International Environmental Governance: A Case for Sub-Regional Judiciaries in Africa

By:

Eghosa Ekhator

November 12, 2019

Due to the non-justiciability of the right to environment in many African countries, non-governmental organisations (NGOs), activists, communities and individuals now utilise the various sub-regional judiciaries in improving access to environmental justice/rights. For example, the Economic Community of West African States (ECOWAS) Court of Justice (ECCJ) and the East African Court of Justice (EACJ) have been at the forefront of this development. However, this post focuses on the ECCJ. Furthermore, there has been a rise in the use of international, regional and sub-regional judiciaries in the promoting and upholding of human rights. Recently, many of these international courts, especially regional and sub-regional judiciaries or courts, have been in the forefront of promoting environmental governance around the world especially in Africa. Examples include the African Commission on Human and Peoples' Rights, African Court of Human and People's Rights and the different sub-

regional judiciaries such as ECCJ and EACJ.

In addition, investments in renewables are likely to lead to conflicts with local communities, disenfranchisement and possibly environmental damage, and therefore the operation of these courts (sub-regional judiciaries) is relevant and should be looked at. This is exemplified in a recent report by the Business & Human Rights Resource Centre (BHRRC) that concludes that most of the top global 'companies extracting key minerals for electric vehicles, solar panels and wind turbines have been linked with human rights abuses in their mines' since 2010.

ECOWAS is a sub-regional group of fifteen states (in West Africa) founded in 1975 and its mission is the attainment of regional and economic integration of the Member States. One of the key institutions of the ECOWAS is the Community Court of Justice (ECCJ). A major aim of the ECCJ is the promotion and protection of human rights and people's rights in accordance with the tenets of the African Charter on Human and Peoples' Rights.[1]

Currently, there are over fourteen economic groupings in Africa that qualify as Regional Economic Communities (RECs). However, the African Union (AU) only recognises eight of these organisations as the building blocks of the AU and the African Economic Community (AEC). The RECs are also referred to as sub-regional economic communities. The RECs were originally set up to serve as vehicles of regional integration. Also, many of these RECs have established judicial organs or courts within their existing frameworks or treaties as vehicles of fostering regional and trade relations. These judicial organs were initially set up to 'resolve inter-state disputes and to interpret treaties and other legal documents within their respective organisational frameworks.' The adoption of the regional/continental treaty for the creation of the AEC has led to the dawn of a new era in regionalism in Africa. This coincided with what is termed as the 'new regionalism', which led to the expansion of the human rights mandate of many sub-regional judiciaries in Africa. The EACJ and ECCJ have been at the forefront of the expansion of the human rights mandate under their respective treaties. Hence 'both the EACJ and the ECOWAS Court are now recognised as critical players in the African human rights system (AHRS).'

There have been a few cases on environmental rights/protection in the ECCJ (most of the cases at the ECCJ have been human rights centred) and this post focuses on two of these cases. The cases are *SERAP v Federal Republic of Nigeria* and *Osaghae and others v Federal Republic of Nigeria*. The aforementioned cases explicitly focus on environmental protection issues in the sub-region. In *SERAP v Federal Republic of Nigeri*a, the plaintiff maintained that federal government of Nigeria has been culpable for environmental degradation in the Niger Delta and requested amongst others, an order directing the government of Nigeria to pay monetary compensation to the victims of human rights violations in the Niger Delta. The ECCJ held that the Nigerian government had violated Articles 1 and 24 of the African Charter on Human and Peoples Rights and ordered the Nigerian government to take effective measures within the shortest possible period to restore or remediate the environment of the Niger Delta. The ECCJ further held that the Nigerian government must take steps to prevent the occurrence of damage to the environment in the Niger Delta and take measures to hold the architects of environmental damage responsible for their actions. The ECCJ stated that the Nigerian government is expected to comply and enforce this decision. This case was decided in December 2012. Unfortunately to date, the government of Nigeria is yet to enforce or implement this decision.

In *Osaghae and others v Republic of Nigeria,* the plaintiffs from the Niger Delta alleged that they were marginalized by the Nigerian government and its agents and suffered environmental injustices arising from the activities of companies operating in the Niger Delta region. The ECCJ held that the plaintiffs 'lack the locus standi to act on behalf of the people of the Niger Delta' to institute this case.

A major conundrum inherent in the ECCJ is the enforceability of its decisions in the Member States. The constitutional frameworks in some countries (especially the dualist states) in the sub-region have impacted negatively on the implementation of ECCJ judgments. Due to the difficulties in implementing the decisions of sub-regional judiciaries in Africa (especially the ECCJ), some academics have suggested the use of common law rule on the enforcement of foreign judgments. Furthermore, some scholars have suggested that one method of implementing ECCJ judgements in Nigeria is by registering the ECCJ

decisions as foreign judgements by virtue of the Foreign Judgements (Reciprocal Enforcement) Act (1990, now Cap F35 LFN 2004) (this is one slant of the statutory regime for enforcing foreign judgments in Nigeria. However, the Foreign Judgments (Reciprocal Enforcement) Act is said to be inchoate and not in force in the country). Arguably, reliance on the Foreign Judgments (Reciprocal Enforcement) Act is fraught with a lot of difficulties. Some of these difficulties include the non-domestication of the Protocol to the ECCJ and ECOWAS Revised Treaty in Nigeria and whether ECCJ judgments can be considered to be 'foreign judgments' under the Foreign Judgements (Reciprocal Enforcement) Act in the country. Thus, recently in Ghana (which is also a dualist state), the High Court (in Ghana) declined to enforce a judgment of the ECCJ via the statutory regime for enforcing foreign judgments in the country. However, courts in South Africa which also has common law heritage have successfully relied on the common law regime of enforcement of foreign judgments to implement or enforce decisions arising from sub-regional judiciaries.Thus, Adigun has persuasively argued that the 'common law on the enforcement of foreign judgments can be successfully adapted to give domestic effect to the judgments of ECOWAS Court as an international tribunal in Nigeria.'

Official data on the enforcement of ECCJ judgments is not readily available online. Therefore, compliance rates by countries are difficult to determine due to the lack of available and reliable data. Due to the fact - that no Member State in the ECOWAS has communicated to the ECCJ the status of compliance with judgements and decisions so far, the ECCJ has had to rely on 'unofficial information from lawyers and parties involved in some cases'.[2] To mitigate this information deficit, this post suggests that official online data-bases should be created by the sub-regional organisations in Africa (especially ECCJ) showing the various cases and their implementation status in Member States. Also, this information should be readily and freely available online.

Finally, sub-regional judiciaries and implementing bodies in Africa should endeavour to avoid what the Kagame Report termed '[t]he chronic failure to see through African Union decisions [which] has resulted in a crisis of implementation.' Hence, ECOWAS and the ECCJ should apply political pressure on Member States to implement the ECCJ judgments. Also, dualist countries in

the sub-region should domesticate the Revised Treaty and the Protocol on the ECCJ into their national laws. This will enhance the implementation of the ECCJ decisions in the sub-region.

---

[1] Revised ECOWAS Treaty, Article 4(g) [2] Tony Anene-Maidoh, 'Enforcement of Judgments of ECOWAS Court of Justice' (2018) 1 (1) *Journal of Law Review National Institute for Legislative and Democratic Studies* 58-80 at 59

View online: International Environmental Governance: A Case for Sub-Regional Judiciaries in Africa

Provided by Afronomicslaw