

Chapter 1

Introduction

Abstract This chapter traces the establishment of ECOWAS historically and legally, strategically explains what the economic grouping is all about and its integration objectives, as well as analyses the political, socio-economic and legal strictures that impinge on the integration objectives. To help readers navigate through the confusing maze of similar economic groupings within West Africa, the chapter carefully distinguishes ECOWAS from other established economic groupings existing in the Sub-region. Also, the chapter defines and explains Treaty and ECOWAS law—as a relatively new body of laws—respectively.

1.1 Establishment and Objectives

Man, by nature, unless choked by the hands of thralldom and mental debilitation or assessed from the prism of determinism, has always been considered by many as a free moral agent, and he is acutely accountable for what he makes of his gift of freedom. If he elects to live in the cave, by the sea, in the desert, on the tree, all are the fruits of the exercise of his free will. By his nature, he loves to live with his fellows to form a community; however, that he is gregarious does not detract from his power to choose to swim against the tide. Sometimes, he may opt, by principle or nature, to live in such an insulating fashion that leaves his community in wonder about his corporeality.

With reference to origin and development of communities, so many historians and text writers have provided us with various accounts of man's migratory history and how communities came to where they are. Be that as it may, it would be uniquely appropriate to limit the sketch of primal societies to some West African communities, for any further foraying into history of communities outside this geography might be pushing the account too far and beyond the range of this work.

Before the Europeans came to Africa, the inhabitants of the geographical area known today as West Africa lived in a certain natural way. Some communities took pleasure in interacting with their neighbours as regards trades, games, culture, farming and other forms of communal activities. That does not in any way erode the history of conflicts in pre-colonial West Africa, for conflict, to a great extent,

helped in shaping the contours of history of migration and ancient states of West Africa. Take for instance how the emanation, from the fourth century, of empires and kingdoms in the hinterland and the savannah, and their decline, all ridden in conflicts, propelled the shift in population. In addition to conflicts, of course targeted at conquest, slavery and colonisation¹ also played dynamic roles in that population shift within the geographical landscape known today as West Africa. In addition, it has been suggested that the ancient Sudanese empire, which ran through Ghana, Mali and Songhai, was established either by Sudanese or invaders from North Africa with the weapon they acquired through trans-Saharan trade and also that Umar Tal conducted a jihad in western Sudan which resulted in the migration of thousands of residents living in the valley of Senegal to Karta.

But conflict was not the only factor that influenced migration in West Africa; in fact, religion and trade also had huge influences. The Hausa and the Madinka tribes were people of trade, for they went about the West African Sub-region trading and establishing their settlements known as Sabongari or Zongos² and, invariably, proselyting the people found in their new communities. In similar vein, the history of the states of Oyo, Asante, Benin and Dahomey, all in present day West Africa, cannot be completely told without stating how migration either contributed to their establishments or became the ordinary consequence of their establishments.³

Generally, in pre-colonial times, persons or, in some situation, a whole community could migrate from one geographical location to another. The causes of the migration could be earnest search for new land, safety, fertile soil⁴ or increase in security. But when the unwanted hands of colonialism grabbed the Sub-region, the nature and degree of migration changed; it has been suggested that the motivation and composition also changed. Indeed, the creation of political and economic structures, tax regimes and territorial boundaries, or as Swidell puts it,⁵ “formal political boundaries”, by colonialists also altered the motivation and composition of migration⁶ in the Sub-region.

Before colonialists invaded Africa, the ancient communities within the geographical area known today as West Africa had boundaries, either earmarked or symbolised with trees or stones or by installation of landmark to show the perimeter or territory of any given community. However, while the practice of keeping boundaries has been part of the culture of primal societies in West Africa, it appears that the discriminatory act of entry restrictions at the borders of the West African States was introduced by colonialists for administrative gains.

At the collapse of colonialism, the political leaders, in the West African Sub-region, returned the urge to keep the brotherhood alive; consequently, they

¹ Swindell (1995), p. 196.

² Ibid.

³ Ibid.

⁴ Adepoju (2005), p. 1.

⁵ Swindell (1995), p. 196.

⁶ Ibid.

exchanged visits and nursed new ideas that could foster closer ties. With an eye on cladding what they share with garments of formality, President Tubman (as he then was) of Liberia pushed for a form of unionism; in response, Cote d'Ivoire, Guinea, Liberia and Sierra Leone entered into a multilateral agreement in February 1965.⁷ But that agreement in itself could not sustain the weight of the idea; consequently nothing, practically, grew from it.

In 1972, the then Head of State of Nigeria, General Yakubu Gowon, and his Togolese counterpart General Eyadema stirred the interest of other leaders within the region; they drew new proposal for economic integration and canvassed for its acceptance in 12 countries between July and August of 1973. In a meeting held in Lome,⁸ the draft of the Treaty was studied carefully by the representatives of the West African countries. The draft was also examined by experts and jurists who met in Ghana⁹ with a view to lending it some form of legal tinge. On the 28th of May 1975, in Lagos, the 15 countries present appended their signatures to the first Economic Community of West African States Treaty. That instrument became the constitutive law from 1975 to 1993 until a revised version was introduced. Quite in character, the States parties reeled out loads of reasons to justify the revision exercise.

The Heads of State noted, in the Preamble to the Revised Treaty, that they bore in mind the African Charter on Human and Peoples' Rights and the Declaration¹⁰ of Political Principles of the Economic Community of West African States. They also weighed the effect of the Treaty establishing the African Economic Community of 1991.¹¹ They also professed, in the same Preamble, that the review arose from the need for the Community to adapt to the changes on the international scene in order to derive greater benefits from those changes. All these points, together with other factors, led them to decide to revise the Treaty of 28 May 1975.¹²

Furthermore, it is commonplace that all the States¹³ that make up ECOWAS have acquired independence; some have English as their *lingua franca*, while others make up the Francophone countries. However, Guinea Bissau and Cape Verde, once colonies of Portugal, speak Portuguese as their official language. It is regrettable to observe that all the countries in the Sub-region, whether of the Anglophone nucleus or of the Francophone zone or Lusophone enclave, once laboured under the excruciating weight of colonial imperialism. One of the net results of the long colonial rule is the condensation of these countries into different language blocks.

⁷ ECOWAS Profile.

⁸ Between 10th and 15th of December 1973.

⁹ Accra, January 1974.

¹⁰ Adopted in Abuja on 6th July 1993.

¹¹ Preamble to Revised Treaty 1993.

¹² Ibid., p. 2.

¹³ Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Liberia, Mali, Niger, Nigeria, Gambia, Ghana, Senegal, Guinea, Sierra Leone, Guinea-Bissau, Togo; note that Mauritania withdrew its membership in 1999.

Consequently, because of this linguistic link, the Francophone countries in West Africa tend to associate more with themselves, while the Anglophone countries apply the same rule of polarisation.

1.2 What Is ECOWAS?

Having traced the trajectory of ECOWAS's origin and establishment, it will be needful to explain, in simple terms, what this economic grouping is and intends to achieve, and to examine, briefly, some socio-economic, political and legal bumps along the path of its grand objectives. ECOWAS (Economic Community of West African States) is an international organisation made up of fifteen independent countries located within West Africa. Similar to the European Union, it is an economic community that strives to promote co-operation and integration among its members. The organisation does not in any way intend to abrogate or substitute the municipal laws of the Member States with the Community rules; rather, it does envisage creating laws which would apply to and in all the Member States in order to quicken integration and harmonise practices.

The ultimate aim of ECOWAS is to create an economic union anchored on common market and custom union principles with a view to raising the living standards of the citizens. In elementary terms, the Community wants to, though gradually, reduce the whole West Africa into a single market, without barriers of any sort among the Member States, so that persons, goods, capital and services could move around freely.

1.3 Socio-Economic, Political and Legal Strictures

The living standards of the people of West Africa would, certainly, move up another notch if the political, economic and legal tasks, set by the Community, are achieved. Unfortunately, there are legal and non-legal strictures that hinder the Community's policies on economic integration and the expected improvement of the living standards of the people of West Africa. Some of these major challenges, in no order of importance, are discussed succinctly below.

1.3.1 Infrastructure Deficit

The Member States collectively have massive infrastructure deficit—especially in the areas of power, water, security, information, communication technology and transportation. According to World Bank, infrastructure deficit, especially among lower income countries, has been a principal impediment to business activities in

Africa, and this also reduces productivity by 40 %.¹⁴ The power sector seems to have a greater share of the deficit bug. The inefficiency, in this sector, runs across power generation capacity, security of supply and electricity consumption. It is difficult to accept that the amount of power generated by the whole sub-Saharan countries equates to the amount of power generated by Spain.¹⁵

Regarding West African Sub-region, it has been shown¹⁶ that the territory is strewn with natural resources, including oil and gas; however, they are not evenly distributed; the exploitation process within the territory is inadequate and minimal; and the energy access rates are significantly low. Another perturbing trend, as laid bare by a report,¹⁷ is that West African countries would require additional 90 GW in order to meet the increase in demand for power.

In regard to information and communication technology, African countries may have chalked relative success in access to telecommunication through their global system for mobile communication (GSM) programmes; however, the success rate of Internet connectivity within the Community may not be summed up in similar terms. Reports showed that slightly above 2 million persons were subscribers, and about 12 million persons were using Internet services between 1996 and 2006.¹⁸

The region also has challenges with regard to water security; the World Bank attributes these to high level of hydrological variability, lack of water storage and irrigation facility. The water storage required to achieve water security is put at 750 m³ per capita, which has been achieved only by South Africa, while the rest of the pack are at the level of 200 m³ per capita.¹⁹ Transportation is another murky area in this challenge-filled landscape. The transport systems are grossly inefficient, and the roads are inadequate or in bad shape. World Bank report showed that African road density is sparse when viewed against the continent's vastness: only one third of persons who live in the rural areas are within 2 km of all season roads.²⁰ In the report published for Commonwealth Business Council, the President of the ECOWAS Commission observed that the cost of transport and logistics in the Sub-region ranked among the highest in the world.²¹ He noted that there is need for expansion of seaports in the Sub-region with a view to accommodating projection of increase in container traffic. He also called for investment in railway rehabilitation in order to prop up intra-Community trade.²²

The question at this juncture would be: how would this chronicle of infrastructure deficit impair integration policies and, by extension, stifle the Community's

¹⁴ World Bank (2013).

¹⁵ Ibid.

¹⁶ Quedraogo (2013), p. 25.

¹⁷ Ibid.

¹⁸ World Bank (2013).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Quedraogo (2013), p. 25.

²² Ibid.

objective of raising the living standards of the citizens? Another could be: what is the correlation between infrastructure deficit in West Africa and the impact of ECOWAS legal regime? It is obvious that infrastructure deficit gnaws more at the end product of integration, which is improved standard of living, than economic integration. But what it does to the latter is to take the wind off its sail, and render the implementation cumbersome and invisible. Of what benefit is effective legal framework for free movement of goods, for instance, when there are insufficient goods, originating from West Africa, to haul around the Community or the goods are, relative to Asian products, very expensive? From economic perspective, if goods are produced with alternative power supply, manufactured with water acquired at exorbitant rates and freighted to other Member States slowly and expensively, consequently the unit price of such goods would likely be costly.

Situating this view within the ECOWAS context, it is clear, from the facts gleaned from the reports,²³ that there exists infrastructure deficit within the Sub-region; this would certainly affect the cost of power, water, communication and transportation. Invariably, it makes goods manufactured within the Sub-region very exorbitant relative to similar goods made in China or India, and renders the whole intra-Community trades hugely expensive.²⁴ Bearing in mind the degree of economic challenges, low purchasing power and unemployment ravaging the Sub-region, it is expected that the citizens would be attracted to cheap, sometimes expired, Asian products. When such economic mishap takes place, it will gradually but inevitably weaken competitive abilities of West African enterprises. Consequently, this mishap will trigger retrenchment, further financial difficulties and winding up. This hostile economic cycle sketched above cannot, by any stretch of imagination, enhance or raise the living standards of the citizens. In such economic state, it will count little that the legal framework of ECOWAS for economic integration is efficient or that it has been implemented by the Member States.

Pursuant to the argument canvassed above, the correlation between the effect of Community legal texts and infrastructure deficit is that laws are instrument of social engineering; they do not mean much on their own. Their effectiveness is often seen when they change or impact the course of social existence. When a regional law fails to change or impact a region, it matters little that it either exists or applies. With infrastructure deficit of gigantic proportion, it would be intensely tough to meet the goal of 'improved standard of living' through the vehicle of ECOWAS laws. Inversely, if the laws are amended in a pragmatic fashion and implemented by the Member States, and the huge infrastructure deficit is tackled assiduously, then the laws will certainly aid the quest for improved standard of living in the Sub-region.

²³ Quedraogo (2013) and World Bank (2013).

²⁴ Alter et al. (2013).

1.3.2 Inefficient Institutions

Having dealt with infrastructure deficit, it is necessary to examine the impact of inefficient and corrupt national institutions on the implementation of the economic integration policies of ECOWAS. To Acemoglu,²⁵ inefficient institution is one that does not maximise the growth potential of a society. It is appropriate to enter a caveat that the word 'institution' is not limited to establishments, funds and the personnel but covers practices, rules and behaviours that shape their output. Acemoglu share that view too, for he sees 'economic institution' as 'rules and constraints' guiding economic interaction. It is agreed that there could be numerous factors capable of impeding productive prowess of an institution, yet one cannot rule out corruption in drawing up one's list of impediments. So the element of corruption is subsumed in the concept or characteristics of inefficient institutions. Now attention should be turned to the Community and the institutions of the Member States.

It is commonplace that the Community drives down its programmes to the Member States and subjects through the channels of national institutions. This strategic option is inevitable because the Community institutional architecture was not crafted to operate independently of national institutions and agencies. Even if it were remodeled to shoulder such enormous institutional responsibility, it would still have failed for want of resources, authority, personnel and domestic support. Consequently, the success, or otherwise, of the integration programmes of ECOWAS depends on the efficiency of national institutions in the Member States. Efficient national institutions, in this integration mandate, are to the Community what skeleton and spine are to the body; therefore, the Community cannot pull the citizens out of the pit of poverty with inefficient national institutions. Little wonder then that some scholars have explained poverty as a consequence of inefficient institutions and customs relating to property rights.²⁶ If one should extend this nexus between inefficient institutions and poverty to West African economies, one would begin to appreciate that the excruciating economic difficulties persisting within the Sub-region trace their roots to corrupt, unruly, irresponsible and mismanaged public institutions.

It may be proper to ask: why would public institutions created by laws be awash with these listed vices? It is because the laws are not obeyed by such institutions. Principles of fairness and good governance are not rigorously applied to their services and the conducts of their personnel. Other statutory provisions that ensure accountability, integrity and productivity are seen as mere surreal idea of what a public service should be and not what should apply practically to an African public institution. It means, therefore, that there is an interconnection between rule of law and inefficient institutions. It is primary knowledge that one of the features of the doctrine of rule of law, at least as shown by Bingham in his sub-rule approach, is

²⁵ Acemoglu (2006), p. 342.

²⁶ Kuffour (2006), p. 101.

that the law should apply to all equally.²⁷ If the laws have not been applying to all in public institutions and governments equally in West Africa; if this improper application—in some cases non-application—of laws to public institutions in West Africa have led to waste of resources, mismanagement, irresponsibility and arbitrariness; if these dire consequences have resulted in economic difficulties and poverty within the Sub-region, then there is a link between poverty and the rule of law in West Africa.

Unfortunately, policymakers and Governments of the Member States have not employed robust and practical strategies to enhance rule of law because they do not want to accept the link between economic hardships in West Africa and their indiscriminate abuse of the law. It is likely that the political and economic actors want the institutions to remain inefficient to protect their unseen interests. That was why an expert had argued that the elite prefer inefficient institutions for the purpose of implementing inefficient policies that are advantageous to them.²⁸

However, it is conceded that the Community has recognised the link between conflicts and good governance and, in response, introduced a legal framework on democracy and good governance.²⁹ The Member States were right to tie some standards of civilisation, like rule of law, to conflict prevention but have been slow in linking rule of law to the success of their integration programmes. While the idea of having a legal framework on democracy, good governance and rule of law appears bright and commendable, the nature of the provisions and the implementation strategies envisaged by the Community do not look irreproachable.³⁰

First, the legal framework has no supranational component; therefore, it is subject to Member States' discretion on how the instrument would be treated within their territories. Second, the major provisions on rule of law were couched in a language that depicts what the Community considers as 'ideals for a modern democratic government'. The draftsmen employed phrases like 'recognizes' and 'convinced' in the operative part of the law; this does not evince 'peremptoriness'. Rather, it is a loose drafting approach that softens the law, protects sovereignty and shelters the Member States from any type of regional interference in their domestic affairs—including decisions on applicability of laws within their territories. This porous drafting approach characterises every legal text made by the Community institutions. And as suggested by some scholars,³¹ this international law pattern does not make for good community law regime. Third, the practical modalities for the implementation of rule of law have been reserved, indefinitely, for the Member States and the Community to fashion out.³² How, then, would the Governments of the Member States come up with practical modalities that would enhance rule of

²⁷ Stone (2013), p. 31.

²⁸ Acemoglu (2006), p. 361.

²⁹ Preamble to Protocol on Democracy and Good Governance 2001.

³⁰ *Ibid.*, sections 32–39.

³¹ Alter et al. (2013), p. 741.

³² Article 34 Protocol on Democracy and Good Government 2001.

law within their territories when arbitrariness inure to their benefits and shield their incompetence and corruption?

In general, the public institutions in West Africa are not diametrically inefficient; it is only an issue of percentage and dimension. The degree of inefficiency among a large number of them is so high that it renders the few efficient institutions insignificant.³³ Painfully, those few efficient institutions cannot constitute sufficient channels through which integration dividends can be taken to the inner communities of West Africa.

No specific theory could match all the institutions in West Africa; they all have their unique problems and challenges. Some might fit into the Marxian model, which considers bureaucracy as a tool for exploitation and marginalisation employed by the elite that controls and manipulate the institutions to achieve economic and political power. There are a lot more that could be likened to the Weberian model, which views public service as a big and specialised organisation, with inherent features of complexity and hierarchy, created to achieve national goals efficiently—by impartial application of the laws to their entire activities.³⁴ Unfortunately, the smears on some of these institutions in this class are the presence of corruption³⁵ and ‘rule of man’, which have made it impossible for them to deliver national goals efficiently.

Since the tenor of the argument is that inefficient and corrupt institutions in West Africa would certainly hamper the implementation of integration policies, it will be evidential to sample few cases of corruption, arbitrariness and irresponsibility on the part of Governments and their conduits: public institutions. Most regional economic communities are led by some political and economic juggernaut,³⁶ and ECOWAS is not an exception. Nigeria, Ghana and Cote d’Ivoire are the political arrowheads of the Community. Where these countries do not agree to a proposal, it is likely it would not survive the heat of resentment and criticisms from this triumvirate. In spite of their economic and political weight, in West Africa, they have very weak and corrupt institutions.

Ghana has become, lately, the mirror of flourishing democratic culture in the entire Sub-region, but her apex institutions are as good as their neighbours’. Under the laws of Ghana, the Bank of Ghana has a statutory duty to advise the Government on any monetary transaction,³⁷ and it is also responsible for keeping the foreign exchange of the Republic of Ghana.³⁸ Furthermore, the Bank also has the statutory duties of receiving, remitting and paying money on behalf of the Government. In the same vein, the laws of Ghana restrict the transfer of foreign exchange to abroad

³³ Examples of efficient public institutions include Kofi Annan International Peacekeeping Training Centre Ghana, Nigerian Law School Abuja, etc.

³⁴ Imhonopi and Ugochukwu (2013), p. 80.

³⁵ Ibid.

³⁶ The European Union is dominated by Germany, France and, probably, the United Kingdom.

³⁷ Section 32 Bank of Ghana Act 2002.

³⁸ Ibid., section 53.

except through a bank.³⁹ It means that the Government cannot withdraw foreign exchange without the knowledge and procedural assistance of the Bank of Ghana; it should not remit or pay money except through the apex bank. Unfortunately, during the 2014 World Cup in Brazil, the Government of Ghana withdrew three million US dollars, stashed them in bags, chartered a flight and transferred the money by air to Brazil in order to pay players' appearance fees. That gesture contravened the foreign exchange laws of Ghana.⁴⁰ Given the archetypal bureaucracy in Ghana, that transaction must have involved more than one public institution, none of them drew the attention of the Parliament of Ghana to this executive illegality. Query: what did the Bank do, knowing that the law expects it to be responsible to the Parliament in the performance of its function in relation to the foreign exchange?⁴¹

With regard to Nigeria, it is the hub of economic activities in the Sub-region, with a population of over 170 million people, with her shores overstocked with oil, gas and other assorted mineral resources, yet her institutions are ailing. The police, which ought to be the spine of civility and orderliness in Nigeria, ranks first as the most corrupt public institution in that country; the following is the list of very corrupt institutions in Nigeria in order of their corruptness: political parties, national and state legislatures, local governments, federal/state executive councils, traffic police, federal road safety corps and National Electric Power Authority (now Power Holding Company of Nigeria).⁴²

Turning the radar to Cote d'Ivoire, it has gained reputation in international trades because of its cocoa produce; unfortunately, there are seepages in the institutions that manage the resources gotten from the sales. A report published by an agency of ECOWAS has shown that the commonest corruption techniques in Cote d'Ivoire are embezzlement of funds and conversion of public property by government officials, bribery among government personnel, influencing performance and inflation of contracts.⁴³ All these corrupt behaviours are linked to public institutions in Cote d'Ivoire.

The examples of institutional challenges shown above underline the argument that the channels through which the Community intends to implement its integration policies are clogged with corruption, arbitrariness, ineptitude and inefficiency. To appreciate the importance of this difficulty, it is better to apply the fresh water analogy, which shows that "fresh and clean water designated for indigenes of a rural community cannot get to them fresh and clean if the water is transported through rusty pipelines that have been used in conveying sea water. In order to get fresh and clean water down to the community, the pipes need to be replaced or cleansed". Applying this to ECOWAS integration policies, the pipelines, which are the public

³⁹ Section 15 (1) Foreign Exchange Act, 2006.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, section 53.

⁴² Imhonopi and Ugochukwu (2013), p. 84.

⁴³ GIABA Report 2010, p. 34.



<http://www.springer.com/978-3-319-26231-4>

ECOWAS Law

Ukaigwe, J.

2016, XVII, 372 p., Hardcover

ISBN: 978-3-319-26231-4