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ECA POLICY BRIEF

Winning the fight against corruption in Africa: an independent and accountable judiciary with integrity is key*

I. Introduction and background

Combating corruption remains a priority policy issue for African Governments and pan-African organizations, as evidenced in the adoption of a number of important national, regional and global anti-corruption frameworks, instruments and initiatives. The most recent initiative in this regard has been the African Union's declaration of 2018 as the "African Anti-Corruption Year", a symbolic year for succeeding in combating corruption under the theme of the thirtieth session of the African Union Assembly of Heads of State and Government, "Winning the fight against corruption: a sustainable path to Africa's transformation". This is a rallying cry for more concerted action against corruption in order to mitigate the multidimensional corrosive impact that it has on the continent. High levels of corruption severely affect growth and investment and exacerbate inequalities, disproportionately affecting the poor, women and children. In addition, corruption in many public sector institutions, such as the judiciary, has created high levels of mistrust between such institutions and the citizenry.

African citizens have consistently placed corruption as one of their top concerns, with two thirds of respondents to a recent Afro-barometer survey being of the view that their governments were performing poorly in tackling corruption (Afro-barometer, 2007). In addition, recent data from the 2017 Ibrahim Index of African Governance showed

that corruption among African government officials and bureaucracies had increased during the past decade.

Corruption has been very insidious in the judiciary systems of African countries, invariably culminating in the compromise of various legal and institutional mechanisms designed to curb it. The judiciary (i.e., prosecutors, court management systems, the bar, the police, traditional rulers, court brokers and court assessors) is affected by two main types of corruption: political interference in judicial processes by either the executive or legislative branches of government, and bribery. Judicial corruption, in essence, consists of acts or omissions that result in the use of public authority for the private benefit of judges, court personnel and other justice sector personnel, culminating in the improper and unfair delivery of judicial decisions. Such acts include bribery, extortion, intimidation, influence peddling, the abuse of court procedures for personal gain and any inappropriate influence on the impartiality of the judicial process by any actor within or outside the court system.

The purpose of the present policy brief is to highlight the important role of the judiciary in combating corruption in Africa. It posits that success or failure in combating corruption in Africa depends in large part on the independence, integrity and accountability of the judiciary and its faithfulness to the rule of law. In this regard, the brief presents three main messages. First, the judiciary is not only one of the main pillars of governance, but also

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is, above all, the custodian of the (sanctity of the) rule of law and the harbinger of justice and people's rights. Second, for the judiciary to be effective in combating corruption, it not only must be incorruptible, but also must be perceived as such. Lastly, although the enhancement of the independence of the judiciary is paramount for its proper functioning, independence should not trump accountability; rather, judicial independence needs to be mediated by judicial accountability.

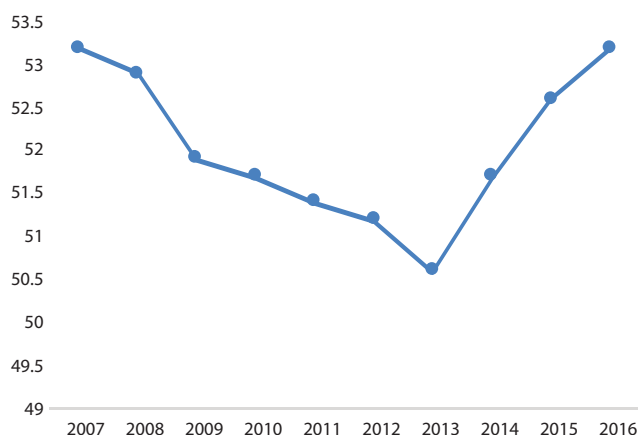
II. Rule of law, integrity, independence and accountability: key to an effective judiciary capable of combating corruption

An effective and efficient judicial system is a prerequisite for the entrenchment of good governance and for enhancing the development prospects of all countries globally. Commonly known as the third arm of government, the judiciary has the primary responsibility of interpreting and applying laws and adjudicating disputes in society. It is charged with countering both private and public corruption, reducing political manipulation and increasing public confidence in the integrity of governments. It protects individual rights and ensures the security of persons and their property. The judiciary decides on what constitutes the appropriate sanction against any conduct that is at variance with the established laws, including pervasive conduct such as corruption.

A. Rule of law is sacrosanct

The judiciary is not only one of the main pillars of governance, but also, above all, the custodian of the rule of law and the harbinger of justice and people's rights. The rule of law denotes the provision and expectation that everyone in society, irrespective of their status, will be afforded the opportunity for their grievances to be heard before an impartial judge and court. The role of judges, in particular, is to tend the gate between order and anarchy, given that they preserve the system of ordered liberties necessary for civilized societies. Upholding the rule of law is made possible under three main conditions: no one can be made to suffer in body or goods except for a distinct breach of law established in an ordinary legal manner before the ordinary courts of the land; the rule of law implies not only that no one is above the law, but also that every man and woman, whatever their rank or condition, is subject to the ordinary laws of the land and subject to the jurisdiction of the ordinary courts; and the principles of natural justice must be observed and the protection of individual freedoms guaranteed (Dicey, 1979).

Figure I: Trends in the rule of law in Africa, 2007-2016



Note: score is out of 100.

Source: 2017 Ibrahim Index of African Governance (Mo Ibrahim Foundation, 2017).

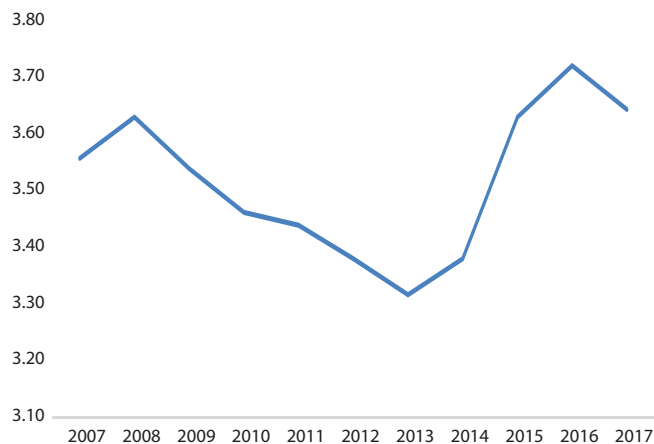
Africa experienced a declining trend in the rule of law from 2007 to 2013 and was only able to register a notable uptick after that period (see figure I).

B. Judicial integrity is not expendable

Judicial integrity consists of the courage of judges to make fair decisions on the basis of their understanding and interpretation of the law without fear or favour. It is at the heart of the rule of law, in the sense that judges must have integrity in order to protect its principles. Justice, as a moral construct rather than a technical legalistic device, must shape the behaviour of judicial officers in their task of dispensing justice to all. Judges should be guided by ethical standards that are captured in codes of conduct to govern their behaviour both inside and outside their working environment. The judiciary is expected to exude integrity, remain accountable and demonstrate high levels of effectiveness at all times in the execution of its functions.

The preservation and sustenance of public confidence is the crucial indicator regarding the propriety of the judiciary in the delivery of justice, seen by the members of society to be fair and by independent decision makers to be without external influence or fear. Judicial corruption has an undue effect on gaining access to and the outcome of judicial processes. Whenever the integrity of the judiciary is called into question, its decisions lose the essential fabric of fairness and predictability and, even more critically, the rule of law is trumped. For the judiciary to be effective in combating corruption, it must not only be incorruptible, but also be perceived as such.

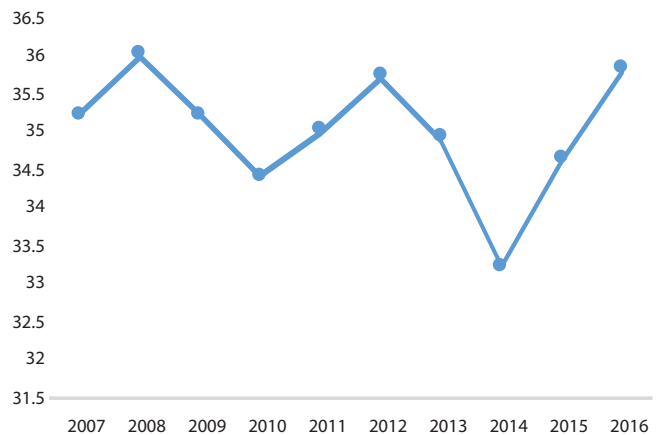
Figure II: Trends in judicial independence in Africa (average score), 2007-2017



Note: The following question was asked: "In your country, to what extent is the judiciary independent from influences of members of Government, citizens, or firms?" [1 = heavily influenced; 7 = entirely independent].

Source: Global Competitiveness Index (World Economic Forum, see <https://tcdata360.worldbank.org/indicators>).

Figure III: Trends in judicial accountability in Africa, 2007-2016



Note: score is out of 100.

Source: 2017 Ibrahim Index of African Governance (Mo Ibrahim Foundation, 2017).

C. Judiciary must be independent and accountable

Judicial independence is distinguishable from judicial accountability. Independence focuses on the prior control of judicial action, while accountability concerns ex post-control, which refers to the requirement that the judiciary explain both its administrative and functional operations and outputs, including its action.

The lack of judicial independence renders the judicial arm of a government very malleable, with the overall effect of weakening the rule of law, especially given that judges invariably become very deferential to politically connected individuals or the wealthy in society. Nevertheless, the judiciary is required to be non-partisan and to make its decisions freely, unencumbered by the influences of money or political pressure. To be able to fulfil its role, including combating corruption, judiciaries in Africa need to have their independence enhanced.

Although the enhancement of judiciary independence is paramount for it to function properly, independence should not trump accountability. Judicial independence needs to be mediated by judicial accountability, which is not intended to undermine judicial independence, but rather to strengthen the effectiveness of the judiciary amid the ever-lingering risks of corruption. Judicial accountability is underpinned by the following considerations:

a) The judiciary as a corporate body may have excessive control over its own composition, creating a self-perpetuating and self-protecting caste;

- b) The removal of traditional external controls may allow the judiciary unparalleled and possibly abusive freedom in managing its own resources;
- c) Judges' ability to interpret laws as they apply them may give them excessive power in reshaping the legal framework according to the values and views shared by neither the public nor other branches of government;
- d) Institutional mechanisms for defining standards for controlling and correcting judicial behaviour are inadequate.

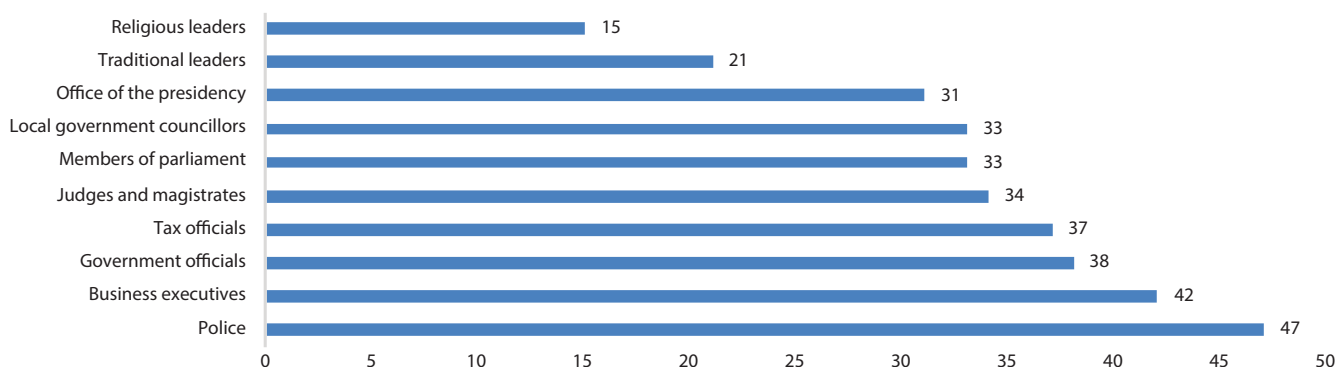
The continent has registered increasing improvement in the area of judicial independence and an uptick in judicial accountability in recent years (see figures II and III).

III. How the African judiciary is faring in terms of corruption and its impact

The results from a 2015 study by Transparency International established that the judiciary, along with government officials, business executives, tax officials and the police, are among the most corrupt institutions in sub-Saharan Africa, with the judiciary occupying an unenviable fifth place. Almost one third of respondents said that judges and magistrates were affected by high levels of corruption (see figure IV).

The causes of corruption in the judiciary in Africa are many and varied. The lack of judiciary independence in the majority of African countries features prominently as an explanation for the high levels of corruption in the

Figure IV: Most corrupt institutions in Africa (excluding North Africa)



Note: percentage of respondents who reported the indicated institutions to be the most corrupt.
Source: Global Corruption Barometer: Africa Survey 2015, Transparency International.

sector. The appointments and tenure of judges in many African countries depend on executive discretion, just as budgetary allocations to the judiciary often depend on the whims of parliamentary budgetary committees. This not only renders the judiciary quite vulnerable to undue influence from the other two arms of government, but also goes against the principle of the separation of powers and its intended checks and balances.

Other causes of corruption in the judiciary in Africa include inadequate funding and the poor remuneration of judges and other court personnel; the non-involvement of judges and magistrates in the reform of the judiciary; a lack of internal capacity both in terms of relevant skills and numbers of staff; poor court infrastructure and inadequate facilities, including information and communications technology (ICT); inadequate training for judges and magistrates and the poor grooming of judicial staff on issues of corruption; a lack of a clear law or rules for the declaration of assets and gifts received in the course of discharging judicial functions; and a lack of strong and effective mechanisms to control delays in delivering judgments.

Corruption debases the judiciary, erodes its legitimacy and integrity, dents its power and authority and undermines confidence in governance. Inadvertently, corruption in the judiciary encourages other branches of government to engage in corrupt acts in the belief that they can get away with their misdeeds, including the bribing of judicial officials. It raises transaction costs and triggers a form of bidding competition for judicial services that escalates prices for those who participate, while discouraging those who cannot afford to participate. Corruption in the judiciary is manifested through occurrences such as the disappearances of case dockets, the unjustified postponement of case hearings, high prosecution expenses and legal fees, high networking ability and old-

boy connections between the rich and the staff of the judiciary, and political connections on the part of the privileged.

IV. Conclusion and recommendations for combating corruption in the judiciary and enhancing its role in broader society

The judiciary in Africa, by virtue of its status as the custodian of the rule of law, has a more direct responsibility and primordial role to play in combating corruption. In the light of the range of continuing challenges faced by the African judiciary, the following policy interventions are worth contemplating, with a view to enhancing its ability to completely fulfil its role, including its responsibility to lead the way in combating corruption.

- African Governments should uphold and effectively implement the principles of separation of powers, in particular with regard to enhancing the independence of the judiciary;
- Adequate human, material and financial resources should be made available to the judiciary to enable it to perform its duties and to reduce its vulnerability to corruption;
- ICT, along with other relevant infrastructure, should be put in place to inform and assist in speeding up the processing and determination of judicial matters;
- Training in ethics and on the imperative of upholding codes of conduct should be mandatory for all levels and categories of judicial officials. There should be continuing legal education for judges, magistrates and lawyers;

- There is a need to enhance institutional links and cooperation among law enforcement agencies, prosecutors' offices, prison systems, probation officers, social workers, doctors and other experts in the field of criminology and penology to work harmoniously with the judicial system to solve interrelated problems;
- There is a need to develop and deploy proper interactive mechanisms between the judiciary and the citizenry for the purposes of raising the awareness of citizens on the services, procedures and operations of the judiciary system, with a view to curbing corrupt exploitation of the citizenry.

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