

Weakening National Judicial Institutions and the Rescue Mission of Regional Courts: A Critical Assessment of the ECOWAS Community Court of Justice

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Abstract

Regional courts are currently functioning effectively in the continent of Africa in response to the progress in economic assimilation initiatives. The Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) has been particularly active, handing out rulings on subjects ranging from human rights infringements, the validity of national elections, to the freedom of movement. Further, the judiciary is responsible for the interpretation of laws within the state, a position which is generally altruistic for most constitutional arrangements in the West African sub-region. However, democratic governance, in most of the states constituting the ECOWAS, is challenged by power dynamics that have created a senior/junior partnership relationship among the arms of government; and in particular, the dominance of the executive over other arms of government. This state of affairs affects mostly the judiciary, and by extension impacts litigants' confidence in the judicial systems within the sub-region. This consequently explains citizens' options to approach the ECCJ for resolution of disputes. This paper seeks to interrogate the causes that have weakened judicial systems within the sub-region, using Nigeria as a case study to determine how the ECCJ intervenes on such matters and the challenges regarding the execution of its judgments. Further comparative analysis of the SADC Tribunal shall be explored. The paper concludes by providing possible ways for the judiciary to navigate the challenges and also recommending how the justice sector can generally be strengthened.

Keywords: Economic Community of West African States (ECOWAS); tribunal; judiciary; interpretation; constitution; community; human rights

Introduction

In any democratic state, there are three arms of government; namely legislature, executive and the judiciary that are generally acknowledged within the settled doctrine of the separation of powers. The resurgence of democratic governance and values has placed a great premium on this classification, with an emphasis on the legislature as the insignia of a democratic regime (Alabi and Egbewole 2010, 1). Despite this, the position of the judiciary is regarded as the only hope (for the hopeless and the hopeful) in view of the critical role the institution is playing in the stabilisation of the polity (Egbewole 2013). Incontestably, the judiciary (as an arm of government) serves as a strong voice for democratisation on the African continent, in spite of serious challenges being faced by the institution and the key players in it. In order to effectively discharge its function as arbiter in the resolution of disputes, either *intra* or *inter se*, the judicial arm must be independent in all its operations (Imam 2015, 108). These must be in line with accepted international standards for measuring judicial independence, as put in place by the United Nations representing global practices.¹

The significance of the judiciary in the resolution of disputes in Africa informs this paper's investigation on how it is effectively performing this role. The paper further examines how politics, administration and governance have weakened the judiciary to the extent that its role in serving as the bastion of hope for the hopeful and the hopeless, is now being challenged. The paper will, however, attempt to investigate the silver lining or the light at the end of the tunnel, by examining the critical role the Economic Community of West Africa States (ECOWAS) Court of Justice (ECCJ) is playing as a sub-regional court to salvage the judiciary. The question which the paper posits to answer, is whether the weakening strategies of "senior" partners in the power matrix within most African countries, against the "junior" partners can be salvaged by the regional courts (Egbewole, W. O., and Egbewole, Q. A. 2017, 6–13). The paper is divided into segments to discuss the separation of powers, the place of the judiciary, and the weakening of judicial institutions. The ECCJ is discussed as an example, followed by a look at the way forward and concluding remarks.

Doctrine of Separation of Powers

The doctrine of the division of governmental powers was established in relation to the development of democratic governance. It was argued that there is the need for a more expansive devolution of powers, instead of a concentration (Glassman 2016, 7; Vile 1998, 82–83). James Harrington (see Dwight 1887), in working out a constitution for Great Britain, prescribed rotation in office, free choice of electors and a separation of powers between the three arms of government. These three arms of government are known today as the basis for "an equal commonwealth," which the government at all times must respect—especially, the will of the people (George and Thomas 1973, 467).

1 "Basic Principles on the Independence of the Judiciary," Preamble, United Nations Human Rights Commission Res. 40/32 Nov. 29 1985 and 40/146 Dec. 13, 1985 serving as an example in this area.

Indeed, John Locke's classification of governmental powers into these three compartments (Simmons 2002, 457) was central to the liberal democratic creed and boosted the idea—even when doubts still existed in some quarters. However, this idea, as we have it today, was popularised by Montesquieu (cf. George and Thomas 1973, 497 and 515). According to Montesquieu (1656[1777]):

Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go. ... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another. ... When the legislative and executive powers are united in the same person or body ... there can be no liberty. ... Again, there is no liberty if the judicial power is not separated from the legislature and executive. ... There would be an end to everything if the same person or body, whether of the nobles or of the people, were to exercise all these powers. (Montesquieu 1656[1777], Chapter VI)

Essentially, there can never be a watertight separation of powers, thus the idea of a pure theory of separation of powers becomes a subject of serious intellectual debate. Separation of powers, according to Alabi (2010), is a bulwark against arbitrariness. Power generally tends to corrupt and this agrees with the popular saying that “absolute power tends to corrupt absolutely” (Anise 1980, 15). Modern constitutional theorists emphasise that the powers of government should be separated between the three organs of government. In this way, absolutist tendencies and reckless abuse of political powers can be avoided. Therefore, as a necessary corollary to the principle of the separation of powers, there is the idea of checks and balances. Checks and balances presuppose that the arms of government should check and balance their respective powers against each other (Alabi 2010, 100).

The powers of the judicial arm also developed in relation to the two other arms of government. In developed democracies, especially in the United States of America as well as Nigeria, the judicial system is fashioned in the same manner. The judicial institution is considered important, because it is the institution vested with jurisdiction to settle disputes, interpret the laws and even determine the constitutionality of the other arms of government's actions. This arrangement gives the judiciary a prime place in power balancing.

Apparently, the founding fathers of the American Federation identified the need for an efficient government as the basis for separating the executive from the “fragmented and episodic” Congress. As a consequence, the prevention of tyranny was the most prominently articulated rationale for the separation of powers (Egbewole 2011, 10–6). Nwabueze (1991, 73) posits that the doctrine of separation of powers curbs arbitrariness and autocratic inclinations, and the tendency towards arbitrariness and despotism is reduced where the executive does not fully control the legislative process. The two goals of efficiency and the devolution of powers to prevent abuse and arbitrary use are seemingly conflicting, and scholars are aligned with one of the two positions. On a

constant basis, attempts are being made at the intellectual level to ensure the reduction of the diverse positions (Currie 1986, 19–36; Peter 1984, 33). These opposite positions may be right, depending on what issue is being considered. If the separation of powers is analysed from the perspective of a reduced workload to different personnel in the government, then efficiency is expected to be the goal. If, however, the issue of accumulation of powers by the same arm of government is being considered, then the idea of a separation of powers on arbitrariness is imperative.

Arguably, the contention has largely been between those who favour separation of powers and others who believe that the reality of governance supports fusion (or concentration), rather than separation of governmental powers (Ray 2003, 144–149). From the latter perspective, it is argued that the complete separation of powers is impossible. Even within its own sphere of authority and competence, no one arm of government can exercise absolute powers. In order to ensure harmonious workings of government, powers are shared and an overlap of some kind is allowed. As will be argued, judicial powers accommodate a level of law making, while executive powers provide for delegated legislation by way of law making. A form of adjudication is performed by the executive in the discharge of executive functions.

Notwithstanding, the doctrine has been a veritable source of counterforce in power dynamics, such that an arm of government cannot lord itself over another arm. The operation of the doctrine is, however, more complex in Nigeria, in the sense that contests and contestations for power continue to be a recurring challenge between the various arms, especially between the executive and legislature (Okebukola 2017). One area where this disagreement is more pronounced, and which recently manifested, is budgeting.² Another area is the disagreement on the confirmation of the nominees by the President for executive offices. That was evident when, in 2015, the President nominated a candidate (Ibrahim Magu) for appointment as the chairman of the Economic and Financial Crime Commission (EFCC).³

In the same vein, the power balance in Nigeria appears to be dominated by control of the revenue of the Federation, without recourse to a constitutional power devolution strategy. It appears that the equation is generally designed to favour the arm that has control of the purse.⁴ The need for a harmonious working relationship cannot be over-

2 For the 2017 budget in Nigeria, there was an unresolved disagreement between the Minister of Power, Works and Housing, Raji Fashola SAN and the National Assembly on the budget allocation to the Ministry. See www.premiumtimesng.com/.../234881-fashola-slams-national-assembly-for-lagos-ibadan. Accessed July 21, 2017. The disagreement between the 8th National Assembly and the Presidency permeated the entire administration between 29 May 2015 to date.

3 In fact, the Presidency has approached the Supreme Court to determine whether there is a need for the confirmation of such position in the light of Section 171 of the 1999 Constitution. See www.vanguard.com. Accessed July 21, 2017.

4 By Section 80 of the 1999 Constitution, 1999 (as altered) the executive arm of government is given power to control the funds of the Federation, notwithstanding the fact that the spending can only be done by presenting budget estimates to the legislature, which will then pass the Appropriation Bill into

emphasised, as no arm of government can effectively discharge the duties associated with governance; and the Constitution of Nigeria clearly recognises this by creating the three power centres. What then, is the place of the judiciary in this power equation?

Place of the Judiciary

In any constitutional democracy globally, one of the essential functions of the judiciary—as the third arm of government—is the power of interpreting the law.⁵ Unlike the other arms of government, the judiciary is occupied by unelected individuals to secure its independence. Be that as it may, section 6 of the Nigeria Constitution provides that “the judicial powers of the Federation shall be vested in the courts ...” Exemplary evidence of the universality of the judicial role is section 9 of Malawi’s Constitution, which provides:

The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law (Malawi Constitution 2002).

As the last hope of the people in any society, the judiciary must be creative in the exercise of their decision-making powers. Though they are not expected to expand the law, fundamentally the courts have the duty to expound the law (*INEC v Musa*; 2008, 1 MJSC: 192; Nigeria) especially any law which has the effect of depriving a citizen of his rights (*Adole v Gwar*; 2008, 5 MJSC: 72; Nigeria). Invariably, they are not expected to just act mechanically in following the rules prescribed by the legislative arm, but must do this by relating them (the rules) with human consciousness and the reconstruction of human relationships (Bhagwati 1999).

The major inevitable occurrence in all human societies, is conflict. This makes the judicial role momentous in the settlement of disputes and the interpretation of laws made by the legislative branch, or those that are made on the authority of the legislature (Emmanuel 2000, 1–20). This role is becoming more expansive, as it is now being used to accommodate a form of law making. This frequently manifests when a court effectively uses its interpretative power to expound the law, which does not explicitly address an issue in controversy before it, or if there is no provision in the law that expressly covers the issue. This proposition can be underscored from the case of *People’s Democratic Party v Independent National Electoral Commission* (1999 7 SC Ptii, 53–55 Nigeria), where the Supreme Court was faced with the construction of

law as provided in Section 81 of the Constitution, 1999. The disagreement today is whether or not the National Assembly can add to, subtract or do anything to the allocation of funds in the estimate submitted by the executive.

5 Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) gives the judiciary duty to settle disputes. There are different layers of court but essentially there are constitutionally recognised courts referred to as superior courts of record, and they are available in all the 36 states in Nigeria, as well as in the Federal Capital Territory.

sections 37(1) and 45(1) of Decree (No 3 of 1999), as related to the time when the seat of an elected governor is deemed to be vacated. They gave a wider meaning to the word “die” and held that by virtue of the said provisions, the 2nd respondent (Bonnie deputy governor elect) was entitled to be sworn in as governor. As argued earlier in the paper, this role fits the judiciary well because they are not expected to be robots in the discharge of their judicial duties (Egbewole 2013, 6). However, the expansive role of the judiciary has been the subject of criticism by scholars such as Aguda (1983, 16 and 61), Aderemi (*Obi v INEC* 2009, 215; Nigeria), and Thomas (2004, 279). Irrespective of their contention, one has no reason to disagree with the expansive role of the judiciary in the light of recent developments around the world, such as the determination of political questions or election disputes. It must be emphasised that when decisions are taken and new legal frontiers are espoused in judgments, especially by the Supreme Court, the legislature is usually left with no choice but to amend the laws in line with such decisions (*Amaechi v INEC* 2007, 79, 91, 170 and 504; Nigeria). Against the above background, it is incontestable that the judicial responsibility in governance, especially in a democracy, cannot be over-emphasised. Oyeboode (1999) posited that:

It is almost axiomatic that the judiciary plays a pre-eminent role in any democratic dispensation. Indeed, a political system can be considered as democratic on the basis of the extent to which the judicial arm is permitted to hold the scales of justice over and above the other arms of government. The source of authority of the judiciary for exercising this critical function is, of course, the Constitution which in fact, captures, in a rather poignant fashion, the interplay of the judiciary, constitutionalism and democracy. For, if good governance has become a modern day desideratum, human ingenuity is yet to devise a better means of preventing arbitrariness and ensuring social well-being than that of separation of powers, due process of law and independence of the judiciary which, taken together, constitute the hall-marks of a well-functioning democratic setting (Oyeboode 1999).

Conversely, the functionality of the judiciary is hampered by the twin factors of independence and corruption. In this perspective, judicial independence presupposes self-determination against any external interference or influence, which is a *sine qua non* for the effective performance of its constitutional mandate. As a result, it is posited that for the judiciary to be seen as being independent, it must have autonomy of thought, liberty of decisions, and independence in funding, appointment or termination of appointment. Generally, the judiciary must be free from any form of interference or undue influence in the discharge of their duties as an independent arbiter. The concept of judicial independence was seen as the foundation of the judicial arm as articulated by Holmoyvik (2014, 45). We have argued earlier that the independence of the judiciary is an all-embracing concept and has some basic features. Egbewole (2018a, 1) postulates that:

For the judiciary to be truly independent as an institution, the functionaries must possess some qualities in terms of professional skills acquired by training, personal satisfaction, self-confidence, financially disciplined and limited level of socialisation. All these

qualities and others will affect the operations of the institution and at the level of governance, the Judiciary must be self-sustaining financially by way of autonomy, appointment of the judicial officers and other personnel must be determined solely on merit without any interference of politics or any form of pollution. The career advancement of the Judges must not be tied to the apron strings of the political structure but rather constitutionally defined in such a way that the judicial officers will not feel bound by the vagaries in the political dynamics of the State.

The judiciary has the mandate to ensure that justice is delivered fairly, in the spirit of the law and equality before the law, especially when the judges are independent. Judicial independence may not be achieved when the mode of appointment is not transparent or free from external influence, or where there is no financial security for the judges (Imam and Egbewole 2014, 55). This may undermine the very principles of fairness and due process of law, and in turn erodes public confidence in the judiciary. The question is whether the existing mechanisms in the Africa Regional Treaties sufficiently protect the independence of regional courts' judges. This can be explained by the method of appointing the courts' judges by national judges of member states. This approach has its inherent dangers, as it could undermine the courts' independence, especially where, on appointment to the court, a judge's employment as a national judge is not terminated, and there is the expectation that he will return to the national post on the expiration of the term in the regional court (Voeten 2013). Thus, a government of state dissatisfied with the rulings of such a judge could seek "revenge" at a domestic level.

There is also a special danger when judges do not have financial security or security in their tenure of office. This can equally undermine the impartiality and independence of the judges as well as the legitimacy of their decisions (Voeten 2013, 421). Considering whether judicial financial protection is sufficient in the African Regional Courts, recourse should be made to the communities' treaties. For instance, according to Article 29/30 of ECOWAS Court Protocol and Article 69 of ECOWAS Treaty, the Summit of Heads of State and Government determines the remuneration, allowances and other benefits of the ECCJ judges on the recommendation of the Council of Ministers, while on the part of EACJ and by virtue of Article 25(5) EAC Treaty, the budget of EACJ is subject to the approval of the Council of Ministers. In the case of the SADC Tribunal, by the provision of Article 11 of its Protocol, the terms and conditions of service, salaries and benefits of the members are determined by the Council of Ministers.

It has been observed that two problems may manifest from this arrangement. In the first place it is doubtful if the salary and other conditions of service of the judges can be varied to their disadvantage while they are in office. In some African countries, judges are constitutionally protected from adverse variations in their conditions of service,⁶ and

6 See s 291 of the Nigerian Constitution 1999 (as altered); Art 127(5) of the Constitution of the Republic of Ghana, 1992, s 176(1) and (2) South African Constitution 1996, and Art 114(2) of the Constitution of the Republic of Malawi, 1994

a similar protective mechanism in the regional courts will enhance the financial independence of the judges. There is no legitimate reason why judges of the regional courts should be less protected than their counterparts in national courts. Secondly, the fact that the budget of the courts is tied to the community budget and subject to the approval of political institutions can undermine the courts' independence. A separate fund, independently managed and financed, out of which their expenditure is charged, would be more appropriate. In fact, this can be justified by the observation of the former Chief Justice of the Republic of South Africa, Arthur Chaskalson, where he said:

Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to perform their duties without fear or favour.⁷

It is instructive to note that there does not appear to be any other reported case before the regional courts where the issue of judicial independence was the subject of litigation. However, the issue of judicial independence was directly raised in the East African Court of Justice (EACJ) case of *Attorney General v Anyang' Nyongo* (2007, 1, E.A. 12). In Anyang' Nyongo's case, the Attorney-General of Kenya, who was the first respondent in a reference pending before the EACJ, brought an application praying for orders to the effect that Justice Moiwo Ole Keiwua, President of the Court, and Justice Kasanga Mulwa disqualify themselves from further hearing of the pending reference and related applications. The application was based on the grounds that Justices Keiwua and Mulwa failed to disclose to the parties that their conduct as national judges in Kenya was under investigation in Kenya and, by virtue of that, they could not be said to be unbiased in the reference involving the Kenyan government. The court observed that:

As members of the court, the Judges individually and collectively, must be in the forefront in ensuring the maintenance of public confidence in the Court. They however must not lightly accede to veiled intimidation in form of unsubstantiated allegation that they or any of them has undermined public confidence in the court. The court has jurisdiction to hear and determine an application to set aside its order on the ground that it was made in breach of the fundamental principle of judicial impartiality. Only through strict adherence to the principle of judicial impartiality can protection of the universally accepted right of every litigant to a fair trial, be enforced.

Aside from the contending issue of whether the judiciary is actually independent or not, the institution is contending with the challenge of corruption among its officials. This is an experience confronting the Nigerian judiciary. It is generally believed that the judiciary is corrupt. In fact, the situation was likened to the race between flies and the cobweb. Olatoke (2017, 18) opined that:

The great problems herein are the ones who circumvent the law and manipulate the judicial system to escape Justice. It is more pathetic when the judiciary, described as the

7 See De Vos 2014 <http://constitutionallyspeaking.co.za/category/criticism-of-courts/>.

last hope of the common man in the protection of the rights of the common man, assume the unfamiliar role of deriding same in the discharge of its duties in the name of all that is in-judicial and injudicious. We are in an age where the members of the Judiciary do not act rightly; committing acts despicable of their oaths of office. What excuse would a judge who is found with huge sums of money above his income in 10 years, have?

However, Egbewole (2018b) disagrees with the hasty ascription of corruption in a generalised form on the judiciary. He argues that the allegation of corruption in the judiciary is better fixed within what may be called the “black dot on white sheet theory,” where the black dot will be easily observed on a white sheet. Agreed, there are “the few bad eggs” in the judiciary that have continued to tarnish the image of the institution; however, there still exists a very vast majority of hard working, industrious, selfless and highly disciplined judicial officers that permeate the entire strata of the justice sector (Egbewole 2018a). In spite of this caveat, it must be understood that corruption has a way of diminishing, debasing and rubbishing the judiciary, as we have witnessed in recent times in Nigeria and Ghana. In fact, President Buhari of Nigeria accused the judiciary of frustrating his anti-corruption war.⁸

Cynicism about the existence of real judicial independence, the fear of getting justice without interference and within reasonable time, the pervasion of corruption in the judiciary and absence of respect for the rule of law are predictive grounds for the citizens’ choice of the ECCJ to ventilate their grievance(s) (Imam and Abdul 2020).

Jurisdiction of ECOWAS Community Court of Justice

Jurisdiction—from the Latin *juris* meaning “law” and *dicere* meaning to “speak”—is the practical authority granted to a legal body (court or any person acting in legal capacity) to administer justice within a defined field of responsibility. It may also be the power to exercise authority over persons and things within a territory, while in a legal sense, it gives a court the power to hear and decide a case or lawsuit (Von Mehren 2007). Functionally, for purposes of private international law, the law of jurisdictions can be defined as those rules and principles that determine the circumstances under which a court is entitled to adjudicate and render a substantive judgment with regard to the international and/or interstate connections involved (Keyes 2005). On the significance of jurisdiction, the Nigerian Supreme Court in the case of *Okorocho v UBA Bank and Ors*, (2018: LPELR-45122), Sanusi JSC said thus:

... it is trite law that jurisdiction is the life wire of any case and is a thresh-hold which is so fundamental that any decision reached by any Court of law no matter how superb, beautiful, or sound such case, it is a nullity once such trial Court or tribunal or appellate Court lacks jurisdiction to determine or adjudicate on the matter or appeal.

8 “Supreme Court under Onnoghen Frustrated my Anti-corruption War—Buhari.” <https://punchng.com> on 25 January 2019 while swearing-in Hon. Justice Muhammed Tanko as the Acting Chief Justice of Nigeria. Accessed January 24, 2019.

In the realm of ECCJ powers, the jurisdiction to determine disputes generally within the region is conferred on it by the ECOWAS Treaty; and in pursuance of the provisions of the 2005 ECOWAS Supplemental Protocol, the ECCJ has the jurisdiction to determine cases of human rights infringements. The justification for the creation of the ECCJ is well entrenched in the resolution of the 49th session of the ECOWAS Committee of Ministers in Dakar in January 2003, which set up an ad-hoc committee to, among others:

... undertake a critical review of the revised ECOWAS Treaty, Protocols and Conventions with a view to endowing the community with modern legal instruments whose implementation shall contribute to the acceleration of the integration process.

Article 9 of the protocol succinctly establishes the authority and rights of access to ECCJ.⁹ The jurisdiction of ECCJ is clearly enumerated in Articles 76(2) of the 1993 Revised Treaty as well as Articles 9 and 10 of the protocol of the Court. Accordingly, the primary function of the court is the interpretation and application of the ECOWAS Treaty, the Protocols and Conventions annexed thereto (The Rules of the Community Court of Justice 2002). Within the context of Article 76(1) of the 1993 Revised Treaty, any dispute regarding the interpretation or the application of the provisions of the treaty shall be amicably settled by the parties and it is only where this fails that either party or any other member state or the authority may under Article 76(2) of the treaty refer the dispute to the court. Article 9(2) further provides that the court shall be competent to deal with disputes referred to it in accordance with the provisions of the treaty by member states or the authority when such disputes arise between the member states or between one or more member states and the institutions of the community on the interpretation and application of the provisions of the treaty. This proposition appears to be similar to that of the East Africa Community, as shown from the position of the East African Court of Justice (EACJ) in *Mary Arinza v Attorney General of Kenya* (Ref. No 7, 2010, EACJ) where it was observed that “subject to Article 30(1) and Article 27 of this Treaty (relating to EACJ jurisdiction), any person who is resident in a partner state may refer for determination by the court, the legality of any act, regulation, directive, decision or action of a partner state or an institution of the community on the ground that such act, regulation, directive, decision or action is unlawful or is an infringement of the provision of this Treaty.”

By Article 9(3) of the Protocol, a member state may, on behalf of its nationals, institute proceedings against another member state or institution of the community, relating to the interpretation and application of the provisions of the treaty, after attempts to settle the dispute amicably have failed. Aside from the above, the ECCJ has even ruled that its jurisdiction extends to human rights cases. This position or principle, enunciated by ECCJ, was later codified by a 2005 ECOWAS Supplemental Protocol, which confers on the ECCJ the jurisdiction to hear human rights cases. It expands the admissibility

9 Recently, in the United States of America, President Donald Trump disagreed with the Congress on the shutting down of government for more than 30 days. See www.theguardian.com. Accessed January 25, 2019.

rules to include disputes between individuals and their own member states. As a result of the revised Protocol 2005, ECCJ can consider cases brought by:

1. Individuals on application for relief for violation of their human rights.
2. Individuals and corporate bodies to determine whether their rights have been violated by an ECOWAS official.
3. Member states and the Executive Secretary, to bring an action against a state for failure to fulfil treaty obligations.
4. Member states, the Council of Ministers, and the Executive Secretary for determination of the legality of any action related to ECOWAS agreements.
5. ECOWAS staff who have exhausted remedies under ECOWAS rules and regulations.
6. Member states' national courts may request to refer an issue related to the interpretation of ECOWAS agreements to the ECCJ.

In line with Article 10 of the ECCJ Protocol, the court may, at the request of the authority, council, one or more member states, or the executive secretary and any other institution of the community, express in an advisory capacity a legal opinion on questions of the treaty. On the same ground, the authority of the heads of state and government may also, according to Article 7(3) (h) of the Revised Treaty, demand the court to give an advisory opinion on any legal questions. The simple fact deducible from the abovementioned is that it has become understandable that the ECCJ is to act as the principal legal/decision-enforcing organ of the ECOWAS community.

This jurisdiction of the ECCJ is now circumscribed in human rights, such that most cases are now couched within the purview of human rights when indeed no such human rights infraction exists. In fact, an interesting scenario can be underscored from how the East African Court of Justice (EACJ) assumed jurisdiction to deal with a human rights issue in *Katabazi v Secretary General of the East African Community* (Ref. No 1 of 2007, EACJ), despite not having been explicitly included in its competence. In the said case, the EACJ was petitioned to determine the lawfulness of the detention of some Ugandan prisoners. The court agreed that considering the current state of the East Africa Community Treaty, it “may not adjudicate on disputes concerning violation of human rights per se.” However, it was quick to add that “while it will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violation.”¹⁰

10 See the cases of *Samuel Mukira Mohochi v AG of Uganda*, (Reference No. 5 of 2011, EACJ, 2013); *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*, (Appeal No. 1 of 2011, EACJ, Appellate Division, 2012); *Attorney General of the Republic of Rwanda v. Plaxeda Rugumba*, (Appeal No. 1 of 2012, EACJ, Appellate Division, 2012), See also Richard Frimpong Oppong,

It is submitted that the rush to the ECCJ and other regional judicial institutions is informed by the inability of disputants to “get justice” in their national courts. Similarly, as earlier argued, this state of affairs may not be completely divorced from the absence of a harmonious relationship between the executive and the judiciary in the various member states. More so, there is also the challenge of citizens’ perception that justice cannot be done or obtained in the national courts. This view is also informed by the reality of the weakened judicial institutions as a result of inadequate provision of infrastructural facilities for courts, the skewed appointment process, overcrowded courtrooms and a delay in the delivery of justice (Imam 2018). There is also the problem of governments’ deliberate refusal to implement the orders of courts, outright jettisoning of court orders by the executive arm of government, lack of access to justice in terms of financial needs and poverty, as well as the perception of a corrupt judiciary in most member states.

These factors indirectly underscore the reason why most litigants consider approaching the ECCJ to ventilate their grievances; and also explain the rationale behind the influx of cases to the regional courts, especially the ECCJ. According to the 2020 judicial statistics released by the Registry of the Court, the ECCJ had delivered 261 judgments on a total of 496 cases filed before the court since its inception in 2003, while it delivered 31 judgments in 2018 and 38 in 2019.¹¹ Similarly, despite the Covid-19 pandemic, the court was able to deliver 30 judgments in 2020, slightly lower than the 31 delivered in 2018 and 38 in 2019, the highest number of judgments by the court before the outbreak of the pandemic. In the same paradigm, the report shows that since its inception, the ECCJ held 1 102 sessions, delivered 261 rulings, issued 32 orders and four advisory opinions.¹² Without mystification of reality, it is evident from the cases determined that an average of 30 decisions were delivered annually by the court (Alter, Helfer, and McAllister 2013, 733–779). Apparently, the plethora of cases filed and decided by the ECCJ demonstrates that the court is even getting busier than the national courts. This is not salutary for the member States and it has also served in the weakening of the national judicial institutions.

ECOWAS Court of Justice: A Shining Example

After independence, most African countries were economically “grossly disarticulated, dependent and underdeveloped” (Ake 2017, 1–23). By the turn of the century, the international judicial institutions had increased their presence in Africa, accounting for 37.5 per cent of such courts, as 15 out of 40 global judicial institutions reside in Africa. This assessment is based on judicial institutions that are resident in Africa or those that “limit their jurisdictions to African countries and territories” (World Justice Report 2019). Paradoxically, the desire and need of African leaders to propel economic

“Legitimacy of Regional Economic Integration Courts in Africa” (2014) *African Journal of Legal Studies*.

11 ECOWAS Court Issues 2020, Judicial Statistics, <http://www.info@courtecowas.org>.

12 ECOWAS Court Issues 2020.

integration in their countries, has eventually led to the formation of, for instance; the Economic Community of West African States (ECOWAS 1975) in the western block; the Southern African Development Community (SADC 1980) in the eastern and southern African blocks, which was instigated by external factors such as economic integration; and the Marrakesh Treaty in the Northern block, established by the Arab Maghreb Union (AMU) in 1989 in spite of a 1964 move championed by Morocco. Other established economic blocks are: Common Market for Eastern and Southern Africa (COMESA 1994); Community of Sahel-Saharan States (CEN-SAD 1998); East African Community (EAC 1991); Economic Community of Central African States (ECCAS 1985); and Intergovernmental Authority on Development (IGAD). Despite all these efforts, the continent of Africa still contends with the absence of an effective regional judicial framework to strengthen or at least complement the integration process (Alabi 2013).

In the same vein, the establishment of the ECCJ was not an isolated one in the 1990s, because the twentieth century witnessed phenomenal growth in the development of continental and regional judicial mechanisms for the interpretation of statutes and enforcement of treaties (Neal and Vallinder 1995). Pertinently, the African continent, in 1994, witnessed the emergence of the *Union Economique et Monetaire de l'Afrique de l'Ouest* (UEMOA 1994) vide Article 16 of its Treaty. There was also the emergence of *The Communitae Economique et Montraired' Afrique Centrale* (CEMAC) in 1994, established by six member states of Cameroon, Central African Republic (CAR), Congo, Gabon, Equatorial Guinea and Chad. In 1998, the Court of Justice was established under the COMESA Treaty, with its operational base in Lusaka, Zambia and in 1999, with member states of Benin, Burkina Faso, Ivory Coast, Gambia, Ghana, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Serra Leone, Togo and Cape Verde. The East African Community (ECA 1993) revived the East African Community Treaty (2005) with the existence of the Court of Justice (East Africa Community Treaty 1993, Art. 9(1)(e) and Art. 27(2)). The EAC has the following as members: Kenya, Tanzania, Uganda, Burundi, Rwanda and South Sudan.

All these efforts are regarded as novel developments in the justice sector, such that the citizens across the continent have the opportunity to ventilate their grievances outside of their states. The African continent's economic development can be traced directly to the Lagos Plan of Action and to the OAU Charter.¹³ This synergy has produced the adoption of the treaty establishing the African Economic Community (AEC) (Abuja Treaty) in June 1991. The treaty entered into force on 12 May 1994. In line with AEC provisions, members are obliged to co-operate in harmonising laws that are to be found in a number of Abuja Treaty Articles. These include Articles 3(c) and (d), 4(1)(d), and 5(1). Article 5(1) is particularly relevant. It provides that member states undertake to create favourable conditions for the development of the community and the attainment

13 Charter of the Organisation of African Unity opened for signature on 25 May 1963 and entered into force 13 September 1963.

of its objectives, particularly by harmonising their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives.¹⁴ Significantly, under Article 88, “Member States undertake to promote the co-ordination and harmonisation of the integration activities of regional economic communities of which they are members with the activities of the community ...”¹⁵ By virtue of these provisions, members would, therefore, be under an obligation to implement any measures agreed on to establish a common market for agricultural products. Thus, by Article 57 of the Revised Treaty of ECOWAS (1993), member states agreed to relate and cooperate on judicial and legal matters, but the protocol was actually put in place in 1991.

The different normative argument concerning the relevance of regional courts is that they are designed to complement national courts and facilitate access to justice when states are unable or unwilling to act on individual complaints. Like ECCJ, SADC, which had its origin in 1974, created a supranational court named, Southern African Development Community Tribunal (SADC Tribunal).¹⁶ The main objective for the creation of this regional community court was to ensure the uniform interpretation of SADC laws (Ruppel and Bangamwabo 2008, 179). The mandate of the tribunal, as specified in the protocol, provides for the following:

Ensure adherence to and proper interpretation of the provisions of this (SADC) Treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it ... [and] give advisory opinions on such matters as the (SADC) Summit or the (SADC) Council may refer to it (SADC 1992, Art. 16).

The relevant protocol that established the SADC Tribunal was not signed until 2000 (Hulse and Van der Vleuten 2015). Regrettably, the existence of the tribunal was short lived, because the tribunal was suspended in August 2010, when the summit ordered a review of the role, function and terms of reference of the tribunal to be completed within a period of six months.¹⁷ The tribunal was further given instruction not to take new cases during the review process. However, in May 2011 the summit extended this suspension for another year to determine whether the tribunal would hear any more cases, be it new

14 AEC Treaty Art 5(1).

15 AEC Treaty Art 88(2).

16 Treaty of the Southern African Development Community (“the 1992 Treaty”) (opened for signature August 17, 1992). <http://www.sadc-tribunal.org/docs/Treaty.pdf>. Accessed November 28, 2012. The SADC is currently composed of 14 member states, including Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar (currently suspended until the constitutional order has been restored), Malawi, Mauritius, Mozambique, Namibia, South Africa, Eswatini, Tanzania, Zambia and Zimbabwe.

17 Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, Windhoek, Namibia, 17 August 2010, para 32 www.sadc.int/. Accessed November 28, 2012. This review was executed by Lorand Bartels and became known as the Bartels Report, see, Lorand Bartels, Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal (Final Report presented to the SADC member State Ministers of Justice and Attorneys-General Meeting on 14 and 15 April 2011).

or existing. The tribunal was later suspended indefinitely on 18 August 2012 at the Summit of Heads of State and Government, which is the SADC's supreme policy-making organ.¹⁸ Arguably, the ground for the tribunal's suspension was the controversies resulting from the chain of cases that bordered on the expropriation of agricultural land in Zimbabwe.¹⁹

Of particular relevance is the case of *Campbell v Republic of Zimbabwe* (SADCT 2008), which was filed in October 2007. The farmer, Mike Campbell, advanced a case against the Zimbabwean government with the newly functional SADCT, protesting against the "Fast Track Land Reform Programme" of Zimbabwe. The court ruled in favour of Campbell and ordered Zimbabwe to not only end expropriations, but also to pay compensation to those whose lands had already been seized. This can be considered an activist and expansionist ruling, as the judgment of the tribunal constrained Zimbabwe's power with regards to the execution of the "Fast Track Land Reform Programme." This decision did not advance integration within SADC because the Zimbabwean government deliberately failed to adhere to the court's ruling. In fact, the lack of domestication of the protocol was also brought up by Zimbabwe to delegitimise the tribunal's authority.

Domestication is the process of incorporating the provisions of a treaty/convention into the extant law of a country to give it a force of law in that country. For example, section 12(1) of the Nigerian Constitution (1999) provides: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."²⁰

It is pertinent to note that the issue of domestication of ECCJ protocol was once brought up in the Nigeria case of *Moukhtar Ibrahim Aminu v Government of Jigawa State and 3ors* (Suit No.: ECW/CCJ/APP/02/11). In that case, the 1st and 2nd defendants had contended that the court did not have the jurisdiction to entertain the action on the ground that the protocol of the court, which gave it the power to hear and determine issues of violation of human rights by individuals, has not been domesticated in Nigeria

18 Consolidated Text of the Treaty of the Southern African Development Community ("the SADC Treaty"), (adopted 17 August 1992, amended August 2001). <http://www.sadc.int/documents-publications/sadc-treaty/>. Accessed September 3, 2019; SADC Treaty, art 10(1).

19 *Campbell and Others v Zimbabwe (Merits)*, Case No SADC (T) 2/2007 (28 November 2008); *Campbell v Zimbabwe (Interim Ruling)*, Case No SADC (T) 2/2007 (17 December 2007); *Fick and Others v Republic of Zimbabwe*, CASE No SADC (T) 01/2010 (6 July 2012); *Campbell v Republic of Zimbabwe (Contempt of Court Ruling)*, Case No SADC (T) 03/2009 (5 June 2009); *Campbell v Zimbabwe Contempt of Court*, Case No SADC (T) 11/08 (18 July 2008); *Nixon Chirinda and Others v Mike Campbell and Others*, SADC (T) Case No 09/08 (17 September 2008); *Gideon Stephanus Theron and 7 Others v Zimbabwe (application to intervene in Campbell case)* Case No SADC (T) 2/08 (28 March 2008); *Albert Fungai Mutize and Others v Campbell and Others*, SADC (T) Case No 8/08 (30 May 2008). See also Laurie Nathan, "Solidarity Triumphs over Democracy—the Dissolution of the SADC Tribunal", (2011) 12 Development Dialogue 131.

20 See s 327; Zimbabwe Constitution 2013 and Article 75 of Ghana Constitution 1992.

as provided for under Section 12 of the Constitution of the Federal Republic of Nigeria. The court rejected this argument and held thus:

It is trite that the question of domestication is entirely a local duty of the state to comply with its domestic laws including its Constitution. However, where the action of the State is indicative of the fact that it intends to abide by the contents of the Treaty and proceeded to enact into law the provision of the African Charter on Human and People's Rights contained in Article 4(g) of the Revised Treaty makes the objection of the 1st and 2nd defendants a non-issue and immaterial. As always, a state cannot approbate and reprobate in respect of domestication of Treaties, that it derives benefits from its application.

As a result of the Campbell case and the process it set in motion, in 2012 the tribunal's jurisdiction was confined to member states (Hulse 2012, 3). This is contrary to Articles 17, 18 and 19 of SADC protocol, which granted the tribunal jurisdiction over disputes between states and community, natural or legal person and community, and community and staff.²¹ It is worthy of note that the existing situation at the SADC Tribunal evidenced the lack of commitment on the part of SADC member states to the doctrine of the rule of law and judicial independence. This is because, when a group of white Zimbabwean farmers petitioned the SADC Tribunal for relief over the government's confiscation of their farms (hereinafter the *Campbell* case), the tribunal ruled that the Zimbabwean government was in breach of the treaty. However, the government described the tribunal's judgment as an exercise in futility and failed to abide by same in contravention of the state's commitment to the SADC Tribunal Protocol (Laurie 2013, 875–876). The implication, as understood from this position, is that the dissatisfaction of a party to a ruling by a tribunal does not warrant measures that call into question the tribunal's role and mandate and seek to alter its operations.

It is our view that these developments appear to have assisted citizens in West African states to have a fallback, or indeed an alternative judicial forum, to ventilate their grievances in case their disputes were not appropriately and properly dealt with by the national court. An illustration of such a development is the adoption of human rights instruments by regional states, indicating a growing acceptance of human rights principles by African governments. However, the situation is different in the Eastern and Southern African blocks due to the indefinite suspension of the SADC Tribunal (Neal and Vallinder 1995). By implication, the citizens of the states involved do not enjoy the privilege of an alternative judicial forum to ventilate their grievances, in cases where they could not secure justice in their national courts. Considering the establishment of these regional courts, and a cursory assessment of the national judicial institutions, it is found that the veritable independence of the judicial institutions appears to have been eroded. The erosion is the resultant effect of unhealthy politics, executive high handedness, executive recklessness, disobedience to court orders and a systematic

21 Treaty of the Southern African Development Community (1992). <http://www.sadc.int/documents-publications/sadc-treaty/n> SADC Treaty 1992 as amended in 2001.

disregard for the rule of law in most African countries (Imam 2018, 26). In Nigeria, for example, in some of the high profile cases in which a court's judgment is against the government, the government more often than not ignores its execution or implementation.²² A classic example was the Nigerian government's refusal to release Sambo Dasuki, former security adviser to President Goodluck Jonathan, on bail after same was granted by the court in *Dasuki v FRN* (2018) 10 NWLR (pt 1627) and later by ECCJ in *Dasuki v FRN* (ECW/CCJ/23/16). It is this state of affairs that provides an opportunity for the citizens to abandon national judicial institutions in preference for the regional courts. The cases decided by ECCJ traverse various strata of the issues of human rights, which are ordinarily within the jurisdictional competence of the court as provided in the 2005 ECOWAS Supplemental Protocol.²³ The jurisdiction of ECCJ extends to disputes between individuals in the member states and disputes between member states and individual citizens.²⁴

In the case of *Festus A. Ogwuche Esq v Federal Republic of Nigeria* (2019), the plaintiffs challenged the directive of the National Broadcasting Commission (NBC) that "political live programs, which are inciting, provocative, highly divisive and threaten the unity and peace of the country before transmission" be submitted to NBC 48 hours before its broadcast. The plaintiffs contended that the directive violated their right to freedom of expression/press guaranteed under the Nigeria Constitution and the African Charter on Human and People's Rights. After considering all the facts and the submissions of the parties, it was held that the freedom of speech of the plaintiffs had been violated by the defendant and the court thus granted all the declarations sought.

Apparently, this is an issue that can be litigated in the Nigerian High Courts, employing the Fundamental Rights Enforcement Procedure Rules (FREP 2009). The Act (FREP) spells out the processes and procedures that can be followed by a person who alleges that his right has been, is being or likely to be threatened to ventilate his grievance (Nigerian Constitution 1999, Section 46). The question, however, is, why approach

22 The case of Col. Dasuki, the former National Security Adviser during President Jonathan's regime, remained in court since 2015 and dozens of orders by various courts were left not obeyed. The same fate befalls Sheikh El Zaky Zaky, whose case has been in court since 2015 and all bail application orders have remained unattended to by the government. Even on 25 March, 2019, the case was adjourned *sine die* as a result of an election tribunal assignment by the trial judge. See www.channelstv.com at the News at ten.

23 Some of the cases decided by the court include; *Dexter Oil Limited v Republic of Liberia* (ECW/CCJ/AP/24/17 2019); *Takor Tropical Hardwood Company Ltd. v Republic of Sierra Leone* (ECW/CCJ/JUD/02/19 2019); *Lieutenant Colonel Silas Jock Santoi v Federal Republic of Nigeria* (ECW/CCJ/APP/01/18 2019); *Festus A. Ogwuche Esq v Federal Republic of Nigeria* (ECW/CCJ/JUD/31/18 2019); *Chude Mba v Republic of Ghana and 16 Ors* (ECW/CCJ/JUD/23/18 2019) and *Finance Investment and Development v Republic of Liberia* (ECW/CCJ/JUD/22/16 2019).

24 Community Court of Justice: Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice of the English version of the said Protocol, 19 January 2005. http://www.courtceowas.org/site2012/pdf_files/supplementary_protocol.pdf. Accessed February 22, 2021. ECOWAS Protocol 1999 Articles 9 and 10. <http://www.ecowas.org>.

ECCJ? In our view, the issue of delay/timing of concluding such matters and the possibility of interference by the political authorities may well be the rationale, as can be fathomed from the subsequent discussions.

There are also instances in which Ghanaian citizens have sought recourse from ECCJ against their failure to secure justice in national courts. For example, in *Chude Mba v Republic of Ghana and 16 Ors* (2019), the plaintiff challenged the failure of Ghana's government to enforce an earlier judgment of Ghana High Court delivered on 21 January 2013. On 2 February 2016, the Ghana High Court sitting in Accra held that it could not enforce the decision of the ECCJ in Ghana on the ground that ECOWAS Protocol, establishing the court, has not been domesticated by the country's legislature as required by Article 75 of Ghana Constitution (1992). The ECCJ held that "the Plaintiff's action is manifestly not maintainable against the Defendant for lack of capacity and same is inadmissible." It must also be said that while citizens of member states have the right to approach the ECCJ for settlement of disputes, one wonders why such a claim as this will in the first place get to the ECCJ, especially when there are clear provisions under the laws of Ghana as to how an order of the court can be effected. Equally, we surmise that this situation is borne out of frustration as a result of non-enforcement of the 2013 order of the court.

A very relevant example of such frustration can be underscored from the case of *Sikiru Alade v FRN* (Judgment No. ECW/CCJ/JUD/10/12). The applicant, a Nigerian citizen, was arrested by a plain-clothed person claiming to be a police officer on 9 May 2003. He was arraigned before the Magistrate Court, which detained him on a holding charge and remanded him at Kirikiri Maximum Security Prison, Lagos. He was detained there from 15 May 2003 until 2012, a period of nine years, awaiting trial. The applicant lodged a complaint to the ECOWAS CCJ on 24 June 2011, asking for his release and a declaration that his right to a fair trial and right to personal liberty had been violated. The court found that there were no grounds for the holding charge, and concluded that the applicant's prolonged detention violated his rights under Article 6 of the African Charter (the right to personal liberty). The court ordered his release, and ordered Nigeria to pay damages to the applicant.

With regard to the case of *Finance Investment and Development v Republic of Liberia*, the plaintiffs approached the ECCJ claiming a violation of their right to a fair hearing and right to property by the failure of the government of the Republic of Liberia to comply with the judgment of the Civil Law Court, 6th Judicial Circuit (the Civil Law Court)²⁵ Montserrado County in Liberia, which awarded the sum of \$15,900,000.00 on 20 April 2005. The ECCJ declined the invitation to decide this matter as the court held that the case was inadmissible as the highest court in Liberia had determined the matter.

25 The 6th Judicial Circuit sits exclusively on civil matters as well as specialised Commercial Court; all are housed in the Temple of Justice in the city of Monrovia, Republic of Liberia. Accessed June 22, 2019. www.judiciary.gov.lr/montserrado-county-6th-judicial-circuit.

In the realm of enforcement of regional courts' judgments, it is regrettable to note that the execution of ECCJ decisions has been very low in the sense that governments of member states do not subscribe to compliance with their obligations to the ECOWAS Treaty, in particular Articles 15(4) and 77 of the Revised ECOWAS Treaty 2005. Such refusal can be demonstrated from the ECCJ's decline of jurisdiction on cases seeking the enforcement of its judgments. An example is the case of *Les Establishment Vamo and 7 Ors v Benin Republic* (ECW/CCJ/APP/12/15). In that case, the applicants requested the court to order the enforcement of its judgment dated 3 July 2013, with reference number ECW/CCJ/JUD/07/13 between *Aziagbade Kokou and 33 Ors v Republic of Togo*. The court ruled that it lacked jurisdiction to enforce its own judgments (see ECW/CCJ/JUD/29/16).

In the same manner, the Zimbabwean and South African courts currently adopt different approaches to the enforcement of the decisions of the SADC Tribunal. In a dispute between *Gramara (Pvt) Ltd v The Government of Zimbabwe* (HC 33/09), the applicants unsuccessfully attempted to register and enforce a judgment of the SADC Tribunal in the domestic court of Zimbabwe. However, the South African courts recognised and enforced the tribunal's aforementioned decision. In both these cases, the applicants had sought the courts of South Africa and Zimbabwe respectively to directly apply undomesticated provisions of the SADC Treaty and the SADC Protocol on the Tribunal in their jurisdictions. This application was made in order to bring about the recognition and enforcement of the decisions of the SADC Tribunal in the *Government of the Republic of Zimbabwe v Fick* (ZASCA 2012) and the *Government of the Republic of Zimbabwe v Fick* (2013 5 SA 325 CC). The different approaches to the enforcement of SADC judgments highlighted the tension between the SADC community law and domestic law when enforcing decisions of sub-regional courts that uphold states' regional obligations.

Correspondingly in *Mr Chude Mba v Republic of Ghana and 16 Ors* (ECW/CCJ/APP/01/13), the applicant, a Nigerian citizen with dual Nigerian/British citizenship and as such a citizen of the Economic Community of West African States (ECOWAS), filed an application against the defendants for failure of the 1st defendant to enforce the judgment of ECCJ, wherein the court ordered the 1st defendant to pay the plaintiff/applicant the sum US\$800,000.00 (eight hundred thousand United States Dollars) as damages for violating the plaintiff/applicant's fundamental human rights and N500, 000.00 (five hundred thousand Naira) only as cost of the action having been issued and served with a Writ of Execution. The plaintiff/applicant sought declarations among others, that the 2nd to 15th defendants were under an obligation to take all reasonable steps to compel the 1st defendant to comply with the decision and orders of this Honourable Court, made in favour of the applicant against the 1st defendant. An order directing the 1st defendant to forthwith comply with the decision and orders of this Honourable Court, by paying the judgment sum of US\$800,000.00 and costs of N500,000.00 to the plaintiff, and an order directing the 2nd–15th defendants to permit the plaintiff to enforce the decision and orders of this Honourable Court, made in his

favour against any of the 1st defendant's assets that may be found within any of their territories without any regard to the 1st defendant's putative sovereign immunity. An order mandating the 16th and 17th defendants and the authority of heads of state and government of ECOWAS to impose the sanctions prescribed in Article 77 of the ECOWAS Revised Treaty on the 1st defendant if it continues in its refusal, failure and/or neglect to comply with the decision and orders of this Honourable Court made against it. The ECCJ, after examining the preliminary objection raised by the defendant, held that it lacked jurisdiction to entertain the suit, that the enforcement of the judgments of the Court of Justice of ECOWAS was not an option but an obligation upon the member states and institutions of the community, pursuant to Article 15(4) and 77 of the Revised Treaty of ECOWAS.

Incidentally, the ECCJ's jurisprudence in the above cases is sufficiently supported by its earlier position in the decided case of *Karim Meissa Wade v Republic of Senegal* (ECW/CCJ/APP/09/13) and Judgement No. ECW/CCJ/JUD/19/13, in which the court ruled that "where it has delivered a judgment, it is up to the parties to pursue the enforcement of same in accordance with the provisions of the Supplementary Protocol of 19 January 2005 and the Supplementary Act on Sanctions of 17 February 2012."

Enforcement of judgments of the ECOWAS Court has been a major problem and this relates to the fact that neither the ECOWAS Revised Treaty, nor supplementary protocols or other legal instruments make provisions regarding the means of enforcing the issued writ of execution where member states fail to voluntarily comply with the terms of the judgments of the court. However, Article 77 of the ECOWAS Revised Treaty empowers the authority of heads of state and government of ECOWAS to impose certain sanctions on any member state who fails to fulfil its obligations to the community through the suspension of new community loans or assistance, suspension of disbursement on ongoing community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the community. This power is, nonetheless, yet to be exercised by the apex organ of ECOWAS. It is the authors' contention that, unless member states are compelled to comply with the judgments of the ECOWAS Court, the confidence in the court will completely be eroded, so much so that the court may be unable to entertain any applications from any person in respect of the violations of the fundamental rights of the citizens of ECOWAS.

Irrespective of whether or not the ECCJ is weakening national courts, the significant of the court in regional integration and protection of human rights cannot be over-emphasised. It has been argued that the propriety of the court is to enhance and strengthen local, national, sub-regional and international institutions in Africa, with the objective of monitoring and protecting human rights. It is on this basis that the president of the court, Honourable Justice Traore Jerome, stressed the need to strengthen the court

to advance democracy and human rights in the sub-region.²⁶ However, critical questions concerning the legality of the new mandate of the court and the suitability of the court to exercise human rights jurisdiction, still linger.²⁷

Way Forward

In light of the precarious situation the national courts have been subjected to in most member states in the African continent, there is a need to provide a working mechanism to strengthen the national judicial institutions; and this is possible if the following strategies are adopted.

1. Review the appointment processes as well as financial protection of judicial officers, with a view to ensuring that appointments are based purely on merit and that there is financial security. The appointment process presently appears to be made from the perspectives of filial relations and opportunistic disposition.
2. Extermination of corruption from the judicial institutions in the two countries must be examined. This is because, if the judiciary is corruption free, it will impact the system and this will in turn strengthen the judiciary at the national level and reduce pressure on the regional judicial bodies.
3. The rules of court must be restructured in a way to ensure that cases are decided more timeously to renew the confidence of the citizens in the judicial system. The present state of affairs, where cases are not concluded between 5–10 years, is not good for the citizens and has serious effects on the economy.
4. Enforcement of regional courts' judgment must be addressed. Thus, executive recklessness must be stopped by ensuring that the orders of the court are obeyed. This can only happen if the sheriff sections of the judiciary are made more effective and efficient through the provision of armed sheriffs, so that the judiciary will not have to depend on the executive to give effect to its orders.
5. Deploy technology to make the work of the judiciary more effective. This will assist in the timely disposition of cases; it will make the filing of processes easier and allow effective monitoring of court proceedings.
6. Promote effective implementation of the concept of the separation of powers by allowing each arm of government, especially the judiciary, a level of independence in terms of finance, employment, discipline and other issues affecting each arm of government.

26 ECOWAS Court of Justice, Alliances for Africa, www.alliancesforafrica.org/strengthening-the-ecowas-court-of-justice-enhancing-access-to-justice-in-the-west-africa-region. Accessed July 22, 2019.

27 Solomon T Ebobrah, 'Critical Issues on the Human Rights Mandate of the ECOWAS Court of Justice', (2010) *Journal of African Law* 54 (1): 1–25.

Conclusion

The ECOWAS Community Court of Justice (ECCJ), which was approved in 1991 and set up in 2001, has turned out to be an additional institution for ECOWAS. Its establishment, pursuant to the provisions of Articles 6 and 15 of the revised Treaty of ECOWAS, has been commendable—especially in the realm of adjudication of human rights violations. In fact, the ECCJ has been an increasingly active and bold adjudicator of human rights from the time it acquired jurisdiction over human rights complaints in 2005. Indeed, the ECCJ has issued numerous decisions condemning human rights violations by the member states of ECOWAS.²⁸

The regional courts have served as a buffer to citizens in member states and thus reduced the effects of weakened structures of national judicial institutions. This paper found that the rescue situation of ECCJ has unwittingly led to the overburdening of regional courts, which may eventually have weakened the national courts. Additionally, the ECCJ is facing the challenge of securing compliance with its judgments—a challenge that the judges are attempting to meet by directing the remedies that they have awarded to successful applicants and by publicly putting pressure on governments to implement the court's rulings. This article contends that the way out is to energise and re-engineer national judicial institutions in order to save the regional judicial outfits by being proactive in the discharge of their constitutional, adjudicative and interpretative roles. Judicial independence, as well as fair and speedy dispensation of justice must be embraced, while a mechanism must also be put in place to see that their orders are not only respected but seen to be complied with.

It is worthy of note that more than the treaties, the operation of the regional courts is important to their independence and legitimacy. In this realm, the treaties have made provisions that contribute positively to the regional courts' legitimacy—particularly the ECCJ. The authors have shown how the courts' liberal jurisprudence on standing, individually-centred jurisprudence, willingness to take on difficult and controversial subjects, desire to enhance their physical accessibility, and the fairness of their procedures, all contribute to their legitimacy and regional integration. Though some of the courts venture into the areas of human rights litigation, the absence of an express treaty mandate (like EACJ), and their jurisprudence on judicial neutrality, may cause a momentous challenge to their independence and legitimacy.

28 A list of all judgments and rulings of the ECOWAS Court and copies of selected decisions is available at: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157. See also, Centre for Human Rights, University of Pretoria, *African Human Rights Case Law Database*. <http://www1.chr.up.ac.za/index.php/browse-by-institution/ecowas-ccj.html>; World Courts.

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