

COMBATING CORRUPTION: CHALLENGES IN THE MALAWI LEGAL SYSTEM

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I. INTRODUCTION

The term “corruption” has become a key word in determining a country’s world standing in terms of its peoples’ financial morals and capacity to deliver in terms of distribution of wealth. There are some countries, especially in the developing world, that are presumed to be potentially corrupt countries. In such countries, it is presumed that people cannot render their services unless the party that seeks services parts with a valuable commodity. In other instances, the party that seeks an offer to render the service has to part with a valuable commodity in order to get such a contract. Malawi is one of the countries that in the past ten years has had its image tarnished with the taint of corruption. In an attempt to correct its image, the country has developed a legal formula in the form of laws that are intended to prevent and correct the corruption disease. This paper is an attempt to discuss some of the challenges the Malawi legal system has so far faced in an attempt to deal with the corruption issue in the past ten years and up to the present. The challenges include: political interference; constitutional interpretation of fundamental human rights and its implication on corruption; the question of whether or not activities that suspects indulge in fall within the criminal justice arena or the civil justice arena; the sentencing pattern in corruption cases, especially whether or not the law should provide for minimum or maximum mandatory sentences; and lack of expertise in the legal authorities to determine and define corruption.

II. THE LAWS

A. The Penal Code

Prior to 1995 Malawi did not have a definite legal document that dealt with corruption issues. Like most commonwealth countries, issues of corruption were another chapter in the country’s penal laws. Hence we had the Penal Code which had a chapter that provided for corruption and abuse of office.

Section 90 of the Penal Code defined official corruption in the following manner. “Any person who:

- a) being employed in the public service and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done by him in the discharge of the duties of his office; or
- b) Corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any other person, any property or benefit of any kind on account of such act or omission on the part of the person so employed,

shall be guilty of a misdemeanor and shall be liable to imprisonment for three years”.

Under this particular provision, the law defined corruption as a misdemeanor and therefore not a serious crime. The law also provided the maximum sentence for a corruption case. The maximum sentence was three years. This made a mockery of the criminal justice system because as long as a matter fell under Section 90 of the Penal Code, the maximum sentence was three years. The monetary value of the service or benefit did not matter. At the same time, we had a provision in the same Penal Code that provided for the minimum mandatory sentences where a public officer who had been convicted of the offence of theft and the

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value of the property in issue did not exceed MK2000 (Malawi Kwacha) would be penalized with a mandatory custodial sentence of 12 months. If the value exceeded MK2000 the sentences would range from 2 years to 14 years on a graduating scale. Here one has to bear in mind that if the value of the stolen property was MK80,000 or above the culprit would serve a mandatory 14 year term in custody. Hence the country had a lot of its citizens complaining about the criminal justice system, the citizens' observation being that the criminal justice system tolerated corruption.

There was also the issue of prosecution in matters that fell under corruption and abuse of office. All matters of corruption and abuse of office could only be prosecuted by the Director of Public Prosecution or with his or her sanction. This had its repercussions. The office of the Director of Public Prosecutions was generally a political office in the sense that such a Director was appointed by the President and would report to the Minister of Justice. In the old Malawi regime, the Minister of Justice for most part was the president himself. It was the citizens' observation that this type of reporting system did not encourage transparency and would easily accommodate corruption.

B. The 1994 Constitution of the Republic of Malawi

As Malawians opted for a new Constitution in 1994 the Constitution attempted to protect the office of the Director of Public Prosecution by ensuring that there should be no interference in the performance of his or her job. This was done by providing procedures for appointment and removal from office of the Director of Public Prosecution in the Constitution itself. The Constitution thereby provides that appointment of the Director of Public Prosecutions shall be made by the President and confirmed by the Public Appointments Committee of Parliament. Where the President is inclined to remove a Director from office, the same should only be based on incompetence; or where the Director is compromised in the exercise of his or her duties to the extent that his or her ability to exercise his or her functions impartially is in serious question. These Constitutional provisions attempt to provide and ensure that the Director has general protection in the exercise of his or her duties in all matters, including corruption matters.

It was however once more observed by the citizenry that much as the Director of Public Prosecutions had Constitutional protection there were a lot of presumed corruption cases that were not being prosecuted. These observations resulted in the assembling as well as coming into force of the Corrupt Practices Act 1995.

C. The Corrupt Practices Act 1995

This was an attempt to provide for the establishment of an Anti-Corruption Bureau and to make comprehensive provision for the prevention of corruption. The functions of the Bureau include investigation as well as prosecution of corruption matters. With regard to prosecution, the Act provides that no prosecution for an offence can be instituted except with the written consent of the Director of Public Prosecutions. Consequently, much as the Independent Bureau had been created, and much as it could investigate and make a finding that there was need to prosecute, the Director of the Bureau could not proceed to prosecute without the sanction of the Director of Public Prosecutions. In the period in issue a lot of cases were reported as investigated and recommended for prosecution but not many such cases ended up in the courts. In some cases, matters would just be registered in the courts and there would be no prosecution. No reasonable explanation for non-prosecution would be provided. The suspects would consequently apply to court for discharge under the Criminal Procedure and Evidence Code. In the absence of reasonable explanation for non-prosecution, the court would discharge the suspects. In as much as such discharge does not operate as a bar to subsequent proceeding on account of the same facts, it is very rare for the prosecutors to seek reinstatement of such matters.

Then there was an attempt to address the issue of the mandatory maximum sentence as was provided in the Penal Code. To solve the problem of the mandatory maximum sentence, a mandatory minimum sentence of seven years was introduced in the new Corrupt Practices Act. This also had its own repercussions. It was observed that providing for a minimum mandatory sentence of seven years limited the sentencing court's discretion to provide a meaningful sentence where the nature of the offence did not invite such stiff sentence. It was thereby observed that courts would rarely convict suspects where, all things being equal, the nature of the offence did not justify a seven year custodial sentence.

In an attempt to resolve these problems, the Corrupt Practices Act was reviewed in 2004 and provided for the Independence of the Bureau by providing that the Bureau shall exercise its functions and powers

independent of the direction and interference of any other person or authority. In an attempt to ensure that the withholding of consent should not be abused by the Director of Public Prosecutions for purposes of scoring political points, an amendment was made to Section 42 of the Corrupt Practices Act in 2004 whose wording requires that if the Director of Public Prosecutions withholds consent he or she should firstly provide reasons for so withholding the consent to the Director of the Anti Corruption Bureau. Such reasons should be in writing and the basis for withholding of consent should only be based on fact and law. Secondly, the Director of Public Prosecutions should inform the Legal Affairs Committee of Parliament of those reasons within thirty days of the decision. Failure to do so entitles the Director of the Bureau to proceed as if the Director of Public Prosecutions had given consent. Despite these amendments the need for the Director of the Bureau to get the consent of the Director of Public Prosecution when it comes to prosecution of the matter still remains. Technically, the Director of Public Prosecutions still has the power to visit the court at any time if he or she so wishes and can withdraw a matter that is being prosecuted by the Bureau.

With regard to the provision of mandatory sentences, the minimum mandatory sentence was removed in the 2004 review and now judicial officers have discretion to impose sentences that are in tandem with offences charged. This has resulted in more prosecutions of minor corruption cases.

D. Political Interference

As discussed, above, the Constitution of the Republic of Malawi as well as the Corrupt Practices Act attempted to provide for offices of the public prosecutor and the office of the Anti-Corruption Bureau to be free from interferences. With regard to the Director of Public Prosecutions, the appointment by the President and confirmation by the legislature was envisioned as the best practice that would provide for checks and balances to ensure that the head of Public Prosecutions would perform his or her services impartially, without fear or ill-will. The lessons drawn from the provision however show that such provisions for checks and balances do not always work for the common good of the citizenry, as was envisaged in the Constitution. In the case of *Mary Nangwale and the Attorney General of the Republic of Malawi* the applicant was appointed by the President as the Inspector General of the Malawi Police Service. To all intents and purposes, she was capable of delivering as Inspector General, however, Parliament, of which the opposition political parties formed a majority, did not confirm the appointment. No reasonable explanation was given for non-confirmation. Political analysts' observations are that the application for confirmation was tabled at the wrong time. The office of Director of Public Prosecutions is equally designed to provide for checks and balances. The President can appoint a candidate to fill the post. However the appointment is subject to Parliamentary confirmation. If the majority in Parliament so wish, they can frustrate such appointments at the expense of the nation. And in the *Mary Nangwale* case the court ruled that the conduct of the members of Parliament in coming up with the position that they did was not subject to judicial review. The wording for the appointment of the Director of the Anti-Corruption Bureau, much as it is in the Corrupt Practices Act, also provides for such checks and balances.

The provisions for the Director of Public Prosecutions to provide a legal and factual basis for withholding consent within a 30 day period were also intended to ensure that there should be no political interference in the affairs of the Bureau. Probably, the shortsightedness of the proposers of this provision was that they could only see political interference from the political power that had the government of the day. The proposers probably never envisaged a situation that would result in having political interference either from the opposition parties or from both parties.

In a situation where the opposition parties have as much to lose from investigations and prosecution of their political leaders who are engaged in or have a record of corrupt practices both camps are likely to speak one language or bargain for the Director of Public Prosecutions and the Bureau to desist from investigating or prosecuting individuals who share their interests. To that extent, the reporting mechanism to the Legal Affairs Committee of Parliament may lack the drive for ensuring that matters of corruption be investigated and prosecuted. This is because the Legal Affairs Committee of Parliament is a body whose composition is of the different political parties that are represented in Parliament.

E. Corruption Matters in Court

1. Prosecutorial Challenges

(i) Lack of Expertise

Lack of expertise has infected all sections of the criminal justice system.

(a) Investigators

It is difficult to come up with a good prosecution record in a corrupt society when the people that are mandated to investigate such matters lack the requisite investigative skills. As stated elsewhere, corruption does not fall under the 'just another criminal case' category. It therefore becomes imperative that the investigators should have the expertise and skill to know how to conduct investigation of corruption matters. The investigators of the Bureau lack the same.

(b) Prosecutors

Most of the prosecutors of these matters are very young and inexperienced junior lawyers. Lack of experience and expertise in presenting to a court evidence which demonstrates the elements of a crime results in failure of prosecution. In a country where there is no sufficient incentive to entice lawyers to work in the public service, some of the corruption matters are actually prosecuted by non-lawyers. Where the prosecution is by non-lawyers who do not have the requisite experience, the situation becomes worse.

(c) Judicial Officers

Corruption matters in Malawi can be prosecuted in the magistracy, which are courts of first instance. Unless the value of the subject matter is exceptionally high or the prosecution is of the view that the likely sentence is beyond the jurisdiction of a magistrate, most criminal trials are conducted in the magistrate courts. The mandatory maximum sentence for corruption matters falls within the jurisdiction of the magistrate courts. The lack of officers with a legal background equally affects the judiciary. Newly appointed judicial officers can therefore be assigned a corruption matter where the suspect is represented by two or three seasoned lawyers who take turns at bulldozing and intimidating the freshman judicial officer. The situation becomes dire where the judicial officer is not only newly appointed but also has no legal background and the prosecutor has no experience.

(ii) Lack of Legal Mandate to Prosecute Related Offences

The other challenge that prosecutors from the Bureau face is one of lack of legal mandate to prosecute in criminal matters that are related to corruption but fall elsewhere than the Corrupt Practices Act. Where the Director of Public Prosecutions gives consent to prosecute a particular charge it becomes difficult for the corruption prosecutor to vary the charge or provide an alternate charge to which consent had not been given.

(iii) Evidential Burden

Since in corruption matters exchange of gains is not done in public, it becomes difficult for prosecutors to identify witnesses who can adequately provide the requisite evidence in court. In some cases, the witnesses are the co-offenders, and in such instances, the prosecution labours to establish its case as its witnesses tend to be hostile in court. In other instances the credibility of such witnesses' testimony is suspect and prosecutors grovel in court.

(iv) Corruption Prosecution versus Human Rights Provisions

The Malawi experience is that corruption matters take a long period of time in the justice delivery system and often do not reach any conclusion. The Constitution of the Republic of Malawi provides for the right to a fair trial of an accused person, which includes the right to public trial before a court of law within a reasonable time after having been charged. There are however a lot of corruption suspects who were charged with offences under the Corrupt Practices Act, yet such cases are not coming to any finality. The prosecution service is persistently failing to prosecute or conclude prosecution of such matters. This interferes with the suspects' rights. As the Constitution provides for speedy trial there is need for such suspects, once charged, to go through the criminal justice system within a reasonable time.

Where a convict has been sentenced to a custodial sentence, he or she will suffer the conditions of prison. The Malawi prisons are very old, most are in a dilapidated state and are usually overcrowded. Section 19 of the Malawi Constitution provides that during the enforcement of a penalty, respect for human dignity shall be guaranteed; and no person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment. In *Yusufu Mwawa v Republic* a Minister was convicted and ordered to serve a custodial sentence. He suffered a stroke whilst in custody. The system had no place to keep him other than the prison, which did not have an appropriate environment for convicts with his disadvantage. The sentencing options are also silent in terms of catering for such instances.

(v) Corruption – A Case for Civil Remedy or Criminal Remedy

In most of the high profile corruption matters that Malawi has suffered, the same have been in the form of high profile politicians seeking a contract with the government to render a service; collecting the consideration and failing to perform or deliver. Millions of *kwachas* have been lost in the process. As the parties that have failed to deliver have been undergoing prosecution for corruption the questions that the courts have been asked to determine have been whether or not the suspects have committed a criminal act or are in breach of a contractual agreement.

(vi) Standard of Proof

As collection of evidence in corruption matters has proved a challenge to corruption investigators, attempts have been made by the corruption prosecutors to persuade the court to lower the standard of proof. The standard of proof in corruption matters still remains one of proof beyond reasonable doubt. Yet to prove the elements of corruption is no mean feat as the standard of proof is on the higher side and the Anti-Corruption Bureau's success record on enforcement (prosecution) is lacking. At the same time, the courts have noted that since corruption is a criminal offence the standard of proof in such cases can never be reduced.

Proving a corruption case beyond reasonable doubt thereby remains a challenge that the Anti-Corruption Bureau has yet to deconstruct.

(vii) Burden of Proof

As with all criminal offences the burden of proof in corruption matters remains with the State except for exceptional circumstances that are actually stipulated by statute. This is another challenge that the prosecution faces where to all intents and purposes there is a public officer who on the face of it appears to be engaged in corrupt activities but the burden lies on prosecutor to establish that the officer is engaged in corrupt practices.

Section 32 of the Corrupt Practices Act attempts to take care of this challenge by creating the offence of "possession of unexplained property" which shifts the burden of proof to the suspect. At the same time Section 42(2) (f) (iii) of the Constitution provides a suspect with the right "to fair trial which includes the right to remain silent during plea proceedings or trial and not to testify during trial".

There are differences in the application and interpretation and conciliation of these two provisions in different courts. Whereas some courts have applied the statutory provisions whilst taking cognizance of the Constitutional provisions and concluded that the statutory provision is unconstitutional, there are other courts which have realized that the statutory provision is actually constitutionally sound as not all human rights provisions are non-derogable. Hence Section 32 of the Corrupt Practices Act is a deliberate intention of parliament to curtail some rights of a public officer who abuses the public office for personal gain.

A standard direction from the court that is mandated to provide guidance is yet to be provided. This creates a loophole in the criminal justice system.

2. Corruption and Judicial Officers

(i) Review and Confirmations

The Criminal Procedure and Evidence Code provides for the review of matters concluded by the magistrate courts where conviction and sentences in varying degrees are imposed. This provides opportunity for the higher court to monitor the patterns and trends of judgments of the lower courts. The limitation however is that no such mechanism is provided where a hearing concludes in an acquittal. This potentially gives judicial officers windows to engage in clandestine activities.

(ii) Uniformity in Sentencing

Once a corruption matter is concluded and a guilty verdict is rendered, the biggest challenge for judicial officers becomes provision of sentences. Whilst appreciating that no two cases are alike, the sentences have a predictability in terms of type of sentence and number of years the convict should serve a custodial sentence. In the Malawi attempts have been made by the Supreme Court to come up with sentencing practice directions for offences that fall under some other criminal provisions of some other statutes. No

such direction has as of yet been introduced for corruption cases. Discretion for judges to provide meaningful sentences on a case per case basis cannot be over-emphasized. At the same time, there is need to take cognizance of the fact that in a system where no leverage is introduced for the use of the discretion, discretion can be abused. Lack of practice direction from the Supreme Court on sentencing for corruption cases therefore potentially gives room for abuse of the discretion.

III. CONCLUSION

To curtail most of the challenges that Malawi is facing, there is need for legal reform; the consent of the Director of Public Prosecutions in matters that fall within the ambit of the Corrupt Practices Act needs to be revisited and abolished. A revision of the provisions that deal with checks and balances of the appointing and confirming bodies also needs to be revisited. The appointing body for the Director of the Bureau should be an independent body that has no political affiliations. The Bureau should also be accountable to a body that has no political affiliations.

Adequate resources for the criminal justice players to ensure that they have the necessary expertise and resources to investigate, prosecute and deter should also be considered.

There is a need for society as well as for the courts to appreciate that, much as corruption matters are criminal matters, they are not ordinary criminal matters. The prosecution of corruption matters needs to be expedited to ensure that the same complies with Constitutional provisions. The judicial officers and prosecutors need ongoing, product-tailored training to ensure that they appreciate the nature and intricacies of corruption. Sensitization of the public at large to ensure that witnesses do not end up being hostile in the courts should also be implemented.

REFERENCES

Malawi. Chapter 1 of the Penal Code, Chapter 7:01 of the Laws of Malawi.

Malawi. Penal Code, Section 95.

Malawi. Penal Code, Section 283(4).

Malawi. Corrupt Practices Act.

Malawi. Corrupt Practices Act 1995, Section 42(1).

Malawi. Corrupt Practices Act, Section 42(2).

Malawi. Criminal Procedure and Evidence Code, Section 81.

Malawi. Constitution of the Republic of Malawi, 1964.

Malawi. Constitution of the Republic of Malawi, Section 42(f)(i).

Malawi. Constitution of the Republic of Malawi, Section 102, 103.

Mary Nangwale and the Attorney General (Misc Civil 1/2005)

Republic versus Kadwa (CRM Blantyre Criminal Case (uncompleted))

Republic versus Kathumba and others