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QUESTION: With the aid of legal authorities, identify and examine the challenges plaguing Public Institutions in Africa, whose mandate is the promotion and protection of human rights. In a creative way, proffer solutions to each problem identified.

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INTRODUCTION

HUMAN RIGHTS IN AFRICA

In Africa, the idea of *human rights* is a comparatively recent phenomenon. Contributing to the establishment of human rights system in Africa are the United Nations, international law and the African Union which have positively influenced the betterment of the human rights situation in the continent. However, extensive human rights abuses still occur in many sections of the continent. Most of the violations can be attributed to political instability (as a consequence of civil war), racial discrimination, corruption, post-colonialism, economic scarcity, ignorance, illness, religious bigotry, debt and bad financial management, monopoly of power, lack/absence of judicial and press autonomy, and border conflicts. Many of the provisions contained in regional, national, continental, and global agreements remained unaccomplished.

HUMAN RIGHTS INSTITUTIONS IN AFRICA

Some institutions which have the responsibility of promotion and protection of Human Rights in Africa include the following:

1. The African Commission
2. The African Court of Human and Peoples Rights (ACtHPR)
3. The ECOWAS Community Court of Justice

These institutions will be discussed accordingly as well as the various challenges which they face after which creative solutions will be recommended.

THE AFRICAN COMMISSION:

The ACHPR was established based on Article 30 of the African Charter and was inaugurated in November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been located in Banjul, The Gambia¹. In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major obligations which are:

- a. Protection of human and peoples' rights.
- b. Promotion of human and peoples' rights.

¹ Killander, M. and Abebe, A. (2011). "Human rights developments in the AU." *African Human Rights Journal*.

c. Interpretation of the African Charter.

The decision to uphold these three fold obligation was reached by the commission in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*². This case is important because it establishes that a state can be held accountable for the human rights violations of private actors. Under this case, if the state does not address mass rape with "due diligence," then the state itself can be held accountable.

Challenges of the African Commission:

1. The Member States Decide which Cases the Commission Accepts:

The Commission is a creation of states in Africa and what it was constituted to do was determined by states upon its creation. Thus, its constitutive instrument delineates its powers which are considered to be overly restrictive.

For instance, **Article 55 of the ACHPR** provides that the commission may consider communications from persons other than state parties, only if a simple majority of its members accept such communication.

This also defeats the principle of *Nemo Judex In Causa Sua* that means, literally, "no-one is judge in his own cause."³

2. The Process of Exhaustion of Local Remedies Before Approaching the Commission Could be Harmful to Victims:

Article 56 also provides that such communications may be accepted if they were made after the exhaustion of local remedies, unless it is obvious to the commission that the local procedure is unduly prolonged.

This Article is particularly difficult to comply with by individuals or non-state parties because certain violations require immediate redress and the victim might suffer irreparable loss should he await exhaustion of local remedies.

3. Heavy Bureaucracy which could be Time Consuming:

Article 58(1) ACHPR provides that the commission shall draw the attention of the Assembly Heads of States and Governments to special cases after which an in-depth study must be conducted before making a factual report.

²(Communication No. 245/2002) [2006] ACHPR 73; (25 May 2006)

³ *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER 233

4. **Article 59(1)** provides that reports of the commission may be concealed from the public and this has the effect of sanctioning or allowing impunity. In the case of *Constitutional Rights Project (In Respect of Zamani Lekwot and Six Others) v Nigeria*⁴, the commission found Nigeria guilty but the facts found were never published.

Solutions to the Challenges Faced by the Commission:

1. The Commission should be allowed to act independently and make decisions without the approval or disapproval of the Assembly Heads. This will enable them to work more efficiently and without bias.
2. The process of exhaustion of local remedies should be modified as sometimes, exhaustion of local remedies could take a long while and justice may not be served in the end.
3. The bureaucracy of the commission should be cut down. The Assembly Heads should trust the Commission to make good decisions without so much bureaucracy and exhaustive processes.
4. Reports made by the commission should be made public. This will not be done to shame or witch hunt any state government but rather, it will be done in a manner that will encourage defending parties or state governments to become more accountable and responsible

THE AFRICAN COURT OF HUMAN AND PEOPLES RIGHTS (ACtHPR):

The African Court on Human and Peoples' Rights (the Court) is a continental court established by African countries to ensure protection of human and peoples' rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights⁵.

The Court was established by virtue of **Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol)**, which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004 after it was ratified by more than 15 countries.

⁴ Communication 87/93

⁵ Kate Stone, African Court of Human and People's Rights (Advocates for International Development, February 2012). Legal Guide (2012)

Challenges Faced By the African Court:

1. The African Court has been modeled to depend heavily on the Commission:

Dependence of the court on the commission is ensured by various provision of the courts protocol. By **Article 33 of the Protocol of the ACtHPR**, the court shall draw its own rules in consultation with the Commission as appropriate, by **Article 5(1)(b)**, the court cannot entertain a case that is already pending before the commission. Similarly, the court cannot give an opinion on a matter pending before the commission, judgement of the court shall be notified to the commission even in cases not brought by the commission.

2. Failure of States to make a Declaration of the Protocol:

As the time of writing and after 9 years of the existence of the court, only seven states- Ghana, Burkina Faso, Malawi, Rwanda, Mali, Tanzania and Republic of Cote d'Ivoire- have made the optional declaration, out of 26 States that have ratified the Protocol of the court. This has led to situation where judicial functions of the court have mostly been exercised to dismiss cases for lack of compliance with **Article 34(6)**. In the case of *Ekollo Alexandre v The Cameroon & Nigeria*⁶, the action failed because Nigeria had not made the declaration and Cameroon had not even ratified the Protocol of the Court.

3. The Provision of **Article 34(6)** which relates to only Organizations with Observer Status accessing the court poses a challenge.

This article was applied in *National Convention of Teachers Trade Unions v Gabon*⁷, and the court held that the application was inadmissible on the ground that the organization did not have observer status before the AU.

4. Regarding individuals and NGO's, there would yet remain the unraveling of the ambiguity created by the combined reading of **Articles 30(f)** of the proposed Statute of the court and **Article 8** of the Protocol of the proposed court. From all indications, the letters of both articles do not correlate in any way.

Solutions to the Challenges Faced by the African Court of Human and Peoples Rights

⁶ App. No. 008/2011

⁷ Application No: 012 12011

1. The provisions of the Protocol should and must be modified in such a way that the African Court of Human and Peoples Rights does not depend so heavily on the Commission. The Court should be granted autonomy to act independently on its own.
2. The Protocol must also be modified to ensure that all state parties ratify and declare the protocol into their various state laws to ensure that its provisions are admissible to all.
3. The African Court should strike out the grating of observer status to only some select few organizations. This would allow for more organizations to be able to approach the court freely.
4. The writers of the protocol should also ensure that the document is free from ambiguities as much as possible. This will reduce the burden placed on the court to detangle the ambiguous provisions of the protocol.

The ECOWAS Community Court of Justice:

The ECOWAS Court of Justice is an organ of the Economic Community of West African States (ECOWAS), a regional integration community of 15 member states in Western Africa. It was created pursuant to the provisions of **Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS)**.⁸

The Court has jurisdiction over four general types of disputes:

- a. Those relating to the interpretation, application, or legality of ECOWAS regulations,
- b. Those that arise between ECOWAS and its employees,
- c. Those relating to liability for or against ECOWAS, and
- d. Those that involve a violation of human rights committed by a member state.⁹

Challenges Faced By the ECOWAS Community Court of Justice:

1. Access to the Court:

The relevance of the ECCJ was challenged by its very first case, which involved an individual complaint not contemplated by the court's protocol. Interestingly, this first case, *Afolabi Olajide v Federal Republic of Nigeria*¹⁰, raised issues around the question of individual access to the court. The question of individual access related to

⁸ "CCJ Official Website". Retrieved 2019-07-10.

⁹ "Jurisdiction of The Community Court of Justice". ECOWAS Court. Retrieved 2015-01-21.

¹⁰ suit no ECW/CCJ/APP/01/03

human rights and fundamental freedoms partly founded on the recognition accorded to the African Charter in the Revised Treaty.

2. Relationship with National Courts:

The ECCJ has no direct relationship with the courts of member states and does not consider itself a court of appeal or a court of cassation over decisions of national courts. This is notwithstanding the fact that provisions in the Supplementary Court Protocol allow national courts to refer domestic cases involving issues of the interpretation of the ECOWAS treaties, protocols and regulations to the ECCJ¹¹. This court structure, when combined with the interpretation that the ECCJ cannot sit in appeal over decisions of national courts, has a negative impact on the court's human rights jurisdiction.

The position taken by the ECCJ in at least two cases gives the impression that, where a case had previously been heard and decided by a national court, the court would hesitate to hear the case or, if it did hear it, hesitate to make a finding, as it does not wish to overrule decisions of national courts¹².

3. Selection of Judges:

By article 3 of the 1991 Protocol on the Community Court of Justice, the qualification for appointment as a judge of the ECCJ is "high moral character and... the qualification required in their respective countries for appointment to the highest judicial offices" or by being a "juris-consult of recognized competence in international law".

This provision was amended by the 2006 Supplementary Protocol, but the only addition in terms of qualification for the office of a judge of the ECCJ is that "juris-consults of recognized competence in international law" should be versed "particularly in areas of Community law or Regional Integration"¹³.

Experience or qualification in human rights is not a consideration for appointment as a judge of the ECCJ. It can be argued that judges in national courts do not need any special human rights qualification to be appointed, yet are expected to provide the first layer of protection in the event of an alleged human rights violation.

4. Acceptance of Cases:

¹¹ New art 10(f) in art 4 of the 2005 Supplementary Protocol.

¹² *Kéïta v Mali*, suit no ECW/CCJ/APP/05/06 (unreported) (Kéïta), at para 31

¹³ New art 3 in art 2 of Supplementary Protocol A/PS.2/06/06 amending art 3 paras 1,2 and 4, art 4 paras 1,2 and 7, and art 7 para 3 of the Protocol of the Community Court of Justice.

As currently practiced, there is no clear guidance on the kind of human rights cases that should be brought before the ECCJ, so a variety of matters have been brought before the court. The court has received cases based on non-performance of a commercial contract¹⁴, dissatisfaction with elections in a member state, dissatisfaction with remuneration for work done on the basis of a contract of employment⁸⁶ and failure of a state to compensate a citizen for damage to arte facts. The court has also received cases alleging violation based on the inheritance of the estate of a deceased¹⁵ and on slavery.

Solutions to the Challenges Faced by the ECOWAS Community Court of Justice:

1. The court should make amendments which would allow all and not a select few of individuals be granted access to the court. By doing this, the court will be able to adjudicate on more matters and serve justice to those who deserve it.
2. The ECOWAS Court of Justice must ensure that it strengthens and defines the relationship with it has with national courts. After all, individuals from various states approach this court after they are unsatisfied with their National Courts. It must ensure that it states whether or not it will hear matters on appeal from other National Courts to avoid confusion.
3. Judges must be screened properly before they are appointed to the ECOWAS Court of Justice. The qualifications for the appointment of judges should be clearly stated and defined and the requirements should be made known.
4. On the issue of acceptance of cases, the ECCJ should state clearly what kind of matters it has jurisdiction to adjudicate on. The matter of jurisdiction is serious one and should not be left unattended to.

¹⁴ *Ukor v Laleye*, suit no ECW/CCJ/APP/01/04 (unreported).

¹⁵ *Chukwudolue and Seven Others v Senegal*, suit no ECW/CCJ/APP/07/07 (unreported).