

Report of the Fourth Regional Conference of the Konrad-Adenauer-Foundation on the Requirements for an Independent and Effective Judiciary in Central and Eastern Africa (Nairobi, Kenya, 1 to 4 September 2016)

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A. Introduction

The conference was organized by the Rule of Law Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung (KAS) together with Professor *Hartmut Hamann*. The main theme was the current problems in criminal and civil proceedings in relation to requirements for an independent and effective judiciary in Burundi, the Democratic Republic of Congo (DRC), Kenya, Rwanda, Tanzania and Uganda.

B. Deliberations

Activities started with a warm welcoming speech by *Dr Arne Wulff*.¹ He began by briefly but precisely explaining the work of KAS in promoting the rule of law in, among other places, Sub-Saharan Africa. He further explained that the ultimate goal of KAS's initiative is to promote sustainable development and democracy. According to him, one of the means used by KAS to achieve that goal is by promoting networking among stakeholders and that is why this conference took place.

Dr Wulff added that KAS' strong conviction is that rule of law can only thrive in a place where there is a strong, independent and an impartial judiciary. He also stated that the problem in many Sub-Saharan countries is that many countries have written Constitutions but there are no effective laws for implementing those Constitutions, and also some governments do not respect those Constitutions. He concluded his opening speech by underlining the aim of the conference which is to bring together young legal researchers from Sub-Saharan countries.

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That opening speech was followed by remarks from *Professor Hamann*. He began by explaining that the conference is a continuation of a series of previous three conferences which took place in Rwanda, Dar es Salaam and Nairobi respectively. Furthermore, he stated that, in addition to what had been said by *Dr Wulff*, the conference intends to create a network of young lawyers who are committed to shaping their future through exchanging ideas, building up relationships, and getting inspiration from each other that can eventually address the challenge of independent and effective judiciary as well as build up a greater change.

The final opening remarks came from Honourable *Michael Derus*, the Deputy German Ambassador in Nairobi, Kenya. He started by underscoring the significance of the programme to participants, and added that networking is very important both in Africa and globally. Apart from that, *Hon. Derus* explained that basic needs people are not only food, shelter and clothing rather they also include a safe environment, and that kind of environment can be created by a properly working judiciary and adherence to the rule of law. He added that trade and Foreign Direct Investments (FDI) in Africa rely heavily on a working system of judiciary, and that it is the task of the current generation in Africa to make decisive efforts so as to assure investors of a secure environment for FDI and for development of the continent in general.

Ms Naomi Gichuki from Kenya gave the first presentation in which she talked about current issues regarding appointment and removal of judges as well as assignment of files at civil courts in Kenya. She asserted that Kenya offers a good learning experience to other African countries on judicial reforms due to the improvements in the Kenyan judiciary after 2007. In clarifying that statement, she said that before 2007 the Kenyan judiciary substantially lacked independence in that it was under so much control of the executive and so the people completely lost confidence in the judiciary. However, the new Constitution introduced significant reforms which greatly restored the independence of the Kenyan judiciary. The reforms include limiting the powers of the executive in judicial appointments, establishment of a strong Judicial Service Commission (JSC) as well as a more transparent and merit-based process of judicial appointments. Moreover, the task of removal of judges was vested on the JSC.

Presenter number two was *Ms Magdalena Sylister* and her topic was on schedule of responsibilities and assignment of files at civil courts in Tanzania. She began with an overview of the Tanzanian judicial structure for civil matters. That overview revealed a hierarchy of the judicial bodies, specialized courts for some cases and a classification of judicial officers together with their respective responsibilities.

Subsequently, that speaker discussed factors which determine schedule of responsibilities and assignment of files in Tanzanian civil courts. The first factor that was mentioned is legal requirements whereby principally responsibilities of judicial officers are laid out by various legal instruments. It was stated that according to those instruments, some judicial officers have been allocated reasonable responsibilities and so they perform those responsibilities effectively. On the other hand, there are judicial officers who have been allocated

too many responsibilities hence their effectiveness is undermined. The speaker further pointed out that the law directs that files in courts should be assigned by heads of courts such as the Chief Justice, judges in charge and magistrates in charge.

The second determining factor is the size of the workload. It was revealed that in courts with heavy workloads, judicial officers in those courts are assigned a big number of files to adjudicate and that compromises their effectiveness. On the other hand, a small workload means that distribution of files will go smoothly and the judicial officers will perform their work effectively. Size of the workforce was the third factor highlighted by *Ms Syllister*. She averred that Tanzania has made efforts to increase the number of judicial officers but in some courts the number is still very small. As a result the existing staff is usually over-worked with too many responsibilities and files.

The third speaker was *Mr Edrine Wanyama*, who discussed the schedule of responsibilities and assignment of files at civil courts in Uganda. He began by describing the Ugandan judicial system and stated that sometimes confusion arises on the demarcations between the jurisdiction of military courts on the one hand, and that of civil courts on the other hand. He added that High Court judges do the biggest work of administering justice because they are spread all over the country.

Another issue which was mentioned is that some functions such as those of the registrar and deputy registrar are not clearly defined. The speaker suggested that such powers should be well defined; that technology should be applied in handling files, that politicization of the judiciary should be eradicated and that anti-corruption measures should be tightened so as to fight corruption in the judiciary. He added that files should be determined within the time specified by the law, that the judiciary should promote access to information and lastly, that public interests should be given priority over personal interests.

The next presentation came from *Professor Adalbert Sango Mukalay* who talked about the schedule of responsibilities and the assignment of files at civil courts in the Democratic Republic of Congo (DRC). His presentation took off with a comment that Africa is the same in all corners because issues are very similar in many countries across the continent. He mentioned key issues troubling the judiciary namely lack of ethics, lack of conformity to legal texts in handling files in courts and lack of respect in observing deadlines in handling cases. He further argued that a university certificate is not enough rather judicial officers need a special school of law that will give them special skills and enable them to discharge their duties more effectively.

Moreover, *Prof. Mukalay* made a further elaboration on the question of legal texts where he said that the existing legal text as it is can make our societies a paradise, and that the DRC has very good legal texts but such texts are disrespected. He recommended that societies and states should respect legal texts, courts should show commitment to timelines and courts should show competence. Lastly, he averred that the splitting of courts and introduction of new courts in the DRC has not solved the problem so the main solution is to respect the letters of the law.

After those presentations the participants had a discussion on all the presented topics and more issues were put forward.

Ms Stephanie Nsomwe Musange's topic was on challenges and obstacles facing enforcement of civil judgments and arbitral awards in the DRC. Challenges mentioned by the speaker are institutional shortcomings which changes the way decisions are made, lack of training among judicial officers, incompetence and lack of understanding among the people. Other challenges include the change of address of judgment debtors which makes it difficult to trace those persons for enforcement purposes, poverty among the people, interference of the processes by politicians, the fact that banks refuse to cooperate and they provide false information, property being in names of different persons hence making enforcement difficult, together with the fact that property of the state is not seizable for purposes of execution. She added that in 2008 the legal regime was reformed hence some former public companies became private companies. As a result, it is now possible to enforce civil judgments against those companies. Furthermore, the speaker highlighted that the mechanism for enforcing arbitral awards exists and is effective.

Professor Stanislas Makoroka discussed challenges of commercial justice in Burundi with a specific focus on companies or businesses in conflicts, and his presentation was based on a research that he and his team had done. He argued that a strong legal regime on companies in conflicts is crucial as it breeds confidence and economic growth. He added that Burundi's legal framework is very modern but there is little application of that law, and that there is a need of data collection on the number of companies which are going under receivership.

Prof. Makoroka recommended capacity building for institutions, legal and institutional reforms, proper management of human resource that will improve service delivery, and availability of financial resources.

The next speaker was *Mr Aime-Parfait Niyonkuru*. His topic was on enforcement of civil judgments in Burundi with a specific focus on responsible law enforcement authorities, procedural obstacles and current issues. He launched his presentation by asserting that effective enforcement of judgments is an important ingredient for access to justice. He went further that in Burundi there is a diversity of enforcement agents and they include court bailiffs, judges and traditional mediators commonly known as *bashingantahe*. The speaker also mentioned problems involved in enforcement of judgments.

The last speaker for that day was *Mr Emmanuel Elau* from Uganda. He talked about the Ugandan perspective on responsible law enforcement authorities, procedural obstacles and current issues on enforcement of civil judgments. He began by explaining how the execution process takes place in Uganda and that the court is the most responsible body for enforcement of judgments. He went further that previously, execution used to be done by specific courts only but nowadays execution proceedings can be transferred to other courts. Moreover, he mentioned that Uganda has a special division of the High Court for enforcement of judgments and that the division speeds up enforcement processes although still there are backlogs of matters. He then listed other players involved in execution namely ad-

vocates, bailiffs, police, local leaders and prison officers. He explained roles of each player whereby he said that advocates identify modes of execution, bailiffs are the foot soldiers who go to the ground to effect enforcement orders, police accompany bailiffs to give them protection and local leaders help to identify property of judgment debtors.

Day two began with a presentation from *Mr Emanuel Richard Alfred*, whose topic was on current issues regarding appointment and removal of judges and assignment of files in criminal courts in Tanzania. He started by briefly explaining the geographical background of Tanzania, governing laws and court hierarchy. Thereafter, he discussed processes for removal and appointment of judges. Subsequently, the speaker talked about assignment of files where he mentioned that the Chief Justice assigns files to judges and he is the one who determines the workload of judges. He recommended that assignment of files should be done with impartiality, it should consider substantial justice, it should be done more efficiently so as to reduce backlog of cases and that court staff members should be increased.

The second speaker was *Mr Bernard Ntahiraja* and his topic was the current issues on independence of criminal judges in Burundi. He began by stating that a big problem lies with the independence of judges from the executive in the sense that the government regards the judges as powerless. He added that the policy of the Ministry of Justice for 2010 to 2015 says that judicial authority shall be recognized as a third authority, but in his opinion, it is improper to place the judiciary in that back position. The speaker also mentioned that the Burundian judiciary is struggling in terms of autonomy and resources.

Mr Nabil Mokaya Orina was the third presenter for day two and his topic was the current issues on the independence of criminal judges in Kenya. Issues that he mentioned include the fact that only Nairobi has a specialized division for criminal cases, while in other parts of Kenya there is no specialization. He further explained that there is a public vetting of judges upon appointment and that approach has restored public confidence in the judiciary. Moreover, the speaker pointed out that that appointment of judges is shielded from influence from the executive. He substantiated that with a recent scenario where the JSC forwarded names to the President for appointment but the President appointed only a half of the names. A petition was filed in court against that decision by the President and it was held that the president should appoint all the names forwarded to him by the JSC. Therefore, the President is now the rubberstamp of the JSC and that the state of affairs ensures independence of the judiciary.

The fourth presentation was on current issues concerning independence of criminal judges in the DRC, and it was done by *Mr Mayembe Mushonga*. According to him, the DRC government has made commendable efforts in improving remuneration of judicial officers, and there is a need to increase the number of magistrates. He opined that a supplementary budget will help to solve that shortage of magistrates. He further stated that the legal text says that a judge cannot be transferred randomly but in reality that provision is applied discriminatively. He also mentioned that that magistrates are subjected to various kinds of temptations and that there are incidents of manipulation of the judiciary by the state.

Mr Kilomba Adolphe was the next presenter and the title of his paper read “Transitional Justice and the Reinvention of an Independent Justice in the DRC: Need or Emergency?”. Among the matters that he highlighted include that the DRC has gone through a lot of armed conflicts in the past 25 years which have led to, among others, violation of human rights, corruption and lack of independence of the judiciary. He argued that the said background means that the DRC needs a transition so as to be a new country and that will be possible through a transitional justice system. He added that the country needs truth for victims, clemency, reparation, guarantee of non-repetition and effective prosecution. According to him, those are five guiding pillars and they will lead to independence of the judiciary.

In addition to the aforesaid, the speaker suggested creation of a local judiciary machinery which will prosecute violations of human rights and other offences, increase of judiciary’s budget, elimination of political influence on the judiciary, encouraging specialization of judges and creation of a special college for the judiciary. He acknowledged efforts of the government such as in increasing salaries of judicial officers but he argued that still there are so many improvements to be made. He concluded by stating that transitional justice in DRC is imperative, independence of judiciary of judiciary is important so as to ensure guarantees of non-repetition and that the question of transitional justice requires a holistic approach.

“Current issues on collaboration of investigative authorities in Kenya” was the sixth topic and it was presented by *Ms Hannah Wanderi*. She first explained that the main task of investigation is done by the office of Director of Criminal Investigation (DCI) but in addition to that there are other investigative authorities. Some of them include the authorities for investigation of people’s complaints against the police, wildlife cases, corruption cases and Interpol.

Subsequently, the speaker discussed challenges involved in the investigative work. The first challenge which she mentioned is that sometimes people obtain court orders to block investigation of crimes. The second challenge is intimidation of witnesses which makes them unwilling to testify in court. The third challenge is bribery which makes some investigators compromise or sabotage the investigation process. Other challenges include non-availability of case files in court, hasty investigations which lead to insufficient evidence, incompetence of investigators, lack of adequate investigation facilities, uncoordinated transfer of investigators across divisions and the fact that expertise is sometimes not matched with the work in place, lengthy investigations and absence of smooth processes between investigators and prosecutors.

That presentation was followed of another presentation by *Ms Jackline Asimwe* who discussed the same topic but from the Ugandan perspective. She began with an observation that poor investigation may lead to the acquittal of guilty persons and the conviction of innocent ones. The speaker then underscored the significance of collaboration among investigative authorities which includes putting pieces of evidence together, maximizing efficiency and ensuring complementarity.

Ms. Asimwe then mentioned challenges involved in the question of collaboration of Ugandan investigative units. The first challenge that she mentioned is the conflict of interest between investigative authorities and the Government such as when a top government officer is under investigation. The second challenge is incompetence of investigators. Other mentioned challenges included violation of human rights in the course of investigation, and withholding of information by some authorities. Finally, the speaker recommended that investigative authorities should acquire more knowledge on how to cooperate more successfully. She also recommended capacity building so as to improve competence of investigators, and more cooperation between investigative units through seminars.

Ms Nina Sokoine from Tanzania gave the last presentation and her topic was similar to those of *Ms Wanderi* and *Ms Asimwe* except that *Ms Sokoine* focused on the Tanzanian perspective. She stated that in Tanzania, the primary duty of criminal investigation is done by the police. She also explained the structure of the investigation department and added that sometimes the police is assisted by state attorneys mainly by giving advice and guidance. The collaboration between the police and state attorneys continues until the final determination of the case. Another investigative unit which was mentioned is that of the Prevention and Combating of Corruption Bureau (PCCB). After that, the speaker highlighted current issues involved. The first one is that collaboration is usually not smooth due to failure of police to comply with advice/instructions of state attorneys, as a result, many cases end up being dismissed. Other issues include lengthy investigations, monopolization of investigation work by police as well as conflicting views between police and prosecutors.

C. Closing

Workshops and intensive discussions marked the end of deliberations of the conference. *Prof. Hamann* gave closing remarks whereby he thanked all the participants for their participation and he expressed his hopes that deliberations would continue even after the conference. He then invited *Prof. Makoroka* and *Prof. Mukalay* to give their closing remarks as well. The professors profoundly thanked *Prof. Hamann* and KAS for making the conference possible, and they also thanked all participants for their positive roles in the conference. Additionally, *Prof. Makoroka* encouraged participants to get into hierarchy of powers in their countries so that they can influence greater change. With those thought-provoking remarks, the conference was officially closed.