

NETRIS external mobility report by Jean Bosco Ngendahimana, PhD researcher from the University of Dar es Salaam (UDSM), Dar es Salaam, Tanzania

Background

According to the practice at the University of Dar es Salaam, Ph.D Students defend their research proposal before the Postgraduate Committee before the student can start the field research.

It is in this context that upon my appearance in early November 2010 that the Research and Publication Unit proposed me to apply for NETRIS Mobility Scheme because my research topic is about "Regional Integration and Human Rights."

The College of Europe (CoE)/United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) and the NETRIS intra-mobility coordinator Prof. Joe Tesha (UDSM) approved my application some weeks later and since then I started to organize my departure to the University Cheikh Anta Diop of Dakar where I spent three weeks before I could connect to the ECOWAS Community Court of Justice in Abuja, Nigeria for a one week research field.

At the ECOWAS Community Court of Justice, I conducted interviews with different professionals including Me Abdoulaye BANE, In-charge of Research, Me Borges PEREIRA, Director of the Vice-president's Office, Dr. Daouda FALL, Director of Research and Publications, Me Tony ANENE MAIDOH, the Chief Registrar and Honorable Justice Awa NANA DABOYA, The President.

Narrative Report

Section 1: Week of 23rd February to 2nd March 2011

Due to the fact that the majority of lawyers and all judges were attending an Annual International Conference in Accra, Ghana, Honorable Justice Awa NANA DABOYA, the President of ECOWAS Court of Justice had assigned Me Abdoulaye BANE to ensure that my internship was conducted in a smooth environment.



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It was in that context that on March 23rd, up on my arrival at the headquarter of the ECOWAS Court of Justice that Me Abdoulaye BANE introduced me to every body and recommended everyone to facilitate me to access any service I would require.

Before this welcoming attitude, I had to organize myself in a way that allowed me to maximize the opportunities that were offered to me: From Wednesday, 23rd to Friday, 25th February morning, I gathered materials including books, journals and internal documents of the court so that I could have a clear idea on what ECOWAS Court of Justice does and prepare the interviews scheduled on the following occasions.

After having got access to copies of court decisions by the Court Chief Registrar I was able to understand the ECOWAS Court of Justice background in terms of human rights protection and other realization without forgetting challenges related to the expansion of the court's jurisdictions throughout its existence.

After having conducted interviews with lawyers and the chief registrar, Honorable Justice Awa NANA DABOYA, The President received me in her office and discussed on a number of issues. It was a great occasion for me to thank her on behalf of NETRIS Coordination and the University of Dar es Salaam.

This report reflects the library works conducted from February 23rd to 25th morning, Interviews conducted with Me Abdoulaye BANE, Me Borges PEREIRA, and Dr. Daouda FALL; Exploitation of Court's judgments, discussions with the Chief Registrar and Honorable Justice the President of ECOWAS Court of Justice.

§1. Library Works

Under special authorization of Mr. Vicenthe VERREIRA, the Chief Librarian and collaboration with Ms. Flora NAMERO and Mr. Abdullahi AMINU, Librarians, I managed to access the following books and journals and photocopy some of their parts:

- ABUJOSHRC VOL.I NO.I 2000.
- Keba MBAYE, *Les droits de l'homme en Afrique*, Paris : Editions A. Pedone, 2^e édition, 2002.
- Mutoy MUBIALA, *Le système régional africain de protection des droits de l'homme*, Bruxelles : Bruylant, 2005.
- Jean-Francois FLAUSS, Elisabeth LAMBERT-ABDELGAWAD (dir.), *L'application nationale de la Charte africaine des droits de l'homme et des peuples*, Bruxelles : Bruylant, 2004.



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- Muhammed Tawfiq LADEN, *Introduction to ECOWAS Community Law and Practice :- Integration, Migration, Human Rights, Access to Justice, Peace and Security*, Zaria : The Ahmadu Bello University Press Limited, 2009.
- Claudia SCIOTTI-LAM, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, Bruxelles: Bruylant, 2004.
- Farideh SHAYGAN, *La compatibilité des sanctions économiques du conseil de sécurité avec les droits de l'homme et le droit international humanitaire*, Bruxelles : Bruylant, 2008.

§2. Exploitation of Court's Decisions in Human Rights and Discussions with Different Court's Officials

Since the establishment of the Court in 2001 and more particularly, since the granting of human rights jurisdiction to the Court in 2005, human rights cases have been the preponderance of the cases before the Court. As at 25th August 2010, a total of seventy seven (77) cases had been lodged before the Court since its inception, and a total of twenty nine (29) judgments had been delivered by the Court as at 11th June 2010. A total of eight significant rulings had been delivered by the Court as at the above date. Out of twenty nine judgments delivered, fifteen were in respect of human rights. Out of the eight rulings six were in respect of alleged human rights violations.

Virtually all the human rights cases lodged before the Community Court of Justice, are in respect of alleged violations of human and peoples' rights contained in Part 1 Chapter 1 of the African Charter on Human and Peoples' Rights, hereinafter referred to as 'ACHPR'. The only notable exceptions, are in respect of preliminary objections raised in respect of Articles 50 and 56 (5) and (6) in Part II, Chapter III of the Charter on exhaustion of local remedies.

i. Exhaustion of local remedies: Article 50 and 56 (5) & (6) of the ACHPR¹

Article 50 and 56 (5) & (6) of the ACHPR are often relied upon by Defense Counsel in contending that the Court lacks jurisdiction to determine human rights cases on the ground that the applicant did not exhaust local remedies before instituting an action

¹ Article 50 of the ACHPR provides that the Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. As for article 56, communications relating to human and peoples rights referred to in Article 55 received by the Commission, shall be considered if they: (5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; (6) are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.



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before the ECOWAS Court of Justice. Whereas, the Supplementary Protocol which gives the Court jurisdiction to entertain applications for human rights violations excludes the exhaustion of local remedies as a condition precedent for instituting actions for human rights violations, the ACHPR which the Court applies, requires the exhaustion of local remedies.

Article 39 of the Protocol on Democracy and Good Governance provides that the Protocol A/P1/7/90 of the Community Court of Justice shall be reviewed so as to give the Court the power to hear *inter alia*, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed. The import of this provision is that applications for violations of human rights could only be brought before the Court after exhaustion of local remedies. Subsequently, the 1991 Protocol of the Court was reviewed and amended by Supplementary Protocol A/SP.1/01/05 of 2005.

Article 9 (4) thereof provides that the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State. However, contrary to the provision in Article 39 of the Protocol on Democracy and Good Governance on exhaustion of local remedies, the Supplementary Protocol did not require the exhaustion of local remedies as condition precedent for instituting actions of human rights violations. Specifically, Article 10 (d) of the Supplementary Protocol provides that "access to the Court is open to individuals on application for relief for violations of their human rights; the submission of application for which shall: (a) not be anonymous; (b) be made whilst the same matter has been instituted before another international Court for adjudication.

The Community Court of Justice has adopted a simple approach in resolving this paradox by repeatedly holding that the Supplementary Protocol does not require the exhaustion of local remedies and that the Court cannot read into it, a requirement that is not contained therein. Furthermore that the requirement for exhaustion of local remedies in the ACHPR only applies to the Commission.

a. Professeur Etim Moses ESSIEM vs. The Republic of the Gambia & Another²

The preliminary objection of the Defendants was on the ground that the action was incompetent for failure to exhaust local remedies as required by Articles 50, 56 (5) and

² Suit No. ECW/CCJ/APP/05/05; Ruling No. ECW/CCJ/RUL/04/07 (20/10/2007). Paragraph 6.



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68 of ACHPR. In its Ruling of 14th March 2007, the Court held that article 50 of ACHPR does not refer to any organization but the Commission and consequently that the Article cannot be applied *stricto sensu* to this case pertaining to the exhaustion of local remedies and its relevance to this Court. Also, that Article 68 ACHPR has no relevance whatsoever in the consideration of the claim before it. The Court further held that Article 10 (d) of the Supplementary Protocol is a special provision that relates to the parties accessing this Court on human rights contraventions while the provisions in the ACHPR on exhaustion of local remedies relate to those cases under the purview of the Commission. In its final judgment in this case of 27th October, 2007 the Court reaffirmed its position on the issue and noted that exhaustion of local remedies has no relationship with the procedure for accessing the Court.

b. Hadijatou Mani Koraou vs. The Republic of Niger

Although the Defendant acknowledged that the condition of exhaustion of local remedies does not form part of the conditions of admissibility of cases of human rights violations brought before the Court, it urged the Court to consider such absence as a lacuna which should be filled in by the Court. After reviewing the relevant provisions of the revised treaty, the Supplementary Protocol, the Charter and the Rules on Exhaustion of local remedies, the Court held as follows:

The adherence of the Community to the principles of the Charter signifies that in the absence of ECOWAS legal instruments relating to human rights, the Court ensures the protection of rights spelt out in the Charter, without necessarily proceeding to do so in the same manner as would the African Commission of Human and Peoples' Rights, hereinafter referred to as 'the Commission'.

Indeed, from the interpretation of Article 4 (g) of the Revised Treaty, one cannot deduce that the modalities for the protection and promotion of human rights by the Court must be those provided for by the Charter. A distinction must be made between the setting out of the fundamental principles of the Charter and the modalities of the implementing such rights. These modalities comprise the creation of the Commission (article 30), its composition (from article 31 to 41), its functioning (from article 42 to 45) and the procedure to be followed before it (from article 46 to 59), whereas the Revised treaty of ECOWAS on its part, has prescribed other mechanisms to the ECOWAS Court of Justice, for implementing these same fundamental principles.

In the final analysis, there are no grounds for considering the absence of preliminary exhaustion of local remedies as a lacuna which must be filled within the practice of the Community Court of justice, for the Court cannot impose on individuals more onerous



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conditions and formalities than those provided for by the community texts without violating the rights of such individuals.

In view of the provisions of article 10 (d) of the Supplementary Protocol, it follows that the rule of exhaustion of local remedies is not applicable before the Court. It is not the duty of the Court to add to the Supplementary Protocol conditions which have not been provided for by the texts.

After the above decisions, a new dimension on the issue of exhaustion of local remedies, with particular reference to Article 39 of the Protocol on Democracy and Good governance was dealt with by the Court in the Case of Musa Saidu Khan vs. The Republic of the Gambia.³

c. Musa Saidu Khan vs. The Republic of the Gambia

The applicant, who is a journalist and a former editor of the Independent Newspaper based in Banjul, instituted this action for illegal detention and torture in contravention of his right to person liberty as guaranteed by article 6 of the ACHPR. The Defendant raised a preliminary objection on the ground, *inter alia*, "that the Plaintiff/ Respondent's suit is an affront to the internal sovereignty of the Defendant/Applicant and violates Article 39 of Protocol A/SP.1/12/01 on Democracy and Good Governance as well as Articles 26, 50 and 56(5) of the ACHPR. The thrust of the Defendants argument was that the Court lacked jurisdiction because the Plaintiff failed to exhaust local remedies available to him in the National Courts of The Gambia and that Article 39 of the Protocol on Democracy and Good Governance lends credence to the fact that Revised Treaty only intended to grant human rights jurisdiction to this Court after the exhaustion of available local remedies.

In its Ruling of 30th June, 2009 the Court maintained its earlier position that Article 10(d) of the Supplementary Protocol does not require the exhaustion of local remedies before a party can access the Court in a human rights violation case. The Court noted that although this provision is at variance with Article 39 of the Protocol on Democracy and Good Governance.

If the Supplementary Protocol on the Court of Justice has the same status as the Protocol on Democracy and Good Governance, then it stands to reason that with issues pertaining to this Court, the Supplementary Protocol takes precedence over the Protocol on Democracy and Good Governance as the Supplementary Protocol was specifically made

³ Suit No. ECW/CCJ/APP/11/07; Ruling No. ECW/CCj/RUL/05/09 (30/06/2009) Para 48.



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in respect of this Court whilst the Protocol on Democracy and Good Governance was not. The general rule of law is that a specific rule supersedes an inconsistent general rule, the specific is deemed to have impliedly amended the general.

The Court further reasoned that “the drafters of the Supplementary Protocol were aware of the provision in Article 39 of the Protocol on Democracy and Good governance, and yet chose to grant jurisdiction over human rights violation to this Court without making the exhaustion of local remedies a condition precedent. It would therefore be fatal for one to import words into the Supplementary Protocol.

The drafters of the Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility of this Court in human rights violation causes. The fact that there is a rule of customary international law in support of the view that local remedies ought to be exhausted before a plaintiff can properly go before international Courts is not in doubt. However, this is not an inflexible rule. It can be legislated away or even parties can compromise it. Article 10(d) of the Supplementary Protocol is an example of legislation out of the rule of customary international law regarding the exhaustion of local remedies. With the enactment of the Supplementary Protocol, ECOWAS Member States expressly dispensed with the customary international law rule regarding the exhaustion of local remedies before access is granted to Plaintiffs coming before this Court.”

The rule is therefore not applicable to this Court. The court further held that Articles 50 and 56 95) of the ACHPR deal with the Commission and not directed to Member States of ECOWAS. It is to be reminded that article 39 of the Protocol on Democracy and Good governance, being inconsistent with article 10 (d) of the Supplementary Protocol A/SP.1/01/05 is null and void on account of article 10 of the Supplementary Protocol which provides as follows: “The provisions of any other prior Protocol that is inconsistent with the provisions of this Protocol shall to the extent of the inconsistency be null and void”

In the views of Maitre Tony ANENE-MAIDOH, the Chief Registrar of the ECOWAS Community Court of Justice, the Court is playing a very useful role in the promotion and protection of human rights in West Africa. The Community citizens of ECOWAS are indeed fortunate, to have the option of proceeding to their domestic Courts or the Community Court of justice, ECOWAS to seek redress for human rights violations. The same idea is supported by Dr. Daouda FALL, the Director of Research and Publications at the ECOWAS Court of Justice who, refers to this option as shop forum available to complainants in the ECOWAS Community space.



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In the final analysis, the Chief Registrar is confident of the success the ECOWAS Community Court of Justice has registered so far and pledged to do more. In the following lines, we will seek into provisions of the ECOWAS Community Instruments prerequisites to the success of the Court.

ii. Prerequisites to the success of the ECOWAS Court of Justice

ECOWAS institutions have set up both institutional and normative frameworks guaranteeing the quality of judgments, among other many we may talk of independence of the Community Court of Justice, rules and regulations providing for smooth access to the court, supra-nationality of courts rules and decisions, etc.

a. Supra-nationality⁴

Supra-nationality 'refers to a situation where an international institution is endowed with powers to take decisions binding on sovereign States either generally or in specific areas of State activity.'⁵In effect, most legal instruments adopted by ECOWAS are now directly applicable within ECOWAS Member States. Among other things, the revised ECOWAS treaty introduced full supra-nationality into the decision making of ECOWAS, enhanced its economic integration and regional peace and security functions, and established a Community Parliament and an organ of the Community Court of Justice as the Community's judicial organ.⁶

To reflect the increased role of supra-national decision-making as ECOWAS' operational instrument, the ECOWAS Summit in December 2006, re-designated the Executive

⁴ In its report, the Committee of Eminent Persons recommended that ECOWAS should operate on the principle of supra-nationality. In the words of the Committee: it is proposed that the principle of supra-nationality should be introduced in the ECOWAS structure and operations. It is sufficient to provide that decisions of the Authority and regulations of the Council shall be binding on not only the institutions of the community but on member States as well. See ECOWAS, Review of the ECOWAS Treaty: Final Report by the Committee of Eminent Persons, para 57-58, 1992. This recommendation was implemented in article 9 (4) of the revised treaty of 1993 which provides that 'decisions of the Authority shall be binding on the member states and institutions of the Community' subject to the judicial powers reserved to the proposed community Court of Justice by article 15 of the Treaty.

⁵ ECOWAS, Review of the Treaty: Final Report by the Committee of Eminent Persons, 16, paragraph 42 (1992).

⁶ For a discussion of all the innovative features of the Revised ECOWAS Treaty, see UNCTAD, Handbook of Economic Integration and Cooperation Groupings of Developing Countries: Regional and Sub-Regional Economic integration groupings, UN, New York, Vol.1, 17 (1996). The Report of Eminent persons that reviewed the 1975 ECOWAS Treaty had recommended that standing before the ECOWAS Court be made accessible to non-State entities too. This was not implemented in the Revised Treaty. However, at its Summit in Accra, Ghana, in January 2005, ECOWAS Summit adopted a Protocol liberalizing access to the Court in favour of individuals and non-State entities.



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Secretariat into a Commission headed by a President, with a Vice-President and seven Commissioners responsible respectively for infrastructure; macro-economic policy; agriculture, environment and water resources, political affairs, peace and security; human development and gender; trade, customs and free movement; and finance and administration. For expedited decision-making, the principal instruments of law-making will no longer be Protocols (which require ratification by the Member States) but Acts and Decisions, which will be applicable directly in Member States. Thus, the new legal regime of ECOWAS envisages that:

Community Acts will be Supplementary Acts, Regulations, Directives, decisions, Recommendations and Opinion. Thus, the Authority passes Supplementary Acts to complete the Treaty. Supplementary Acts are binding on Member States and the institutions of the Community. The Council of Ministers enacts Regulations and directives and makes Decisions and Recommendations. Regulations have general application and all their provisions are enforceable and directly applicable in Member States. They are enforceable in the institutions of the Community. Decisions are enforceable in member States and all designed therein. Directives and their objectives are binding on all member states. The modalities for attaining such objectives are left to the discretion of States. The Commission adopts Rules for the implementation of acts enacted by Council. These Rules have the same legal force as Acts enacted by Council. The Commission makes Recommendations and gives advice. Recommendations and advice are not enforceable.⁷

The legal instruments and tools at the disposal of the Community have become simultaneously both simplified and more complex. The process of instituting or adopting new norms within ECOWAS has become much simpler to the extent that Protocols which require prolonged processes of adoption, followed by domestic processes of ratification, have now diminished in their significance as instruments for decision making within the Community, their relative significance vis-à-vis the national legal systems of ECOWAS and the evolving regional legal system sought to be created, will take some getting used to among legal professionals.

b. Provisional Entry into Force of the ECOWAS Court of Justice Protocol

According to Article 11 (1) of Supplementary Protocol A/SP.1/01/05 Amending the Protocol A/P1/7/91 on the Community Court of Justice, this Supplementary Protocol shall enter into force provisionally upon signature by the Head of State and

⁷ 'ECOWAS Commission at a Glance', <http://www.ecowas.int>, accessed on 12 March 13, 2011



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Government. Accordingly, signatory Member States and ECOWAS hereby undertake to start implementing all provisions of this Supplementary Protocol.

Paragraph 2 of the same protocol talks of definitive entry into force upon ratification by at least nine signatory States, in accordance with the constitutional procedures of each Member State. The new thing in this article and contrary to what was common to many treaties is that even though the ratification is delayed by the small number of ratifications, it will not hamper the functions of the Community Court of Justice to exercise its jurisdictions.

One can see that the new legal regime provides the Community with compulsory legal instruments, compatible with the principles of immediate application, direct application and primacy of Community Law over national legislations.

➤ **Immediate application**

This principle presents consequence of forbidding any transformation of community norms at the national level as well as the interdiction of any procedure of their reception in domestic law.

➤ **Direct application**

Direct application means that rules of community law shall be of full effects in all Member States, starting from the date of their entry into force and throughout the whole period of their validity.

➤ **Primacy of Community Law**

Community law supersedes national legislation and obliges each Member State to apply it, notwithstanding the opposing national legislation, be it prior or posterior. In all cases, the Community law cancels and replaces all contrary national provisions.

c. Prevalence of Monism on Dualism in application of international human rights norms

According to international law theory, the extent to which the provisions of international human rights treaties have become part of a particular country's domestic law correlates with the status enjoyed by international law in that domestic legal system. As far as international treaties are concerned, they are expected to become an integral part of national law upon ratification in states following the monist tradition.



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Dualist states should in theory be clearly distinguishable, because international norms, in principle, need to be domesticated before they become part of national law.

In Commonwealth Africa, which on the whole is following the dualist theory, treaties do not become part of domestic law merely by virtue of their ratification. The explanation for this lies in the British constitutional tradition. The ratification of a treaty which binds the state at the international level ('external ratification') is a prerogative of the Crown. Once ratified, treaties have to be incorporated explicitly into domestic legal system. This is in line with the system of parliamentary sovereignty, which has been developed as a cherished bulwark against the exercise of executive prerogatives. In terms of the long-standing principle of checks and balances, and of the more recent symbolical functions of the Crown, such 'external' ratification does not automatically bind domestic courts.

Following this tradition, the position in most Commonwealth African states is that international law does not become part of domestic law, unless explicitly incorporated by an Act of Parliament. International law may be incorporated into these dualist legal systems in one of two ways: directly, through incorporation, or indirectly, through a process of reception (transformation). Incorporation entails the wholesale enactment, as part of domestic legislation, of an international agreement. Explicit reference is usually made to the international instrument. Reception or transformation takes place if the provisions of an international agreement are reflected in parts of national legislation; or if pieces of national legislation are amended or repealed to conform with international norms, usually without explicit reference to the source of these norms.

Although the dualist principle remains largely unchallenged, it has been qualified in particular respects. For example, in 1988, at Bangalore, India, a colloquium of senior Commonwealth judges convened to discuss the question of domestic of human rights norms and reached a number of conclusions that have come to be known as the Bangalore principles.

One of these principles is that where a treaty has been ratified but not yet incorporated into domestic law, it would still be taken into account by a court for purposes of deciding cases where the domestic law, whether constitutional, statute or common law, is ambiguous, uncertain or incomplete (Bangalore Principle NO. 4). Another Bangalore principle is that in performing their judicial roles, judges must interpret statutes in such a way as to avoid the violation of international law. This is based on the presumption that legislatures do not intend to enact laws that violate the state's treaty obligations.



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The Bangalore principles were fully endorsed in 1989 at a judicial colloquium of senior African Commonwealth judges held at Harare, Zimbabwe.⁸ Following the Bangalore and Harare colloquia, a number of judges in the eastern and southern Africa region have demonstrated their readiness to draw on international human rights norms in interpreting local legislation including national constitutions. Thus referring to the legal effect (under domestic law) of Zambia's ratification of international human rights instruments, in *Sara Longue v. International Hotels* (1993) Justice Musumali said:

...ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provision of such [a treaty]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that treaty or Convention in my resolution of the dispute.⁹

In *Dow v. Attorney General of Botswana* (1992)¹⁰ the Supreme Court of Botswana also declared that although international treaties were not binding within Botswana unless enacted by Parliament, courts ought not to interpret legislation in a manner that conflicted with Botswana's international obligations. After making reference to Botswana's ratification of several international human rights treaties, Amissah, JP observed that, even if:

...it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.¹¹

In a separate concurring judgment, Aguda JA made reference to the Bangalore judicial colloquium, citing with approval the arguments of Hon. Justice Michael Kirby, then president of the Court of Appeal, Supreme Court of New South Wales, and that of Hon. Justice Muhamad Heleem, Chief Justice of Pakistan. Both judges having argued, at Bangalore, that when interpreting written constitutions whose provisions are usually expressed in general terms, judges have a wide choice and in exercising that choice

⁸ This endorsement is known as the Harare Declaration on Human Rights. See *The Parliamentarian*, October 1989, LXX No. 4, p.218.

⁹ *Sara Longue v. International Hotels*, 1993 (4) LRC 221.

¹⁰ *Unity Dow v. Attorney General of Botswana* 1992 LRC (Const) 623 (CA). See also E.K. Quansah, 'Unity Dow v. Attorney General of Botswana, One More Relic of a Women's Servitude Removed?'

¹¹ *Dow v. Attorney General of Botswana*, 1992:656.



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judges should normally seek to ensure compliance with the international obligations of the state in which they operate.¹²

Tanzanian judges have also adopted a similar stand concerning the effect of domestic law of unincorporated international treaties. In 1990, the High Court of Tanzania, relying on the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the African charter on Human and Peoples' Rights, declared *ultra vires* the constitution, a customary law rule of the Bahaya people of Tanzania that was discriminatory to women on matters of inheritance.¹³ Hon. Justice Mwalusanya considered such a rule to be discriminatory and contrary to Article 13(4) of the Tanzania bill of Rights.¹⁴ The Supreme Courts of Namibia,¹⁵ Nigeria¹⁶ and Zimbabwe¹⁷ have all handed down significant decisions that clearly signal their willingness to draw on international human rights norms to interpret domestic law, including their national constitutions.¹⁸

All this suggests that the localization of international human rights norms by domestic courts has become an acceptable practice within Africa jurisdictions.

d. Judicial Monism

¹² *Dow v. Attorney General of Botswana, 1992:671.*

¹³ The relevant rule provided that women could only inherit clan land for use during their life time but, unlike male heirs, they were not entitled to alienate such property.

¹⁴ *Ephraim v. Pastory, 1990 (87) ILR 106.*

¹⁵ *S v. D and Another 1992 (1) SA 513* also noted in 1993 (37) JAL 97. See also Pamela Jane Schwikkard, 'Sexual Offenses—the Questionable Cautionary Rule', pp.46-49, South African Law journal, Vol.110, 1993.

¹⁶ *Abibatu Folami and Others v. Flora Cole and Others v. Minister of Education, Bophuthatswana and Anor 1992 (3) SA 181.*

¹⁷ *Ncube and others v. the State 1987 (2) ZLR 246; Rattigan v. Chief Immigration Officer of Zimbabwe 1994 (1) LRC 343, 195 (2) SA 182, Salem v. Chief Immigration Officer of Zimbabwe 1994 (1) LRC 354.*

¹⁸ This is not to ignore instances of lost opportunities such as the Kenya case of *Virginia wambui otieno v. Joash Ougo and Omolo Siranga*; Court of Appeal, Nairobi Civil App. No. 31 of 1987 where the Supreme Court of Kenya failed to consider the compatibility of Luo customary law with international human rights standards. (Cited in Cotran, *Casebook on Kenya Customary Law*, pp.331-345, professional books and Nairobi University press, Nairobi, 1987.) For a more recent critique of the Kenyan situation, see Mumbi Mathangani, 'Women's Rights in Kenya: A Review of Government policy', pp.179-199, *Harvard Human Rights Journal*, Vol.8, 1995. See also Marsha Freeman, 'Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries', pp.110-138 especially pp.121-125, *Berkeley's Women's Law Journal*, Vol.5, 1989-90.



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The ECOWAS Community Court of Justice does not have powers to hear appeals against decisions of National Courts of Member States. The distinctive feature of the Community Legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law and if the obligations to implement the decisions of the Community Court of Justice lies with the National Courts, the kind of relationship existing between the Community Court and these National Courts is not of a vertical nature between the Community and the Member States but demands an integrated Community legal order. The ECOWAS Court of Justice is not a Court of Appeal or a Court of Cassation.¹⁹

This opinion confirms the supra-national effect of ECOWAS legal instruments and decisions. Its implications are quite far reaching. For litigators, there is no additional forum with arguably more robust normative repertoire than national courts. However, this also saddles the Court with the responsibility of being a forum of first instance and primary fact-finder in essentially international proceedings. The cost implications for litigators in cases with contested factual foundations may turn out to be quite significant. This may involve, in human rights cases, in particular, moving the court to the sites or locations of violations for ease of collection of evidence. Thirdly, the asserted monism of the community legal order implies that to the extent that the community court of justice is a court of first and last resort.

e. Enhancing Access to the Court

The enjoyment of freedom requires a genuine area of justice, where people can approach the Community Court as easily as those in their own countries. From its earliest days, the law has been rooted in the idea of serving the greater good in society. In the first code of law written over 3,700 years ago, Hammurabi noted that the purpose of the law is to protect the powerless from the powerful. That purpose is central to the justice system, which promises equal justice under the law to all people.

But in order for the law to provide equal justice to all, all people must have equal access to the legal expertise that only a lawyer can offer. Although the courts system promise equal justice, unequal access to legal assistance by indigent persons, frequently means that indigent person receives no justice at all.

The ECOWAS Court of Justice has powers to hear and give binding decisions on cases brought by individuals, including companies and NGOs, against governments in West Africa on a wide variety of issues including discrimination, citizenship, regulation of the

¹⁹ Supplementary Protocol A/SP.1/01/045 Amending the Protocol (A/P1/7/91) relating to the Community Court of Justice, adopted 19 January 2005, para. 32.



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movement of persons across international and regional boundaries as well as regional trade and transactions, and compliance with national and regional rule of law.

The existence of this court increases avenues within the sub-region for holding African governments accountable but do community citizens know about the court?

At the commencement of the present 2007/2008 new legal year for the ECOWAS Court of Justice some weeks ago, Justice Aminatta Malle Sanogo, of the Court of Justice, stated amongst other things:

"Accessibility constitutes a serious handicap to the Community citizens possessing the right to seek justice before the Court due to the long distances separating them from the Court, as well as the extreme poverty of most of the potential applicants, who cannot therefore take their cases to the court."

She noted that this issue to justice has been a major challenge facing the ECOWAS Court of Justice which is situated in Abuja and that it has become increasingly difficult for citizens of other West African states, whose rights have been violated, to come before the court for justice. Justice Malle Sanogo stated that this problem has led to the setting up of a legal solidarity system at the Community level to make it possible for the legitimate seekers of justice to gain easier access to justice at the Community level. For his reason, there is great need to think of Strategies to enhance access to the ECOWAS Court of Justice.

➤ Legal Aid

The poor face multiple obstacles to legal and judicial services. As a basic public service, community citizens must have access to conflict resolution and rule enforcement mechanisms. The most common approach to improve access is to introduce subsidized legal services. In some national jurisdictions, to promote access to justice, some international organizations such as the World Bank, have targeted legal aid funding specifically at poor women and children, who face particularly high obstacles to legal and judicial services. Successful legal aid services for poor women have been shown to increase the probability of obtaining favorable judgments in child support cases, increase the chance of actually obtaining child support payments, and increase the probability of severe physical violence from ex-spouses or –partners.

Poor people are particularly vulnerable to human rights violations and abuses by governments' authorities and private individuals. The most important tool to defend themselves against these abuses is court protection. Usually, for economic or other



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reasons, poor people lack the capability to obtain court protection. Even if free legal aid is available, they may lack the necessary information and self-confidence to seek redress through the courts. Thus, ECOWAS states should actively promote the free access of poor people to the courts and other dispute resolution mechanisms as a remedy against human rights violations.

➤ **'Pro Bono' Services**

It is the responsibility or duty of lawyers to provide legal services to poor, marginalized and indigent individuals, groups, or communities, without a fee or expectation of compensation, in order to enhance access to justice. ECOWAS nations need to examine legal and practical conditions that facilitate the provision of *pro bono* work and the experience of various developed and developing countries in establishing and managing a *pro bono* program for the Community Court.

➤ **Public Interest Work**

Public Interest Work (PIL) refers to the practice of lawyers seeking to participate in social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms. Sometimes taking advantage of procedures that allow a single lawsuit to resolve a large number of claims, these public law cases can involve the restructuring of important government institutions, including public schools, mental hospitals, welfare agencies, and prisons and that can affect many thousands of individuals. Although Public Interest Litigation originated in the United States, it is now part of the landscape of many nations. ECOWAS nations can facilitate the provision of PIL through the Bar Association in the Community.

➤ **Legal Information**

The complexity, scope and sheer number of legal rules had long since outweighed the capacity of individuals to master them. In addition, poor people are rarely literate in legal matters. Generally, Court costs are too high for people to seek a remedy, lack of clarity in the normative framework on the justice dimensions of social, economic and cultural rights, restrictive rules of standing act as a barrier to access justice, complex regulations and procedures alien and off-putting to the majority of the population, geographical and physical barriers, cultural and linguistic barriers. However, the protection of rights requires access to legal information and, this in turn enhances their effectiveness.

➤ **Public Awareness**



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Very little is known about the ECOWAS Community Court, which indicates a need for the Court and their personnel to develop and conduct outreach programs. There is the need for ECOWAS nations to keep working on public awareness campaigns and partner with civil society organizations in taking steps to adequately sensitize Community citizens on their rights and duties under ECOWAS laws.

f. Free Access to Individual Complainants

The challenge of creating accessible justice mechanisms in the West African sub-region transcends national boundaries as most African countries have had an uphill task in trying to overcome it. Across the African continent it is not in doubt that national judiciaries are generally under-funded and that their independence is more often than not undermined mainly by the other arms of government. Be that as it may, the establishment of the ECOWAS Court of Justice and the subsequent adoption of policies to facilitate its functionality remains a giant achievement within the sub-region. In July 2004, the 15 countries of ECOWAS agreed at the ministerial level to grant individuals and companies the right to sue the governments of the region before the ECOWAS Court of Justice in Abuja. This culminated in the landmark achievement which occurred in January 2005, when the Summit meeting of ECOWAS in Accra, Ghana, adopted a supplementary Protocol amending the Protocol on the Community Court of Justice to grant individuals and non-state entities access as claimants to the ECOWAS Court of Justice.

g. Independence of the Judiciary

According to Article 3, new Paragraph 1) of the Supplementary Protocol A/SP.2/06/06 Amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7 Paragraphs 3 of the Protocol on the Community Court of Justice), the Court shall be composed of seven independent judges selected and appointed by the authority from nationals of the Member States who are persons of high moral character and possess the qualification required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law, particularly in areas of Community Law or Regional Integration Law.

Furthermore, article 3, new Paragraph 2 requires candidates to the posts of Judge of the Community Court of Justice to have a total of no less than twenty years professional experience. Election of the Court's Bureau is in the hands of the members of the Court. No two members of the Court shall be nationals of the same member state. One can



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easily notice how both procedure and conditions of recruiting judges guarantee independence.

➤ **Article 3, new Paragraph 4 provides for the procedure of selecting judges**

The Authority of Heads of State and Government shall allocate vacant posts to Member States. A Judicial Council of the Community composed of the Chief Justices of the Supreme Courts of Member States to which the posts have not been allocated, or their representatives, shall select three candidates per country from among nationals of the countries to which the posts have not been allocated. The Judicial Council shall also interview the candidates and propose their appointments by the Authority of Heads of State and Government through the Council of Ministers.

➤ **The Judicial Council of the ECOWAS Community**

For the recruitment of judges to the Community Court of Justice, the Judicial Council of the Community shall comprise the Chief Justices of the Supreme Courts of member states or their representatives to which positions of judges have not been allocated.

For disciplinary matters, the Judicial Council of the Community shall comprise the Chief Justices of the Supreme Courts of member states or their representatives which do not have judges on the Community Court of Justice, and one representative of the judges of this Court, elected by his peers for one year.

The representatives of the Chief Justices of the Supreme Court shall be judges of the Supreme Court.

According to article 4, new Paragraph 7, cases of discipline of judges and cases of inability to perform the functions of a judge by reason of physical or mental disability of members of the Community Court of Justice, shall be brought before the Judicial Council of the Community for consideration.

Duration of term

Membership of the Judicial Council of the Community shall change whenever new judges are appointed to the Community Court of Justice, and when a new representative is elected for the judges in accordance with article 2 (2) of the Regulation (Decision A/Dec. 2/06/06 establishing the Judicial Council of the Community).



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Functions

The Judicial Council of the Community, constituted as stated in Article 2 (1), shall shortlist three candidates per member state, from among applicants of the member states to which the positions have been allocated. This Council shall interview the short-listed candidates and recommend the appointment of the judges to the Community Court of Justice by the Authority of Heads of State and Government through the Council of Ministers.

The Judicial Council of the Community constituted as stated in Article 2 (2), shall examine cases of gross misconduct and inability to perform the functions of a judge by reason of physical or mental disability of members of the Court. The Judicial Council of the Community, through the Council of Ministers, shall make recommendations to the Authority in case of criminal acts committed by judges of the Community Court of Justice.

Judicial Council of the Community may be assisted by other ECOWAS organs or offices. Complaints or allegations shall be forwarded to the Chairman of the Community Judicial Council, through the ECOWAS Executive Secretary. The Chairman shall make necessary consultations with other members of the Council and shall, where necessary, request the Executive Secretary to convene a meeting of the Judicial Council. The Chairman shall thereafter inform the Court about the proposed meeting of the Community Judicial Council.

The Judicial Council of the Community shall prepare its draft budget which shall be incorporated into that of the Executive Secretariat.

According to article 4 (1) When the Court called upon to decide whether a member no longer fulfils the requisite conditions or no longer meets the obligations arising from his office, the President shall invite the Judge in the presence of the other judges to make representations to the Court, in closed session and in the absence of the Chief Registrar. Article 4 (7) of the Protocol shall apply.

Thus, in the event of gross misconduct, inability to exercise his functions or physical or mental disability on the part of one of its members, the Court shall meet in plenary session to take cognizance of the fact. The Court shall then draw up a report which will be promptly transmitted to the Authority which may decide to relieve the member in question of his post.



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h. Compliance with Court's decisions

Following the adoption in 2005 of the Supplementary Protocol granting individuals and non-state entities access as claimants to the ECOWAS Court of Justice, it is encouraging that despite the big number of petitions against governments and other states' actors, court's decisions are complied with. According to Me BANE, no state has resisted from executing the court's judgments.

Indeed, according to article 24, judgments of the Court that have financial implications for nationals of Member states or Member States are binding (article 24 (1)). The execution of any decision of the Court shall be in form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State (article 24 (2)). Upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced (article 24 (3)).

All Member States shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly (article 24 (4)). Considering the fact that only the Republic of Guinea has complied with this obligation, Dr. FALL concludes that the appointment of the national authority to deal with execution of the ECOWAS Court's decisions can be ignored since the practice shows us that decisions that have been executed so far by Member States did not require the presence of such a national authority.

Thus, in *Hadidjatou Mani Koraou vs. The Republic of Niger*²⁰, the later complied with the decision of the Court, in paying the amount of CFAF 10,000,000 to the Applicant. This

²⁰ Hadidjatou Mani Koraou brought her case before the ECOWAS Court of Justice to press charges against the Republic of Niger for violation of her fundamental human rights, i.e. for the Court to find that she had been in a situation of slavery and to prefer sanctions for violation of her rights.

In 1996, the Applicant was sold for a sum of CFAF 240,000 in accordance with the ' wahiya' practice of the Bouzou custom in the northern part of Niger, which consisted of acquiring a young girl, generally under conditions of servitude, for her to serve both as domestic servant and concubine.

After living for nine years in the worst of conditions, with the firm resolve to come out of her condition of slavery, she embarked upon a true judicial marathon before the national courts of Niger, which, despite having found that Hadidjatou Mani Koraou had been in a situation of slavery, did not grant her justice.



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positive attitude of the Republic of Niger is to be commended on another account: as soon as the Judgment was read out, the Niger authorities very quickly declared their willingness to comply with the Court's verdict and promised to take all the necessary measures to that effect.

In Habré's case, where the Republic of Senegal were asked by the ECOWAS Court of Justice to establish special tribunal to judge former Chadian President, though it is arguable whether the Senegalese Government complied with the court's decision or not, what is interesting is that Senegalese authorities did not set Mr. Habré free, they rather before internal political tensions transferred the obligation to the African Union.

In another controversial case, Chief Ebrimah Manneh vs. The Republic of The Gambia, the later was asked to release the plaintiff from unlawful detention without any further delay upon being served with a copy of the judgment. The unfortunate issue in this case is that the journalist died in custody before the judgment could be executed. Nobody could challenge the Gambian Government for not having executed the Court's judgment.

Jean Bosco Ngendahimana
7 April 2011

It was this inaction on the part of the administrative and judicial authorities of Niger that was sanctioned by the ECOWAS Court, which asked the Republic of Niger to pay CFA F 10,000,000 in damages to Hadidjatou Mani Koraou.



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