

2018 ANNUAL JURIST CONFERENCE (AJC)
“The State of Judicial Independence in Africa: Threats, Challenges and Opportunities”

CONCEPT NOTE

Introduction

The Kenyan Section of the International Commission of Jurists¹ (ICJ Kenya) in partnership with The International Commission of Jurists² (ICJ) and support of its national and regional partners³ 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 Charter⁶ obligates State parties to guarantee the independence of the Courts. More so, the Grand Bay (Mauritius) Declaration and Plan of Action⁷ recognizes that an independent, open, accessible and impartial judiciary guarantees adherence to the rule of law, democracy and Human Rights.

¹ 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.

² 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.

³ The Kenya Human Rights Commission (KHRC), the International Development and Legal Organization (IDLO), the Konrad Adenauer Foundation, International Bar Association.

⁴ 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>

⁵ 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>

⁶ 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

⁷ Paragraph 4 of the Grand Bay (Mauritius) Declaration and Plan of Action, 1999 available at <http://www.achpr.org/instruments/grandbay/>

Various international principles set standards for the protection and promotion of judicial independence: The UN Basic Principles on the Independence of The Judiciary⁸, the Bangalore Principles of Judicial Conduct⁹ and the Commonwealth (Latimer House) Principles of The Three Branches of Government¹⁰ 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.

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 home¹¹. In April 2018, a former Judge and Vice President of the Court of Appeal in the South West region of Cameroon was also reportedly kidnapped¹². In Kenya, an opposition lawyer was arrested and deported in February 2018 in total disregard of court orders against his deportation¹³. 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

⁸ 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/>

⁹ The Bangalore Draft Code of Judicial Conduct 2001 available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

¹⁰ The Commonwealth (Latimer House) Principles of The Three Branches of Government, November 2003 available at <http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>

¹¹ See https://www.newvision.co.ug/new_vision/news/1465913/judge-kidnapped-legal-profession-targeted-mali

¹² See <https://www.garda.com/crisis24/news-alerts/107851/cameroon-suspected-separatists-kidnap-former-judge-in-southwest-april-8>

¹³ See <https://www.capitalfm.co.ke/news/2018/03/firebrand-miguna-deported-despite-court-orders/>

¹⁴ 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.

top judges without consulting any other institution¹⁵. Further, there have been moves to interfere with the independence of the JSC which safeguards the appointment, discipline and promotion of judicial officers¹⁶.

Second, the executive and legislature have become notorious in disregarding court orders, therefore undermining the independence and authority of the judiciary¹⁷.

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 attacks¹⁸. 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 term¹⁹.

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 government²⁰. 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

¹⁵ 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.

¹⁶ 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.

¹⁷ 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>

¹⁸ 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://nairobi.news.nation.co.ke/news/dcj-mwilus-driver-shot-nairobi/>

¹⁹ See <https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy>

²⁰ 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%20IMMA%20Advocates%20Offices.pdf> and <https://www.amnesty.org/en/latest/news/2017/09/tanzania-outspoken-opposition-politician-shot-and-wounded-by-unidentified-gunmen/>

with some being shut down over flimsy allegations²¹. The media has not been left out; the executive has ordered numerous stations to be shut down²² and media personalities have been detained²³ 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 Action²⁴ 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

²¹ 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>

²² 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.

²³ 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.

²⁴ 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/>

so repel imminent attack on the independence of the courts or to rise to the defense of the courts should politicians manifest any untoward intentions²⁵.

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.

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

²⁵ 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>

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

PROGRAMME

Tuesday 20th November 2018

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

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	<p>The journey of judicial independence- A reflection of post-independent Africa:</p> <p>A judicial perspective</p> <p>An Academic perspective</p> <p>A Practitioner perspective</p>	<p>Lady Justice Yvonne Muhoro (TBA) Former constitutional court judge, South Africa</p> <p>Dr. Hugh Corder Professor Of Public Law University of Cape Town</p> <p>Kaajal Ramjathan Keogh Director, South African Litigation Centre</p>
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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	<p>Guiding questions:</p> <ol style="list-style-type: none"> 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 	<p>Vanja Karth Director, Democratic Governance and Rights Unit- University of Cape Town Director, Judicial Institute of Africa</p> <p>Hon. Justice Charles Mkandawire Commonwealth Magistrates and Judges Association (CMJA)</p> <p>Martin Masiga Secretary General- African Judges and Jurists Forum (AJJF)</p>
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	Monomotapa initiative and plan of action?	
03:00- 04:00	PLENARY	
04:00 pm	TEA BREAK	
	END OF DAY ONE	

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	<p>Implementing the judicial code of conduct: Use of social media as a tool for judicial activism- its challenges and opportunities</p> <p>The intricacies of financial independence: The chocking of judiciary funding as a strategy to bottle judicial independence</p> <p>The Executive Hand: disregard for the law and its impact of on authority of the judiciary</p> <p>Judicialization of politics and its effect on public perception of the judiciary</p>	<p>Rtd. Chief Justice Dr. Willy Mutunga Immediate Former chief justice of the Republic of Kenya (also Lawyer, Activist, Scholar)</p> <p>Hon. Justice Oagile Bethuel Key Dingake Judge of the Supreme Court of Papua New Guinea Honorary Professor of Public Law (UCT)</p> <p>Lady Justice Sophia Akuffo Chief Justice of the Republic of Ghana (also former Minister in Ghana, former Judge and President of The African Court of Human and People’s Rights)</p> <p>Justice Makaramba Vice President of the East African Magistrates and Judges Association (EAMJA)</p> <p>Lady Justice Therone Leonna (TBA) Judge, Constitutional Court of South Africa</p>
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, ICJ Kenya

11:00- 12:30 pm	<p>Guiding questions:</p> <ol style="list-style-type: none"> 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? 	<p>Judy Oyer Programme Manager, International Bar Association's Human Rights Institute (IBAHRI)</p> <p>Don Deya CEO Pan African Lawyers Union (PALU)</p> <p>Kwamchetsi Makhoha Journalist For Justice (JFJ)</p> <p>Hon. Justice Kayitesi Zainabo Sylvie Commissioner to the African Commission of Human and Peoples Rights</p>
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12:30- 01:00 pm PLENARY

01:00- 02:00 pm LUNCH BREAK

THEME: OPPORTUNITIES TO STRENGTHEN 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, ICJ Kenya

02:00- 3:30 pm	<p>Guiding questions:</p> <ol style="list-style-type: none"> 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? 	<p>Arnold Tsunga Director, Africa Regional Programme of the International Commission of Jurists (ICJ)</p> <p>Dr. Japheth Beigon Africa Regional Advocacy Coordinator, Amnesty International</p>
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3:30pm TEA BREAK

END OF DAY TWO

CONFERENCE DAY 3: Friday 23rd November 2018

Sub Theme: Anchoring regional standards for effective monitoring of judicial independence
Style of Presentation: Debate
Moderator: Peter Wendo, Konrad Adenauer Stiftung (KAS)

09:00- 10:30 am	<p>Pen on Paper: Anchoring Regional Standards for Judicial Independence for Effective Implementation</p> <ol style="list-style-type: none"> 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 	<p>Martin Masiga Secretary General, African Judges and Jurists Forum (AJJF)</p> <p><u>Discussant:</u> Hon. Justice Kayitesi Zainabo Sylvie Commissioner to the African Commission of Human and Peoples Rights</p> <p>Dr. Japheth Biegon Africa Regional Advocacy Coordinator, Amnesty International</p> <p><u>Discussant:</u> Dr. Elvis Fokala Senior Research Associate, Institute for Human Rights</p>
10:30- 11:00 am	HEALTH BREAK	
11:00- 12:30 pm	CLOSING CEREMONY Moderator: Elsy Sainna, ICJ Kenya	
	<p>Keynote Address: “In my View”, closing remarks by guest speakers</p> <p>Conference communique</p> <ol style="list-style-type: none"> 1. Presentation of Rapporteur’s report 2. Consensus building on recommendations 	<p>Hon. Justice David Maraga Chief Justice of the Republic of Kenya</p> <p>Brian Kegoro Human rights advocate and constitutional law expert</p> <p>Wakesho Kililo ICJ Kenya</p>
12:30- 01:00 pm	Closing remarks/ Vote of thanks	ICJ K and ICJ
THE END OF THE CONFERENCE		