LAW AS AN EFFECTIVE FORCE FOR INTEGRATION IN THE ECOWAS FRAMEWORK?*

Abstract

This paper argues, based on the ECOWAS experience, that there are limits to which international law in the form of inter-state legislative action as a force on its own, can compel integration or effectively create an Economic Community into existence. It considers why West African states would engage in economic integration and at what costs integration can occur. This is done mostly from a lawyer's perspective which one concedes is likely to be quite restrictive. Following the traditional view that integration occurs in a continuum, one outlines the broad stages of integration in order to ask where ECOWAS stands in the matrix. The study also explores some barriers, not exclusively economic, that challenge efforts at free trade and integration within the ECOWAS framework. One then takes a broad look at how law has been harnessed and deployed within the ECOWAS framework to facilitate integration. Before the concluding thoughts, the author equally undertakes a very modest examination of whether and how 'Community law' has been effective in promoting integration in the ECOWAS framework.

Keywords: ECOWAS Framework, Law, Effective Force, Integration

1. Introduction

The legalisation of international relations is no longer a strange phenomenon, whether for lawyers or non-lawyers. Across the globe, states and international organisations have increasingly resorted to the use of legal instruments to shape inter-state relations, pursue common goals and generally bring order to what would otherwise have been an anarchical state of affairs.[1] Regional integration, whether at the level of economic integration or to the fuller extent of political integration, is one area where law and legal instruments have been applied generously. In fact, the application of law for regional integration is so ubiquitous that one would be forgiven for thinking that the field of regional integration is the exclusive preserve of the law and lawyers.

An outsider peeping at integration in Europe, especially in the face of the magnitude of the literature on the role of the European Court in driving integration in that part of the world,[2] is likely to come to the inevitable conclusion that law is the major force that drives integration. As a natural consequence, a number of subsequent efforts at integration in different parts of the globe have employed the same or a similar strategy of driving or seeking to drive by legal means – usually by the adoption of a formidable body of norms and legal instruments along with the establishment of a judicial organ to supervise the adopted norms and legal instruments. In the Economic Community of West African States (ECOWAS), integration which began over four decades ago has also resulted in the adoption of an expansive body of legal documents and the establishment and operationalisation of a judicial organ – the ECOWAS Community Court of Justice (ECCJ). Indeed, ECOWAS Member States appear not to have relented in their commitment to establish an 'enabling legal environment' for integration.[3] Yet, few would be bold enough to claim that integration in the ECOWAS framework has been an overwhelming success. This state of affairs invites the question whether law, especially in its character as transnational law, is as

---

***By Solomon T. EBOBRAH, LLD (Pretoria),** Professor of Law, Nigeria Delta University; Extra-ordinary Lecturer, CHR University of Pretoria. The background research for this paper was done while I was a post-doctoral researcher at the Centre of Excellence for the study of International Courts (iCourts) University of Copenhagen.

[1] Generally, see KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 (3) *International Organization*, 421 – 456 who argue that a mix of hard and soft legalisation is employed in international relations. Also see LR Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 (7) *Columbia Law Review*, 1832 – 1911.

[2] For instance, see A Burley & W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 (1) *International Organization*, 41; H de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6 *Hanse Law Rev*, 3.

[3] See art 3(2)(h) of the 1993 revised ECOWAS Treaty.

effective a force for integration in the ECOWAS framework as it has been elsewhere, particularly in the European integration context.

2. Why integrate, and at what costs?

In the statement of its aims and objectives, the 1993 revised ECOWAS Treaty[4] arguably considers the ultimate goal of integration to be 'raising the living standards of the peoples of its Member States and maintaining and enhancing economic stability'.[5] According to Nigeria's General Yakubu Gowon (Rtd), one of the founding fathers of ECOWAS, 'the long term expectations of member governments were … growth and development'.[6] These expectations actually found their way into the revised Treaty as a healthy dose of references to economic development and improvement in the 'standard of living of our peoples' appear in the preamble to the 1993 revised ECOWAS Treaty.[7]

If raising the living standards of its peoples is the main motivation for integration in the ECOWAS framework, its objectives are not very far from the initial objectives that drove integration in Europe. In the case of European integration under the European Union, the goal of raising standards of living has been largely achieved. According to Fontaine, one of the outcomes of European integration was that 'peoples standard of living has improved considerably' as a result of the benefits from the 'economies of scale and the gains of growth stemming from the common market'.[8] Fontaine notes further that 'people are free to move … to work within a frontier-free internal area'.[9] From the perspective of an economist, Hyman explains that the attraction of free trade (and by extension, integration) is that states are able to take advantage of both the lower production costs associated with the economies of scale and the principle of comparative advantage.[10] These generally result in the expansion of the 'consumption possibilities' available to citizens of the participating states which then 'raise the standard of living … in the aggregate'.[11] Specific to Africa, Mbekeani also asserts that 'regional integration can help to achieve economies of scale and build the supply capacity and competitiveness of Africa…'.[12] Clark seems to agree with these views as he also holds the view that 'the movement towards economic integration proceeds on the basic assumption that increasing the size of the unit will improve the process of production and distribution through more efficient use of existing resources, and through greater development' arising from the creation of more resources.[13] Emerging from colonial domination complete with its actual and perceived economic and social impacts, political leadership in Africa has been desperate to be seen to have delivered an improvement in the lives of peoples. Confronted with this challenge of ensuring post-colonial economic growth and development, and witnessing what appears to be a very successful project of economic integration in Western Europe, successive generations of African leaders have found regional integration an attractive venture to

---

[4] ECOWAS was originally founded when a number of states in the West Africa region adopted the Treaty of the Economic Community of West African States, May 28, 1975 [1975 Treaty], 1010 U.N.T.S. 17, 14 I.L.M. 1200. This 1995 Treaty was amended in 1993 with the adoption of the Revised Treaty of the Economic Community of West African States, July 24, 1993, 35 I.L.M. 660.

[5] Art 3(1) of the 1993 revised ECOWAS Treaty

[6] Y Gowon, 1984) The Economic Community of West African States: A Study in Political and Economic Integration, unpublished PhD Thesis submitted to the University of Warwick, 24.

[7] See the preamble to the 1993 revised ECOWAS Treaty, n 4 above.

[8] P Fontaine, 'A new idea for Europe: The Schuman Declaration – 1950 – 2000' (2000) *European Documentation Series,* 2nd, 7.

[9] As above.

[10] DN Hyman, Economics, (1997) 4th ed, Irwin Publishers, p780.

[11] Hyman, as above, at 791.

[12] KK Mbeleani, 'Understanding the barriers to Regional Trade Integration in Africa', (2013) ADP Working Papers. However, see JT Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes', (2009) 35(3) *North Carolina Journal of International Law*, 571 who outlines a number of reasons why the projections of economies of scale, comparative advantage etc may be difficult in the contexts of integration in Africa.

[13] RS Clark, 'Legal principles of non-socialist economic integration as exemplified by the ECC', (1980) 8(1) *Syracuse Journal of International Law & Commerce*, 3.

pursue, notwithstanding the failures of some of the earlier attempts at regional integration on the continent.[14]

The benefits that free trade and regional integration promise generally come at some political and economic costs to integrating states. From the economic perspective, the removal of tariffs generally results in the loss of some revenue for states participating in regional integration schemes.[15] Integration and the abandonment of protectionism may also result in loss of employment for certain categories of skilled workers and owners of specialised machineries in the event that a state cedes or loses its comparative advantage in a given field.[16] Such a loss of employment or business may also result in political costs for a government in power if the affected class enjoys political clout within the national space. However, by far the biggest political cost of regional integration is the actual or perceived loss of some aspects of a state's sovereignty. Either by way of pooling or delegating sovereignty, governments of integrating states generally cede some part of their sovereign power to legislate over the issue-area or areas donated to the Community – in this case ECOWAS. Hence, Abbott and Snidal argue that when states adopt and ratify Treaties, Protocols, Conventions and other binding international legal instruments (what they term 'hard law'), such states may 'reduce transaction costs and strengthen the credibility of their commitments' but they also then take on significant costs in the sense that they subject both their freedom to act or take certain actions (state behaviours) and to some extent their sovereignties.[17] While in some cases, the transfer of aspects of sovereignty to an organisation like ECOWAS privileges the government in the sense that the issue-area is partly or totally removed from the sphere of scrutiny by domestic political actors, such an advantage is arguably lost where the organisation adopts procedures that limit or removes decisional veto from the participating states. In other words, states involved may just shift legislative oversight from domestic legislative actors to an international body, without necessarily retaining full control over the issue area.[18] However, in the ECOWAS framework, the procedure currently applicable retains the decisional veto in favour of states so that the loss of sovereignty is rather negligible as Member States largely remain the masters of both the treaty and the organisation.[19]

3. Stages of Integration: Locating ECOWAS in the Continuum

Since Balassa's influential work, it is widely accepted (even if contested by some) that integration can occur in at least five stages, all of which exist in some sort of continuum. These include the free trade area (FTA), the Customs Union, the Common Market, the Monetary Union and the Economic Union.[20] At the simplest level - the free trade area - states are required or expected to facilitate trade by the removal of tariffs, quotas and any other nontariff obstacle to trade. At the level of the customs union, custom duties and related tariffs and taxes as well as any other nontariff barriers to trade between and among the participating states have to be removed while a common external tariff is adopted and applied towards third party states. In a common market, the focus shifts to facilitation of free and unobstructed movement of the factors of production – persons, capital, goods and services. At the level of an economic union, integration should result in the harmonization of important national policies and in some cases, the making of unified rules and policies. The monetary union calls for adoption of a single currency usually managed by a single central bank. The complete economic union should see the harmonization of taxes and a general unification or at least, harmonization of fiscal policies.[21]

---

[14] Also see Gowon (1984), n 6 above.
[15] See Hyman (1997) n 10 above, 795.
[16] Hyman (1997), n 10 above, 790.
[17] Abbott & Snidal, n 1 above, at 422.
[18] Again, integration in Europe in the EU framework is an excellent example. In the face of EU's supranationality and the principle of supremacy of EU law, Member States of the EU shift oversight from the state level to the regional level, yet do not claim veto over decisions made at the EU level – which veto could have been retained if unanimity was the basis of all decision making.
[19] C/f KJ Alter, Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice' (1993) 52(1) *International Organizations*, 121 -147.
[20] B Balassa, *The Theory of Economic Integration*, (1961), George Allen & Unwin Ltd.
[21] See generally, PM Crowley, 'Is there a Logical Integration Sequence after EMU? (2006) 21(1) *Journal of Economic Integration*, 1 at 3 -4.

In the view of some scholars, Balassa's stages of integration need not be sequential. In some ways, the ECOWAS approach to integration may well have followed this wisdom as indicated by the processes operationalised by the organisation. However, the ECOWAS Community has also been fairly faithful to its own agreed sequence of integration. Article 3(2)(d)(i) of the revised ECOWAS Treaty requires that the establishment of a common market should be through 'the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition … of non-tariff barriers in order to establish a free trade area at the Community level'. As Adetula shows, the ECOWAS effort to set up a free trade area started as early as 1979 with the adoption of the ECOWAS Trade Liberalisation Scheme (ETLS) to cover agricultural products and handcrafts.[22] However, it was only in 1990 that the ETLS was finally launched,[23] with an extension of its coverage to industrial products.

The revised ECOWAS Treaty also envisages evolution of the Community into a Customs Union. In this regard, the revised Treaty invites the 'adoption of a common external tariff and a common trade policy vis-à-vis third countries'.[24] In October 2013, ECOWAS Member States adopted a Common External Tariff (CET) which was operationalised in January 2015.[25] Its effect is to set the same customs duties, import quotas, preferences or other non- tariff barriers to trade applicable to all goods entering the ECOWAS territory. Preliminary efforts at the creation of a Common Market began in the ECOWAS framework with the adoption in May 1979, of the ECOWAS Free Movement Protocol.[26] In other words, the Free Movement Protocol (and thus the move towards a common market) was in place even before the Free Trade Area or the Customs Union was kickstarted. The Free Movement Protocol has since been complemented by four additional protocols considered necessary to firm up the free movement of persons, capital, goods and services within the Community.[27] Together, these treaties entrenched (or are supposed to entrench) the right of ECOWAS Community citizens to enter, reside and establish themselves in the territory of a Member State on really liberal terms with a view to complete implementation within a 15-year period. Although, there have been talks and plans for the adoption of a common currency, this has yet to materialise.

4. Barriers to regional trade and integration

Barriers to regional trade and integration in the ECOWAS Framework are not significantly different from the barriers identified in the wider African context. Such barriers include infrastructural challenges, policy issues and more structural challenges. From a largely economic perspective, Mbekeani insists that in additional to infrastructural issues, 'time delays and costs created by weaknesses in trade facilitation, non-tariff barriers, restrictive rules or origin and a poor regulatory environment' are obstacles to trade in Africa, especially in relation to private business.[28] To these, he adds 'complex customs arrangements … limited regional harmonization of policies, regulations and procedures, poor transit systems and numerous informal roadblocks along trade corridors …'.[29] At a very general level, the barriers identified and listed by Mbekeani can be regarded as capacity related obstacles that can potentially be addressed with technical assistance from more capacitated partners.

---

[22] V Adetula, 'The economic community of West African States (ECOWAS) and the challenges of integration in West Africa' in ECOWAS: Milestones in regional integration, (2009) - NIIA Lagos, 25.
[23] As above.
[24] Art 3(2)(d)(ii) of the 1993 revised ECOWAS Treaty.
[25]See https://www.premiumtimesng.com/news/more-news/250404-nigeria-implements-70-ecowas-common-external-tariff-customs-boss.html
[26] Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment adopted in 1979/
[27] In 1985, Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment was adopted. This was followed in 1986 by Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence). In 1989, Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment was adopted. Finally, in 1990, Supplementary Protocol A/SP.2//5/90 on the Implementation of the Third Phase (right to Establishment) was adopted.
[28] Mbekeani (2013) n 12 above, 8.
[29] Mbekeani (2013) n 12 above, 28.

More critical to the present discourse are the structural and systemic barriers to trade and integration in Africa generally, and the ECOWAS specifically. A major, if not *the* major barrier to integration in the ECOWAS framework is the long-standing attachment of Member States to their sovereignties and the consequent reluctance of modern political leaders to cede part of the sovereignty of their states. General Yakubu Gowon's record of the resistance of his contemporaries to the idea of any loss of sovereignty as a consequence of integration affirms this point.[30] Perhaps it is in recognition of this attachment to sovereignty exhibited by their predecessors that political leaders in the 1990s expressed their conviction that integration 'may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will'.[31] How much this conviction has translated into actual willingness on the part of current political leaders of Member States to sacrifice some portion of their sovereignty is open to debate as shown by the lingering preference for an intergovernmental approach to Community governance in ECOWAS.[32]

A possible manifestation of this attachment to sovereignty is the difficulty experienced by the Community with regards to Member States' implementation of their community obligations. This is what may have been described as 'lax implementation in the Latin American context.[33] In fact, Gathii's defensive argument that African regional trade agreements are flexible regimes rather than failed integration attempts[34] is another evidence of the implementation difficulties linked to the reluctance to sacrifice any significant degree of sovereignty. Another barrier to integration in the context ECOWAS is the re-emerging political instability in the West Africa region. Over the last one to two years, unconstitutional changes of government have taken place in ECOWAS Member States such as Mali, Guinea and Burkina Faso while in Guinea Bissau, an attempted coup was foiled.[35] While three of the coup-affected states have exited, there remains a high level of political instability in a number of the remaining ECOWAS Member States. Apart from the sudden change of political decision makers that comes with such unconstitutional changes of government, the suspension of Member States where coups have taken place results in major hiccups to the integration process. These are some of the main barriers that confront regional integration in the ECOWAS framework. The challenge to the Community is how to address these challenges.

5. Law as a force for ECOWAS integration?

As part of the legalisation of international relations mentioned earlier in this paper, law has had a significant role to play in the ECOWAS integration process. It is in recognition of this fact that even the revised ECOWAS Treaty alludes to the establishment of an enabling legal environment for realisation of the goals of integration.[36] Although, as Torrent persuasively argues, legislation (law or

---

[30] Gowon (1984) n 6 above.

[31] See paragraph 5 of the Preamble to the 1993 revised ECOWAS Treaty.

[32] Under the prevailing regime, the heads of state and government as Member States and the Council of Ministers as representatives of Member States continue to retain control over the legislative and policy making processes of ECOWAS without any loss of decisional veto on the part of the states. This is despite attempts to transform ECOWAS into a veritable supranational organisation, by for instance, doing away with the need to adopt protocols and treaties that require ratification and instead evolving to a regime of adopting supplementary Acts that do not require ratification by states. See for example, Supplementary Act A/SA.3/01/10 Amending New Article 9 of the ECOWAS Treaty as Amended by Supplementary Protocol A/SP.1/06/06 provides for a new art 9(3) which provides that 'It is incumbent on Member States and Institutions of the Community to abide by the Supplementary Acts …'. Also see Supplementary Act SA.1/12/25 Relating to the Community Court of Justice, adopted in Dec 2025.

[33] See J Dominguez, 'International Cooperation in Latin America: The Design of Regional Institutions by Slow Accretion' in *Crafting Cooperation: Regional Interdependence in Comparative Perspective* 83, 94 – 95 (Amitac Acharya & Alastair Johnson eds, 2007) cited by Gathii (2009)574.

[34] Gathii (2009) 573 - 575

[35] See E Akintowu, 'Contagious coups: What is fuelling military takeovers across', The Guardian Newspaper, 7 Feb 2022 available https://www.theguardian.com/world/2022/feb/07/contagious-coups-what-is-fuelling-military-takeovers-across-west-africa. It is important to note that three of the affected states – Burkina Faso, Mali and Niger have since exited ECOWAS at the end of one year after they notified the organisation of their intention to exit.

[36] Art 3(2)(h) of the 1993 revised ECOWAS Treaty.

rules), public activities (such as 'subsidizing specific economic activities'), income redistribution through budgetary transfers and diplomatic acts are all instruments that states employ to drive regional integration,[37] the focus in this section is on law and legislation as an instrument for regional integration. Torrent identifies what he terms two different techniques by which law is utilised as an instrument in integration. The one technique is to insert 'the rules once and for all in the constitutive treaty' while the other is to define 'rules through a specialized organization'.[38] In the ECOWAS framework, law is utilised applying both techniques in the sense that the broad framework of integration and some of the main obligations are captured in the revised ECOWAS Treaty while law in the form of rules and policies are also made by States and their representatives acting as Community organs.[39] Functioning as both a constitutive treaty and a contractual treaty (for its Member States), the revised Treaty was subject to adoption, signature, and ratification (or accession as the case may be) as a basis for imposing international (law) obligations on participating states. However, as Abbott and Snidal point out, as a contractual treaty, the revised Treaty operates on the logic of interest so that its effectiveness is a function of how it changes 'incentives or other material features of interaction'.[40] From this point, it can then be argued that Member States' compliance with their Treaty obligations and implementation of the revised Treaty could depend on a cost-benefit analysis by each state. Significantly, it would be noted that as a result of the intergovernmental approach that the Authority applies to decision making, the same logic would apply to even the rules made within the framework of ECOWAS as Community law.

Similar to the distinction between market-creating legislation and market-regulating legislation, Torrent further suggests that there are three approaches or instrumental ways by which international rules promote integration. One is the imposition of obligations to liberalise and open up access to national markets.[41] Arguably, this is akin to the market-creating rules as opening access to national markets ought to result in a bigger Community market. A second approach (which we may ignore for our purposes) is the imposition of obligations of non-discrimination. A third is the obligation to create 'uniform legislation establishing a common legal framework for transactions and operations covered by the agreement'.[42] In the ECOWAS legal framework, the task of liberalising trade and opening up access to national markets is one that created by treaty obligations so that it is essentially dependent on Member States for its implementation. With regards to the creation of uniform rules, Community organs bear responsibility and it is a task suited to a more supranational body since it requires ignoring existing national rules and legal traditions. Arguably, this genre of legislation is not yet in existence in the ECOWAS framework as the Member States continue to apply the intergovernmentalist approach to this task.

As far as the barriers identified above are concerned, the ECOWAS approach has been to set the Member States to the task of law-making in international law – treaty making in either of the two forms already discussed. Thus, the Community has adopted relevant legal instruments to tackle political and related insecurity in the region. Some form of model community legislation is also adopted in different issue-areas and basically recommended for states to consider harmonising national laws with. The challenge, as Torrent observes, is that 'integration cannot rely solely on liberalization obligations' for its effectiveness.[43]

[37] R Torrent, 'The Legal Toolbox for Regional Integration: A Legal Analysis from an Interdisciplinary Perspective', draft paper presented by the author to the ELSNIT Conference, in Barcelona Spain (undated). This section borrows freely from the ideas in Torrent's paper.
[38] Torrent, 4.
[39] With respect to Treaty based obligations, the broad commitments to cooperate in sectors itemised in the Treaty – articles 25 to 42, the commitment to accord other member states the most favoured nation treatment etc all coupled with the general undertakings in art 5 of the revised Treaty exemplify the application of law through the Treaty. On the other hand, the protocols, supplementary protocols and lately supplementary Acts adopted by the Authority as an organ or institution of the Community constitute rule making through ECOWAS.
[40] Abbott & Snidal, 424.
[41] Torrent, 7.
[42] As above.
[43] Torrent, 7

6. Conclusion

There is really no debate that ECOWAS Member States and their representatives are convinced of the benefits that can accrue from regional economic integration. The survival of ECOWAS as an integration scheme over the last four decades despite the various challenges that confronts both the West Africa region and ECOWAS as an organisation, is ample testimony to that fact. It is also beyond doubt that there is some realisation and perhaps, even acceptance of the fact that some concession of sovereignty is necessary for integration to be successful. The question that this paper has sort to trigger is how effective ECOWAS has been in the deployment of law as a force for integration. It has been shown that despite its best efforts to migrate to a supranational model, ECOWAS currently continues to apply a single model – the intergovernmental model – for the application of law to drive integration in the Community. As this paper has also hopefully demonstrated, more than the single intergovernmental approach to the use of law is required if Member States really expect to move the organisation to the next in order to enable the States and their citizens reap the benefits of economic integration.