THE ENFORCEMENT OF THE RIGHT OF ESTABLISHMENT BEFORE THE ECOWAS COURT: JURISDICTIONAL HURDLES FOR INDIVIDUALS

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Abstract

The Economic Community of West African States Court of Justice (ECCJ) was established in 1991 by the Protocol on the ECCJ. This article examines the jurisdictional challenges faced by individuals in approaching the ECCJ with regard to the violation of the right of establishment within the sub-region. Fundamentally, the inability of the ECOWAS citizens to access the ECCJ to litigate ECOWAS Protocols is given prominent emphasis with reference to the case of *Pinheiro v. Republic of Ghana*. Although, the ECCJ can now assume jurisdiction over cases of human rights violations through its expanded mandate, its jurisdiction is still very limited, given the inability of individuals to use the jurisdiction of the Court for the interpretation and application of ECOWAS Protocols. The study, therefore, argues for an amendment to the ECOWAS instruments to accommodate the protection of individual rights. It also argues for the Court's courageous approach in interpreting ECOWAS Protocols in line with the object of ECOWAS, to accommodate suits by individuals seeking to enforce their Community rights.

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1.0 Introduction

Integration efforts in the West African sub-region is date back to the 19th Century when the idea of West African nationalism was prevalent and it was believed that the creation of a United West African States was important for the emancipation of the African Continent.[1] However, when concrete attempts at integration began to have effect, they were on the basis of economic objectives rather than political unification.

Thus, in 1975, when the original Treaty founding the Economic Community of West African States (ECOWAS), 1975 ECOWAS Treaty was signed, the reasons for coming together were essentially economic.[2] Meeting in Lagos, Nigeria in May 1975, 15 West African Heads of States and Governments adopted the 1975 ECOWAS Treaty with the aim of promoting cooperation and development in all fields of economic activities for the purpose of raising the standard living of West African peoples; fostering closer relations among Member States and contributing to the progress and development of the African Continent.[3] Decades after the adoption of the 1975 ECOWAS Treaty and after the conclusion of several protocols which were aimed at actualising the goals of integration, it seems that, the realisation of the said objectives envisaged by the Community is still far-fetched. Apparently, it can be stated that the 1993 Treaty revision opened space for ECOWAS to pay greater attention to the rights of Community citizens. Accordingly, the most elaborate provisions relating to individuals' rights within the ECOWAS legal framework are contained in the Protocols and Supplementary Protocols adopted for the purpose of extending the scope of the Community.

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[1] Foremost political actors like JA Beale Horton, Edward Blyden and Casey Hayford were identified as prime movers of the project of West African unification. See EM Edi, *Globalisation and politics in the Economic Community of West African States*, Carolina Academic Press, 2007, 27.

[2] The Economic Community of West African States (ECOWAS) Treaty is a multilateral agreement signed by the then 16 member States: Benin, Cape Verde, Ghana, Italy Coast, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta (now Burkina Faso). In the year 2000, Mauritania denounces the ECOWAS Treaty in favour of full membership in the Maghreb Union, bringing membership of ECOWAS to 15.

[3] Treaty Establishing the Economic Community of West African States [28 May 1975], Article 2(1).

Notwithstanding the above intendments, regional integration efforts in ECOWAS have faced serious challenges in the last decades of its existence. The most obvious of such challenges is that, the existing provisions in the ECOWAS Treaty did not provide the ECOWAS Community Court of Justice (ECCJ) with adequate jurisdiction to enable it handle disputes affecting the individuals that may arise within the sub-region. Worse still, though the ECOWAS instruments envisaged a Free Trade Area (FTA), as well as free movement of persons, right of residence and establishment as major steps towards economic integration, but however, many of such provisions are observed more in breach and this has either stagnated or truncated the economic development of the West African sub-region, and essentially, impeded the progress of the individuals who are supposed to be the drivers of integration activities in the Community. In addition, when the provisions of the ECOWAS instruments are contravened, most times by a Member state or its officials, there is no actionable process available to the individuals for seeking redress or remedying the breach, especially, when it affects their right of establishments. Essentially, there is doubt as to whether the individuals have any opportunity for the settlement of economic disputes arising from violations of their right of establishments through the ECCJ. This has contributed in no small measure to placing the ECOWAS intra-trade activities at low ebb.

The foregoing is against the backdrop that, since disputes are inevitable especially within the context of regional integration between the various actors, such as Community citizens, Community institutions and/or Member Sates operators manning the borders, the thorny question is: where can these private actors seek redress in the event of any violation against their rights of establishments? Can these actors approach their national courts when it borders on the violations of Community citizens' right of establishments within the sub-region? In answering the above questions, the essence of this article will be; to identify the legitimate approaches available to Community citizens, as well as business operators in holding ECOWAS Member States accountable to their integration promises, particularly, through the instrumentality of the ECCJ in terms of adjudication of inevitable economic disputes within the sub-region. This study is therefore on the premise that ECCJ should replicate the vast and courageous approaches of the the East African Court of Justice (EACJ) and the Southern African Development Community Tribunal (SADC

Tribunal), in interpreting the provisions of the ECOWAS Treaty in a clear approach that does not diminish the promotion and protection of the rights of individuals within the Community.

1.1 Concept of integration

The term 'integration' is a modern process of bringing together two or more sovereign entities within a given global geo-political zone into one unit for enhanced promotion of their economic, political, social, cultural or legal priorities or interests.[4] Integration cannot be achieved without some measure of supranationality. Thus, although the ECOWAS experience might not be perfect, it confirms that, unless Member States wilfully give up some extent of their national sovereignty and empowers sub-regional integration institutions to make binding decisions, and to implement them, little progress can be made.[5]

People come together to form communities on the basis of parameters such as common language and culture due to the need for security and self-preservation.[6] This need for security and self-preservation leads communities to integrate and nations to emerge.[7] The current global trend is for groups of neighbouring nations to pool their resources together to form a regional cooperation for the well-being of their citizens. It is argued that integration relates to any process leading to the formation of a political and economic whole or organised unit.[8] In such a process States agree to forgo the ability to formulate policies independently on matters concerning trade, custom tariffs

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[4] Muhammed Tawfiq Ladan, *Introduction to ECOWAS Community law and practice: Integration, migration, human rights, access to justice, peace and security,* Ahmadu Bello University Press, 2009, 10-11.

[5] *Ladan, Introduction to ECOWAS Community law and practice*, 11.

[6] Ali W Butu, 'Impact of ECOWAS Protocols on political and economic integration of the West African sub-region,' 1(2) *International Journal of Physical and Human Geography* (2013), 47.

[7] Butu, 'Impact of ECOWAS Protocols on political and economic integration of the West African Sub-region', 47.

[8] P Charmely, 'A note on the concept of integration on paths and on the advantages of integration,' in M Samai and K Garam (eds), *Economic integration, concept, theories and problems*, Academai Kiado, 1977.

and immigration, seeking instead to delegate the decision-making process to a new central organ.

In legal integration, for instance, the unification of national (or municipal) legal systems on the basis of common legal principles and standards, that is, inter-state legal integration, is regarded as a synonym for the concept of integration of national legal systems.[9] Undoubtedly, the effectiveness of political, economic and other inter-state integration in the modern civilised world is impossible without the respective legal formalisation and the creation of a unified legal foundation. Thus, without the integration of law, effective co-operation of States in other spheres of social life is impossible due to the fact that, the means and forms of the realisation of national interests, as well as the basic values and priorities exclude the possibility of the normal interaction of States in the political, economic, and other spheres.[10] Accordingly, EG Potapenko posits that 'law is an effective mechanism for the realisation and regulation of integration processes, within the framework of which the protection and defence of the interests of participants of integration interaction is ensured.[11] Law formalised the results of integration, enabling the degree of such integration to be determined.[12] More so, law creates a platform for elaborating a strategy of development of integration and imparts stability and transparency to them.[13] In essence, legal integration denotes the bringing together of parts of whole.[14]

Economic integration as an ambit of this discussion, involves aspects of international economic and trade laws, as well as human rights, institutional law and, most especially, peace and security law. Thus, economic integration is probably the most widely studied form of regionalism.[15] Economic integration encompasses measures designed to abolish discrimination between economic units belonging to different national States, viewed as a state of

[9] EG Potapenko, 'Methods and means of inter-state legal integration,' (2015) 10 *Journal of Comparative Law.*

[10] Potapenko, 'Methods and means of inter-state legal integration'.

[11] Potapenko, 'Methods and means of inter-state legal integration,' 144.

[12] Potapenko, 'Methods and means of inter-state legal integration'.

[13] Potapenko, 'Methods and means of inter-state legal integration'.

[14] B Balassa, *The theory of economic integration*, Richard D. Irwin Incorporation, 1961, 1.

[15] Balassa, *The theory of economic integration*.

affairs. It can be represented by the absence of various forms of discrimination between national economies.[16] It also denotes a state of affairs or a process which involves the amalgamation of separate economies into larger free trading regions.[17] However, the said amalgamation has consequences for the scope and traditional prerogatives of statehood. It produces institutions, constrains sovereignty and creates new obligations. Regional economic integration also helps in the construction of communities and identities.[18]

On the political factor of regional integration, it is apposite to state that the relationship between human rights and regional integration is both intrinsic and instrumental. Intrinsically, both integration and the regional protection of human rights involve varying degrees of diminution of sovereignty. States in regional integration arrangements agree to pool sovereignty. Thus, in political integration, the pooling evolves into a fusion of sovereignty across independent territories.[19] In a similar vein, a regional human rights regime institutes supranational values as limits on State conduct and establishes mechanisms for monitoring compliance within these limits.[20] Although economic integration of States is a regional setting which may result in the organisation of inter-State economic relationships, regionalism becomes ultimately, a political issue. It is rare for States to accidentally fall into an economic integration. They usually engage in long, sustained and highly technical discussions over time, to delimit the policies and geographical boundaries of the region.[21]

Accordingly, the pursuit of economic integration can also present novel international challenges for participating States. For instance, developing States or less developed States may engage in defensive regionalism in order to improve their collective bargaining powers against dominant States in the

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[16] Balassa, *The theory of economic integration*.

[17] A El-Agraa, *Regional integration: Experience, theory and measures*, Palgrave Macmillan, 1999, 1.

[18] El-Agraa, *Regional integration: Experience, theory and measures*.

[19] CA Odinkalu, 'Economic integration of West Africa: Challenges and prospects,' The International Conference, Accra, 21-24 October, 2019, 8.

[20] Odinkalu, 'Economic integration of West Africa: Challenges and prospects,' 8.

[21] CC Ohuruogu, 'Economic integration of the West African States within the ECOWAS framework: Vision, prospects and illusion,' The International Conference, Accra, 21-24 October 2019, 4.

global economy. It may also result into a divide and conquer strategy in inter-regional and multinational negotiations which then, places additional burdens on State-actors to maintain solidarity of the region. It has also been argued that the advantages of economic integration fall into three categories, trade benefits, employment, and political cooperation.[22] Arguably, the tenet of the above assertion is that, the founding Member States of ECOWAS envisaged the idea of economic integration that would also lead to the protection of individual rights and improve availability of a wider efficiency gains within the sub-region.[23] It suffices to state that, individual rights of establishment constitute fundamental factors for sub-regional integration.

Having established that the protection of individual rights of establishment is germane in any integration policies (be it legal, political or economic integration), the next ambit of this article interrogates the inability of ECOWAS citizens to litigate before the ECCJ for the violation of their rights of establishment.

2.0 Protection of individuals rights of establishment

Although the 1975 ECOWAS Treaty did not create a Community Court, it envisaged a Tribunal which would ensure the observance of law and justice in the interpretation of the Treaty.[24] The ECCJ was officially established by the 1991 Protocol as the principal legal organ of the ECOWAS with the responsibility to interpret and apply the treaties, conventions, protocols and decisions of the Community. Consequently, the principal function of the Court as expressed by the legal instruments of the Community includes settlement of disputes among or between Member States, institutions and officials of the

[22] B Abbot and W Kenton, 'Economic integration' <https://ww.investopedia.com/termss/e/economic-integration.asp> accessed 4 November 2019.

[23] Abbot and Kenton, 'Economic integration'.

[24] ECOWAS Treaty, Article 11. It was originally conceived as the 'Tribunal of the Community' in the 1975 ECOWAS Treaty, the ECOWAS Community Court of Justice (ECCJ) came into existence through a 1991 Protocol adopted by the ECOWAS Heads of State and Government. The ECCJ is currently established by Articles 6 and 15 of the 1993 Revised ECOWAS Treaty.

Community. The ECCJ also enforces Community laws, protects and enforces human rights of citizens of Member States.[25]

The ECCJ is equally empowered to hear and determine contentious disputes within its jurisdiction, render advisory opinions brought before it by appropriate institutions or Member State(s) of the Community, as the case may be.[26] It has the power to act as an arbitrator pending the establishment of an Arbitration Tribunal.[27]

However, the ECCJ is restrictive in nature as direct claims by individuals and non-governmental organisations (NGOs). This remains a major inadequacy of the 1991 Protocol. Interestingly, this defect was not rectified in the comprehensive review of the 1975 Treaty of ECOWAS which resulted in the ECOWAS Revised Treaty of 1993. However, the 1993 Treaty created personal rights for individuals.[28] It is baffling that the 1991 Protocol, in restricting the jurisdiction of the Court to State Parties alone, did not take cognisance of the incursion made into the rights of individuals by Protocols postdating the 1975

[25] The human rights mandate of the Court was introduced by the Supplementary Protocol A/SP.1/05.

[26] 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. See Article 10 of Protocol A/P.1/7/91.

[27] Supplementary Protocol A/S.P.1/01/05 Amending the Protocol A/P.1/7/9 relating to the Community Court of Justice, art. 9(5).

[28] For instance, Article 3 of the ECOWAS Revised Treaty provides for; the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments; the adoption of measures for the integration of the private sector, particularly the creation of an enabling environment to promote small and medium scale enterprises; the establishment of an enabling legal environment; the harmonisation of national investment codes leading to the adoption of a single Community investment code; the harmonisation of standards and measures; the promotion of balanced development of the region, the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions; the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socio-economic development; the establishment of a fund for co-operation, compensation and development; and any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives. See also, Article 10(d) of the ECOWAS 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. Also see the 1993 Revised ECOWAS Treaty which also refers to specific rights and obligations of Member States as in Articles 56(2), 59 and 66(2) (C).

Treaty,[29] which rights could not be complete without a complementary right to judicial redress. In view of the above assertion, there were global and internal pressures from NGOs[30] and probably the Court itself[31] that compelled the amendment of the 1991 Court Protocol in 2005. Although, the Court was still in its rudimentary stage as at the time the initial Protocol was drafted.

Having recognised the limited nature of its jurisdiction as a major obstacle at inception,[32] the Court embarked on sensitisation missions to draw attention to its existence and enlighten prospective litigants about its jurisdiction and competence.[33] The efforts did not yield the expected results because of the inherent defects in the 1991 Protocol,[34] which restricted individuals' access to the Court.

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[29] Such as the rights of residence, movement and establishment of citizens.

[30] In 2001, NGOs formed the West African Human Rights Forum, an umbrella organisation that gained accreditation from ECOWAS and attempted to influence Community policymaking. These opportunities for regional mobilisation provided an avenue in 2004 for human rights groups to contribute to proposals to expand the Court's jurisdiction. See Karen Alter, Laurence Helfer, and Jacqueline McAllister, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' <http://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/AfricaCourts_files/AlterHelferMcAllisterECOWASAJIL.107.4.737.Helfer.pdf> accessed 20 January 2020.

[31] The Court gained 'jurisdiction to determine case(s) of violations of human rights that occur in any Member State' in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance, requiring that the Court be given 'the power to hear, inter-alia, cases relating to violations of human rights…'. The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights**,** considered by Article 1(h) of Protocol A/SP1/12/01.

[32] Franca Ofor, 'Limits of persona jurisdiction: Perspective of ECOWAS Court of Justice' < https://www.google.com/search?q=Franca+Ofor+%E2%80%98Limits+of+Personal+Jurisdiction> accessed 10th February, 2022. See *Jerry Ugokwe v Federal Republic of Nigeria* [2005] ECCJ Suit No ECW/CCJ/APP/02/05; *Jerry Ugokwe v Nigeria* [2005] ECCJ Judgment No ECW/CCJ/JUD/03/05; *Kéiita and Another v Mali* [2005] ECCJ Suit No ECW/CCJ/APP/05/06; *Moussa Léo Kéita v Mali* [2007] ECCJ ECW/CCJ/JUD/03/07; *Essein v Republic of the Gambia* [2005] ECCJ Judgment No ECW/CCJ/APP/05/05; *Manneh v The Gambia* [2007] ECCJ Suit No ECW/CCJ/APP/04/07; *Mani Karou v Republic of Niger* [2008] ECCJ Judgment No ECW/CCJ/JUD/06/08; *The Registered Trustees of the Social Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2009] ECCJ Suit No ECW/CCJ/APP/08/09; *The Registered Trustees of the Social Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2010] ECCJ Ruling No ECW/CCJ/APP/07/10.

[33] The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011, Herlem Publishers, 2011, 04-05.

[34] Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice.

Access to the Court was widened in 2005 to allow individuals and corporate bodies within the sub-region to institute cases before it. The 2005 Supplementary Protocol also included in Court's mandate the interpretation of the legal texts of the Community, dispute settlement, enforcement of Community obligations and human rights violations.[35] However, the changes were not so far-reaching as to allow individuals to play significant roles in using the judicial process to shape Community laws. Article 9(3) of the 1991 Protocol grants the rights to litigate before the Court only to Member States. Despite the above treaty provision, it became obvious as no Member State instituted any action against another State party to enforce ECOWAS laws or seek to protect any of its nationals against any other Member State or institution of the Community in the fourteen-year period of the existence of the Court before the Protocol was amended to expand the Court's jurisdiction.

The fate of individuals who were daring enough to test the jurisdiction at that time is exemplified by *Afolabi v Federal Republic of Nigeria,*[36] where a Community citizen of Nigerian nationality claimed that the unilateral closure of the Nigeria/Benin border sometime in 2003 was unlawful and a breach of the provisions of the ECOWAS laws. Mr Afolabi cited the provisions of the ECOWAS Treaty, the Protocol on Free Movement of Persons and Goods, and the provisions of Article 12[37] of the African Charter on Human and Peoples' Rights to back his claim. He claimed compensatory reliefs and mandatory order of injunction to restrain the government of Nigeria from further closing the borders. The Court construed the Protocol literally and upheld the preliminary objection, stating that Article 9(3) of the Protocol A/P.1/7/91 under which the plaintiff instituted his action did not grant direct access to individuals for breach of their fundamental human rights.

The Court maintained this approach even after the enactment of the 2005 Supplementary Protocol[38] and was unprepared to give effect to the new provisions on its expanded jurisdiction. Individual lack of access before the ECCJ

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[35] Supplementary Protocol A/SP.1/01/05, Article 9.

[36] *Afolabi v Federal Republic of Nigeria,* [2004] ECCJ 2004/ECW/CCJ/04.

[37] Every individual shall have the right to freedom of movement and residence within the borders of a State, provided he abides by the law.

[38] 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.

became obvious in the subsequent case of *Ukor v Laleye.*[39] It is important to note that both Protocols entered into force provisionally as soon as the Authority of Heads of State and Government of member states signed them. As the 1991 Protocol did not endow the ECCJ with human rights jurisdiction, the relevant provision from a human rights perspective is Article 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January, 2005. In the absence of anything to the contrary, the ECCJ can only entertain cases of violations that occur after that date. The ECCJ has lent judicial backing to this position as it declined jurisdiction on this ground in the above case.[40]

This inability of the ECCJ to grant access to the individuals to enforce their rights of establishment was demonstrated in *Pinheiro v Republic of Ghana*[41] where the ECCJ held that the Protocol on the Court does not grant individuals with the *locus standi* to sue a Member State for violation of its obligations enshrined in Community texts. Accordingly, only a Member State or the ECOWAS Commission has access to the Court to compel a Member State to fulfil an obligation. The ECCJ took a similar view in *Chude Mba v Republic of Ghana,*[42] where it held that the Applicant was not competent to litigate the provisions of the Protocol on the Community Court of Justice as an individual. In *Karim Meissa Wade v Republic of Senegal*,[43] though upholding *its jurisdiction to examine actions brought for failure by an ECOWAS Member State to honour its obligation, the Court reaffirmed its strict view that the application brought by Mr Wade, in the aspects relating to requests before the ECCJ to examine failure by the Republic of Senegal to fulfil its Community obligations, were inadmissible for lack of competence.*

[39] *Ukor v Laleye* [2005] ECCJ, Judgment No ECW/CCJ/APP/01/05, 19.

[40] Solomon Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2009) 7(2), *African Human Rights Law Journal*, 307-329.

[41] *Pinheiro v Republic of Ghana* [2010] ECCJ, Suit No ECW/CCJ/APP/07/10; *Pinheiro v Ghana* [2010] ECCJ, Judgment No ECW/CCJ/JUD/11/12.

[42] *Chude Mba v Republic of Ghana* [2018] ECCJ, Judgment No ECW/CCJ/JUD/30/18.

[43] *Karim Meissa Wade v Republic of Senegal* [2019] ECCJ, Judgment No ECW/CCJ/JUD/13/19.

The Court restated this position in Gnassingbe Kpatcha v Republic of Togo.[44] In its reasoning, the ECCJ held that 'a mere interest in a problem, no matter how qualified an individual or group is in the evaluation of the problem is not of itself sufficient for the Community Court of Justice to render such an individual or group adversely affected or aggrieved for the purpose of giving it standing to obtain judicial decision.' Article 7(3) (g) of the Revised ECOWAS Treaty expressly vests in the Authority of Heads of State and Government the powers to refer where it deems necessary any matter to the ECCJ when it confirms that a Member State or Institution of the Community has failed to honour any of its obligations.[45]

Thus, Article 3(1) of the Supplementary Act on Sanctions provides for judicial and political sanctions against Member States or their leaders that fail to honour their obligations to the Community.[46] In the same vein, Article 77 (1) of the Revised Treaty sets out a sanctions regime for States that fail to undertake their obligations under the Treaty. These may include: suspension of new Community loans or assistance; suspension of disbursement on-going Community projects or assistance programmes; exclusion from presenting candidates for statutory and professional posts; suspension of voting rights and suspension from participating in the activities of the Community. In spite of these sanctions mentioned, it is trite to state that the provision only enjoins the Authority of Heads of State and Government to take action to enforce that obligation. The article gives no right or cause of action to individuals to do so. Accordingly, the ECCJ held that the Plaintiff (Pinheiro) lacks the *locus standi* to prosecute the case against the Defendants (Republic of Ghana) having not violated any human rights that would warrant an action.

On this note, having established that the individuals still do not have access to litigate the violations of their rights of establishments before the ECCJ, it is therefore our argument that, the ECCJ can adopt a purposive interpretation of its jurisdiction *vis-a-vis* the Revised Treaty and other Community

[44] *Gnassingbe Kpatcha v Republic of Togo* [2015] ECCJ, Judgment No ECW/CCJ/JUD/08/15.

[45] Supplementary Act A/SP.13/02/12, Article 3(1); Supplementary Protocol (A/P.1/01/05), Article 9(1) (a), (d), (e) and (f).

[46] Supplementary Act A/SP.13/02/12.

Protocols[47] that gives rights to individuals in a manner that allows them to question Community acts.

With regards to the restricted nature of its jurisdiction as a major obstacle at beginning,[48] when access to the Court was limited to State parties and its institutions, the Court embarked on sensitisation missions (as early as it was inaugurated in year 2001) to draw attention to its existence and enlighten prospective litigants about its jurisdiction and competence.[49]'The efforts did not yield enough results because of the inherent defects in the Protocol,[50] which restricted individuals' access to the Court. However, it was the global developments and internal pressures from NGOs[51] and probably the Court itself[52]

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[47] Such as the Protocol Relating to Free Movement, Residence and Establishment; Supplementary Protocol A/SP.2/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; Decision A/DEC.2/7/85 of the Authority of Heads of State and Government of the ECOWAS Relating to the Establishment of ECOWAS Travel Certificate for Member States; Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment; Decision A/DEC.2/5/90 Establishing a Residence Card in ECOWAS Member States.

[48] (2004-2009) CCJELR VII. These include: *Ugokwe v Federal Republic of Nigeria and Others*; *Kéiita and Another v Mali*; *Essein v Republic of the Gambia*; *Manneh v Gambia*, *Karou v Niger*; *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Another.*

[49] *The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011,* Herlem Publishers, Abuja, 2011, 4-5.

[50] Protocol A/P.1/7/91 on the Community Court of Justice.

[51] In 2001, "NGOs formed the West African Human Rights Forum, an umbrella organisation that gained accreditation from ECOWAS and attempted to influence Community policymaking. These opportunities for regional mobilisation provided an avenue in 2004 for human rights groups to contribute to proposals to expand the Court's jurisdiction." See KJ Alter, LR Helfer and JR McAllister, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice', available at http://faculty.wcas.northwestern.edu/~kal438/KarenJAl ter2/AfricaCourts_files/AlterHelferMcAllisterECOWASAJIL.107.4.737.Helfer.pdf. accessed 20 January 2020.

[52] The Court gained 'jurisdiction to determine case(s) of violation[s] of human rights that occur in any Member State' in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance, requiring that the Court be given 'the power to hear, inter-alia, cases relating to violations of human rights…' The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights, considered by Article 1(h) of Protocol A/SP1/12/01.

that compelled the amendment of the 1991 protocol of the ECCJ in 2005 to accommodate individual litigants. Although individuals now have access to the Court, the limited manner in which the access has been granted remains a hindrance to the full actualisation of the roles they can play through litigation. The limitation is in the restriction of the jurisdiction only to human rights matters, without a right to litigate the protocols dealing with economic rights of Community citizens.

3.0 Protection of individuals rights of establishment in selected jurisdictions

Enforcement of disputes arising from the violations of individuals' rights of establishment in sub-regional courts, particularly, in Africa has faced a lot of challenges during their stages of operations. However, a few regional courts in Africa have also applied the doctrine of implied powers as developed by the International Court of Justice (ICJ) and as well as the Court of Justice of the European Union (CJEU). For instance, although the EACJ and the SADC Tribunal have also been impaired with jurisdictional challenges regarding their competence to adjudicate issues involving violation of individuals' rights, they have courageously progressed in the transformation towards the rationalisation of the individuals' rights of establishment within the EAC and the SADC.

3.1 The EACJ

In 1999, the Treaty of the East African Community (EAC) established the EACJ. Article 27 of the Treaty provides for the Court's jurisdiction over the interpretation and application of the Treaty and may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realise such extended jurisdiction. The Treaty has also expressed that the EAC is a people centred, as well as market-driven cooperation.[53] Fundamentally, the Community enjoins private sector and civil society participation in the

[53] EAC Treaty, Article 7(1).

negotiations that led to the conclusion of the Treaty, apart from the Summit and other organs of the Community.[54]

Although, the EACJ does not have an express mandate over issues relating to the violation of human rights that may occur within the sub-region, the established view of the Court is that there exists an implied mandate in the EAC Treaty which gives it competence to entertain and adjudicate over such cases. This position was tested in *Katabazi v Secretary General of the East African Community*,[55] where the Applicants were, *inter alia,* charged with treason and remanded in prison custody in Uganda. Subsequently, the Ugandan High Court granted bail to some of the Applicants but immediately after they were released on bail, the court was surrounded by security personnel who re-arrested them within the court premises. Thereafter, the Applicants were prosecuted before a General Court Martial and charged with similar offences and remanded in prison custody. Consequently, the matter was brought before the EACJ. The EACJ in its ruling, assumed jurisdiction and concluded that the intervention by the armed security agents of Uganda in preventing the execution of a court order violated the principles of rule of law, as well as the EAC Treaty.

Similarly, in the case of *Mohochi v Attorney General of Uganda,*[56] the EACJ supported the said view where it held that, once there is an allegation of infringement of the provision of the EAC Treaty, the EACJ has jurisdiction to interpret and apply the provisions alleged to be infringed under the powers conferred on it by virtue of Articles 23(1) and 27(1) of the EAC Treaty. By implication, an individual, who is a Community citizen and having an establishment in any Partner State of the Community and whose rights of establishment has been infringed upon, can seek redress before the EACJ for a remedy.

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[54] *East African Law Society and Others v Attorney General of Kenya and Others* [2007] EACJ, Reference No 3 of 2007.

[55] *Katabazi v Secretary General of the East African Community* [2007] EACJ, Reference No 1 of 2007, 3; *Democratic Party v Secretary-General of the EAC & 4 Others* [2013] EACJ Reference No 2 of 2012; *Venant Masenge v Attorney-General of the Republic of Burundi* [2014] EACJ, Reference No 9 of 2012; *African Network for Animal Welfare v Attorney General of the United Republic of Tanzania*, Judgment of 20 June 2014.

[56] *Mohochi v Attorney General of Uganda* [2011] EACJ Reference No 5 of 2011.

It is apt to commend the EACJ's interpretation on this legal question, as it shows a courageous approach of the Court in interpreting the provisions of the EAC Treaty in a clear approach that does not diminish the promotion and protection of the rights of individuals within the EAC.

3.2 The SADC Tribunal

The SADC Tribunal covers the interpretation and application of the SADC Treaty, its protocols and other legal instruments within the SADC.[57] The SADC Treaty and its Protocol on the SADC Tribunal are both silent on the adjudication of violation of human rights within the sub-region. However, the SADC Treaty does make reference to human rights, democracy and the rule of law.[58] In *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe,*[59] the SADC Tribunal made practical and effective use of the principles contained in the SADC Treaty and judiciously asserted that it had the power and competence to adjudicate over human rights cases.

4.0 Concluding remarks and recommendations

The inability of individuals to use Community legal instruments for the protection of their rights remains a key factor in impeding integration in the ECOWAS sub-region. Although individuals now have access to the ECCJ, the

[57] Treaty of the Southern African Development Community, Article 16 (1); the Protocol on the Tribunal in the Southern African Development Community, Article 14.

[58] Preamble to the SADC Treaty which provides for the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law; and Article 4(c) of the Treaty which requires Member States to act in accordance with the principles of human rights, democracy and the rule of law.

[59] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* [2008] SADC Tribunal, (2/2007) [2008] SADCT 2. As a direct result of the Zimbabwean opposition to the Campbell decision, the Heads of State and Government of SADC decided to suspend the Tribunal in August 2012. In the same meeting, SADC countries also declared that a successor court, if ever constituted, would have no jurisdiction over cases brought by individuals and civil society against states. Rather, only States would have access to the Court, to solve inter-State disputes. See also *Louis Karel Fick v Republic of Zimbabwe* 2010 SADC 8 (16 July 2010).

limited manner in which the access was granted remains a hindrance to the full actualisation of their role in integration through litigation. The limitation is in the restriction of the jurisdiction only to human rights matters, without a right to litigate other legal instruments like the Protocols. If the Court's jurisdiction as it presently stands is not expanded to accommodate individuals who are supposed to be the prime movers of businesses in the sub-region, to litigate, as well to protect their businesses, then the realisation of integration objectives envisaged by ECOWAS would remain a hope in transit. This is because the ECOWAS Court is supposed to be a court of justice that should accommodate issues effecting not just Member States, its institutions and/or individuals' human rights violations, but also, Community citizens' rights of establishment. The EACJ and the SADC provide ready lessons for the ECCJ to adopt a courageous approach in protecting the rights of individuals under the ECOWAS legal framework.