“CONTAMINATING THE CLEAN HALLS OF JUSTICE”: AN ASSESSMENT OF THE IMPACT OF JUDICIAL CORRUPTION ON THE ADMINISTRATION OF JUSTICE IN ZIMBABWE.

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DECLARATION

I, MUNAMATO MUTEVEDZI, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: ……..

Date: ……..

Supervisors;

Professor Lovemore Madhuku, University of Zimbabwe

Signed: ……

Date: ……

And

Mr

Signed: ……

Date: ……

DEDICATION

This work is dedicated to my wife Nyarai and our children. The worst thing a father can do is go to school but you guys gave me all the confidence that what I was attempting to do was right. To the lawyers Takudzwa and Tsitsi, I have no doubt this will inspire you to do better things than dad but to Darrel, Kuku, Kelsey, Kupi and Kuzi, this should serve as a big lesson never to get anywhere near the thankless profession that I chose to pursue. I love you all.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACD	Anti-Corruption Division
ANCORR WEB	Anti-Corruption Ring Online
CPI	Transparency International Corruption Perceptions Index
ICJ	International Commission of Jurists
JSC	Judicial Service Commission
LSZ	Law Society of Zimbabwe
NPA	National Prosecuting Authority
OECD	Organization for Economic Cooperation and Development
PG	Prosecutor-General
PUMA	Public Management Service
TI	Transparency International
UNODC	United Nations Office on Drugs and Crime
UDHR	Universal Declaration of Human Rights
ZACC	Zimbabwe Anti-Corruption Commission
ZIMASSET	Zimbabwe Agenda for Sustainable Socio-Economic Transformation

Chapter 1: Research Overview

1. Introduction

Zimbabwe is currently at political, economic and social crossroads. In the eyes of a section of the citizenry, public institutions are manipulated for purposes of self-indulgence, pleasure and money by those in positions of authority. For instance, the country ranks very lowly on corruption barometers such as Transparency International Corruption Perceptions Index (CPI) which ranks countries in terms of "perceived public sector corruption determined by expert assessments and opinion surveys."[1] The highest authority in the country, the President, has publicly accepted that corruption is the biggest threat to economic development of the country.[2] A lot of public resources are channelled towards efforts to combat and fight the scourge. In the 2020 national budget, the Zimbabwe Anti-Corruption Commission was allocated a whopping **$71 550 000**. Both the National Prosecuting Authority and the Judicial Service Commission have also reserved significant resources for the same purpose. The Judicial Service Commission set up specialized anti-corruption courts to deal with sleaze. As a result, there is widespread public condemnation of the perceived corruption. The judiciary has not been spared from this criticism with even the Prosecutor-General of the country claiming that the judiciary is captured by corruption syndicates.[3] More recently another senior government official alleged that the country has *"a coterie of very corrupt lawyers who buy out investigating officers, prosecutors, magistrates and judges."*[4] Although the accusation triggered a spirited defence of the legal profession from the Law Society of Zimbabwe, the comments remain a fair illustration of the public's perception of the issue. This general decadence of the Zimbabwean society

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[1] "Corruption Perceptions Index 2019." Transparency International. Accessed 25 February 2020. https://www.transparency.org/cpi2019

[2] *"Corruption remains the major source of some of the problems we face as a country and its retarding impact on national development cannot be overemphasized."*
"President Mnangagwa's State of the Nation Address to Parliament, 20 December 2017." Veritas. Accessed 29 June 2020. http://www.veritaszim.net/node/2293

[3] The Prosecutor-General of Zimbabwe alleged that corrupt cartels have captured key government institutions including the police and the judiciary, making it difficult to tackle graft or bring them to book.
P Sithole, 'Its State Capture: PG' NewsDay, 11 February 2020

[4] F Kwaramba, 'Lawyers Seek Special Treatment' *The Herald*, 17 June 2020

could persuade some into accepting corruption as a way of life and asking so what if the judiciary is corrupt? Unfortunately, corruption in the judiciary stands out from the rest of public corruption for many reasons and deserves special public censure.[5]

Scholars are generally agreed that judicial corruption is the worst form of corruption. O. Wali remarked that: -

> The worst kind of corruption is judicial corruption. It is the specie which signals final decay, may lead to unconsolidated democracy and by extension, fatal sustainable development. It is the genus that suggests societal suicide.[6]

Sagay also observed that:

> The perception now is that judgments are purchasable and judges have no integrity. They all have their prizes in cash, and in fact, there are some lawyers whose special function is to be the middlemen between litigants, who want to buy justice and judges…[7]

These perceptions of judicial corruption in other jurisdictions ring very true of the situation obtaining in Zimbabwe.[8] From these accusations, the questions which arise are as follows: - Has the judiciary of Zimbabwe sunk to the level where it can be characterized as a system in crisis or has been infested with judicial officers who live on corruption? In other words, is this a question of one "bad apple," a "bad barrel" or "an entire bad orchard?" It must be assessed whether the contamination of the judiciary is sporadic or systemic and whether the system requires urgent and radical reform.

Regardless of the answers to the above questions, the growing public view of corruption remains dangerous to the administration of justice. If not checked and the factors fuelling such perception not dealt with, the situation can soon degenerate to

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[5] 'Mnangagwa Goes after dirty Zimbabwean Tycoons' *Bulawayo 24News* 16 May 2019

[6] O. Wali, 'Practical Ways to Combat Corruption in Nigeria's Justice System' *Daily News Watch*, 12 August 2012

[7] "Nigeria law professor urges CJN to rid judiciary of corruption" *Premium Times,* 10 January 2013

[8] "Annual report: read what the ICJ did in 2018 to protect human rights. International Commission of Jurists." Accessed 29 June 2020.
https://www.icj.org/icj-annual-report-2018-now-online/

the levels of the English Society of 400 years ago, when it was considered imminent that the entire country was about to be consumed by corruption.

2. Statement of the problem

Corruption is a global menace with debilitating effects on any country afflicted by it. It is more devastating when it extends its tentacles into the judiciary. Sadly, that cancerous spread is inevitable in societies where corruption has taken root. Corruption is hampering the delivery of justice globally. People perceive the judiciary as the second most corrupt public service, after the police.[9] The Corruption Barometer published by Transparency International (TI 2009) paints a gloomy picture about the judiciary. It indicates that nearly half of the respondents surveyed across the world consider the judiciary as a corrupt institution. Payment of bribes connected to legal processes seem to be on the rise. The parasitic effects of the scourge result in stunted growth particularly for developing nations. Africa as a continent has generally been affected. In countries such as Zimbabwe, economic development is acutely hamstrung with corruption rising to unprecedented levels.[10] In fact, according to the Corruption Perception Index, Zimbabwe is amongst the world's top thirty corrupt countries, ranking number 150 out of 180.[11] More tellingly for this study, a survey by Afro- Barometer revealed that a majority of the surveyed Zimbabweans perceive judges and magistrates to be involved in corruption. Twenty-one (21%) percent of the survey respondents admitted to have paid a bribe or given a gift to get assistance from court officials.[12] These findings highlight the existence of actual and perceived judicial corruption in Zimbabwe.

It is noteworthy that the narrative on judicial corruption is fuelled through what appears to be both fictional and lived experiences amongst litigants, lawyers, judicial officers,

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[9] "A Transparent and Accountable Judiciary to Deliver Justice for All." United Nations Development Programme. Accessed 29 June 2020. https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/a-transparent-and-accountable-judiciary-to-deliver-justice-for-a.html

[10] A Choruma, "Corruption stalls Zimbabwe's economic agenda" *Financial Gazette*, 30 June 2017

[11] "Corruption Perceptions index 2018." Transparency International. Accessed 3 January 2020 https://www.transparency.org/cpi2018

[12] S Ndoma, "Zimbabweans see corruption on the increase, feel helpless to fight it." Afro Barometer. Accessed 10 February 2020. http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno25.pdf

prosecutors and ordinary court users. The heart-rending discourse traverses all forms of corruption from the unmitigated species such as criminal abuse of office and outright bribery to the more indirect methods like conflict of interest among judicial officers.

The challenge is that in all this debate, there has not been any systematic study to provide evidence to support the perceptions of judicial corruption and other ills blamed on judicial officers. Despite the ubiquity of research on general corruption from various quarters the reality on the ground is that judicial corruption has generally been shunned. What enables and what drives judicial corruption has hardly been interrogated.

This research therefore seeks to undertake an in-depth examination of the factors fuelling perceptions of judicial corruption, the veracity of those perceptions and their impact on the administration of justice in the country.

3. Definition of key words

3.1. Administration of Justice

The personnel, activity and structure of the justice system. It includes the entire chain of actors from the courts, the prosecution and the investigating agencies such as the police and the anti-corruption commission - in the detection, investigation, apprehension, prosecution, trial and punishment of persons suspected of crime.[13]

3.2. Corruption

The Black's Law Dictionary defines corruption as illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.[14]

A more general and simplified definition of the term relates to the abuse of office for personal or private gain.[15]

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[13] "Administration of Justice Definition." Duhaime's Law Dictionary. Accessed on 3 January 2020. http://www.duhaime.org/LegalDictionary/A/AdministrationofJustice.aspx

[14] "What is corruption?" Black's Law Online Dictionary. Accessed 29 June 2020. http://alegaldictionary.com/corruption/

[15] "What is Corruption?" Transparency International. Accessed on 3 January 2020. https://www.transparency.org/what-is-corruption#define

3.3. Judicial corruption

The United Nations Convention against Corruption 2003[16] defines judicial corruption as an act or omission that profit the judge, court staff or other persons involved in the judiciary and the behavior leads to inappropriate or unjust court decisions.[17] Such conduct can for example be payment or acceptance of bribes, extortion, embezzlement, threats, abuse of the procedural rules or other improper pressure that can affect the independence and impartiality of the judicial outcome by anyone that is involved in the decision-making process.[18]

4. Objectives of the study

The major objectives of the study are as follows:

i. To expose the extent if any, of judicial corruption in the Zimbabwean courts.

ii. To examine the factors which influence perceptions of judicial corruption and its different forms.

iii. To explore the impact of judicial corruption on the independence of the judiciary, the rule of law and general administration of justice.

5. Research Questions

This research paper seeks to answer four pertinent questions namely:

i. What are the different types, causes and implications of judicial corruption on the independence of the judiciary, the rule of law and the general administration of justice?
ii. Are allegations of judicial corruption in Zimbabwe a real problem or simply a perception which is baseless?
iii. How effective is the law regulating judicial corruption in Zimbabwe?
iv. What solutions are available to address the problem of judicial corruption?

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[16] United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003.

[17] See for example the Inter-American Convention against Corruption of 1996, and "The Global Programme against Corruption: UN Anti-Corruption Toolkit." United Nations on Drugs and Crime. Accessed on 29 June 2020. https://www.unodc.org/documents/corruption/Toolkit_ed2.pdf

[18] "Global Corruption Report 2007: Corruption and Judicial Systems." Transparency International. Accessed on 29 June 2020. https://www.transparency.org/en/publications/global-corruption-report-2007-corruption-and-judicial-systems

6. Literature Review

WR Borg argues that the literature in any field is the backbone upon which any prospective work is to be built.[19] The literature by other authors used in this study is acknowledged in the writer's references at the appropriate stages of the paper. This is intended to strengthen the writer's conclusions and to show that this work is not a duplication of work that has already been done better by someone else.[20] The paper summarizes for executive purposes, the literature on this topic. It highlights the significance of this particular study when juxtaposed against the major literature existing on the subject.

Writers such as Nyoni,[21] Kempe,[22]Johnston,[23] Scharbatke-Church, Chigas,[24] Gico and C. H. R. de Alencar,[25] in their work discuss the scourge of corruption at length. They all attempt to define the term corruption and then proceed to examine the different types, causes and effects of corruption. While parts of their studies resemble the present one, the major distinction is that this paper is confined to judicial corruption. In this respect, there are limited writings on the topic of judicial corruption particularly in the context of Zimbabwe. This study further examines international, regional and municipal legal frameworks relating to judicial corruption.

Win-Dari and Hamauswa in their study explore how the use of strategies and principles of community psychology can bring about possible ways to combat and prevent corruption to enable the full realization of the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) goals in the short and long term future.[26] Their research sought to find ways of combating corruption through community psychology

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[19] WR Borg, *Applying Educational Research: A Practical Guide for Teachers*, Longman Higher Education, 1987

[20] YK Singh, *Fundamentals of Research Methodology and Statistics,* New Age International Publishers New Delhi, 2006. 36

[21] T Nyoni, The Curse of Corruption in Zimbabwe, 2017. Vol 1, Issue 5. *International Journal of Advanced Research and Publications*

[22] RH Kempe, *Corruption and Governance in Africa: Swaziland, Kenya, Nigeria,* Palgrave MacMillan, 2017.

[23] M. Johnston, *Syndromes of Corruption: Wealth, Power and Democracy*, Cambridge University Press, 2005.

[24] C Scharbatke-Church, D Chigas, *Facilitation in the Criminal Justice System: A systems analysis of the Corruption in the Police and Courts in Northern Uganda, Institute for Human Security*, Tufts University, 2016.

[25] IT Gico, CHR de Alencar, *When Crime Pays: Measuring Judicial Efficacy against Corruption in Brazil*, Law and Business Review of the Americas, 2011.

[26] NK Win-Dari, S Hamauswa, Fighting corruption in Zimbabwe: Making a case for community psychology towards the realization of ZimAsset 2016. Vol 2 No 4. *Journal of Studies in Social Sciences and Humanities* 152-160.

and in the process promoting the realization of ZimAsset. This paper departs from their position entirely in that while it centers primarily on judicial corruption it also seeks to find legal avenues of combating the same.

Buscaglia critiques the predominant literature on the topic as being simply descriptive and symptomatic studies of official corruption.[27] In his study he proposes that in order to develop reliable anti-corruption policies, research on corruption ought to go further and focus more on the search for scientifically-tested causes of corrupt practices in specific institutions within the public sector. He advocates for a systematic and scientific approach on studying the causes of corruption within a particular public sector institution and chose to focus specifically on the judiciary in developing countries.

Without a doubt, Buscaglia's research resembles the present paper in many facets. The major distinction, however, is that his study was confined to the study of the causes of judicial corruption and its economic consequences in developing countries. In contrast, this paper goes beyond that to discuss the different types of judicial corruption, examine and critique the existing legal framework on the subject with particular interest on Zimbabwe.

Lastly, the present paper merges both the doctrinal and empirical methodologies to test the veracity of allegations of judicial corruption in Zimbabwe. That initiative sets it apart from Buscaglia and makes it *sui generis*.

Lastly, in 2018, the International Commission of Jurists (ICJ) commissioned the Mass Public Opinion Trust titled "Court Users Perceptions Survey." The research dealt with various issues from the perspective of court users. It dealt with perceptions of corruption in the courts. What distinguishes this writer's work from the ICJ survey is that the latter was confined to a presentation of raw figures of which the issue of corruption formed a small segment. Further the ICJ survey only dealt with perceptions of court users but did not involve the judicial officers, prosecutors and legal practitioners like this research seeks to do.

[27] E Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences*, Hoover Institution Press, 1999.

7. Research Methodology

The study employs both the doctrinal and empirical research methodologies. Lawyers, judges and jurists have widely been using doctrinal research as a systematic means of legal reasoning since the nineteenth century.[28] Doctrinal research therefore takes the pride of place as the traditional genre of research in the legal field.[29] This research, although largely doctrinal, infuses an empirical approach in the sense that the writer went into the field and collected data from the targeted research participants. The two methodologies contribute to solidify the conclusions which result from the research.

7.1. Primary Methods of Data Collection

The study will adopt the use of questionnaires in data collection. In this regard two sets of questionnaires will be developed, with the first targeted at collecting data from a group referred to as court officials which comprise lawyers, prosecutors, magistrates and judges. The second set was for general court users. The group encompasses a cross section of people who use the courts from litigants in civil proceedings, accused persons in criminal trials, witnesses and persons whose marriages are solemnised in the courts.

7.2. Secondary Methods of Data Collection

Secondary techniques of data collection were also employed. The researcher also collected data from various sources which include published and unpublished books, journal articles, legislation, case law, policies, various scholarly articles and raw official documents from particular institutions.

7.3. Scope of the study

The bigger part of the research was concentrated in Harare and Bulawayo. The justification being that these two metropolitan cities are the heart and soul of all major litigation in Zimbabwe and are host to the busiest courts in the country. They offer a wide range of judicial litigation. As a result, a study of their processes offers a near accurate examination of the mechanics of judicial corruption.

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[28] A Kharel, Doctrinal Legal Research in *SSRN Electronic Journal* https://www.researchgate.net/publication/323762486_Doctrinal_Legal_Research)

[29] Kharel (n 29 above)

8. Limitations of the study

The researcher faced a number of limitations in the pursuit of this study. To begin with, the topic under discussion is a sensitive one regard being had to its implications on the public's confidence in and the legitimacy of the judicial system. Judicial officers are major participants in the research. Given that the topic deals with issues which impact directly on their integrity or lack of it, some of the court officials did not proffer honest responses to certain questions. On the other hand, it is an open secret that Zimbabwe is heavily polarized along political divisions. It is very likely that some responses by members of the political divides were made in the hope of scoring political victories against each other. Such responses may have led to inaccurate conclusions.

To add on, this study was conducted within particular academic timelines. There was therefore, a very limited time frame within which to carry out the study. The quality of the work may have been compromised in that regard.

Lastly, the questionnaires administered on court users were written in English. That posed communication challenges on participants in that category. In the end, the writer needed to translate some of the questions into vernacular languages. The translations created a likelihood that part of the meaning was lost therein.

9. Organization of the study

The study is organized and categorized in the following broad manner.

Chapter 1: The chapter deals with the research overview, the statement of the problem, objectives of the study, research questions, literature review, scope of the study and the strengths and limitations of the research.

Chapter 2: The second chapter covers a discussion on international and regional instruments regulating judicial corruption. The chapter also discusses the Zimbabwean legislative framework designed to combat judicial corruption. The purpose of the undertaking is to understand the problem of corruption from an international legal standpoint and the efforts set in place to abate the same. Those international standards can then be juxtaposed against the legislative framework in Zimbabwe to assess its effectiveness in curtailing and preventing judicial corruption.

Chapter 3: Chapter 3 is dedicated to a study of the nature of judicial corruption.

Chapter 4: The chapter analyses the causes of Judicial Corruption and its implications on the administration of justice in Zimbabwe

Chapter 5: Chapter 5 deals with the presentation and discussion of findings from the field study

Chapter 6: This is reserved for conclusions and recommendations

10. Chapter Conclusion

In conclusion, it has been established that judicial corruption is a menace that threatens the integrity and legitimacy of many countries' justice systems. It however has a very a poor prognosis which makes it imperative for studies like the one the writer is undertaking to be commissioned. Any effort to address and seek to combat judicial corruption without identifying its root will be fruitless. The chapter has laid the foundation of the research setting the stage for a discussion of the international, regional and municipal legal instruments enacted to deal with corruption.

Chapter 2: International, regional and domestic instruments for combating judicial corruption

1. Introduction

Any discussion on domestic legislation would be incomplete without an examination of international and regional laws as these are the yardstick in framing national content.[30] From an international and regional perspective, there has been an increased awareness on corruption generally. This assertion is supported by the proliferation of various legal instruments promulgated to curb the graft. There is even a heightened need to deal with judicial corruption given the centrality of the judiciary in any effort to tackle other forms of corruption.

This chapter therefore seeks to investigate the global, regional as well as domestic efforts of the respective mother bodies in dealing with judicial corruption. Against that background, an examination of the relevant instruments shall be conducted. The chapter commences with a discussion of the effects of international and regional norms in the domestic legal system of Zimbabwe.

1.1. The Role of International and Regional Norms in the Domestic Legal System of Zimbabwe.

In addressing this topic, a distinction is often made between the monist and dualist systems. The monist system is one under which international treaties are directly applicable by courts in a domestic setup in the same way that national legislation is. In contradistinction, a dual system implies that the national legislature must domesticate the international treaty by either incorporating it into domestic legislation, or by using the treaty as a basis for national legislation.[31]

Put differently, the monist approach simply means that international and national law form part of a single legal system. This entails directly incorporating international law

[30] M Killander, How International Human Rights Law Influences Domestic Law, 2003. Vol 17. *University of Western Cape* 380

[31] J Dugard, *International Law: A South African Perspective*, Juta and company, 2011. 42-43. F Viljoen *International human rights law in Africa,* Oxford University Press, 2012. 518-525.

into the national legal order. McDougal in this respect, advances the notion that to monists, international law is superior to national law.[32]

On the contrary, dualists identify international law as a separate legal order that is distinct from national law. Their school of thought is that for international law to be operative in the domestic setup it has to be received through domestic legislative measures. In other terms it must be domesticated. It is only after this metamorphosis is complete that a state can benefit from the international law.[33]

Consequently, ratification of a treaty bestows upon a member state, both negative and positive obligations. Negative obligations arise from that the member state must refrain from actions that violate provisions of the same whilst the positive obligations are where the member state takes affirmative action to guarantee that rights in the treaty are protected.[34]

1.2. The position in Zimbabwe

Zimbabwe is of the dualist persuasion. An international treaty is not automatically applicable by the local courts upon ratification or accession.[35] **Section 34 of the Constitution, 2013** provides that for international law to become applicable at the national level it has to be incorporated into domestic law.[36] Although the provision appears to obligate the state to domesticate international conventions, treaties and agreements, the government has in many instances seemed reluctant to fulfil that obligation. The International Court of Justice (ICJ), worryingly noted and queried Zimbabwe's lack of commitment to domesticate international treaties.[37] On the other hand, it can be argued that this criticism of Zimbabwe by the ICJ is misplaced. It is not

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[32] M McDougal, The Impact of International Law upon national law: A policy perspective, 1959. Vol 4 *South Dakota Law Review* 25:27-31

[33] FX Bangamwambo, *The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework*, Windhoek: MacMillan Namibia, 2008. 167.

[34] "Enforcement Mechanisms in the United Nations." United Nations System. Accessed 5 January 2020. http://www1.umn.edu/humanrts/svaw/law/un/unenforced.htm

[35] D Makwerere *et al* Human Rights and Policing: A case study of Zimbabwe, 2012. Vol 2 No 17, *International Journal of Humanities and Social Sciences* 131.

[36] Constitution of Zimbabwe Amendment Act 20 of 2013

[37] "Zimbabwe' slow domestication of international treaties criticized." The Crisis Report. Accessed 5 January 2020. http://archive.kubatana.net/docs/demgg/ciz_crisis_report_issue_243_131203.pdf#:~:text=Zimbabwe%E2%80%99s%20slow%20domestication%20of%20international%20treaties%20criticized%20Harare,the%20application%20of%20international%20law%20in%20the%20country.

enough to ratify and domesticate international legal instruments. What is critical in my view, is to understand the underpinnings of the instrument and the ecosystem from which it feeds.

In light of the ensuing discussion, this chapter also seeks to test Zimbabwe's commitment towards curbing judicial corruption through its commitment to implement the objectives of international and regional instruments. It is therefore imperative at this stage, to discuss the relevant instruments from an international, regional and domestic level *seriatim*.

2. United Nations Convention against Corruption

The major international legal instruments against corruption were not borne out of nothing. A slew of activities led to the enactment of those instruments. These, in my assessment, ranged from the Post-World War 11 economic terrain, the 1960s market failures and the shift towards neoliberal ideology to the Watergate and Lockheed scandals.

The point of departure in assessing international legal instruments against corruption is, inevitably, an examination of the only universal, legally binding, anti-corruption instrument which is the United Nations Convention against Corruption.[38] The Convention was adopted by the United Nations General Assembly on 31 October 2003 by resolution 58/4. It came into force on 14 December 2005.[39] Important to note is that contrary to the lofty position accorded to it, the Convention was not created out of morality but as a result of pressures from the business markets. Its major objective, in my view, is to ensure that capitalism thrives. Corruption is not a moral issue worthy occupying a top global agenda. Its wings grow from economic considerations of the powerful nations of the world. The BAE Systems corruption scandal is an instance that fortifies this assertion.[40] The scandal involved a British arms deal with Saudi Arabia which earned BAE Systems at least 43 billion pounds between 1985 and 2007. The British Serious Frauds Office discovered the payment of bribes totaling about 6 billion

[38] "United Nations Convention against Corruption." United Nations Office on Drugs and Crime. Accessed 2 January 2020.
https://www.unodc.org/unodc/en/corruption/uncac.html

[39] United Nations Office on Drugs and Crime (n 39 above)

[40] "Al-Yamamah arms deal." Wikipedia. Accessed 29 June 2020.
https://en.wikipedia.org/wiki/Al-Yamamah_arms_deal

pounds by BAE to members of the Saudi royal family. When investigations were opened, the British Prime Minister interfered with the investigation on the grounds that he was concerned with the "critical difficulty in negotiations over a new sales contract, as well as a real and immediate risk of collapse in UK/Saudi security, intelligence and diplomatic cooperation."[41] In truth economic considerations had overridden morality, forcing the British government to turn a blind eye to stinking corruption by a British Company, particularly when the Saudis were threatening to take the deal to the French if Britain continued with the investigations. This corruption infested interference in the investigations of bribery by the British government is not an isolated incident. Such economic considerations pervade many major business deals across the world.

Zimbabwe signed the UNCAC on 20 February 2004 and ratified the same on 8 March 2007.[42]

Article 11 of the UNCAC - a fundamental provision of the convention - emphasizes the decisive role of the judicial branch in the fight against corruption. It establishes that in order to carry out this role effectively, the judicial branch itself must be free of corruption, and that its members must act with integrity. Substantive guidelines on matters of internal organization, which are critical to prevent and confront corruption, have been included in the Convention. [43]

UNCAC recognizes the importance of a clean judiciary for the enforcement of sanctions against corruption. In that regard, it requires that State Parties take preventive measures to improve integrity and reduce corruption in their court systems. That system covers judges and court personnel. In its second paragraph, Article 11 also urges States Parties to apply similar standards to the prosecution, where that service is constituted separately from the judicial branch. However, when considering the target institutions, it is important to remember two things. First, any measures taken to implement Article 11 depend on a broad range of actors: if the security services do not function, or if police, lawyers or prison officials are corrupt, the integrity

[41] Wikipedia (n 41 above)

[42] "Signature and Ratification Status." UNODC. Accessed 29 June 2020. https://www.unodc.org/unodc/en/corruption/ratification-status.html

[43] "Corruption, Human Rights and Judicial Independence." UNODC. Accessed 29 June 2020. https://www.unodc.org/dohadeclaration/en/news/2018/04/corruption--human-rights--and-judicial-independence.html

of courts – and people's motivation to address the problem – will be compromised. For instance, a prosecutor in the Palestinian Territories once told U4 that, "I have had a hand grenade thrown at me. Why should we be the only ones doing something about corruption?"[44]

Second, legal disputes in any country are resolved through a variety of organs and processes, most of which fall outside the formal systems. This is particularly relevant in developing countries where non-state systems (such as traditional justice systems, paralegals and victim support groups) handle the vast majority of cases. In many developing countries, over 80% of the population seek justice through informal means at the community level. Although not easily ascertainable, it is safe to say that a high percentage of Zimbabweans resort to the chiefs' courts for the resolution of their disputes. The Convention does not address such informal systems explicitly. It can however, be argued under human rights law that State Parties should ensure non-discrimination in the provision of justice, regardless of the channels which are used. The actual measures taken to realize the Convention's requirements in Article 11 depend, to a large extend, upon a wide array of institutions, systems and individuals in any given setting.

2.1. The strengths and weaknesses of the UNCAC

The biggest strength of the UNCAC is that it is the first truly global instrument against corruption.[45] It combines both the elements of prevention and criminalization. It is built on a strong foundation of global cooperation which gifts governments and other institutions with a reliable framework from which to operate. That in turn ensures that all efforts are directed towards the same cause. UNCAC's scope exceeds the bounds of similar instruments. For instance, article 15 which deals with criminalization of extortion of public officials significantly extends the scope of the Organization for Economic Cooperation and Development (OECD) Convention.

Basically, the Convention's strength lies in its condemnation of corruption, both active and passive; public and private; the combination of prevention and criminalization; the

[44] UNODC (n 44 above)

[45] H Hechler, M Huter, R Scaturro, "UNCAC in a nutshell 2019." U4 Anti-Corruption resource Centre. Accessed 29 June 2020.
https://www.u4.no/publications/uncac-in-a-nutshell-2019

emphasis on international cooperation and technical assistance, to enable all countries to implement it consistently and thoroughly; and a viable mechanism for the return of the proceeds of corruption to their legitimate owner, or at least to their country of origin.[46]

Whilst celebrating the strengths of the Convention, sight cannot be lost that it still requires improvement in a number of areas as pointed out in this article.

Firstly, the success in fighting corruption is dependent on how the Convention is implemented. The scant interest shown by the developed countries in implementing it casts a thick cloud over its likely success.47

The Convention remains an instrument of limited applicability due to the apparently poor craftsmanship employed. It appears to give priority to political and economic interests ahead of human, legal and moral interests.

Its content also leaves a few things to be desired largely because it imposes no obligation on signatory countries to criminalize certain acts. In other words, some of its provisions are couched in non-binding terms. Those acts include passive bribery of a foreign public official, trading in influence, abuse of public functions or illicit enrichment. It contains a number of ambiguous phrases such as that each State Party: "shall adopt" or "shall consider adopting" or things they "shall endeavor to adopt." It is such ambiguities which led Canada to formulate a detailed proposal to the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption, A/AC.261/IPM/27, December 7, 2001.[48]

Another major shortcoming of the Convention is the problem of implementation and enforcement. There is a glaring absence of any mechanism to punish States Parties which do not fulfill their obligations under the Convention because there are no monitoring and surveillance mechanisms involving representatives of civil society,

[46] A Argandona, The United Nations Convention against Corruption and Its Impact on International Companies, 2007. Vol 74 No 4. *Journal of Business Ethics*

[47] "United Nations Convention against Corruption." Wikipedia. Accessed 29 June 2020. https://en.wikipedia.org/wiki/United_Nations_Convention_against_Corruption#Signatures,_ratifications_and_entry_into_force

[48] Argandona (n 47 above)

companies, unions, *inter alia.*[49] It is these mechanisms which in the writer's opinion can define the success or failure of an instrument such as UNCAC.[50]

3. United Nations Declaration against Corruption and Bribery in International Commercial Transactions

3.1. Essence of the Convention

In its resolution 51/191 of 16 December 1996, the General Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions. In the same resolution, the Assembly requested the Economic and Social Council and its subsidiary bodies, in particular the Commission on Crime Prevention and Criminal Justice, to examine ways to further the implementation of the Declaration. This was intended to promote the criminalization of corruption and bribery in international commercial transactions; to keep the issue of corruption and bribery in international commercial transactions under regular review; and to promote the effective implementation of the resolution. In the Declaration, the Assembly recognized the need to promote social responsibility and appropriate standards of ethics on the part of private and public corporations. These included transnational corporations and individuals engaged in international commercial transactions. This would be achieved, among other methods, through observance of the laws and regulations of the countries in which they conduct business. It would also take into account the impact of their activities on economic and social development and environmental protection.

3.2. Strengths and weaknesses of the Convention

The significance of the OECD Convention is that it inadvertently acknowledges that investors from the OECD countries play a significant role in spreading corruption in the developing countries.[51] This tacit acquiescence buttresses the writer's earlier argument that the fight against corruption particularly by the developed countries lacks moral grounding. The extent to which a multinational is dissuaded from engaging in

[49] Argandona (n 47 above)

[50] Argandona (n 47 above)

[51] A Padideh, "Controlling Corruption in International Business: The International Legal Framework." UNDP/UNESCO. Accessed 29 June 2020.
https://ssrn.com/abstract=1540144

active bribery, again depends on the implementation and enforcement of the Convention by each signatory state.

Another important feature of the OECD Convention is that it serves as an extradition treaty. It allows for extradition in cases of violations of the anti-bribery provisions. It is crucial, however, that the penalties must be comparable to those applicable to bribery of domestic officials and such penalties must be effective, proportionate and dissuasive.

Further, the OECD has enacted a number of mechanisms to ensure that signatories of the Convention take appropriate steps to implement its provisions. The OECD Anti-Corruption Division (ACD) serves as the focal point within the OECD Secretariat to respond to the fight against corruption in international business. In early June 1999, the ACD launched the OECD Anti-Corruption Ring Online (ANCORR WEB), a comprehensive online information and resource center on corruption, bribery, money laundering, and related issues. The centre provides governments, businesses, civil society, international organizations, and individuals with information they need to implement better policies and actions to fight corruption. In addition to the ACD, OECD Public Management Service (PUMA) helps member countries develop and maintain a framework for promoting integrity and high standards in public officials.

Despite all this, the enforcement of the OECD Convention has proved to be difficult, because of the inefficiency of national criminal and evidentiary rules in the context of transnational bribery and the fact that the same companies who engage in acts of bribery and corruption in the developing world often are the most respected and law-abiding companies in their homelands.

Lastly, the OECD Convention is not self-executing. It does not include a model law. Rather, it provides only rough guidelines for its implementing legislation. The aim is that the signatories, by national implementation, will provide clear and detailed rules that are functionally equivalent to one another in punishing and deterring bribery in international business.[52] Unfortunately, the benefits intended to accrue from this convention remain obscure in Zimbabwe.

[52] Padideh (n 52 above)

4. African Union Convention on Preventing and Combating Corruption

The African Union encouraged the participation of civil society in the development of a draft convention on corruption. The Draft African Union Convention on Preventing and Combating Corruption was approved by the Ministerial Conference on the Draft African Union Convention on Preventing and Combating Corruption, held in Addis Ababa on 18 and 19 September 2002.

The Convention was adopted by the Heads of State and Government of the African Union in Maputo on 11 July 2003. Zimbabwe signed the Convention on the 18 November 2003 and ratified the same on the 17 December 2006.[53]

The Convention contains provisions that should guarantee access to information and the participation of civil society and the media in the monitoring process. The Convention is critical in relation to judicial corruption given the vigilance and outspokenness of civil society in such issues. It is also noteworthy that the Convention seeks to ban the use of funds acquired through illicit and corrupt practices to finance political parties and adoption of legislative measures to facilitate the repatriation of the proceeds of corruption.

5. Civil Law Convention on Corruption

The Civil Law Convention on Corruption represents the first attempt to define common international rules in the field of civil law and corruption. Judicial corruption is alleged to abound courts which deal with civil cases. The Convention requires each party to it, to provide for, in its internal law, effective remedies for persons who have suffered damages as a result of corruption. This includes the possibility of obtaining compensation. The Convention requires each state party to provide in its internal law, for the right to bring civil action in corruption cases. It should be noted that, under the Convention, damages are not limited to any standard payment but must be determined according to the loss sustained in the particular case. This excludes punitive damages although parties whose domestic law provides for punitive damages are not required to exclude such in their applications. The extent of the compensation is to be granted by the court. The court can also award compensation for material damages, loss of

[53] "Status of Ratification of the Convention on Corruption." African Union Advisory Board on Corruption. Accessed 29 June 2020.
http://www.auanticorruption.org/auac/about/category/status-of-the-ratification

profits and non-pecuniary loss. In order to obtain compensation, the plaintiff has to prove the occurrence of the damage; whether the defendant acted with intent or negligently; the causal link between the corrupt behavior and the damage must also be established. The main achievement in this context lies in the significantly reduced evidentiary requirements which are usually demanded in civil proceedings. As far as unlawful and culpable behavior on the part of the defendant are concerned, it should be indicated that those who directly and knowingly participate in the corruption are primarily liable for the damage. This includes the giver and the recipient of the bribe, as well as those who incited or aided the corruption. It also speaks to those who failed to take the appropriate steps, in the light of the responsibilities that lie with them, to prevent corruption. The question which arises is whether or not this convention can be applied to have corrupt judicial officers account for their transgressions? In Zimbabwe, this appears next to impossible. Various pieces of legislation protect judicial officers from being sued for wrong decisions yet some of those wrong decisions are not a result of errors of law. The wrong decisions are made to deliberately contort the law to suit the officials' scheme of corruption. The law also makes it very difficult for citizens to sue judicial officers in the superior courts for civil debts and wrongs that the judges may be liable to. As a result of these bottlenecks, judicial officers take a chance with corruption in the confidence that if criminal liability cannot stick, they get away with it.

The Convention also deals with the issue of state responsibility for acts of corruption by public officials. Unfortunately, it does not indicate the conditions for the liability of a State Party but leaves each party free to determine in its internal law the conditions under which the party would be liable.

The Convention also intends to protect the interests of whistle-blowers by obliging states parties to take the necessary measures to protect employees who report in good faith and on the basis of reasonable grounds, their suspicions on corrupt practices from being victimized.

Finally, under the Convention, the parties are required to cooperate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction and recognition and enforcement of foreign judgments and litigation costs. It therefore emphasizes international cooperation in civil and commercial matters.

In Zimbabwe, the fact that very few people have attempted to sue the state or its institutions, for corrupt actions of judicial officers, shows that although the law may allow it, the burden of proving such allegations is just too onerous. That dissuades citizens from seeking recourse against corrupt judicial officers as was illustrated in the case of *Danha v Mudzongachiso*.[54]

6. Criminal Law Convention on Corruption

The Committee of Ministers of the Council of Europe adopted the Criminal Law Convention on Corruption in November 1998. It was opened for signature on 27 January 1999. This applied to member states of the Council of Europe and the non-member states which had participated in its development.

The Criminal Law Convention on Corruption seeks to enhance the coordinated criminalization of a large number of corrupt practices such as: (a) active and passive bribery of domestic and foreign public officials; (b) active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies; (c) active and passive bribery in the private sector; (d) active and passive bribery of officials of international organizations; (e) active and passive bribery of domestic, foreign and international judges and officials of international courts; (f) active and passive trading in influence; (g) laundering of proceeds from corruption offences; and (h) accounting offences (invoices, accounting documents etc.) connected with corruption.[55] In addition, it is foreseen that each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences established in accordance with the Convention.

States parties are required to provide for effective, proportionate and dissuasive sanctions and measures. These include acts committed by natural persons, and penalties involving deprivation of liberty that can lead to extradition.

Legal persons will also be liable for the criminal offences of active bribery, trading in influence and money-laundering.

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[54] *Danha v Mudzongachiso* NO HB 20/18

[55] "Details of Treaty No.173: Criminal Law Convention on Corruption." Council of Europe. Accessed 29 June 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173

Further, the Convention contains provisions concerning the setting up of specialized anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities and gathering of evidence and confiscation of proceeds.

The Convention also provides for enhanced international cooperation (mutual assistance, extradition and the provision of information) in the investigation and prosecution of corruption offences. In connection with mutual assistance, it provides that parties will create specially designated central authorities to deal with requests in a prompt manner. While mutual assistance may be refused if the request undermines the fundamental interests, national sovereignty, national security or *ordre public* of the requested party, it may not be invoked on the grounds of bank secrecy.

7. Critique of Zimbabwe's implementation of international law

As alluded to earlier, the Constitution of Zimbabwe provides for the incorporation of International law into domestic legislation. The major point of criticism in this respect has been Zimbabwe's slow domestication of the same. Similar observations have been made by international courts. A Ugandan judge at the International Court of Justice (ICJ), Justice Julia Sebutinde lamented that Zimbabwe appeared to be quick to sign a treaty but slow to domestic it.[56] This implies to an extent a lack of commitment in enforcing the said treaties.

Another major challenge is that for some reason, in Zimbabwe, the criminal sanction appears to have lost its fear factor. High ranking officials accused of corruption have found loopholes within the criminal justice system to escape liability. Their criminal cases go on in the courts for eternity. Both the public and the state end up losing interest in the cases and play right into the hands of the corrupt officials. This merry-go-round does not do anything to deter judicial officers from engaging in corrupt activities. Those judicial officers who engage in corruption certainly know that the law is porous and that their chances of being convicted in a criminal court are very slim. Needless to say, that removes the biggest threat.

8. Zimbabwe's Municipal Instruments

Zimbabwe functions under a dual legal system which comprises general law and traditional African customary law. The general law of Zimbabwe is largely Roman-

[56] "A crisis in Zimbabwe." The Crisis Report. Accessed 29 June 2020. http://archive.kubatana.net/docs/demgg/ciz_crisis_report_issue_243_131203.pdf

Dutch law with fusions of English law. Both were introduced to the country during colonial times.[57]

This part of the chapter examines municipal legislation and other instruments enacted in Zimbabwe to deal with judicial corruption. The purpose of this undertaking is to establish the efficacy of those instruments in relation to judicial corruption in Zimbabwe. The discussion will focus on the Constitution of Zimbabwe Amendment Act 20 of 2013,[58] the Prevention of Corruption Act,[59] the Criminal Law (Codification and Reform) Act[60] as well as the remedies which these statutes offer. It will also assess the Judicial Codes of Ethics for judges[61] and for magistrates. The section commences with a discussion on the Constitution.

8.1. The Constitution

The most important source of law in Zimbabwe is the Constitution which became law on 22 May 2013. Zimbabwe is a constitutional democracy where the Constitution is the *suprema lex.* The supremacy of the Constitution is reflected in section 2 of the document. It is unequivocal that "any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency." At this point, it is important to point out the provisions of the Constitution which speak to judicial corruption.

To begin with s 9 of the Constitution provides as follows:

> **Good Governance**
>
> **(1)** The State must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution, and in particular—
>
> **(a)** Appointments to public offices must be made primarily on the basis of merit;

[57] "Zimbabwean Legal System." Global Ethics Observatory. Accessed 5 February 2020. http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=34&lng=en

[58] The Constitution of Zimbabwe Amendment Act 20 of 2013 (hereinafter referred to as the Constitution)

[59] Prevention of Corruption Act [*Chapter 9:16*]

[60] Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

[61] Judicial Service (Code of Ethics) Regulations, 2012

(b) Measures must be taken to expose, combat and eradicate all forms of corruption and abuse of power by those holding political and public offices.

As shown above, s 9 (1) (b) expressly provides for measures to be set in place to eradicate all forms of corruption and abuse of power. There is no gainsaying that judicial officers hold public office. That shows that a reading of section 9 in light of this research means that the Constitution obligates the state to appoint judicial officers on merit as well as to devise and implement measures that can be used to prevent and combat judicial corruption.

In addition, s 164 of the Constitution provides for judicial independence. It provides that the courts are independent and only subject to the Constitution and the law.[62] In the course of exercising their functions, judicial officers must make decisions freely and without interference or undue influence.[63] These values, expressly stated in the Constitution are meant to be the antidotes to judicial corruption. Though not worded in express terms with reference to judicial corruption, the only reasonable inference that can be drawn is that the legislature intended to prevent judicial officers from preying on litigants and abusing the judicial office.

Chapter 13 of the Constitution is dedicated to institutions established to combat corruption. Section 254 of the Constitution provides for the establishment and composition of the Zimbabwe Anti-Corruption Commission (ZACC) whilst section 258 provides for the establishment of the National Prosecuting Authority (NPA). One of the core-functions of ZACC is to investigate and expose cases of corruption both in the private and public sector[64] whilst the NPA is mandated to institute and undertake criminal prosecutions on behalf of the state. Chapter 13 provides a clear illustration of the law's desire to combat corruption including judicial corruption.

The legislature operationalized ZACC through the enactment of the Anti-Corruption Commission Act [*Chapter 9:22*].[65] The judiciary is not immune to investigation by ZACC. There is no indication that the legislature intended the judiciary to be excluded from investigations. Provisions such as section 16 of the Judicial Service Act [*Chapter*

[62] Constitution (n 60 above) s 164 (1)

[63] Constitution (n 60 above) s 165 (3)

[64] Constitution (n 60 above) s 255 (1) (a)

[65] Constitution (n 60 above) s 255 (3)

7:18] however appear to detract from this understanding by barring the search and arrest of judicial officers within their chambers or within the precincts of the court over which the judicial officer presides. The majority of judicial corruption transactions are rumoured to be conducted within the courthouses. By making judicial officers immune from arrest within the precincts of the courthouse or their chambers, the law disarms investigating agencies as that removes the opportunity for them to get evidence against corrupt judicial officers.

8.2. The Prevention of Corruption Act [*Chapter 9:16*]

The Prevention of Corruption Act prohibits active and passive bribery, the giving and receiving of gifts and facilitation payments in the public and private sectors. Despite the express provisions of that law such practices are not uncommon. The punishment for corruption offences is heavy. These range from hefty fines to imprisonment of up to 20 years or both such fine and such imprisonment. The government is however under attack for allegedly applying the law selectively. There are loud accusations from some quarters that the state targets mostly political opponents although this appears to be an inaccurate conclusion.

It is also noteworthy to point out that the Criminal Law Codification and Reform Act [*Chapter 9:23*] amended the Prevention of Corruption Act.[66] Sections 3, 4 and 5 of the Prevention of Corruption Act were repealed by Schedule 6-part VIII of the Criminal Law Codification and Reform Act. Regardless of that repeal it is important to highlight that s 4 (a) of the Prevention of Corruption Act was one of the first attempts to criminalize actions by a public officer which are contrary to his duties for the purpose of showing favor or disfavor or the incitement thereof. The storm around judicial corruption in Zimbabwe is best illustrated by the case of *S v Paradza*[67] in which the accused was a High Court Judge. He was charged with contravening s 4 (a) of the Prevention of Corruption Act.[68] The State alleged that the accused had attempted to procure a fellow judge to act in a way that would result in favor being shown to himself or his business colleague. The accused was held to be in direct contravention of the said section and that it was not necessary that any inducement be offered. He was

[66] See preamble of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

[67] 2006 (1) ZLR 20 (H)

[68] Case no: HC 2475/03, CRB 152/04, Media Neutral Citation ZWHHC 7

convicted but fled the country before the criminal trial could be concluded. He sought and obtained political refugee status in New Zealand.[69]

The case of *S v Paradza* is particularly outstanding in that it remains the only case where a sitting judge of the superior courts in Zimbabwe was charged with corruption. The paucity of such cases does not in my view, demonstrate the absence of judicial corruption in Zimbabwe in the superior courts but rather, how difficult it is to expose and prevent judicial corruption at that level. Nevertheless, the arrest of that judge buttresses the sufficiency of legislation meant to curb corruption in Zimbabwe.

8.3. The Criminal Law Codification and Reform Act [Chapter 9:23]

The criminal law of the country has been codified in the Criminal Law [Codification and Reform] Act (The Criminal Law Code). This Act amends or repeals most previous Acts applicable to this area of law in Sections 282 and 283 respectively. Criminal law is now entirely based on this Act rather than on other legislation or the common law derived from Roman-Dutch criminal law.

The part of the Criminal Law Code most relevant to this discussion is chapter IX which deals with bribery and corruption. In essence chapter IX seems to have expanded the provisions of the Prevention of Corruption Act. A notable inclusion in the Code is found in s 169 which is the interpretation clause of Chapter IX. The definition of a public officer includes in s169 (e), a judicial officer. The express inclusion shows that the legislature was alive to the threat of judicial corruption. Section 170 of the Criminal Law Code criminalizes bribery. The penal provision provides for a maximum sentence of a fine not exceeding level fourteen or not exceeding three times the value of any consideration obtained or given in the course of the crime, whichever is the greater; or imprisonment for a period not exceeding twenty years; Those penal provisions go a long way in illustrating the seriousness with which the law in Zimbabwe considers corruption and bribery.

Lastly, s 174 of the Criminal Law Codification and Reform Act provides for criminal abuse of duty by public officers. The offence of criminal abuse of duty re-enacts and

[69] "Enforcement of Anti-Corruption Laws." UNCAC Civil Society Review. Accessed 29 June 2020. https://uncaccoalition.org/files/cso-review-reports/year2-zimbabwe-report.pdf

expands the previous s 4 of the Prevention of Corruption Act.[70] Historically neglect of duty, bribery and extortion were at the core of abuse of public office.[71] Furthermore, crimes such as bribery, extortion, theft and fraud which may also speak factually to various situations that involve public officers are separate offences in the code.

8.4. The Anti-Corruption Commission Act [*Chapter 9:22*]

The Zimbabwe Anti-Corruption Commission was first established in 2004 through the Anti-Corruption Commission Act, 2004. It later evolved in 2013, into a constitutional commission through the new Constitution. The Commission was created as an institution to assist in the fight against corruption, patronage practices and abuse of power. The intention was to enhance the accountability and transparency of Zimbabwean institutions. Its main objective is to "combat corruption, theft, misappropriation, abuse of power and other improprieties in the conduct of affairs in both public and private sectors."[72] The preamble to the Anti-Corruption Commission Act further clarifies the purpose of the Commission. The Act equally outlines the powers and functions of the Commission. Section 12 of the Act outlines the functions of the Commission which include duties such as monitoring and examining practices, systems and procurement procedures, enlisting and fostering public support, and also instructing, advising and assisting any officer, agency or institution.

8.4.1. Problems of the Commission

The Commission's challenges are a direct result of the deficiencies inherent in the enabling legislation. These challenges then raise questions as to the commission's effectiveness.

Firstly, the functions of ZACC are hamstrung by inadequate resources and an employment structure which has not been given full effect. The Anti-Corruption Act does not give the Commission enough budgetary autonomy but leaves it, to dependent on hand outs from Treasury.[73] There have been lamentations that ZACC is being

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[70] G Feltoe, *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]*, Legal Resources Foundation, 2017.

[71] G McBain, Modernizing the Common Law Offence of Misconduct in a Public or Judicial Office in Vol 7, *Journal of Politics and Law*, 2014.

DOI: 10.5539/jpl.v7n4p46

[72] Anti-Corruption Commission Act [*Chapter 9: 22*], preamble

[73] A Magaisa, "The trouble with Govt's anti-corruption organ." *Zimbabwe Independent*. 24 May 2018.

underfunded yet it carries a huge mandate which if properly executed would return externalized billions of dollars into the country's economy.[74] There is in ZAAC, a lack of money as well as the requisite expertise to properly execute its mandate.[75]

This creates controversy and breeds allegations of corruption in the Commission. Although Treasury provides funding to other public institutions such as the judiciary and the police, the Executive's funding of the Commission creates the impression that the Commission is under the control of powerful and influential individuals. That in turn undermines ZACC's credibility and independence.

Secondly, the challenges which the Zimbabwe Republic Police faces are well documented. Yet, in terms of section 13 of the 2004 Act, the Commission shall exercise its powers concurrently with those of the police and it shall be governed by the same relevant provisions of the Criminal Procedure and Evidence Act which govern the police force. This means that ZACC is instructed by law to work closely with the police force. As a result, it is difficult for ZAAC to create and propagate its stand-alone image. Its brand is always associated with that of the police. The ineffectiveness previously exhibited by the police is likely to be imputed on and associated with ZAAC.[76]

ZACC has been described as a "toothless bulldog" in the fight against corruption. In my considered view, this however appears to be a description which was coined by those who want the commission to fail. The Commission has in a number of cases, executed its mandate professionally. That the cases are not prosecuted at all or are unprofessionally prosecuted is not the Commission's problem because it does not hold a prosecutorial brief.

8.5. The Judicial Service (Code of Ethics) Regulations[77]

The Judicial Service (Code of Ethics), Regulations (The Code of Ethics) for judges came into effect in 2012. That of magistrates which mirrors the one for judges came into effect in 2019. The two instruments will on that basis, be discussed together. The

[74] V Langa, "Newsday Underfunding NPA, ZACC dangerous: MP" *NewsDay*, 28 December 2018

[75] Magaisa (n 75 above)

[76] Ndoma (n 13 above

[77] The Judicial Service (Code of Ethics) Regulations, 2012

purposes of the codes of ethics are aptly captured in the two documents' preambles. They are to entrench the independence of the judiciary; to enhance the competence and impartiality of the judiciary; to encourage judicial officers to collectively and individually respect and honour the judicial office; and to promote and maintain high standards of judicial conduct.

The instruments clearly speak to the elimination of judicial corruption and prevention of other vices which tend to contaminate judicial officers' decisions or besmirch the dignity of the judicial office. The codes of conduct are very elaborate on what is expected of judicial officers. Those expectations range from ethical considerations to values that must attach to judicial office,[78] to timeframes within which judgments must be passed by the courts.[79] Without the need to extensively examine the provisions of the codes, it is apparent that they are sufficient in terms of depth. What is lacking is the strict enforcement of the codes. As a result, the effectiveness of these codes of conduct has not been apparent in practice. The codes appear to be moral documents more than legally binding instruments through which defaulting judicial officers can be held to account. To date, there is no documented case of a judicial officer (both in the superior and the inferior courts) who has been censured on the basis of breaching the judicial codes of ethics. The codes require amendments to ensure that they become enforceable against judicial officers. In fact, they must become codes of conduct rather than codes of ethics.

8.6. Deficiencies in the legislative framework of Zimbabwe

The absence of provisions on criminalization of foreign bribery from our municipal instruments on judicial corruption is glaring.

There is also a need to improve legislation on protection of witnesses, experts, victims and liability of legal persons. Corruption cases are usually sensitive especially where they involve judicial officers. The people who are close to judicial corruption are lawyers and litigants. When these groups of people allege corruption against judicial officers, utmost care must be taken to ensure that they are not victimized. The laws

[78] Code of Ethics (n 79 above) s 4

[79] Code of Ethics s (n 79 above) s 19 (1)

must therefore craft ways to protect all stakeholders.[80]At the moment these protections are absent from our statutes.

There is equally a need to build the capacity of the individuals and institutions tasked with curbing corruption. As alluded to in the discussion above, there is a shortage of resources to effectively enforce legislation. These include experts in the field of corruption and proper remuneration structures to attract suitable candidates. The investigative staffers in ZAAC for instance, are ordinary police officers who did not do any extra-ordinary investigations during their stint in the police force; the prosecutors in the National Prosecuting Authority remain the same ordinary prosecutors. The Judicial Service Commission has at least started the process to streamline judicial officers who sit in the anti-corruption courts in a bid to enhance effectiveness. This was after the realization that the ordinary magistrate was trailing behind the machinations of the criminal underworld.

8.7. Overview of the legislative framework on judicial corruption

Zimbabwe's legislative framework is strong as evidenced by the foregoing discussion.[81] The Criminal Law Code, in particular, expressly acknowledges the threat of judicial corruption and in the process criminalizes it. There are heavy penal measures set in place for such transgressions. Although there is always room for improvement like suggested above, the legislative efforts to curb judicial corruption are apparent.

9. Conclusion

Evidently, the problem of judicial corruption in Zimbabwe cannot be attributed to a weak legal framework. This paper has thus far proved that Zimbabwe is a signatory to international and regional instruments and its municipal legislation is strong. The paper has however shown that it is not enough to set in place proper legal frameworks without effective enforcement and implementation. The country has

[80] "Enforcement of Anti-Corruption Laws." UNCAC Civil Society Review. Accessed 29 June 2020. https://uncaccoalition.org/files/cso-review-reports/year2-zimbabwe-report.pdf

[81] "Zimbabwe Corruption Report." GAN Business Anti-Corruption Portal. Accessed 29 June 2020. https://www.ganintegrity.com/portal/country-profiles/zimbabwe/

laid the necessary groundwork in the fight against judicial corruption but still has a lot to do in the enforcement sphere.

In order to fully develop a working plan in the fight against judicial corruption, it is vital to further discuss its different types. The next chapter sets out to achieve that and give an exposition of some of the insidious forms of judicial corruption.

Chapter 3: An Examination of the Nature of Judicial Corruption

1. Introduction

Corruption is an insidious plague whose forms of manifestation are legion. It has a wide range of corrosive effects on societies.[82] It impedes democratic development and the rule of law, leads to violations of human rights, distorts markets, diminishes the quality of life and promotes the flourishing of organized crime, terrorism and other threats to human security.[83]

As already shown in the earlier chapters, the judiciary is affected in equal measure. Judicial institutions, like other organizations are susceptible to corruption. Corruption and perceptions of it, in the judiciary do not only undermine the courts' credibility as corruption fighters but also erode trust in the courts' impartiality generally. Corruption serves to harm all the core judicial functions, such as dispute resolution, law enforcement, protection of property rights and contract enforcement. In addition, corruption impedes the broader accountability function that the judiciary is entrusted with in democratic systems namely upholding citizens' rights, securing the integrity of the political rules of the game and sanctioning representatives of other branches of government when they act in contravention of the law.

These implications are dire. Robust solutions aimed at mitigating judicial corruption must be crafted. To achieve that, it is crucial to understand the genealogy of the endemic because the factors which influence corruption and the resultant implications are usually varied. That synthesis calls for an analysis of the scourge's different forms, causes and implications. Understanding the causes and implications of corruption is important in that it is only from that basis that the types of anti-corruption initiatives which a country may put in can be determined. It may be suicidal to simply adopt anti-corruption measures for the sole reason that such measures were effective in another jurisdiction. In that regard, this chapter is dedicated to an examination of the different types of judicial corruption. The discussion commences with an examination of the types of judicial corruption.

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[82] United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003, foreword by Koffi Annan p iii

[83] United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003.

2. Types of Judicial Corruption

2.1. Grand and Petty Corruption

There have been efforts to streamline corruption into two broad categories namely grand and petty corruption. Those divisions, as will be shown below, are in my opinion, blurred in judicial corruption.

2.1.1. Grand Corruption

Grand corruption is corruption that pervades the highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability.

When the highest level of government gets involved in compromising the work of the judiciary, the central functions of governance get distorted and grand corruption is a matter of fact.[84] Grand corruption therefore relates to the large-scale misuse of public resources by senior civil servants and politicians. It is mostly corruption which is found in government institutions. All judicial officers in Zimbabwe are part of the Judicial Service and are employed by the Judicial Service Commission. By extension, they are therefore public servants. The decisions they make are profound. There cannot be petty corruption by a judicial officer.

2.1.2. Petty Corruption

Petty corruption involves the exchange of very small amounts of money, the granting of minor favors by those seeking preferential treatment or the employment of friends and relatives in minor positions.

The exchange of a sum of money or favor between a plaintiff and a judge in order to receive a positive outcome of the judicial matter is not petty corruption, even if the amount of money is very small or the favor is diminutive.[85]

Admittedly the terms grand and petty corruption offer a blanket approach and embrace other forms of corruption as shall be discussed below. In the end the distinction appears convoluted. According to Transparency International there are two types of

[84] UNODC (n 18 above) p. 10-11.

[85] UNODC (n 18 above) p. 10.

corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery.[86]

2.2. Political interference in judicial processes

Etyang defines political corruption as the abuse of entrusted power by political leaders for private gain, with the objective of seizure of state power.[87] In addition, Gyekye defines political corruption as the illegal, unethical and unauthorized exploitation of one's political or official position for personal advantage.[88]

Political corruption, particularly of the judiciary, takes many forms, some of which are clearly illegal (bribes, blackmail, threats, violence/murder), while others are more subtle forms of undue influence. These stem from the ways in which relations between the judiciary and other arms of government are organized, or reflect a legal culture where judicial officers are expected to defer to political authorities.[89] This means that political interference does not only manifest in threats, intimidation and bribery of judges, but also by the manipulation of judicial appointments, salaries and conditions of service.

Transparency International argues that structural sources of political bias in the judiciary are related to procedures for *appointment* of judges and judicial leadership; terms and conditions of *tenure* for judges; and budgetary and *financial* regulations, including salaries and benefits.[90] The judiciary thus primarily serves a political purpose of an inferior servant rather than an equal partner, of the executive and legislature.

Judicial and political corruption are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced. The ramifications of this dynamic are profound as they deter

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[86] "Global Corruption Report 2007: Corruption and Judicial Systems." Transparency International. Accessed on 29 June 2020.
https://www.transparency.org/en/publications/global-corruption-report-2007-corruption-and-judicial-systems

[87] *O Etyang*, Political Corruption and Justice in Africa, 2015. Vol 14 No 1. *Corruption in Africa: A threat to Justice and Sustainable Peace*.

[88] K Gyekye, *Traditional and Modernity: Philosophical Reflections on the African Experience*, New York: Oxford University Press, 1993.

[89] S Gloppen 'Courts, corruption and judicial independence' Corruption, Grabbing and Development, 2013

[90] "Global Corruption Report 2007: Corruption and Judicial Systems." Transparency International. Accessed on 29 June 2020.
https://www.transparency.org/en/publications/global-corruption-report-2007-corruption-and-judicial-systems

more honest and unfettered candidates from entering or succeeding in politics or public service.

2.3. Bribery

Heidenheimer defines bribery as the bestowing of a benefit in order to unduly influence an action or decision.[91] Section 170 of the Criminal Law Codification and Reform Act criminalizes bribery in Zimbabwe. The term, as defined in s 170 of the Code embraces bribery by an agent who seeks or solicits bribes or by an agent who offers and then pays a bribe. The term agent in the Code has been defined to include a public officer who is also defined to include a judicial officer. Bribery is probably the most common form of corruption known.[92] It has often been categorized into active and passive bribery. In discussions of transactional offences such as bribery, "active bribery" usually refers to the offering or paying of the bribe, while "passive bribery" refers to the receiving of the bribe.[93]

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to 'expedite' or 'delay' cases, or to direct clients to judges known to take bribes for favorable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a certain way.

Scholars agree that there is another specie of bribery which has wreaked havoc in the administration of justice. It is abuse of office or abuse of power.

2.4. Abuse of Power

In Zimbabwe, s 174 of the Criminal Law Code criminalizes abuse of office by a public officer. Abuse of power has generally been defined as the improper use of authority by someone who has that authority because he or she holds public office.[94]

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[91] A J Heidenheimer, *Perspectives on the perception of corruption*, Transaction Publishers, 2002.

[92] A Johnson *'Bureaucratic corruption, MNEs and FDI'* (Unpublished thesis, Jonkoping International Business School, 2004)

[93] European Criminal Law Convention on Corruption, articles 2 & 3. Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Article VIII of the OAS Convention require Parties to criminalize the offering of bribes by nationals of one State to a Government official of another in conjunction with a business transaction.

[94] www.encyclodepia.com

In Zimbabwe, classic examples of this kind of judicial corruption exist. In the *Paradza* case a judge of the High Court attempted to influence the discretion of another judge in a bail application.[95] The offending judge was convicted after a protracted trial but fled the country before he could be sentenced. In another case which however has not been proven, a judge of the Supreme Court of Zimbabwe is facing allegations of abusing his office after seeking to rail road a litigant into settling a case involving the judge's relative. A tribunal has been set to consider the question of the judge's removal from office in terms of section 187(2) of the Constitution.[96] In the magistrates' courts, these allegations are more pronounced. A former chief magistrate of the country was charged with criminal offences for abusing his office by seeking to influence magistrates under his charge to decide cases in a predetermined manner.[97]

In some cases, judicial corruption can involve the abuse of a discretion, vested in an individual, for personal gain. This occurs where for instance, a judicial officer responsible for exercising his or her discretion impartially decides to preside over a case in which he or she holds a personal interest. Such abuse is often associated with bureaucracies where there is broad individual discretion and few oversight or accountability structures, or where decision making rules are so complex that they neutralize the effectiveness of any accountability structures that do exist. In Zimbabwe, judicial officers have for instance, unfettered discretion on questions of the guilt or innocence of people accused of criminal offences or the liability or otherwise of litigants in civil cases. There are many examples where the discretion of judges goes beyond the confines of legislation or of binding precedent. In such cases it would be clear that the court may be abusing its discretion and undermining the rule of law. Yet such decisions are usually celebrated as testimony to the existence of judicial activism. Allegations of abuse of power are frequently raised against judicial officers but such officers are always quick to raise the discretion card. The Judicial Service Commission is powerless to proceed with any disciplinary action against the concerned judicial officers unless there is evidence of extra-legal misconduct.

[95] Justice Paradza was accused of having contacted two fellow judges and asked them to intercede to obtain the release of his business partner's passport. The partner was on bail on a charge of murder.

[96] E Chikwati, 'Tribunal to probe Justice Bere sworn in' *The Herald*, 29 June 2020

[97] T Rupapa, D Nemukuyu, 'Updated: Chief magistrate arrested over Supa, Kasukuwere' *Chronicle*, 12 Jan 2019

2.5. Favoritism and Nepotism

Nepotism and favoritism are actually two different concepts. They are however, usually used interchangeably, because their meanings and implications complement each other.

Nepotism is a special form of favoritism which is defined as the granting of positions and or benefits to relatives and friends regardless of their abilities.[98] It takes place when officials favor relatives or friends for positions in which they (the officials) hold some (or sole) decision making authority.[99]

Generally, favoritism and nepotism involve interference and abuse of discretion. Such abuse, however, is governed not by the personal-interest of an official but benefits to someone linked to him or her through membership of a family, political party, tribe, religious or other group. The next type of judicial corruption to be considered in this study is extortion.

2.6. Extortion

Whereas bribery involves the use of payments or other positive incentives, extortion relies on coercion, such as the use or threats of violence or the exposure of damaging information, to induce cooperation. As with other forms of corruption, the "victim" can be the public interest or individuals adversely affected by a corrupt act or decision. In extortion cases, a further "victim" is created, namely the person who is coerced into cooperation. While extortion can be committed by government officials or insiders, such officials can also be victims of it. In some cases, extortion may differ from bribery only in the degree of coercion involved.

2.7. Judicial Capture and Lawfare

This type of corruption exists where the courts or a wide section of judicial officers feel beholden to private individuals or organizations or the political leadership of a country. The broad range of indiscretions under this type of corruption enables it not only to compromise the administration of justice but various other sectors of the administration of state affairs.[100]

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[98] T Nyoni, The Curse Of Corruption In Zimbabwe, 2017. Vol 1 No 5. *International Journal of Advanced Research and Publications*

[99] Nyoni (n 99 above)

[100] “Independence, Accountability and Quality of the Judiciary.” UNODC. Accessed 30 June 2020

Judicial capture usually targets the upper echelons of the judiciary which in turn controls the jurisprudence of a jurisdiction. It is employed hand in glove with what has come to be known as lawfare. Lawfare involves the political harassment of those opposed to the ruling political establishment through arrests and prosecution. Unfortunately, allegations of judicial capture and lawfare can be used by left wing politicians and other political opportunists to suborn members of the public. This happens in cases where a section of society encourages the public to flagrantly disobey the law and then blame administration of justice agencies for their arrest and prosecution.

In Zimbabwe, allegations of judicial capture have been raised in relation to the allocation by Government of vast tracts of farm land to several justices of the superior courts. [101] The basis of such allegations appears to have stemmed from decisions such as *Commercial Farmers Union & Ors v Minister of Lands & Ors.*[102]The courts were alleged to have ruled against the former white commercial farmers on the ground that the judges were direct beneficiaries of the land redistribution programme. The perception of bias was worsened by the fact that prior to that decision, other judges who had not benefited from the programme had in their judgments described the redistribution as chaotic and illegal.

More recently, the clamor of judicial capture was resuscitated in the aftermath of the decision in *Chamisa v Mnangangwa*[103] (*Chamisa* case) where the Constitutional Court dismissed the opposition Movement for Democratic Change-Alliance president's electoral petition on the ground that he had failed to place before the court clear, sufficient, direct and credible evidence that the irregularities that he had alleged had marred the election process materially, to warrant the court to vitiate the election result. Although from a legal analysis, it is difficult to fault the court's reasoning in that case, some sections of the Zimbabwean population have remained fixated on judicial

https://www.unodc.org/res/ji/import/programmes_projects_initiatives/infosheets/JI_Extended_English_Web_30.10.pdf

[101] L Madhuku, *The appointment process of judges in Zimbabwe and its implications for the administration of justice*, SAPL, 2006. 345.

[102] 2010(2) ZLR 576 (SC) In that case the Supreme Court held that former owners and or occupiers whose land had been acquired by government could not challenge the legality of such acquisition in a court of law. The jurisdiction of the courts had been ousted by a Constitutional amendment.

[103] *Chamisa v Mnangangwa* CCZ 42/18

capture as a justification for the MDC-A's loss in court. Those sentiments especially when juxtaposed against other decisions in which the courts have ruled against the government can only serve to vindicate the argument that judicial capture is at times an imaginary concept.[104] The allegations of capture have also been levelled against the lower judiciary albeit in a more blatant manner.[105]

3. Conclusion

The types of judicial corruption discussed above are not exhaustive but are merely the major ones that affect the judiciary in Zimbabwe. The study acknowledges the existence of other forms of corruption such as embezzlement, theft and fraud. Those cannot be discussed and exhausted in the limited scope available in this research. Having critiqued the nature of judicial corruption, the next logical step which is undertaken in the next chapter, is to make an analysis of the causes of judicial graft and its implications on the independence of the judiciary, the rule of law and the general administration of justice.

[104] "Zimbabwe separates Constitutional Court from Supreme Court" ZimLive News, 22 May 2020

[105] S Chikanza, 'Dealing With The Zimbabwean Magistrate Who Imprisoned UN Protected Torture Victims | The Bianca Makwande case' *Zimeye*, 14 June 2020

Chapter 4: An Analysis of the Causes of Judicial Corruption

1. Introduction

As already discussed, a determination of the causes of judicial corruption is important if successful efforts to combat the scourge are to be implemented. Admittedly, some corruption drivers are common in all jurisdictions but each country may have causes that are peculiar to it.

Most countries have criminal laws prohibiting corruption in the judiciary. They also have independent auditing mechanisms within the court system which control the registration of cases and account for the money coming from different revenue sources. These systems should ideally make it harder for anyone to get away with corruption. Unfortunately, those mechanisms do not entirely protect citizens from corrupt behavior of the judiciary which behavior is often concealed. The more systemic the corrupt behavior becomes, the harder it is to deal with. Systemic corruption involves more people at different levels and might even become acceptable in society. Some of the potential factors of judicial corruption as discerned from different legally binding and non-binding documents are:

2. Potential causes of Judicial Corruption

2.1. Low salaries

One of the primary causes of corruption in the judiciary is low government remuneration which often results in court personnel being tempted to accept or solicit bribes in order to make their everyday life better.[106] UN Anti-Corruption Toolkit recognizes low salaries as a problem and that adequate remuneration for persons working within the judiciary will make them less inclined to get involved in corruption.[107] Court personnel that earns less than a regular blue-collar salary is more likely to be encouraged to get involved in bribery. [108]

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[106] E Peter, Field Reports: Combating Corruption around the World, 1996. Vol 7 *Journal of Democracy* 158-168 see also E Buscaglia, M Dalolias, An analysis of the causes of corruption in the judiciary, 1999. Vol 1 No 11 *Law and Policy in International Business* 95

[107] "Global Corruption Report 2007: Corruption and Judicial Systems." Transparency International. Accessed on 29 June 2020.
https://www.transparency.org/en/publications/global-corruption-report-2007-corruption-and-judicial-systems

[108] K Barrett, *'Corrupted Courts: A Cross-National Perceptual Analysis of Judicial Corruption.'* (Unpublished thesis, Georgia State University, 2005)

When government employees see themselves subsisting below the level of the general public, they take the opportunity to supplement their income through the misuse of their positions.[109] In Zimbabwe, the issue of low salaries has been a perennial complaint by court personnel. The salaries for judicial officers in the country are pathetically low. The situation is exacerbated by the hyperinflationary environment that continues to stalk the country. At the prevailing official exchange rate of **1** United States dollar (USD) to 57.35820 RTGS,[110] dollars most judges of the superior courts earn around **$800** USD per month. In reality however, they earn less than $**300** USD per month given the prevailing parallel market exchange rates which in turn determine the price of commodities in most shops. The magistrates are worse off with the majority of them earning around **$50** USD per month. The disparity between the rate at which the Judicial Service Commission reviews the salaries of the judicial officers and the rate of inflation compounds the situation. Between January 2020 and June 2020, the salaries were only reviewed once yet inflation was growing in leaps and bounds on a monthly basis. A comparative analysis of the Zimbabwean judges and magistrates' salaries with those of their counterparts in the region exposes the reality that the Judicial Service Commission must seriously reconsider its policy on the remuneration of judicial officers. For instance, the lowest paid judge in South Africa earns one million, eight hundred and eighty -two thousand four hindered and eighty-six rand **(R1, 882, 486)** per year.[111] At existing exchange rates, this translates to about **$10 000** USD per month.[112] In the same country, the least paid magistrate earns **R971, 649** per year which translates to approximately **$5 000** USD per month.

Without seeking to justify judicial corruption, it is doubtful that the meagre earnings of Zimbabwean judicial officers can insulate them against the vagaries associated with corruption.

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[109] Barrett (n 110 above)

[110] "International Banking & Portfolio Management: Tuesday 30 June 2020." Reserve Bank of Zimbabwe. Accessed 30 June 2020.
https://www.rbz.co.zw/documents/Exchange_Rates/2020/June/Rates-30-June-2020.pdf

[111] South African Government Notice No. 42107/18

[112] "Live Exchange Rates." OANDA. Accessed 30 June 2020.
https://www1.oanda.com/currency/live-exchange-rates/USDZAR/

2.2. Recruitment policy

Systematic corrupt behavior can also be caused by non-transparency in the recruitment process of judicial personnel. There is a possibility that court staff may be influenced by outer interests from the very beginning. The Constitution of Zimbabwe provides for an elaborate and transparent process in the recruitment of judges.[113] When a vacancy arises, the Judicial Service Commission must advertise the position and invite the President and the public to make nominations. It must thereafter, conduct interviews in public from which, a list with three nominees for a single vacancy is submitted to the President who then makes the appointment. Where the President is of the view that none of the nominees on the list submitted to him is suitable for appointment as a judge, he is obliged to request the JSC to submit a further list of three qualified persons and the President has to appoint one of the nominees submitted.[114] A number of talking points have arisen from these provisions. To begin with it must be admitted that the process provided by the new Constitution appears quite laudable in that it is open to public scrutiny. It allows various stakeholders in the administration of justice to comment and even raise objections against particular candidates where there is reason for that. The deliberations of the JSC in the final selection of nominees for submission to the president are however shrouded in secrecy. The list itself is not made public. As a result, the public ends up suspecting that the process is manipulated. The interviews for the post and final appointment of the current Prosecutor-General of the country are an example of the unnecessary suspicion and rumour peddling which can result from a process viewed as opaque.[115] The Commission is required to conduct its business in a just, fair and transparent manner.[116] The debate surrounding the Prosecutor-General interviews could have been avoided had the JSC deliberations been transparent. In addition, unlike the South African position on appointment of judges of the High Courts where the

[113] Constitution, s 180

[114] Constitution, s 180(3)

[115] News have been peddled to the effect that the President rejected the names on the first list submitted to him by the JSC and requested that the Commission submits a further list with three names. It was reported that the president picked the current Prosecutor-General when he had failed the interviews.

T Karombo, 'Mnangagwa disregards JSC, controversially picks Hodzi as Prosecutor General' *NewsLive*, 23 January 2019

[116] Constitution, s 191

decisions of the JSC are binding on the President, the Zimbabwean Constitution leaves room for the appointing authority to choose for example, the worst of the three nominees on the list submitted to him.

The process followed in the appointment of other judges was initially intended to also apply to the appointment of the Chief Justice, Deputy Chief Justice and the Judge President of the High Court. Constitutional Amendment No.1 however removed those three posts from the public appointment process.[117] As it stands, the Chief Justice, Deputy Chief Justice and the Judge President of the High Court are directly appointed by the President after consultations with the Judicial Service Commission. The amendment has been attacked by some sections of society, on the basis of being retrogressive. Once this happens, there is no consolation that can be drawn from the seemingly transparent appointment of other judges. The top three judges in question all sit in the Judicial Service Commission which plays a critical role in the selection of judges. If they are compromised, it follows that the process of selecting judges may also be compromised. The entire process will then hinge on the integrity and objectivity of the men and women holding such offices. In my view, it is not enough for a system to depend on the integrity of the person holding the office. It is the system itself which must have integrity.

In addition, the Constitution emphasizes that a person appointed to the office of a judge must be a fit and proper person.[118] The concept of a fit and proper person has not been properly examined. It is not clear what it is that a person must hold to qualify as a fit and proper person. It is desirable that the JSC uses this principle to ensure that those selected for appointment to judicial office have integrity. Rigorous vetting must be undertaken to weed out the possibility of candidates who come into the system for purposes of self-enrichment through judicial office. The selection of judges through the public interview process has been criticized by some as being incapable of reducing the risk of appointments along political lines. For instance, it has been argued that in

[117] The Amendment was challenged in *Goneso & Ors v Parliament of Zimbabwe & Ors* CCZ 4/ 20. The Constitutional Court struck down the amendment on the basis that it had been passed unprocedurally. The Court however suspended the operation of the order to allow Parliament to redress the anomalies.

[118] Constitution, ss 177 (2), 178 (2) & 179 (2)

Zimbabwe, South Africa and Mozambique, there is evidence from data gathered that there is need to limit the influence of political patronage in the judicial selection processes. The main threat of political patronage is identified as the creation of a politically dependent bench or an executive minded bench which in reality would negate the separation of powers principle.[119] In other words, it creates a corrupt judiciary.

Appointment of judicial officers in the lower courts is done in accordance with the Judicial Service Regulations.[120] For the lower magistracy the Commission recruits fresh graduates from law schools in the country, the region and from other international universities. The dangers associated with the immaturity of some of the graduates are obvious. It is difficult for the Commission to attract experienced and mature candidates to the bench because of the poor remuneration levels. Unless this changes, the situation cannot be salvaged.

2.3. Political instability and democratic insecurity

Political instability and democratic insecurity are other potential factors that can affect the independence of the judiciary. Generally, it seems that states with high political competition and with a regular change in power tend to have a higher level of judicial integrity. In states with only one strong political force, that political party is more likely to try to get involved in the work of the judiciary in order to keep its political stranglehold. The challenge was aptly described by retired Zimbabwean judge Moses Chinhengo in an interview with Manyatera when he said:

> In Africa, if you have an executive for a long time, it is wishful thinking to expect an independent judge. The bench is pliable not by choice but because they are overwhelmed by an executive which is there forever. It is difficult to be independent in such an environment. Even a good judge will bend.[121]

Lack of judicial independence especially as a result of political influence is the most worrying concern affecting the probity of judicial officers. It is a factor that has dogged particularly African judiciaries for a long time now. Even when governments claim to

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[119] G Manyatera *'A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe'* (Unpublished LLD thesis, University of Pretoria, 2015)

[120] Judicial Service Regulations SI 30/2015

[121] Manyatera (n 122 above)

carry out judicial reform, they will always find a way to interfere or manipulating the law to keep the judiciary pliant.

2.4. Lack of transparency and accountability in the court administration and court procedures

Deficiencies in accountability and transparency are closely linked as causes of corruption. Each makes a significant individual contribution.[122] Transparency can be defined as actions that are available for public scrutiny. It is measured as the ability of citizens to access accurate information about the actions of public officials. In terms of the judiciary this means that the judicial processes and decisions are open for scrutiny and criticism by others.

Accountability, on the other hand, forces the judiciary to focus on the public interest rather than personal interests. It can simply be defined as allowing scrutiny of a public official's actions.[123] Thus, the lack of either of these qualities can foster public disenchantment with the judiciary. A lack of both accountability and transparency is definitely fertile ground for corruption.

Where there is a lack of transparency and accountability within a particular system there is a lack of trust in the same. Research shows that where there is a high level of mistrust in a system, corruption abounds.[124] Building trust in a society's legal institution is therefore an important factor in fighting corruption.[125] In his speech at the occasion to mark the official opening of the 2020 Legal Year, the Chief Justice of Zimbabwe emphasized the importance of judicial transparency and accountability.[126] For years, the operations of the Zimbabwean judiciary have not been open to real scrutiny by the public. The courts are mystical institutions feared to the extent that the public do not dare to question even those decisions clearly actuated by corruption. It is heartening

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[122] Kathleen (n 110 above)

[123] P Jeremy, *Confronting Corruption: The Elements of a National Integrity System.* Germany: Transparency International, 2000.

[124] T Vartuhi, *The Bright and Dark Sides of Trust: Corruption and Entrepreneurship.* Germany: University of Mannheim, 2003.

[125] T Vartuhi.(n 127 above)

[126] "Chief Justice's Speech 2020 Legal Year Opening." Veritas. Accessed 30 June 2020. https://www.veritaszim.net/node/3903

to note the stance recently taken by the Chief Justice to open the courts for more scrutiny by the public.

2.5. Absence of technological equipment

The use of manual systems in the courts for various purposes including the maintenance of court records is a source of despair for many litigants. The complaints about the issue are so wide-spread to even encompass accusations of judicial officers who fraudulent alter court records to reflect information which is totally different from the proceedings which occurred in court. At the end of 2019, the Judicial Service Commission unearthed a scandal where a provincial magistrate doctored court records to indicate that the accused persons who had appeared in court were represented by legal practitioners when in reality, they were not. The magistrate fraudulently manipulated the court records in order to avoid the scrutiny or review of the proceedings. Although, there was no evidence of that, it is highly probable that the desire to hide the work from review or scrutiny was a bid to hide decisions that had been made corruptly. Records indicate that the JSC could not take disciplinary action against the magistrate after the officer abruptly resigned from office. The disappearance of court records and other vital documents are a common occurrence in the courts at all levels. These malpractices would not be possible if for instance, court proceedings are recorded by mechanical means. The courts must have technological equipment, to maintain records by electronic means and to maintain databases to keep record of judgments. The absence of critical technology enables judicial officers and other court staff to manipulate the system for corrupt purposes.

Insufficient computerization of court systems may also slow down court processes. The dilatoriness which results from the cumbersome manual processes easily leads to corruption. Paying of bribes is then viewed as the surest to get prompt service.

2.6. Complex procedural systems

Corrupt behavior can easily be hidden within complex procedural systems. There are complaints that the rules of court are too complicated for the general litigant to understand. The rules of the High Court for instance are complex, voluminous, repetitive and fragmented. The court rooms are closed to the press and therefore can never properly communicate to the public what goes on in court. It becomes easier to

get away with corruption and harder to find evidence against it.[127] In that maze of legal procedures the litigant is confused and opportunity for corruption is created for judicial officers and other court staff. The importance of simplification of court procedure cannot be overemphasized.

2.7. Heavy workloads

The workloads of judicial officers in Zimbabwean courts is unrealistic. For instance, in 2019, about **200** magistrates dealt with and completed over one hundred and eighty-five thousand nine-hundred and one (**185 901)** cases. That workload translates into almost ten thousand **(10 000)** cases dealt with by each magistrate per year. The thirty-eight **(38)** judges of the High Court completed twenty-four thousand seven-hundred and fifty-two (24 752) cases in 2019 alone.[128] With such heavy workloads, the public cannot expect quality decisions from the courts. Once that attitude creeps in, corruption thrives as out rightly corrupt decisions are explainable on the basis of unbearable workloads. For a long time, the judiciary has raised concern about the inadequate number of judicial officers at all levels of the court system. That shortage in turn masks corruption as the reprobate behavior is always blamed on the shortages.

2.8. Conclusion

The factors discussed in this segment are not conclusive. They relate to the Zimbabwean context and do not necessarily overlap to other countries. As indicated earlier, a case by case study of each country should be undertaken to provide more accurate and more conclusive results. At this stage, the study proceeds to focus on the implications of judicial corruption.

3. Implications of Judicial Corruption

The effects of judicial corruption, perceived or real, are far reaching. Corruption has adverse effects on the growth of any nation. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has argued that corruption undermines the core of the administration of justice, generating a substantial obstacle to the right to an impartial trial, and severely undermining the population's trust in the judiciary.[129] The new Global Corruption Report suggests that a corrupt judiciary erodes the

[127] UNCAC, article 10. See also UNODC (n 18 above) p. 206-207

[128] See Judicial Service Commission 2019, Annual Report

[129] UNODC (n 101 above)

international community's ability to prosecute transnational crime and inhibits access to justice and redress for human rights violations. It undermines economic growth by damaging the trust of the investment community, and impedes efforts to reduce poverty.[130] Arvidsson and Folkesson state that judicial corruption negates the rule of law and fundamental principles of justice such as: impartiality and propriety, equality, integrity, competence and diligence, the separation of powers and judicial immunity.[131]

Whilst the adverse effects of judicial corruption are obviously difficult to cover in one writing because they are vast, it is crucial in this study to identify some of the dominant ones.

The erosion of these principles of justice together with the concept of access to justice and increased crime rate will be the basis of the discussion in this segment.

3.1. Dearth of Impartiality and Propriety

The independence and impartiality of the justice system in Zimbabwe are constitutionally enshrined values.[132] Every person must have access to an independent and impartial court or tribunal. Danilet contends that judicial corruption in itself is a threat to the independence and impartiality of the judiciary in delivering a fair trial.[133] The partiality of a judicial officer who accepts a bribe from a litigant in exchange for a decision in favor of the party can never be in doubt.

In the case of *Valente v The Queen,* the Supreme Court of Canada distinguished between the terms judicial independence and impartiality and stated that:

> "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" while judicial independence "connotes not merely a state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship to others -particularly to the

[130] "Judicial corruption fuels impunity, corrodes rule of law." Transparency International Secretariat. Accessed 29 June 2020. https://www.transparency.org/news/pressrelease/20070523_judicial_corruption_fuels_impunity_corrodes_rule_of_law_says_report

[131] A Arvidsson *'Corruption in the Judiciary: Balancing Accountability and Judicial Independence'* (Unpublished thesis, Örebro University 2010)

[132] Constitution ss 69 (1) & 164 (1)

[133] C Danilet, *Corruption and Anti-Corruption in the Justice System*, Konrad-Adenauer-Stiftung, 2009.

executive branch of government- that rests on objective conditions or guarantees".[134]

Even if the two terms represent different values, they are closely interrelated. Impartiality cannot exist without independence, although some level of case to case independence can be achieved without impartiality.

The livelihood of the court system is entirely dependent on public confidence in the courts and the belief that the courts must are impartial, both subjectively and objectively. Subjective impartiality means that no court member should have any personal prejudice, while objective impartiality means that the court must be viewed as impartial by the general public without any reasonable doubts.[135] Judicial officers, however, are not robots and by the time they reach the office of the judiciary, they probably have some personal beliefs. Those personal prejudices cannot be used to disqualify them from their positions. As Justice Rehnquist stated in *Laird v. Tatum*, "Proof that a justice's mind at the time he joined the court was a complete *tabula rasa* … would be evidence of lack of qualification, not lack of bias."[136]

On the other hand, judicial propriety is how the general public perceives a judicial officer' behavior. The essential feature of the judiciary is impartiality and it must exist *de facto* but also, and not less importantly, in the perception of the public. The confidence of the judicial system will be destroyed if partiality is observed by the general public.[137] The question of propriety arises even in cases where a judicial officer discreetly conceals any corrupt involvement to the public; the mere fact that he or she knows about it, puts into question that person's propriety, since the scope of the term is so extensive.[138] Any gift or favor to a judicial office or to a member of his family given in order to gain advantage in a case therefore distorts the propriety.[139]

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[134] *Valente v. The Queen*, [1985] 2 S.C.R. 673, Supreme Court of Canada December 19 1985

[135] *Gregory v. United Kingdom* Application No. 22299/93, Strasbourg 25 February 1997, §§ 43-50

[136] *Laird v. Tatum*, United States Supreme Court, 409 U.S. 824 (1972

[137] "Commentary on the Bangalore Principles of Judicial Conduct." UNODC. Accessed 30 June 2020. https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

[138] UNODC (n 143 above) 85-86.

[139] UNODC (n 143 above) 117

3.2. Erosion of principle of equality before the Law

S 56 of the Constitution of Zimbabwe provides that all people are equal before the law and have the right to equal benefit and protection of the law. This is a fundamental human right which ought not to be treated lightly. Judicial corruption erodes the sanctity of these rights and promotes discriminatory practices. Judicial officers ought to treat everyone equally, regardless of gender, race, sexuality, age, religious beliefs, social background and other such prejudices.

Equality before the law is one of the core principles in a democratic society. Corrupt judges or magistrates do not necessarily share the opinion of the bribing party. The bribe they receive to judge in briber's favor on a basis other than the merits of the case, distorts the very essence of the principle of equality.

The first article of the Universal Declaration of Human Rights (UDHR) states that everyone is equal in dignity and rights. Judges and magistrates have several other international instruments to consider when determining equality. That shows the magnitude of the principle and why the fight against corruption in the judiciary is so vital. Many groups protected by the international instruments are vulnerable and fragile.[140]

Corruption in the judiciary negates these values. The wealthy and powerful become more equal than others.

3.3. Loss of integrity

One of the fundamental facets of good governance is integrity.[141] The two components that can be found within the definition of integrity are judicial morality and honesty. Judicial officers are always expected to behave honorably, even in their private life. They cannot be involved in fraud or other corrupt behavior which are the antithesis of integrity.

Integrity is unconditional and pivotal for the judiciary to function in a satisfactory way. Importantly, judicial officers must always consider their behavior in the eyes of reasonable observers. A judicial officer with high integrity must always show it, otherwise the opposite becomes hypocrisy, and that damages the court's

[140] Universal Declaration of Human Rights, General Assembly resolution 217A (III) of 10 December 1948

[141] Constitution, s 9

appearance.[142] The integrity of a judicial officer can be measured from his or her actual conduct in certain situations.[143]

In Zimbabwe allegations of lack of integrity of judges and magistrates abounds. Those perceptions put the judicial office at risk of falling into disrepute. A judge must handle the society's high demand of integrity carefully, since "a judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law.''[144] The judicial integrity *de facto* is very important, but so are the parties' and the public perceptions of judges' integrity. Evidently, a corrupt judge cannot be considered honest and needless to say as a danger to the administration of justice. [145]

3.4. Absence of competence and diligence

The lack of competence is also a potential consequence of corruption. Countries with questionable educational systems can easily be trapped in a vicious circle of low-quality judicial officers and resultantly a dysfunctional judiciary. As discussed above, in corrupt systems appointment to judicial office may not always be based on merit. The elevation of incompetent people to the sacred judicial office becomes a real possibility. That type of judge or magistrate may lack the necessary education, may have insufficient experience or may have personality or temperament problems, which ordinarily disqualify them.

Judicial diligence is a prerequisite to the achievement of impartial application of the law; to the consideration of the facts of a case with a sober mind; to deciding a case based only on the facts and the law; to acting efficiently; and to preventing abuses of the process.

Failure by judges or magistrates to exercise due diligence, in many instances, results in unmitigated errors. It is and is usually the beginning of malpractice which in the end informs the general public' perception of the courts.

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[142] UNODC (n 143 above) 79-80

[143] Office of the United Nations High Commissioner for Human Rights (UNHCHR), Rule-of-Law Tools for Post-Conflict States, Vetting: an operational framework, p. 11.

[144] UNODC (n 143 above) preface

[145] UNODC (n 143 above) 83

3.5. Blurring the lines of separation of powers

S 164 of the Constitution of Zimbabwe preserves the sanctity of judicial independence. When the functions of the judiciary are conflated with those of the executive and parliament the threat to the rule of law becomes blatant. The judiciary must therefore always be seen as a separate arm from the other branches of government. Corruption blurs these demarcations. Writing for the UNODC Judicial Integrity Views, Justice Edith Mushore observed that:

> "The state of judicial independence in Zimbabwe came under enormous public and international scrutiny both during and in the aftermath of parliamentary and presidential elections of 2018. The stakes were at an unprecedented high, as the notion of democracy had taken reign … The highly politicised environment …bore down an intense need for …judges to acquit themselves with an exemplary level of independence and transparency. Any perception … that the judiciary was pressured by the executive or biased… was a possibility for spontaneous unrest capable of destabilizing the country."[146]

The view expressed above illustrates that corruption can distort the concept of separation of powers. It can lead to civil unrest and complete destabilization of a country. It is clear therefore that for the sustenance of the rule of law, the judiciary's freedom from outside influences is essential. A judge cannot live with the fear of repercussion or sanction when deciding a case.

A court can only be accepted as just and fair if the public has its confidence, it is therefore not only essential for the court to *be* independent but also to *appear* to be independent. Therefore, it is important for court personnel to refrain from any being corrupted in any way or by political actors.[147] The judiciary must be effectively and institutionally independent, not only from political pressure, but also from economic and social pressures.

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[146] Justice Edith Mushore is a judge of the High Court of Zimbabwe and a passionate advocate for judicial integrity and independence

[147] "Rule-of-Law tools for post-conflict sates; Vetting: an operational framework." Office of the United Nations High Commissioner for Human Rights. Accessed 30 June 2020. https://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf

The appointment procedure of judges is very important when it comes to separation of powers. Politicians may appoint judges who they know will be their lap dogs and follow the political agenda. A judge or magistrate who feels betrothed to politicians is always insecure. He or she is likely to take decisions that are unlawful in order to please the politicians who are responsible for his or her appointment. If the judge or magistrate decides not to follow the politicians' recommendations, he or she might have less opportunities in future. His or her career prospects or appointment to more interesting courts and other promotions may be jeopardized.[148]

3.6. Stifling access to justice

A USAID report suggests that under most corrupt judicial systems, the powerful and wealthy can escape prosecution and conviction, while large segments of society are excluded from their rightful access to fair and effective judicial services.[149]

3.7. Increased crime rate

Judicial corruption also leads to high crime rates and mob-justice. Criminals are cut loose and return to society to perpetuate their terror against defenceless and vulnerable communities. Their confidence lies in that they can always compromise the system even if and when they are arrested again.[150] The prevalence of mob justice often points to a lack of trust in the justice system and is indicative of perceived corruption in the judicial system as the motivating factor for their actions.[151]

3.8. Conclusion

Judicial corruption undermines the rule of law and as a result lowers the public's trust and confidence in the administration of justice. Where the judiciary is perceived to be ineffective in its fight against corruption, this adversely impacts the socio-economic culture. There is a reduction in investment particularly direct foreign investment. That in turn also adversely affects the growth of any given economy. A correlation exists between the level of economic activity in a country and the efficacy of the judiciary in

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[148] G Blundo et al, *Everyday Corruption and the State: Citizens and Public Officials in Africa*, Zed Books, 2006. 159-160.

[149] C Mann, "Corruption in Justice and Security." U4 Anti-Corruption Resource Centre. Accessed 29 June 2020. https://www.u4.no/publications/corruption-in-justice-and-security.pdf

[150] A Opare "Effects of Corruption in the Judiciary on a Nation." Modern Ghana. Accessed 30 June 2020. https://www.modernghana.com/news/682188/effects-of-corruption-in-the-judiciary-on-a-nation.html

[151] A Opare (n 156 above)

fighting corruption. Judicial corruption does not only affect the economic climate but infringes upon fundamental human rights and distorts the values and principles which are the bedrock of good governance. An independent judiciary free of corruption is the catalyst of a clean society and a thriving economy.

Given the discussion and various conclusions drawn therefrom, the writer proceeds to analyze the results from the empirical data gathered during this study. Those findings will then be juxtaposed against the concepts already discussed in order to reveal the extent of judicial corruption in the country. That is the essence of the next chapter.

Chapter 5: Presentation of Data and Discussion of Findings

1. Introduction

The chapter focuses on data presentation and analysis of the findings from the questionnaires distributed to ordinary court users and professionals who included magistrates, prosecutors and lawyers. There were two sets of questionnaires which were distributed; the first was designed for professionals and the second was for ordinary court users. The major objective of the undertaking was to gather data on judicial corruption from various participants and analyse it to understand the trends of the challenge. That understanding can then be used as a baseline for the formulation of strategies to combat it.

Both questionnaires, for court officials on one hand and for court users on the other, were divided into three main sections. This chapter focuses on the analysis of the data gathered and seeks to probe the participants' perceptions of judicial corruption and assess whether there is a distinction with what transpires in reality. In order to effectively analyze the data gathered, the researcher shall employ a thematic approach.

2. Participants in the study

The total number of research participants in the study was fifty-five. Thirty questionnaires were distributed to courts officials namely Magistrates, prosecutors and lawyers. Ten questionnaires were allocated to each category. The remaining twenty-five questionnaires were administered on court users. The researcher settled for this limited number of participants due to time constraints. It would have been difficult to include a larger study population. There were also challenges surrounding the obtaining of consent to distribute the questionnaires to magistrates and prosecutors because of the requirement to obtain prior consent from their principals. Considering that the data sought to be gathered was of a sensitive nature such approval needed to be sought.

3. Data Collection

As illustrated earlier, the primary instrument of data collection was questionnaires. The researcher distributed the questionnaires with assistance of research assistants. The majority of the questionnaires were distributed to people in the cities of Harare and Bulawayo. These two cities comprise the busiest courts in the country. It is the

researcher's view that if any research on judicial corruption were to be conducted excluding these two it would result in glaring inaccuracies. In Harare, the questionnaires were distributed to Harare Criminal court, Harare Civil Court, Mbare and Chitungwiza whilst in Bulawayo the questionnaires went to Tredgold and Western Commonage.

The researcher used the purposive sampling technique.[152] The technique was subjective in that it was dependent on the researcher's own judgment in selecting the magistrates, prosecutors and lawyers to participate in the survey. This was the best method to adopt given that the sample to be studied was very small and was concerned with a specific characteristic of a particular group of respondents which enabled the researcher to best answer the research questions.

4. Analysis of Data

The data gathered through the questionnaires is discussed using thematic data analyses. Braun and Clarke define thematic analysis as a method for identifying, analysing and reporting themes within data.[153]

There were two kinds of questionnaires utilised in the survey. Three thematic areas were developed for each questionnaire. The three themes in the first questionnaire for court officials attached as **appendix A** are as follows:

- Personal Experience
- Perceptions of corruption in the courts
- Measures in place to combat judicial corruption

The second set of questionnaires for court users also contained three sections which are as follows:

- Personal Information
- Perceptions of corruption in the courts
- Perception on judicial corruption

[152] "Purposive sampling." Laerd Dissertation. Accessed 30 June 2020. http://dissertation.laerd.com/purposive-sampling.php

[153] V Braun, V Clarke, *Using thematic analysis in psychology*, Routledge: Taylor and Francis Group, 2008. 79.

It is therefore important to focus on the sub-themes under each of the three sections provided in each questionnaire. The researcher comparatively analysed the responses by the participants. To begin with, the researcher examined the responses given under the questionnaire for court officials.

5. Questionnaire for Professionals: Personal Experience

The section of the questionnaire sought to establish the official position of the participant, to understand if they had ever witnessed corruption and whether they had ever participated in the same.

5.1. Official position

As described earlier, each set of the following professions namely, Magistrates, lawyers and prosecutors was allocated ten questionnaires to make it a total of thirty. As a result, ten questionnaires were answered by Magistrates, ten by lawyers and ten by prosecutors.

5.2. Witnesses of Corruption

In this respect the participants were asked if they had ever witnessed corruption by court officials and if they had, to briefly explain the experience. The following is a summary of the responses from the participants.

5.2.1. Response from Magistrates

From the Magistrates who were purposively selected to participate in the data collection, all of them responded that they had never witnessed corruption by court officials.

5.2.2. Response from Lawyers

The participants in this category gave the following response; 60 % stated that they had witnessed corruption by court officials while 40 % of them denied having witnessed such.

Those participants who responded in the affirmative stated that the most common form of corruption they had witnessed was bribery. From the 60 %, 30 % indicated that the bribe had been paid directly to a magistrate while 20 % said that it was through the prosecutor. The remaining 10 % implicated both magistrates and prosecutors as the recipients of the bribes.

5.2.3. Response from Prosecutors

A **100%** of the respondents under this category indicated that they had never witnessed any form of corruption by court officials.

5.2.4. Comparative assessment

It is a surprising finding that only 20% of the thirty participants included in this questionnaire indicated that they had witnessed corruption in one form or another by court officials. All magistrates and prosecutors who were respondents in the survey denied ever witnessing corruption in the courts. Yet in the same questionnaire they gave their opinions that corruption existed in the courts. Further revealing is the fact that the 20% who testified to witnessing corruption in the courts were lawyers. That 20% indicated in their responses that the corruption they had participated in or witnessed involved either prosecutors or magistrates.

The only reasonable inference from these inconsistencies is that magistrates and prosecutors who participated in the survey were not entirely truthful in their responses. This can be expected to some extent in view of the accusations that fly around about court officials fuelling judicial corruption.

6. Participants in Corruption

The participants were in this segment, asked about whether they had ever participated in corruption in the courts. If their answer was in the affirmative, they were requested to further explain the role that they played.

6.1. Response by Magistrates

All respondent magistrates denied ever participating in corruption in the courts.

6.2. Response by lawyers

In a repeat of the previous question, a total of six out of ten legal practitioners agreed that they had participated in corruption at court. The remaining four denied having participated in any form of corruption.

From the six who answered in the affirmative, three of them acknowledged that they paid a bribe to the clerk of court to have part of the record of proceedings destroyed. The remaining three indicated that they had paid bribes to both magistrates and prosecutors.

6.3. Response by Prosecutors

As in the previous question, all the prosecutor participants in this category denied ever having participated in any corruption in the court.

6.4. Comparative assessment

An interesting inclusion by part of the 20% who admitted to participation was that of clerks of court as recipients of bribes. It added a new dimension which revealed that support officers at the courts participate in corruption not as conduits (as previously thought) but to directly destroy evidence and court records. Magistrates and prosecutors were still included as recipients of the bribes. A staggering 80%, made up of court officials still denied any kind of participation in corruption in the courts. As indicated earlier the responses appeared motivated by factors other than honesty.

7. Perception on Judicial Corruption

This part of the questionnaire sought to solicit the respondents' perception on judicial corruption. The participants were asked which court they perceived to be the most corrupt, the one which they thought was the least corrupt and the reasons for such perceptions.

7.1. Perceptions by professionals on the most corrupt court

This question sought to draw the opinion of the participants as to which court they perceived to be the most corrupt.

7.2. Response by Magistrates

80 % of the respondents in this category indicated that the magistrates' court is the most corrupt. The remaining **20 %** chose not to respond to the question.

The reasons behind these perceptions were as follows. 40 % of the participants attributed this perception to the fact that the magistrates' courts handle the bulk of litigation. **20 %** stated that it was due to poverty. The remaining **40%** opted not to give any reasons for their perception. What is striking about these findings is that magistrates admitted that they perceive the magistrates' court as the most corrupt court despite their protestations that they have never witnessed or participated in corruption in the courts.

7.3. Response by Lawyers

All the participants in this regard unanimously agreed that they perceived the magistrates' courts as the most corrupt when compared to other courts such as the Labour, Administrative, High Court, Supreme Court and Constitutional Court.

The reasons behind this perception were as follows. **20%** of the participants attributed this perception to **political bias** by court officials. Another **20%** attributed the perception to **poor remuneration**. Another 20% of the participants advanced a new reason of **accessibility of court officials to members of the public** whilst a further **20%** stated that this was due to the fact that the magistrates' courts are the courts of first instance in the majority of criminal matters. The remaining **20 %** argued that the magistrate's court **lacked resources** in terms of recording processes which resulted in a **lack of transparency.**

7.4. Response by Prosecutors

60% of the participants in this segment indicated that they perceived the magistrates' court as the most corrupt court in the country. The same **60%** attributed these perceptions to the volume of work that is handled by the magistrates' court.

The remaining **40%** of the participants chose not respond to the question.

7.5. Comparative Assessment

An overall assessment of the responses advanced by the participants in this thematic area shows that there is a general consensus by magistrates, prosecutors and lawyers that the magistrates' court is perceived as the most corrupt court in the country. **80%** of the all the participants combined under this questionnaire agreed with the perception that the magistrates' court is the most corrupt in the country.

8. Perceptions by the public on the least corrupt

The thrust of this section was to determine which court is perceived by the public to be the least corrupt and therefore is more trusted by litigants.

8.1. Response by Magistrates

A total **60 %** of the magistrate respondents indicated that the perceived the Supreme Court as the least corrupt while the remaining **40 %** stated that it was the constitutional court.

The **60%** that perceived the Supreme Court to be the least corrupt attributed this perception to the low number of cases that the court handles. **20%** suggested that it was because the Chief Justice sits in the supreme court and the constitutional court while the other **20%** said that this was due to the fact that most people do not understand proceedings in the highest courts in the country to know whether there is corruption or not.

8.2. Response by Lawyers

60% of the participants under this category stated that they perceived the Constitutional Court to be the least corrupt court. **30%** said the Supreme Court was the least corrupt. The remaining **10%** was of the view that the Administrative Court is the least corrupt.

60% of the participant lawyers said that the reason for the low perception of corruption in the constitutional court and Supreme Court is the improved transparency in those courts. **30 %** highlighted that it was because the judges working in those courts are well-remunerated which reduces the temptation to be corrupt. The remaining **10%** linked the low perception of corruption to the fact that those courts deal with fewer cases than other courts.

The intriguing finding under this category was the distinction in perceptions between the Constitutional Court and the Supreme Court. It is telling that the perceptions are different yet the courts were manned by the same judges until 22 May 2020. The finding is important as it may suggest that the higher the number of judges in the decision-making process, the less susceptible the decision is to corruption.

8.3. Response by Prosecutors

Under this category, **60%** of the participants suggested that the Constitutional Court was the least corrupt. The remaining **40%** did not respond to the question.

The **60%** who chose the Constitutional Court all agreed that this was due to the fact that the court handles fewer cases as compared to other courts. The important issue that came out is that high workloads easily lead to perceptions of corruption.

9. Perceptions from participants on the most corrupt court

This part of the questionnaire sought to draw the perceptions of the participants themselves as to which court they perceived to be the most corrupt.

9.1. Response by Magistrates

40% of the participants agreed that the High Court was the most corrupt court. Their reasons were that the High Court deals with cases which involve huge sums of money. **20%** perceived the Magistrates' Court to be the most corrupt due to poor remuneration of judicial officers. The remaining **40%** did not answer the question.

9.2. Response by Lawyers

80% of the lawyers who participated were of the view that the Magistrates' Court is the most corrupt court. Another **10%** stated that they held the view that the High Court is the most corrupt while the remaining **10%** suggested that it was the Constitutional Court.

On the reasons for those perceptions, **40 %** in this category suggested that the Magistrates' Court was the most corrupt court because it handled a huge volume of work. Another **30%** argued that the court officials are easily accessible which exposes them to temptations of accepting bribes. The remaining **20%** held the view that superior courts are the most corrupt due to political interference.

9.3. Perceptions by Prosecutors

For some strange reason none of the participating prosecutors responded to any of the questions posed in this part of the questionnaire.

9.4. Comparative Assessment

From the responses given, it is safe to conclude that the Magistrates Court is perceived as the most corrupt court in the country. What is worrying and more damaging is that the superior drew unacceptably high negative perceptions in this regard. The major reason appears to be that there is political interference.

10. Causes of Corruption

The participants were asked to explain in their opinion the main causes of corruption and the following were their responses.

10.1. Responses by Magistrates

60 % of the magistrate participants stated that one of the main causes of corruption was **poor salaries** while the remaining **40%** chose not to respond to the question.

10.2. Responses by Lawyers

All respondents argued that one of the major causes of judicial corruption is low salaries. All the participants noted that judicial officers are under-paid. **40 %** of them added political interference as a further cause.

10.3. Responses by Prosecutors

70% of the participants advanced poor remuneration as the main cause of judicial corruption. The remaining 30 % chose not to respond to the question.

10.4. Comparative Assessment

A majority of the participants pointed to poor remuneration as the biggest cause of judicial corruption. The issue of poor remuneration featured among all the classes of professionals chosen for this study. Lawyers further highlighted political interference as another big factor influencing judicial corruption.

11. Main perpetrators of corruption

Under this sub-theme, the participants were asked to choose the group of people whom they thought was at the forefront of instigating corruption from amongst judges, magistrates, prosecutors and lawyers. The following were their responses.

11.1. Responses by Magistrates

In this group, **60%** suggested that prosecutors were the main perpetrators of corruption. Another **20%** picked judges as the major perpetrators. The remaining 20% chose not to respond to this question. What is intriguing about the responses is that the magistrates completely exonerated themselves from instigating corruption. A sizeable number of them even pointed a finger at judges as main perpetrators of judicial corruption.

11.2. Response by Lawyers

50% of the participants in this category chose prosecutors as the major perpetrators of corruption. **20%** pointed the finger at their colleague lawyers whilst another **20%** accused magistrates. The remaining **10%** picked judges.

11.3. Response by Prosecutors

Surprisingly none of the participants in this category responded to this question.

11.4. Comparative Assessment

More than half of magistrates and lawyers accused prosecutors as the major perpetrators of corruption. What was startling was the fact that the prosecutors themselves chose not to participate in this question. This was the first time where all of the prosecutors chose not to respond. They chose not to respond to a question where the majority of the other participants picked them as the major perpetrators. It is a reasonable inference that the prosecutor participants feared to give self-incriminating responses.

12. Measures in place to combat judicial corruption

The purpose of this theme was to draw the opinion of the participants as to whether there were sufficient legislative and other measures in place to curtail corruption. It was also intended to establish how best judicial corruption could be curbed. Since this questionnaire was targeted at professionals, they were best suited to share their opinion.

12.1. Adequacy of legislation

The main thrust of this sub-theme was to solicit the views of the participants regarding the adequacy or inadequacy of legislation pertaining to judicial corruption and the following were their responses.

12.2. Response by Magistrates

The participants in this respect collectively agreed that there was not enough legislation in place to purge corruption.

12.3. Response by Lawyers

All of the participants in this section agreed that the legislation in place was adequate to curb corruption.

12.4. Response by Prosecutors

60% of the participants in this category admitted that there was adequate legislation in place to curb corruption. The remaining **40%** elected not to respond to this question.

12.5. Comparative Assessment

It seems from the different classes of participants, only prosecutors had a dissenting view to that held by the other classes. They were of the view that there was sufficient legislation to deal with the scourge of corruption. Magistrates and lawyers all agreed

that such was not in place. This disparity can be attributed to the fact that specialised courts have been set in place to deal with matters relating to corruption hence not every magistrate, lawyer or prosecutor handles such matters. It is imperative to note that as a result not all of them are well-versed with anti-corruption legislation. The difference in opinion can also be attributed to a simple difference in perspective.

13. Ways to curtail judicial corruption

This was the last part of this questionnaire and its focus was to decipher ways in which judicial corruption could be curbed.

13.1. Response by Magistrates

The collective agreement among these participants was that there is a need to improve the conditions of service for judicial officers particularly the salary aspect.

13.2. Response by lawyers

70% of the participants indicated that there was a need for an upward adjustment of conditions of service for judicial officers. The remaining **30%** of the participants suggested that implementation of measures to increase accountability and transparency would help to curb corruption.

13.3. Response by prosecutors

40% of the participants stated that there was a need to conduct awareness campaigns and to educate the public on anti-corruption legislation. Another **40 %** were of the view that there was a need to improve the conditions of service for court officials particularly their remuneration. The remaining **20%** opted not to respond to this part of the questionnaire.

13.4. Comparative Assessment

Judicial officers represented by magistrates all agreed on the need to improve their conditions of service. They did not proffer any other ways of curtailing judicial corruption. The common factor among all the three classes of participants was the need for the improvement of conditions of service for court officials. This was the last question in the first questionnaire.

The second set of questionnaires marked **appendix B** was targeted at ordinary court users. The researcher proceeds to analyse the themes therein.

14. QUESTIONNAIRE FOR COURT USERS: Personal Information

This section of the questionnaire sought to understand the personal circumstances of the participants which included age and gender. **70%** of the participants fell in the age group of between 18 to 35 years while the remaining **30%** were between the ages of 35 to 50 years. A majority of the population was therefore of a youthful age. **60%** of the participants were female whilst the remaining **40%** were male. There was no indication that any of that participants were in the other category of gender. That was expected given Zimbabwe's conservatism in terms of gender issues.

14.1. Actual perceptions of corruption in the courts

90% of the participants stated that they had attended court at some time in their lives. They were either directly or indirectly involved in some form of litigation. **10%** stated that they had attended as witnesses.

Unexpectedly, **90%** of the participants stated that they had never witnessed any form of corruption by court officials. The remaining **10%** admitted having witnessed corruption at the hands of a prosecutor. None of the respondents had ever participated in any form of judicial corruption.

These findings exposed the fact that a majority of court users had never witnessed any form of judicial corruption. Further, they had not participated in the same. The manifestation of actual judicial corruption was therefore minimal among court users.

14.2. Perceived Judicial Corruption

50% of the participants stated that they viewed the Magistrate' Court as the most corrupt court; **40 %** suggested that it was the Constitutional Court while **10%** said that it was the High Court. With regards to the least corrupt court, the responses were that **40%** perceived the High Court to be the least corrupt, another **30%** were of the view that it was the Administrative Court. **20 %** indicated the Supreme Court as the least corrupt court while the remaining **10%** suggested that it was the Constitutional Court.

The Magistrate's Court was perceived to be the most corrupt court in the country; The Constitutional Court was viewed by court users as the second most corrupt court. The Magistrate's Court is the commonest amongst court users interfacing with a large portion of the population of the country. That heightened interaction with ordinary people, in my view, may be the reason for increased suspicions of judicial corruption in that court. This viewpoint is buttressed by the fact that courts such as the

Administrative Court and High Court which deal with fewer cases when compared to the Magistrate's Court were deemed to be the least corrupt. The choice of the Constitutional Court as the second most corrupt court is also not surprising in my opinion. In the aftermath of the 2018 harmonised elections, the court which hitherto was relatively unknown to a lot of litigants had its proceedings aired live on national television to the public. That made it one of the most known courts. Due to the polarisation usually brought about by electoral disputes, then decision which the court arrived at in the *Chamisa* case was widely debated with views as to its correctness or otherwise based on political affiliation. As a result, allegations of bias in the decision were also driven along the political divide. It may therefore be safe to also conclude that views on whether or not the court is corrupt were influenced by the same factors.

This analysis and conclusions leave very little room if any, for doubt given the findings which showed that the majority of participants in this group indicated that they had not witnessed any corruption taking place in the courts although they had attended proceedings at the Magistrate's Court. It shows that allegations of judicial corruption by court users are not based on direct evidence but on perceptions.

14.3. Opinion on causes of judicial corruption

Under this sub-topic the researcher sought to solicit the participants' opinions on the causes of judicial corruption, whether or not they trust the judicial system and who they perceived to be the main perpetrators of corruption.

A total **50 %** of the participants stated that poverty induced by poor remuneration was the main cause of corruption. **40%** attributed the same to political interference while the remaining **10%** suggested that it was out of pure greed. Once again, it is sad to note that a large percentage of the general public is alive to the fact that court officials are poorly remunerated. They believe that the low salaries drive the officials to corruption. It is important to note that where the public knows that a court official is lowly remunerated, the perception that the official may accept a bribe to give a decision in the briber's favour is increased.

In the last part of the questionnaire, **80%** of the participants indicated that they did not trust the judicial system while the remaining **20%** said that they trusted it. In addition, **80%** were of the view that prosecutors were the most corrupt court officials while **10%** suggested that it was judges. The remaining **10%** concluded that it was magistrates.

A synopsis of the above data suggests that a majority of the general court users may have lost confidence in the judicial system. The major factor behind that lack of confidence is corruption induced by poor remuneration.

Noteworthy, is that although the magistrates' court is singled out as the most corrupt court, the public believes that the corruption is fuelled more by prosecutors than any other court official. The view by the public is supported by the views of lawyers and magistrates.

14.4. A comparative assessment of the entire findings

It is remarkable that the only category of participants who claimed to have witnessed actual judicial corruption was that of lawyers. Magistrates, prosecutors and ordinary court users, although acknowledging the existence of judicial corruption denied having experienced it first-hand. The responses by magistrates and prosecutors may not have been entirely truthful in view of the significant roles that other participants said the groups played in fuelling the vice. The inference is that magistrates and prosecutors as public officials are well aware of the implications of judicial corruption but are still willing to pursue it.

The perceptions of judicial corruption are high in the Magistrate' Court in comparison other courts. Prosecutors are perceived as the most corrupt court officials.

Lastly, the major cause of judicial corruption as agreed by the majority of the participants is poor conditions of service for judicial officers.

15. The International Commission of Jurists' (ICJ) Court Users Survey conducted by the Mass Public Opinion Trust[154]

A comparison of the researcher's findings with those of the ICJ survey reveals similar patterns. In that survey, Court users perceived lawyers as the most corrupt with **36%** of the participants saying so. **30%** of the respondents accused prosecutors of being the most corrupt while magistrates stood at **25%.** Further in support of this researcher's findings, the ICJ survey also found out that a lot of court users have never paid a bribe either to have their case heard, to get a favourable outcome or to get favourable evidence. Nearly nine out of ten (86%) of the court users claimed that they

[154] ICJ Court Users' Perception Survey, prepared by Mass Public Opinion Trust, September 2018, Harare

have never paid a bribe for their case to be heard. As such the allegations of corruption are largely based on perceptions.

16. Other Documentary Findings

16.1. Statistics of magistrates charged with misconduct

The researcher had access to official records of the Judicial Service Commission showing the various magistrates who were implicated in acts of misconduct between 2010 (when the JSC assumed its expanded mandate as an employer) and June 2020. The figures make sad reading. During that ten-year period, an astonishing **60** magistrates faced various charges of misconduct. The numbers and the stations at which the misconduct occurred are depicted below.

Table 1. No. of magistrates charged with acts of misconduct 2010- June 2020.

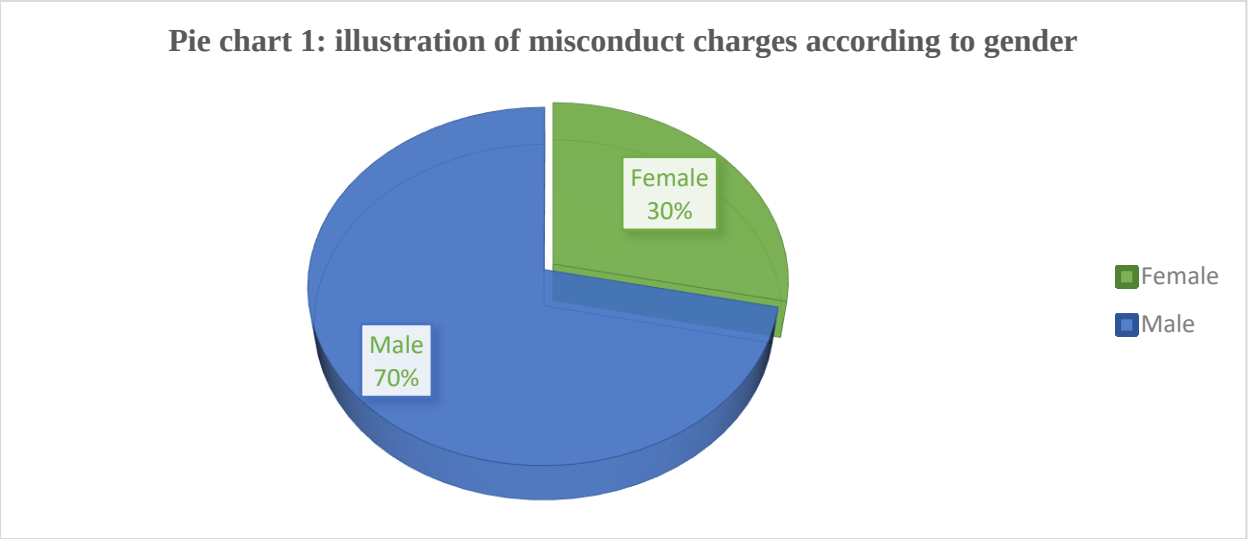
	Station	**No. of Magistrate charged with acts of misconducts per station**
1	Bulawayo	7
2	Masvingo	6
3	Mt Darwin	4
4	Bindura	3
5	Chipinge	3
6	Chiredzi	3
7	Guruve	3
8	Beitbridge	2
9	Chinhoyi	2
10	Chitungwiza	2
11	Gokwe	2
12	Gweru	2
13	Harare	2
14	Mutare	2
15	Plumtree	2
16	Rusape	2
17	Filabusi	1
18	Karoi	1

19	Kezi	1
20	Kwekwe	1
21	Lupane	1
22	Marondera	1
23	Mbare	1
24	Mutoko	1
25	Mwenezi	1
26	Norton	1
27	Shurugwi	1
28	Zaka	1
29	Zvishavane	1
	Total	**60**

The Judicial Service Commission has **56 resident court stations** across the country. From the figures, the acts of misconduct were committed at twenty-nine different stations. Apart from the high figures concentrated in Bulawayo and Masvingo, there is no indication that delinquency was concentrated in any particular region.

As shown in the pie chart below, **42** of the **60** magistrates which represents **70%** of the total were males whilst only **18** representing **30%** were females. It is a fact therefore that male magistrates tend to offend more than women. The finding is buttressed by the fact that there are more female magistrates than males in the JSC.

Pie chart 1: Misconduct according to gender

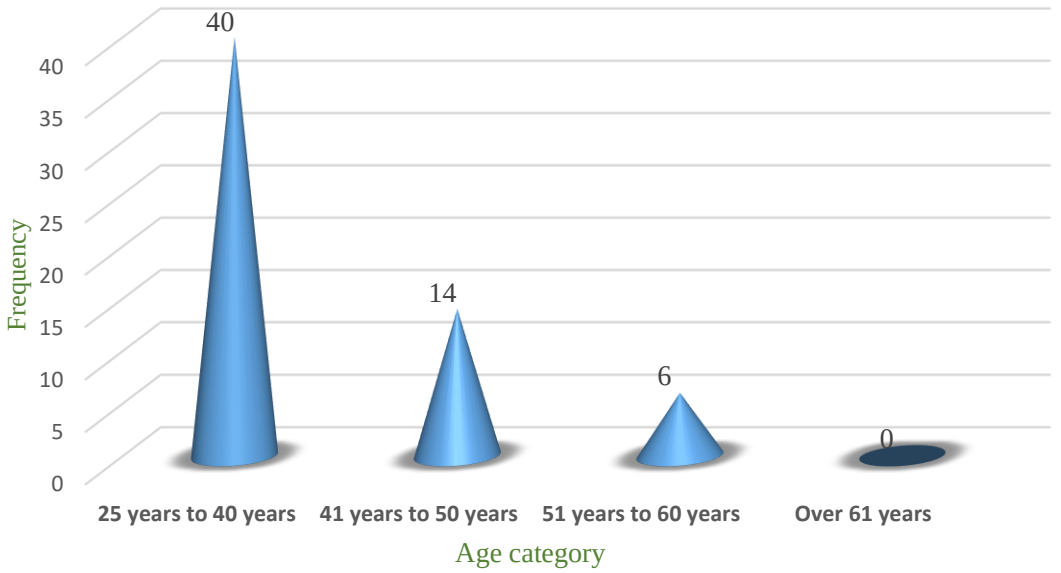


Misconduct analysis in relation to age

Table 2. Ages of magistrates charged with misconduct during the period under review

Age category	Frequency	Percentage
25 years to 40 years	40	67
31 years to 50 years	14	23
51 years to 60 years	6	10
Over 61 years	0	0
Total	**60**	**100%**

Graph 1: Illustrating magistrates charged with acts of misconduct in relation to age.



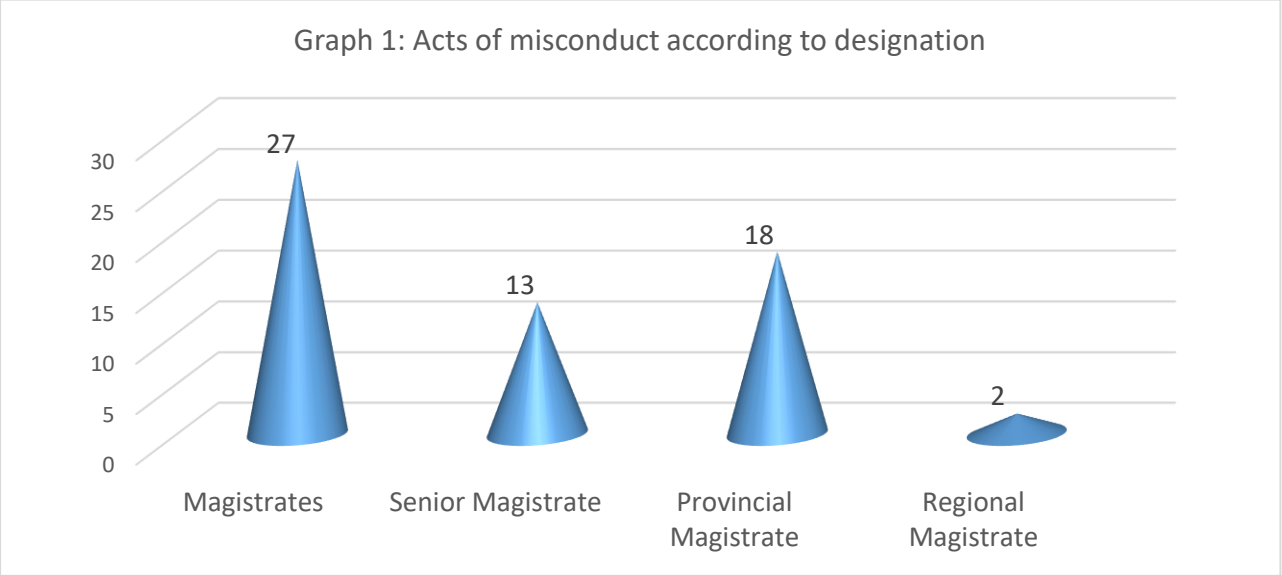
Seniority of magistrates charged with misconduct

The magistracy in Zimbabwe is divided into five levels of seniority. The lowest grade is ordinary magistrate, followed by senior magistrate, provincial magistrate and regional magistrate. The grades of deputy chief magistrate and chief magistrate are administrative. The statistics shown below indicate that **40** of the **60** magistrates who faced misconduct were in the grades of magistrate and senior magistrate. Right at the top, only **2** regional magistrates were charged with misconduct.

The age analysis of magistrates who were charged with misconduct also supports this deduction. **40** of the **60** magistrates were aged between 23 and 40 years. The numbers therefore clearly illustrate a relationship between maturity and misconduct as well as seniority and misconduct. The recruitment policy of the JSC must therefore be informed by such statistics. Requirements such as that a person must be at least 40 years old to be appointed as a judge make sense when viewed from this background.[155]

[155] Constitution ss 177(1), 178(1) & 179(1)

Graph 1: Acts of misconduct in relation to grade of magistrate



Categories of misconduct charges preferred

As shown in the table below, there are four main genres of misconduct that were preferred against magistrates.

Table 3: Categories of misconduct charges against magistrates

Types of misconduct	No. of magistrates charged	Percentage
1. Bribery, abuse of authority, unbecoming or indecorous behaviour and violation of the magistrates' code of ethics	39	54
2. Absence from work without authority or abuse of sick leave	15	21
3. Incompetent or inefficient performance of duties	11	16
4. Failure to obey lawful instructions	7	9
Total	**72**	**100**

Of interest to this study is misconduct **category 1.** The offences indicated under that genre relate to bribery, abuse of authority, unethical behavior and violation of magistrates' code of ethics. Put bluntly, they connote judicial corruption. A massive **54%** of the magistrates who faced misconduct were therefore charged with acts of judicial corruption. What is heartening is that there is evidence that many of the charges of misconduct were initiated as a result of complaints from litigants and general members of the public.

16.2. Statistics of judges' cases of misconduct

As indicated earlier in this research, Justice Benjamin Paradza remains the only judge in Zimbabwe to have been prosecuted and convicted on a corruption charge. Another judge recently became the first judge to have his case referred to a tribunal for investigation of the question of his removal from office in terms of section 187 of the Constitution. Records at the JSC however show that between the times that the Judges' Code of Ethics was promulgated in 2012 to date, about four judges have had complaints of unethical conduct referred to the Judicial Ethics Advisory Committee for its views on the probity of those judges. Unfortunately, the outcomes of those proceedings remain classified and the writer could not access them. Nonetheless, the referrals would point to the judiciary's willingness to deal with concerns raised by members of the public and may be a further pointer to the existence of unacceptable conduct by judges in the course of their duties.

17. Chapter Conclusion

The data as presented showed that lawyers and ordinary court users were unrestrained when responding to most questions. Responses by magistrates and prosecutors appeared caged. Some of them even chose to disguise their handwritings in a bid to remain anonymous. It was apparent that the topic is a highly sensitive one.

From the data, it can be concluded that corruption exists in the courts. The general public is aware of it and their confidence in the court system may be waning. The officials entrusted with interpreting the law appear to be the ones abusing it. There is therefore an urgent need to deal with the problem.

Chapter 6: Conclusions and Recommendations

1. Introduction

The study set out to expose the extent if any, of judicial corruption in the Zimbabwean courts. The writer was also keen to unravel the factors which influence perceptions of judicial corruption, the causes of corruption and the forms which judicial corruption takes. A further objective was to bring to the fore the impact of judicial corruption on the independence of the judiciary, the rule of law and general administration of justice.

Extensive examination of various issues was systematically undertaken in order to answer the key questions. Although the research was largely doctrinal, the writer infused an empirical flair into it and collected data through the distribution of questionnaires and through other primary documents from institutions such as the Judicial Service Commission. Through this data, telling findings were made.

The purpose of this chapter is to discuss the conclusions of the study and make the necessary recommendations on various issues that came up in the study. To achieve this, the chapter commences with an analysis of the findings, proceeds to draw conclusions and finally to make recommendations.

2. Findings of the study

The purpose of this section is to synthesize the main findings of the study and to ascertain whether the study's research objectives have been fulfilled.

The first research question dealt with the different types, causes and implications of judicial corruption on the independence of the judiciary, the rule of law and the general administration of justice. **Chapters three and four** of the research focused on addressing this objective.

Chapter two of the research was designed to answer the question of the adequacy and effectiveness of legislation to combat judicial corruption. It focused on discussing international, regional and municipal legislative frameworks. While this was largely achieved under that chapter, a further assessment of the efficacy of those instruments will be conducted in the ensuing discussion on conclusions. The last question related to identification of solutions to curb judicial corruption. Below are the study's conclusions on the major questions.

2.1. Major forms of judicial corruption

From the study, it was apparent that there are many forms of judicial corruption in Zimbabwe. The most prominent however are criminal abuse of office, bribery and political interference.

2.2. Existence of strong legal framework and policies

This sub-theme focuses on efficaciousness of legislation and policies to combat judicial corruption.

The study noted that at international level, the most prominent legal instrument is the United Nations Convention against Corruption more particularly article 11 which gives prominence to the importance of a corruption free judiciary. In Zimbabwe, it was shown that the Constitution abhors judicial corruption whilst the Criminal Law Codification and Reform Act has elaborate provisions aimed at dealing with the problem. Anti-Corruption Courts were set up primarily to expedite the trial of cases of corruption. In addition, the Anti-Corruption Commission Act established ZACC whose main function is to combat corruption. The judges' and magistrates' codes of ethics extensively provide for principles that judicial officers must follow to uphold integrity of the courts. The discussion showed that there is no dearth of legislation to deal with the scourge in Zimbabwe. Consequently, the inescapable conclusion is that Zimbabwe has a robust legal framework in place. What is required is to scale up strategies of implementing the law and holding judicial officers to account. As shown earlier in the study an unacceptably high number of magistrates were charged with misconduct. Some of the cases were criminal in nature but instances in which those magistrates were prosecuted are negligible. Charges of misconduct alone are not deterrent enough. In the superior courts it has already been shown that there is a paucity of both prosecutions and constitutional investigations for misconduct. To date the only known criminal prosecution of a judge was the *Paradza* case and the only referral for investigation by a tribunal occurred recently and is still under consideration.

2.3. Impact of judicial corruption on the independence of the judiciary, the rule of law and the general administration of justice.

This sub-theme seeks to establish the severity of the impact of judicial corruption on the independence of the judiciary, the rule of law and the general administration of justice. The study found that the public's confidence in the court system appears to be

waning due to incessant perceptions of judicial corruption in its various manifestations. Needless to emphasize, this is a dangerous trend. The growing unmitigated attacks on the courts' decisions and on the persons of judicial officers signifies that there is a section of society which believes that any decision made against it or a member of its constituency is a decision procured through judicial corruption.[156] If not halted, it can easily lead to a total breakdown of the rule of law.

Political interference was touted as one of the major forms of corruption in Zimbabwean courts. There was however no tangible evidence that politicians interfere with the decisions of the courts. If true however such interference can also seriously hurt the independence of the judiciary and lead to unpleasant results. The battle lines drawn between the executive and the judiciary of Malawi illustrate the dangers of the executive seeking to have a pliant judiciary.[157] Where the judiciary accepts to be an inferior partner of the executive, the rights of citizens are trampled upon and the rule of law breaks down.

It was also a major finding of the study that judicial corruption can act as a barrier to access to justice. The Constitution provides that everyone has the right of access to the courts.[158] The astonishing number of judicial officers alleged to be subverting the law to please certain litigants depicts that the vulnerable members of society may easily be deprived of their right to access to justice. There is no access to justice where a litigant loses a case not because his/her case is poor but because he/she has no means to bribe the judicial officer.

2.4. Major causes of judicial corruption

The major causes of judicial corruption which stuck out from the study are:

a. Poor conditions of service for judicial officers particularly low remuneration. Almost every category of participants in the survey was unequivocal that corruption is driven by the failure of the Judicial Service Commission to provide a living wage to judicial officers. Although this cannot be an excuse for judicial

[156] See *S & Anor v Machaya & Ors* HH 442-19 where Chitapi J was at pains to explain that legal practitioners must not be seen to be attacking the person of a judicial officer but rather must attack the decision. In that case one of the grounds for review was that the magistrate was unreasonable.

[157] C, Rickard "Judiciary in Malawi under Threat- Strong Support offered." African-Lii. Accessed on 30 June 2020. https://africanlii.org/article/20200611/judiciary-malawi-under-threat-%E2%80%93-strong-support-offered

[158] Constitution, s 65 (3)

officers' lack of probity, it is an issue that cannot be wished away easily and has to be addressed.

b. Accessibility of judicial officers in the magistrates' court to the litigants and other members of the public also prominently featured as a source of corruption.
c. Unrealistic workloads were also identified as challenge and have a direct link with judicial corruption. The majority of respondents in the survey argued that the magistrates' court is singled out for judicial corruption because of the large volumes of work that magistrates have to cope with. The converse was advanced for the perception of low corruption in the superior courts.
d. Judicial discretion can be a source of corruption in instances where it is abused. The study made the finding it is difficult for corruption to occur where there is more than one judicial officer presiding over a case. For instance, the consensus by all respondents in the professional category that the Constitutional Court and the Supreme Court are the least corrupt court may be supported by the reasoning that judges do not make decisions single-handedly in those courts.
e. Recruitment policies
    i. Immaturity of the judicial officers significantly contributes to judicial corruption. The relationship between the ages of magistrates, their seniority and low salaries on one hand and corruption on the other is significant. It was shown that more than two thirds of magistrates who committed misconduct are in the lower ranks which is generally occupied by the younger and less paid magistrates.
    ii. The figures of misconduct from the JSC also depict that male magistrates are more susceptible to corruption than their female counterparts. This may be a direct result of the patriarchal nature of Zimbabwe where men are generally the breadwinners in their families and are usually more daring then women. It is impressive that the JSC now boasts of more female magistrates than males.
    iii. It was also noted during the research that the JSC and the appointing authority are paying lip service to the fit and proper requirement stipulated in the recruitment of judges which may result in people who lack integrity finding their way into judicial positions.

f. It was also a finding of the research that greed contributes to judicial corruption. There are judicial officers who are inherently corrupt and take bribes because of greed.

It shows that allegations of judicial corruption by court users are not based on direct evidence but on perceptions.

2.5. Ways to curb judicial corruption

The general and specific recommendations that will be made by the researcher also speak to the study's conclusions on ways of curbing judicial corruption. It is prudent therefore to discuss both aspects together.

3. Recommendations

3.1. General

This section of the chapter discusses the general recommendations which are of significance to Zimbabwe. The general recommendations are supplemented with the specific measures which ensue.

a) As shown in the study corruption is more an economic than moral issue. Billions of dollars are involved where there is grand corruption. Any country which is serious in fighting corruption should prioritize the provision of resources and infrastructure required for that fight. The judiciary is central in that fight and ensuring judicial officers' integrity is key.

b) Although the country has adequate legislation and policies to fight judicial corruption, more needs to be done in the implementation of strategies. The study showed for instance, that the protection offered to judicial officers by the law may serve to encourage them to act with impunity. It may be necessary to relax the requirements of suing a judicial officer in the civil courts for decisions proven to have been motivated by extra- judicial considerations.

c) The research proved that members of the public may not be aware of what judicial corruption is let alone understand its implications. There is need for periodic awareness programs to correct this. The general public should be taught about judicial corruption and their right to be tried by impartial courts. These programs should be extensive so that the dissemination of information

reaches the grassroots levels. Legislation cannot be effective without the public being informed of its substantive provisions.

3.2. Specific Recommendations

a) Strengthen anti-corruption legislation

The Constitution of Zimbabwe is still relatively young. It is necessary to create and align legislation in accordance with the Constitution to strengthen anti-corruption statutes and policies.[159] The country should also prioritize continuous development of anti-judicial corruption legislation which may include access to information, freedom of information laws, whistle-blower protection laws, statues regulating proper judicial conduct and developing laws/policies that expressly and comprehensively deal with judicial corruption.

b) Remove the settling of political disputes from jurisdiction of the courts

The polarization of political views in Zimbabwe is central to accusations of judicial capture and law fare as forms of judicial corruption. Those allegations stem from the resolution of cases brought before the courts by political parties. In my view, the courts are not the best fora for resolution of political disputes such as challenges to election results. The ousting of the courts' jurisdiction in land disputes for instance, fortifies the argument that political disputes are best left to be resolved through political mechanisms.

c) Improve conditions of service of judicial officers

Section 188 (2) of the Constitution provides for the creation of an Act of Parliament which regulates the conditions of service for magistrates but seven years after publication of the Constitution, such an Act does not exist. Conditions of service for judicial officers are an issue provided for in the Constitution for the sake of safeguarding the independence of the judiciary. Judges in all courts are lowly paid. Without a doubt, poor remuneration has a negative bearing on any attempts to curtail judicial corruption. Chief Justices assembled from seven Asian and African countries

[159] Constitution, schedule 6 part 4 (10) provides that that all existing laws continue to be in force but must be construed in conformity with this Constitution.

agreed that there is no hope of defeating corruption without fair remuneration.[160] While adequate salaries alone are not entirely a guarantee of official probity there is a general consensus among the Zimbabwean public that judicial officers are not properly remunerated which prompts them to take bribes. Measures must therefore be put in place to remunerate judicial officers with fairness.

d) Control exercise of judicial discretion

One of the major findings of the study was that judicial officers can easily hide behind judicial discretion to perpetuate judicial corruption. The public and litigants trust courts constituted by two or more judicial officers more than one-man tribunals. The higher the number of judicial officers presiding over a case, the less susceptible the court's decision is to corruption. It is therefore recommended that the composition of all courts below the Supreme Court be changed to make it mandatory for specified cases to be heard by not less than two judicial officers. That way arbitrary exercise of judicial corruption is curtailed.

e) Reduce the workload of judicial officers

It was shown in the study, that most judicial officers in the lower courts deal with outrageous workloads which are in turn used to mask judicial corruption. The Judicial Service Commission must deal with this by recruiting more judicial officers in the High Court and the Magistrates' Court. It is inequitable that a population of close to 15 million people is served by about 250 magistrates or 38 judges.

f) Improve transparency of court systems by automating processes

After the JSC effectively dealt with the accusations of disappearance of court records from registries, the modus of unscrupulous judicial officers shifted to alteration or complete falsification of court records. The example of a magistrate who lied in more than ten cases that the accused were represented by legal practitioners is clear testimony that automating court processes, removes the opportunity for judicial corruption by making it difficult to manipulate records. The judiciary must therefore move with speed to implement the use of electronic platforms to make the systems

[160] C Mann, "Corruption in Justice and Security." U4 Anti-Corruption Resource Centre. Accessed 29 June 2020. https://www.u4.no/publications/corruption-in-justice-and-security.pdf

more transparent. The JSC's desire to introduce an Integrated Electronic Case Management System is that regard, laudable.

g) Redefine and enhance recruitment policies

It was shown that there is a relationship between age and immaturity on one hand and judicial corruption on the other. It was also highlighted that the JSC is paying lip service to the fit and proper requirement in recruitment of judges. The country does not have a system of acting judges where the probity of an individual can be assessed before they become a substantive judge. All these point to the need to revamp and enhance the policies used in the recruitment of judicial officers.

The routine of interviews in public may not be producing the best results and must be revisited. The composition of the JSC is elitist. That blights its competence when selecting candidates for judgeship especially when it comes to the fit and proper aspect. A transparent selection process is necessary to win over public confidence. The Judicial Integrity Group, generally regarded as the vanguard of the Bangalore Principles, suggested that lay members should be a part of the selection process.[161] Many countries took heed. In the United Kingdom there is a Judicial Appointments Commission made up of 15 members drawn from the lay public, legal profession and the Judiciary.[162] The system is followed in Germany, Italy, France and Spain.[163] Zimbabwe will lose nothing in following international best practices. Further, the widening of the system of acting judges to include legal practitioners and other legal officers in government can only enhance the assessment of both competence and probity of potential judges.

In the lower courts, the entry age of judicial officers must be prescribed at a level where the person appointed is mature enough to understand the onerous responsibilities attached to the office.

h) Make efforts to demolish corruption syndicates

Another major finding of the study was that prosecutors and lawyers were singled out as the main perpetrators of judicial corruption yet both groups do not make decisions

[161] C Mann (n 161) above

[162] C Mann (n 161) above

[163] C Mann (n 161) above

in court. The corrupt decision is the work of the judicial officer. What that means is that judicial corruption is syndicated and systemic. The prosecutors and lawyers are the conduits through which the bribes are paid to judicial officers. The syndicates make it very difficult for judicial corruption to be detected. One of the primary reasons which fuel this practice is the cohabitation of judicial officers and prosecutors in the same offices at courthouses. That gives lawyers access into the same offices because the interaction between them and prosecutors is inescapable. The authorities must therefore do everything in their power to discourage and ultimately ban the incestuous relationships between judicial officers on one hand and prosecutors and counsel on the other.

3.3. Study Conclusion

The study found that Zimbabwe has a strong anti-corruption legislative framework in place to deter judicial corruption but the implementation of the laws is a phenomenal challenge. Institutions that were established to help in combating judicial corruption lack human and material resources. The emergence, however, of the specialized anti-corruption courts and the reinvigoration of ZACC are progressive steps towards curbing the scourge.

More importantly, the study revealed that allegations of judicial corruption in Zimbabwe are not strongly backed by direct evidence. They thrive on perceptions of its existence by all stakeholders in the administration of justice and by the public. Such perceptions are high in relation to judicial officers in the lower courts although the stink has now permeated the higher echelons of the judiciary. Poor conditions of service and political interference were singled out as the biggest factors contributing to judicial corruption.

Further, it can be said with confidence that the judiciary of Zimbabwe has not yet sunk to levels where its judicial officers can be branded as an “entire bad orchard.” Admittedly, there is a sizeable number of bad apples in the superior courts and quite a big “bad barrel” in the lower courts who are responsible for the perceptions that the country’s halls of justice are contaminated.

The question which remained unanswered is “will the rotten apples not contaminate the entire orchard if the disease is not treated effectively?”

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