2018 Annual Jurists Conference

"The State of Judicial Independence in Africa: Threats, Challenges & Opportunities"

Conference Report

The Lagoon Beach Hotel, Cape Town,South Africa,
20-24 November 2018

icj International Commission of Jurists

International Bar Association Human Rights Institute

Konrad Adenauer Stiftung

IDLO

Pamoja Tutetee Haki Kenya Human Rights Commission

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List of Abbreviations

ACDEG	African Charter on Democracy Elections and Governance
ACHPR	African Charter on Human and People's Rights
AJJF	African Judges and Jurists Forum
AU	African Union
CJ	Chief Justice
CMJA	Commonwealth Magistrates and Judges Association
DGRU	Democratic Governance and Rights Unit
EAMJA	East Africa Judges and Magistrates Association
EU	European Union
GJIN	Global Judicial Integrity Network
IBAHRI	International Bar Association Human Rights Institute
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICJ Kenya	The Kenyan Section of the International Commission of Jurists
IDLO	International Development Law Organization
JCE	Judiciary Committee on Elections
JSC	Judicial Service Commission
KAS	Konrad-Adenauer-Stiftung
KHRC	Kenya Human Rights Commission
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
SACJF	Southern Africa Chief Justices' Forum
SADC	Southern African Development Community
SAJAA	Southern African Judicial Administrators Association
SASSA	South Africa Social Security Agency
UNODC	United Nations office on Drugs and Crime

Executive Summary

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and partners; the International Commission of Jurists Africa Programme (ICJ), Konrad-Adenauer-Stiftung (KAS), the International Bar Association Human Rights Institute (IBAHRI), International Development Law Organization (IDLO) and the Kenya Human Rights Commission (KHRC) convened a successful and interactive 2018 Annual Jurists Conference (AJC). The three day conference held from the 21st to 23rd November 2018 reflected on the state of judicial independence in Africa, evaluated threats and challenges, identified gaps in legislative and policy frameworks that weaken judicial independence, and suggested plausible recommendations to strengthen judicial independence in the region.

The objectives of the AJC were inter *alia*: to examine the state of judicial independence in Africa; the role of the legal professions and civil society in safeguarding judicial independence; identifying gaps in existing normative human rights frameworks, policies and practices, with a view of suggesting plausible recommendations to strengthen judicial independence in the region.

The participants were drawn from members of the bench and bar across the region, leading civil society groups, professional associations, government representatives, academics and key media personalities. The discussions were guided by panel presentations on selected topics with robust plenary discussions. At the end of the consultations, the participants agreed on action points towards the furtherance of safeguarding judicial independence in Africa.

The conference was organized along three thematic areas, namely:

1. Reflection and Contextualizing Judicial Independence
2. Challenges and Threats to Judicial Independence
3. Opportunities to Strengthen Judicial Independence in the Region

At the end of the Conference, several issues emerged:

1. The discourse on judicial independence in Africa has been there since the 1960s and still persists to date
2. The courts act independently but experienced attacks from government and government agencies, which severely undermine judicial independence. The judiciary has faced a backlash from the executive and legislature in the form of budget cuts and physical and verbal abuse.Africa has several mechanisms and initiatives that support judicial independence in the continent.
3. The Bangalore Principles and the Commonwealth Latimer House Principles are both guiding texts on the best practices on judicial independence. Other initiatives that support judicial independence in the continent include: Advancing Justice - and Gender Equality Initiative – through the Global Judicial Integrity Network, Southern African Judicial Administrators Association (SAJAA), Southern Africa Chief Justices' Forum (SACJF and Monomotapa initiative and plan of action.
4. There is evidence of some advancement of judicial independence in Africa. For instance in the case of Omar Al Bashir in South Africa, where the court ruled that the law required the government to arrest the former Sudanese President.
5. Financial autonomy is key to judicial independence. Inadequate funding and/or budget cuts of the judiciary interferes with its ability to fulfil its mandate- this may also affect judicial independence.
6. Judicialisation of politics also undermines judicial independence as it may lead to politicization of the judiciary.

7. Conflict between state and non-state actors such as the civil society and legal professionals has slowed down the fight on judicial independence in Africa. The shrinking civic and democratic space in Africa has led to restrictions/crackdown on civil society organisations that support judicial independence in Africa.
8. Fake news fueled by the media has created a narrative that undermines the judiciary in the public limelight-this has led a negative public perception of the judiciary.
9. There are opportunities to strengthen judicial independence in Africa through Regional standards and bodies such as the African Union and African Commission on Human and Peoples's Rights.

At the end of the conference, the jurists developed a call for action (annexed) that highlighted the state of judicial independence in Africa and called upon African States and African governments to put conditions that support judicial independence and the later to support regional bodies that promote independence of judiciaries in Africa. The jurists recommended that African governments and continental bodies should work together in the development of regional standards for the design, composition and mandate of national Judicial Service Commissions. Finally, the over 100 jurists at the conference resolved to:

1. Join efforts in support of judges under threat
2. Ensure that the findings of independent tribunals are implemented
3. Develop a regional mechanism that would promote the independence of Judges and Lawyers' in Africa.

Opening Remarks

The Conference began with preliminary remarks from the **ICJ Kenya Council Secretary, Brenda Kamau**. This was followed by opening remarks from the **ICJ Kenya Executive Director, Mr. Samuel Mohochi**. Mr. Mohochi thanked the participants for expressing interest and attending the auspicious occasion and acknowledged all partners that teamed up with ICJ Kenya to organize the 2018 Annual Jurists Conference in Cape Town, South Africa.

The Chair of the ICJ Kenya Council Mr. Kelvin Mogeni, introduced the ICJ Kenya Council members and provided the context that informed the theme of the Conference.

The Director of the Africa Regional of the International Commission of Jurists, Mr. Arnold Tsunga, expressed his gratitude for being part of the Conference. He underscored the importance in having a special mechanism to protect the independence of judges.

Ms. Judy Oder from the International bar Association Human Rights Institute (IBAHRI) noted that the Conference was timely noting that judicial independence is under threat and called participants to interrogate whether existing regional instruments offered sufficient protection for the independence of judges.

Mr. Peter Wendoh of Konrad-Adenauer-Stiftung in his remarks noted that the Conference discussions would aid in crafting appropriate strategies for overcoming interferences with judicial independence. He emphasized on the need to formulate homegrown responses to judicial independence in Africa.

The Deputy Executive Director of the Kenya Human Rights Commission, Mr. Davis Malombe, in his remarks, brought out several perspectives for consideration; he noted the need to contextualize regional happenings such as shrinking civic space in the discourse of judicial independence and look out for ways of dealing with such issues aand ensuring protection. He further noted that the need to find ways of ensuring solidarity when courts are targeted for making progressive decisions, as was with the case of Kenya presidential elections. He also urged the audience to consider also how quasi-judicial institutions are facing similar threats.

The President, Commonwealth Magistrates and Judges Association (CMJA), Hon. Justice Charles Mkandawire observed that while judicial independence is a topic being discussed all over the world, Africa needs to find its own solutions to its peculiarities. He noted that in the last 5 years, there has escalating threats to the independence of the judiciary. For example in Botswana, Seychelles, Kenya and Lesotho, the Commonwealth Judges and Magistrates Association had intervened in instances where judges were undergoing trial to make sure the rule of law and due process was upheld.

Hon. Justice Paddington Shadreck Garwe, Judge of the Supreme Court in the Republic of Zimbabwe stated that there can be no doubt that judiciaries all over the world are facing threat. He hoped that the Conference would give opportunity to participants to share experiences and find ways and means to address the threats faced by judiciaries and come up with a course of action.

The Vice President of The East Africa Judges and Magistrates Association (EAMJA), Hon. Justice Robert Vincent Makaramba, observed that the threat to judicial independence was also present in regional tribunals, and encouraged participants to consider these in the discussions ahead.

The Chairperson Judiciary Committee on Elections (JCE), Hon. Justice Amraphael Mbogholi Msagha began his remarks by thanking ICJ Kenya and partners. He conveyed regards of the Hon. Chief Justice of Kenya who, as he explained, had urgent matters at the Supreme Court. Hon. Mbogholi noted that although the issue of judicial independence had been discussed for a long time, it still remained unresolved. He wished everyone fruitful deliberations.

> For accountability to be effective, there must be judicial independence and security of tenure.

~ Hon. Justice Charles Mkandawire - President, Commonwealth Magistrates and Judges Association (CMJA) #AJC2018

Photo Wheel
Top: Hon. Justice Charles Mkandawire giving opening remarks during the opening of the 2018 Annual Jurist Conference (AJC)
Bottom: (From left) Mr. Chris Gitari, Mr. Martin Masiga and Vanja Karth listening in to Hon. Justice Charles Mkandawire's speech during the opening of the 2018 AJC.

Section A: Reflection and Contextualizing

This section provided participants with opportunity to thrash out the elements of judicial independence as enumerated by the Bangalore Principles on Judicial Independence[1] and Commonwealth Latimer House Guidelines on Parliamentary Supremacy. [2]An understanding of their application assisted participants gauge the progress made in so far as judicial independence is concerned. The session was moderated by **Dr. Nazreen Shaik – Peremanov** who guided the panelists through an interview led discussion. The presenters provided judicial, academic and practitioner's perspective in order to assist participants reflect and contextualize on the issue of judicial independence.

1.0 The Journey of Judicial Independence: A reflection of post- independent Africa

The discussants drew from three perspectives: Judicial, academic and practitioners.

1.1 Judicial perspective

Hon. Justice Kathurima M'Inoti

The journey has been long and persists to date. Since the 1960s and 90s the judiciary has been undermined and even though the context changed after the 90s, the issues remain the same. Many countries suffer from post colonialism "hangover"- if the pattern observed in many African countries is anything to go by. In the 80s, it was perceived that the best way to safeguard judicial independence was through the president, and not the constitution. Currently, many African countries, for example Uganda, South Africa, Zimbabwe and Tanzania have adopted constitutions which have immensely changed the narrative, but sadly not in practice.

In Kenya, the Judiciary has radically changed since the year 2010. The Kenyan Constitution gave the Judiciary the impetus to reform and restructure the country's justice sector for purposes of advancing and stabilizing democracy. However, to date, judicial independence is still much contested with obvious deliberate attempts to undermine its role and mandate by the Executive and the legislature.

The Judicial Service Commission (JSC) in Kenya is a critical body that promotes and facilitates the independence and accountability of the Judiciary. However, when the JSC follows its due process and recommends to the president persons for appointment, the president can take up to one year before appointing them, subjecting the recommendations to further evaluation. Furthermore, the JSC has been disabled by the Executive through the interference with election of commissioners and the chairperson. The executive has introduced new terms, including vetting by the National Assembly of commissioners that have not been appointed by the president. Currently, Justice Warsame's appointment has stalled following a battle between the three arms of government, on whether he should first, be vetted by parliament before official appointment. The JSC has been conducting its business without quorum.

[1] Commonwealth Parliamentary Association, Commonwealth Magistrates and Judges Association, Commonwealth Legal Education Association, Commonwealth Secretariat, and Commonwealth Lawyers' Association Commonwealth (Latimer House) Principles on the Three Branches of Government, 2009.http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

[2] The Bangalore Principles of Judicial Conduct 2002 https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

Secondly, while criticizing the judiciary, it is important to ensure appropriate checks and balances; there are a lot of accusations and false allegations on the judiciary, e.g. corruption that has eroded the credibility of the judiciary.

Thirdly, the move by the government to cap Judiciary's budget has undermined its independence and ability to deliver efficient service in the justice sector.

1.2 Academic perspective

Prof. Hugh Corder

There is need to differentiate judicial independence and separation of powers. There is also importance in drawing the difference between the constitution and constitutionalism.

In separating powers, the third branch of government must recognize, that its integrity lies in bodies such as the Ombudsman, the Auditor general etc.

There is a perception that the major threat to judicial independence is from the executive; however people must be alive to the fact that the attacks on judicial independence are both external and internal. There has to be mutual respect among three arms of government, but in reality there is a lot of disrespect for the judiciary by the executive and legislature.

On accountability, the judiciary must display a different kind of accountability, and judges must not be held accountable for an individual judgment, and the executive has often used this against them. Additionally, judicial appointments by the JSC must be wisely crafted to create a balance between judicial independence and accountability, since when threatened or compromised, it undermines both independence and accountability.

The executive in South Africa, has used disciplining of Judges as a tool to undermine judicial independence, but real independence would entail having mechanisms for disciplining judges that are held by the judiciary. Thus, the Judiciary needs legitimacy from the citizens to counter threats to Judicial Independence. This can be attained by crafting respectable decisions when making unpopular decisions, thus engaging in law fare rather than warfare.

1.3 Practitioner's perspective:

Kaajal Ramjathan Keogh

1.3.1 Evidence of Judicial Independence in South Africa

1.3.1.0 South Africa litigation Centre vs Minister of Justice and Constitutional Development (AL Bashir case) 2015

In June 2015, President Omar Hassan Ahmad Al Bashir of Sudan attended a meeting of the African Union (AU) in Johannesburg, South Africa, despite the fact that a warrant had been issued for his arrest by the International Criminal Court (ICC) for the commission of atrocity crimes in the Darfur region. Although South Africa, a party to the ICC, was obliged to arrest Al Bashir and surrender him to the ICC under the terms of the Rome Statute of the ICC, the South African government made no attempt to apprehend him. On the application of a South African public interest law firm, the North Gauteng High Court ordered that the government was required by law to arrest and detain Al Bashir. Al Bashir was, however, allowed to leave South Africa.

The court findings in the matter led to constant attacks from government insinuating that the judiciary was a body that created chaos and compromised stability. Justice Fabricios stated "A democratic state established based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A court is the guardian of justice, the corner stone of a democratic system based on the rule of law. If the state or its organ does not abide by Court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues".[3]

[3] Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015) [2015] http://saflii.org/za/cases/ZAGPPHC/2015/402.html

> Judicial leadership and collegial pressure from colleagues ought to bring an errant judge to line.

~ Prof. Hugh Corder - Professor of Public Law, University of Cape Town #AJC2018

Photo Wheel
Top: Prof. Corder presenting on the journey of judicial independence - A reflection of post-independent Africa from an academic perspective
Bottom: Participants listening keenly during the presentation by Prof. Corder

1.3.1.2 Former President Jacob Zuma and the personal costs order in reviewing: The state of Capture Report

The High Court ruled that former president Jacob Zuma should pay the R10 million legal costs bill he incurred when he tried to halt former Public Prosecutor Thuli Madonsela from releasing the State Capture Report[4] and later tried to have it reviewed .The bench ruled that Zuma was ill advised and reckless when he took the report on the review. The former president had argued that he had acted legitimately by approaching the court to decide on issues which concerned him about the state capture remedial action. The court, evidently, disagreed with him.

1.3.1.3 Court order for personal costs payable by former minister

Minister for Social Development, Bathabile Dlamini was ordered to pay out of her own pocket 20% of the legal costs of the Black Sash Trust and freedom under law in relation to the 2017 Social Security Agency.[5]

In a unanimous judgment, penned by Justice Johan Froneman, Dlamini was criticised for her role in handling the South Africa Social Security Agency (SASSA) debacle. The court also directed that copies of the judgment and the findings of an inquiry headed by Judge Bernard Ngoepe – held to determine Dlamini's role in the social grants saga – be forwarded to the Director of Public Prosecutions to consider whether she lied under oath and should be prosecuted for perjury. Dlamini is the second public official to be ordered by the court to personally bear some of the costs of litigation. In 2017 the Pretoria High Court ordered former president Jacob Zuma to personally pay the costs of an application to interdict the release of the Public Protector's State of Capture report

The challenge demonstrated in all these cases is that the courts acted independently but experienced attacks from government and government agencies, severely undermining judicial independence.

Plenary Discussions

Should we consider a review of the constitution of the Kenyan JSC?

When the Kenyan judiciary delivers a judgment that is displeasing to the executive, the Chief Justice (CJ) is summoned before a parliamentary committee, with an attempt to embarrass the CJ in the name of accountability. It was also observed that such accountability processes cannot be used on the judiciary, because the judiciary has some independence that is not experienced by other arms of government. Citing the provisions of Article 173 of the Constitution of Kenya (CoK), the administration of the Judiciary fund the mandate of the Registrar, and the Chief Justice should not be summoned by parliament to answer accountability questions on finances.

Conclusion

The journey of Judicial Independence Africa dates back to the early 1960s. Today the people of Africa want the rule of law, and they are demanding it more and more, often from their local judiciaries. Judicial Independence is still much contested with obvious deliberate attempts to undermine its role and mandate by the Executive and the Legislature. Theoretically, most constitutions in Africa provide for the concept of separation of powers with each arm of government assigned defined roles and functions but operationally, the Judiciary is regarded as the junior partner with the 'restrictions' on appointments-in the case of Kenya- which is usually the prerogative of the Executive branch of government.

[4] The South Africa state Capture Report, 2018. https://www.businesslive.co.za/bd/national/2018-12-19-jacob-zuma-challenged-protectors-state-capture-report-to-shield-inquiry/

[5] Bathabile Dlamini slapped with court costs, possible perjury probe. https://mg.co.za/article/2018-09-27-bathabile-dlamini-slapped-with-court-costs-possible-perjury-probe

Mutual respect between the arms of government is paramount since is positive obligation on States support the independence of the courts. Moreover, in order for Judiciaries to reclaim their legitimacy support from citizens is important.

There is need to interrogate the extent to which constitutionalism affects the concept of Judicial Independence. Other threats that may counter Judicial Independence include: threats at appointments, and disciplining processes. Institutional protection of judicial independence which involves the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service is designed to guarantee that judges will be free from extraneous pressure and be independent of all authority, save that of the law and, hence, that it is essential for the preservation of the rule of law.

However there has been evidenced instances of judicial independence in Africa. For instance in the South African Al Bashir Case where the the North Gauteng High Court ordered that the government was required by law to arrest and detain Al Bashir; The High Court ruling that former president Jacob Zuma should pay the R10 million legal costs and the court order for personal costs payable by former South Africa Minister for Social Development, Bathabile Dlamini.[6] In Kenya, the 2010 Constitution has given the Judiciary the impetus to reform and restructure the country's justice sector for purposes of advancing and stabilizing democracy

2.0 Application of Principles and Standards on Judicial Independence

Vanja Karth

There are initiatives at the global level in support of judicial independence and judges can apply judicial independence based on value 1 of Bangalore Principles of judicial conduct. Value 1 of Bangalore Principles of judicial conduct is on Judicial Independence. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

6 *ibid* at no.5

2.1 Advancing justice - and gender equality - through the Global Judicial Integrity Network

The Global Judicial Integrity Network (GJIN)[7], launched in April 2018 as one of UNODC's unique contributions to advancing justice around the world, also tackles the issue of gender equality in its promotion of judicial integrity. The aim of the initiative is to assist judiciaries across the globe to strengthen judicial integrity and prevent corruption in the justice sector. It is also a platform for judges to share best practices and lessons and to join forces in developing new tool and guidelines.

The network is considering developing an updated version of the Bangalore Principles. Meanwhile, the Democratic Governance and Rights Unit (DRGU) in collaboration with Southern Africa Chief Justices' Forum (SACJF) have developed a set of guidelines and principles on judicial selection[8] and appointments as a mechanism for protecting and enhancing judicial independence, which have been adopted by SACJF.

Their adoption means that eleven countries in the region have committed to utilizing the guidelines. What remains now is to monitor and assist in their implementation, and ensure that the Executive and legislature support the guidelines. Some countries will be required to make changes to the JSC practice and regulations but others will require constitutional and legislative reforms to adopt the guidelines.

2.2 Southern African Judicial Administrators Association (SAJAA)

SAJAA was developed under the auspices of the Southern African Chief Justices Forum (SACJF)[9] and it aims to strengthen and advocate for reforms for various aspects of judicial administration such as financial independence and ensuring that all staff fall under the judiciary and not the other two arms of government. She explained that a code of conduct needs to be developed for judicial administrators in order to strengthen the institution of the judiciary.

Plenary Discussions

It was questioned if DGRU in partnership with SACJF and ICJ Africa can provide certified courses for judges around SADC. The presenter observed that it is cheaper to train judges in their respective countries but it is recommended that the judges from various countries are trained together so that they can share best practice.

A participant also inquired about the fact finding missions conducted by ICJ Africa, DGRU and SACJF in Swaziland, Lesotho, and Seychelles in response to threats against the rule of law and independence of judges. In response, the presenter observed that jurists need to support judicial independence and judges under threat. For example, Jurists ought to have stood in solidarity with Chief Justice Mabel Agyemang when she had to flee from Gambia after delivering a judgment that the president did not like. She also added that Jurists need to ensure that the findings of the independent tribunal of inquiry in the Seychelles that was released two months ago are implemented.

[7] Advancing justice - and gender equality - through the Global Judicial Integrity Network. https://www.unodc.org/dohadeclaration/en/news/2018/06/advancing-justice--and-gender-equality--through-the-global-judicial-integrity-network.html

[8] Lilongwe Principles And Guidelines On The Selection And Appointment Of Judicial Officer**s**, 2018 available at: https://sacjforum.org/content/3-guidelines-selection-and-appointment-judicial-officers

[9] Southern African Judicial Administrators Association (SAJAA) https://sacjforum.org/

> Judicial independence is fundamental for democracy.
>
> ~*Kaajal Ramjathan Keogh, Director, South African Litigation Centre*

Photo Wheel
Highlights of the 2018 Annual Jurists Conference.

3.0 What do Commonwealth (Latimer House) principles provide as far as institutional independence is concerned?

Hon Justice Charles Mkandiware

The Latimer House Principles[10] were endorsed in 2003 by African Heads of States- this was a sign of political good will. He noted that at a conference held in Nairobi attended by Chief Justices, Speakers of National Assemblies and Chief Secretaries of Presidents/Cabinet Secretaries, delegates at the meeting representing their various governments appreciated the importance of the principles and developed an action plan for the sub Saharan region.

The action plan addresses the issue of the relationship between three arms of government. Each institution must exercise responsibility and restraint in the exercise of power within their constitutional sphere so that they do not encroach on legitimate powers vested on other institutions. The interaction among the three arms of government should be based on principle of cooperative governance.

Effective communication is important among the three arms of government. The principle of good governance and accountability require the institutions to maintain high standards of accountability and transparency in handling public affairs. When the judiciary is accountable, the public become more receptive. In order to attain transparency and accountability, the following should be exercised.

1. Observance of professional ethics among judicial staff;
2. Establishment of peer review mechanisms;
3. Appropriate criticism by the media;
4. Judicial independence and security of tenure. Independence can be achieve through training of judges and magistrates which is conducted by the judiciary itself;
5. Judiciaries should be properly resourced and financed; and
6. Establish appropriate appointment mechanisms – the composition of the judicial service commission is important, and revisits the tenure and regulations in order to improve them.

4.0 What regional initiatives have taken place towards the development of regional standards on judicial independence including the Monomotapa initiative and plan of action?

Mr. Martin Masiga

In 1961, ICJ Africa convened a conference on the Rule of Law in Lagos, Nigeria.194 jurists were in attendance. The conference proposed: i) Establishment of an African Court of Human Rights; ii) Development of African Convention on Human Rights The above proposals have been manifested in:

1. Enacted regional instruments
2. Decisions of the African Commission; and

[10] *Ibid* at no.1

3. Pan African Governments' initiatives such as New Partnership for Africa's Development (NEPAD)[11]

Regional instruments such as the **African Charter on Human and Peoples Rights**[12] (article 7[13] and article 26[14]) are steps towards safeguarding Judicial Independence in Africa. The African Charter on Democracy Elections and Governance (ACDEG) was adopted on 30 January 2007[15] as the African Union›s main normative instrument to set standards for better governance across the continent.

Similarly, the African Commission between 1994- 2008 has dealt with 20 communications on Judicial Independence, and only a few did not pass admissibility stage. The Commission has set standards by developing guidelines and principles e.g. right to fair trial and assistance in Africa.

The civil society work has advanced the judicial independence; ICJ Kenya and ICJ have advocated for the establishment of special procedure on independence of judges and lawyers at the African Union (AU) level. In March 2018 in Mauritania during the AU Commission Session, the delegation met with Commissioners and the civil society and a roadmap was developed. One of the main function of the special rapporteur will be to develop standards of independence and accountability for judges and lawyers in Africa

In conclusion, there are standards on judicial independence but there exists a disconnect in practice. Judicial Independence does not exist in a vacuum but it is dependent on democracy. This disconnect can be attributed to lack of democracy. The gap between the norm and reality can be addressed through litigation and addressing legal technicality in applying regional standards and soft laws at the domestic level.

Conclusion

The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions. There are regional and international initiatives and mechanisms that support the independence of Judges. Commonwealth countries have severally come together and declared the standards of judicial independence that are desirable of preservation within their jurisdictions. Guidelines are issued in matters relating to appointments, funding, training, ethics and accountability mechanisms and the role of non-judicial institutions. The preamble to the Bangalore Principles reiterates the requirement for protection of remedies through independent tribunals. It goes further to set out six values to be observed by judges in the exercise of their judicial conduct. Other initiatives include; Advancing Justice - and Gender Equality Initiative - through the Global Judicial Integrity Network, Southern African Judicial Administrators Association (SAJAA), Southern Africa Chief Justices' Forum (SACJF and Monomotapa initiative and plan of action.

[11] New Partnership for Africa's Development: http://www.nepad.org/

[12] African Charter on Human and Peoples Rights 1981. Available at:http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

[13] Every individual shall have the right to have his cause heard. This comprises: The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;The right to be presumed innocent until proved guilty by a competent court or tribunal; The right to defence, including the right to be defended by counsel of his choice; The right to be tried within a reasonable time by an impartial court or tribunal.

14 States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter

15 The African Charter on Democracy Elections and Governance (ACDEG) 2007; http://archive.ipu.org/idd-E/afr_charter.pdf

> Judicial Independence does not exist in a vacuum. It is dependent on democracy. You will enjoy judicial independence as much as you enjoy democracy.
>
> *~ Mr. Martin Masiga Secretary General, African Judges and Jurists Forum (AJJF)*

Photo Wheel
Participants at the AJC posing for photos during tea break.

Section B: Challenges and Threats to Judicial Independence

The overall objective of this session was to examine a holistic approach to safeguarding judicial independence through ensuring that support actors operate in a safe environment; and that judiciaries in the region, in safeguarding their independence, can out to these actors for support. This session was presided over by **Ms. Teresa Mutua** and **Mr. Brian Penduka** who guided the panelists through an interview discussion. Under this theme, the participants, heard from judges across the region on their experiences on varied emerging threats to judicial independence. Judges also shared personal experience with a view to making the concept of judicial independence a reality and making a case for safeguarding judicial accountability and independence.

5.0 Experiences from Judges in the Region on Challenges and Emerging Threats to Judicial Independence

Justice Robert Vincent Makaramba, United Republic of Tanzania

In a government in which three arms should be equal to one another, the judiciary will always be the weakest link because of its lack of capacity to injure. The legislature prescribes the rules by which rights should be regulated, the judiciary can take no active resolution and must ultimately depend on the executive and the legislation. *"The independence of the judiciary and the independence and impartiality of judges and magistrates are achievements which require the maintenance of constant vigilance."*[16]

Currently the judiciary is seen as the most dangerous of the three arms. The judiciary has the longest arm without the necessary force. Its power comes from power to render decisions on the work of the other arms. In the same regard, Judges are not supposed to be popular, but make the most unpopular decisions using the law.

According to Roscoe Palm- Dean, the four areas which raise suspicion of the judiciary entail:

1. Necessary mechanical place of rules
2. Inevitable difference between rate of progress and practice
3. The administration of justice is an easy task for which anyone is competent
4. Popular impatience of restraint- justice hurried is justice buried

Some of the emerging issues of concern on Judicial Independence are as follows: Rebuke by American Chief Justice of President Trump remarks about Clinton judge; The US Supreme Court Chief Justice John Roberts took the extraordinary step of rebuking President Donald Trump's criticism of a federal judge. Mr. Trump had suggested that the 9th Circuit Court, where a federal judge blocked his recent immigration proclamation, opposed his policies on border and safety. The Chief Justice responded by saying that "*We do not have Obama judges or Trump judges, Bush judges or Clinton judges....What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them*."[17] It is extremely rare for a senior member of the judiciary to clash with a US president.

[16] Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and Lawyers https://www.rechtspraak.nl/SiteCollectionDocuments/Matters-of-principle.pdf

[17] Robert Barnes, The Washington Post, Rebuking Trump's criticism of 'Obama judge,' Chief Justice Roberts defends judiciary as 'independent', 21 November 2018, https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on&utm_term=.f903274788c4

Institutional autonomy of the judiciary including management and financial autonomy are important in a democracy. Judiciary is often given funds from national budget, which is allocated by legislature and executive.

It is important for those making budget to take needs of judiciary into consideration; Inadequate funds, undermines ability to fulfill work which may interfere with the independence of the judiciary. There are also no consultations of the judiciary when making budgets-often ministers make budgets without participation of the judiciary. He emphasized that one of the most effective way of controlling an agency is restricting its finances- thereby chocking the agency and manipulating its independence.

International standards such as the United Nations Basic Principles on the Independence of the Judiciary must be put into consideration by governments. The principles were formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist

In Tanzania- Judicial Administration Act provides for the judiciary to prepare its own budget which it gives to the Minister of Finance to present in parliament, the Act also gives judges remuneration and benefits packages which comes as a lump sum and 80% of salary.

The Judiciary should not wait for the executive to tell them how to reform. Judicial law making should not make a judiciary become a "juristocracy" and additionally contempt of court is not the best way forward; should judiciary hold exec in contempt- such orders are also ignored. Finally, the Judiciary should be autonomous and the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

Plenary Discussions

There have been similar conversations around judicial independence for a long time. Should we not be progressing the discussion beyond traditional issues and looking at how to address issue of finances? Courts in Africa are the oldest branch of the government, e.g. Tanganyika court was made a high court before executive was in place; therefore the question should be to what extent should we go back to old ways such as mediation- which is the traditional way of settling disputes (not alternative). However, beyond the traditional issue of independence, as long as we have modern institutions with the two arms of the state still existing, we will always be talking about independence. There are now also new challenges and threats that need to be discussed; what Kenyatta and Trump are talking about are issues that were there in 1800's, the problem is the state and so the problems persist.

What is adequate financing? Can over financing also compromise independence? Tax payers are paying taxes that should be shared equally; judiciary must participate in making its own budget according to needs subject to ceiling set by treasury and in accordance with the law. On the issue of over financing, there are no examples of such so it is difficult to answer. However, it should be distinguishable from corruption where money is given to choke someone to give a particular position.

6.0 Judicialization of Politics: Background of Judiciary in Kenya and Election Matters

Hon. Justice Amraphael Mbogholi Msagha

Before 2010 constitution, no timelines were there to determine election petitions. Pursuant to this, in 2013 the Chief Justice Dr. Willy Mutunga set up a standing committee to advice the judiciary on administrative mechanisms to deal with elections. The Supreme Court, Court of Appeal, Magistrates committee has different arms which engage stakeholders across the board including NGOs. Since there is not much funding, it is dependent on donors e.g. International Development Law Organization (IDLO), FORD Foundation, etc. Furthermore, which have organized benchmarking trips to countries such as South Africa, Ghana, India and Mexico.

Elections and jurisprudence: In most cases, the judiciary has succeeded in complying with the law. Judges take an oath to defend their office and the law, so Judicial Officials make decisions based on law though politics is always hovering around them. For example, separation of powers limits judicial role in politics; all election petitions are political. John Harrison, on political doctrine question, stated that judges are not well suited to make political decisions; therefore, remaining away from political fray allows the judiciary to retain its integrity and independence.

In 2007/2008, after elections, candidates refused to go to court and this fueled violence which led to several deaths. Consequently, reforms came about e.g. the Supreme Court was created to handle presidential disputes, all ERC disputes to be handled within six months. In fact 188 petitions were solved within six months in 2013, in 2016/2017, the number doubled. At the same time, any persons can file election petition; any person aggrieved, where one withdraws can take the case up.

Some of the challenges highlighted on presidential election petitions in Kenya are:

1. Influential peddlers pushing election petitions behind the scenes
2. Complains that politicians get special treatment;
3. Non adherence to deadlines set by law; presidential petition is set by law so no option but adhere to the 14 days;
4. Election process is long , from party elections, which always end up in the courts;
5. Issues of jurisdiction for instance, people ending up in Supreme Court which has no jurisdiction on some matters e.g. the cases on procurement of election ballot boxes etc.
6. Attempts to stop resolutions through alternative dispute resolution mechanisms for election disputes e.g. Kadhi courts and clan courts in some rural parts; in some instances handshakes can also work;
7. There is also no culture of conceding defeat in elections;

There is need to limit judicial intervention in electoral petitions so as to resolve concerns over court interference with the will of the people.

Plenary Discussions

Separation of powers comes with separation of roles; should judges descend into political arena to decide on political issues?

There is no alternative because any matter in which a court has jurisdiction, it must decide on that matter; internal dispute resolutions help and there are instances where courts have turned away litigants to first utilize internal procedures.

Is efficacy of time limits not an excuse for judicial avoidance?

It was introduced because election petitions took over five years e.g. an election petition filed in 2008 determined in 2017. Delays create anxiety which can have negative impacts, hence the importance of limitation of time to decide on election petitions. At the same time, Judges still have other cases to deal with so election petitions must be dispensed with urgency so the court can go on. Furthermore, it creates order so litigants can go on.

Judges decide on evidence and facts, which is potential for conflict and disorder due to decisions, does that not have a role when deciding?

There is less violence after petitions; people have been more ready to accept the decisions. At the same time, filing of petitions is sometimes a healing process.

7.0 Paper presentation by Rtd. Chief Justice Dr. Willy Mutunga on Judicial Independence

Judicial independence has been at the core of the world's democratic and constitutional evolution. The principles of 'separation of powers' and 'checks and balances' principles that govern inter-branch relations within the state, and of which judicial independence is a conceptual derivative, have been the holy grail of the modern nation state for centuries now. Lee and Campbell[18] define judicial independence as the principle that focuses on the creation of an environment in which the Judiciary can perform its judicial function as one of the three branches of government without being subject to any form of duress, pressure or influence from any person or other institutions, in particular the other branches of government.

Modern transformative constitutions go deeper than the traditional definition by demystifying the duress, pressure or influence. They do this by providing in their provisions the requisite qualifications for judges, and the process of their recruitment. Robust public participation has become a key requirement in the recruitment of judges. In the case of Kenya all judicial officers are appointed by the Judicial Service Commission (JSC). In the cases of CJ, DCJ the Commission sends to the President names of the candidate for each position for vetting by Parliament. The Executive is represented in JSC by two officers, both appointed by the President: the Attorney General and the Chair of the Public Service Commission. The President appoints two other Commissioners to represent the public, not himself, at least in theory. Whatever other views the President has have to be channeled through the JSC for consideration, including due process for the candidates. For judges of the High Court, Court of Appeal, and Supreme Court it is the JSC that recruits and the President swears them in office.

Some constitutions provide for the financial independence of the Judiciary from both the Executive and Parliament. In the case of Kenya, the Constitution provides for the creation of the Judiciary Fund. Parliament has come up with a legislation for the setting up such a Fund, but after a very protracted struggle. The disciplining of judicial officers while observing the principle of the security of tenure, is the task of an independent Judicial Commissions or Councils. To reinforce this independence is the provision of retirement packages through statutes.

[18] H P Lee and Enid Campbell, The Australian Judiciary (Cambridge University Press, 2nd 1 Edition, 2012) 7

> What are we doing to support judges who have stood firm and maintained judicial independence?
>
> *~ Vanja Karth - Director, Democratic Governance and Rights Unit - the University of Cape Town and the director of the Judicial Institute of Africa.*

Photo Wheel
Highlights at the 2018 Annual Jurists Conference.

Cardinal to the independence of the judiciary is the integrity of the judicial officers themselves. Judicial Commissions seek the participation of the public in their decision on the suitability of individuals who apply for those positions. The Commissions will seek integrity reports from the Bar, from Universities, arms of state such as the Revenue authority, intelligence, and criminal departments. Commissions have the capacity to conduct their own investigations on the issue of integrity. In Kenya, it is dangerous to rely on reports by departments of the other arms of state without verifying them and giving the candidates due process about allegations of integrity. Where serving judicial officers apply, their personal files can be perused to find out if they have ever had integrity issues.

There are other pressures, duress, and influences that are normally ignored. These are the insidious and invisible influences. These are the seduction of power; ethnic communities; opposition political parties; religions; family, friends; vested corporate and civil society interests; and international community, a euphemism for economic, social, political, and cultural foreign interests.

Pressure from executive can result in death; a case in point is that of Benedetto Kiwanuka, the Chief Justice under Idi Amin who was also the first Prime Minister in Uganda. Kiwanuka was arrested in office at the high court, murdered; body removed and placed in a jeep for disposal which was then set ablaze, his remains have never been found. In a letter, it was confirmed that the murder of Kiwanuka was executed on instruction of Idi Amin. He had granted bail and warned police, allowed appeal for habeas corpus, and stated military has no power to detain. The reasons for his arrest are cause for speculation given that Amin believed he was a mover of an opposition.

Judicial independence is a political course which people must be prepared to die for. This should be despite experience of separation of power; driven in a convoy with nice cars, police escort, traffic stopped, Kenyans lined up, liking this ritual. The Retired Chief Justice recalled an experience when he was kept waiting for President Mugabe to pass, recalled white man cursing who after he passed said there goes Bob and his wailers. The motorcade is nonsense meant to intimidate people.

> *At state house, he was welcomed, photos taken, few women, even in his short speech which warned them that the law is above everyone, did not dampen spirits. When he arrived at home, he thought about what it means in this life, he saw a poem which heeded a warning; 'going to bed with power is seductive, avoid power like plague, it kills the human in you'. Second came leaders of his community, they wanted to capture the office. When he went home to lay foundation for a High Court, he was told it's a home coming party, they needed new and bigger courts. He got into trouble after 2013 Electoral Petition; rural relatives expected him to rule in favor of his community. So he warned my community of dangers of divisive politics.*

There were courtesy calls by international and corporate, Civil society who stated they had captured one arm- when he was appointed. One can be subverted by family and friends, warned them to not be brokers- be careful when an aunt comes unannounced and expresses interest in a case before the court, Judicial Officers should never take a bribe. Moral authority of judiciary can be great if they desist from bribery and corruption.

Plenary Discussions

If people have delegated sovereign will to the state, but organ with such power refuses to take up responsibility because it is political, is this not subverting the will of government?

The will of the people is in the ballots; -power to determine matters does not and should not change the will of people, delegation is not representation

Conclusion

Financial autonomy is key to judicial independence. Judicial finance, should be exercised free of interference by agents of the executive branch of government, in the same manner that the executive and legislative branches administer the funds appropriated for their internal operations. The judiciary should be adequately funded in order to discharge its functions. States have a duty to guarantee this requirement, preferably by means of legislation. Judicial participation in the delineation of the budget constitutes an important safeguard against insufficient funding. It is important for those making budget to take needs of judiciary into consideration; Inadequate funds, undermines ability to fulfill work which may interfere with the independence of the judiciary. Even though the judiciary enjoys financial autonomy as to the way it allocates resources, it must remain accountable for any misuse to the other branches of power.

Judicialization of politics also undermines judicial independence. In Kenya, for instance, it is has been noted that some of the challenges to election petitions are influence of 'prominent persons' behind the scenes, politicians accorded special treatment in court, disregard of deadlines set by law and politicization of court processes.

Independence of the judiciary, and the decisional independence of individual judicial officers is about the integrity of the judicial officers. The fundamental pillar for this integrity is the ideological and political position of a judicial officer. Yet this is the pillar judicial officers are told to distance themselves from as if it was possible. It gives judicial officers great moral authority to speak to societal issues that impact transformation. Independence of the Judiciary is accountable to and trumped the Supreme Law, the Constitution.

8.0 Threats to Legal Profession and Stakeholders that Support Judicial Independence

The overall objective of this session was to discuss the threats that civil society, the legal profession and other stakeholders that support Judicial Independence experience. This session was presided over by Mr. Patrick Ngujiri who guided the panelists through a discussion. Under this subtheme, participants had from, civil Society players, media practitioners, and human rights advocates. The panelists discussed shrinking of civic and democratic space as a threat to judicial independence; threats on the 4th estate and impact on judicial independence; and the connection between independence of regional mechanisms and independence of national judiciaries

8.1. How do threats to the legal profession impact judicial independence?

Mr. Davis Malombe

The notion of shrinking civic space is a global problem and it has become prominent in the last 10 years. Closing civic space is hardly given a human rights approach and the definition poses a conceptual challenge. It can be defined as a violation of civil and political rights. Civic space implies that the civil society are the victims. In the 80s and 90s closing civic space was defined as political suppression. When states are repressive, the relationship between the judiciary and the executive is strained. The interests of the government for targeting these institutions is to undermine the legitimacy and to frustrate the institutions thereby making it difficult for it to work. Some of the tactics used in doing this include: threats, killings of some of the actors in the institutions (Willy Kimani in 2015), denial of resources to the institutions. The judiciary is targeted for a number of reasons because it is a key factor in the protection of human rights and democracy. Even the context of elections in Africa it becomes worse because that is where all the political disputes.

Actors have gone to court to seek remedies and protection of the judiciary, e.g. the government has attempted to amend the Judicial Service Commission Act and the civil society went to court. They got a progressive judgment, which protected the judiciary and the interest of the country. The civil society has also been targeted and organizations such as KHRC have gone to court to defend their rights. The government has also targeted the media by trying to shut them down. In such contexts, the court becomes the space where these rights can be ventilated and encouragement to find more ways in which to express more solidarity with the judiciary when they make decisions.

8.2 How do attacks and threats on the 4th estate impact judicial independence?

Mr. Kwamchetsi Makokha

When justice is done, it is done for the public good. Legitimacy questions about judicial decisions, public sphere is an accountability forum for judiciaries which can be reduced by controlling the media. The power struggle between various arms of government ends up in the public sphere. If the contexts are not clear, some of the arms may suffer. Ordinarily attacks against the media included deaths and attacks against the journalists, closing the media houses, buying media outlets, bribery and even physical violence. Soft control of the as a media capture includes; Executive buy out, denial of advertisement, editorial control, regulatory capture.

Media are not free to hold to account the various arms of government. Media capture reduce political accountability. Media is not able to frame the conversation. Media capture is converted into a space for harassing judges. The poorly regulated public sphere e.g. the social media creates a place where scandal is rehearsed and pushed to mainstream media hence a scheme to employ media to undermine credibility of the judiciary. Harassing the judges by the executive can be one way of threatening judges so that they do not apply themselves to political cases. The government outfits of bloggers in Kenya called (36 bloggers) were used in Kenya to intimidate the judges.

Fake news spreads faster, and it is used as a tool of undermining the judiciary and individuals. Examples include (undercover investigation of judges in Ghana, the impending investigation of the deputy chief justice in Kenya. There are similar cases where judges have been linked with scandals which are prosecuted on national television. Online campaigns to discredit organizations that work with the judiciary is rampant. The attacks at the municipal level and the regional level are very similar. There is a need for a new philosophical and intellectual mindset in the judiciary. The aloof perception that judges only communicate through the judgments creates a communication gap. It is important for the judges to adopt emerging trends such as live reportage example of the tweeting judge given.

8.3 Is there a connection between independence of regional mechanisms and national judiciaries?

Mr. Brian Kagoro

Africa inherited a triple legacy of the state founded on three functional pre dispositions. In Africa there has been a fundamental fraud in explanation of ideas such as separation of powers. There will be no judicial independence if there is no social struggle. Security fetish must be challenged for the independence of the judiciary to sprout. The eco system we are defending including judicial independence is the very essence of our struggle. For there to be judicial independence, actors should contest against national security and be able to hold everyone accountable. The corporate veil ought to be pierced and the financial transactions of business should be dwelled on. The personal security of the judge is the most important to deal with unlike corrupt judicial officers.

The problem comes in when judges are being attacked and are facing realities such that it becomes difficult for them to be independent without considering what it will do to their personal security.

Discussing judicial independence without considering corrupt lawyers as a threat equates to going to a brothel to discuss morality. Lawyers are the most politicized groups group who should not create an impression that is delusional in trying to win many cases and not dealing with the real issues.

Plenary Discussions

The use of social media as a tool for judicial officers. According to Zimbabwe laws, judges are not allowed to make public comments about their cases but how can one steer clear of social media since it is so alive in the modern day age. Not being on social media is safer in a way, but there are conversations going on there that would require their input. A line needs to be drawn in the use of social media (judicial officers cannot tweet their reaction to cases or things related to their work). There is a high risk of having fake accounts opened which is also challenge.

Strong partners i.e. NGOS and the media are very critical for judicial independence. Does the judiciary return the same support to them when they are being attacked? A strong partnership would be useful for the strengthening of judicial independence. Judicial diplomacy, which is the ability to connect across different legal devices is very important and should be put to use.

Can the judiciary also capture the media so that they use it as a tool to equally explain themselves? The Judiciary should try to capture the media just as USA did.

Using the pen in their judgments as the only means to explain themselves should come to an end and the judicial officers should use social media to reach more audiences.

In Kenya, judges had a judicial march after so many attacks in a bid to prove that they are human beings too. Judicial independence can be problematic in that the judges do not have an army or security unlike the state so it becomes problematic in terms of who will ensure their security

Conclusion

Conflict between state and non-state actors has slowed down the fight for judicial independence in Africa. Moreover, the closing civic space has reduced the civil society's momentum in striving for judicial independence. Denial of resources by the state has limited funding and crackdown on CSOs has limited NGOs work in the area of judicial independence.

Furthermore, fake news fueled by the media has created a narrative that undermines the judiciary in the public limelight-this has led a negative public perception of the judiciary.

Recommendations

Some of the recommendations that can be put in place to tackle the threats to Legal Profession and Stakeholders that Support Judicial Independence are as follows:

a. There should be the development of a regional special mechanism, a Special Rapporteur on the independence of judges and lawyers that can deal with issues relating to judicial independence in Africa
b. Justice should be made to be an ongoing and continuous conversation for judges
c. Judges should join social media forums so that their voices can be heard
d. There should be the development of a judicial radio that will be used as a form of communication for the judicial officers

> Kenya's Judges and Magistrates vetting process was very interesting and inclusive. It should be adopted internationally.
>
> *~ Rtd. Justice Albie Sachs - Former Judge, Constitutional Court of South Africa.*

Photo Wheel
Highlights of the 2018 AJC Conference.

Section C: Opportunities to Strengthen Judicial Independence in the Region

This theme presented with an opportunity to propose a way forward in developing a regional standard for safeguarding judicial independence in the region. Participants' interrogated options for anchoring such standards to ensure proper observance by judiciaries in the region as well as to ensure that African States adhere to safeguarding judicial independence at the national level. The session took a classroom discussion approach and it was moderated by **Ms. Jemimah Keli**. She welcomed the panellists and guided the participants through the session. This thematic area presents the participants with an opportunity to propose a way forward in developing a regional standard for safeguarding judicial independence in the region.

9.0. Regional Standards for Judicial Independence

Dr. Elvis Fokala
African Commission on Human and Peoples' Rights Resolution on the Respect and the Strengthening on the Independence of the Judiciary[19] calls upon African countries to:

1. Repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges;
2. Provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system fulfil its function;
3. Provide judges with decent living and working conditions to enable them maintain their independence and realise their full potential;

Incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure; Refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.

The African Commission Urges African judges to organise nationally and regionally, periodic meetings in order to exchange experience and evaluate efforts undertaken in various countries to bring about an efficient and independent judiciary.

Judges should network regionally to share experiences since the above points do not really speak to national situation but are cross cutting across the region. There are two dimensions and judiciary sits at an angle-vertical relationship; relationship with arms of government –they establish bodies that formulate international law and regional laws; Horizontal-relationship with peers, communities, family (corruption, bribery etc.) Judiciary is more concerned with vertical line; horizontal is also very important but in most cases-laws for horizontal relationship are few e.g. corruption, cultural law not explicitly mentioned.

It is insightful to reflect on the 63rd session of African Commission, where civil society advocating independence of ACHPR; African Committee on the Rights of Children; has level of state compliance e.g. For instance the Nubian case, the level of compliance was low. In 2011 when the decision was made, committee followed up, government states there are no resources-when elections get close level of compliance increases; the Committee has been giving recommendations, some which are very achievable e.g. in Malawi to change age of majority from 16 to 18.

[19] Commission on Human and Peoples' Rights http://www.achpr.org/sessions/19th/resolutions/21/

He observed that most African States have provisions on independence and that the Judiciary can never have complete independence but we can strive for judiciary to make decisions which are just, fair and acceptable

Question: Comment on powers of African court, also what do you think about the elective nature of the protocol? Commissioners are representatives of states; it's a political decision to be a member. Commissioners claim they have independence. Judicial independence will never be comprehensive because judges are fed and protected by the state- all that can be done is to encourage judges to make decisions which are just and acceptable.

9.1 Why is it important to have African Human Rights Standards?

Mr. Arnold. Tsunga

There are assumptions that the judiciary is a critical component of the state**.** Human rights are universal and because of universality there is a minimum core content and African human rights standards, accepted at different levels.

The AU was a decolonisation project with South Africa's independence meant it had been achieved but principle of sovereignty was being interpreted as non-interference and non-intervention and so post-colonial state became an inherited colonial structure. Efforts to shift from non-intervention to non-indifference must remain ongoing

It is important to have African standards as solutions to African problems. There has been incessant pressure for states to vote individually but there is a better chance if Africa votes as a bloc. The problem has always been the failure to implement acceptable human rights standards- this is the reason why the African Charter was developed.

African Human Rights Standards covers four main areas: State actors should get involved in developing standards and all the main AU documents; AU and sub-regional economic bodies, including Africa wide bodies e.g. ACHPR make a rubric of standards that identify as African standards; The adoption of standards by African bodies, non-governmental institutions e.g. Africa Chief justice forum etc.; A layer of standards emerging from court interpreting standards especially where citizens allege violations, includes pronouncements in domestic courts adopted at sub-regional level.

Question: Where cases against the state, governments are not disturbed when they lose cases before regional bodies, what can we do to increase legitimacy of regional bodies? Government non-compliance with regional body decisions undermines confidence. The political cost of defiance can only be raised by advocacy efforts by civil society through evidence based advocacy –which looks at particular public interest cases that would have been defied., the political leadership legitimacy gets affected most when failure to comply. The performance legitimacy of courts is not dependant on whether decisions have been implemented by non-performing government but on whether they have been fearless and rendered decisions that are fair.

Question: Does having African standards lower the standards?

Question: Guiding principles and standards of judicial independence, what is the basis of your theory to setting of standard? Give examples on standards. A good example of standards is the 2017 Guidelines on combating sexual violence and its effect in Africa. The process of developing the standards spanned over 2 years (Standards now adopted as AU standards). The process involved African Commission Special Rapporteur leading the working group. When states are reporting before the African Commission they will now have to show concrete steps they have taken to meet the standards in the guidelines. Currently there is development of article 12(1) of African Charter.

Question: Who should hire and pay the judges so they can remain independent? Who is to judge a judge? Who should protect the judges? It is the responsibility of the state. Problem is that in some states court processes are televised, listening to pleadings, lawyers are asking judges to apply their mind. Judges should make decisions based on the law and not where their money comes from.

State should protect the judges but citizens also have a duty to protect the judges especially when they face retribution –through civil society advocacy. In countries where judges operate under harsh conditions, underpaid, have pressure etc. their independence is compromised.

Civil law countries have a greater challenge because the law is not based on precedent and this exposes judges to threats to their independence. The more there is a resourcing model reliant on executive, the more you have a potential conflict. Civil society should develop a resource model for judiciary which is self-accounting, which does not require executive and parliament

Question: The JSC is employer, when it is a litigant it disturbs independence, where advocates are JSC members, when serving they should not be appearing in courts because they are also an employer. The suggestion sounds attractive but might not be practical.

Question: On the vertical relationship, does it mean we need framework to guide relationship with community to guard independence?

Question: Corruption is sometime just a perception, where it is found it is sometimes people surrounding the judiciary who are corrupt. Surveys have been done that do show that generally the judiciary is not corrupt but the support staff is usually problematic. This takes to question of power relations between JSC secretariat and the Chief Justice.

There is need for a balance as research suggests that the independence of judges is now under capture of the JSC.

A participant commented on the issue of conflation of government and state,-that the state remains almost independent from government and how do we differentiate state and government? It was agreed that the state and government are used interchangeably but there is need to separates them.

Recommendations

At the end of the session it was recommended that African states must be urged to comply with recommendations from regional bodies including the ACHPR, African Court and the African Committee on the Rights of the Child. It was also suggested that African courts should place more reliance of African standards and that States are encouraged to adopt and implement the AU Resolution on the Respect and the Strengthening of the Independence of the Judiciary

10.0 Anchoring Regional Standards for Effective Monitoring of Judicial Independence

10.1 Opportunity to create a special rapporteur mandate at the AU building a case for regional mechanism

Martin Masiga

African Judges and Jurists Forum (AJJF) is leading the initiative to establish a regional mechanism together with regional partners like the International Commission of Jurists, National Secretariat and the ICJ Kenya. The Africa Judges & Jurists Forum (*AJJF*) is a pan-African network of judges and jurists, who are committed to promoting justice and development in Africa.

Rapporteurs are independent experts in Human Rights systems who promote Human Rights. He stated the Africa Commission on Human and People's Rights has a number of Special Mechanisms: that is, 8 working groups, 1 standing group, 6 Special Rapporteurs, and 2 standing committees.

The Special Rapporteur on the Independence of lawyers and judges would be the 7th if it is successful. The Commission was approached in March 2018 He added that there is an already existing mechanism at the UN level but there are challenges with the UN one hence the need for a regional mechanism since it has been hard to get the mandate holder to intervene in cases from Africa for unknown reasons. He observed that an African mechanism is needed in order to deal with African situations

10.2. Alternative opportunities in existing mandates at the AU

Dr. Japheth Biegon

There is need for a regional mechanism on the judicial independence. The Special Rapporteur on extra judicial killings was the first one and noted that the Special Rapporteurs of the African Commission are supported by the Secretariat

Since the Special rapporteurs are supported the African Commission Secretariat the mechanism has been affected the mechanism because there is no enough financial support and much reliance is now being put on civil society groups because there is little funding of the Commission from the AU.

In Africa, the Special Rapporteur are drawn from the Commission itself and not like in the UN were it is open for everyone who is an expert. The Special Rapporteur are drawn and inter changed from one group to the other which shows that there is a shallow pool to choose from. If this cannot be done there can be the expansion of the already existing special mechanisms. The one that fits judicial independence amongst the existing mechanisms can be the Special Rapporteur on Human Rights Defenders

Recommendations

a. External funding can be explored since finance is a challenge and that collaboration with the states that are willing to cooperate can also be explored

b. Political actors can be approached to support and provide assistance i.e. resources

c. A baseline survey of the existing framework can be done to show how it is lacking and the justification for the creation of the mechanism.

d. Proper and effective enforcement can also be ensured while looking into the expansion of existing mechanisms rather than just making a new one.

11.0 Closing Remarks- Rtd. Justice Albie Sachs

The role of the judiciary is to uphold the constitution. Although it is a difficult task as it is well-nigh impossible to lay down standards of judicial independence and integrity which will be acceptable to all jurisprudential beliefs. Strengthening judicial independence using constitutional procedures and upholding integrity can move judiciaries away from state capture.

12.0 Conclusion of the Conference

Despite the existence of various normative frameworks, there continues to be a mismatch between standards set and State practice. Judges and lawyers in many African countries continue to face threats in the context of their work. Verbal threats, physical attacks, orchestrated removal procedures, prosecution and reprisals for judicial/ legal decisions, poor remuneration and working conditions and unfair promotion processes are among many challenges that Judges face; and which undermine their independence and accountability.

There are opportunities available at the international level that can be replicated in the region and consider its relevance in the African context. Mechanisms such as Monomotapa Initiative and Plan of Action, Latimer House Principles and the Bangalore Principles if adhered to can led to strengthened judicial independence in the Region.

The Executive and the Legislature must also accord the judiciary financial autonomy to budget and make decisions in order to fulfil its duty and function to administer justice.

The courts rely on the political will to give effect to its decisions, and because political will is often directed by public opinion & the media, their influence is one of the most relevant constraining forces on judicial power and its independence. There is expectation that judicial decisions and the judicial independence of judges are not unduly influenced by the media, and the insight that judges have a role to play in explaining their decisions to the general public via the media in order to gain legitimacy of their decision-making and the judiciary.

ANNEXTURE 1: CONFERENCE COMMUNIQUE

THE LAGOON CONFERENCE CALL FOR ACTION

GREATLY CONCERNED that the threats to judicial independence on the continent are a significant, contentious issue, especially in the face of persistent challenges on judiciaries by the other branches of government.

COGNISANT that the Executive and legislative overreach manifest in cuts on Judiciary budgets that undermine the institution's ability to deliver efficient service but also demonstrate how financially vulnerable judiciaries cannot be independent. Jurists also note that the executive and legislature have routinely disrespected the judiciary. Jurists also note that judicial service commissions face innumerable frustrations from executives and legislatures.

FURTHER NOTING that threats to judicial independence not only arise from executives, legislatures and other external actors, but also arise from within.

COMMITTED to join efforts to Support judges under threat and institute follow-up measures to ensure that the findings of independent tribunals are implemented.

We the 100 jurists meeting for three days at the Lagoon Beach Hotel in Cape Town to reflect on the State of the independence of judiciaries in Africa, taking stock of threats, opportunities and challenges, agree to call upon:

1. African Heads of State to uphold constitutionality and ensure that each branch of government acts within its constitutionally defined mandate;
2. The three arms of government to interact on the basis of cooperative governance, ensure effective communication, and require high standards of accountability and transparency in handling public affairs;
3. African governments to ensure the institutional autonomy of the judiciary including financial and administrative independence;
4. African governments to comply with all recommendations from regional bodies including the African Commission on Human and Peoples Rights, the African Court and the African Committee on the Rights and welfare of the Child, especially those that pertain to the independence of judges;
5. African governments and continental bodies to work towards the development of regional standards for the design, composition and mandate of national Judicial Service Commissions to ensure judicial independence;
6. African Union to establish special procedures on independence of judges and lawyers at the African Union. Further calling upon the African Union to ensure that standards on judicial independence are put to practice.

ANNEXURE 2: CONFERENCE CONCEPT NOTE

Annual Jurists Conference

"The State of Judicial Independence in Africa: Threats, Challenges and Opportunities"

Concept Note

Introduction

The Kenyan Section of the International Commission of Jurists[1] (ICJ Kenya) in partnership with The International Commission of Jurists[2] (ICJ) and support of its national and regional partners[3] will convene the Annual Jurists Conference (AJC) to deliberate and contribute to the discourse on emerging rule of law, human rights and justice trends affecting the Continent.

This year, the 2018 AJC will be held from 20-24 November at The Lagoon Beach Hotel in Cape Town, South Africa. The theme of the conference is ***"The State of Judicial Independence in Africa: Threats, Challenges and Opportunities".*** The conference will be in the form of a three day consultative forum that will consist of key stakeholders to be drawn from members of the Bench and the Bar in the region, civil society actors, state agencies and independent Experts.

Context Setting

The protection of the independence of the judiciary is guaranteed under both international and regional mechanisms: The Universal Declaration of Human Rights (UDHR)[4] and the International Convention on Civil and Political Rights (ICCPR)[5] make the independence of the judiciary a pre-requisite component of the right to fair trial. The African Charter[6] obligates State parties to guarantee the independence of the Courts. More so, the Grand Bay (Mauritius) Declaration and Plan of Action[7] recognizes that an independent, open, accessible and impartial judiciary guarantees adherence to the rule of law, democracy and Human Rights.

Various international principles set standards for the protection and promotion of judicial independence: The UN Basic Principles on the Independence of The Judiciary[8], the Bangalore Principles of Judicial Conduct[9] and the Commonwealth (Latimer House) Principles of The Three Branches of Government[10] task member States to secure and promote the independence of the judiciary within the framework of their national legislation and practice. Consistent with this, most national Constitutions in the region, vest judicial power in the courts and declare that they are independent and subject only to the Constitution and the law.

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20 ICJ Kenya a non-governmental membership organization constituting of a body of jurists drawn from members of the Bench and Bar in Kenya and the region dedicated to promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices.

21 ICJ is an international human rights non-governmental organization composed of 60 eminent judges and lawyers from all regions of the world dedicated to ensuring respect for international human rights standards through the law.

22 The Kenya Human Rights Commission (KHRC), the International Development and Legal Organization (IDLO), the Konrad Adenauer Foundation, International Bar Association.

23 Section 10 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948 available at http://www.unhcr.org/refworld/docid/3ae6b3712c.html

24 Section 14 of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 available at http://www2.ohchr.org/english/law/ccpr.htm

25 Article 26 of the African Charter on Human and Peoples Rights, Adopted 27 June 1981 and entered into force 21 October 1986 available at http://www.africaunion.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

26 Paragraph 4 of the Grand Bay (Mauritius) Declaration and Plan of Action, 1999 available at http://www.achpr.org/instruments/grandbay/

27 Basic Principles on the Independence of the Judiciary, December 1985 available at https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/

28 The Bangalore Draft Code of Judicial Conduct 2001 available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

29 The Commonwealth (Latimer House) Principles of The Three Branches of Government, November 2003 available at http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

Despite the existence of these normative frameworks, there continues to be a mismatch between standards set and State practice. Judges and lawyers in many African countries continue to face threats in the context of their work. Verbal threats, physical attacks, orchestrated removal procedures, prosecution and reprisals for judicial/ legal decisions, poor remuneration and working conditions and unfair promotion processes are among many challenges that Judges face; and which undermine their independence and accountability.

Problem Statement

Between 2017 and 2018, the number and scope of attacks on African Judges and lawyers has intensified significantly. In November 2017, a District Court Judge in Central Mali was kidnapped from his home[11]. In April 2018, a former Judge and Vice President of the Court of Appeal in the South West region of Cameroon was also reportedly kidnapped[12]. In Kenya, an opposition lawyer was arrested and deported in February 2018 in total disregard of court orders against his deportation[13]. This trend can be attributable to a number of factors:

First, the executive and legislature have increasingly failed to comply with the provisions of the law that safeguard independence of the judiciary. Presidents in the region have in various instances refused or delayed to appoint judges who have been referred by the Judicial Service Commission (JSC)[14]. Similarly, attempts have been made in amending sections of the law to give the president the sole power to appoint top judges without consulting any other institution[15]. Further, there have been moves to interfere with the independence of the JSC which safeguards the appointment, discipline and promotion of judicial officers[16].

Second, the executive and legislature have become notorious in disregarding court orders, therefore undermining the independence and authority of the judiciary[17].

Third, the political contestations that have followed elections in the recent past have brought into sharp focus the role of the judiciary in determining political outcomes. The concept of 'judicialization of politics' a key feature of contemporary constitutionalism across the globe, has further exposed judicial officers to personal and institutional attacks[18]. This concept refers to where courts, in their adjudication, have entered the political and policy-making arenas, and thus the courts have become key players of the political process, with decisions rendered impacting both politics and the law. In Burundi during the 2015 period of political strife, the court was under so much pressure owing to the decisions they were making. The Vice-president of the Constitutional Court of Burundi, Justice Sylvere Nimpagaritse fled the country citing threats to his life after differing with the court's ruling on the eligibility of the president to vie for the third term[19].

30 See https://www.newvision.co.ug/new_vision/news/1465913/judge-kidnapped-legal-profession-targeted-mali

31 See https://www.garda.com/crisis24/news-alerts/107851/cameroon-suspected-separatists-kidnap-former-judge-in-south-west-april-8

32 See https://www.capitalfm.co.ke/news/2018/03/firebrand-miguna-deported-despite-court-orders/

33 In 2014, the President of Kenya, contrary to the law, refused to appoint judges already selected by the Judicial Service Commission a move that was interpreted as interference with the independence of the judiciary. Former President of Zimbabwe delayed for over a year in appointing judges of the Supreme Court and High Court after they had been interviewed by the JSC in 2016.

34 In June 2017, Zimbabwe Parliament passed a Bill to amend the Constitution so as to give exclusive powers to the President to appoint the Chief Justice and Deputy Chief Justice without consulting the JSC and without a public interview as previously provided. In 2016, the President assented to a Bill amending the Judicial Service Act to give the President the final say on who should be Chief and Deputy Chief justice, a power entrusted to the JSC.

35 In March 2018, The High Court of Kenya suspended presidential nominees to the JSC over allegation that the process of their appointment was not transparent as is expected under the law.

36 The Attorney general of Uganda disregarded the Supreme Court order in Mbabazi v Museveni to carry out electoral reforms within two years and instead moved on to amend article 102 (b) of the Constitution to remove the age limit of presidential candidates. See https://www.pambazuka.org/democracy-governance/why-president-museveni-won%E2%80%99t-or-can%E2%80%99t-implement-electoral-reforms-ordered

37 In Kenya, during the electioneering period in 2017, the President himself threatened to "deal" with the judiciary once elections were finalized for the unfavourable decisions that the Court was making. See https://www.standardmedia.co.ke/article/2001253379/president-uhuru-kenyatta-threatens-to-deal-with-judiciary-if-re-elected . The driver of the Deputy Chief Justice was shot and greatly injured just a few hours before the Supreme Court was expected to sit to determine a petition of whether elections should be conducted. See https://nairobinews.nation.co.ke/news/dcj-mwilus-driver-shot-nairobi/

38 See https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy

Fourth, attacks meted on the legal profession and civil society has reduced the support base that has traditionally come out strongly to counter backlash against the judiciary. Attacks have been targeted at the legal profession when they express contrary views to those of the government[20].

Similarly, governments are increasingly introducing new restrictive laws curtailing the activities of civil society groups, making it difficult to operate and forcing many to close down. Civil Society Organizations have also been targeted with some being shut down over flimsy allegations[21]. The media has not been left out; the executive has ordered numerous stations to be shut down[22] and media personalities have been detained[23] over reporting of news that does not favour the government.

Finally, there is a lack of a regional framework dedicated for setting standards for the promotion and protection of judicial independence, including setting standards for judicial appointment, remuneration, tenure, transfer and discipline, et cetera. There is also no regional mechanism that is dedicated purely for responding to the foregoing threats to judiciaries in the continent, including inter alia the mandate to identify, record and condemn attacks on the independence of the judiciary, lawyers and court officials in the region as well as to note progress achieved in protecting and enhancing their independence, and make concrete recommendations.

Justification

The judiciaries in Africa are at varied levels, albeit paradoxically, in the journey of constitutional transformation. To secure credible independence for the courts would require more—a great deal more—than mere political concessions. Africa's independent judiciaries would need a home-grown framework that sets standards for the promotion and protection of judicial independence. The Monomotapa Initiative and Plan of Action[24] reaffirms the need to establish a regional mechanism for the protection and promotion of judicial independence; and develop regional standards in areas key to judicial independence such as remuneration of judges, composition and tenure of the Judicial Service Commissions, selection, appointment, tenure and removal of judges.

Above all, the judiciary needs dependable and influential allies, a constituency for the courts that had a strong enough stake in the institution of an independent judiciary that could be counted on to mobilize and so repel imminent attack on the independence of the courts or to rise to the defense of the courts should politicians manifest any untoward intentions[25].

It is for this reason that this year's Annual Jurists Conference (AJC) proposes to examine the state of judicial independence in Africa, evaluate threats and challenges, identifying gaps in legislative and policy frameworks that weaken judicial independence, with a view to suggesting plausible recommendations to strengthen judicial independence in the region.

39 On 27th August 2017, IMMA Advocates in Dar es Salaam were attacked by unknown assailants, action which was meant to interfere with the independence of lawyers. This was months after the government of Tanzania threatened to shut down the Law Society over allegations that they were engaging in politics. A month later, the head of the Law Society was shot and severely injured and had to flee the country for his safety. See file:///C:/Users/teresa.mutua/Downloads/Letter%20to%20CJ%20-%20GC%20Position%20on%20Bombing%20of%20IMMMA%20Advocates%20Offices.pdf and https://www.amnesty.org/en/latest/news/2017/09/tanzania-outspoken-opposition-politician-shot-and-wounded-by-unidentified-gunmen/

40 There was uproar in Kenya when the NGO Coordination Board made a decision to close down the Kenya Human Rights Commission (KHRC) and the African Centre for Open Governance (AFRICOG) in the heat of the electioneering period, action that was seen as one to discredit the legitimacy of civil society in elections monitoring. In 2015, the government of Burundi shut down most of the remaining civil society organizations, froze most of their accounts and forced most of the institution heads into exile for supporting democratic change. Just March of this year, prominent human rights defenders, human rights lawyers and journalists in Sudan have been subject to arbitrary arrests and detention for their participation or purported participation in the anti-austerity protests that started in January 2018. See https://freedomhouse.org/article/burundi-shuts-down-civil-society and http://www.icnl.org/research/monitor/sudan.html and https://www.standardmedia.co.ke/article/2001251504/anger-as-state-shuts-down-another-ngo-in-crackdown

41 In Kenya, the government shut down major television and radio stations to gag freedom of the media to report on the swearing in of the opposition leader Raila Odinga as the peoples' president. Uganda is rather known for its routine practice of blocking social media during electioneering period. The Tanzanian government in 2017 suspended publication of four newspapers in what critics say was a crackdown on press freedom.

42 In Uganda, eight managers and editors of a daily newspaper were detained for publishing an article that stated that Rwanda believed Ugandan President was plotting to oust its leader, Paul Kagame. In 2016 in the environment of elections, Zambia security forces detained five journalists over allegations that they were inciting the public.

43 Concluding Remarks of a meeting of African judges in Harare, Zimbabwe, otherwise referred to as the Monomotapa Initiative/Plan of Action (28–29 April 2016) available at http://africajurists.org/2015/03/10/a-day-at-the-office/

44 H. Kwasi Prempeh, African judges, in their own cause: Reconstituting independent courts in contemporary Africa. International Journal of Constitutional Law, Volume 4, Issue 3, 1 July 2006, Pages 592–605, available at https://doi.org/10.1093/icon/mol018

The conference will examine emerging threats to judicial independence such as in adjudication of electoral disputes, use of administrative action to discipline judicial officers and use of social media to undermine the credibility of judicial officers.

Moreover, the Conference will examine the opportunities available at the international level that can be replicated in the region and consider its relevance in the African context. The Conference will also evaluate the opportunities and/ or efficacy of existing regional frameworks and mechanisms including the African Union.

Further, the Conference will scrutinize the role of the Executive and Parliament in these processes and re-evaluate the concepts of judicialization of politics and separation of powers principles.

Lastly, the Conference will explore the role of the legal profession, civil society and the larger public in promoting and safeguarding the judicial independence, specifically in countering backlash on judicial independence.

Participation

The Annual Jurist Conference 2018 will draw its participants from jurists across the region including Judges, Magistrates, legal practitioners drawn from various bar associations in the region, state officials in justice and legal departments, civil society and academia.

The Conference will take the form of interactive discussions led by a panel of experts in different thematic areas in discussion.

Objective of the Conference

To examine the state of judicial independence in Africa and the role of the legal professions and civil society in safeguarding judicial independence, identifying gaps in existing normative human rights frameworks, policies and practices, with a view of suggesting plausible recommendations to strengthen judicial independence in the region

Conference Outcomes

1. Discourse on regional mechanism mechanisms for the independence of Judges and Lawyers initiated;
2. Increased advocacy on strengthening judicial independence in Africa;
3. Strengthened engagement among members of the Bench and Bar on safeguarding judicial independence in Africa;
4. Domestic and regional frameworks for monitoring the independence of judiciaries in Africa established.

Conference Outputs

1. A conference report on the state of judiciaries in Africa;
2. Jurists Communique on proposed recommendations geared towards regional mechanisms for the independence of Judges and Lawyers in Africa;
3. Development of an action plan for the implementation of the conference recommendation;
4. Publication of Expert papers presentation for the Annual Judiciary Watch Series.

ANNEXURE 3: CONFERENCE PROGRAMME

ARRIVAL: TUESDAY 20TH NOVEMBER 2018

Arrival of Participants	
Arrival, Check in and registration of guests at the Hotel	ICJ Kenya Secretariat

CONFERENCE DAY 1: WEDNESDAY 21ST NOVEMBER 2018

Opening Ceremony

Session Moderators:
Samwel Mohochi - Executive Director, ICJ Kenya
Brenda Kamau - Council, ICJ Kenya

08:00- 09:00 am	Registration and assembling of delegates in the conference venue	ICJ and ICJ Kenya Secretariat
09:00- 10.30 am	Opening Remarks	**Kelvin Mogeni** Chairperson, the Kenyan Section of the International Commission of Jurists (ICJ Kenya)
	Partners:	**Arnold Tsunga** Director, Africa Regional Programme of the International Commission of Jurists (ICJ) **Judy Oder** Programme Manager, International Bar Association's Human Rights Institute (IBAHRI) **Peter Wendoh** Project Advisor, Rule of Law Program for Sub-Saharan Africa, Konrad Adenuer Stiftung (KAS) **Davis Malombe** Deputy Executive Director, Kenya Human Rights Commission (KHRC)
	Judiciaries Represented:	**Hon. Justice Mogoeng Mogoeng** Chief Justice, the Republic of South Africa

		Hon. Justice Charles Mkandawire President, Commonwealth Magistrates and Judges Association (CMJA) **Hon. Justice Paddington Shadreck Garwe** Judge, Supreme Court of Zimbabwe **Hon. Justice Robert Makaramba** Judge-in-Charge, High Court of Tanzania - Mwanza Zone; Vice President of the East African Magistrates and Judges Association (EAMJA) **Hon. Justice Amraphael Msagha Mbogholi** Judge, High Court of Kenya; Chairperson, Judiciary Committee on Elections - Kenya
	Key Note from Guest Speaker "A New Dawn- Home grown standards of judicial independence in Africa"	**Hon. Justice Mogoeng Mogoeng** Chief Justice, the Republic of South Africa **Professor Michelo Hansungule** Commissioner, International Commission of Jurists; Professor of Human Rights Law, Centre for Human Rights, University of Pretoria, South Africa
10:30- 11.00 am	HEALTH BREAK/ CONFERENCE PHOTO SESSION	

THEME: REFLECTION AND CONTEXTUALIZING

Under this first thematic area, participants will reflect on journey of safeguarding judicial independence highlighting the gains achieved along the way.

While the discussion will include aspects of judicial independence across the region, the country of focus will be South Africa, which will illustrate the perception of judicial independence from a blend of perspectives. There will be a judicial perspective which will look back at the struggles and transformation of the judiciary in the apartheid and post-apartheid era and how social and political transformations have influenced judicial independence, for instance the development of new constitutions, increased awareness of rights but on the other hand, delay or failure of the executive to comply with laws that safeguard judicial independence, et cetera and its impact on judicial independence. Also, participants will discuss various strategies that the judiciary has employed towards pushing back backlash and interference with the independence of the judiciary.

Further, there will be a practitioner's perspective where the participants will journey through the participation of the legal profession in advocating for and their contribution towards the strengthening of judicial independence and the experience of litigating lawyers during the different stages of judicial independence in South Africa.

To further bring the Conference discussions to perspective, participants will have the opportunity to thrash out the elements of judicial independence guided by the Bangalore Principles relating to judicial independence and Commonwealth Latimer house guidelines on parliamentary supremacy. An understanding of their application will assist participants to gauge the progress made in so far as judicial independence is concerned. This knowledge will also be handy towards the end of the Conference when participants will be needed to share their thoughts in the kind of standards that are relevant to the African region to protect judicial independence.

Sub Theme: The Journey of Judicial Reforms in Safeguarding Judicial Independence and Gains Achieved

Style of Presentation: Interview Discussion

Interviewer and Moderator: Dr. Nazreen Shaik - Peremanov

11:00- 12:00 pm	The journey of judicial independence- A reflection of post-independent Africa: A judicial perspective An academic perspective A practitioner perspective	**Hon. Justice Kathurima M'Inoti** Judge of the Court of Appeal - Kenya Director, Judicial Training Institute; Member of Judiciary Committee on Elections in Kenya. **Dr. Hugh Corder** Professor of Public Law, University of Cape Town **Kaajal Ramjathan Keogh** Director, South African Litigation Centre
12:00- 01:00 pm	PLENARY	
01:00- 2:00 pm	LUNCH BREAK	

Sub Theme: Application of Principles and Standards on Judicial Independence

Style of Presentation: Panel Discussion

Session Moderator: Christopher Gitari - Treasurer, ICJ Kenya Council

02:00- 03:00 pm	Guiding questions: 1. How can judges apply judicial independence based on value 1 of Bangalore Principles of judicial conduct? 2. What do commonwealth (Latimer House) Principles provide as far as institutional independence is concerned? 3. What regional initiatives have taken place towards the development of regional standards on judicial independence including the Monomotapa initiative and plan of action?	**Vanja Karth** Director, Democratic Governance and Rights Unit - University of Cape Town, South Africa; Director, Judicial Institute of Africa **Hon. Justice Charles Mkandawire** President, Commonwealth Magistrates and Judges Association (CMJA) **Martin Masiga** Secretary General, African Judges and Jurists Forum (AJJF)
03:00- 04:00	PLENARY	
04:00 pm	TEA BREAK	

CONFERENCE DAY 2: THURSDAY 22ND NOVEMBER 2018

THEME: CHALLENGES AND THREATS TO JUDICIAL INDEPENDENCE

This part of the Conference will give an opportunity to the participants to hear from judges across the region on their experiences on varied emerging threats to judicial independence. Judges will share from their personal experience but also from the experiences of their colleagues. The aim is to make real the concept of judicial independence and make a case for its safeguarding.

Other stakeholders have also suffered in one way or another in their quest to protect the independence of the judiciary. Participants will have an opportunity to understand the role played by support actors such as the regional mechanisms, legal profession, the media and civil society in safeguarding judicial independence. Also, participants will also understand the link between the independence of these support actors and the independence of the judiciary through the experiences that will be shared at the sessions.

The overall objective here is to have a holistic approach to safeguarding judicial independence, which is to ensure that support actors also operate in a safe environment, and that judiciaries in the region, in safeguarding their independence, will reach out to these actors for support

Sub Theme: Experiences from Judges in the Region on Challenges and Emerging Threats to Judicial Independence

Style of Presentation: Interview Discussion

Interviewer and Moderator: Brian Penduka (ICJ) and Teresa Mutua (ICJ Kenya)

08.30: 10:00 am	Implementing the judicial code of conduct: Use of social media as a tool for judicial activism- its challenges and opportunities The intricacies of financial independence: The chocking of judiciary funding as a strategy to bottle judicial independence The Executive Hand: Disregard for the law and its impact of on authority of the judiciary Judicialization of politics and its effect on public perception of the judiciary	**Rtd. Chief Justice Dr. Willy Mutunga** Immediate Former Chief Justice of the Republic of Kenya (also Lawyer, Activist, Scholar) **Justice Robert Makaramba** Judge-in-Charge, High Court of Tanzania - Mwanza Zone; Vice President of the East African Magistrates and Judges Association (EAMJA) **Hon. Justice Amraphael Msagha Mbogholi** Judge of the High Court of Kenya Chairperson, Judiciary Committee on Elections - Kenya

10:00- 10:30 am	PLENARY
10:30- 11.00 am	HEALTH BREAK

Sub Theme: Threats to Legal Profession and Stakeholders that Support Judicial Independence

Style of Presentation: Panel discussion

Moderator: Patrick Ngunjiri, Vice Chairperson, ICJ Kenya Council

11:00- 12:30 pm	Guiding questions: 1. How is shrinking of civic and democratic space a threat to judicial independence? 2. How do threats to the legal profession impact judicial independence? 3. How do attacks and threats on the 4th estate impact Judicial independence 4. Is there a connection between independence of regional mechanisms and independence of national judiciaries?	**Judy Oder** Programme Manager, International Bar Association's Human Rights Institute (IBAHRI) **Davis Malombe** Deputy Executive Director Kenya Human Rights Commission (KHRC) **Kwamchetsi Makokha** Journalist For Justice (JFJ) **Brian Kagoro** Human rights advocate and constitutional law expert
12:30- 01:00 pm	PLENARY	
01:00- 02:00 pm	LUNCH BREAK	

THEME: OPPORTUNITIES TO STRENTHEN JUDICIAL INDEPENDENCE IN THE REGION

This thematic area presents the participants with an opportunity to propose a way forward in developing a regional standard for safeguarding judicial independence in the region.

Participants will also think through options for anchoring such standards to ensure proper observance by judiciaries in the region as well as to ensure that African States adhere to safeguarding judicial independence at the national level.

Sub Theme: Regional Standards for Judicial Independence

Style of Presentation: Class Room Discussion

Moderator: Jemimah Keli, Member - ICJ Kenya Council

02:00- 3:30 pm	Guiding questions: 1. What do we mean by African Human Rights Standards? 2. Why is it important to have African Human Rights Standards? 3. What are the guiding principles in the development of regional standards for judicial independence?	**Arnold Tsunga** Director, Africa Regional Programme of the International Commission of Jurists (ICJ) **Dr. Elvis Fokala** Senior Research Associate, Institute for Human Rights
3:30pm	TEA BREAK	
END OF DAY TWO		

CONFERENCE DAY 3: FRIDAY 23RD NOVEMBER 2018

Sub Theme: Anchoring regional standards for effective monitoring of judicialindependence

Style of Presentation: Debate

Moderator: Peter Wendo, Konrad Adenauer Stiftung (KAS)

09:00- 10:30 am	Pen on Paper: Anchoring Regional Standards for Judicial Independence for Effective Implementation 1. Opportunity to create a special rapporteur mandate at the AU building a case for regional mechanism 2. Alternative opportunities in existing mandates at the AU	**Martin Masiga** Secretary General, African Judges and Jurists Forum (AJJF) **Dr. Japheth Biegon** Africa Regional Advocacy Coordinator, Amnesty International
10:30- 11:00 am	HEALTH BREAK	
11:00- 12:30 pm	CLOSING CEREMONY Moderator: Elsy Sainna, ICJ Kenya	
	Keynote Address: "In My View", closing remarks by guest speakers	**Rtd. Justice Albie Sachs** Former Judge, Constitutional Court of South Africa **Brian Kagoro** Human rights advocate and constitutional law expert
	Conference communique 1. Presentation of rapporteur's report 2. Consensus building on recommendations	**Wakesho Kililo** ICJ Kenya
12:30- 01:00 pm	Closing remarks/ Vote of thanks	**ICJ Kenya and ICJ**
THE END OF THE CONFERENCE		

GALA DINNER

The dress code theme is 'Under the Water' (blue, light green or white).

07:00- 07:30 pm	Participants arrive at the venue	**ICJ Kenya Secretariat**
07:30- 08:30 pm	Dinner and Entertainment	

About ICJ Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit and a member based organization. ICJ Kenya is the only African national section. It is affiliated with International Commission of Jurists (ICJ), Geneva, but operates autonomously. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya.

Mission Statement

Our Mission is to promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practice.

Vision Statement

A just, free and equitable society.

The Membership

The organization admits to its membership lawyers and judicial officers who volunteer to support its activities as regulated under a Constitution. Members are drawn from the various divisions of the legal profession and share common beliefs and values on freedom, justice and peace for all, equality, social and economic equity and the respect for human dignity for every human being.

Currently the organization comprises of over 500 members. Every year and since 1993, ICJ Kenya has conferred an award to an outstanding Kenyan jurist who has made an exceptional contribution to promoting of human rights and the rule of law. The award is conferred annually to commemorate the 10th December being the United Nations Human Rights Day.

The Council

The Council of ICJ Kenya is elected by members of ICJ Kenya from among its membership. The Council serves for two years. The Council offers strategic leadership and is responsible for the development of ICJ Kenya mission, objectives, strategies, structures and policies. The Council also manages ICJ Kenya risks. As required by the Constitution of ICJ Kenya the Council meets at least once every two months. Council members offer their skills and competencies on a voluntary basis and provide institutional legal advice for ICJ Kenya.

The Secretariat

The Secretariat is headed by the Executive Director who oversees the daily operations and management of the organization. The Executive Director is deputized by a Deputy Executive Director who provides operational and administrative support as well as coordinates implementation of programmes. Each programme is headed by a Programme Manager who leads a programmes team comprising of Programme Officer and Programme Assistant. On a biannual basis, there is provision for internship and volunteerships and each intern or volunteer is attached to and becomes a member of a specific programme team.

ICJ Kenya 2016 – 2020 Strategic Plan

ICJ Kenya is implementing its 2016 – 2020 Strategic plan and has set out to achieve five main strategic objectives namely;

1. To promote and protect the observation of human rights in Kenya and around Africa;
2. To support the strengthening of democratic governance in Kenya and across Africa;
3. To improve access to justice in Kenya and the African region;
4. To promote justice for international crimes and gross human rights violations in Kenya and across Africa and;
5. To protect and promote civic space in order to enhance enjoyment of human rights and participation in governance in Kenya and the region.

Partners

The International Commission of Jurists (ICJ)

The ICJ is comprised of up to sixty lawyers (including senior judges, attorneys and academics) dedicated to ensuring respect for international human rights standards through the law. Commissioners are known for their experience, knowledge and fundamental commitment to human rights. The composition of the Commission aims to reflect the geographical diversity of the world and its many legal systems.
For more information, kindly visit: https://www.icj.org/

European Union (EU)

The European Union is a political and economic union of 28 member states that are located primarily in Europe. For more information, kindly visit: https://www.europa.eu

International Bar Association's Human Rights Institute (IBAHRI)

IBAHRI is an autonomous and financially independent entity which works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.
For more information, kindly visit: https://www.ibanet.org/IBAHRI.aspx

Konrad-Adenauer-Stiftung

The Konrad-Adenauer-Stiftung is a German political party foundation associated with but independent of the centrist Christian Democratic Union. For more information, kindly visit: https://www.kas.de/

International Development Law Organization (IDLO)

IDLO is an intergovernmental organization with a joint focus on the rule of law and development. The aim of IDLO is to secure dignified lives by creating a culture of justice. For more information, kindly visit: https://www.idlo.int/

The Kenya Human Rights Commission (KHRC)

KHRC is a non-government organisation founded in 1992 and registered in 1994. The Commission campaigns to create a culture in Kenya where human rights and democratic culture are entrenched. It does this through monitoring, documenting and publicising rights violations. For more information, kindly visit: https://www.khrc.or.ke/

ANNEXTURE 4: LIST OF PARTICIPANTS

Name of Participant	Organization/Occupation
Brenda Kamau	ICJ Kenya
Crispen James Mberewere	Zimbabwe
Gikunda David Muruti	ICJ Kenya member
Hon. Justice Emilia Muchawa	Judge Zimbabwe
Silas Kamanza	ICJ Kenya
Constance Mukarati	ICJ - Africa Regional Programme
Jemimah Keli	ICJ Kenya council member
Hon. Roselyne R.A Jalango	Chief Magistrate - Kenya Judiciary
Dr. Ken Nyaundi	ICJ Kenya Member
Joseph Riungu Gitonga	Public Prosecutor - ODPP - Kenya; ICJ Kenya Member
Samwel Mohochi	ICJ Kenya
Nancy Mwangi	ICJ Kenya
Cecilia Mugo	ICJ Kenya
Rumbidzai Muyendesi	ICJ - Africa Regional Programme
Elizabeth Mangenje	ICJ - Africa Regional Programme
Hon. Justice Paddington garwe	Constitutional Supreme Court Judge - Zimbabwe
Hon. Justice Ben Hlatshwayo	Constitutional Supreme Court Judge - Zimbabwe
Kuyioni Josephat	Legal Counsel - Kenya
Jeremy Njenge	ICJ Kenya member
Mwangi Wahome	ICJ Kenya member
Kenneth Obae	ICJ Kenya member
Carolyne C.	Legal Counsel Senate, Kenya
Faith Kirui	Kenya Human Rights Commission
Sandra Oyombe	Kenya Human Rights Commission
Carol Werunga	Kenya Human Rights Commission
Jacquiline Manani	Director Legal Services Public Service Commission - Kenya
Martin Mavenjina	Kenya Human Rights Commission
Robert Mochache	ICJ Kenya council member
Purity K.Makoni	ICJ Kenya member
O. Victor	ICJ Kenya Member
John Liliembe	ICJKenya
Hon. Justice Robert V. Makaramba	Judge of the High Court of Tanzania - Zanzibar
Leonard Koech	Legal counsel - Kenya
Hon. Justice Mbogholi Mshagha	Chairperson, Judiciary Committee on Elections - Kenya
Kelvin Mogeni	ICJ Kenya Council Chairperson
Peter Wendoh	Konrad Adenauer Stiftung (KAS)
Isaac O. Aloo	ICJ Kenya member
Edigah Kavulavu	ICJ Kenya
Kaajal Ramjathan keogh	South Africa Litigation Centre (SALC)
Thilani M.	ICJ Kenya member
Elizabeth Karanja	ICJ Kenya member

Linnet Mwende	Konrad Adenauer Stiftung (KAS)
Joyce Munene	East African Breweries Limited; ICJ Kenya member
Chris Gitari	ICJ Kenya council treasurer
Prof. Hugh Corder	Dean of Law - UCT
Lynette Otieno	Legal counsel, NA
Judy Oder	Program lawyer, IBAHRI
Brian Penduka	ICJ - Africa Regional Programme
Patrick Ngunjiri	ICJ Kenya council vice chairperson
Josephine Kusinyi	Legal Counsel - Senate, Kenya
David Malombe	Kenya Human Rights Commission
John Gikonyo	ICJ Kenya member
Tom Mutei	ICJ Kenya member
Joseph Osoro	ICJ Kenya member
Kenneth Akide	ICJ Kenya member
Hon. Justice Alfred M.	Judge
Wakesho Kililo	ICJ Kenya
Kwamchetsi Makokha	Journalists for Justice - Kenya
Wanjiru Kamanda	Legal Researcher - Judiciary Commitee on Elections
Teresa Mutua	ICJ Kenya
Elsy C. Sainna	ICJ Kenya
Elizabeth Kimura	Legal Counsel- Kenya
Charles Mwongela	ICJ Kenya council member
Gitonga Kamiti	ICJ Kenya member
Emma Otiende	Legal Counsel - Kenya
Clarah Kimeli	Parliament S.L.counsel- Kenya
Peter L.	Chief Magistrate
Diana Gichengo	Kenya Human Rights Commission
David Wahome	ICJ Kenya member
Arnold Tsunge	ICJ
Mangoneh M.	ICJ
Brian Kagero	Lawyer- Zimbabwe
Priscilla Nyokabi	ICJ Kenya member
Munyithya Justus	ICJ
Hon. Justice Stella Mutuku	Judge - Kenya
Alphonse Mutinda	ICJ Kenya member
Hon. Charles Mkandawire	Commonwealth Magistrates and Judges Association
Frank Walukwe	ICJ Kenya member
Nomali Zubengwa	ICJ
Vanja Karth	University of Cape Town
Dr. Elvis Fokala	Institute of Human Rights
Pauline Muhanda	ICJ Kenya member
G. mnyariki	ICJ Kenya member
Geoffrey Imende	ICJ Kenya member
Godfrey Munene	ICJ Kenya member

Hon. Canon Justice James Ogoola	Rtd. Judge- Uganda
Esther Waweru	Equity Now - Kenya
Dr. Japheth. K. Biegon	Amnesty International
Joy Mayawar	Communication Consultant

Photo Wheels
Highlights of the 2018 Annual Jurists Conference.

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