

**CHALLENGES IN THE FIGHT AGAINST
CORRUPTION IN MALAWI**

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SOME THOUGHTS

By

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On 17th May 1995, a new Democratic Constitution came into effect after over three decades of what most political commentators have called a dark era of one party dictatorship in Malawi. The new Constitution which, through its fundamental principles, expressed the new Democratic Malawi's commitment to public trust, transparency, financial probity and good governance.¹ In conformity with this commitment, the President gave his assent to the Corrupt Practices Act no 18 of 1995 on 1st December 1995. The first Director and Deputy Director of the newly established Anti Corruption Bureau officially took up their positions on 1st March 1997. The Bureau commenced full operations on 9th February 1998.

Since the constitutional establishment of the Anti-Corruption Bureau (herein after referred to as the ACB) and the enactment of the Corrupt Practices Act (CPA), a lot of legal and social-political developments have taken place in Malawi. Despite relative public display of political will by a minority of the political elite, the campaign against corruption has yielded a considerable amount of positive results. Today, many of our people on both sides of the social-political and intellectual divide immensely appreciate that corruption is an evil which only benefits a few individuals at the expense of major development projects².

However many continue to ask why there has been slow progress in the fight against corruption despite numerous multi-concerted efforts by the Malawi Government and its development partners. This report will aim at teasing out some thoughts at the challenges Malawi faces in the fight against corruption.

Institutional Incapacity.

The ACB, a body charged with the responsibility of arresting corruption in Malawi is understaffed in terms of legal expertise. The ACB has very few lawyers to prosecute the many cases that have been registered in the preceding years³. Every time new lawyers are recruited they end up leaving

¹ Section 13 "introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence. in public institutions"

² See the Apex Case at <http://www.sdn.org.mw/ruleoflaw/acb> **The Bureau to continue with prosecutions in the Apex Case;** the allegation was that government officials awarded a contract to Apex who were not franchise holders for Land rovers at an inflated price. Investigations were concluded and a report submitted to government. Government cancelled the contract hence saved k150 million over the 110 Land rovers. However the Bureau is prosecuting Apex for misleading Bureau official during investigations according to Section 13 of the Corrupt Practices Act. This will be done through private lawyers.

for greener pastures in private companies and law firms due to inadequate compensation⁴. For some 3 years now the ACB has had no Deputy Director. The last Director's appointment was rejected by the Public Appointments Committee (PAC) of Parliament.⁵ A new Director has just been appointed and already the opposition which dominates parliament is threatening to reject his name. The legal implications of this are very clear. He can not execute the functions of his office, give consent to investigate or prosecute any matter since he has no standing in the Malawian courts. In essence the Anti Corruption Bureau has no Director and therefore new cases can not be processed.⁶

The High Profile Cases Syndrome

Since its inception the Anti Corruption Bureau has suffered what can be described as the **“high profile cases syndrome”**. Time and time again the ACB through the media has gone very public after arresting high profile figures like the individuals (former ministers) involved in the infamous Ministry of Education case otherwise known as the **“K187 million Education case”** and the **Fieldyork scandal**⁷. These cases have not been

2 Reports and complaints received

<i>BLANTYRE</i>	<i>LILONGWE</i>	<i>MZUZU</i>	<i>TOTAL</i>
3082	4620	487	8189

1. ACTION TAKEN ON COMPLAINTS RECEIVED

<i>Action</i>	<i>Blantyre</i>	<i>Lilongwe</i>	<i>Mzuzu</i>	<i>Total</i>
<i>Authorized for Investigation (a)</i>	255	1364	67	
<i>Authorized for prevention</i>		124	20	
<i>Complaint referred to other institutions (b)</i>	294	1017	67	
<i>Awaiting Director's approval (c)</i>	830	6	Nil	
<i>Non-pursuable cases (d)</i>	1,703	2109	394	
SUB TOTAL	3,082	4,620	548	

⁴ Currently there are only four lawyers in the entire organisation to prosecute the above cases.

⁵ He continues to remain in office despite the expiry of 21 days under the authority of S.8 CPA. He is seen like a pony in a game of chess between the executive and parliament.

⁶ All complaints received by the Bureau are examined by the Director who decides whether or not to order an investigation in accordance with Section 11 (1) (a) of the Corrupt Practices Act. In cases where the Director decides not to investigate because the complaint is not of corruption, but information indicates malpractice of other kinds, the complaint is referred to the particular institution named for appropriate action to be action. The Bureau monitors the process. See official website of the ACB.

⁷ See official website of ACB at <http://www.sdn.org.mw/ruleoflaw/acb>. **K187 Million kwacha Ministry of Education case in court soon.** The Anti-Corruption Bureau has started prosecuting 17 suspects in the K187 Million Education case. Speaking during an interview, the Senior Investigations Officer, **Mr. Geoffrey Chikuta** said, preparations for the case are now through. The Bureau is parading seventeen suspects and twenty two witnesses at the High Court in Lilongwe starting on 5th June, 2002. The dates set for the hearing are 18th June to 21st June, 2002, 2nd July to 5th July, 2002. The key suspects in the case are **Ms Gresselder Geoffrey** a contractor who is alleged to have obtained K66 million from Treasury to do

completed for many years now thereby raising concern as to the capacity of the ACB and its current officer holders. Many political and legal experts predict that the recent **Bakili Muluzi**'s Corruption case will suffer the same fate and yet a lot of resources have been spent in investigating this particular case both within and outside Malawi⁸. The most notable high profile cases that the ACB has successfully prosecuted to finality are **Rep vs. Dr Sam Safuli** and **Rep vs. Dennis Kamabalame**⁹.

Despite this institutional policy misdirection, positive results have been achieved in the smaller cases involving ordinary Malawians. In all the four judicial regions, magistrates' courts have pronounced judgments in so many corruption cases¹⁰. The most notable case as reported on the ACB official website is the case involving a judicial officer (lay justice) decided by the lower court;

Magistrate slapped with 6 years imprisonment

George Saulos Chirombo a 2nd grade magistrate for Chikwawa Court was sentenced to 6 years imprisonment with hard labour for corruptly receiving K2,000 from Mr. Damiano Shovela as an inducement to pass a suspended sentence against Mary Shovela who had carried out an illegal abortion. In addition, magistrate Chirombo was ordered to pay back the K2,000.00 he had received from Mr. Shovela a father to Mary Shovela. The six years was with effect from 1st October, 2001 the day magistrate Chirombo was arrested by the Bureau. The judgment was passed on 28th May, 2002.

contracting work on behalf of government and only did work worth K10 million and **Mr. And Mrs. Kathumba** who are alleged to have pocketed K20 million. The government has lost over K187 million kwacha over payments on contracts that were not done or not completed. The fieldyork scandal involves former MP Sam Mpasu who is also UDF spokesperson.

⁸ Muluzi, who ruled **Malawi** [CIA backgrounder] from 1994 to 2004, had been charged with 42 counts of corruption, fraud and theft arising from allegations that he directed campaign contributions into his personal accounts through the Malawi embassy in Tunisia. South Africa's Mail & Guardian has **more**. See report at, <http://jurist.law.pitt.edu/paperchase/2006/08/Malawi-president-demands-top.php>

⁹ Both cases went to the Supreme Court of Appeal and they are unreported. Suffice to say that Dr Safuli was eventually acquitted of all charges. See report at Jurist Legal News and Research. Thursday, August 03, 2006, **Malawi ex-education secretary gets jail sentence as Anti-Corruption sweep continues** Holly Manges Jones at 12:09 PM ET, [JURIST] A Malawi court Wednesday sentences the former principal secretary in the country's **Ministry of Education** [official website] to two years in jail for "aiding and abetting the theft of public funds," making him the most senior civil servant to be sentenced as the African nation continues a crackdown on corruption. Sam Safuli was originally suspended in 2000 from his post as Education Secretary and has been found guilty of authorizing a \$1,000 payment to a building contractor in 1999 even though the builder never finished his contract to complete a school construction job.

¹⁰ See **Rep vs. Khowoya** CRM (N) Crim Case No 34 of 2006 (unreported) and **Rep vs. Mzilahowa** and another CRM (N) Crim Case No 42 of 2005 (unreported)

Lack of Independence

Before the CPA was amended¹¹, the Director had the power to proceed with prosecution without having recourse to any body or person. This allowance was seen by some politicians as giving too much power to the ACB. The fear was that the Director was bound to abuse his/her position. In actual fact the said politicians were afraid of the powers for their own selfish reasons. After the amendment, the Director must now seek consent from the Director of Public Prosecution (DPP) before prosecuting a matter¹². Although the DPP is duty bound under law to give reasons for refusing to grant consent, the amendment is likely to make the Anti Corruption Bureau toothless¹³. The current impasse between government and the opposition as to the appointment of a new Director is a clear manifestation of how the ACB has been politicized in recent times and thereby losing its inherent institutional independence.

Political Interference

The other major problem is political interference by the political elite and their business associates. Since the Director and his Deputy are appointed and removed by the President with the confirmation of the Public Appointments Committee (PAC), issues of loyalty still dictate the order of business. After the arrest of Dr. Bakili Muluzi, the former president on corruption charges, it is alleged the President intervened and ordered the ACB Director to pend the process until he was further advised¹⁴. He was suspended and eventually removed from office. When the Director of Public Prosecution went to court to discontinue the case as was expected in the circumstances, he was ordered to resign within 24 hours after Malawi's major development partners had queried government on the wisdom of such a move¹⁵. This kind of interference by the political elite is detrimental to the fight against corruption and the rule of law in general.

¹¹ S. 43 and 44 was repealed by Act no 17 of 2004. CPA.

¹² S.42 CPA No prosecution for an offence under this Part IV shall be instituted except by or with the written consent of the Director of Public Prosecutions. Courts are expected to see the actual certificate granting consent before hearing any matter under the Corrupt practices Act

¹³ S.42 (2) the DPP in addition to providing reasons to the Director must inform the Legal Affairs Committee of Parliament of his decision within 30 days. If no reasons are given within 30 day, the ACB can proceed.

¹⁴ The reasons for the pendency were political. The budget was being discussed in parliament and opposition MPs has threatened to reject the annual budget.

¹⁵ See article by Jurist Legal News and Research, University of Pittsburgh School of Law at <http://jurist.law.pitt.edu/paperchase/2006/08/malawi-president-demands-top.php> . **Thursday, August 10, 2006, Malawi president demands top prosecutor resign over dropped corruption charges** Joshua Pantesco at 12:56 PM ET, JURIST] Malawi President Bingu wa Mutharika on Thursday called for the resignation of Ishmael Wadi, DPP, who in July dropped corruption charges against **Former President**

After the removal from office of the ACB Director and the DPP many legal and political analysts concluded that the ACB could no longer retain the respect, integrity and force of law it had commanded prior to these events. The other major worry is that the ACB Director is required under law to submit reports to the President and the Minister of Justice instead of parliament¹⁶. This is likely to compromise his independence.

Lack of Expertise in the Judiciary.

The other major obstacle that has compounded the problem in the fight against corruption in Malawi is within the court system itself. Corruption as a specialized regime of law is relatively new to the Malawi's legal fraternity. The CPA is a new Act which requires special understanding. The rules of procedure and evidence are much more complex than in all other criminal cases. The adhoc training that the judiciary has received so far has predominately been confined to professional magistrates (lawyers) who sit as courts of first instance in corruption cases. Unfortunately there are very few professional magistrates who are also confined in urban centers¹⁷. The majority of District Courts are manned by lay justices who do not always comprehend technicalities of trial under the Corrupt Practices Act¹⁸.

Corruption as an enterprise is not done in public and culprits rarely leave traces behind. It therefore takes much effort and legal thinking to appreciate and analyze evidence in corruption cases.

Interpreting the Corrupt Practices Act.

The second issue that criminal courts face in Malawi is how to deal with S 32 which creates the “*reversal burden of proof*” under the CPA¹⁹. Many legal experts have argued that the provision is unconstitutional because it

Bakili Muluzi on the eve of Muluzi's trial. Muthalika, who was elected as Muluzi's hand-picked successor on a platform of ending government corruption, suspended the director of the ACB in July before the charges were dropped. Wadi previously said the charges against Muluzi were dropped because after the ACB director was fired, no one was left to prosecute the government's case because under Malawi procedure, only the ACB director can prosecute such cases.

¹⁶ S. 4(4) CPA the Director shall report to the President and the Minister regarding the general conduct of the affairs of the Bureau. General can include whom to investigate and arrest.

¹⁷ There are 21 Professional/lawyer Magistrates in Malawi against a population of 13 million. Only two of these are stationed in Dedza and Ntchinji districts.

¹⁸ Lay justice/magistrates do receive some training in basic law. Although the Judiciary has endeavored to train these in many aspects of the law, there is still need for more training at Diploma level.

¹⁹ Possession on unexplained property is presumed illegally obtained unless the one possessing gives a reasonable explanation of how he came by the same.

calls upon the accused to explain himself thereby removing his/her right to remain silent²⁰. The matter has been referred to the Constitutional Court for interpretation and meanwhile several matters continue to pend awaiting direction from the Constitutional Court. The real problem is defining what reversal burden of proof is. When the burden of proof has shifted to the suspect does the standard remain “*beyond reasonable doubt*” or “*on a balance of probability*”? Most legal experts hold the view that the standard of proof does not change as far as the accused is concerned. There is very little jurisprudence that has emerged from the High Court and these are some of the practical challenges lower courts face when trying corruption cases.

Way Forward

For the fight against corruption to succeed there is need for a multisectoral approach to the issues raised in this brief write up.²¹ Malawi needs a strong political will which must come from both sides of the political isle. Attractive compensation for lawyers and other staff will ensure that there are strong investigation and prosecution teams which will serve the Anti Corruption Bureau diligently. The ACB must put its house in order of priority. The term “*first come first serve*” should apply. It is high time the ACB had treated all cases equally other than prioritising the so called high profile cases²². The people of Malawi want results and this can only be achieved if all cases are prosecuted expeditiously.

Most importantly at this point in time the executive branch should resolve at the earliest opportune time the current crisis with the Public Affairs Committee of Parliament so that a new Director is appointed or the incumbent confirmed. A compromised candidate will surely be confirmed. The current stalemate is detrimental to the fight against corruption and it is the rule of law which will sure at the end of the day.

It is strikingly sad to note that Parliament had put restrictions on the liberty of the Director to decide whom and when to prosecute. The need for him to seek consent from the DPP can easily affect operations of the Bureau. The

²⁰ S42 (2) (f) (111) every accused person has a right to a fair trial which shall include the right to be presumed innocent and to remain silent during plea, trial and not to testify during trial. See **Rep Vs. Dennis Kambalame** High Court of Malawi (unreported)

²¹ The ACB alone can not fight corruption. It is the responsibility of every Malawian to join in the battle to eradicate corruption in this country. The **zero tolerance campaign** initiated by the President should be supported and people from all sides of the political divide should feel the heat.

²² The ACB must first clear its backlog of cases which were registered earlier rather than concentrating on new high profile cases.

same applies to the requirement that the Director should report to the President and Minister generally. This requirement can easily be abused. An amendment allowing the Director to report to the legal affairs of Parliament or the whole Chamber once a year will ensure transparency in all operations of the ACB.

The current initiative to train members of the judiciary is a step in the right direction. However these endeavours should be concentrated in the lower ranks where a greater percentage of corruption cases are tried. It is hoped that in the near distant future the lay justices will be trained so that corruption cases are dealt with at district level with minimum amount of delays. In the mean time, professional magistrates and judges have a duty to develop jurisprudence in this new area of law. The issues raised in this report about the evidential technicalities and the reversal burden of proof should be dealt with as soon as is possible.

The path that Malawi has chosen in the fight against corruption is the right one. In this vein it is urged that Malawi's development partners should continue to assist the government of Malawi in this mammoth task. A concerted effort is but the way forward.

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Ethiopia