

Judicial Independence Under Threat?

Global Conference in Strasbourg, December 5th-6th, 2018
Conference Report

By Dr Franziska Rinke, Dr Mónica Castillejos-Aragón
and Aishwarya Natarajan



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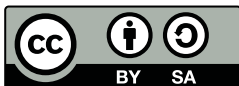
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A. About the 2018 Judicial Independence Project and the Global Conference

Rule of Law is one of the core values of the Konrad-Adenauer-Stiftung. As an important part of the Rule of Law the Konrad-Adenauer-Stiftung devoted its efforts to address the most compelling issues surrounding the independence of the judiciary for already a long period of time.

In 2018, the Rule of Law Programmes of the Konrad-Adenauer-Stiftung embarked on a global topic of the year – “Judicial Independence”. In April 2018, the Konrad-Adenauer-Stiftung signed a memorandum of understanding with Dr Diego García-Sayán in his capacity as the United Nations’ Special Rapporteur on the Independence of Judges and Lawyers to work closely together on the topic of judicial independence. As part of that, Dr García-Sayán has accompanied the project over the year and joined different workshops to discuss the current situation of the independence of the judiciary in various parts of the world.

Our five regional Rule of Law Programmes organised various events to generate discussion on the topic of judicial independence within their regions. The first workshop was held in February 2018. The Rule of Law Programme Sub-Saharan Africa hosted a workshop in Tanzania to discuss the challenges facing the independence of the judiciary with participants of the whole region. In April 2018 the Rule of Law Programme Latin America held the second workshop in Sao Paulo, Brazil in cooperation with the Brazilian National Judicial School for Formation and Development (Enfam). At this event, the participants discussed the importance of integrity and judicial independence. The Rule of Law Programme Asia



organized the third workshop as a round-table discussion along with the Philippine's Judicial Academy in Manila. The meeting discussed the scope of judicial integrity and independence. The Rule of Law Programme Middle East and North Africa organized the fourth workshop. It was held in September 2018 in Lebanon. The meeting discussed the undue influence on the judiciary and how to protect judges against it. Finally, the last event was held by the Rule of Law Programme South-East Europe in Bucharest and addressed the challenges surrounding the concept of judicial integrity as the prerequisite to a functioning justice system.

On December 5th and 6th, the Konrad-Adenauer-Stiftung organized a plenary conference titled "Judicial independence under threat?" at the Council of Europe in Strasbourg, France. This conference brought together distinguished sitting and retired Supreme Court justices, lawyers and experts from five Rule of Law Programme regions to discuss the outcome of the one-year series of conferences and workshops on judicial independence. Most of the speakers in Strasbourg took part in the regional events. We selected Strasbourg as the place of the conference especially because of the work of the Venice Commission in the sphere of judicial independence. Our sincere thanks to the Council of Europe for allowing to use their premises for the conference.

The detailed programme can be found under the following link:

https://www.kas.de/c/document_library/get_file?uuid=9a7d2845-f0cd-4106-1847-78d6ed95a3a5&groupId=252038

This report summarises the presentation and discussions of the conference.

B. Judiciaries Under Attack: An Introductory Note

The judiciary plays a crucial role in the socio-economic and political affairs of any democratic system. It provides the checks and balances intended to ensure there is equality and fairness in the actions of the other arms and equal rights protection for all. Indeed, the absence of an independent judiciary capable of ensuring equal rights before the law can lead to chaos. An independent judiciary and the rule of law are two sides of the same coin. Thus, an independent judiciary plays a pivotal function in society. It protects minorities from dominant social groups. It prevents the centers of power to influence and obtain undue advantages from the courts. Only an independent judiciary can protect society from arbitrary state action and unchecked private power. It would be desirable to count on minimum safeguards that guarantee the judiciary's operation, such as freedom of expression and association; qualifications, selection and training guarantees; conditions of service and tenure; professional secrecy and immunity; discipline, suspension and removal guarantees. Judges, require functional and personal safeguards.



“Independent courts can only exist in a state governed by the rule of law, and the rule of law is not possible without an independent judiciary.”

Prof. Dr Michael Eichberger

Former Judge of the German Federal
Constitutional Court

On one hand, the functional safeguards relate to the idea that judges are bound only by the law, which prohibits them from receiving any instruction or interference from other branches of government. However, it is equally true that the judiciary relies on the financial assurance from other branches of government to ensure there do not succumb to monetary gains offered by private parties. On the other hand, personal safeguards relate to the conditions of service and tenure. Law should

adequately secure judges' conditions of service and retirement. State's constitutions must ensure that judges cannot be dismissed or transferred against their will. This does not preclude accountability measures implemented in the case of professional or ethical misconduct. However, disciplinary actions must be in accordance with the proper due process of law guarantees. These personal and functional safeguards should be implemented considering to the state's context. Appropriate functional and personal safeguards play a crucial role in preventing corruption by external actors within the judiciary. These safeguards also contribute to the strengthening of the judicial standing and trust among the members of society.

We have recently witnessed attempts to undermine the functional and personal safeguards in many parts of the world as a way to exert control over the judiciary. Governments have made use of parliamentary majorities to change the statutory rules of appointment and the composition of appointment panels. These actions are also intended to provide sitting justices with limited legal recourse to oppose executive actions. Such attacks qualify as serious attempts to undermine the judiciary's central constitutional mandates. There is a complete failure to acknowledge that an independent judiciary based on the rule of law cannot and must not – by its nature – be an instrument for implementing the will of changing political majorities. Judges must enforce the law independently and, if necessary, against the will of current majorities. It is critical to note that an independent judiciary plays a key role in shaping the society's approach to the rule of law. It is important for the citizens to understand that the real beneficiary of such safeguards is not only the judiciary but also society. *"Judicial independence is not a virtue, but a duty"*, Justice **Moura** stated.

C. The UN Special Rapporteur on the independence of Judges and Lawyers

Judicial independence is a historical topic, as well as a chronic problem given the constant temptation of the political power to control other branches of government. Dr **García-Sayán** has witnessed a constant

trend to use constitutional reforms as a mechanism to undermine the judicial power in many countries around the world. Being aware of the massive attacks against the judiciary, the United Nations created the office of the Special Rapporteur on the Independence of Judges and Lawyers in 1994. Despite the backlash against judicial independence, significant developments in this area, such as the increasing existence of judicial councils responsible for the selection, appointment and evaluation of the judicial activity have to be acknowledged. While these institutional bodies have been effective in some countries, they are not a panacea for guaranteeing independent judiciary. In addition, the various international treaties or documents that address the protection and promotion of judicial independence such as the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Integrity and the Universal Charter of the Judge provide states new international standards of guaranteeing judicial independence within their local contexts.



“The independence of the judiciary is an essential component of the right to a fair trial and the rule of law. This independence should be regarded as a guarantee of truth, freedom, respect for human rights and impartial justice free from external influence.”

Dr Diego García-Sayán

UN Special Rapporteur on the Independence of Judges and Lawyers

D. Common threats against the Independence of the Judiciary in our Rule of Law Programmes regions

1. External Threats to the Judicial Independence

As stated earlier, other branches of government continue to pose external threats to judicial independence by challenging the functional and personal safeguards. In **Sub-Saharan Africa**, Chief Justice David **Maraga** described how the independence of the judiciary is under constant

attack from the heads of state and the executive arm of government. In the African region, this situation takes place because the judiciary runs against the practices and aspirations of an executive that wishes to assert control over all governmental authority. Even though, the constitutions of all African countries recognize the tripartite structure of state institutions, the executive, the judiciary and the legislature, soon after the end of the colonial rule, the emerging political elite in order to consolidate all governmental power within the executive successfully amended the constitutions. Consequently, the judiciary has become an appendage of the executive branch of government.



“When judges are consistent in their resilience, courage and steadfastness against unwarranted attacks, the other arms of government have no choice but to respect the Judiciary, and gradually cede space for courts to carry out their mandate, as provided for in the Constitution.”

Hon. Justice David Maraga

Chief Justice and President of the Supreme Court of the Republic of Kenya

In this same context, Justice Maria Thereza de Assis **Moura** described how the judiciaries in **Latin America** are being placed in the center of national discussion. After a long history of dictatorships and authoritarian regimes, judiciaries in various Latin American countries have bravely delivered landmark decisions regarding abortion rights, the legalization of drugs and same-sex marriages. But apart from political interference, these judiciaries are under constant pressure from the organized crime networks and corruption. Transparency International's data indicates that a majority of Latin American countries rank high as far as the prevalence of corruption is concerned. While some judiciaries in Latin America have been actively engaged in the review of high-profile cases on corruption and have delivered unpopular decisions, the trend is not constant across the continent. According to the World Economic Forum data from

2016 to 2017, Chile, Costa Rica, and Uruguay are ranked among the most independent judiciaries in Latin America while Nicaragua, Bolivia, and Venezuela rank among the least independent countries.



“Judicial Independence and integrity are essential for judges and their judicial function in a state, this is why they need be not only protected, but also supported with specific mechanisms based on the rule of law.”

Hon. Justice Maria Thereza de Assis Moura
Vice President Superior Court of Justice of Brazil

Similar to the general trend observed thus far, **Asia** also faces various external pressures aiming to undermine judicial independence. For instance, authoritarian regimes have attempted to control the judiciary through legal mechanisms. On a positive note, Justice Kang mentioned that Asian courts have become more independent and judges have been able to intervene into matters of public policy. He noted this trend in South Korea, Taiwan, Indonesia and Thailand. The judicial pronouncement of the South Korean judiciary has increased its credibility as the most respected branch of government. According to the Economic World Forum, several Asian countries including South Korea rank among the most independent countries in the world.



“Judicial Independence in Asia is under threat. However, with the enhancement of the international cooperation and the emergence of new globalized generation, Asians have hope of a real democracy nowadays.”

Justice Ilwon Kang
Retired Justice of the Constitutional Court
of the Republic of South Korea

In the case of the **MENA** region, Madam Mireille **Najm-Checrallah** underlined the strong influence exerted by the executive branch over the judiciary, which is also manifested in the few resources allocated to the judicial power in comparison to those granted to other state institutions. That situation has raised the levels of distrust among members of society given the flagrant asymmetry of power among the judicial, executive and the legislative branches. Even though the separation of powers is enshrined in the Constitution in many countries in the region such as Egypt, Algeria and Lebanon, it is vital to implement this principle in daily practice. The allocation of powers is also asymmetrical when it comes to determining the appointment and disciplinary process of judges. For instance, in various MENA countries, the executive possesses the authority to appoint judges and conduct disciplinary proceedings. On many occasions, those appointed by the executive are the ones who decide the cases brought before the court.



“The Judicial Independence is hampered by the primacy of the executive over the Judiciary, and the instrumental role of the judge at the service of law and order, at the expense of the concept of judge as guarantor of rights and freedoms.”

Mireille Najm-Checrallah

Attorney-at-Law, Beirut

2. Internal Threats to the Judicial Independence

One of the most common internal threats to the independence of the judiciary is the abuse of disciplinary institutions responsible to supervise the jurisdictional activity as a whole. Judicial independence is strongly connected with the idea of integrity. *“An independent judiciary not only should be, but it should also appear to be independent”*, Justice **Moura** stated. Citizens should perceive the judicial power not only as an independent institution, but also an honest institution. However, judicial accountability measures such as disciplinary processes should only be used as a way to maintain judicial integrity, not for pursuing political

agendas. It is often noted that the judicial pronouncements against the legislative and executive branches of government results in a political backlash in the form of disciplinary and removal processes.

3. Gaps in the law as a mechanism to undermine/ promote the independence of the judiciary

Chief Justice **Maraga** presented the **Kenyan** case as an example of the instrumentalization of legal gaps in order to undermine the independence of the judiciary. In Kenya the Judicial Service Commission was established by the Constitution with the core mandate of promoting and facilitating the independence and accountability of the judiciary and has the sole mandate of interviewing and recommending persons for appointment as Chief Justice. However, there is a legal gap since the Constitution does not specify the number of people who are to be chosen/nominated for appointment. Since 2010, the Judicial Service Commission has nominated one candidate for appointment. Taking advantage of the legal interstice, the Kenyan Parliament considered necessary to enact a law that seeks to make it mandatory for the Judicial Service Commission to nominate at least three persons, from whom the President will choose, for appointment as Chief Justice. *"The gaps in the law can be exploited in a manner that can culminate in the infringement on judicial independence"*, Chief Justice **Maraga** stated.

In **Lebanon**, for example, the Constitution only briefly covers the idea of judicial independence and access to justice and subsequent constitutional amendment processes in this country made no meaningful effort to expand the idea in the Constitution. Madam **Najm-Checrallah** highlighted the role of civil society in the MENA region to seek constitutional reforms to strengthen the independence of the judiciary, especially in the case of Tunisia and Morocco. Despite the work of the civil society in the MENA region, the overall improvement of the judicial independence remains limited in these countries.

4. Judicial budgetary cuts as a result of unpopular decisions

Another constant threat is the allocation of budget for the judicial power. The **Kenyan** judiciary provides an example of such threats. After declaring unconstitutional the Constituency Development Fund, individual judges faced direct attacks and the Parliament threatened budget cuts. Chief Justice **Maraga** described in addition that after the nullification of the presidential election of August 2017 there were explicit attacks on the judges of the Supreme Court by politicians who were affected by that decision. It is now an open secret that the Kenyan Judiciary has been fighting serious cuts to its budget and funding. Judges from other **African regions** have encountered similar situations. For instance, in Lesotho, Supreme Court justices are currently facing serious financial resource constraints, as a result of unpopular judicial decisions.

In the case of the **MENA** region, the constant threat to cut financial means and personnel has caused backlog of cases and delay in delivering justice. *"Justice delayed is justice denied"* stated Madam **Najm-Checrallah**.

5. Threats against the judiciary when defending the rights of minorities

Judicial independence is essential not only to protect the judiciary but also as a preventive mechanism against the majority seeking to override the rights of minorities in a society. Experience has shown that there is constant threat against members of the judiciary when upholding the rights of minorities. Justice **Kang** of the Constitutional Court in **South Korea** spoke about the instance when the Taiwanese Constitutional Court struck down legislation that restricted LGBTQ rights and upheld the rights of the said community. The Taiwanese society openly rejected the judicial decision through a national referendum. The example shows the influence of the public, who may sometimes hamper the efforts of the judiciary to uphold minority rights. On the other hand, the **Kenyan** judiciary found popular support for its decision to uphold the constitutional right to association of the LGBTQ community.

E. Ways to strengthen the Independence of the Judiciary

1. The role of judges' associations for the defense of judicial independence

When there are strong professional associations those attacks against the judiciary can be counteracted more effectively not only at the national level but also at the international level. From the **African** perspective, there is a need to bring judicial leadership in professional associations as a mechanism to expose, perhaps internationally, the most serious attacks occurring in the judiciaries in the region.

Asian courts are promoting international cooperation among judiciaries as well. For instance, there is the Secretariat for Research and Development in Seoul; the Association of Constitutional Courts; the Permanent Secretariat for Planning and Coordination in Jakarta and the Center for Training and Human Resources Development in Ankara. These organizations promote the development of democracy, rule of law and fundamental rights in Asia. Also, they encourage exchange of information and experiences related to administration of constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction. These institutions are also significant support in the times when judiciaries are being threatened by the state institutions. For example, in 2016, the Mongolian Constitutional Court faced various threats after deciding a case that was not in favor of the government. When members of the government attempted to dismiss the current membership of the Constitutional Court, the justices sought support from the Association of Constitutional Courts (AACC). The AACC advocated for the independence of the Mongolian Constitutional Court. This is the first example of the AACC intervention to support and defend the independence of the judiciary in Asia.

The **International Association of Judges (IAJ)** adopted the Universal Charter of the Judge. The IAJ focuses on addressing the main issues regarding the independence of judiciary. This Charter contains nine basic principles that include topics on internal independence that includes principles on the appointment, discipline and removal of

judges, remuneration and tenure protection, as well as topics on external independence *vis-à-vis* the other branches of government. This is considered the first Charter of this nature.

In the **MENA** region, judges do not have a right of association, for example, in Lebanon and in Gulf countries. Although the **UN Basic Principles** of the Independence of the Judiciary proclaim that judges shall be free to form associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence. However, those principles are not applicable in various MENA countries. Nevertheless, it is important to highlight the role of judges' associations to promote and advocate for reforms that granted, for example, major independence to judges and lawyers in Tunisia.

2. Judicial integrity codification efforts and education

In **Kenya**, judicial integrity is facilitated through codes of conduct and a Commission, which oversees the compliance of the code by the members of the judiciary. In order to combat corruption, Justices are not allowed to open bank accounts abroad without the permission of the Chief Justice. However, mere codification of judicial integrity standards is not sufficient. There is a need to create judicial training institutions such as the National Judicial Institute (*Escuela de Formación para los Jueces*) in Brazil and the Judicial Academy in Philippines, where judges are required to take various training courses on judicial integrity and ethics and that provides judges with a platform to share their knowledge with each other. It may also be beneficial to consider ways in which meritorious legal skills and high ethical standards can be assessed together as part of the selection process.

3. Peer-to-peer network

In April 2018 the **Global Judicial Integrity Network** was launched. This UNODC initiative has its goals of sharing experiences and domestic ethical standards among the country members of this network, which are mostly high-ranking justices.

4. Reaching out to the Public

The **Brazilian** Supreme Court has made a conscious effort to communicate through the mass media to be able to explain the main arguments of its decisions, as well as the reasoning behind them. The Judicial Institutes are playing a pivotal role in promoting mass media dissemination. The Brazilian Supreme Court has recently held public hearings, including sessions be followed on TV, as an effort to improve transparency.

The **German** Federal Constitutional Court has been gradually moving towards building a new relationship with the public. This new attitude has also permeated to other German lower courts. Judge **Eichberger** witnessed during his judicial career how judges began discussing publicly the outcome of their decisions and implications. Short press releases have been fundamental to disseminate the judicial outcome of the German Federal Constitutional Court. There is also an increasing trend to hold public conferences to explain the decisions. Justice Filomena **Singh** described the example from the **Philippines**, wherein judges are encouraging society to bring their claims on judicial corruption to the attention of the court in an effort to improve the legitimacy of the judiciary in the eyes of the public.

5. Independence of Litigants and its correlation with Judicial Independence

Judicial independence cannot be guaranteed if litigants do not enjoy a degree of independence, the right to a fair trial, the right to seek justice, which is all an integral part of judicial independence. Most **MENA** countries have ratified the universal Declaration of Human Rights and the International Covenant of 1966. The Arab Charter of Human Rights ratified by Arab countries provides in Article 12 that state parties shall guarantee the independence of the judiciary. It also protects magistrates against any interference, intervention or threats. It guarantees those rights given to litigants, as well. However, in the MENA region, there is still a gap between the ideals sought in the Arab Charter and the real situation in the Arab countries. The Constitution of Tunisia is among the few constitutions that provide a chapter regarding the independence of lawyers.

F. Selection and Appointment of Judges

The Conference emphasized on selection and appointment procedures of the judiciary because it can be considered as the gateway to influencing judicial independence. This part will summarize some of the findings of our Rule of Law Programmes' regions.

1. Sub-Sahara Africa

Africa's main challenge in the last three decades has been to restore public confidence in the judiciary. The main reason for this is that during the long years of dictatorial rule, judges were stripped of their independence and appointed or dismissed at the whim of presidents. Post 1990 constitutional reforms in Africa have seen attempts to limit executive control over judicial appointments.

Given its diverse colonial backgrounds, Africa inherited different legal traditions but primarily common law approach in Anglophone Africa and the civil law approach in Francophone, Hispanophone and Lusophone Africa. These different approaches have resulted in different judicial selection processes in the region. The collapse of judicial integrity affected each of these legal traditions with varying degrees depending on the local country context. The following comparative analysis will focus on 5 countries in Francophone and Anglophone Africa that can be divided into progressive and conservative groups: 1) The progressives are: Kenya and South Africa, representing Anglophone Africa, and Benin, representing Francophone Africa; 2) For the conservative: Cameroon and Botswana. In the post-independence period, the constitutions that Britain bequeathed to its colonies allowed for some degree of judicial independence. However, within a few years, the executive emasculated the judiciary after giving themselves extensive arbitrary powers to appoint and remove judges.

In Francophone Africa, the model of judicial independence adopted was shaped by the obsessive Gallic fear of legal dictatorship through a "government of judges". Due to this mistrust of the judiciary, post-independence constitutions relegated the judiciary to what was referred to as a 'judicial authority' (*autorité judiciaire*), entirely subservient to the

president of the republic. The president remains the guarantor of the independence of the judiciary, clearly meaning that the two branches are not equals.

The appointment process is more elaborate in Anglophone as compared to Francophone constitutions. Qualifications for office are probably one of the most important factors to consider in judicial appointments. The common law approach has been to appoint judges from legal practice; whilst in the civil law tradition those who have undergone formal training, graduated from a school of magistracy become career judges. There are now changes in both systems. First, some common law countries now provide for some formal training and appoint academics.

As regards to the institutional set up of the judicial appointment process, there are stark differences between the Judicial Service Commission in Anglophone Africa and the Higher Judicial Council in Francophone Africa. There are no regulatory values and operational principles to guide the operation of the Higher Judicial Council. Francophone constitutions are silent on the composition of the Higher Judicial Council and hence they are heavily influenced by pro-government supporters. Anglophone constitutions try to provide for an inclusive Judicial Service Commission but the extent to which members are directly or indirectly appointed by government varies (83 % in Botswana, 27 % in Kenya and 52–56 % in South Africa). Judicial Service Commission's proceedings are usually presided over by the Chief Justice with the assistance of a deputy judge, whereas in Francophone Africa the Higher Judicial Council is presided over by the president of the republic with the assistance of the minister of justice. Often the president also has the power to convene the meetings of the Higher Judicial Council and set the agenda. The Judicial Service Commission makes only recommendations or provides advice to the president, who is the ultimate appointing authority. By contrast, the Higher Judicial Council is chaired by the President and is supposed to submit an 'opinion' to him on selection, transfer, promotion and dismissal of judges. However, there are some anomalies too. In Anglophone Africa: the President alone appoints the most senior judges in the two highest courts in Botswana and South Africa.

Because the Higher Judicial Council is under the exclusive control of the executive and the detailed laws that regulate judicial appointments are left to be determined at the whims of a parliamentary majority, it offers little prospects for the appointment of independent minded judges. The opposite might be true of the Judicial Service Commission although it may depend on its composition. Both the Higher Judicial Council and Judicial Service Commission differ markedly in the transparency of their appointment processes. The entire proceedings of the Higher Judicial Council remain opaque. By contrast, in Anglophone Africa most judicial positions are relatively more transparent. Further, in Anglophone African jurisdictions mechanisms have been put in place for promoting diversity in judiciary, especially of women and minorities.

2. Latin America

In the following a general overview of the judicial selection process in Brazil and processes of some other Latin American countries will be conducted. From 1998, when the newly adopted Brazilian Constitution entered into force, the appointment process transitioned from a merit-based selection to a more objective selection process. In the former process of selection, both members of the tribunals and the bar associations played an important role to assess merits of the candidates. However, since the passing of the 1998 Constitution, tenure became an objective criterion for selection. In former times, the appointment process based solely on merits led to a more subjective selection.

Since 1998, all the judicial appointments at the first level (federal or provincial) are made by members of those tribunals, without the intervention of the legislative and executive powers. The same system applies for the selection of judges at the second level (five federal regional tribunals). In both levels, there is a merit-based and a tenure-based selection process. The tribunal presents a short-list of candidates, and the President selects one out of the three candidates. In this context, the executive is actively involved in the selection process. As for the third level (Superior Tribunal of Justice; Supreme Federal Tribunal; Labour Courts; Electoral Tribunal; and Military Court), judges are appointed by the executive, after been approved by a majority of Congress. The perception of autonomy regarding the selection and appointment processes decreases when dealing

with higher levels of jurisdiction. On the third level a trend of more intervention from legislative and executive branches can be noted.

Another model of selection and appointment is the one conducted by the Tribunal or National Council of Judges in countries such as Uruguay. The National Council of Justice has established a number of factors to be considered during the appointment and promotion of judges to higher courts. These factors are the following: a) performance; b) productivity; c) efficiency; d) technical knowledge; and e) moral character. On the other hand, there are a few countries in Latin America that follow a direct process of judicial selection at the Supreme Court level, such as Bolivia. Other countries, such as Brazil have a National Justice Council, whose members do not have a career within the judicial power.

3. Asia

For Asia The Philippines are used as an example. The Philippines' Supreme Court is composed by fifteen members. Since the 1997 Constitution came into force the Judicial and Bar Councils became the institutions in charge of selecting judges. Its main goal is to safeguard the judicial appointment process. Since this new system entered into effect, the lobbying is done by members of the Judicial and Bar Council. However, the President is the one entitled to make all judicial appointments to the bench. The Judicial and Bar Council is composed of former judicial officials, such as the former Chief Justice, as well as members of the presidential cabinet. The remaining members are also appointed by the President. The President has appointed the Chief Justice of the Supreme Court. In the most recent appointment made in December 2018, there were five members appointed by the President, who are known to have close ties with him.

The removal of the Chief Justice in 2018 is also a good example of how judicial independence is challenged by internal threats. In 1997, the Supreme Court was given such expanded power to review cases of abuse of discretion or excess of jurisdiction by any other branch of government. Using this expanded power of judicial review, the Supreme Court reviewed the legality of the appointment of the Chief Justice and reversed the recommendation of the Judicial and Bar Council.

4. Middle East/North Africa

For the Middle East region Lebanon is used as an example. The Preamble of the Lebanese constitution has adopted the principles of separation of powers, balance and cooperation. In Lebanon, according to Article 4 of Decree-Law No. 150/83, the High Judicial Council monitors the judicial functioning, as well as the conduct of work in courts. Under Article 2 of Decree-Law No. 150/83, the High Judicial Council is composed of ten members including three ex officio members, namely, the President of the Court of Cassation, who is also the Head of the High Judicial Council, the General Prosecutor at the Court of Cassation, who is also the Vice-President of the High Judicial Council and the President of the Judicial Inspection Committee. Five members of the Council are appointed by cabinet decree proposed by the Minister of Justice. One judge is chosen from among the chamber of presidents of the Court of Cassation; two judges from the chamber of the president of the Court of Appeals; one from the chamber of the president of First Instance courts; and one from the presidents of tribunals or heads of departments at the Ministry of Justice. Judges are elected by presidents and justices of the Court of Cassation, from among the Chamber Presidents of the Court, by secret ballot. The three ex-officio members are appointed to their positions by virtue of Cabinet decrees upon the Minister of Justice's proposal. However, the term of ex-officio members is not specified. They can only be transferred or dismissed as per the provisions of Decree-Law No. 150/83.9. The other seven members of the Council – whether appointed or elected – hold their positions for a non-renewable period of three years. In the event of a vacancy, the new judge is either elected or appointed – following the appropriate procedure – for the remainder of the term, which is renewable only once if the first term does not exceed a year and a half. The scope of Article 5 of the Decree-Law No. 150/83 by which the High Judicial Council is entrusted with a wide range of powers including selections and appointments of judges, preparing proposals for individual or collective judicial transfers, ensuring judicial discipline, and issuing requests to the Judicial Inspection Committee for the investigation of judges. In Lebanon, the Minister of Justice determines, when needed and after consulting the High Judicial Council, the number of judges in training to be selected. Then, the High Judicial Council arranges the appropriate exams to select those judges, and forms a Board of Examiners for that purpose. The High

Judicial Council also announces the results and informs the Minister of Justice. Exceptionally, judges in training may be also be appointed and without the exams if they hold a doctorate in law. Such an appointment can be made by virtue of a decree issued upon the proposal of the Minister of Justice following the High Judicial Council's approval.

In case of a difference of opinion, both the Minister of Justice and the High Judicial Council hold common meetings to resolve contested issues. The High Judicial Council's decision should be made by a majority of seven members and its decision is final. However, the general rule is that judicial appointments are issued by virtue of a decree made upon by suggestion of the Minister of Justice. Finally, once the High Judicial Council has made a decision regarding the competency of the candidates taking the exams, such decision is not subject to any further challenge.

Even though the situation is looking more positive than before in Lebanon, there are still challenges in terms of judicial appointments and removal procedures, where the Executive power exerts an imperative influence on both processes.

5. South East Europe

For South East Europe Romania is used as an example. The Constitutional Court of Romania (CCR) has issued several decisions on the judicial organization, status of magistrates and the organization of the Superior Council of Magistracy, especially in 2018, after the Parliament has adopted revised laws for the judiciary. In this context, the case-law of the Constitutional Court of Romania underlined that the problem of the selection and appointment of judges must be seen as closely related to their independence. The Court through its decisions underlined the United Nations "Fundamental principles concerning the independence of magistracy",¹ which expressly hold in Article 11 that "the term of office of judges, their independence, their security, the adequate remuneration, the working conditions, the pensions and the retirement age are adequately secured by law".

The selection and appointment of judges occupying leading positions at the High Court of Cassation and Justice (being the highest court of

Romania) should be solely under the competence of the Superior Council of Magistracy – the Council being the only body guaranteeing the independence of the Judiciary, according to the Romanian Constitution. This is distinctly different from the appointment of prosecutors, who work under the authority of the minister of justice.

The selection of new magistrates was modified recently continue giving the National Institute of the Magistracy (NIM) the entire role to organize the selection and admission to the NIM. However, the training stage has been increased from 2 years to 4 years in order to provide a better professional training of future magistrates. The training process raises question of public policy such as whether it is appropriate for a future judge to practice in a lawyers/barristers offices during his/her training stage. Secondly, it also raises the question of whether it is adequate to leave the entire selection and training of future corps of judges to a training body.

G. Strengthening judicial independence: a perspective from the Venice Commission

The Council of Europe has paid special attention to the independence of the judiciary. The Venice Commission usually reviews the constitutions of its members to determine whether they comply with the standards established by the Venice Commission. After 1989, the independence of the judiciary became more prominent, when the communist countries were integrated within the organization and those countries received assistance in building independent judiciaries. In Central and Eastern Europe, the Council of Europe had advised to establish a Judicial Council as one of the tools to secure the independence of the judiciary. Judicial councils are institutions responsible for supervising the appointment of judges but should not be regarded as courts. The Venice Commission also advocates for requiring a qualified majority during the judicial appointment process to prevent an excess of influence from the parliament over the judiciary. Judges should only be transferred – against their will – when there is a general restructure of the judicial system. The general standard should be that judges can only be transferred with their consent.



“Unfortunately, we are observing in several European countries a tendency of decreasing independence of judges and of rising corruption. The role of the Venice Commission is to prevent such setbacks.”

Thomas Markert

Director, Secretary of the Venice Commission
Council of Europe

The Council of Europe has also stressed on the aspect of internal independence of the judiciary. For instance, in Turkey, there was a misconception that judicial hierarchy allows superior judges to guide the decision of lower judges. Finally, the Venice Commission has also addressed the issue of corruption. A higher degree of independence has triggered a higher index of judicial corruption. Further research must be conducted on this topic.

H. The Group of States Against Corruption (GRECO)

The Group of States against Corruption (GRECO) was established by the Council of Europe to monitor States’ compliance with the organisation’s anti-corruption standards and is composed of 39 states. GRECO believes that there is no effective fight against corruption without judicial independence and encourages the right of judges to draft their own code of conduct.

I. Kyiv Recommendations on Judicial Independence

The Kyiv Recommendations on Judicial Independence were developed in a regional conference in 2010 and sought to enhance the rule of law in the Eastern participating states, such as the Russian Federation, Georgia, Turkistan and Kazakhstan. This document has become a soft-law and was used as basis of rule of law reforms in this region. The recommen-

dations were the result of an extensive research project conducted at the Max Planck Institute, which analyzed the status of judicial independence in Canada, United States, France, Italy, United Kingdom and Kazakhstan, among other countries.

In order to improve the standards of judicial accountability, the Kyiv Recommendations provide for a pluralistic composition of bodies, which are not only composed of judges, but also by other members of the legal profession, such as members of the bar, law professors and other legal experts.

As for the judicial selection, this section of the Kyiv Recommendations aimed to have an independent recruitment process. It also talks about the need of disciplinary bodies. It also stresses that there has to be a distinction between bodies that investigate complaints about judicial misconduct and those competent to decide on disciplinary measures. In order to ensure that the needs of the judiciary are taken into consideration, the recommendations state that there should be a body representing the budgetary needs of the judiciary.

With regard to the composition of judicial councils, the primary purpose is to ensure the competency of the members of the judiciary. However, special attention must be paid in its composition to avoid abuse and interference by other branches of government in the selection of judges. For the Judicial Council to function as a transparent and independent body, it requires a composition of legal experts familiar with such matters, such as law professors, lawyers and members of the bar. The recommendations also underlined that ideally Judicial Councils should be composed of judges from all instances, and not exclusively by the presidents or chief justices of the supreme courts.

The Recommendations also addressed the topic of the selection of the Chief Justice. As for the selection, it is desirable that the Supreme Court presidents be selected by their peers or by an advisory board involved in the selection of the court president. The selection process should be transparent so the general public will be aware of the upcoming selection. It is not desirable that the president of the court becomes involve

in the allocation of cases, as it occurs in various countries. These recommendations also suggested a random system of allocation or a system with objective and clear criteria. Although, there is a group of structural reforms proposed by these Recommendations, these structural reforms only partially guarantee judicial independence, which depends largely on the legal culture to uphold and defend the rule of law.

J. Case-law with respect to the independence of the judiciary – the initiatives from regional courts

The European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples Rights are the three regional courts for Human Rights worldwide. There is also a current advocacy project led by the Constitutional Court of South Korea to create the Asian Court of Human Rights. The importance of discussing and analyzing the jurisprudence issued by human rights regional courts on judicial independence and integrity has to be underlined. However it has to be said that there are no court decisions on the independence of the judiciary from the African Court of Human and Peoples Rights, while the other two courts have been active in this field. Especially interesting is the “judicial correlation” among the other two regional courts. For instance, the Inter-American Court of Human Rights has constantly followed and quoted various precedents of the European Court of Human Rights.

1. The case-law of the European Court of Human Rights

The European Court of Human Rights receives **two types of cases** relating to the independence of the judiciary. The first group includes claims brought forward by the plaintiff whose case has been adjudicated by courts, which are deemed not to be independent. The second group is composed by claims brought forward by dismissed judges, whose human rights have been violated. Even though conventional wisdom assumes that questions regarding the independence of the judiciary are straightforward, the experience of the Court shows that claims regarding the independence of the judiciary are often not self-evident.



Pablo Saavedra

Executive Secretary Inter-American
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Article 6 of the European Convention on Human Rights regulates the right to a fair trial, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 8 regulates the respect for private life. Finally, Article 10 regulates freedom of expression. These are the most common legal grounds raised by dismissed judges. However, there are other rights that can also be violated, such as the freedom of assembly.

The European Court of Human Rights has taken into cognizance both external and internal pressure on the judiciary. The European Court of Human Rights receives **17,000 cases per year**. A majority of the cases, however, fail to make substantive arguments before the Court that could persuade the Court to review the case. Therefore, only when there is enough evidence supporting the case, the European Court of Human Rights would be more prone to hear it.

In the claim brought forward by Judge Andras Baka, president of the Supreme Court of Hungary and also a former judge of the European Court of Human Rights, the European Court of Human Rights confirmed that the removal of the judge was unfair and defined for the first time the **scope of judicial independence** by crafting the standard called **“behind the appearances”** to review this case. In a previous judgment in the case of *Ramos Nunez de Carvalho*, the Court developed for the first time the above-mentioned standard; however, in *Baka* the Court additionally analyzed the disciplinary procedure under which Mr. Baka was removed from office. This procedure had been conducted by the Judicial Council. The European Court concluded that the procedure violated Mr. Baka’s due process guarantees.

The European Court has addressed the scope of the right to a private life and its relationship with judicial activities by developing the **“reason-based” approach and the “consequence-based” approach**. For instance, in the case of *Arzu Özpinar*, the judge dressed and wore make up in an unconventional fashion. Such behavior was one of the main reasons of her dismissal. In this case, the European Court also developed the **“consequence-based” approach** to tests whether the dismissal would result in the judge’s loss of her professional environment. The Court held that a person’s professional environment is essential for her personal development. The Court found that there was an interference of Judge Özpinar’s private lifestyle. However, the Court also found that there was a legitimate claim when it comes to preserve the impartiality and independence of courts. Within its arguments, the Court analyzed whether the dismissal had been a necessary measure in a democratic society and held that it is permissible to have restrictions to avoid conflict of interest when performing judicial responsibilities. The Court after carefully reviewing the case found that there had been a violation of Article 8 as the interference with the applicant’s private life had not been proportionate to the legitimate aim pursued.

In relation to **Article 10** of the European Convention of Human Rights, the Court in the case of *Kudeshkina v. Russia*, reviewed the case in light of a violation of freedom of expression and on how the exercise of such freedom impacts on the Supreme Court’s independence and impartiality.

The court's findings supported the dismissed judge, considering that her public statements were substantial and supported by solid evidence.

2. The case-law of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights has reviewed various cases in which institutional and personal guarantees of the judiciary has been violated by authoritarian regimes or by the legislative branch. The Inter-American Court of Human Rights has reviewed **seven landmark decisions** in terms of judicial independence. Judges had brought their claims before the Inter-American Court and the court has acknowledged the international responsibility of various states based on unfair and arbitrary dismissals. In 2017 – for first time in history – the Inter-American Court of Human Rights issued **precautionary measures**, which halted various disciplinary procedures, aiming the dismissal of four members of the Supreme Court of Peru. The first case relates to the dismissal of three members of the Supreme Court of **Peru**. Following an impeachment process by the Peruvian Congress. The impeachment process did not respect the judges' minimum due process of law guarantees. Their dismissal occurred after having opposed former President Fujimori's reelection. In this case, the Inter-American Court held that one of the main objectives of separation of powers is judicial independence and argued that judges should always be granted with guarantees that allow them to perform their function with autonomy and with respect to their judicial tenure. Consequently, the Inter-American Court ordered the Peruvian government to compensate them and demanded the state to recognize its international responsibility and to issue an apology for its actions. Subsequently, the plaintiffs were reinstated as justices at the Supreme Court of Peru.

Another set of landmark cases were brought by **Venezuelan** judges. At the time of their complaint before the Inter-American Court, the Venezuelan judges held provisional positions (*juces provisionales*), which was mostly at the discretion of the executive. This status allowed governmental officials to remove judges without facing constitutional limitations. The Inter-American Court stated that “regardless of whether the judges in a country are permanently tenured or provisional, they must be and appear to be independent” and “[t]heir removal from office must be

processed in strict compliance with the procedures established by law, respecting their right to due process.”

The Court noted that provisional appointments should not modify in any manner the safeguards instituted to guarantee the good performance of the judges. The Inter-American Court considered that such provisional appointments must not extend indefinitely in time and must be subject to a subsequent condition, such as a predetermined deadline or the holding and completion of a public competitive selection process based on ability and qualifications, or of a public competitive examination, whereby a permanent replacement for the provisional judge is appointed.” Thus, the Court found that provisional positions violated the judicial independence of Venezuelan judges. The Court also stated that judges cannot be removed on the sole ground that one of their decisions has been overturned on appeal or review by a higher judicial body.

In the *Reveron Trujillo* case, the Inter-American Court considered that the Supreme Court’s decision to not reinstate a provisional judge as violative of the judicial independence guarantees of judges, which include guarantees protecting their tenure and stability in their positions. In the cases relating to the removal of the entire membership of **Ecuador’s** Constitutional Court, the Inter-American Court held that the impeachment process against the Supreme Court justices served as a mechanism to deviate power. The Inter-American Court in response clarified that the executive should state clear legal grounds for removing the members of the Constitutional Court and a failure to do so obligates the State to acknowledge its international responsibility in this regard. The Inter-American Court concluded that the Ecuadorian government used impeachment as political mechanism to undermine the independence of the judiciary.

The most recent case reviewed by the Inter-American Court related to the removal of judges from **Honduras**. In this case, the judges were removed from their offices as a result of their comments regarding the overthrow of former President Manuel Zelaya’s government. The Inter-American Court of Human Rights stated that the “legitimate protection of the principles of judicial independence and impartiality cannot be premised on the notion that a judge must remain silent on public issues; [r]ather any

restrictions must strike a proper balance between the right of judges to express their opinions and their duty to exercise the discretion and prudence necessary to protect the independence and autonomy of their office". Therefore, the Inter-American Court of Human Rights considered that their dismissal was arbitrary, and also took their context into account to recognize the international responsibility of the Honduran state.

3. Analysis of the complaints received by the African Commission on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established to ensure the protection of human and peoples' rights. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights. Although the Court officially started its operations in Addis Ababa, Ethiopia in November 2006, it only adopted its final Rules of Court in June 2010 and is therefore a **young court**. The African Charter on Human and Peoples' Rights of 1981 contains two provisions that deal with the issue of judicial independence – article 7 and article 26. However, **no cases** have been brought before the African Court on the issue of judicial independence. By contrast, the **African Commission on Human and Peoples' Rights** has over the years received numerous complaints on the violation of articles 7 and 26.

The Commission, through its decisions has established that any law that fails to uphold the right to be tried by an impartial and independent court or tribunal violates Articles 7 and 26 of the African Charter that required parties to the Charter to guarantee the independence of the courts.² The Commission also took the view that Special Military Tribunals constituted a violation of Article 7 of the Charter by the virtue of their composition, which is reserved to the discretion of the executive organ and are thus not independent.³ The Commission also held that civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial.⁴ The Commission also held that by establishing a section responsible for matters relating to state security within the Special Tribunal, the state was reneging on its duty to guarantee the independence of the judiciary and was in violation of Article 26.⁵

K. Final Comments

Judicial independence benefits the entire community and triggers public trust in the judiciary. Judicial independence implies that the judiciary will operate on the standards of fairness, impartiality and will be immune from improper external or internal influences. Judicial independence creates the conditions for members of society to believe that all of them will receive fair and equal treatment before the law and increases their incentives to respect the outcomes of the judicial process.

This conference was aimed as a comparative exercise to analyze the modern dilemmas faced by judiciaries around the world. It was also hoped that the conference would encourage dialogue at an international level to resolve the challenges and propose solutions to improve judicial integrity. Although some of the experiences described along this document occurred under different cultural and legal backgrounds, we also conclude that there are constant variables or similar pattern of interaction of those external and internal forces to undermine the work of the judiciary as a third branch of government. Thus, we believe that the conference constituted a meaningful effort to identify similar patterns of attacks and potential measures to counteract external and internal pressures faced by the judiciary.

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- 1 adopted by the Seventh United Nations Congress on Crime Prevention and Criminal Justice (Milano, 26 August – 6 September 1985) and confirmed by the United Nations Organization General Assembly by resolutions no. 40/32 of 29 November 1985 and no. 40/146 of 13 December 1985.
 - 2 87/93 Constitutional Rights Project (in respect of Zamani Lakwot and six others) of **Nigeria and** 48/90–50/91–52/91–89/93 *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan.*
 - 3 Communications 139/94, 154/96 and 161/97 (International PEN, Constitutional Rights Project, Inter-rights and Civil Liberties Organization/**Nigeria**) and 151/96 *Civil Liberties Organization/Nigeria.*
 - 4 222/98–229/99 *Law Office of Ghazi Suleiman/Sudan.*
 - 5 54/91–61/91–96/93–98/93–164/97_196/97–210/98 *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme/Mauritania.*

In 2018, the Rule of Law Programmes of the Konrad-Adenauer-Stiftung embarked on a global topic of the year – “Judicial Independence”. Our five regional Rule of Law Programmes organised various events to generate discussion on the topic of judicial independence within their regions. On December 5th and 6th, the Konrad-Adenauer-Stiftung organized a plenary conference titled “Judicial independence under threat?” at the Council of Europe in Strasbourg, France. This report summarises the presentations and discussions of the conference.