

**INTERNATIONAL COMMISSION OF JURISTS  
(ICJ)**



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***REVIEWING MEASURES TO PREVENT  
AND COMBAT JUDICIAL CORRUPTION***

**- THE EXPERIENCE OF LESOTHO**

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Lesotho Sun International  
Maseru - July 29, 2010**

## **Introduction\***

### **Corruption – *Its nature***

- [1] “*Corruption*” is one of the frailties of humankind since time immemorial. Almost all societies experience this vice in one form or another. In some societies corruption is normal and is tolerated socially and culturally as demonstrative of gratitude; in some societies, corruption is systemic whereas in some societies corruption receives zero-tolerance<sup>1</sup>. Corruption manifests itself in differing forms – it may be political, bureaucratic, corporate and judicial. Nowadays it is even rampant in sports in the form of match-fixing. Who knows-even in school and church circles?
- [2] Of all types of corruption<sup>2</sup>, *judicial corruption* is perhaps the most insidious and odious because this type of corruption gnaws and destroys a most important pillar of a democratic government. Much has been written about the topic of corruption, but judicial corruption tops the list of the condemned. Corruption adulterates, clogs, pollutes, perverts and distorts the dispensation of justice.

### ***Definition***

- [3] *Judicial corruption* is very elusive and may elude precise definition as it varies its form and *modus operandi* like HIV AIDS virus. In general, judicial corruption connotes an immoral misuse and abuse of judicial power for private gain or benefit of a judicial officer or for his henchmen. Judicial corruption has connotations of rottenness; this rottenness may be individual, institutional and systemic; it may even occur at national, regional and international levels.

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\*I take the full responsibility for all views I make in this Paper and these views should not be attributed to any member of the judiciary in Lesotho.

<sup>1</sup> In China and Singapore, corruption in a public institution is a capital offence.

<sup>2</sup> Corruption may be political, bureaucratic, corporate, economic, it may be petty or grand, endemic or sporadic.

- [4] *Judicial corruption* is perversely unconstitutional because it militates against the fundamental constitutional right of everyone to due process of law, to a fair hearing by an independent and impartial tribunal established by law. Judicial corruption unduly influences access to and outcome of judicial decisions; it kills the fairness of trial. A judge who has taken a bribe cannot be independent or fair or impartial.
- [5] *Judicial corruption* today appears to be a global problem and its manifestations seems to be at their worst in developing countries and countries in transition. Lesotho is no exception and has experienced corruption-petty or grand in one form or another.
- [6] *Judicial corruption* is usually aimed at bending the rules and distorting justice by perverting the evidence and the decisions; it violates the principle of legality and it amounts to a gross abuse and misuse of judicial power. Its motive is always spurious and illegitimate. Judicial corruption can never have an honourable purpose or end – It is evil and it is morally depraved.
- [7] It is always important to distinguish between *judicial corruption* on one hand and simple *inefficiency* or *incompetence* or *laziness* or *incoherent organization* and administration of justice on the other. Judicial/corruption is evil and requires punitive measures and its causes are distinct; whereas maladministration of justice is not criminal and requires different form of redress mainly organizational or supervisory.
- [8] The **Oxford Dictionary** defines corrupt as –

“...willing to act dishonestly in return for money or personal gain  
... evil, morally depraved...”.

Corruption is essentially evil and immoral<sup>3</sup> and under our common law, corruption had hitherto been recognized as form of bribery which “*consists of dishonestly persuading someone to act in one’s favour by a payment or other inducement*”.

Corruption and bribery in the judiciary are both antithetical to the *independence* (freedom from influence or control) and *impartiality* (absence of bias) of the courts; judicial corruption is criminal and is unlawful and above all it violates the Constitution. The citizenry of the country whose judiciary is caught in the grip of corruption is rendered helpless and utterly wretched in its plight.

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### ***Judicial independence and Corruption***

- [9] Judicial corruption militates against judicial independence and impartiality. It damages the judge’s integrity and public confidence. **Lord Denning MR** once said<sup>4</sup>-

*“...the critical test which they (judges) must pass if they are to receive the confidence of the people is that they must be independent of the executive ...judicial servility and judicial independence do not blend at all”.*

For his part, the *Chief Justice of Tasmania Sir Guy Green* had this to say<sup>5</sup>-

*“...It follows that the courts are under a particular duty to ensure that there is no possibility that they may appear to be subject to interference or influence by the executive arm of Government because in that event the courts might appear to lack impartiality not only in particular cases but in the whole classes of cases....”*

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<sup>3</sup> Its odiousness is condemned even by the **Holy Bible** (*Exodus 23:8*) and the **Holy Koran** (*Al Bagarah: verse 188*). In Lesotho, certain token presents were not regarded as bribery. Nepotism was explained as “**metla khola o e lebisa ho oa habo**”; bribery as **matsoho a ea hlatsoana**, “**vula mlomo**”.

<sup>4</sup> (1954) 71 SALJ 345; see also **Bamford** –“*The Rationale and Some Aspects of Judicial Independence* – (1956) 73 SALJ 380

<sup>5</sup> (1985) 59 Australian Law Journal 135.

and, one may add, the judiciary may appear to be an extended arm of the executive.

### ***Judicial Power***

- [10] *Section 118 of the Constitution of Lesotho 1993* vests the *judicial power* in the courts of Lesotho; and section 22 thereof entrusts the protection of human rights and freedoms in the High Court of Lesotho. As a pivotal pillar of state under the Constitution, the judiciary administers justice, guarantees the rule of law and fair play. The judiciary is the bulwark of the human rights and freedoms of the individual. The independence and the impartiality of the judiciary are entrenched and guaranteed under the Constitution.
- [11] Judicial corruption is today the worst form of corruption because it gnaws at the very fabric of the justice system; a judiciary hijacked by the corruptors (be they political or otherwise) is like a ship without an engine that drifts without direction and that is being tossed hither and thither. It is abused and misused for most nefarious of purposes. Justice then becomes a sole privilege of the few, of the rich and of the powerful; the rights of individual are trampled with arrogant impunity and a corrupt judiciary ceases to be the bulwark of justice and becomes a tool that is used to achieve injustice. In short judicial corruption constitutes an abuse of the judicial power, and its misuse for nefarious purposes.

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### ***Post 1966 Lesotho***

- [12] Lesotho is a developing country with a budding democracy in the subcontinent and politically and economically it cannot afford to sustain a judiciary that is corrupt or that is vulnerable to corruption, a judiciary with judges who turn blind eye to and distort true facts, and who misapply the law in a grotesque manner for evil purposes; indeed a corrupt judge who violates the ethos of his or her judicial office is a

virus that must be pruned away and eliminated lest he or she can bring the rot and decay amongst his or her colleagues. He or she destroys the good reputation of and confidence of the judiciary.

***Prevention of Corruption and Economic Offences Act 1999***

- [13] A milestone in the fight against corruption in Lesotho is the **Prevention of Corruption and Economic Offences Act No.5 of 1999**. Its preamble reads:-

*“An Act to provide for the establishment of a Directorate on Corruption and Economic Crime; to make provision for the prevention and to confer power on the Directorate to investigate suspect cases of corruption and economic crime and matters connected therewith or incidental thereto”.*

- [14] The success of the Directorate in Lesotho is still to make its mark in the fight against corruption. It needs more autonomy, more capacity, resources and training. It had indeed been recognized that corruption if unchecked could become a cancerous virus that could permeate through the whole state apparatus (*executive, bureaucratic and judiciary*) and that it could ultimately bring about a state capture<sup>6</sup>. It is however the independence and the autonomy of this anti-corruption body that can ensure its capacity to tackle corruption effectively and which also guarantee its legitimacy.
- [15] For it to be efficacious and credible, an anti corruption unit must enjoy appropriate independence and must be sufficiently empowered by law. An anticorruption body that is appointed and wholly controlled by the Executive is likely to stand beholden to its master. The “*no go area*” policy and virtual immunity of certaining executive officials hobbles the unit’s credibility and effectiveness. Such a powerless unit can become a mere cosmetic window dressing.

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<sup>6</sup> State capture occurs when the corruptors succeed to exercise complete control of people in the legislature, in the Executive bureaucracy and judiciary.

[16] **Limassol Conclusions – Cyprus** – 25-27 June 2002 Commonwealth Governments were requested to

- “(a) consider how best the judiciary could contribute to the goals of eliminating corruption and promoting high ethical standards in the judiciary.*
- (b) Acknowledge that a judicial system free from corruption was an essential component of a truly democratic country and is critical to national development. A court system that is free from corruption was recognized as one of the essential features of a country able to attract investment for general development.*
- (c) That governments should allocate sufficient resources to the courts to ensure their ability and capacity to provide efficient, impartial and accessible service.*
- (d) The process of appointment and promotion of judges should respect the principle of separation of powers and reflect principle of transparency, competitiveness and merit.*
- (e) Remuneration of judicial officers be fixed a level that will ensure that they enjoy financial security during their tenure of office and upon retirement.*
- (f) To promote judicial education on issues relating to corruption and judicial integrity.”*

[17] The **Latimer House Guidelines** which were endorsed by Commonwealth Heads of Government at *Abuja Nigeria* in 2003 recognized the principle of separation of powers and that resting on the government was the responsibility of providing sufficient and sustainable funding and resources to enable the judiciary to perform its functions to the highest standards and that the allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

The Guidelines also recommended a code of conduct to be developed and adopted by each judiciary as a means of ensuring accountability of judges.

- [18] Judicial corruption may involve no bribery or advantage but may be judicial conduct reflected in the delivery of perverse judgment based on grotesque and distorted assessment of fact and law in order to placate some one or a spurious motive. This strikes at the very root on a judge's integrity.
- [19] Listed as probable causes and indicators of corruption are the following

***Causes***

- *Decadence - state of moral decline (debauchery) (loose morals);*
- *low remuneration;*
- *no or weak monitoring/supervision systems;*
- *far reaching discretionary powers;*
- *lack of transparency;*
- *tolerant public attitudes;*

***Indicators***

- *disappearance of documents;*
- *high acquittal rates;*
- *frequent conflict of interests;*
- *high rates of decisions in favour of the Executive;*
- *appointments perceived as resulting from political patronage;*
- *media uproar over certain court decisions;*
- *preferential or hostile/unfriendly treatment by the executive;*
- *frequent socializing with particular members of the legal profession, executive or legislature or party officials.*

The list is not exhaustive.



- [20] Lesotho's judiciary is no doubt still in its infancy or at its embryonic<sup>7</sup> stage and it still has to nurture and cultivate its own ethical foundations and its own jurisprudential character. Four decades since independence, Lesotho has a paramount duty to train its own *cadre* of judicial officers (*expatriate* judges should only be engaged on brief contracts and mainly to train local people – and not to replace each expatriate with another *ad infinitum*)
- [21] We should accept a reality that judicial corruption may or in fact exist in Lesotho and we should resolve that judicial corruption wherever it rears its ugly head, in the judiciary must be prosecuted and punished robustly in order to deter its recurrence. Judicial corruption should never be allowed to flourish because it is essentially inimical to the rule of law and to justice whose delivery it distorts and perverts.
- [22] ***The root causes of judicial corruption***

In any given situation, judicial power is always enormous and its exercise affects lives, rights, freedoms and other interests of the individuals. The judiciary are entrusted with its sacred exercise. Judicial corruption usually occurs when a judicial officer or official corruptly does any act in exercise of the judicial power vested in him or her for private benefit and which distorts administration of justice. It can come through acceptance of a bribe and also submitting to its undue influence or control. Corruption can also manifest itself in many other ways in and out of the courtroom. At times it can even involve lawyers and ordinary members of the public who can bribe their way to obtain verdicts in their favour.

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<sup>7</sup> It only had its first Chief Justice – **Mr J. Mapetla** in 1974. Today, the High Court Bench and the Magistracy are manned by Basotho. The Court of Appeal still consists of white expatriate Justices and one Mosotho who is President of the Court.

(a) ***Bribery***<sup>8</sup> (*tjotjo*)

Vulnerability or susceptibility of judicial officers to bribery is mainly attributable to the sometimes unsatisfactory remuneration packages; some of the judicial officers are tempted to demand and receive bribes to redeem themselves from claws of poverty. In most cases, bribery is result of pure greed and avarice!

A poor and unethical judicial officer becomes an easy target to bribery; he is highly vulnerable because he readily succumbs to a temptation to receive or to demand a bribe and to readily accept one. Justice is subsequently perverted and distorted by a corrupted mind which bends the facts and the law to favour the briber. Judicial corruption has been classified as the worst form of corruption because a corrupt judiciary can precipitate total collapse of state apparatus.<sup>9</sup>

(b) ***Political corruption*** (*bobolu*)

In Africa, political corruption can be very common and it can sometimes enjoy toleration as a form of political patronage and as a way of sharing the spoils of a political victory!

- Political corruption sometimes targets the judiciary in its nefarious exploits. At worst, unscrupulous politicians often seek to influence the process of judicial appointments in order to ensure appointments of their proteges through nepotism, patronage and favouritism. Such servile judicial appointees stand forever “*beholden*” and in awe of their patrons. Such appointees sorely lack essential independence and true impartiality; and they pose a serious danger to the judiciary in general.

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<sup>8</sup> Whilst cases of judicial corruption in Lesotho maybe very few, this can be deceptive because due to its secretive nature judicial corruption could be happening undetected.

<sup>9</sup> A few years back in **Kenya**, some 18 judges were alleged to have been corrupted. The saying went: “*why hire a lawyer if you can buy a judge.!*”

- A rather chilling utterance has recently been made in the press in South Africa concerning an acting judicial appointment given to an erstwhile National Director of Public Prosecutions

*“...The Minister cannot treat the courts like a chessboard on which he plays political end-games with judges put into or out of play like so many chess pieces...”*

*Appointment to the bench must not create a perception that it is a reward for work well done elsewhere...*

*“...It appears as if a reward had to be sought elsewhere and that the Bench is now treated as an arena of ministerial grace and favour ...such appointments undermine the judiciary’s independence.”<sup>10</sup>*

- In South Africa, the Judicial Service Commission has since categorically stated that it is undesirable for acting judges to be appointed from the prosecution and later for them to return to their prosecutorial duties at the end of term.<sup>11</sup>

### [23] ***Prevention of Judicial Corruption***

#### **Judicial appointment process**

- (a) Judicial appointment process can made or break a country’s judiciary.

A strategy to seriously combat corruption in the judiciary needs to identify firstly the root causes of such corruption and the circumstances that are conducive to occurrence of corruption. First, the judicial appointment process must be seen to be as immaculate, as transparent, as fair and as meritocratic as possible. A corrupt appointment process will no doubt bring

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<sup>10</sup> Star Newspaper – 16<sup>th</sup> February 2010. Justice Hlophe’s case also comes to mind.

<sup>11</sup> See also **Law Society of Lesotho v Prime Minister of Lesotho 1985-1990 LLR 500**. (the present writer had been appointed an acting judge while he still substantively held position of Director of Public Prosecution.

potentially corrupt persons into the judiciary. Only men and women of integrity and competence, legal experience, of independent and impartial character should be appointed<sup>12</sup>. Incorruptibility must be the ethos.

- (b) *Politicization* of the judiciary must always be avoided because politicization can corrupt the judiciary; it can exert its undue influence in violation of the Constitution<sup>13</sup>. A judge once appointed should never be labelled "...our man..." or "...our woman". The judiciary also should neither be labelled "*executive minded...*" or "*...reactionary...*" Judges are clearly nobody's protégées or puppets. For the sake of his or her independence and impartiality, a judicial officer must therefore forsake his or her respective membership and allegiances or sympathies to a political party whether it is a party in or out of government.
- (c) Towards this noble end, the government of the day should always refrain from doing any acts or making any statements that tend to denigrate the judiciary, but rather the government must protect, support and offer assistance as is demanded by the Constitution<sup>14</sup>.
- (d) In most countries in the western world, the Head of the Executive yet continues to play decisive role in the appointment of judicial officers. In USA, for example, the President has power to appoint the Chief Justice of the Supreme Court subject to approval by committee of Congress. In Lesotho, only the Chief Justice and President of the Court of Appeal are appointed by the King on the advice of the Prime Minister without consulting the Judicial Service Commission. The main question is: should they then be beholden or servile to the Executive? I only pose this question and give no answer.

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<sup>12</sup> Though no one is perfect, and even judges are also fallible, corruption can be avoided and must be avoided!

<sup>13</sup> Section 118 (2) of the Constitution

<sup>14</sup> Section 118 (3) of the Constitution.

- (e) But it has been seen that it is not so much the manner of appointment or of who appoints that should raise concern but it is the innate integrity, diligence, impartial uprightness and an independent spirit of the person appointed that will determine his or her susceptibility to political manipulation and other sorts of influence.
- (f) Whereas the constitutional validity or legitimacy of executive appointments of judicial officers may no doubt pass the muster, it is only the post-appointment interference or control sometimes exerted over the judiciary that should raise concern as it is prone to bring about unhealthy tension and confrontation between the judiciary and the executive or can result in political influence bringing about judicial corruption.
- (g) ***Remuneration***<sup>15</sup>

Remuneration of judges is always important factor that can sometimes adversely affect their independence and security of tenure. Unsatisfactory remuneration naturally renders some judges susceptible to undue influence in one form or another.

Remuneration is basically a reward for work done well. It must be satisfactory. Inadequate or unsatisfactory remuneration of the judicial officers often renders some (certainly not all) judicial officers very vulnerable to corrupt influence by unscrupulous litigants. Appropriate salary structures should therefore be put in place, firstly to attract suitable people and secondly to retain them by giving them satisfaction on the job. In short, remuneration that is likely to be supplemented with bribes or other improper benefits, is certainly not satisfactory.

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<sup>15</sup> Section 115 of the Constitution and Section 14 (1) of the High Court Act 1978 states:-  
“No Chief Justice or Judge shall accept or perform any other office or place of profit or emoluments not authorized by law.” (This excludes acting or temporarily appointed Judges.)

(h) ***Resources***

The inadequacy of resources that are allocated to the judiciary can contribute in a large measure towards corruption. Tensions and alienation creep in when little or grossly inadequate financial resources are allocated to the administration of justice in the government's budget – and the judiciary is delegated to the position of a “*mendicant*” (beggar) in order to keep the court system on an even keel ...The inevitable result of persistent failure to address the needs of the judiciary is that the scourge of corruption rears its ugly head and bribery sets in.”

(i) ***Judicial ethics***

In tackling corruption in the judiciary, a cultivation of an ethical culture founded on clear ethical rules must come about. Not only does the “*conscience*” guide the individual judicial officer in rebuffing corruption but for his and her assistance, the internalized ethical rules of conduct should guide the judicial officer about the “*dos and the donts*” about rules on integrity, proper behaviour, independence, impartiality, diligence, conflict of interest, to mention but a few of these.

It is hoped that the curriculum in the proposed **Lesotho Judicial Education Institute** will offer full instructions on these important aspects of judicial life. Happily for Lesotho, the Honourable Chief Justice has caused to be drafted the ***Ethical Principles for the Judiciary in Lesotho***<sup>16</sup>.

(j) ***Security of Tenure***

Under the Constitution of Lesotho, judges enjoy security of tenure i.e. that they cannot be arbitrarily dismissed (till they reach the age of 75) unless it is proven before a tribunal duly

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<sup>16</sup> Though as yet ungazetted, these Ethical Rules have gained general approval and have been deposited at the Uganda House in London in 2004.

appointed that the judge is guilty of “*misbehaviour*”<sup>17</sup>, or is unable to perform his or her judicial functions. Corruption is by its nature such gross form misbehaviour because it is very criminal and truly unworthy of judicial office.

Whilst the retirement age of 75 can ensure security of tenure, on one hand the judicial longevity can also corrupt in that a judge may end up ultimately taking himself as untouchable and may in his senility be corrupted into feelings of infallibility. In the New Millenium, some people have suggested that judgeship should be made to be contractual and for a definite short term (say ten years) during which a judge can function effectively till the end of his term, instead of becoming a burden to the bench for a long period till he or she retires at 75 and having contributed little or nothing at all during his or her long but faultless term! Productivity rather than security should be the norm.

[24] ***Judicial Service Commission (JSC)***

Save for the appointment of the Chief Justice<sup>18</sup> and of the President of the Court of Appeal<sup>19</sup>, all judges are appointed by the King on recommendation of the Judicial Service Commission.<sup>20</sup>

Recently, it has also been suggested that the *section 132 (c)* of the Constitution be amended to render **Judicial Service Commission** a more representative body and to bring on board members/representatives of the Law Society and of the Faculty of Law of National University of Lesotho and other stakeholders.

[25] Thus in order to make it more representative in character, the relevant Part 6 of the Constitution of Lesotho needs to be reviewed and perhaps amended. A new-look **JSC** would consist of –

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<sup>17</sup> Section 121 (3) and (4) and section 125 (3) and (4). It has been said the misbehaviour should be “gross” and not slight.

<sup>18</sup> Section 120 (1) of the Constitution.

<sup>19</sup> Section 124 (1) of the Constitution.

<sup>20</sup> Section 120 (2) and 124 (2) of the Constitution.

- (a) *Chief Justice – Chairman;*
- (b) *A Judge of Appeal;*
- (c) *A Judge of the High Court;*
- (d) *Member of State Council;*
- (e) *Attorney General (representing the Executive);*
- (f) *Chairman of the Public Service Commission;*
- (g) *Chief Magistrate;*
- (h) *Representative of Law Society;*
- (i) *Representative of Faculty of Law – NUL;*
- (j) *A Senator;*
- (k) *2 Members of the National Assembly (one from the opposition ranks);*
- (l) *A Member of civil society.*

This 12 member Judicial Service Commission (JSC) would be truly representative of all important sectors of the Basotho public in the judicial appointment process.

- [26] Provisions would be made to ensure transparency and meritocracy in the judicial appointment process, suitability factors, experience and other matters like independence, impartiality, competence, diligence, and gender of new appointees. All these innovations would imbue judicial appointments with credibility, legitimacy and authority.

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- [27] *Strategies against judicial corruption*

- (a) Judicial corruption is a vice that is antithetical to the oath judicial office, it is immoral, it is criminal and clearly in violation of the Constitution. Judicial corruption can debilitate the essential public confidence which the public has in the judiciary; corruption tarnishes judiciary's reputation, its legitimacy and its moral authority. Corruption saps away the independence and impartiality of the judiciary; corruption is cancerous – it breeds decadence and decay in the judiciary as an institution.



- (b) A strategy that tackles and combats judicial corruption, must resolutely target the root causes of corruption, it must identify factors that are conducive to its incidence, it must promote its timeous detection and investigation including prosecution and punishment; above all “*rotten potatoes*” or “*black sheep*” must be identified timeously and be rooted out.

Eradication of corruption from the justice system needs to be a holistic and a joint task involving not only the judges and members of the legal profession but literally all stakeholders, including all branches of Government, the media and civil society.

- (c) **Justice Karunakaran** of *Supreme Court of the Republic of the Seychelles* had recently stated<sup>21</sup>

*“...One rotten apple is enough to spoil the whole barrel. Sometime an entire group is corrupted<sup>22</sup>, like a barrel of fruits, by the presence of one bad person. It is an observed truth that one bad public officer, a sleazy judge or a lawyer can eventually corrupt a whole institution ....beginning with the reluctance of others to correct him or rat him out.”*

- (d) Judicial corruption must receive no toleration, no condonation or connivance – instead it should receive “*zero tolerance*” whenever and wherever it rears its ugly head.
- (e) For their part, those men and women who hold judicial office must for ever remember their sacred judicial oaths of office; they must exude integrity, dignity, honesty, they must shun corruption and other malpractices. They should cultivate for themselves high standards of ethical life; they should always (without being too holy) seek to attract respect and righteousness.

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<sup>21</sup> 9<sup>th</sup> December 2009 – Keynote Address on “**Stamping out corruption – Paving the way for economic growth by eliminating bribery and corruption**”.

<sup>22</sup> As it happened in Kenya Supreme Court.

[28] Perhaps a sceptic or cynic can say that all these are feats that are humanly not easy to achieve or accomplish in the to-day's life where temptations always lurk about, and where cut – throat politics hold the respect of law in contempt, where temptation to interfere with and to unduly influence the judiciary is ever present. It is necessary that the Constitution<sup>23</sup> as the supreme law in the country should proscribe against corruption in clearest of terms; laws should be enacted which outlaw corruption in government bureaucracy and in other organs of state – judiciary included. No one – whether Judge, Minister, Parliamentarian or layman – should get away with corruption!

[29] *Judicial corruption* may, as it often happens, be difficult to detect; it may be not easy to investigate because this kind of corruption can come about in all subtle and secretive ways; it may elude detection or if discovered, judicial corruption an sometimes be dealt with internally. The manner in which it is treated should depend upon factors such as its magnitude<sup>24</sup>, its seriousness and the rank of the judicial officer implicated. Justice must never be purchased or negotiated surreptitiously! A judicial officer who is bribed in order to acquit a guilty person might as well be bribed in order to convict an innocent one! All this is pure evil!

An anti-corruption strategy must also not remain static because corruption “*constantly mutates its forms and **modus operandi***” and with the advancement of technological development, bribery can be perpetrated through e-mail and proceeds banked and transferred through internet within minutes.

[30] ***Recusal – Conflict of Interest***

The ethical rule of practice is that because a judge has taken an oath of judicial office to dispense justice to all without fear, favour prejudice or bias, he or she must recuse oneself if there is a likelihood of bias or

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<sup>23</sup> The Constitution of Uganda establishes an Integrity Commission accountable directly to Parliament.

<sup>24</sup> Small presents at Christmas time can present a problem. Presents – if made – should be given equally to all judges and not to a single one and should not be unusually expensive but very token.

prejudice as a result of *conflict of interest* or cause. Each case shall depend on its own merits and circumstances; one judicial officer may be readily recuse himself or herself if likelihood of bias is likely whereas another will refuse to recuse in similar circumstances and yet still deliver an impartial judgment. Guidelines are however necessary to ensure consistency and good practice. Recusal in cases of conflict of interest is founded on the natural justice principle “*nemo debet esse iudex in propria sua causa*” – (no one should be a judge in his own cause)

### *Human frailty*

- [31] Judges being human beings and like other people sometimes falter and suffer human frailties like fallibility and susceptibility to sin (and corruption is no exception). With resolute determination, corruption like any other sin can be rebuffed and we should always realize that unless corruption is extortionate, corruption is never thrust down one’s throat! Weakness of character and of spirit, and vicissitudes of life do sometimes render some judicial officers susceptible to corrupt influence. On the other hand, the public must be educated to desist from bribing or otherwise corrupting the judicial officers. Cases must be won or lost upon their own merits and fortune; bribery has ever since time immemorial been sinful, immoral and illegal and hence punishable. Whenever it occurs or continues unnoticed corruption must always receive “*zero tolerance*” at all levels of society.

Seminars and workshop for judicial officers should regularly be held to sensitise them regarding the evils of corruption especially in all the ranks of the judiciary. Lesotho must never be a pariah state riddled and infested with corruption.

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- [32] Idiosyncratic prejudices or stereotypes – often deep rooted in the personality of a particular judge may smack of corruption whereas these may merely be personality symptoms of character e.g. an extremely lenient or heavy sentence for a rapist or a robber may smack of a corrupt judge – prosecutor collusion or bribery; sometimes

an acquittal of seemingly guilty accused can be interpreted as a result of behind the scenes manipulations of a judge and lawyer.

***Judicial virtues***

[33] ***Legitimacy, credibility, authority, integrity, respectability, uprightness*** and ***rectitude*** are all honourable virtues that are not tangible but which – “*like love*” – once lost cannot be easily regained. Legitimacy may be influenced by meritworthiness while suitability, integrity and respectability may only result from the traits of a judge as a person; judicial authority may be a product of a combination of all. Judicial corruption is antithetical to all virtues and attributes of a good judiciary. Corruption gnaws at and erodes whatever authority, respectability credibility, indeed legitimacy which the judiciary may have – and once lost, these virtues may never be easily regained.

[34] The strategy to combat judicial corruption should thus timeously identify its root causes, circumstances and conditions that are conducive to its occurrence; the strategy must also establish a dynamic ethical/legal infrastructure and it must also cultivate a culture that outlaws corrupt behaviour and has incorruptibility as its goal. It is the toleration of corruption that feeds its growth into a systemic monster capable of swallowing the whole state apparatus.

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***Integrity awareness/perceptions***

[35] Corruption in the judiciary is a complex problem that needs to be addressed using a variety of approaches; a right balance needs to be achieved between autonomy in decision-making and independence from external forces on the one hand and accountability to the community on the other. Any approach to judicial integrity must also contain measures to restore and retain public trust and credibility of the judiciary. Eliminating judicial corruption alone is not complete if

courts and judges are still perceived as corrupt by litigants and by general population.

[36] Negative perception of judicial corruption can also be caused to a large extent by malignant practices within the law profession and other law enforcement agencies – e.g. some lawyers, police or prosecutors may sometimes try to cover up their own shortcomings by painting a distorted picture that the opponent paid a bribe to the judge who has returned an adverse decision. The critical role of the Law Society in combating corruption in the judiciary therefore should be recognized and acknowledged.

[37] ***Targets of Strategy***

1. Without satisfactory remuneration, there is not much hope that can be achieved. Adequate salary is necessary but the increase is not *per se* a sufficient condition for official probity. Greed and avarice once aroused and appetised are not easy to subdue or to quench.
2. More transparent procedures for judicial appointment and discipline are fundamental tools towards cleansing the judiciary of “*dead wood*” or of “*rotten apples*”.
3. Transparent procedure for the assignment of cases to particular judicial officers as a form of judge- shopping.
4. Code of Conduct – sensitized through regular workshops to heighten vigilance in the judiciary.
5. Recusal – Practice – Guidelines should be put in place.
6. Civil Society – Radio/media liason officers must be instilled with a true sense of accountability and civil responsibility.

[38] *Epilogue*

All what has been stated above can certainly not be wholly achieved in a day and not without much effort; zeal and determination are needed. Countries such as **England, United States, Canada, Australia, India, and South Africa** and others have had long histories and gruelling experiences during which their judiciaries stoically struggled to acquire and gain the recognition, the respect and reputation they presently enjoy. Lesotho has to start its own journey – but without a corrupt judiciary. A corrupt judiciary is a sure recipe for disaster and a catalyst towards an abyss of our extinction.

- [39] Perhaps it is proper to have as part of this epilogue, to cite the crisp words of two South African Judges concerning the scourge of corruption. Recently Judge **Hilary Squires** of the Durban High Court described corruption and or bribery in the case of **S v Shabir Shaik**<sup>25</sup> in the following terms–

*“...It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream. It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is a scourge of the modern democracies.”*

- [40] In dismissing the appeal by this accused, **Justice Graig Howie**<sup>26</sup> of the Supreme Court of Appeal of South Africa had to say:-

*“The seriousness of the offence of corruption cannot be overemphasized. It offends against the rule of law and principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have traveled a long and tortuous road to achieve democracy. Corruption threatens our*

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<sup>25</sup> Accused had been charged with contravening the Corruption Act by making certain payments to Zuma with intention to influence Zuma to perform his duties in a way that could be to the advantage of Mr Shaik’s commercial interests.

<sup>26</sup> Now a Justice of Appeal in the Court of Appeal of Lesotho.

*constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Court must send an unequivocal message that corruption will not be tolerated and that punishment will appropriately severe”* ([www.iol.co.za](http://www.iol.co.za))

At the end of the day, it requires courage and resolution on the part of the judiciary first to clean its house, assert its independence and impartiality, function efficiently and expeditiously, maintain the highest of ethical standards. It behoves the judiciary to promote better understanding on how it functions and to recognize its final accountability to the community.

### ***Who is to blame?***

- [41] Judicial corruption and political corruption are birds of the same feather – they flock together! Judicial corruption is often bred and it flourishes in a corrupt regime. It lacks independence, it is not impartial in cases where the government interest is at stake. It is forever beholden to the executive.
- [42] Political corruption reigns supreme where there is no Ethical Code for the Executive and for the Legislature. Integrity, honesty and probity are labeled as signs of weakness. Kleptocratic wealth, power, ruthlessness are virtues that are lauded and strived for.<sup>27</sup>
- [43] Capture of the judiciary and its ultimate subjugation are at times seen as the precious rewards and “*spoils*” of political victory whose warped sense of justice discerns nothing to be wrong. In Africa today this tendency is gradually gaining ground in many forms; some call it *judicial transformation*, some call it *judicial activism*.
- [44] Whereas absolute judicial independence or absolute judicial impartiality are not achievable in our real world, it is however mischievous to label as anti-government a judge who having independently and impartially assessed the facts and the law, makes a

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<sup>27</sup> Up to now all attempts at creating mechanisms for declaration of assets by public officers have hit a wall.

decision not favourable to the executive; or to denigrate as “*executive-minded*”, a judge who after an impartial assessment of facts and the law decides in favour of a ministry of Government. This is an idiosyncratic stereotype that is unfair, unjust but difficult to dislodge.

### ***Political Influence***

- [45] Executive control over the judiciary is essentially a worst form of political corruption but which can last for five years. With the inevitable exit of his or her political patron, a corrupt judge is left in the lurch to be – scorned and rejected even by his or her colleagues. Loyalties, hard to die, continue and can then assume divers forms of gross dishonesty, chicanery or bribery.
- [46] As the saying goes, in corruption “*it takes two to tango.*” A corrupt judge may be a willing recipient of corrupt rewards e.g. promotion, secret allowances or he or she may be the principal instigator who demands or extorts rewards for decisions he or she makes. In most cases, it is the litigant or his kin or friends who secretly approaches a judge in an attempt to influence his or her decision one way or the other. All these must be swiftly and robustly exposed and be dealt with in a manner that will deter others from repeating the malpractice.
- [47] The other side of the coin is the sad fact that people often choose to become politicians not for the betterment of their country and its people but do so for the selfish good of themselves and their henchmen and a corrupt judge is often a handy tool in cloaking their nefarious schemes with an aura of legality. A corrupt judge lacks moral fibre and integrity as a person and is either too timid or too greedy and thus can easily be manipulated to give grotesque decisions of unparalleled monstrosity!



- [48] In this saga, the civil society especially the media play a catalytic role of either exacerbating an already bad situation or “*crying wolf*” where none prawns. Labelling a righteous judge as corrupt is a both unfair and evil as it is to praise a corrupt judge.<sup>28</sup>
- [49] Judicial corruption whenever it occurs remains the worst form of corruption because it destroys or distorts justice, it mars fairness and it damages rule of law. Judicial corruption can never be justified upon any grounds such as poverty, temptation, unsatisfactory remuneration or any other grounds. It is bad through and through!

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5. **Hon. Mme Justice Desiree Bernard, OR, CCH** – Judge of the Carribean Court of Justice – “*Impact of Corruption within the Court System on its ability to administer justice*” – at 14<sup>th</sup> Commonwealth Law Conference – September 2005.
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<sup>28</sup> It is wrong for judges to be classified by anyone as being pro or anti-government. This is clearly denigrating and discourteous unless there exist cogent grounds for the allegation. It is baffling if not mind-boggling because if judges were white or expatriate, nothing but respect and praise follows their every judgment.

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**END**