

Challenges to the Successful Implementation of Anti-Corruption Measures: The Case of

Political Corruption in Malawi

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BY

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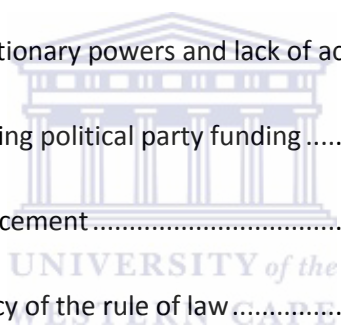
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Key words

Access to information

Anti-corruption measures

Good governance

Obstacles

Operational independence

Patronage

Political will

Public interest

Social accountability

Transparency



Declaration

I, **DANIEL DOMINIC DAKA**, hereby declare that this research paper titled '**Challenges to the Successful Implementation of Anti-Corruption Measures: The Case of Political Corruption in Malawi**' is my own work, that it has never been submitted before to any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student Name: Daniel Dominic Daka

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Date:

Supervisor: Prof. R Koen

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Date:



List of Abbreviations and Acronyms

ACB	: Anti-Corruption Bureau
AU Convention	: African Union Convention on Preventing and Combating Corruption
CPA	: Corrupt Practices Act
DANIDA	: Danish International Development Agency
DPP	: Director of Public Prosecutions
EU	: European Union
FIU	: Financial Intelligence Unit
IMF	: International Monetary Fund
PAC	: Public Appointments Committee of Parliament
SADC Protocol	: Southern African Development Community Protocol against Corruption
UK	: United Kingdom
UNCAC	: United Nations Convention against Corruption
USA	: United States of America



Dedication

Through my Dear and Almighty God, I dedicate this paper to Camilla-Mia Daka and Xolani Daka, my daughter and son respectively.

The research is also dedicated to all the victims of political corruption in Malawi, particularly the majority living in abject poverty in rural areas ... Surely a better life is possible.



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CHAPTER 1

GENERAL INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Background to the Study

This paper discusses the key challenges faced by Malawi in combating corruption despite its having anti-corruption laws and enforcement institutions in place. Corruption in Malawi varies from high-level political corruption to petty bribery.¹ This paper will focus on political corruption.

The United Nations in 2003 adopted the United Nations Convention against Corruption (UNCAC)² which is aimed at coordinating efforts by States Parties in the fight against corruption and related financial crimes such as money laundering. Malawi is a State Party to UNCAC, having ratified the convention on 4 December 2007.³ UNCAC requires every State Party to have in place systems and structures that would prevent persons from indulging in corrupt practices or laundering the proceeds of corruption anywhere in the world. According to Shehu

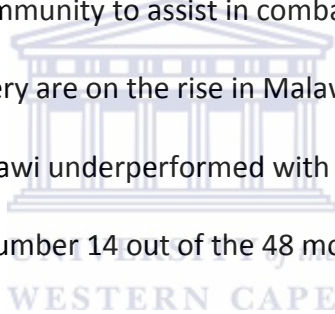
1 Nawaz F 'Overview of corruption and anti-corruption in Malawi' (2012) available at <http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-Malaw/> (accessed 20 March 2013).

2 United Nations Convention against Corruption, adopted by the General Assembly of the United Nations on 31 October, 2003, and entered into force on 14 December 2005.

3 United Nations Convention against Corruption 'UNCAC Signature and Ratification Status as of 24 December 2012' available at <http://www.unodc.org/unodc/en/trities/CAC/signatories.html> (accessed 26 February 2013).

UNCAC provides a comprehensive set of standards, measures and rules for anti-corruption implementation, and there is a critical focus on prevention.⁴

Malawi has had in place anti-corruption laws and an anti-corruption institution well before the inception of UNCAC and its ratification by Malawi in 2007.⁵ The Corrupt Practices Act (CPA) was enacted in 1995 and came into force in 1996.⁶ The CPA established the Anti-Corruption Bureau (ACB). The ACB is mandated to investigate, prosecute, prevent, and educate the public about corruption. Thus, UNCAC recommendations ought to have just reinforced the national anti-corruption measures already in place. However, despite these anti-corruption measures and all the efforts by the international community to assist in combating corruption, both high-level political corruption and petty bribery are on the rise in Malawi.⁷ According to the 2011 Corruption Perceptions Index, Malawi underperformed with a score of 3 out of 10. In the sub-Saharan region, Malawi was number 14 out of the 48 most corrupt countries.⁸



Since the inception of the ACB, there has not been even a single successful prosecution of corruption cases bordering on high-level political corruption except for very few former public officials who had fallen out of favour with the political leadership of the relevant time.⁹ Neither has the Financial Intelligence Unit (FIU) registered a single success in the area of money

4 Shehu (2005) 224.

5 Transparency International 'Overview of Corruption and Anti-Corruption in Malawi' (2012) available at http://www.transparency.org/files/content/corruptionqas/329_Overview-of_Corruption_and_anti-corruption_in_Malawi.pdf (accessed 20 March 2013).

6 Corrupt Practices Act, Chapter 7:04 of the Laws of Malawi.

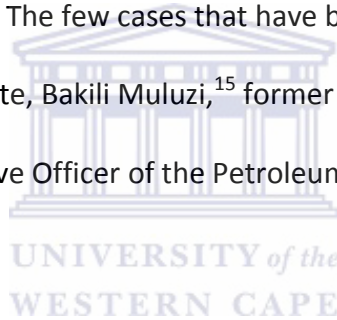
7 Transparency International (2012).

8 Transparency International (2012). The lower score indicates more corruption.

9 Hussein (2005) 97.

laundering.¹⁰ The reasons for this upsurge in corruption levels and ineffective anti-corruption enforcement measures can be attributed to lack of political will to combat corruption, particularly high-level political corruption.¹¹ One example of lack of political will is the refusal by President Joyce Banda to declare her assets upon her assumption of the office of State President of the Republic of Malawi.¹² This was in contravention of the constitutional requirement for the President to declare her assets and liabilities within three months of assuming office.¹³

There have been serious allegations concerning political corruption.¹⁴ However, very few of them have been investigated fully. The few cases that have been taken to court include those concerning the former Head of State, Bakili Muluzi,¹⁵ former Minister of Finance, Friday Jumbe,¹⁶ and former Chief Executive Officer of the Petroleum Control Commission, Denis Kambalame.¹⁷



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- 10 The FIU was established in 2007 in terms of the Money Laundering, Proceeds of Crime and Terrorist Financing Act, 2006.
- 11 Hussein (2005) 97.
- 12 Matonga G 'JB won't declare her assets' *The Daily Times*, 1 February 2013, available at <http://www.bnltimes.com/index.php/daily-times/headlines/national/13228-jb-wont-declare-her-assets> (accessed 24 March 2013); See also 'What Are You Worth? Malawians Ask New Leader' *NewsdzeZimbabwe* 21 June 2012, available at <http://www.newsdezimbabwe.co.uk/2012/06/what-are-you-worth-malawians-ask-new.html> (accessed 20 March 2013).
- 13 Section 88(3) of the Constitution of the Republic of Malawi.
- 14 Hussein (2005) 97.
- 15 *Dr Bakili Muluzi v Director of Anti-Corruption Bureau* (High Court of Malawi, Constitutional Case No. 8 of 2005) unreported.
- 16 *Hon. Friday Anderson Jumbe et al v The Attorney General* (High Court of Malawi, Constitutional Case No.1 and 2/2005) unreported.
- 17 *Dennis Spax John Kambalame v The Republic* (High Court of Malawi, Criminal Case No. 108/2002) unreported.

The status of the anti-corruption enforcement measures seems to create a breeding ground for political corruption. For example, powers to appoint and fire the Director of the ACB are vested in the President.¹⁸ Further, although powers to prosecute corruption cases lie with the Director of the ACB, consent to prosecute has to be obtained from the Director of Public Prosecutions (DPP).¹⁹ This requirement of consent affects effective prosecution of corruption cases, as the DPP may either delay or refuse the ACB consent to prosecute.²⁰ This status of the law breeds impunity.

Apart from the selected provisions in the Constitution that require senior public officials to declare assets upon assuming public office,²¹ there is no enforcement law in place to regulate such assets declarations. In 2008, the Malawi Law Commission published a Report that recommends development of legislation to regulate assets declarations.²² The Commission drafted a Bill for the recommended legislation and submitted the Bill to Parliament for consideration. To date, the Bill has not been enacted into law, a delay that borders on lack of political will. The study, while supporting the need for legislation to regulate assets

18 Sections 5 and 6 of the CPA.

19 Section 42 of the CPA.

20 Hussein (2005) 96. In 1999, the DPP refused to grant consent to prosecute a Minister of Education (from the ruling party) who was implicated in a multi-million Ministry of Education scam. The DPP also refused to grant consent to prosecute the former Attorney General for embezzlement of US\$7.6 million. Further, the DPP ignored applications by the Director of the ACB to prosecute a former Minister of Local Government who was accused of involvement in a national identity card scam in which over US\$ 32 million were misappropriated.

21 Sections 88A(3) and 213 of the Constitution.

22 Malawi Law Commission Report No. 19 (2008) *Report of the Law Commission on the Development of Legislation on Declaration of Assets, Liabilities and Business Interests by Public and Elected Officers*, Gazetted 28 August 2008, available at http://www.lawcom.mw/docs/Report_of_Legislation_on_Declaration_of_Assets.pdf (accessed 24 February 2013).

declarations, will seek to establish whether the Bill puts sufficient focus on political corruption. Further, lack of legal frameworks to regulate disclosure of assets and finances of political parties promotes political corruption.²³

Malawi could have all the necessary laws and institutions, but lack of political will could derail or prevent the positive impact to be expected from the laws and institutions.

1.2 Research Question

The question this paper seeks to answer is this: What are the obstacles to the successful battle against political corruption in Malawi? As noted above, despite establishing the anti-corruption legal and institutional framework and being State Party to international legal instruments such as UNCAC, Malawi is experiencing a rise in both political corruption and corruption in general. This fact signifies a problem deeper than the anti-corruption legal framework can measure and solve single-handedly.

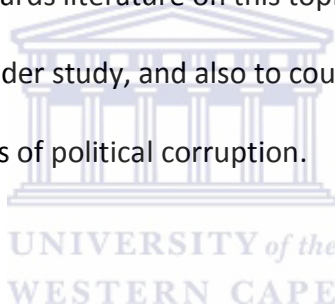
This paper, therefore, seeks to explore the key obstacles to combating political corruption, and to suggest solutions to the problem. The pertinent questions which this paper seeks to answer include (a) what are the causes of political corruption? (b) why is it difficult effectively to combat political corruption while Malawi has the anti-corruption legal and institutional framework? and (c) what are the possible solutions to the problem?

23 Democratic Malawi has witnessed ruling political parties and senior party members amassing wealth, without disclosing sources of such wealth.

While discussing the question, this paper will highlight political will as a fundamental element in the successful implementation of the anti-corruption measures.

1.3 Significance of the Study

There has not been any scholarly writing about Malawi on this subject.²⁴ Political corruption is on the rise in Malawi. Its impact on the welfare of the citizenry is devastating. The approach towards reforming the national anti-corruption legal and institutional framework taken by the donor community, the International Monetary Fund (IMF) and the World Bank seems not to be effective. Besides contributing towards literature on this topic, the findings of this study may be valuable to Malawi as a country under study, and also to countries from the sub-Saharan region, which face similar problems of political corruption.



1.4 Scope of the research paper

This study will limit itself to the situation in Malawi.

1.5 Hypopaper

This paper's main hypopaper is that anti-corruption measures cannot be implemented piecemeal. Effective and efficient corruption control requires multiple, reinforcing and overlapping institutions of accountability. Further, the paramount weapon against corruption is political will.²⁵ Combating political corruption can succeed only if political commitment replaces

24 Those who have written about corruption in Malawi did so either as journal article contributions or seminar papers.

25 Abdulai (2009) 387.

mere rhetoric. Efficiency and effectiveness of the anti-corruption institutions and the relevant legal instruments can be achieved only when some spectrum of independence is guaranteed and political meddling is eliminated. In other words, there must be a legal environment that will make politicians and other public officers perceive a substantial risk of losing office and having illegally acquired property forfeited if they engage in corrupt conduct.²⁶ Thus, the paper will analyse what laws and institutions ought to be in place for the successful implementation of UNCAC standards and a successful battle against corruption.

1.6 Research Methodology

This is a desktop study. This paper will use a qualitative research methodology in order to establish the root cause of political corruption, its impact on the socio-economic welfare of the people of Malawi, and find out the possible solutions to curbing the mischief. This involves reading and analysis of primary sources such as international conventions, memoranda of understanding, official reports, national laws and case law. The secondary resources will range from books and articles through journal articles and conference papers to electronic resources.

1.7 Chapter Outlines

This paper comprises five chapters. The remaining chapters are as follows;

26 Fostering institutions to contain corruption, available at <http://www.siteresources.worldbank.org/INTLAWJUSTINT/Res/PREMnote24.pdf> (accessed 20 March 2013).

Chapter 2

This chapter will deal with the concept of political corruption. Then it will discuss the international anti-corruption legal framework and Malawi's national anti-corruption legal and institutional framework.

Chapter 3

This chapter will discuss the causes and effects of political corruption in Malawi.

Chapter 4

This chapter will explore the key obstacles to combating political corruption. It will also discuss the possible roots of the obstacles. The chapter will further discuss what needs to be done for a successful fight against corruption.



Chapter 5

This chapter will comprise a general conclusion of the paper and recommendations. The recommendations will be made in the light of the recommendations in the United Nations Convention against Corruption.

CHAPTER 2

THE LEGAL AND INSTITUTIONAL ANTI-CORRUPTION FRAMEWORK

2.1 Introduction

This chapter gives an overview of what political corruption is and how it is being combated. First, it highlights what corruption is all about. It then defines and discusses the concept of political corruption. Thereafter, an operational definition of political corruption used in this paper is provided, followed by a discussion of the anti-corruption legal framework at both international and national levels.

2.2 Definition of corruption in general

Corruption has been defined differently in literature and in various legal instruments. According to Gardiner, the diversity in definitions is due to the way corruption is defined in official laws of nations, by public opinion or the way it is understood to affect the public.²⁷ This has resulted in some international instruments, such as the United Nations Convention against Corruption (UNCAC), avoiding defining corruption altogether and adopting the descriptive approach to definition instead.²⁸ However, the Southern African Development Community Protocol against Corruption (SADC Protocol)²⁹ has a comprehensive definition of corruption.

27 Gardiner (2001) 25.

28 Chapter III of UNCAC.

29 SADC Protocol, entered into force on 6 July 2005.

Besides describing specific corrupt practices in its Article 3, the SADC Protocol defines corruption as:

“any act referred to in Article 3 and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents, or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.”³⁰

This definition covers corruption both in the public and private sectors. However, the concepts of corruption in most literature are associated with corrupt practices involving public officials.

For example, the World Bank defines corruption as the “abuse of public office for private gain”,³¹ thus leaving out corrupt practices in the private sector.

According to Shah,³² there are four types of corruption. First is petty or bureaucratic corruption representing isolated practices by low-ranking individual public officials abusing their offices by demanding bribes or kickbacks or awarding favours in return for personal benefit.³³ Second is state or regulatory capture and influence peddling. Here public officials collude with private actors or politicians for mutual private gain. The private sector captures the government for its own purposes.³⁴ Third is patronage, paternalism and clientelism, where public officials abuse their offices by ensuring that colleagues, relations or friends of the same geographic area or

30 Article 1 of the SADC Protocol.

31 The World Bank (1997) 8.

32 Shah (2007) 234.

33 Shah (2007) 234.

34 Shah (2007) 234.

ethnic or cultural origin receive preferential treatment in their dealings with the public sector.³⁵

Fourth is grand corruption, understood as embezzlement or abuse of vast amounts of public resources by state officials, usually comprising the political or administrative elite.³⁶

This paper reduces the types of corruption illustrated by Shah to two: (a) petty or bureaucratic corruption and (b) political corruption composed of patronage, paternalism and clientelism, and state capture. Political corruption, the subject of this paper, is discussed below.

2.3 Definition and concept of political corruption

Political corruption is based on two concepts: the public office and the public interest.³⁷ The working definition of political corruption for this paper is: the subversion of national laws and institutions by political leaders with the aim of increasing wealth and power.³⁸

What is clear from the working definition above is that political corruption involves the subversion of the public interest by private interests.³⁹ While “public interest” entails the existence of a society, “public official” suggests the existence of a government. Public official is defined as:

“any person in the employment of the State, its agencies, local authorities, or parastatals and includes any person holding office in the legislative, executive or judicial

35 Shah (2007) 235.

36 Shah (2007) 234.

37 Gardiner (2001) 25.

38 Hodess (2004) 12.

39 Philp (2001) 45.

branch of a State or exercising a public function or duty in any of its agencies or enterprises.”⁴⁰

The establishment of a government is an act of society to further the common good.⁴¹ Thus, public officials exist to serve the community. They are trustees of the common good, and rules and regulations are promulgated to monitor how government serves society. This is a principle entrenched in the Constitution of the Republic of Malawi. In this respect, the Constitution stipulates that “all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the Constitution solely to serve and protect their interests”.⁴²

However, due to inducement the public official abuses his or her office in return for private gain. The inducement may come in different forms. Firstly, the public official may induce himself or herself, for example, by abusing discretionary powers.⁴³ Secondly, external forces such as the private sector or political party leadership, or forces from within the structures of the public office may induce the official to indulge in corrupt practices. Thus, the public official is enticed to subvert the law and legal institutions to serve private interests at the expense of public interests.

According to Mbaku, among the motives for political corruption is building and strengthening political interests, such as promoting a political party, as well as assisting politicians to “capture

40 Article 1 of the SADC Protocol. See also Article 2 of UNCAC and Article 1 of the AU Convention.

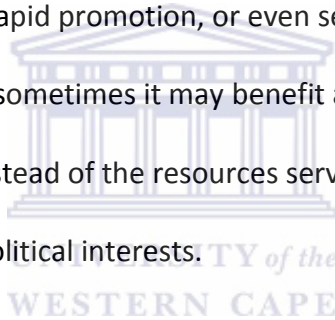
41 Van Klaveren (1989) 26.

42 Section 12(1)(a) of the Constitution.

43 Mbaku (2007) 74.

and retain leadership”.⁴⁴ As will be discussed in chapter three, this may be achieved by rewarding political supporters, friends and family members through subversion of legal procedures in recruitment and procurement of goods and services. Thus, in the absence of self-inducement, the public official is induced to take actions which favour whomever provides a reward, thereby compromising the public interest.⁴⁵

Political corruption may be prevalent in an environment where there is a monopoly of power and discretion in decision-making in the absence of accountability.⁴⁶ While the behaviour includes bribery, nepotism and misappropriation of public resources, the gain may take many forms, such as monetary reward, rapid promotion, or even security of a job. The gain may be personal to the public official, but sometimes it may benefit a family member or other entity such as a political party.⁴⁷ Thus, instead of the resources serving the public interest, they are diverted in pursuance of private political interests.



2.4 Legal framework

This section discusses the anti-corruption legal framework at both international and national levels. The discussion is limited to issues relevant to political corruption. The relevant instruments discussed are UNCAC, the AU Convention,⁴⁸ and the SADC Protocol. At the

44 Mbaku (2007) 12.

45 Friedrich (2001) 15.

46 Babu (2006) 5.

47 Nye (2001) 284, defines nepotism as “bestowal of patronage by reason of ascriptive relationship rather than merit”; Bayley (1989) 936, defines a bribe as a “price, reward, gift or favour bestowed or promised with a view to pervert the judgment or corrupt the conduct especially of a person in a position of trust, such as a public official”.

48 The AU Convention entered into force on 11 July 2003.

international level, regulation of political corruption takes centre stage. Malawi is a State Party to all the three instruments by virtue of signing them, and is bound to them by ratification.

2.4.1 International legal framework: UNCAC, the AU Convention and the SADC Protocol

The transnational nature of corruption was the cause of the international community developing legal instruments, such as UNCAC, the AU Convention and the SADC Protocol, for combating corruption.⁴⁹ UNCAC is rated as the first comprehensive and most important anti-corruption legal instrument with a global scope of application.⁵⁰ Unlike UNCAC, the AU Convention is of continental force, whereas the SADC Protocol applies to the Member States of the SADC region.



2.4.2 Purposes of the instruments

The underlying theme of the instruments is the promotion and strengthening of measures seeking to prevent and combat corruption more efficiently and effectively, as well as safeguarding the rule of law and good governance.⁵¹ The anti-corruption consensus is that the effective fight against political corruption requires a comprehensive set of standard measures and rules that all countries ought to implement in order to strengthen their anti-corruption regulatory frameworks.⁵² The measures include (a) development of anti-corruption mechanisms at the national level, (b) promotion of co-operation in the fight against corruption

49 Shehu (2005) 221.

50 U4 Anti-Corruption Resource (2011) 1.

51 Articles 1 and 5 of UNCAC, Article 3(1) of the AU Convention, Preamble to the SADC Protocol.

52 Shehu (2005) 224.

by States Parties, and (c) harmonisation, to the extent possible, of anti-corruption national legislation and policies of the States Parties.⁵³ Below are some of the key measures relevant to combating political corruption.

2.4.2.1 Criminalisation and law enforcement

The instruments require States Parties to establish criminal offences to cover the acts of political corruption. They recommend the criminalisation of corrupt practices such as bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment, concealment, laundering of the proceeds of corruption and obstruction of justice.⁵⁴ These corrupt practices are at the heart of political corruption, and their criminalisation would make public officials perceive a substantial risk that if they engage in corrupt conduct they will be prosecuted and imprisoned, lose their offices, and forfeit wealth acquired illegally.⁵⁵

Malawi, as will be discussed below, criminalises all the offences listed above. Criminalisation of these offences is targeted at public officials who are susceptible to political corruption.

2.4.2.2 Establishment of permanent anti-corruption institutions

The instruments stipulate the need for States Parties to establish anti-corruption institutions responsible for preventing, detecting, punishing and eradicating corruption.⁵⁶ Such specialised

53 Article 1 of UNCAC, Article 2 of the AU Convention, Article 2 of the SADC Protocol.

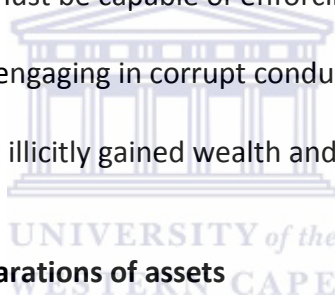
54 Chapter III of UNCAC, Articles 5, 6, and 8 of the AU Convention, Articles 1 and 3 of the SADC Protocol.

55 “Fostering institutions to contain corruption” available at <http://www.siteresources.worldbank.org/INTLAWJUSTINT/Resources/PREMnote24.pdf> (accessed 20 March 2013).

56 Article 6(1) of UNCAC, Article 5(3) of the AU Convention, Article 4(1)(g) of the SADC Protocol.

institutions with well trained staff are justified because of the serious nature of corruption and its harmful effects on the social, political and economic well-being of societies. Besides establishing the specialised institutions, the instruments further require States Parties to accord such institutions necessary operational independence from political meddling.⁵⁷ The institutions must be available readily to monitor the conduct of public officials, and detect and prosecute a corrupt public official irrespective of his or her status in society.⁵⁸

It is the availability of independent anti-corruption institutions that ensures that the cost-benefit ratio for a public official of obeying the law is higher than that of behaving corruptly.⁵⁹ Thus, the institutions must be capable of enforcing the rule of law, thereby discouraging a public official from engaging in corrupt conduct unless the official is prepared to lose his or her employment, forfeit illicitly gained wealth and even go to prison.⁶⁰



2.4.2.3 Codes of conduct and declarations of assets

The instruments recommend the development of codes of conduct to regulate the ethical behaviour of public officials in the course of performing their duties.⁶¹ One of the standard clauses in such codes of conduct requires public officials to declare any gifts or any advantage they receive in the course of performing their duties. Such provisions help in keeping officials

57 Article 6 of UNCAC, Article 5(3) of the AU Convention, Article 4(1)(g) of the SADC Protocol.

58 Hope (2000) 36.

59 "Fostering institutions to contain corruption".

60 "Fostering institutions to contain corruption".

61 Article 8 of UNCAC, Article 7(2) of the AU Convention, Article 4(1)(a) of the SADC Protocol.

on guard against corruption.⁶² The AU Convention further prescribes the creation of internal committees to monitor implementation of the codes of conduct.⁶³

Besides the codes of conduct, UNCAC and the AU Convention recommend that States Parties enact legislation prescribing declarations of assets for public officials and their close relatives.⁶⁴

An effective law in this regard enhances transparency of the finances of officials, and improves accountability. It further deters illicit enrichment.⁶⁵

This paper will argue that legislation prescribing codes of conduct and declarations of assets must not apply only to lower ranking public officials, but extend to politicians as well, including heads of state, as they are the most prone to corrupt practices.

2.4.2.4 Recruitment and procurement of goods and services

The instruments further recognise the process of procurement of goods and services, as well as recruitment of public officials, as being sites of corruption. Corruption in this instance includes awarding government procurement contracts and recruiting and promoting public officials on a patronage basis.⁶⁶ In pursuit of the ideal of according every person equal opportunity to economic activity, the instruments require that public procurement and recruitment processes be transparent, equitable and efficient.⁶⁷ While recruitment includes promotion to lucrative grand office, corruption in procurement would include awards of high value contracts, for

62 Nsereko & Kebonang (2005) 92.

63 Article 8(5) of UNCAC, Article 7(2) of the AU Convention.

64 Article 7(1) of AU Convention.

65 Diminio & Kpundeh (1999) 9.

66 Transparency International "Country Study Report: Malawi" (2004) 24.

67 Article 7 of UNCAC, Article 3 of the AU Convention, Article 4(1)(b) of the SADC Protocol.

example, contracts for the supply of educational materials or medical drugs and contracts in the construction industry. Thus, there is a need for legislation to prescribe transparency, competition and objectivity in decision-making in relation to both recruiting officials and awarding procurement contracts.⁶⁸

2.4.2.5 Access to information

Excessive secrecy in governmental operations is another cause of political corruption.⁶⁹ Secrecy enables public officials to commit corruption undetected.⁷⁰ Thus, the instruments require States Parties to have laws in place that will promote easy access to information.⁷¹ Easy access would enable the public to monitor government operations, and thereby help to eliminate opportunities for corruption.⁷² The rationale of the right to information is to empower any person affected by any decision of government to ask to be furnished with reasons for the decision, and access to documentation that formed the basis of the decision. This would promote transparency and accountability, and thereby curb arbitrary and corrupt practices.⁷³

Thus, an active and effective role for civil society in the fight against corruption can be achieved through measures ensuring that both civil society and the public have effective access to information.⁷⁴

68 Article 9 of UNCAC, Article 7 of the AU Convention, Article 4(1)(b) of the SADC Protocol.

69 Article 5 of UNCAC, Article 3(3) of AU Convention, Article 4(1)(d) of the SADC Protocol.

70 Nsereko & Kebonang (2005) 96.

71 Article 13 of UNCAC, Article 9 of the AU Convention, Article 4(1)(d) of the SADC Protocol.

72 Nsereko & Kebonang (2005) 97.

73 Nsereko & Kebonang (2005) 97.

74 Articles 5 and 13(1)(b) of UNCAC.

2.4.2.6 Regulation of political party financing

In developing countries, particularly in Africa, many democratic governments fail to distinguish between state and ruling party governance.⁷⁵ Ruling parties, therefore, end up surviving on national resources, albeit illegally and to the detriment of the public interest.⁷⁶ To curb this malpractice, UNCAC and the AU Convention recommend that States Parties enact legislation for the regulation of political party funding.⁷⁷ While Article 7(3) of UNCAC is persuasive, Article 10 of the AU Convention is mandatory.

This paper, as will be discussed below, observes that Malawi is in breach of Article 10 of the AU Convention. This breach facilitates abuse of office by high-level leadership and its ruling party.

2.4.2.7 International co-operation and asset recovery

Fighting corruption hardly can be successful if corrupt public officials are permitted to consume proceeds of their criminal conduct with impunity. Hence, the need for anti-corruption measures promoting international co-operation among States Parties to enable smooth and swift recovery and repatriation of proceeds of corruption to their country of origin.⁷⁸ A public official will have no motivation to acquire property corruptly if there will be no safe haven for laundering the property. Thus, for example, Malawi should be able to secure wealth allegedly illicitly acquired and secreted in Australia, Singapore, and the Isle of Man by late former President Bingu wa Mutharika, to avoid dissipation while investigations and asset recovery

75 Hope & Chikulo (2000) 2.

76 Hope & Chikulo (2000) 2.

77 Article 7 of UNCAC, Article 10 of the AU Convention.

78 Chapter IV of UNCAC, Articles 15,16 and 19 of the AU Convention, and Articles 8, 9, 10 of the SADC Protocol.

proceedings are under way.⁷⁹ International co-operation extends to extradition requests for any fugitive corrupt public official.

2.4.2.8 Technical assistance and information exchange

Effective implementation of anti-corruption measures in developing societies adversely affected by political corruption is not easy. Implementation of the measures thus requires technical assistance ranging from necessary equipment to training, not only of law enforcers such as the investigators, prosecutors and the judiciary, but also of civil society and society generally.⁸⁰

Technical assistance, if applied to an area in critical need, is an effective tool for combating political corruption.



In summary, the instruments are aimed at complementing, co-ordinating or harmonising actions of States Parties in combating corruption in their jurisdictions. They provide benchmarks by which the effectiveness of state actions can be evaluated.⁸¹ The leader in the fight against political corruption remains the State Party itself, which is established to serve the public interest.

2.4.3 Malawi's National Anti-Corruption Legal Framework

Enactment of national anti-corruption legislation has its foundation in the Constitution of the Republic of Malawi. This section discusses the relevant constitutional provisions that ought to

79 Nyirongo 'Bingu was worth more than K61 bn' *The Nation*, 2 July 2013.

80 Shehu (2005) 224. See also Chapter VI of UNCAC and Article 18 of the AU Convention.

81 Nsereko & Kebonang (2005) 89.

be implemented for an efficacious fight against political corruption. Thereafter comes a discussion of the Corrupt Practices Act and the establishment of the Anti-Corruption Bureau.

2.4.3.1 The Constitution of the Republic of Malawi

The Constitution of the Republic of Malawi came into force on 17 May 1995, marking the birth of democracy in Malawi after three decades of one-party rule.⁸² Section 12 outlines the founding principles of the Constitution. These principles provide, *inter alia*, that:

- “(a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
- (b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
- (c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.”⁸³

It has been noted that section 12 embodies the public trust theory, the social trust theory, and the principle of participatory democracy.⁸⁴ The public trust and social trust theories entail that those who govern do so not for personal interest but on trust, for the interest, well-being and preferences of the governed. Participatory democracy entails individual participation by citizens in political decisions and policies that affect their lives, especially directly rather than through

82 Madise D “Challenges in the Fight Against Corruption in Malawi: Some Thoughts” (2007) available at <http://www.uneca.org/dpmd/events/corruption/Malawi.pdf>. (accessed 17 June 2013).

83 Section 12(1) of the Constitution.

84 Kuwali (2012) 143.

elected representatives.⁸⁵ Thus, the government is not an end in itself but only a means to fulfil the public interest.⁸⁶

The Constitution proceeds to prescribe principles of national policy in section 13. Here, the state is mandated to promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the goals enumerated in section 13. Among the goals are (a) economic growth and (b) public trust and good governance. Economic growth is to be achieved through the nurturing of a market economy and long-term investment in health, education, economic and social development.⁸⁷

Public trust and good governance are to be achieved by measures which will guarantee accountability, transparency, personal integrity and financial probity.⁸⁸ All this is aimed at curbing conflict between duty and self-interest for a public official.

To achieve good governance, the Constitution separates the powers of the executive, legislature, and the judiciary.⁸⁹ In principle, these arms of government provide checks and balances.⁹⁰ To guard against illicit enrichment, the Constitution requires the Presidency, members of cabinet, members of Parliament, and other senior public officials to disclose their assets, liabilities and business interests within three months of their election or appointment to

85 Marquette (2001) 396.

86 Van Klaveren (1989) 26.

87 Section 13(n) of the Constitution.

88 Section 13(o) of the Constitution.

89 Sections 7, 8, 9 of the Constitution.

90 Nkhata MJ "Origins and Historical Development of the Constitution" 13 available at <http://www.web.up.za/sitefiles/file/47/15338/Malawi.pdf>.

office.⁹¹ In order to guard effectively against corrupt practices, section 37 accords every person a right of access to all information held by the state insofar as such information is required for the exercise of the person's rights. Access to information is important in the fight against corruption, as already noted.

Malawi's parliamentary system is modelled after that of the United Kingdom, including its parliamentary committees.⁹² The committees are designed to oversee Parliament, providing checks and balances, and thereby complementing the formal work of the Anti-Corruption Bureau.⁹³ Among the committees are the Public Accounts Committee and the Public Appointments Committee, whose respective primary duties are ensuring the government's accountability in financial matters and recruitment of senior public officials. The Public Accounts Committee, for example, is mandated to hold public hearings and quiz accounting officers or departmental heads on expenditures of their respective departments.



It must be noted, however, that almost two decades after the Constitution has come into force, government has not promulgated legislation to enforce its fundamental principles. There is no law to regulate the declaration and monitoring of assets of public officials, and there is no legislation to enforce citizens' rights of access to information. There is not even legislation to regulate financing of political parties. As is discussed in the chapters following, this lacuna in legislation fuels political corruption.

91 Sections 88A(1) and 213 of the Constitution.

92 Patel *et al* (2007) 5.

93 Patel *et al* (2007) 33.

Among the laws enacted in pursuance of transparency, accountability and financial probity are the Corrupt Practices Act, the Public Procurement Act and the Public Finance Management Act.

2.4.3.2 The Corrupt Practices Act

The Corrupt Practices Act (CPA)⁹⁴ came into force in 1995. It established the Anti-Corruption Bureau which became operational by 9 February 1998.⁹⁵ The CPA does not define corruption in general, nor does it define political corruption. However, section 1 does define “corrupt practice” to mean:

- “(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 other person;
- (b) influence peddling;
- (c) the extortion of any advantage.”⁹⁶

This definition is very narrow as compared to the definition of corruption in the SADC Protocol.⁹⁷ However, Part IV of the CPA comprises detailed corruption offences. Section 24 criminalises soliciting, offering and acceptance of bribes. Sections 25, 25A and 25B criminalise abuse or misuse of office. Sections 25C and 25D regulate the conduct of public procurement officers. Fraudulent disclosure of information related to tenders, and failure by the officer to declare interest and recuse himself or herself from handling any procurement processes affected by such interest, are criminalised. Like article 20 of UNCAC, section 32 of the CPA criminalises possession of unexplained property. Further, section 36A empowers a court of law

94 Chapter 7:04 of the Laws of Malawi.

95 Madise (2007) note 83.

96 Section 1 of Corrupt Practices Act defines “public officer” to include the President, a Vice-President, a Minister, and a Member of Parliament.

97 Article 1 of the SADC Protocol.

to authorise the Anti-Corruption Bureau to trace property reasonably linked to corruption.

Most importantly, besides other sanctions prescribed by the CPA,⁹⁸ forfeiture of any property or wealth connected with corruption is mandatory.⁹⁹ Finally, section 51A provides for the protection of whistle-blowers.

2.4.3.3 The Anti-Corruption Bureau: institutional framework

The Anti-Corruption Bureau (ACB) comprises the Director, Deputy Director and other employees.¹⁰⁰ The President appoints both the Director and Deputy Director of the ACB. Such appointments, however, are subject to confirmation by the Public Appointments Committee of Parliament.¹⁰¹ The appointments are on terms and conditions deemed fit by the President. There are no prescribed qualifications for the positions of Director and Deputy Director, as the law merely requires the officials to be of “high integrity and qualifications and training” necessary for the posts.¹⁰²



The President has powers to suspend from office or terminate the services of the Director or Deputy Director for inability to discharge duties or for misbehaviour. Of course, the decision to terminate services is subject to confirmation by the Public Appointments Committee.¹⁰³ While

98 Section 40 of the CPA.

99 Section 37 of the CPA.

100 Section 4(1) of the CPA.

101 Sections 5 and 7 of the CPA.

102 Section 6(1) of the CPA.

103 Section 6(2) of the CPA.

the other officials of the ACB are appointed on terms and conditions approved by the President, their appointments do not require the confirmation of the Public Appointments Committee.¹⁰⁴

2.4.3.3.1 Functions of the ACB

The ACB's objectives include protection of Malawi from the dangers that can be caused by corruption and any related crimes, such as money laundering and tax evasion. In order to achieve this task, the CPA prescribes a three-pronged approach for the ACB to combat corruption, namely, (a) corruption prevention through public education, (b) investigation, and (c) prosecution.¹⁰⁵

2.4.3.3.2 Independence and accountability

As noted above, powers to appoint and to dismiss the Director and Deputy Director of the ACB vest in the President. Under section 4(4) of the CPA, it is mandatory for the Director to report to the President and to the Minister of Justice on the general conduct of the business of the ACB, although the CPA prescribes non-interference in the operations of the ACB. Such conduct of business includes findings of investigations.¹⁰⁶

Further, the independence of the ACB is limited by the fact that section 42 of the CPA requires the Director to seek the consent of the Director of Public Prosecutions (DPP) to prosecute any corruption-related cases. Although the law requires the DPP to furnish reasons to the Director of the ACB for denial of consent,¹⁰⁷ this requirement limits the powers of the ACB, and also

104 Section 9 of the CPA.

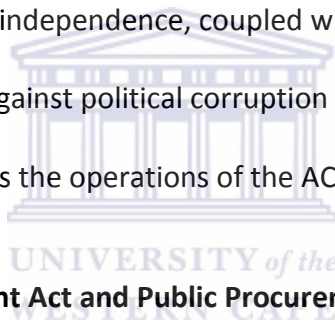
105 Section 10 of the CPA.

106 Section 10(4) of the CPA.

107 Section 42 of the CPA.

undermines the rule of law.¹⁰⁸ In 1999, for example, the ACB could not prosecute the former Minister of Local Government involved in a US\$ 32 million national identity cards scam because the DPP refused consent.¹⁰⁹ Again, the DPP denied the ACB consent to prosecute the former Attorney General alleged to have embezzled US\$ 7.6 million.¹¹⁰ Recently, the ACB failed to prosecute Floyd Mondwiwa, Deputy Manager of the Malawi Housing Corporation, alleged to have benefited corruptly from the US\$ 690 789 loss arising from the sale of houses to politicians, due to refusal of consent by the DPP. The Blantyre Magistrates' Court thus discharged the accused from criminal prosecution for want of prosecution by the ACB.¹¹¹

This paper argues that this limited independence, coupled with a lack of other relevant legislation, has affected the fight against political corruption in Malawi seriously. As discussed in chapters 3 and 4, politics influences the operations of the ACB.



2.4.3.4 Public Finance Management Act and Public Procurement Act

The Public Finance Management Act¹¹² comprehensively prescribes procedures for the disbursement of public funds, accountability for the funds, as well as disciplinary measures for offences proscribed under the Act. Besides the checks of expenditures through Parliament, the Act further provides for checks through auditing by the Auditor General.¹¹³

108 Hussein (2005) 96.

109 Hussein (2005) 96.

110 Hussein (2005) 96

111 'Court discharge Mondwiwa in Malawi housing scam' *Nyasa Times*, February 2013.

112 Chapter 37:02 of the Laws of Malawi.

113 Section 83(2) of the Public Finance Management Act.

The Public Procurement Act¹¹⁴ regulates comprehensively public procurement of goods and services.¹¹⁵ The Act establishes a specialised entity, the Office of the Director of Public Procurement (ODPP), with supervisory powers over public procurement.¹¹⁶

However, despite the existence of these two statutes, there is a lack of political will to enforce them effectively, as evidenced by rampant political corruption perpetrated through public procurement and weak financial controls.¹¹⁷

2.5 Summary

Given the evils of corruption, there are initiatives at international, continental and regional, as well as national levels, to prevent and fight corruption. UNCAC is the most powerful international agreement representing the international community. It has been observed that UNCAC, the AU Convention and the SADC Protocol place considerable focus on combating public corruption. The theme running across these international agreements is that prevention is the best tool for combating corruption, and corruption preventive measures must encompass those aimed at promoting good governance, transparency and accountability. Such measures include safeguarding the right of access to information, declarations of wealth by public officials, enactment and strict observance of codes of conduct, regulation of political party

114 Act No. 8 of 2003.

115 Preamble to the Public Procurement Act.

116 Sections 4, 5, 6 of the Public Procurement Act.

117 Report of the Auditor General on the Accounts of the Government of the Republic of Malawi for the Year ended 30th June, 2011.

funding, as well as the establishment of anti-corruption monitoring and law enforcement bodies.

While the Constitution prescribes the fundamental principles of good governance which include transparency and accountability, such principles have not been implemented at all. For example, since the Constitution came into force, almost two decades ago, no laws have been enacted for the enforcement of the right of access to information, the declarations of wealth by public officials, and the regulation of political party funding.

The CPA mandates the ACB to lead the fight against corruption. The CPA criminalises most of the core corruption offences. Thus, Malawi has the necessary legal framework to combat corruption. Although the CPA provides for the operational independence of the ACB, such independence is obstructed by both political interference as well as the legal requirement that the ACB be accountable to the President and Minister of Justice. Further, the fact that its prosecutorial powers are conditional upon the consent of the DPP limits the independence of the ACB. It has been observed that political corruption is on the increase despite the enactment of comprehensive legislation and the establishment of institutions responsible for public finances and public procurement. These developments smack of a lack of political will to combat political corruption.

CHAPTER 3

CAUSES AND EFFECTS OF POLITICAL CORRUPTION IN MALAWI

3.1 Introduction

This chapter discusses how political corruption affects Malawian society. It focuses on the causes of political corruption and its impact on the social, economic and political development of Malawi.

3.2 Causes of political corruption in Malawi

As defined earlier, political corruption entails abuse of power, either for personal gain or for the benefit of a group, to which the corrupt person owes allegiance.¹¹⁸ Often it is motivated by greed or the desire to retain or increase one's power.¹¹⁹ According to Gbadamosi, political corruption is not a problem *sui generis*, but merely a symptom of a major problem embedded in the "collusive system in which politicians mediate the often contradictory claims of capitalism and democracy".¹²⁰ Thus, corruption is not a criminal problem but a social problem comprising economic, political, and cultural forces.¹²¹ While it is manifested in various shapes and forms, its gravity depends on the reasons for the corruption and type of office involved.¹²²

Below are some of the major causes of political corruption in Malawi.

118 Staphenurst & Sedigh (1999) 1.

119 Staphenurst & Sedigh (1999) 5.

120 Gbadamosi (2006) 4.

121 Gbadamosi (2006) 4.

122 Bayley (1989) 941.

3.2.1 Poor governance

Much as there are social, economic and political causes of political corruption, it is argued that all those causes are collectively a symptom of failed governance.¹²³ Thus, unlike petty or bureaucratic corruption that may prevail over good governance, political corruption thrives on poor governance.¹²⁴ Put differently, all facets of political corruption, such as greed, nepotism, and state capture are symptoms of weak governance.

Johnston & Doig¹²⁵ define governance as “the use of political authority and the exercise of control over society and the management of its resources for social and economic development”.¹²⁶ Further, they argue that governance comprises:

“ the nature of functioning of a state’s institutional and structural arrangements, decision-making processes, policy formulation, implementation capacity, information flows, effectiveness of leadership, and the nature of the relationship between the rules and the ruled.”¹²⁷

Thus, governance is the way in which public power and authority are formed and used to control and manage society’s resources.¹²⁸ Good governance, therefore, is said to exist where: (a) the public is consulted on government actions that affect them;¹²⁹ (b) there is transparency in the sense that relevant information is accessible to the citizenry at low cost; (c) there is predictability of uniform and effective application of clearly stipulated policies, laws and

123 Shah (2007) 235.

124 Governance and Corruption Baseline Survey: Malawi Final Report (2006) 11.

125 Johnston & Doig (1999) 15.

126 Johnston & Droig (1999) 15.

127 Johnston & Droig (1999) 15.

128 Governance and Corruption Baseline Survey: Malawi Final Report (2006) 11.

129 Governance and Corruption Baseline Survey: Malawi Final Report (2006) 11.

regulations; and (d) public officials can be called to account for their actions.¹³⁰ Conversely, poor governance reduces the likelihood of exposure and censure for wrongdoing, and thus breeds political corruption.¹³¹

Malawi is plagued by poor governance at almost all levels of administration, as is argued by Norwegian Ambassador to Malawi, Asbjorn Eidhammer, who said “corruption (in Malawi) is more widespread now than 12 years ago. Now you can risk meeting corrupt practices at any level (of government).”¹³² A case in point is weak financial controls¹³³ perpetrated by high-level public officials in virtually unaccountable centres of political power.¹³⁴ For instance, the Report of the Auditor General on the Accounts of the Government of the Republic of Malawi for the Year ended 30 June, 2011 (Auditor General’s Report)¹³⁵ exposes serious weaknesses in financial controls in almost all ministries and government institutions.¹³⁶ Among the instances cited by the Report is the Ministry of Agriculture’s failure to account for expenditure of approximately US\$ 5,4 million.¹³⁷ The main share of this amount represents: (a) US\$ 233 589 lost through the disappearance of 397 metric tons of fertilizer for a subsidy programme on the way to points of

130 Hope (2000) 19.

131 Kaufmann & Diminio (2006) 17.

132 Kumwembe W ‘ACB’s Independence Questioned’ *ZODIAK ONLINE*, 4 July 2013.

133 Transparency International ‘Country Study Report: Malawi’ (2004) 23.

134 Hussein (2005) 92.

135 National Audit Office, available at <http://www.nao.mw> (accessed 1 August 2013).

136 Auditor General’s Report (2011) 14-40.

137 Auditor General’s Report (2011) 14-19.

delivery;¹³⁸ (b) US\$ 1,4 million lost through unaccounted for farm inputs in the northern region of Malawi;¹³⁹ and (c) unaccounted for payment vouchers amounting to US\$ 289 474.¹⁴⁰

Strong political influence on accounting personnel compromises the requisite tight controls on public finances.¹⁴¹ Further, as discussed in chapter two, government administration processes lack transparency. Worse still, although section 37 of the Constitution guarantees the right of access to information, its potential effectiveness is stifled severely by lack of “freedom of information” legislation to prescribe detailed rules and an institutional framework pertaining to the exercise of the right.¹⁴²

Similarly, lack of “declaration of assets” legislation limits the citizens’ capacity to monitor illicit enrichment by public officials.¹⁴³ Thereby, citizens are prevented from enforcing public accountability, which is central to good governance.¹⁴⁴ Thus, poor governance is the main cause of political corruption, and the other causes of corruption thrive on poor governance.

3.2.2 Abuse of power

Political corruption is widespread in Malawi because high level public officials enjoy a monopoly of power and, as discussed earlier, laws and processes barely are transparent.¹⁴⁵ Sometimes high public officials can dictate to procurement officers who should be granted procurement

138 Auditor General’s Report (2011) 15.

139 Auditor General’s Report (2011) 15.

140 Maganga S ‘Mejn Slams Malawi govt over funds abuse’ *bnlimes*, 20 August 2013.

141 Transparency International (2004) 23.

142 Chirwa *et al* ‘Democracy Report for Malawi’ available at <http://www.idea.int/publications/sod/upload.Malawi.pdf> (accessed 21 August 2013).

143 Patel *et al* (2007) 19.

144 Hope (2000) 19.

145 Ampratwun (2008) 78.

contracts. Such interventions reasonably would be viewed by the public as motivated by the pursuance of private gain.¹⁴⁶ Abuse of powers is exemplified in President Joyce Banda's Directive to the Office of the Director of Public Procurement to cancel awards of contracts for the procurement of drugs for public hospitals; and the dismissal of public officials deemed to be loyal to the former Democratic Progressive Party regime,¹⁴⁷ and their replacement with those deemed loyal to her and her ruling People's Party.

3.2.3 Politics: A lucrative enterprise

Malawi is among the world's poorest countries, ranking 170th of 187 countries on the Human Development Index.¹⁴⁸ About 74 per cent of the population still lives below the income poverty line of US\$ 1,5 per day.¹⁴⁹ The economy is based largely on subsistence farming.¹⁵⁰ Hence, working in the public sector is seen as a main source of stable income, and access to political power or public office is the quickest means to creating opportunities.¹⁵¹ Thus, there is a "perception that politics offers the best domestic opportunity for financial gain, and ambitious citizens literally invest in politics".¹⁵² When such politicians get into power they immediately

146 'Trust to cancel 4 drug Contracts' *The Daily Times*, 8 May 2013.

147 Bingu wa Mutharika preceded Joyce Banda as president. His political party was the Democratic Progressive Party.

148 UNDP 'Human Development Report: Malawi (2013).

149 Rural Poverty Portal "Rural poverty in Malawi" available at <http://www.hdrstats.undp.org/images/explanations/MW.pdf> (accessed on 17 August 2013).

150 Hussein (2005) 14.

151 Patel *et al* (2007) 29.

152 Hall-Matthews (2007) 79. Sidik Mia estimated that he spent £85,000 to win the Chikwawa Mkombezi constituency during the 2004 election campaign.

indulge in corrupt practices to accumulate wealth during their time in power.¹⁵³ There is the phenomenon of “it is our turn to cut a share from the national cake”.¹⁵⁴

3.2.4 Greed

This paper further argues that political corruption has more to do with greed than the reasons of poverty cited earlier. This is because high level public officials are generally remunerated well, with lots of privileges attached to their offices.¹⁵⁵ Hence, their corrupt behaviour is not attributable to low pay or necessity to meet the living expenses of their families. Instead, greed and lack of ethical values are major motivating factors.¹⁵⁶ Many public officials, thus, regard public service as an opportunity for enriching themselves, their immediate and extended families, their friends, as well as a ruling political party.¹⁵⁷ For example, former President Bakili Muluzi is answering charges of embezzlement for allegedly diverting into his personal account £7 million of donor funds meant for the government.¹⁵⁸ Similarly, late former President Bingu wa Mutharika is alleged to have enriched himself illicitly while in power in that he: (a) built an opulent Ndata House in his home district; (b) acquired three houses and had a bank account in Singapore; and (c) acquired two presidential flats and maintained a bank account in Australia.¹⁵⁹

153 Transparency International (2004) 23.

154 Hussein (2005) 94.

155 Hall-Matthews (2007) 79.

156 Myint (2000) 40.

157 Mbaku (2007) 64.

158 *Dr Bakili Muluzi v Director of Anti-Corruption Bureau*; Hall-Matthews (2007) 88.

159 Nyirongo E ‘Bingu was worth more than K61 bn’ *Nyasa Times*, 2 July 2013.

3.2.5 Patronage and political support

The corrupt political practice in Malawi is such that once a certain group of political leadership assumes power, it immediately starts rewarding those who supported it and its political party when they canvassed for power.¹⁶⁰ The forms of rewards include lucrative jobs, promotions and even the award of lucrative procurement contracts. Priority for this patronage is given to their home region, the “home boy syndrome”,¹⁶¹ and the rewards are not based on merit.¹⁶² This corrupt practice is always detrimental to persons well-deserving and capable of serving the government, but not connected to the political authority, and it always involves the subversion of laws. A recent example is President Joyce Banda’s firing from office of Malawi’s Reserve Bank Governor (Dr Perks Ligoya), the Chief Immigration Officer (Elvis Thodi), the Commissioner General for the Malawi Revenue Authority (Lloyd Muhara), the Director of the ACB (Alex Nampota), and replacing them with her favourite persons.¹⁶³



3.2.6 Manipulation of public procurement

Political corruption is also rampant in the procurement of goods and services for government.¹⁶⁴ This is common in respect of goods such as subsidised fertilizer¹⁶⁵ and medical drugs, and in the construction industry. Corruption in procurement may occur in three main ways. Firstly, there is procurement of services at much-inflated prices in exchange for kickbacks. For example, government is accused of building houses, under the “Umoyo Housing Project” in

160 Transparency International (2004) 24.

161 Transparency International (2004) 23. “Home boy syndrome” simply means nepotism.

162 Nye (2001) 284.

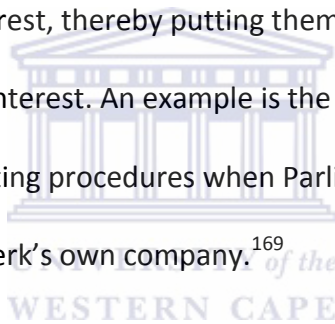
163 *Nyasa Times*, 10 September 2012.

164 Nsereko & Kebonang (2005) 93.

165 Nyondo P ‘Malawi losing 30% of budget money to Corruption’ *Nyasa Times*, 13 July 2013.

the Ministry of Health, at an exorbitant cost of about US\$ 65 000 per house.¹⁶⁶ Secondly, the services already procured at highly-inflated costs are sub-standard, thereby depriving the government of better quality goods and services at more favourable prices offered by fair competition.¹⁶⁷ Thirdly, contractors may be paid the contract price without rendering the services purportedly procured. An example is the Malawi Ministry of Education scam where a contract sum of US\$2,3 million meant for the construction of school blocks was paid to the contractor without even a single block being built.¹⁶⁸

It is also common for public officials to procure goods or services from their own companies or sources in which they have an interest, thereby putting themselves in a situation where their duty conflicts with their personal interest. An example is the Malawi Clerk of Parliament being dragged to court for allegedly flouting procedures when Parliament procured printing and photocopying services from the Clerk's own company.¹⁶⁹



3.2.7 Lack of regulation of political party financing

In Malawi, as in many African countries, democratic governments fail to distinguish between the state and the ruling party.¹⁷⁰ Thus, the ruling party monopolises national resources, thereby controlling all facets of economic activities. Besides party supporters unlawfully enjoying favours on a patronage basis, ruling parties amass unexplainable wealth using national resources. For example, the importation of more than 150 vehicles and thousands of t-shirts

166 *bnltimes*, 20 August 2013.

167 The Auditor General's Report (2011) 33.

168 Nsereko & Kebonang (2005) 94.

169 "Katopola in Court on April 22" *The Nation* available at <http://www.mwnation.com/Katopola-in-court-on-april-22> (accessed 18 July 2013).

170 Hope & Chikulo (2000) 2.

and caps for former President Bakili Muluzi's UDF party,¹⁷¹ and the recent acquisition of more than 50 vehicles and luxurious coaches by President Joyce Banda's Peoples' Party,¹⁷² smack of abuse of office for party political interests. President Banda claims the source of the property to be "undisclosed" well-wishers.¹⁷³ However, it is alleged that the vehicles were a bribe in exchange for lucrative government procurement contracts.¹⁷⁴

Besides the acquisition of property, ruling parties generally survive on national funds and other national resources for party political goals, whether during elections campaign periods or not. This corruption diverts resources from the common interests of citizens. This corrupt practice is worsened by lack of legislation regulating financing of political parties as well as lack of clear separation of state and political party functions.¹⁷⁵



3.3 Effects of political corruption in Malawi

Political corruption in Malawi victimises the poor, the marginalised and the disadvantaged more than any other sector of society.¹⁷⁶ Put differently, political corruption affects human rights such as the rights to health, food, education, equal opportunity to employment and economic activity, and also access to justice and other social services.¹⁷⁷ Further, it diverts scarce national resources, thereby frustrating the implementation of national policies.¹⁷⁸ In

171 Hall-Matthews (2007) 87.

172 "PP 'buys' over 50 pick ups" *The Daily Times*, 10 May 2013.

173 *The Daily Times*, 10 May 2013.

174 *The Daily Times*, 10 May 2013.

175 *The Daily Times*, 9 May 2013.

176 Hussein (2005) 92.

177 Gathii (2009) 128.

178 Gardiner (2001) 37.

other words, political corruption in Malawi disables the state from fulfilling its constitutional mandate in respect of the protection and promotion of the public interest.¹⁷⁹ From a human rights perspective, political corruption prevents the State from ensuring maximisation of available resources with a view to achieving social and economic rights.¹⁸⁰

“Corrupt management of public resources compromises the government’s ability to deliver an array of services, including health, education, and welfare services, which are essential for the realisation of economic, social and cultural rights. Also, the prevalence of corruption creates discrimination in access to public services in favour of those able to influence the authorities to act in their personal interest, including by offering bribes. The economically and politically disadvantaged suffer disproportionately from the consequences of corruption, because they are particularly dependent on public goods.”¹⁸¹

Political corruption, if unchecked, perpetuates poverty and deprives citizens of access to basic social amenities of life such as food, good health and education.

3.3.1 Poverty and economic inequality

Corruption motivates public officials to formulate policies in favour of the areas in which they know they will benefit corruptly. Thus, the bureaucratic machine will pay more attention to projects with corrupt monetary benefit than projects favouring the public interest.¹⁸²

The programmes that generate enormous illicit profits for the public officials are, *inter alia*, the Fertilizer Input Subsidy Project, which the Minister of Finance (Ken Lipenga) admitted to be

179 Gathii (2009) 151.

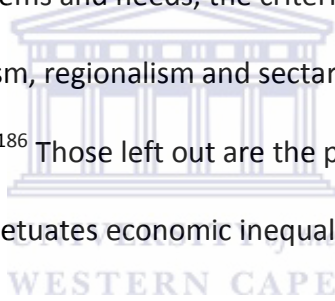
180 Office of the High Commissioner for Human Rights and the Government of Poland “UN Conference on Anti-Corruption Measures, Good governance and Human Rights, Background Note” (8-9 November 2006) para. 3.

181 Gathii (2009) 148.

182 Bayley (1989) 944.

infested with hefty corruption,¹⁸³ and the construction industry. The latter is exemplified by projects such as (a) the Umoyo Housing Project where the houses under construction have appeared in national budgets for nearly five years, costing the taxpayer exorbitantly, but are marred by poor workmanship,¹⁸⁴ (b) the approximately 100 km Zomba-Jali road which is yet to be completed after US\$ 47 million have been spent already, and (c) the three teacher training colleges project which has consumed money amounting to US\$ 29 million before the construction of even a single college.¹⁸⁵

Political corruption thus encourages the inefficient distribution of public resources. Instead of focusing on legitimate public problems and needs, the criteria for disbursement of such resources are partisanship, nepotism, regionalism and sectarianism, leaving out people with legitimate claims to the resources.¹⁸⁶ Those left out are the poorest of the poor and the powerless.¹⁸⁷ This breeds and perpetuates economic inequality.



The situation is worsened always when the donor community decides to withhold aid because of political corruption. For example, when political corruption grew in 2000, the donor community reacted strongly. The IMF suspended payments under the Poverty Reduction and Growth Facility in 2000, followed by the withholding of bilateral budgetary support in 2001.¹⁸⁸ Then the EU, the UK, the USA, and the Danish governments also suspended aid pledged for

183 *Nyasa Times*, 13 July 2013.

184 Auditor General's Report (2011) 33.

185 *The Daily Times*, 20 August 2013.

186 Transparency International (2004) 24.

187 Kaufmann & Diminio (2006) 14.

188 Hall-Matthews (2007) 80.

budgetary support.¹⁸⁹ Further, the Danish government withdrew DANIDA from Malawi after former President Bakili Muluzi's administration embezzled a grant of £5 000.¹⁹⁰ Similar abuse of public funds occurred during late former President Bingu wa Mutharika's government, such as the ordering of a £325 000 Maybach as the President's official vehicle, and the abuse of £75 000 from the World Bank's Emergency Drought Recovery Programme to purchase a motor vehicle for the former Minister of Agriculture (Gwanda Chakuamba).¹⁹¹

3.3.2 Escalating unemployment levels

When government policies favour projects that maximise private gain, little interest is paid to public interests such as job creation. This practice, coupled with recruitment of civil servants by way of favours rather than merit, results in the escalation of unemployment levels. The recent futile government attempts to export labour to Kuwait and South Korea are evidence of the growing unemployment rate, and a sign of the lack of clear policies concerning job creation. The government, in an attempt to curb the rising unemployment rate, informed the nation that arrangements had been finalised for exportation of labour from Malawi to South Korea and Kuwait.¹⁹² However, the governments of these countries denied the existence of such arrangements.

189 Transparency International (2004) 18.

190 Hall-Matthews (2007) 80.

191 Hall-Matthews (2007) 97.

192 "MPs want the House to approve labour export" *The Nation*, 29 May 2013. The executive arm of government did not involve Parliament in the labour export project.

The hiring of individuals is governed by nepotism, favouritism, or the offering of financial, material or other favours to recruiting authorities.¹⁹³ Such recruitments are not only detrimental to public offices because of compromised qualifications, but also to other candidates with qualifications suitable for the job.¹⁹⁴ *The Nation*, for example, observes that about 80 percent of high school graduates fail to gain access to tertiary education due to high costs, and they go back to their villages with no hope of finding employment.¹⁹⁵

3.3.3 Impact on human rights

The distribution of patronage results in recruitments and promotions to lucrative public offices, as well as the award of high-paying public procurement contracts, not according to merit or ethics or professionalism, but according to loyalty to the ruling party and its leadership. This results into wastefulness and inefficiency in the delivery of social goods and services in Malawi.¹⁹⁶

Further, political corruption diverts public expenditure away from crucial areas such as health¹⁹⁷ and education.¹⁹⁸ The Director of the Anti-Corruption Bureau underscored this point when he observed that, due to corruption, 30 per cent of government's budget does not finance the intended projects.¹⁹⁹

193 Kajee (2006) 91.

194 Nsereko & Kebonang (2005) 93.

195 "Youth unemployment a big challenge in Malawi" *The Nation*, 11 September 2013.

196 Transparency International (2004) 24. See also Bayley (1989) 942.

197 "Medical Stores runs out of drugs" *The Daily Times*, 30 January 2013.

198 "Malawi gov't failing to pay primary school teachers their arrears" *Nyasa Times*, 23 July 2013.

199 *Nyasa Times* 2013.

In addition, corruption increases the price of administration as a person, most likely a taxpayer, is forced to pay more than what the service is worth.²⁰⁰

3.3.3.1 Health

President Joyce Banda has been accused of advancing party political agendas in total disregard of public policies. For example, at a time when government hospitals have no drugs,²⁰¹ the President is busy mobilising political support for her ruling Peoples' Party under the guise of distributing maize to the rural poor people.²⁰² The Malawi Health Equity Network (MHEN) observed, with great concern, that the money the President spends to distribute maize and flour could rescue the country's hospitals, thereby serving millions of Malawians.²⁰³ MHEN further estimated the cost of one presidential trip at US\$ 46 429, while the President donates maize worth US\$ 1 000.²⁰⁴ This cost of a single trip includes travel allowances for the President's spouse, council chief executive officers, senior political party members, television crew, Ministers and Members of Parliament, as well as security officers.²⁰⁵

3.3.3.2 Education

Like the health sector, the education field is affected severely by political corruption. It has been plagued by procurement scams, among them (a) the £1,9 million supply of exercise books

200 Hussein (2005) 94; Bayley (1989) 942.

201 *The Daily Times*, 30 January 2013.

202 "JB travel costs can rescue hospitals-Mhen" *The Daily Times*, 29 November 2012.

203 *The Daily Times*, 29 November 2012.

204 *The Daily Times*, 29 November 2012.

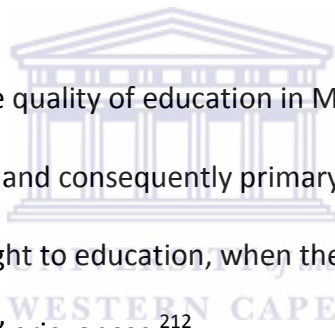
205 *The Daily Times*, 29 November 2012.

scam,²⁰⁶ (b) the £935 000 scam in respect of uncompleted school buildings,²⁰⁷ and (c) the unaccounted for US\$ 29 million meant for the construction of teacher training colleges.²⁰⁸

The effects of corruption on education include a serious shortage of classrooms, with the consequence of children having to learn in the open.²⁰⁹ All this may be attributed to political corruption, where the elite concentrates on projects, such as the fertilizer input subsidy programme, that make them consolidate political power at the expense of education.

The fertilizer subsidy programme is fertile ground for political corruption, where procurement contracts are issued, on a patronage basis, to relations, business partners and political supporters.²¹⁰

Political corruption thus affects the quality of education in Malawi.²¹¹ Recently, teachers staged industrial strikes over low salaries, and consequently primary school pupils took to the streets in an attempt to safeguard their right to education, when the government did not show any interest in addressing the teachers' grievances.²¹²



3.3.4 Widespread corruption

Political corruption inevitably leads to corruption in other spheres of life, either by design, example or by the failure of political leadership to implement and effectively enforce

206 Hall-Matthews (2007) 84.

207 Hall-Matthews (2007) 85.

208 *Daily Times*, 20 August 2013.

209 Unicef "Basic Education and Youth Development: Malawi" (2010).

210 *Nyasa Times*, 13 July 2013. See also Kaufmann & Diminio (2006) 14.

211 "Malawi govt failing to pay primary school teachers their arrears" *Nyasa Times*, 23 July 2013.

212 "Malawi school kids march against President Banda" *Nyasa Times*, 21 February 2013.

anti-corruption measures, including transparency and accountability.²¹³ Put differently, political corruption can breed impunity. It erodes the impetus necessary to adhere to ethical values. Thus, when corruption goes unpunished it exerts a corrupting influence on other members of the administrative apparatus.²¹⁴ This results in widespread corruption at almost all levels of government.²¹⁵

3.3.5 Loss of revenue

Political corruption also negatively infringes on revenues in several ways. Firstly, when corruption takes the form of kickbacks, it diminishes government revenue since part of the revenue is diverted from public purposes into private ones.²¹⁶ Secondly, political corruption affects efforts to collect maximum revenues from taxable imports, taxable income from natural resources, as well as other business profits.²¹⁷ According to Transparency International,²¹⁸ the Malawi Revenue Authority is selective in the application of tax laws. There is evidence of political influence in the Authority's enforcement decisions, with favours being given to politicians or individuals who have family or friends in high level government leadership.²¹⁹ Importation of fleets of motor vehicles by former President Bakili Muluzi²²⁰ and the late former

213 World Bank "Malawi Final Report: Governance and Corruption Baseline Survey" (2006) 9.

214 Bayley (1989) 942.

215 *ZODIAK ONLINE*, 4 July 2013; Hope (2000) 22.

216 Bayley (1989) 942.

217 Kaufmann & Diminio (2006) 15.

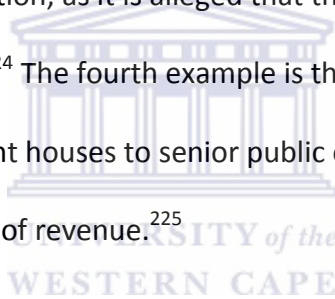
218 Transparency International (2012).

219 Transparency International (2012).

220 Hall-Matthews (2007) 87. During his reign, Bakili Muluzi imported more than 100 motor vehicles disguised as being for personal use, in order to enjoy the duty free privilege to which Presidents are entitled. Eventually, they were used for party political functions.

President Bingu wa Mutharika²²¹ duty free, allegedly for personal use, illustrates abuse of office, resulting in loss of revenue.

Thirdly, political corruption is faulted for loss of revenue from the mining industry.²²² A case in point concerns tax incentives which the Malawi government gave an Australian mining company, Paladin Energy Limited, for uranium mining. The mining contractual agreement, which is currently under intense criticism, gives Malawi only a 15 per cent local stake in the project. There is public demand that the contract, which has resulted in huge loss of revenue, be renegotiated for the public benefit.²²³ The government's reluctance to renegotiate the contract smacks of political corruption, as it is alleged that the Vice President was soliciting bribes from the mining company.²²⁴ The fourth example is the recent sale by the Malawi Housing Corporation of government houses to senior public officers and politicians at heavily discounted prices, resulting in loss of revenue.²²⁵



3.3.6 Erosion of democratic values

This is reflected in the use of government resources by a ruling party for party political gains, for example, the mobilisation of political support through the distribution of maize flour disguised as a relief programme. This is to the disadvantage of the opposition political parties who have limited financial resources. The abuse is not limited to election campaign periods, but

221 *The Commissioner General of MRA ex-parte Tapiwa Mutharika* (High Court, Judicial Review Cause No. 3 of 2013, unreported). As a sitting President entitled to import goods duty free, late former President Bingu wa Mutharika imported a fleet of motor vehicles subsequently used by other persons.

222 "Malawi govt risks losing K92 bn over Kayelekera deal", *The Daily Times*, 23 July 2013.

223 "Malawi yet to decide on Uranium mining renegotiation" *The Nation*, 6 June 2013.

224 "Paladin reports Malawi VP Kachali to ACB over alleged extortion" *Nyasa Times*, 31 January 2013.

225 *Nyasa Times*, 1 February 2013.

includes corrupt practices outside the campaign periods, such as bribing Members of Parliament elected on a ticket of an opposition political party to leave the party and join the ruling party.²²⁶ This is tantamount to ignoring the interests of the electorate in pursuit of private gain.²²⁷ These corrupt practices defeat the constitutional safeguards for democratic governance.

3.4 Summary

The level of political corruption in Malawi is alarming as it is widespread, benefiting high level public officials. Mostly, political corruption involves subversion of laws for private gain. The gain may be personal or for a group such as a political party or personal relations and friends of the public official.

Much as it is widespread, political corruption is especially prevalent in government procurement of both goods and services. This is where persons deemed loyal to the public official, are either employed in or promoted to lucrative positions, or are awarded high value procurement contracts. All this is aimed at strengthening the grip on political leadership and, of course, is detrimental to the deserving but politically unconnected.

Political corruption has a serious negative impact on the public interest. It threatens the rule of law, democracy and human rights. It affects the poor seriously, especially in undermining the rights to health, education, and equal opportunity to economic activity and employment.

226 Hall-Matthews (2007) 92.

227 Section 65 of the Constitution proscribes leaving a political party on whose ticket a Member of Parliament was elected into Parliament and joining another party represented in Parliament.

Restoring good governance is the only way to combat political corruption, thereby ensuring the implementation of public policies that favour the public interest.



CHAPTER 4

OBSTACLES TO COMBATING POLITICAL CORRUPTION

4.1 Introduction

Despite the existence of legislative instruments ranging from the Constitution, through the Public Finance Management Act and the Public Procurement Act, to the CPA, combating political corruption in Malawi seems an insurmountable task. Further, this perception persists despite the existence of the ACB and other governance institutions.

This chapter explores the major obstacles to effective enforcement of the anti-corruption measures. The obstacles include breach of constitutional prescriptions of transparency, accountability and financial probity; lack of laws regulating (a) access to information, (b) political party financing, and (c) declarations of assets by public officials; operational independence of the law enforcement authorities; lack of social accountability mechanisms; political interference; and absence of political will.

4.2 Lack of political will and its effects

The adoption of laws which endeavour to prevent and criminalise corruption widely is meaningless in the absence of the requisite political will to implement them.²²⁸ As regards “political will”, Kpundeh defines it as “the demonstrated credible intent of political actors (elected or appointed leaders, civil society watchdogs, stakeholder groups, etc) to attack

228 Chaikin & Sharman (2009) 61.

perceived causes or effects of corruption at a systemic level”.²²⁹ Further, it has been suggested that combating political corruption in a sustained manner requires a consistent demonstration of genuine commitment on the part of high-level public officials towards the eradication of the pandemic.²³⁰ As noted earlier, political power in most poor countries is seen as the main and quick gateway to wealth.²³¹ Unless a political leadership is ethically upright, reforms that would redistribute wealth effectively, for example, improved governance and resource allocation systems, are bound to fail.²³²

For Malawi, lack of political will to combat political corruption is self-evident. For example, since its adoption two decades ago, government is yet to implement the good governance measures prescribed by the Constitution. The measures are aimed, *inter alia*, at enhancing participatory democracy, transparency, accountability and financial probity.²³³ As it were, the Constitution is observed more in the breach than in compliance. The resultant effects of lack of political will include (a) progressive erosion of participatory democratic governance, (b) breakdown of the rule of law, and (c) entrenched political corruption.²³⁴

This paper argues that the lack of political will is the source of all obstacles to effective implementation of the anti-corruption measures. This lack of political will exhibits itself in the legal and non-legal obstacles discussed below.

229 Kpundeh (1999) 92.

230 Abdulai (2009) 16.

231 Snider & Kidane (2007) 695.

232 Mbaku (2007) 359.

233 Sections 12(1) and 13(o) of the Constitution. See also Article 5(1) of UNCAC.

234 Christensen J “Africa’s Lost Tax Revenue, Lost Development Opportunities” available at <http://www.Concernedafricascholars.org/bulletin/issue87/christensen/> (accessed 22 February 2013).

4.2.1 Legal obstacles: Impediments to good governance

For Malawi, the efficacy and legitimacy of anti-corruption measures, like any law, are derived from the Constitution.²³⁵ Further, both the efficacy and legitimacy of anti-corruption measures are derived from their compliance with fundamental constitutional principles of transparency, accountability and financial probity.²³⁶

As noted in chapter three, all facets of political corruption are symptoms of weak governance.²³⁷ It follows, therefore, that anti-corruption initiatives fall within the ambit of good governance, which, in turn, mutually reinforces and overlaps with constitutional principles such as public participation, transparency and accountability.²³⁸ Below are legal obstacles to an effective fight against political corruption in Malawi.

4.2.1.1 Secrecy and lack of access to information

Despite the constitutional prescription of the right of access to information,²³⁹ Malawi does not have enabling legislation for the right.²⁴⁰ There has been an inordinate delay in enacting into law the Access to Information Bill that was drafted in 2003.²⁴¹ The right of access to information

235 Section 5 of the Constitution.

236 Sections 12(1) and 13(o) of the Constitution.

237 Shah (2007) 243.

238 Gathii (2009) 150.

239 Section 37 of the Constitution.

240 Sentala KS "Access to Information Legislation" (2008) A Paper presented at the African Network for Constitutional Lawyers Symposium on Access to Information, University of Cape Town, South Africa, available at http://www.publiclaw.uct.ac.za/usr/public_law/ANCLAATIWorkshop/ppai.doc (accessed 21 June 2013).

241 Sentala "Access to Information Legislation" (2008).

is a crucial tool for political participation.²⁴² Neuman aptly states that “knowledge is power, and transparency is the remedy to the darkness under which corruption and abuse thrives”.²⁴³ Ocheje adds that the more public administration, public procurement, and general public resource management are secretive, the more it becomes a breeding ground for corrupt practices.²⁴⁴

In this regard, section 37 of the Constitution entitles every person to access to “all information held by the State or any of its organs at any level of Government”. With reference to sections 12 and 13 of the Constitution, the information includes that pertaining to (a) management of public finances, (b) hiring of public officials, and (c) public administration and decision-making processes. The access to information would benefit the citizenry in several ways. Firstly, it would enhance meaningful participation in democratic processes, as only an informed populace can participate effectively in governance.²⁴⁵ Secondly, it would expose nepotism, clientelism, unfair treatment in recruitment of public officials and public procurement, and corruption in general,²⁴⁶ and hold the government to account.²⁴⁷ Lastly, information would empower both civil society and the media to disseminate accurate information to the citizenry, rather than mere speculation.²⁴⁸

242 Roberts (2002) 9.

243 Neuman (2002) 5.

244 Ocheje (2011) 242.

245 Calland (2002) 15.

246 Calland (2002) 15.

247 Gathii (2009) 151.

248 Roberts (2002) 12.

In summary, the right of access to information, which reinforces freedom of expression, is a prerequisite for encouraging public accountability and the punishment of corruption.²⁴⁹

Accordingly, lack of access to information in Malawi is an obstacle to the effective fight against corruption, since deterrence of corruption is by way of transparency and the accountability of public officials and their respective institutions.²⁵⁰

4.2.1.2 Lack of enforcement of law on declaration of assets

It has been argued that effective corruption control requires that public officials, whether elected or appointed, declare their assets upon taking office and periodically thereafter, and whenever their assets change significantly.²⁵¹ The declaration of assets is regarded as a most important tool for preventing corruption.²⁵² It is aimed, *inter alia*, at promoting transparency, public accountability, financial probity and trust, and most importantly, guarding against illicit enrichment.²⁵³

In Malawi, the Constitution requires the Presidency, members of cabinet, members of Parliament, and other senior public officials to declare their assets, liabilities and business interests within three months of their appointment or election to office.²⁵⁴ The declarations

249 Gathii (2009) 152.

250 Chirwa *et al* "Democracy Report for Malawi" 81, available at <http://www.idea.int/publications/sod/upload.Malawi.pdf> (accessed 20 August 2013). See also Ocheje (2011) 262.

251 Chaikin & Sharman (2009) 63. See also "Fostering institutions to contain corruption" available at <http://www.siteresources.worldbank.org/INTLAWJUSTINT/Resources/PREMnote24.pdf> (accessed 20 March 2013).

252 OECD (2011) 29.

253 OECD (2011) 29.

254 Sections 88A(1) and 213 of the Constitution.

have to be made to the office of the Speaker of Parliament. However, the constitutional requirement has not been implemented yet, and if any declarations have been made at all, no one has had access to the information.²⁵⁵ The Speaker has refused to make public any declarations, arguing that the law does not mandate him to do so.²⁵⁶

Non-implementation of the constitutional requirement smacks of lack of political will to fight corruption. This paper argues that even if the requirement were met, it hardly would have enhanced accountability, on three grounds. Firstly, the Constitution does not prescribe mandatory verification of the declarations by the office of the Speaker. This lacuna in the law is prone to abuse, as targeted public officials can fake declarations without being detected. Secondly, the law prescribes no punishment for defaulting public officials. Lastly, the law does not provide for accountability of public officials after leaving office. Chêne opines that a successful law must have: (a) clarity as to assets, liabilities and interests targeted, (b) a mandatory requirement for verification of declared assets, (c) effective sanctions for law defaulters, and (d) public access to officials' declarations.²⁵⁷

In an apparent attempt to address the lacuna in the Constitution, Malawi has drafted a "Public Officers (Declaration of Assets, Liabilities and Business Interests) Bill, 2013 (Declaration of Assets Bill)",²⁵⁸ aimed at addressing the gap in the legal framework. This paper argues that if

255 Patel *et al* (2007) 28.

256 Lee R 'No one knows what politicians own' *OSISA*, 3 November 2011.

257 Chêne M "African experience of asset declarations" (2008) 2, available at <http://www.u4.no/publications/african-experience-of-asset-declarations/> (accessed 30 June 2013).

258 Available at http://www.lawcom.mw/docs/Report_of_Legislation_on_Declataion_of_Assets.pdf (accessed 25 May 2013).

enacted into law, the Bill will not achieve the intended purpose due to lack of operational independence of the prescribed authority.

For example, the President will have the power to appoint the Director and Deputy Director of the institution responsible for asset declarations.²⁵⁹ Although the appointments will be subject to confirmation by the Public Appointments Committee of Parliament (PAC),²⁶⁰ both the President and PAC will ensure that the appointee serves their political interests. Worse still, the Bill prescribes, pursuant to section 213(4) of the Constitution, an oversight committee comprising members of Parliament.²⁶¹ In addition, the Bill restricts public access to declarations by requiring that the citizenry apply to the Director for access to the information, and the Director has absolute discretion whether to deny or grant access to the declarations.²⁶²

Of further concern is that sections 18 and 19 of the Bill avoid addressing procedure for removal from office of the President and members of Parliament. The law, therefore, should be interfaced with provisions of the Constitution and Standing Orders of Parliament that prescribe the removal from office of the President²⁶³ and members of Parliament.²⁶⁴

This paper argues that this Bill is a sham, aimed at hoodwinking the citizenry and the international community into believing that Malawi is desirous of stamping out political corruption. The tentacles of politics have to be removed from the Bill. That is to say, (a)

259 Section 7(1) of the Declaration of Assets Bill.

260 Section 7(3) of the Declaration of Assets Bill.

261 Section 13 of the Declaration of Assets Bill.

262 Section 17 of the Declaration of Assets Bill.

263 Section 86 of the Constitution.

264 Section 63 of the Constitution.

appointments and monitoring functions should be executed by persons independent of politics; (b) declarations have to be effectively verified, and made readily accessible to the public; (c) defaulting public officials, including members of the Presidency, ought to be prosecuted, punished and removed from public office; and (d) accountability should be enforced at the time of leaving office. Absent these conditions, the law will be another paper tiger.

4.2.1.3 Abuse of excessive discretionary powers and lack of accountability

The President of the Republic of Malawi has excessive discretionary powers which are prone to abuse in the absence of effective mechanisms of accountability. Section 89 of the Constitution empowers the President to make appointments as may be necessary and in accordance with constitutional powers or pursuant to an Act of Parliament. The President thus has powers, *inter alia*, to appoint the Director of Public Prosecutions,²⁶⁵ and the Director and Deputy Director of the ACB. As noted in chapter two, the Constitution prescribes a system of checks and balances for the effective separation of powers among the branches of government, to ensure that each branch operates within its designated ambit of authority.²⁶⁶ However, as exemplified in the appointment and dismissal of Directors of the ACB, there is lack of efficacy in the accountability mechanism. Thus, in pursuance of enhancing the grip on leadership power, the President can appoint persons considered loyal to him and the ruling party. The appointments are, in most cases, not based on merit.

265 Sections 100 and 101 of the Constitution.

266 Nkhata MJ "Origins and Historical Development of the Constitution" 13, available at <http://www.web.up.ac.za/sitefiles/file/47/15338/Malawi.pdf> (accessed 27 July 2013).

This conduct breeds impunity among public officials deemed close to the Presidency.²⁶⁷ For example, instead of corrupt public officials being held to account, they are rewarded with either non-removal from the ministry, or relocation to another ministry. Cases in point include the following: (a) Ken Lipenga, after pocketing travel allowances as Labour Minister for a trip that was not made,²⁶⁸ was promoted to head the Ministry of Finance where he was involved in two corruption scandals concerning (i) unlawful borrowing of money from banks and disguising it as revenue duly collected by the government revenue agency (Malawi Revenue Authority),²⁶⁹ and (ii) the recent “Capital Hill cash gate” scandal involving massive theft of public funds by public officials through the Treasury;²⁷⁰ (b) Friday Jumbe was promoted from heading the Agricultural Department and Marketing Corporation (ADMARC) to Minister of Finance at a time when he was being investigated for allegedly fraudulently selling government maize reserves and pocketing £14,5 million;²⁷¹ and (c) Messrs Goodall Gondwe and Patricia Kaliati retained their ministerial positions while being investigated on serious corruption allegations concerning procurement of government subsidised fertilizer, and the award of the Vwaza-Nyika Marsh Eco-Tourism concession, respectively.²⁷² This practice breeds impunity and perpetuates political corruption.

Further, it is common cause that parliamentary committees, such as the Public Accounts and Public Appointments Committees, are aimed at providing a check on the functions of the

267 Auditor General’s Report (2011).

268 Hall-Matthews (2007) 86.

269 “Climax of Lipenga’s weak Leadership” *The Nation*, 3 March 2013.

270 Chitsulo & Namangale “JB dismisses suggestions to fire top government officials” *The Nation*, 10 October 2013.

271 Hall-Matthews (2007) 86.

272 Bertelsmann Transformation Index (2012) 10.

executive branch.²⁷³ And, effectiveness depends on representation in the Committees, that is to say, unless a Committee is represented by members of Parliament from all political parties represented in Parliament, a Committee dominated by the ruling party will advance a party political agenda above public interests.²⁷⁴

4.2.1.4 Lack of legislation regulating political party funding

Transparency International observes that an important area where Malawi's legal framework is inadequate is in the regulation of political party funding.²⁷⁵ There are currently no laws limiting or regulating individual or corporate political contributions. Further, and worse still, there is no requirement for disclosure of donations to political parties or audits of political parties or candidates.²⁷⁶ As a result, political parties are noted mysteriously to amass wealth immediately upon assuming leadership.

Further, the lacuna in the law perpetuates the abuse of public resources by the ruling elite, for party political objectives.²⁷⁷ By way of example, both former Presidents Bakili Muluzi and the

273 Parliament of Malawi "Committee Systems" available at <http://www.parliament.gov.mw/committees.pho?mode=ct> (accessed 30 August 2013).

274 Catholic Commission for Justice and Peace "Parliamentary Audit of the First Hundred Days of the 2009-2014 Parliament", available at http://www.episcopalconferencemalawi.files.wordpress.com/2010/09/parliamentary-audit-of-the-first-hundred-days-of-the-2009-e28093-2014_malawi_parliament_doc (accessed 20 October 2013).

275 "Overview of corruption and anti-corruption in Malawi" (2012), available at http://www.transparency.org/files/content/corruptionqas/139_Overview-of_corruption_and_anti-corruption-in-Malawi.pdf (accessed 20 March 2013).

276 Business Anti-Corruption Portal "Snapshot of the Malawi Country Profile", available at <http://www.business-anti-corruption.dk/country-profiles/sub-saharan-africa/malawi/snapshot.aspx> (accessed 20 March 2013).

277 Transparency International Country Study Report: Malawi (2004) 17.

late Bingu wa Mutharika abused public resources for party political functions.²⁷⁸ Similarly, the current President Joyce Banda is benefiting from the abuse of public resources, as discussed in chapter three.²⁷⁹

4.2.1.5 Politicisation of law enforcement

As noted in chapter two, political meddling in the operations of law enforcement authorities obstructs the Anti-Corruption Bureau's efficiency, undermines the rule of law and breeds impunity. The Director of the ACB is politically appointed and required to be accountable to the political offices of the President and the Minister of Justice.²⁸⁰ Further, the requirement that the ACB seek consent from the DPP before prosecuting a corruption case, compromises its operational independence.²⁸¹ As observed in chapter two, consent can be denied, or cases discontinued, on political grounds.

It is thus a challenge for Director of the ACB to enforce the law against his political masters at whose mercy lies his security of tenure.²⁸² A case in point is the termination of the employment of Director Gilton Chiwaula by former President Bakili Muluzi when the ACB insisted on prosecuting some Ministers in his administration, and the appointment of his replacement, Michael Mtegha.²⁸³ Similarly, Michael Mtegha was fired from office by late former President

278 Transparency International Country Study Report: Malawi (2004) 17. See also Hall-Mattews (2007) 88.

279 "JB travel costs can rescue hospitals-Mhen" *The Daily Times*, 29 November 2012.

280 Section 10(4) of the CPA.

281 Section 42 of the CPA.

282 Transparency International Country Study Report: Malawi (2004) 11.

283 "Malawi Sacks Top Corruption Fighter" available at <http://www.unpan1.un.org/intradoc/groups/public/documents/un/unpan014267.htm> (accessed 14 October 2013).

Bingu wa Mutharika, and replaced by Gustav Kaliwo.²⁸⁴ In turn, Gustav Kaliwo was fired later for arresting former President Bakili Muluzi for corruption offences.²⁸⁵ Likewise, Alex Nampota, who replaced Gustav Kaliwo, was fired by President Joyce Banda, and replaced with Justice Rezine Mzikamanda.²⁸⁶

Although the Corrupt Practices Act prescribes procedure for recruitment and termination of employment of the Director of the ACB, the practicality of the law is a challenge.²⁸⁷

Considerations of who to recruit and whether or not to fire the incumbent are not meritorious, but based on political power.²⁸⁸ When recruited, therefore, the Directors are inclined more to serving the interests of their political master than the public interest.²⁸⁹

To curb this mischief, there is a need to amend the CPA to enhance effective performance of the ACB by freeing it from political meddling in its operations. In other words, the law should grant the ACB and any other anti-corruption watchdogs exclusive investigatory and prosecutorial powers.²⁹⁰ This would require amending the CPA to (a) prescribe a competitive recruitment process for the Director and Deputy Director of the ACB, preferably by a politically neutral body or a body representing all political parties,²⁹¹ (b) remove the current requirement

284 Hall-Matthews (2007) 81.

285 Hall-Matthews (2007) 88.

286 "PAC throws a spanner in appointment of new Malawi anti-graft body boss" *Nyasa Times*, 11 October 2012. See also "Anti-Corruption director Alex Nampota under pressure from govt to resign" *Malawi today*, available at <http://www.malawitoday.com> (accessed 18 July 2013).

287 Kamanga I "Combating Corruption: Challenges in the Malawi Legal System" available at http://www.unafei.or.jp/english/pdf/RS_No76_17PA_Kamanga.pdf (accessed 22 March 2013).

288 Kamanga "Combating Corruption: Challenges in the Malawi Legal System".

289 "ACB's Independence Questioned" *ZODIAK ONLINE*, 4 July 2013.

290 Staphenurst & Sedigh (1999) 10.

291 Nsereko & Kebonang (2005) 102.

for the Director to report to the President and the Minister of Justice,²⁹² (c) prescribe and safeguard security of tenure of the Director and Deputy Director whose removal from office should comply with due process principles,²⁹³ (d) remove the requirement of seeking consent from the DPP to prosecute corruption cases,²⁹⁴ and (e) provide for public officials under investigation to leave office, in order to pave the way for thorough investigations into the allegations against them.

Further, an ideal situation would be that the CPA prescribes the establishment of a politically neutral watchdog institution to oversee the functions of the ACB. Besides reporting to Parliament, the ACB should be accountable to an independent body for its functions. This would curb abuse of the ACB by the ruling elite for selfish political interests.

4.2.2 Non-legal obstacles: Legitimacy of the rule of law

The legal obstacles discussed above constitute major impediments to combating political corruption. However, the legal reasons are the tip of the iceberg. As persuasively argued by Gbadamosi, corruption is not a criminal problem *per se*, but a social problem comprising economic, political and cultural forces.²⁹⁵

292 Madise (2007) note 83.

293 Nsereko & Kebonang (2005) 102.

294 Khembo (2004) 26.

295 Gbadamosi (2006) 4.

4.2.2.1 Politics of the rule of law

Malawi is a liberal democracy with a liberal democratic Constitution.²⁹⁶ The Constitution has arguably good anti-corruption principles of transparency, accountability and financial probity which represent the rule of law. However, persistent breach of the Constitution by public officials, as noted earlier, exposes a missing link between the anti-corruption measures and their effective implementation. The breach of the founding principles of the Constitution is a symptom of the breakdown of the rule of law.

The enactment of the Constitution of 1994 was an expression of the nation's desire to embrace democracy. However, according to Kanyongolo, the Constitution was imposed on Malawian society, as the process of enactment lacked serious consultation.²⁹⁷ The lack of consultation deprived the Constitution of legitimacy and, as will be discussed below, lack of legitimacy may explain the persistent breach of the Constitution by Malawi leadership.

Further, Bukovansky contends that good policies and laws are only a means to achieve an end, and their successful implementation is dependent upon the existence of a suitable milieu which legitimises the anti-corruption measures, thereby making them pragmatic and self-enforcing.²⁹⁸

As noted above, the Malawi Constitution faces serious implementation challenges due to lack of the requisite normative force. This is exemplified in the following observations.

296 Khembo (2004) 87.

297 Kanyongolo (2004) 206.

298 Bukovansky (2006) 265.

Firstly, it is trite to note that no matter how good legislation may appear on paper, its efficacy is always dependent on whether the law attains normative legitimacy in a society.²⁹⁹ In other words, the society has to appreciate the need for the law, and reach a consensus to implement it. Appreciation of the need for the law requires consultation.³⁰⁰ Consultation entails working with leadership and the citizenry in identifying common grounds and areas in need of modifications to conform to domestic situations. This is, however, normally done with leaders who derive authority from society, as legitimacy of the laws and reforms cannot be gained from society and leadership in the absence of substantive consultation. Therefore, it has been said that the Constitution lacks legitimacy because it was imposed on Malawi society.³⁰¹ The Malawi leadership and society were not engaged to appreciate the benefits of abandoning the culture of secrecy prevalent during the dictatorial regime and adopting a culture of transparency. This paper argues that this affects seriously the enforcement of constitutional law pertaining to corruption, for example, the right of access to information. This breakdown of the rule of law promotes secrecy in government operations and perpetuates political corruption.

It is argued that since corruption is all about perception, Malawi society ought to determine what constitutes corruption and how to combat it. The role of the international community must, therefore, be to assist the society with information on the dangers of corruption and how it can be curbed in furtherance of public interests. The social consensus on the evils of

299 Ocheje (2011) 239.

300 Kanyongolo (1998) 369.

301 Nkhata JM *Rethinking governance and constitutionalism in Africa: the relevance and viability of social-trust based governance and constitutionalism in Malawi* (unpublished LLD paper, University of Pretoria, Pretoria, South Africa, 2010) 198, available at <http://www.upetd.up.ac.za> (accessed 15 October 2013).

corruption and its impact on society translate into sophisticated checks and balances on the exercise of public power and stiff legal sanctions for transgressors of corruption laws.³⁰² In Malawi, political corruption and corruption generally are on the rise, endemic, and uncontrollable due to a lack of social consensus. As instructively put, lack of congruence between the lofty goal of the law and the social and political reality prevalent in a society renders the law ineffective.³⁰³

Secondly, it has been suggested elsewhere that the Western anti-corruption framework, which advocates operational independence for law enforcement institutions of government, cannot be feasible without modification in the light of the political spectrum of Malawi.³⁰⁴ Institutions such as the ACB cannot function effectively unless the Western concepts of its functions are modified to attain the societal normative values. Accordingly, it is recommended that the external concept of corruption and the requisite anti-corruption measures need enculturation for them to attain legitimacy.³⁰⁵ Imposition of the liberal-rationalistic principles of good governance portrays the African concept of governance as corrupt and in need of Western solution.³⁰⁶ Imposition of the constitutional anti-corruption measures on Malawi society thus lacks legitimacy. The citizenry, upon whom the Constitution bestows power to regulate political governance, has not conceptualised its power and the need to hold public officials to account. Also, the leadership does not appreciate why it (a) has to be accountable for its policies to the

302 Ocheje (2011) 262.

303 Ocheje (2011) 242.

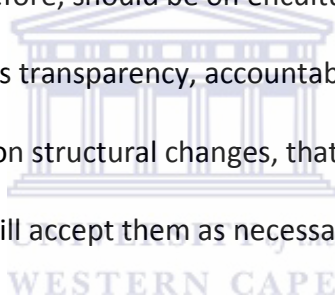
304 Bukovansky (2006) 204.

305 Bukovansky (2006) 204.

306 Bukovansky (2006) 198.

citizenry, (b) has to be transparent and allow the populace access to information, and (c) has to protect and promote equal access to public resources and opportunities to economic activities.

Thirdly, to combat political corruption and general corruption successfully, it is imperative to instil in Malawi society the normative perspective of the rule of law. This point of view is premised on people's regard for the law as both just and moral, and not necessarily as good for private interests.³⁰⁷ It is, therefore, essential to legitimise the law so that people should obey it not out of fear of punishment, but because of belief in its legitimacy. The law attains legitimacy when it is deemed morally just and the lawmaker is considered to have the equitable right to regulate behaviour.³⁰⁸ Focus, therefore, should be on enculturation and consolidation of democracy (public interest, fairness transparency, accountability, access to information, etc). Reforms should, as a result, focus on structural changes, that is, formulate anti-corruption measures in a way that a society will accept them as necessary to serve its interests.³⁰⁹



4.2.2.2 Misplaced reasons for law reform

This paper opines that another obstacle to combating corruption is the focus on “good governance” in the sense that good governance promotes foreign investment.³¹⁰ However, others have argued that reforms should focus centrally on equitable allocation of domestic resources.³¹¹ Unfortunately, the Western concept of corruption, its causes and effects on

307 Bukovansky (2006) 204.

308 Ocheje (2011) 265.

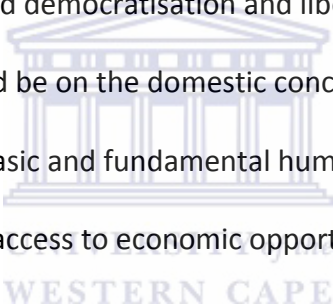
309 Bukovansky (2006) 199; See also Ocheje (2011) 268.

310 Bukovansky (2006) 194.

311 Williams & Beare (1999) 121.

society are disconnected from the realities of life in African communities.³¹² Thus, corruption must be contextualised in relation to national and societal conditions. Reforms should not be premised on the “Western best practice”, but on the fundamental needs of the society concerned.

In Malawi, the donor community, the IMF, the World Bank, and the EU have been working on law reform with the ACB, focusing on strengthening law enforcement and trying to secure operational independence for the ACB. The reforms have failed so far to produce results due to what could be termed a wrong focus. It is erroneous to think that national development is dependent on “political stability and democratisation and liberalisation of business processes”.³¹³ Instead, focus should be on the domestic conception of development, which in the Malawian context comprises basic and fundamental human requirements such as access to good health, education, equitable access to economic opportunities, and access to information.³¹⁴



In addition, it has been contended that any reforms that neglect the unique national characteristics (such as cultural divergence) and conditions which are determinant of the practical viability and reasonableness of reforms are bound to fail.³¹⁵ It is suggested, therefore, that the approach to a successful fight against corruption ought to comprise a critical

312 Williams & Beare (1999) 123.

313 Williams & Beare (1999) 121.

314 See section 13 of the Constitution.

315 Williams & Beare (1999) 125.

framework that is cognisant of broader societal contexts and conditions as well as the interests earmarked for protection.³¹⁶

4.3 Lack of social accountability

The prevailing traditional theory of accountability is what may be called a “top-to-bottom approach” to consolidating accountability systems and calling leaders to account.³¹⁷ In Malawi, as in any other underdeveloped societies, where culture and traditions are quite important influences upon governance systems, there may be need for a bottom-to-top approach towards strengthening accountability.³¹⁸

According to Schouten, the World Bank has recognised this bottom-to-top approach as effective and necessary in addressing accountability under the concept of “social accountability”.³¹⁹ This theory is an initiative that relies on civic engagement, whereby ordinary citizens participate directly or indirectly in holding public officials to account. It is common cause that political corruption involves high-level public officials who are supposed to be guardians of the law. Thus, they cannot enforce the law against their selfish interests. The bottom-to-top approach, therefore, would be the only effective tool for combating political corruption. However, for this to succeed there would be a need first to address the cultural challenges of Malawi society to legitimise the need to combat political corruption regardless of

316 Williams & Beare (1999) 141.

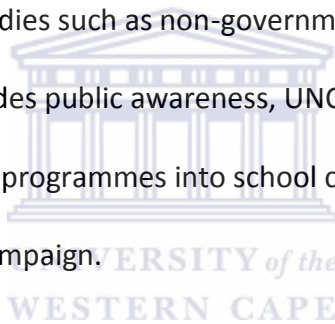
317 Schouten C “Social Accountability in Situations of Conflict and Fragility” (2011) U4 Brief No.19, available at <http://www.integrityaction.org/files/documents/files/social-accountability-in-situations-of-conflict-and-fragility> (accessed 17 June 2013).

318 Mbaku (2007) 152.

319 Schouten (2011) note 317.

the social status of the perpetrator. In other words, there is need to incentivise the citizenry to have the impetus for holding leaders to account, rather than just focusing on personal survival, due to poverty.³²⁰

For Malawi society, like many African societies, strengthening the bottom-to-top approach towards accountability requires raising public awareness regarding the evils of corruption and its impact on the society.³²¹ This awareness-raising is what Indira Carr calls “re-socialisation”.³²² Carr emphasises the need to make the society aware of the debilitating effects of corruption on its socio-economic welfare.³²³ She further states that this public awareness campaign should be conducted by politically neutral bodies such as non-governmental organisations, civil society organisations and activists.³²⁴ Besides public awareness, UNCAC recommends that States Parties introduce public education programmes into school curricula in order to widen the spectrum of the anti-corruption campaign.



Once people appreciate the ill effects of political corruption, its impact on the society, and what role the citizenry can play to curb it, they will condemn corrupt practices regardless of the status of the perpetrator. In other words, when the people perceive threats to their sources of livelihood and fundamental human rights (wealth, good health, education, employment, etc) they become willing to take effective steps to defend themselves at whatever cost.³²⁵ Thus, the citizens’ preparedness to defend their rights constitutes deterrence of the public officials from

320 Kaufmann & Diminio (2006) 16.

321 Article 13 of UNCAC.

322 Carr (2007) 243.

323 Carr (2007) 243.

324 Carr (2007) 245.

325 Ocheje (2011) 263.

indulging in corrupt practices, for fear of adverse citizen reaction.³²⁶ The citizen reaction includes voting leadership out of office, and ensuring that corrupt officials are investigated, prosecuted and duly punished, regardless of social status or ethnic background.³²⁷

4.4 Summary

This chapter has shown that there are various obstacles to successful enforcement of anti-corruption measures. The major impediments in the implementation of the law, including the Constitution, are lack of political will and lack of legitimacy of the law. The law that attains societal legitimacy becomes self-enforcing, as the citizenry feels obliged to protect and promote the law, not for fear of punishment but in pursuance of the public interest.

Thus, it is normatively imperative to engage the society in conceptualising political corruption and corruption generally in order to succeed in the fight against the pandemic. Put differently, every society is governed by normative values, and for any reforms to be successful they must reflect the values of the particular society. Involvement of the citizenry in law enforcement therefore requires a well informed society. Any anti-corruption drive, therefore, must commence with educating the society about the evils of corruption and demonstrating that it requires every person's effort to curb it.

For Malawi, lack of normative legitimacy of the existing legal framework has translated into resistance to implementation of good governance measures, and inordinate delays in enacting

326 Ocheje (2011) 264.

327 Treisman (2000) 404.

requisite legislation for the regulation of, *inter alia*, access to information, declarations of assets, and political party financing.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

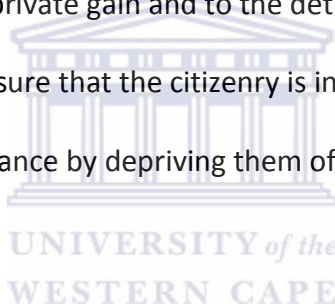
This paper has sought to examine the major obstacles to combating political corruption in Malawi in the light of the international and Malawi's anti-corruption legal frameworks.

Corruption is a global problem, and due to its complexity and the serious impact that it has on the international community, particularly poor countries, combating it requires concerted global efforts. This is what motivated the international community to adopt various international anti-corruption legal instruments such as UNCAC, the AU Convention, and the SADC Protocol. Although the legal instruments target corruption both in the private and public sectors, the focus is on combating corruption in the public sector. Malawi is a State Party to the three legal instruments identified above, besides having a national anti-corruption legal framework.

Surprisingly, despite the anti-corruption legal framework, political corruption specifically and general corruption have been on the rise in Malawi. Political corruption is the worst kind of corruption for Malawi, one of the poorest countries in the world. It involves mostly high-level public officials, those with authority to develop national policies, enact laws, and ensure effective enforcement of the law. Its impact on the social and economic welfare of the populace, particularly the majority poor people in rural areas of the country, is massive. The

effects include lack of access to food, good health and education facilities, and equitable access to economic activities.

The main cause of political corruption is poor governance, which is manifested in greed, nepotism, patronage and state capture. Political corruption is prevalent and systemic in Malawi because public officials lack the political will to combat it. The lack of political will is motivated by pursuit of wealth and a strong grip on power in political leadership. That is to say, (a) the recruitment and promotion to lucrative public offices, and award of high-value procurement contracts to persons deemed loyal to the leadership, and (b) the general abuse of public resources, operate in practice for private gain and to the detriment of the public interest. To achieve this, public officials will ensure that the citizenry is incapacitated from active participation in democratic governance by depriving them of information pertinent to enforcement of good governance.



The strategy for combating political corruption, therefore, is to avoid focusing narrowly on law and institutional reforms based on the Western concept of good governance. Rather, emphasis ought to be placed on the establishment and strengthening of social accountability through new methods of active participatory governance. Efficacy in social accountability will eventually breed political leadership with the political will befitting the changing needs and aspirations of the Malawi citizenry, and national values that will ensure a viable future. This can be achieved with a citizenry well-informed of (a) its rights to equitable access to public resources, and the duties of the government leadership, (b) the evils of political corruption and corruption in general, and their impact on its rights, and (c) the urgent need for concerted efforts of the

citizens themselves to combat corruption at all levels. To achieve this feat will require reforms and technical assistance as recommended below.

5.2 Recommendations

Besides the solutions already offered in chapter four, this paper proposes the recommendations which follow. These recommendations recognise the fact that effective anti-corruption measures require a symbiotic relationship between legislative measures and non-legal measures; and that political will cannot be achieved and sustained only upon enhancement of social (bottom-to-top) accountability.

5.2.1 Building social accountability mechanisms

This paper recommends implementation of Article 13 of UNCAC which prescribes participation of civil society in the fight against corruption by raising public awareness regarding the evils of corruption and its impact on the society. This concept of re-socialisation³²⁸ was discussed extensively in chapter four.

The concept of re-socialisation ought to be implemented in two ways. Firstly, it should involve public awareness campaigns by politically neutral bodies such as non-governmental organisations, civil society organisations and activists.³²⁹ Secondly, the Malawi government should introduce public education programmes into school curricula in order to widen the spectrum of the anti-corruption campaign. Once the populace appreciates the ill effects of

328 Carr (2007) 243.

329 Carr (2007) 245.

political corruption, its impact on the society, and what role the citizenry can play to curb it, it will condemn and fight corrupt practices regardless of the status of the perpetrator. That is to say, corrupt practices will be considered normatively evil regardless of the social status of the perpetrator. Public officials, in turn, will perceive the high cost of indulging in corruption, including removal from office, prosecution, and deprivation of illicitly gained property.³³⁰ Consequently, public officials will choose to pursue good governance for fear of adverse citizen reaction.³³¹

5.2.2 Enactment of access to information legislation

This paper advocates the enactment of an access to information law for enforcement of the constitutional right of access to information.³³² This law is fundamental to the pursuit of social accountability through the concept of re-socialisation. With information, the populace will participate fully in the democratic governance of the Republic of Malawi.³³³

5.2.3 Law on declarations of assets

An effective fight against political corruption requires measures to ensure that public officials declare their assets and liabilities before they assume public office. This is aimed, *inter alia*, at curbing illicit enrichment. This paper recommends the enactment of legislation for the enforcement of sections 88A and 213 of the Constitution. The law ought to permit public access

330 Treisman (2000) 404.

331 Ocheje (2011) 264.

332 Section 37 of the Constitution.

333 Sections 12 and 37 of the Constitution. See also Neuman (2002) 5.

to records of declarations made by public officials. This recommendation was discussed in detail in chapter four.

5.2.4 Regulation of political party funding

This paper further advocates the enactment of legislation to regulate political party funding.

The law would curb the abuse of public resources by ruling parties that run party political business using public resources. Thus, the law ought to prescribe declarations of political party funding from any source, mandatory auditing of political party accounts, and clear separation between state and party functions.

5.2.5 Technical assistance

This paper strongly recommends that the donor community participating actively in anti-corruption law reform in Malawi should refocus its attention towards mobilisation of a vibrant civil society for an outreach programme. This recommendation is derived from the recommendation to build and strengthen social accountability through the concept of re-socialisation. Effective implementation of re-socialisation would require a buoyant civil society that will take the anti-corruption message to the rural communities. There would be need for adequate resources and training to ensure fruitful results.

Further, technical assistance would be required for the introduction of anti-corruption subjects into primary, secondary and tertiary education curricula.

In summary, therefore, this paper argues that unless concrete solutions are found for the obstacles to combating political corruption, Malawi will forever languish in the dungeon of

abject poverty. That is to say, political corruption will keep rising, with two consequences for the society. On the one hand, the politically connected few will have unlimited access to public resources such as good education and good health services, as well as wealth and unqualified opportunities for economic activities. On the other hand, the majority of the citizenry in rural areas will remain poor, without access to education, good health-care services, or to economic opportunities such as employment and business. This abject poverty will pass from generation to generation.



(17,821 words)

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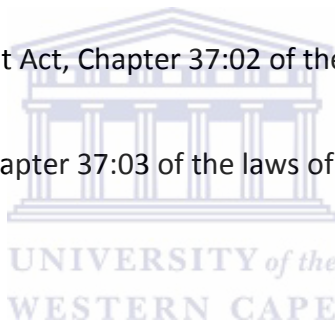
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