3 Regional Court Establishment

Regional developing trends

The association of the practice of law across international borders with that of traditional international tribunals such as the International Court of Justice (ICJ) is now undergoing change with the emergence of regional courts. This is as a result of the thrust of globalisation, which has changed not only the financial landscape of the planet, but has increasingly modified the legal parameters of the traditional forms of justice at the international level and access thereto. At the regional level, the challenges are indeed assuming an energy of their own, and in some respects are in the process of developing regional jurisprudence as a hybrid form of international law within the general body of international law itself [75].

The forerunner of a regional court without doubt has been the Court of Justice of the European Communities, established pursuant to Article 177 of the Treaty of Rome, *viz:*

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- *the interpretation of this Treaty;*
- *the validity and interpretation of the acts of the institutions of the Community;*
- *the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide'.*

In the southern hemisphere, the need for the creation of a regional court to adjudicate on matters deemed particular to the dictates of that region was evidenced in the Agreement Creating the Court of Justice of the Cartagena Agreement, which was signed in 1979 and came into effect in 1983. It will be recalled that the constituent members of the Andean Community – Bolivia, Colombia, Ecuador, Peru and Venezuela – are associated through the Andean system of integration, as they deem it necessary to co-exist on the mutuality of shared regional interests.

Since the formation of these regional courts, there has been heightened interest as the world is increasingly described as 'a global village'. At the same time, advances in technology now enlighten the manner in which multilateral conventions are to be elaborated for the trans-border movement of goods and services and the attendant institutional framework to let all that come together.

Communities in their regions have felt the need to, in some instances, deepen their traditional form of regional camaraderie so as to present a unified front to the challenges of globalisation. Weighing in the balance of all this are the justifiable concerns of developing and less-developed countries to maintain a posture of competitiveness on an uneven playing field. The need to associate not only becomes more compelling, but also evolves at a heightened level. It is at this stage that regional communities recognise the need to formalise the development of their communal law.

75 Extracted from previous writing of Cheryl Thompson-Barrow (2003).

In order to provide a legal framework for the operation of the regional system, pursuant to the particular treaty of association, a regional court will be established. In the instance of the Court of Justice of the European Communities, that institution assumes the characteristic of a court of supra-national status, effectively being the final instance of appeal from courts of national jurisdiction in the countries of the European member states themselves. A similar situation arises in the Court of Justice of the Cartagena Agreement: that agreement has expressed that the creation of a tribunal at the highest level shall have the authority to define 'communitarian' law.

Regional courts and their community law

In an examination of the regional activities of the Commonwealth family, the following judicial arrangements are of note:

- The Caribbean Court of Justice (CCJ) for the Caribbean Community (CARICOM)
- The Court of Justice of the Common Market For Eastern and Southern Africa (COMESA)
- The Court of Justice of the Economic Community of West African States (ECOWAS)

The various treaties of association of these regional groups and/or the instruments creating the courts are consistently thematic in their purposes.

The Caribbean Court of Justice

The Treaty of Chaguaramas, which formed the Caribbean Community/Common Market (CARICOM) was signed on 4 July 1973, in the Republic of Trinidad and Tobago. The revisions of the treaty were completed in 2001, which also heralded the CARICOM Single Market and Economy (CSME). Discussions on the Caribbean Court of Justice hitherto have essentially focused on its appellate jurisdiction to replace the Judicial Committee of the Privy Council as the highest appellate municipal court of the member states. However, the CCJ is also a regional tribunal with the consequent attention to the rules of international law, particularly as they relate to the interpretation of the Caribbean Community's (CARICOM) treaty of association. As eloquently expressed by the Hon. Messieurs Justices Duke Pollard and Adrian Saunders[76]:

> *'The …CCJ is a unique judicial institution in terms of its jurisdiction, composition, financing*[77] *and as a catalyst for regional economic integration. The uniqueness of the CCJ is not a function of its status as a multinational municipal court of appeal;… Nor is the uniqueness of the CCJ based on the fact that it combines in its composite remit an appellate and original jurisdiction… The uniqueness of the CCJ is to be found in the fact that it combines in its remit a municipal appellate jurisdiction of last resort and an original jurisdiction in the exercise if which it is mandated to employ rules of*

76 Hon. Messieurs Pollard and Saunders, Judges of the CCJ, attended the July 2007 Commonwealth meetings. This quotation is extracted from their joint paper, which was presented to the judges of the International Court of Justice – 'The Caribbean Court of Justice in Judicial Institutional Development'.

77 The CCJ also enjoys an enviable measure of administrative autonomy, since its operations are funded by the proceeds of a trust fund administered by independent trustees. The initial capitalisation of the trust fund is US$100 million.

international law in interpreting and applying the constituent instrument of the Caribbean Community'.

This latter function will see the CCJ rule, in original jurisdiction mode, on matters relating to the operation of the CARICOM Single Market and Economy (CSME), as well as determining matters of community law.

It should also be noted that the original jurisdiction of the CCJ regarding the CSME ensures that any questions relating to its operation and interpretation of rules relating thereto, are accorded consistent elucidation since these will be removed from national jurisdictions. Equally, the CCJ's appellate chambers will also adjudicate as an appellate body for the CSME.

The implications of this will not only afford the level of respectable assurances necessary for investment and development in the region, but will nurture the true development of a regional Caribbean jurisprudence, thereby constituting another area of meaningful regional maturity. Justice Pollard further explains:

'Article IV of the Agreement determines the constitution of the Court which may consist of ten judges, including the President. Judges of the Court, except the President, are appointed by an independent apolitical Regional Judicial and Legal Services Commission ('the Commission'), which must be constituted in accordance with Article V of the Agreement.

The President is appointed by a qualified three-quarters majority vote of the Contracting Parties on the recommendation of the Commission (Article IV(6)) and may be removed by Heads of Government on the recommendation of a Special Tribunal established to investigate a charge of misconduct. Judges other than the President may be removed by the Commission on the recommendation of a Special Tribunal established to investigate a charge of misconduct'.

Administration

The Caribbean Court of Justice is administered by a Department of Court Administration, which is headed by a court executive administrator who reports in turn to the president of the CCJ. The court executive administrator is responsible to the president of the CCJ for the overall development and management of the court and provides the leadership necessary for the effective functioning of the organisation.

The court and its place in community law

The CCJ is the only regional court of the Caribbean Community. Unlike those of Eastern and Southern Africa, there are not and will not be any conflicting community law challenges. The CCJ, then, is the sole vessel for developing community law and should discharge that function honourably and responsibility with the sobriety and dedication required.

Landmark rulings thus far in the CCJ, while in the appellate jurisdiction of the CCJ, are already indicative of the essence of a development of community law unique to the CARICOM region. These will be discussed later in the book. It remains to be seen when cases are submitted in the original jurisdiction, how those will be argued and reasoned. In all, the future presents a canvas to be painted with Caribbean jurisprudence, hitherto unseen.

The COMESA Court of Justice

The Common Market for Eastern and Southern Africa (COMESA) has objectives that echo those of an association seeking to increase levels of integration. Of particular note is the creation of a free trade area and promotion of trade through the provisions of its treaty, which came into being on 8 December 1994 at Lilongwe, Republic of Malawi. In endowing its association with the requisite infrastructure, COMESA is seeking to create the necessary legal framework to encourage growth of the private sector, the establishment of a secure investment environment and the adoption of a common set of standards. There are presently 19 member states of COMESA – Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The Court of Justice of the Common Market of COMESA was created by the 1994 treaty as an independent organ of that the association. It is charged with the responsibility of realising these legal objectives and is established under Article 7 of the COMESA Treaty as one of its organs. The court has power to hear:

- matters referred to it over legal and natural persons resident in a member state;
- disputes between COMSESA and its employees;
- matters relating to arbitration and special agreements; and
- any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which COMESA or any of its institutions is a party, and to determine any dispute between the member states regarding the treaty if the dispute is submitted under a special agreement between the member states concerned.

The Court of Justice will then foster the development of the regional body of laws, and this is additionally consolidated by the fact that decisions of the court on the interpretation of the provisions of the treaty will have precedence over decisions of national courts or tribunals.

Composition

The COMESA Court of Justice consists of the First Instance Division with seven judges and an Appellate Division with five judges. The First Instance Division is headed by a principal judge, while the Appellate Division is headed by the president of the court, who is also in charge of the overall supervision of the court. The First Instance Division hears all references on both the facts and the law. A party aggrieved by a decision of the First Instance Division is free to appeal to the Appellate Division on points of law, lack of jurisdiction or procedural irregularity[78].

Justice Samuel Rugege sees that the judicial independence of the COMESA court is assured by in Article 8 of the treaty, where it recognises the Authority as the Supreme Policy Organ of the Common Market, but goes on to state in Article 8(3):

> *'Subject to the provisions of this Treaty, the directions and decisions of the Authority taken or given in pursuance of the provisions of this Treaty, shall as the case may be,*

78 Justice Sam Rugege, Judge of the COMESA Court of Justice, describes his court.

be binding on the Member States and on all the other organs of the Common Market other than the Court in the exercise of its jurisdiction…'.

Independence is additionally protected by Article 9(2) (c), *viz:*

'2. It shall be the responsibility of the Council to:

(c) give directions to all other subordinate organs of the Common Market, other than the Court in the exercise of its jurisdiction'.

Regarding the personal independence of the judges, the treaty in Article 20.2 states:

'The judges of Court shall be chosen from among persons of impartiality and independence who fulfil the conditions required for the holding of a high judicial office in their respective countries of domicile or who are jurists of recognised competence.'

It must be noted that the judges are not permanently appointed, but are in fact able to serve an initial period of five years, with the eligibility for a second term of five years. However, Justice Rugege points out that while appointed judges do enjoy security of the tenure, as provided in Article 22:

'the President, the Principal Judge or a Judge shall not be removed from office except by the Authority for stated misbehaviour or for inability to perform the functions of his office due to infirmity of mind or body or due to any other specified cause'.

COMESA's judges are appointed differently from those of the CCJ, who are faced with the rigours of the Regional and Judicial Services Commission in a transparent effort to eschew political input. Not so with the COMESA court, where this process is fundamentally held by the various Heads of Government of that association. Judges are appointed after election by the Meeting of the Ministers of Justice and Attorneys-General. Candidates need not be sitting judges, as long as they fulfil the conditions required for the holding of high judicial office in their respective countries, or are jurists of recognised competence. The first president of the court was a professor of law and jurist, while the current president is a senior counsel with long experience in private practice. The other judges of the COMESA court include a chief justice, a former chief justice, a current deputy chief justice and other senior judges from member states.

The budget

The court also has a budget that is separate and independent from that of the General Secretariat. This should augment its independence and efficiency. The budget is borne by the member states under the same formula used for determining contributions by the members states to the budget of the Secretariat[79]. However, a major challenge is ensuring that member states pay their contributions on time. The interaction over the years by these Commonwealth courts has encouraged some courts to adopt financing arrangements akin to that of the Caribbean Court of Justice.

79 Contributions to the budget correspond to the relative strength of the economy and ability to pay of the member state concerned, as well as the benefits accruing to that state, its market size and fairness and equity.

Jurisdiction

The COMESA Court of Justice has jurisdiction to hear references from member states, the Secretary-General and natural or legal persons challenging decisions of member states. National courts may seek preliminary rulings on aspects of the treaty in cases pending before them, and the COMESA Council may approach the court for advisory opinion. The staff of COMESA and its institutions, as well as third parties, may file claims for damages against COMESA. Finally, the court may exercise jurisdiction under arbitration clauses and special agreements.

Relationship between COMESA court and national courts

National courts are not excluded from hearing matters to which COMESA is a party. However, Article 29.2 of the treaty provides that:

> *'decisions of the COMESA Court on the interpretation of the provisions of the Treaty have precedence over decisions of the national courts'.*

The intention of this provision is to ensure uniformity in the interpretation of provisions of the Treaty by national courts of different member states. In addition, where a matter arises in a national court and there is no remedy under the national law, the court is obliged to stay proceedings and refer the matter to the COMESA court for determination.

The court and its place in community law

The place of the COMESA court has to be rationalised in terms of other regional courts in Southern and Eastern Africa. In this context and of note is the East African Community's Court of Justice and the recently inaugurated Tribunal for the Southern African Development Community (SADC). All three groupings have some overlapping of member states, but the judicial decisions of the East African Court and that of COMESA (SADC still has yet to hear cases), have given rise to a growing body of community law in the region.

The Community Court of Justice of ECOWAS

The Economic Community of West African States (ECOWAS) is a union of 15 West African States integrating towards a single community – the Republics of Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria (Federal Republic), Senegal, Sierra Leone and Togo. The aims of ECOWAS are stated in its founding treaty of association at Article 3:

> *'to promote cooperation and integration, leading to the establishment of an Economic Union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African continent'.*

The raison d'être of the court

The treaty also envisaged *'…the establishment of an enabling legal environment'*. This 'enabling legal environment' was given effect in Articles 6 and 15 of the Revised Treaty of ECOWAS, through the decision of the 'Court of Justice of the Community'. The rationale

for the establishment and existence of the ECOWAS Community Court of Justice (the CCJ as it is also now referred to), was articulated by its then president in 2006, Hon. Justice HN Donli [80]. She opined that while the objectives of the treaty (as stated above) were noble, she deduced that other regional economic communities, such as the European Union, have through experience indicated that the process of integration and the establishment of a regional community can only be achieved where there is a virile court of justice. The preamble to the ECOWAS Protocol A/P/1/7/91 expresses this juridical intention thus:

> *'The essential role of the [ECOWAS] Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and Protocols and conventions annexed thereto and to be seized with responsibility for settling such disputes as may be referred to it in accordance with the provisions of Article 76(2) of the Treaty and disputes between States and the institutions of the Court'.*

The court is deemed to therefore be an organ for jurisdictional control, and has the added roles of assessing the extent to which states fulfil their obligations and verifying the legality of acts adopted by the institutions of ECOWAS.

However, it took several years from the adoption of the protocol in 1991, for the court to become a reality. At its 24th session, held in Bamako, Mali, 15-16 December 2000, the ECOWAS Authority of the Heads of State and Government, by its decision A/D.1/12/00, appointed the seven judges of the court. The swearing in was held approximately ten years after the 1991 Protocol, on 30 January 2001. Its 25th session, ECOWAS Authority of the Heads of State and Government in Dakar, Senegal, via decision A/DEC.23/12/01, established the seat of the court to be fixed in Abuja, the Federal Capital Territory of Nigeria.

The structure

The 1991 Protocol and the Rules of Court address the court's structure. The bureau of the court consists of the president and the vice president. Further, Article 3(2) of the Protocol establishes seven members of the court, of which no two should hold the same nationality. The members of the court are selected and appointed by the Authority of the Heads of State and Government. These members are required to elect a president and a vice president from amongst them, to each hold a term of office of three years. The president is the administrative head of the court and presides at hearings and deliberations.

The court is thus staffed with the Offices of the President; the Offices of the Judges; the Office of the Chief Registrar; and the Court Registry Department. There are also divisions for the functional arrangements of the court which include protocol, finance, language services, library, internal audit, and research and information.

The court and its place in community law

In the 1991 Protocol, the competence of the court was limited to actions brought before it by its member states and institutions of ECOWAS. Individuals therefore had no direct

80 Hon. Justice Donli participated in the February-March 2006 Commonwealth meetings and presented her Paper: 'The ECOWAS Court of Justice: Its Developments, Structure and Jurisdiction'.

access, but could only seek audience through representation by their member states. This was expressed as a cause of concern, as noted by the principal legal/research officer of the court [81]:

> *'The lack of direct access to the Court by individuals was of great concern to the Court because it had an adverse effect on its operations as no Member State or Institution of ECOWAS filed any action either on its behalf or for its citizen before the Court. Between 2001 and January 19th 2005 when Protocol A/P/7/91 was finally amended only two cases were filed before the Court and having been filed by individuals directly were struck out for want of jurisdiction. It was therefore obvious that individuals must be granted direct access to the Court for it to become fully operational'.*

The amendment to enlarge the court's jurisdiction was achieved through the January 2005 Supplementary Protocol A/SP.1/01/05, by Article 9 granting individuals and corporate bodies direct access to the court in respect of certain causes of action. Additionally, the court developed a jurisdiction to hear human rights cases, and there was the innovation of an arbitral jurisdiction. However, cases relating to the legality of the ECOWAS text could only be instituted by member states and the executive secretary.

In addition to the changes mentioned above, the right of access to the court of member states and the executive secretary in relation to failure to fulfil an obligation was reaffirmed, as was the right of access of member states, the Council of Ministers and the executive secretary regarding the determination of the legality of an action in relation to any ECOWAS text. Staff of any ECOWAS institution could also have recourse to the court after they had exhausted all appeal processes under the ECOWAS Staff Rules and Regulations.

The 15 member states of ECOWAS have legal systems that cross between common law and civil law jurisdictions. This has not been a challenge to the effective functioning of application of the court's jurisdictions, since its essential purpose is to address matters relating to its constituent treaty of association. Article 19(1) of the 1991 Protocol calls upon the body of law from the International Court of Justice as a source of law in the court's determination of its community law.

81 Ms Franca Ofor participated in the January-February 2007 Commonwealth meetings and presented her Paper: 'The Role of Regional Courts in the Treaty Adjudication Process'.