

Kangnikoé Bado

The Court of Justice of the Economic Community of West African States as a Constitutional Court

Member States obligations resulting from the Court's rulings



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To my parents with gratitude

Preface

Almost two years after the publication of the first edition in German, I am delighted to be able to present this English edition which aims at meeting the need to reach broader audience. In this respect, I owe my particular gratitude to Birgit Böttner, Leonie Spangenberg und Prof. Dr. André Thomashausen who were entrusted with the translation.

Substantially the topical issue remains, in my view, relevant and pertinent as it did in 2015 when I have completed the researches, since the court is always confronted by the problematic at the centre of this reflection and its jurisprudential practice has not really changed until now. The examination at hand broaches the subject of a supra-constitutional function of the Court of Justice of the Economic Community of West African States (ECOWAS). . A particular source of inspiration for this book has been the research project “Constitutional Jurisdiction and Democratisation in West Africa” financed by the German Research Foundation (DFG). Although I became a Member of the project team rather late, the work within the project inspired me to think about the role of the ECOWAS Court of Justice. For example, I refer to the decision in *Ameganvi et al vs. Togo* and its relevance for the relationship between the regional courts and the courts of the Member States, in particular, the Constitutional Courts. I especially wanted to show the development of human rights jurisdiction since the inception of the additional protocol in 2005 and on this basis the possible individual complaints before the Court of Justice. based on recent developments in international law, my main objective is to clarify all the legal consequences arising from this extension of competence of the Court, in particular with regard to the international responsibility of member states in the event of human rights violations. Moreover, this paper aims to examine the constitutional implications of this reform and the guarded use by the court of its own competence.

Finally, I would also like to contribute to the reduction of the deficit of legal protection within the Economic Community of West African States by strengthening the constitutional role of the ECOWAS Court of Justice. According to my thesis, the declaratory judgments by the Court of Justice should be able to unfold their legal force in the signatory-countries to their fullest extent.

During the preparation of this research, which was completed in December 2015 and accepted by the Justus-Liebig-University of Gießen's Faculty of Law as a dissertation, I have received support from numerous persons and institutions.

Firstly, I would like to thank my mentor Prof. Dr. Thilo Marauhn for his mentorship during this dissertation. I am endlessly grateful for his steadfast trust and patience. The exchange of ideas with him was always effective and constantly resulted in new findings. These exchanges belong to my fondest memories. I would like to thank Prof. Dr. Rainer Grote for contributing a second opinion and for his valuable further inspirations. Furthermore, I would like to thank Prof. Dr. Dres. h.c. Herbert Kronke for his constant support and for being a willing partner for discussion.

I would like to particularly thank Vera Strobel for her support regarding the editorial revision of the German edition.

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Furthermore, my circle of friends in Germany has contributed considerably to the realisation of this paper. I would like to thank my friends Fabian Kiehlmann, Edem Atsiatorme, Juliane and Cornelia Glinz as well as Vera Bense, Fanny Raisch, Robin Azinovic, Gabriel Noll, the Degbè family (Brussels), the Doglo family and the Tèko family.

This work presented thrilling scientific challenges for me. The handling of these would not have been possible without the support of my family. In particular, I owe my brothers Ékoé Richard and Messanh Nicolas as

well as my sisters Marie Povi and Ayélévi endless gratitude for giving me strength through their continued support and encouraging words.

Amongst various institutions which I would like to thank, I owe my thanks first and foremost to the Konrad-Adenauer Foundation which not only financed significant part of my researches in Germany but also covered the costs of translation and publication of the English edition of the manuscript. I must acknowledge my sincere thank to Dr. Arne Wulff who has been available to coordinate the English translation and publication of this work. Moreover, I am genuinely grateful to Ms Anja Berretta's and Mr. Berthold Gees' for their understanding during my scholarship period at the Konrad-Adenauer foundation. In the same manner, I owe gratitude to the Max Planck Institute for Social Law and Social Policy and the Max Planck Society for making the Open Access publication of this Book possible. Furthermore, I am also grateful for the German Research Foundation's (DFG) interest in the legal developments in Africa and for their funding.

I would also like to thank the Max-Planck Institute for Comparative Public Law and International Law (Heidelberg) for making their library available to me. Besides, I would like to thank Mr. Albrecht Günther of the branch library for Law and Economy for his assistance in trying to locate documents that were not available in Gießen. My sincere thanks go to the library manager, Mr. Vincente Mendes Correia, for giving me access to the ECOWAS-Court of Justice Library and for making numerous official documents by the ECOWAS Community.

This dissertation is dedicated to my sisters Kayi and Tsotso.

Kangnikoé Bado Munich, in the spring of 2019

Abstract

Whereas the Court of the Economic Community of West African States (ECOWAS) had originally been established to address matters of regional integration only, it has been tasked to rule on human rights violations since 2005. This has led to jurisdictional conflicts between national (constitutional) courts of ECOWAS member states and the Court itself. This study analyses the relationship between the national and the regional level, and develops proposals on how to overcome such jurisdictional conflicts. This thesis is based on the ruling of the Constitutional Court of Togo N°E-018/10 of 22 November 2010 and the position of the ECOWAS Community Court of Justice, N°ECW/CCJ/JUG/09/11 of 7 October 2011 and N°ECW/CCJ/JUG/06/12 of 13 March 2012, concerning the aforementioned ruling of the Constitutional Court of Togo. The thesis is an attempt at finding an answer to the question as to whether the judgments of the Court carry a binding effect within the Member States and particularly on judgments of constitutional courts.

This work explores real and potential tensions within the ECOWAS legal order. The tensions stem from the legal force of judgments of constitutional courts of Member States and the admissibility of individual petitions before the Court according to Art. 9.4 and 10.d of Supplementary Protocol A/SP.1/01/05 Amending the Protocol A/P.1/7/91 Relating to the Community Court of Justice. Since the binding effect of the rulings of the Court is not clearly defined, Member States resist implementing the Court's decisions particularly in constitutional matters. Pursuant to article 9.4 of the aforementioned supplementary protocol the Court has authority to examine the conformity of the actions of Member States' institutions with the African Charter on Human and Peoples' Rights whether the organ exercises legislative, executive, and judicial or any other similar functions. However, it is interesting to note that the decisions of Constitutional Courts or Supreme Courts of ECOWAS Member States are final and not subject to further appeal. It is true that a Constitution and decisions of Constitutional Courts express the sovereignty of a state. Nevertheless Art. 27 of the Vienna Convention on the Law of Treaties forbids the states to invoke their national law to hinder the implementation of their international obligations. To that extent the *res judicata* is not a valid argument to hinder the implementation of the Court's rulings. Then a state party en-

dorses the obligation of restitution in integrum according to international customary law and judicial precedents of the International Court of Justice. Moreover, according to international customary law, all organs of the state involved in a case are bound by the rulings of the Court. Constitutional Courts are state organs. Hence, they are also bound by the findings of the ECOWAS-Court.

This work also identifies some deficiencies in the current regime of the human rights mandate of the Court. Gaps exist not only at the level of the Member States constitutional order but also at the community level. At the national level, there are no legal provisions in ECOWAS Member States about the legal force and how the rulings of the Court should be domesticated. At the community level, the binding effect of the rulings of the Court is not adapted to its human rights mandate. With regard to its human rights mandate, the Court plays a role of supranational constitutional court. For instance, the Court is empowered to decide on individual petitions and its rulings are final and binding. For a better compliance with the judgments of the Court, this thesis suggests innovative remedies to render national legislation adequate to the human rights mandate of the ECOWAS Community Court of Justice. Some of the key remedies proposed in the thesis include the following: the Court should be empowered to order concrete measures about how its rulings should be implemented. Art. 15 par. 4 of the Revised Treaty should be adapted to extend the jurisdiction of the Court; a Committee should be created to work with the Court about the implementation of its rulings; Member States should provide exceptional provisions that permit a new enrolling of a case after the rulings of the Court, as available in many Member States of the European Council, and particularly kindred to Art. 122 of the Constitutional Process Law of Switzerland.

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List of Abbreviations

ANC	Alliance Nationale pour le Changement
AU	African Union
BVerfGE	Decisions by the Federal Constitutional Court of the Federal Republic of Germany
CDRF	Centre de Recherche pour les Droits Fondamentaux
CEDEAO	Communauté Economique des Etats de l'Afrique de l'Ouest
CEDH	Cour Européenne des Droits de l'Homme
CHARTA	African Charta for Human Rights and Peoples' Rights
CIJ	Cour Internationale de Justice
CJ CEDEAO	Cour de Justice de la CEDEAO
CJEU	Cour de Justice de l'Union Européenne
CPJI	Cour Permanente de Justice Internationale
ders.	By the same author
DÖV	Die Öffentliche Verwaltung (Legal Journal)
EAC	East African Community
EACJ	East African Court of Justice
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EuGH	European Court of Justice
EuGRZ	European Magazine on Fundamental Rights
EuR	Journal on European Law
FS	Commemorative Publication
ICJ	International Court of Justice
ILC	International Law Commission
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
R.Q.D.I	Revue Québécoise de Droit International
SADC	Southern African Development Community
UFC	Union des Forces du Changement
VRÜ	The Journal "Law and Politics in Africa, Asia and Latin America"
ZaöRV	Journal for Foreign Public Law and International Law

