

University of Chicago Law School

Chicago Unbound

Articles

Scholarship

2021

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

Tom Ginsburg

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the **Law Commons**

In placing these diverse criminal justice TLOs in a single collection, *Transnational Legal Orders of Criminal Justice* offers an opportunity to make visible these shared temporal, substantive, and geopolitical coordinates, recognizing how they draw on, reinforce, or contradict each other. The breadth, depth, and empirically grounded rigor of this book offers a nuanced and illuminating understanding of how criminal law governs or organizes domination across borders.

NICOLA PALMER
King's College London, UK

The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change. Edited by James Thuo Gathii. Oxford, UK: Oxford University Press, 2020. Pp. xxv, 384. Index. doi:10.1017/ajil.2021.38

In the 1990s, some scholars argued that the future of international law was to be European. National leaders would cede sovereignty to regional bodies; networks of cooperating technocrats would make rules; transnational courts would adjudicate them; and democracy, human rights, and markets would spread ever eastward. Needless to say, this vision looks a little quaint from the vantage point of the third decade of the twenty-first century. Autocracy is on the rise, borders are closing, and a series of books has asserted the twilight or end-times of human rights. International courts are under attack from powerful states, including the United States.

But the newfound pessimism may also go too far. Something important is happening in Africa. Throughout the continent, and despite the tenuous hold of democracy in many countries, courts are speaking truth to power. The South African Constitutional Court's order to jail former President Jacob Zuma for contempt of court is

only the highest profile recent example. In numerous other countries, courts have played a major role in defending their political systems from executive overreach. In Malawi and Lesotho, high courts prevented political leaders from using COVID-19 as an excuse to extend their time in power. Kenya's Supreme Court rejected a constitutional amendment that would have consolidated control of the governance system in the hands of a political cartel. And while term limit evasions remain frequent, there are some instances of courts blocking leaders' attempts to remain in power.

The growing importance of law is also reflected in the burgeoning jurisprudence of Africa's regional and continental trade and human rights courts. For example, the Community Court of Justice for the Economic Community of West African States (ECOWAS) recently blocked Nigeria's attempt to ban Twitter. The African Court on Human and Peoples' Rights is hearing more cases each year, even if states are leaving its protocol allowing individual complaints. In short, law increasingly matters for the exercise of public power on the continent, even in imperfect ways, and international law is part of the story.

Loyola University School of Law Professor James Thuo Gathii's edited volume provides a terrific introduction to the trade and human rights courts in the region. Consisting of a series of case studies and an extended introduction by Gathii, the chapters cover the three most high-profile bodies—the East African Court of Justice (EACJ), the ECOWAS Community Court of Justice, and the African Court on Human and Peoples' Rights—along with some less well-known courts. Some of the chapters focus on particular themes, such as transitional justice or constitutional litigation, while others look at broader audiences and dynamics, such as the phenomenon of backlash. Collectively, the authors show how these courts are playing a role by providing fora to challenge dominant parties and strongmen, providing important space for political mobilization and contestation, and developing a normative architecture for human rights on the continent.

One of the great strengths of the volume is its empirical sensibility. Rather than arriving with preconceived notions of the roles courts should or will play, the authors take a bottom-up approach to the data, situating the courts in their political and social context through discrete lenses and inductively examining the case law and actors to capture the bigger picture. As Gathii puts it, the chapters “put the users of international courts and their broader strategies at the center of their analysis” (p. 13).

This is a refreshing approach. As Gathii notes in his introduction, most studies of international courts focus on the question of whether or not losers comply with judgments against them. While intuitive, this measure is hardly sufficient to measure “success” or “failure,” since courts can shape outcomes without formal compliance. A speed limit affects behavior even if no one obeys it perfectly. In recognition of this fact, observers of international courts have introduced the notion of “effectiveness” to capture a broader notion.¹ But this approach too assumes that courts have a job to do, assigned by some other actor, and proposes taking a broader lens in examining how well they do it.

Gathii pushes beyond this, painting international courts as opportunity structures for political mobilization. From this angle, it is not so much the institutional features of courts that do the work, though they are obviously important. Nor is impact the main explanandum. Rather it is the interaction of the courts with litigants and audiences that is at the center of the analysis. Simply by virtue of their existence, the courts provide venues for contesting and raising of awareness of injustices, allowing opportunities that would otherwise not exist. Collectively, the studies thus demonstrate that courts can become arenas within a broader social field, regardless of what they were designed to be or how states react to them. The volume provides a very valuable sociolegal contribution to our understanding of the region, and of international law more broadly.

In Chapter One, Gathii argues for thinking about courts as “coordination devices,” in which litigation allows players to raise issues and mobilize supporters. Unlike domestic courts, international courts lie outside the control of any one government, and so can provide a forum for claims that would be foreclosed at the domestic level. Using the example of political parties before the East African Court of Justice, Gathii shows how opposition parties in four of the six member states were able to bring cases to the sub-regional court. In 2006, for example, Kenya’s opposition parties successfully challenged the ruling party’s attempt to seat its own partisans as members of the East African Legislative Assembly without an actual election in the Kenyan parliament. The Court decided that the process was not acceptable and so the delegates should not be seated at the regional organ.² And while Kenya’s president, furious, successfully obtained an amendment to the East African Community treaty (an example of backlash examined later in the book), the government eventually complied with the judgment and held a genuine election process.

Chapter Two, by Andrew Heinrich, a JD candidate at Harvard Law School, focuses on the role of the EACJ in transitional justice in Burundi. In light of the repeated displacements that have occurred in Burundi’s history, property claims abound, and domestic institutions have not effectively resolved them. The EACJ has no specific jurisdiction in regard to transitional justice, and yet NGOs and repeat litigants have found ways to bring cases, keeping their issues alive in public consciousness. Heinrich draws on sociologist Bonny Obhawah’s notion of flow and counterflow to capture the two-way nature of the interaction between domestic and regional systems. The flow comes from Burundian civil society, who find a platform that allows the counterflow of human rights norms and discourse into that authoritarian country. This theoretical lens is obviously

¹ YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* (2014).

² Prof. Peter Anyang’ Nyong’o and Others v. Attorney General of Kenya and Others, Reference No. 1 of 2006 (Judgment), [2007] EACJ 6 (E. Afr. Ct. Just. Mar. 30, 2007).

relational more than institutional, and illustrates the rich array of frames put forth in the book.

Another such frame appears in Chapter Three by Obiora C. Okafor, professor at the York University Osgoode Hall Law School, and Okechukwu J. Effoduh, doctoral candidate at Osgoode Hall Law School, which focuses on the role of the ECOWAS Court in providing normative resources for the poor. The authors develop the idea that activists and bar associations act as “brainy relays,” channeling local issues to the regional body, afterward using the judgments to mobilize support and shape local discourse within national contexts. There is, they argue, a kind of “virtual alliance” between litigants and regional judges (p. 117). Of particular note is the way in which the ECOWAS Court has developed standing doctrines amenable to pro-poor claimants, while also denying standing to corporations as legal persons. The subaltern and supranational interact in ways that challenge the sometimes captured national institutions.

Chapter Four, by Olabisi D. Akinkugbe, professor at Dalhousie University Schulich School of Law, uses Ran Hirschl’s notion of “mega-political” jurisprudence to understand the role of the ECOWAS Court in high politics.³ The major tool here has been a 2001 Protocol on Democracy and Good Governance and a 2005 Supplementary Protocol, the latter of which gave the Court the authority to hear human rights cases. Civil society actors and supranational institutions mobilized for these reforms, arguing that giving the Court a human rights jurisdiction would help further regional economic integration. Although there was no explicit mandate to adjudicate national electoral disputes, the Court developed a mechanism allowing it to do so when disputes implicated human rights concerns.⁴ The so-called *Ugokwe* doctrine has been an important procedural hook in subsequent cases. While the Court has been cautious in providing effective relief,

Akinkugbe argues that it provides an alternative forum for opposition political parties.

Chapter Five, by Solomon T. Ebobrah, professor at Niger Delta University, and Victor Lando, partner at Kamau, Lando & Associates, examines the role of the EACJ and ECOWAS regional courts as “back-up custodians” of constitutional justice. By providing a forum in which claims can be heard, these bodies provide early warning systems, especially in contexts in which no effective domestic venue is available. They also play a role in normative development, creating resources whose future possible uses and impact cannot be predicted. Similarly, in Chapter Six, Gathii and Jacqueline Wangui Mwangi, SJD candidate at Harvard Law School, examines the African Court on Human and Peoples’ Rights as an opportunity structure for mobilization. Many of the cases involve use of the Optional Protocol, under which states can choose to allow individual litigants to bring cases before the regional body.

The final substantive Chapter, by Gathii, Karen Alter, professor at Northwestern University, and Laurence Helfer, professor at Duke University School of Law, examines the phenomenon of backlash against the subregional courts. Famously, the Southern Africa Development Community Tribunal was dismantled after a case in which it provided relief to white farmers against the government of Robert Mugabe in Zimbabwe. But the chapter elaborates less well-known attempts by governments to rein in the EACJ and the ECOWAS Court. In the former case, the Kenyan government pushed through a plan to hamper the court procedurally, but the Court found ways around some of the constraints; in the latter case, an attempt promoted by the Gambia to limit the jurisdiction of the Court failed. This chapter nicely illustrates how the African cases provide important data points for the broader literature on international courts.

The final chapter is a reference guide to the African courts, including many not covered in the main chapters, and a valuable one-stop shop for basic information on their structure and jurisdiction. It also grapples with substantive

³ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

⁴ *Ugokwe v. Nigeria*, Merits, ECW/CCJ/APP/02/05, IHRIL 3117 (ECOWAS Oct. 7, 2005).

questions, like why North Africa seems to be an exception to the judicialization trend.

Collectively, the volume offers an analytic shift away from compliance that is in part a response to the brute fact that compliance is low. None of the chapters shy away from the limits of what the courts have been able to do. But what the authors are bringing to our attention, and the regional judges appear to understand, is that the courts are playing a role in continental justice simply by staying open. Judges seem aware of the compliance problem: for example, a recent strategic plan put out by the African Court on Human and Peoples' Rights aspires to a compliance rate of 30 percent with its judgments, a number that would surely be considered low in a national context.⁵ But the fact of the strategic plan itself is remarkable, showing how the Court is well aware of its embeddedness in a challenging broader strategic and social environment. The realism and honesty is refreshing.

Another theme that emerges from the book is that viewing courts as simple agents of the states that set them up is too simple. The EACJ has a large docket of human rights cases which is orthogonal to its primary intended jurisdiction in trade and integration matters. It has relied on a good governance provision of the regional Charter to claim this broad jurisdiction. The ECOWAS Court was also set up for trade, and only later given a human rights jurisdiction at the instigation of civil society and ECOWAS Commission staff. In short, judges, litigants, and regional officials have all played a role in developing these fora, and they have become institutionalized in the sense that they cannot be understood as pure agents. Hence the effectiveness frame does not fit as well as the idea that the courts are opportunity structures. The regional institutions are channeling the broader discursive power of law to limit power,

something they share with some of the national high courts on the continent.

Because it is designed as an introduction, the volume raises questions for further research as well. One wonders about the relationship with national courts, both high courts and lower ones. Many of the international judges have served in their national judiciaries, and it would be interesting to understand how national judges view the supranational bodies. The regional institutions vary in terms of their demand for exhaustion of local remedies, so that litigants may in some cases bypass local judiciaries. This may be helpful in some contexts, but also has led to the broader trend of states seeking to reduce exposure. Only six states currently have optional declarations under a Protocol to the African Charter on Human and Peoples' Rights giving individuals and NGOs direct access to the that court; four countries recently withdrew those declarations.

One of the wonderful things about the book is its detail bringing individual cases to light. In many national contexts, filing these cases or even serving as a judge on a regional court can be an act of great courage. The motives of the litigants, lawyers, and activists call out for further ethnographic study, as well as admiration.

This brief review is not the place to advance or defend a claim that the future of international law is African. But for now, suffice it to say that the story of these courts is novel and understudied, and this volume will become an important touchstone for future work. Much of the existing work on international courts draws from European and Latin American experiences, where integration is deeper and legal regimes are older. The African courts' challenges are not trivial. Theirs is not a straightforward story of ever-expanding jurisdiction in alliance with national courts. Rather the developments are more messy, uneven—and perhaps therefore more worthy of attention. For that project, Gathii has provided us a terrific place to start.

⁵ African Court on Human and Peoples' Rights Strategic Plan 2021–2025, "Deepening Trust in the African Court by Enhancing Its Efficiency and Effectiveness," at <https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-strategic-plan-2021-2025>.