

POST-EVENT REPORT

**ASSESSING THE CURRENT
SITUATION OF THE INDEPENDENCE
OF THE JUDICIARY IN SUB-SAHARAN
AFRICA**

Background

The judicial system is the custodian of the rule of law in any country that has a democratic system of governance. Despite the concept of the independence of the judiciary being integral to the doctrine of separation of powers, the judiciary is perceived as the weakest institution among the three institutions in most sub-Saharan African countries. Furthermore, as with most other institutional processes, the COVID-19 pandemic has only served to exacerbate interference with the justice machinery and in so doing hindered the independence of the judiciary.

Judiciaries in their own efforts to curb the spread of COVID-19 have resorted to measures which provide for the well-being of both the court workers and court users in turn creating damaging repercussions in court activities. In trying to strike a balance between ensuring that the Rule of Law is upheld and protecting themselves,

judiciaries in sub-Saharan Africa seem to be at a loss due to financial constraints, lack of digitized and automation of court processes, strict national bail and bond laws, lack of safe environment among other things.

Other common challenges including but not limited to, internal and external threats, procedures of appointment and promotion of judges continue to be exhibited across sub-Saharan Africa during these uncertain times. If unaddressed, these challenges run the risk of increasing the deficit on the trust and confidence of the citizenry in the judiciary as the backbone of a functional constitutional state under the rule of law or worse still, even breeding autocracies.

¹ In Zimbabwe, the Chief Justice Luke Malaba issued a memo which instructed that before a judgment was delivered by any judge 'it should be seen and approved by the head of the court'. See <https://africanlii.org/sites/default/files/Original%20memo.pdf>

² Malawi's Chief Justice, was asked to go on compulsory leave pending retirement on grounds that he had accumulated more leave days than the remainder of his working days to retirement date. See <https://africanlii.org/sites/default/files/Leave%20pending%20retirement%20%20Justice%20%20Andrew%20Nvirenda-1%20%281%29.pdf>

³ The Attorney General of Kenya, came to the president's defence maintaining that President Uhuru would not appoint 41 judges who were nominated by the Judicial Service Commission (JSC) in July 2019. See <https://www.capitalfm.co.ke/news/2020/06/ag-defends-president-kenyattas-refusal-to-appoint-41-superior-court-judges/>

PANEL



DR. STEFANIE ROTHENBERGER

DIRECTOR,
KAS RULE OF LAW PROGRAM
FOR SUB-SAHARAN AFRICA
Opening Remarks



CINDY SALIM

PROGRAM OFFICER
KAS' RULE OF LAW PROGRAM
FOR SUB-SAHARAN AFRICA
Session Moderator



MR. DIEGO GARCÍA-SAYÁN

UN SPECIAL RAPPOREUR ON THE INDEPENDENCE
OF JUDGES & LAWYERS

Explore the actions that can be taken by the governments to prevent blockages of the justice systems to guarantee a functioning and independent judiciary amid the current situation



HON. JUSTICE HASSAN JALLOW

THE CHIEF JUSTICE OF THE
REPUBLIC OF THE GAMBIA

Examine how the COVID-19 pandemic has affected the delivery of justice in Sub-Saharan Africa



DR. JUSTICE MAVEDZENGE

LEGAL ADVISOR,
INTERNATIONAL COMMISSION
OF JURISTS (AFRICA PROGRAMME)

Analyze the current situation of the independence of judiciary in Sub-Saharan Africa

Introduction

The Konrad-Adenauer-Stiftung Foundation under the auspices of the Rule of Law Program for Sub-Saharan Africa hosted an online seminar on the 3rd of November 2020 with the prime objective of giving some insight into the current situation as regards independence of the judiciary in sub-Saharan Africa, discussing the impact of the COVID-19 pandemic on justice delivery and exchanging views on recommendations that can be adopted by governments to prevent obstructions within justice systems in a bid to guarantee a functional and independent judiciary.

The session kicked off with introductory remarks from Cindy Salim, the session moderator and thereafter opening remarks from Dr. Stephanie Rothenberger, the director for the KAS-RLPSSA who introduced the seminar series focusing on the promotion and protection of human rights especially during the Coronavirus Disease pandemic.

Impact of the COVID-19 Pandemic on Justice Delivery

The Hon. Chief Justice of the Gambia underscores that the COVID-19 pandemic has severely undermined the fundamental rights of access to justice and the right of a fair and expeditious hearing. The Special Rapporteur on the independence of judges and lawyers reiterated recent sentiments of the Former UN Secretary General, Ban Ki Moon, who opined that the pandemic has widened the justice gap with a sharp increase in problems people face coupled with a decline in the ability of justice actors to respond adequately. Furthermore, funding for access to justice has declined by 40% in the last four years and the economic downturn occasioned by the pandemic has intensified the pressure on financing.

In Gambia, initial precautionary measures included suspending court operations in an effort to curb new infections of the various parties involved.

However, with the realisation of the impracticality of suspending justice administration in society came innovative measures that aimed at not only keeping courts open but also protecting court staff and other parties. These measures taken up by a range of sub-Saharan countries include following through with physical distancing guidelines, boosting sanitation procedures, undertaking temperature screening at court buildings, the adoption of virtual hearings.

Current Situation as regards Independence of the Judiciaries in SSA

Judicial independence is essentially the principle that judges must be left to perform the functions without interference from anyone so that they may dispense justice without fear or favour. Despite the adoption of this principle in the African Charter on Human and Peoples' Rights and various domestic constitutions in Eastern and Southern Africa, attacks on judicial independence are increasing. In Zambia, a bill that sought to tinker with the tenure of judges was tabled before Parliament, albeit voted against. In Zimbabwe, an amendment that seeks to give the executive greater control over the appointments of judges to higher courts as well as a proposed annual contract renewal for Constitutional Court judges by the president is being considered by their Parliament.

Additionally, the country's Chief Justice issued a directive requiring judges to submit their judgements for review before handing them down although it was later scrapped off.

In Malawi earlier this year, there were unsuccessful attempts to prematurely end the tenure of the then incumbent Chief Justice on the grounds that he had accumulated more leave days than the total remaining days of his term soon after the Supreme Court had nullified the presidential election results. In Kenya, the president has refused to swear in 41 judges that have been nominated for appointment in defiance of court orders to do so. In 2018, the Chief Justice of Lesotho was suspended and later removed from office in violation of an existing edict that prohibited such suspension unless upon the finalisation of a constitutional application.

The Legal Framework for Judicial Independence

Established in 1994, the mandate of the Special Rapporteur on the independence of judges and lawyers is to examine the parameters necessary to effectively guarantee the independence of judges, lawyers and court officials. The Basic Principles on Independence of judges in of the judiciary adopted in at the UN in 1985 and the Basic Principles on the Role of Lawyers adopted in 1990 are key legal and political frameworks supporting the mandate of the Special Rapporteur alongside the UN Charter and the Protocol of Civil and Political Rights. The two key instruments have transformed into essential parts of customary law binding to all UN state parties.

Of importance also are the guidelines which were provided by the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán on specific urgent actions which ought to be acted upon by governments to prevent blockages of the justice systems and to guarantee a functioning and independent justice system.

⁴ Commission on Human Rights resolution 1994/41 <http://hrlibrary.umn.edu/commission/thematic51/39.htm>

⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25810&LangID=E>

Challenges

1. The COVID-19 Pandemic has significantly undermined the efficiency of justice administration as courts scale down physical operations or transition to novel justice innovations unfamiliar to court staff, lawyers and all other parties involved in a bid to manage the spread of the disease.
2. Constitutional and legislative amendments executed by Executive branches of government aimed at regressing constitutional and other legislative safeguards to the independence of the judiciary.
3. Administrative reforms which allow judicial leaders to interfere with the decisional independence of judges.
4. Direct specific threats against the tenure or the person of judges such as unlawful procedures for removal from office and intimidation tactics to influence the decision-making powers of judges.
5. Underfunding of the judiciary which is occasioned not from financial constraint but mismanagement of funds. The executive branches have been reported to exploit their budgetary allocation powers as a weapon to cow the judiciary to tow certain positions in exercise of their judicial authority.
6. Weakening of checks and balances within government branches in the umbrella of emergency pandemic containment measures has led to the over-concentration of power in the executive branches of government which constantly undermine the judiciary.
7. Inadequate technical capacity to leverage technology-based justice innovations such as virtual courts due to insufficient internet infrastructure in some regions.
8. Inadequate due process for emergent forms of technology such as ensuring confidentiality and data protection in virtual hearings.
9. The rise of corruption within judicial processes. Corruptible judicial officers and entrepreneurs who stand to benefit from government contracts allocated in expedited emergency measures due to the pandemic undermine judicial independence and proper dispensation of justice.
10. Government censorship within the civic space in form of legislations curtailing freedom of expression in countries like Zimbabwe, Tanzania and even Kenya under the guise of prevention of circulation of false information in light of the COVID-19 pandemic. This hampers accountability of the executive branches, for instance.

Recommendations: Existing & Potential Solutions

1. Leveraging technology to streamline justice delivery. Judicial bodies ought to invest in capacity building to streamline court processes at all levels by leveraging technological solutions, as Gambia has done by commissioning IT experts to explore justice innovations.
2. Periodical review of 'traditional' rules of practice and procedure as well as substantive law to keep up with the evolving aspects of legal landscape such as e-filing, e-discovery and virtual hearings. Thus far, Gambia and Kenya have made substantive progress in this regard.
3. National governments ought to substantially invest in the infrastructure and human capital resource of the judiciary to maximise efficiency in justice delivery which consequently improves social justice, stability, economic and social development.
4. Adequate checks and balances within the different arms of government to avoid over-concentration of power in specific arms of the government such as monitoring due procedures for declaration and implementation of national states of emergency.
5. National governments ought to invest in digital communications infrastructure such as internet connectivity so as to improve the means for access to justice for all in spite of their social or economic status. The special rapporteur on the freedom of expression in 2011 classified access to the internet as a human right.
6. Promotion of an independent prosecutorial system that is free from interference by state machinery and political power. This will go a long way in ensuring the procedural integrity of justice administration even in cases of state capture.
7. Utilising the United Nations Convention against Corruption which establishes robust judicial international cooperation mechanisms that can be used in the fight against transnational corruption.
8. Promotion of alternative justice systems such as the traditional customary courts operational in Gambia as well as court-aided alternative dispute resolution mechanisms to promote access to justice.
9. Increased cooperation among judicial institutions, civil society, professional associations and the citizenry at large so as to counterbalance the temptation for absolute power that has seen countries like Kenya relegate the judiciary because they are not elected representatives. The European Association of Justice is an example of an institution playing a critical role in the defence of judicial independence in Poland.
10. Empowering judicial accountability mechanisms to run independent of state and political interference by creating them within the judiciary as opposed to political appointments by the executive for example. The South Africa Complaints & Disciplinary Committee within its Judicial Service Commission is one such laudable effort.

A background image of a pair of scales of justice, rendered in a dark blue, semi-transparent style. The scales are centered and occupy the upper portion of the page. The word "Conclusion" is overlaid on the left side of the scales in a large, white, sans-serif font.

Conclusion

The independence of the judiciary and the legal profession are fundamental pillars of a democratic society. It serves neither the benefit of judges or lawyers nor to shield them from legal accountability in the performance of their professional duties under general law. Instead, it is necessary for the protection of the people, affording them an independent legal profession and judicial system as a bulwark of a free and democratic society. Their work is indispensable to the protection and promotion of human rights as well as ensuring effective access to justice for the greater community. In addition to independence, the judiciary must also uphold its duty of impartiality and pursue to the greatest extent possible, efficiency in justice delivery.

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IN SUB-SAHARAN AFRICA REPORT
3RD NOVEMBER 2020



245
REGISTERED



120
ATTENDED



49%
ATTENDED %



14
QUESTIONS



16
COUNTRIES



109 MIN
DURATION



KENYA
UGANDA
RWANDA
NIGERIA
TANZANIA
ZIMBABWE

GAMBIA
NAMIBIA
SOMALIA
BURUNDI
MAURITIUS

USA
UK
PERU
POLAND
CAMEROON

