Book Review: The Performance of Africa's International Courts, Using Litigation for Political, Legal and Social Change

By:

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James Thuo Gathii has edited a volume on the effectiveness and impact of Africa's international courts and tribunals. This is against the general context of assessing the effectiveness and impact of international courts on which scholarship abounds.

The fact that Africa hosts the largest number of international courts and tribunals in the world warrants a closer review of their effectiveness. Previous scholarship has assessed these courts' and tribunals' effectiveness through the prism of compliance with their decisions. There has been little analysis of the wider impact that the courts and tribunals have on litigants, on the social, political and economic progress in the State concerned and on the values that the states that establish these courts seek to uphold and protect. This volume

by African researchers with a record of writing on these courts and tribunals espouses a more nuanced Afro-centric approach which will serve as a further stimulus to analysing this important topic.

The book opens with an introduction by the editor on the benchmarks that have been used for the assessment of international courts, that is, the rate of compliance of their decisions and how often resort is made to them, as evidence of their effectiveness. The introduction highlights the shortcomings of this quantitative approach, of emphasising only the technicalities of compliance with the decisions of these courts. The second approach highlighted in the introduction, examines the wider impact that the litigation process and the outcome thereof have, on the parties involved, on the society at large and on the rule of law. This second approach – a qualitative approach – addresses the shortcomings of the first approach and is proposed as the more suitable one when assessing Africa's international courts and tribunals.

The main body of the book then demonstrates the application of the second approach with regard to the East African Court of Justice (EACJ), the Community Court of Justice of the Economic Community of West African States (ECOWAS Court), the African Court on Human and Peoples' Rights (ACtHPR) and the South African Development Community Tribunal (SADC Tribunal). These courts' and tribunals' resolution of disputes on electoral malpractices, national constitutional amendment processes, transitional governance arrangements, socio-economic rights, fair trial and land reform policies provide a rich background for this analysis. Particular attention is given to the role played in this process by civil society actors, opposition politicians, legal practitioners, victims of human rights violations and other organs of the Intergovernmental organisation of which these courts are a part. All international courts and tribunals face resistance, pushback and backlash and Africa's international courts and tribunals are no exception, therefore the book has a chapter on these issues. Although the different chapters focus on identified courts, the book ends with a helpful reference guide to all Africa's international courts and tribunals.

The most interesting contribution of this book is on the re-orientation of the assessment of the effectiveness of Africa's international courts and tribunals from a purely legalistic approach to an Afro-centric, multi-dimensional and

interdisciplinary one. It also undertakes a critical analysis of the role of various actors, including litigants, legal professionals, civil society organisations and judges, who must undertake the litigation and dispute resolution process in the face of overt or covert State influence. The book establishes that, State influence at the national level, is one of the reasons for resorting to Africa's international courts and tribunals. Other reasons include the internationalisation of domestic, usually electoral or governance disputes, the low probability of success in litigation on socio-economic rights and the imperative of upholding constitutionalism and the rule of law either in normal or post-conflict settings. Another theme that the book highlights is the careful appraisal of the litigation and dispute resolution processes at play. It demonstrates that beyond the issue of compliance with decisions, Africa's international courts and tribunals influence various legislative and policy processes at the national level. In turn, these national processes and contexts influence the strategies employed by the international courts and tribunals to resolve the disputes before them.

The Chapters by James Thuo Gathii and by Olabisi D. Akinkugbe set out how opposition politicians and groups in East and West Africa have utilised the EACJ and the ECOWAS Court respectively, to seek redress for electoral malpractices with regard to elections to the East African Legislative Assembly and national elections. For the EACJ, these cases have facilitated it to repurpose its mandate from a trade-related dispute tribunal to dealing with violations of the applicable treaty law of the East African Community. In the case of the ECOWAS Court, which unlike the EACJ, has an explicit human rights jurisdiction, these cases have enabled the Court to clarify the extent to which it will entertain matters based on electoral disputes at the national level.

A similar comparative approach is used in the Chapter by Solomon T. Ebobrah and Victor Lando, which analyses the impact of the EACJ and the ECOWAS Court on the promotion of constitutionalism in the respective States against which applications have been determined. They argue that these courts offer an alternative forum beyond the State, through direct and indirect impact on compliance with constitutional principles and protection of human rights. The analyses of the impact of litigation process and reactions from the States, demonstrates that the focus of assessment should not be limited to the outcome of the process and compliance with the decisions rendered.

Turning to the performance of Africa's international courts and tribunals regarding socio-economic rights, the Chapter by Obiora C. Okafor and Okechukwu J. Effoduh focuses on the ECOWAS Court. They posit that this court has provided social justice activists and those undertaking strategic litigation on these rights, with an invaluable opportunity to advance their cause. In a State-centric world, these entities would face an uphill battle in strategic litigation on socio-economic rights at the national level due to various procedural and substantive hurdles. With the ECOWAS Court's wide material jurisdiction, liberal standing and procedural requirements, its judgments on socio-economic rights are setting out State obligations on giving effect to these rights. These decisions precipitate legislative and policy reform and galvanise developments on social justice issues either by the court itself or by activists. This approach serves to demonstrate the direct and indirect impact of the ECOWAS court.

Another area in which Africa's international courts have played a role is in the stabilisation of post-conflict societies through review of transitional governance arrangements. This is an issue that is peculiar to the African context, in view of the conflict and instability experienced in many countries. The Chapter by Andrew Heinrich analyses the role of the EACJ as a transitional justice mechanism with regard to Burundi. The Chapter discusses the EACJ's role in this regard in resolving disputes on property issues, freedom of expression, governance arrangements, and challenges to the constitutional review process. The Chapter demonstrates that the EACJ offered a viable forum for those seeking redress for their grievances by providing an alternate or additional level of judicial review of actions by State organs. The analysis in the Chapter illustrates that the filing of these cases had an effect at the national level, whether or not the applicants were ultimately successful at the EACJ. Yet again, the chapter demonstrates the premise that the assessment of Africa's international courts and tribunals should not be restricted to the quantitative assessment of compliance with their decisions.

Moving to the continental level, James Thuo Gathii and Jacquelene Wangui Mwangi present a chapter on the opportunity offered by the ACtHPR for individual litigants, political actors and interest groups to advance civil and political rights, electoral justice and good governance. It is argued here that, the court's material jurisdiction and focus on substantive justice rather than

procedural technicalities and pro-activeness in providing free legal assistance to indigent applicants has contributed to the widening of these opportunities. However, the jurisdictional limitations the court faces due to the opt–in mechanism regarding recognition of its jurisdiction by States and the recent withdrawals of such opt-in declarations by four States is a step backward. Whereas applications can be filed by individuals regardless of their nationality, for Non-Governmental Organisations, they must have the Observer Status before the African Commission on Human and Peoples' Rights. Nevertheless, as examples, the court's jurisprudence has impacted on electoral processes in Cote d'Ivoire and provision of free legal assistance in United Republic of Tanzania by precipitating or consolidating reforms in this regard. Despite the jurisdictional limitations, the interpretation provided by the Court in resolving specific disputes can be applied by all African Union Member States thus having a wider impact.

The penultimate chapter by Karen J. Alter, James Thuo Gathii and Laurence R. Helfer deals with the backlash against the EACJ, the ECOWAS Court and the SADC Tribunal. With respect to each court, there is an analysis of what precipitated the backlash, the actions and strategies employed by the state that mobilised against the court and the role played by the court itself, secretariats of the relevant intergovernmental organisations and the civil society - particularly the affiliated bar associations and the media. The Chapter undertakes an in-depth review of the roles played by the various actors. It looks at the impact of their action or inaction on the outcomes of the backlash. In the case of ECOWAS Court, the court emerged strengthened, while for the EACJ reforms were effected as a result, whereas the worst-case scenario was realised for the SADC Tribunal, when it was disbanded.

The last Chapter by James Thuo Gathii and Harrison Otieno Mbori is a description of the eight active international courts and tribunals in Africa and the inactive Arab Maghreb Union's Judicial Organ. They are presented thematically, starting with the human rights-oriented courts (EACJ, ECOWAS Court, SADC Tribunal, ACtHPR and African Commission on Human and Peoples' Rights), then the economic-oriented courts (Court of Justice for the Common Market of Eastern and Southern Africa (COMESA Court), Common Court of Justice and Arbitration of the Organisation for the Harmonisation of African Business Law (OHADA CCJA), Court of Justice of the Economic and Monetary

Community of Central Africa (CEMAC Court) and Court of Justice of the West African Economic and Monetary Union (WAEMU Court) and then the Arab Maghreb Union Judicial Organ. They are described in terms of establishment, jurisdiction, composition, organisation and access. This is a very useful guide to map out the landscape of Africa's international courts and tribunals. The view of this reader is that this ought to have come just after the Introduction Chapter to facilitate the reader have a full appreciation of the various courts and tribunals before delving into the specific analysis of some of the Courts.

It is clear from the mix of Chapters and the analyses undertaken in this volume that the various authors followed the golden thread of presenting an Afro-centric model to assess the performance of Africa's international courts and tribunals. All arguments posited supported this approach, therefore ensuring consistency in the themes that were elaborated in the book. I hope that the editor and contributors to this volume will continue the scholarship on this theme and transform the narrative on the performance of Africa's international courts and tribunals. This book is an excellent place to start.

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