

Human Rights Adjudication in Africa

**Challenges and Opportunities
within the African Union and
Sub-Regional Human
Rights Systems**

**Edited By
Alejandro Fuentes
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Human rights adjudication in Africa: Challenges and opportunities within the African Union and sub-regional human rights systems

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PREFACE

Established at Lund University, Sweden in 1984, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) is an independent academic institution promoting human rights through education, research, and institutional development. Through cooperation with primarily governments and academic and national human rights institutions in Europe, Africa, Asia, the Middle East, and Latin America, the RWI has been active in the human rights domain for almost 40 years.

In Africa, the RWI works towards developing human rights capacity through regional, sub-regional and bilateral cooperation programmes with bodies of the African Union and the Regional Economic Blocs, academic institutions, national human rights institutions, and civil society organisations. In 2017, to further expand and develop its cooperation in Africa, the RWI, with funding from the Swedish International Development Cooperation Agency, started the Regional Africa Programme (RAP). The overall objective of the RAP is to secure a demonstrable improvement in access to justice and implementation of human rights commitments in Africa for all. This objective is framed by the premise that the key challenge for increased respect for human rights regionally is not primarily a lack of standards and institutions, but rather making existing standards and institutions work.

Within the framework of the RAP, the Regional Africa Academic Network (Academic Network) was further established to bring together universities from across the African continent to generate research and resources, build capacity, and develop spaces for inter-sectoral dialogue. One of the key activities of the Academic Network is the organisation of an annual conference which creates a space for reflection, dialogue, and knowledge sharing between members of the academic community, representatives of civil society organisations, bar associations, and regional bodies that contribute to the advancement of human rights adjudication in Africa.

The collection of chapters contained in this book originates from the first Academic Network conference held at the University of Zimbabwe, Harare, in October 2022. The conference, like this book, is titled *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems*. Aligning with the overarching objectives of the RWI and the RAP, the main aim of the 2022 Academic Network conference was to advance an understanding of the way the regional and sub-regional human rights systems in Africa contribute to access to justice on the continent. Thus, the conference, and by extension, this book, aims to generate further knowledge on both procedural and material aspects of the institutions that make up the system of African human rights adjudication. This particularly relates to the practice, methods, and jurisprudence of human rights adjudication that take place before the African Court on Human and Peoples' Rights (African Court), the African Commission on Human and Peoples' Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts) and the sub-regional courts, such as the East African Court of Justice and the Economic Community of West African States Community Court of Justice (ECOWAS Court).

Successful adjudication before these institutions depends on whether a matter falls within the courts' and quasi-judicial bodies' material, personal, temporal, and geographical jurisdiction. It is also dependent on the fulfilment of the applicable admissibility criteria. In this regard, it is fair to suggest that the material jurisdiction of the abovementioned courts and quasi-judicial bodies differs greatly, both in terms of scope and how and where their mandates are presented. There are furthermore significant differences regarding personal jurisdiction, that is, in the access to the courts and quasi-judicial bodies, as well as the admissibility criteria applied. In terms of the application of admissibility criteria, while exhaustion of local remedies is essential before the African Court, the ECOWAS Court, as an example, does not apply such a criterion. These, and other considerations have, as discussed throughout the eight chapters, a direct effect on where, how, and when human rights adjudication takes place, and it also influences the subject matter of the claims presented as well as the outcome.

As is also debated throughout this book, we have witnessed many challenges to human rights adjudication on the African continent in recent years. For instance, access to the African Court has been limited through the withdrawal of the article 34(6) declaration made by states parties to the African Court Protocol, preventing individuals and non-governmental organisations (NGOs) from directly accessing the African Court. Access

to the African Court by NGOs has also been restricted by the withdrawal of observer status of some NGOs before the African Commission, more restrictive criteria in obtaining such status and the denial of access by NGOs with observer status before the African Commission to the advisory jurisdiction of the Court.

As the different parts of the African regional and sub-regional human rights develop, there is palpable tension between the desire to have regional and sub-regional bodies establish and enforce uniform human rights standards and the need to respect the sovereignty and diversity of the different member states. Related to this are the issues of uniform interpretation of treaties across a multitude of courts and quasi-judicial bodies, a standardised approach to the limitations of rights, and the achievement of a suitable balance between individual rights and the general interests of member states.

Considering this complex topic, the call to present papers at the Harare inaugural Academic Network conference was extended to senior and early career researchers, scholars and academic staff affiliated with academic institutions¹ and non-academic institutions² partners within the RAP. To foster and promote the advancement of early career researchers, they were invited to participate in a research methodology workshop held in Nairobi, Kenya, in June 2022. This workshop, put together and presented by representatives of the Academic Network, aimed at supporting the development of their papers, strengthening their research, and increasing the potential for their publication in this edited volume. As a result of this parallel process, four out of the eight chapters presented in this book involve the contributions of early career researchers and constitute a milestone in their academic careers.

- 1 The following institutions make up the RWI Regional Africa Academic Network: School of Law, Kenyatta University; Faculty of Law, University of Nigeria-Nsukka; Faculty of Law, University of Zimbabwe; College of Business, Peace, Leadership and Governance, African University; Gender, Health and Justice Research Unit, University of Cape Town; Faculty of Law, Stellenbosch University; Centre for Human Rights, Addis Ababa University; and Faculty of Law, British University in Egypt.
- 2 The following non-academic partners are part of the RAP: Pan African Lawyers Union, East Africa Law Society, African Court Coalition, Equality Now, the Network of African National Human Rights Institutions, the African Policing Civilian Oversight Forum, Centre for Human Rights-University of Pretoria, the East African Court of Justice, the ECOWAS Community Court of Justice and the African Court on Human and People's Rights.

To kick-start the exploration of the nature, scope, and challenges to human rights adjudication in Africa, chapter 1, titled *Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of Mtikila, Zongo and Konate*, authored by Tarisai Mutangi, interrogates the remedial approach of the African Court, as demonstrated in its first reparations cases. This chapter forms part of a growing and intensified African scholarship on implementing human rights obligations, especially decisions of human rights courts and tribunals in Africa. It is premised on the basis that a remedy reflects the remedial approach a tribunal takes in its adjudication role, and because it is the remedy that stands to be executed or implemented, it has a bearing on the impact it will have on victims of human rights violation as well as national legal and policy frameworks in general. Thus, as the chapter suggests, it is necessary to commit time to learn about the remedial approach the African Court has preferred with a view to establishing the remedial philosophy of the Court in the long run.

Chapter 2, titled *The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights*, authored by Derick de Klerk and Annika Rudman, then explores the impact and legitimacy of the African Court by forwarding the premise that the involvement of individuals before African Court is critical to its ability to fulfil its mandate adequately. As the African Court relies on individuals and NGOs with observer status before the African Commission to file cases before it to develop its jurisprudence, the withdrawal of optional declarations made by states under article 34(6) of the African Court Protocol, disabling direct access of individuals and NGOs to the African Court, deprives it of an adequate pool of cases to adjudicate. This in turn, as is argued in this chapter, negatively affects the authority of the African Court along with its legitimacy and continuing ability to operate.

Chapter 3, titled *The law and politics of access to the ECOWAS Court in human rights cases*, authored by Christopher Nyinevi and Apraku Nketiah, directs attention to the ECOWAS and investigates the human rights mandate of the ECOWAS Court. Access to the human rights jurisdiction of the ECOWAS Court is not, contrary to the position of the African Court, predicated on the exhaustion of local remedies or deference to national courts to avoid parallel proceedings. As discussed in this chapter, this has generated resistance from some member states. In response to recurrent concerns from such member states, the ECOWAS Court in 2022 decided to clarify and regulate access to its human rights

mandate by adopting Supplementary Rules of Procedure, subject to the approval of the ECOWAS Council of Ministers. This chapter discusses the human rights mandate of the ECOWAS Court, evaluates the proposed Supplementary Rules, and considers the extent to which the Rules may impact individuals' access to the Court.

Focusing specifically on the adjudication and implementation of women's rights, chapter 4, titled *Rape as manifestation of gender-based discrimination: An exploration of state responsibility for sexual and gender-based violence in the jurisprudence of the ECOWAS Community Court of Justice*, authored by Annika Rudman, analyses the effects of not classifying rape, a form of sexual and gender-based violence (SGBV), as gender-based discrimination from the vantage point of feminist jurisprudence. It engages with states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where a non-state actor has perpetrated acts of SGBV within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations. Ultimately, the arguments and methods crafted aim to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

Along the line of women's rights chapter 5, titled *A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice* by Anisa Mahmoudi and Annika Rudman then further analyses the gendered aspects of the African human rights system. It explores articles 2(2) and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which set out member states' obligations to modify the social and cultural behaviour of women and men through education, information, and communication strategies. These obligations are, as argued in this chapter, key to achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes or on gender stereotypes. This chapter aims to draw attention to the potential of the modification provisions in the Maputo Protocol and to provide examples of best practices emerging from the Committee on the Elimination of Discrimination against Women, the African and the ECOWAS Courts.

The final three chapters, chapters 6, 7 and 8, all have in common a specific focus on intersecting vulnerabilities such as age, socio-economic status and indigenouness. Chapter 6, titled *Africa is ageing: Prospects in the implementation of the Protocol on the Rights of Older Persons in Africa* by Faith Kabata, concerns itself with ageism and the prospects of the implementation of the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons) by reviewing evolving norms and jurisprudence on the rights of older persons. Drawing from the normative content and jurisprudence of the European and Inter-American Courts of Human Rights (Inter-American Court), this chapter highlights comparative, evolving jurisprudence that can be contextualised to the application and interpretation of the Protocol on the Rights of Older Persons.

Chapter 7, titled *'Fortune' as a ground of discrimination under the African Charter on Human and Peoples' Rights*, authored by Gideon Basson, then considers what insights a teleological interpretation of the African Charter on Human and Peoples Rights (African Charter), rooted in its 'object and purpose', could give to the content of fortune as a ground of discrimination. The chapter demonstrates that a teleological interpretation of fortune furthers a regionally sensitive account of a substantive conception of equality in law that seeks to transform the political marginalisation, material deprivation and disadvantage, and social stigma, harm, and prejudice vulnerable groups such as impoverished people encounter. It develops normative standards to interpret impoverished people's guarantee not to be discriminated against based on their fortune. Ultimately, it argues that fortune as an expressed ground of discrimination is an untapped legal tool to contest the multiple manifestations of discrimination impoverished people face.

The final chapter, chapter 8, titled *Comparative jurisprudential developments and adjudication of indigenous peoples' rights: Integration of international human rights law in the Americas and Africa*, by Alejandro Fuentes, proposes a critical comparative analysis of the jurisprudence of the Inter-American Court, the African Commission and the African Court regarding the recognition of indigenous peoples' rights. In particular, it focuses on the cross-fertilisation jurisprudential processes between these regional bodies and the role that this jurisprudential dialogue has played in the recognition of indigenous peoples' right to communal property over their traditional lands and natural resources and deliver protection to their culture and cultural identity.

In conclusion, as is evident from the range of topics and the deep analysis presented in this book, a substantial amount of work went into preparing these chapters. Therefore, we are certain that this edited volume will make a substantive contribution to the scholarly debate regarding human rights adjudication in Africa. Finally, sincere thanks and appreciation go to the nine authors and the sixteen reviewers involved in peer-reviewing this book's eight chapters. Their dedication to the writing and reviewing process is admirable, and together, they made the editorial process both smooth and successful.

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First, we would like to thank the contributing authors – young, budding scholars as well as seasoned writers – who heeded the call for papers and remained committed to it till the culmination of the process. Their research and expertise will enrich and advance discourse on access to justice and adjudication of rights within the African human rights system. Without them, this publication would not have been possible.

This publication is the brainchild of members of Raoul Wallenberg Institute (RWI)'s Academic Network, represented by: Prof Joy Ezeilo – University of Nigeria, Nsukka; Prof Pamela Machakanja – Africa University; Prof Annika Rudman – Stellenbosch University; Prof Lillian Artz – University of Cape Town; Prof Alejandro Fuentes – RWI; Dr Tarisai Mutangi – University of Zimbabwe; Dr Faith Kabata – Kenyatta University; Dr Fasil Mulatu – Centre for Human Rights, Addis Ababa University; and Mahmoud Hazem – British University of Egypt. Their forward-thinking insights, mentorship to young scholars and vision steered all who were part of this publication.

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authors, careful handling of manuscripts and an outpouring of their many years of experience in the field of human rights adjudication.

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Authors' Statement

This chapter is the culmination of earlier ideas and drafts on the topic, which were presented at the International Conference of the ECOWAS Court in Praia, Cape Verde (May 2022), the RWI Research Writing Workshop in Nairobi, Kenya (June 2022), and the RWI Academic Network Human Rights Conference in Harare, Zimbabwe (October 2022). We express gratitude to the participants of these events, as well as to the editors and reviewers of this book, for their valuable comments and suggestions.

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