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# ACHIEVING THE 2030 AGENDA AND AGENDA 2063: THE RULE OF LAW AS A DRIVER OF AFRICA'S SUSTAINABLE DEVELOPMENT

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## Dispensing justice: building effective, accountable and inclusive institutions BACKGROUND PAPER

### OBJECTIVE

This paper explores some of the challenges and opportunities confronting justice institutions in fulfilling their constitutional roles of adjudicating disputes, interpreting laws and ensuring transparency and accountability. The objective is to move the debate beyond a consideration of the challenges to a discussion of lessons learned from the policies, practices and practical measures introduced in Africa and other parts of the world to strengthen the independence, integrity and effectiveness of justice institutions.

### CONTEXT

African governments recognize that effective, accountable and inclusive justice institutions are essential for building and maintaining democracy, sustainable development, peace and security. Sustainable Development Goal (SDG) 16 of the UN 2030 Agenda for Sustainable Development as well as Aspiration 3 and Goal 11 and 12 of the AU Agenda 2063 underline the importance of the rule of law and access to justice.

SDG16 contains strong and far-reaching commitments to promote access to justice for all and to build effective, accountable and inclusive institutions at all levels. The Goal aims to reduce corruption and bribery and ensure responsive, inclusive, participatory and representative decision-making at all levels.

Through Aspiration 3 and Goals 11 and 12, AU member countries commit to entrench democratic values, practices, universal principles of human rights, justice and the rule of law and to put capable institutions and transformative leadership in place.

When drafting the Constitutive Act of the AU in 2000, State Parties recognized that the promotion and protection of human and peoples' rights, consolidated democratic institutions and culture, as well as good governance and the rule of law are indispensable preconditions for peace, security and stability and thus for the implementation of national, regional or continental development and integration agendas.

The African Charter on Human and Peoples Rights (ACHPR) provides in article 26 that State Parties shall have the duty to guarantee judicial independence. Thus the fundamental democratic pillar of separation of powers, especially between the executive and the judiciary, has been recognized by all AU member parties as a fundamental and unequivocal precondition for the enjoyment of human and peoples' rights in each and every country of the continent.

Though progress is being made in many countries in Africa to reform the justice sector and develop and safeguard independent and accountable justice institutions, there remain some major

challenges on how to move forward and safeguard independence, integrity and effectiveness of justice institutions.

## DISCUSSION

The establishment and consolidation of courts that can independently and impartially deliver procedurally fair justice, ensure equality before the law, legal certainty and non-arbitrariness is a priority objective of good governance. Inherent in this objective is the supremacy of the law, and accountability to the law of all persons and entities, including the state itself.

Most justice institutions in Africa operate with minimal technical capacities and insufficient budgetary allocations, which pose a major challenge to their effectiveness as well as autonomy. Much of the international assistance for judicial reform in Africa has traditionally focused on strengthening the capacity, knowledge and efficiency of justice sector institutions to fulfil their core functions.

Capacity problems of the judiciary are certainly very real and large. Lack of capacity and inefficient procedures has an impact across the justice chain, from criminal to commercial disputes. It is not unusual for litigants or defendants to wait for years before their case is heard. The complexity, length of time and costs of litigation shut out most poor people from turning to the courts for recourse, or, if they do, affects the quality of justice they receive. It is not surprising therefore to find that the vast majority of Africa's population seek justice through informal systems. The specific difficulties that women confront in accessing justice is discussed in the background paper, *Equality and empowerment through access to justice: views on gender*.

The World Bank *Doing Business Report* shows that the efficiency of courts in commercial cases vary greatly across Africa. Enforcing a contract through the courts, for example, can take less than 10 months in Rwanda but more than two years in Benin. The cost of litigation ranges from 14% of the value of the claim in Tanzania to more than 80% in Burkina Faso and Zimbabwe. The judicial impediments to doing business in Africa is covered further in the background paper, *Investing in the Rule of Law for Economic Development*.

Maintaining the independence and integrity of the judiciary is a considerable challenge. Be it to varying degrees, the lack of political will and respect for due process of law by state institutions, including the judiciary itself, are still considered common across Africa. Though the separation of powers is properly enshrined in the constitutions of most African states, the reality is often different, and predominance of the executive branch of government over the judiciary is a disconcerting feature in many parts of Africa. While oversight institutions and parliaments struggle to effectively curb the excessive influence of the executive powers in the justice sector, civil society organizations and the media are increasingly becoming vocal in their criticism and exposure of the shortcomings.

Reports and indexes on governance in Africa show a mixed picture of progress, reflecting the diversity and different levels of institutional development among the various countries. The World Justice Project Rule of Law Index 2015, four African states are ranked among the top 40 out of 102 surveyed states, with Botswana ranking first among all surveyed African states, ahead of some European states.<sup>1</sup> On the other hand, Transparency International's Corruption Perception Index

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<sup>1</sup> COUNTRY/SCORE/GLOBAL RANKING - Botswana/0.64/31, Ghana/0.60/34, South Africa/0.58/36, Senegal/0.57/38, Malawi/0.50/61, Tanzania/0.47/72, Zambia/0.47/73, Cote d'Ivoire/0.47/76, Burkina Faso/0.47/78, Madagascar/0.45/82, Liberia/0.45/83, Kenya/0.45/84, Sierra Leone/0.44/87, Ethiopia/0.42/91, Uganda/0.41/95, Nigeria/0.41/96, Cameroon/0.40/97, Zimbabwe/0.37/100, <http://worldjusticeproject.org/rule-of-law-index>

shows, consistent with previous surveys and strong variations from country to country, that people who come into contact with the police and the courts are the most likely to pay a bribe.<sup>2</sup>

According to the UNECA African Governance Report, the WB World Wide Governance Indicators and the Ibrahim Index of African Governance, improvements have continued in a number of countries, but progress in enhancing governance in Africa has overall stalled since 2011. The slow-down is largely due to deteriorations in safety and security and reduced sustainable economic opportunity in countries affected by war and civil unrest.

Building (or re-building the justice sector) is essential for successful peace-building as it helps to restore people's trust in the State<sup>3</sup>. An interesting example of a judicial contribution restoring peace and democracy has been the successful efforts made by the Kenyan judiciary on the resolution of electoral disputes.<sup>4</sup> There is also innovation underway to bring more transparency to the justice sector through greater use of technology.

Fostering public trust and confidence will require the systems of checks and balances to be strengthened so that abuses and arbitrariness in the justice sector can be countered effectively and the independence and impartiality of the courts preserved. Parliaments and other state institutions, civil society and the media all have a role to play in that process.

## GUIDING QUESTIONS

1. What should be done to fulfil the commitments of AU Agenda 2063 and the UN 2030 Agenda to make justice institutions more inclusive and effective?
2. How can the barriers to strengthening the independence and integrity of the judiciary in Africa be overcome? What lessons can be learned about key success factors from good practice in some African countries?
3. How can the specific challenges of institution-building in post-conflict societies in Africa best be addressed? What is the scope of regional or sub-regional support to countries in fragile, transitional and post-conflict situations?
4. What is the role of civil society and media in ensuring the independence and integrity of the judiciary?

## BACKGROUND DOCUMENTS

- Ibrahim Index of African Governance 2015: <http://mo.ibrahim.foundation/iiag/>
- UNECA - African Governance Report: <http://www.uneca.org/publications/african-governance-report-ii>
- UNODC Bangalore Principles: [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)
- Transparency International Corruption Perception Index: <http://www.transparency.org/cpi2015>

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<sup>2</sup> <http://www.transparency.org/cpi2015>

<sup>3</sup> World Bank, World Development Report 2011, Post-conflict recovery and Peacebuilding, [http://web.worldbank.org/archive/website01306/web/pdf/wdr%20background%20paper\\_hoeffler%20et%20al\\_0.pdf](http://web.worldbank.org/archive/website01306/web/pdf/wdr%20background%20paper_hoeffler%20et%20al_0.pdf)

<sup>4</sup> IDLO, Lessons Learned Brief: Judicial Resolution of Electoral Disputes in Kenya.

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<http://info.worldbank.org/governance/wgi/index.aspx#home>
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<http://www.idlo.int/publications/perspectives-involving-non-state-and-customary-actors-justice-and-security-reform>

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