

**THE EXTENT AND RAMIFICATION OF THE
HUMAN RIGHTS JURISDICTION OF THE ECOWAS
COMMUNITY COURT OF JUSTICE**

By

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Abstract

The ECOWAS community Court of Justice (ECCJ) is a creation of the member states of the ECOWAS Community via its establishment protocol of 1991. It was originally established to ensure the observance of law and the principles of equity in the interpretation and application of the provisions of the ECOWAS Treaty, and to deal with disputes referred to it in accordance with the provisions of Article 56 of the Treaty. This paper examined the concept of human rights and jurisdiction within the context of the establishment protocol of the court and the ECOWAS Treaty. This is against the backdrop of the existing legal and institutional framework (both regional and international) that reinforces the court's mandate. The paper identified some conflicts in the decisions of the court regarding its competence, highlighting them to show how they impact on the determination of the court's jurisdiction. It further examined the constraints to the realization of the court's mandate by its narrow interpretation of Article 9(3) of the Supplementary Protocol which imbues it with the jurisdiction to determine human rights violation in the community. The author made case for the liberal interpretation of the community texts and protocol towards expansion of the court's competence to include every shade of human rights violation. The author thereby recommended that the areas of the court's competence in its human rights jurisdiction be defined with certainty and exactitude by a protocol that would crystallize the components of the court's jurisdiction, and pointed out the danger of leaving it to judicial discretion.

Introduction

The ECOWAS Community Court of Justice is a creation of treaty by virtue of protocol A/P.1/7/91 on the Community Court of Justice. At its inception, its jurisdiction was strictly to intervene and determine disputes between member states, or member state(s) and the ECOWAS Commission.¹ However, this jurisdiction was expanded to include enforcement of fundamental rights against member states of the commission in line with the growing trends in regional and sub-regional judicial mechanisms for protection and enforcement of fundamental rights.² This expanded jurisdiction opened in its wake a floodgate of applications by individuals for the enforcement of their rights, a greater percentage of which are in total misconception of the nature of the human rights jurisdiction conferred on the ECOWAS Community Court of Justice (hereinafter referred to as 'the Court').

Thus, the growing jurisprudence and case law of the court have crystallized into defining who is and who is not a recognizable plaintiff or defendant before the court, the limits of its territorial jurisdiction, the extent to which a statute of limitation would apply in a fundamental rights proceeding in the determination of its jurisdiction, and the extent or otherwise of its enablement to interfere in pending proceedings before domestic courts.

This research is basically aimed at highlighting the nuances of this jurisdictional enablement with a view to identifying the intricate web or labyrinth that establishes the Court's competence. It would also bring to the fore, the distinctive nature of the Court's competence, and straighten its strands towards a clearer perception of the nature and extent of this competence. It would also bring to the fore, the areas of jurisdictional convergence or similarities between the court and other international human rights courts, and the extent to which it merges or departs from that of other regional courts, particularly, the European Court of Human Rights, and the Inter-American Court of Human Rights.

In predicating our work on the defining ingredients and features of the jurisdiction of the Court of Justice of the ECOWAS Community, the community text must be referred. This is in addition to the protocol establishing the court, and the one expanding its jurisdiction to include the determination of human rights violations by member states against

¹Revised Ecowas Treaty 1999, arts 16 and 9 (3)

² *Ibid*, arts 6 (4), 15 (3) and (4)

their citizens. That is the aspect of jurisdiction that readily is of concern to us in this work, as the said human rights scope come with the attendant variables and nuances that define the criteria for competence and admissibility of a complaint before the regional court and indeed other regional courts.

The jurisdiction of the court circumscribes its competence to determine a matter before it. As in municipal courts, the competences of International Courts are also established by the three vital ingredients of parties, subject matter, and territorial considerations. Put in another way, a court does not have jurisdiction if it is incompetent, and conversely, cannot be incompetent and at the same time possess jurisdiction.

Even though, both words (i.e. jurisdiction and competence) are used interchangeably, they translate to different meanings. But within the context of this work, we shall restrict its meaning strictly in accordance with established principles, as it relates to the power of a court to hear applications and complaints, or determine or adjudicate on matters before it particularly as in this circumstance, fundamental rights complaints.³

As stated earlier, the relevant convention relating to the jurisdiction of the court on human rights are the Protocols firstly establishing the court, and secondly imbuing it with the jurisdiction on human rights violations contained in two different instruments. Essentially, the core jurisdictional criteria are categorized into the three broad predicates of competence *ratione materiae*, competence *rationae materiae* and competence *rationae loci*. Within these two are lumped other considerations for the determination of competence of an application which usually determine admissibility of individual complaints subsequent to the determination thereof in the substantive sphere of the core complaint.

Jurisdiction *rationae personae* are concerned with the parties or persons over whom a court can exercise jurisdiction. Within this *personae* sphere of jurisdiction is the determination of whether this aspect of the court's competence also includes violations by other entities, corporate and non-corporate within the court's territorial definition and the extent to which they can be bound by the court's decisions.⁴ Jurisdiction *ratione materiae* states that the individual can only bring his complaints within the ambit of the Convention or Charter guaranteeing the rights he seeks to enforce and of which the defendant is bound. Thus any enforcement that is outside the

³*Moukthar Ibrahim Amini v Government of Jigawa State* [2011] CCJELR 2

⁴Supplementary Protocol on Community Court of Justice 2005

guaranteed rights contained in the particular convention or treaty is well not within the competence of the court established pursuant to the convention or pact.⁵

Rationae loci is all about the territorial jurisdiction of the court in terms of geographical limits of the court's competence. In construing this aspect of jurisdiction, recourse must be had to the protocol enshrining and guaranteeing the human rights as an aspect of the court's competence. It is equally of importance to note the states that have subscribed to the pact and upon which the court having jurisdiction to determine cases of human rights that occur in any member state would exercise jurisdiction over.⁶ This aspect of jurisdiction is only exercisable within the geographical limits of the extent of the high contracting parties put together and not outside it. Specifically, the jurisdiction of the Ecowas Court in terms of its territorial extent is restricted to the member countries that constitute the Ecowas Community. The extent of the court's competence does not therefore go beyond the defined territorial area of its competence, which essentially is the extent of the territories of the member states that subscribed to the ECOWAS Treaty, though there are specific exceptions to this principle. There are other requirements intrinsic to the consideration of the issue of jurisdiction-as for instance the application of a limitation statute, specifically the limitation for bringing actions as contained in the Protocol and the possibility of the application of the exhaustion of local remedies rule as criteria for admissibility of a complaint by court.

The reasons of the protocol's departure from the usual rule of general International Law that the state must have the opportunity to redeem the alleged wrong as a precursor to an International Court or tribunal assuming jurisdiction on the matter has to be ascertained. This is in the area of exhaustion of domestic remedies. Being a requirement that ensures that state judicial institutions are given the opportunity to redress wrongs within the domestic ambience, it would appear that the circumvention of that criterion by the ECOWAS Protocol was deliberate and targeted at making for quick redress of human rights violations within the region. As shall be seen, the criteria for assumption of jurisdiction for the ECOWAS court go beyond the three traditional spheres of judicial competence as earlier stated. Other important considerations come to bear, as per whether or not it is an abuse of court process when a similar matter on the

⁵*Musa Saidykhan v The Government of Gambia* (2007) CCJELR 3

⁶*Mrs. Ameganvi Isabelle Manavi v The Republic of Togo* (2012) CCJELR 10

same subject matter on the same parties and issues can be pending in both the regional court and a domestic court, or another international tribunal, or whether the regional court can in all its essence hear a matter already determined by a domestic court, or act as a court of cassation in exercise of appellate jurisdiction to the decision of the domestic courts. In construing the jurisdiction of a regional court, such as the ECOWAS Community Court of Justice, other considerations come in to play aside from the high contracting treaty and Protocols creating the court and the instruments denoting its jurisdiction. Much as the court would endeavour to expound and not necessarily expand its jurisdiction in consonance with its human rights mandate, the case law of the court shows that cases are found incompetent for admissibility by the court notwithstanding that they contain genuine complaints by community citizens against actual violations of fundamental rights by member countries. In some other circumstances, the court outrightly declines to exercise jurisdiction notwithstanding the palpable violations that are discernible from the facts in a manner that enthrones technicalities over substantive justice. In other words, it is not all cases of genuine violations before the court that can be determined within the ambit of its competence and this has somewhat generated a cloud of doubts as to the jurisdictional mandate of the court, and its effectiveness to tackle all cases of fundamental rights abuses and infringements against state authorities brought before it by citizens of the sub-region.

Legal and Institutional Frameworks

It is apt at this point, to present the legal and institutional framework within which a human rights system constituted at the regional level operates. The framework underscores the whole basis for the existence of the court and the area of its power, jurisdiction, and competence and these are determined by the different domestic, regional and international instruments that provide bulwark to the court's functions and existence. The existing institutions and instruments overlap in their outlooks and functions and their existence at both the domestic and international planes are not necessarily marked with remarkable differences but simply meant to strengthen and complement both levels towards the achievement of a human rights legal order or regime at both planes, possibly harmoniously.

1.1 Legal Framework

1.1.1 National

The paramount importance attached to human rights on the international plane greatly impacts on the pre-eminence accorded it at the domestic plane. Indeed, this importance accorded fundamental rights in domestic constitutions is the fallout of the obligations imposed on states to observe and recognize these rights and where possible, implant them as domestic norms by the United Nations Charter and international human rights instruments beginning with the Universal Declaration on Human Rights.⁷The purport and regime of the fundamental rights instruments make it obligatory on state parties to respect and ensure the observance of these rights within their different domestic jurisdictions. They compel the undertaking and commitments of high contracting parties to the instruments to respect those rights and ensure that any person whose rights or freedoms are violated have an effective remedy within the domestic judicial forum for redress. Along this vein, Nigeria, by virtue of its membership of the United Nations and having become signatory to the two covenants, alongside other countries put effective domestic framework and measures for the preservation of the fundamental rights norms and mechanism of enforcement in the event of a violation against its citizens. Pursuant to this obligation, several legal and institutional frameworks were established to give value and efficacy to these rights. Using Nigeria as a case study, the constitution of the Federal Republic of Nigeria 1999 (as amended) dedicated a whole two of its chapters to the guarantee, protection and enforcement of fundamental rights and freedoms.⁸

1.1.2 Constitution of the Federal Republic of Nigeria

The constitution of the Federal Republic of Nigeria is unique in several aspects, but one notable area is the importance and hierarchy of place it accords fundamental rights. The main fundamental rights provisions are contained in a whole chapter of the organic instrument. Chapter II also contains norms that conform or relate with the second generation of rights, but which were enacted as a charter of government in what it called the Fundamental Objectives and Directive Principles of State Policy.

⁷ Universal Declaration of Human Rights 1986, arts 1 and 2; Covenant on Economic, Social and Cultural Rights 1966, arts 1 and 2; Covenant on Civil and Political Rights 1986, arts 2 and 3

⁸ The Constitution of the Federal Republic of Nigeria 1999, (as amended) S 12(1) and 46(1)

Chapter IV of the constitution in its provisions guarantees the rights to life, right to dignity of the human person, and right to personal liberty.⁹ Right to fair hearing occupies a conspicuous place in S. 36 of the constitution, which also regulates criminal proceedings in areas that requires the application of the fundamental right to fair hearing. Sections 37, 38, 39 and 40 are guarantees to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press and the right to freedom of movement. Section 40 guarantees the right to peaceful assembly and association, 41 is about right to freedom of movement. The right to freedom from discrimination is embedded in section 42 while the right to acquire and own immovable property anywhere in Nigeria is contained in sections 43 and 44.¹⁰ The constitution recognizes the fundamental nature of those rights in terms of their inviolability, in spite of which it imposes some restrictions and allows derogation from those rights, which are provided for under the same chapter IV, by virtue of section 45, of the constitution. These restrictions connote to interference or restrictions in the enjoyment of those rights in circumstances that are absolutely necessary for public security and welfare. Two forms of restrictions have been identified, firstly those that fall under the category of derogations and secondly those that fall under claw-back clauses even though the later is more identified with international treaties. Derogations from those rights are only justified by a law reasonably justifiable in a democratic society.¹¹ However, these restrictions do not apply to all the rights enshrined in Chapter IV but to those rights listed in the provisions, namely Sections 37, 38, 39, 40 and 41 of the constitution.

This sets in another form of categorization of the rights which clearly makes it appear that some rights are more fundamental than the others but in spite of which this distinction is acceptable going by two stringent criteria stated in the sub paragraphs of S. 45 on the application of the derogations. Even so, evolving case law on the purport of such laws do not allow a legal encroachment on basic rights and an approach or attitude which must be on the side of the individual rights. The current state of the law enjoins a strict construction, *fortissimo contra preferentes*,

⁹ CFRN 1999, S 34

¹⁰ A Aguda and O Aguda, 'Judicial Protection of some Fundamental Rights in Nigeria and in the Sudan before and during Military Rule' [1972] (16) (2) *Journal of African Law*, 130-144.

¹¹ R Higgins, 'Derogations under Human Rights Treaties' [1976] (2) (3) *Berkeler Journal of International Law*

which leans in favour of the citizen in terms that if any law restricts, abridges or curtails the exercise of a fundamental right, that law must be construed against the benefitting authority and in the interest of justice in favour of the right.¹² Uwaifo J.SC, in construing one of such laws, observed that ordinarily, laws are not supposed to encroach into the arena of fundamental rights, but then, if such laws are only derogations from the right and meant to curtail the freedom, their validity cannot be questioned by virtue of S. 45 of the constitution.¹³ His Lordship further enjoined that in construing such laws, against the right, it must be construed against the enactment and in favour of the right. In spite of the fact that the derogations are put in place to fulfill a constitutional purpose, the curtailment and abridgment of the rights in any manner must strictly follow the purpose and principle. Thus derogations become impossible when the rights are properly exercised.¹⁴

Section 46 of the constitution creates a special jurisdiction for the enforcement of the rights contained under chapter IV, which is reposed in the High Court within the state in which the violation occurred for redress. At the initial state of the entrenchment of this right, there was some confusion as to which of the High Courts created under the constitution would possess jurisdiction, and under what circumstances would such jurisdiction be exercised?¹⁵ In other words, being that there exists two High courts under the constitution, S.46 failed to delineate which of the courts would exercise the special jurisdiction and under what circumstances. Initial decisions of the courts tended to lean in favour of the courts exercising such jurisdiction (in tandem with the specific areas of their competence in conformity with the subject matter and parties), as given to it by the constitution. But the issue was settled in later decisions of the court beginning with *Bronik Motors Ltd v Wema Bank*.¹⁶ The final resolution of this controversy was the decision in *Jack v University of Agriculture*,¹⁷ wherein the apex court held that the jurisdiction conferred

¹²*Peenok Investments Limited v Hotel Presidential Limited* (1982) 13 NSCC 47; *Attorney General of Bendel State v PLA Adeyan* (1989) 9 SCM 27.

¹³*Ndoma Egba v Chukwogor* (2004) 2 SC 107; *Attorney General of Bendel State v PLA Adeyan* (1989) 9 SC.

¹⁴ W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning [1923] (30) (9) *New York University Journal of International Law and Politics*, 10-15.

¹⁵*Tukur v Government of Gongola State* (1989) 4 NWLR 117.

¹⁶*Bronik Motors Limited v Wema Bank Limited* (1983) 1 FWR 463.

¹⁷*Jack v University of Agriculture Makurdi* (2005) 5 NWLR 865.

upon the High Courts by virtue of section 46 of the constitution is a special one and therefore both the Federal High Court and State High Courts have concurrent jurisdiction on the matter. The dichotomy between the two courts thereby ceased to exist when the subject matter is the enforcement of fundamental rights.

The scope of this enforcement, as provided for under section 46 is not restricted to persons who have suffered infringements but also extends to persons whose fundamental rights are breached, being breached or about to be breached. Such application would lie within the state where the breach occurred, is occurring and likely or about to occur.¹⁸ The Supreme Court in Jack's case captured the very essence of the exclusivity of the Federal High Court's jurisdiction pursuant to section 251 of the constitution and how this line of jurisdiction vis - a - vis the state high courts is extinguished by the special provision in section 46(1) of the constitution. It is settled that where both the state High court and Federal High court exist in a state, they have concurrent jurisdiction in matters pertaining to fundamental rights.¹⁹ In other words, section 46 confers jurisdiction on any High Court in matters of fundamental rights, and it is immaterial whether or not the subject matter of the application is within the constitutionally enumerated matters within which the court can exercise jurisdiction. It has therefore become trite that under the present enforcement mechanism or framework in Nigeria, there is no distinction between the Federal High Court and the State High Court on the issue of jurisdiction to enforce fundamental rights.

1.1.3 Fundamental Rights Enforcement Rules 2009

The Fundamental Rights Enforcement Procedure Rules 2009 (hereinafter referred to as the FREP Rules) is the rules of procedure that regulate fundamental rights proceedings in the High Courts. It was made by the Chief Justice of Nigeria, pursuant to the mandate given to him by the constitution.²⁰ The FREP Rules sets out in detailed form the mode of enforcement of the fundamental rights under the Constitution and the African Charter on Human and Peoples' Rights, and the scope of which the rights enshrined therein can be enforced. The Rules states its overriding objectives as being the expansion and purposeful

¹⁸ CFRN 1999, s 46(1).

¹⁹ (n 11).

²⁰ CFRN 1999, s 46(2) (a).

interpretation and application of the fundamental rights provisions under Chapter IV of the constitution and those contained in the Articles of the African Charter on Human and Peoples Rights.

It recognizes Nigeria's international obligations by stating that the court shall respect municipal, regional and international bills of rights cited to it or brought to its attention, or of which the court is aware. Specific reference is made to the African Charter on Human and Peoples' Rights' and other instruments (including Protocols) in the African regional human rights system, and the Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations Human Rights System. The relevance and pursuit of the rights are set without boundary by the FREP Rules, as it recognizes the need for enhanced justice for all classes of litigants. For the first time, and as a radical departure from the old rules, great emphasis was made of public interest litigation in the enforcement of fundamental rights.²¹ By this, individuals, groups, activists, advocates, non - governmental organizations are allowed to initiate human rights applications in the courts on behalf of persons that suffer infringements. This automatically forecloses any challenge to a pending application on the ground of *locus standi*. Statutes of limitation do not also apply thereunder.

Also, importantly, leave of court is no longer required as a precursor to the enforcement by the individual of his fundamental rights, as was the case in the 1979 Rules. Order 1 of the Rules deals with interpretation by which provision further clarifications were made on the diffusion or capsizement of the erstwhile dichotomy between the Federal High Court and the High Court of the States in respect of the enforcement of fundamental rights. By this, High Court as provided for in the rules is either the High Court of the State or the Federal High Court. Order II is about the complaint procedure, regarding the content and structure of an application in terms of the motion proper which must necessarily be on notice, the statement accompanying the application settling out the name and description of the Applicant, the reliefs sought, grounds for seeking the reliefs, the supporting affidavit and the written address. The rules made provisions for general conduct of the proceedings and other vital areas such as the service of court process, orders which the court may make ex-parte applications etc.

²¹ The Fundamental Rights Enforcement Procedure Rules 2009, s 3 (e).

1.1.4 The Police Act

The Machinery for the maintenance of law and order is an indispensable aspect of every legal system.²⁰ The Nigerian Police Force is saddled with the prevention and detention of crimes, the apprehension of offenders, the preservation of law and order, the protection of life, property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or outside Nigeria as may be required under the authority of this or any other Act.²¹

1.2 Regional legal framework

1.2.1 African Charter on Human and Peoples' Rights

Within the African region, are in operation certain legal measures that guarantee fundamental rights paramount of which is the African Charter on Human and Peoples' Rights. It is an international human right instrument established to promote and guarantee fundamental right within the continent. The Charter, also known as the Banjul declaration came with unique features embodying within it all the three generations of human rights and fundamental freedoms and which received the unanimous gratification of all the state members of the organization of African Unity, now the OAU. The Charter was later to be domesticated in those countries as part of the laws of individual state, and as for Nigeria, it is contained in Cap 12 of the laws of the Federation of Nigeria 1990. It is about the only international human rights instrument that received the approval and gratification of the National Assembly pursuant to section 12 of the 1999 constitution (as amended). The aims and objective of the Charter are anchored on the broad perspective of freedom, equality, justice and human dignity which according to its Preamble justify their international protection being also that the reality and respect of peoples' rights must necessarily guarantee human rights. By virtue of its domestication and having body of the part of the laws of the federation of Nigeria, it may be stated that its placement within the context of this dissertation would appropriately be under the National Legal Framework aspect of this discourse. But it has been stated that for the fact that it is domesticated, does not make it a wholly municipal legislation *stricto sensu*, being that its status as an international treaty remains unaltered. In other

²⁰ L B Mitee, *Nigerian Legal System: A Fundamental Approach* (2nd edn, Port Harcourt; Ebenezer Publishing House 2001) 48-50.

²¹ Police Act 1943, s 4.

words, that it is domesticated does not shorn it of its international character, being a part governed not by the domestic constitution but by the Vienna Convention on the Law of Treaties, 1969.²³

1.2.2 African Charter on Democracy, Elections and Governance

This Charter embodies in all its essence the core principles and practice of democracy, elections and governance. It was adopted by the member states of the African Union 30th day of January, 2007 with the core purpose of promoting liberal democracy and human rights in Africa.²⁴ It is anchored on an integrative approach towards the entrenchment of Africa's goal for inclusive and sustainable development and the protection, preservation and guarantee of fundamental rights. Prominent amongst this provisions are the creation of barriers to junta the rules and abrupt constitutional interruption through coup d'état. It represents in its context the new found focus for the sustenance of constitutional and democratic values in the continent, away from authoritarianism or tyranny. It has also been argued somewhere that its efficacy in eradicating totalitarian governments on the continent is questionable as not much has been done since its ratification in easing out these monsters who appear to be emerging daily on the continent's political landscape as leaders and unfettered by its provisions.

1.2.3 ECOWAS Protocol on Democracy and Good Governance

The Protocol which came into effect in December, 2001 upon adoption by the head of states and governments was essentially meant to guarantee a sound constitutional and democratic culture for the ECOWAS community alongside the attendant freedoms associated with them. Just as its counterparts on the continental plane, it aims particularly to entrench popular sovereignty and legitimacy in governance within the ECOWAS sub-region. It creates a barrier towards false usurpation of political power and the governance space by military juntas and the sustenance of core democratic values by promoting and strengthening good governance and the constitutional state of affairs in the sub-region. It sought radically to exclude the military from exercising governmental powers banning them also form all political and trade union activities and propaganda in the

²³ *Abacha v Fawehinmi* (2000) 6 NWLR 228.

²⁴ 'A Tortuous Road for the African Charter on Democracy, Elections and Governance' Submissions to the United Nations Universal Periodic Review of Africa

barracks and within the armed forces. It stipulates an enhanced right to vote and the banning of all cruel, inhuman and degrading treatment and punishment as a requirement for respect of human rights and humanitarian law which according to it constitutes important focus and direction on the choice of and desires of democracy and good governance.

1.3 International Legal Framework

On the international plane, several human rights instruments exist in the form of pacts, treaties, conventions and Declarations that seek to protect, preserve and enforce fundamental rights. Many countries, including Nigeria have expressed their willingness to be bound by such human rights instruments, through the ratification of the said instruments. The existence of these human rights pacts is predicated on the noble goals and objectives of the United Nations as crystallized in the UN Charter. The Charter essentially seeks to get member countries to 'reaffirm their faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'²⁵

This paved the way for the institution of human rights norms at the supranational level which has positive impact in national jurisdictions.

1.3.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights²⁶ paved the way for massive global advancement in the area of human rights. It put in place protections and measures for the promotion and protection of human rights in member countries of the United Nations. It became the basis for the development of the international bill of Human Rights and thus is the foundation of international human rights law. The declaration which forms the matrix of all other human rights instruments under the UN Human Rights system in its preamble restated the pledge of member countries to achieve, in co - operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

It emphasizes in its different articles the brotherhood, dignity and equality of man and the universality of the right and freedoms guaranteed in the Declaration.²⁷ It proclaims the status of humanity right to life, liberty and

²⁵ UDHR 1986 art 1

²⁶ (n25)

²⁷ (n25)

security of the human person, contrary to cruel, inhuman and degrading practices such as servitude, slavery and torture²⁸. Its Article 7 emphasizes equality before the law, and prohibits any discrimination and incitement to such discrimination. Article 8 compels the member states to establish competent judicial fora for enforcement of their citizens' rights against acts violating or infringing upon their fundamental rights. The right to fair hearing is property entrenched in Article 10 and the subsequent Article 11 which guarantees the presumption of innocence and the sub-provisions that forbid trials outside the due process of the law. Articles 12 and 13, guarantee the rights to privacy and preservation of individual reputation, freedom of movement, right of entry and exit into any country, including his own. Articles 14 - 27 guarantees the right to asylum, right to nationality, family, property, freedom of thought, conscience and religion, freedom of opinion and expression, association and peaceful assembly, right to participation, social security, labour related freedoms, standard of living, education, cultural life. Article 28 affirms the existence of a social and international order necessary for the actualization and full realization of the guarantees contained in the Declaration. Article 29 sets out the duties of the individual to his community, and in his relation with others in line with the principles of the United Nations.

1.3.2 International Covenant on Civil and Political Rights

The Covenant on Civil and Political Rights, one of the two instruments which together alongside the Universal Declaration of Human Rights form the bedrock of the international bill of Human Rights under the UN System was adopted by the General Assembly, resolution 2200 4(XXI) of 16th December, 1966. It entered into force on 13th March, 1976 ten years after its adoption. It currently has 149 state parties including the Federal Republic of Nigeria as signatories, and contains several guarantees of rights bordering on civil and political freedoms. The bulk of the rights it enshrines fall within the category of the second generation rights. The regime of rights it covers are quite wide, beginning from its article 1 relating to the right to self - determination, right to life, protection against torture or cruel inhuman and degrading treatment, to liberty and security of the person, amongst several other rights. By its Article 2, state parties undertake to respect and to ensure all individuals within their territories and subject to their jurisdiction, the rights contained in the covenant. Sub paragraph 3 of Article 1 enjoins state parties to create the appropriate judicial

²⁸ (n25) art 2

administrative or legislative fora for persons claiming remedies to ventilate their complaint, and to ensure that the competent authorities enforce such remedies.

1.3.3 International Covenant on Economic, Social and Cultural Rights

The third instrument that falls under the United Nation's international bill of rights is the Covenant on Economics, social and cultural Rights.²⁹ Just like its twin covenant, on civil and political Rights, it entered into force on the 3rd day of January, 1996 just as its title suggests, its scope encapsulates in its text a whole body of right, relating to economic, social and cultural rights. State parties therein undertake to harness the available resources with a view to achieving progressively the full realization of the rights recognized in the covenant. The equal right of all is proclaimed therein, specifically relating with the enjoyment of all economic, social and cultural rights. The instrument recognizes the right to work and for opportunity for individuals to gain their living through work which can be achieved through technical and vocational guidance, training programs, policies and techniques to achieve steady economic, social and cultural development.³⁰ The covenant seeks to protect, preserve and advance the economic and social values inherent in nation states, for the realization of the rights guaranteed there under. It proclaims the institutional guarantees for labour rights, and trade unionism, right to social security including social insurance, right to adequate standard of living, education and the enjoyment of the highest attainable standard of physical and mental health. Ample guarantees were given for the entrenchment of free primary education and the right to participate in cultural life and the enjoyment the benefits of scientific progress and its applications. The rights enshrined therein are an advancement and departure from the mainstream traditional fundamental norms, and showcases the dynamism and flexibility of existing rights to given circumstances and needs in line with the developmental strides of society.³¹ The rights in the covenant could be rightly described as pertaining to the economic, social and cultural rights which are offshoots of the aspects of the economic, social and cultural implications of the Provisions of the Covenant on Civil and Political rights.³² The rights, contained in the two covenants can be said to be interwoven, and mutually complimentary and reinforcing.

²⁹ (n25) arts 3, 4, 5 and 6

³⁰ *Ibid.*

³¹ *Ibid.*, art 6.

³² F E Dowrick, *Human Rights Problems, Perspectives and Texts* (3rd Saxon House Westmead UK 1979)

1.4 Institutional Framework

1.4.1 National Framework

1.4.2 National Human Rights Commission

The National Human Rights Commission is a national institution, with an international character having emerged as a child of an international convention.³⁸ It is established principally to deal with all matters relating to the promotion and protection of human rights guaranteed under the constitution, the United Nations Charter, the African Charter and African Union and ECOWAS Declarations and other international requisite instruments on human rights of which Nigeria is party. By S.5 of the Act, it is enabled to undertake studies on all matters pertaining to human rights, and this includes the formulation of appropriate policies on the guarantee of human rights. It is also to publish and submit periodic reports to the authorities of government on the state of human rights promotion and protection in Nigeria. This it can do through its liaison with international and local organizations on human rights with the purpose of advancing the protection and promotion of human rights. The commission equally plays a vital role in the preservation and enforcement of fundamental rights within the country. It is empowered to receive and investigate complaints concerning the violations of human rights, and make appropriate determination as it deems necessary.

1.4.3 The Courts

The courts are statutorily empowered to resolve disputes through the dispensation of justice guaranteed under the constitution of the Federal Republic of Nigeria 1999, which confers judicial powers on them.³⁹ The courts have the last and most authoritative say in the determination and pronouncement of what justice demands in every situation involving claims and counter claims to legal rights and duties. Finally, it arrives at decisions by applying the law selected, and as interpreted by it, to the facts accepted to be true, material and relevant.⁴⁰ The courts, in course of discharging their statutory duties, also play a major role in the promotion and protection of women's rights.⁴¹ Both at the national and international

³⁸ The National Human Rights Commission Act 2010, (as amended)

³⁹ The Constitution of the Federal Republic of Nigeria 1999, (as amended) S 6

⁴⁰ (n 20)

⁴¹ CFRN 1999, s 42.

levels, perpetrators of sexual and other forms of gender related offences have been arrested and prosecuted.⁴² However, in Nigeria the requirement of corroborative evidence has always been a major challenge in the prosecution of sexual and other gender related offences.⁴³ Internationally, decisions of the International Criminal Tribunal for the former Yugoslavia and Rwanda have shown that sexual and other gender based offences were successfully prosecuted.⁴⁴

Regional Institutional Framework

1.5 International Framework for Institutions

1.5.1 United Nations

The United Nations is the pivot upon which the establishment and advancement of human rights rotates. By its essential attributes, it embodies in its Preamble, the necessary attributes and commitment 'to reaffirm faith in fundamental rights in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' it compels the respect for the obligations arising from treaties and other sources of international law and their ends to promoting the dignity of the human person and improve conditions and better standards of life in larger freedom.⁵⁵

It is a global organization which seeks amongst others to protect fundamental rights and it is against the backdrop of its most notable declaration that the principles that brought human rights into the arena of international law was entrenched in 1948, that is a Universal Declaration of Human Rights. Since then, the organization has become a veritable vehicle for the drive and sustenance of human rights norms across the globe through legal instruments, the office of the high commissioner for human rights, the UN commission for human rights, and numerous other agencies operating within the umbrella of its human rights mandate. The human rights components of peace keeping mission in different countries received massive supports from the human rights commission and cases of human rights abuses across the globe received the attention of body,

⁴² K D Askin, Prosecuting Wartime Rape and other Gender Related Crimes under International Law: Extra Ordinary Advance Ending Obstacles [2003] (21) (2) *Berkeler Journal of International Law* 30-35

⁴³ (n 22)

⁴⁴ (n 42)

⁵⁵ UDHR 1949 art 1

depending of course on the size and dimension of the violations or infringements pursuant to its goal of promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.⁵⁶

1.5.2 United Nations Charter and Treaty based Bodies

Under the United Nation human rights system are ten (10) human rights treaty bodies that monitor the implementation of the core human rights treaties. These bodies work essentially as human rights monitoring mechanisms in the United Nations Systems. They are made up of independent expert, mandated in the requisite credentials to monitor state party's compliance with their obligations under the UN treaties touching particularly on human rights. By these, the rapporteurship system of investigation of gross human rights violations upon receipts of complaints by the office of the high commissioner for human rights. The bodies are, The Human Rights Council, Commission on Human Rights, Committee on the Elimination of Racial Discrimination, Committee on Economic, Social and Cultural Rights, Human Rights Committee, Committee on the Elimination of Discrimination against Women, Committee against Torture, Committee on the Rights of the Child, Committee on Migrant Workers, Subcommittee on Prevention of Torture, Committee on the Rights of Persons with Disabilities, Committee on Enforced Disappearances.

1.5.3 United Nations Commission on Human Rights

The United Nations Commission on Human Rights which is saddled with the responsibility of the promotion and encouragement of respect for and observance of human rights and fundamental freedom, in recent past, has made efforts and put in place modalities on how to protect women against sexual violence during armed conflicts.⁵⁸ At its Fiftieth session on the 4th day of March, 1994, the Commission on Human Rights adopted resolution 1994/45, entitled "The question of integrating the rights of women into the human rights mechanism of the United Nations and the elimination of violence against women in which it decided to appoint, for a three year period, a special rapporteur on violence against women, including its

⁵⁶ H O Agerwal, *Human Rights* (14th edn Central Law Publications)

⁵⁸ (n 56)

causes.⁵⁹In the same resolution, the commission on Human Rights invites the special Rapportuer, in carrying out that mandate and within the framework of the Universal Declaration of Human Rights and all other International human rights instruments, including the convention on the elimination of all forms of discrimination against women and the declaration on the elimination of violence against women, to: seek and receive information on violence against women, its causes and consequences from Governments, treaty bodies, specialized agencies, inter governmental, non-governmental organizations and to respond effectively to such information.⁶⁰Furthermore, the commission also called for the elimination of gender-based violence in the family, within the general community and where perpetrated or condones by the state it also emphasized the duty of Governments to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the state or by private persons.⁶¹ The Commission also emphasized the elimination of all forms of violations of the rights of women in situations of armed conflict and in particular, murder, systematic rape, sexual slavery and forced pregnancy as well as all forms of sexual harassment exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of the harmful effects of certain traditional or customary practices, cultural prejudice and religious extremism.⁶²

Summary of Findings

The need for definitiveness in the determination of the area of competence of a supranational court is imperative. The divergent positions and conflicts manifest in the case law of ECOWAS Community court relating to its jurisdiction does not make for certainty and consistency in adjudication. They rather breed confusion in the minds of community citizens and could corrode on the level of confidence they repose on such vital community institution. The case law of the court has developed quite impressively over the short period of time of its establishment. These cases define and enforce the courts' prestige and importance in the eyes of the community, and indeed in the international community. The quality of

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

its decisions also confers it with the acceptance and recognition as an effective regional supranational judicial forum for the enforcement of fundamental rights. But the approach by the court in determining its jurisdiction and competence is somewhat restrictive and narrow when juxtaposed with the proper construction of Article 9 (3) of the Supplementary Protocol on its power to adjudicate on violation of fundamental rights by member states upon application by individuals, which is wide. Its position in discarding the exhaustion of local remedies requirement which thus makes the court one of first instance on matters relating to fundamental rights violation is commendable. These places the court at equal par with domestic courts on the enforcement of those rights contained particularly under the African Charter. But while there is no disparity or distinction regarding the entrenched rights and between those enforceable under domestic courts as different from those enforceable under international courts, the court has created imaginary scopes and limits to its adjudicatory prowess relying on a vague and undefined margin of appreciation that makes some rights unenforceable or inappropriate before it.²² This appears clearly to constrict the court's exercise of jurisdiction in a manner unenvisaged by the Provisions of Article 9 (3) of the Protocol and Supplementary Protocol of the Community court. Agreed, that the court is meant to expound on its jurisdiction, not necessarily to expand it, it is equally trite that the court is enabled to guard its jurisdiction jealously and zealously.²³

Conclusion

By discarding the exhaustion of local remedies criterion pursuant to the Protocol on Democracy and Good Governance, the community members showed ample willingness to have a regional court that is effective and effectual in the redressing of fundamental rights infringements. Thus, the restrictive approach by the court to matters already decided by domestic courts does not add any positive value to the court's jurisdiction. This is so because the nature and weakness of the judicial fora of the different municipalities within the community, manifest serious violations in the judicial process, and thus declining jurisdiction on the grounds that the matter has been determined by a competent domestic court makes mockery of Articles 7 of the African Charter, and 9 (3) of the

²² *Obinna Umeh v Federal Republic of Nigeria* (2018) LPELR, 45481.

²³ *Hon Sule Audu v Federal Republic of Nigeria* (2016) CCJELR, 2.

Supplementary Protocol on the Community Court of Justice. It also connotes that the court's jurisdiction has been ousted in a very vital area, where community citizens suffer even the worst infringements. To make redress in such areas impossible is to give or confer validity on the decisions of those courts, quite in contrast with other regional human rights courts that unearth massive violations in the decisions of such courts.²⁴ The role and application of democratic norms by critical democratic institutions such as the police and judiciary are central to the preservation and entrenchment of fundamental rights in Europe and other similar jurisdictions.²⁵ The contents of the decisions of domestic judicial courts will clearly show the existence of these infringements and (as also inherent in the facts of the applications brought before the community court and discarded by it on such ground) actually reveal existing violations. Such violations will forever remain unredressed unless and until the court reverses its position and enthrones a jurisprudence that will exercise discretion on pronouncements or proceedings of domestic tribunals that impinge against fundamental rights.²⁶

It is a far better alternative to choose the exhaustion of local remedies option to exist as a condition precedent to the assumption of jurisdiction than to have its non-application operate as a barrier to the court looking into the contents and pronouncements of domestic courts that touch on, or corrode upon guaranteed rights. For, having the jurisdiction to entertain complaints of violation of human rights to the exclusion of the vital area that provides the bulwark, shape and strength to democratic institutions undermines the primacy of fundamental rights enshrined in the charter and other international human rights norms and their importance to human existence. The bulk of applications received at the Strasbourg court touch on infringements to that right in the judicial process. Importantly, the ramifications of that right have advanced through case laws to include the right to effective access to the courts.

Recommendations

It is hereby recommended that a more formal Protocol of the Court be enacted embodying in its details the list and components of the court's jurisdiction. Such list would be cast in the form of enumerations denoting

²⁴ *R Mtilika v United Republic of Tanzania* (2011) CCJELR, 10.

²⁵ (n 3).

²⁶ Constitution of the United States of America 1789, ss 6 and 7

the items and areas of jurisdiction in the mould of that done under the 1999 constitution (as amended) specifically at section 251 relating to the competence of the Federal High Court.²⁷ That way, the nuances of the jurisdiction of the court will be defined with exactness and certainty and, this would promote a veritable guide to both the judges, lawyers, litigants, and the community citizens on the workings of the court specifically in the area of identifying what application to bring before it, and in what mode or manner. It is noteworthy, that the inconsistencies in the divergent and conflicting decisions of the court in the areas of its jurisdiction *rationae personae* and *rationae materiae* emanate chiefly from the reality that the jurisdiction of the court is determined by individual considerations of judges, and from one panel to the other, rather than from a written formal code or text of the community in the form of a Protocol. This has resulted to quite some misconceptions of the exact extents and ramifications of the court's jurisdictions such that the bulk of the cases that come before it are either struck out or dismissed, and this becomes more burdensome to ECOWAS citizens when placed against the backdrop of the fact that the Appellant chamber of the court is yet to be established. The dispensation of a court of this magnitude and importance must be anchored on legal texts and protocols defining its competence and subscribing its jurisdiction. These cannot be done by mere inferences. The existing Protocols on the court of justice only made provisions on the competence of the court to determine human rights violations by community members without defining specifically what amounts to be said to have been violated within the context of the court's jurisdiction. Nowhere in either the community treaty or the protocols is any reference made to existing treaties or conventions guaranteeing fundamental rights which must guide the court's determination of the entrenched rights, *vis-à-vis* the evaluation of individual applications before it. In a notable case, the court stated that the core text of its mandate is the interpretation and enforcement of the articles of the African Charter on Human and Peoples' Rights, without an explanation of whether that includes or excludes other international treaties or conventions touching on human rights, duly entered into by the member states.²⁸ In some other cases, other instruments were applied. These assumptions and inferences on areas as fundamental as competence and jurisdiction create problems for the court,

²⁷ The Constitution of the Federal Republic of Nigeria 1999, (as amended), s 251

²⁸ *Musa Saidykhon v Republic of the Gambia* (2009) CCJELR 8.

as per the identification of the specific law upon which its mandate resides and is derived. It is wrong to consider as given that the basic rights which violation is envisaged under the Protocol relate to those contained in the Charter and/or other international instruments without expressly stating them. This leaves the judge with a too wide discretion as to which amongst the numerous international instruments, the community texts, or even the state party constitution to apply in a given case. Such discretion could transform into an unruly horse that bolts away from the stable beyond the control or imagination of the owner. It is appropriate to create legal ambience of certainty and consistency in a judicial machinery, and the structure and framework of the community court, as it presently exists only give room for disparities in application and conflicting decisions.²⁹ This would also make for a proper harmonization of the enforcement mechanism amongst the different courts that form part of similar institutional framework for the preservation and redress for infringement of those rights within the continent. This is with particular reference to the ECOWAS Community Court of justice and the African Court of Human Rights, and this becomes necessary to stem the tide of the disparities in the interpretations of Article 13 of the African Charter by both courts and the resulting conflicting decisions as in the Christopher Mtilika case.³⁰ It is disillusioning to have two different supranational courts within a continent give different interpretations to a single provision of a treaty touching on fundamental rights. There must be a strengthened capacity and a much accentuated legal anchor for the regional judicial institutions, through the establishment of a broad template of judicial principles, rules and values as aid to adjudication. This would serve as enablement measures towards efficient, consistent and quality justice delivery mechanism for the court to accomplish its mandate of protecting, preserving and enforcing the fundamental rights of individuals within the continental and sub-regions.

²⁹ *Ibid.*

³⁰ African Charter on Human and Peoples' Rights 1986, art 13.