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14 June

Special Edition: IAJ-ARG Conference



African Judges in Action

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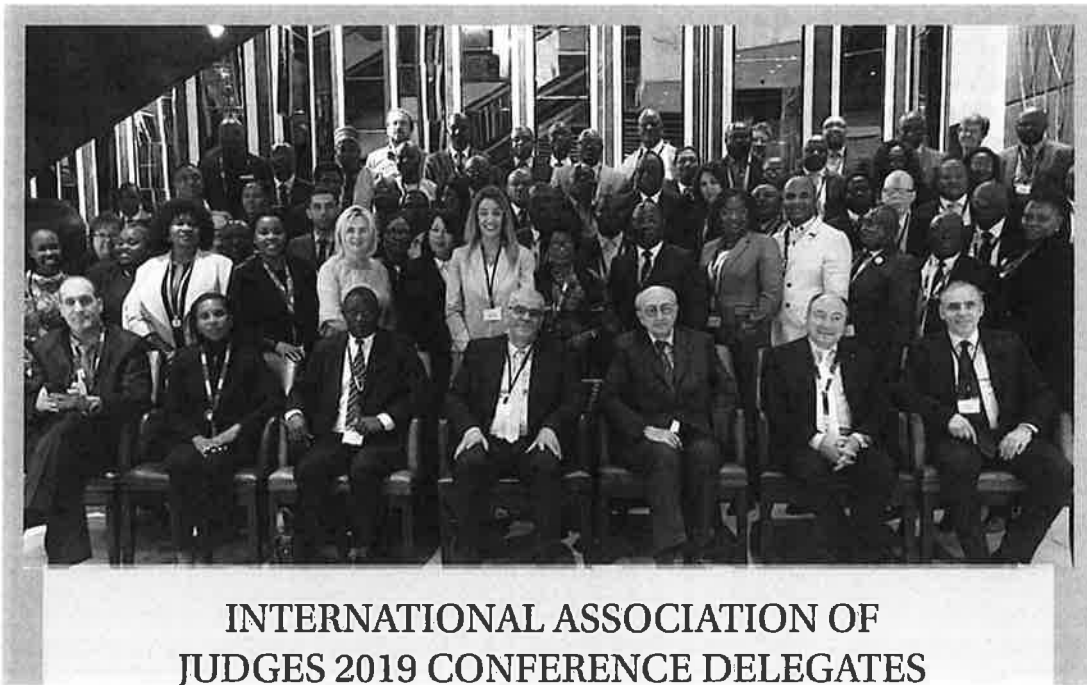
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**INTERNATIONAL ASSOCIATION OF
JUDGES 2019 CONFERENCE DELEGATES**

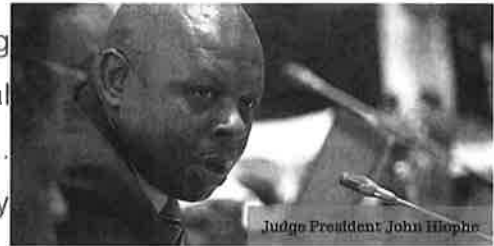
Editorial: IAJ-ARG Conference, 2-6 June 2019

The International Association of Judges' Africa bloc conference in Cape Town earlier this month was a landmark event in many ways, highlighting the various and crucial needs of judicial officers across Africa. At the Judicial Institute for Africa we recognized the role that this conference could play and so we were determined to offer what help we could to support the initiative. And indeed, many of the issues which Jifa has been concerned about, were raised and flagged by participants as crucial. Some of these relate to judicial officers themselves, some concern governments and a third category deals with issues where outside intervention and help is needed.

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Top judge pleads for protection of judicial officers

The safety of judicial officers was a recurring theme during the conference of the International Association of Judicial Officers' Africa region. These dangers - even in court - were starkly illustrated just as the conference was ending: a



fight broke out between members of rival gangs in the corridors of the Johannesburg magistrates court. Members of the public tried to hide or run away, and eye-witnesses said only the quick intervention of police prevented serious injury. In his welcome speech at the opening dinner of the conference, the Judge President of the Western Cape, host province of the event, raised the safety issue for what would be the first - though not the last - time during the five-day event.

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Judicial officers urged to join associations

One of the strong themes of the International Association of Judicial Officers' Africa region conference was that judicial officers should join professional associations. This call came after decades in which judicial leaders have



strongly advised against such associations, and at a time when they are still regarded with some suspicion in top judicial circles. Throughout the conference,

speakers stressed the importance of such associations for judicial officers, not just in relation to conditions of employment, but also in helping maintain the rule of law.

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Standing ovation after acting Chief Justice tells of her judiciary's plight

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conference, to hear the particular challenges faced by judiciary and the justice system of each country. Several outlined serious difficulties, but the plight of the judiciary in Lesotho touched delegates particularly deeply, and had people talking right to the end of the five-day gathering.

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in Africa at the University of Pretoria. In a challenging address to the International Association of Judges' Africa region conference in Cape Town, Fombad urged judges to take note that if these issues were not properly dealt with, the "reverse winds" of authoritarianism and the decline of good governance and constitutionalism, caused by politicians clinging to power, might prevail.

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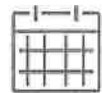
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About Carmel Rickard

Carmel Rickard has written about the law, human rights, justice, judgements and judicial matters for many years. A former legal editor of The Sunday Times, South Africa's biggest newspaper, she is now a columnist on legal issues.

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MAGISTRATES ARE JUDICIAL OFFICERS, NOT CIVIL SERVANTS - JOASA

MAGISTRATES ARE JUDICIAL OFFICERS, NOT CIVIL SERVANTS - JOASA

JUN
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By Carmel Rickard (/users/carmel-rickard)

The proper place of magistrates within a constitutional state came under the spotlight again at the closing ceremonies of the International Association of Judges' African region conference, held in Cape Town. It had been a recurring theme throughout the conference, with delegates from a number of countries complaining that magistrates were often treated as civil servants, and their judicial independence ignored or undermined by government.

In the view of conference host organisation, the Judicial Officers Association of South Africa (Joasa), under the South African constitution, magistrates are not civil servants but members of the judicial arm of government, and Joasa president, Cape Town's chief magistrate Daniel Thulare, spoke with some passion on this issue at the final event, a mayoral dinner in the civic centre. Broadening the reach of the concept of a single judiciary, Thulare said that everyone who held judicial office "in every part of Africa, in every layer of our court and court administration systems", had a special mandate. This was to establish the "judicial authority" of each country, "(asserting) the judiciary as an arm of the state."

"We are not a government department and we have a generational duty to reject (being) treated like one. We are part of the triad of the state, made up of the executive, the legislature and the judiciary," he said.

It was against this background that "we have to unlearn ... the structural flaw of having courts and judicial officers, magistrates, as not members of the judiciaries in our countries."

"We have to learn and appreciate Africa's innovative voice that these are judicial officers and belong in the (judicial arm of state) and nowhere else in the machinery of the states of Africa."

During the conference "Africa told us" that judicial officers were not an "elitist club of fat cats", he said. "The judiciary in Africa is not cold, aloof and unjustifiably removed from the poverty, inequality and a backlog of resources and services for the majority".

"The struggles for redress and relief from poverty (and) inequality ... are not that of the executive and the legislature alone."

When Joasa and its equivalent bodies elsewhere in Africa argued for a proper budget for infrastructure and for resources, it was not simply for "personal convenience". It was to ensure that when anyone, in any of the countries of Africa, approached a courthouse for services, the state, through its judicial arm, could respond appropriately. "It is to help us uphold the rule of law." Similarly, "we do not assert our independence for our own sake. It is necessary for the rule of law."

Thulare, who is a special United Nations rapporteur for Africa on the independence of the judiciary, added that at the September 2019 meeting of the International Association of Judges in Kazakhstan, the issues raised during the conference by delegates from more than 20 African countries, would be reported on. These issues could then be taken further by the IAJ if there was agreement to do so.

The question of the place of the magistracy in the judicial system was raised repeatedly during the conference by delegates from other countries as well, among them Lesotho whose situation was portrayed as particularly dire. The message from many countries was that the legal position was clear, with the magistracy included in the judicial system as judicial officers, but that the government often treated magistrates as though they were "mere" civil servants, thus compromising their independence.



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"TIMOROUS" JUDGES VS "BOLD SPIRITS"

JUN
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By Carmel Rickard (/users/carmel-rickard)

The positive role that judges could play in Africa has been hampered by the increasing politicization of the judiciary, judicial corruption, lack of resources and judicial conservatism, according to Professor Charles Fombad of the Institute for International and Comparative Law in Africa at the University of Pretoria. In a challenging address to the International Association of Judges' Africa region conference in Cape Town, Fombad urged judges to take note that if these issues were not properly dealt with, the "reverse winds" of authoritarianism and the decline of good governance and constitutionalism, caused by politicians clinging to power, might prevail.

Read the paper by Professor Charles Fombad

Unusual for the subject of constitutionalism to cause discomfort, but Professor Charles Fombad's paper at the conference of the International Association of Judges' Africa bloc seemed to make some participants distinctly uneasy.

Originally from Cameroon, and now a staffer at the University of Pretoria's law school, Fombad did not mince his words. This expert on constitutionalism and judicial independence in Africa said judges across this continent had not always played their full role as constitutional guardians, protectors of human rights and impartial enforcers of the rule of law. This was partly due to "judicial timidity and the abdication of responsibility by judges deferring and pandering to the perceived or actual wishes of the executive".

It was one of the most challenging addresses at the conference, forcing judicial officers from around the continent to re-examine the mindset that they bring to bear when they considered cases that could have a political impact.

Fombad said that despite an era of widespread constitutional change in Africa, politics across the continent had become more volatile because of the increasing tendency of politicians to hang on to power. Politicians have resorted to manipulation of the appointment system, the deliberate appointment of executive-minded judges and even to intimidating the judiciary.

The problem of judicial corruption also remained a "potent problem". Though judges were "reasonably well paid", with salaries and pensions well above that of the average civil servant, the institution was generally considered to be the most corrupt institution in Africa after the police. "The quality of justice has suffered where it becomes cheaper to buy a judge than hire a lawyer."

While many jurisdictions suffered from a serious lack of resources, something outside the control of judicial officers, there was another factor for which judges themselves were responsible (apart from corruption), namely judicial conservatism, he said.

Many African judges were not alive to the new progressive constitutional spirit or have not shown this spirit in their decisions. The new context included rejection of dictatorship and sensitivity to issues of human rights, a field in which many judges did not show an understanding of the changed thinking in the rest of the world.

As African leaders intensified their fight to cling to power, judges would find themselves under increasing pressure to decide cases in a way that deferred to the executive. But the bench had to "reflect contemporary desires and aspirations of the citizenry and the progressive spirit of post-1990 constitutional reforms."

This required judges who were willing to act as the last defence against authoritarianism and to join the global judicial dialogue about how to promote respect for the rule of law and good governance.

In Fombad's view, judicial independence was compromised by "enthusiastic abdication of judicial responsibilities" - one of his most scathing and challenging descriptions. African judges should no longer be "timorous souls" as in the past. Instead they must be "bold spirits" adopting a more principled and rights-sensitive approach, using their constitutions as living documents and ensuring that their countries did not breach international commitments, even where these had been signed but not domesticated. They should also join the "global judicial dialogue" and engage with relevant foreign decisions and thinking.



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TOP JUDGE PLEADS FOR PROTECTION OF JUDICIAL OFFICERS

By Carmel Rickard

The safety of judicial officers was a recurring theme during the conference of the International Association of Judicial Officers' Africa region. These dangers - even in court - were starkly illustrated just as the conference was ending: a fight broke out between members of rival gangs in the corridors of the Johannesburg magistrates court. Members of the public tried to hide or run away, and eye-witnesses said only the quick intervention of police prevented serious injury. In his welcome speech at the opening dinner of the conference, the Judge President of the Western Cape, host province of the event, raised the safety issue for what would be the first - though not the last - time during the five-day event.



Judge President of the Western Cape high court, Judge John Hlophe, has made a plea for greater protection and security of judicial officers. Speaking at the opening function of the Africa region of the International Association of Judges (IAJ) conference in Cape Town, he said judges and magistrates were no less vulnerable than politicians. An inadequate or complete lack of security for judicial officers in court and at home was "a huge area of concern" and there had been "numerous incidents" where the lives of judicial officers had been threatened. He also listed magistrates who had been killed, wounded and threatened in the line of duty, as well as incidents that had taken place in court as a result of inadequate security, including the recent lockdown of the high court when judgment was passed by a judicial officer whose life had been threatened.

The warning proved timely: just days later, a major battle between rival gangs broke out in corridors of the Johannesburg magistrates court as two opposing gang leaders were standing trial for murder in separate courts.

The conference, hosted by the Judicial Officers Association of South Africa (Joasa), was attended by judicial officers (judges and magistrates) from 23 African countries. Their focus was on safeguarding the independence and conditions of service of judicial officers. A special concern within those topics was the need to ensure security of tenure and to maintain conditions of service and constitutionally-mandated protection for the selection and appointment of judicial officers.

During the opening dinner, Judge Hlophe and Daniel Thulare, the president of Joasa, made clear their concern that South Africa should have a "single judiciary". Judge Hlophe said the institutional independence of the SA judiciary – as opposed to the magistracy – was clear: judges were independent in that they fell under the Office of the Chief Justice, created relatively recently to take judges out of the government's Department of Justice. Magistrates, on the other hand, still fell under the Department of Justice, creating what Judge Hlophe called an administrative "nightmare", with two sets of judicial officers, one under the Chief Justice and the other under the Department of Justice and he hoped "all judicial officers" would soon fall under the Chief Justice.

As for judicial independence and working conditions in the broader sense, he urged that security of judicial officers and their support staff should be addressed without delay. Some courts were "over-resourced" compared to others, so that each member of the Constitutional Court had three law researchers whereas the 35 judges of the high court in the Western Cape shared just five researchers between them.

Judges' pay would also have an impact on transformation, he warned. To attract good lawyers to the bench, "judges must be well paid", but as long as the budget came from central government politicians would continue to get the "lion's share", while "we get the hyena's share", he quipped.

By contrast, political analyst Somadoda Fikeni warned against judicial officers being "tempted", saying they should not be "obsessed" by material things. "If every day you are thinking (about) money and material things that is crass materialism and opens you to temptation."

In a pre-conference interview, Tulare said the Africa region conference report would be presented at the IAJ meeting in Kazakhstan during September, after which programmes for lobbying on the various issues identified across all the continents would be drawn up. He anticipated that one of the issues that would emerge during this week was the difficult situation in Lesotho where magistrates are on strike, the chief justice has been suspended and the highest court is not sitting.

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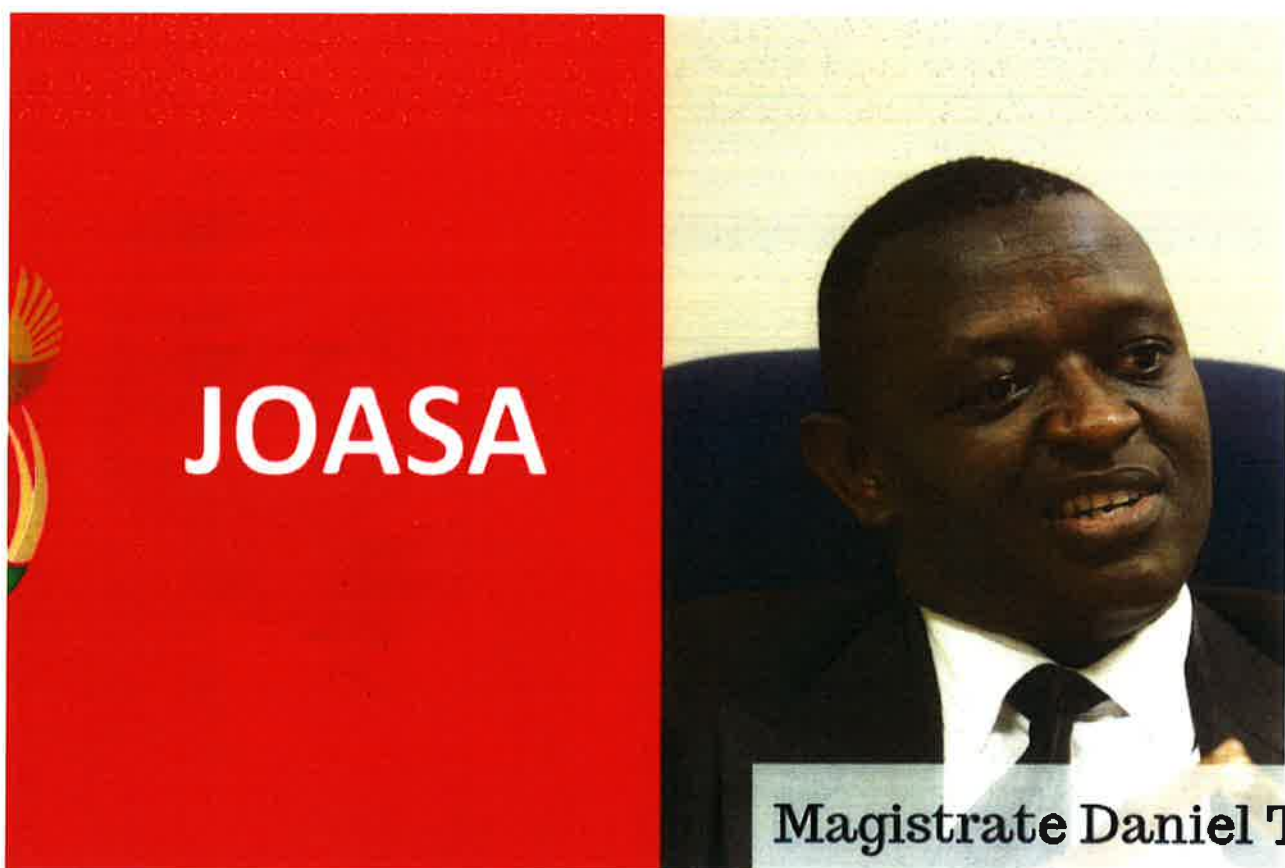
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JUDICIAL OFFICERS URGED TO JOIN ASSOCIATIONS

By Carmel Rickard

One of the strong themes of the International Association of Judicial Officers' Africa region conference was that judicial officers should join professional associations. This call came after decades in which judicial leaders have strongly advised against such associations, and at a time when they are still regarded with some suspicion in top judicial circles. Throughout the conference, speakers stressed the importance of such associations for judicial officers, not just in relation to conditions of employment, but also in helping maintain the rule of law.



JUN
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STANDING OVATION AFTER ACTING CHIEF JUSTICE TELLS OF HER JUDICIARY'S PLIGHT

By Carmel Rickard

One of the most crucial sessions of the conference called by the International Association of Judges' Africa region dealt with reports by the countries represented at the event. This provided an opportunity for all delegates, and top officials of the International Association of Judges who attended the conference, to hear the particular challenges faced by judiciary and the justice system of each country. Several outlined serious difficulties, but the plight of the judiciary in Lesotho touched delegates particularly deeply, and had people talking right to the end of the five-day gathering.



The acting Chief Justice of Lesotho, Maseforo Mahase, was given a standing ovation after she presented a report to the Africa region of the International Association of Judges, meeting in Cape Town in early June 2019, on the difficulties experienced by her colleagues in that country.

The media was barred from the entire country report session, but even from beyond the closed doors there was no mistaking the applause – enthusiastic and sympathetic – that her presentation won from the audience of judicial officers from across Africa. Her report was still being discussed by participants even at the end of the conference.

Though delegates from many countries spoke of problems they experienced, conditions for judicial officers in Lesotho emerged as the worst of all. Inadequate salaries and inadequate resourcing of the entire judiciary topped the list of problems, along with the ambiguous position of magistrates who were sometimes treated as members of an independent judiciary and sometimes as civil servants, depending on which suited government at the time. Two delegates from Lesotho travelled to Cape Town by bus, for example, as there were no funds for flights.

Asked later about the most significant moments of the conference, the president of the International Association of Judges, Judge Tony Pagone of Australia, said, “The report that we heard from Lesotho was very moving. The CJ talked about sending (judicial officers) into parts of the country where they were exposed to real physical risk.” Some had been killed by litigants. The government said it did not have the resources to provide for their safety and yet it was essential to do so. “Judges do their work for the benefit of others and of the country, not for themselves.”

It was a very sad story, he said. “Nothing harms a legal system more than to have a judiciary that is so vulnerable.” When judges were vulnerable this undermined confidence and independence. He said he was struck by the determination of the delegation from Lesotho, some of whom had come all the way by bus to participate.

In a later interview, two magistrates from Lesotho explained the background to the recent six-week strike by all the country’s magistrates, mentioned by the acting Chief Justice during her report.

Peete Molapo, president of the Judicial Officers Association of Lesotho (JOALE) and Masoopho Kao, secretary of the organization, said their members felt “hopeless” because the promises so often made by government had not materialized.

It is not legal for magistrates in Lesotho to strike; however, during the six weeks of their protest, members of JOALE reported for work every day but then did not carry out their duties.

Their members called off the strike after the acting Chief Justice organized a meeting with the Minister of Justice. “But ultimately the decision whether to help us lies with those who have the purse, and she (the CJ) does not.” They said a series of meetings over the last 10 years had only resulted in promises that were never met.

To illustrate the problem of under-resourcing, they quoted the R97m budget allocated for justice in the current financial year. More than R90m was for salaries and related benefits. A further R3m went on renting premises for the Master of the High Court. The remaining R4m had to be divided between the court of appeal, the high court and the various levels of magistrates courts.

"Some remoter courts are getting just R500 per quarter for maintenance. That's the cost of five bags of cement and then the money is all used up." Many of these remote courts are housed in dilapidated buildings that urgently need to be fixed but the funds allocated to them was completely inadequate for the required repairs.

The JOALE officials said the courts had no stationery or ink and as a result could no longer even make copies of summonses. "We are not even able to print judgments."

Justice Mahase who, as acting CJ, has been assisting the magistrates to resolve their difficulties, said she was expecting the relevant minister to come and explain to her and to the magistrates, what will be done about the allowances that had been promised but that had never materialised.

"If I were the government," she said, "I would rush on this issue because I would fear that if they strike again they will not end it in a hurry."

Explaining the impact of the budget allocation, she said that a recent tornado had blown the entire roof off a local court, but that there was no money to fix it. At another local court, in the rural area of Phamong, the principle judicial officer had been given a dilapidated house to live in, but the house had burnt down and she herself had also been badly burned and needed regular medical checks. "Now we have to house her in a horse stable, converted into a room for her. That is all there is."

"You cannot maintain the high court if you run out of essential things like paper for copying documents (and) you cannot pay a R4m debt to a service supplier."

Justice Mahase said that in serious cases such as murder, the presiding judge should sit with assessors. "But we (judges) have been contemplating – maybe we should (suggest) that the law be amended so we do not have to sit with assessors anymore because we just don't have any money to pay them for their services."

She contrasted the situation of judicial officers with that of the army. "The army budget is so much higher than for any other sector. Each army officer, for example, has several brand-new cars", while judicial officers who needed to travel to remote areas to hear cases struggled without suitable vehicles.

In her view, "they want to tame us by starving us of money and resources." Every time there was an election, politicians told voters that if they were elected, they would solve the problems of the courts – that there were too few in the remote areas, for example. But after the election "nothing happens". "We are like a campaign platform for successive governments. There is no political will from government to assist the judiciary, but they do not tell us the reasons."

Justice Mahase, who was formerly a magistrate before being appointed a judge, added, "Things have always been difficult. But I am not going to give up."

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EDITORIAL: IAJ-ARG CONFERENCE 2019

By Carmel Rickard

The International Association of Judges' Africa bloc conference in Cape Town earlier this month was a landmark event in many ways, highlighting the various and crucial needs of judicial officers across Africa. At the Judicial Institute for Africa we recognized the role that this conference could play and so we were determined to offer what help we could to support the initiative. And indeed, many of the issues which Jifa has been concerned about, were raised and flagged by participants as crucial. Some of these relate to judicial officers themselves, some concern governments and a third category deals with issues where outside intervention and help is needed.

Perhaps the most challenging session for delegates concerned the "conservatism" of too many judges in Africa, despite the potentially liberating effect of new constitutions. "Judicial timidity" and an "enthusiastic abdication of judicial responsibilities" in the face of a determined executive meant that the rule of law, constitutionalism and democracy itself were all at risk. In our view, training of judicial officers is crucial to address this problem: in a safe and supportive environment, judges need to reflect on what their judicial independence actually means.

Related to this, networking by judicial officers is also important so that judges and magistrates feel professionally and personally supported in their work, particularly in challenging interactions with the executive.

The conference also highlighted the need for improved resourcing of judicial officers in many countries: with salaries sometimes barely higher than petrol attendants, no books or even facilities for copying judgments, magistrates and judges cannot be expected to produce quality decisions that deal fairly with the litigants before them.

Delegates also told shocking tales of the dangers and discomfort they and their colleagues experienced as a regular part of their work. Judicial officers killed in the line of duty, working under appalling conditions, having to sleep in court buildings to stay safe, forced to live in a stable. All of these problems need to be taken up with governments by lobby groups, because judicial officers cannot be expected to uphold the law when their own lives are needlessly put in danger.

Outside monitoring and pressure is also crucial when governments try to undermine judicial independence or "starve" judicial officers into submission by withholding funds.

The conference also illustrated the need for countries to have a single judiciary. Not only is this foreshadowed, even required, under most of new constitutions, but it is also essential to protect the magistracy and ensure they are properly funded and respected. If magistrates and judges are seen as part of one judicial arm of government, judicial officers in the lower courts will inevitably gain from the support and protection of the higher courts whose members often have a more powerful voice.

And most of all, perhaps, the conference illustrated why judicial associations are a good idea, and why judicial officers should seriously consider joining such bodies. Who better to take up the cause of judges and magistrates when government treats them badly, undermines their independence and threatens the rule of law?

All papers from the conference can be found on the IAJ conference website (<http://iaj-arg-capetown2019.org/>) [1]

The following articles have been written about the conference

Top judge pleads for protection of judicial officers (<https://africanlii.org/article/20190612/top-judge-pleads-protection-judicial-officers>) [2]

Judicial officers urged to join associations (<https://africanlii.org/article/20190612/judicial-officers-urged-join-associations>) [3]

Standing ovation after acting Chief Justice tells of her judiciary's plight (<https://africanlii.org/article/20190614/standing-ovation-after-acting-chief-justice-tells-her-judiciarys-plight>) [4]

"Timorous" judges vs "bold spirits" (<https://africanlii.org/article/20190613/timorous-judges-vs-bold-spirits>) [5]

Magistrates are judicial officers, not civil servants - Joasa (<https://africanlii.org/article/20190614/magistrates-are-judicial-officers-not-civil-servants-joasa>) [6]

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Links

[1] <http://iaj-arg-capetown2019.org/>

[2] <https://africanlii.org/article/20190612/top-judge-pleads-protection-judicial-officers>

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[6] <https://africanlii.org/article/20190614/magistrates-are-judicial-officers-not-civil-servants-joasa>