



**UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL**

Distr.: **LIMITED**

GPAD/TP/06/3/Rev 1
2 November 2007

Original: **ENGLISH**

ECONOMIC COMMISSION FOR AFRICA

**Ad Hoc Experts Group Meeting on
Deepening Judiciary's Effectiveness in Combating Corruption**

Addis Ababa, Ethiopia
19-21 November 2007

**DEEPENING THE JUDICIARY'S EFFECTIVENESS IN COMBATING
CORRUPTION**

WORKING DRAFT (NOT TO BE QUOTED)

Disclaimer: The views expressed in this paper are those of the author and do not necessarily represent the views of the United Nations Economic Commission for Africa.

Table of Contents

List of Acronyms	ii
Abstract.....	iii
Background.....	iii
1. Introduction.....	1
2. Defining Corruption.....	2
2.1 Types of Corruption.....	2
2.2 Factors contributing to corruption	3
2.3 Correlation between perception of, and actual corruption.....	3
2.4 Causes and effects of corruption.....	4
2.5 Effects of corruption	5
2.6 Patronage	5
3. The Judiciary: Rule of Law, Judicial Integrity	7
3.1 Rule of Law	7
3.2 Judicial Integrity	8
3.3 Corruption in the judiciary.....	9
3.4 Factors that influence corruption in the judiciary	11
4. Challenges and systemic weakness	13
5. Recommendations to Tackle corruption in the judiciary.....	15
5.1 Judicial accountability:	17
6. Conclusion	18
7. Plan of Action	20
8. Bibliography	24

List of Acronyms

ADF	African Development Forum
AfDB.....	African Development Bank
AGR	Africa Governance Report
APRM	African Peer Review Mechanism
AU.....	African Union
CSOs	Civil Society Organizations
ECA	Economic Commission for Africa
EU	European Union
GPAD	Governance and Public Administration Division
MDGs	Millennium Development Goals
NEPAD.....	New Partnership for Africa's Development
NGO.....	Non-Governmental Organization
PRSP	Poverty Reduction Strategy Paper
REC.....	Regional Economic Community
SROs.....	Sub-Regional Offices (ECA)
UN.....	United Nations
UNDP	United Nations Development Program
UNECA.....	United Nations Economic Commission for Africa

Abstract

This paper seeks to analyze the role of the judiciary (in selected African countries) in combating corruption, and, through best practices, provide recommendations on how to strengthen its crucial role as the custodian of basic rights and freedoms of citizens. The paper is in compliance with several United Nations (UN) General Assembly mandates, including the UN Convention against Corruption as well as the African Union's (AU) Convention on Preventing and Combating Corruption.

The purpose of the study is to highlight measures that will enhance the judiciary's effectiveness in dealing with corruption. It is also intended to facilitate and promote international cooperation and technical assistance in the prevention of and the fight against corruption.

The methodology used in this paper is desktop research method. This was the chosen option, given the scope of the work and the time constraint that the research presented itself. Case studies based on experiences from participants after the meeting and based on their presentations from different African regions, have provided recommendations for governments, private sector and civil society to combat corruption within the judiciary and through the judiciary.

Background

The Governance and Public Administration Division of the ECA commissioned this paper as part of the wider mandate of the ECA to help promote good governance towards achieving the Millennium Development Goals.

It is also in response to the various United Nations General Assembly mandates, including the UN Convention against Corruption¹, which calls on States to fight against corruption, and enhance the judiciary's role in enforcing compliance and respect for the rule of law.

The paper is based on the Economic Commission for Africa (ECA) research-based work on governance that has amply demonstrated that corruption remains the single most-important obstacle to sustained development and the creation of an enabling environment for good governance in Africa.² In addition, during the Fourth African Development Forum on governance,³ participants agreed on, *inter alia*, the importance of strengthening the capacity of the judiciary to combat corruption. It was also recognized that the effectiveness of the judiciary on combating corruption would depend in a number of factors, namely: independence in both finance and constitutional mandates. However, it was also acknowledged that corruption remains one of the daunting challenges, hence the need for short and long term interventions to reverse the negative trend caused by corruption.⁴

¹ Resolution 58/4 of October 2003. Article 11 of the UN Convention against Corruption provides for measures relating to the judiciary and prosecution services in combating corruption.

² African Governance Report – AGR 2005, Economic Commission for Africa, Addis Ababa, Ethiopia

³ African Development Forum IV

⁴ Ibid

1. Introduction

1. Africa has strived to bring about development and good governance to her people. The New Partnership for Africa's Development (NEPAD) has identified democracy, human rights, and good governance (amongst other issues) as major challenges for moving the continent forward. Good governance is a pre-condition for Africa to meet the Millennium Development Goals (MDGs).⁵ The new leadership in Africa is now committed to systems and institutions that are accountable, transparent and responsive to people's needs.

2. Corruption is recognized as a major impediment to sustained development and the creation of an enabling environment for good governance in Africa.⁶ It has permeated every aspect of governance including the judicial systems. The New Partnership for Africa's Development (NEPAD) is the African articulation of sound economic and corporate governance; political governance; peace and security as necessary conditions for is the African articulation of sound economic and corporate governance; political governance; peace and security as necessary conditions for development in Africa.⁷ It calls for the setting up of coordinated mechanisms to combat corruption in Africa.⁸ Emerging structures and processes such as the African Peer Review Mechanisms (APRM) are designed and intended to take the continent further to improve governance systems through the African Union (AU) mechanisms.

3. The importance of an effective and efficient judicial system to the good governance and development of any nation cannot be understated. It is instrumental to good governance. As one of the pillars of governance, the custodian of the rule of law, the upholder of justice, and people's rights, it is essential that the judiciary should be seen to be, and, in reality, be above board in carrying out all its functions. An incorrupt, independent and impartial judiciary is vital to the integrity of a government.

4. At the fourth African Development Forum on Governance⁹ the importance of strengthening the capacity of the judiciary to combat corruption was emphasized. The judiciary protects individual rights; preserve security of persons and their properties. Disputes are resolved fairly and in a transparent fashion that encourages fair competition and economic growth. The role of the judiciary is imperative to countering both private and public corruption, reducing political manipulation and increasing public confidence in the integrity of the government.

5. "Governance" is defined as the exercise of political power to manage a nation's affairs.¹⁰ "Good" governance therefore may be termed as the discharge of government responsibilities to the governed in an efficient, effective, transparent and accountable manner. The judiciary as an arm of government has the responsibility to uphold the rule of law, justice and the peoples' rights, which are fundamental to good governance. For the judiciary to be effective in combating corruption, it must be clearly established that the judiciary is incorrupt and seen to be so in the discharge of its duties. This however, is not the case in Africa.

⁵ See Foreword by K.Y. Amoako, Executive Secretary, (UNECA) Fourth African Development Forum (ADF IV), Governance for a progressing Africa, 11-15 October 2004, and Addis Ababa, Ethiopia. Visit -- www.un.org/millennium/sg/report/summ.htm. These goals are: Eradication of extreme poverty and hunger; Achieve universal primary education; Promote gender equality and empower women; Reduce child mortality; Improve maternal health; Combat HIV/AIDS, malaria and other diseases; Ensure environmental sustainability; and Develop a global partnership for development.

⁶ African Governance Report 2005, Economic Commission for Africa

⁷ Decision of the 37th Ordinary session of the Assembly of Heads of State and Government of the OAU held in Lusaka, Zambia, in July 2001 as well as the Declaration adopted by the first session of the Assembly of the Union held in Durban, South Africa in July 2002, relating to NEPAD; See also the African Union Convention on Preventing and Combating Corruption, 2003

⁸ Ibid

⁹ African Development Forum IV, October 2004

¹⁰ UNDP, Governance for Sustainable Human Development, A UNDP Policy Document, UNDP, New York, January 1997

6. The term “Judiciary” for the purposes of this paper, will be taken holistically to include all aspects of the justice system like prosecutors, courts management systems, the Bar, the Police, traditional rulers, court brokers and court assessors.

2. Defining Corruption

7. Corruption is an elusive concept because what may be corruption in one society may not be seen to be so in another society. Nonetheless, corruption is everywhere in all societies. It is a global problem that affects virtually all countries. The only difference is the level and degree of tolerance a country has towards it. It is a general notion describing any organized, interdependent system in which part of the system is either not performing duties it was originally intended to, or performing them in an improper way, to the detriment of the system's original purpose. Corruption is generally designed to gain a personal financial or political benefit by public officials or officers in exchange for not pursuing, or selectively pursuing, a public duty.

8. Corruption has been given different meanings to according to different interest groups. There is no single, comprehensive, universally accepted definition of corruption. However, corruption has been generally understood to refer to as an abuse of office for personal or private gains. It is the perversion or destruction of integrity in the discharge of public duty by bribery or favor. It is this context that Max Weber observed that in the modern state, public affairs are no longer considered a source of income to be exploited for rents.¹¹ In the negotiations of the UN Convention against Corruption, Langseth informs that it was felt that to provide definition to the term “corruption” would not serve any useful purpose instead; the Convention provided a list of specific types or acts of corruption for that purpose.¹²

2.1 Types of Corruption

9. There are two broad types of corruption: ‘Grand’ and ‘petty’ corruption. ‘Grand’ corruption has the characteristics of involving highly placed public officials and the amount of money involved is staggering and has enormous dent on the economy. Typical examples are found in big contracts especially in military purchases where single source contracts are secured. Mungiu-Pippidi writes that “predatory elites” who, in the process of generating prosperity for themselves, produce a degree of poverty otherwise unwarranted in the society.¹³ ‘Petty’ corruption is always the kind of corruption involving less amount of money or gift. It is a way of supplementing low salaries paid to public employees including judicial officers.¹⁴

10. In the UN Convention against Corruption ‘active’ and ‘passive’ bribery are mentioned. ‘Active’ corruption refers to the offering or paying of a bribe. This is a completed commission of the offence as provided in many of the anti-corruption legislations. While ‘passive’ corruption is the receiving of a bribe. ‘Passive’ corruption would normally involve cases where bribery has been offered but not accepted or is still being negotiated.

11. Judicial corruption may then be defined as “acts or omissions that constitute the use of public authority for the private benefit of judges, court personnel, and other justice sector personnel that

¹¹ Max Weber, *Economy and Society III*, New York, Bedminster, 1969, p. 159

¹² Peter Langseth, *Discussing the UN Convention against Corruption*, UNCDO, Proceedings Document on the Strengthening Judicial Integrity and Capacity in Indonesia, Kendari, October 7-8, 2004

¹³ Alina Mungiu-Pippidi, *Corruption: Diagnosis and treatment*, *Journal of Democracy* Volume 17, Number 3 July 2006, National Endowment for Democracy and The Johns Hopkins University Press.

¹⁴ *ibid*

results in the improper and unfair delivery of judicial decisions. Such acts include bribery, extortion, intimidation, influence pedaling and the abuse of court procedures for personal gain¹⁵ and any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

2.2 Factors contributing to corruption

12. The AGR¹⁶ shows that the increasing level of corruption in Africa is due to three main factors: First the level of institutional weakness in many African countries which makes it possible for political leaders and public servant to embezzle national resources and abuse their power without being checked.

Second, the deteriorating economic conditions and living standards of public servants in many countries, which make corruption a viable means of social livelihood.

The third reason has to do with the role of external actors. Foreign companies and private interests often capitalize on weak institutional mechanisms and level of poverty in Africa to bribe state officials in order to gain undue advantage or secure political privileges in state policies.¹⁷

As regards the judiciary, there are two types of corruption that affects it: political interference in the judicial processes by either the executive or legislative branches of government and bribery.¹⁸

2.3 Correlation between perception of, and actual corruption

13. Combating corruption is not in itself an end; rather, it is instrumental to the broader goal of a more effective, fair, and efficient judiciary, which in turn is associated with greater economic development.¹⁹

14. There is a correlation between the perception of, and actual corruption in the context of governance. In Ghana for example, the AGR documented that 62-87% of households had paid bribes to government agencies, the police and immigration service topping the list of bribe-takers.²⁰ The Report further notes that corruption is perceived to rank very high in the list of problems in Africa. The World Bank Study in Ethiopia found that corruption is the most important problem that households face after poverty. The situation is similar in other African countries, with corruption ranked among the top three problems behind poverty and unemployment. In Cameroon, Morocco, Nigeria and Tanzania more than 25% of the households surveyed said corruption was a serious problem.²¹

15. The perception of corruption is very high among court users and the challenge here is how to differentiate the correlation between perceptions of corruption and the actual corruption experienced. In the case of South Africa, perceptions are much higher than actual experiences.²² In South Africa the constitution requires the government to act accountably and transparently and this has raised the threshold of accountability and transparency. In addition the Administrative Justice Act requires public officials to follow procedures that are fair and impartial and to explain their

¹⁵ Mary Noel Pepys, a US based senior attorney specializing in the rule of law, International legal and judicial Reform.

¹⁶ African Governance Report 2005, op. cit; p. 148

¹⁷ Ibid

¹⁸ Executive Summary, Global Corruption Report by Transparency International.

¹⁹ Jeremy Pope, 'Elements of a successful Anti-corruption Strategy 'Curbing Corruption Toward a Model for Building National Integrity', Edited by Rick Stapenhurst and Sahr J. Kpundeh, p. 97

²⁰ African Governance Report 2005, op. cit; p. 148

²¹ ibid

²² ibid

decisions. The Access to Information Act also provides easy access to information from government departments and agencies to the public under specific rules and procedures.²³

2.4 Causes and effects of corruption

16. The causes of corruption are various. In Africa ‘survival’ is a contributory factor to corruption because of abject poverty. The need for an individual to make ends meet, to respond to extended family pressure are factors that make an individual think of violating established norms that lead eventually to seeking bribes.

17. In Nigeria, a case study on the Governance and Corruption Survey²⁴ conducted by a consortium of Nigerian institutions focusing on citizens, government officials, and enterprise owners gave their opinions on and experiences with government service delivery and corruption. The Study concluded that corruption has permeated all aspects of the Nigerian society and causes of corruption are attributed to weak government institutions and an economic environment characterized by widespread poverty and unemployment as principle determinants of corruption.²⁵

18. The Study also found that “public” officials often put their own welfare before that of the Nigerian people, due to greed and because salaries are inadequate to support a family and often aren’t paid on schedule. Government agencies are seen as self-serving, poorly managed, unaccountable and not living up to their responsibility of protecting citizens and providing services to them”²⁶ This finding is true in all African countries and reflect the realities on the ground. The Study identified further that a major area of corruption, is the manner in which judicial officials are appointed.²⁷

19. Contributory to corrupt practices is the tendency in Africa for the rich to be idolized irrespective of the fact that such wealth was illicitly or corruptly obtained. Also the fact the government honors 419-ners who looted the government coffers, with awards but does not recognize those who have lived honorably”²⁸ Mungiu-Pippidi put it in a more succinctly, that there is an important qualitative difference between a state bribed by a firm to provide a tax break and a state whose executives are also its main businesspeople and gradually transform public assets into their private property. Those who are supposed to guard against corruption are themselves the guardians of the corrupt system. In turn, the system is also likely to be organized hierarchically, much like a criminal group, with those at the bottom collecting bribes that feed the upper levels of government.²⁹

20. The Nigerian study further found that most public officials are morally bankrupt, because their primary motivation is to make money for themselves rather than serving their country. The sentiment is founded on the belief that “Nigeria is a rich country with abundant oil and other natural resources; this wealth is not benefiting the people.”³⁰

²³ Ibid, p. 147

²⁴ Policy Considerations: Forums on the Nigeria Governance and Corruption Survey Study, Summary Report, 2001

²⁵ ibid

²⁶ ibid

²⁷ ibid

²⁸ Ibid

²⁹ African Governance Report 2005, op. cit.

³⁰ Ibid

2.5 Effects of corruption

21. Corruption dents judicial power and authority, to the extent that the other branches of government are confident that their misdeeds will never be punished, hence the attendant loss of legitimacy for the justice system is generally a death knell for the rule of law.

22. Corruption raises transaction cost and “triggers the bidding competition for judicial services that escalates prices for those who participate.”³¹ At the same time it slows down or otherwise deteriorates for those who cannot afford to participate. As a result, the pace of litigation is driven by corruption rather than legal process. The consequences are to circumvent the rules for money and judiciary public confidence become threatened and undermines the rule of law and integrity of justice system itself.

23. Corruption as robbery, fraud and other form of crimes against property and people undermine the investment climate and stifle entrepreneurial activity. In this respect, the judiciary could directly contribute to economic development by fighting corruption. It could play an important role in the development of a nation, which is to set standards of conduct and promote essential values of the nation.³² Corruption undermines the rule of law, lowers investment and retards economic growth, misallocates talents, lowers quality of infrastructure and of public service, quality of legal system is reduced and confidence of its users is compromised.

24. Corruption harms the investment climate through its ability to distort policymaking, undermining the credibility of government, act as an added cost in doing business, and divert resources from public coffers. There is a clear correlation between the level of economic activities in the country and judiciary’s effectiveness as essential intervention in the fight against corruption. Where the courts punish corrupt elements appropriately, a clear message is sent to public that corruption is intolerable. The prompt, impartial and just dispensation of cases by the courts is another important aspect of the judiciary’s commitment against the scourge.

2.6 Patronage

25. Another form of corruption is “Patronage” a term often used to describe the corrupt use of state resources to advance the interests of an individual, groups, families, ethnicities or races in exchange for electoral support, appointment to a public office or being awarded a contract without any merit or laid down provisions of the law.³³

26. Nepotism is one form of patronage, which exhibits conflict of interest. Conflict of interest is understood to mean that a public employee is influenced by personal considerations when doing or performing public duty. Most often a public official and in this case, a judicial officer would use his or her position or power to solicit and obtain a favor, invariably, to render a decision through corrupt means. This could include, obtaining a job for a family member, a close relative or a friend from institutions where one believes that there would be reciprocity. As observed above, to decide a case on the basis of extraneous considerations and in most cases decision is based on who pays first for the court's decision.

³¹ *ibid*

³² Opinion expressed at the Ad-Hoc Expert Group Meeting on Deepening Judiciary’s effectiveness in Combating Corruption, 14 – 15 December 2006, Addis Ababa, Ethiopia.

³³ See <http://en.wikipedia.org/wiki/Patronage>

27. In Nigeria, a Study has revealed with dismay that the increasing prevalence of “godfathers” has sustained corruption in the public life and godfather’s support is viewed as an investment and should yield a financial dividend or an obligation to receive that support. This has led to the godfather being compensated through inflated contract pricing and other unethical favors, which often involve bending the rules, thus undermining efficiency of government to deliver social services.³⁴

28. Jeremy Pope states that the objective is to prohibit a public official from using or abusing her public office to get a public job for relatives or close friends.³⁵ Cronyism is a wider concept than patronage because it covers situations where preferences are given to friends and colleagues – old school ties or club ties.³⁶

29. Dakolias and Thachuk analyze the same problem as follows:

One of the most prevalent forms of corruption is clientelism or patron – client relationships. This is basically a situation in which individuals use public offices for personal aggrandizement or to gain favorable advantages for themselves or their friends. This system is largely the result of a complex network of personal or affiliations and ties all of which have a long tradition of personal and or factional loyalties that take precedence over the commitment to public policies and indeed the constitution.³⁷

30. In Zambia, the Governance Baseline Survey conducted in 2004 has also shown that most respondents identified that the judicial or court decisions were influenced by corruption or favors this being the most serious obstacle where on average cases would range from 1 month to 75 months, for households. Asked whether based on their experiences with the courts they were likely to sue again, 36.5% of the business respondents who had taken legal action before, indicated that they were extremely unlikely to do so.³⁸

31. The Study carried out in Nigeria found that Business enterprises use gratification to influence court decisions, criminal proceedings and avoid regulation.³⁹ The Study concludes that people lack faith in reporting corruption incidences because they are not taken seriously and no investigations are carried out. Where they take place they take too long to be finalized to the extent that they become useless.⁴⁰

32. Corruption continues to plague the society as a cultural problem. Rose-Ackerman argues that though culture is dynamic and constantly changing, but certain cultures would regard certain behavior as corrupt while others may view it as gift giving.⁴¹ In this regard the prevalence of patronage in Africa essentially entails protection of incompetent personnel without meritorious considerations who are employed because of connections with the higher up officials with a say in an organization.

33. This problem as it affects all public sector institutions has also been identified as one of the major weakness within the judiciary, which undermines its independence. The culture of “god

³⁴ See UNODC, Assessment of the Integrity System and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report, January 2006

³⁵ Jeremy Pope, *Confronting Corruption: The Elements of a national Integrity system*, transparency International, London, 2000, p.197

³⁶ *ibid*, p. 198

³⁷ Maria Dakolias and Kim Thachuk, ‘Attacking Corruption in the Judiciary: A critical Process in Judicial Reform’, 18 *Wisconsin International Law Journal* 353, Spring 2000

³⁸ Zambia National Governance Baseline Survey Report, Government of Zambia, August 2004, p.94

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ Susan Rose – Ackerman, *Corruption and Government, Causes, Consequences and Reform*, Cambridge University Press, 1999, p.110

father” is a manifestation of nepotism in any organizational setting and has contributed to the slow down of efficiency and discipline.⁴²

3. The Judiciary: Rule of Law, Judicial Integrity

3.1 Rule of Law

34. This concept is seen by some scholars to mean the ability to have one’s grievances heard before an impartial judge.⁴³ Doing ‘justice’ is to apply its rules with equal favor to the high and to the lowly placed members of society. It is the removal of a sense of injustice. Judges tend the gate between order and anarchy. They preserve our system of ordered liberties and are necessary to a civilized society. Injustice breeds the feeling that another has wronged one without recourse to justice: that is, one is denied some means to redress the conduct that one finds manifestly unjust, hence he or she becomes bitter and cynical against the judiciary.⁴⁴

35. Eighteenth century scholars and philosophers propounded the rule of law. Most notably, Professor Dicey who’s thinking has had an influence today in the understanding of the concept “Rule of law.” Rule of law has been assigned to mean: First, no one can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Second, the rule of law not only implies that no one is above the law, but that every man whatever be his rank or condition is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary courts.⁴⁵ Third, the principles of natural justice must be observed and protection of individual freedoms guaranteed.⁴⁶

36. In Dworkin’s formulation, governments must treat those whom it governs with concern and care, that is, as human beings who are capable of sufferings and frustrations, and who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Governments should not only treat their people with equal concern and respect, they must also not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are more worthy.⁴⁷

37. Hayek has provided the clearest and most powerful formulation of the ideal of the rule of law that, government in all its activities is bound by rules fixed and announced beforehand. Rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs.⁴⁸

38. Hayek advocated for the independence of the judiciary as one of the virtues of the rule of law. Methods of appointment of judges, their security of tenure, their salaries, and other conditions of service are important pointers as to judicial independence. Powers to review administrative action, accessibility of the courts by ordinary citizens, the discretion of the crime preventing agencies should not be allowed to pervert the law where the prosecution authorities should not be allowed to decide not to prosecute for commission of certain offences, or crimes committed by certain classes

⁴² UNODC, Assessment of the Integrity System and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report, January 2006

⁴³ Jennifer A. Widner, building the Rule of law, Francis Nyalali and the Road to Judicial independence in Africa, W.W. Norton & Company Inc., New York, p.41

⁴⁴ Frank M. Johnson Jr, Civilization, Integrity. And Justice: Some Observations on the function of the Judiciary, 43 W.L.J. 645, October 1989

⁴⁵ See H.W. Arthurs, Rethinking Administrative law: A Slightly Dicey Business, York University, Canada, 1979

⁴⁶ *ibid*

⁴⁷ Ronald Dworkin, ‘What Rights do we have?’ Taking Rights Seriously, 1977

⁴⁸ F.A Hayek, The Rule of law and its virtue, The law Quarterly Review (1977)

of offenders. The police should not be allowed to allocate its resources so as to avoid all efforts to prevent and detect certain crimes or prosecute certain classes of criminals.⁴⁹

3.2 Judicial Integrity

39. Judicial integrity is considered to be the heart of the Rule of law in the sense that judges must have integrity in order to protect the above principles. These principles of Rule of law may conveniently be summarized into three components: Firstly, it emphasizes that the law binds the Government; secondly, all people should be treated equally; thirdly, basic human rights must be protected. Judges must maintain integrity for the Rule of law to be sustainable and maintained.⁵⁰

40. Justice as a moral construct rather than a technical legalistic device must shape the behavior of judicial officers in their task of dispensing justice to all. Judges should be guided by ethical standards that are reduced into codes of conduct to influence their behavior within their working environment and outside. The preservation and sustenance of public confidence is the crucial indicator as to propriety of the judiciary in the delivery of justice, seen by the members of society to be fair and independent decision-making without external influence or fear.

41. Justice Kennedy of the US Supreme Court commenting on the integrity of the court, stated: “That a commitment to the constitution is not something that is genetic. It is not inherited, is not automatic. It has to be taught and each generation must learn about the constitution and the values of constitutional institutions within the context of their own time, within the environment of their own time. And if we are in an era in which there is a loss of confidence in the judicial system, and even worse, a misunderstanding of the judicial system, then we must take steps to correct it.”⁵¹

42. The above observations by Justice Kennedy are relevant today to Africa. Judges should be men and women of integrity. They must be honest, straightforward and upright. Justice Black put it more elegantly that “courts stand against any winds that blow as heavens of refuge for those who might otherwise suffer because they are hopeless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement”.⁵²

43. It is a fair assumption by our societies that the measure of the judiciary’s worth, and its integrity is not by the extent to which its judgments are popular or accepted by some ephemeral majority, however defined, but rather by the extent to which judgments of the courts spare us from the disorders that otherwise inevitably result from injustice.⁵³ A graceful pen demonstrates it and unwavering faith in what was right and proper.⁵⁴

44. Judges give the law its humanity and life through their decisions, which should be guided by a sense of justice and practical wisdom. They are regarded as priests of the Rule of law. Lawyers are key stakeholders in preservation of judicial integrity and the Rule of law. If the public’s perception of the judiciary’s integrity plummets, so will its respect for the law. Corruption is likely to keep away better candidates for judicial office because they will not be willing to be associated with such dirty and denting associates.⁵⁵

⁴⁹ Ibid

⁵⁰ See David Barnhizer, ‘On the make: Campaign Funding and the Corruption of the American Judiciary’, 50 Catholic University Law Review 361, Winter 2001

⁵¹ Ibid, See also Frontline: Justice for Sale/ PBS television broadcast, November 23, 1999, www.pbs.org/wgbh/pages/frontline/shows/justice

⁵² See Frank M. Johnson, Jr., ‘Civilization, Integrity, and Justice: Some Observations on the function of the Judiciary’, 43 Southwestern Law Journal 645, October 1989

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Edited by Yassin El-Ayouty, Kevin J. Ford and Mark Davies, op. cit.

45. Judicial integrity may be defined as the courage of our judges to make fair decisions in their understanding of the law without fear or favor. Courts are respected and heeded to, because they speak from the moral heights of our society and when they don't, their integrity is compromised.⁵⁶ The calmness of temperament, accuracy of judgment, unblemished character, and sound legal views should be clearly reflected to earn the judicial integrity.⁵⁷

46. The Bangalore Principles of Judicial Conduct⁵⁸ provide standardized professional and ethical guidelines to members of the judiciary. They are intended to afford the judiciary a framework for regulating judicial conduct. It enshrines the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.⁵⁹

47. Value 3 of the Bangalore Principles states that integrity is essential to proper discharge of the judicial office. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

48. The behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done; it must be seen to be done.⁶⁰ Most importantly, a judge and members of the judge's family shall neither ask for, nor accept any gift, bequest, and loan or favor in relation to anything done or to be done or omitted to be done by the judge in connection with their performance of judicial duties.⁶¹

3.3 Corruption in the judiciary

49. As has been said earlier, corruption has permeated most government institutions in Africa including the judiciary. The negative impact of a corrupt judiciary cannot be over emphasized. The implications are far reaching as it stunts trade, economic growth and human development and deprives citizens of justice. It should also be noted that judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government. There is a correlation between levels of judicial corruption and levels of economic growth because the enforcement of contracts and impartial resolution of disputes are fundamental to investors, and underpin sound business development and growth. An independent and impartial judiciary has important consequences for trade, investment and financial markets, as experienced by China and Nigeria.⁶²

50. The Kenya judiciary has conceded that corruption has assumed pandemic proportions and the Chief Justice J.E. Gicheru has found that people go by the maxim "why pay a lawyer when you can buy a judge" and the best judges had become "the best judges than money can buy".⁶³ In 2003, the report of a Committee that he had appointed to look into the problem of corruption in Kenya judiciary and suggests remedies to the situation, the CJ's Committee reported to him in September that corruption was prevalent in the judiciary, with 5 out of 9 judges of the Court of Appeal, 18 of 36 High Court judges, 82 out of 254 magistrates, and 43 of the 2910 paralegal staff being

⁵⁶ Frank M. Johnson Jr, op. cit.

⁵⁷ *ibid*

⁵⁸ The Bangalore -Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25 – 26, 2002

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *Ibid*, -- value for propriety.

⁶² Executive Summary, Transparency International Global Corruption Report 2007.

⁶³ UNODC Report of The Judicial Integrity Group, Vienna, 27 – 28 October 2005

implicated. The principal forms of corruption the Committee found included: bribery, fraud, abuse of office, and receipt of favor without consideration. The Committee concluded, "Corruption reduces the temple of justice into a cave of venality and exploitation".⁶⁴

51. It is reported also in Kenya a more insidious structure sometimes exists where in the executive have an influence over the judiciary. While the most significant problem in Benin is the lack of access to courts and a resulting shift to popular justice familiarly called a vindicate populaire"⁶⁵

52. Corruption dents judicial power and authority, to the extent that other branches of government are confident that their misdeed will never be punished, hence the attendant loss of legitimacy for the justice system is generally a death knell for the rule of law.⁶⁶

53. Explaining the perversion of corruption in the judiciary, one lawyer put it that corruption had create a system that "reeks of inconsistent decisions because they are not principled, but are anchored on expediency and size of the purse".⁶⁷

54. An impartial judiciary will reduce the influence of government officials, legislators, political parties, and other powerful elites who are used to operating above the law. The realities of corruption on the ground are well explained by a judge himself who said, "magistrates would physically go and find cases in the registry from which they could make money. Villagers could not believe that one can win a case unless they paid a bribe to a magistrate. Magistrates would adjourn cases to leave time for litigants to get money to pay them off".⁶⁸

55. Another respected judge of the Court of Appeal of Tanzania, when interviewed by Widner⁶⁹ confirmed, "one judge in the High Court asked for a million shillings. The judge was no longer on the Bench. Clerks and support staff who operate their own rackets would go out and say: "If you want favor of a judge, you must offer a figure commensurate to his stature".⁷⁰

56. The Uganda law society complained in its memorandum that when prisoners were taken before magistrates, their files 'developed feet' or were misplaced and therefore not available. This is one of the tricks used to get a prisoner to pay some money to the magistrates, after which the file was found.⁷¹

57. A research by Jennifer Widner has revealed that court clerks would see a decision of the court in advance of its pronouncement, and then sells the judgment to the winning party, claiming that the judge or magistrate was still undecided. The person who paid the bribe would then hear the judgment read in court and assume that his or her money had helped secure the result, even when the judge or magistrate knew nothing about the transaction.⁷²

58. Former Chief Justice of Tanzania lamented on the problem of corruption that the execution of court decrees by court brokers mushroomed into a profiteering and fraudulent business. The court broker would attach a property, put it under his custody for an inordinate period of time so as to

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ Jennifer A. Widner, *op. cit.*

⁶⁷ R. N. Ben Lobulu after being interviewed by Jennifer A. Widner, *op. cit.*; p.274.

⁶⁸ Judge William Maina interviewed by Jennifer A. Widner, *op. cit.*; p. 275

⁶⁹ Jennifer A. Widner, *op.cit.*; p.276

⁷⁰ *ibid*

⁷¹ *Ibid*, p.276

⁷² *Ibid*

charge increased storage charges. This has led for winning sides to loose money and end up bankrupt.⁷³

59. Nigeria is another country that has been rated as one of the most corrupt countries in the world to the extent that corruption has reached alarming proportions.⁷⁴ It is found by the experts that by far the most harmful and destructive effects of corruption are on the rule of law, especially when the efficiency of the criminal justice system, which should be seen as the epitome of integrity, are undermined and compromised by corruption.⁷⁵

60. It was also established that companies with low levels of capital had greater difficulties in accessing the courts as compared with larger ones and they tended to experience worse services from the courts. The size of the company seemed also to influence its likelihood to be confronted with corruption in the courts. Findings from Lagos state have confirmed that the smaller the company, the more likely it was to perceive the judicial system as corrupt and as a result, display a lower level of trust.⁷⁶

61. The UN guidelines on Strengthening Basic Principles of Judicial Conduct that was passed by the General Assembly⁷⁷ clearly acknowledges the problem of corruption in the judiciary thus:

“Corruption of members of the judiciary undermines the rule of law and affects public confidence in the judicial system, and, that the integrity, independence and impartiality of judiciary are essential prerequisites for the effectiveness protection of human rights and economic development.”⁷⁸

3.4 Factors that influence corruption in the judiciary

62. It has been found that various factors influence corruption in the judiciary. One factor is independence. In most African countries, the judiciary lacks independence particularly where the appointments and tenure of office of judges depend on the president of the country or the ministry of justice (which is a part of the executive arm of government). Good governance within the judiciary is critical. Courts are expected to be impartial in the dispensation of justice. In this regard a judicial system is required to be non-partisan, free to make their decision unhindered by influence of money or political pressure. The judiciary as an organ entrusted in interpreting the law, also has an important role in the system of checks and balances. To discharge this crucial role, judiciaries in Africa have to examine their levels of competences and the degree of independence from the executive and insufficient resources.

63. In 2000, the UN Economic Commission for Africa commenced a project to Measure and Monitor Progress towards Good Governance in African countries (AGR). The project carried out surveys on households and experts in different countries, to assess their perception on governance. The judiciary was targeted as crucial institution and the survey of experts found that its capacity varies widely depending on the levels of competence and the degree of independence from the executive. Despite constitutional guarantees, however, the perception prevalent in most African countries is that the judiciary is only partially independent.⁷⁹

⁷³ Ibid, p. 277

⁷⁴ UNODC, Assessment of the Integrity System and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report, January 2006

⁷⁵ Ibid, p. 3

⁷⁶ Ibid, p. 117

⁷⁷ General Assembly Resolution 2200 A (XXI)

⁷⁸ Ibid

⁷⁹ African Governance Report 2005, UN Economic Commission for Africa, 2005, p.128

64. Contributory to the lack of independence is the fact that the judiciary's policy and budget processing in most African countries is dependent upon the ministry of Justice, an arm of the Executive branch of Government⁸⁰ Zambia, Kenya, Uganda, Tanzania and Swaziland Judiciaries' budgets, to mention but a few, are processed through their Ministries of Justice.⁸¹ The rationale behind is that though they are independent as provided in the constitution, but the way government business operates, judiciaries have to process their budgetary requirements through the Ministry of Justice because, it is the Minister responsible for constitution and legal affairs who is responsible and accountable to parliament to table any budgetary needs of its departments including the judiciary.

65. Another factor is inadequate funding for the judiciary, and poor remuneration for judges and other court personnel. The survey of experts has found that in many countries in Africa, the judicial system as a whole is poorly funded and judicial officers are poorly remunerated. This de-motivates them, promotes corruption and reduces commitment. It is further found that courts have poor facilities especially in the lower courts. In Malawi, the judiciary remains under funded despite recent efforts. Over one third of the total prison populations were on remand. This figure demonstrates that courts do not have the capacity to deal with the volume of cases placed before them.⁸²

66. The AGR also reveals that most judicial officers are poorly remunerated and the overall consequences of these deficiencies restrict the access to justice for many poor and marginalized people as shown in the expert survey carried out in Lesotho, Cameroon, South Africa, and Ethiopia who said that the first instance or lower courts are rarely or never accessed by citizens within three days and delays impede the maintenance of the rule of law and access to justice for all.⁸³ Also most of the judiciaries in Africa are not adequately staffed; they are poorly trained and lack the re-tooling to ease their delivery of justice function. They lack qualified and professional work force such as court administrators and IT personnel to smoothen the recording of proceedings and streamline docketing. The report notes that the Gambia relies heavily on expatriate judicial officers on contractual arrangements. Of the seven judges in the High Court, only two are Gambians, two are technical assistants, one is a foreign judge on contract and two seats are vacant. In Uganda the judicial system is extremely slow due to insufficient number of judicial officers. So is the case in Swaziland, where due to insufficient number of judicial officers the system of justice delivery is hamstrung. For example, out of registered 3,430 cases in the five busiest magistrates' courts, 1480 cases remain unprocessed and not concluded. They lack adequate stationery and legal books for reference purposes. This situation is worst in rural areas.⁸⁴

67. It is pertinent to note however, that though poor remuneration for judicial officers has been used as a justification for rampant corruption within the judiciaries in Africa,⁸⁵ it has been found not always to be the case. At the ad-hoc experts' group meeting that took place in Addis Ababa from 14-15 December 2006 it was observed that large-scale corruption did not occur within the low-paid

⁸⁰ Ibid, p.204

⁸¹ ibid

⁸² African Governance report, op. cit, p. 206

⁸³ Ibid. p. 206

⁸⁴ Ibid, p. 205 – In the survey carried out shows that in Tanzania and Zambia, respectively, adjournment of cases is the order of the day and reasons advanced for such adjournments, including lack of court folders, stationery to write proceedings of the court, which are done by handwriting.

⁸⁵ Ibid, p. 205—for example in Malawi, the judiciary remains under funded with consequences on institutional capacity. See the Presidential Commission of Inquiry against Corruption in Tanzania, Executive Summary, World Bank, 1996, p.21 – The Commission found that corruption has widespread in the judiciary. Court clerks, court assessors are also involved in corruption to the extent that confidence of the citizens to their judiciary is undermined.

civil service cadres, citing the case of Cameroon as an example. Where, at certain times the salary of judges was doubled but those of the civil servants were reduced or remained at the same level but this did not reduce corruption in the judiciary.

68. It is therefore important to underscore the fact that big salaries are not by itself a factor to reduce corruption. Vincent Green elaborated from his experiences as a law enforcement officer for many years “In almost all cases individuals involved into corrupt relationships do so because they feel the following:

- They are knowledgeable about the area they are conspiring to defraud,
- There is an opportunity to implement the plan that could be completed successfully, and
- The environment or the attitude within the organization lends itself to corrupt behavior.”⁸⁶

69. Another factor that contributes to corruption in the judiciary is that of undue influence by the executive and legislative arms of government. It has been found that the executive and legislature have significant control over the judiciary in many countries despite constitutional guarantees of equality. In countries where the rule of law is weak, the judiciary’s often seen as a malleable branch of government, and judges in weak judiciaries are deferential to politically connected individuals.⁸⁷

4. Challenges and systemic weakness

70. Various studies⁸⁸ by expert groups and judicial integrity workshops have identified the following as challenges and systemic weaknesses in the judiciary:⁸⁹

- The Group of Experts⁹⁰ observed that the failings and causes of impropriety in the Judiciary gravitate around disappearances of case dockets, postponements of case hearings, high prosecution expenses and legal fees which favor the rich, high networking ability and old-boy connections between the rich and the staff of the judiciary and political connections on the part of the privileged. Most of these failings operate at the expense of the poor and less privileged persons, and are compounded with poor remuneration of judiciary staff in the face of high inflation, cultures of conspicuous consumption and social glorification of achievement as exemplified by property ownership among certain members of society
- Non-involvement of judges and magistrates in the reform of the judiciary results in inefficiency and lack of ownership by the judiciary.
- Lack of internal capacity to maintain independence;⁹¹

⁸⁶ Edited by Yassin El-Ayouty, Kevin J. Ford and Mark Davies, *Government Ethics and Law Enforcement: Toward Global Guidelines*, Praeger Publishers, New York, 2000, p. 162

⁸⁷ Mary Noel Pepys, *Corruption within the judiciary: causes and remedies*, Global Corruption Report, 2007

⁸⁸ Guidance for promoting Judicial Independence and Impartiality, revised Edition, Technical Publication Series, USAID, January 2002; UNODC-sponsored international judicial groups.

⁸⁹ Workshop on Judicial Integrity in Uganda (Jinja, 15 -17 December 2002)

⁹⁰ Opinion expressed at the Ad-Hoc Expert Group Meeting on Deepening Judiciary’s effectiveness in Combating Corruption, op. cit.

⁹¹ The problem of judiciary performance can be seen from the following indicators: Management of the budgeting process, management of relationship with other branches of government, organization and delivery of services to the trial court and court management assistance programmes to improve the performance of the court in delivery of justice, Developing statistical capability to measure the performance of the judiciary, developing policy by involving all levels of the legal system, Develop managerial training programmes for those assuming the positions in the governance structure, supervision of the Bar, Strategic corporate planning and implementation.

- Court infrastructure: The smooth functioning of courts is constrained by inadequate facilities, run down conditions, inadequate space distribution, poor lighting system, poor maintenance, lack of decorum, poor location among others, are serious shortcomings.
- Judicial appointments are not transparent in order to prevent the perception of nepotism or politicization. It is observed that in some jurisdictions, the judicial appointment process is manipulated to the extent that assignment of cases are done by a compliant Chief Justice, to control which judge hears a case of importance to the government.⁹²
- Inadequate training for judges and magistrates due to lack of training curricula that include the grooming of the staff of the Judiciary on issues of corruption, as well those of anti-corruption agencies, on importance and nature of their independence, autonomy and responsibility.
- The absence of an effective code of conduct in some jurisdictions: which if not properly inculcated to its members and understood properly and applied correctly in their public and private life respectively, the integrity of judiciary may be compromised.
- A lack of a clear law or Rules for Declaration of assets and gifts received in the course of discharging judicial function;
- Conflict of interest and bias; a judicial officer should refrain to handle a matter that he has a personal interest because accusation of bias will be imminent.
- A lack of Inspectorate Division particularly in rural areas to monitor and evaluate the performance of the judiciary.
- Inadequate remuneration,⁹³ but as been said earlier⁹⁴, corruption does not occur within the low-paid civil servants. In the case of Cameroon, for instance, at certain times the salary of judges was doubled whereas those of the civil servants were reduced or maintained at the same level. This situation did not reduce the incidence of corruption in the judiciary. In this respect, the experts observed that while there is a tendency to consider poverty as a cause of corruption it was indeed, not a direct cause of corruption, but a contributory factor.⁹⁵
- Inappropriate socializing between judges and lawyers; where a judge has his personal needs being taken care of by an advocate; or being seen mingling freely in a social setting with an advocate whose clients have matters pending before the judge.
- Inconsistencies in sentencing: imposition of a fine or the discharge of an accused in a criminal case where the law provides otherwise.
- Lack of strong and effective mechanisms to control delays in delivering judgments;

⁹² Guidance for Promoting Judicial Independence and Impartiality, *op. cit.*

⁹³ See Government of United Republic of Tanzania, Financial and legal Sector Management Upgrading project (FILMUP): Legal sector Report, Dar es Salaam, January 1996.

⁹⁴ Para.54 of paper, Deepening the effectiveness of the Judiciary

⁹⁵ Opinion expressed at the Ad-Hoc Expert Group Meeting on Deepening Judiciary's effectiveness in Combating Corruption, *op. cit.*

- The fact that justice systems have not proven to be effective in handling more complex court cases involving corruption and organized crime. Only few corruption cases are being brought to court and even fewer ends up in a conviction; the Ethiopian experience has demonstrated that the courts are reluctant to accept cases investigated by the Anti-Corruption Commission because of the perceptions and their understanding of corruption.⁹⁶

5. Recommendations to Tackle corruption in the judiciary

71. Good governance within the judiciary is critical. Courts are expected to be impartial in the dispensation of justice. In this regard judicial system is required to be non-partisan, free to make their decision unhindered by influence of money or political pressure. The judiciary as an organ entrusted in interpreting the law, also has an important role in the system of checks and balances. To discharge this crucial role, judiciaries in Africa have to examine their levels of competencies and the degree of independence from the executive and legislative branches of government. Also access to and transparency of justice systems, fairness in protecting procedural and substantive rights and equality before the law demand an accurate and open information system on court operations and decisions

72. The Judicial Commission or Council does judicial appointments in many countries in Africa as the case may be. However for meritorious appointment of competent judges, the following steps are recommended:

- Judicial vacancies should be advertised extensively.
- Candidates' names, background and competencies should be publicized
- Selection process and criteria should be clearly expressed and publicized.
- Division of responsibility between the Executive and judiciary. One nominates and the other selects and appoints. (Another school of thought suggests that a body that is independent of the executive and legislative arms of government should handle judicial appointments).⁹⁷
- Participation of civil society in the selection process. As this will give credibility to the Commission or council and ensure transparency, executive, Supreme Court control is reduced, and the quality of candidates is ensured.⁹⁸

73. Delay of cases is a major constraint that fuels corruption in the judiciary. This is a management weakness within the judiciary. It is recommended that case management system be installed,⁹⁹ whereby court administrators who are professional managers will administer the system. This will release judicial officers from administrative functions and enable them to focus on cases that are brought before them. In most judiciaries in Africa,¹⁰⁰ administration of the courts is performed by Registrars of the court who could spend less time in expediting the hearing of cases by speeding up the pre-trial proceedings. It is therefore, recommended that the rules of procedure be reformed to allow Registrars carry out the pre-trial proceedings of the cases before the case is ready for hearing by a judge.

⁹⁶ *ibid*

⁹⁷ Executive Summary of the Global Corruption Report 2007

⁹⁸ Opinion expressed at the Ad-Hoc Expert Group Meeting on Deepening Judiciary's effectiveness in Combating Corruption, *op. cit.*

⁹⁹ Preserving a comprehensive case tracking through a CTM system that ensures a comprehensive case record management.

¹⁰⁰ Botswana, The Gambia, Tanzania, Kenya, Uganda, Nigeria, Malawi, Swaziland, Lesotho, Zambia, Zimbabwe,

74. Rules should be put in place to restrict postponement of cases, and where possible each case be given a particular time frame to be disposed of. Parties to the case should be notified in advance and their availability is ascertained.¹⁰¹

75. Training in ethics and introduction of codes of conduct where there are none should be mandatory to uniformly regulate the conduct of judicial officers.

76. Inculcating judicial values, code of conduct and etiquette, particularly to the new judges and magistrates before they resume their duties on the bench should be made mandatory. The chief Justices of each country should ensure that no one is elevated to next rank within the establishment unless, she or he has attended ethics training which should be mandatory and each year, a refresher course be put in place for all judicial officers to understand and observe the code to the letter.

77. A complaints mechanism known for its role and functions should be established to provide redress to wrongs committed within the shortest possible time and where possible, seven days are recommended for simple complaints.¹⁰² The necessity for leveling the field in the judiciary that the needs of the legal underprivileged classes are fully served and are not neglected.¹⁰³

78. Reported cases of corrupt practices must be dealt with objectively, transparently and seriously in order to send the necessary deterrence signals to would-be-offenders. This process will enhance accountability and restoration of citizens' confidence in the judiciary. Balance must be exercised to ensure that judges and magistrates are protected from frivolous or unfair attacks by unhappy litigants who use the complaints avenue as an alternative to appellate process or simply an exercise of revenge.¹⁰⁴

79. Alternative Dispute mechanisms enacted in the Civil Procedure Code to ensure that litigants are encouraged to settle their disputes where necessary out of court.¹⁰⁵

80. Increased openness and accountability, which allows the Chief Justice or Judge in charge to monitor the performance of judges and employees under his jurisdiction, should be encouraged. Access to and transparency of justice system, fairness in protecting procedural and substantive rights, and equality before the law demand an accurate and open information system on court operations and decisions.

81. Good court management requires the capacity to understand and act upon management information. The court tracking management system should be able to produce reports that extract information from individual case files to present a picture of how the court operates as an organization.¹⁰⁶

¹⁰¹ Record system must ensure that the location of court record is always known, whether the case is active or archived. Untimely availability of court record seriously undermine the integrity of the judiciary

¹⁰² In Tanzania and Zambia, Integrity Committees have been introduced in all government structures to address corruption and unethical behavior of public officials to supplement the existing disciplinary mechanisms. See for analogy purpose Decentralized Self Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 University of Pennsylvania Law Review, 1994

¹⁰³ See Note 123 (Supra)

¹⁰⁴ See Note 127 (Supra)

¹⁰⁵ In Tanzania the same has been introduced and there are some achievements though no research has been carried to establish its efficacy. The major contribution of ADR in reducing corruption in the judiciary is education that people benefit from mediation and mainstreaming mediation into culture of litigants to solve conflicts in society is one of the rich cultures Africa can document and internalize it in the judicial process.

¹⁰⁶ See Centre for Democracy and Governance, Case Tracking and Management Guide, Technical Publication Series, Washington DC, September 2001

82. Institutional linkages and cooperation: The law enforcement agencies, Attorney General's Offices, Prisons system, probation officers/ social workers, doctors and other experts in the field of criminology and penology are important to work harmoniously with the judicial system to solve problems that are inter-related.¹⁰⁷

5.1 Judicial accountability:

83. Judicial accountability is a recent development that has been added to the notion of judicial independence. Critics of this element see it as an affront to judicial independence and that this element has gone too far to the extent of threatening judges' gain against control by executive and legislature branches of government, respectively.¹⁰⁸

84. The purpose of independence of the judiciary as explained by Justice Akiwumi, "Is not to create an absolute independence of the judiciary, but rather a relative independence which is intended to provide protection of judges from improper or unlawful influences, direct or indirect, on the way in which the judicial officer carries out his/her judicial functions."¹⁰⁹

85. However, it is contextually understood that, judicial accountability is not diametrically opposed to judicial independence; rather it stresses on the following important elements:

- That the judiciary as a corporate body may have excessive control over its own composition creating a self-perpetuation and self-protecting caste.
- A concern that the removal of traditional external controls may allow the judiciary an unparalleled and possibly abusive freedom in managing its own resources.
- A concern that judges' ability to interpret laws as they apply them may give them excessive power in reshaping the legal framework according to the values and views shared neither by the public nor by the other branches of government.
- A concern that institutional mechanisms for defining standards for, controlling and correcting judicial behavior are inadequate.¹¹⁰

86. Judicial accountability represents a demand that an independent judiciary should be able to account for its existence and relate to the society for which it serves by justifying its actions, and be responsive to the society's perception of its own integrity and fairness in the dispensation of justice to all.

87. Accountability is part of the new reform that seeks to improve judicial performance of which there has been in recent times, complaints about delays of cases, corruption, and unethical conduct of some of its members.¹¹¹

88. To understand judicial accountability, it is essential to answer the implicit question: Are the two elements (independence and accountability) mutually exclusive? Hammergen seems to suggest that accountability is better understood as referring to an institutional accountability to political and civil society. That while other branches of government are critical in enforcing judicial

¹⁰⁷ An introduction of case management committees has worked very well and could be adopted in judiciaries in Africa for its linkages to solve common problem confronting users of the court. In Tanzania this committee has been introduced at all levels of the court hierarchy and members are drawn from court itself, AG's Chambers, Police, Immigration, Prisons, the Bar, Social welfare to deliberate on common problems facing the justice system.

¹⁰⁸ See Linn Hammergen, 'Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals', in Guidance for Promoting Judicial Independence and Impartiality, Technical Publication Series, Revised Edition, USAID, Washington, D.C., January 2002

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

accountability especially in impeachment proceedings of a judge, redefines the limits of legal powers, and the extent to which the judiciary serves the society as a whole.¹¹²

89.Accountability can be distinguished from independence by focusing on the relationship. Independence focuses on prior control of judicial action while accountability, is about ex post-control, which refers to the requirement that the judiciary explain both its administrative and functional operations and outputs.¹¹³ Accountability sets out standards for justification of judicial actions and in this sense strengthens the independence of the judiciary and not weaken it.

90.Accountability should therefore be seen as a means of combating judicial corruption, especially today where concerns have been raised that there is corruption in the judiciary like elsewhere in other public sectors, and it must be addressed.¹¹⁴

91.Hammergen has identified five factors that feed into judicial accountability. These are:

- Changes in public attitudes toward authority including the judiciary. The democratic demands of modern society expect their officials to explain their action, no longer taking them on faith. Arbitrariness in decision-making has to be addressed as one of the major concerns in accountability.
- Informal system of internal control and decision making no longer guarantee predictability and standardized outcome.
- The expanding importance of the judiciary especially in judicial decision that impact on the lives of citizens.
- The explosive myth of the judiciary's neutral application of the law.
- The emergency and reliance of constitutional challenges by ordinary citizens against the executive action.¹¹⁵

6. Conclusion

92.For the judiciary to be effective in combating corruption, the institution itself must be rid of corruption. The paper has attempted to highlight various factors that lend to corruption in the judiciary and has also made suggestions as to how to tackle and remedy the fact of corruption in the judiciary.

93.The effectiveness of the Judiciary will be enhanced when there is Political support, which is ultimately important, and an effective strategy that will build support within the political structure through alliances and pressure on it. The support of the Ministry of Finance is absolutely critical to carry out the needed judicial reforms.¹¹⁶ Experts recognized that many African countries, by signing the international and regional conventions against corruption were demonstrating their political willingness to combat corruption. However, still there was a lack of political support, which is more important than political willingness. In this respect, it was pointed out that governments should enact domestic laws to reinforce international conventions against corruption at national level. Overall, it was recognized that political support is more important than political will. Indeed, it was pointed out that governments should enact domestic laws to reinforce the conventions. The

¹¹² Linn Hammergen, op.cit

¹¹³ ibid

¹¹⁴ ibid

¹¹⁵ ibid

¹¹⁶ Opinion expressed at the Ad-Hoc Expert Group Meeting on Deepening Judiciary's effectiveness in Combating Corruption, op. cit.

creation of special courts to handle corruption issues was felt to be necessary to effectively and efficiently combat corruption.¹¹⁷

94. There is the need to enlighten the public on what to expect from anti-corruption structures and institutions, and to train them to put pressure on such structures to perform. The training curricula should include the grooming of the staff of the judiciary on issues of corruption, as well as those of anti corruption agencies, on the importance and nature of their independence, autonomy and responsibilities.

95. The experts underscored the fact that the independence of an anti-corruption commission should not be determined according to its attachment to a ministry or even to the office of the President and that this should not be seen as a condition for efficiency or inefficiency. The efficiency of an anti-corruption commission depends mainly on the independence, integrity and honesty of the person in charge. Lack of creativity and competence may be the cause of the ineffectiveness. In this respect, experts illustrated the case of Ghana's anti-corruption commission, which is under the parliament but less effective than the one of Nigeria, which is in the President's office. The experts further noted that to ensure independence of anti-corruption institutions there should be an oversight body with multiple and diverse membership and the funding should be uneven.¹¹⁸

96. The conduct of judges and magistrates both in and outside the court determines the level of confidence, which the public reposes in the justice system. Judges must not only be fair but must be seen to have been so by the general public. Judges must observe to the letter, basic standards of conduct because of their role and the high degree of authority and discretion their work entails.

97. Eradicating corruption is the fundamental pre-requisite for institutionalizing the rule of law, maintaining public order and security of citizens and their properties. It is also part of the broader objectives of empowering the citizenry, strengthening the law enforcement and the judicial capabilities.

98. The paper has offered recommendations based on the best practices and different experiences obtaining in many countries in Africa and beyond because corruption is a global problem and has to be addressed holistically to surmount the challenges. The Plan of Action presented below is the strategic and operationally oriented framework towards combating corruption in Africa.

¹¹⁷ ibid
¹¹⁸ ibid

7. Plan of Action

a) PUBLIC EDUCATION AND COMMUNICATION

Challenge	Contributing factors	Recommended action	Responsible Sector	Timeframe	Measuring technique
Improve public perceptions of the judiciary	Lack of information re their rights; lack of access to information	Public seminars, multi- media approach (radio, TV newspapers, magazines; part of school curriculum	Govt. Civil soc.	Long term	Ongoing evidence- based research among public
Provide safe mechanisms to report experiences of corruption	Poor implementation of national reporting mechanisms and lack of security measures	Advertise corruption hotlines widely in courts, police offices, brochures, multi-media; provide effective witness and whistleblower protection programs	Govt. Civil. Soc.	Long term	Ongoing evidence- based research among public

b) IMPROVING THE JUSTICE SYSTEM

Challenge	Contributing factors	Recommended action	Responsible Sector	Timeframe	Measuring technique
Inadequate Ethical Guidelines/Codes of Ethics for all sectors of the judiciary	Lack of awareness among all sectors of judiciary of accepted good practice	Draft appropriate Ethical Guidelines/Codes of Conduct for relevant sectors and display widely in courts	Law. Soc. Civil soc	Short term Govt.	Regular surveys among all sectors of judiciary and public
Improve court management to prevent delays/postponements	Poor training of court personnel/prosecutors, poor investigations by police, poor liaison between different sectors; poorly resourced courts; lack of court administrators	Regular training courses for all court personnel workshops with police and prosecutors to assess problems; determine measures to deal effectively with these problems; appoint court administrators	Govt.	Long term	Regular monitoring of performance; workshops; evidence based research to determine court users' satisfaction with the functioning of the judiciary
Make more use of restorative justice processes	Lack of awareness of these processes among the judiciary and the public	Train the judiciary to create an awareness of the values of restorative justice processes for victims and offenders	Law schools Govt.	Long term	Regular surveys to establish victim/off. Satisfaction with the restorative justice processes
Holding the judiciary accountable	Lack of official control mechanisms	Maintain assets register in which disclosure should be made of all assets received	Govt.	Long term	Monitoring and control of the register; action taken against transgressors to be made public

Challenge	Contributing factors	Recommended action	Responsible Sector	Timeframe	Measuring technique
Greater focus on victim rights and needs	Lack of awareness among judiciary and public about victim rights and needs	Draft a Victims' Charter and norms of standards; advertise and display widely; print brochures	Govt. Civil soc.	Long term	Monitor implementation of norms and standards; regular public surveys
Poor judicial involvement in the development efforts ***	Inadequate awareness of the Africa development strategies	Awareness programs on the role of the judiciary in meeting the development goals	Judiciary Govt. Civil soc.	Long term	Regular workshops targeting the judiciary on major African development challenges
Provide information to court users	Lack of professional work ethics; lack of training	Establish court information desks to inform victims/witnesses re case progress, delays; training courses for court personnel	Govt.	Long term	Monitor by means of course user surveys and staff workshops
Make courts affordable	Lack/insufficient legal aid and witness fees	Provide legal aid to those who need it; advertise service to public, police, courts.	Govt	Long term	Regular surveys of court users
Improve staff morale	Inadequate remuneration; poor job satisfaction; lack of support services; poorly resourced courts and poor security and poor security	Improve court resources and security; provide support services (health, psychological) to staff who need it; regularly review/adjust salaries	Govt.	Long term	Monitor staff morale and satisfaction by means of regular surveys.

					Monitor staff morale and satisfaction by means of regular surveys.
Inadequate funding	Dependence on the Ministry of Justice	Provide adequate grants/funding to ensure independence	Govt.	Long term	Regular independent monitoring

***** There was not consensus among the experts about the relevance of this issue to be considered as part of the proposed plan of action**

8. Bibliography

Alina Munngiu- Pippidi, Corruption: Diagnosis and Treatment, Journal of Democracy Volume 17, Number 3 July 2006, National Endowment for Democracy and the Johns Hopkins University Press

African Governance Report – AGR 2005, Economic Commission for Africa, Addis Ababa, 2005

African Development Forum IV, Economic Commission for Africa, Addis Ababa, 2005

Center for Democracy and Governance, Case Tracking and Management Guide, Technical Publication Series, Washington DC, September 2001

David Barnhizer, 'on the make: Campaign Funding and the Corruption of the American Judiciary', 50 Catholic University Law Review 361, Winter 2001

Edgardo Buscaglia and Maria Dakolilias, 'An Analysis of the causes of Corruption in the Judiciary' 30 Law and Policy in International Business 95, Winter 1999

F.A Hayek, The Rule of law and its virtue, the law Quarterly Review (1977)

Frank M. Johnson Jr, Civilization, Integrity. And Justice: Some Observations on the function of the Judiciary, 43 W.L.J. 645, October 1989

Government of United republic of Tanzania, Financial and legal Sector Management Upgrading project (FILMUP): Legal sector Report, Dar es Salaam, January 1996

Guidance for Promoting Judicial Independence and Impartiality, Revised Edition, Technical Publications Series, USAID, January 2002

H.W. Arthurs, Rethinking Administrative law: A Slightly Dicey Business, York University, Canada, 1979

Jennifer A. Widner, building the Rule of law, Francis Nyalali and the Road to Judicial independence in Africa, W.W. Norton & Company Inc., New York

Jeremy Pope, 'Elements of a successful Anticorruption Strategy' in Curbing Corruption Toward a Model for Building National Integrity, Edited by Rick Stapenhurst and Sahr J. Kpundeh

Jeremy Pope, Confronting Corruption: The Elements of a national Integrity system, transparency International, London, 2000

Linn Hammergen, 'Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals', in Guidance for Promoting Judicial Independence and Impartiality, Technical Publication Series, Revised Edition, USAID, Washington, D.C., January 2002

Maria Dakolias and Kim Thachuk, 'Attacking Corruption in the Judiciary: A critical Process in Judicial Reform', 18 Wisconsin International Law Journal 353, Spring 2000

Max Weber, Economy and Society III, New York, Bedminster, 1969

Omar Azfar, Young Lee, and Anand Swamy, 'The causes and Consequences of Corruption', 573 The Annals of The American Academy of Political and Social Sciences 42, January 2001

Policy Considerations: Forums on the Nigeria Governance and Corruption Survey Study, Summary Report, 2001

UNODC, Strengthening Judicial Integrity and capacities in Indonesia, Kendari, October 7-8, 2004

Ronald Dworkin, 'What Rights do we have?' Taking Rights Seriously, 1977

Susan Rose – Ackerman, Corruption and Government, Causes, Consequences and Reform, Cambridge University Press, 1999

The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25 – 26, 2002

UNDP, Governance for Sustainable Human Development, A UNDP Policy Document, UNDP, New York, January 1997

UNODC, Assessment of the Integrity System and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report, January 2006

UNODC, Report of The Judicial Integrity Group, Vienna, 27 – 28 October 2005

UN Economic Commission for Africa (ECA), African Governance Report, 2005

World Bank Poverty Reduction and Economic Management, Helping Countries Combat Corruption: The Role of the World Bank 5 (1997)

Yassin El-Ayouty, Kevin J. Ford and Mark Davies, Government Ethics and Law Enforcement: Toward Global Guidelines, Praeger Publishers, New York, 2000

Zambia National Governance Baseline Survey Report, Government of Zambia, August 2004