

Summary Report of the International Conference on Requirements for an Independent and Effective Judiciary in Nairobi (Kenya) from 11 to 14 February 2016

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After Stuttgart¹ (Germany) and Lubumbashi² (Democratic Republic of Congo – DRC) meetings, another round of conference was organized by the Robert Bosch Foundation, in collaboration with the African Law Association (Germany), in Nairobi (Kenya), from 11 to 14 February 2016. Participants were now invited to identify and discuss matters relating to ‘requirements for an independent and effective judiciary’. Discussions focused on six countries of the African Great Lakes Region (Burundi, DRC, Kenya, Rwanda, Uganda and Tanzania) and Germany. Professor *Hartmut Hamann* coordinated the conference which was attended by some twenty young lawyers and professionals in all: seven from Germany (judges and public prosecutors who welcomed their African colleagues in Stuttgart in October 2014), five from the DRC, three from Rwanda, two from Burundi (advocates, judges, prosecutors or/and university assistant lecturers), and three young lawyers graduated at the Tanzanian-German Centre for Eastern African Legal Studies (respectively from Kenya, Uganda and Tanzania). Their exchange was nourished by participation of two experienced judges of the East African Court of Justice, two other practicing jurists in Kenya, including one university lecturer, and Professor *Matthiesen Kalala Ilunga* from the University of Lubumbashi (DRC).

The current report summarizes the content and the outcomes of this conference. Part one sets out the activities accomplished during the conference (1), while part two elaborates on its materials, which include participants’ conclusions and recommendations (2).

1. Brief Recall of the Activities of the Conference

The conference activities took place during two days. Participants arrived in Nairobi on 11 February 2016. Day one commenced with three opening speeches on 12 February 2016.

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1 See *Kahombo, Balingene*, Summary Report on the ‘Exchange Programme between Young Lawyers from Burundi, Rwanda and the Democratic Republic of Congo and the Judiciary of Baden-Württemberg (Germany)’ from 5 to 18 October 2014, in: *Recht in Afrika – Law in Africa – Droit en Afrique* 17 (2014), pp. 228-236.

2 *Kahombo, Balingene*, Rapport-synthèse de la Conférence internationale de Lubumbashi (République Démocratique du Congo) du 18 au 21 août 2015, in : *Recht in Afrika – Law in Africa – Droit en Afrique* 18 (2015), pp.256-263.

The first one was delivered by *Markus Lux*, the representative of Robert Bosch Foundation, the second by the representative of the German Embassy (Kenya) in charge of cultural and political affairs, and the third by Professor *Hartmut Hamann*. In his opening note, *Markus Lux* explained that Robert Bosch Foundation is a product of Bosch Company which aims at exploring opportunities on how to be more active in Africa and contribute to promoting multi-faceted changes for good governance, the rule of law and development in the continent. This is why, he said, Robert Bosch Foundation supports the exchange programme between German and African lawyers and professionals. It is expected to generate active citizens who could be change makers in society, aware of their duties and rights, as well as challenges of state building, good governance and the rule of law. As such, the exchange programme appears as a pilot project which is, according to Professor *Hartmut Hamann*, the first one to be funded by Robert Bosch Foundation in the African Great Lakes Region. On his side, the representative of the German Embassy underscored the significance and relevance of the conference, and pointed out that the topic focusing on the judiciary did not attract international attention as much as the legislature and the executive. In particular, he underscored that an independent, efficient and stable judiciary could promote the rule of law and judicial security, the fight against corruption and the promotion of economic investments. He also stated that regional blocs also have a role to play in the matter. The East African Court of Justice is relevant in this respect and useful comparisons are possible with other regional cooperation and integration framework such as the European Union (EU). According to him, supporting the judiciary and the fight against corruption is also among primary objectives of Germany in this part of Africa.

After all the aforesaid preliminaries, three sessions of exchange were held. The main session began by a lecture from the first guest, *Dr. Emmanuel Ugirashebuta*, the Honourable President of the East African Court of Justice, who talked about the criteria for an independent and a credible judiciary, the institutional settings and the individual responsibility of judges. The second guest lecture was from Honourable *Jean Bosco Butasi*, the retired judge of the East African Court of Justice, who focused on the 'place and mandate of the judiciary in the Constitution of Burundi', but in a comparative perspective with other member states of the East African Community (Kenya, Rwanda, Uganda and Tanzania). The second session consisted of lectures by young lawyers graduated at the Tanzanian-German Centre for Eastern African Legal Studies. They depicted their respective countries' perspectives on the topic of the conference. *Naomi Gichuki* spoke about the Kenyan perspective, *Jackline Asimwe* the Ugandan case, while *Magdalena Sylister* portrayed the Tanzanian situation. Both sessions were each followed by a 30 minutes discussion.

In the afternoon session, a panel discussion took place with lecturers and practicing jurists from Kenya who shared details on the independence and effectiveness of the Kenyan judiciary. Lastly, we had presentations and discussions on short reports from all participating German/African teams on their experiences during the visit by German professionals in Lubumbashi (DRC) and Kigali (Rwanda) just before the conference. This exchange visit was a response to the African visit in Stuttgart in 2014.

On 13 February 2016, day two took off with the presentation and discussion of results and conclusions of the conference in Lubumbashi in August 2015 by some participants of the conference. When that was done, we had lectures of three German participants, namely *Cornelia Rank*, *Mario Mannweiler* and *Christian Trauthig*, concerning their view on the prerequisites of an independent and efficient judiciary. As usual, the lectures were followed by a discussion. Subsequently, participants held workshops in four groups where they discussed recommendations on further development of the exchange programme. They identified important subjects to be covered, next steps to be taken and ways for establishing and maintaining a network. Lastly for that day, a wonderful trip to Naivasha town was organized to allow participants to enjoy, by the end of the conference, pleasant moments on the pristine shores of Lake Naivasha. On 14 February 2016, all participants departed from Nairobi.

2. Materials of the Conference

This part covers a summary of the materials which were shared during the conference. The lectures and discussions were very informative, replete with practical examples that enhanced the understanding of the topic of the conference and provoked further critical thinking and processing of ideas. We shall start by looking at what participants said on the concept of judicial independence and effectiveness, followed by a look at the current challenges of judicial independence and effectiveness in the participating countries. The last part will be on the requirements for an independent and effective judiciary as recommended by participants.

2.1. *The Concept of Judicial Independence and Effectiveness*

Two types of judicial independence were mentioned. The first type is primary independence which refers to decisional independence of individual judges, whereas the second type refers to independence of courts as institutions. According to participants, judicial independence should be guaranteed and protected jealously so as to safeguard the welfare of the society. It was stated that the 2007 Kenyan post-election violence was a result of failure of the judiciary to play its role. As a result, the people of Kenya lost faith in the judiciary and resorted to violence in order to seek redress for their grievances.

The need to guarantee and protect judicial independence is also based on the 20-60-20 percent theory, explained by Judge *Emmanuel Ugirashebuja*. It was argued that within the judiciary there are a 20% of judges who will maintain their independence irrespective of harsh circumstances. At the same time, there are a 60% of judges who will go either way depending on the circumstances, in that if the conditions are good, they will act independently and if those conditions are bad they will not maintain independence. The remaining 20% of judges will not be independent whether circumstances are favourable or not. In view of that, there are 80% of potentially independent judges, namely the first 20% and the

unpredictable 60%. Therefore, if the welfare of the 60% is protected, we would achieve 80% judicial independence.

Moreover, an independent and effective judiciary attracts Foreign Direct Investments (FDI) and encourages political, economic and social integration. A good example is the significant role that the European Court of Justice (ECJ) plays in strengthening EU integration. Not only that but also, a judiciary of that calibre may prevent wars between states because disputes will be taken to courts instead of being solved through fighting.

2.1.1. Current Challenges of Judicial Independence

Lack of Political Will. One of the most notorious challenges is lack of political will among the executive to safeguard, protect and maintain independence of their judiciaries. It was observed that participating African countries have colourful guarantees for judicial independence enshrined in their Constitutions as well as statutory instruments. Also, those countries (African) are parties to relevant international legal instruments such as the Universal Declaration of Human Rights, the International Convention of Civil and Political Rights, the African Charter on Human and Peoples' Rights, or even the Treaty of the EAC (except the DRC), which guarantee judicial independence. National constitutions and various legislative Acts provide for the same guarantees. Unfortunately, in reality, such legal texts are hardly observed, largely due to lack of political will.

Undue Influence by the Executive. Hand in hand with the first challenge is the problem of undue influence of the judiciary by the executive which makes the judiciary incapable of being impartial in matters where the executive is guilty or has interests. It also turns the judiciary into an executive agency. The undue influence comes in various forms such as through judicial appointments, dictating assignment of significant cases to judges who have closer relations with the executive, presidential appointments whether before or after retirement, contractual terms of employment to judges upon retirement, transfers of duty stations, intimidation and promotions.

In Uganda there were allegations that some members of the judiciary had been pressured to collude with the police. There was also an incident where the High Court was put under siege as an apparent attempt to intimidate the judiciary. Apart from that, the Ugandan Judicial Service Commission is appointed by the President and if the members of the Commission go against the wishes of the Executive they do not get promoted. Moreover, there was an incident where a judge cried in court due to blatant violation of the rule of law.

Tanzania is one example of a country where judges are employed on contractual bases upon retirement. There has been strong criticism especially from the opposition to the effect that the said practice is unconstitutional as it has not been provided for by the Constitution. Moreover, it has been argued that a judge who is approaching retirement will not be expected to be impartial against the Executive from which he/she is expecting a renewal of his contractual term. Additionally, in October 2015, the High Court of Tanzania made a vividly misguided interpretation of the law in favour of the incumbent regime and against the oppo-

sition side in the famous 200 metres ruling where it held that voters and general public are not allowed to remain within the 200 metres radius of polling stations after casting their votes. However, that is not one of the acts which were forbidden by the law.³

According to Burundi's Constitution, the President is the appointing and disciplinary authority, while the Supreme Council of Magistracy that he chairs only plays an assisting role for the exercise of the presidential powers. Thus, recommendations for appointment of judges practically come from the executive, and removal of judges is dependent upon the will of the executive. Sometimes transfer of judges is used as a weapon to punish judges who do not pledge allegiance to the executive.

The Kenyan judiciary before the new Constitution era was characterized by a serious lack of impartiality and as a result most decisions of the High Court and the Court of Appeal were pro-government. A similar situation still affects the DRC courts system.

Lack of Integrity. Judicial integrity is highly compromised in Africa. Largely, it depends on personal character of a judge. That is because some judges act without integrity despite that there are tough laws against misconduct, and also despite that they are well remunerated. At the time of the Conference, there was an ongoing scandal in Kenya whereby a judge of the Supreme Court was facing accusations of accepting bribe in the sum of Kenya Shillings 200,000,000/-, equivalent to a sum of USD 2,000,000. We were also informed that two Kenyan justices of the Supreme Court had passed their retirement age but they do not want to leave office. Furthermore, all the judges of the Kenyan Supreme Court have stated that they cannot be forced to retire.

Tanzania also shared incidents of lack of integrity within the judiciary. They include two judges who, while they were still advocates, had been caught bribing Magistrates and before disciplinary measures had been taken against them, they were appointed as judges. One judge had intentionally refused to deliver a judgment for more than four years and, surprisingly, upon his retirement he was given a two year contract in 2005.

Incompetence. A judge who is highly qualified both in experience and intellect is more likely to be capable of withstanding strong public opinion in the execution of his/her judicial duties. On the other hand, an incompetent judge can hardly be independent and will most likely succumb to strong public criticism like *Pilate*, the Roman Governor of Judea, in the case of *Jesus Christ* and *Barabas*. Incompetence in Kenyan judiciary still exists and that has given rise to complaints that competent but corrupt judges were vetted out and incompetent but sober ones were vetted in. On the other hand, Tanzania has had one serving Justice of Appeal who had no law degree, and one Judge who could not write judgment in proper English, the language for recording court proceedings.

3 Section 104 (1), of the National Elections Act, Chapter 343, of the laws of Tanzania (revised edition of 2002). The provision states that *No person shall hold a meeting on election day or within any building where voting in an election is in progress, or at any place within the radius of two hundred metres of such building wear or display any card photograph, favour, or other election emblem indicating support for a particular candidate in the election.*

Lack of Security of Tenure. A judge must feel confident that he will not be punished for what the executive feels is a “wrong” decision. They should be employed on a permanent and pensionable terms until they retire. In Burundi judges have no security of tenure. They owe allegiance to the executive so as to remain in office. Moreover, tenure of judges of the Supreme Court of Burundi is three years only in practice.

Poor Remuneration. It was stated that inadequate remuneration exposes judges to corruption. Apart from salaries and other benefits while in office, remuneration extends also to retirement benefits. For instance, previously Tanzanian judges had no secure retirement benefits and that created doubts on their impartiality. However, later on attractive retirement benefits for judges were enshrined in the law. Despite those developments, Magistrates (adjudicators who preside in subordinate courts) and other judicial officers are still poorly remunerated. In Uganda judicial officers are underpaid. Poor remuneration is also a chronic problem in Burundi as well as the DRC.

Lack of Safety. The judiciary has to be free from intimidation and all kinds of personal insecurity and lack of peace in relation to the discharge of its duties. In Uganda, Burundi and the DRC, there are cases where judges had been intimidated. Moreover, the first Ugandan Chief Justice was murdered by the *Iddi Amin* regime.

Shortcomings in Judicial Appointments. In countries where the executive has an upper hand in the appointment of judges, the judiciary can hardly be independent. Similarly, selection and appointment of judges should not be influenced by any irrelevant and external factors. In Tanzania some appointments suggest that they were influenced by irrelevant or external factors. They include a judge who was appointed while he had only two years remaining before retiring; as well as some judges who were appointed without being recommended nor vetted by the Judicial Service Commission.

2.1.2. Current Challenges of Judicial Effectiveness

Underfunding and Lack of Adequate Resources. Low budget allocations to the judiciary is a common scenario in African countries and it largely contributes to poor performance of the judiciary in dispensation of justice. Consequently, the judiciary continues to be critically undermanned, hence leading to heavy backlogs of cases. It continues to reside in dilapidated premises and fails to improve its working tools, to mention just a few. In Uganda, recently, the Chief Justice decried the poor funding of the judiciary and stated that it was the only underfunded arm of government. In the current financial year, the judiciary requested to be allocated a sum of Ugandan Shillings 333 billion, but received Ugandan Shillings 77billion, which is only 23% of the sector’s requirements.

Contrary to the German experience, courts in Burundi, Tanzania and the DRC continue to record proceedings only by way of writing by hand, a method which wastes an unimaginable amount of time, is tedious and very outdated. In 2012, the judge population ratio in Tanzania was less than two judges per one million inhabitants. Up to February, 2015, the District Land and Housing Tribunal of Arusha had only two adjudicators while it serves the

whole of Arusha region with an exception of Ngorongoro and Karatu districts. As of November, 2015, the Tribunal had 890 pending matters.

Technicalities. It was argued that technicalities pose a huge obstacle against smooth dispensation of justice because they cause delays and sometimes denial of justice.

2.2. Requirements for an Independent Judiciary

A Strong Political Will on the part of the executive is one of the most vital requirements. That, executive will not exert any undue influence on the judiciary. It will appoint competent and morally upright judges and will respect judicial independence, rule of law and democracy. In Tanzania there is hope in the new President who seems to be people-centred, a man of integrity and determined to fight corruption and impunity in all sectors including the judiciary. It was also observed that Rwanda has a strong political will to fight corruption.

Personal Integrity of each individual judge. This is the cornerstone of establishing and sustaining an independent and clean judiciary. Before a person is appointed as a judge, there should be a background check to ensure that only persons of high integrity are appointed. We were made aware that judges in Germany are highly ethical. One participating German judge shared a very inspiring personal experience on a Christmas present which he received and the diligence which he exercised in ascertaining the actual value of the present so as to satisfy himself that the present was not of a higher value than the permissible one. We were also informed of a judge during the Nazi regime who refused to sign a court order to take some disabled people to special camps, because he had learned that people who go to those camps disappeared.

Moral Uprightness in the Society. Participants articulated repeatedly the need to plant positive values and morals into our African societies in order to create good judges, good leaders who respect rule of law, democracy and independence of judiciary, and good lawyers together with citizens who do not tempt judicial officers with bribery. The existing deficiency of this requirement is what makes the colourful constitutional and other legal provisions ineffective. In emphasizing this requirement, one Kenyan participant opined that we have come to the limits of the law in that all the necessary good legal provisions have already been enacted. What is needed now is an emphasis on values and soul searching.

Improvement of Judicial Appointment Frameworks. Judicial appointment should not lie in the hands of one political actor especially the executive. It should actively involve other actors such as the civil society. The Kenyan new Constitution offers positive insights in that it provides for a more inclusive, transparent and participatory process. Another good lesson from Kenya is the public vetting of judicial officers initiative which took off in 2012. In Tanzania it has been recommended that in appointing the Chief Justice, Deputy Chief Justice and judges, the President should adhere to the names recommended by the Judicial Service Commission; and that after the Chief Justice and the Deputy Chief Justice have

been appointed, their names should be submitted to the Parliament of the United Republic of Tanzania for approval.

Strict Laws and Monitoring Initiatives. Laws have to be strict so as to ensure integrity. It was stated that German laws are very strict on corruption and that has largely assisted in maintaining judicial integrity. For example, a prosecutor, when invited to a party, is not allowed to accept a present which is worth more than USD 35. During Christmas judges are not allowed to accept presents unless they are of small value. The laws of Rwanda have zero tolerance on corruption as well. Parallel to that, there has to be in place strong bodies and institutions for monitoring the performance of the judiciary and disciplining judges who commit acts of misconduct. They include a strong Chief Justice, an effective Judicial Service Commission, peer review schemes and the Chief Ombudsman.

Impartiality. This requirement is intertwined with the requirement of integrity. A judge must be able to make decisions without an influence from the executive, private individuals *et cetera*. A judge must not expect to gain any benefits for delivering a decision. A judge must not be afraid of impacts of his/decision from the executive or due to public criticism. A judge should not receive guidance on how to make a decision and courts should not be regarded as executive agencies. An interesting scenario from Germany was shared, where a Minister who had been summoned to testify in court, called the judge in advance to inquire if he was obliged to comply with the summons. Surprisingly, on the date of the case, the judge disclosed to the parties about the Minister's inquiry. African countries should aim at building judicial systems of that kind, which do not fear or favour the executive in any way.

Adequate Remuneration. Judges should receive adequate remuneration and it should be well guaranteed by the law. Tanzanian and Kenyan judges are well remunerated. However, judicial officers in lower courts should also be well remunerated as most of corruption allegations arise from those courts.

Safety. Judges should be well protected, be kept free from intimidation, threats or fear of their life due to the nature of their work and the type of decisions which they make.

Role of Academics. Participants recommended that academics have a crucial role to play in ensuring judicial independence. The role includes writing papers, reviewing doubtful decisions so as to make the judiciary conscious, conducting research projects, engaging in conferences and educating the public.

Independence of Prosecutors was also emphasized as an indispensable requirement. It was argued that the judiciary will not be independent if the prosecutors are not independent due to the existing close interdependence between those two concepts.

Open Court Requirement. Proceedings should be conducted in open courts so as to ensure fair trial, transparency and impartiality. A good example on this aspect is Uganda which strictly observes this requirement.

Capacity Building. Judges should undergo regular training programmes so as to update their skills and maintain competence. Other requirements which were highlighted include respect for rule of law and democracy and observance of the principle of separation of powers.

2.3. Requirements for an Effective Judiciary

Sufficient Resources. Resources especially financial ones are a key requirement because they determine the ability of the judiciary to discharge its duties. Sufficient resources will enable the judiciary to employ an adequate number of judges and other personnel hence reducing backlog of cases and expediting delivery of justice. Not only that, but also, sufficient resources will enable the judiciary to establish more court premises thereby reaching more people; and afford sophisticated facilities such as premises, technological tools for recording proceedings, keeping records and conducting cases. Burundi has a sufficient number of judges, namely, 540 for the superior courts alone. In Kenya there are five permanent stations of the Court of Appeal and that has enhanced access to justice. The number of judges has increased, the backlog has been almost cleared and cases are finalized with better speed.

The new President of Tanzania, *John Joseph Pombe Magufuli*, seems to be determined to ensure that the Tanzanian judiciary becomes very effective. For example, on 4 of February 2016, he was informed by the judiciary about a sum of Tanzanian Shillings 12.3 Billion which had been allocated to the judiciary as part of its budget, but had not yet been actually handed to the judiciary. The President promised to ensure that the said funds are delivered to the judiciary without further delay, and only four days later he fulfilled his promise.

Specialisation. Participants encouraged specialization of courts in order to reduce backlog of cases and increase efficiency. In 2013, Kenya introduced specialized divisions of the High Court which include Family Division, Environmental Division, Employment and Labour Relations Division, Commercial Division *et cetera*. Those changes have largely enhanced efficiency of the Kenyan judiciary.

Technicalities. Courts have been called upon to do away with technicalities and instead focus on merits of cases. This is among the improvements that were carried out in Kenya in 2013.

Embracing ICT. In the contemporary digital world, African judiciaries should embrace the numerous benefits offered by Information and Communications Technology (ICT) in order to improve service delivery. That includes adoption of more modern methods for recording court proceedings so as to save time and significantly trim down backlog of cases. Use of ICT also extends to the use of modern methods for keeping records, e-filing and use of courtroom technology. Rwanda has already adopted the use of e-filing means for filing cases, and it was argued that the method has largely improved effectiveness of her judiciary.

Performance Management System. Participants have recommended presence of effective performance management systems which will monitor judicial performance of its duties. Rwanda already has a system of that nature. There is a time limit to determine cases and by virtue of that system, an ordinary case has to be finalized within six months.

Finally, there was a consensus among participants on the relevance of the exchange programme. They believed and recommended that the programme should continue in order to

strengthen the existing network between young lawyers and professionals, and to share more experiences on different typical issues concerning the judiciary and the dispensation of justice.