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Introduction

One of the problems facing individuals (natural and legal persons) who wish to enjoy the rights created by the ECOWAS Treaty and other legal texts is the non-availability of information about the means through which they can seek redress if their Community rights are violated by a Member State. Being a sovereign State, a Member State may decide to interpret a Community text in a way that suits it, which may not be compatible with the Community law and may infringe individuals’ Community rights. It may also decide, for one economic reason or another, and despite its obligation to refrain from any action that may hinder the attainment of the objectives of the Community, to encourage anti-competition or unfair trade practices on its territory and across the border to the detriment of another Member State and its nationals. So, when a dispute arises between a Member State and an individual in connection with a right guaranteed by the ECOWAS legal instruments, or when an individual’s economic activities are seriously hampered by the excessive regulations of a Member State incompatible with the Community law, violating the individual’s Community rights, where can the person seek redress?

The situation is all the more worrying as there is no mechanism foreseen under the Treaty to deal with the enforcement, at national level, of the rights created by the Community legal texts. To be sure, there is the regional Court of Justice which has competence to adjudicate on disputes relating to the interpretation

and application of the texts. But the Protocol on the Court does not empower individuals to sue a Member State before it for non-compliance with its Community obligations if that non-compliance affects the individuals’ rights. Thus, businesses and citizens are often left to their own devices. Violations of Community rights are rife; trade agreements such as the ECOWAS Trade Liberalization Scheme (ETLS) are often subverted; exporters across the region experience enormous difficulties taking their goods from one Member State to another[1] owing to the existence of all sorts of barriers to free trade; in some Member States, non-native Community nationals are subjected to conditions laid down for “foreigners” in terms of access to commercial activities and investment. All these violations of ECOWAS law slow down the process of regional economic integration considerably and often lead to some questioning the rationale for the formation of the economic Community. They are rarely challenged at national or Community level owing primarily to the non-availability of information concerning the mechanism for the enforcement of the Community law at both levels.

The purpose of this paper therefore is to provide basic information on the means through which violations of the rights and the obligations arising from Community legal texts can be addressed at national level, in accordance with the international best practices. We shall discuss in another paper the mechanism for the enforcement of the Community law at Community level – as opposed to national level.

Enforcement of Community law in national courts

Under the law of the European Economic Community/European Union which is the leading example of a regional economic bloc, Community rights can be invoked before national courts. In other words, individuals whose Community

rights are violated by a Member State can take their complaints to national courts, which are bound to protect them. This principle was laid down by the European Economic Community Court of Justice (ECJ) in case ***Van Gend en Loss v Nederlandse Administratie der Belastingen***. In that case, a dispute between the Dutch company and the Dutch Customs and Excise led to the national court before which the matter was pending requesting a preliminary ruling from the ECJ on whether a particular provision of the Treaty of Rome conferred rights on individuals which could be enforced in national courts. The ECJ used the opportunity to lay down the doctrine, which has become one of the cornerstones of Community law.

The principle has been adopted by several other regional Economic Communities. For instance, under Article 31 of the Treaty Creating the Court of Justice of the Andean Community, natural or artificial persons have the right to appeal to competent national courts should a Member country fail to comply with the Treaty obligation in the event that the rights of those persons are affected by that non-compliance. Here in West Africa, the ECOWAS Court of Justice has held that *“… national courts are also Community courts as they have competence to apply the Community law which forms part of the internal order*” (Judgement No. ECW/CCJ/JUD/11/12), debunking the widely-held belief that there is no mechanism where traders in the region whose Community rights are violated can seek redress.

Generally speaking, there are several reasons why domestic courts have competence to apply Community law at national level. Let’s look at two of them. First, they are constitutionally empowered to adjudicate on disputes over rights and obligations within their domestic legal order. For instance, Section 6(1) of the 1999 Nigerian Constitution states that the judicial powers of the Federation shall be vested in the judicial courts established for the Federation. Section 6(6) provides, inter alia, that those judicial powers “shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of

that person”. Likewise, Article 159 (1) of the 2010 Kenyan Constitution provides that the “Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

The sole competence of national judicial authorities in their domestic legal order is one of the constituents of national sovereignty. Naturally, nothing prevents a state from ceding, under a treaty, its rights to resolve disputes within its domestic legal order to a foreign tribunal. Thus international free trade agreements and bilateral investment treaties, for example, most often contain a dispute resolution mechanism known as investor-state dispute settlement mechanism, under which disputes arising from these instruments between the state and a foreign investor are resolved by a tribunal outside the domestic legal system. This regime, however, forms the subject of a lot of criticism. The second reason why domestic courts have competence to apply Community Law is that, as was declared by the ECOWAS Court of Justice, Community law is part and parcel of the domestic legal order; it therefore falls within the jurisdiction of domestic courts, holders of judicial powers within the domestic legal order.[2]

One of the advantages of the involvement of national courts in the enforcement of the Community law is that it boosts the confidence of economic operators as it gives them the assurance that, in the event of a breach, by a Member State, of their Community rights, they can seek redress *locally*, that is, in the domestic courts of the Member State where the alleged breach of their Community rights has occurred, and in accordance with the existing procedural rules which their lawyers are familiar with. If the case raises a particular question of the Community law (such as a question concerning the interpretation of a provision of the Treaty or of any other binding Community legal instrument), then the national court dealing with it may, on its own initiative or at the request of any of the parties to the action, refer that particular question to the Community Court for interpretation.[3] This is known as the preliminary ruling procedure. It is important to note that the

mechanism is not an appeal procedure as what is requested from the Court is the interpretation of that particular question and not a final decision on the main action. The preliminary ruling delivered by the Community Court on any question of Community law is binding on all the Member States. In this way, the Court is able to ensure that the Community law is applied properly and uniformly across the Community, harmonizing national practices in the area concerned.

Implementation Problems and Recommendations

Implementing the principle according to which national courts are also Community courts and have competence to apply ECOWAS law presupposes that lawyers in the Member States are familiar with ECOWAS law comprising, not only the Protocols and other binding legal instruments, but also the institutions and their functions; the rules of procedure of the Court of Justice and the Court’s decisions interpreting the texts, especially in matters relating to economic integration; the relationship between ECOWAS law and national law; the human rights mandate of the Court and its implications etc. But, the majority of the lawyers in the region do not seem to be familiar with the Community law as it does not form part of their training programme.

It is true that some institutions of higher learning in the French-speaking West African countries run very good courses on “Community Law”, in some cases up to Master’s degree level, but the focus of these courses seems to be on “WAEMU” law[4] and the “OHADA” Law[5]. The former is concerned with the economic and monetary integration of the Member States, the latter with legal integration. It is important to note in passing that, although WAEMU Member States are also Members of ECOWAS, the provisions of WAEMU legal

instruments are not always aligned with those of ECOWAS dealing with the same subjects.

So, unlike the EEC/EU law which is widely taught, and therefore widely known and used, in the EEC/EU Member countries, ECOWAS law is not on the curriculum of West African institutions of higher learning. Consequently, most people, including lawyers, are not familiar with it. A look at the case law of ECOWAS Court of Justice shows that most of its cases in recent years are in the area of human rights as guaranteed by the African Charter on Human and Peoples’ Rights, although violations of the Community rights enshrined in the Protocols and other binding instruments are rife across the region, impeding the attainment of the objectives of the Community. They are rarely challenged at Community level or national level. There does not seem to have been any judicial reference to the Court of Justice under the aforementioned Article 10(f) of Supplementary Protocol A/SP.1/01/05.

If the process of economic integration is to make any progress in the area of market integration, it is necessary that the Member States take ownership of the aforesaid decision of the ECOWAS Court of Justice and put in place a training programme designed to enable legal practitioners to meet the challenge of dealing with issues governed by the Community law. By deepening their knowledge of the legal instruments relating to the economic integration agenda of the Community, and familiarising themselves with the principles of “community law”, the enforcement mechanisms etc, legal practitioners will be better equipped to deal with disputes arising from the application of those instruments. National courts will thus be in a position to apply the Community law and to refer questions related to it to ECOWAS Court for interpretation, enabling the Court to play a more proactive role in the process of regional economic integration. One should bear in mind that, as the judicial organ of ECOWAS, the Court has jurisdiction to oversee the interpretation and application of the Community legal instruments ensuring effective and uniform implementation of these instruments. It may not be able to exercise these responsibilities unless actions are brought to it either directly

at Community level by the relevant actors, or indirectly through the preliminary ruling mechanism involving national courts and tribunals as well as individuals.

Reference to the Court of Justice would also help to address, to some extent, the problems posed by the co-existence, in the same geographical area, of two major economic Communities ie ECOWAS and WAEMU, with sometimes differing or conflicting rules. While it may not be possible to subsume WAEMU under ECOWAS so that ECOWAS “ultimately (becomes) the sole economic community in the region for the purpose of economic integration”, as Article 2 of the Revised Treaty of ECOWAS seems to suggest, it should be possible to achieve, thanks to the interpretation delivered by the Court of Justice following a reference from a national court, some form of harmonisation of ECOWAS and WAEMU rules to the extent required for the proper functioning of the regional Community.

Conclusion

To conclude, we would also recommend that enlightenment campaign be intensified and relevant ECOWAS documents made accessible to the greatest possible extent within the business community, by the competent authorities, including ECOWAS. That many citizens and businesses in the region are not aware of the rights and the obligations arising out of ECOWAS legal instruments is a fact that only a few people would dispute. Accordingly, raising public awareness about these rights and obligations seems to be a priority. There is no doubt that ECOWAS economic integration agenda will be given a boost, and intra-regional trade and investment facilitated, if the national courts of the Member States – which, according to the ECOWAS Court of Justice, are also Community courts – exercise the responsibilities incumbent on them in terms of the enforcement of the Community law, which, also according to the

Court of Justice, forms part and parcel of the internal order.

[1] See, for instance, Nigerian newspaper “Vanguard” of November 8, 2018, p.19

[2] For more discussion on this, see Iheukwumere Duru: *“Regional Economic Community: The Role of National Courts and Tribunals in the Enforcement of Community Law”* available at *https://www.thenewsguru.com/regional-economic-community-the-role-of-national-courts-and-tribunals-in-the-enforcement-of-community-law*

[3] Article 10(f) of ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 of Protocol A/P.17/91 relating to the Community Court of Justice

[4] Law of the West African Economic and Monetary Union, a grouping of French-speaking West African States, more commonly known by its French acronym “UEMOA” for “Union Economique et Monetaire Ouest-Africaine”

[5] A body of business law designed for all the countries of the CFA Zone plus the Comoro Islands and the Republic of Guinea, and placed under the auspices of an organisation known as the “Organisation pour l’Harmonisation en Afrique du Droit des Affaires” (Organisation for the Harmonisation of Business Law in Africa) abbreviated “OHADA”.

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