

# **Determinants of Judicial Corruption in Malawi: A Case Study of Child Maintenance Claims at Nsanje Magistrate Court and Zomba Child Justice Court**

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## **Abstract**

*The justice sector is particularly vulnerable to corruption, and judicial corruption is potentially more devastating than other sectors (Mzikamanda, 2016: 122). Corruption in the Malawi judiciary is evident, as is the culture of silence in which judges participate to protect each other. Judicial corruption breaks the basic principle of equality before the law, and those with power get things done in their favour. This paper evaluates the determinants of judicial corruption in Malawi using findings from a study that looked at child maintenance claims at Zomba Child Justice Court and Nsanje Magistrate Court. The paper employed qualitative methods of collecting and analysing data. The paper argues that there is evidence that institutional corruption in the judiciary is or may be facilitated by three determinants of corruption: the availability of numerous and inconsistently applied laws, broad discretionary powers of judicial officers, and inadequate institutional accountability measures. The paper recommends employing a systematic approach to deal with each identified determinant through law review and capacity building for judicial officers to facilitate an effective judicial system.*

**Key Words:** Judicial Corruption, Child Maintenance, Determinants of Corruption and Enforcement

## **1. Introduction**

Since time immemorial, corruption has been recognized as one of society's vices. It has been described as an insidious plague with a wide range of corrosive effects on societies (United Nations Convention Against Corruption (UNCAC), 2003: iii). Corruption undermines democracy and the rule of law, leads to human rights violations, and erodes the quality of life (ibid: iii). It also undermines a rational basis of trust in public officials, resulting in less tax income and fewer public services (Rose, 2018: 220). No one accepted definition of corruption exists. Nevertheless, corruption can be referred to as the act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of station or office to procure some benefit either personally or for

someone else, contrary to the rights of others (Garner, 2007:371). Despite recognizing the effects of corruption, it continues to be a challenge faced by many countries, including Malawi. In 2022, Malawi was ranked 110 out of 180 least corrupt countries (Transparency International, 2022). Malawi's score on the index was 34 out of 100. According to the index, a country's score is the perceived level of public sector corruption on a scale of 0-100, where 0 means highly corrupt and 100 means very clean. The Mo Ibrahim Foundation (2023:31) also ranked Malawi at position 18 in Africa among countries improving their governance status, including the absence of corruption. The studies focused on corruption in all the state institutions critical to governance, including the judiciary.

A well-functioning justice system is crucial to address corruption effectively, which is essential for development (Gloppen, 2014:68). This can only be achieved where the judiciary is free from corruption. However, recent studies indicate that the judicial sector is not spared from the vice as it is ranked among the top five most corrupt public institutions in Malawi (Mzikamanda, 2016:124). According to the Daily Lives and Corruption survey, it was found that 39% of the citizens who came into contact with the judiciary in Malawi had to pay a bribe (Transparency International, 2011:12). This was augmented by the Afrobarometer Round 9 Survey in Malawi (2022) which observed a high perception regarding corruption done by judges and magistrates. An average of 49.7% of the respondents from urban, peri-urban, and rural areas believed that some officials indulge in corruption.

Further, according to the study by the Democratic Governance and Rights Unit (2022), it emerged that 14% of the people who were interviewed at the courts in Malawi reported that they or someone they know had been asked to pay a bribe, give a gift, or a favour to a court official to get the help they needed. The study further established that 32% of the legal professionals in Malawi admitted to having engaged in bribery to get the help they needed from the court officials. The development is distressing as it defeats the judicial system's core purpose, which is interpreting and enforcing the law and upholding the rule of law.

One of the roles of the judiciary in Malawi is to adjudicate on child maintenance cases. However, judicial corruption has adverse effects on the realization of access to child maintenance and the realization of human rights generally. The present paper tackles one of the findings from a study titled 'Child Maintenance, in Law, Policy and Practice'. The study investigated the legal and policy framework and lived realities of child maintenance claims in Zomba and Nsanje districts. The study followed recent reports on the increase in the number of child maintenance claims by women in the courts of law (Tithetse Nkhanza 2021:5). Among others, the study found that corruption in the judiciary is one of the factors that affect child maintenance claims in Malawi. This paper seeks to interrogate the determinants of corruption in the judiciary using child maintenance claims as a case study.

## **2. Methodology**

The discussion in this paper emanates from the study findings of a research project titled 'Child Maintenance, in Law, Policy and Practice.' The paper discusses one of the findings of the Child Maintenance study which was that there is a high perception by court users in maintenance claims that judicial officers are corrupt which makes the court users lose trust in judicial processes. It is important to note that the study was not on judicial corruption. The study aimed to interrogate the legal and policy framework of child maintenance and to highlight challenges and opportunities in maintenance claims. Judicial corruption came out strongly as one of the challenges in accessing maintenance claims. The paper employed a desk review method which enabled the interrogation of legal doctrines surrounding corruption in general, corruption in the judiciary, child maintenance, and related matters. This involved reviewing and analysing the study findings from the Child Maintenance study, available literature, and doctrines in primary and secondary sources by reading legislation, international human rights conventions, byelaws, court decisions, and legal commentaries/articles on the subject matter. This assisted in ascertaining the position of the law regarding child maintenance and its interpretation by courts of law, as well as laying down the conceptual and theoretical framework for corruption. Further, the paper utilized other study findings that dwelt on judicial corruption. This was in recognition that the Child Maintenance study only tackled corruption as an emerging issue and thus necessitated a need to rely on other primary data that tackled corruption as a subject of research. Such study reports included the Afrobarometer Round 9 Survey of 2022, the Transparency International Survey of 2022, and the Mo Ibrahim Foundation Survey of 2023.

## **3. Conceptualising Corruption in the Judiciary**

Corruption has not been an easy term to define. There have been many unsuccessful attempts to have a single comprehensive definition of corruption. The United Nations Convention Against Corruption (UNCAC, 2005), a leading global anti-corruption legal instrument, does not define corruption. Thus, corruption has been generally perceived as concerning each country's culture, legal system, and social, economic, and political levels of development. Nevertheless, Article 11 of UNCAC recognizes the problem of judicial corruption everywhere and provides:

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, by the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.

According to the wording of Article 11 above, the emphasis is on the significance of making the judiciary independent in its operation. To appreciate the meaning of the concept of corruption, reference should be made to the definition by Garner (2007:371) above, which emphasizes the intent to give or procure some advantage contrary to one's duty and the rights of others. Although this is not comprehensive

enough, it still offers insights into the different forms corruption can take, thereby widening the scope of coverage of what corruption entails. The categorization of the acts has been regarded as the tangible way through which the concept of corruption can have its definition (Boisvert, 2014:1). Myint (2000: 35) tried to come up with a single comprehensive definition of corruption when he defined corruption as:

...the use of public office for private gain, or in other words, official position, rank or status by an office bearer for his benefit. Examples of corrupt behaviour would include (a) bribery, (b) extortion, (c) fraud, (d) embezzlement, (e) nepotism, (f) cronyism, (g) appropriation of public assets and property for private use, and (h) influence peddling.

The above definition is instructive on the list of corrupt behaviours that concern corrupt activities that can be undertaken by an official alone and without the involvement of a second party. Further, some corrupt activities in the list involve two parties, the giver and the taker, in a corrupt deal. It is worth noting that corruption can be done by commission or omission. A public official can either refrain from acting or act in the performance of his or her duties in exchange for a benefit from an individual or business. These factors, as well as the degree of coercion applied by the public official and the type of benefit allotted, are essential as they may affect the decision-making and rationality of the corrupt actors.

Considering the above concepts was relevant in understanding corruption within the context of the judiciary, which is understood as falling within corruption by public officers. In this study, however, a definition of judicial corruption that is diverse and complex, involving much more than judicial officers taking bribes, was adopted. The definition is provided by Gloppen (2014:69), who explains that judicial corruption includes all forms of inappropriate influence that may damage the impartiality of the courts and the proper administration of justice. This definition, therefore, covers corrupt acts by judicial officers, court officials, and lawyers as officers of the court, as well as prosecutors, and members of the public as court users. Thus, judicial corruption can harm the core judicial functions and the broader accountability functions entrusted to the judiciary in a democratic society (Mzikamanda, 2016).

### ***3.1 Determinants of Corruption***

With the growing worldwide concern over corruption, several factors have been pinpointed as responsible for the growth of corrupt practices. There is a striking consensus that corruption is universal and exists in all developed and developing countries. The contributing factors are cross-cutting with a difference in their scope and extent (Myint, 2000:33). The rising trend in the use of corruption as a tool for personal gains borders on the frailty of human nature. Naturally, humans become conflicted when altruistic and egoistic norms seem to converge such that pursuing personal interests often carry the day.<sup>1</sup> It should be appreciated that corruption can

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<sup>1</sup> *Bray v Ford* [1896] AC 44

impede access to justice, specifically child maintenance, such that it should receive priority attention in any country's development agenda. Admittedly, there are still wide gaps in the current information and knowledge on the determinants of corruption. Nevertheless, the theoretical and empirical research conducted thus far has yielded fresh insights into appreciating the underlying causes of corruption, its consequences, ideas, and approaches to possible measures to combat it. Myint (2000:2000) states that a fertile ground for the growth of a thoroughly corrupt system will emerge in a country if it satisfies three conditions.

First, corruption thrives where a country has a large number of laws, rules, regulations, and administrative orders to restrict business economic activities and thereby create enormous opportunities for generating economic rent, especially if these restrictive measures are complex and opaque and applied in a selective, secretive, inconsistent and non-transparent way (Myint, 2000:2000). Similarly, Nkhata & Chipofya (2024:3) state that "cumbersome procedures for public procurement in Malawi are a clear motivation for businesspersons to offer corrupt inducements to public officials." Further, they argue that the burdensomeness of the process gives government officials involved in public procurement a reason to rationalize deviating from the rules, which in turn motivates and sustains systemic corruption (Nkhata & Chipofya, 2024:3)

Second, corruption thrives in an environment where administrators are granted extensive discretionary powers concerning making and interpreting rules, are given much freedom to decide on how rules are to be applied, to whom and in what manner they are to be applied, are vested with powers to amend, alter, and rescind the rules, and even to supplement the rules by invoking new restrictive administrative measures and procedures (Myint, 2000:38). The same is also highlighted by Nkhata and Chipofya, who observe that "laws that confer over-broad freedom on public officials to enact by-laws or subsidiary legislation create a risk of corruption." Their paper concluded that broad discretionary powers create opportunities for corruption (Nkhata & Chipofya, 2024:3). Under section 9 of the Malawi Constitution, the judiciary has broad discretionary powers to interpret, protect, and enforce the Constitution and all laws. However, this has to be done independently and impartially.

Thirdly, corruption often increases when the country has no effective mechanisms and institutional arrangements to hold administrators accountable for their actions. Although the Corrupt Practices Act (CPA) applies to everyone, including judges and magistrates, it is amenable to the interpretation and application by the judiciary itself. This can arguably be regarded as a challenge to its practical application due to conflict of interest. Nevertheless, the judiciary developed a Code of Conduct and a Code of Ethics, which regulate the acts of its officers. According to Part 2, clause 13 of the Code of Conduct, a judicial officer shall be guilty of misconduct if he or she engages in fraudulent or corrupt practices. What is fraudulent or corrupt will depend on the circumstances of each case. However, Rule 4 of the Code of Ethics hints at what is expected of a judicial officer to ensure no room for corruption. Thus, a judicial officer should not accept and should urge family members residing in his or her household

not to accept any gift, bequest, favour, or loan from anyone that could be perceived as intended to influence the performance of judicial duties. These are efforts by the judiciary to ensure that its officers' conduct is checked. The discussed determinants serve as parameters for appreciating the scope of judicial corruption in child maintenance claims. This paper will discuss judicial corruption in child maintenance claims using the three determinants as a measure.

#### **4.0 Theoretical Framework**

Several theories have tried to explain corruption, its causes, and generally as a phenomenon. Some appreciated theories include principal-agent theory, collective action theory, and institutional theory. Principal-agent theory considers the nexus between the public as a principal and the public officers as agents (Groenendijk, 1997:207). That is, corruption is seen as a conflict between the interests of the principal and the agent, such that the agent opts to further their interests at the principal's detriment. Collective action theory perceives corruption as a collective problem as it is a result of putting the behaviour of others on a continuum of analysis (Persson, 2013:449). People rationalize their corrupt conduct based on perceptions of what others would do in the same situation. Lastly, institutional theory links corruption to the structure of existing institutions to appreciate how corruption might get entrenched in such institutions (Luo, 2005:119). From the many theories interrogated, this paper adopted the institutional theory as discussed below.

#### **4.1 Institutional Theory**

Institutional theory, also known as institutionalism, uses country and government institutional legal frameworks of well-defined pre-existing laws, such as the rule of law, and anti-corruption institutions with enforcement powers to explain corruption in the public sector. It examines the processes and mechanisms by which structures, schemas, rules, and routines become established as authoritative guidelines for social conduct (Scott, 2004: 465). To explain how the notion of corruption is linked to the existing institutions, the theory fuses in the social context. It provides a taxonomy for appreciating how corruption might get entrenched in the organizations in society regardless of the presence of a well-arranged legal framework (Luo, 2005:119). The general conception of institutionalism is that corruption is influenced by the character, design, and transparency of the political system and its institutions. Furthermore, the theory acknowledges the synergies between corruption and an individual. Thus, it stresses that while corruption can occur on an individual level, it can also be institutional, especially in situations where institutions are structured in a manner that makes them deviate from their original objective (Luo, 2005:119). This theory helped to understand the existence of judicial corruption in child maintenance claims despite the availability of laws proscribing the same. It also allowed assessing how judicial corruption has impeded the provision of goods and services, such as justice, to the citizenry.

## **5.0 Legal Framework on Corruption in Malawi**

The main instrument on corruption at the international level is the United Nations Convention against Corruption, which was adopted in 2003 by the United Nations General Assembly. It is an anti-corruption legal instrument for a global response to global problems. The Convention covers preventive measures, criminalization and law enforcement, international cooperation, asset recovery, technical assistance, and information exchange in various forms and acts of corruption to all signatory countries, Malawi included.

The primary legal instrument for fighting corruption at the local level is the Corrupt Practices Act, adopted in 1995 and amended in 2004. The Act in Section 3 provides a basic understanding by defining a corrupt practice as “(a) the offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or another person; (b) influence peddling; (c) the extortion of any advantage”.

The country also has supporting laws apart from the Corrupt Practices Act, which combat various forms of corruption in public sectors, including the judiciary. These are the Penal Code, the Public Procurement Act (2003), the Public Audit Act (2003), the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (2006), and the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (2014).

In terms of official corruption, the principal offense is found in section 24 of the Corrupt Practices Act (CPA), which is titled ‘corrupt practices by or with public officers’, and it reads:

- (1) Any public officer who by himself, or by or in conjunction with any other person, corruptly solicits, accepts obtains, or agrees to accept, or attempts to receive or obtain, from any person for himself or for any other person, any advantage as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything about any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offense.
- (2) Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises, or offers any advantage to any public officer, whether for the benefit of that public officer or any other public officer, as an inducement or reward for doing or forbearing to do anything about any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offense.

Although the paper is not primarily concerned with criminalising corrupt practices, the wording of section 24 above is very instructive about the forms that corruption can take.

Accordingly, a person will be deemed to have acted corruptly when she or he engages in “corrupt practices”, which means any of the three things listed above. The judiciary acts in Malawi will also be scrutinized in light of the three pointers above as they (officers within the judiciary) are also public officials as per the definition of a public officer in section 3 of the CPA. Any act of the judiciary that falls within this threshold should, without hesitation, be regarded as a form of corruption. Nevertheless, it should be noted that the core of ascertaining whether corruption has occurred is the causal relationship between the benefit, reward, or advantage given to a public official and its influence or inducement on her or his conduct. This was also emphasized in the case of *Jerwe (P.H.) v The State*.<sup>2</sup> This case was an appeal by Traditional Authority Mlonyeni against the decision of the First Grade Magistrate sitting at Mchinji, who convicted him on two counts of corruption, having received money from two Group Village Headmen after their elevation from Village Headmen. It was established that the payment was a token of appreciation for being elevated, as it is expected of every chief according to their custom. In allowing the appeal, the court stated that corruption is an act intended to give some advantage inconsistent with official duty and the rights of others. Considering that the appellant did not solicit the payment and it was made after the elevation and in full view of other chiefs, the court held that it could not be said that the appellant intended to indulge in a corrupt act. Accordingly, this was a mere appreciation of the elevation. There was no inducement to the elevation to make it corrupt.

The existence of the seemingly many statutes that deal with corruption speaks volumes of how deeply the illicit act has manifested itself within the Malawian society, the judiciary inclusive. This has had a bearing on the functioning of the state machinery as it stifles some interests of the public. One of the interests affected by corruption, especially where the judiciary is at the epicentre of illegitimate conduct, pertains to child maintenance claims.

## **6.0 Child Maintenance and the Role of the Judiciary**

Child maintenance is a system developed to secure children’s living standards after parental relationship dissolution. Child maintenance aims to reduce the poverty of children whose parents do not live together (Hakorvita, 2011:3). As such, child maintenance is defined as a regular contribution from a non-resident parent towards the financial cost of raising a child, usually paid to the parent with whom the child lives most of the time (Hakorvita:3). Child maintenance has become essential today with the growing number of divorce cases. Further, it is recorded that children who live with a single parent have a high likelihood of poverty and deprivation across countries. As such, states have increased efforts in demanding that non-resident

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<sup>2</sup> Criminal Appeal No. 166 of 2008 (Unreported).



parents offer maintenance to their children (Plan International, 2016: 5). At the international level, Malawi is a party to conventions that address child maintenance issues. For instance, Malawi is a state party to the United Nations Convention on the Rights of the Child (CRC). The CRC builds upon Article 10 of the International Covenant on Economic, Social, and Cultural Rights, which allows state parties to recognize special measures for the protection and assistance of children without discrimination for reasons of parentage or other conditions. Article 18 of the CRC gives state parties the duty to ensure that parents have the shared responsibility for the upbringing and development of their children.

At the regional level, Malawi is a state party to the African Charter on the Rights and Welfare of the Child (ACRWC). Article 18(1) of the ACRWC provides that state parties shall take appropriate steps to ensure the rights and responsibilities of spouses about their children in a marriage setting or during a divorce. Malawi is also a party to the SADC Protocol on Gender and Development (SPGD). Article 8 of the SPGD is on marriage and family rights, requiring, among others, state parties to place legislative and other measures to ensure that parents honour their duty of care towards their children and maintenance orders are enforced. At the national level, Section 23(1) of the Constitution provides the cardinal principle that children's best interests and welfare shall be the primary consideration in all decisions affecting them. Specifically, on child maintenance, the Constitution, in section 23(4), provides that all children are entitled to reasonable maintenance from their parents, whether or not such parents are married, as well as from their guardians. Similarly, section 3(1)(a)(ii) of the Child Care, Protection and Justice Act (CCPJA) imposes the obligation on a parent to provide, among others, care, assistance and maintenance for the child and to ensure his or her survival and development. Paragraph (iv), in particular, emphasizes the parents' or guardians' duty to exercise joint primary responsibility for raising their children.

The duty to order maintenance under the CCPJA lies with the courts. Section 10 of the CCPJA has provided several considerations the court needs to consider before granting a maintenance order. Section 11 of the CCPJA has allowed the court to request a social welfare officer to make a social inquiry report before a court gives a maintenance order. Sections 12 and 13 of the CCPJA have provided for the actual maintenance order and attachment order on the earnings of a party paying for the maintenance of a child. Section 22 of the CCPJA provides for offenses against a person liable to maintain a child.

The Marriage, Divorce, and Family Relations Act (MDFRA) is the principal Act that regulates the institution of marriage in Malawi. Section 97 (1)(b) of the MDFRA, as read with section 97(2) of the MDFRA, gives the court powers to grant maintenance orders for children against a party to a marriage. Further, under section 100(2) of the MDFRA, the court is given powers to order a party to a marriage to provide another party to the marriage with maintenance and suitable accommodation for an applicant and any child entitled to maintenance.

When it comes to enforcement, the state bears the primary and ultimate responsibility of enforcing all laws under the Constitutional order. Under sections 8 and 9 of the Constitution, the executive and judicial branches of government each bear the responsibility of implementing and enforcing all laws according to the Constitution. This includes those relating to the maintenance of children. The executive exercises responsibility through organs such as the Malawi Police Service and the Director of Public Prosecutions. As for the judiciary, enforcement comes through the power to determine maintenance-related proceedings. For instance, under section 12 of the CCPJA, the court has the power to award a maintenance order to a child following an application made under section 9 of the same Act by any of the parties listed therein. Such maintenance order shall, by section 18, be enforced thirty days after the order is made unless the court makes an otherwise appropriate order.

According to Gloppen & Kanyongolo (2007: 276), indigent people often view the legal system with distrust and fear, and this is not without reason. For them, the law reflects the power relations in society and often has an anti-poor bias, if not formally, in its application. The law offers them little protection, and the justice system is encountered in a punitive capacity, often in ways perceived as arbitrary and corrupt, particularly in developing countries like Malawi, whose legal systems are weak and subject to capture by those with resources. Gloppen & Kanyongolo (2007: 277) further state that when the law and the legal system lack legitimacy because it is at odds with socially entrenched norms, it dampens the users' inclination to turn to courts for support. With the growing perceptions of judicial corruption and its acknowledgment by the Malawi judiciary, the seekers of child maintenance may have their confidence in the judiciary and the relevance of the rule of law threatened. From the above discussion, it can be seen that the judiciary is at the centre of child maintenance claims, with applications being made before the courts and enforcement of these orders dependent, in some cases, on court-enforced orders. This, therefore, calls for a meaningful consideration of the impact of judicial corruption in child maintenance claims.

## **7.0 Findings on Determinants of Judicial Corruption in Maintenance Claims**

The paper used Myint's conception of determinants of corruption to check whether such determinants exist in the Malawi judiciary when handling maintenance claims. Myint (2000:33) isolated three determinants as discussed under section 3.2 above, and the paper shall now discuss them with the findings from the maintenance study.

### ***7.1 Availability of numerous laws and rules applied inconsistently***

Myint argues that the availability of numerous laws, rules, regulations, and administrative orders can restrict business economic activities and thereby create enormous opportunities for generating economic rent. This is especially true if these restrictive measures are complex and opaque and applied in a selective, secretive, inconsistent, and non-transparent way. The study found numerous and somewhat inconsistent laws, rules, and regulations that apply in child maintenance cases. These

laws range from international instruments Malawi has ratified, such as the Convention of the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the Protocol to the African Charter on the Rights of Women (Women's Protocol).

As illustrated in the sections below, the local laws on maintenance remain unconsolidated and are somewhat inconsistent with each other and these include the Constitution, the Child Care Protection and Justice Act (CCPJA), and the Marriage, Divorce and Family Relations Act (MDFRA). The presence of these numerous laws leads to the lack of uniformity in their application and creates an opportunity for corrupt practices in the judiciary. The lack of uniformity could lead to the judicial officers picking and choosing laws to apply, leading to considerable disparities in the type of court maintenance orders. The existence of numerous laws that are incoherent also brings in complexity and the laws become burdensome to the users which most often leads to bribery as the users use bribes to speed up the legal processes. Complex and burdensome laws leave court users no option but to pay money to avoid them. This form of corruption is sometimes known as “grease money” as it is used to turn the wheels of bureaucracy more smoothly, speedily, and hopefully in the right direction (Myint, 2000:35).

The inconsistency in the laws was noted during the maintenance study. For instance, there is a lack of harmony between the Constitution, the MDFRA, and the CCPJA on the definition of a “child” thereby rendering it confusing who is or should be the subject of child maintenance. The Constitution and the MDFRA peg the age of the child at 18 (section 23(6) of the Constitution) whilst the CCPJA puts it at 16 (section 2 of the CCPJA). Whilst appreciating the supremacy of the Constitution, to ensure consistency, the age of the child needs to be reconciled in all statutes that provide for child-related matters as the definition of the child affects whether one gets maintenance or not.

Second, the national laws are not fully consistent with the international laws. For instance, under local laws such as section 23 of the Constitution the duty to maintain children is borne by parents and guardians alone. However, Article 5 of the CRC extends such duty not only to a child's parents or guardians but also to a child's family and community. Further, Article 20(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) goes on to give a state party the duty to help parents or others responsible for a child in maintaining the child through appropriate measures but section 23 of the Constitution does not give the state such a duty. The local laws must be aligned to the international instruments that Malawi is a party to. Nkhata and Chipofya have similarly observed that laws that are numerous, uncoordinated, incoherent, incomplete/inadequate, and too abstract do not serve the needs of the people and they engender frustration. They further argue that such laws “lose legitimacy, and weaken people's inclination to comply with them and they open the door to a culture of illegality which in turn creates space for corrupt practices” (Nkhata and Chipofya, 2024:7).

## 7.2 Wide discretionary decision-making powers

Myint also argued that corruption thrives in an environment where administrators are granted extensive discretionary powers concerning interpreting rules. He stated that corruption happens when administrators can decide how to apply rules, to whom, and in what manner. He further argues that administrators should not be given too much power to amend, alter, and rescind the rules and even to supplement the rules by invoking new restrictive administrative measures and procedures, as this breeds corruption.

The study found that judicial officers in Malawi have extensive discretionary powers to interpret maintenance laws and rules to the disadvantage of the claimants. The amount of maintenance and items the courts can order as child support is at the courts' discretion. As such, there is no consistency as to what can be ordered. Each court orders what it deems appropriate according to the circumstances of the case. Sometimes, the court generalizes that the non-resident parent should pay child maintenance without specifying the items or amounts. This arbitrariness can be a fertile ground for corruption. For instance, the court can collude with either party to order higher amounts of maintenance in cases that do not deserve such amounts or, indeed, collude for the court to order lesser amounts in cases that deserve higher amounts. Most of the claimants in the maintenance study lamented that the maintenance orders were too low and inadequate to serve the needs of the children. The claimants suspected a collusion between the courts and the respondent or non-resident parent.

The challenge emanates from the law that puts a general obligation on the courts to order 'reasonable' maintenance (section 23 (4) of the Constitution). It is not always clear as to what the term reasonable maintenance means. However, the court in the Canadian case of *Ostrander v Kimble Estate*, 1996 stated that what constitutes proper maintenance and support is a question to be determined with reference to a variety of circumstances. The court went further to state that this cannot be limited to the bare necessities of existence and the deciding court should consider the situation of the child, wife or husband and the standard of living to which, having regard to this and other circumstances, reference ought to be had. Further, in the case of *Shaw v The City of Regina, City of Saskatoon et al* the court stated that the phrase 'reasonable provision of maintenance' means something adequate and proper under all circumstances. What can be noted from the above definitions provided by the courts is that the definitions are too wide as well as "in the eyes of the beholder" and give broad discretionary powers for the judicial officer to determine what is reasonable in maintenance claims on a case by case basis.

The effects of the wide discretionary powers were more evident in the court's decisions and the amounts that the court ordered in the maintenance claims. There was a huge disparity in terms of orders that were made at the Zomba Child Justice Court and those made at the Nsanje Magistrate Court. For instance, the Nsanje Magistrate Court mostly makes monetary orders regarding maintenance awards. All

of the 77 cases reviewed except one had monetary awards. Only one case had a combination of monetary and material child support. The highest amount awarded was MK40,000 a month, and the least was MK10,000.

Unlike the Nsanje Magistrate Court, the Zomba Magistrate Court usually awards material and cash child support. The material support included school fees, groceries, clothes, medical facilities, food items, washing and bath soap, diapers, bags of maize, and others. The money awards at Zomba Child Justice Court mostly ranged from 5,000 to 20,000 kwacha, lower than at Nsanje court. The highest amount awarded was K50,000 in a month, which was for one child. The court record indicated 43 cases with cash and material support and 59 cases with only cash support. The court record hardly showed reasoning on why the courts made the awards as they did. The trend indicates that the orders are by the taste of a particular magistrate handling the matter at a given time. The data from the court shows that there is no actual guideline that the court uses in determining the amounts for child support. The court uses discretion after assessing the child's needs and parents' financial status. As such, the law must be consolidated or provide a uniform guide across the numerous laws establishing minimum amounts and materials that can be paid in a given case. This would prevent the arbitrariness of the awards and allow uniformity and consistency in the cases. The court should only depart from the minimum thresholds in exceptional circumstances. This mechanism has the potential to close any gaps of potential judicial corruption that the numerous laws may cause. As has been observed by previous scholars "the greater the discretionary powers granted to administrators, the greater will be the corruption" (Myint, 2000:39).

The current situation in Malawi was also experienced in the United States. In the past, child support orders in the United States were determined case-by-case. Trial judges exercised discretion under statutes, leaving them mainly free to set awards at appropriate dollar amounts (Ellman, 2008:108). The result was a wide variation in the amount of child support ordered among cases whose essential facts seemed similar. The few applicable legal principles did not provide courts with much guidance. It was often said that the law required the support amount based on the living standard maintained in the intact family. Some commentators argued that child support orders were often too low to meet a child's minimum needs, much less to maintain the child's prior standard of living. This changed with the Family Support Act of 1988, which requires that state guidelines provide a dollar amount of child support for every potential case. States must require their courts to set a support order at the guideline amount unless a judge writes an opinion explaining why it is inappropriate for the particular case (Ellman & Ellman, 2008:110).

In Malawi, no statute on child maintenance limits the discretionary powers of the courts creating room for judicial corruption. The country would do well if it developed regulations for minimum payments or items that can be provided for each child maintenance claim. In such a way, each child will be guaranteed some reasonable maintenance without depending on the court's mercy. This would further prevent the

arbitrariness of the awards and allow uniformity and consistency in the cases. The court should only depart from the minimum thresholds in exceptional circumstances. This would help deal with any room for abuse of discretion and collusion, which can be a bedrock for corruption.

### **7.3. *Inadequate institutional accountability measures***

Myint stated that one of the determinants of corruption is a country's lack of effective mechanisms and institutional arrangements to hold administrators accountable for their actions. The study findings concurred with Myint's observations as it was shown that most court users are frustrated with the court system of administering and enforcing maintenance claims. The respondents claimed, among others, that the court hardly does its work enforcing maintenance orders. Claimants have to do continuous follow-ups, costing them time and financial resources. There seemed to be no avenues where the people could report the malfunctions at the court, especially since the court is often taken as a last resort when all other avenues have failed. As evidenced by different studies, the lapses in accountability measures and the personal experiences of court users on judicial corruption increase the weight of such perceptions. This is a consideration that the judicial officers cannot be expected to declare themselves as corrupt openly. However, the perceptions could derive from what the court users experience when using the courts, raising eyebrows regarding the vice's existence. Several issues were also highlighted concerning challenges with the judicial system in pursuing child maintenance. Some raised issues can give room for corrupt tendencies, leading to an ineffective judicial system. Inadequate institutional accountability measures that facilitate judicial corruption were evident in the issues stated below.

#### **7.3.1 *Lack of enforcement of court orders and burdensome processes***

The lack of court order enforcement was a concern for both Nsanje's and Zomba's respondents. Maintenance provision takes several years until the child is of age and thus needs an effective and efficient court enforcement system. Most women reported becoming tired of following up on payments and giving up. A woman from Zomba reported:

After my divorce, the man stopped providing support to his children. Then, I complained to the court, and the court ordered my kids' father to start supporting his children. He accepted the order, but he did not provide support to his children. I stopped following up on the order because I was tired. It was a waste of time to seek the same thing at the court, which the court seemed not serious about.

In addition, the lack of a proper follow-up system on maintenance payments by the court was also an issue that was highlighted both in Nsanje and Zomba. First, it was said that the courts never followed up on the men who defaulted payments. Second, it was said that the women are given a further burden of physically visiting the courts to

find out if maintenance has been paid, which is costly on their part. Some suggested that courts phone the women to inform them of the payment status.

Cumbersome or burdensome processes and procedures in securing public services have been marked as a clear motivation for citizens to offer corrupt inducements to public officials (Nkhata & Chipofya, 2024:40). As for government officials involved, the burdensomeness of the process gives them a reason to rationalize deviating from the rules, which in turn motivates and sustains systemic corruption (Nkhata & Chipofya, 2024:40).

### ***7.3.2 Missing of court files***

Further, the claimants complained about the mysterious missing court files that concern their cases. The claimants were of the stern view that court officials deliberately misplaced the files in collusion with the fathers so that their matters never get to be heard. This also acts as a discouragement for women to pursue such matters further in court. One lady had this to say in Zomba:

I also have been to court before. I started with YONECO and was given a letter to go to court. The case was going well on my side. Unfortunately, on the day of the judgment, I went to court only to be told that the file for my case had been misplaced. It was in 2018, the end of my pursuit of justice. I felt that was a high setback; it was a setback because I had been going to court for about six months only to be told that the file was missing.

Surprisingly, the courts in Nsanje and Zomba rely solely on a manual filing system. In Nsanje, both Bangula and Nsanje Magistrate Courts, the clerical and magistrate's offices had no computers. The challenge of missing files could be partly solved by having an automated system that backs up the manual system. Thus, there is a need to make the Electronic Case Management System (ECMS) operational in all courts in Malawi. The findings are supported by previous research studies such as the study finding by Chawinga (2019: 2), which observed that the Malawi courts continue to rely heavily on the manual filing system of documents as the ECMS, which was rolled out in 2015, is not fully operationalized in all the courts. According to Chawinga, the traditional paper-based filing system is often prone to challenges such as missing files.

Lack of control over official court files has been said to be a frequent cause of corruption (USAID, 2009:11). This is because keeping court files in unsecured places presents a high risk that the court files might disappear. As such, there is a greater case for the operationalization of the ECMS in all courts to minimize opportunities for favouritism, delay, and abuse (USAID, 2009:11).

### 7.3.3 Perceived Corrupt Practices in the Courts

Some female respondents in Zomba also accused court officials of misusing maintenance money. Corruption includes the abuse of power for private gain and embezzlement of maintenance money is a form of abuse of power by the court officials. The claimants reported that they sometimes get information that maintenance has been paid in court, but when they go to court, they are told stories: either that the money has been banked or that no maintenance was paid in court.

Sometimes, you go to court to collect the money, but when you get there, you find no money. You are told that they have deposited it in the bank account, yet they know that they embezzled the money. You rush to the bank to get the money, only to find that nothing was deposited. I experienced this ordeal at Mulunguzi Court (A female participant in Focus Group Discussion in Zomba).

Further, some of the claimants accused court officials of outright corrupt acts. It was said that court marshals who are supposed to enforce court orders often receive bribes from respondents. As such, they are too lenient on respondents who fail to honour the maintenance orders. It was said that the court marshals often pleaded with the claimants to understand if the respondents failed to pay or paid little of what was ordered. A woman in Zomba said as follows:

He only pays MK15,000 for all three children and gives excuses, yet he can bribe the court marshals. Then you hear the court marshals telling you to understand him while giving false hopes that they will do something. In the end, nothing is done concerning the matter.

Some stakeholders also stated that they have, in some instances, received complaints from claimants about corruption by court officials. The stakeholders stated that some court officials ask for bribes in exchange for helping the claimants. Another stakeholder stated that in other cases, the claimants can only suspect corrupt practices between the respondents and the court officials.

We once dealt with a case where, following divorce, the court ordered the man to construct a house for the woman and children since he had chased them away. A few weeks later, the woman was summoned to the court, where she was told that the man could not construct the house due to lack of funds, yet this man was a businessman. The woman suspects that bribes might have been exchanged (WOLREC official, Zomba).

The allegations concerning corrupt practices cannot be wholly ignored in the face of corruption cases that continue to persist involving judicial officers. There have been many cases where judicial officers use their positions to solicit benefits from court users. This can also be appreciated in the case of *Republic v Mhone and Mvula* (2018). In this case, Reverend Daniel Mhone and Mlenga Mvula obtained money from the Methodist Church by falsely representing that the said money was to be given to the then Attorney General, Mr. Kalekeni Kaphale and Justices Fiona Mwale and Charles



Mkandawire, to influence them to act in favour of the Methodist Church in a case between the State, Attorney General and the Registered trustees of United Methodist Church. It should be noted that Mlenga Mvula was the judiciary's spokesperson. This can also be appreciated in the recent report by the Anti-Corruption Bureau of the arrest of Mponela Second Grade Magistrate and Mponela Police prosecutor for demanding K400,000 from a suspect for the suspect to win a theft case (Nzangaya, 2023). With the growing perceptions of judicial corruption, the victims of the illicit act can easily fall into the trap where citizens perceive judicial corruption as an established norm in the judiciary.

Concerning such corrupt acts, the women stated that most of them are not seeking court intervention for child support due to the misgivings of the judicial system. Perceptions of corruption in the judiciary are rampant. According to previous research findings by Democratic Governance and Rights (2022) on the corruption allegations, the courts have responded by saying that their decisions regarding a particular case fall within the extremes of public opinion and the law. Thus, people sometimes view court decisions with their preconceived perceptions about the corruption of the judiciary such that any outcome contrary to their expectations increases the levels of such perceptions. Nevertheless, the officers were ripe to the fact that corruption in the judiciary exists, exacerbated by inadequate remuneration and benefits of the officers, as earlier highlighted. The existence of the vice in the judiciary has also been acknowledged by the Magistrates and Judges Association of Malawi (Majma) when the board chairperson, Frank Kapanda, conceded that he is aware that some magistrates and other judicial officers indulge in corruption (Pansungwi, 2022).

## **9.0 Conclusion**

The paper discussed determinants of judicial corruption in Malawi by assessing three factors as determined by Myint as the causes of corruption in a country or an institution. The three factors were the availability of numerous and inconsistently applied laws, broad discretionary powers of administrators, in this case, judicial officers, and inadequate institutional accountability measures. The paper relied on data collected in Nsanje and Zomba on the law and practices in cases of maintenance of children. The paper argues that there is an institutional type of corruption in the judiciary, which is facilitated by the three determinants of corruption as observed by Myint. As such, a systematic approach needs to be employed to deal with each of the identified determinants through, among others, law review, an increase in funding to the judiciary to support maintenance enforcement and electronic record keeping, capacity building for judicial officers to facilitate mindset change and an effective judicial system. Something needs to be done in the way the judiciary discharges its services to the public. Corruption allegations hurt the justice delivery system. Apart from the judiciary losing trust and confidence among the people, the people are also denied access to justice. Pursuing court justice concerning child maintenance is a right that every citizen expects the state to respect and provide a promising avenue for its

fulfilment. As a state institution, the judiciary should, therefore, strive to offer public goods and services to the citizens' satisfaction.

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