ potentially impacts on public perception of their dedication to the cause of human rights protection. This does not however, take away the fact that the approach of the Court in that case is legally defensible on the basis of the doctrine of conferred powers. In any event, the restraint by the ECCJ has resulted in a clear and unambiguous empowerment of the Court by the lawmaking organ of the Community. Thus, the human rights mandate of the ECCJ is ‘a legislature-driven’ mandate.

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Court is rather expansive in the sense that it affects the material, personal, temporal and territorial aspects of the Court’s jurisdiction with respect to human rights.⁶⁰ In addition to conferring the ECCJ with jurisdiction over cases of ‘violation of human rights that occur in any member state’,⁶¹ the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation.⁶² This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original jurisdiction. Consequently, the ‘new wine’ is an increased jurisdiction that comprises competence in disputes involving member states and Community institutions, to interpret and apply the ECOWAS Treaty from a regional integration perspective and competence in complaints of human rights violation involving member states, Community institutions, corporations and nationals of member states. With respect to the credibility of the ECCJ, the critical question then, is whether the original design of the Court is able to sustain this additional mandate without amendments to the Court’s structure, composition and procedure.

⁵⁹ See F Viljoen, *International Human Rights Law in Africa* (2007) Oxford: Oxford University Press p. 507. Viljoen argues that a more activist court would have taken a different position.

⁶⁰ ST Ebobrah, ‘A rights-protection goldmine or a waiting volcanic eruption: Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice’ (2007) 2 *African Human Rights Law Journal* p. 307.

⁶¹ New art 9 of the Protocol of the ECOWAS Court as introduced by art 3 of the 2005 Supplementary Protocol

⁶² New art 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol. Access is available to individuals and corporations for acts and inactions of Community officials which violate rights, and to individuals for violation of human rights (apparently) that occur in member states.

3.1 Structure

In relation to structure, the ECCJ remains largely fit for the original concept of a judicial forum for settling disputes arising from economic integration rather than human rights. The ECCJ is the single court in the ECOWAS legal system and its decision on a matter is final and immediately enforceable.⁶³ The ECCJ has no direct relationship with the courts on member states and does not consider itself a court of appeal or a court of cassation over decisions of national courts.⁶⁴ This is in spite of provisions in the 2005 Supplementary Protocol allowing national courts to refer domestic cases involving issues of interpretation of the Treaty, Protocols and Regulations of ECOWAS to the ECCJ.⁶⁵ This structure of the Court, when combined with the interpretation that the ECCJ cannot sit in appeal over decisions of national courts negatively impacts the human rights jurisdiction that the Court now has. The position taken by the ECCJ in at least two cases gives the impression that the Court would hesitate to hear a case or if it does, to make a finding where the case had previously been heard and decided by a national court as it does not want to overrule the decisions of national courts.⁶⁶ If this is indeed the intention of the Court, then the first effect is that a right of appeal is extinguished in cases heard by the Court as such a case would not have previously been heard by a national court. In other words, once a litigant decides to bring his case before the ECCJ, the litigant abandons his right of appeal as no other court would have previously heard the case and there is no appeal from the decision of the ECCJ. Secondly, the operation of the principle of subsidiarity in the form of requirements to exhaust local remedies before bringing human rights complaint before international courts does not apply in the ECCJ.⁶⁷ This has a double barrel effect. The one is that the ECCJ is forced to become a court of first instance, depriving the national courts of the first opportunity to remedy alleged violations. The Court thereby opens the gate for every single case of injustice from the 15 member states. The other related effect is that the majority of cases alleging human rights violation first go to national courts and such cases become barred from getting to the ECCJ. Thus, by emphasising that it is not an appellate court, the ECCJ, for example, potentially avoids all the cases alleging a violation of the right to fair trial. Either way, the ECCJ's credibility as an

⁶³ Art. 19 (2) of the 1991 Protocol of the Court. In the case of *Ugokwe v Federal Republic of Nigeria*, Unreported Suit No. ECW/CCJ/APP/02/05 the ECCJ proclaimed that it is the first and last court in Community law. (para 32 of the judgment).

⁶⁴ See the *Ugokwe* case, para 32.

⁶⁵ New art 10(f) in art 4 of the 2005 Supplementary Protocol.

⁶⁶ See the *Ugokwe* case and the case of *Keita v Mali*, Unreported Suit No. ECW/CCJ/APP/05/06, para 31. In the *Ugokwe* case, the ECCJ stressed that appealing against decisions of national courts does not form part of its powers and it can not overturn the decision of a national court. This position was emphasised in the *Keita* case. On the other hand, the Court does not seem to have had difficulty hearing cases not previously heard by national courts or at least, in which the issue in contention had not been addressed by a national court. This latter caveat is necessitated by the fact that the recent case of *Dame Hadijatou Mani Koraou v Niger*, Unreported Suit No. ECW/CCJ/APP/08/08, the Court entertained the case even though aspects of the fact had previously been tried in a national court.

⁶⁷ See Ebobrah (2007) on the inapplicability of exhaustion of local remedies. Interviews with judges and officials of the ECCJ indicate that the Court sees the non-inclusion of that requirement as a renunciation of the rule by ECOWAS. See ECOWAS Court Bulletin, (2008) Vol 1. No. 1, pp. 22 – 27 for one of such interviews.

international court is thrown open to challenge as a result of adapting the original structure to cover the new jurisdiction.

The difficulty that the ECCJ faces in insisting on holding on to its original conception as a judicial institution in non-hierarchical relation to the national courts can best be appreciated in the observation that that the ECtHR and the ECJ have different hierarchical relation to national courts of European states. As a result of the clear delineation of competences between the EU and its member states, the ECJ, for as long as it restricts itself to the area of EU competence and maintains the procedure of receiving cases essentially by reference from national courts need not 'sit on appeal' over decisions of national courts. In contrast, since the ECtHR receives human rights cases directly from individual, on every conceivable area of human rights, that court can not avoid the toga of a 'court of appeal'.⁶⁸ Herein lies one of the contradictions of placing an expanded and radically different jurisdiction on the original structure of the ECCJ.

3.2 Composition

By article 3 of the 1991 Protocol on the Community Court of Justice, the qualification for appointment as a judge of the ECCJ is 'high moral character and ... the qualification required in their respective countries for appointment to the highest judicial offices' or by being a 'jurisconsult of recognised competence in international law. This provision has been amended by a 2006 Supplementary Protocol which substitutes the original article 3 with a new article 3. The only addition in terms of qualification for the office of a judge of the ECCJ is that 'jurisconsults of recognised competence in international law' should be versed 'particularly in areas of Community law or Regional Integration'.⁶⁹ Clearly, experience or qualification in international human rights is not a consideration for appointment as a judge of the ECCJ. It can be argued that judges in national courts do not need any special human rights qualification to be appointed, yet are expected to provide the first layer of protection in the event of alleged human rights violation. However, as Besson notes, an entity claiming the status of a post-national human rights institution needs some 'global-know how' in the field of human rights.⁷⁰ The practicality of this requirement lies in the need for international courts involved in human rights protection to provide leadership and guidance for national courts in the application of human rights instruments. Such leadership becomes even more relevant for legitimacy of the system considering the gap between international judges and direct domestic mandates. It is the 'global-know how' that would prompt the sort of indebt analysis of human rights issues that international courts need if their decisions are to be taken seriously. In this respect, the original composition of

⁶⁸ L Sheeck, 'The Relationship between the European Courts and Integration through Human Rights' (2005) *ZaöRV* pp. 837, 844

⁶⁹ New article 3 in art 2 of Supplementary Protocol A/PS.2/06/06 Amending Article 3 Paragraphs 1,2 and 4, Article 4 Paragraphs 1,2 and 7 and Article 7 Paragraph 3 of the Protocol of the Community Court of Justice.

⁷⁰ Besson (2006) p. 341

the ECCJ poses challenges for the credible exercise of its human rights mandate in terms of not requiring any specific human rights qualification for appointment.

3.3 Procedure

The rules of procedure of the ECCJ were adopted in August 2003 by the Court on the basis of authority granted in article 32 of the 1991 Protocol of the Community Court of Justice. At the time those rules were adopted, the ECCJ did not have jurisdiction over human rights and the Court was not competent to receive cases from individuals. However, the current rules of procedure are generally adequate even for the purpose of the human rights competence. The only visible concern is in the fact that there is no provision for legal assistance to indigent litigants. Considering that some of the people most commonly at the receiving end of human rights violations are those at the lower end of the economic spectrum, omitting to create room for legal assistance may easily result in disempowerment of people with genuine cases.⁷¹

The issues of structure, composition and procedure raised in relation to the addition of a human rights mandate to the jurisdiction and competence of the ECCJ arise as a result of the origin and scope of the mandate. The ECJ provides an excellent comparator to the ECCJ with regard to the acquisition and exercise of a human rights mandate in the context of regional economic integration. It is generally agreed that the founding treaties of the EC/EU did not make any reference to the protection of human rights but the ECJ was forced to engage human rights in its working as a result of national challenges to its principle of supremacy of EC law.⁷² Hence, since the 1960s, the ECJ has exercised some form of human rights jurisdiction even in the absence of a mandate in that regard. As a consequence of the ECJ's pioneering and proactive efforts in bringing human rights protection within its sphere of authority, the ECJ forced the EC/EU to introduce references to human rights in later treaties. In effect, the EC/EU human rights mandate is driven by the judiciary.⁷³ However, in decades of its adaptive exercise of human rights jurisdiction, the ECJ has maintained its structure, composition and procedure without any visible negative impact on the protection of human rights. Even though, there are some who doubt the suitability of the ECJ to play the role of a human rights court,⁷⁴ the ECJ has continued to exert its influence in the field of human rights in Europe. Perhaps the difference between the ECJ and the ECCJ in this regard lies in the fact that the ECJ exercises limited competence in the field of human rights. Without the unambiguous special legal basis in human rights, the ECJ has restricted itself to human rights as it relates to the 'interpretation and application of European Community law'. Thus, the view has been expressed that the ECJ is a 'tardy convert to human

⁷¹ C/f art 31 of the Interim Rules of the African Court on Human and Peoples' Rights (on file with this author).

⁷² Alston and Weiler 81998) p. 665.

⁷³ Shelton (2006) 124, Alston and Weiler 81998) p. 709

⁷⁴ Brosig (2006) p. 19

rights'.⁷⁵ To the extent that individual access to the ECJ is limited and the ECJ addresses only human rights in relation to application of or derogation from European Community law, its human rights mandate is different from that of the ECCJ. These are some of the reasons why challenge to its existing structure does not arise.

Putting new wine in old wineskin does not always result in the disaster of a burst skin and spilled wine but the disaster looms until the old wineskin shows its durability and worth by stretching to accommodate the new wine. To date, the ECCJ has done fairly well in adapting to its growing role as an economic integration cum human rights court. But the quality of protection it offers can improve significantly if concerns identified are addressed. This paper would offer some advice at a later section. Having demonstrated that the ECCJ has a clear human rights mandate, the following section of the paper examines the nature of the mandate.

⁷⁵ KD Magliveras and GJ Naldi, 'The African Court of Justice', *ZaöRV* 66(2006) p. 192

4. Complexities of an evolving jurisdiction: undecided questions

An intriguing aspect of the evolving human rights jurisdiction of the ECCJ is the fluidity that surrounds the mandate and its exercise. In a sense, the complexities that come out of the vagueness and consequent fluidity of the jurisdiction can both be constructive and destructive. Thus, an understanding of the unresolved issues that would make or mar the emerging system is vital to guide the response that the ECCJ and all concerned actors would make where these issues turn up for determination. There are at least five of such issues that can be identified. In considering these issues, it has to be borne in mind that the credibility of the system depends, to a large extent, on the ability of the ECCJ to act within the bounds of the powers conferred. This essentially requires a delicate balance between meeting the expectations of the citizenry – touching on the effectiveness of the Court- and respecting the legal and legitimate bounds set by member states. This section of the paper would examine these complexities.

4.1 Scope of the power of judicial review: any limits?

Generally, the exercise of supranational legislative powers by international organisations is strictly confined to pre-determined issue-areas voluntarily ceded by the states that converge in such international organisations.⁷⁶ Consequently, the powers of judicial review by the judicial or quasi-judicial bodies of such international organisations are also usually restricted to the areas over which the international organisation has been granted legislative competence. This rule may not apply with exactly the same level of rigidity in essentially intergovernmental organisations as the legislating powers in such intergovernmental arrangements effectively remains with the heads of states and governments of converging states. The level of resistance to the ceding of sovereign powers is even higher among African states for reasons beyond the scope of this paper. However, under the platform of ECOWAS, West African heads of states and governments have made moves to create a supranational organisation with powers to exercise direct jurisdiction (legislative and judicial) over the territories, nationals and institutions of the integrating states.⁷⁷

Notwithstanding the rhetoric on the transformation of ECOWAS into a supranational organisation, it is noteworthy that the Authority of heads of states and governments remains the supreme organ of ECOWAS and thus, control and highest legislative competence resides in the heads of state and government. Another vital observation is that even in the field of economic integration, ECOWAS does not seem to have clearly delineated the subjects that fall within the competence of the Community and those that remain with the states. In this regard, it is easy to

⁷⁶ See the *Reparation case*

⁷⁷ By the new legal regime of ECOWAS introduced in 2006/2007, it is intended that legislative instruments of ECOWAS should apply directly in member states without the necessity of protocols and treaties. This regime does not seem to have been commenced as at November 2008.

point out the clear distribution of competence between the EC/EU. However, while it could be argued that the highest legislative competence in the EC/EU also remains with the European states to the extent that it resides in the EU Council of Ministers, the practice of majority voting in decision-making strengthens the quality of supranationality in the areas that fall within the legislative competence of the EC/EU. The relevance of this distinction to the present discourse is that whereas the ECJ's exercise of human rights jurisdiction revolves around the areas of EC/EU competence, it is not possible to clearly identify the boundaries of the human rights mandate of the ECJ.

It is evident from the vast literature on the human rights practice of the ECJ that there are clear boundaries beyond which the ECJ would not seek to apply judicial competence. As the EU is a 'multi-layered institution' comprising of Community institutions and member states institutions, the powers of the ECJ spreads over internal acts and legislation (EC/EU) as well as acts and institutions of member state institutions.⁷⁸ In terms of EC/EU legislations and conduct, the human rights enquiries of the ECJ do not seem to apply to primary legislation of the Community/Union although it would apply to secondary legislations.⁷⁹ However, the ECJ monitors compliance with human rights when the EC/EU acts on its own competence through Community institutions.⁸⁰ In terms of member states legislations and actions, there are layers of jurisdiction issues. As a general rule, the human rights jurisdiction of the ECJ is 'essentially limited to matters within the fields of EU law...'⁸¹ so that 'if member states were bound by EU fundamental rights, it was not in their own fields of competence and the EU had no business telling them how best to protect human rights in their national sphere of competence'.⁸² Even within the competence of the EU, ECJ scrutiny of member states human rights compliance was initially restricted to situations where the member state in question acted in the execution of EU legislation, that is, in cases where the state acted as an agent of the EU.⁸³ Subsequently, ECJ scrutiny extended to cases arising from situations where member states derogate from the application of Community law.⁸⁴ Thus, effectively, insofar as member states are concerned, ECJ scrutiny for human rights compliance of legislation and action arises where states act as agents of the EU in making implementation legislation in an area of EC/EU competence or where state institutions execute

⁷⁸ Besson (2006) p. 353

⁷⁹ TC Stever, 'Protecting Human Rights in the European Union: An Argument for Treaty Reform' (1996 -1997) p. 20 *Fordham International Law Journal* pp. 919, 941.

⁸⁰ Ahmed and Butler (2006) 773

⁸¹ C Lyons, 'Human Rights Case Law of the European Court of Justice, January 2003 to October 2003' (2003) *Human Rights Law Review*, Vol. 3 No. 2 pp. 323, 344

⁸² Besson (2006) p. 344

⁸³ J Kingston, 'Human Rights and the European Union – An Evolving System' in MC Lucey and C Keville (eds.) *Irish Perspectives on EC Law* (2003) Dublin: Round Hall p. 275

⁸⁴ *Ibid.* J Holmes, 'Human Rights protection in European Community Law: The Problem of Standards' in JF Beltran and N Mora (eds.) *Politics and Morality: European perspectives II*, Utlanssaml p. 160

EU legislation as agents of the EU, or where states legislate or act in derogation of EU law and in permissible exceptions from EU legislation.

On the part of the ECCJ, it is not possible to identify the boundaries of the Court's human rights jurisdiction. As previously noted, there are no clear demarcations between Community competence and states competence. The ECOWAS treaties basically refer to member states cooperation in specified field of actions. However, from a human rights perspective, it is possible to identify what can liberally be described as 'community treaty rules' in the areas of immigration, touching on the rights of free movement, residence and establishment.⁸⁵ It is around these economic freedoms that ECOWAS has made the most elaborate 'collective legislation' having binding effect on the member states. The Treaty provisions in these areas have been strengthened by protocols drafted in similar rights language. A survey of the cases already decided by the ECCJ however, demonstrates that the ECCJ does not restrict its scrutiny of human rights compliance to the economic freedoms: whether from the perspective of Community institutions or member states' institutions.⁸⁶ Indeed, the provisions of new articles 9(4) and 10 of the 2006 Supplementary Protocol of the Court do not set any boundaries for the court in terms of competence partitioning. Thus, the ECCJ can and does exercise jurisdiction to scrutinise the human rights situation of member states insofar as there is an alleged violation.

From the view-point of a human rights lawyer, the fact that the ECCJ has no limitations whatsoever in its human rights mandate should be cause for celebration. This is especially so seeing that the ECCJ has emerged in a situation where most domestic courts have not lived up to the high expectations of human rights lawyers and activists alike. The supervisory institutions of the continent-wide African human rights system themselves have left so much to be desired. The African Commission comes under constant (though decreasing) attacks while the African Court of Human and Peoples' Rights is only just emerging.⁸⁷ In these circumstances, the emergence of a court with powers to make binding decisions at the transnational plane becomes an exciting prospect. In fact, the ECCJ has in a way even begun to justify the confidence and hopes of its admirers with recent decisions finding violation of human rights for detention without trial of a Gambian journalist,⁸⁸ and for failure of a state to prevent the practice of slavery.⁸⁹ However, these positive aspects need not becloud constructive assessment of the possible consequences of the fluid jurisdiction of the ECCJ. The first point to note is that there is the likelihood of conflict between national courts of member states and the ECCJ on the one hand and between the ECCJ

⁸⁵ Art 59 of the 1993 revised ECOWAS Treaty. The article is drafted in rights language as against most other provisions which are statements that states agree to cooperate for set purposes.

⁸⁶ See eg in the *Ugokwe* case, the violation alleged was fair hearing relating to national elections. In the *Keita* case, the violation alleged was on the bases of alleged refusal by the state party to compensate for damage to art work.

⁸⁷ The Protocol establishing the African Court of Human and Peoples Rights was adopted in 2004 but the rules of the court have only just appeared in 2008.

⁸⁸ *Chief Ebrimah Manneh v The Gambia*, Unreported Suit No. ECW/CCJ/APP/04/07

⁸⁹ *Koraou case* (n 66 above)

and continent-wide supervisory institutions on the other hand. Considering that the ECCJ can exercise jurisdiction on the same competence areas as the national courts, forum shopping is a present danger. With respect to the continent-wide institutions, the ECCJ now shares jurisdiction with the African Commission and the African Court, over the same instrument (the African Charter), the same territories, peoples and institutions, albeit, in a given part of the African continent. With the potential of conflicting decisions, fragmentation of the African international human rights is a risk that is unavoidable. Further, the realities of the manner in which African states jealously guard national sovereignty holds the danger of future state resistance to the unrestricted jurisdiction of the ECCJ to scrutinise their human rights conducts on issues perceived as purely domestic concerns. These are some of the possible challenges that need to be addressed at some stage of the court's evolution. (Legitimacy of international courts vis-à-vis national courts)

4.2 Relationship between the ECCJ and national systems: the ostrich approach

There are two possible dimensions from which the relationship between the ECCJ and the domestic courts of member states of ECOWAS can be examined. First, linked to the discourse on demarcation of competence, is the question relating to which system should have the first opportunity to scrutinise alleged human rights violations that occur in the member states. Secondly, there is the question of hierarchy and status of the one system in the 'eyes' of the judges of the other system. These questions are essential against the fact that the decisions of the ECCJ (including in the field of human rights) have to be judicially enforced by the domestic courts in the member states.⁹⁰

Owing to the nature of international law and international relations, international judicial practices that involve exercising jurisdiction directly over the territories, nationals and institutions of sovereign states usually requires some form of coordinated relation between the post-national judicial system and the domestic legal system. Hence, it has been suggested that the European human rights convention system is 'based upon a partnership between the national courts and the Strasbourg Court'.⁹¹ Similarly, the development of the human rights jurisdiction of the ECJ under the EC/EU system has been attributed partly to the ECJ's reaction to national courts' challenge of the ECJ doctrine of supremacy of Community law.⁹² Thus, it is possible to identify some sort of partnership between the ECJ and national courts in the EC/EU system. In the case of the ECCJ,

⁹⁰ New art 24 of the Court Protocol (in art 6 of the 2006 Supplementary Protocol of the ECOWAS Community Court of Justice) provides that decisions of the ECCJ shall be submitted to the relevant member state for execution 'according to the rules of civil procedure of that Member state'.

⁹¹ RCA White, 'The Strasbourg Perspective and its effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnall, P Eeckhout and T Tridimas (eds.) *Continuity and Change in EU Law* (2008) Oxford: Oxford University Press p. 155

⁹² A Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Arnall *et al* (2008) p. 126

despite the provisions that require the involvement of the national courts, there are no Treaty or other ECOWAS legislative provisions that ‘speak to’ the relations between the legal systems. In terms of practice, the ECCJ seems to have adopted an ostrich approach of avoiding the question. There are at least two cases to illustrate this point. In the *Ugokwe* case,⁹³ the ECCJ stressed that the ‘relationship existing between the Community Court and these national courts of Member states are (sic) not of a vertical nature ...but demands an integrated Community legal order’.⁹⁴ This was subsequent to stating that the ECCJ could not receive appeals against decisions of the national courts of member states.⁹⁵ If ‘integrated’ is understood to mean ‘included’ or ‘incorporated’ or it is understood to mean ‘parts that work together’ or even ‘bringing dissimilar parts to work together’, what rules would apply to determine where a prospective litigant should go first? Subsequently, in the *Kéïta* case, the ECCJ reaffirmed that it is not a court of appeal.⁹⁶ It however, stated that within the context of article 10 of the Court’s Protocol it ‘can only intervene when ...courts or parties in litigation expressly so request it within the strict context of the interpretation of the positive law of the Community’.⁹⁷

It comes out from the discussion above that the ECCJ seems to be avoiding conflicts with national courts of ECOWAS member states. However, in doing so, the ECCJ evades rather than try to assert some form of authority, if only in the field of ECOWAS Community law. The result is that confusion is blown up with regards to when a matter should come before the ECCJ as vis-à-vis the national courts. In fact, it has to be stressed that the provision in article 10(f) of the Supplementary Court Protocol on requests by national courts to the ECCJ relates to references for interpretation which the nationals are at liberty to decide whether or not they want to. Thus, as it stands, the ECCJ shares jurisdiction with the national courts insofar as a litigant decides to submit a case to the ECCJ without any prior reference to a national court. The practice of the ECCJ in this regard, it is submitted, is not legally wrong, considering that there is no requirement for local remedies to be exhausted before a case alleging human rights violation is brought before the ECCJ.⁹⁸ The danger in this regime is that national courts, which are closest to the *loci*, may not be given the first opportunity to remedy the alleged wrongs. Such an overreaching practice could even ignite resistance by national courts, at least in the form of refusal to give domestic judicial backing to the decisions of the ECCJ. However, in a positive sense, the practice allows for easy access to the ECCJ without the complications of spending time and resources in pursuing domestic remedies.

⁹³ n 63 above.

⁹⁴ *Ugokwe* case, para 32.

⁹⁵ *Ibid.*

⁹⁶ *Keita* case, n 66 above para 31

⁹⁷ *Keita* case, n 66 above para 27

⁹⁸ Ebobrah (2007) p. 316

The approach of the EU system to the present challenge, while not expressed in statements of hierarchical relation between the ECJ and the national courts of European states, can be found in the treaty principle of subsidiarity and in the jurisprudential assertion of supremacy of EU law by the ECJ. By the operation of the principle of subsidiarity, European Community powers are exercisable only where the objectives intended cannot be adequately achieved if action in the given area is taken by the member states.⁹⁹ The principle has also been interpreted to mean that ‘decisions should always be taken at the level closest to the citizen at which they can be taken effectively’.¹⁰⁰ This, it is argued further, essentially creates a ‘presumption in favour of action at the level of member states except where exclusive Community competence has already been granted’.¹⁰¹ Applied to human rights, a common view is that member states are closest to the *loci* of alleged violation and are in a better position to protect rights. Hence, the principle has based opposition to EC/EU accession to the European Convention on Human Rights (ECHR) that could lead to making human rights a central theme of the EC/EU.¹⁰² Thus, while in one breath, by ECJ jurisprudence, EU law primes over national laws and the ECJ has positioned itself as the principal judicial organ of the Community, the national systems (therefore, the national courts) retain the right to deal with these issues and the ECJ is basically a court of last resort of sorts. However, it has to be noted that there are commentators who hold the view that any assumption that the principle of subsidiarity banishes matters of human rights to the national plane would be wrong, as such an assumption undermines the objectives of the principle.¹⁰³ From an ECOWAS perspective, this later view can be very attractive as the argument can be made that the ‘turmoil’ that human rights faces at the domestic level in most states favours removing human rights litigation to the ECOWAS Community level. If it is considered that prior consideration of human rights matters does not shut out subsequent consideration at the Community level, the attractiveness of the argument is reduced. For as long as the question is not addressed, it hangs over the growth of the system.

The other uncertain aspect of the relation between the ECOWAS legal system and the national system with respect to human rights relates to the status that the ECCJ has before national courts. As already observed, the article 10(f) of the ECOWAS Court Protocol allows national courts to refer issues relating to the interpretation of ECOWAS Treaty and legislative provisions to the ECCJ, where such issues arise in cases before national courts. However, the provision makes use of the term ‘may’ which would imply that it is a permissive rather than an obligatory requirement. In other words, where a case is brought before a national court and a claim for human rights linked to the ECOWAS instruments are included, the national court is not under any legal duty to refer such cases to the ECCJ. The mischief inherent in such a situation is that, as

⁹⁹ Art 3b of the EC Treaty, Shelton (2003) p. 135

¹⁰⁰ Alston and Weiler (1998) p. 683

¹⁰¹ *Ibid*

¹⁰² TC Stever (1996-1997) p. 989

¹⁰³ Alston and Weiler (1998) p. 683

the ECCJ would generally not hear matters already decided by the national courts, the matter would never come before the ECCJ for determination. The other angle to the quandary relates to the perception of the ECCJ by national courts. Considering that the ECCJ holds out itself as an equal partner in an integrated community legal order, in the common law jurisdictions especially, national courts would not be bound by the decisions of the ECCJ. At best, national courts can ignore the decisions and proceedings of the ECCJ. At the worst, national courts could give judgments that are parallel and conflict with decisions of the ECCJ. At the very extreme, national courts could even hear cases challenging the legality or constitutionality of judgments of an international court not recognised under national law. In any of these scenarios, human rights protection by the ECCJ would be threatened. Thus, an approach avoiding to deal with these issues as if they would go away (the ostrich approach) is a danger in itself to the existence and growth of the system.

4.3 Indeterminacy in the mandate

Indeterminacy in the human rights jurisdiction of the ECCJ has two aspects, one of which is specific to the ECCJ and the other being the general character of human rights instruments. The usual effect of indeterminacy in legal discourse is that it raises questions of judicial discretion and hence, the remote challenge of judicial preparedness to exercise conferred or implied discretion. In the first place, in granting human rights competence to the ECCJ, the 2006 Supplementary Protocol of the ECOWAS Community Court does not specify what instruments are applicable in the determination of human rights cases by the Court. This therefore leaves open the question whether only exclusively ECOWAS instruments such as the ECOWAS Treaty, Conventions, Protocols and other subsidiary instruments of the ECOWAS Community are applicable or whether the ECCJ may rely on any other human rights instrument. The general indeterminacy is that which is associated with human rights instruments generally. Fortunately, the increasing jurisprudence of the ECCJ provides some guidance in these areas and these would be constantly referred to in the discourse.

By the new article 9(4) of the ECOWAS Court Protocol, 'The Court has jurisdiction to determine cases of violation of human rights that occur in any member state'. Considering that ECOWAS is primarily a community for economic integration and the original mandate of the ECCJ is to 'ensure the observance of law ...in the interpretation and application of the provisions of the Treaty', the provisions of the article 9(4) of the Court Protocol leaves room for all kinds of interpretations. It is possible to put forth the argument that against the background of its original mandate, article 9(4) should be interpreted to mean that the ECCJ can only hear cases of violations of human rights provisions contained in the 1993 revised ECOWAS Treaty and in the conventions and protocols that form part of the Treaty. If this were the case, the clear Treaty provisions in question would be the rights of free movement, residence and establishment contained in article 59 of the revised Treaty. Should a more liberal interpretation be adopted,

human rights provisions in the Treaty could expand to include the undertaking to respect the right of access to information and to respect the rights of journalists.¹⁰⁴ These enumerated rights, it can be argued further, have direct links to the realisation of the economic objectives of ECOWAS and therefore can be loosely classified as economic freedoms. However, such an approach would spark some of the controversies that surrounded the ECJ's human rights practice when the ECJ was seen as protecting economic freedoms to the detriment of wider human rights concerns.¹⁰⁵ Such a situation would invariably even restrict the enjoyment of rights protection under the regime to participation in the economic sphere. However, a teleological approach would lead to an interpretation that statements of agreement in the Treaty, to cooperate for the purpose of realising the objectives of the African Charter implies that human rights in that instrument form part of the human rights provisions of the Treaty.¹⁰⁶

As certain conventions, protocols and supplementary protocols of ECOWAS are deemed to form part of the Treaty, it is also possible to interpret the new article 9(4) of the ECOWAS Court Protocol to include rights contained in such instruments. In this context, certain ILO Conventions dealing with Migrant workers (incorporated by definition in some protocols of ECOWAS) can be included as part of what could found actions before the ECJ.¹⁰⁷ In fact, the ECCJ seems to have taken this sweeping understanding of Treaty, conventions and protocols in its interpretation of the mandate granted by the 2006 Supplementary Protocol of the Court. Hence, in the *Kéïta* case, the ECCJ took the view that:¹⁰⁸

...as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies the legal proceedings before the Court.

The dicta of the ECCJ in the *Kéïta* case can be read in several ways. It can be read to mean that only those rights relevant for the movement towards economic integration can base complaints of human rights violation. The dicta can also be read to mean that insofar as a right or group of rights are present in any of these instruments adopted for the functioning towards economic integration, they form part of ECOWAS legislation and can be applied. The latter understanding is better as the former would be unduly restrictive.

It is also possible to interpret article 9(4) of the ECOWAS Court Protocol to say that all human rights contained in any human rights instrument directly or remotely referred to in the legislative

¹⁰⁴ Art 66 of the revised ECOWAS Treaty.

¹⁰⁵ MP Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in P Alston (ed.) *The EU and Human Rights* (1999) Oxford: Oxford University Press p. 449.

¹⁰⁶ Art 56 of the 1993 revised ECOWAS Treaty.

¹⁰⁷ The challenge here would be that not all ECOWAS member states have ratified all the relevant ILO Conventions.

¹⁰⁸ *Keïta* case, n 66 above, para 27.

instruments of ECOWAS can found an action for human rights protection before the ECCJ. From this perspective, references to human rights instruments in preambles and statements of fundamental principles of ECOWAS instruments would be sufficient to entrench such instruments as sources of human rights law in the ECOWAS context. Thus, in the *Ugokwe* case, the ECCJ in trying to address the indeterminacy in its mandate, interpreted article 4(g) of the revised ECOWAS Treaty as requiring application of the African Charter in the context of articles 9 and 10 of the 2006 Supplementary Protocol of the Court. The ECCJ stated thus:

In articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provisions of article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including ‘the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter n Human and Peoples’ Rights’.

Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.¹⁰⁹

While it provides reasoning for its use of the African Charter, the Court has not been so expressive of the reasons for its use of the UDHR. Yet, the UDHR has appeared frequently in proceedings before the ECCJ, either in the pleadings of litigants or in the decisions of the Court itself. The ECCJ has placed unambiguous reliance on the UDHR in at least three of its decisions.¹¹⁰ What is clear however, is that both the African Charter and the UDHR appear in varying frequency in parts of ECOWAS legislative instruments and this strengthens the argument that article 9(4) of the Supplementary Protocol of the Court can be read to accommodate actions based on all such enumerated human rights instrument. This attitude to interpretation benefits litigants before the ECCJ.

Apart from the African Charter and the UDHR, other human rights instruments upon which actions before the ECCJ have been founded, and which the Court has referred to in judgments include the International Covenant on Economic, Social and Cultural Rights (CESCR),¹¹¹ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)¹¹² and the Slavery Conventions¹¹³. While CEDAW is mentioned in at least one ECOWAS legislative

¹⁰⁹ *Ugokwe* case, para 29.

¹¹⁰ *Keita* case n 66 above, *Professor Etim Moses Essien v The Gambia*, Unreported Suit No. ECW/CCJ/APP/05/05 and in the *Karaou* case, n 89 above.

¹¹¹ *Essien* case as above.

¹¹² *Karaou* case n 89 above.

¹¹³ *Ibid*

document,¹¹⁴ the other two instruments are yet to be specifically mentioned or enumerated in ECOWAS documents. To a lesser extent, provisions of national constitutions of member states have also been relied on in actions before the ECCJ although it is not clear whether the Court sees national constitutions as part of its sources of law. The fact cannot be denied that the liberal interpretation that the ECCJ has given to articles 9 and 10 of the Supplementary Protocol of the Court encourages robust human rights litigation. However, as already argued in this paper, the credibility of the ECCJ (as indeed applies to all international courts with conferred powers) depends on the Court's ability to get results while acting within the legal and legitimate boundaries of its competence. This much is required by article 6(2) of the 1993 revised ECOWAS Treaty that limits the functioning of ECOWAS institutions to the powers expressly conferred by the Treaty and Protocols of the Community. It will therefore be useful to assess whether the ECCJ has acted credibly in the exercise of the apparent discretion resulting from the indeterminacy of the provisions of the Supplementary Protocol of the Court.

It may appear contradictory to assert that indeterminacy grants a right to exercise judicial discretion, yet try to assess the legality and legitimacy of this discretion. But it has to be borne in mind that judicial decisions do not exist in vacuum since they have to relate as much as possible to existing positive law. As some would like to argue, the main duty of the judge is not to make law but to interpret law that has been made. The view has been expressed however, that judicial interpretation can take either of two forms. In the first sense, interpretation is essential in the context of identifying the meaning of a given text 'so that interpretative statements can be true or false depending on whether or not they reflect that meaning'. In the other sense, interpretation extends to creating the meaning of the text.¹¹⁵ In both forms, there is some element of judicial discretion which could mean freedom to choose among different options, lack of binding legal standards in the form of precedence or the absence of a superior reviewing authority.¹¹⁶

The legitimacy of judicial discretion exercised in the form of creating meaning in a given text depends on whether there is room for choice and whether the authority to make the choice resides in the court, either by positive conferment or as a result of legal indeterminacy. Citing Kelsen, Vidal notes that there are two types of indeterminacies; intentional indeterminacy and unintentional indeterminacy. Both types of indeterminacy have the effect of empowering the applying authority to fill the gap created by indeterminacy.¹¹⁷ However, the degree of discretion in situations of unintentional indeterminacy is lower than in intentional indeterminacy so that the creation of meaning by the applying authority is limited by surrounding regime standards.¹¹⁸ It would appear therefore that the authority, even where its decision is not subject to review, has to

¹¹⁴ See for eg, the Supplementary Protocol on Democracy and Good Governance.

¹¹⁵ IL Vidal, 'Interpretation and Judicial Discretion' in Beltran and Mora 82006) p. 90

¹¹⁶ Vidal (2006) p. 95

¹¹⁷ Vidal (2006) p. 96

¹¹⁸ Ibid.

restrict itself to the principles and standards that can be found within the ‘walls’ of the given legal system.

Clearly, the 2006 Supplementary Protocol of the ECOWAS Community Court of Justice does not expressly confer power on the ECCJ to ‘determine’ the human rights instruments that should be applicable in cases brought before the Court. It is rather the indeterminacy of the Protocol that has created room for the exercise of discretion by the ECCJ. Hence, relying on the arguments, it can be argued further that the ECCJ does not have absolute discretion in the sense of giving itself a right to hear cases based on every single human rights instrument that exists. The legitimacy of the discretion would require that the human rights instruments applied should be those acknowledged by ECOWAS by way reference in other documents of the Community. It is possible to identify a strain of this consciousness in the jurisprudence of the ECJ. In the early days of its foray into the field of human rights, the ECJ restricted its standards of scrutiny to human rights found within ‘the Community legal order’ and in the ‘constitutional traditions common to the member states’.¹¹⁹ The indeterminacy that arose out of this approach was met with the ‘adoption’ of the ECHR as a major source of inspiration.¹²⁰ The ECJ appears to have also made some references to the European Social Charter and the non-binding EU Fundamental Rights Charter but it has basically restrained from applying universal human rights instruments as much as possible. Looking with the eyes of the human rights practitioner, the liberal approach of the ECCJ is more convenient but it holds the risk of undermining the legitimacy of the system. It also poses a risk of conflict with the supervisory organs established in some human rights instrument should the ECCJ decided not to defer to the jurisprudence of such organs.

The general indeterminacy relates to the general indeterminacy of human rights instruments. As a result of the contending interests and views that need to be balanced in the negotiation of human rights instruments, most instruments emerge in vague, imprecise and abstract forms.¹²¹ Hence, Koskeniemi has noted that the ‘linguistic openness of rights discourse leads to policy being made determinative of particular interpretative outcomes’. In the context of ECOWAS, the human rights provisions scattered in different documents of the Community require concrete judicial interpretation in order to acquire the status of useful statements of law for the benefit of ECOWAS citizens. The ECCJ also has the challenge of giving ‘judicial breath’ to the neutral provisions in the various instruments that it applies. This has to be done, taking into context, the legal status of such instruments in the national legal systems of member states. A constructive balancing process in this regard is essential to preserve both the credibility and the effectiveness and efficiency of the Court. Up till now, the ECCJ has not had the opportunity to ‘interpret’ human rights provisions in the ECOWAS Community documents.

¹¹⁹ Tizzano (2008) p. 127

¹²⁰ Sheeck (2005) pp. 850 - 852

¹²¹ Brosig (2006) p. 15

4.4 Interpretation of state responsibility

It is now commonly accepted in international human rights circles that human rights instruments give rise to duties of respect, protection, and fulfilment. These duties have also been categorised as obligations of conduct and obligations of result. They can further be classified as negative duties and positive duties. Generally, the duty to respect is a negative duty while the duties to protect and fulfil are positive duties. Both sets of duties can be found in all human rights in spite of previous classification of rights in terms of generations of rights. With respect to the human rights mandate of the ECCJ, the uncertainty in this regard lies in the question whether the term ‘violation’ as used in the empowering provision relates to both positive and negative duties of member states. Considering that the undertaking by states in article 5 of the revised ECOWAS Treaty reflects both positive and negative duties, should the ECCJ apply its mandate to both types of duties? Put differently, what is the nature of failure of state obligation that can activate the human rights jurisdiction of the ECCJ? This is a particularly interesting inquiry when it is considered that resistance to judicial enforcement of social, economic and cultural rights in national systems is a reflection of feelings that courts ought not to interfere in the allocation of resources by finding violation of positive duties.

It goes without saying that violation of negative duties are within the ambit of the ECCJ’s human rights mandate. The Court itself seems to look out for such violations in the inquiries it makes in cases already decided.¹²² The scrutiny of violation of positive duties are however not so easy to justify. The difficulty would be linked to the fact that it is possible to argue that the ECCJ lacks political legitimacy and technical competence to determine how member states apply scarce national resources. This difficulty is apparent in the depth of the position taken by the African Commission in seeking to identify the nature of the positive duty imposed on Nigeria by social and economic rights provisions in the African Charter.¹²³ The relative ease that national courts would have in this area is evident in the robust decisions of the South African Constitutional Courts in actions imposing positive duties on government.¹²⁴ However, to the extent that it has found state violation for failure to protect rights from being violated by third parties, the ECCJ has effectively moved into the square of positive duties of member states.

In their assessment of EU human rights practice, some commentators have found an essentially negative approach to human rights protection in that regime.¹²⁵ The ‘negative integration’ approach has also been attributed to the ECJ’s practice in the sense that the ECJ sees its role as merely to prevent European Community and national institutions implementing common policies

¹²² See for eg, the *Essien* case n 110 above, where the Court’s focus was on whether the state had failed to respect the right to equal pay for equal work.

¹²³ *SERAC and Another v Nigeria*, (2001) African Human Rights Law Reports (AHRLR) 60

¹²⁴ The South African Constitutional Court is famous for its decisions in cases such as *Grootboom v South Africa* (2000) 11 BCLR 1169 in which ESCRs were litigated upon.

¹²⁵ Ahmed and Butler (2006) p. 794

and legislation from interfering with the enjoyment of recognised human rights.¹²⁶ It is argued however, that if the EU perceived itself to be bound by international human rights obligations, it would conceive its human rights duties in the tripartite classification to respect, protect and fulfil.¹²⁷ The attraction of the tripartite conception is that it gives room for the ECCJ to ensure that ECOWAS member states protect rights from third party violation. Constant reference to international human rights instruments in ECOWAS documents suggests that the ECOWAS Community sees itself as bound by international standards. It can safely be concluded in this regard that the ECCJ is on track in its combined approach to state duties and responsibilities in human rights cases.

4.5 Standard setter or just another court?

Linked to the question of the relation between the ECCJ and the national courts of member states is the question of the objective of the human rights mandate of the ECCJ. While the mandate is still evolving, it is necessary to delineate whether the ECCJ should take cases that positions the Court as a standard setter or it would embrace all sorts of cases and show itself as just another court. Making this determination is useful for a number of reasons. In the first place, the nature of cases taken by the Court and the jurisprudence that results from that could determine whether national courts would perceive some sort of regional ‘judicial hegemony’ in the jurisprudence of the ECCJ. It would also prevent a situation of a clash of jurisdiction and jurisprudence as the ECCJ would be providing ‘judicial leadership’ in areas of human rights that are relatively new. Considering that the ECCJ only has seven judges and the Court has to serve the entire West African region, there is the potential of the caseload becoming a burden. In that regard also, careful choice of cases would prevent a situation of the ECCJ becoming a victim of its own success. However, in this regard, there needs to be care not to shut out deserving cases unduly. Finally on this point, careful choice of cases brought before the Court would ensure that the goal of the mandate would not be to provide justice in every conceivable case, thereby moving far from its original mandate and thus antagonising member states of ECOWAS, but will enable the Court build a democratic environment in the region. It is in this context of building and preserving a democratic environment with respect for human rights that the link between human rights, conflict prevention and the objective of economic integration can be found.

As currently practiced, there is no clear guidance as to what kind of cases should be brought before the ECCJ in pursuit of its human rights mandate. Since article 9(4) of the Court’s Protocol (2006 Supplementary Protocol) permits the ECCJ to ‘determine cases of violation of human rights that occur in any Member State’, a variety of matters have been brought before the Court.

¹²⁶ EF Defeis, ‘Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights’ (2000 – 2001)19 *Dick International Law Journal* pp. 301, 313

¹²⁷ Ahmed and Butler (2006) p. 796

Hence, the Court has received cases based on non performance of a commercial contract,¹²⁸ dissatisfaction with elections in a member state,¹²⁹ dissatisfaction with remuneration for work done on the basis of a contract of employment¹³⁰ and failure of a state to compensate a national for damage to artefacts.¹³¹ The Court has also received cases alleging violation based on inheritance of the estate of a deceased¹³² and on slavery.¹³³ While all these cases have been couched in human rights complaint formats, some have little to do with the complex human rights issues and are matters that can be resolved in national courts. The generality of these cases also aim at providing immediate and personal benefit for the individual litigant. Granted that judgments of a court of law has no use if it can not benefit any one, it is submitted that the aim of an international court should be to cases which have wide consequence for the greatest number of people. Thus, for example, the case relating to slavery may have had an immediate benefit for the victim, but it is significant to the extent that it addresses a societal malaise with wide consequences. While the ECCJ cannot determine the cases that come to it, it can set guidelines by setting down clear guidelines in decisions that are made in the cases already before the Court.

The experiences of the European human rights system and of the European Courts would be relevant to demonstrate the point being canvassed. Relating to the ECHR, it is reported that at the drafting of the instrument, it was understood by the drafters that the concern is not with ‘every case of injustice which happens in a particular country, but with the question whether a county is ceasing to be democratic; Have those freedoms, give effect to those freedoms and you will ensure that each state remains democratic’.¹³⁴ This approach sits nicely with the role of the ECCJ as an international court within the framework of economic integration, regulating human rights for the purpose of creating an environment suitable for the economic goals. Focusing on the cases that maintain the level of democratic governance and respect for human rights without necessary entering into the ‘national playing field’ is vital for the credibility of the Court. In a similar vein, it has been noted that human rights in the ECJ rarely results in individual benefits for litigants.¹³⁵ Conceded that this, if it is entrenched, is extreme, the ECCJ needs to take care to select cases that would have wider consequences while providing succour to the individual litigant. The immediate challenge however, is that the human rights of the ECCJ is still at its infancy and cases are only coming in tickles presently. Making the right choice and using its case law to establish itself as a standard setter rather than just another court is most important for the ECCJ to maintain a position of judicial superiority in the absence of a structure of hierarchy.

¹²⁸ *Chief Frank Ukor v Rachad A Laleye*, Unreported Suit No. ECW/CCJ/APP/01/04

¹²⁹ *Ugokwe* case, n 63 above.

¹³⁰ *Essien* case, n 110 above.

¹³¹ *Keita* case, n 66 above.

¹³² *Alice Chukwudolue and 7 Others v Senegal*, Unreported Suit No. ECW/CCJ/APP/07/07

¹³³ *Karaou* case, n 89 above.

¹³⁴ Quinn (2001) p. 857

¹³⁵ Stever (1996-1997) p. 967

The complexities and ambiguities of the evolving system have been considered to provide a basis for investigating the quantum of protection that the system provides or should provide for ECOWAS citizens. In the following section, this paper will examine documents and jurisprudence of the system to assist an understanding of the classes of rights that can be guaranteed under the human rights mandate of the ECCJ.

5. The content of the mandate

The term ‘human rights’ is generally not a confusing term. At its most basic level, ‘human rights’ is understood to represent the rights that are inherent in a human being by the simple fact of being human.¹³⁶ Thus, at that simplistic level, reference to human rights in any document ought not to pose a problem as any one should immediately understand what is meant by that term. However, the term human rights has come to mean different things to different people and as its popularity increased, so did its division into compartments and the struggle to expand the body of guarantees that exist under that cloak.¹³⁷ With the emergence of human rights as a branch of international law after the Second World War, the division of human rights into classes (later, generations) of rights occurred and with it came the resultant tension as to what class or category of rights constituted legal rights as against programme rights. Despite concerted efforts to promote a unified understanding of human rights, the distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other hand remains visible in judicial attitude to the protection of rights. In the context of the African Charter, the codification of both categories of rights and the inclusion of aspects of the so-called solidarity rights in the same instrument further complicates the question with regard to justiceability of rights contained in the Charter.

Ordinarily, the association of human rights supervisory institutions with specific catalogues of rights facilitates the identification of the specific rights that can be protected by such institutions. However, in the case of judicial bodies with ‘borrowed’ human rights jurisdictions, there is difficulty in ascertaining the categories of rights over which jurisdiction can be exercised. Thus, in relation to the ECJ’s assertion that ‘fundamental rights’ is a part of the European legal order, it has severally been observed that there is ‘a certain amount of confusion’ as to the exact meaning of the term.¹³⁸ Similarly, the exact meaning of ‘human rights’, the violation of which the ECCJ is empowered to exercise jurisdiction is unknown. The risk of confusion in pinning down the meaning of human rights as used in article 9(4) of the 2006 Supplementary Protocol of the ECOWAS Court is amplified by the fact that there are at least four classes of rights that can fall under the umbrella of human rights that the ECCJ should protect. The fundamental freedoms necessary for the realisation of economic integration form the first category of rights. The other three categories are the commonly accepted three generations of human rights. It is arguable that the legitimacy of the ECCJ’s competence to engage in human rights scrutiny varies with the

¹³⁶ United Nations Human rights: Questions and answers (1987) 4 cited by JC Mubangizi, ‘Towards a new approach to the classification of human rights with a specific reference to the African Context’ (2004) 4 African Human Rights Law Journal pp. 93, 94.

¹³⁷ B Algan, ‘Rethinking Third Generation Rights’, (2004) 1 Ankara Law Review, pp. 121, 123

¹³⁸ J Heliskoski, ‘Fundamental Rights Versus Economic Freedoms in the European Union: Which Paradigm?’ J Petman and J Klabbers (eds.) Nordic Cosmopolitanism (2003) The Hague: Martinus Nijhoff p. 420.

category of rights involved and sceptics are bound to resist the competence on the basis of link and relevance to the central theme of economic integration. Yet, it is not possible to ignore the interconnectivity between the categories of rights and the ultimate objectives of ECOWAS. What rights can then be legitimately located within the ambit of human rights that the ECCJ is empowered to protect?

5.1 Economic freedoms

One of the main tools for realisation of the objective of economic integration under ECOWAS (as elsewhere) is the removal of the obstacles to free movement of persons, goods, services and capital between the borders of integrating states and the grant of rights of residence and establishment to nationals of integrating states. These tools have come to be generally recognised as economic freedoms.¹³⁹ Under the revised ECOWAS Treaty, economic freedoms are entrenched as rights of ECOWAS citizens and they carry the weight of fundamental rights under the ECOWAS regime as they are contained in the constitutive document.¹⁴⁰ Economic freedoms under ECOWAS Community law are further fleshed out in protocols adopted to promote their implementation and they considerably expand beyond the narrow statements contained in the original Treaty and in the revised Treaty. Significantly, in addition to recognising the rights of ECOWAS citizens to ‘enter, reside and establish in the territory of member states’,¹⁴¹ the implementing protocols generally provide rights guarantees against host member states in the event of expulsion or repatriation. These guarantees take the form of the protection of ‘fundamental rights even in the event of ‘clandestine or illegal immigration’,¹⁴² the protection of property rights,¹⁴³ right against discrimination and equal right of access to justice,¹⁴⁴ and the protection of the ‘fundamental rights’ of migrant workers.¹⁴⁵

In contrast to the vagueness already identified in relation to certain documents in the ECOWAS legal order, the protocols relating to economic freedoms define ‘fundamental rights’ either as ‘the rights of any individual recognised by the Universal Declaration of Human Rights’¹⁴⁶ or in terms of ‘ILO Conventions on the protection of the rights of migrant workers.’¹⁴⁷ Clearly, these

¹³⁹ MP Maduro, ‘Stiking the Elusive Balance Between Economic Freedoms and Social Rights in the EU’ in P Alston pp. 449 - 451

¹⁴⁰ Art 59 of the revised ECOWAS Treaty.

¹⁴¹ See for eg, art 2 of Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment

¹⁴² Art 3 of Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment

¹⁴³ Art 7 of the 79 Protocol

¹⁴⁴ Ibid, and art 4 of Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Rights of Residence and Establishment

¹⁴⁵ Arts 14 to 16 of Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.

¹⁴⁶ Art 1 of the 1985 Supplementary Protocol on Free Movement

¹⁴⁷ Art 1 of the 1986 Supplementary Protocol on the Second Phase and art 1 of the 1990 Supplementary Protocol on the Third Phase

economic freedoms are within the purview of the competence of the ECCJ as they fall under the Treaty and other ECOWAS instruments over which the Court was originally granted competence. In fact the first case heard by the ECCJ centred around denial of the right to free movement of persons and goods based on Treaty and Protocol provisions.¹⁴⁸ The rights, it is submitted are protected against violation by member states and the ECCJ is completely competent in that regard. However, certain questions could arise in the ECCJ's protection of economic freedoms. The first relates to whether the enjoyment of these freedoms is tied to active participation in economic activities within the framework of economic integration. This is especially as some of the rights are granted in connection to certain types of workers or to nationals 'for the purpose of seeking and carrying out income earning employment'.¹⁴⁹ While the ECCJ has not had the opportunity to address this question, the practice of the ECJ demonstrates that the enjoyment of rights under the European Union system has been relaxed to accommodate people who are not engaged in any economic activity.¹⁵⁰

Another question that arises with respect to the protection of economic freedoms touches on the relation between economic freedoms and general human rights, from the perspective of which category should trump in the event of a conflict. This has been a major concern in the ECJ practice where the ECJ has often been seen as giving preference to economic rights over human rights.¹⁵¹ For example, there are those who hold the view that a crucial distinction exists between economic freedoms (and the case law of the ECJ in this field) and case law in the actual area of human rights law. Thus, for them, apart from the free movement of workers and the related access to employment, economic freedoms do not generally provide guarantees for human rights.¹⁵² There are others however, who recognise the instrumental value of economic freedoms as a means to forge a common market in Europe, yet do not question the possibility of viewing economic freedoms from the standpoint of human rights theory and doctrine.¹⁵³ In the ECOWAS context, considering that 'fundamental rights' which are tied to the economic freedoms are defined in terms of rights guaranteed under the UDHR and the ILO Conventions, the risk of conflict is very remote. But even where such a conflict arises, it is submitted that the rights in the UDHR and the ILO Conventions should prime on the grounds of being earlier treaties¹⁵⁴ and (in the case of certain provisions of the UDHR) on the grounds of acquiring the status of *jus cogens*.¹⁵⁵ On the whole, it has to be emphasised that economic freedoms fall within the

¹⁴⁸ *Olajide* case, n 56 above.

¹⁴⁹ See eg, art 2 of the 1986 Supplementary Protocol and art 1 of the 1990 Supplementary Protocol

¹⁵⁰ Lyons (2003) p. 336

¹⁵¹ Heliskoski (2003) p. 420,

¹⁵² A Van Bossuyt. 'Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities' (available at [http://www.wcmi.de/jemie/download/1-2007 van Bossuyt.pdf](http://www.wcmi.de/jemie/download/1-2007%20van%20Bossuyt.pdf)) p. 1326

¹⁵³ Quinn (2001) p. 859

¹⁵⁴ Art 30(3) of the VCLT would apply.

¹⁵⁵ See Ahmed and Butler (2006) pp. 779 to 781 on this point in relation to the ECJ.

legitimate jurisdiction of the ECCJ and provides a platform for the enjoyment of other rights by reason of their link to the UDHR in the treaty provisions.

5.2 Civil and Political Rights

The second category of rights that can be considered under the human rights jurisdiction of the ECCJ are those commonly known as civil and political. These are classical rights that are perceived as protection against unwarranted interference from the state and rights that guarantee participation in the affairs of the state. Civil rights protect freedoms and liberties from violation by those exercising public power and intrusion by third parties.¹⁵⁶ Political rights guarantee participation in the public realm and protect the liberties that are instrumental for this guarantee.¹⁵⁷ As already noted, ECOWAS does not have a catalogue of rights containing civil and political rights. However, these rights are present in several other international human rights instruments that ECOWAS has explicitly or implicitly adopted. These include the UDHR, the African Charter and CEDAW.¹⁵⁸ Considering the explicit mention of these instruments, it is submitted that the ECCJ can validly exercise jurisdiction over the rights contained in them as part of the conventions and treaties of ECOWAS that the Court is empowered to interpret and apply. With regard to the International Covenant on Civil and Political Rights (CCPR), considering that not all ECOWAS member states have ratified that instrument, it is doubtful whether the ECCJ can validly apply the CCPR in reaching its decisions. The doubt arises on two possible grounds: first, on grounds of the doctrine of reciprocity, it is arguable that ‘non-universality’ of ratification would prevent application of the CCPR. Secondly, linked to the previous argument, it can be argued further that the CCPR does not yet constitute a ‘treaty of ECOWAS’ or a part of a common legal tradition of the ECOWAS Community.¹⁵⁹ This approach is not different from the practice of the ECJ in the sense that the ECJ has derived fundamental rights in the European Community from different sources,¹⁶⁰ but did not apply the ECHR directly until that instrument was ratified by all member states of the EU/EC.¹⁶¹ For the sake of legitimacy, it may however be necessary to show the link between these rights and the objective of economic integration. There is also a further challenge in finding a middle ground between ‘ownership’ of the source

¹⁵⁶ Heliskoski (2003) p. 417

¹⁵⁷ Ibid

¹⁵⁸ Civil and political rights are also catalogued in the International Covenant on Civil and Political Rights (CCPR) but out of the 15 member states of ECOWAS, one (Guinea Bissau) had not ratified the CCPR as at 3 October 2008 (see <http://www2.ohchr.org/english/bodies/ratification/4.htm> accessed 3 November 2008). It raises the question whether the CCPR should validly be applied by the ECCJ. All ECOWAS member states have ratified the African Charter as at May 2005 (see ratification status at http://www.achpr.org/english/_info/index_ratifications_en.html, accessed 15 November 2008). Similarly, CEDAW has been ratified by all ECOWAS member states. See ratification status at <http://www2.ohchr.org/english/bodies/ratification/8.htm> (accessed 3 November 2008).

¹⁵⁹ A survey of the ECCJ’s jurisprudence shows that the CCPR has not been applied by the Court in any of its decisions.

¹⁶⁰ Stever (1996- 1997) p. 959

¹⁶¹ France became the last original member state of the EC to ratify the ECHR in 1974. It is recorded that the ECJ only directly applied the ECHR in the Nold case after the French ratification. See DS p. 112.

documents and exercise of jurisdiction by the ECCJ on the one hand, and the tension between national constitutional practices and the direct application of source documents through the instrumentality of ECOWAS Community law and order.

Civil and political rights may not have any direct link to economic integration, but they are indirectly connected to the realisation of the objectives of economic integration to the extent that the protection of human rights provides a conflict-free environment for the pursuit of economic goals. The argument can be made that part of the difficulties that have prevented the realisation of economic objectives of ECOWAS can be traced to denial of and demand for human rights within the borders of member states. In the absence of a democratic culture with guarantees of respect for human rights, internal conflicts and insecurity pervades and results in reluctance to open up borders towards the outside world. It would be observed that this link differs from the European experience where the link can be found in the need to maintain the principle of the supremacy of European Community law following a challenge from the national courts seeking to protect national human rights guarantees that be violated in the process of economic integration.¹⁶² This different approach to the link between civil and political rights and the goals of economic integration reflects in the actual practices of the two courts. Whereas the ECJ uses human rights to limit possible excesses of EU institutions and member states in the implementation of EU policies and legislations, the ECCJ is forced to guarantee human rights as a means of creating an enabling environment for the realisation of economic integration. In so doing, the ECCJ reaches further than the ECJ to the extent that it takes on cases that do not have direct connection with ECOWAS policies and legislations. This leaves room for conflict with the jurisdictions of national courts and the jurisdiction of the supervisory bodies of the human rights instruments 'borrowed' by the ECCJ in its human rights adjudication. While the scope of this paper does not extend to a consideration of those tensions, it has to be noted that in the absence of exclusive jurisdiction claimed by any institution over the instruments in question, the ECCJ can validly apply the instruments. To the extent that civil and political rights are located in documents adopted by ECOWAS and in international law generally, the ECCJ should validly exercise jurisdiction. Thus, the ECCJ has received complaints touching on rights such as; fair hearing and political participation,¹⁶³ personal liberty, life, dignity and fair hearing,¹⁶⁴ the right to property,¹⁶⁵ and freedom from slavery.¹⁶⁶

¹⁶² See the so-called *Solange* cases from Germany: *Solange* 1 (1974) 2 CMLR 540 and *Solange* II (1987) 3 CMLR 225

¹⁶³ *Ugokwe* case, n 63 above.

¹⁶⁴ *Manneh* case, n 88 above.

¹⁶⁵ *Chukwudolue* case, n 132 above.

¹⁶⁶ *Koraou* case, n 89 above.

5.3 Economic, Social and Cultural Rights (ESCR)

The category of rights generally classified as ‘second generation’ rights have faced resistance from countries on every part of the economic divide for various reasons. Whatever their motivations may be, the result of the resistance is that this category of rights are commonly perceived as programme rights that lack the quality to be enforced by judicial application. Although economic, social and cultural rights are often lumped together, the focus in this paper is on economic and social rights. It has been argued that economic and social rights are guaranteed essentially to place states ‘under a legal obligation to utilise ...available resources maximally to correct social and economic inequalities and imbalances’.¹⁶⁷ Along these lines, it is noted that economic and social rights, ‘through their redistributive function, essentially seek to provide every individual with a set of basic means for the exercise of his or her other rights...’.¹⁶⁸ Thus, economic and social rights touch directly on the living conditions of citizens. Accordingly, some have made the argument that ESCRs are the category of rights most likely to be promoted by economic integration initiatives as a result of the promise of better economic values and gains.¹⁶⁹

Similar to civil and political rights, economic and social rights are not catalogued for protection under the ECOWAS legal regime. It has to be noted however, that economic and social rights are contained in the UDHR (as declarations of standards) and in the International Covenant on Economic, Social and Cultural Rights (CESCR) as legal rights.¹⁷⁰ To a limited extent, economic and social rights can be found in the African Charter.¹⁷¹ Since the UDHR has acquired the status of a source of legal rights and obligations under the ECOWAS regime, all economic and social rights guaranteed in the UDHR become justiciable under the human rights mandate of the ECCJ. This is especially so as the UDHR recognises the indivisibility of all human rights.¹⁷² This position is reinforced by the integrated approach of rights adopted in the African Charter, which, by application of the doctrine of implied rights (as first introduced by the African Commission)¹⁷³ can be stretched to cover economic and social rights not expressly itemised in the African Charter. Hence, on the basis of the UDHR, the African Charter or even the CESCR, economic and social rights can (and at least in one case, have) been brought before the ECCJ.

¹⁶⁷ B de Villiers, ‘The protection of social and economic rights – international perspectives’, Occasional paper 9, Centre for Human Rights, (1996) p. 2

¹⁶⁸ Heliskoski (2003) p. 417

¹⁶⁹ See F Musungu, ‘Economic integration and human rights in Africa: A comment on conceptual linkages’ (2003) p. 1 *African Human Rights Law Journal* 88 and Nwogu (2007) p. 345

¹⁷⁰ All 15 member states of ECOWAS have ratified the CESCR as at 3 October 2008. See ratification status at <http://www2.ohchr.org/English/bodies/ratification/3.htm> (accessed 3 November 2008).

¹⁷¹ Arts 15, 16 and 17 of the African Charter are generally seen as economic and social rights. Art 14 of the African Charter containing the right to property is not widely accepted as an economic right.

¹⁷² See LH 40 in this regard. The 1993 Vienna Declaration also reinforces the indivisibility of human rights.

¹⁷³ In the *SERAC* communication, n 123 above, the African Commission first introduced the doctrine of implied rights to find the right to housing.

There are however, challenges that arise with respect to the protection of economic and social rights by the ECCJ. The first relates to the status of economic and social rights in the national legal regimes of member states. This is relevant as the essence of the ECCJ's judgments is not only to find international liability of violating states, but to ignite compliance at the domestic level. Where economic and social rights are stated as non-justiciable principles under national constitutional law and the given state has not incorporated (or domesticated) the African Charter to give the limited economic and social rights in the Charter direct applicability in domestic courts,¹⁷⁴ protection of these rights in judicial proceedings sets the process in conflict with national constitutional laws of member states. It thus raises the question whether this is intended and acceptable. The second connected challenge concerns the question whether the judiciary (in this case, an international court) has the technical competence and legitimacy necessary to interfere with the allocation of resources by elected officials. Thirdly, there is the question whether economic and social rights (at least as contained in the UDHR and the ECSCR) have the legal precision required to attract judicial application. At a general level, it is possible to respond to the challenges by suggesting that to the extent where judicial application is restricted to a determination of the negative responsibility of member states not to interfere with the enjoyment of rights, the ECCJ is as competent as any other court to receive and pronounce on allegations of violation of economic and social rights.¹⁷⁵ However, it has to be added that the ECCJ needs to carefully justify its decisions in this area with detailed analysis and explanation of its decisions. In the *Essien* case,¹⁷⁶ the ECCJ appears to have tilted more to a consideration of the right to satisfactory working conditions from the perspective of non-discrimination rather than an intention to redistribute wealth. Thus, the case represents a 'safe' approach to economic and social rights litigation that avoids grounds for interference with allocation of national resources. These arguments notwithstanding, it is obvious that economic and social rights fall within the ambit of the ECCJ's human rights mandate.¹⁷⁷

5.4 Solidarity rights

Despite known resistance to the generational classification of rights,¹⁷⁸ solidarity rights are commonly seen as the third generation of rights. This category of rights can be traced to article 28 of the UDHR even though their transformation into binding legal obligations in international law has not been as smooth as has been the transformation of the other two generations of rights even if some solidarity rights can be found in certain binding international human rights

¹⁷⁴ As in the case of Nigeria. In this regard, see ST Ebobrah, 'The future of economic, social and cultural rights litigation in Nigeria' (2007) 2 CALS Review of Nigerian Law and Practice p. 109.

¹⁷⁵ See the SERAC case, n 123 above.

¹⁷⁶ *Essien* case, n 110 above.

¹⁷⁷ This integrated approach to human rights is also evident in the EU practice as recorded by Alston and Weiler (1998) p. 687 and Shelton (2003) p. 136.

¹⁷⁸ For eg, P Alston, 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?' (1992) p. 29 *Netherlands International Law Review* pp. 307, 322. Also see Algan (2004) p. 126

instruments.¹⁷⁹ The African Charter, with its provisions on the rights to existence and self-determination,¹⁸⁰ the right of peoples to freely dispose of wealth and natural resources,¹⁸¹ the right to development,¹⁸² the right to national and international peace,¹⁸³ and the right to a satisfactory environment,¹⁸⁴ represents the best guarantor of solidarity rights. A significant difference between solidarity rights and the other two generations of rights is that generally solidarity rights are collective in nature and character so that their enjoyment hinges on group affiliation.¹⁸⁵ Algan takes the view that an essential aspect of solidarity rights is that they are only realisable ‘by the combined efforts of all social factors: individuals, states, public and private associations and the international community’.¹⁸⁶ From this perspective, solidarity rights sit nicely with economic integration. In fact, in a sense, allusions to solidarity rights can be found in the objective of ECOWAS as well as in certain articles of the revised ECOWAS Treaty.¹⁸⁷ Thus, in addition to the UDHR, solidarity rights can find links to the ECOWAS legal regime in both the revised Treaty and the African Charter. To this end, the right to development can be associated with the objective to raise the living standards of ECOWAS citizens.¹⁸⁸ Similarly, the collective right to a satisfactory or clean environment can be associated with articles 29 and 30 of the revised ECOWAS Treaty. The question of solidarity rights does not seem to arise in relation to the ECJ.

Notwithstanding the presence of solidarity rights within the purview of the ECOWAS legal regime, it is not conclusive that solidarity rights would be accommodated in the human rights mandate of the ECCJ. First from a procedural angle, it is not possible to state with certainty that articles 9(4) and 10 of the 2005 Supplementary Protocol of the ECOWAS Court envisages the grant of access to ‘collectives’. Reference to ‘individuals’ in the grant of access to the ECCJ leaves room for the debate whether that term covers ‘groups’ or ‘peoples’. The equivalent usage of the term ‘individuals’ in the First Optional Protocol to the CCPR appears to have been consistently interpreted to exclude ‘peoples’ or organisations submitting communications as ‘collective institutions’.¹⁸⁹ However, the usage before the Human Rights Committee has not

¹⁷⁹ The right to self-determination in the CCPR and the CESCPR and the right to the enjoyment of national resources in both instruments are clear examples.

¹⁸⁰ Art 20 of the African Charter

¹⁸¹ Art 21 of the African Charter

¹⁸² Art 22 of the African Charter

¹⁸³ Art 23 of the African Charter

¹⁸⁴ Art 24 of the African Charter

¹⁸⁵ Y Dinstein, ‘Collective Human Rights of Peoples and Minorities,’ (1976) 25 *International and Comparative Law Quarterly* pp. 102, 103.

¹⁸⁶ Algan (2004) p. 125

¹⁸⁷ Arts 3, 29 and 30 of the revised ECOWAS Treaty.

¹⁸⁸ Art 3 of the revised ECOWAS Treaty

¹⁸⁹ See for eg, Communication No. 167/1984, Chief Ominayak and the Lubicon Lake Band v Canada, where the Human Rights Committee declined to determine what constitutes ‘peoples’. A de Zayas, ‘The International Protection of the Rights of Peoples and Minorities’, (available at

excluded a group of individuals acting on behalf of a community or people who have suffered an alleged violation. From this point of view, the ECCJ can interpret the relevant provisions to allow collections of individuals to present cases alleging violation of solidarity rights. The challenge however, is that, if it is accepted that solidarity rights can only be enjoyed in community with others, individual or representative actions defeat the spirit of solidarity. Notwithstanding this argument, it has to be noted that certain solidarity rights can be enjoyed individually and thus could be violated with respect to a single individual or a group of individuals. Thus, for example, the right to a satisfactory environment could be violated with respect to a single individual or a group of individuals. In which case, there is no reason why such single individual or group should not be able to bring an action before the ECCJ for the vindication of the right in question. In fact, it is arguable that even before the African Commission, cases involving solidarity or collective rights have only arisen on the basis of individual or representative actions.¹⁹⁰ The difference between the processes of the African Commission and the Human Rights Committee being that in the former case, the absence of a victim requirement allows for filing of cases by non-victim and further that the action could be brought in the name of the 'peoples'. In view of the victim requirement in the 2006 Supplementary Protocol of the ECOWAS Court, it has to be submitted that the better approach for practice before the Court would be to follow the practice of the Human Rights Committee and allow individual and representative actions for the realisation of appropriate solidarity rights.

From a substantive perspective, there are at least two worries relating to the protection of solidarity rights generally and specifically in relation to the ECCJ. The one worry is the lack of clarity and consequent continuing rejection of the concept of solidarity rights. Despite the pressure from the developing world, the right to development (for example) has failed to acquire universal recognition as a legal right. There are those who even argue that collective rights are a philosophic inconsistency and a conceptual mistake.¹⁹¹ Related to this worry is the second question of who emerges as a rights bearer and who is identifiable as a duty bearer in claims for solidarity rights. In this regard, even advocates of solidarity rights admit the difficulty in identifying 'peoples' as linked to the enjoyment of the rights in question.¹⁹² The ability of the ECCJ to brave these difficulties in the realm of solidarity rights is likely to affect the credibility of the Court itself.

<http://www.alfreddezayas.com/Chapbooks/AMSTERDAM.shtml> (accessed 15 November 2008) takes the same position in reliance on several cases before the Human Rights Committee.

¹⁹⁰ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) which involved the claim to self-determination by the Katangese people was filed by Mr Gerard Moke as President of the Katangese Peoples' Congress. Similarly, the SERAC case was filed by two NGOs on behalf of the Ogoni people of Nigeria.

¹⁹¹ S Schaumburg-Muller, 'The Uneasy Balance between Individual Rights and the Necessity of Communities' in S Lagoutte, H Sano and PS Smith (Eds) *Human Rights in Turmoil* (2007) Martinus Nijhoff: The Hague.

¹⁹² Dinstein (1976) p. 104

Against the challenges set out above, it may be tempting to suggest that the ECCJ avoids the complications of solidarity rights in the exercise of its human rights mandate. But, the issues surrounding public interest litigation in West African States (either in the form of legal obstacles as in Common-Law states or non-familiarity as is often the case in Civil-Law states) amplifies the need for the ECCJ to offer a viable legal alternative for the realisation of such rights affecting groups. This is essential for the purpose of maintaining a conflict-free environment for economic integration. In the face of this argument, it has to be submitted that solidarity rights represent a difficult question for the ECCJ but does not fall outside the competence of the Court. For as long as it is possible to protect such rights in favour of individuals and group of individuals, the ECCJ need not shy away from exercising jurisdiction over such rights as guaranteed in the ECOWAS Treaty and other conventions directly or impliedly claimed by the ECOWAS Community.

6. Consolidating for the future

Hoisting a human rights mandate on the judicial institution of a subregional economic integration initiative would definitely have consequences for the credibility, efficiency and effectiveness of such an institution. Reaction of various actors to the consequences of such an adopted competence would arguably determine the future of such a judicial institution. It is however, the reaction of the institution in question that is likely to have the most effect on its own future. A proactive approach by the ECCJ is therefore necessary to shape the future of human rights litigation and protection in the ECOWAS legal system. While this paper does not pretend to have addressed all conceivable consequences of the human rights mandate of the ECCJ, there are salient issues that are evident from the discourse undertaken in this paper. The issues identified in this paper include the challenges posed by the current composition, structure and procedure of the ECCJ for the exercise of a human rights mandate, the looming potential for conflict with national courts of member states and supervisory institutions created under human rights instruments applied by the ECCJ in carrying out an expanded mandate, the risk of fragmentation of human rights law in Africa and the dangers in the indeterminate nature of the human rights mandate of the ECCJ. It is not disputable that the protection of human rights in the ECCJ is a positive development in a region infamous for conflicts ignited by abuse of human rights. It is therefore essential that effort is made to consolidate the gains of the system and safeguard the future of the ECCJ as a major player in the field of human rights in West Africa. The following section aims to make a modest contribution in this regard.

Although the ECCJ is still not a human rights court, it is now commonly accepted by all players that human rights protection forms a significant part of the Court's mandate.¹⁹³ Yet, this does not take away the fact that the ECCJ remains the judicial organ of a regional economic community with a primary duty to interpret and apply Community Treaty aimed at facilitating regional integration. Consequently, it would be unrealistic to advocate for substitution of the competence criteria of international law tilting towards regional integration with a competence in human rights for qualification to the office of a judge of the ECCJ. However, if the ECCJ has to consolidate its role in the field of judicial protection of human rights, it may be necessary to appoint judges with some demonstrable knowledge in human rights into the ECCJ.¹⁹⁴ In addition to the personal human rights knowledge of the judges, the selection of research and other judicial staff of the ECCJ should reflect the increasing human rights protector posture of the Court. All of

¹⁹³ The ECCJ recognises this point as indicated by the responses of the Bureau of the ECCJ to questions posed by this writer during a meeting facilitated by the Danish Institute for Human Rights in November 2008 at the ECOWAS Community Court in Abuja, Nigeria.

¹⁹⁴ This position was also advocated by the Vice President of the ECOWAS Court during the November 2008 meeting. For him, the human rights competence of prospective appointees should be taken into consideration even though it should not be expressly stated as a criterion for appointment.

these can be strengthened with concerted capacity building for judges and staff of the Court.¹⁹⁵ It would also be important for ECOWAS to fast-track the establishment of the proposed appellate division in the ECOWAS legal system to address concerns touching on the absence of a right of appeal.¹⁹⁶ While the present Rules of Procedure do not differ substantially from the rules of human rights courts, the ECCJ would do well to strengthen co-operations aimed at providing legal aid to indigent litigants.

In relation to the looming potential for conflict with national and other international judicial and quasi-judicial institutions, there is no short cut towards avoiding potential conflict. Despite opinion to the contrary and the position of the ECCJ itself,¹⁹⁷ it may be necessary to reconsider the question of exhaustion of local remedies before human rights cases come before the ECCJ. This position does not seek to argue that it is ‘unlawful’ or ‘illegal’ not to require the exhaustion of local remedies. It also does not seek to wish away the benefits of easy access to the Court. However, it would be beneficial in the long run to defer to some sense of the principle of subsidiarity by giving national courts the first opportunity to remedy human rights violation, subject of course to availability and efficiency of local remedies.¹⁹⁸ Some of the consequences of such reconsideration of the question of exhaustion of local remedies is that any appearance of a struggle for primary jurisdiction would be avoided. But it would also allow the ECCJ act in some form of ‘appellate jurisdiction’ and thereby position itself as a judicial hegemony in the subregion. Even though the ECCJ seems to want to avoid such a role, the reality of human rights litigation is that a human rights court sitting at the international plane necessarily has to review national decisions from time to time. The only way this can be avoided is if the cases only come by way of reference from national courts for the opinion of the ECCJ. This, it must be submitted, would not be a desirable option considering the gains already made by the court. In this regard also, the ECCJ would in the future, need to carefully select its cases in a manner that preference would be given to cases with new issues or cross-cutting consequences. But this would also mean that the ECCJ should build a jurisprudence that has a binding (or at least, very persuasive) effect in the region. If the jurisprudence of the Court acquires the expected level of superiority, national courts would refer to decisions of the Court in situations of violations that have previously been addressed by the Court.

With respect to potential conflict with other international judicial and quasi-judicial bodies, the main approach would be to aim at developing co-operation agreements with other relevant

¹⁹⁵ Judges and staff of the subregional courts seem to agree on the need for capacity building programmes in this regard. This came out both in the meeting with the Bureau and staff of the ECOWAS Court and at a programme facilitated by Interights at Abuja in November 2008.

¹⁹⁶ A proposed appellate division of the ECCJ is still being awaited. Interview conducted with the ECCJ in November 2008 indicates that a consultant is currently working on modalities for the appellate division to start.

¹⁹⁷ See n 67 above.

¹⁹⁸ The jurisprudence of the African Commission is clear on this point. See for eg, *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200, para 50.

institutions. This should be supported by other informal approaches including the exchange of visits, joint participation in colloquia and other capacity building programmes, and the creation of mutual respect between judges of the various institutions.¹⁹⁹ Further, in order to avoid fragmentation arising from conflicting decisions, the ECCJ needs to take previous decisions of the African Commission into consideration in the build up to judgments. This is essential as the African Charter forms the major source of the human rights law applied by the ECCJ. An attractive option may be to propose that ECOWAS adopts its own catalogue of human rights,²⁰⁰ but the risk of fragmentation on African International Human Rights Law would be stronger if all subregions were to adopt human rights instrument. It would thus be better to work towards enthrone the African Charter as the regional human rights standard.²⁰¹ Similarly, the ECCJ needs to positively consider the interpretation given by bodies created in other relevant instruments applied by the Court.

As far as indeterminacy of the human rights mandate of the ECCJ is concerned, one cannot rule out the possibility of exhausting the goodwill of states and the emergence of resistance and compliance-fatigue if states perceive the Court to be too activist and exceeding appropriate legal boundaries. It would be necessary therefore, that the Court sticks to the application of instruments envisaged by the ECOWAS Community either by express or implied reference in ECOWAS Community law. It would also mean that only instruments universally ratified by member states of ECOWAS should be applicable before the Court as sources of law. This would however, not exclude seeking inspiration from other relevant human rights instruments. Further, in order to maintain the confidence of litigants and thus sustain the proper environment for economic integration, the ECCJ needs to maintain its approach of recognising the indivisibility and interrelatedness of human rights. In this regard, as much as they can be accommodated without exceeding the boundaries of legality and legitimacy, the Court should continue to accept cases arising from all generations of human rights. One way of doing this would be to emphasise the duty of states to respect and to protect, while giving a ‘margin of appreciation’ for national decisions on the allocation of resources. In the absence of powers to ensure compliance of its own judgments, the ability of the Court to maintain credibility and effectiveness depends on its skill in balancing needs of rights protection with respect for the sovereignty of states.

¹⁹⁹ Lyons (2003) p. 330

²⁰⁰ Similar to the European Charter of Fundamental Rights. There have been moves in East Africa to adopt a sub-regional human rights instrument while the Southern Africa Development Community already boasts of a human rights instrument of sort.

²⁰¹ Viljoen (2007) p. 500

7. Concluding remarks

The movement from purely economic objectives into the area of politics has brought ECOWAS into the realm of human rights with its attendant political volatility. The spill-over has resulted in positioning ECOWAS both as an actor and as an arena in the field of human rights. Increasingly, the ECCJ has also grown to take position as the arrow-head of the ECOWAS Community intervention in the arena for the protection of human rights. True to type as a volatile subject, the involvement of the ECCJ as a forum for human rights protection also raises questions and creates potential for resistance by member states of ECOWAS as well as potential for conflict with national and international institutions. All these have contributed to the necessity of this study. Similar to the EU, the need for ECOWAS and indeed, the ECCJ to decide on how much spill-over into human rights is possible and acceptable under the existing legal framework is vital.²⁰²

Over the past few years, the regime change in ECOWAS that squarely positions human rights in its institutional agenda has also culminated in expansion of the competence of the Court. But the manner in which the regime change has occurred has created room for confusion on the actual scope of protection that is available in the area of human rights. It appears that the more ECOWAS progresses towards acquiring the character of a post-national human rights institution, the more it opens space for contradictions between its original goals and its emerging character. Thus, the ECCJ has to delicately navigate its way through the web of uncertainty and indeterminacy created by the system.

The absence of clear areas or subjects of ECOWAS Community competence further complicates the task of delineating the extent of human rights mandate that the ECCJ should validly exercise. Yet, in this indeterminacy lies the temptation of pushing the ECCJ to transform itself completely into a human rights court. If it does so without regard to applicable principles of international law and the law of international institutions, it stands the risk of committing judicial suicide by exhausting the goodwill that it currently enjoys among member states of ECOWAS. On the other hand, if the Court defers too much to respect for sovereignty of states, it would lose the confidence of ECOWAS citizens. The task faced by the Court is by no means easy but it is at this stage of infancy that the future of the Court can be shaped. Proactively engaging challenges identified in its work is one certain way that the ECCJ can consolidate and strengthen itself as a subregional protector of rights and a guarantor of the environment necessary for the much desired economic integration.

²⁰² Brosig (2006) p. 23 who argues that deciding on the ultimate size of its human rights agenda is a key question for the EU.

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