

## **(Originally published online in THENEWSGURU - with minor changes)**

**By Duru Iheukwumere**

### **Abstract**

The process of regional economic integration in Africa has been extremely slow. As a result, the level of intra-regional trade on the continent has been less than satisfactory. Many analysts attribute this situation to a number of economic and political reasons, including infrastructural challenges, mono-cultural agro-based economies, governance issues, and especially the perceived unwillingness of African political leaders to implement the treaties, protocols and other relevant instruments adopted within the framework of the Regional Economic Communities (RECs). While these economic and political reasons cannot be disputed, it is worth recalling that the aforementioned instruments are legal instruments the implementation of which, at the national level, is the duty not only of the executive but also of the judiciary. The former is called upon to perform the obligations arising from them, while the latter, as the judicial organ of States, has the duty to adjudicate over disputes relating to the infringement of individual rights as a result of non-compliance with those obligations. This paper focuses on the role of national courts and tribunals in the implementation of community legal instruments at the national level, which is crucial for the advancement of the process of regional economic integration and the boosting of intra-regional trade.

### **Introduction**

The establishment of a regional economic community undeniably presents challenges to lawyers in the member states. Not only must they know the workings, the rules of procedure, the structure, etc of the judicial organ set up

## The Role of National Courts and Tribunals in the Enforcement of Community Law [1]

within the context of the relevant treaty and which will have to operate side by side with national courts, but they also have to figure out how the rights conferred on individuals (natural and legal persons) by the community legal instruments can be effectively enforced, especially at the national level. This is all the more important as the effective exercise of those rights by nationals of the member states is one of the indispensable conditions for the achievement of the goals of the community. The purpose of this paper, therefore, is to provide basic information on the role of domestic courts and tribunals at the national level. [1] It is based on the practices of the European Economic Community/European Union, and is aimed primarily at lawyers and other persons such as judges and economic operators in African Regional Economic Communities. The need for such information cannot be over-emphasised, especially at a time when regional economic integration is being resolutely pursued on the African continent with a view to boosting intra-African trade. The 2016 Africa CEO FORUM which was held in Abidjan in March 2016 observed as follows:

**“The economic imperative for regional integration has never been clearer; Africa’s constellation of small fractured markets needs consolidation to help domestic industrial champions, and to attract outside investments... The Abuja Treaty, which established the African Economic Community in 1991, created regional economic blocs as stepping-stones to one united market. The milestones have already been identified - improving regional infrastructure, free movement for goods and people ... But despite this, intra-Africa trade struggles to break through the 15% mark”**

15 per cent is very low indeed compared to ‘50 per cent for Asia and 70 per cent for Europe’ (Lopes, C., 2016: *Regional integration and monetary unions in Africa*). One of the major reasons for this situation seems to be the non-

## The Role of National Courts and Tribunals in the Enforcement of Community Law [1]

enforcement, at the national level, of the rules designed to facilitate integration within the RECs. Whereas in the EEC/EU countries national courts and tribunals play a major role in the enforcement of Community provisions, this is not always the case in the African regional economic blocs. Thus, legislative or administrative measures, for instance, which breach community trade rules causing substantial financial loss to traders, or restrict in a discriminatory manner the right of establishment as defined in the founding treaties are most often not challenged at the national level. There is rather a tendency to resort to diplomatic negotiations to resolve such issues. Maybe by emulating the EEC/EU practices in terms of the enforcement of community economic rules ensuring the effective implementation of the legal instruments African countries can deepen regional economic integration and achieve a much higher degree of intra-African trade and investment.

In keeping with its purpose stated above, this paper will first of all analyse briefly why national judicial authorities are expected to be involved in the enforcement of community law. It will then present an overview of the EEC/EU practices in this regard, as well as some of the advantages of the EEC/EU model. Finally, it will argue by way of conclusion that the involvement of national courts and tribunals, protectors of individuals' rights, is crucial to the growth and success of a regional economic community. The paper is intended to be a modest contribution to the efforts being made by various individuals and institutions to give a boost to the process of economic integration in the African Regional Economic Communities. The author hopes that it will help to stimulate the interest of the reader in the subject matter encouraging them to further explore this very important and topical issue.

### **Some of the Reasons for the Involvement of National Courts and Tribunals**

National courts are constitutionally empowered to adjudicate on disputes over rights and obligations within their domestic legal order. For instance, under the 1999 Nigerian Constitution, Section 6(1), states as follows: "The Judicial

powers of the Federation shall be vested in the judicial courts to which this section relates, being courts established for the Federation.” Section 6(6) provides:

**The Judicial powers vested in accordance with the foregoing provisions of this section ... (b) 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.” No other body or authority has power to perform such functions.<sup>[2]</sup>

The sole competence of national judicial authorities to adjudicate over disputes in their domestic legal order is one of the constituents of national sovereignty. It is implicitly recognised by various international legal instruments. For instance, Article II of the 1907 Convention for the Establishment of the Central American Court of Justice stipulates as follows:

**This Court shall also take cognizance of the questions which individuals of one Central American country may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character ... *provided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown* [emphasis added]**

## The Role of National Courts and Tribunals in the Enforcement of Community Law [1]

This implicitly acknowledges the sovereignty of the Members States with regard to their domestic legal order: national courts, including the supreme courts, must adjudicate on such cases first before they are taken to a court outside the domestic legal system. Similarly, Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. Individuals who claim to be victims of a violation of rights guaranteed by this legal instrument can take their complaints to the judicial body set up under the instrument, but only after exhaustion of all domestic remedies, “according to the generally recognised rules of international law” (Art. 35 of Protocol No. 11 to that Convention). Also, Article 7 of the African Charter on Human and Peoples’ Rights stipulates that “Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force”

Furthermore, under the terms of the Preamble and of Article 1 of the Rome Statute of 17 July 1998 which established the International Criminal Court (ICC) to try individuals for the most serious crimes defined therein, the ICC is “complementary” to national courts. In other words, the latter retain their sovereign right to try such cases within their domestic legal order; the ICC exercises its jurisdiction only when they (the national courts) are unwilling or unable for one reason or another to investigate and prosecute such crimes.

**TO BE CONTINUED**

**READ ALSO:**

[The Role of National Courts and Tribunals in the Enforcement of](#)

## The Role of National Courts and Tribunals in the Enforcement of Community Law [1]

### [Community Law \[2\]](#)

---

[1] We shall discuss enforcement at community level in another paper

[2] Naturally, nothing prevents a state from ceding, under a treaty, its right 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 operating outside the domestic legal system. This regime, however, forms the subject of a lot of criticism. It is interesting to note that in its Protection of Investment Act 2015, South Africa makes recourse to international arbitration in respect of the investments covered by the Act conditional on the exhaustion of domestic remedies.