A Venue or a Decision Maker? The Constitutional Function of African Regional Courts

By:

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The *Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change*, edited by James Thuo Gathii (2020) breaks the convention in writing about international courts. This is because it departs from the well-trodden path of investigating the impact of finalized court decisions. The book instead puts at the centre of its inquiry the impact of filing of cases with the African regional courts and their subsequent litigation. It is more about the journey than about the destination. It looks at the courts through the eyes of a litigant. By examining the impact from this perspective, we are better able to see that litigants do not always file cases merely or only to win or prevail. Rather, we learn that litigants are often pursuing multiple goals when they file their cases. The research is meticulous and thought-provoking. Using numerous case studies, it invites the reader to contemplate the regional international courts as institutions giving to the individuals, civil society and opposition parties, an opportunity to be heard, to air grievances, to expose the misdeeds

of the governments, to have the victimhood identified and documented, to mobilise support for the promotion and defence of political freedom, to have certain norms of behaviour recognised, to have values and interests validated, to educate the public, to challenge the government on a forum it does not control and in so doing, to compel authoritarian governments to be answerable for their conduct.

The first thought: Are those expectations not too many? A huge responsibility is being vested on a handful of unelected officials – the international judges. And then the first reflection: Are we lawyers not taking ourselves too seriously? Where are the political institutions advancing the goals the authors talk about? It is indeed only the East African Legislative Assembly (EALA) that is given some credit, while other international parliamentary organs are -- not without merit -- characterised as “talk shops”. Are the courts a substitute for political institutions? How are we getting to a situation in which public debates on crucial issues are carried out not in the parliament but in a courtroom?

The second thought: What are those expectations telling us about the current state of democracy and the rule of law on the domestic level? How come the “venue to peacefully channel political conflicts that arise from the systemic obstruction of their political activity imposed by the incumbent political parties” is found in the international court and not in the electoral campaign or domestic political process? The book’s diagnosis, even if not always made explicit, is not encouraging, to say the least. And the national courts do not fare much better: conservative, committed to status quo, out of touch with social realities, not independent. How come Tanzanians could more easily access the African Court of Human and Peoples Rights– and the same still holds true for the EACJ – than the Tanzania Court of Appeals? Are the international courts instruments of outsourcing democracy and the rule of law?

It is those deficiencies – both on the domestic and the regional level – that set the scene for the function of the international courts which the book seems to be advancing. It can be regarded as a constitutional function. Even if the concept as such is not new in the international law sphere, the shift of the focus towards the applicants, away from the institution and the judges is quite a novel idea. The authors envisage the African international courts as regional intellectual hubs, where mutual intellectual fertilisation takes place between

the court and the civil society; the book speaks even of a “virtual alliance” between the two. The chapter on the ECOWAS-Court advances the concept of NGOs as “brainy relays” channelling the local issues to the Court and then using the Court’s judgement to shape public debate and put pressure on the domestic government. While engaging with the court, the individuals and lawyers create a regional constitutional system or, as one of the chapters terms it, a “supranational constitutionalism anchored outside of national constitutions”. The idea sits well with the EAC’s ultimate goal of a political federation that apparently begins with the EACJ.

The EACJ’s docket has been populated by the human rights cases. The same is true for the ECOWAS Court which was given the human rights jurisdiction by explicit treaty provisions. And it is the human rights cases that enable the conceptualisation of the African international courts as quasi-constitutional courts. Deciding them, the court may act as protector and promoter of values that inspire a regional constitutional architecture. Similarities to national constitutional courts are also there: open-ended texts, proclamations of principles, inflexible norms in international treaties and difficulty of change and, above all, involvement of individuals. The individual complaint has a twofold function. First, it disaggregates the State as a unitary actor on the international plane, and second, it adds some moral dimension to the court proceedings, enabling even the weakest in the society to challenge the government on what the book refers to as a “relatively level playing field”. This “inner morality” of the court proceedings initiated by individuals was one of the reasons for the inclusion of the individual complaint in the European Convention on Human Rights. Back then, it was seen as an expression of democratic ideal. Today, one may add that it is also an instrument of empowerment and recognition of agency, a particularly important one in situations like Burundi, characterised in the book as a power-sharing arrangement based on a deal struck between the elites.

But if the constitutional function of the court is to be exercised by an alliance between the court and the various interest and advocacy groups or private individuals, what is the division of responsibilities? Or to answer the question asked at the beginning: what part of the burden of the numerous expectations is carried by the judges and what part is carried by the litigants?

Defining the court not as much as a decision maker, but as a forum or a venue, or even as a resource to the domestic activist sources, as the book does, the responsibilities vested with the judges appear suddenly quite limited. If it is the venue which counts and not the decision, then the judge should just keep the venue open, keep the resource available and facilitate the access. Such a role description has consequences for the case law. To keep the venue open, means to avoid a backlash or, put simply, not to anger the State Parties which have the power to abolish the Court and eventually shut the venue. The book gives some examples of coping strategies and tactics used by the African regional courts to avoid such backlash, such as issuing declaratory judgments, rather than ordering specific remedies. This used to be the practice of the EACJ for a long time.

A liberal and progressive interpretation of the access provision which the ECOWAS Court and the EACJ have been advancing would be another responsibility of the judges. An interesting exception is EACJ's refusal to adopt the idea of the "continuous violation" that would be an appropriate instrument to ensure access to justice in cases in which the prohibitive 60 days application deadline imposed by the EAC-Treaty has expired. Did the tactic of avoidance trump the duty to facilitate access to justice? Regarding the content of the judicial decisions, the constitutional function as constructed throughout the chapters places premium on the development of the law, rather than on the delivery of justice in individual cases. It is more about clarifying ambiguities in specific factual settings, resolving clashes of principles or creating "common understanding"; like in the question of justiciability of social and economic rights denied in the Nigerian domestic jurisprudence, but affirmed by the ECOWAS-Court. This is in line with what, according to the book's research, the litigants expect from the African regional courts: not necessarily a major structural break-through, not even "immediately demonstrable results", but rather "long-term incremental impact" on State behaviour. The regional court appears to be an additional, supranational actor within a system of checks and balances with its case-law being like constant dropping that wears away a stone. It may be that the position of the courts is fragile and a support by further robust regional institutions is desirable. But are the judges at the regional courts really overwhelmed?

In this alliance between the litigants and the court, it is the litigants and not the court that can be easily overwhelmed. Take the objective of exposing the misdeeds of the government. How much in terms of resources can autocratic governments mobilise to maintain silence about their misdeeds? How much is invested in propaganda? How much violence is meted out to prevent people from raising their voice? Depending on the political context which of course varies across Africa, filing a complaint can be even an act of heroism or an act of desperation or both. For example, the case of EACJ case of Plaxeda-Rugumba , where a family of a detainee held incommunicado compelled the government of Rwanda to reveal his whereabouts by filing the case in Arusha. In this sense, the book while conceptualising the constitutional function of African regional courts pays tribute to all those individuals and organisations that are willing to take risks in order to enforce a commitment to certain basic values.

One doubt remains. What about the litigants who are not interested in promoting values and exposing misdeeds, but rather in obtaining an effective remedy in their case, like the applicant in the EACJ's case Grand Lacks Supplier v. Burundi who was just legitimately claiming compensation for the foodstuffs which rotted away while his truck was illegally held up by the Burundian customs officials? The less the national judiciary is capable of administering justice the more frequently applicants will seek redress in the regional courts. Moreover, the further the economic integration progresses, the higher the number of commercial disputes that are likely to find their way to the regional courts. Therefore, the traditional function of courts as institutions administering justice in individual cases cannot be downplayed. The book, however, does not jettison individual justice; quite to the contrary, the research is about exploring functions of regional courts beyond compliance in individual cases, and not instead of it. And leaving out compliance is more than understandable, since this is what most of the existing scholarship is already about. The constitutional function and the traditional one may be mutually supportive. For example, both require unhindered access to justice. But when it comes to the effects of the court's decisions, tension may arise: While exercising constitutional function, one may suggest the use of some avoidance tactics discussed earlier. Doing justice in individual case might require court orders with robust remedies. How to master the splits? Clearly, the book does not only answer pertinent research questions, it also opens new fields for research. It is a must read for everybody interested in regional integration, constitutional law and access to justice in

Africa.

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