CIVIL SOCIETY AND JUDICIAL INDEPENDENCE IN AFRICA

The following memorandum provides a brief overview of the role that civil society organizations (CSOs) can play in promoting and preserving judicial independence. The goal of this memo is to provide background information that can facilitate a discussion among leaders of African and U.S. civil society on how civil society can strengthen judicial independence and what the United States government and African leaders can do to support civil society’s work on this critical issue.

Introduction


An independent judiciary is generally understood to be one which is not under the influence of the other branches of government or subject to manipulation or undue influence by private or partisan interests. Civil society plays a vital role in calling for and monitoring the independence of the judiciary in any national or regional system. In many ways, a nation’s civil society and judiciary enjoy a symbiotic relationship wherein civil society plays a vital role in calling for and monitoring the independence of the judiciary and the independent judiciary plays a vital role in maintaining the space and rights of CSOs and their constituencies.

In the remainder of this memorandum, we describe various threats to judicial independence and challenges faced by NGOs seeking to promote judicial independence. Further, the memo describes the different ways that CSOs can support judicial independence in the face of these challenges. Finally, this memo proffers questions to facilitate a discussion about how CSOs can best promote judicial independence.

Civil society organizations in Africa, like CSOs throughout the world, face myriad challenges when working to strengthen judicial independence. It is important to recognize at the outset that, within the field of democracy and rule of law promotion, there is perhaps no endeavor as challenging as promoting judicial independence. Thus, for example, CSOs in some countries have helped effect electoral reforms and free and fair elections within a few years, while promoting judicial independence is typically a generational or multi-generational undertaking. What are the main impediments to judicial independence in Africa and beyond? One of the first challenges is simply defining and measuring judicial independence. Are things becoming

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1 http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx
measurably better, worse, or fairly static? There are several tools available to CSOs that can help measure independence, but they require a commitment of time and resources to properly implement.4

The challenges to judicial independence in Africa are not unique to the region. These challenges include, but are not limited to: (1) an overreaching executive branch (e.g., head of state or minister of justice influencing cases that are politically-charged or that involve cronies and/or their financial interests); (2) a politicized judicial appointment process, or a process that simply does not result in the appointment of qualified judges; (3) lack of basic resources (e.g., access to all relevant laws) that impinge upon the ability of judges to adequately adjudicate cases; (4) lack of security for judges and court personnel, especially in connection with the issuance of unpopular decisions; (5) lack of objective advancement criteria for judges; (6) lack of an impartial system for case assignment, resulting in strategic assignment of cases to certain judges (including by chief judges) in order to affect the likely outcome of a case; (7) lack of independence in how resources are budgeted and spent; (8) unfair or punitive removal and discipline of judges; (9) corruption, including acceptance of bribes or favors by judges; and (10) lack of transparency, including lack of publication of judicial decisions.

Just as judges face challenges in promoting judicial independence, so, too, do CSOs. CSOs often face retaliation – including threats, incarceration and violence directed at members or their families – for conducting their activities. For example, judges active in an independent judicial association that presses for reforms or fair judicial salaries risk being singled out for harsh treatment. Similarly, CSOs that are involved in monitoring sensitive trials are particularly vulnerable to intimidation, with governments often creating pretexts for investigating such CSOs (e.g., claiming a CSO failed to properly account for receipt of foreign funds in violation of tax laws or NGO laws). In fact, in many countries, repressive NGO laws have made it harder for CSOs to operate freely or at all, including CSOs that serve a judicial watchdog role. Unfortunately, it is precisely in those countries in which CSOs are most repressed that courts typically are unable to protect their ability to advocate for judicial independence.

The Role of Civil Society in Judicial Independence

Strengthening and Enforcing Legal Frameworks

The independence of the judiciary is generally guaranteed by the State and enshrined in a country’s constitution and other laws. CSOs, particularly independent bar and judicial associations, can play an important role in reviewing a country’s legal framework and can advocate for legal reforms necessary to protect judicial independence. Several tools exist to evaluate judicial independence, such as the American Bar Association Rule of Law Initiative’s Judicial Reform Index, which can be used to assess the correlation between a country’s legal and policy framework on the one hand, and international best practices relating to judicial independence on the other.

CSOs can play a watchdog role where proposed or actual changes to constitutions or laws imperil the independence of the judiciary. In 2002, for example, the Swazi CSO Lawyers for Human Rights successfully challenged a proclamation declaring that judicial power vested in the King at the African Commission on Human and Peoples’ Rights. Further, in 2011 the Council for the Advancement of the South African Constitution challenged the constitutionality of a bill that would usurp Parliament’s power to extend the term

of a Chief Justice, and instead bestow such powers upon the president in contravention of the constitution. Judicial associations can also play an important role. For example, the Judicial Officers Association of South Africa’s emphasizes the need for “a strong, independent and cohesive judiciary.” Similarly, the Tanganyika Law Society of Tanzania has a Legal Sector Reform Program which, in conjunction with the Danish, Swedish, and Canadian governments, the World Bank and UNDP, implements projects in support of judicial efficiency, access, and independence, as well as legal framework-building.  

CSOs have also advocated for judiciaries to more vigorously enforce legislation that promotes good governance and transparency. For example, the Carter Center’s Access to Information program works with CSO coalitions to promote enforcement of national freedom of information legislation, while simultaneously training executive agencies, government ombudsmen, and appellate courts about their enforcement roles and obligations. Similarly, the Environmental Law Institute develops training curricula for judges on environmental protection legislation to help them resist external pressure from government officials and industry groups.

*Vetting, Selection and Discipline of Judges*

Judicial independence is strengthened where the appointment and selection process for judges is transparent and potential judges are vetted based on objective criteria, such as the passage of an exam, performance in law school, and reputation in the legal community. A rigorous and transparent selection process reduces the likelihood that a judge’s candidacy is based on political ties or personal attributes (political party membership, ethnicity, religion, etc.). Judicial independence is also furthered where the discipline or removal of judges occurs through a transparent process, governed by objective criteria. CSOs can play a role in vetting judicial nominees and monitoring judicial elections to ensure that the process is transparent and to support efforts to select qualified and independent judges. For example, Section27, a South African CSO, voiced its concerns to the Judicial Service Commission about Justice Mogoeng’s suitability for appointment as Chief Justice of South Africa. In the U.S., the American Bar Association releases public evaluations of all proposed high-level judicial appointees, and this information is used by U.S. lawmakers when considering whether to confirm a president’s judicial nominees. Similarly, the Nigerian Bar Association’s judiciary committee evaluates judicial appointments and monitors the performance of judges.

In Guatemala, the U.S. Government and the European Union have invested significantly in the development of so-called “high-risk courts” to adjudicate sensitive cases concerning organized crime and human rights abuses. While the courts have faced recent setbacks, they have succeeded in protecting judges working on high-profile cases and helped combat impunity in Guatemala.

In addition, the U.S. and other members of the international have contributed to the establishment of an independent UN Commission Against Impunity in Guatemala that has helped expose influence-peddling in the judicial selection process.

*Advocating for Adequate Financial Support for the Judiciary*

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5 Numerous donor agencies outside the U.S. are active in the area of judicial strengthening. For instance, DANIDA (Denmark), SIDA (Sweden), JICA (Japan), NORAD (Norway), the Austrian Development Cooperation, and the Finland Department for International Cooperation train judges in judicial independence and support CSOs in Bangladesh, Bhutan and Syria. The Konrad-Adenauer Foundation, which is largely funded by the German government, is an example of a private organization that lobbies for judicial independence and supports a more democratic legal framework.
In order to maintain a level of financial independence, judiciaries should have a meaningful opportunity to participate in the budget-making process for courts and, once a budget is allocated, should have control over its own budget and how such funds are expended. Judicial salaries should also be adequate to attract and retain qualified judges, enabling them to support their families without being forced to seek other sources of income. CSOs, in particular judicial and bar associations, can play a vital role in advocating for sufficient allocation of resources to the judiciary, including through outreach to the public about the importance of the judiciary.

*Increasing Transparency and Free Access to Law*

Ensuring that judicial proceedings are open to the public and that judicial decisions are published increases accountability for courtroom practices and helps to ensure decisions are not the product of undue influence by senior judges, other government officials or private interests. Many CSOs have successfully worked to increase the transparency of judicial proceedings and decisions. For example, members of the Free Access to Law Movement (FALM)\(^6\) have organized and made publicly available the decisions of the high and appellate courts of dozens of countries, often at no cost to the public. CSOs play a critical role in monitoring trials, particularly where there is concern over the fairness of the proceedings. For example, the South African NGO Shukumisa monitors trials with a particular emphasis on ensuring that victims of sexual violence receive a fair trial. In addition, the U.S. and other governments regularly observe trials, and privately raise concerns about the fairness of trials with government counterparts and, in certain cases, issue public statements or reports about such concerns, including the highly influential U.S. State Department annual Country Reports on Human Rights Practices.

International *pro bono* lawyers can also play a helpful role by training observers on fair trial standards, observing trials themselves, and issuing reports together with local CSOs. For example, the American Bar Association Center for Human Rights (ABA CHR) and the International Bar Association Human Rights Institute deploy *pro bono* lawyers to monitor trials and issue independent reports. In one such case, a Bulgarian judge was removed from the bench in apparent retaliation for her criticism of political interference in judicial affairs. The ABA’s observer attended an appeals court hearing of her case and issued a report which concluded that the removal of the judge violated Article 6 of the European Convention on Human Rights, which guarantees the independence of the judiciary. The report generated local press and stirred public dialogue about the case. As a result of these efforts, the judge was ultimately reinstated.

Because effective reporting of trial proceedings is also vital for judicial independence, media monitoring groups such as Media Monitoring Africa also do important work, calling for more extensive efforts to train journalists on accurately reporting court proceedings.

*Training Judges and Building Judicial Institutions*

Many CSOs provide training for judges on judicial ethics and on practical skills necessary for an independent judiciary, such as opinion writing and case management. Combining training with institution building can solidify and magnify its impact. The American Bar Association Rule of Law Initiative (“ABA ROLI”) works alongside African CSOs, judiciaries, and judges associations on these issues, and, for example, was

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\(^6\) FALM members include the African Legal Information Institute, the Southern African Legal Information Institute, the Liberia Legal Information Institute, the Sierra Leone Legal Institute, and JurisAfrica.
instrumental in the creation of Liberia’s judicial institute, and the opening of Zambia’s first judicial center of excellence. With support from the U.S. State Department, Bureau of Democracy, Rights and Labor, ABA ROLI is also launching a regional judicial training initiative in Central Africa that will work to improve the independence and impartiality of magistrates and court personnel in Burundi, the Democratic Republic of Congo, the Republic of Congo, and Rwanda.

Public Education about Judicial Independence and the Rule of Law

CSOs such as the African Centre for Shared Development Capacity Building and Legal Integrity Education in Uganda can contribute to the public’s understanding of the importance of an independent judiciary through a variety of media, including radio programs, public service announcements on television and radio, opinion pieces in newspapers, etc., as well as facilitating legal clinics and workshops. The more diffuse the support for an independent judiciary, the better. For example, journalists and human rights activist groups that are not primarily comprised of members of the legal profession can be especially compelling when they engage in public education initiatives on the importance of judicial independence.

Supporting At-Risk Judges

CSOs can play an important role in protecting judges from retaliation for unpopular decisions, for example through public education and awareness campaigns that inform the public about the reasoning behind controversial decisions (for example, election-related court cases). For example the Center for Judicial Independence was established by the American Judicature Society in response to increased efforts to remove from the bench judges who had issued unpopular rulings. Strong judicial associations also provide a measure of solidarity for judges and can lobby the government to ensure the security of judges. In addition, ABA CHR relies upon a network of pro bono law firms, lawyers, and law school clinics to coordinate pro bono legal support to African lawyers and judges who are facing retaliation for their efforts to promote the rule of law and independence of the judiciary.

Questions for Discussion

1. What are some examples of CSO activity that have played a constructive role in promoting judicial independence? Are there negative examples, that is, examples where CSOs have deliberately or inadvertently undermined judicial independence?
2. Are there examples where you feel CSOs should have spoken out about a genuine threat to the judiciary’s independence but failed to do so? How might this silence or inaction be prevented in the future?
3. What steps can be made in the next 6-12 months to increase the likelihood that there will be vocal opposition to threats to judicial independence? Do you see value in having several CSOs join forces to address particular threats to judicial independence? Do you see value in alerting international organizations about threats to judicial independence, or should this be handled solely by stakeholders within the country at issue?
4. What can the United States government and African leaders do to support civil society’s efforts to promote greater judicial independence?