



Over the past years, research conducted by the University of Pretoria's Centre for Human Rights in the Faculty of Law has contributed to positioning the University as an important research institution dealing with the realisation of human rights in African subregional organisations. One such research project, conducted by Dr Solomon Eboobrah under the auspices of the Research Partnership Programme of the Danish Institute for Human Rights, examined critical issues in the human rights mandate of the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ).

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Very little academic work had previously been conducted to promote an understanding of the involvement of the judicial organs of subregional economic communities in Africa in the field of human rights. This research provided an opportunity to analyse the work of this court, the most active African subregional court, in an attempt to identify both best practices and dangerous trends. As the possibility exists for other subregional courts to follow this court's lead, the research focused on salient issues that could impact on the court's work.

The research, which was published in the *Journal of African Law*, has drawn attention to positive and negative trends in the human rights work of the ECCJ. This has increased awareness not only of the court itself, but also of the potential to address human rights issues in the Southern African Development Community (SADC) and the East African Community.

There is some evidence to suggest that greater attention is being paid to these organisations by development partners who seek to strengthen subregional courts. This research has therefore resulted in some continental human rights structures recognising the need to work closely with the subregional courts involved in human rights, thereby helping to increase an awareness of human rights on the subcontinent.

The ECCJ, which was established by the 1975 treaty and operationalised by a court protocol in 1991, was constituted in December 2000 and became functional in January 2001. In 2005, a new opportunity for international human rights litigation in West Africa was presented when ECOWAS adopted a supplementary protocol to empower the ECCJ to determine cases of human rights violations that occur in ECOWAS member states. Since then, several human rights claims have been brought before the court.

Beginning with an inquiry into the foundation within ECOWAS for the exercising of a human rights jurisdiction, this research project analysed the legitimacy of the human rights mandate of the ECCJ and interrogated crucial issues relevant to the effectiveness of the mandate. The outcome of the

research suggests ways to enhance execution of the mandate by making a call for careful judicial navigation in exercising the court's expanded jurisdiction.

Under the 1991 protocol, the court was empowered to "ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the treaty." The ECCJ could only exercise competence in cases between ECOWAS member states or between member states and ECOWAS institutions. Where the interests of nationals of member states were involved, a member state was authorised to bring an action on behalf of its national after failing to reach an amicable settlement.

In addition to conferring human rights jurisdiction on the ECCJ, the 2005 supplementary court protocol granted individuals and corporations access to the court in respect of different cases of human rights violations. Hoisting a human rights mandate on the judicial institution of a subregional economic integration initiative definitely has consequences for the credibility, efficiency and effectiveness of such an institution.

Although the ECCJ is not a human rights court, it is commonly accepted that human rights protection forms a significant part of the court's mandate. However, if the ECCJ is to consolidate its role in the field of human rights, it may be necessary to appoint judges with some demonstrable knowledge in human rights, which is not the case at present. The selection of research and other judicial staff should also reflect the court's increasing human rights content.

In its analysis of the current situation, the research identified a number of challenges that would need to be addressed in order for this court to properly exercise a human rights jurisdiction.

The first salient issue that was identified was the need to fast-track the establishment of the proposed appellate division in the ECOWAS legal system. This would address concerns about the absence of a right of appeal raised by some states. Any opportunity to amend the court's protocol will also enhance cooperation aimed at providing legal aid to indigent litigants.

Secondly, the potential for conflict between the ECCJ and national and other international judicial and quasi-judicial institutions needed to be addressed. In the case of national bodies, it would be beneficial in the long run to give national courts the first opportunity to remedy human rights violations, subject to the availability and efficacy of local remedies. This would allow the ECCJ to act as some form of “appellate jurisdiction”, thereby positioning itself as a judicial hegemony in the subregion. In the case of other international bodies, the main approach would be to aim at developing cooperation agreements with other relevant institutions. This should be supported by other informal approaches, such as exchange visits, joint participation in colloquia and other capacity-building programmes, and the creation of mutual respect between the judges of the various institutions.

Another challenge that was identified was that of avoiding the fragmentation that arises from conflicting decisions. In this regard, the ECCJ needs to take previous decisions of the African Commission into consideration in its judgments. This is essential, as the African Charter forms the major source of the human rights law applied by the ECCJ. An attractive option may be that ECOWAS adopts its own catalogue of human rights. The risk of the fragmentation of African international human rights law would, however, be greater if subregions were to adopt their own human rights instruments. It would thus be better to work towards enthrone the African Charter as the regional human rights standard.

Finally, the research addressed the indeterminacy of the ECCJ's human rights mandate. In this regard, one cannot rule out the possibility of exhausting the goodwill of states and the emergence of resistance and compliance fatigue if states perceive the court to be too activist and to exceed appropriate legal boundaries.

It would therefore be necessary for the court to stick to the application of instruments envisaged by the ECOWAS community, either by express or implied reference to ECOWAS community law. In order to maintain the confidence of litigants and sustain the proper environment for economic integration, the ECCJ needs to maintain its approach of recognising the indivisibility and interrelatedness of human rights.

In conclusion, the research recognised that the task faced by the ECCJ is by no means easy. However, it is at this stage of infancy that the future of the court can be shaped. By proactively engaging challenges identified in its work, the ECCJ can consolidate and strengthen itself as a subregional protector of rights and a guarantor of the environment necessary for the region's much desired economic integration.

The findings of this research have been positively received and have been used by other researchers as benchmarks for further research. The ECCJ has also addressed some of the issues raised, while other subregional institutions have informally employed the findings as standards to measure their practices.