ECOWAS Court's Jurisdiction and the Argument of Sovereignty: An Evaluation of an Impeachment Debacle in Liberia

A Mini-Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws (LLM) in Transnational Criminal Justice

By

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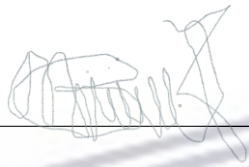
DECLARATION

I, F. Mulbah Z. Forkpa, Jr., declare that '*ECOWAS Court's Jurisdiction and the Argument of Sovereignty: An Evaluation of an Impeachment Debacle in Liberia'* has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and adequately referenced.

Student's signature: 

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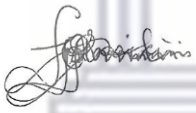

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Date: 26 January 2023

DEDICATION

This work is dedicated to my late mother, Yassah Duyan Forkpa. She has long departed the earth but still lives in my memories.

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God was very good to me during this study. In exchange for this goodness, I remain highly grateful to Him. I extend a special appreciation to my father, Mr Mulbah Z. Forkpa, Sr., who has been an important source of motivation for my educational journey. Coming from a family with no formal education, he took the courage to obtain two master's degrees. He set the bar high while guiding my siblings and me to climb above. The courage derived from him was strongly backed by his wife, Mrs. Marie Forkpa, a true mother and a God-sent blessing. I am honoured to give special recognition to my wife, Mrs Kebbeh M. Forkpa, who remained supportive throughout the study programme. I am also grateful to my children and siblings; I derived immeasurable strength from their prayers.

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I will never forget my interaction with all the beautiful people I have spoken about above. You will all continue to be part of my life in a unique way. I love you all and will forever keep you in my memories.

ABSTRACT

The need for a just and orderly society is the essence of retributive justice in domestic courts. Globalisation has left an immense mark on the development of both domestic and international laws. Rule of Law was largely associated with justice from the domestic perspective. Beyond the nation state, the concept of international rule of law now adds a new layer of justice at regional and global levels. What has emerged is a system of accountability to balance individual rights against state actions. On the other hand, state parties have often contested supranational courts' authority in domestic constitutional matters that border on states' sovereignty. As a result, the link between supranational courts' jurisdiction and state sovereignty has become blurred, complex, and controversial. In nearly all international litigation, the world has seen varying analyses with respect to the nexus between the exercise of jurisdiction by supranational courts over states in constitutional matters and the constitutional duties of states' judiciaries to serve as the final arbiters of their constitutions.

In the wake of these controversies, the view is popularly held that external interference in the affairs of states as they exercise their constitutional duties amounts to an assault on their sovereignty. The exact opposite of that argument says that a state has accepted to lower its sovereignty to a supranational body by the very fact that it contracted to become a party to a treaty body. The debates even become complex where states become subject to enforcement against themselves owing to the outcome of supranational rulings. Where these rulings are popularly resisted, they simply become historical documents relegated to shelves for academic purposes. The purpose of this study is to assess whether the Economic Community of West African States Community Court of Justice (ECCJ) is justified in the exercise of jurisdiction over complaints of human rights violations that grow out of a state's exercise of its constitutional duties. The study considers the scenario of Justice Kabineh Mohammed Ja'neh, an impeached Associate Justice of Liberia.

Impeached for his judicial opinion in 2019, Ja'neh filed a complaint against the Liberian Government at the ECCJ and prevailed. In a sovereignty-linked defence, the Liberian Government argued that it had simply exercised a duty under the Liberian constitution, and that a review of such action would undermine the state's sovereignty. The ECCJ rejected such an argument. The study examines the debate on sovereignty from a varying perspective and finds that states'

sovereignty may be limited or delegated to a supranational body through the full domestication of a treaty. The study further found that supranational courts have proven efficient in checking the excesses of sovereign states, and upon such foundation, argued that the decision to examine such excesses is an attribute of the sovereign that should never be construed as a violation of sovereignty.

Keywords: Jurisdiction, Sovereignty, Impeachment, Human Rights, Regional Integration, & Supranational Courts.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CDC	Coalition for Democratic Change
CEC	Central Electoral Commission
ECOWAS	Economic Community of West African States
ECCJ	ECOWAS Community Court of Justice
ECtHR	European Court of Human Rights
EDR	Exhaustion of Domestic Remedies
EU	European Union
GoL	Government of Liberia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Convention on Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
LPRC	Liberia Petroleum Regulatory Agency
OAS	Organisation of American States
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SJC	Senate Judiciary Committee
SJR	Supranational Judicial Review
SG	Solicitor General
SAC	Special Ad Hoc Committee
SADC	Southern African Development Community

UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNCAT	United Nations Convention against Torture
UWC	University of the Western Cape
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 **Introduction**

This chapter presents the background context to the study. It summarises the events that led to the impeachment of Justice Kabinah Mohammad Ja'neh, an Associate Justice of the Supreme Court of Liberia. The basic facts in the impeachment in the Liberian House of Representatives, and the subsequent conviction trial in the Senate, set the basis for the research. Out of this factual context, the study presents a basic proposition that focuses on the major concept of state sovereignty, harnessing the critical links between the roles of supranational and municipal courts in the interpretation of domestic laws. The study seeks to explore answers to the question of whether a procedural breach in Liberia's impeachment processes by the Liberian States may amount to a human rights violation for purposes of intervention by the ECOWAS Community Court of Justice (ECCJ). The subject examined is informed by recurring arguments from respondent states, challenging the jurisdiction of the ECCJ while asserting that municipal courts alone have the sole jurisdiction over cases that derive from the interpretation of domestic constitutions.

1.1.1 An overview of Justice Ja'neh's impeachment

Justice Ja'neh had been accused of economic sabotage, misconduct, abuse of public office, misuse of power, wanton abuse of judicial discretion, fraud, and corruption.[1] In the end, it was the crime of economic sabotage[2], in connection to his judicial opinion in a case against the Liberian government, that stood out and caused his impeachment.

The Liberian legislature, on 17 July 2018, initiated the impeachment process for his removal from the Supreme Court bench for reasons stated above. On 17 August 2018, Petitioners Thomas T Fallah and Moses Acarius Gray from the House of Representatives of the 54th Liberian

[1] *Ja'neh v House of Representative,* Petition to Impeach Justice from the Supreme Court of Liberia, 2018.
[2] Liberia Code of Law Revise (19 July 1976) Volume IV, Title 26, Subchapter F.

Legislature] amended their Petition of Impeachment, and stated the grounds of impeachment as follows:

i. That the Applicant misinterpreted and misapplied the Code of Conduct which was tantamount to 'a serious official misconduct' and an 'unsavory exercise' of his judicial discretion.

ii. That the Applicant, while presiding in Chambers of the Supreme Court of Liberia, abused his judicial discretion when he issued a remedial writ in the case of '*Ecobank vs Austin Clarke*'; that Applicant's conduct of issuing of that remedial writ was tantamount to 'proved misconduct, gross breach of duty, inability to perform the functions of his office'.

iii. That Applicant misused his office as Associate Justice of the Supreme Court of Liberia by surreptitiously conniving with one J. Nyema Constance, Jr. to illegally acquire a parcel of land owned by a Madam Annie Yancy, widow of her deceased husband, J. Nyema Constance, Sr., which act was described as a 'further testament of proved misconduct, gross breach of duty, inability to delineate between right and wrong…'[3]

Upon receipt of the Petition of Impeachment, the Plenary of the House of Representatives promptly set up the Special Ad-hoc Committee (SAC) and entrusted it with the mandate to primarily examine the petition.[4] On 27 August 2018, the SAC prepared its own Rules of Impeachment which were adopted by the House's Plenary to guide the House's version of the impeachment process and submitted its report to the full plenary recommending impeachment on the same day.[5] The grounds approved for the impeachment included the following:

i. That the accused stole records of the House of Representatives; ii) that the accused filed a petition for prohibition while the petition for impeachment was filed; iii) that the accused issued the writ of prohibition growing out of a petition filed by Srimex and Connex against the Liberia Petroleum Refining Company; and iv) that the accused

[3] *Ja'neh v. The Republic of Liberia & 1 Anor.* Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 6-7, Para. 11.
[4] *Ja'neh v. The Republic of Liberia & 1 Anor.* Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 6-7, Para. 12.
[5] *Ja'neh v. The Republic of Liberia & 1 Anor.* Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 6-7, Para. 16.

> illegally acquired real property belonging to Annie Constance which was previously a subject of litigation at the Supreme Court.[6]

The House Plenary thereafter adopted the SAC Report, declared the accused impeached and transmitted the bill of impeachment to the senate for trial.

When the Senate received the Bill of Impeachment, it forwarded it to the Senate's Judiciary Committee (SJC) for review and recommendation. The SJC drafted an amendment to the Senate Standing Rule 63 (hereinafter referred to as Rule 63) to govern the conviction trial; the amended rule was approved by the Senate's Plenary on 6 November 2018.[7] On 13 February 2019, the conviction trial officially started. On 29 March 2019, Chief Justice France Korkpor, presiding judge over the trial, ruled the accused Justice guilty and impeached. Justice Korkpor declared:

> Wherefore and in view of the foregoing, the respondent is found guilty of gross breach of duty and hereby impeached in accordance with Article 43 of the Liberian Constitution. I therefore order that the verdict of the Liberian Senate be recorded on the minutes of this proceeding as in keeping with Article 43 of the Liberian Constitution.[8]

There is a political context to the impeachment, but it falls out of the scope of this research. For background information, I will provide a quick narrative that gave rise to a political conspiracy theory around the impeachment. The House of Representatives' Petitioners for the impeachment, two Montserrado County[9] Representatives, Acarous Moses Gray, and Thomas P. Fallah, are both stalwarts of the governing Coalition for Democratic Change (CDC). It is speculated[10] that Ja'neh's removal nightmare stemmed from a dissenting opinion he rendered in a 2017 election-dispute case which brought all political processes on the Liberian political scene to a standstill and became a determining factor for the second rounds of elections among the parties that had acquired majority votes.[11]

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[6] Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 8, Para. 17
[7] Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P.9, Para. 19
[8] Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 11-12, Para. 28
[9] Montserrado County is one of Liberia's 15 major political subdivision that hosts the Country's capital city-Monrovia
[10] Newspapers reporting different views included: Toweh A 'Kangaroo Removal …Sen. Dillon Describes Removal of Former Associate Justice Kabineh Ja'neh as Senate Justifies Its Action; Says The Action Has Embarrassed Liberia' *New Republic Newspaper* 19 Nov 2020 1, available at *https://www.newrepublicliberia.com/kangaroo-removal-sen-dillon-describes-removal-of-former-associate-justice-kabineh-janeh-as-senate-justifies-its-action-says-the-action-has-embarrassed-liber (accessed 13 February 2022).*
[11] *Liberty Party v National Elections Commission*, Decided 7 December 2017.

Justice Ja'neh delivered his dissenting opinion in the face of a result that favoured the Coalition for Democratic Change following the conclusion of the first round of the 2017 presidential elections. The Liberty Party had filed a complaint alleging electoral fraud and urging the cancellation of the election results.[12] The majority opinion acknowledged fraud, but said it was insufficient to invalidate the result of the election.[13] In his dissent, Justice Ja'neh recalled the maxim *fraus ominia vitiate* (meaning fraud vitiates everything), and opined that no matter how tiny the result of the fraud is, it was sufficient to invalidate election results. Apart from the dissenting opinion in the election case, Justice Ja'neh explained on a local talk show that he found it difficult to understand why he could be impeached for a majority opinion in an economic sabotage case that reflected the view of more than three Justices. He notes:

> They, too, should have been impeached, if that is what they believed – that I deserved impeachment from the Bench. We all agreed on the ruling that the Government was wrong by imposing the taxes without Legislative approval, and the Government accepted the ruling and promised to meet with the petroleum importers and settle the matter out of Court. All my colleagues, including the Chief Justice, signed that decision. Why, then, I alone should be punished?[14]

1.1.2 Motions, challenges, and key contentions during impeachment

In both the House of Representatives and Senate, the defence team for Justice Ja'neh proffered challenges, many of which were decided by the Supreme Court on appellate reviews. In February 2019, the accused petitioned the Supreme Court of Liberia to prohibit all proceedings in the House of Representatives.[15] The Petition was on the grounds that the Representatives were not complying with the tenets of the due process of laws. The defence team argued that there were no impeachment rules, as envisaged by article 43 of the Liberian Constitution. Several other pretrial motions would later follow during the Senate's impeachment trial.

[12] *Liberty Party v National Elections Commission*, Decided 7 December 2017.
[13] *Charles Walker Brumskine – Harrison Karnwea, et. al. vs NEC* Dissenting Opinion, 2017 available at *//judiciary.gov.lr/charles-walker-brumskine-harrison-karnwea-et-al-vs-nec-dissenting-opinion* (accessed 21 April 2021).
[14] Major DS 'Ja'neh Impeached for 2017 Dissenting Opinion?' *Liberia Daily Observer* 20 November 2020.
[15] *Kabineh Ja'neh v The Liberian Senate*, Petition for the Writ of Prohibition, 2019.

The pretrial challenge continued to the senate. Following the Senate's approval of Amended Rule 63 on 6 November 2018, four members unsuccessfully filed a petition before the Supreme Court, challenging the legality of the amendments on 9 November 2018.[16] They held the view that the amendment of the Senate Rule to govern the trial did not conform to article 43 of the Constitution which requires the legislature to prepare rules to guide impeachment.

Before the trial could begin, the accused filed another pretrial motion requesting presiding Chief Justice Francis Korkpor to recuse himself. The motion was on grounds that the Chief Justice had signed the majority opinions in selected cases that had been included in the bill of impeachment as impeachment grounds.[17]

In another pretrial motion, the defence requested that the Senate's trial on the Bill of Impeachment be dismissed or quashed. This time, it was based on the legality principle, known as nullum crimen sine lege, a long-standing concept in international law (also known as the legality doctrine). As Ja'neh argued, the grounds for the dismissal request were based on the legislature's refusal to enact rules for impeachment in line with the mandate enshrined in article 43 of the 1986 Liberian Constitution. In count six of that motion to dismiss the bill of impeachment, Ja'neh notes:

> That the alleged act contained in the bill of impeachment for which the impeachment of the movant is being sought occurred prior to the amendment of Rule 63 of the Senate's standing rules to provide for impeachment proceedings. So, assuming that the amendment of Rule 63 satisfies the requirement of the 1986 Constitution, which is not the case, then in that case, said Rule 63 would not be applicable to Movant. Movant submits that Article 21(a) of the 1986 Constitution of the Republic of Liberia provides that no person shall be made subject to any law or punishment which was not in effect at the time of the commission of an offense… Movant submits and says that there have not been any rules prescribing the procedures for impeachment at the time the Movant was alleged to have committed impeachment offenses, the subsequent adoption by the Senate of the purported

[16] Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 10, Para. 26
[17] For example, *Constance v Constance* [2001] LRSC 33; 40 LLR 738 (2001**).**

Senate's rule to govern impeachment trial cannot be applicable to the Movant, and to do so otherwise could be a gross violation of article 21(a) of the Constitution…[18]

1.1.3 An overview of the ECCJ's intervention

Following his impeachment, Justice Kabineh Ja'neh filed a suit at the ECCJ contesting that his removal from the Supreme Court Bench and subsequent replacement amounted to a violation of his human rights.[19] Specifically, the Applicant alleged that his rights were violated in the manner shown as follows:[20]

a) That the Respondent subjected him to an impeachment proceeding absent prescribed rules of procedures, and as such deprived him of his fundamental rights to fair hearing guaranteed by article 7 of the African Charter on Human and People's Rights, article 10 of the Universal Declaration of Human Rights, and in further violation of the requirement stipulated by article 43 of the 1986 Constitution of Liberia.

b) That his removal through an illegal trial and conviction was in violation of his rights to a fair hearing, dignity of his person, and work under equitable and satisfactory conditions guaranteed by articles 5, 7, and 15 of the African Charter on Human and People's Rights.

Respondent's argument:

The Republic of Liberia denied violating the Applicant's human rights and submitted that the impeachment was a political process executed in line with due process of law as laid down in article 43 of the 1986 Constitution of Liberia. The Liberian State urged and requested the Court to declare the application inadmissible, noting that the ECCJ is incompetent to review, interpret, and apply the Member States' national constitutions and domestic laws.

1.1.4 Summary of ECCJ's Ruling:[21]

On 10 November 2020, the ECCJ ruled that Liberia violated the Applicant's rights to work and live a dignified life contrary to articles 5, 7, and 15 of the African Charter on Human and People's

[18] *Kabineh Mohammend Ja'neh v the House of Representative of the Republic of Liberia*, Motion to Dismiss Bill of Impeachment, November 2018.
[19] *Kabineh Mohammed Ja'neh v. Republic of Liberia*, ECW/CCJ/APP/33/19.
[20] *Kabineh Mohammed Ja'neh v. Republic of Liberia*, ECW/CCJ/APP/33/19.
[21] Application No: ECW/CCJ/APP/33/19 Judgment NO. ECW/CCJ/JUD/28/20, P. 73.

Rights. The ECCJ ruled that the Applicant was entitled to reinstatement. The Court ordered Liberia to pay to the Applicant all his withheld entitlements, including salaries, allowances, and pension benefits from the date of his removal from office up to the date of notification of the Court's Judgment; to reinstate the Applicant as an Associate Justice of the Supreme Court; or, in the alternative, grant him the right to retire from service on the date of notification of this judgement with full pension benefits as if he had retired at the normal retirement age for justices of the Supreme Court. The ECCJ also ordered Liberia to pay the Applicant the sum of US$ 200,000.00 as reparation for moral prejudice suffered for the violation of his rights.

1.2 Problem statement

The Liberian Constitution grants immunity to judges and shields them from punishment on account of their judicial opinion. The Liberian legislature ignored this immunity clause while arguing that impeachment was a duty under the Constitution. Arguably, the impeachment was marked by many procedural issues in domestic and international law, including the theory of legality, *ex post facto* doctrine, and the concept of equality of arms. Many of these principles, being established and widely accepted judicial standards, are restated throughout the Liberian Constitution of 1986. Notably, among them are the legality theory, which implies that no crime should exist without law; and the *ex post facto* doctrine, which argues against the retroactive application of laws. The legality and *ex post facto* doctrines are restated in article 21(a) of the Liberian Constitution. It states: 'No person shall be made subject to any law or punishment which was not in effect at the time of the commission of an offence, nor shall the Legislature enact any bill of attainder or *ex post facto* law'.[22]

Ja'neh's impeachment seems to have proceeded contrary to these domestic and international law principles. While Liberia saw these matters as falling within the scope of the domestic legal system, the impeached Justice saw an international dimension and therefore pursued his case via the ECCJ. The Government of Liberia (GoL) believed that the impeached Justice was simply aggrieved with a performed constitutional duty and that the Supreme Court of Liberia, tasked with the authority to interpret the constitution, was the only forum that would legally entitle him to a remedy. This argument is challenged by ECCJ 's authority to adjudicate human rights violations

[22] Constitution of the Republic of Liberia, 1986 article 21*(a).*

irrespective of whether the complainant has exhausted local remedies in municipal courts or not. The GOL does not concede that it violated the rights of Justice Ja'neh; rather, it argued that the ECCJ acted ultra vires when it admitted a case emanating from an impeachment proceeding in the lawful judicial process of a Community Member State. At this point, the link between the jurisdiction of supranational courts and the sovereignty of state parties to a treaty setting up such regional judicial bodies becomes blurred, if not controversial. These points of contention are examined in this thesis.

1.3 Significance of the study

International law has become a subject of intense debate, with scholars presenting a critique of multiple concepts. As a source of international law, state consent has come under severe scrutiny in various forms. As this research examines the impeachment of Justice Ja'neh, a landmark argument is presented. In the Ja'neh Case, Liberia contested the jurisdiction of the ECCJ over a matter performed in the exercise of the State's constitutional duty. The implication of that argument is that the ECOWAS Treaty does not expressly allow the ECCJ to adjudicate a case that emanates from the constitutional and political duties performed by state organs. Accordingly, a novel argument is presented in this research, and the conclusion will contribute to the body of knowledge in international law. The research will set the basis for discussions that are capable of ensuring a significant reform of the ECCJ or assisting in further communicating to the contracting parties their treaty obligations in the context of international law. It is important to note that the study expands on whether matters that border on constitutional interpretation can rightly become human rights violations, to allow the intervention of an international court in a state's domestic affairs.

1.4 Research objective

The research examines the ECCJ's legal framework and determines the point at which the Court's intervention in a municipal matter becomes proper or appropriate. In so doing, attempts have been made to reconcile the argument of state sovereignty, and the jurisdiction of supranational courts.

1.5 Research question

This research presents several related legal issues for consideration. The primary question is: Does a breach in a judicial proceeding or the existence of a constitutional controversy in a municipal court amount to a human rights violation as to place a resultant case within the jurisdiction of the ECOWAS Court? Other sub-questions are as follows:

- What is the legal basis for the ECCJ assuming jurisdiction over a complaint for which a local remedy has not been exhausted in the local court system of a member state?
- To what extent may an argument of sovereignty suffice when a state challenges the jurisdiction of a supranational court to which it is a state party?

1.6 Theoretical framework

This study adopts a liberalist approach to analyse the linkages that ought to exist between municipal and supranational courts. Liberalism, as a political philosophy, emphasises the idea of being accessible and liberated.[23] The critical focus of liberalism is on democracy, civil rights, property ownership, religion, and the like. The theory implies that individuals should exercise fundamental human rights, and governments should not curtail these rights.[24] John Locke, the enlightenment period philosopher who introduced Liberalism, asserted that individuals have the birthright to freedom, to inherit property, and live in a society where the right to a free life can be guaranteed. Like Locke, I am of the conviction that no government should violate individual rights under any circumstances. With the legal framework of ECOWAS and the ECCJ focused on good governance, human rights, and regional integration, I find it best suited to analyse the ECCJ using the liberalist framework. With such a framework, the study will examine the role that both domestic and supranational courts ought to play in the defence of human rights and individual freedom. In all its attributes, this theory frowns on autocratic forms of Government and establishes open support for democracy.[25] Courts are tools that citizens should use as pathways to strengthen democracy. Accordingly, the liberalist framework supports my argument that efficient

[23] Meiser JW 'Introducing Liberalism' in McGlinchey S, Walters & Scheinpflug (eds) *International Relation Theory International Relations Theory* (2018).
[24] Freeman S *Liberalism and Distributive Justice* (2018) 17.
[25] Freeman S *Liberalism and Districtive Justice* (2018) 38.

supranational courts are essential to deter states from the arbitrary use of state power to suppress citizens' rights.

1.7 Scope and limitations

This study will deal with the jurisdiction of the ECCJ. It will also assess whether the ECCJ's intervention in the Liberian case under discussion was a proper exercise of jurisdiction. The Court's ruling is still fresh and has yet to receive any implementation. The ECCJ's ruling mandates the GoL to fully restore the impeached Justice, paying him all monies he is entitled to as of the time of his removal from his office up to the ECCJ's ruling, and moral damages of up to US$200,000.00 and to do so within six months. It is premature to conclude that Liberia could refuse to adhere to the Court's ruling. In most instances, international justice may be characterised by international politics and diplomacy marked by behind-the-scenes discussions. In the event that negotiations of this sort occur, the author would be unable to factor the results into this study due to the unavailability of such information to the public.

1.8 Literature review: The ECCJ and the sovereignty debate

ECOWAS, as a sub-regional body, was formed in 1975 to foster economic cooperation among member states in order to raise living standards and promote economic development.[26] Decades later, ECOWAS has gone through several transformations, including creating new institutions, expanding its mandates, and revising its original treaty of 1975. The transformations, for instance, expanded the scope of ECOWAS into becoming a peace-keeping institution. Chris Kwaja highlighted key lessons learned from the ECOWAS intervention in Liberia as part of its mandate for peace, security, and stability in the region.[27] The ECCJ is another outcome of the immense transformations that have occurred within ECOWAS. It was established pursuant to the provisions of articles 6 and 15 of the Revised Treaty of ECOWAS as the sole judicial organ of the community.[28]

[26]ECOWAS Treaty, 1975, article 2.
[27] Kwaja C *The Role of Economic Community for West African States (ECOWAS) in Post-Conflict Rehabilitation: Lessons from Liberia* (2017) P 53.
[28] ECOWAS Revised Treaty [Done at Cotonou, Benin, July 24, 1993] 35 I.L.M. 660 (1996).

The ECCJ, like all human institutions, is far from perfect. Significant problems identified in the Court's functioning include the lack of awareness among citizens, and the States' attitudes toward non-patronage.[29] Despite existing challenges, the Court has remained progressive, expanding its jurisdiction to hear human rights violations filed before it by citizens in the sub-region.[30] This was a fundamental departure from the previous denial of individuals from accessing the Court, as was done in the ECCJ's first ruling.[31] The Court is composed of seven independent judges selected from member states.[32] From its inception, the court had no specific human rights mandate; only the member states and institutions of ECOWAS had direct access to it.[33] As a result, the rights of private individuals or corporations were at the mercy of member states.

The opportunity to expand the ECCJ's jurisdiction emerged when the Court adjudicated its first case, *Afolabi v Nigeria*, in 2004.[34] Despite the restriction that barred private persons from filing cases before the ECCJ, Afolabi, a Nigerian citizen, filed the case in his private capacity and argued that Nigeria's closure of the border with Benin Republic amounted to the violation of the right to free movement guaranteed under the ECOWAS Treaty. Although the Court dismissed the Afolabi case for want of jurisdiction, it succeeded in provoking the debate that finally paved the way for the ECCJ to adopt a human rights mandate and allow private persons to file cases before it. Ebobrah described the move as a new opportunity for international human rights litigation in West Africa when ECOWAS adopted a protocol for the ECCJ to determine cases of human rights violations in ECOWAS member states.[35]

There is no dispute that the ECCJ has played a huge role in championing human rights; however, there is a wider acceptance that the court has more challenges to resolve. Worika and Etemire, for instance, found that the ECCJ has a robust human rights jurisdiction due to the expansion of the Court's jurisdiction to include human rights complaints from private litigants; they recounted key challenges of the Court and proposed solutions to include the exhaustion of local remedies.[36]

[29] Banjo S 'The ECOWAS court and the politics of access to justice in West Africa' (2010) 78.
[30] Banjo S (2010) 34.
[31] *Afolabi v. Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment (27 April 2004)
[32] ECOWAS Community Court of Justice Annual Report (2003)13, Para 24.
[33] See Protocol A/P.1/7/91 On the Community Court of Justice, article 9*(3&4)*.
[34] *Afolabi v. Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment (27 April 2004).
[35] Ebobrah, S. *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice (2010) P.1*.
[36] Worika I & Etemire U 'ECOWAS Community Court of Justice: Recent trends and future directions' (2017) P. 28.

From the above literature, it is my observation that good governance and human rights are not mutually exclusive. In 1991, ECOWAS adopted the declaration on political principles in which it fully alluded to human rights under 'universally recognised international instruments on human rights including the African Charter on Human and Peoples' Rights'.[37] The ECOWAS goal of achieving economic integration and ensuring the promotion of the economic well-being of the region and its citizens can be achieved only when contracting states are committed to the enhancement of governance under which the rights of all ECOWAS citizens can be protected. The ECCJ remains more engaging, holding member states accountable for the protection of human rights. However, it should be noted that a line of cases has shown resistance from member states on the ECCJ's stance on human rights cases.[38] Just five years after the ECCJ adopted the mandate to adjudicate human rights cases, Ebobrah predicted that the involvement of the ECCJ in human rights would be a potential recipe for resistance by ECOWAS member states, as well as the potential for conflict with national judicial and quasi-judicial institutions.[39] This prediction has been proved true with time as ECOWAS member states proffer a sovereignty-style argument challenging the ECCJ's jurisdiction.[40] In pointing out the major source of the resistance that the Court faces, Ebobrah notes:

> Further, the realities of the manner in which African states jealously guard national sovereignty show the danger of future state resistance to the unrestricted jurisdiction of the ECCJ to scrutinise their human rights conducts on issues perceived as purely domestic concerns.[41]

I agree with Ebobrah's reasoning above when he notes that member states are likely to perceive cases before the ECCJ as matters of domestic concern. I do not however agree with him that the ECCJ has restricted jurisdiction over human rights cases, since the Supplemental Protocol renders

[37] ECOWAS Fourthteenth Session of the Authority of Heads of State and Government, Abuja, 4-6 July 1991, Declaration A/DCL.1/7/91 of Political Principles.
[38] *Barkare Sarle v Mali*, CCJELR, p. 9; *Cheihk Gueye v Senegal*, JUD ECW CCJ JUD 21 20; *Ebere Anthonia Amadi & 3 Ors v The Federal Government of Nigeria* (2019), ECW/CCJ/JUD/22/19, P.8, Judgment of 31 January 2001, Series C NO. 55; *Counselor Mohammad Ja'neh v Republic of Liberia & Anor,* Application No. ECW/CCJ/APP/33/REV Judgement No. ECW/CCJ/13/21.
[39] Ebobrah S (2010) 14.
[40] *Barkare Sarle v Mali*, CCJELR, p. 9; *Cheihk Gueye v Senegal*, JUD ECW CCJ JUD 21 20; *Ebere Anthonia Amadi & 3 Ors v The Federal Government of Nigeria* (2019), ECW/CCJ/JUD/22/19, P.8, Judgment of 31 January 2001, Series C NO. 55; *Counselor Mohammad Ja'neh v Republic of Liberia & Anor,* Application No. ECW/CCJ/APP/33/REV Judgement No. ECW/CCJ/13/21.
[41] Ebobrah S (2010) 1.

inadmissible cases that are pending before other international courts.[42] Assuming however that the ECCJ has an unrestricted jurisdiction, I argue in this mini-thesis that such jurisdiction was fully derived from the member states themselves through their accession to the ECOWAS Treaty, and the ratification of the ECCJ Protocols. To that end, Jean Bodin's contention, as evaluated by writers including Lees, that the sovereign is all-powerful and can only be limited by itself, is reconceptualised.[43] Though Boden's focus was with respect to the state's supremacy over its internal affairs, I give his logic an international lens, by blending his thoughts with what contemporary writers have classified as international rule of law.[44] To that effect, I argue that it is within the purview of international rule of law to elevate the rights of individuals beyond the borders of their states when those rights are suppressed in the name of sovereignty. I take clues from Jeremy Waldron's argument that the value of state autonomy is derived from the role it plays in protecting autonomy for individuals and groups. I reconcile Bodin's absolutist view on sovereignty with Waldron's primacy on individual protection and argue that in support of International Rule of Law, states will voluntarily limit their sovereignty by acceding to treaties.[45]

On the above foundation, I argue that there is no basis for a state to use a sovereignty-styled argument to dwarf a treaty obligation. This thesis notes that this form of sovereign-styled argument has been exerted as a recurring affirmative defence by respondent states appearing before the ECCJ despite the chain of rulings to the contrary. I hypothesised that arguments that the ECCJ is violating state sovereignty by taking on roles reserved only for domestic courts is most likely attributable to the absence of the requirement to exhaust domestic remedies (referred to throughout the thesis as the EDR Rule) before filing a case at the ECCJ. This view is consistent with Worika and Etemire's view that the refusal of the ECCJ's framework to embrace the EDR Rule is one of the challenges that the court will need to deal with. Referencing an article by Marki, Worika and Etemire believe

[42] ECOWAS Community Court of Justice, Supplementary Protocol A/SP1/01/05 Amending the Protocol (A/P.1/7/91), adopted Jan. 19, 2005 [2005 Protocol], article 10 (2)*(d).*

[43]Boden J *Six Book on the Commonwealth* (1967) & Lee D *The Right of SOvereignty: Jean Bodin on the Sovereign State and the Law of Nationals* (2021) ch 2.

[44]Samatha B 'Sovereignty, international law and democracy' (2011), 373-374; Waldron J 'The rule of law in contemporary liberal theory' (1989) 79.

[45] Pavel CE *Law beyond the state: Dynamic coordination, state consent, and binding international law* (2021) Ch 3, p. 86.

that the ECCJ should be reformed to include a requirement that litigants exhaust domestic remedies. They recount some benefits of the EDR Rule in support of their argument:

> …an exhaustion requirement acts as a buffer between domestic and international legal systems. It 'reinforces the subsidiary and complementary relationship of the international system to systems of internal protection,' and reflects a belief that domestic institutions should have 'a first shot' at addressing human rights complaints. An exhaustion rule also reduces 'forum shopping and unnecessary rivalry between municipal and international Courts,' as well as the risk of conflicting decisions.[46]

This thesis adopts the above view and recommends that future reform of the ECCJ should consider making the EDR Rule a precondition for filing a case before the ECCJ.

1.9 Methodology

This study was conducted using a qualitative method of analysis. Different sources have been analysed in the form of desktop reviews. First, the treaty and Protocols of the ECCJ were surveyed to access meaningful information on the statutory provisions of the Court. Additionally, a random selection was made of significant opinions that the Court has rendered since its formation. Additional, selected case laws were examined from other regional human rights systems to ascertain how they compare with the ECOWAS human rights system. These decisions have been analysed with reference to the evolution of the Court's jurisdiction. Finally, critical scholarly literature on the ECCJ has been examined to inform findings of the study.

1.10 Chapter overview

Chapter I – Introduction: This Chapter provides a background context to the study. Key to that context, it sets out the impeachment of Justice Kabineh Ja'neh, and the ensuing arguments from both the Petitioner and Respondent, as the motivation behind the research task. The chapter further presents a brief literature review as well as a research methodology and endeavours to introduce all the other subsequent chapters in the study.

[46] Worika I & Etemire U (2017*)* 9.

Chapter II –The ECCJ's Origin and Transition to an ECOWAS Human Rights System: This Chapter examines ECOWAS as a subregional body. The ECCJ is evaluated as a judicial organ of ECOWAS. It evaluates the transition that has occurred to provide the ECCJ with a human rights mandate and sets into motion the argument of the Court's jurisdiction, and the sovereignty of member states.

Chapter III – Impeachment in Municipal Courts: A Critical Evaluation of Liberia's Impeachment Framework: I assessed the domestic framework for impeachment in municipal courts similarly situated as Liberia. I outlined circumstances under which a supranational judicial body has intervened in disputes stemming from domestic adjudication of impeachment. I specifically considered the role of the ECCJ in litigating the Ja'neh scenario, and generally examined the positions of selected regional human rights courts on impeachment proceedings in member states.

Chapter IV -The Ja'neh Case Before the ECCJ: Human Rights and the Limits of Government of Liberia's Sovereignty Argument: This Chapter looks at the Ja'neh Scenario, *pro and con*. In relation to the argument of the Respondent State, it examines grounds that are likely to dilute a state's sovereignty argument. As a significant factor, I analyse the obligations that states incur under a treaty and aver that such obligations are voluntary commitments on the part of states to redelegate sovereign functions.

Chapter V – Recommendations, and Conclusions: Building on the preceding chapters, this chapter draws on the analysis and interpretation to conclude with its findings and sets forth critical recommendations for future consideration.

CHAPTER TWO

THE ECCJ'S ORIGIN AND TRANSITION TO AN ECOWAS HUMAN RIGHTS SYSTEM

2.1 Introduction

This chapter provides a historical synopsis of the ECCJ and highlights Liberia's membership as a contracting party to ECOWAS. It examines body of regional treaties, and postulates that supranational courts have attained human rights jurisdictions in three ways. I note that the ECCJ acquired subject matter jurisdiction over human rights issues but did not make requirement to exhaust domestic remedies. I praise the principle of exhausting domestic remedies and argue that it will strengthen a more robust human rights system among ECOWAS nations when it is adopted. I reason that the EDR Rule will enhance regional integration, and subject national judicial mechanisms and legal framework to a systematic review by the ECCJ.

2.2 The evolution of ECOWAS and the ECOWAS Community Court of Justice (ECCJ)

When the West African States organised ECOWAS in 1975, their focus was primarily on trade as well as economic and regional integration. They had very little concern about framing a regional human rights system. ECOWAS would later envisage a judiciary organ in 1991 with the sole purpose of interpreting the ECOWAS laws. In the late 1990s and early 2000s, the context changed, and a robust human rights system emerged. This section documents the circumstances around such emergence.

2.2.1 The emergence of the ECCJ as a judicial body with human rights mandate

The ECCJ is the judicial arm of ECOWAS, a sub-regional body of the West African States established in 1975 to foster cooperation among member states. It was re-organised in July 1993 at the Cotonou Summit after ECOWAS adopted a revised treaty (Revised Treaty). The Organisation was established to promote cooperation and integration as a *sine qua non* for improving the living standards within member states and for contributing to progress and development on the continent of Africa.[47] The ECOWAS Revised Treaty adopts the principles enshrined within the African Charter on Human and Peoples' Rights (ACHPR or African Charter)

[47] Revised Treaty of ECOWAS (1993), article 3.

and the Declaration of Political Principles of the Economic Community of West African States (DPP-ECOWAS).[48] Before revising the treaty, ECOWAS had established a track record of adhering to human rights principles. For instance, the African Charter and DPP-ECOWAS were adopted at the Fourteenth Ordinary Session of the Authority of Heads of State and Government on 6 July 1991 in Nigeria. In the DPP-ECOWAS, the West African states committed to respecting human rights and fundamental freedoms; promote the full enjoyment of fundamental rights; and to uphold individual liberty and inalienable rights to participate in democratic processes.[49] Given the coverage of, and commitment to, adhering to good governance and human rights in the Revised Treaty, it can be argued that the ECOWAS leaders had come to grapple with the reality that achieving economic advancement and regional integration would only be made possible by adopting the mechanisms to promote human rights and good governance in members states.[50] A review of existing literature shows acceptance of the view economic integration regimes flourish well when they are built upon a vibrant human rights system.[51]

Consistent with its adherence to the principle of good governance and human rights, the ECOWAS Revised Treaty created several institutions including the ECCJ.[52] The ECCJ was set up only after judges were appointed in January 2001.[53] The Treaty mandated a further development of the ECCJ's structure, composition, powers, procedures, and other issues through Protocols.[54]

Though ECOWAS's initial mandate was to ensure cooperation and the economic integration of West Africa as expressly reaffirmed in article 3 of its 1993 Revised Treaty, other compelling developments transformed it in many ways. For instance, the Liberian Civil War of the 1990s necessitated the establishment of a regional force for military intervention.[55] Under the 1975 ECOWAS Treaty, military intervention into the affairs of states would have been considered interference and a violation of the sovereignty of member states. By the 1990s, what would have been considered a violation of sovereignty derived from regional interventions became the new

[48] Revised Treaty of ECOWAS (1993), Preamble, p.1.
[49] See the Political Principles of ECOWAS, Declaration A/DCL.1/7/91(4-6 July 1991).
[50] Revised Treaty of ECOWAS (1993), article 4*(J)*, p. 6.
[51] Nwogu N 'Regional integration as an instrument of human rights: reconceptualizing ECOWAS' (2007);
[52] Revised ECOWAS Treaty (1993) article 6, p.8.
[53] Revised ECOWAS Treaty (1993), article 15*(1)*.
[54] Revised ECOWAS Treaty (1993), article 15*(2)*,
[55] Kufuor OK *The Institutional Transformation of the Economic Community of West African States* (2006) p. 67.

normative methodology for the enhancement of regional peace in West Africa.[56] Dr Iyi documents this transition and notes how ECOWAS military intervention to restore peace in Liberia and Sierra Leone became a starting point to reconcile state sovereignty and military intervention to halt humanitarian catastrophes.[57]

Similarly, the establishment of the ECCJ, first to interpret ECOWAS laws, and subsequently to adjudicate cases concerning human rights violations, became a new normative development engendered by the Revised ECOWAS Treaty and subsequent Protocols.[58] The transformation in the judicial structure of ECOWAS can be considered a significant milestone in the achievement of good governance within the West African sub-region. As a judicial arm of ECOWAS, the ECCJ has metamorphosed, and for the best reason. From a court of treaty interpretation, the ECCJ would later become a court to champion the rights of citizens in member states.[59] As a result, it positioned itself to advance a supranational judicial system, good governance, and human rights as a way of achieving the overall mission of ECOWAS.[60]

The ECCJ's task of ensuring adherence to the rule of law has never been without debates or challenges.[61] I attribute these challenges to two reasons: a) Lack of understanding of the liberal agenda that ECOWAS adopted by way of the Revised Treaty; and/or b) that a significant number of contracting states are yet to achieve the desired goals of transitional justice following the era of colonialism, coups, and autocracy. Thus, the leading question that springs out of nearly all debates relates to the jurisdiction of the ECCJ, as well the extent to which states' sovereignty can be limited in the face of treaty obligations. Expanding this point further, I adopt the view of Nwauche, who argues that achieving ECOWAS's objective of economic integration is done best by strengthening the link between the ECCJ and municipal courts in ways that would see ECCJ rulings being relied upon for precedential purposes in national courts.[62] To reach that point however, I propose in this

[56] Iyi J.-M *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law Towards a Theory of Regional Responsibility to Protect* (2016) 3.
[57] Iyi J.-M (2016) 3.
[58] Revised Treaty (1993) Article 15.
[59] Revised Treaty (1993) Article 7(3)*(g)*.
[60]Cowell F 'Impact of the ECOWAS protocol on good governance and democracy' (2011) 331-342; Abass A 'The new collective security mechanism for ECOWAS: Innovation and problem' (2000) 211-229; Ebeku KSA 'The succession of Faure Gnassingbe to the Togolese presidency: An international law perspective (2005); & ECOWAS Protocol on Governance and Democracy (2001), Protocol A/SP/12/01.
[61] For example, Gambia's argument embodies in *Justice Joseph Wowo v. Gambia*, ECW/CCJ/JUD/09/19, is an embodiment of contrary views from state parties.
[62] Nwauche ES 'Enforcing ECOWAS law in West African national courts (2011)181-202.

research the need for the ECCJ to modify its scope and allow applicants to first exhaust all the required domestic remedies as applicable.

2.2.2 The adoption of human rights mandates over individual applicants: How did the ECCJ get there?

I assess ways in which supranational courts have attained the mandate to hear individual applications on human rights violations and narrowed my analysis specifically to how the ECCJ attained such jurisdiction. Alongside the ECCJ, I focus on similarly situated regional courts such as ECtHR, IACtHR, and SADC, and identified three modes through which they acquired the authority to adjudicate applications for private persons.

As stated above, supranational human rights courts, for the purpose of protecting the inalienable rights of all humans against the tyranny of states, have established the culture of adjudicating cases in which individuals are parties. I find that the authority to adjudicate cases containing individual applicants has taken three forms depending on the circumstances under which a court emerged. These include : 1) In instances where the provisions of a human rights treaty provide for the creation of a supranational court to enforce protected rights, (*Mode 1: Locus Standi Ab Initio)*; 2) Where a regional treaty court, previously established to interpret protocols and treaty provisions, and to provide advisory opinions, expands its scope to cover individual applicants through judicial activism (*Mode 2: Locus Standi Through Judicial Activism)*; and 3) Where an existing treaty without a previous mandate over individuals has been amended for purposes of mitigating human rights abuses (*Mode 3: Locus Standi Through Modification)*. I have expanded on these detailed modes below:

Mode 1: Locus standi ab initio. The first of the three modes, I argue, relates to circumstances where human rights treaties, from their inceptions, expressly provide for the establishment of courts to enforce rights. I reason that the primary purpose of this mode is to enforce treaty obligations and give meaning to the provisions of human rights instruments.[63] In support of my argument, I examine the historical development of the ECtHR and IACtHR.[64]

[63]Nyarko J 'Giving the treaty a purpose: Comparing the durability of treaties and executive agreements' (2019) 66.

[64]Dzehtsiarou K 'European consensus and the evolutive international of the European convention on human rights'(2019) 1731-1735; Weil GL The evolution of the European convention on human rights (2017) *American*

The European Conventions on Human Rights (ECHR) and the Inter-American Conventions on Human Rights (IACHR) are examples of treaties that created courts from their very inceptions to enforce the protection of human rights that are traceable to the Universal Declaration of Human Rights (UDHR). Both the ECtHR and IACtHR came into effect in 1953 and 1979 respectively through their respective constitutions.[65] They are the first widely known human rights courts to directly reference the UNDHR following its adoption by the United Nations on 10 December 1948, with forty-eight states in favour, eight abstentions, and no vote against.[66] The Declaration is a towering project that outlined, as a central focus, the inherent and inalienable rights of all human beings.[67] So, it is reasonable to agree that the UDHR assisted in laying the foundation to protect the inalienable rights of all human beings against discretionary powers of states. As a result, international law has witnessed the development of an international rule of law system, in which states can be held accountable for the way they treat their subjects.[68] Domestic and regional courts, so to speak, have played significant roles in safeguarding these judicial accountability mechanisms.

For 70 years following the adoption of the UDHR, a contentious issue has been related to translating declared rights into binding and enforceable rights. To that effect, states have used individual and collective approaches to give meaning to the UDHR's declared rights. The ECHR and IACHR emerged as part of the global efforts to actualise the UDHR's human rights principles. As part of institutionalising the UDHR Principles through regional solidarity, supranational courts were engendered to concretise the enhancement of rights that were merely of ideal status, soon championing the development of mechanisms to enforce human rights law. Thus, the supranational

Journal of the International Law, Volume 57, Issue 4,pp 804-827; Neuman GL 'Import, export, and regional consent in the Inter-American court of human rights' (2008), p. 102–110; and Follesdal A 'Exporting the margin of appreciation: Lessons for the Inter-American court of human rights' (2017) p. 359–369.

[65]Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 19.

[66] Yearbook of the United Nations, 1948-1949 (United Nations, 1950 - UN sales number: 1950.I.2) 524-537.

[67]Waltz S 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights, (2002) 437-448; and Hughes G 'The concept of dignity in the Universal Declaration of Human Rights' (2011) *Journal of Religious Ethics*, Volume 39, Issue 1, p. 1-24.

[68] Chesterman S(2008) 343; Ranney J *World Peace through Law: Replacing War with the Global Rule of Law* (2018); Heupel and Reinold (eds) *Global Governance*(2016); Kratochwil F *The Status of Law in World Society: Meditations on the Role and Rule of Law* (2014); Zangl B, 'Is there an emerging international rule of law?' (2005) 13.

courts that have been modelled after the ECtHR and the IACtHR have within their constitutive legislations the permission for individual applicants to be heard.

Mode 2: Locus standi through judicial activism. The second mode considers the treaty courts that were previously established to interpret regional treaties and issue advisory opinions, but later assumed jurisdiction over human rights violations by way of judicial activism. The SADC Tribunal took this second path to widen its scope from a court of regional economic integration to a court that adjudicated human rights violations against individual citizens. In the Case *Campbell v The Government of Zimbabwe*, the SADC Tribunal found that the government of Zimbabwe's land redistribution programme was racist following the confiscation of farmlands from white farmers and therefore ordered compensation for those whose farmland had been forcefully taken.[69] Robert Howse gave an international attribute to judicial activism when he defined it as a tendency to impose on states legal limits or constraints not justified by the strict rule of international law.[70] Commenting on Robert's definition, Fuad Zarbiyev states:

> Judicial activism is sometimes defined by reference to a certain implicit conception of the relationship between judicial and political branches. More precisely, judges are considered to be activists when they lack deference to political branches and pass judgement on matters which are deemed normally to be reserved to those political branches.[71]

In view of the above, it is my contention that through judicial activism, judges are likely to change or modify the consent that states expressed by signing a treaty. I expand on this point using the SADC example. While the human rights jurisdiction is seen coming out clearly through the protocols of the ECCJ, the SADC Tribunal does not have any protocol dedicated to human rights. In fact, the founding protocol of the SADC Tribunal does not contain the word 'human rights.' Though the SADC Treaty made a single reference to human rights, that reference is with respect to human rights being one of the treaty's principles that member states are required to uphold. While the ECOWAS Contracting parties expanded the ECCJ's mandate through legislation, the SADC human rights mandate only became clear through a ruling from the SADC Tribunal. The

[69] *Campbell v The Government of Zimbabwe* SADC (T) 2/2007.
[70] Robert H *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power' in Thomas Cottier and Petros C Mavroidis (eds), The Role of the Judge in International Trade Regulation* (2003) 35.
[71] Fuard Z 'Judicial Activism in International Law-A conceptual framework' (2012), p. 258.

Tribunal determined in *Campbell v Republic of Zimbabwe* that it had the authority to adjudicate human rights cases.

From the Campbell ruling, Zimbabwe saw the SADC Tribunal's decision as nothing other than legislating, which is thus seen as a usurpation of the functions of the Summit, the legislative body for SADC. I adopt this view and argue that treaty arrangements tend to be undermined if courts enter the minds of contracting states and extract consents that those states did not provide in the treaty. On this point, I submit that Liberia's argument contesting the jurisdiction of the ECCJ would have been a perfect one for the SADC Tribunal. As a matter of fact, Zimbabwe did not hold back from challenging the jurisdiction of the SADC Tribunal on similar grounds.[72] As an expression of the argument that the Tribunal had arrogated to itself a rule-making authority, the contracting states suspended it at the 2010 SADC summit On 17 August 2012.[73] It is my contention that the suspension of the SADC Tribunal amounted to the contracting parties' reaffirmation of their original intention of limiting the Tribunal's mandate to the interpretation of SADC's Treaty and Protocols. The chronicles of the 2010 and 2012 summits leave the impression that the Tribunal had grossly undermined the expressed treaty consent of the SADC member states.

To begin, the tribunal relied on an assertion outlined in article 4 of the SADC Treaty as a justification for assuming the authority to adjudicate human rights cases. Article 4(c) states that 'SADC and its Members shall act in accordance with the following principles… Democracy, human rights and the rule of law.' In the entire Treaty, the only time that words such as human rights are mentioned is with respect to the article 4(c)-principles of the Treaty. Treaties that are dedicated to the promotion of human rights are very likely to have, among their objectives, the goal to meet a set human rights standard, I argue.[74] The objectives of SADC, stated in article 5 of the treaty, failed to reference any human rights mandate for the Tribunal. Years later, the Treaty was amended to include a new provision, article 5A(1), which labelled the objectives stated in article 5 as the common agenda for SADC. The implication, I reason, is that the promotion of human rights is not a common agenda for SADC since it is not enlisted among the objectives. Article (6)(1) directly imposed obligations on the member states to adopt measures to promote the

[72] Nathan L 'The disbanding of the SADC Tribunal: A cautionary tale (2013)870-892.
[73] Nathan L 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 872-75.
[74] See for eg: European Convention on Human Rights, article 34; ECOWAS Revised Treaty, article 15 *(2)* & ECCJ Supplemental Protocol A/SP.1/01/05; and Inter-American Convention on Human Rights, article 44.

achievement of SADC's objectives, which do not include human rights promotion. Without any human rights-centred objectives in the Treaty, I argue that it is safe to conclude that it gave rise to a court without any authority to adjudicate human rights cases, at least not in the expressed language of the treaty. Article 16(1) creates the SADC Tribunal and notes that its composition, power, functions, and procedures, among others, will be established through a protocol aimed at governing the day-to-day affairs of the Tribunal. Including a protocol related to the SADC Tribunals, all of SADC's Protocols are adopted in accordance with article 22 of the Treaty, which requires the Summit, SADC's legislative body, to adopt all protocols through the article 10(9) consensus requirement.[75] Up to the SADC Tribunal's suspension in 2010, the Summit did not adopt any protocol relating to human rights. This also begs the question of why the Summit had not adopted any human rights protocols if it intended to have a Tribunal with a human rights mandate. In the end, it only establishes the point that the Contracting Parties did not contemplate a regional court that would adjudicate human rights violations. Nevertheless, a pattern has been established that makes it possible for courts to achieve a result through activism.

Mode 3: Locus standi through modification. ECOWAS**,** with aim to promote regional integration among member states, was the perfect West African equivalent of what would later develop in Southern Africa as SADC.[76] Unlike the SADC Tribunal which assumed the authority to adjudicate human rights cases through judicial activism, ECOWAS followed a different path to transition its judicial arm into a full human rights court. I consider the Court's transformation as the third mode through which a supranational court may assume jurisdiction over human rights cases. In order to explain this mode, I examine the key legislations of ECOWAS and early rulings of the ECCJ.

In 1991, a Protocol on the Community Court of Justice (1991 Protocol), which conceptualised the ECCJ as the judicial body to interpret the ECOWAS laws, was signed by the High Contracting Parties. Its root can be traced to Article 11 of the 1975 Treaty which had provided for the establishment of a tribunal to interpret the provisions of the ECOWAS Treaty, and to resolve controversies arising from the interpretation of the Treaty.[77] However, the 1991 Protocol did not empower the ECCJ to adjudicate matters relating to private persons; it also did not grant

[75] SADC Treaty, article 10*(9)* states: 'Unless otherwise provided in this Treaty, the decisions of the summit shall be taken by consensus and shall be binding.
[76] Revised ECOWAS Treaty (1993), preamble.
[77] ECOWAS Treaty (1975), article 11.

jurisdiction over human rights violations. The Court's doors were only opened to states and institutions of the ECOWAS region.[78] Remedies for individuals were to be obtained through their states.[79] A framework of this nature, I argue, is problematic and leaves citizens at the mercy of their states for two reasons that I classify in this thesis as *diplomatic cherry-picking and the dilemma of own-state neglect.*

Diplomatic cherry-picking. On a diplomatic note, I argue that a state will most likely refrain from filing suits against another state for the purpose of maintaining relations (see my analysis on the *Bauchau Case* in section 4.3.1 on page 56). It is my contention that a scenario of this kind is most likely to cause the rights of individuals to be swept under the carpet as a sacrifice for the protection of a diplomatic relationship. As a result, diplomacy may result in cherry-picking actions on the part of states which would then result in selective protection of human rights.

The dilemma of own-state neglect. The principal question that underlies the *dilemma of own-state neglect* is how a citizen can get remedy against his own state before a supranational court for a human right violation. Under article 9 of the 1991 ECCJ protocol, an individual had to rely on his own state to file a case against another state. In the second scenario, however, it is difficult to figure out how citizens would get relief in the event their rights were violated by their own states. I contend that it would be illogical to think that a state would file a complaint against itself before a supranational tribunal for the sake of giving its citizen a relief. It is my reasoning that such neglect for the protection of human rights was among the inadequacies of the ECCJ up until 1993 when it adopted the jurisdiction to hear individual applicants.

2.2.2.1 A new day with the adoption of a citizen-centric human rights regime

In 1993, as I have noted above, the dilemma of own-state neglect came to an end when the Revised ECOWAS Treaty gave legitimacy to the ECCJ through Article 15 to hear individual applicants. In 2004, the ECCJ received its first case which challenged its inability to admit cases from individual applicants.[80] In the *Afolabi Case*, Olajide Afolabi, a Nigerian citizen, had entered a business transaction with another businessman in the Republic of Benin. Disappointingly, Afolabi could not complete the transaction because of Nigeria's closure of its borders with the Republic of Benin.

[78] Protocol A/P.l/7/91, article 9 (2).
[79] Protocol A/P.l/7/91, article 9 (3).
[80] *Olajide Afolabi v Federal Republic of Nigeria.*

He filed an application with the ECCJ alleging that Nigeria's unilateral closure of the border was in violation of the ECOWAS Protocol on Free Movement of Persons and Goods.[81] The Federal Republic of Nigeria challenged Afolabi's application and argued that the ECCJ did not have jurisdiction over human rights as well as private individuals. The ECCJ dismissed the application and declared that an individual did not have the locus standi to file an action before the court.

Although the ECCJ had struck off Afolabi's application, the ruling set the basis for expanding the jurisdiction of the court through the adoption of formal legislation. This included an additional protocol, adopted in 2005, to grant the ECCJ jurisdiction over individuals[82] At all levels, member states granted their consent by ratifying the modifying instruments. The ECCJ should also be lauded for exercising an exemplary role in interpreting its framework document through the *Afolabi Case.* Unlike the SADC Tribunal in the *Campbell Case*, the ECCJ reasoned in Afolabi that the treaty provisions were clear to the point that *locus standi* to individuals was not applicable.

2.3 ECCJ and the omission of the doctrine on exhaustion of domestic remedy (EDR)

The doctrine on the exhaustion of domestic remedy is an internationally acclaimed principle rooted in customary international law.[83] It requires victims to first use the judicial or administrative complaint procedures available under national laws before taking a complaint to the international level.[84] When the ECCJ was established, it did not require exhaustion of domestic remedies as a precondition to file a complaint. I contend that the omission of the exhaustion of domestic remedy rule (hereinafter referred to as the EDR Rule) in the ECOWAS framework has resulted in a pattern of arguments that I liken to the expression of frustration on the part of respondent states for not being allowed to cure defects in the application of national laws or policies. By implication, it is my position that ECOWAS' omission of the EDR Rule was an inappropriate waiver of a major

[81] ECOWAS Community Court (1979) *Protocol A/ P.1/5/79.*
[82]ECOWAS Community Court, Additional Protocol A/SP.1/01/05 amending the Supplementary Protocol A/P.1/7/91.
[83] See Selmouni *v. France* [GC], no. 25803/94, ECHR 1999-V, Judgment of 28 July 1999, para. 74; Schenk *v. Germany (dec.),* no. 42541/02, 9 May 2007, pg. 11, *Social and Economic Rights Action Center v. Nigeria,* Communication No. 155/96, Merits Decision, 30th Ordinary Session (2001), para. 38
[84] International Justice Resource Center, available at https://ijrcenter.org/exhaustion-of-domestic-remedies/ (accessed 5 January 2023).

domestic characteristic of contracting states to exercise the prime role in the administration of their laws.[85]

The EDR Rule plays a significant role in integrating municipal courts with supernatural tribunals which coincide with the primary goal of ECOWAS--regional and economic integration.[86] It is my contention that if there is any possibility of achieving the integration goal of ECOWAS through judicial interventions, it is via the ECCJ and with a stronger reliance on the EDR rule. The EDR rule, it has been argued, allows states to exercise control over their citizens and ensure that dockets of international tribunals are not overcrowded with matters that can be easily resolved in municipal courts.[87] On the reverse, I also argue that the EDR rule is the surest way to protect a municipal court from being unnecessarily scrutinised by supranational courts. This position is adopted with the background that domestic judicial regimes will act in the interest of justice for their citizens. In the event there is no good faith action from domestic regimes, I argue that exceptions to the EDR rules are well in place to guide intervention from supranational courts.[88]

2.4 Impeachment and human rights consideration: An argument for international rule of law

The facts of the Ja'neh scenario, stated in section 1.1.1 set the basis for the contention that impeachment in national courts ought to comply with human rights standards.[89] To briefly reiterate, Justice Ja'neh, impeached and removed from the Bench of the Supreme Court of Liberia, filed a complaint before the ECCJ. The applicant alleged that his impeachment, trial, removal from his judicial office and replacement, amounted to a violation of his rights to a) fair trial and hearing; b) the dignity of his person; and c) work under equitable and satisfactory conditions. The

[85] Sullivan, DJ *Overview of the rule requiring the exhaustion of domestic remedies under the Optional Protocol to CEDAW* (2008), p.12. Also, examples of the EDR Rule under the UN systems are as follows: CCPR-OP1, art. 5(2)(b); International Covenant on Economic Social and Cultural Rights-Optional Protocol 1, art. 3(1); CERD, art. 14(7)(a); OP-CEDAW, art. 4(1); and UNCAT, art. 22(5)(b)
[86] ECOWAS Revised Treaty, 1993, Art. 2
[87] *Velásquez Rodríguez Case*, 1988 Inter-Am Ct.H.R., (Ser. C) No. 4 at 63 (July 29, 1988); *Landaeta Mejías Brothers and others Case*, 2014 Inter-Am Ct.H.R., (Ser. C) No. 281 at 22 (August 27, 2014); *Case of Kemmache v. France*, 14992/89 Eur. C.H.R., (June 17, 1990); *Case of Nada v. Switzerland*, 10593/08 Eur. Ct. H.R., GC, at 140 (September 12, 2012); *Case of Tanganyika Law Society and Legal and Human Rights Centre v. The United Republic of Tanzania*, Afr. Ct. H.P.R. at 82.1, (June 14, 2013).
[88] Sullivan, DJ *Overview of the rule requiring the exhaustion of domestic remedies under the Optional Protocol to CEDAW* (2008), p.12.
[89] *Kabineh Mohammed Ja'neh v. Republic of Liberia*, ECW/CCJ/APP/33/19.

violations, as the applicant noted, were of protected rights guaranteed by article 5, 7, and 15 of the African Charter on Human and People's Rights. Article 5 of the Charter obligates state parties to uphold human dignity of every person. Article 7 entitles every person to the right to have his or her cause heard. Specific rights guaranteed by article 7(1) include the rights to: i) appeal; ii) presumption of innocence unless proven guilty; iii) speedy trial; and iv) representation by a counsel of one's choice.[90] The complaints of the applicant, both at his impeachment trial and before the ECCJ, also pointed to the violation of his article 7(2) rights under the Charter. Article 7(2) of the ACHPR endeavours to protect a person against the retroactive application of laws. It states:

> No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.[91]

Article 15 of the African Charter protects people's rights to work under equitable and satisfactory conditions and to receive equal pay for equal work. All the rights protected by articles 5, 7 and 15 of the African Charter are also protected in different provisions of the Liberian Constitution of 1986. Like article 7 & 15 of the African Charter, article 20 of the Liberian Constitution guarantees the right to speedy trials and notes that no person shall be deprived of life, liberty, security of the person, property, privilege, or any other right, except as the outcome of a hearing judgement consistent with the provisions laid down in the Constitution and in accordance with due process of law.[92] Succinctly put, Justice Ja'neh alleged the violation of his rights to work under article 15 of the African Charter, which as he notes, should not be taken away from him unless as a result of the outcome of due process of law guaranteed under article 20 of the Liberian Constitution.

Countering applicant's contention, Liberia argued that the applicant was impeached as a result of a constitutionally designated mandate of the legislature that should not be reviewed by any judicial tribunal other than the Supreme Court of Liberia.[93] It is the respondent state's reasoning that impeachment is a political process prescribed by the constitutions of states, and that the execution of such process constitutes sovereign duties that must never be questioned. By implication, it is

[90] African Charter on Human and People's Rights, 1981, article 7 (1).
[91] African Charter on Human and People's Rights (ACHPR), 1981, article 7(2)
[92] The Liberia Constitution,1986, article 20
[93] *Kabineh Mohammed Ja'neh v. Republic of Liberia*, ECW/CCJ/APP/33/19.

the Liberian Government's view that the processes contained within a state's functions, impeachment for example, could not be properly reviewed without being in violation of the sovereignty of a member state. The problem I see with this argument is that it leaves individuals and their rights purely at the mercy of their states. If such an argument is allowed to escape scrutiny, it will most likely pose a public policy concern where individuals would forever remain vulnerable to state suppression with justification that states are performing their sovereign constitutional duties. For such a reason, this thesis adopts the view for the existence of international rule of law where law is viewed with a lens of global governance that resonates beyond the domestic order within states.[94] Rightly so, Chesterman recalled the United Nations World Summit in 2005 when Member States unanimously recognized the need for "universal adherence, to and implementation of, the rule of law both at the national and international levels.[95] With a wider acceptance of the view that rule of law has been elevated to the international levels through treaties and international organisations, I argue that states are caught in larger regional or international networks that compel them to prohibit arbitrary actions that trample on the rights of their citizens.[96]

Contrary to the adherence to international rule of law standards noted above, the context expressed by the argument of the respondent-state mirrors a context of a utopian international community where states are all controlled by saints and angels; a flawless society where justice is pure and untainted. On the contrary, the context presents the reality of a man's quest for justice that must be provided by men who themselves are unjust; and his desire to obtain righteousness which must be delivered by men who are themselves unrighteous. Like men, it is the combination of flawed attributes, the quest for justice, and the desire for a righteous society, that bring states together in regional alliances. In the end, the collective virtues that matter to the international community are protected by all despite individual weaknesses and flaws.

[94] Chesterman S 'An International Rule of Law?' (2008) 343, & aldron J 'The Rule of Law in Contemporary Liberal Theory' (1989) 79.
[95] Chesterman S 'An International Rule of Law?' (2008) 332.
[96] Chesterman S(2008) 343; Ranney J *World Peace through Law: Replacing War with the Global Rule of Law* (2018); Heupel and Reinold (eds) *Global Governance*(2016); Kratochwil F *The Status of Law in World Society: Meditations on the Role and Rule of Law* (2014); Zangl B, 'Is there an emerging international rule of law?' (2005) 13.

CHAPTER THREE

THE JA'NEH SCENARIO AND IMPEACHMENT IN MUNICIPAL COURTS: A CRITICAL EVALUATION OF LIBERIA'S IMPEACHMENT FRAMEWORK

3.1 Introduction

This chapter surveys Liberian history, and documents instances of impeachment since independence in 1847. The key emphasis is on the impeachment of judges, and how political undertones leading to such impeachments have adversely impacted the independence of the judiciary. The study admits the insufficiency of best practices on impeachment throughout Liberian history, and as a result, examines and draws lessons on the nature of impeachments from some jurisdictions outside of Liberia.

The chapter attempts to assess mechanisms through which a relief may be sought from impeachment-related grievances within a domestic jurisdiction. I specifically consider the role of the ECCJ in adjudicating the Ja'neh scenario, and generally examine the positions of other supranational courts relating to impeachment proceedings in member states. The main intention is to see how supranational courts, such as the ECCJ, IACtHR, and ECtHR, have interpreted human rights cases that grew out of impeachments, and the level of consistency that the findings have in common with the Ja'neh scenario.

3.2 A history and overview of the Liberian legal framework on impeachment of judges

Liberia is located along the West Coast of Africa, and bordered by Guinea on the north, Ivory Coast on the east, Sierra Leone on the west, and the Atlantic Ocean on the south. It was founded by free slaves from America in 1822 and became the first black African republic upon declaring independence in 1847. The country has had two different constitutions spanning two historical periods. The military personnel of indigenous origin parted ways with the country's first Constitution in 1980, after a bloody *coup d'état* that overthrew over 100 years of Americo-Liberian

hegemony.[97] During different dispensations, different branches of the Liberian Government have risen to exercise dominance over the others. Often, the dominant branch of government would exercise its power to remove a disfavoured member of another branch whose service posed a form of threat. In the 1800s, the legislature dominated the Liberian political landscape and exercised absolute power over the executive and judicial branches. In 1871, a confrontation between the executive and legislative branches over the mismanagement of a US$500,000 loan that President Edward J. Roye had taken from London led to his removal from office. In what seems like the most significant high-profile impeachment under the 1847 Constitution, President James Payne was impeached in 1876.[98] Though these were not Judges, the scenarios help to establish a pattern of how nearly all impeachment situations of high-profile officers have had some underlying political reasons. President Payne had been impeached for refusing to implement a joint legislative directive to suspend Benjamin J.K. Anderson, then-Secretary of Liberia's Treasury, who had not filed his annual report on time.[99]

The 1900s saw the executive branch of government exercising immense power within the body politik of Liberia. By this time, it was easy for the legislature to execute plans designed by the executive branch of Government against its opponents. Under the 1847 Constitution, the procedures governing impeachment were quite susceptible to political manipulation. Justices of the Supreme Court and all other judges were required to hold their offices dependent on good behaviour. The President could remove them on the recommendation of two-thirds of both houses of the legislature, or by impeachment and conviction thereof.[100] Since removing a judge through impeachment and conviction seemed much more challenging due to the systematic steps that had to be followed, it was easier to resort to removal using a joint resolution. The most famous example of removal by a joint legislative resolution was the 1915 case of Associate Justice T. McCants Steward.[101] In 1915, Associate Justice McCants Stewart received a letter from Liberian President

[97] Ernest JY *Historical Lights of Liberia's Yesterday and Today* (1967) 19: The term Americo-Liberian references Liberians of American descent who migrated to Liberia following the end of slavery in America.
[98] *The Petition of CDB Kings*, 3LLR 337(1932).
[99] Tim G 'The Impeachments and Trials of President James S. Payne and Secretary Benjamin J.K. Anderson: The Documentary Evidence'(1999) 27-29.
[100] Constitution of the Republic of Liberia, 1847, article 4, section 1.
[101] *Re Notice from the President of Associate Justice's Removal* [1915] LRSC 1; 2LLR 175 (1915).

Daniel E. Howard, informing him of his removal by a joint Legislative resolution. The content of the letter was as follows:

> I have the honour to inform you that you are hereby removed from the office of Associate Justice of the Supreme Court of Liberia, in keeping with a Joint Resolution of the Legislature passed at their present session, a copy of which is herewith enclosed.[102]

The joint resolution authorised President Howard to remove Justice Stewart without stating any reason. Unfortunately, Justice Stewart had no external or regional judicial body where he could seek any relief. That was in 1915, when the idea of supranational judicial bodies like the ECCJ was nonexistent. Justice Stewart only had the domestic judicial system from which he could seek relief. If the domestic system operated on a well-planned conspiracy theory like it was widely rumoured in the case of Justice Stewart, a judicial officer subject to a removal ploy would have no other venue for further remedy. As such, the only obvious outcome was to allow Justice Steward's rights to crumble, while the will of the state prevailed. Such oppression of human rights was a real challenge, where the executive branch of government could easily use state institutions to retaliate against political opponents. Several sources point to the role that Justice Steward had played in being a solid critic of President Howard, and have, on that basis, concluded that the Justice was the target of a political removal.[103] His quest for a domestic remedy simply collapsed, and he frustratedly spent the rest of his life outside of Liberia. Before then, Justice Stewart, troubled by his removal, wrote to the Liberian Supreme Court seeking intervention. His communication, unsupported by affidavit, was written not under any specific form of remedy but by way of a letter captioned 'Statement of the Facts'.[104] As a result, the Court found a technical legal ground to dismiss his claim.

The current Liberian Constitution would later come into effect in 1986, after a brief rule by military decrees under the People's Redemption Council (PRC)[105] Government of Samuel K. Doe. In line with the 1986 Liberian Constitution, a Justice may be removed from office upon impeachment by the House of Representatives and subsequent conviction by the Senate based on proved

[102] *Re Notice from the President of Associate Justice's Removal* [1915] LRSC 1; 2LLR 175 (1915)
[103] Albert B *the Black Past* (2007); Albert B *T McCants Stewart: South Carolina Encyclopedia online* (2016); Wynes CE *T. McCants Stewart: Peripatetic Black South Carolinian* (1979)311-17
[104] *Re Notice from the President of Associate Justice's Removal* [1915] LRSC 1; 2LLR 175 (1915)
[105] The PRC refers to the military government that ruled Liberia from 1980 to 1985 following the assassination of President William R. Tolbert.

misconduct, gross breach of duty, inability to perform the functions of the office, or conviction in a court of law for treason, bribery, or other infamous crimes.[106] The Liberian legislature is required to make rules governing impeachment.[107] The removal of Justice Ja'neh from the Supreme Court's bench generated debate as to whether the Liberian legislature had ever made rules for impeachment. Though this was not the first time a judge was removed from the Supreme Court bench, the Ja'neh debacle will go a long way in setting the blueprint for public discussions around impeachment trials under Liberia's 1986 Constitution.

As early as 1987 following the adoption of the new Constitution, Chief Justice Chea Chepo became the first man to be impeached. Justice Chepo's impeachment was as controversial as Justice Ja'neh's. Some sources indicate that the former had resigned from office upon learning of his potential impeachment, but that the then Liberian President, Samuel K. Doe, refused to accept his resignation.[108] In the end, it is argued that the singular political motive of President Doe's administration was to see Justice Cheapo impeached, criminally prosecuted,[109] and then disqualified from holding public office for the rest of his life in keeping with the 1986 Constitution.[110] No records have been discovered to clarify whether the legislature made any impeachment rules during Justice Chepo's impeachment case. As a result, the impeachment has been criticised for being stage-managed. The 1987 US State Department Report on Human Rights Practices reported that many had viewed the impeachment as having political undertones owing to disagreement between Justice Chepo and President Doe over the arrest of Judge Harper S. Bailey.[111] Chea Chepo had arrested and detained two persons, including Judge Bailey, for allegedly attempting to bribe him. The Chief Justice facilitated media coverage of the arrest, and repeated allegations of presidential involvement in the bribery.

Like that of Justice Chea Chepo, Justice Ja'neh's impeachment elicited mixed reactions. Some have criticised it for falling short of the constitutional requirements for impeachment and other

[106] Constitution of the Republic of Liberia (1986), article 71.
[107] Constitution of the Republic of Liberia (1986), article 43.
[108]Staff, 'Chea Cheapo: Progressive Icon and Supreme Court Chief Justice is Dead' *The Liberian Listener* 20 September 2020.
[109]Immediately upon removal from Office, Justice Cheapo was arrested on charges of defaming the President, but he got extensive popular support from the citizens. Members of the Montserrado Bar Association resolved to boycott Judge Bailey's Court until he was removed.
[110] The Constitution of the Republic of Liberia (1986), article 43.
[111] US Department of State *Country Report on Human Rights Practices* (1987), Document #1033572 - ecoi.net.

sound judicial virtues such as the due process of law. Others, primarily apologists of the Government of President George M. Weah, believe that Justice Ja'neh was granted due process, and that his removal from office was consistent with the Liberian Constitution. The distinct attribute of Justice Ja'neh's impeachment is the controversial application of controversial impeachment procedures that did not exist during the impeachment of Justice Chepo and were all made at the time of the Ja'neh scenario.

The Liberian Constitution is modelled after the American Constitution, where impeachment proceedings begin in the House of Representatives and end in the Senate. After the House impeaches, the Senate conducts a trial to determine guilt or acquittal. Consistent with this practice, Ja'neh was impeached, and the Senate took charge of the trial and convicted him.[112]

Under the Liberian Constitution, the Chief Justice presides over impeachment trials. Arguably, the presence of the Chief Justice memorialises the judicial attributes of the impeachment process and makes it a quasi-judicial proceeding. From the procedural perspective, the Liberian Civil Procedure Law guided the practice and procedure during the Ja'neh impeachment, but some aspects, including evidence production and charges to the jury, were less rigorous than required in non-impeachment cases.

When it comes to applying for the recusal of a judge, it appears as though there is some inconsistency between the Liberian civil procedure law and the Constitution. For instance, the grounds for the recusal of a presiding judge in non-impeachment cases are stated in Liberian case law and civil procedure laws. There is some doubt whether it is applicable for the Chief Justice to recuse himself in the case of impeachment proceedings. This is because the Chief Justice alone is designated as the Judicial Officer to preside over impeachment. While it may be sound to argue that his recusal could cause constitutional uncertainty over a particular impeachment trial, it remains doubtful whether the framers of the Constitution intended that the Chief Justice should preside even in the face of a gross conflict of interest with a well-established basis. In the Ja'neh scenario, a request was made for Chief Justice Korkpor to recuse himself. But noting that the reasons provided as grounds for recusal were not supported by facts and were therefore inconsistent with the Liberian Case law requirements for recusal, Chief Justice Korpkpor remained

[112] Liberian Const. (1986) Article 43.

and presided over the trial to the end.[113] Perhaps the dismissal did well to prevent a possible constitutional debate over the question of what would happen if the Chief Justice recused himself from impeachment. The question of recusal, being out of the scope of this thesis, is laid to rest.

With the application of the adversarial system, the Liberian Civil Procedure Law was at work as the key strategic plan governing the litigation. Several rule of law values, guaranteed by both the Liberian Constitution and international law principles, were deemed to be on trial. Values to safeguard the respect for human rights and dignity were being tested, both under the dictates of the ECCJ on the international front and the Liberian municipal legal regime on the domestic front. The most popular argument against Ja'neh's impeachment relates to the lack of the elements of due process which is considered lengthily in this thesis.

3.3 The facts, context and constitutional implications of Justice Ja'neh's case

The petitioners for the impeachment of Justice Ja'neh and their reasons for doing so have been set forth in section 1.1.1. It is important to note that all grounds for the impeachment were in connection with judicial opinions that the justice had rendered while in the official performance of his duties as an Associate Justice of the Supreme Court of Liberia.

After the petition for impeachment was filed, the House of Representative constituted a Special Ad-Hoc Committee (SAC) to probe the allegations and advise plenary. Justice Ja'neh protested the formation of an extra committee, arguing that the House of Representatives already had a Judicial Committee vested with authority to probe legal matters.[114] Despite Ja'neh's objection, the SAC proceeded with its function and presented its report to the Plenary of the House of Representatives on 27 August 2018, recommending that Ja'neh be impeached. The grounds for impeachment recommended by the SAC included: i) alleged theft of records of the House of Representatives; ii) filing of a petition for a writ of prohibition against the impeachment proceedings; and iii) issuance of a writ of prohibition growing out of a petition filed by Srimex and Connex against the Liberia Petroleum Refining Corporation (LPRC), the agency of

[113] *Logan v RL* [1985] LRSC 44; 33 LLR 434; *Ketter v. Dennis*, [1937] LRSC 5; 5 LLR 375 (1937) have all concluded that a judge's interest or other questionable relationship with the case before a court or the parties thereto imposes a duty to recuse himself on his own motion, or on the motion of a party wishing to object to his sitting on the matter.

[114] *Ja'neh v The Republic of Liberia & Anor*, Judgement ECW/CCJ/JUD/28/20, p.8. para 17.

government that regulates the sale of petroleum in Liberia.[115] Based upon the SAC's recommendation, the House of Representatives impeached Justice Ja'neh.[116] A further analysis on the SAC is provided in 3.3.1 below.

The Liberian Constitution requires the Liberian Senate to conduct a trial to determine the guilt or acquittal of an impeached Justice.[117] Following the Senate's trial, Justice Ja'neh was found guilty on a single count that related to the issuance of the writ of Prohibition against the LPRC in the petition that was filed by Srimex and Conrnex. LPRC's attempt to enforce a petroleum tax instituted by executive action was challenged by Srimex and Cornex, two corporations that deal in petroleum. Srimex and Cornex filed a writ of prohibition and prevailed on the argument that the tax was derived from an executive action in violation of the law-making function of the legislature.[118]

Before the Ja'neh scenario, the arbitrary removal of public officials by political actors had exposed the 1847 constitution to criticism and justified its suspension when the military junta of Samuel K Doe ruled Liberia in 1980. The new constitution, adopted in 1986, introduced two key reforms to protect judicial independence. The 1986 constitution did not only designate impeachment as the sole means to remove a judge from office but also mandated the legislature to make the rules before proceeding with any impeachment.[119] However, it was only a matter of time before testing whether safeguards for the protection of judicial independence have done enough to protect judges against political manoeuvring and human rights violations. The removal of Justice Ja'neh is a classic example of how vulnerable judicial officers can be when they are perceived as a threat to the existing interest of a ruling class. The Ja'neh scenario has left several lessons to be learnt. First, it shows that the reforms of yesterday could be manipulated today depending on what political interest is at stake. Secondly, it shows that when safeguards to protect human rights are established as parts of legal reforms, they play meaningful roles in exposing those who undermine systems to violate the norms of human rights and democracy for the sole purpose of protecting existing political interests. And finally, it points to the significance of the roles of supranational courts in

[115] *Ja'neh v The Republic of Liberia & Anor*, Judgement ECW/CCJ/JUD/28/20, p7, para 12.
[116] *Ja'neh v The Republic of Liberia & Anor, Judgement ECW*/CCJ/JUD/28/20, p.8-9. para 18
[117] The Liberia Constitution (1986), article 43.
[118] The Liberia Constitution (1986), article 34*(d)* makes it a function of the Legislation to levy taxes, a duty it usually performs through legislation.
[119] Liberia Constitution (1986), article 43.

checking domestic judicial actions and human rights violations. This research considers the final point in detail, while noting that the first two points are outside of its scope.

3.3.1 Examining the legality of the SAC and its actions

As stated above, the House of Representatives, upon receiving the petition to impeach Justice Ja'neh, constituted the SAC to examine it and to advise plenary on the next step. I argue that both the SAC and its actions were problematic and with no legal foundation. I identify two problems that were wrong with the SAC: first, it was not an independent and impartial body; and secondly, its actions were arbitrary and set on a foundation to predict a biased outcome. I will first examine the partiality of the SAC before scrutinising its actions.

As opposed to the SAC, it is my contention that the authority to investigate the petition for impeachment was properly vested in the Judiciary Committee consistent with Rule 57.3 of the House of Representatives' Standing Rules (hereinafter called House Rule 57.3).[120] House Rule 57.3 requires the Judiciary Committee to probe into matters relating to a) the administration of Justice in Liberia; b) judicial proceedings-civic and criminal; c) constitutional amendments and constitutional matters; and d) the courts and judges of Liberia. Given that the SAC was constituted to take charge of what the judiciary committee was properly in place to do, I argue that the SAC was incompetent and in contravention of several human rights instruments that Liberia is a party to. This conclusion is supported by Principle 3 of the UN Basic Principle on the Independence of the Judiciary, which defines the competency of a tribunal as its exclusive authority to decide whether an issue submitted for its decision is within its scope or mandate as defined by law.[121] As will be seen below, no rules existed among the House standing rules to support the formation of any ad-hoc committee. Howbeit, I find it prudent to ascertain further if the SAC, despite an incompetent tribunal, was capable of conducting an independent and impartial judgement consistent with the UDHR, African Charter and the Liberian constitution. [122]

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[121] United Nations Office on Drugs and Crime *Basic Principles on the Independence of the Judiciary. United Nations Office on Drugs and Crime*, 1985, Principle 3.

[122] The rights to speedy trial by an impartial and independent tribunal are guaranteed by article 10 of the UNDR; article 7(4) of the African Charter and chapter 3 of the Liberian constitution.

I deploy the Impartiality-Independence test adopted by the ECtHR as a basis to reach a conclusion.[123]

Under the ECtHR case-law, in order to establish whether a tribunal is independent, notably of the executive and of the parties to the case, regard is had, inter alia, to: the manner of appointment of its members and their term of office; the existence of guarantees against outside pressures; and the question of whether the body presents an appearance of independence.[124] According to Papayannis, independence entails the absence of family or social ties, professional or business relationships, etc., between the arbitrator and one of the parties or any third party that has an interest in the proceedings.[125] For purposes of this thesis, I consider both independence and impartiality as one and the same, with the sole intention of ensuring confidence and proper authority in an investigating body to act. It may also be logical to argue that the SAC was constituted to preside over a process for the sole purpose of producing an impartial result and that in the course of doing so, the competence of the body did not matter. This reasoning is closely connected to the ECCJ ruling in the case *Gabriel Inyang & another v Federal Republic of Nigeria (the Gabriel Inyang case*). In the *Gabriel Inyang case*, the ECCJ adopted a reasoning of the African Commission on Human and Peoples' Rights in support of the view that a military tribunal was incompetent to adjudicate a civilian case. With respect to impartiality, the ECCJ held that because the military tribunal was composed of agents from the executive branch of government, there was an appearance, if not actual lack of impartiality that violates Article 7(1)(d) ACHPR. I also find it reasonable to examine the composition of the SAC against the ECtHR's subjective and objective tests with respect to impartiality. While the subjective test lends regards to the personal conviction and behaviour of the investigating officers, the objective test seeks to ascertain whether the tribunal itself and, inter alia, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[126] Relying principally on the objective test, it is reasonable to

[123] Independence: *Case of Beaumartin v France (Application no. 15287/89), ECtHR, 24 November 1994 ;* In the case of Stafford v. the United Kingdom, *(Application no. 46295/99)*, ECtHR, 28 May 2002 & *Case of Oleksandr Volkov v. Ukraine*, (Application no. 21722/11), ECtHR, 9 January 2013. Impartiality: *case of Wettstein v. Switzerland* (Application no. 33958/96), ECtHR, 21 December 2000; In the case of Ramljak v. Croatia *(Application no. 5856/13), ECtHR*, 27 June 2017.

[124] *case of Wettstein v. Switzerland* (Application no. 33958/96), ECtHR, 21 December 2000; In the case of Ramljak v. Croatia *(Application no. 5856/13), ECtHR*, 27 June 2017.

[125] Papayannis DM 'Independence, impartiality and neutrality in legal adjudication'(2016) 33–52. *Issues in Contemporary Jurisprudence*, available at https://doi.org/10.4000/revus.3546 (accessed 10 January 2022).

[126] case of Buscemi v. Italy (Application no. 29569/95), ECtHR, 16 September 1999.

conclude that the composition of the SAC gave rise to a perception that the impeachment was a project of the ruling political party and that the independence and impartiality of the investigating body, in this case the SAC, was farfetched. The Petitioners for impeachment, Thomas Fallah and Moses Acarus Gray, were stalwarts of the governing political party, Congress for Democratic Change. The formation of all committees is within the authority of the House Speaker Bhofah Chamber, also a member of the governing polity party. House Speaker Chamber leveraged his authority to form the SAC. The composition of the committee formed a strong circumstantial basis to cast doubt on its independence and impartiality and pointed to a conclusion that it was incapable of rendering an impartial judgement. Out of the seven SAC members, four (Kannie A. Wesso, Dixon Seboe, Isaac B. Roland and Clarence Gahr) were from the governing party, sufficient enough to form a majority block; two were from political parties either in alliance with the governing party (Jeremiah Koon-MDR) or with a Political Leader serving in government (Edward Karfiah- of the People's Unification Party whose political leader, J. Emmanuel Nurquay, was then head of the Civil Aviation Agency).

In addition to the above, I provide more analysis on the illegality of not only the SAC but its actions as well. The SAC developed mini rules as the General Standing Rules of the House of the Representative, referenced above, did not have an impeachment provision. I contend that such practice was strange and inconsistent with the Liberian Constitution. Rules to govern either house of the Liberian Legislature are authorised under article 38 of the constitution.[127] Consistent with the constitutional authority, the 54th legislature adopted the current House standing rules that were validated and approved by the 52nd Legislature.[128] The Rules make reference to only two types of committees: Statutory Committee, Rule 57; and Standing Committees, Rule 58. No reference is made to any ad-hoc committee. In fact, there is no mention of the word 'ad hoc' in all provisions of the rules. It is therefore safe to argue that the speaker did not have authority to form an ad-hoc committee.

3.3.2 The house impeaches without article-43 mandated rules[129]

I analyse the role of the Liberian House of Representative in the Ja'neh scenario and argue that it represented an embodiment of the breakdown of the rule of law at the highest level. In support of my argument, it is my contention that the impeachment of a judicial officer from the nation's highest court without the relevant impeachment rules was contrary to article 43 of the Liberian constitution. To that end, I draw a correlation between the House's actions and the constitutional requirement for impeachment, to reach the conclusion that the legislature violated the standards of *due process*.

Building on political developments that culminated in the abuse of power during the First Liberian Republic, from 1847 to 1980, I content that the intention of the framers of the Constitution, when they authorised the House in article 43 to develop the rules governing impeachments, was to ensure that the principles of due process of law are adhered to. In the absence of rules to govern judicial or quasi-judicial proceedings such as impeachments and removal from office, politicians are directly given a blank cheque to use wider discretion which could possibly be abused. It is my contention that for the best-case scenario, fully developed impeachment rules will tend to prevent such abuse from the very beginning and set in place an opportunity to challenge any aspect of any impeachment that is contrary to established rules. Because the absence of any such rules amounts to indicting an accused without rules, I submit that any impeachment of such nature is unarguably outside the scope of due process.

Justice Ja'neh did not allow legal faults referenced above to go unnoticed. He had, for instance, petitioned the Supreme Court to prohibit the lawmakers from proceeding without rules. In the Liberian legal system, like those of many other countries, the Supreme Court is the final arbiter of justice and serves as the only forum where all constitutional questions are answered.[130] The Supreme Court refused to grant his prohibition petition, thereby allowing the impeachment to move forward. Two of the five justices on the Liberian Supreme Court Bench dissented. Initially, Associate Justice Sie-A-Nyene G. Yuoh had presided in the Court's chamber when the petition for

[129] Liberian Constitution (1986), article 43, mandates the Liberian Legislature make rules and regulations that would govern impeachments. Although these rules were never derived, I have referred to them throughout this mini-thesis as the *Article 43 Mandated Rules.*
[130] Liberian Constitution (1986), article 66.

prohibition was filed.[131] In a communication calling the parties to a conference, she directed the House to refrain from proceeding with the impeachment pending an outcome of the petition for prohibition.[132] In light of Justice Yuoh's temporary restraining order, verbal exchanges ensued, with the House asserting that its initiation of impeachment was within the ambient of its constitutional duties. In a letter to Justice Yuoh, the House wrote:

> The House thinks that the writ violates Article 3, separation of powers clause, Article 42, immunities clause, Article 43, impeachment powers, and a long line of cases and precedents in this jurisdiction and its progeny. You are therefore advised in the interest of our constitutional democracy and consistent with the separation of powers and checks and balances to vacate this writ and avoid embarrassment to the sacred institution of the Supreme Court.[133]

The Liberian legal system requires constitutional issues to be determined by the full bench of the Supreme Court. The petition for prohibition, given its constitutional nature, was forwarded to the full bench of the court. In the Supreme Court's majority opinion, Chief Justice Francis Korkpor quashed the preliminary stay order that Justice Yuohn had issued and ordered the prohibition petition dismissed. He would later preside in the Senate over the trial to remove Justice Ja'neh in keeping with his constitutional duty. Writing for the majority in the prohibition ruling, the Justice Korkpor noted:

> The settled law in this jurisdiction is that the writ of prohibition will not lie 'where the act complained of is not wrong or illegal and is within the scope of authority of the person or office complained against.' *Komai v The Ministers of Justice and Public Works* [1989] LRSC 40; 36 LLR 518, 522 (1989). This Court has also held that the writ of prohibition will not lie or will be disallowed where it is shown that it is intended to prevent, prohibit or obstruct an administrative agency of government from exercising its lawful and

[131] The Chief Justice appoints justices in chamber to receive and act on all cases, subject only to the review of the full bench of the supreme court.
[132] *His Honor Kabineh M. Ja'neh, Associate Justice of the v. The House of Representatives of the National Legislature* (2018), Petition for Prohibition.
[133] *His Honor Kabineh M. Ja'neh, Associate Justice of the v. The House of Representatives of the National* Legislature, Decided Nov. 30, 2022.

administrative duties and responsibilities. *Wesseh v Tubman* [1979] LRSC 1; 28 LLR 3, 12 (1979).

The ruling was partly premised on the principle of law that implies that prohibition will not lie or will be disallowed where it is shown that it is intended to prevent, prohibit, or obstruct an administrative agency of government from exercising its lawful and administrative duties and responsibilities.[134] I argue that the conclusion reached by Justice Korkpor is problematic and a wrong application of the referenced rule. I contend that Justice Korkpor asked the wrong question when his determination was on the basis of whether a body can be prohibited from performing a duty assigned to it by the Constitution, seen in his reference to *Wesseh v Tubman.*[135] Rather, I argue that the right question should have been whether a body can be prohibited from proceeding in a wrong or illegal way in the course of performing its constitutionally assigned task? While the court decided on the former, I argue that the prohibition should have been upheld based on the latter. My argument is supported by a chain of rulings from the very Liberian Supreme Court, which support the conclusion that 'writ of Prohibition will lie, not only to prevent the doing of an illegal act but to also undo that which has been illegally done'.[136] The House of Representatives admitted a bill of impeachment in the absence of article 43 Mandated Rules on impeachments. Such omission, I argue, was a dereliction of a constitutionally designated function that would have safeguarded the petitioner against arbitrary impeachment and removal from office. For a clearer analogy, I thought to make a comparison with the contract law principle on what is known as a condition precedent.[137] I argue that the impeachment rules were the condition precedent to the impeachment itself. Where certain action (in this case the impeachment of a Judge) is conditioned on a prior action, (in this case the legislature's adoption of rules on impeachment), the latter action is void ab initio when the prior condition is not met. By this reasoning, the most obvious conclusion will be that an impeachment that should have taken place following the adoption of article 43 Mandated Rules cannot validly be held in the absence of such rules. To conclude otherwise is to confirm that such impeachment was illegal. I am of the conviction that the article 43 Mandated

[134] Wesseh v. Tubman [1979] LRSC 1; 28 LLR 3.
[135] *Wesseh v. Tubman* [1979] LRSC; 28 LLR 3
[136] *Honorable Jenkins K. Z. B. Scott, Minister of Justice versus The Job Security Scheme Corporation, Inc.,* 31 LLR 552, Syl. 1.
[137] Black's Law Dictionary ,8 ed. (2005) defines condition precedent as an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered.

Rules would have engendered different reliefs, final or interlocutory, that parties subjected to impeachment could have had the right to take advantage of. It is also obvious that article 43 Mandated Rules would set forth a question of law that could serve as the grounds for challenges on appellate reviews. These advantages were never available to the impeached Justice since there were no rules in the first place. As the old maxim notes, it is part of my submission that what is not done legally is not done at all; hence my submission that removing a judge in ways that were not legality tenable was an abrogation of the constitution that resulted in the break of rule of law as well as an assault on due process standards.

3.3.3 The Senate's trial and its ex-post facto implication

On 18 August 2018, the House concluded its impeachment against Justice Ja'neh and passed the task over to the senate to conduct a trial to ascertain whether the accused was guilty as charged in the article of impeachment. The Senate immediately amended Rule 63 of the Senate Standing Rules.[138] The Amended Rule 63 defined the procedures governing impeachment within the Senate. The Standing Rules of the Liberian Senate, like those of the House of Representatives, are creatures of article 38 of the Liberian Constitution, which authorises each House to adopt its rules and procedures.[139] I argue that rules made under article 38 of the Liberian Constitution are far different from the article 43 Mandated Rules. The application of amended Rules 63 to the trial of Justice Ja'neh raises two legal questions: 1) Was the amendment consistent with the article 43 mandate requiring the legislature to prescribe rules for impeachment? and 2) Assuming the Amended Rule 63 qualifies for the legislature's article 43 mandate, could it legally apply in the case of Justice Ja'neh? I have answered both questions in the negative as can be seen from the details below.

As I stated above, the first question is whether Amended Rule 63 can properly satisfy the article 43 mandate of the Liberia Constitution. For the purpose of impeachment, the legality of the amended Rule 63 would depend on two conditions: 1) that it does not contradict the impeachment procedures authorised under article 43 of the Constitution (assuming that such procedures were already adopted), and 2) that the amendment does not become applicable to a particular case

[138] The Liberian Senate *Standing Rules* (2009). The Rules were adopted by the 52nd Legislature and remain valid to date

[139] Liberian Constitution (1986), article 38 States in Part that, "Each House shall adopt its own rules of procedure, enforce order, and with the concurrence of two-thirds of the entire membership…"

actively pending at the time of the amendment occurred.[140] In the Ja'neh Scenario, there is a gross contravention of these conditions, thereby bringing the legality of the amended Rule 63 into question. Overall, the House of Representatives had made no input into the amendment, and the amended rule was used to try a case that was actively pending before the Senate at the time of the amendment. Since the amended rule does not qualify for the legislature's article 43 mandate, its application to Ja'neh's case leaves us with one of these two conclusions: either the accused was illegally removed from office, or the rule was wrongly applied in violation of the doctrine barring retroactivity. Further details have been provided below.

The second question raised by the amendment of Rule 63 is whether the amended rule could legally apply to the Ja'neh case. In responding to this question, I assume for all purposes of this research that the amendment met the article 43 mandate of the Liberian Constitution (which was far from the case as I have argued in my response to the first question above), which requires the legislature to prescribe procedures for impeachment. Again, my answer is no, it does not apply. The retroactive application of a law is a violation of the doctrine of legality (also known as nullum crimen sine lege) widely known in international laws and affirmed by the Liberia constitution. By the *nullum crimen sine lege* standard, international criminal law has firmly established the principle that prohibits a person from facing punishment for an act before it was outlawed. The legality principle, affirmed in article 11(2) of the Universal Declaration of Human Rights, as well as many human rights treaties and the national constitutions of states, notes: 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed'.[141] It appears reasonable to argue that *nullum crimen sine lege* is inapplicable in the Ja'neh scenario. Such an argument could be squarely on the basis that the grounds for impeachment were long defined in the Liberian Constitution before the Justice Ja'neh case. Article 71 of the Constitution requires the Chief Justice and the Associate Justices of the Supreme Court and the judges of subordinate courts of record to hold office during good behaviour and authorises their removal by impeachment and conviction by the legislature based on proven misconduct, gross breach of duty, inability to

[140] Liberian Constitution (1986), article 21 *(a)*.
[141] William S, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals (2012) recounts* article 11(2) of the UDHR.

perform the functions of his or her office, or conviction in a court of law for treason, bribery, or other infamous crimes.

As seen above, article 71 enlists the grounds for impeachment to include: a) proven misconduct; b) gross breach of duty; c) inability to perform the functions of a judicial office; or d) conviction in a court of law for treason, bribery, or other infamous crimes. It is my contention that any grounds for the removal of a Justice would have to be subjected to a substantial examination. I argue that such substantial examination must be guided by procedural rules as was envisaged by the Liberian Constitution under article 43. While the substantive reason for impeachment was set in article 71, as stated above, it remains unarguable that article 43 mandated the legislature to prescribe the procedures for impeachment, something that was not done up to Justice Ja'neh's impeachment. Blending multiple versions of the doctrine of legality in key human rights instruments, and also affirmed in the Liberian constitution, I submit with conviction that an accused judge is equally excused from facing an impeachment prosecution if the procedures to govern such prosecution were not in existence at the time the impeachable offence was committed. The Liberian Constitution is supportive of this view, as it reiterates the doctrine of *nullum crimen sine lege* in article 21(a) as follows: 'No person shall be made subject to any law or punishment which was not in effect at the time of the commission of an offence, nor shall the legislature enact any bill of attainder or *ex post facto* law'.[142] The ex post facto provision of the Liberian Constitution generally prohibits the retroactive application of laws. I argue that this provision covers substantive laws that define offences, as well as the procedural laws that guide the prosecution of such offences. In fact, due process is undermined when there are no procedural laws to guide the prosecution of alleged crimes. It is therefore safe to conclude that subjecting Justice Ja'neh to impeachment proceedings in the absence of the article 43 mandate rules of the Liberian Constitution was a violation of the due process of laws requirements envisaged by national and international laws.

3.4 The politics of good behaviour v the legality of judicial independence

As stated above and throughout this thesis, the Ja'neh scenario chronicles the removal of a judge from office for reasons connected to his judicial opinions. This leaves a new precedent that implies that a judge's conduct can be categorised as unethical by nature of his or her judicial opinions. It

[142] Liberian Constitution (1986), article 21 *(a)*.

is my contention that this view is problematic, and incompatible with the Liberian Constitution, the African Charter, and other human rights conventions.

Human rights treaties as well as the constitutions of states have ensured the existence of mechanisms to safeguard judicial independence. For instance, The United Nations (UN) upholds the legality of judicial independence through a well enumerated principle quoted as follows: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[143] Also, the Africa Charter protects judges from punishment for their judicial opinions.[144]

Similarly, the IACtHR has agreed that the independence of the judiciary must be upheld and demonstrated that by mounting the courage to review an action by the Government of Peru to remove justices from the bench of the Constitutional Court.[145] The IACtHR reasoned that independence of judges was one primary intent for the separation of public power that must be protected at all times.[146] But such reasoning is not just unique to the IACtHR. In a situation where the Greek Parliament adopted a legislation to annul the jurisdiction of the court over cases relating to compensation against the Government, the ECtHR held that the law was in violation of the independence of the court.[147] The ECtHR established in its ruling that it is a violation of the independence of the judicial authority for any state organ other than the judiciary itself to try to change judicial opinions.[148]

As has been recounted in the above human rights instruments, the independence of the judiciary is also protected by the Liberian constitution. I argue that under a municipal regime, constitutional provisions that protect judicial independence serve as mediums through which domestic laws

[143] United Nations General Assembly *Basic Principles on the Independence of the Judiciary* (1985), adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6
September 1985 and endorsed by UNGA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[144] ACHPR, article 26.
[145] *The Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsona v. Peru)*, IACtHR Judgement of 31 January 2001, Series C NO. 55, para. 71.
[146] *The Constitutional Court Case*, IACtHR judgement of 31 January 2001, Series C No. 55, para. 73.
[147] *Stran Greek Refineries and Stratis Andreadis v. Greece,* ECtHR judgement of 9 December 1994, Series A301-B, para. 49.
[148] *Findlay v. The United Kingdom, doc. cit.*, para. 77; and *Campbell and Fell v. The United Kingdom*, ECtHR judgement of 28 June 1984, Series A80, para. 79.

reaffirm international human rights standards. Thus, the Liberian Constitution reaffirmed similar international law principles in article 73, which immunes judges from being held liable civilly or criminally for the judicial opinions that they render.[149]

3.4.1 Politicisation of good behaviour

The Liberian Constitution requires judges to remain in office based on good behaviour and authorises their removal by the legislature only when they breach such good behaviour.[150] I argue that the breach of good behaviour as a ground to remove judges, has been defined by the discretion of politicians, and has therefore become a loose concept that incentivises legislative removal of judicial officers at will. It is my reasoning that the authority granted to politicians to identify what constitutes good behaviour serves as carte blanche for politicisation and the greatest potential to undermine judicial independence. Gerald Ford, a former member of the US House of Representatives, notoriously defined what constitutes an impeachable offence and conviction as follows: 'An impeachable offence is whatever the House of Representatives consider it to be at given time in history; conviction result in whatever offence or offences two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office'.[151] Good behaviour is often traced to the Act of Settlement which granted judges *tenure quamdiu se bene gesserint*, interpreted as 'for so long as they conduct themselves well'.[152] Tushnet notes that the legislature's power to define good behaviour now leaves a floodgate open so wide that the discretion has left politicians to revert to what he called constitutional hardball. Professor Tushnet notes that 'constitutional hardball occurs when competing arguments, within the bounds of existing constitutional norms, are made about what the constitution permits.[153]

My reference to the term 'constitutional hardball' relates to how the lawmakers exercised their discretion to remove Justice Ja'neh from office, citing the very constitution that the applicant claimed was violated. It is my view that the legislature succeeded in sending out a message that the Justice had breached his good behaviour bond guaranteed by article 71 of the Constitution. Put

[149] The Liberian Constitution (1986), article 73.
[150] Liberian Constitution (1986), article 71.
[151] Youngjae L (2005) 407.
[152] Ross GW '*Good Behavior' of Federal Judges,* 119 (1944) p 119; Kramer & Barron *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of 'During Good Behavior*' (1967) p. 456; and The United States Constitution, article III, Section I.
[153]Tushnet MV 'Constitutional Hardball' (2004) 529-550.

in plain language, the legislature has concluded an argument that implies that Justice Ja'neh was impeached for his judicial opinion that was in breach of the good behaviour standards contemplated by the constitution. I argue that this position amounts to a constructive amendment to article 71 of the Liberian constitution which protects judges for their judicial acts including the opinions they render. That conclusion would be to admit that the constitution was grossly violated since amendments are only allowable through referendum by the popular votes of the citizen.[154] I therefore argue that Gerald Ford's view that 'impeachment is whatever the legislature says it is', could not have implied that the legislature could define an impeachable offence in ways that abrogate the very constitution that grants legislators the authority to impeach.

[154] Article 92, Liberia Constitution of 1986.

CHAPTER FOUR

THE JA'NEH CASE BEFORE THE ECCJ: HUMAN RIGHTS AND THE LIMITS OF THE GOVERNMENT OF LIBERIA'S SOVEREIGNTY ARGUMENT

4.1 Introduction

In this chapter, Liberia's argument relating to sovereignty is considered. In examining this argument, the chapter analyses states' obligations under treaties and reaches the conclusion that those obligations are possible constraints to claims of sovereignty where a conflict arises. It also draws a link between international laws and their subsequent domestication to reflect the will of the Sovereign.

4.2 Brief context of Ja'neh's application before the ECCJ

Removed from the Liberian Supreme Court Bench for his judicial opinion, Justice Ja'neh filed an application before the ECCJ complaining that his rights to a fair hearing and impartial trial; and rights to work and dignity of person were violated (See section 1.1.1 and 3.3 for detailed facts).[155] Responding to Ja'neh's application, Liberia filed an objection challenging the jurisdiction and competence of the ECCJ among others. Specifically, Liberia's objection in part is noted as follows:

> i. That the Court lacks jurisdiction over the person of individuals as defendant;
>
> ii. That the Court lacks the competence to adjudicate on cases which require the Court to interpret and apply domestic laws of member states;
>
> iii. That the instant suit requires the Court to sit as an appellate court and to review the decisions made by the Supreme Court of Liberia and actions taken by its Legislative Assembly.[156]

The ECCJ examined the application and ruled on 10 November 2020 that Liberia had violated the rights of Applicant Ja'neh. Before reaching its final ruling, the Court reasoned that it had the jurisdiction to hear the case since it related to a human rights violation that was not pending before

[155] *Ja'neh v The Republic of Liberia & 1 Anor.*, Judgement No. ECW/CCJ/JUD/28/20, P.12, Para 30.
[156] *Ja'neh v The Republic of Liberia & 1 Anor.,* Judgement No. ECW/CCJ/JUD/28/20, P.12, Para 44.

another international court.[157] In this research, I reconceptualize sovereignty from an absolutist view to a more liberal view and provide further context and analysis to the question of jurisdiction in relation to treaty obligations.

4.3 A reconceptualisation of Jean Bodin's argument of sovereignty[158]

I trace the concept of sovereignty back to the fourteenth century when mediaeval monarchs found themselves in constant struggle with internal and external adversaries over the superiority of the throne.[159] In the 16th Century, the concept widely gained an absolutist explanation that implied that sovereignty was an attribute of power that was not limited by any will other than its own, be it internal or external.[160] Jean Bodin argued that ultimate authority (the sovereign) either rests in a) one person in a monarchy, b) in a few persons in aristocracy, or c) in the people (or majority) in a democracy. Proponents of democratic theories of the state would later expand the view that sovereignty derived from the consent of the people.[161] The alignment of sovereignty with the consent of the people have been embodied in key historical documents and in most instances, as a rallying cry for revolutions– for example the 1689 English Bill of Rights, the 1789 French Declaration of the Rights of Man, the 1776 American Declaration of Independence, and the 1847 Liberian Declaration of Independence.[162]

In view of the above, I adopt, in this thesis, the position that sovereignty rests in the people in a democracy and that sovereignty is an attribute of power that can only be limited by itself. I find this view consistent with the Republican structure of the Liberian state and the dualist approach adopted by its constitution, which requires treaties to be domesticated in order to get the full effect of municipal enforcement.

[157] *Ja'neh v The Republic of Liberia & 1 Anor.,* Judgement No. ECW/CCJ/JUD/28/20, P.20-32.
[158] Jean B *The Six Books of the Commonwealth* (1962) p. 91.
[159] James WG *Limitations on National Sovereignty in International Relations* (1925), p.3.
[160] James WG (1925) 5.
[161] Lovelace L 'Reconstructing sovereignty'(2000) p.3; Christiano T 'A democratic theory of territory and some puzzle about global democracy (2006) 81-90; and Cunningham F *Theories of Democracy: A Critical Introduction* (2002) 40-45. London: Routledge.
[162] Lovelace L 'Reconstructing sovereignty (2000) p.3.

4.3.1 Sovereignty & contractarianism: legal and moral views

In this section, I present a contractarian view on sovereignty from moral and legal standpoints. I adopt the definition that contractarianism is the claim that legitimate authority (the sovereign) must derive from the consent of the governed, where the form of this consent derives from the idea of contract or mutual agreements.[163] Building upon contractarianism, I also adopt the view that the sovereign derives its legitimacy principally by adhering to contractual obligations. On that basis, I equate the ECOWAS treaty and all protocols to contracts and opine that states ought to respect contractual obligations. I connect contractarianism with Bodin's view that the sovereign has absolute power above all positive laws but should have the legal obligation and moral consciousness to obey contracts it enters (see section 4.2 above). It is my submission that the domestication of all international instruments translates them into contracts not only with citizens, but also with other states that have acceded to them. Such contracts, as I elaborate, must be respected for two reasons: a) first, due to their legal binding nature, and b) secondly, due to the moral imperative that ought to compel states to abide by their commitments.

Treaties, like contracts, are binding agreements guaranteed under the Liberian Constitution.[164] Beyond the legal obligation, contracts engender moral duties where actors ought to respect their commitments.[165] Digging into the spirit of the Liberian constitution, I reason that the framers must have realised the moral imperative of respecting obligations that are mutually incurred with all humility. In article 25, the Liberian Constitution notes that: 'Obligations of contract shall be guaranteed by the Republic and no laws shall be passed which might impair this right.'[166] The referenced constitutional provision aligns with the doctrine *pacta sunt servanda*,[167] which notes that states are required to respect their agreements. In that sense, I argue that by entering into agreements such as the ECOWAS Treaty of 1993, the West African States, including Liberia, were accepting to surrender aspects of their sovereignty by simply obeying all terms and conditions that

[163] Boucher D and Kelly P The *Social Contract from Hobbes to Rawls,* eds, (1994) New York: Routledge.
[164]The Liberian Constitution (1986), article 25 states that 'Obligation of contract shall be guaranteed by the Republic and no laws shall be passed which might impair this right.
[165]Alces PA 'A theory of contract law: Empirical insights and moral psychology' (Oxford 2011); and Barnett R E 'Consenting to form contracts' (2002) 671.
[166] Liberia Constitution (1986), article 25.
[167] Vienna Convention on the Law of Treaties, 1969, article 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

were enshrined within the provisions of the ECOWAS Treaty, especially article 3(1)- which outlines the primary goal of ECOWAS. Article 3(1) of the revised treaty states:

> The Community aims to promote cooperation and integration, leading to the establishment of an economic union in West Africa 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.[168]

All ideas contrary to supporting the means aimed at promoting the goals of ECOWAS, I argue, are deemed void *ab initio* in line with treaty obligations. It is therefore reasonable to say that just as the Liberia Constitution expects citizens to live up to contractual commitments, the law on treaties also expects Liberia to live up to treaties that it obligates itself to.

As noted above, there is a moral side to respecting contracts. On the moral ground that the state will not contravene what it expects its citizens to obey, I am of the conviction that the framers of the Liberian Constitution would have overwhelmingly disagreed with the Ministry of Justice's argument that obeying a treaty obligation amounted to a breach of sovereignty. The ECCJ ruled for Justice Ja'neh, authorising Liberia to compensate for damages that Ja'neh incurred because of his arbitrary removal from office. It is my view that to do otherwise is to place a mark of condemnation on the sovereign.

4.3.2 Supra-nationalisation of collective commitment by multiple sovereigns

I return to Bodin's description that sovereignty is the attribute of power that cannot be limited by anything other than itself.[169] There are two key elements to this concept: 1) that the state is all-powerful; and 2) that the state's only limitations derive from conditions that it chooses to impose on itself through legislation. These two points are considered in detail below.

The emergence of the concept of state responsibilities has seen notable jurists argue that the international system has developed ways to place limits on the sovereignty of states outside of their wills.[170] This contention is however outside of the scope of this research. As such, I will stick

[168] Article 3(1), Revised ECOWAS Treaty, 1993.
[169] James WG (1925) 6
[170]Bodin is the earliest originator of the concept that states are all-powerful and are only limited by their wills. However, James WG, in *Limitations on National Sovereignty in International Relations* (1925), p.6, examined

to the concept that a state is sovereign and can only be limited by its own will. Expanding this concept further, I submit that two or more states can agree to limit their sovereignty through an agreement to uphold their *collective commitment.* Collective commitment, as used in this thesis, is traced to Jean Jacque Rousseau's 'The Social Contract's' reference to the concept of general will (from the French words volonte generale). Rousseau equates general will to the will of the sovereign, or all the people together, that aims at the common good—what is best for the state as a whole.[171] Though Rousseau's view of general will was with respect to citizens within the state, I elevate that concept and argue that states enter treaties around *collective commitment* with the ultimate goal of supporting the general will of achieving supranational goals within member states.

I have defined *collective commitment* as the obligations set forth in a treaty that every member chooses to obey in the interest of achieving a treaty objective. When states reach a commitment to set a limitation on their authority by subordinating their individual wills to the interest of a *collective will,* they have chosen to limit their authority as a mean of safeguarding *that collective will*. The commitments of states to limit their authority in favour of a collective commitment, I argue, is a product of sovereignty that is carefully decided by the rightful sovereign agents.[172]

For purposes of this research, one can refer to the ECOWAS treaty obligations as the collective commitment of member states. In other words, ratifying the ECOWAS legal framework can be seen as a voluntary commitment to the limitation of sovereign authority in favour of the collective commitment to foster good governance, economic integration, and human rights. It is my reasoning that the *individual commitment* of any single state can only survive based on the extent to which it aligns with the collective commitment.

In line with the view above, there is a recurring pattern of support to the ECOWAS commitment—all 16 West African states signed the ECOWAS Treaty in 1975 and then in 1993. Where it is identified that a state's domestic policy conflicts with what could potentially become the c*ollective commitment,* a framework has been developed for states to express a treaty reservation.[173] It is important to note that Liberia did not enter/express any reservation concerning any ECOWAS

Bodin's writings and agreed that states could be limited by natural laws. This conclusion has been used to support the argument that states' sovereignty can be limited by external powers.

[171]Canon JS 'Three general will in Rousseau' (2022) 350-371.

[172] Article 7 of the Vienna Convention on the Law of Treaties outlines state authorities that negotiate treaties.

[173] See article 19-23 of the Vienna Convention on the Laws of Treaties.

laws. Further, it is my reasoning that by ratifying the ECOWAS Treaty in 1993, ECOWAS countries were revoking their adherence to their individual will under the 1975 Treaty while affirming a new *collective commitment* under the 1993 Revised Treaty and all subsequent protocols. I contend that the principles embedded within ECOWAS have therefore been vetted and accepted, and ought to be complied with. These principles, for instance, are reflected by human rights instruments on the continent such as the African Charter. I argue that as an expression of that collective commitment, ECOWAS states agreed in article 4(J) of the Revised Treaty to consolidate and promote democratic governance inclusive of human rights standards enshrined in the African Charter.

4.4 Jurisdictional challenges and treaty obligation: A constraint to the argument of sovereignty

The central issue analysed in this section relates to whether international law supports the claim of protected sovereign rights in the face of treaty obligations. I framed this question considering Liberia's position recounted in section 4.2 above.

It is my argument that States incur obligations under treaties, and these obligations tend to constrain their absolute claim of sovereignty.[174] The Vienna Convention on the Law of Treaty, adopted in 1969, cautions states not to invoke the provisions of its internal law as justification for failure to perform a treaty obligation.[175] Prior to the Vienna Convention, the principle that states ought not to use sovereignty as a ground to abrogate treaty obligations had been upheld by the Permanent Court of International Justice (PCIJ) in the Upper Silesia Case in 1926.[176] In the Upper Silesia Case, the PCIJ reiterated that treaties create laws for state parties.[177] The PCIJ was giving meaning to the German-Polish Convention on Upper Silesia (also called the Geneva Convention of 15 May 1922) that had been signed between Germany and Poland concerning the constitutional and legal future of Upper Silesia after the 1921 Plebiscite. The Treaty required the maintenance of German laws in Upper Silesia and the restrictions on Polish legislative sovereignty in the region.[178]

[174] Cassese A *International Law* (2001) 126.
[175] Vienna Convention on the Law of Treaty, 1969, article 18, p.331.
[176] *German Interests in Polish Upper Silesia (Germ. v. Pol.),* 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).
[177] *German Interests in Polish Upper Silesia (Germ. v. Pol.),* 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).
[178] Oxford Public International Law available at http://opil.ouplaw.com (accessed 12 2021).

The implication of this ruling was that, though Upper Silesia was a Polish Territory, German laws could legally remain in effect for 15 years in adherence to treaty provisions. The ruling defeated Poland's argument that the region was a Polish territory and needed to be entirely governed by Polish law consistent with the principle of legislative sovereignty. On the other hand, the ruling validated Germany's argument that enforcing Polish laws in Upper Silesia was a violation of a treaty obligation. The Upper Silesian treaty regime therefore required that all German laws that had not been *ipso facto* abrogated by the cession were to remain in force, in principle, for another 15 years.

As above, the guiding constitutional rule around treaties is designated by the Latin maxim *pacta sunt servanda*, which implies that parties in international agreements must abide by them.[179] *Pacta sunt servanda*, provided for in article 26 of the Vienna Convention on the Law of Treaties, states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[180]

In the Ja'neh scenario, Liberia's argument goes to the supremacy of its constitution and the power to perform all functions designated under it. This includes the power of the Liberian legislature to impeach, and where controversies arise, the power of the domestic court to provide a relief. It is my contention that such a line of reasoning becomes controversial when a state's obligation under international law comes into conflict with the domestic laws. The principle of *pacta sunt servanda* which, I argue, the PCIJ upheld in the Upper Silesia case would later stand out as a codified customary international law in article 18 of the Vienna Convention in 1969 and adopted by 118 states as of 2018.[181] I argue that two legal reasons set the pacta sunt doctrine higher in ranking and creates an obligation for contracting parties to uphold the provision of treaties. First, its customary nature creates binding rules upon states. It should however be noted that the customary argument is outside of the scope of this thesis. Secondly, its codification of customary rules, and approval by up to 118 states including Liberia, gives it an unarguable attribute of consent that must not be abrogated. It is my contention that through state consent, it became a sovereign decision to limit the power of a single state to respect a commitment. It is reasonable to argue that when states enter

[179] Cassese A *International Law* (2001) p.126-127.
[180] Vienna Convention on the Law of Treaty (1969), article 26.
[181] International Law Commission, *Report on the work of its eighteenth session*, 4 May - 19 July 1966 (A/CN.4/191, reproduced in *Yearbook of the International Law Commission, 1966*, vol. I, Part One, Chapter II).

a treaty, they have voluntarily agreed to redelegate some of their sovereignty which may include subordinating provisions of their constitutions when those provisions conflict with the treaty.[182] I have expanded on this point further below.

4.4.1 Sovereign decision to delegate sovereignty via domestication

I take my argument further in this section that the sovereign may redelegate a sovereign function by domesticating treaties through prescribed domestic rules. By extension of that argument, I reject the view that a supranational body, duly established through a valid treaty, can violate the sovereignty of a member state in the performance of functions defined by the plain language of the treaty that established it. That is, the domestication of international law makes it a domestic instrument that has met all processes approved by the sovereign. I, therefore, adopt the dualist logic that implies that international laws become municipal laws through domestication. Consistent with that domestication logic, I question those who take the view that the ECCJ interfered with Liberia's sovereign duty in violation of its Constitution. Assuming, for the sake of argument, that Liberia's sovereignty was interfered with in the Ja'neh scenario, my question becomes: Who is responsible for such violations, Liberia or the ECCJ?

In response to the question above, I argue that Liberia is responsible for the violation of her own sovereignty, if any violation occurred at all. To expand this argument further, I recount the reasoning that the Liberian Supreme Court has made in elaborating on the effect of treaties in relation to Liberian laws.[183] Speaking in the case *Davis v Republic*, the Liberian Supreme Court held that any treaty which is confirmed or ratified by the legislature becomes a part of the domestic laws and takes full force and effect as any other law enacted by the legislature.[184] It is my contention that the court reached a fairly reasonable principle of law in the *Davis case* when it implied that treaties become domestic laws to the point where they are domesticated through locally established procedures. By that reasoning, one can safely argue that countries take ownership of international instruments through domestication. Accordingly, there is a clear nexus of how international laws, in the semblance of treaties, are localised to take all attributes of domestic statutes. The Liberian Supreme Court, in the *Davis Case* above, has also made it

[182] Ferreira-Snyman A 'Sovereignty and the changing nature of public international law: towards a world law?' (2007) pp. 395-424; and Finke J 'Sovereign Immunity: Rule, Comity or Something Else?' (2011) 853-881.
[183] Davis v. Republic, [1862] LRSC 2; 1 LLR 17 (1862).
[184] *Davis v. Republic,* [1862] LRSC 2; 1 LLR 17 (1862).

meaningless to make an argument of rankings between domestic and international laws. Arguably, this means that for Liberia to argue that an ECCJ's adjudication amounted to a violation of its domestic laws, by that reasoning, concedes that it first domesticated the violation.

The Case *Bauchau v USA* reiterates Liberia's commitment to adhere to international instruments. In the *Bauchau case,* the Supreme Court agreed with the Foreign Ministry's position to refuse the service of a writ of summons on the United States Ambassador to Liberia.[185] The position was in adherence to Liberia's treaty obligations incurred under the 1961 Vienna Convention on Diplomatic Relations.[186] Making recourse to article 31 of the Convention, the Court said:

> A diplomatic agent is immune from the criminal, civil and administrative jurisdictions of the receiving state, except where such diplomatic envoy in his private capacity holds private immovable property in the territory of the receiving state, or as executor, administrator, heir or legatee, as a private person, not acting on behalf of the sending state, or where such diplomatic agent in the receiving state exercises activities outside of his official functions. In the instant case, the United States envoys hold the property for and on behalf of the United States Government and not in their private capacity, a point conceded by the plaintiff in his resistance.[187]

In the scenario above, the business interest of Plaintiff Louis Bauchau was at stake. From a protectionist perspective, one would imagine that the Liberian Foreign Ministry could not only issue Bauchau's writ of summons on the American Ambassador but could also apply every effort to defend one of its citizens against a powerful state. Proponents of the doctrine of realism could argue to the contrary, that America's superior position in global politics could serve as a fear factor against service of writ from Liberia (assuming there was an exception to the general rule or probable grounds to support such service). I will refrain from going any deeper into the point of realism and big power politics as they are not the focus of this thesis. With respect to the *Bauchau Case*, I note that Liberia's position, refusing to subject the USA to a court action, was proper and consistent with adherence to a treaty obligation. However, I find it difficult to understand why Liberia endeavoured to change its position in the Ja'neh Scenario. I view the shift in position as

[185] *Bauchau v USA et al* [2000] LRSC 7; 40LLR 58.
[186]Vienna convention on Diplomatic Relations, 1961, article 31. Pp. 9., available at https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf (accessed on 8 January 2021).
[187] Vienna Convention on Diplomatic Relations, 1961, article 31, p. 9.

one that sends out a message that the approaches that states adopt when faced with a question of international law depend on the context and subject involved. On one occasion, a state, in this case, Liberia, could be a respecter of treaty obligations when its relationship with another country was at stake, and on another, it could contest treaty obligations when dealing with the rights of its own citizen (see my analysis on the *dilemma of own-state neglect in 2.2.2*). This variation seems to me like an unnecessary double standard and hypocrisy.

4.5 The ECCJ's appellate myth

The background to the preliminary objection by Liberia, questioning the jurisdiction of the ECCJ has been referenced above. Noting that the exercise of jurisdiction would amount to serving as an appellate court to Liberia's Supreme Court, Liberia contended that the applicant's remedy could only lawfully originate from the domestic jurisdiction. The respondent relied on article 66 of the Liberian constitution which makes the Supreme Court the final arbiter of constitutional issues and with authority to exercise final appellate jurisdiction in all cases. The argument that the ECCJ was serving as an appellate court to domestic courts in violation of domestic laws has been raised several times before the ECCJ.[188] In this thesis, I have classified such an argument as the ECCJ's appellate myth.

I examine article 66 of the Liberian constitution to establish the foundation of the ECCJ's appellate myth. While article 66 designates the supreme court as the sole arbiter of constitutional matter, it also prohibits the Legislature from making any law to usurp the appellate function of the Supreme court. By implication, reaching a conclusion that the ECCJ exercised an appellate function would also amount to agreeing that the Liberian legislature ratified the ECCJ's protocols at the expense of its domestic laws. Such a position could also be an admission that the President of Liberia, authorised under article 57 of the Liberian constitution to conclude treaties, has set a precedent of negotiating Liberia's foreign affairs in ways that do not uphold the sanctity of the state's domestic laws contrary to his oath of office to protect all Liberian laws. These would be problematic conclusions which I have rejected in this thesis. It is therefore my contention that all cases that

[188] *Ocean King Nigeria Limited v Republic of Senegal* (2011) CCJELR 139; *Dr. Mahamat Seid Abazene v. The Republic of Mali & 2 Ors* (2010) CCJELR 95; and *Hon. Justice S. E. Aladetoyinbo v. The Federal Republic of Nigeria* (2020) ECW/CCJ/JUD/18/20.

have been filed at the ECCJ begin as human rights violation de novo, irrespective of whether they are pending or have concluded in domestic courts.[189] I elaborate further below.

The ECCJ's position on the appellate myth. At the heart of the ECCJ's appellate myth argument is the question of state sovereignty. In further examination, I endeavour to answer whether the review of a constitutional question, already examined in the local judiciary, may position the ECCJ as an appellate court over a domestic court, in this case, the Liberian Supreme Court, in violation of Liberia's constitution?[190] With respect to that question, the ECCJ decided in *Bakary Sarre v Mali* that it lacks jurisdiction to sit on appeal on decisions of national courts. The ECCJ refused jurisdiction in the *Bakary Sarre* case in that the applicant sought the reversal of a ruling by the Mali Supreme Court. The ECCJ also reiterated in the case *Ocean King Nigeria Limited v Republic of Senegal* that it does not serve as an appellate court over decisions of national courts or national bodies that have quasi-judicial authority. Compared with both Bakary and King Nigeria Limited, the distinguishing feature of the Ja'neh case is that the applicant in the later requested the ECCJ to rule that his rights were violated, unlike the former instances where the applicants were requesting for the overturn of domestic court's rulings. Holding these two views of the ECCJ constant, I establish that the ECCJ may review domestic laws including constitutions, in the quest to examine whether the provisions of the applicable domestic law were in violation of the human rights of the applicant. In fact, the ECCJ has expanded this view to allow examination of domestic actions that would be immune from consideration under the domestic system. For instance, an impeachment outcome is not a subject of review under Liberia laws; but the ECCJ, I argue, disallowed such prohibition by reaching a conclusion that the impeachment of Justice Ja'neh was illegal.

4.5.1 Guidance against the ECCJ's appellate myth

The ECCJ has specifically added that it adjudicates human rights violations and does not act as an appellate court to the domestic jurisdictions. ECCJ refuted its appellate myth status in several rulings, specifically noting that it is not an appellate court, and it does not play an appellate role. I note that appellate courts are designed to review interlocutory or final rulings of subordinate courts,

[189] See ECCJ, Protocol A/P1/7/91, article 9, as amended by Supplementary Protocol A/SP.1/01/05.
[190] The Liberian Constitution gives the Supreme Court the final interpretation over constitutional issues.

with resultant power to reverse or modify. I then argue that ECOWAS's adjudication of human rights cases is not premised on a judgement from any municipal court.[191]

It is my observation that the prime argument for state parties at the ECCJ is slightly different from that which is predominantly made at the ECtHR and IACtHR. It is my finding, that while the ECtHR[192] and IACtHR[193's] admissibility challenges relate to the exhaustion of the domestic remedies' requirement, the ECCJ's respondent states have often argued that the ECCJ has adopted appellate functions exclusively reserved for the domestic courts. For instance, Liberia, in the Ja'neh scenario, challenged the jurisdiction and competence of the ECCJ, and contended that the matter was inadmissible because the Applicant intended the ECCJ to sit as an appellate court to review judicial decisions of the domestic courts of Member States.[194] I contend that Liberia's position was a restatement of the ECCJ's appellate myth. Though it is almost predictable that the ECCJ will deny the appellate myth argument, it is my reasoning that state parties are simply sending out a united message that domestic courts ought to play their part in determining the outcome of domestic legal issues before they are filed before the ECCJ. I have therefore recommended in chapter five that adopting the EDR Rule is the most effective way for ECOWAS to give meaning to the message that comes out of the appellate myth.

I postulate three rules to diagnose if a respondent state is making a form of argument that I have classified as an appellate myth. I consider these rules as useful guidance to dispel the ECCJ's appellate myth.

The whole-of-country rule. As I have indicated above, appellate courts take on the task to review findings from lower courts to reach an outcome reversing or modifying those findings. The ECCJ, on the other hand, review laws that are alleged to have violated the rights of citizens from member states and order the respondents to take corrective measures to prevent their recurrence. For

[191]Garner BA *Black's law dictionary* (ed), 9 ed (2014). St. Paul, MN: Thomson Reuters& Stephen LW 'The study of appellate court administration: The state of the enterprise (1987) 119-142.
[192]*Case of Advance Pharma SP. Z O.O v. Poland,* application no. 1469/20; *Case of Gudmundur Andri Astradsson v. Iceland,* Application no 26374/18; *Case of Dolinska-Ficek and Ozimek v. Poland* (Applications nos. 49868/19 and 57511/19); & *Case of Reczkowicz v. Poland,* (Application no. 43447/19).
[193] *Allan R. Brewer Carías Case*, 2014 Inter-Am. Ct.H.R., (Ser.C) No. 278, (May 26, 2014); *Velásquez Rodríguez Case*, 1988 Inter-Am Ct.H.R., (Ser. C) No. 4 at 63 (July 29, 1988); *Case of Claude Reyes and others*, 2006 Inter-Am Ct. H.R., (Ser. C) No. 151 at 140 (September 19, 2006); & *Case of Liakat Ali Alibux*, 2014 Inter-Am Ct.H.R., (Ser. C) No. 276 at 19 (January 30, 2014).
[194] SUIT NO: ECW/CCJ/APP/33/19 JUDGEMENT NO. ECW/CCJ/JUD/28/20, p.18, para 40.

example, in the case *Amnesty International & Ors v The Republic of Togo*, the ECCJ ruled that Togo, the Respondent, violated the applicants' rights to freedom of expression under article 9 of the African Charter by shutting down the internet.[195] In what appeared like a mandate to a lower court in an appellate judgement, the ECCJ directed Togo to take all necessary measures to guarantee non-occurrence of this situation in the future and to enact and implement laws, regulations and safeguards in order to meet its obligations with respect to the right to freedom of expression in accordance with international human rights instruments. In addition to this example, the Ja'neh scenario, grows of out impeachment proceedings, where the legislature was arguably sitting as a lower court and intermittently petitioning the Supreme court to review interlocutory actions such as the request for presiding Chief Justice Korkpor to recuse himself. Taking these examples together, it is easier for supporters of the ECCJ's appellate myth debate to conclude that the ECCJ sat in appellate judgement by reviewing domestic laws and authorising respondents to take actions aimed at preventing the recurrence of the human rights violations that resulted therefrom. The problem with such an argument is that, while appellate courts direct their mandates to lower courts whose judgements are reviewed, the ECCJ directs its mandate to the entire country.

Not-in-isolation rule: I also contend that the ECCJ review of cases or laws from municipal jurisdiction do not stand in isolation. I use the phrase 'not-in-isolation' to indicate that the ECCJ reviews cases from municipal courts in relation to the African Charter and other applicable human rights instruments. The ECCJ has spoken to that effect wherein it has held that it does not have the mandate to examine the laws of member states of the community in the abstract, but rather to ensure the protection of the rights of individuals-- and the court does so by examining concrete cases brought before it.[196]

Procedural-substantive rule: The ECCJ admits cases on grounds of human rights violations. In that capacity, I argue, the ECCJ's review of cases that emanate from municipal courts limits itself to the procedures followed. I reasoned that this is done to assess if applied procedures were compliant with the human rights treaties within the scope of the ECCJ's interpretational mandate. It may also assess if the substantive application of domestic laws violates human rights. It is my assessment that reviews done by the ECCJ with the aim of checking human rights violations are

[195]*Amnesty International vs The Togolese Republic* (ECW/CCJ/APP/61/18) [2020] ECOWASCJ 09
[196]*Hadijatou Mani Koraou v Republic of Nigeria* (2004-2009) CCJELR,
pg. 232 para. 60.

different from appellate reviews, which scrutinise both substantive and procedural facts as may be contained in a case before a municipal court. In keeping with this analysis, it is my view that ECCJ's conclusion in the Ja'neh Scenario, that Justice Ja'neh's rights to a fair hearing were violated, came out of a procedural review of the scenario, and it defeats Liberia's assertion that taking jurisdiction over the case amounted to playing an appellate role over the Liberian supreme court.

4.6 International case law on impeachment, judicial independence, and regulation of municipal judicial systems

In this section, I briefly consider selected rulings from the ECtHR and the ECCJ to examine the relationship between supranational and municipal justice systems. I place a special emphasis on the responsibility of the domestic judicial systems to conduct impeachment as a sovereign duty, while examining conditions in which a procedural breach in the performance of a domestic responsibility may warrant intervention from a supranational court. Upon this foundation, I argue that supranational courts have duties to regulate domestic courts of contracting states to a human rights treaty.

4.6.1 Regulatory nexus between municipal and supranational judicial systems

The respondent's argument in the Ja'neh scenario, referenced in sections 3.3 and 1.1.1., appears like a protest for contracting parties to a human rights treaty to play lead roles in the interpretation of domestic laws as opposed to supranational courts. I argue that the world has advanced into a globalised international system, under which the regulation of domestic courts by supranational judicial bodies is well supported by a well-established pattern under various human rights systems. This proposition is a part of the contention raised by proponents of the argument of what has been labelled international rule of law.[197] Consequently, it is my argument that supranational courts have duties to regulate acts by domestic jurisdictions that are non-compliant with international rule of law.

[197] Chesterman S (2008) 343; Ranney J World Peace through Law: Replacing War with the Global Rule of Law (Routledge 2018); Heupel and Reinold The Rule of Law in Global Governance, eds (Palgrave Macmillan 2016); Kratochwil F The Status of Law in World Society: Meditations on the Role and Rule of Law (2014); Zangl B, 'Is There an Emerging International Rule of Law?' (2005) 13.

I first find that the European, Inter-American and ECOWAS human rights systems contemplated within their respective constitutions the intentions for the domestic courts of constituent members states to seek consultations from supranational courts to ensure compliance with human rights standards. It is my view that these consultations have voluntary pathways that allow contracting parties to solicit advisory opinions from supranational courts.[198] I hold the view that advisory opinions are the first opportunity for supranational courts to exercise their regulatory mandate. While advisory opinions in their natures are voluntarily requested, I argue that supranational courts are positioned to compel compliance with human rights standards when providing redress to complaints.

To support my argument above, I examine a Lithuanian domestic law that culminated into a request for an advisory opinion from the ECtHR.[199] Relevant to this thesis, I place focus on how a domestic electoral law impeded an applicant's chances to hold elected office. I then point out how the domestic law conflicted with the European Convention to the extent of that it was nullified by the ECtHR. In the end, I classify the nullification as a form of regulation, among others, and argue that there are bases for supranational courts to regulate domestic laws of contracting states.

The subject, Presidential Elections Act, referenced above, was amended on 4 May 2004, to disqualify impeached persons from standing for election for a period of 5 years. In an interpretation of the law, the Constitutional Court of Lithuania ruled on 25 May 2004 that the disqualification was compatible with the local Constitution, but that subjecting it to a time limit was unconstitutional.[200] On 15 July 2004, the parliament passed a corrective law based on the 25 May 2004 ruling of the constitutional court. The new law prevented impeached persons from standing for parliamentary elections on a no-time-bound basis. Pursuant to the new law, the Central Electoral Commission (CEC) found grounds to disqualified Paksas from standing for re-election on 22 April 2022.[201] Paksas' argued that the law violated his rights to hold public office.[202] The ECtHR held that the permanent and irreversible disqualification of the former President of

[198] All supranational courts have within their framework the mandate to deliver advisory opinions; specific provisions are as follows: Council of Europe Treaty Series, 214, Protocol No 16 on the Protection of Human Right and Fundamental Freedom; Inter-American Convention, article 41*(e);* and ECCJ Protocol (A/P.l/7/91), article 10.
[199] ECHR 129 (2022) 08.04.2022
[200] *Paksas v. Lithuania* (application no. 34932/04).
[201] ECtHR on the case *Paksas v. Lithuania* (application no. 34932/04), Press Release no. 003 06.01.2011.
[202]*Paksas v. Lithuania* (application no. 34932/04), lECHR 129 (2022) 08.04.2022.

Lithuania from taking a seat in the Legislature (Seimas) following impeachment had been disproportionate, in violation of article 3 of Protocol No. 1 to the European Convention.[203]

The Paksas judgement, following from my argument above, is one example wherein the ECtHR does not only intervene but also regulates what the law ought to be in municipal jurisdiction. It is my argument that the ECtHR's position that the ban on Paksas was a disproportionate punishment, overturned the ruling of the domestic court and nullified a domestic law. I find that the scenario sets an established pattern wherein a supranational body may regulate a domestic jurisdiction. By reason of that finding, it is my contention that the outcome of the ECCJ ruling, opting for the reinstatement of Justice Ja'neh, constitutes nullification of a legislative action, the Ja'neh impeachment. I take that reasoning further by introducing a new concept in international law, which I refer to in this thesis as *supranational judicial review*. I define this concept as the power of supranational courts to review and nullify domestics laws or actions that are inconsistent with protected human rights. It is my hope that researchers will find interest in expanding the concept further.

4.6.2 The ECCJ and Supranational Judicial Review

In 4.6.1 above, I introduced and defined a new international law concept that I called *supranational judicial review (SJR)*. In this section, I trace the existence of supranational judicial review at the ECCJ and argue that the concept is an extension of supranational court's regulatory mandate over domestic anti-human rights actions; I note that SJR is likely to encounter resistance from domestic systems, especially in the ECOWAS context. I reason that through SJR, the ECCJ has earned for itself an accolade as a champion for human rights in West Africa. This reasoning is consistent with praises lavished on the ECCJ as champion for human rights.[204]

Like the ECtHR regulatory example in 4.6.1 above, the ECCJ also has a track record of safeguarding judicial independence through SJR. By doing so, the ECCJ has established a pattern of nullifying domestic actions that threatens judicial independence in contracting countries. The case of *Justice Wowo v The Gambia* is a classic example.[205] In the case of *Justice Wowo,* the ECCJ

[203] *Paksas v. Lithuania (*The Paksas Judgement) (lECHR 129 (2022) 08.04.2022)
[204] Ebobrah S (2010) 1.
[205] *Justice Joseph Wowo v. Gambia*, ECW/CCJ/JUD/09/19

concluded that Justice Wowo was removed from office under conditions inconsistent with the Gambian Constitution. The Court noted:

> Whereas the 1997 Constitution of Gambia provides the methods of initiating proceedings for the removal of a Supreme Court Judge, and whereas the provision requires the tribunal to conduct independent investigations before making a conclusion, and whereas the Defendant has not complied with this requirements, the Court in considering the texts creating the Gambian Superior Court of Judicature and in line with the principles of fair trial enshrined in International Instruments particularly UDHR and ACHPR, has found that the acts of the Defendant relative to the Plaintiff's removal from office, trial and conviction were biased, lacking in independence, amount to non-compliance with due process and in breach of natural justice and thereby constitute a gross violation of the Plaintiff's right to fair trial.[206]

From the above view, I reiterate my argument that it is consistent with international human rights law for supranational bodies to exercise regulatory functions over domestic judicial systems. I also restate my contention that these interventions are aimed at regulating domestic jurisdictions as was seen in the invalidation of domestic laws and certain state functions incompatible with human rights protections in both the ECCJ's Justice Wowo and Ja'neh scenarios and the ECtHR's Paksas judgement. It is my contention that such function of international courts is justified through the concept I have termed as SJR.

[206] *Justice Wowo v The Republic of Gambia*, SUIT NO: ECW/CCJ/APP/06/18, JUDGEMENT NO. ECW/CCJ/JUD/09/19.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

I examined the arguments in the Ja'neh Scenario alongside several jurisdictional arguments raised by several other respondent states in various human rights systems including ECOWAS, Europe and America. Nearly all respondent states raised some concerns that relate to the supra-nationalisation of their domestic legal systems. Primarily, I argue that states incur obligations under treaties, and unless those treaties are revised, their sovereignty cannot be used as a shield to immunise them from adhering to treaty obligations.

Building upon that argument, I evaluated the multiple claims of violation of sovereignty, and recommended that the ECCJ legal framework be modified to include the EDR Rule. I argue that the EDR Rule will allow the Contracting States to play significant roles in the administration of domestic laws and thereby help to enhance judicial integration in West Africa, and allow ECOWAS to largely achieve its goal of regional and economic integration.

5.2 Recommendations

In this thesis, I pointed to instances where the ECCJ has exerted its core functions to adjudicate cases of human rights violation. I applauded the ECCJ for not allowing the argument of sovereignty from respondent states to weaken its role in serving as the principal custodian of international rule of law in West Africa. I referenced the ECCJ's clarity in the *Cheikh Gueye Case* for instance, that it will not sit in appellate judgement over cases decided by municipal courts. I then note the ECCJ's application to the Ja'neh scenario by pointing out the thin line it drew between appellate intervention and its jurisdiction to hear cases relating to human rights abuses. Despite the ECCJ's reiteration of its authority to hear cases of human rights violations, I observed that the sovereignty-related arguments are by no means going away.

In the Ja'neh scenario, the ECCJ dispelled the notion that it sat in appellate judgment by acknowledging the *Chief Ambrose case,* where it invoked article 9(4) of its Supplementary Protocol by restating that its jurisdiction is to adjudicate human rights cases that occur in

contracting states.[207] Arguments around jurisdictions from the Respondent States, I argued, are enveloped by the notion that the interpretation of domestic law is a sovereign duty that must be performed by the sovereign alone. As states continue to uphold the notion that their treaty obligations cannot dilute their full enjoyment of sovereignty, it is my observation that states are more comfortable playing lead roles in judicial matters that relate to the applications of their domestic laws.

I therefore argued that state sovereignty and treaty obligation are best reconciled and made to coexist by adopting the EDR Rule to allow municipal courts to play larger roles in the interpretation of domestic laws if their actions are in good faith. Consistent with such an argument, it is my recommendation that the ECCJ's legal framework be modified to allow applicants to exhaust domestic remedies as the precondition for filing applications before the ECCJ. I reasoned that the adoption of the EDR Rule will establish a state-centric approach to viewing sovereignty from the perspective of the predominant involvement of domestic courts in the administration of national laws.

In the Ja'neh Case, as a matter of emphasis, Liberia's argument seems to be expressing concern for its sovereignty. Liberian laws are tailored in such a way that impeachment is supposedly required to be a political question, to the extent that no further court's intervention is required once the impeachment is consummated. To that end, it is reasonable to conclude that any post-judicial action following the Ja'neh impeachment in the domestic system would have encountered an obstacle. However, such an obstacle would still present the opportunity for the ECCJ to examine a novel question around the incompatibility of the refusal of national laws to recognise a post-impeachment review where a human rights violation is alleged.

As I have pointed out throughout this thesis, the pro-sovereignty debate at the ECCJ is capable of being curtailed with a modification to the court's legal framework that would allow the adoption of the EDR Rule. In that way, contracting states would be taking on a new commitment that implies that their first line of duty is to administer domestic laws, and it is only upon their refusal to do so that the ECCJ would intervene. Besides allowing states to serve as the principal architects

[207] *Chief Ambrose Albert Owuro & Ors v. Nigeria*, ECW/CCJ/JUD/01/22, Para. 36. Others include *Moussa Leo Keita v The Republic of Mali*, CCJELR, para 63; *Obinna Umeh & 6 Ors v Federal Republic of Nigeria*, ECW/CCJ/JUD/10/20; *Barkare Sarle v Mali*, CCJELR, p. 9; etc.

for the administration of domestic laws, there is another important advantage that the adoption of the EDR Rule would bring about. I argued here that the EDR Rule can help ECOWAS to reach full judicial integration as a starting point for achieving the ECOWAS goal of regional and economic integration. With the EDR Rule, most respondents would most likely argue in favour of the dismissal of most applications for reasons around the exhaustion of domestic remedies. Such situations would provide a unique opportunity for the ECCJ to review and recommend a unifying system of remedy among contracting states. These reviews would also cause a groundbreaking transformation for domestic laws to become the underlying foundation for good governance and trade. That way, the ECCJ would position itself as the regulator of governance and human rights in the member states and further support ECOWAS's goal of integration.

5.3 Conclusion

When states argue in favour of the sanctity of their sovereignty, they are referring to the absolute authority to take control of their own decisions. This includes the authority to interpret domestic constitutional provisions to act as they may see fit. In this thesis, I noted that the interpretation of domestic laws and invalidation of state actions are sovereign attributes of states through domestic courts, but argued that these functions can be performed by supranational courts. I found that supra-nationalisation of domestic laws and state functions occur when supranational courts examine domestic laws and invalidate domestic actions deemed incompatible to targeted human rights treaties. I reasoned that what is considered an interference is in its truest sense a redelegation of a sovereign function to a supranational body in support of global governance and achievement of a collective commitment. By extension of that view, I contended that the extension of a sovereign task to a supranational institution is done when local legislative bodies domesticate treaties through processes fully laid out by domestic laws.

In view of the above, I argued with respect to the Ja'neh scenario that ECOWAS members including Liberia surrendered some sovereign attributes to cultivate collective commitment toward economic and regional integration as well as good governance. The thesis submits that the Revised ECOWAS Treaty of 1993 gave rise to the ECCJ, under which West African states committed themselves to comply with human rights instruments such as the Universal Declaration of Human Rights and the African Charter. Like nearly all treaties, I argued that the legal instruments of

ECOWAS are framed in ways that were intended to subordinate the sovereignty of any single state in so far as such sovereignty conflicted with the treaty objectives.

Though the arguments for the unhindered enjoyment of sovereignty for ECOWAS countries have come in different forms before the ECCJ, I pointed to instances where they have so far crumbled. In the Ja'neh case, Respondent State Liberia denied the allegation that the impeachment of Justice Ja'neh violated his human rights to a fair hearing and an impartial trial, and the right to work and dignity of a person guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights, as well as the Liberian Constitution. On the other hand, it is Liberia's argument that impeachment is sanctioned under the Liberian constitution as a duty that is the sole prerogative of the Liberian legislature. Liberia further contended that its supreme court has the sole authority to interpret its constitution. Taking these contentions together, it is Liberia's submission that the ECCJ intervention amounts to sitting in appellate review of the Liberian constitution contrary to the article 66 that requires the supreme court to serve as the final arbiter of constitutional questions. By examining that argument critically, I labelled it in this thesis as the ECCJ's appellate myth. I then expanded my argument further by distinguishing appellate review from the adjudication of human rights violations that are examined de novo and pursuant to provisions of article 9 of additional protocol A/SP.1/01/05 amending the supplementary protocol A/P.1/7/91, which empowered the court to hear human rights cases.

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