The Performance of Africa's International Court: Book Review

By:

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April 6, 2021

The African continent has more international courts than any other continent of the world. For over a decade the growth of international courts that have sprung up across Africa, the increasing role played by these courts in the expansion of international law jurisprudence, and their functioning and effectiveness continue to receive less scholarly attention than it deserves. The book "The Performance of Africa's International Court" edited by Professor James Gathii is a very welcome long-awaited scholarly development. The book offers a collection of scholarly work aimed generally at the assessment of the effectiveness of Africa's international courts by analysing their performance and impact without judging them based on standards or benchmarks established in European courts. This is a turning point as courts across the continent are usually measured against European standards without recourse to the difference in the legal, social, economic, and political setting in which they operate. Another major innovative feature of the book is that it goes beyond the usual measures of compliance and effectiveness, which according to Gathii do not adequately account for the impacts of the courts.

The book is a robust piece of work that covers assessment of different subject matters in the East African Court of Justice (EACJ), the African Court of Human and People's Rights, the defunct Southern African Development Community Tribunal, and the ECOWAS Community Court of Justice (the ECCJ). However, this review will centre on the chapters which focus on the ECCJ. This is not in any way a dismissal of chapters dedicated to other courts, it is simply in a bid to streamline this review and also a reflection of the specific research interest of the writer i.e. the quality of the ECCJ.

The book consists of eight chapters, of which three assesses substantive subject matters related to the performance and impact of the ECCJ. The first is chapter 3, "The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces" where Okafor and Effoduah examine the roles played by the ECCJ as a resource for "pro-poor brainy-relays" such as Socio-Economic Rights and Accountability Project, public interest lawyers, and other NGOs for the enhancement of their leverage, and to overcome certain hurdles in their quest to effect social changes and protection of human rights. This chapter which focuses mainly on economic and social rights examines the normative and procedural resources provided by the ECCJ to pro-poor activists to help them overcome socio-legal and economic hurdles they would have otherwise faced in their domestic judiciaries. The normative resources examined in the chapter include the role played by the ECCJ in the expansion of the growing jurisprudence on the protection of human rights, specifically in West Africa. Other normative resources are the Court's application of an endless range of international human right treaties that have been ratified by the relevant member states; the analysis of details of the general laws of the ECOWAS community; and the assertion of the existence and justiciability of certain fundamental rights which are otherwise non-justiciable in member States. The chapter also examined procedural resources provided by the Court such as its liberal approach to the question of locus standi; the exemption of the rule of exhaustion of local remedies from the conditions precedent to the institutions of actions; its free filling fee policy; and in exceptional cases, the moving of the seat of the Court to make it more geographically accessible to litigants.

The chapter also identifies some of the gaps in the Court's design and actions as well as their consequences to pro-poor activism. These gaps include the fact that individuals and transnational corporations cannot be sued for violation of

human rights; the inability of groups or communities to litigate common human rights violation matters; and the insufficiency in the awareness about the Court.

This chapter sufficiently analyses the obstacles faced by the brainy-relays in domestic courts, and how the ECCJ has attempted to help ease their obstacles by providing a platform as well as resources to ensure the protection of human rights. However, it seems to exaggerate the practical contribution these have made to the overall aim of both the ECCJ and the pro-poor activists which is to secure and protect human rights and effect social, economic, as well as legal reforms.

Also, the authors did not explore the downsides to some of the procedural resources made available by the Court's design. For instance, the ECCJ's liberal approach to the question of locus standi may give room for meddlesome interlopers to crowd the corridors of the Court. Similarly, the lack of the requirement for the exhaustion of local remedies which is a rule of customary international law, does not only rob member States of the chance to remedy cases of human right violation occurring within their jurisdiction before being dragged to the ECCJ, it also results in competition between the ECCJ and national courts regarding the competence to adjudicate human right matters and may put a strain on the relationship between the ECCJ and the judiciaries of the member States. The absence of the rule on exhaustion of local remedies also encourages forum shopping, thus litigants can institute more than one action on the same subject matter in both courts at the same time.

The second chapter focusing on the ECCJ, "Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice", authored by Akinkugbe, assesses the Court's political jurisprudence. The ECCJ has evolved over time from a court focused on cases on regional integration into a multi-faceted one. This chapter is an exceptional scholarly work which is a deviation from the norm when it comes to the literature available on the ECCJ, most of which focus solely on the human rights jurisdiction of the Court. Another major contribution of this chapter to the growing literature on the ECCJ is the extensive analysis of the ECOWAS Protocol on Democracy and Good Governance which enshrines recommended practices for democratic regimes, such as separation of powers, parliamentary immunity, judicial independence, and free, fair, and transparent election in member States.

This chapter examines the judicialization of high-profile cases arising from the electoral process in member States in a manner that is entwined into the Court's traditional functions. Just like Okafor and Effoduh, Akinkugbe's analysis of these political cases seeks to establish the impacts of the cases by focusing on other motivations of the plaintiffs beyond compliance or even judgement in their favour. He considers the ECCJ an alternative for politicians who cannot obtain justice in their national courts. Akinkugbe stated that the ECCJ, to the litigant is an alternative forum to mount pressure on member States when the national courts fail and to deter subsequent violations of election laws. He maintains that these actions are not necessarily instituted for the pursuit of substantive justice and that a strict adoption of a compliance-centre or effectiveness oriented focused approach to the assessment of the political jurisprudence of the Court would only enhance a failure narrative and also ignore the complex socio-political and historic climate of the region. He concluded that "non-compliance can itself be part of a successful regulatory strategy".

An extremely important factor which the chapter fails to sufficiently examine is the Court's lack of jurisdiction in political matters. The author instead propounds that the Court has adopted an innovative way to adjudicate on political matters. The argument of the author is flawed as the Court itself has, on many occasions, re-emphasised its lack of jurisdiction in political matters. Even in cases where the matters are laced with human rights violations undertones, the Court does a brilliant job at separating the issues and adjudicating only on the human rights issues. This was the case even in the cases examined by the author in this chapter. Also, the author's postulation on the motivations of the litigants, in this case, does not necessarily represent the true intentions. For instance, in the Sule Audu Case, the litigant's motivation was clearly to attain justice at all costs even to the extent of forum shopping.

Another chapter that examines the ECCJ is chapter 5, "Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice", by Ebobrah and Lando which examines the role of Africa's international courts as a back-up mechanism for supporting national courts in the protection of constitutional order. Again, like the other authors, Ebobrah and Lando in this chapter look beyond the obviously low level of compliance to analyse the impact of the international courts' decisions and litigation process on constitutional justice in

member States. This chapter examines the four ways in which the courts including the ECCJ protect constitutional justice i.e. (a) by flagging violations and acting as an early warning system, (b) by expanding the normative and institutional scope of human right protection, (c) by developing norms, and (d) by setting boundaries of acceptable behaviour.

While the ECCJ and its counterparts do have the potential to impact the member States in these ways, without compliance and enforcement, it is ultimately of no effect and does not deter further violations in member States. For instance, flagging human rights violation exposes defaulting member States and attract international and media attention thereby forcing such member States to do better. However, it is apparent that the ECCJ continues to struggle to impact member States in this way as member States continue to ignore cases of human rights violations.

In conclusion, it is undeniable that the book is a rich, interdisciplinary addition to the literature on international and regional courts in Africa and is a worthy addition to the library of every international law academic. The other chapters not analysed in this review also present very important arguments on viable subject matters such as the role of the EACJ as a coordination device for an opposition party; the EACJ as a transnational justice mechanism in Burundi; and the backlash against international courts in Africa. Additionally, the last chapter of the book provides a comprehensive reference guide to all the international courts in Africa. Generally, the book successfully puts the international courts in Africa on a separate pedestal from international courts in other continents and points out the importance of impact in measuring the performance of international courts. However, the authors in the book have heavily downplayed the importance of compliance and implementation in the impact of these courts. Holistically, the book argues that compliance and effectiveness do not adequately measure the impact of international courts in the African socio-legal and political setting. While compliance, implementation, and effectiveness are not the only factors tied to the performance and impact of the courts, they are very key and indispensable factors.

One of the biggest challenges faced by the ECCJ is the failure of member States to comply with and enforce its decisions. There seems to be a high level of nonchalance amongst member States to fulfil this and other obligations owed

to the ECOWAS Community. The Court has expressed multiple concerns about the impediment. In 2014, the then president of the court, Awa Daboya, at a news conference stated that the "usefulness of the court does not lie in its mere creation and existence" and that the court will achieve its purpose when its adjudicated cases and decisions are enforced by member States. According to her, the impact and significance of the court have been significantly undermined by the failure of member States to regard its decision. Similarly, the former vice president of the court, Justice Micah Wright had expressed that the non-execution of judgement is notably the biggest hardship or impediment faced by the court. More recently, the former president of the ECOWAS Commission, Marcel De Souza, during his handover in 2018, expressed displeasure at the level of "disrespect of the community's court decisions by member States".

Overall, while Africa's international courts are impactful, without compliance, implementation, and effectiveness international courts including those in Africa continue to run the risk of weakening its legitimacy and becoming inefficacious.

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