



Webinar Report: Reimagining Africa's Judiciaries and the Legal Profession in the Context of Democratic Recession, Held on 26 February, 2021

By the African Court Coalition & Pan African Lawyers Union, with support from Open Society Foundations

On 26 February 2021, the Coalition for an Effective African Court on Human and Peoples' Rights (African Court Coalition) and the Pan-African Lawyers Union (PALU), hosted a convening on the theme: Reimagining Africa's Judiciaries and the Legal Profession in the Context of Democratic Recession. The Africa Regional Program (AfRO) of the Open Society Foundations and the Open Society Justice Initiative were partners in the organisation of the webinar.

The objective of the Webinar was to examine patterns of the rising violations of judicial independence as well as multi-faceted efforts to co-opt, neutralize or capture the judicial system in different countries around the continent, and explore a continental advocacy agenda to respond to the identified challenges.

240 persons registered for the webinar, 113 attended. The Webinar was attended by participants from all the major regions and legal traditions of Africa, including:

- The Minister of Justice of the Republic of Namibia, Ms. Yvonne Dausab;
- The two most recent Chief Justices of Kenya, Chief Justice Willy Mutunga and Chief Justice David Maraga;
- Former Chairperson of the African Commission on Human and Peoples' Rights, Maître Soyata Maiga (Mali)
- Former Vice-President of the International Criminal Court, HE, Sanji Monageng (Botswana)
- Former Judge of the African Court on Human and Peoples' Rights, Justice Bernard M. Ngoepe
- Nouhou Diallo, Deputy Registrar of the African Court on Human and Peoples' Rights;
- The African Judges and Jurists Forum (AJJF)
- Association of Judges of Senegal
- The leaderships of the East Africa Law Society (EALS); West African Bar Association (WABA); the Southern African Human Rights Defenders Network (SAHRDN)
- The Africa Regional Program of the International Commission of Jurists, ICJ-ARP; and
- The Justice Defenders Program of the American Bar Association (ABA)

In his keynote address, Judge Bernard M. Ngoepe, South Africa's Tax Ombudsman and former Vice-President of the African Court on Human and Peoples' Rights, acknowledged the rising and multi-faceted nature of attacks on judicial independence across the continent. Illustrating the nature of these attacks, he said that they included efforts by politicians to compromise standards of judicial integrity through poor appointments and preferments, disobedience of court orders,

financial incapacities, corruption, and, attacks on the reputation of individual judges and, in some cases, even inflicting physical harm on judges. Judge Ngoepe affirmed and underscored the importance of an independent legal profession as a complement to judicial independence. He also noted that in all instances where judicial independence is under attack or targeted for capture, the independent legal profession is also under attack. He called for concerted actions in response from the organized legal profession, civil society, academia, media and regional institutions and underscored the importance of the need for strategic litigation to develop what he called “continental jurisprudence” for the defense of judicial independence from these forces.

The webinar also received submissions from a diversity of countries reflecting the legal and political traditions of Africa, including Algeria, Benin Republic, Cameroon, Kenya, Mali, Namibia, Nigeria, Senegal, South Africa, Tanzania, Tunisia, Uganda, and Zimbabwe. Among the highlights, the major themes that emerged from the deliberations included:

- **Institutional Safeguards and judicial appointments:** The quality of appointments to the judiciary is important in guaranteeing the judiciary against capture and corruption. In many countries, ruling politicians are now invested in compromising the judiciary by ensuring the appointment of unqualified candidates or candidates of poor quality.
- **Attacks on judges:** [In DRC](#) in 2020, a judge who was conducting a high profile anti-corruption trial was killed in an attack by unidentified persons. Faceless persons were hired to [attack](#) the integrity of a former Chief Justice of Kenya perceived to have been independent. Politicians seem to authorize or undertake indiscriminate attacks on the judiciary because “when judges are threatened because of their work, good candidates refuse to put themselves forward for judicial elevation or office”, ultimately lowering the bar for entry of bad candidates.
- **Discipline, preferment and tenure:** Security of judicial tenure from arbitrary executive interference and reprisal needs to be defended. In many countries, this is now under political attack. In Nigeria, ahead of the 2019 general election, the president arbitrarily and unlawfully [fired](#) the Chief Justice and barred him from holding public office. A cowed and intimidated judiciary found itself unwilling and too politically exposed to be able to assert its own independence. Ahead of the July 2020 Presidential re-run in Malawi, the judiciary successfully resisted similar steps from former President Arthur Peter Mutharika. In Kenya, high political forces appear invested in having the last say on who succeeds to the vacant position of Chief Justice. South Africa’s [President Ramaphosa](#) has recently spoken out against attacks on judges and to defend judicial independence as has his Namibian counterpart, [Hage Geingob](#). Such high level political support for judges and solidarity spaces need to be encouraged.

- **Election Petitions and Corruption:** In many countries, courts now determine high political questions including the abrogation of term limits; the eligibility of term limited presidents to run again; and election disputes. In Kenya and Malawi, courts have struck down rigged presidential elections. In Ghana, Nigeria, and Uganda, courts have previously decided election petitions very narrow margins, in some cases under [cloud of allegations](#) of judicial intimidation or judicial corruption or both. In [Mali](#), a military coup overthrew the government last year after it used the Constitutional Court to rob the opposition of seats won in a parliamentary election, triggering a popular uprising.
- **Financial autonomy:** Around the continent, many governments have resisted institutional safeguards for [financial autonomy](#) of the judiciary, [subordinating](#) the funding of the courts to the executive or civil service, as a deliberate means to subvert judicial independence.
- **Implementation of and disobedience of court orders:** In many countries, the executive by itself or through the instrumentality of an Attorney-General or law enforcement agencies, undermines picks and chooses which decisions to obey, thereby undermining the authority, credibility and independence of the judiciary.
- **Unpacking judicial capture:** [Judicial capture](#) happens when the safeguards for judicial independence are compromised. Judges and judiciaries come under pressure from diverse forces interested in capturing the judiciary, including state institutions, politicians, armed elements, CSOs, international actors. It is important in any given case to ensure that allegations of judicial capture are properly documented and backed up as much as possible by evidence of both motives and processes.
- **Defence of independent legal profession:** To ensure that the independent legal profession does not have the attention span to defend judicial independence, political, commercial and investment actors, among others, often invest energy to compromise, attack or co-opt it. Increasingly, counter-terrorism, anti-money laundering compliance, cyber-crimes and contempt of court processes are used to intimidate independent-minded lawyers. In [Tanzania](#), a leading lawyer was disbarred because of her tweets. In [Sierra Leone](#), the Supreme Court summarily convicted another leading lawyer for criticizing a decision of the court on social media. Separately, external actors including politicians, security agencies, and business invest vast sums of money in elections for the leadership of bar associations in order to capture the independent Bar.

- **Regional jurisprudence:** Regional courts and tribunals in Africa, including the African Court on Human and Peoples' Rights; the African Commission on Human and Peoples' Rights; as well as the courts of Justice of East African Community and of ECOWAS are increasingly pronouncing themselves on aspects of judicial independence. This needs to be deepened and amplified.

- **Strategic litigation & advocacy:** Strategic litigation and advocacy are needed now, more than ever before to advance and defend judicial independence and the independent legal profession from attacks and capture. Some issues may be more suitable to litigation than others. Such issues include:
 - (a) Appointments, tenure and discipline
 - (b) Financial autonomy
 - (c) Implementation of judgments
 - (d) Defence of the independent legal profession

A digital recording of the webinar is available [here](#). The South Africa Broadcasting Corporation (SABC TV), broadcasted a contemporaneous emission on the webinar, available [here](#).