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REGIONAL COURTS AS JUDICIAL BRAKES?

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ABSTRACT

The article examines how regional integration courts can act as judicial brakes, at a time when “constitutional coups” – leaders staying in power past constitutional time limits or other forms of actions against the spirit if not always the letter of the constitution – are alarmingly common. The article discusses how regional courts can be used to modify or protect national rule of law and the constitutional order from the outside (i.e. from the regional integration aspect) and the extent to which this can be valid particularly to promote

a uniform interpretation and application of human rights. Although this trend is visible in Europe, it is more striking, because less expected, on other continents, in particular Africa and the Americas, where the developments take place in less than perfect democratic environments. The article contains evidence from cases dealt with in the various regional courts, supporting that a system of political and judicial oversight, especially in regions with weak or fragile democratic systems, can be a useful addition to national judicial or other mechanisms of protection of rule of law and control of the executive. Action by regional courts helps defeat perceptions of majoritarian politics, which in many countries allow for the winner to take all. Under a system of regional oversight, states become aware of the limits they themselves have set and citizens become aware of their possibilities to challenge political power.

KEYWORDS

Regional integration, courts, rule of law, political and judicial oversight

INTRODUCTION

The recent (December 2017) proposal of the European Commission to activate Article 7, paragraph 1 of the Treaty of the European Union against Poland as a reaction against the continuing deterioration of the rule of law situation in that country is but the most recent expression of a 21st-century phenomenon: a new form of relationship between international legal instruments and domestic law. The discussion about the hierarchy between these two is not new: a long debate has opposed scholars of international and constitutional law in this respect. This article intends to demonstrate that such debates are to a significant degree *passé*, as new forms of intermingling between international and national legislative levels become more convoluted; it even goes into the so far uncharted territory of relations between international obligations and national constitutions.

To a large extent, this development is linked to the exponential increase of the number and the competences of regional integration organisations and to the fact that these organisations enter substantially into what was until recently exclusively national competences. This intervention has been made possible, among other factors, by the increasing role of regional and sub-regional courts of justice. Regional courts are often not established by the organisations to deal with the relationship of international and constitutional hierarchy, but rather to deal with interpretation of the regional organisations' basic rules of operation; however, they gradually encroach on other areas than those specifically delimited for them. These areas include in particular the protection of individual rights as well as the safeguarding of constitutional order and balance of powers. This article examines how regional integration courts can be and are used in order to modify or protect national rule of law and the constitutional order from the outside (i.e. from the regional integration aspect rather than domestically) and the extent to which this can promote a uniform interpretation and application of human rights. Although this trend is visible on the European continent both at the level of the European Union (EU) and the Council of Europe, it is more striking, because less expected, on other continents, in particular Africa and the Americas. Asia does not possess any developed system of regional integration—most of the existing Asian regional cooperation takes place by inter-state mechanisms. The continent lacks a functioning system of human rights protection “in large part because [the] realities are markedly different from other regions”¹: these realities are linked to the “territorially vast extent, the large variety of political, economic and social systems,

¹ Hideotoshi Hashimoto, *The Prospects for a Regional Human Rights Mechanism in East Asia* (London: Modern East and South East Asia, Taylor and Francis, 2015), 101.

diverse cultures and a different Asian approach to human rights.”² We shall therefore focus the research especially on Africa and the Americas, as these two regions are less researched than Europe and provide a more interesting legal and political development, since it takes place in less than perfect democratic environments. However, the conclusions reached are valid for other regions of the world as well.

The article consists of four parts. After the introduction, we give an overview over relevant regional courts and examine cases where regional courts have played a role of constitutional “upholders”. We do not provide a detailed description of the courts, as such information is easily obtainable from the courts themselves, but we stress the most important elements for the issues we examine. The research for this article was largely carried out by study visits to the mentioned courts in 2015 (the Americas) and 2016 (Africa), which permitted discussions with judges and other high officials. The third part examines what the prerequisites are for the evolution of a judicial brake. Finally, we deal with trends for the future. The article finds with evidence from cases from various regional courts, that a system of political and judicial oversight, especially in regions with weak or fragile democratic systems, can be a useful addition to national judicial or other mechanism of protection of rule of law and control of the executive. In fact, action by regional courts helps defeat perceptions of majoritarian politics, which in many countries allow for the winner to take all. Under systems of regional oversight, States become aware of the limits they themselves have set and citizens become aware of their possibilities to challenge political power. Obviously, this picture is far from uniform and depends on the implicit acceptance by States and governments. The main handicap is problems of enforcement, which is the reason why regional courts cannot replace national ones in terms of protecting citizens. However, the internationalisation of complaints acts as publicity as well as a judicial brake. States fear the implication of foreigners in internal matters but they fear even more the “bad press” they can get by having an international court rule against them.

The intention of this article is not to demonstrate that regional courts are a panacea against authoritarianism but that they can help reduce its negative consequences. Relatively little academic research exists concerning this new trend, thus this article fills an important gap on an issue that is likely to increase in significance.

² Shveta Dhaliwal, *Human Rights Mechanism in South Asia* (London: Taylor and Francis, 2016), 107. The author enumerates various UN initiatives to establish human rights mechanisms in Asia since the 1980s which have not produced any concrete results (109-110).

1. SETTING THE SCENE

1.1. COUPS BY A DIFFERENT NAME

The twenty-first century has brought about a new form of breaches of constitution. It is no longer the army, which takes over with tanks rolling through capitals. Now, more often than not, especially in developing countries in Latin America and Africa, breaches of constitutions take more insidious forms, avoiding blatant violations and usually resorting to modification (either clearly unconstitutional or at least against the principles of the constitution) of the form of government. This development is linked in many respects with the increasing international intolerance of military interventions and higher attention given to such action by the international community and regional organisations. Nowadays, breaches of the constitution are often committed by sitting leaders, who want to perpetuate their presence in power but are not willing to resort to outright prohibiting of elections or other obvious ways of remaining unconstitutionally in power. Thus, they resort to referenda (or other forms of popular consultation), parliamentary revisions of the constitution or of legislation on term limits or checks and balances, allowing them to remain in power indefinitely. Governments also use constitutions to impose their specific policies and to obstruct political developments. They manipulate them in order to perpetuate their power and to prevent undesirable social, political or economic developments. This is done by interpreting constitutional rights in a manner, which contradicts the spirit of human rights and their evolutionary nature.

We can observe this trend in the last ten to fifteen years in Latin America and Africa. It is often linked to the increased personalisation of executive power, with the rise of charismatic leaders, such as Lula, Hugo Chavez or Joseph Kabila, at the same time as there is a weakening of the States' checks and balances. In other cases, such as Youweni Museveni in Uganda and Paul Kagame in Rwanda, there is in addition an absence of a reliable opposition, which enhances the need for a strong central leadership in particular after prolonged civil strife or State failure. Confronted with these developments, the international community remains powerless, as frequently the argument used for such machinations seems valid and respects the letter of the relevant constitutional provisions. The usual constitutional tools for preventing such overstepping at national level, namely constitutional or other supreme courts, are often subservient to the (logic of) the executive; failing this, judges are merely replaced by more docile persons. Under these conditions, the opposing sectors of society have no peaceful alternatives or at least rarely have

such alternatives at the domestic level. In most cases, these developments take place when the sitting leadership feels comfortable enough in power and therefore confident that the constitutional evolution will be completed without problems. As already pointed out, there is little the international community can do in such cases, save significant and prolonged escalation of various forms of sanctions.

At the same time as domestic forms of judicial control demonstrate their failure to protect the constitutional order, we increasingly witness non-domestic ways to confront and possibly alter such developments, which do not encompass the entire international community but draw their force from various regional integration instruments.³ In the last half century, in particular since the 1990s, throughout the world and especially in South and Central America as well as Africa, sub-regional integration has expanded: this includes in the Americas, Mercado Comun del Sur (Mercosur), the Andean Community of Nations (CAN), Sistema de la Integración Centroamericana (SICA) and the Caribbean Community (CARICOM) among others, and in Africa primarily the East African Community (EAC), the Economic Community of West Africa (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).⁴ These efforts constitute a response to globalization and the perceived need of neighbouring States to ally themselves in order to better compete in the international arena. In many instances, these forms of regional integration are of an economic or trade nature, intergovernmental in structure and relatively weak in competences. The tendency of several such organisations to emulate the European integration institutional structure (even though integration is much less developed than in the case of the EU) means however that these sub-regional organisations are often endowed with regional courts of justice, as the case is in Europe. Globally, the exception to the trend toward more regional integration with quite powerful organs is Asia. In this continent the regional bodies have limited mandates, restricted to specific issues.⁵

Regional courts have a varied degree of competences, usually including the right to interpret the regional integration rules and solve disputes arising therefrom. On some occasions, however, they are also entrusted with other, quasi-constitutional competences; for instance, upholding principles of democracy and rule of law and resolving conflicts between the various branches of State power. The combination of the courts being familiar with and part of the regional political

³ Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge: Cambridge University Press, 2015), 24–25.

⁴ Katrin Nyman Metcalf and Ioannis F. Papageorgiou, *Democracy through Regional Integration* (Antwerp: Intersentia, 2015), 11–12, 40–43.

⁵ Thomas Christiansen, Emil Kirchner, and Philomena Murray, "Conclusion": 629; in: Thomas Christiansen, Emil Kirchner, and Philomena Murray, *The Palgrave Handbook of EU-Asia Relations* (London: Palgrave Macmillan, 2013).

environment, in a manner which global courts cannot emulate, together with their degree of independence from domestic politics of a specific State provides regional courts of justice with a unique role as both “outsiders” and “insiders.”

In the same period, a parallel trend provides that States more and more adhere to regional human rights instruments and establish regional mechanisms for the promotion and protection of human rights. The San José Pact⁶ is the oldest such instrument for the American continent and the Banjul Charter⁷ for Africa. Increasingly though, these instruments which initially started with a very intergovernmental approach to the protection of human rights—setting up quasi-judicial institutions such as, respectively, the American and African Commissions on Human Rights—have obtained effective international human rights courts. In parallel, sub-regional integration schemes have acquired their own human rights instruments. Basically, we witness a “regionalization” of human rights protection and introduction of principles of rule of law and human rights in the ambit of sub-regional organisations, at the same time as continental instruments of human rights receive more prominence, and, often, powers. Such a dual development has brought into the forefront the role of regional courts of justice in intervening in domestic constitutional issues and introducing the regional integration obligations by Member States onto the internal arena.

1.2 THE JUDICIAL BRAKE

In recent years the courts of justice of certain regional integration systems have taken over a role not originally conceived for them: that of a quasi-regional constitutional court controlling *ex post* alleged violations of the constitutional order and of the rule of law. In this role, such courts can have an important effect on the political developments especially in situations where leaders exploit legal unclarities or weaknesses and when national courts may have difficulties reacting.

The term “judicial brake” comes from the United States, which is not surprising given the importance of the division of powers and the role of the judiciary in that system. The expression is referred to by Evan Tsen Lee⁸ when

⁶ *The American Convention on Human Rights (also known as San José Pact)*, adopted on 21 November 1969 in San José (Costa Rica) by the Member States of the Organization of the American States (OAS). It is a classical text for the international protection of individual rights and freedoms, inspired from the preceding experience of other similar regional treaties, but also from the Universal Declaration of Human Rights and the International Pact on Civil and Political Rights. The Convention entered into force on 18 July 1978 though not all OAS Member States, notably neither the USA nor Canada, have ratified it.

⁷ *The African Charter of Human and Peoples’ Rights (also called the Banjul Charter)*, adopted in 1981 by the then Organization for African Unity (OAU). It entered in force in 1986, once ratified by all OAU Member States (Manfred Nowak, *Introduction to the International Human Rights Regime* (Lund/Den Haag: Martinus Nijhoff Publishers/The Raoul Wallenberg Institute Human Rights Library, 2003), 203–214).

⁸ Evan Tsen Lee, *Judicial Restraint in America: How the ageless wisdom of the Federal Courts was invented* (Oxford: Oxford University Press, 2011), 26.

analysing the work of Judge Brewer in relation to the crises of 1894 in connection with a large Pullman strike, one of the largest labour disputes in the US, which led to the court examining wide-ranging issues of property rights and equity jurisdiction.

After the Second World War and the experience of European fascism, many scholars and lawyers expressed an increased interest in the possibility of a judicial brake – of courts keeping governing structures in check.⁹ I. Glenn Cohen uses the term in a manner that is suitable also outside of (US) constitutional law as such, namely by linking it to proportionality and suggesting that proportionality employed by courts is a judicial brake.¹⁰

We use the term in its constitutional role, as a tool for a system of division of powers where courts can uphold the rule of law in its basic sense: that everyone, including the governing structures, is bound by law. The objective of this article is to analyse first, *whether*; secondly, *to what extent*; and thirdly, *to what result* regional courts can perform the role of a regional judicial brake. We provide a brief overview of selected regional courts and move on to a discussion of specific cases from these courts that illustrate the tenability of the idea of a judicial brake at the regional level.

2. CASES IN REGIONAL COURTS

2.1. THE COURTS

2.1.1. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Sub-regional courts may be better placed than larger regional courts to act decisively. At the same time, both Africa and the Americas have continental human rights systems with courts and other institutions with a fairly important mandate. The Charter of the Organisation of American States (OAS) and the American Declaration of the Rights and Duties of Man adopted in 1948 were the first documents to stipulate human rights for the American continent.¹¹ The Inter-American Commission on Human Rights was the first specific human rights organ, created in 1959 and functioning from 1960. The Inter-American Court of Human

⁹ Keith E. Whittington, "The Power of Judicial Review": 392; in: Mark Tushnet, Mark A Graber, and Sanford Levison, eds. *The Oxford Handbook of the US Constitution* (Oxford: Oxford University Press, 2015).

¹⁰ I. Glenn Cohen, *The Globalization of Health Care: Legal and Ethical Issues* (Oxford: Oxford University Press, 2013), 132.

¹¹ Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, *International Law, Cases and Materials* (New York: American Casebook Series, 1982), 823.

Rights (ICHR)¹² was established through the American Convention on Human Rights, adopted in 1969 but only in force in 1978 after which the court could be established.

ICHR has been able to exert significant influence in some countries, whereas in others there has been more resistance and it has not been able to have the desired impact. Generally, ICHR has been more effective than the quite pessimistic view when it was inaugurated when many commentators feared States would not make any use of it or would denounce its jurisdiction.¹³ Unfortunately, human rights organs appear to have the most effect for countries that in any case have a reasonably good record of protection of rights, or at least the will to improve. In the American system, it means that countries such as Mexico¹⁴ and Colombia¹⁵ have permitted the ICHR to have some influence. In Guatemala, some positive effect is seen, even if limited and challenged.¹⁶ Venezuela, on the other hand, is a negative example. Although having been denounced (in 2012 and 2013) by ICHR for human rights violations, it has not implemented the court decisions but chosen a confrontational approach.¹⁷ As representatives of the ICHR stated, in the absence of firm implementation mechanisms and unless the court commands sufficient respect, there is always the risk with regional organs that countries that are dissatisfied with decisions denounce the courts or even withdraw from their jurisdiction, if such behaviour carries no consequences. As all other international courts, the ICHR does not have powerful enough tools to enforce its rulings to such an extent that their impact is guaranteed. Symbolically, however, the ICHR can be important even when the "real" impact remains restricted.¹⁸

2.1.2. THE COURT OF JUSTICE OF SICA

The Central American System of Integration (SICA, with its Spanish acronym) includes some of the furthest reaching elements of regional integration outside of Europe. Article 3 of the Tegucigalpa Protocol which establishes the SICA specifies that:

¹² See *The Inter-American Court of Human Rights* // <http://www.corteidh.or.cr/index.php/en>.

¹³ Oscar Parra Vera, "El impacto de las decisiones Interamericanas. Notas sobre la producción académica y una propuesta de investigación de torno al 'empoderamiento institucional': 393; in: Hector F. Fix-Fierro, Armin von Bogdandy, and Mariela Morales Antiozzi, eds. *Ius constitutionale commune en América Latina. Rasgos, potencialidades y desafíos* (Mexico City: UNAM Instituto de Investigaciones Jurídicas, 2016).

¹⁴ *Ibid.*: 412–413.

¹⁵ *Ibid.*: 394.

¹⁶ *Ibid.*: 398–399.

¹⁷ Santiago Otamendi and Pablo Saavedra Alessandri, eds., *Diálogos. El Impacto del Sistema Interamericano en el ordenamiento interno de los estados* (Buenos Aires: Ministerio Publico Fiscal de la ciudad autónoma de Buenos Aires, 2013), especially 396–399.

¹⁸ Reflections are made here and in the following based on interviews made by the authors at all the mentioned courts, during study visits in February 2015 (the Americas) and February–April 2016 (Africa).

The fundamental objective of the Central American Integration system is to bring about the integration of Central America as a region of peace, freedom, democracy and development” and that “to that end [it reaffirms] the objective... to consolidate democracy and strengthen its institutions on the basis of the existence of Governments elected by universal and free suffrage with secret ballot, and of unrestricted respect for human rights.¹⁹

The Tegucigalpa Protocol provided for the establishment of the Central American Court of Justice (CCJ) which exists from 1994. According to its Statute, the Court has important powers. These include: to examine, at the request of any Member State, disputes which may arise among them; to examine the validity of legislative, regulatory, administrative or any other acts taken by a State, when these affect Conventions, Treaties or any other provision of the Central American Integration Law or the agreements and decisions of its organs and bodies; to act as a standing Advisory Tribunal for the Supreme Courts of Justice of the States, for explanatory purposes; to act as a consultative body for the organs and bodies of SICA in matters concerning the interpretation and implementation of the Tegucigalpa Protocol; and to examine and rule, at the request of the affected party, on conflicts that may arise between the fundamental Organs or Powers of the State, as well as when judicial rulings are not respected in fact. These powers make CCJ the most important organ of SICA as a genuinely supranational institution with almost sovereign powers.²⁰

All these powers and perhaps especially the fact that the CCJ is a supranational constitutional court as a second instance gives it an almost unique role globally (with the CARICOM court being one of the few other similar examples). Theoretically, this means the court is very important, but this role is not necessarily translated to ability to implement its rulings. CCJ obliges States to follow the rulings but does not have many powers to enforce them or to impose sanctions. To obtain such tools requires political will of the Member States – to give the requisite powers to the supranational organ. This is not the case now, as only three (Honduras, Nicaragua and El Salvador) of the seven SICA Member States have nominated judges to the CCJ. Consequently, currently it does not have the reputation as a powerful body – parties may not turn to a court that is seen as weak, which creates a vicious circle, having further detrimental effect on the respect for its decisions. Representatives of the court expressed the opinion that potentially, CCJ could play the role of regional conscience, in which case it could really affect development of democracy in the region, but it does not always appear comfortable in its role.

¹⁹ *The Tegucigalpa Protocol to the Charter of Central American States*, Signed in Tegucigalpa in 13 December 1991.

²⁰ Katrin Nyman Metcalf and Ioannis F. Papageorgiou, *Regional Integration and Courts of Justice* (Antwerp: Intersentia, 2005), 45–49.

2.1.3. THE TRIBUNAL OF MERCOSUR

As opposed to the SICA, which had political and integration objectives from the start (although not always successfully pursued), Mercosur has been described as an intergovernmental structure with community objectives.²¹ The fact that it modelled itself on the European Communities did not mean that it copied the idea of a strong institutional structure and independent court. Initially, the institutional structure was very limited, although after some years (in 1996) it was modified to include more organs. Even at this point, there was however no court of justice.²²

A judicial body was introduced through the Olivos Protocol, adopted on 18 February 2002, in force 1 January 2004. The Permanent Court of Review of Mercosur (Tribunal Permanente de Revisión – TPR) was created, based in Asuncion, Paraguay and operational from 13 August 2004. The TPR has competence over appeals against the rulings of Ad Hoc Arbitration Tribunals within the Mercosur system and can furthermore act as a single jurisdictional instance if so requested by the parties or when Member States request an urgency procedure. TPR can give consultative opinions on request of Member State governments of supreme courts or the decision-making organs and Parliament of Mercosur. Access to the Court is not granted to individuals or moral persons.²³ The Olivos Protocol provides that the rulings (both of the Ad hoc Arbitration tribunals and of TPR) are compulsory for the States Parties in the dispute and will have the force of *res iudicata*.

TPR is one of many regional tribunals that is underused. In the words of the TPR representatives this is not necessarily for lack of will, but the relevant parties are not sure how to use the tribunals. To counteract this, TPR undertakes outreach activities, promotes its library and so on. The absence of very many cases has underlined other activities and representatives of the tribunal made a point of stressing that few cases does not mean that TPR has no influence. Another aspect that the TPR demonstrates that is the case to some extent also for other American regional tribunals, is how the personalities of the judges or other court officials play a great role.

2.1.4. THE CARIBBEAN COURT OF JUSTICE

Like in Central America, the States of the Caribbean appear to have a strong incentive for regional cooperation. They come largely from the same colonial

²¹ John A.E. Vervaele, "Mercosur and regional integration in Southern America," *International and Comparative Law Quarterly* Vol. 54 (April 2005).

²² Mariana Luna Pont, "Southern American Common Market (MERCOSUR)"; in: Lucio Levi, Giovanni Finizio, and Nicola Vallinoto, eds., *The Democratization of International Institutions* (London: Routledge, 2014).

²³ *Ibid.*: 267.

background and in most cases, share a language. In addition, most are very small and there was thus no shortage of reasons to look into regional cooperation or even a federal construction which was the original scheme of the British colonial power before independence. Eventually, the Caribbean Community (CARICOM) set up in 1973 was not so ambitious but is still gradually asserting itself.²⁴

The decision to establish a CARICOM court was taken in February 2001 when an Agreement Establishing the Caribbean Court of Justice was signed by ten CARICOM States, with two more signing in 2003.²⁵ This allowed work on establishing the judicial structures to start, first with a Regional Judicial and Legal Services Commission (RJLSC) and in 2004 with the first President of the Caribbean Court of Justice being sworn in. The inauguration was held in April 2005 at the seat of the court in Port of Spain, Trinidad & Tobago.²⁶ The court uses an impressive array of electronic means to hold hearings, to overcome practical problems of the poor physical communications in the region and to be more accessible to all CARICOM citizens.

The Caribbean Court of Justice has an interesting and wide mandate despite that the founding treaties do not say much about the court or its jurisdiction.²⁷ There is however a rule of law principle and the court can develop further principles based on this. Accountability and human rights would flow from this general principle. The Court can inform about its interpretation of the treaties even in the absence of a fully-fledged preliminary ruling procedure and thus influence interpretation of community law. Decisions are not directly effective as CARICOM community legislation is not directly applicable either, but the founding Treaty does express that community legislation should be respected at Member State level. At the same time, the regional tradition is generally one of strong dualism, with Haiti being the most significant example of this. The influence of the Court is increased by its additional roles, as a supreme court for some CARICOM members and furthermore as it is called upon as an arbiter in commercial disputes involving several States.

²⁴ David Berry, *Caribbean Integration Law* (Oxford: Oxford University Press, 2014).

²⁵ Antigua & Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; St. Vincent & The Grenadines; Suriname; and Trinidad & Tobago.

²⁶ See *The Caribbean Court of Justice* // <http://www.caribbeancourtjustice.org/about-the-ccj/ccj-concept-to-reality>.

²⁷ See *The Caribbean Court of Justice* // <http://www.caribbeancourtjustice.org/>.

2.1.5. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African human rights system consists of two organs, the African Commission²⁸ and the African Court on Human and Peoples' Rights.²⁹ This is somewhat similar to the earlier European human rights system, before abolition of the Commission attached to the European Court on Human Rights (ECtHR), but with the difference that the two organs are more independent from one-another. There is even a certain competition between them, even if the trend is toward greater cooperation as the Court hopefully will assume a greater role. Until now only a handful of States have made the declaration recognizing the competence of the Court to receive cases brought by individuals. The Commission has a somewhat wider mandate. Although links between these organs and the African Union (AU) exist and are supposed to get stronger, to create a more coherent pan-African regional integration structure, the Commission and Court are relatively independent from the AU. In Africa, both as regards courts and other cooperation, the sub-regional organs tend to be more active and influential than the pan-regional ones.³⁰

The African Commission on Human and Peoples' Rights (ACHPR) has been granted wide competences, including monitoring procedures, reporting requirements of Member States and inter-State and individual complaints procedures. Views on how efficient the system is in practice vary between it being an expression of taking rights seriously to doubts about any effectiveness whatsoever.³¹

Since its start of operations, in 2008, the Court's main obstacle to having a significant impact is the limited number of States that allow individual complaints. Work is ongoing to look into the Court dealing also with international criminal cases, to deal with the criticism – very common in Africa – of the International Criminal Court being prejudiced against Africa.³²

²⁸ The African Commission on Human and Peoples' Rights was established by the African Charter. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been located in Banjul, The Gambia.

²⁹ The Court was established by article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004 and the Court started operating in 2008. It is based in Arusha, Tanzania (See *The African Court on Human and Peoples' Rights* // www.african-court.org/en/).

³⁰ Malebakeng Forere, "Is discussion of the United States of Africa premature? Analysis of ECOWAS and SADC," *Journal of African Law* 56(1) (2012): 36–37.

³¹ Adrien K. Wing, "Women's Rights and Africa's Evolving Landscape: The Women's Protocol of the Banjul Charter": 25–26; in: Jeremy I. Levitt, ed., *Africa. Mapping New Boundaries in International Law* (London: Hart Publishing 2010).

³² See *African Court on Human and Peoples' Rights* // <http://en.african-court.org/index.php/about-us/jurisdiction>.

2.1.6. THE EAST AFRICAN COURT OF JUSTICE

The East African Community³³ (EAC) consists of few States but includes some of the larger and more developed ones in Africa. The mandate of the East African Court of Justice (EACJ) is, briefly expressed, to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty. The EACJ (like the EAC) are not totally new, but rather re-established organs of the defunct previous East African Community and East African Court of Appeal.³⁴ However, despite still being only temporarily operational (since 2001, pending that the Council of Ministers of EAC determines there is need for a full-time court) it has become perhaps the most activist of the regional courts.

An interesting example of this activism is how the EACJ assumed the right to deal with human rights issues, despite this not having been explicitly included in its competence. The Court made clear in 2007 in the case *James Katabazi and 21 others v. the Secretary General of the EAC and Uganda*³⁵ that it was not going to interpret its limited competence over human rights issues in a restrictive fashion. It said: "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1)³⁶ merely because the reference includes allegation of human rights violation."³⁷ The case set a precedent for the EACJ finding a legal basis for dealing with cases on human rights, democracy and constitutional matters.

2.1.7. THE COURT OF THE ECOWAS

Another active African regional organisation is the Economic Community of West African States (ECOWAS).³⁸ ECOWAS was formally established in 1975 and started out as an economic cooperation organisation, developing to a body with a more political mandate. Now expectations are quite high that ECOWAS should react in case of behaviour by Member States that contravene its treaties and principles – as seen in the case of the Gambia. In fact, ECOWAS possesses various instruments

³³ The East African Community (EAC) was established, as a regional intergovernmental organization, in Arusha (Tanzania) in 30 November 1999. It consists today of seven Partner States: The Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania.

³⁴ See *The East African Court of Justice* // http://eacj.org/?page_id=19.

³⁵ *James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda*, Ref. No 1 of 2007, The East African Court of Justice // http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf. The case is further discussed below.

³⁶ Including interpretation of the Treaty.

³⁷ *James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda*, *supra* note 35, 16.

³⁸ Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

based on which it can react to challenges to democracy in any of its Member States.³⁹

The ECOWAS institutional structure includes a court of justice, the rulings of which are binding. The court has been active not least on cases with a human rights element, stressing that constitutional guarantees for rights must be respected in practice. The jurisdiction in human rights cases was extended in a supplementary protocol from 2005 (to the original 1991 protocol on jurisdiction).⁴⁰

2.1.8. THE COURT THAT IS NO MORE: SADC

The best example of the way courts can be side-lined when they act too independently may be the Southern Africa Development Community (SADC)⁴¹ Tribunal. The Tribunal was first envisioned in 1992 and in 2000 SADC leaders in Windhoek, Namibia signed a Protocol on a SADC Tribunal. The court, consisting of judges from Member States, was officially established on 18 August 2005 in Gaborone, Botswana, but with swearing in of judges at what was to be its location, Windhoek, on 18 November 2005. The SADC Tribunal according to the constitutive documents should ensure adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments, and adjudicate on disputes referred to it.⁴²

The problems of the Tribunal started soon after its creation, when it heard and ruled on a number of cases against the Zimbabwean government between 2007 and 2009. In 2009, the government of Zimbabwe challenged the legitimacy of the Tribunal and in August 2010 at the SADC summit, the leaders of SADC announced that there would be a "review of the role, functions and terms of reference of the SADC [...] to be undertaken and concluded within 6 months."⁴³ The Tribunal was de facto suspended pending the review, first for a year.⁴⁴ On 17 August 2012 at the SADC Summit in Maputo the issue of the suspended Tribunal was addressed and it was decided that a new Tribunal should be negotiated, with a mandate confined to interpretation of the SADC Treaty and Protocols relating to

³⁹ Katrin Nyman Metcalf and Ioannis F. Papageorgiou, *supra* note 4, 44. Also Jeremy I. Levitt, "Pro-democratic Intervention in Africa": 112–116; in: Jeremy I. Levitt, ed., *Africa. Mapping New Boundaries in International Law* (London: Hart Publishing 2010).

⁴⁰ ECOWAS Supplementary Protocol A/SP.1/01/05, 19 January 2005, amending Protocol A/P.1/7/91 of 6 July 1991.

⁴¹ The SADC States are Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴² See *Southern Africa Development Community* // <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

⁴³ *Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government*, Windhoek 17–18 August 2010, Point 32 // http://www.sadc.int/files/3613/5341/5517/SADC_Jubilee_Summit_Communique.pdf.pdf.

⁴⁴ See *Southern Africa Litigation Centre* // <http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/>.

disputes between Member States.⁴⁵ This was a somewhat hidden way of telling the Tribunal not to be too active and independent vis-à-vis the members - despite that the review found that the Tribunal was properly constituted with authority under international law to hear individual petitions regarding human rights violations. Thus, it had been competent to hear the cases against Zimbabwe. Nevertheless, the suspension of the Tribunal was extended for another year and the Ministers of Justice and Attorney Generals of SADC were tasked with conducting another review. This led to the decision that the Tribunal should be changed so that it could no longer hear human rights cases until the adoption of a SADC Human Rights Protocol. The review suggested that individuals should still be able to take other cases (apart from human rights cases) to the Tribunal. The leaders of SADC however, negotiated another protocol removing not only the human rights mandate, but also the ability of individuals to access the Tribunal. In August 2014, this new protocol was signed at the SADC Summit by nine leaders of SADC States.⁴⁶ For entry into force ten ratifications are needed.⁴⁷ There are activities going on to advocate for the return of a SADC court with powers also over human rights, but this is mainly at the level of civil society activists.

2.2. EFFICIENCY OF THE COURTS

Regional courts present similarities but also differences. Their competences vary both in their content and extent. In addition to interpreting rules directly related to the specific integration issues, many of the courts have been granted further competences. What is most relevant for our analysis are possibilities of taking decisions that support principles of democracy and rule of law, for example when there are conflicts between the various branches of State power with State organs pulling in different directions.⁴⁸ Examples of cases are outlined below.

As previously mentioned, we do not provide details on the composition of the courts as such information is accessible from the courts, which are transparent.⁴⁹ The importance of the personal competences and credibility of the judges is significant. In the absence of a clear and strong institutional role, the fact that distinguished persons sit on the tribunals – the very people who would in any case be asked for advice on integration legal issues – means that the organ will

⁴⁵ See *Southern Africa Development Community* // <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

⁴⁶ The new draft protocol can be found in *International Justice Resource Centre* // <http://www.ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf>.

⁴⁷ See *Southern Africa Litigation Centre* // <http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/>.

⁴⁸ Oscar Parra Vera, *supra* note 13: 384.

⁴⁹ See, for example, *Inter-American Court of Human Rights* // <http://www.corteidh.or.cr/index.php/en/about-us/estatuto> or http://eacj.org/?page_id=1271.

command respect even if its formal role is limited. This is, however, not a sustainable mechanism as it relies on the right kind of persons being in the positions and even if the selection process intends to ensure this, political decisions may thwart such ambitions.

The number and extent of tasks given the court varies and the image that emerges from reading the relevant treaties does not always reflect reality. For example, the Tegucigalpa Protocol⁵⁰ which led to the establishment of the CCJ provided a range of significant tasks and powers, but the Court has not been able to use these fully due to lack of commitment from some Member States. In contrast, the quite activist EACJ lack a clear mandate for human rights but supports its activities on interpretation.⁵¹ The possibility of human rights complaints by individuals is a potentially very important tool, but even when provided by the instruments setting up the courts, like for the African Court on Human and Peoples' Rights, it remains weak if States reject it. Until now only a handful of States have made the declaration recognising the competence of the African Court to receive cases brought by individuals.⁵²

Given the level of integration in the regions analysed, the powers of the courts may appear even surprisingly wide. The reason for this is unclear: it may be related to the fact that States relegate the drafting of judicial aspects of integration to professional jurists without being aware of their impact or because they believe – sometimes erroneously – that they can control them. In any case, their being endowed by such powers and their better acquaintance with the regional political environment as well as their relative independence from any specific State makes regional courts of justice natural mechanisms of control of political behaviour.

At the same time, many regional court are underused. This may be due to a lack of understanding in the legal community and generally about their role and potential. Interestingly, this has not led to the courts remaining passive or accepting their limited role, but instead has made them undertake outreach activities. Courts can influence other institutions by introducing a rule of law element in discussions that may otherwise remain purely political. However, such an effect is hard to measure and any court that is not functioning as a proper court will eventually lose significance.

⁵⁰ *The Tegucigalpa Protocol 1991, supra* note 19.

⁵¹ Ally Possi, "Striking a balance between community norms and human rights: The continuing struggle for the East African Court of Justice," *African Human Rights Law Journal* (15) (2015): 194.

⁵² Katrin Nyman Metcalf and Ioannis F Papageorgiou "Why should we obey you? Enhancing implementation of rulings by regional courts," *African Human Rights Yearbook* 1 (2017): 173.

2.3. THE CASES

2.3.1. INTERVENING IN CONSTITUTIONAL MATTERS OF GOVERNANCE

As mentioned, the CCJ holds significant competence for dealing with constitutional conflicts among SICA Member States. The most significant example is the so-called *Bolaños* case⁵³ from 2005. The case emanated from the political crisis between the then Nicaraguan President Enrique Bolaños and the Sandinista-dominated Legislative Assembly. In this case, CCJ mentions the rule of law, inspired by the European Court of Justice. The CCJ ruled that congressional reforms (which removed control of water, energy and telecommunications from President Bolaños) were legally inapplicable. President Bolaños had cited community law as well as national law as a basis for his claim. The Court underlined that:

One of the fundamental principles of the integration process in Central America is that member states have established a democratic regime, not only at constitutional level but also at a community regional institutional one, based on the respect of fundamental rights, in particular the democratic principle of the principle of separation of powers.⁵⁴

Equally interesting, but from the point of view of the reluctance of States to use the judicial route in solving essentially constitutional issues, is the “non-case” of Zelaya in Honduras. Jose Manuel Zelaya was elected President of Honduras under the banner of one of the two traditional parties of the country, the Liberal Party. However, he soon fell out with his party and started a rapprochement with the leftist governments of the region. In June 2009, following a prolonged escalation with the Congress after Zelaya announced that he would organize a plebiscite to call for a Constituent Assembly, Zelaya was deposed through a military intervention supported by the majority of the Congress but not in line with the constitution. Zelaya was expelled to Costa Rica and the Speaker of the Congress took over the Presidency. The coup created a rift between Honduras and the rest of the SICA, and the country was de facto suspended for a period from SICA institutions.⁵⁵ However, CCJ, although competent to rule on conflicts between the constitutional organs of Member States (article 20 (f) of the Court’s Statute makes the Court competent “to examine and rule, at the request of the affected party, on

⁵³ *Enrique Bolaños Geyer, in his function as President of Nicaragua vs. the National Assembly of Nicaragua*, Central American Court of Justice, Expediente 69-01-03-01-2005 (29 March 2005) in Centro de Documentación e Información de la Corte Centroamericana de Justicia // <http://cendoc.ccj.org.ni/Documentos/69-01-03-01-2005/0045/PDF%20RESOLUCION%20DEFINITIVA%20con%20firmas.pdf>.

⁵⁴ *Ibid.*, 24 [Translation by the authors].

⁵⁵ See the relevant *Declaration of the 34th Meeting of Presidents of the SICA, Managua*, 29 June 2009, Sistema de Integración Centroamericana // <https://www.sica.int/consulta/reunion.aspx?idn=83164&idm=1&identstyle=401>.

conflicts that may arise between the fundamental Organs or Powers of the State, as well as when judicial rulings are not respected in fact”) and with the situation like a textbook case for such a ruling, CCJ was never asked to discuss the matter – neither by the Honduran authorities nor other SICA institutions.

EACJ has had occasion to look at some cases of constitutional nature. In *Mary Ariviza and Okotch Mondoh*,⁵⁶ the claimants alleged that the conduct and process of the constitutional referendum as well as the promulgation of the new Constitution in Kenya in 2010 were contrary to law, infringed the Treaty for the East African Community and should be declared null and void.⁵⁷ There was a preliminary objection concerning the admissibility of the case, which was rejected by the court.⁵⁸ The court also rejected the claimants’ call for an injunction, as they found no risk of such irreparable damage that should be at hand for an injunction.⁵⁹ In the event, the first instance court rejected the complaint.⁶⁰ In the judgement, the court lists the various legal challenges to the referendum process that the complainants had brought in Kenya. The alleged problems with the referendum and the Constitution resulting from the process, included flouting of the law on campaigning, irregularities on polling day, tallying of votes in a manner that gave an inaccurate result and failure to follow the law on publication of the Official Gazette notice on the referendum result. Numerous incidents were brought forward to illustrate wrongdoings, disputed by the government. The EACJ summed up the issue as one of due process.

The case gave EACJ a basis for a deliberation on what due process is. They found that:

In our understanding, the expression “due process” means the same thing as “due process of law”. Simply put, “due process” and “due process of law” mean following laid down laws and procedures. Further, “due process of law” is a component of the principle of “the rule of law” as generally understood in Anglo-American jurisprudence.⁶¹

The rule of law concept is further elaborated based on a UN Secretary General report, with the core element being that all persons, institutions and entities are

⁵⁶ *Mary Ariviza & Okotch Mondoh Vs The Attorney General of the Republic of Kenya & The Secretary General of the East African Community*, Case No. 3/2010 East African Court of Justice // <http://eacj.org/?cases=mary-ariviza-another-vs-the-attorney-general-of-the-republic-of-kenya-another-2>.

⁵⁷ Based on articles 5(1), 6 (c) and (d), 7(2), 8(1) (c), 27 (1), and 29 of the Treaty for the Establishment of the East African Community, articles 1, 3, 7(1) and 9(2) of the African Charter on Human and Peoples’ Rights.

⁵⁸ *Mary Ariviza & Okotch Mondoh Vs The Attorney General of the Republic of Kenya & The Secretary General of the East African Community*, *supra* note 56.

⁵⁹ *Ibid.*

⁶⁰ *Mary Ariviza & Okotch Mondoh Vs The Attorney General of the Republic of Kenya & The Secretary General of the East African Community*, Application for injunction, East African Court of Justice // <http://eacj.org/wp-content/uploads/2012/11/No-7.-of-2010.pdf>.

⁶¹ *Ibid.*, 21.

subject to the law and accountable for their behaviour. Fairness, legal certainty and transparency are other elements of the concept.

The outcome of the case, to dismiss the complaint, was based on the Court finding that insufficient evidence had been presented on irregularities and the seriousness of these – that they had really affected the referendum. The level of required evidence was set high by the court and, to some extent, the court also questioned its competence to deal with some of the issues, depending on how they had been dealt with in Kenya. However, the EACJ clearly underlined its own importance for ordinary individuals when it decided not to “penalize” the applicants with costs. EACJ found that:

The Claimants are ordinary individuals who tussled over different aspects of the same matter before the High Court of Kenya, before Kenya’s IICDRC and before this Court. They clearly must have felt strongly that they had genuine grievances requiring judicial adjudication even at regional level. [...] We feel that the Claimants have already paid adequately by pursuing this matter before different courts including EACJ.⁶²

Thus, the Court encourages individuals to bring their grievances to the regional court, even if in this instance their claim was not satisfied.

The EACJ in 2007 dealt with a coup-like event that contravened rule of law. In *James Katabazi and 21 others*⁶³ armed security guards intervened to prevent the claimants – accused of treason – from being granted bail, although the High Court of Uganda had decided on bail. Apart from being remanded in custody despite this decision, the claimants were found guilty in a military court of terrorism and illegal possession of firearms, even if the events tried were the same as those for which they had been examined in civilian court. The Uganda Law Society complained to the Ugandan Constitutional Court about the interference of security personnel and the constitutionality of simultaneous court processes. The Constitutional Court ruled that what had happened was unconstitutional but the claimants were nevertheless not released. The respondents either denied the alleged events or defended them because of information that the claimants would have conducted armed rebellion if they had not been apprehended.⁶⁴

Several articles in the EAC Treaty were mentioned but the underlying issue was whether rule of law had been respected in Uganda. It was alleged that the acts

⁶² *Ibid.*, 30.

⁶³ *James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda*, *supra* note 35.

⁶⁴ From a procedural viewpoint, it is interesting to read the court’s discussion on the preliminary objections raised in the case, as the court uses cases from various national courts as a basis for its arguments, thus showing how it is attempting to distil relevant general principles even in a situation where the court itself has only a limited amount of case law. It is also interesting that the definition of rule of law is taken from Wikipedia although in addition also writings of Justice George Kanyeihamba in *Kanyeihamba’s Commentaries on Law, Politics and Governance*.

under investigation constituted contempt of court and violation of the independence of the judiciary. EACJ had not been given an explicit mandate for human rights, so an alternative element had to be found to be able to consider the substance, namely through general principles.⁶⁵ The conclusions include that the independence of the judiciary, which is a cornerstone of rule of law, had been violated. The ACHPR is quoted, saying that although there is understanding of the need to take measures for State security, extreme measures to curtail rights only lead to more unrest:⁶⁶ "Much as the exclusive responsibility of the executive arm of government to ensure the security of the State must be respected and upheld, the role of the judiciary to provide a check on the exercise of the responsibility in order to protect the rule of law cannot be gainsaid."⁶⁷

In another case against Uganda, concerning the failure of the President to appoint judges to the Supreme Court, High Court and Court of Appeals, the EACJ states that it carefully considered principles of good governance and rule of law but found that the President's preferred course of action did not violate these principles.⁶⁸ The regional legal system does not go into details of the governing of the country, provided basic principles are respected. These cases and the statement by the EACJ shows that this may be the regional court that most consciously has dealt with constitutional matters of the Member States.

Elsewhere in Africa, one of the better-known examples of action by regional integration organisations to deal with a constitutional crisis is that of Madagascar and the crisis that has been going on since 2009, with a mixture of a more "classical" and a constitutional coup. Both the AU and SADC have taken action. However, the issue has been dealt with by various instruments of political and economic pressure rather than as a case in a court of justice. A SADC court may have been able to play a role. As it now is, this is yet another example of "non-cases" in regional courts.

2.3.2. INTERVENING IN POLITICAL MATTERS

The ICHR in several cases addressed the political situation in Guatemala following the civil war and was able to exert some influence in the complex situation, where various organs were pulling in different directions as far as the battle against impunity for atrocities committed during the war was concerned. The

⁶⁵ *James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda*, *supra* note 35, 16.

⁶⁶ *Ibid.* 22.

⁶⁷ *Ibid.*, 23.

⁶⁸ *S. P. Ochieng & J. Tusiime v. The Attorney General of the Republic of Uganda*. East African Court of Justice, Ref. 11/2013, 7 August 2015 EACJ Ref. 11/2013, 7 August 2015 // <http://eacj.org/wp-content/uploads/2017/08/Appeal-no-4-of-2015-Simon-Peter-Ochieng-vs-The-AG-of-Uganda.pdf>.]

ICHR was quite explicit on what type of investigations that should be made in a Member State. This included stressing that intelligence officers had to contribute and not hinder investigations.⁶⁹ In another example, the ICHR underlined that in certain situations it is justified to reopen cases, even if this in normal circumstances would be against principles of law. It was able to refer to courts in the region that had come to similar conclusions (in Peru and Colombia), highlighting that at times the rights of the victims and the struggle against impunity supersede other principles.⁷⁰

The Caribbean Court of Justice has found itself seized with the interesting question of to what extent a regional court can intervene in legislative issues of Member States – invalidating their laws and not just reacting to specific actions. This occurred via several cases regarding homosexuality and whether provisions in the laws of Member States on banning entry of homosexuals as they are categorized as undesirable in national law are against CARICOM law, even if homosexuals are in fact not denied entry to the States in question.⁷¹ The treatment of the cases provides interesting examples of how a regional court tries to deal with the dilemma of upholding regional law without excessively imposing rules on Member States. Maurice Tomlinson, a Jamaican national, brought cases against Belize and Trinidad & Tobago, that include homosexuals in the categories of persons who may be denied entry according to the respective immigration laws. Mr Tomlinson conceded that he had never actually been denied entry, but the existence of provisions was still relevant as it meant he may be seen as breaking the law, it stigmatised him plus the situation did not provide him or other homosexuals legal certainty.⁷² What he sought was declaratory orders to explicitly state that he had the right to enter as well as an order that the Member States had to amend their laws. The States in question argued that they had not hindered Mr Tomlinson or other homosexuals to enter based on their sexuality as this alone did not make people undesirable – an interpretation the CARICOM court supported. Thus, the main issue for the court was whether the States' obligations under community law were breached by the mere existence of the challenged provisions.

Such a finding would set an important precedent for the possibility to use a regional court to modify national law of Member States also in a pre-emptive or abstract fashion, not just in response to actual events. The court was cautious,

⁶⁹ Case *Molina Theissen v. Guatemala*, Inter-American Court of Human Rights, 16 November 2009 // http://www.corteidh.or.cr/docs/casos/articulos/seriec_106_ing1.pdf.

⁷⁰ Case *Bamaca Velasquez v. Guatemala*, Inter-American Court of Human Rights 18 November 2010 // http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf. See Oscar Parra Vera, *supra* note 13: 403.

⁷¹ *Original Jurisdiction CCJ Applications No. OA 1 of 2013 and OA 2 of 2013 between Maurice Tomlinson and the State of Belize and the State of Trinidad and Tobago [2016]*, Caribbean Court of Justice, CCJ 1 (OJ) Judgement.

⁷² *Ibid.*, para 12 and 16

even if it did explicitly state that it could make its own determination of the issue. The outcome was that the court agreed with arguments made by Belize and Trinidad & Tobago, that the official policy was to not discriminate and this was sufficient. However:

The Court wishes to state that it is not to be taken as condoning the indefinite retention on the statute book of a national law which in appearance seems to conflict with obligations under Community law. Member States should ensure that national laws, subsidiary legislation and administrative practices are transparent in their support of the free movement of all CARICOM nationals. This is a necessary aspect of the rule of law, which, as the Court has indicated, is the basic notion underlying the Caribbean Community. In principle, national legislation should expressly be harmonized with Community law. Any permanent or indefinite discord between administrative practices and the literal reading of legislation is undesirable as the rule of law requires clarity and certainty especially for nationals of other Member States who are to be guided by such legislation and practice.⁷³

One of the more notable cases on intervention in political matters is the ACHPR decision in the *Dawada K. Jawara v. Gambia* case from 1995.⁷⁴ The Complainant was the former Head of State of Gambia who brought the case after the military coup of July 1994, which overthrew his government. He alleged blatant abuse of power by the military junta, which had initiated a reign of terror, intimidation and arbitrary detention as well as abolished the Bill of Rights in the Constitution through military decree.⁷⁵ In a separate communication⁷⁶ additional violations were alleged, such as torture and absence of rights to fair trial. Detailed and specific allegations of torture as well as extrajudicial killings were made. The Gambian government disputed the allegations or in some cases justified the limitations of rights due to the situation in the country.

Among the deliberations of the Commission was how the information about the situation in the country had been obtained. The Commission admitted (in answer to the complaint of the government) that while it would be dangerous to rely exclusively on mass media, it would be equally damaging if the Commission were to reject a communication only because some aspects of it were based on such media. Indeed, the African Charter denies information "exclusively" from mass media but there is no denying that media is key in spreading information. The issue

⁷³ *Ibid.*, para 56

⁷⁴ *Dawada Jawara v. The Gambia*, African Commission on Human and Peoples' Rights, Communication 147/95 // http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27_147.95_149.96_eng.pdf; see also Ndiva Koebele Kole, "Participatory Rights in Africa: A brief overview of an emerging regional custom," *Netherlands International Law Review* (2008): 248.

⁷⁵ *Dawada Jawara v. The Gambia*, *supra* note 74, para. 1-3.

⁷⁶ *Dawada Jawara v. The Gambia*, African Commission on Human and Peoples' Rights, Communication No 149/96.

is not where the information comes from but whether it is correct and verified.⁷⁷ Another issue examined was the meaning of the exhaustion of domestic remedies. The point made by the Commission in this respect is significant.

The Complainant in this case had been overthrown by the military, he was tried in absentia, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the Complainant to return to his country to exhaust local remedies.⁷⁸

If a remedy has no prospect of success it is no effective remedy.

After finding the case admissible, the Commission examined the claims, analysed whether allegations were proven, whether there may be justifications for limitations of rights and whether proper procedures had been followed. Different conclusions were reached, but it was clearly stated that a military coup, even if peaceful, is a violation of democratic rights.⁷⁹ Gambia was asked to bring its law into conformity with the African Charter.

The ECOWAS court had occasion in 2012 to examine the contentious elections in Cote d'Ivoire in the *Gbagbo* case, where the ousted president claimed violation of human and political rights.⁸⁰ The wife and son of Mr Gbagbo also complained of human rights violations during and following the attack on the presidential palace. The background was the election in which Mr Gbagbo lost, which result he refused to recognize. Efforts were unsuccessfully undertaken to persuade Mr Gbagbo to accept the election result and step down. At the same time, various violent attacks took place in the country and unrest increased to a critical level. The violence had a tribal or regional aspect and led to serious human rights violations. The ECOWAS court describes the events in some detail. The president-elect, Mr Ouattara, decided in April 2011 that he could not remain passive in the face of the violence and thus undertook the attack on the presidential palace through which Mr Gbagbo and his family were forcibly removed.

The legal questions related to whether the arrest of the Gbagbo family was legal and whether there were any human rights violations during the events. After a careful analysis, admitting the extreme situation in the country, the court found in favour of the complainant as it considered that the arrest and subsequent handling of the matter did not follow the principles of rule of law. Even in extreme

⁷⁷ *Dawada Jawara v. The Gambia*, *supra* note 74, para. 25–27.

⁷⁸ *Ibid.*, para 36.

⁷⁹ *Ibid.*, para. 73.

⁸⁰ *Simone Ehivet and Michel Gbagbo vs. Republic of Cote d'Ivoire* ECOWAS Court, Case ECW/CCJ/JUD/03/13.

circumstances, rights should be respected.⁸¹ National remedies would not have been effective⁸² and thus the ECOWAS court was competent.

Regional courts are aware of the potentially complex relationship with national courts and especially national constitutional courts. The ECOWAS court explicitly mentions that it is not an appeal court over national courts and it has no competence to annul decisions of a constitutional court, although it finds that it can to some extent examine merits in a case that has been deliberated upon by a constitutional court, if the claim made allows for this without leading to potential annulment of the constitutional court verdict.⁸³ The ECOWAS court also demonstrates that it is aware of the situation that people may turn to regional courts when they are dissatisfied with national courts for political reasons. In the case *Dias v. Senegal*⁸⁴ in 2012 the court examined allegations of political bias and denial of the presumption of innocence among other things, but found that the case challenged by the applicant was a criminal case handled in accordance with law by Senegal. It is worth noting that Senegal did not present its view of the facts of the case. The ECOWAS court wanted to signal that it is not a special appeal instance for any national cases.

However, some issues are of such dignity that intervention is needed. In October 2008, the ECOWAS court issued a landmark ruling on slavery.⁸⁵ A woman from Niger, born into slavery and later sold, raped and abused, took a case to a local tribunal after being charged with bigamy for running away and marrying. The ECOWAS court found that slavery is illegal under international law, special conventions and the African Charter. The case was complicated by many factors, such as the master of the woman in question releasing her when threatened with prosecution under the anti-slavery rules but instead using Niger customary law to reclaim her as his wife. She managed to get a local tribunal to rule that she was not legally married to the man but that ruling was changed when she later married and was accused of bigamy. The ECOWAS court came out strongly in defence of her rights, stating that the rules on prohibition of slavery must have a real meaning and not be manipulated with.⁸⁶

The cases in the now defunct SADC Tribunal were political in nature. Many of the cases involved human rights violations, particularly regarding expropriation of

⁸¹ *Ibid.*, para 70.

⁸² *Ibid.*, para 89.

⁸³ In a case on whether deputies in the National Assembly should be reinstated as they had been wrongfully removed. The applicants lost the case (*Isabelle Manavi Ameganvi et. al. v. Togo*, ECOWAS Court, Ruling ECW/CCJ/APP/12/10 (ECW/CCJ/JUG/06/12, 13 March 2012, appeal of the case ECW/CCJ/JUD/09 from 7 October 2011).

⁸⁴ *Dias v. Senegal*, ECOWAS Court Ruling ECW/CCJ/APP/01/12 (ECW/CCJ/JUG/05/12), 23 March 2012.

⁸⁵ *Hadijatou Mani Koraou v. The Republic of Niger*, ECOWAS Court, Ruling ECW/CCJ/JUD/06/08 27 October 2008.

⁸⁶ Helen Duffy, "Hadijatou Mani Korua v. Niger: Slavery unveiled by the ECOWAS Court," *Human Rights Law Review* (2008): 6.

private property. What adds a political piquancy to the issue is that in case of Zimbabwe the affected persons were generally white farmers, disenfranchised for political motives. In *Mike Campbell (Pvt) LTD and Others v. Zimbabwe*,⁸⁷ a Zimbabwe national claimed that his basic rights had been violated as a result of the expropriation without compensation of his private property. This was also the issue in *Barry L.T. Gondo and Others v. Zimbabwe*.⁸⁸

Property rights were not the only issues the Tribunal dealt with and Zimbabwe was not the only State to be found in violation. In *Cimexpan v. Tanzania*,⁸⁹ the Tribunal considered claims of torture in connection with the applicant's deportation. The court determined that the applicant had not exhausted legal remedies and that he had failed to substantiate his claims of ill-treatment. In resolving such cases, the SADC Tribunal used common principles of international human rights law, rather than applying one specific human rights treaty.⁹⁰ This was later used as an argument for the suspension. The Tribunal found that it did have jurisdiction on human rights, as one of the principles of SADC is the observance of human rights, democracy and rule of law. The SADC Protocol did contain certain rules on the Tribunal, indicating a role for the Tribunal even in the absence of a special treaty on which it should rule. Any person (natural or moral) could bring a matter before the Tribunal alleging a violation of SADC law by a Member State.⁹¹

2.3.3. INTERVENING IN ORGANISATIONAL MATTERS

As quite often happens with regional integration cases, there are attempts to deal with situations through judicial organs that are not fully completed for different, mainly political, reasons. The Mercosur TPR was charged with an interesting situation in 2012 following a crisis in the organisation caused by the suspension of Paraguay. The matter started with an impeachment of President Lugo, following uprisings in 2012 that led to several deaths – a situation that in itself was a result of simmering troubles since the election of President Lugo in 2008. The impeachment was handled according to the letter of the law and constitution, but in an extremely speedy manner⁹² that led other countries to see it as a hidden coup. In June 2012 Mercosur (the Common Market Council) decided to suspend Paraguay for violation of its rules on protection of democracy. The matter

⁸⁷ *Mike Campbell (Pvt) LTD and Others v. Zimbabwe*, Case No. SADC (T) 2/2007, Main Decision of 28 November 2008.

⁸⁸ *Barry L.T. Gondo and Others v. Zimbabwe*, Case No. SADC (T) 05/2008, Decision 9 December 2010.

⁸⁹ *Cimexpan v. Tanzania*, Case No. SADC (T) 01/2009, Decision 11 June 2010.

⁹⁰ See *Justice Resource Centre* // <http://www.ijrcenter.org/regional-communities/southern-african-development-community-tribunal/>.

⁹¹ See *The Institute for Human Rights and Development in Africa* // <http://www.ihrda.org/2012/10/sadc-tribunal/>.

⁹² The entire process of impeachment, process and destitution of the president took 24 hours.

is of special interest because the suspension of Paraguay allowed for accepting Venezuela as a member of Mercosur – something earlier blocked by Paraguay.⁹³

Paraguay challenged its suspension before the TPR (in July 2012),⁹⁴ asking for an emergency procedure under the Olivos Protocol.⁹⁵ The arguments of Paraguay were both formal and substantial, while other Member States challenged the jurisdiction of the TPR, which in their view should be limited to commercial disputes. The TPR interestingly did not refuse to examine the case in principle, stating among other things that it did consider itself competent to rule on such matters,⁹⁶ but dismissed the case because Paraguay had not undertaken negotiations with the other parties before appealing to the TPR, as required for cases brought under the urgency procedure. The TPR considered that it had jurisdiction, as it considered that the legitimacy of the system could not allow an absence of remedies: as integration advances to various spheres, the TPR's competence expands. The ruling was unanimous but a minority opinion on admissibility was attached, which provides an interesting reflection on how a court can assume the jurisdiction it feels that it needs.

A different example of attempts to use regional courts for purposes outside of what they may have been explicitly intended for, comes from the CCJ. This was the issue of Arnoldo Alemán, former President of Nicaragua and in this capacity an ex officio member of the Central American Parliament. He was indicted for graft by the Nicaraguan authorities and brought a case to the CCJ, against Nicaragua, claiming political persecution, objecting that the immunities extend to members of the Central American Parliament did not allow the Nicaraguan authorities to prosecute him.⁹⁷ The Court accepted Alemán's arguments.⁹⁸ This was considered negative publicity for the court, given that the prevailing opinion was that he was a criminal who just used procedural technicalities to escape justice.

A weakness of African human rights system is that few States have accepted individual complaints to the African Court on Human and Peoples' Rights. There was

⁹³ Katrin Nyman Metcalf and Ioannis F. Papageorgiou, "Los tribunales de justicia en sistemas de integración regional y el estado de derecho: el caso de Mercosur y la suspensión de Paraguay en 2012," *Revista Derecho Comunitario y Derechos Humanos* 4 (2015).

⁹⁴ Geraldo Vidigal, "Enforcing Democracy at the Regional Level: Paraguay's suspension before the Mercosur court," *Cambridge Journal of International and Comparative Law* 2 (2) (2013): 339–340.

⁹⁵ Article 24. Such procedures were regulated by the Mercosur Common Market Council Decision 23/2004.

⁹⁶ The resulting decision is *Laudo N° 1/2012 del TPR que rechaza procedimiento excepcional de urgencia solicitado por Paraguay, en relación a su suspensión en los órganos del Mercado Común y a la incorporación de Venezuela como miembro pleno* (2012), 21 July 2012, Constitución Web // <http://constitucionweb.blogspot.gr/2012/07/mercocur-laudo-n-12012-del-tpr-que.html>).

⁹⁷ *José Arnoldo Alemán Lacayo v. Republic of Nicaragua*, Central American Court of Justice Expediente 59-01-08-01-2003 in Centro de Documentación e Información de la Corte Centroamericana de Justicia // <http://cendoc.ccj.org.ni/ExpedientesFichaLectura.aspx?id=130>.

⁹⁸ Alemán therefore escaped his fate. This had an important impact on the internal Nicaraguan politics as Alemán allied himself, on the premise of the enemy of my enemy is my friend, with the Sandinistas against the conservative government, leading, among others, to the re-election on Daniel Ortega as president.

an interesting attempt to use the EACJ to challenge this, although it was eventually unsuccessful. The Democratic Party of Uganda brought a complaint against the Secretary General of the EAC and the Attorney Generals of Uganda, Kenya, Rwanda and Burundi to make individual country declarations in acceptance of the competence of the African Court.⁹⁹ The claimants alleged that by a failure to allow such competence the respondents had created a disturbing situation, which has seriously affected the entire system of judicial protection of human rights at the regional and continental level.¹⁰⁰ The Secretary General of the EAC was mentioned as a respondent as, being the Chief Executive Officer of the EAC and EAC being mandated to play supervisory roles over all the Partner States and ensuring that they comply with the Treaty, there was a responsibility for the failure to ensure the individual complaints (according to a detailed exposé on where the duty emanated from).

The Court elaborated first on jurisdiction, as the respondents challenged this. It pointed out that jurisdiction is quite different from the specific merits of any case and the respondents appear to have misunderstood this – wider – implication of jurisdiction.¹⁰¹ Generally, the EACJ thoroughly discussed concepts such as not just jurisdiction but also “justiciable” and “triable”, rule of law and good governance, using dictionary interpretations and case law. The court was sympathetic to some extent, although it also claimed that the applicants, in the specific case, make a mountain of a molehill: apparently relying on the possibility in future that declarations will be made, so it was just a question of delay. However, the EACJ found that it cannot make rulings on Member States’ obligations under another international treaty.

3. PREREQUISITES FOR INTERVENTION

Courts of Justice can strengthen the rest of the institutional structure and determine the division of competence between the organisation and its Member States. This quasi-constitutional role makes the organisation different from traditional international organisations with a more limited mandate, where there is no independent organ to determine division of competence, but this is done by the members themselves.

However, there are certain prerequisites that must be met for courts to be able to undertake such a role. Firstly, courts cannot be the only strong institution.

⁹⁹ *The Democratic Party of Uganda v. The Secretary General of the EAC and The Attorney Generals of the Republics of Uganda, Kenya, Rwanda and Burundi*, East African Court of Justice. Ref. 2/2012, 29 November 2013.

¹⁰⁰ *Ibid.*, 9.

¹⁰¹ *Ibid.*, 17 (point 30).

The regional integration system should have other institutions with significant power to decide and willingness to confront challenges to their power through a regional court. In other words, it is necessary to have a critical mass of integration institutions for courts to be effective. Central American integration, with a relatively weak intergovernmental structure, has given the CCJ significant powers making it a quasi-Supreme Court of the region. Due to this discrepancy the court has not been able to play the serious role envisaged in its Statute: in fact, the CCJ was not asked to rule nor be otherwise involved in the constitutional crisis in Honduras when president Zelaya was overthrown in 2009. At the same time, it faces direct opposition from specific Member States, which refuse to accept its jurisdiction. It has to be said that one such country, Costa Rica, is the most democratic and respectful of rule of law in the region. Its reaction may be presumed to be linked to judicial uncertainty and constitutional matters rather than the presence of the court itself.

This first prerequisite is linked intrinsically to the legitimacy of the court – our second prerequisite. Legitimacy appears in two aspects: the first is legitimacy provided by the national level. There is no question that at the present time national governments have a higher degree of legitimacy than regional integration organisations, with the possible exception of the EU. It is thus necessary that States recognize or at least tolerate the role of the regional courts. It is very difficult for courts to operate, confronted with unswerving hostility from Member States. A degree of at least benign indifference and tacit acceptance of its rulings is necessary for the regional court to play a significant role at regional level. This is more easily said than done, given that in several areas of the globe, court rulings, even domestic ones, are frequently disregarded. The second aspect of legitimacy has to do with the people. Courts must be seen both to produce good law and effective law. This aspect is linked to easy access to courts, and even before this, to the capacity of citizens to bring their cases before such courts. Not all regional organisations allow such a process or do so with very stringent conditions, which cannot often be met. Consequently, legitimacy from both States and the people needs to be present for courts to be significant contributors to regional rule of law.

Thirdly, there is the effectiveness of courts. Given the fact that regional integration organisations lack the lawful use of force, regional courts are twice as weak as national courts. Implementation cannot be enforced; it has to be requested. Courts cannot act on their own but need to follow up their rulings with Member States. This presupposes the capacity of the States to implement decisions and their willingness to do so, which is greater if the values reflected in the

decisions are clearly accepted.¹⁰² A major problem in many regional courts has been the insufficient degree of implementation, which reduces legitimacy and leads to a downward spiral, as less and less people have confidence in applying to such courts, courts deal with fewer cases and, in turn become irrelevant in the upholding of rule of law. Underuse of tribunals gets a multiplying effect as it means there will be little jurisprudence and thus little understanding how the tribunals should be used. In this sense if a tribunal is sought out due to the personalities on it (or almost by chance, if any tools to deal with a specific situation are looked for) rather than for any conviction that it is the best legal tool, it may still have a multiplying positive effect, as it proves how the tribunal can be used.

Fourth, legal certainty is important. Regional courts to a larger extent than national ones have to interpret or even elicit legislation. Very often, their production is limited especially in their early years and there is considerable doubt on the outcome of a case, or even before that, on its admissibility. Obviously, there is a degree of uncertainty in all cases, but regional courts have to make a stronger effort to provide some set of basic case law, which could act as guidance to potential applicants or their lawyers and thus induce access.

The extent of the court's competence is also important. Courts that only have arbitration competences cannot easily play a role as a judicial brake. A court that has a wider competence can potentially be of a more direct use for citizens and therefore act as a significant court. Of course, courts evolve. They appropriate competences that they do not have at first sight. The case of the TPR regarding Paraguay is noteworthy as pointed out above. The EACJ is another example whereby a court itself acquires the right to hear cases on matters that were not directly set out for them in their constitutional documents. We have seen similar expansion of the role of courts both in the European Community of the 1960s and 1970s and even earlier, in federal Supreme Courts, especially in the United States. In other cases, it is the Member States themselves that recognize the need to give wider competences to the courts. The Olivos Protocol of the Mercosur whereby the TPR received a wider mandate is a case to this effect.

A culture for sharing sovereignty is also necessary. States do not accept to be forced or even coerced in general and especially not by an international organ. For such organisations, it is necessary to prove the legitimacy in a different way than that which applies to State decisions. It is in this context that the importance of the institutional structure of the body is very clearly shown. Territorial States no doubt continue to play an important role in modern society, but at the same time

¹⁰² Tanel Kerikmäe, Onderj Hamulak, and Archil Chochia "A Historical study of contemporary Human rights: Deviation or extinction?" *Acta Baltica Historiae et Philosophiae scientiarum* Vol. 4, No. 2 (2016): 105.

there is a discussion on what exactly this role is, with different forces pulling at the traditional image of the State from many different angles. This includes globalization and regionalization (which can mean States in a region cooperating but more often includes actions disregarding State boundaries in favour of other elements of attachment). As Brenner et. al. point out, most authors expect the existing State-based structure of international organisation to remain at least for a foreseeable future – few boldly predict major upheavals.¹⁰³ At the same time, there is an increasing interest in progressive protection of human rights and in this context it should be possible to have a role for regional courts. Globally, progressiveness can be a problem if it means that human rights are pushed too far in the direction of what certain values may prescribe. Universality and progressiveness may not match so well. It is possible that it is easier to move on by shaping new rights regionally. This still has a bigger effect than if countries do it by themselves. The ICHR takes special situations into consideration (like the ongoing peace process in Colombia) and is willing to shape its decisions according to realities that may make application of human rights more difficult. This is an example of where a regional body can be especially well placed.

Courts must take a role and insist on it, vis-à-vis other organs, but they can only do so if they have a certain status and respect. The institutional structure needs to be determined in the founding documents of the organisation or otherwise the way in which such structure will be created (through a constituent assembly) needs to be established. The structure must be clear enough to be effective but at the same time flexible enough to allow the organisation to grow with its tasks. The credibility and success of an organisation are strengthened if details concerning its activities can be established by the organisation's organs themselves. Static organisations where any changes to their role and functions need to go back to the Member States for decision have less of a long-term chance of success or at least of taking on an independent role. Member States must be willing to give the organisation the possibility to lead some life of its own if it is to influence the region in which it operates, rather than just carry out clearly delimited operational tasks given to it.

Autonomy also requires enforcement. Enforcement of decisions in most modern societies passes through the judicial branch. As a result, the presence of regional courts, which rule finally on relevant disputes, is crucial. It is no coincidence that the degree of autonomy of different regional integration

¹⁰³ Neil Brenner, Bob Jessop, Martin Jones, and Gordon Macleod, "Introduction: State Space in Question": 15; in: Neil Brenner, Bob Jessop, Martin Jones, and Gordon Macleod, eds., *State/Space* (London: Blackwell Publishing, 2003).

organisations increased when and to the extent that they instituted courts which ruled independently.

Until courts have strong legitimacy they must always face the risk that if they are too active, there will be resistance to them. If it is felt that a court can successfully be opposed or ignored if it takes uncomfortable decisions, this is very likely to happen. The fate of the SADC court is a clear illustration of this risk.

TRENDS AND CONCLUSIONS

The analysis of the various cases examined does not establish a rule; nor does it set precedents for each and every regional integration scheme. Surreptitious forms of trampling with the constitution diverge significantly around the world from control of the media to blatant vote rigging. There are many ways through which an authoritarian leader can bend the constitution to his whim. We have seen, though, that a trend clearly has arisen and one should salute and respect the boldness of judges in countries with recent judicial culture to espouse tactics that their European counterparts would hesitate to. It is not a form of judicial activism like the ones in the 1960s and 1970s with the then European Court of Justice. More appropriately, it should be called a judicial brake, whereby regional courts go beyond their assumed competencies and take over the prerogative of acting as guardians of rule of law and constitutional balance both for the sake of the regional organization and for its Member States.

Courts of Justice of regional integration systems can play a very important role in strengthening the system as well as protecting the rights of individuals – thus making the system relevant for them and contributing to regional integration becoming part of the political discourse. The fact that courts are hindered in their work can be seen as a sign of the importance as there would be no point in taking specific action to obstruct a court if it were to be irrelevant. It also illustrates the problem if the court has not achieved a sufficient degree of legitimacy, as it is then expedient to do away with it if it makes uncomfortable decisions.

We return to a quote from the EACJ made in relation to costs in the *Mary Ariviza and Okotch Mondoh* case that nicely illustrates what a regional court can and should mean for ordinary people. The EACJ noted that the Claimants, bringing a case on constitutional irregularities, were “ordinary individuals” who, as they had brought cases in many different organs nationally and also regionally “clearly must have felt strongly that they had genuine grievances requiring judicial adjudication even at regional level. The litigation before this Court was not frivolous and it was

of interest not just to the Claimants but to other East Africans as well.”¹⁰⁴ The EACJ is a positive example of a court that not just takes its mandate seriously but also sees itself as an organ that must matter to ordinary people in its jurisdiction. The finding of the ACHPR that there are situations in which there cannot be any effective domestic remedies exactly as the case concerns depriving certain people of such remedies, for political reasons, explains why the basis for regional intervention in favour of rule of law can be so important.

It is obvious that there are limits to what regional courts can do and the judges are fully aware of these limits. They have also the counter-example of the SADC tribunal to remind them of the “sudden death” that awaits an all too bold tribunal against a not all too bold despot. They play with specifics, with interpretations and with the superior knowledge of their juridical expertise. They also use the still-present respect for the judicial institution in many African and Latin American countries. The fact that civil society – an element that should increasingly be taken into account in such cases – turns to them, is also to the courts’ advantage.

Although the current global political situation appears gloomy, it is not possible to predict whether authoritarianism will get stronger around the world in the coming years or whether democratic principles and rule of law will prevail. It is also uncertain whether regionalism as a trend will continue, especially in building political communities. Most systems of integration start with economic objectives, mostly trade, and gradually accept – willingly or not – that an element of political integration and judicial review is necessary for the smooth operation of economic integration. It is difficult or even impossible to reverse globalization but it is a realistic possibility in the current international political climate. At the same time, one realises that regionalism is more important for smaller countries. It is easier to exercise pressure on the president of Gambia than on the president of Russia. As a result, one cannot establish a uniform pattern for all courts but even in the case of Russia or Turkey, the jurisprudence of the ECtHR acts as an insufficient but still very real brake. It remains an open question to what extent such brakes can hold in the current geopolitical climate. Regional courts require “regional spirit” and therefore governments which have opted for a clearly authoritarian direction and are sufficiently important to forfeit a regional scheme or to establish a regional system of their own can remain impervious to judicial brakes of the kind examined in this article.

¹⁰⁴ *Mary Ariviza & Okotch Mondoh Vs The Attorney General of the Republic of Kenya & The Secretary General of the East African Community*, *supra* note 56, p. 30.

It is also obvious that the international community cannot expect that democracy in Africa and Latin America will be upheld exclusively through courts of justice. In an increasingly interdependent world, the regional courts will be called to play a stronger and perhaps decisive role in safeguarding rule of law at domestic level and at the same time safeguarding the principles of their own regional integration instruments. This is not a role usually endowed on regional courts of justice. The ECJ has not had any similar role when it was shaping European integration. However, it is clear when analysing regional integration on other continents that the European pattern cannot apply as such and should not do so at times when European integration is heavily questioned. It might be propitious for Europeans to look at the way other regional integration instruments work and take examples from them.

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