Those Who Serve a Revolution Plough the Sea: Ghanaian Market Traders and their Resistance to the ECOWAS Supranational Order

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The Economic Community of West African States (ECOWAS) Revised Treaty of 1993 is supposed to be the basis of a legal revolution that ended its members' sovereignty and create a regional order that mirrored the European Union's (EU) successful supranationalism. Departing from its 1975 Treaty ECOWAS has been reconfigured as a new entity whose rules, under article 9 (4) are of direct and binding effect on its members – the essence of supranationalism. The ECOWAS Community Court of Justice has underscored this principle in *Musa Saidykhan v The Republic of Gambia* where the Court stated that:

> "ECOWAS is a supranational authority created by the Member States wherein they expressly ceded some of their sovereign powers to

> ECOWAS to act in their common interest. Therefore, in respect of those areas where the Member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent."

The Court's words in *Siadykhan v Gambia* reflect the jurisprudence of the European Court of Justice's (ECJ) interpretation of supranationalism. The ECJ in *Van Gend en Loos* developed the concept of direct effect of EU law, in *Costa v ENEL* it made plain that the EU was a supranational order where EU law supersedes national law of the members of the EU and in *Internationale Handelsgesellschaft mbH* the ECJ stated that even the constitutional law of the EU's members cannot override the effect of EU measures.

However in a surprising development and after almost 10 years of resistance to ECOWAS, Ghanaian market traders have delivered a decisive blow to notions of supranationalism. They have concluded an agreement with Nigerian traders that sets aside the rights of Nigerian traders under ECOWAS law and re-affirms the supremacy of the Ghanaian constitutional order. The president of the Ghana Union Traders Association (GUTA) announced the conclusion of this agreement with Nigerian traders that grants a 'special dispensation' to allow them to operate in areas prohibited by Ghanaian law. Nigerian traders operating before 2020 and who were targets of GUTA actions that closed down their shops, now qualify to trade in markets after clearance by the Ghana Investment Promotion Centre. Under the Ghana Investment Promotion Centre Act (Act 865) article 27 a person who is not a citizen of Ghana or an enterprise which is not wholly owned by a citizen of Ghana shall not invest or participate in the sale of goods or provisions of services in a market. Article 28 allows a way around the article 27 restrictions but the minimum capital injection for a non-Ghanaian to take advantage of the exceptions is 200,000 dollars and the maximum is 1 million dollars.

It has always been the contention of Nigerian traders that Act 865 does not apply to them as it conflicts with article 59 of the Revised ECOWAS Treaty on the right of free movement of persons, residence and establishment (and related protocols) which attaches no conditions for ECOWAS citizens to engage in business in any of the member states. Notwithstanding ECOWAS law, under the agreement, Nigerian traders must submit proof they belong to the Nigeria

Union of Traders Association, Ghana; provide tenancy agreements for shops they have rented, and related documents, to qualify for the concessions granted.

This agreement is another landmark in the fight against supranationalism. Resistance to ECOWAS' supranationalism has usually been from the executive arm of governments – with, for example, the government of Sierra Leone rejecting decisions of the ECOWAS Court of Justice, or courts in Ghana in the case of *Chude Mba V Republic of Ghana* rejecting the concept of supranationalism unless Parliament approves the same, or just general non-compliance with treaty provisions even though the treaty legislation is supposed to be of direct and binding effect. What is interesting is that the latest strike against supranationalism has not come through action but rather by private traders prevailing through extras-legal challenges that have culminated in erosion of the basic supranational concept of ECOWAS law superseding national law.

Arguably, the ECOWAS supranationalism project is a flimsy one, conjured with no real appreciation of how the EU came into existence and not surprisingly a determined group of traders has brought the project to its knees. African supranational enthusiasts since the 1960s have pointed to the EU as a rather easy model to copy and it is this assertion that found its way into the Revised ECOWAS Treaty. From their standpoint the main problem is the lack of political will. Thus all that the faint-hearted and conservative leaders in Africa need to do is to muster the desire to sign away national sovereignty by actually giving effect to their supranational commitments.

The fact that the EU was centuries in the making and was crystallized in its final form due to the massive political and economic dislocation in Europe after the Second World War seems to have has been lost in the statements, declaration, and treaties in Africa on supranationalism over the decades. The first instance of a pan-European entity was that which was produced by the Catholic Church in Europe's Middle Ages. It was a socio-religious project, driven by Catholic norms and law under the direction of the Church. The Church welded Europe together and it asserted power over Europe's monarchs, the Papal Tribunal was a virtual European supreme court, and the Church also mobilized European armies for war in the Holy Land. The Church imposed its norms on marriage

and it also destroyed Europe's clan system.

Europe's religious schism during the Reformation stunted Papal power but this never did away with the desire for some sort of confederation and over the centuries Europeans (for example Richard von Coudenhove-Kalergi; Aristide Briand; William Penn; Charles Saint-Pierre and Duc De Sully) wrote about a pan-European entity, or even tried to unite Europe by force (Napoleon Bonaparte) but failed to do so. However, unity finally happened (or resumed really) when after the Second World War, and under the glare of the United States, conditions were ripe for the EU as an instrument of peace. The Schuman Declaration of 1950 was clear in telling the world that European collective action was to make war between Germany and France ….not merely unthinkable, but materially impossible". The thrust of the point here is that the successful model that ECOWAS copies was borne out of centuries of cultural and social interaction and the chaotic conditions after the Second World War that necessitated some form of union for 'perpetual peace'. Markets were also important in this process as the commercial and technological revolutions in Europe had practically produced a single market by 1900.

Thus European supranationalism was not decreed out of thin air by those who were articulate, charismatic and swayed their citizens with their views or the product of a sudden call to supranational arms after the Second World War. Rather it was dragged out of a period of religion-driven integration, deep integration of markets, and the need to unite Europe in the interests of peace. The jurisprudence of the European Court of Justice in *Van Gend en Loos, Costa and Internationale Handelsgesellschaft* only helped restart a process that was centuries old and which was embedded in the thinking of Europeans and, which was also possible because economic and political circumstances made it so.

Supranationalism in ECOWAS is the expression of a 19th century project that is traced to the work of Edward Blyden, the Liberian of West Indian origin, the father of Pan-Africanism and the first exponent of an African supranational order. Blyden proposed the unity of Liberia and Sierra Leone, to be followed by the incorporation of all of Anglophone West Africa, then French West Africa and then the extension of this to the entire African continent. However, Blyden never had a fixed time for the crystallization of his idea; he saw this process playing out after European rule in Africa had ended - an end for which he never

predicted a specific time. While critical of the European powers he saw some value in their role - the merging of Africa's states into single political and administrative units. This made further unity of the continent less complicated as unification had one less obstacle to surmount. Blyden's approach to unification stressed the importance of non-state actors in driving the process and here his faith also lay more in non-market actors in bringing the continent together: churches, mosques, social interactions under the umbrella of a hoped for West African education complex were to bring people together and forge a sense of common identity.

Blyden's gradual and cultural approach was overrun by the hubris of post-colonial radical pan-Africanism and which after a setback in the 1960s in the intergovernmental Organization of African Unity has returned. From the 1980s the drafters of the myriad of regional integration treaties have inserted clauses on supranationalism, single currencies, and political union. The model has been the EU: if the EU can bring virtually all of Europe together under the umbrella of a robust supranational order then this should inspire regional integration in Africa. However, it is increasingly obvious that the supranational enthusiasts in ECOWAS and other regions in Africa have failed to understand the forces at play that brought Europe together, and as a result they continue to be dealt regular blows to their supranational goal.

By the 1830s South America had freed itself from Spanish rule. The war of independence had been fought by a coalition of colonies that existed briefly as a state: Colombia, Venezuela, Panama, Ecuador, parts of Peru and Portuguese controlled Brazil. This coalition was formed in 1819 as Gran Colombia and at the end of the struggle Simon Bolivar, the military and political hero sought to consolidate this alliance into a permanent state with a central government and constitution. This ultimate goal was never attained and he was forced to confront the harsh realities of localism and parochialism that the Spanish had encouraged in their colonies over almost three centuries of rule. Bolivar saw his dream dissolve: there were no economic links between the former colonies, there was no powerful economic class in the component units that wanted unification, and local elites were happy with the rents they could obtain if they ruled independent countries instead of remaining as part of Gran Colombia, Bolivar did not have the military might to forcibly reverse this reluctance. Gran Colombia had served its purpose – defeating Spain. With the end of the war of

independence sustaining unification propelled by the myth surrounding Bolivar was not possible and surveying the ruins of his plans caused Bolivar to lament that ‘those who serve a revolution plough the sea’.

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