



A Human Rights-Based Approach to combating Corruption in Malawi

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Dedication

To my dad. If you can see your bambino now, I hope you are proud.

To my mom, Micah and Kara. Everything I am, everything I do, is for you guys.

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Finally, and most importantly, I would like to thank God for having brought me this far.

Plagiarism Declaration

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Acronyms and Interpretations

ACB	Anti-Corruption Bureau
AU	African Union
CPA	Corrupt Practices Act
CSO	Civil Society Organisations
DFID	Department for International Development
DPA	Deferred Prosecution Agreement
DPP	Director of Public Prosecutions
FCA	Financial Crimes Act
FIA	Financial Intelligence Authority
FSO	Financial Services Organisation
HRBA	Human Rights-Based Approach
IPDC	Internal Procurement and Disposal of Assets Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NACS	National Anti-Corruption Strategy
PPDAA	Public Procurement and Disposal of Assets Act
SGR	Strategic Grain Reserve
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
CPS	Crown Prosecutions Service
NCA	National Crimes Agency
PCCA	Prevention and Combating of Corruption Act

Interpretations

African Charter	African Charter on Human and Peoples' Rights
AU Convention	African Union Convention on Preventing and Combating Corruption
Declaration of Assets Act	Public Officers (Declaration of Assets, Liabilities and Business Interests) Act
SADC Protocol	SADC Protocol against Corruption
The Constitution	The Constitution of the Republic of Malawi

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Chapter one

Introduction and Background

1.1 Background of the Study

The dawn of multiparty democracy in Malawi in 1994 came with a visible scourge of corruption.¹ Previously, corruption was not a serious crime in the country as it was classified as a misdemeanour under the Penal Code² and carried a maximum sentence of 3 years.³ This has been attributed to various factors, including Malawi's authoritarian state.⁴ After independence, Malawi's first president, Dr Banda, used the state as a personal vehicle for himself and the Malawi Congress Party (MCP).⁵ The lack of separation between party, president, and state made it difficult to determine if there was resource abuse or corruption.⁶ Further, the stifling of freedom of expression meant that there was a low likelihood that corruption by public officials would be reported.⁷

Post 1994, it is argued that there was a democratisation of corruption in Malawi which led to a visible increase in corruption cases perpetrated mainly by government officials.⁸ Thus, the Corrupt Practices Act (CPA) was adopted in 1995 to establish the Anti-Corruption Bureau (ACB), which was mandated to investigate and prosecute corruption and make comprehensive provisions for preventing corruption and all matters incidental thereto.⁹ Following this, in 2005, the ACB arrested former president Bakili Muluzi on corruption and fraud charges.¹⁰ The discovery of what was popularly known as the 'cashgate' scandal in 2014 provided further evidence regarding the proliferation of corruption in Malawi. This scandal involved civil

¹ G Anders 'Like chameleons, civil servants and corruption in Malawi' (2002) 23-24 *Bulletin de l'APAD* 4.

² Penal Code, Chapter 7:01 of the Laws of Malawi.

³ I Kamanga 'Combating corruption: challenges in the Malawi legal system' https://unafei.or.jp/publications/pdf/RS_No76/No76_17PA_Kamanga.pdf (accessed 1 May 2024).

⁴ Anders (n 1) 5.

⁵ G Anders *In the shadow of good governance: an ethnography of civil service reform in Africa* (2010) 124.

⁶ Anders (As above).

⁷ As above.

⁸ Anders (n 1) 5.

⁹ Chapter 7:04, Laws of Malawi, see preface.

¹⁰ 'Ex-President Muluzi denies Malawi corruption charges' *BBC News Africa* 14 September 2010 <https://www.bbc.com/news/world-africa-11296599> (accessed 15 July 2024).

servants from low to upper management who were involved in the looting of hundreds of millions of dollars.¹¹ At the height of the COVID-19 pandemic, a minister of labour was fired, and a large number of civil servants were arrested for abusing funds meant for battling COVID-19.¹² An investigation by the Ombudsman uncovered that a large chunk of the funds were used as allowances for public servants as opposed to buying protective equipment.¹³ In 2022, a case of state capture by a businessman was unravelled, involving high-ranking government officials such as the vice president, the president's chief of staff and the Inspector General of police, among others.¹⁴

Despite multiple arrests and suspensions, no progress has been made in prosecuting corruption cases. The DPP discontinued former president Bakili Muluzi's case after over 15 years in court.¹⁵ The case of the Vice President was also discontinued by the DPP, citing national security issues.¹⁶ Further, cases involving many suspects arrested for abusing funds meant for managing the COVID-19 pandemic have stalled.¹⁷

Apart from the CPA, the state also relies on the Financial Crimes Act, 2017¹⁸ which introduced the concept of asset forfeiture with regards to the proceeds of crime, the Public Procurement and Disposal of Public Assets Act (PPDAA)¹⁹ which regulates the procurement of public property, the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (Declaration of Assets Act)²⁰ which provides for the monitoring of public officers and their assets to curb unexplained wealth, Access to Information Act,²¹ which makes provision for

¹¹ SW Kayuni 'Running to standstill: Reflections on the cashgate scandal heist in Malawi' (2016) 19 *Journal of Money Laundering Control* 170.

¹² 'Malawi fires labour minister, arrests officials over misuse of Covid19 funds' *Reuters* 18 April 2021 <https://www.reuters.com/world/africa/malawi-fires-labour-minister-arrests-officials-over-misuse-covid-funds-2021-04-18/> (accessed 15 August 2024).

¹³ Office of the Ombudsman 'Call for effective, efficient and accountable public resources management: systemic investigations on Covid-19 response funds management' (2022) 1.

¹⁴ 'Malawi vice president arrested by anti-corruption bureau' *Aljazeera* 25 November 2022 <https://www.aljazeera.com/news/2022/11/25/malawi-vice-president-arrested-by-anti-corruption-bureau> (accessed 7 May 2024).

¹⁵ 'Muluzi freedom raises queries' *Nation Online* 30 May 2023 <https://mwnation.com/muluzi-freedom-raises-queries/> (accessed 15 August 2024).

¹⁶ L Masina 'Anti-corruption advocates worry over dropping of Malawi VP case' *Voice of America* 7 May 2024 <https://www.voanews.com/a/anti-corruption-advocates-worry-over-dropping-of-malawi-vp-case-/7601748.html> (accessed 15 August 2024).

¹⁷ V Nyirenda 'K.6.2 billion covid-19 funds abuse: prosecution goes cold' *CIJM* 26 September 2023 <https://www.investigative-malawi.org/1576/k6-2-billion-covid-19-funds-abuse-prosecution-goes-cold/> (accessed 15 August 2024).

¹⁸ Chapter 7:07 of the Laws of Malawi.

¹⁹ Chapter 37:03 of the Laws of Malawi.

²⁰ Chapter 01:04 of the Laws of Malawi.

²¹ Act 13 of 2017.

citizens to access information about the government and its activities and the National Anti-Corruption Initiatives (NACS) which aims at promoting a culture of integrity.

Despite these legal frameworks, Malawi struggles with corruption, evident in its poor corruption index ratings. In 2023, it ranked 115 out of 180 countries with a score of 34 on Transparency International's Corruption Perception Index (where 100 is clean and 0 is corrupt) as compared to 2014, where it scored 33, indicating minimal progress in curbing corruption.²² Although the current government was elected on an anti-corruption campaign, most Malawians view corruption as being on the rise in the country.²³ There are also suggestions that corruption is being fought half-heartedly, with incidents of selective justice emerging where cases involving high-level government officials are being withdrawn before a full trial.²⁴

Corruption disproportionately affects the most vulnerable in society; thus, the effects of corruption are felt most of all by poor Malawians.²⁵ Corruption leads to the violation of human rights and has been said to be a violation of human rights in itself.²⁶ Corruption also thrives where human rights are violated with impunity.²⁷ In Malawi, rampant corruption has resulted in countries such as Norway and institutions such as the European Union and DFID withholding donor funds, which has led to the state's failure to provide basic necessities, impacting health, food, education, and living standards.²⁸ In 2001, Malawi sold the entirety of its Strategic Grain Reserve (SGR), and top government officials abused the funds realised from the sale.²⁹ When the country experienced a famine that same year, thousands of Malawians died due to lack of food.³⁰ Although the effects and terrible response to the famine has been attributed to several factors,³¹ the misappropriation of funds indirectly led to the violation of the Malawians' right to life and adequate food. During the COVID-19 pandemic, health

²² <https://www.transparency.org/en/cpi/2023/index/mwi> (accessed 1 May 2024).

²³ J Chunga & R Nedi 'Malawians dissatisfied with government efforts on corruption, want swift action against corrupt officials' (26 May 2022) *Afrobarometer Dispatch No. 522* <https://www.afrobarometer.org/wp-content/uploads/2022/05/AD522-Malawians-demand-swift-action-against-corrupt-officials-Afrobarometer-dispatch-25may22.pdf> (accessed 3 May 2024).

²⁴ n 15 & n 16.

²⁵ 'How corruption derails development in Malawi' *Foreign Policy Magazine* 21 May 2021 <https://foreignpolicy.com/2021/05/21/how-corruption-derails-development-in-malawi/> (accessed 3 May 2024).

²⁶ M Murray and A Spalding 'Freedom from official corruption as human right' (2015) *Governance studies at Brookings* 1.

²⁷ A Peters 'Corruption as a violation of International human rights' (2019) 29 *The European Journal of International Law* 1255.

²⁸ PG Strasser 'An anti-corruption bureau's inexorable endeavour: study of Malawi's *cashgate* scandal' (2016) 73 *Washington and Lee Law Review Online* 305-306.

²⁹ Anders (n 5).

³⁰ n 5.

³¹ n 5.

workers in Malawi protested due to insufficient protective equipment.³² However, a significant portion of funds allocated to combat the disease was misused by officials through questionable allowances and alleged mis-procurement.³³ In addition, there is a culture of informal payments to health workers in public hospitals.³⁴ All these actions by public officers have led to the violation of the right to health for poor Malawians.³⁵ These are some examples of how corruption often violates human rights and erodes democracy, undermining trust in state institutions.³⁶

1.2 Problem Statement

The anti-corruption framework in Malawi has been mostly punitive in nature and in line with the prohibitionist criminal law approach. Despite the presence of what appears, at least on paper, to be a comprehensive legal framework for addressing corruption, the scourge remains rampant in the country, thus eroding the ability of the citizens to enjoy fundamental human rights. Sadly, relevant stakeholders overlook corruption's impact on human rights. Resultantly, there has been little to no attempt to examine the role that a human rights-based approach could play in dealing with or at least mitigating the effects of corruption in Malawi or providing remedies to the victims. Recognising the limits of solely relying on criminal law to address corruption, an approach that is regarded as unrealistic and outdated,³⁷ the present study attempts to examine the role that a human rights-based approach could play in the anti-corruption fight in Malawi.

1.3 Research Questions

³² 'Malawi health workers protest against lack of protective gear' *Aljazeera* 14 April 2020 <https://www.aljazeera.com/news/2020/4/14/malawi-health-workers-protest-against-lack-of-protective-gear> (accessed 20 August 2024).

³³ S Nayupe and others 'Covid-19 fund mismanagement in Malawi: a major challenge to its effective pandemic containment' (2022) *Health Science Reports*

³⁴ A Mphande-Namangale & I Kazanga-Chiumia 'Informal payments in public hospitals in Malawi: the case of Kamuzu Central Hospital (2021) 6 *Global Health Policy* 1.

³⁵ As above.

³⁶ Chunga (n 23 above).

³⁷ J Hatchard 'Combating corruption effectively? the role of the African Court of Justice and Human Rights' in CC Jalloh KM Clarke & VO Nmehielle (eds), *The African Court of Justice and Human and People's Rights in context: development and challenges* (2019) 503.

This study mainly seeks to explore whether despite the robust legal framework in place, the anti-corruption fight in Malawi would benefit from a human rights-based approach. In achieving this, the main research question this study will be looking at is:

Whether the human rights-based approach can be utilised to complement the fight against corruption in Malawi?

In answering the main question, the study will look at the following sub-questions:

- (a) What is the impact of corruption on human rights in general and in Malawi in particular?
- (b) What does the human rights-based approach in combating corruption entail?
- (c) What are the anti-corruption laws in Malawi and how do they incorporate the human rights-based approach if at all they do?
- (d) How can a human rights-based approach be utilised to complement the anti-corruption fight in Malawi?
- (e) What lessons can be learnt from other jurisdictions implementing the human rights-based approach?

1.4 Hypothesis

The research contends that implementing a human rights-based approach, in which the citizens are participants in holding the state and perpetrators of corruption accountable for the human rights violations that result from corrupt practices, would offer a complementary route to the fight against corruption in which the people can see tangible results.

1.5 Literature Review

1.5.1 Corruption in Malawi

Camacho and Jenkins state that corruption in Malawi takes different forms including political corruption, clientelism and patronage, grand corruption and petty corruption.³⁸ They state that while there are a number of initiatives undertaken by the ACB such as NACS II and the

³⁸ G Camacho & C Jenkins 'Malawi: Overview of corruption and anti-corruption efforts' (2022) *U4 Helpdesk Answer* <https://www.u4.no/publications/malawi-overview-of-corruption-and-anti-corruption-efforts> (accessed 18 July 2024).

investigation and arrests of prominent politically exposed persons, corruption is still on the rise in the country.³⁹

Hussein categorises corruption in Malawi into petty corruption and grand corruption, with petty corruption being committed by low-level civil servants such as traffic officers and grand corruption being committed by high-level government officials such as the president and ministers.⁴⁰ Multiple authors like Hussein,⁴¹ Strasser,⁴² Anders and others attribute corruption, particularly by civil servants, to the economic context which includes high levels of poverty, inflation and lack of increase in wages. Anders and others, in their study, have shown that following the ‘cashgate’ scandal, in which civil servants looted state funds worth hundreds of million dollars, there has been little deterrence for other civil servants not to engage in corruption as they believe there is selective justice.⁴³ Most government officials hold the view that they will only be held accountable if they have no political affiliations to the ruling party of the time.

1.5.2 Localised approach to combating corruption

Several authors have emphasised the need to localise anti-corruption strategies to a specific cultural context. Maguchu, while advocating for a human rights-based approach argues for the use of the Ubuntu principle as a cornerstone in the fight against corruption particularly in Africa stating that this would be the best way in localising the human rights-based approach.⁴⁴ He argues that ubuntu promotes a culture of ‘people first’ which in turn encourages accountability, transparency and good governance.⁴⁵ Nkhata, while not necessarily promoting the human rights-based approach, still emphasises that there is need to understand the local intricacies that are peculiar to Malawi and that the solution should be one tailored to the Malawian context. He states that fighting corruption must be considered as a core Constitutional obligation.⁴⁶

³⁹ As above.

⁴⁰ M Hussein ‘Combating corruption in Malawi: an assessment of the enforcing mechanisms’ (2005) 14 *African Security Review*.

⁴¹ As above.

⁴² Strasser (n 28 above).

⁴³ G Anders, FE Kanyongolo & B seim ‘Corruption and the impact of law enforcement: insights from a mixed-method study in Malawi’ (2020) 58 *Journal of Modern African Studies* 315-336.

⁴⁴ P Maguchu ‘Localising the human rights-based approach to fight corruption: the role of ubuntu’ *Cross-cultural Human Rights Review* (2020) 2 5-22.

⁴⁵ As above, 17.

⁴⁶ MJ Nkhata ‘A hollow commitment? Constitutional promises and anti-corruption efforts in Malawi’ in C Fombad & N Steytler (eds) *Corruption and Constitutionalism in Africa* (2020) 212-234.

1.5.3 Freedom from Corruption as a human right

Murray and Spalding while advocating for a human rights-based approach in combating corruption, argue that the freedom from official corruption should be enshrined as a human right in domestic laws. The argument put forth is that recognising freedom from official corruption as a fundamental and inalienable human right would help to strengthen the conceptual underpinnings of anti-corruption norms, prioritise anti-corruption enforcement as a matter of policy, and concentrate that enforcement on improving the lives of victims of corruption.⁴⁷ Murray and Spalding focus on official corruption as it is regarded as ‘a principal cause of human suffering and deprivation.’⁴⁸ The recognition of freedom from corruption as a human right is echoed by Mubangizi, who advocates for the human rights-based approach while focusing on South Africa and Uganda. He argues that establishing a right to freedom from corruption would strengthen the human rights approach in both countries. The main advantage of a human rights strategy is that it empowers ordinary people to hold elected officials and public servants accountable and responsible. South Africa and Uganda could better utilize their national human rights institutions, such as South Africa's Public Protector and Uganda's Inspector General of Government, in the fight against corruption.⁴⁹

1.5.4 A holistic approach to combating corruption

Boersma states that the relationship between human rights and corruption is multifaceted.⁵⁰ She identifies 5 dimensions in the link between human rights and corruption which are; corruption and the violation of human rights being the product of the same environment, corruption as a violation of the citizen's human rights, the rights of a person accused of corruption, anti-corruption measures that violate the rights of the most vulnerable in society and finally, human rights that are necessary in combating corruption such as freedom of expression, association and the right to information.⁵¹ These dimensions highlight the need for a comprehensive strategy that addresses all aspects of this complex interplay as the curbing of corruption will further lead to a holistic enjoyment of human rights.

⁴⁷ Murray (n 26).

⁴⁸ As above.

⁴⁹ J C Mubangizi ‘A human rights based approach to fighting corruption in Uganda and South Africa: shared perspectives and comparative lessons’ (2020) 24 *Journal of Law, Democracy and Development*.

⁵⁰ M Boersma *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012) 56.

⁵¹ As above.

Hussein suggests that there is a need for a holistic approach in the fight against corruption in Malawi. He states that combating corruption cannot be for the ACB alone but other stakeholders such as civil societies, Constitutional bodies, independent bodies and the media must play a role in combating corruption.⁵²

1.5.5 Contribution to the existing literature

The current research agrees that there is need for a localised and holistic approach in combating corruption. It further agrees that corruption leads to human rights violations and is in itself a human rights violation. Thus, a human rights-based approach should be employed in combating it. This study will contribute to the existing literature by seeking ways to implement the human rights-based approach in the Malawian context to combat corruption effectively. The study will examine how law enforcement, the courts and other relevant stakeholders can incorporate human rights, accountability and citizen participation in the fight against corruption.

1.6 Methodology

This research employed a qualitative methodology utilising extensive desktop study. Data was collected and critically analysed from both primary and secondary sources. Primary sources included treaties, Malawian laws and policies on anti-corruption and human rights. Secondary sources consisted of scholarly books, journals, reports, credible news Articles.

The desktop research systematically reviewed and synthesised the collected data to identify key themes, gaps in existing frameworks, assess current anti-corruption measures through a human rights lens, and explored strategies for implementing a human rights-based approach in the Malawian context.

1.7 Scope and Limitations

This study focused specifically on corruption in Malawi and its impact on human rights. While the study explored corruption and human rights in South Africa and the United Kingdom (UK), this was strictly to draw lessons and inform recommendations, not for comparative analysis purposes. Although efforts were made to provide a comprehensive analysis, the study was limited by data availability and access to key stakeholders.

⁵² Hussein (n 40 above).

1.8 Overview of chapters

The study comprises five chapters. The first chapter introduces the research topic, outlining corruption's effects on human rights in Malawi along with the research questions, methodology, literature review, study scope and limitations.

The second chapter examines the framework guiding the research, focusing on concepts like corruption and its connection to human rights. It discusses the human rights-based approach to combating corruption and explores Ubuntu and social contract theories, highlighting their role in supporting HRBA implementation.

The third chapter analyses the legal and policy framework governing Malawi's anti-corruption fight and how they make a case for the implementation of the HRBA if at all they do.

Chapter four examines the connection between corruption and human rights violations in Malawi, focusing on health, food, and access to justice. It analyses how HRBA can bolster anti-corruption efforts, referencing approaches in the UK and South Africa. The UK, as a common law country and former colonial master, heavily influences Malawi's legal system. Further, since Malawi's Penal Code was adopted from the UK, this study examines the latter's evolution to incorporate human rights in combating corruption. Although South Africa has a hybrid legal system, it actively enforces socio-economic and human rights. This study examines the HRBA approach in Africa through South Africa's perspective.

The final chapter contains recommendations and conclusions.

Chapter Two

Conceptual and Theoretical Framework

2.1 Introduction

Chapter one has introduced the history and impact of corruption on human rights in Malawi and proposed a human rights-based approach (HRBA) as a complementary tool in the fight against corruption. This chapter will give an in-depth discussion of corruption as a concept and its link to human rights, with the aim of uncovering how they interconnect to inform the strategy that is HRBA for combating corruption. Additionally, the chapter will delve into the theoretical framework underpinning the research. By exploring the theories of *ubuntu* and social contract, the chapter aims to give the research a jurisprudential foundation for implementing the HRBA.

2.2 Conceptual Framework

2.2.1 Corruption

Corruption has no standard definition.⁵³ This is because the offence encompasses many crimes, including bribery, abuse of office, money laundering, fraud and embezzlement, just to name a few.⁵⁴ Further, the definition of corruption varies according to the discipline or analytical focus, thus, economists and legal professionals will not define it the same.⁵⁵ When dealing with human rights and corruption, it is essential to employ a definition steeped in law.⁵⁶

Most legal frameworks do not define corruption but rather discuss what constitutes corrupt acts or practices. The United Nations Convention against Corruption (UNCAC) does not attempt to define corruption. However, it mandates parties to criminalise acts such as bribery, embezzlement, money laundering, trading in influence, illicit enrichment and concealment of proceeds of crime.⁵⁷ The African Union Convention on Preventing and Combating Corruption (AU Convention) provides that acts such as bribery, diversion of property, illicit enrichment

⁵³ Z Pearson 'An International human rights approach to corruption' in P Larmour & N Wolanin (eds) *Corruption and anti-corruption* (2013) 32.

⁵⁴ UNODC 'What is corruption?' <https://www.unodc.org/corruption/en/learn/what-is-corruption.html> (accessed 19 July 2024).

⁵⁵ N Lord *Regulating corporate bribery in international business: anti-corruption in the UK and Germany* (2014) 17.

⁵⁶ ICHRP 'Corruption and human rights: making the connection' (2009) 16.

⁵⁷ n 56.

and concealment of proceeds of crime amount to corruption.⁵⁸ The SADC Protocol on Corruption defines corruption as bribery or any behaviour that violates the duties of public or private sector officers entrusted with responsibility for their own benefit.⁵⁹ The definition also includes acts such as fraud or concealment of any property that was derived from such acts.⁶⁰ The CPA of Malawi,⁶¹ states that corrupt practices includes bribery of public officers or any person, influence peddling and the extortion of an advantage.⁶²

The most common definition is provided by Transparency International which identifies corruption as the ‘abuse of entrusted power for personal gain’.⁶³ This definition projects a duty on the perpetrator who is a person entrusted with power. Where power is vested, there is a duty to act for the benefit of those in trust. This means there are people with rights, whose breach through corruption demands remedy. Basel Institute on Governance whilst subscribing to this, expounds on this definition by including the abuse of power and influence invested in an individual by virtue of politics, or influence in a corporation, having personal wealth or social standing in society.⁶⁴ The notion of personal gain is also expanded to include gain for private corporations, political parties, or groups of people. It further states that personal gain should not be explicitly considered in financial terms but may include non-financial gains such as power preservation.⁶⁵

Corruption is categorized as grand or petty. Transparency International defines grand corruption as the abuse of power by a few for their benefit, at the expense of the many.⁶⁶ This typically involves elected officials and large sums of money.⁶⁷ Its effects are on a larger scale including the loss of public trust and economic instability.⁶⁸ Economic instability usually leads to multiple violation of rights such as the right to health, housing, food and development. Petty corruption involves exchanging small sums to bypass systems, offering minor favours and

⁵⁸ AU Convention, art 4.

⁵⁹ SADC Protocol, Preamble.

⁶⁰ SADC Protocol, art 3.

⁶¹ (n 9).

⁶² CPA, sec 3.

⁶³ Transparency International ‘What is corruption?’ <https://www.transparency.org/en/what-is-corruption> (accessed 19 July 2024).

⁶⁴ Basel Institute on Governance ‘What is corruption?’ <https://baselgovernance.org/what-is-corruption> (accessed 19 July 2024).

⁶⁵ As above.

⁶⁶ Transparency International ‘Grand corruption’ <https://www.transparency.org/en/our-priorities/grand-corruption> (accessed 20 July 2024).

⁶⁷ UNODC *The global programme against corruption: UN anti-corruption toolkit* (2004) <https://www.un-anticorruption-learn.org/resources-unodc> (accessed 20 July 2024).

⁶⁸ n 68.

preferential treatment to certain individuals linked to the duty bearer.⁶⁹ An example would be unofficial payments to access public services, for instance, obtaining a passport at the immigration offices which may lead to inequalities for people who cannot afford payments.

This research will deal with corruption in all its forms. That includes bribery, money laundering, fraud and embezzlement among others. It will also adopt the broader definition provided by Basel Institute which expounds on entrusted power to include private elements and individuals and thus provides a wider ambit of application for the HRBA.

2.2.2 The Unseen Bond: Human Rights and Corruption

While human rights aim to primarily benefit the individual by recognising the inherent dignity of everyone, corruption is the antithesis as it seeks to systematically undermine, harm and threaten democratic institutions and values, development and the rule of law.⁷⁰ Human rights violations thrive where corruption exists. Linking human rights to corruption emphasises the responsibility of the state to prevent corruption and to implement effective measures to protect citizens' rights from these violations.⁷¹ Linking human rights violations to corruption can alter societal perceptions, encouraging people to take action against it when they understand how corruption impacts their personal and community rights.⁷²

Further, promoting and protecting human rights creates an environment that prevents and remedies corruption.⁷³ This is very evident when it comes to civil and political rights. For instance, where freedom of expression and access to information is guaranteed, transparency and accountability between the state and the citizenry increases, thus making it harder for public officers to engage in corrupt activities. The inverse is equally true because human rights, such as the right to political participation, are more likely to thrive where corruption is not present.⁷⁴

⁶⁹ As above.

⁷⁰ A Peters 'Human rights and corruption: problems and potential of individualising a systematic problem' (2024) 2.

⁷¹ D Prasad & L Eeckeloo 'Corruption and human rights' *Geneva Academy and Centre for Civil and Political Rights* (2019) 10.

⁷² ICHRP (n 56) 5.

⁷³ As above.

⁷⁴ Prasad (n 71) 10.

There is however, a greater focus on corruption and socio-economic rights.⁷⁵ Corruption usually involves the depletion of public resources, leading to the failure of the state to provide basic human necessities such as food, adequate health services or housing.⁷⁶ Corruption also produces poverty by diverting resources from those deserving, usually the poor and vulnerable in society, to those not entitled.⁷⁷ Thus corruption impedes the ability of the state to respect, protect and fulfil the rights of its citizens.⁷⁸

The primary responsibility to promote and protect human rights rests with the state.⁷⁹ However, individuals and non-state actors also have a duty and responsibility to other members of their community to promote and respect human rights. This is evidenced in the preambles of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁰ and the International Covenant on Civil and Political Rights (ICCPR),⁸¹ which recognise that individuals have duties to other individuals and the community. Further, the fact that certain rights can be limited if they affect the rights of others, such as the right to freedom of expression, entails that even individuals can be duty-bearers.⁸² When the state fails to prevent corruption, it is violating its duty under the core human rights instruments.⁸³ A comprehensive examination of all major human rights violations by the United Nations (UN) has revealed that corruption was a contributing factor.⁸⁴

There are three principles that can be advanced when linking corruption to human rights.⁸⁵ Firstly, corruption can be the main cause of a human rights violation. For instance, in the case where a bribe is paid to a judicial officer to influence the handling of a matter, the right to a fair trial has been violated.⁸⁶ The second principle is where corruption indirectly leads to the

⁷⁵ K Appiagyei-Atua 'A rights-based critique of poverty production and its impact on human security in the less industrialised world' (2008) 3 *Journal of Human Security* 6.

⁷⁶ J Ngugi 'Making the link between corruption and human rights: promises and perils' (2010) 104 *Proceedings of the Annual Meeting (American Society of International Law)* 246.

⁷⁷ Appiagyei-Atua (n 75).

⁷⁸ Prasad (n 71) 11.

⁷⁹ A Barkhouse H Hoyland & M Limon 'Corruption: a human rights impact assessment' (2018) *Universal Human Rights Group* 2.

⁸⁰ Malawi ratified ICESCR in 1993 https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-3&chapter=4 (accessed 16 October 2024).

⁸¹ Malawi ratified ICCPR in December 1993 https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 16 October 2024).

⁸² ICCPR, art 19.

⁸³ Barkhouse (n 79)2.

⁸⁴ (n 79) 3.

⁸⁵ M Ali A Mulinyono & S Nurhidayat 'The application of a human rights approach toward crimes of corruption: analysing anti-corruption regulations and judicial decisions' (2023) *Laws* 3.

⁸⁶ As above 3.

violation of human rights. For example, where a corporation bribes the state so that they bypass environmental feasibility tests, and as a result, there is pollution leading to the displacement and death of citizens.⁸⁷ In this case, the people's right to health, life and housing has been affected due to the corrupt actions of government officials.⁸⁸ Finally, corruption may be the remote cause of a human rights violation. An example would be where due to corruption, there are demonstrations against the government, in attempting to diffuse the demonstrations, police are deployed who then brutalise and arrest the protesters. The actions of the state will lead to the violation of the right to freedom of assembly, expression and liberty.⁸⁹

Corruption has for a long time been considered as a victimless crime.⁹⁰ This is because it was considered taxing to identify the victims due to legal issues such as standing, causation and evidence gathering.⁹¹ However, the victims of corruption are not as invisible anymore.⁹² Where funds to purchase drugs for hospitals are embezzled, it is the people who access public hospitals whose right to health has been violated. Where a tender to construct a school block is corruptly given and the contractor does substandard work because he had to pay bribes, the children's right to education is violated.

Under International criminal law, victims of human rights violations can claim damages. Therefore, it stands to reason that if corruption has led to the violation of human rights, those victims should be afforded damages by state parties as well.⁹³ Olaniyan proposes that this be achieved by establishing a trust fund for victims of corruption by the state.⁹⁴ The right to a corrupt-free society stems from the people's right to economic self-determination as recognised under article 1 of the ICCPR and the ICESCR.⁹⁵ This is an inherent human right that ties to the right to dignity, life, health, education and all other rights.⁹⁶ According to Murray and Spalding, there must be a right to freedom from official corruption as corrupt acts are a source of

⁸⁷ *SERAC & another v Nigeria* (2001) AHRLR 60.

⁸⁸ (n 85) 3.

⁸⁹ See Kenya protests and the Galamsey protests in Ghana where, following anti-government protests, the people were detained without due process and some even killed.

⁹⁰ K Olaniyan 'In search of remedies for victims of grand corruption' <https://uncaccoalition.org/in-search-of-remedies-for-vitims-of-grand-corruption/> (accessed 8 October 2024).

⁹¹ As above.

⁹² (n 87) 2.

⁹³ K Olaniyan 'Towards a human rights approach to corruption' in A von Arnould, K von Der Decken & M Susi (eds) in *The Cambridge handbook on new human rights: recognition, novelty, rhetoric* (2020) 536.

⁹⁴ As above.

⁹⁵ N Kafele-Kale 'The right to a corruption-free society as an individual and collective human right: elevating official corruption to a crime under international law' (2000) 34 *The International Lawyer* 168.

⁹⁶ n 95 163.

deprivation and human suffering.⁹⁷ They go further to argue that classifying corruption as a human rights violation will add normative weight and emphasise its importance as human rights violations are taken more seriously than torts or crimes.⁹⁸ Peters states that human rights highlight the rights of persons affected by corruption and in turn, empowers them to denounce the vice.⁹⁹

2.2.3 A look at the human rights-based approach to corruption: what does it entail?

A human rights-based approach (HRBA) aims at emphasising a victim-centred approach to dealing with corruption.¹⁰⁰ This entails focusing on the concept of rights holders and duty bearers.¹⁰¹ The approach empowers the citizens to exercise their rights and strengthens duty bearers in their capacity to promote, protect and fulfil human rights.¹⁰² Unlike the criminal justice approach which seeks to punish perpetrators of the crime, HRBA focuses on the failure of the state to protect its citizens from corruption.¹⁰³

HRBA states that corruption must be considered as a human rights concern. It provides that corruption must not only be viewed as the misappropriation of funds and abuse of duty but must be looked at as a breach of fundamental human rights.¹⁰⁴ The following principles guide the implementation of the HRBA: universality and inalienability, indivisibility, participation and inclusion, equality and non-discrimination, interdependence and accountability and rule of law.¹⁰⁵

Universality and inalienability entail that human rights are inherent to every individual and thus cannot be stripped from them.¹⁰⁶ This is one of the benefits of the HRBA as unlike the

⁹⁷ Murray (n 26) 5.

⁹⁸ As above.

⁹⁹ A Peters 'Corruption as a violation of international human rights' (2018) 29 *European Journal of International Law* 1276.

¹⁰⁰ Maguchu (n 44) 10.

¹⁰¹ Peters (n 9) 1252.

¹⁰² European Network of National Human Rights Institutions 'A human rights-based approach' <https://ennhri.org/about-nhris/human-rights-based-approach/#:~:text=Principles.and%20Equality%2C%20Empowerment%20and%20Legality> (accessed 19 July 2024).

¹⁰³ <https://www.unodc.org/e4j/zh/anti-corruption/module-7/key-issues/human-rights-based-approach.html>.

¹⁰⁴ As above (n 53) 46.

¹⁰⁵ (n 102).

¹⁰⁶ n 102.

criminal justice route where the victim is the state, here, the victim can be anyone by virtue of their inherent rights as humans.¹⁰⁷

Indivisibility means that all rights are equal, thus there must be no distinction between civil and political rights and socio-economic rights with regards to importance.¹⁰⁸ It also means that all rights are interconnected and the violation of one right will usually lead to the violation of another right.¹⁰⁹ For instance, embezzlement of education funds violates a child's right to education and, consequently, their standard of living, hindering good job prospects due to lack of qualifications.¹¹⁰

Participation and inclusion provides that citizens should be active participants in issues that affect their rights and this is a right that is applicable to every person regardless of their social standing, sex or abilities just to name a few.¹¹¹

Interdependence and interrelatedness states that the fulfilment of one right is dependent on other rights bringing back the principle of indivisibility of rights.¹¹²

Equality and non-discrimination entail that everyone is entitled to the enjoyment of human rights irrespective of race, age, and sex, among others, and states should take steps to ensure that there is no discrimination in the application of the law.¹¹³

Accountability and rule of law place a duty on the state to fulfil its duty to respect, promote and fulfil human rights and where it fails to do so, have effective remedies in place.¹¹⁴

Another variation of the key principles when it comes to HRBA is the PANEL. The PANEL consists of 'Participation, Accountability, Non-discrimination, Empowerment and Legality.'¹¹⁵ Empowerment involves equipping the citizens with the knowledge and tools to ensure that they understand their rights and thus are better placed to claim them. Legality, on the other hand, states that the approach should be in line with domestic and international human rights laws to

¹⁰⁷ United Nations Sustainable Development Group 'The human rights based approach to development cooperation towards a common understanding among UN agencies <https://unsdg.un.org/download/85/279> (accessed 20 August 2024).

¹⁰⁸ n 101.

¹⁰⁹ n 103.

¹¹⁰ As above.

¹¹¹ n 102.

¹¹² As above.

¹¹³ n 102.

¹¹⁴ As above.

¹¹⁵ n 102.

be enforceable.¹¹⁶ Although there are different variations on the principles that inform HRBA, the common principles which this paper will focus on are participation, accountability, empowerment, and equality.

In implementing the human rights-based approach, the legal framework must be interpreted through a human rights lens.¹¹⁷ First there must be identification of the corrupt act that has led to the violation of human rights.¹¹⁸ As corruption takes various forms, such as bribery, embezzlement, and money laundering, it is important to establish what constitutes a corrupt act.¹¹⁹ After identifying the act, the perpetrator must be identified.¹²⁰ Is he a public official, a private individual or a corporation working with the state?¹²¹ Then, there must be identification of the right that has been violated by the corrupt act.¹²² So for instance, where a public official embezzles public funds meant to purchase medicines in public hospitals, the right to health has been violated. The right in question must be looked at in terms of the obligations owed by the state.¹²³ The state has an obligation to protect, respect and fulfil human rights thus in identifying the right that has been violated, there must also be an identification of the act or omission by the state that led to the violation.¹²⁴

It is also important to establish a causal link between the act or omission of the state and the right violated.¹²⁵ The human rights violation should be a foreseeable consequence of the corrupt act.¹²⁶ In the example given above, the violation of the right to health is a foreseeable consequence of embezzling funds meant to purchase medicine. The state's failure to put in place mechanisms that would prevent the wanton abuse of funds thus makes it liable under HRBA to provide remedies to the victims of this violation. However, as stipulated above, the human rights violation is not always a foreseeable result of corruption, as long as a link can be

¹¹⁶ Peters (n 99) 1252.

¹¹⁷ n 99 1278.

¹¹⁸ Maguchu (n 44) 11.

¹¹⁹ As above.

¹²⁰ Maguchu (n 44) 11.

¹²¹ Maguchu (n 44) 12.

¹²² Maguchu (n 44)

¹²³ Peters (n 99) 1258.

¹²⁴ Maguchu (n 44) 12.

¹²⁵ Maguchu (n 44) 12.

¹²⁶ Peters (n 99) 1268.

established.¹²⁷ Recently, human rights bodies have addressed the link between corruption and human rights which suggests that there is a correlation between the two.¹²⁸

According to Rose, HRBA is limited as most of the international legal frameworks on corruption do not discuss human rights, nor do most international human rights instruments incorporate corruption.¹²⁹ She argues that international human rights instruments' lack of clarity on corruption harms and their state-centred nature complicate implementing an HRBA to combat corruption.¹³⁰ Van Der Herik has posited that private entities such as corporations do not enjoy full liberties and control as the state and thus it is not plausible to apply the same obligations that human rights instruments impose on state parties on corporations.¹³¹ Despite this, Rose admits that the human rights-based approach has the potential to be a much-needed support to the fight against corruption if developed, however, at this point in time, it is lacking.¹³²

Peters, whilst admitting that most human rights and anti-corruption instruments do not provide sufficient clarity as to the connection between human rights violations and corruption, states that the obligations imposed in the same instruments on the state to respect, protect and fulfil human rights may be violated by a corrupt act of a government official.¹³³ She argues that under the obligation to protect, the state not only bears the burden of promoting its citizens from the actions of a third party that may violate their rights but also reducing 'structural human rights risks in which state officials are involved.'¹³⁴

The HRBA provides a unique opportunity for citizens to get remedies before international human rights tribunals.¹³⁵ This is especially important in countries where the criminal justice route is hindered by lack of an independent judiciary and politics.¹³⁶ However, it is important and possible that the approach be implemented from the domestic level as the state is bound

¹²⁷ n 99 above.

¹²⁸ Concluding observations on the initial report of Pakistan, Committee on Economic and Social Cultural Rights (20 July 2017) UN Doc E/C12/PAK/CO/1 paras 17–18.

¹²⁹ C Rose 'The limitations of a human rights approach to corruption' (2016) *International & Comparative Law Quarterly* 407.

¹³⁰ As above.

¹³¹ L van den Herik, 'Regulating corporations under international law: from human rights to international criminal law and back again' (2010)8 *Journal of International Criminal Justice* 725.

¹³² C Rose 'The application of human rights law to private sector complicity in government corruption' *Leiden Journal of International Law* (2011)24 740.

¹³³ Peters (n 99) 1259.

¹³⁴ As above 1260.

¹³⁵ Maguchu (n 44) 11.

¹³⁶ Peters (n 99) 1285.

by the international treaties to which they are a party.¹³⁷ Affected parties must participate in the accountability process as well as the aftermath.¹³⁸ Thus citizens, CSOs and NGOs must take part in the anti-corruption fight either through impact assessments or accountability processes.¹³⁹

Under a human rights-based approach to corruption, victims, NGOs and other parties with vested interest can be afforded standing to bring corruption matters not only before domestic courts, but also before international human rights tribunals.¹⁴⁰ The human rights-based approach does not suggest that the criminal route in combating corruption be abandoned, it however makes a case for supplementing the anti-corruption fight by promoting and ensuring citizen participation, empowerment, accountability and equality.

2.3 Theoretical Framework

2.3.1 Ubuntu/Umunthu and Human Rights

Ubuntu is an African philosophy that recognises the humanity in community.¹⁴¹ Although popularised in South Africa, the philosophy goes by different names including *umunthu* in Malawi.¹⁴² Illustrated in the phrase ‘I am because we are’ this philosophy recognises the importance of rights and duties between an individual and the community at large. Ubuntu/*umunthu* suggests that the community’s needs must be paramount, and every individual must be treated with the utmost respect and dignity.¹⁴³ Ubuntu/*umunthu* connotes that the state has the duty to treat its citizens with respect as it is bound by the laws of togetherness. Therefore, a public officer in the execution of his duties must do so to the benefit of the public at large and not for his own advantage. Mokgoro states that ubuntu is about an anti-

¹³⁷ n 99.

¹³⁸ As above 1278.

¹³⁹ As above.

¹⁴⁰ Olaniyan (n 93) 534.

¹⁴¹ V Ojakoroto and O Bamidele ‘Ubuntu and nature: towards reversing resource curse in Africa’ (2019) *Journal of Conflict and Social Transformation* 28.

¹⁴² HM Kayuni and RIC Tambulasi ‘ubuntu and corporate social responsibility: the case of selected Malawian organisations’ (2012) 3 *African Journal of Economic and Management Studies* 67-68.

¹⁴³ MJ Nkhata ‘Rethinking governance and Constitutionalism in Africa: The relevance and viability of social trust-based governance and Constitutionalism in Malawi’ PhD thesis, University of Pretoria, 2010 <https://repository.up.ac.za/handle/2263/25693> 38-39.

individualistic approach when it comes to conduct that may affect the wellbeing of the community.¹⁴⁴

Ubuntu philosophy is not written down but is better understood in a series of lived norms.¹⁴⁵ It is the way the individual and the community relate to each other.¹⁴⁶ The South African Constitutional Court has described ubuntu in several ways. The Court in *S v Makwanyane*¹⁴⁷ stated that ubuntu is a culture that recognises the value and dignity of every human being, who is entitled to unconditional respect, dignity and acceptance from the community in the exercise, promotion and fulfilment of his rights. In the same vein, the individual has a corresponding duty to respect, promote and fulfil the rights of the community. It is about mutual dependence and enjoyment of rights.¹⁴⁸

In the case of *Joseph and others v City of Johannesburg and others*, the Constitutional Court of South Africa held that in fulfilling its Constitutional duties, the government must act in a manner that is fair, respectful and responsive particularly when it comes to the provision of public services.¹⁴⁹ In this decision, the court referred to the notion of *Batho Pele* which is Sesotho notion of putting people first.¹⁵⁰ The court held that this notion is a practical example of the concept of ubuntu entailing that in making decisions, the state must always put the priorities and rights of the citizens first. In the case of *Albutt v Centre for the Study of Violence and Reconciliation and Others*,¹⁵¹ the court underscored the fact that one of the values of ubuntu was the participation of victims in the accountability process.¹⁵² This promotes a key principle of HRBA where the citizens take part in the accountability process if their rights have been violated.

The values and characteristics of ubuntu prescribe what is right, wrong and what an individual must do for the survival of a community.¹⁵³ According to Nkhata, in a government based on ubuntu, the people are active participants and their duties are not abdicated after elections.¹⁵⁴

¹⁴⁴ Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 16.

¹⁴⁵ As above 16.

¹⁴⁶ Nkhata (n 143) 39.

¹⁴⁷ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁴⁸ As above.

¹⁴⁹ *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC).

¹⁵⁰ As above.

¹⁵¹ *Albutt v Centre for the study of violence and reconciliation and others*, 2010 (3) SA 293.

¹⁵² As above.

¹⁵³ Ojakoroto (n 141) 30.

¹⁵⁴ Nkhata (n 143) 39.

This is also in line with the HRBA which calls for active participation of the people in governance matters and matters that affect their rights.

Ubuntu/*Umunthu* in the Malawian context describes ‘personhood’ or ‘being a person’ and it entails being helpful and thinking of others in need.¹⁵⁵ A person with *umunthu* would not simply use resources meant for the masses for his own advantage, he would consider the greater good. Through the utilisation of the *umunthu* principle, the HRBA finds a home in the African and Malawian context.¹⁵⁶ Ubuntu encourages accountability and transparency in the public sector by promoting good morals and social sacrifice from the people.¹⁵⁷ These are all elements that can be used to combat corruption through a notion that the people are familiar with which will also encourage participation.¹⁵⁸

2.3.2 Social Contract Theory

John Locke’s social contract theory has its foundation in the natural law theory.¹⁵⁹ In the state of nature, every individual has rights and this includes the right to punish those who infringe on those rights.¹⁶⁰ However, this leads to constant conflict as there are no laws, no judges and no enforcers of laws.¹⁶¹ Thus individuals are forced to band together to form governments which are entrusted with the protection of their property.¹⁶² The individual gives up some of their rights to the government and the government is legitimate so long as it protects these rights.¹⁶³ Where the government fails to protect the rights entrusted to it, the people are at liberty to overthrow it.¹⁶⁴ This is the basis of for an accountable and democratic government rooted in the rule of law.¹⁶⁵

Rawls argues that the social contract in international terms is an agreement between the government and its citizens to respect treaties, undertakings, and human rights. It recognises

¹⁵⁵ Kayuni (n 142) 68.

¹⁵⁶ Maguchu (n 44) 18.

¹⁵⁷ As above.

¹⁵⁸ n 44.

¹⁵⁹ N Yao ‘The constructive aspect of social contract theory’ (2024) *Science of Law Journal*.

¹⁶⁰ As above.

¹⁶¹ n 159.

¹⁶² n 159.

¹⁶³ n 159.

¹⁶⁴ n 159.

¹⁶⁵ n 159.

the duty to assist those in vulnerable conditions.¹⁶⁶ This entails that governments are also bound by the human rights instruments and the anti-corruption conventions they are a party to.

The social contract theory influences the HRBA in that the duties owed by the state to protect, fulfil and respect the rights of its citizens, stem from the fact that the state has been entrusted to govern for the benefit of the citizens.¹⁶⁷ The concept of an accountable government suggest that where the state fails to sustain this trust by not protecting the public from corruption and human rights are violated, the people should be allowed to have recourse and remedies.

2.4 Conclusion

This chapter has defined corruption, which although difficult to define, has roots in the abuse of entrusted authority. It also discussed the link between corruption and human rights and the importance of doing so as it provides a basis for the implementation of HRBA. It also covered HRBA and its main principles: accountability, transparency, equality, empowerment, and participation. Finally, the chapter examined the theories of ubuntu and social contract theory and how they inform HRBA through emphasising the duty of the individual to act for the advantage of the many.

¹⁶⁶ T Lemens KM Ghimire K Perhedoff and N Persaud ‘The social contract and human rights bases for promoting access to effective, novel, high priced medicines (2022) *World Health Organisation Oslo Medicines Initiative Technical Report* 18.

¹⁶⁷ This is reflected in section 12 of the Constitution of Malawi which states that authority to govern is derived from the sustained trust of the people of Malawi and must be exercised for their benefit and interest.

Chapter Three

The Legal and Policy Framework on Corruption in Malawi

3.1 Introduction

The legal and policy framework on corruption in Malawi is quite elaborate. Malawi is a state party to International anti-corruption treaties such as the United Nations Convention against Corruption, the African Union Convention on Anti-Corruption and the SADC Protocol against Corruption. Malawi has also domesticated these treaties by enacting laws dealing with various aspects of corruption. However, the question is whether these international treaties or domestic laws and policies make room for the implementation of the human rights-based approach (HRBA) to combating corruption. This chapter discusses the legal frameworks and policy on corruption in Malawi and how they support the implementation of the HRBA to combat corruption in the country.

3.2 International framework

3.2.1 United Nations Convention Against Corruption

Malawi became a signatory to the United Nations Convention against Corruption (UNCAC) in 2004 and ratified it in 2007.¹⁶⁸ The Convention focuses on prevention, asset recovery, international cooperation and prosecution of corruption.¹⁶⁹ UNCAC mandates states to take measures under their domestic legal systems to prevent and combat corruption.¹⁷⁰ Although the Convention does not directly address corruption from a human rights perspective, several of its provisions acknowledge that human rights and citizen participation are important considerations when combating corruption. The Preamble to the UNCAC states that corruption undermines the rule of law, sustainable development, good governance, democracy and ethics. It goes further to state that there is a need for a comprehensive and multi-disciplinary approach to combating corruption.¹⁷¹ The Preamble also highlights the state's duty to combat corruption,

¹⁶⁸ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en (accessed 18 August 2024).

¹⁶⁹ JC Mubangizi and P Sewpersadh 'A human rights-based approach to combating public procurement corruption in Africa' (2017) 10 *African Journal of Legal Studies* 75.

¹⁷⁰ UNCAC, art 1.

¹⁷¹ UNCAC, Preamble.

which must be implemented in collaboration with NGOs, civil societies, and community-based organisations, thus promoting participation.¹⁷² UNCAC acknowledges the effects that corruption has on development and good governance. The acknowledgement that there is a need for a multi-disciplinary approach to combating corruption shows that the United Nations (UN) is aware that the criminal approach to eradicating corruption is insufficient and further reinforces the need for citizen participation in this fight by encouraging collaboration with other stakeholders.

The UNCAC states that state parties must create policies that promote the participation of society, reflective of the rule of law, integrity, transparency, accountability, and proper management of public affairs.¹⁷³ This resonates with the principles of *ubuntu*, which obligates individuals to act honestly and with integrity for the benefit of the community.¹⁷⁴ Ubuntu, as discussed in Chapter 2, is an essential philosophy in localising the HRBA as it promotes the approach from an African perspective.¹⁷⁵ The duty owed by an individual to act in the community's best interest, coupled with societal participation, would then translate to a right owed to the citizens by the state to provide a means for redress in instances where the duty is breached.

Article 9 of UNCAC deals with procurement in public institutions and provides that state parties shall take measures to ensure transparency and accountability in the management of public funds. According to the United Nations Office on Drugs and Crimes, about 10% to 25% of public contract finances are lost to corrupt practices.¹⁷⁶ Public procurement is a highly susceptible area to corruption, and Malawi is no exception. To address this issue, HRBA can be used to create public institutions that are transparent in their procurement processes. This transparency will help ensure greater accountability to citizens when procurement processes are affected by corruption and abuse.

Article 13 of UNCAC provides that state parties must promote the active participation of society in decision-making when it comes to preventing and fighting corruption. This must be done by giving the public access to information.¹⁷⁷ This is also complimented by article 10,

¹⁷² n 171.

¹⁷³ UNCAC, art 5(1).

¹⁷⁴ Mokgoro (n144)16.

¹⁷⁵ Maguchu (n 44).

¹⁷⁶ <https://seldi.net/public-procurement-integrity-in-southeast-europe/public-procurement/> (accessed 5 September 2024).

¹⁷⁷ UNCAC, art 13.

which provides that state parties must take necessary measures to enhance transparency. Transparency can be improved by allowing members of the public to access information on the functions and decision-making process of public entities.¹⁷⁸ As stated above, public participation and transparency are key elements of HRBA. Although the UNCAC does not explicitly address the HRBA, these provisions can be utilised in implementing this approach in Malawi.

The UNCAC also makes provision for the creation of independent bodies mandated to prevent corruption such as the ACB.¹⁷⁹ UNCAC also deals with various corrupt practices, including money laundering, and promotes international cooperation among law enforcement agencies to curb the practice.¹⁸⁰ It goes further to mandate state parties in criminalising acts such as the bribing of public and international public officials,¹⁸¹ embezzlement,¹⁸² illicit enrichment,¹⁸³ trading in influence,¹⁸⁴ laundering of proceeds of crime,¹⁸⁵ abuse of functions¹⁸⁶ and concealment.¹⁸⁷ The Convention also provides for the freezing, seizure and confiscation of proceeds of crime.¹⁸⁸

Although the UNCAC deals mostly with preventing and criminalising corruption, other instruments by the UN advocate for HRBA to corruption. Under the UN common position to address global corruption, it is stated that there must be prioritisation of the rule of law and human rights principles and promoting gender equality and development.¹⁸⁹ Prioritizing human rights shows the need to connect human rights and corruption, demonstrating how HRBA supports criminal law in addressing this issue. Further, article 35 obligates state parties to take necessary measures that will ensure that those affected by corruption have the right to initiate legal proceedings against the perpetrators. This is the embodiment of the HRBA in which the people, whose rights have been violated because of corrupt practices have recourse under the law.

¹⁷⁸ UNCAC, art 10.

¹⁷⁹ UNCAC, art 6.

¹⁸⁰ UNCAC, art 14.

¹⁸¹ UNCAC, art 15 & 16.

¹⁸² UNCAC, art 17.

¹⁸³ UNCAC, art 20.

¹⁸⁴ UNCAC, art 18.

¹⁸⁵ UNCAC, art 23.

¹⁸⁶ UNCAC, art 19.

¹⁸⁷ UNCAC, art 24.

¹⁸⁸ UNCAC, art 31.

¹⁸⁹ The UN Common position to address global corruption 'towards UNGASS 2021' (August 2020) 5.

3.3 Regional Framework

3.3.1 African Union Convention on Preventing and Combating Corruption

Malawi ratified and deposited the African Union Convention on Preventing and Combating Corruption (AU Convention) in 2007.¹⁹⁰ The preamble to this AU Convention states that the member states recognise the need to promote and protect human and peoples' rights and to foster a culture of democracy, good governance and the rule of law. It further acknowledges the need to foster human rights including socio-economic, civil and political rights.¹⁹¹ The preamble also highlights the concern of the state parties with the negative effects of corruption on the development of African states and recognises the need to deal with the root cause of corruption.

The objectives of the Convention are to promote the eradication, prevention, punishment and detection of corruption in both the public and private sectors by member states, promote the socio-economic development of African countries by removing obstacles hindering the enjoyment of human rights and establishing necessary conditions to develop transparency and accountability of public affairs.¹⁹²

Unlike UNCAC, the AU Convention attempts to directly link corruption to human rights although this is not done with the most clarity, as the link is only addressed in the preamble, objectives, and principles of the AU Convention. However, elements pertaining to the HRBA can be implied from the fact that the principles of the Convention bind the state parties to respect democratic principles, popular participation, the rule of law, and good governance.¹⁹³ It also provides that state parties must undertake to abide by principles of human and peoples' rights as well as transparency and accountability in the management of public affairs.¹⁹⁴ Article 12 states that state parties must ensure the participation of civil societies and the media in combating corruption by creating an enabling environment that will hold the government into account and ensure that it is transparent in its dealings.

Under article 7, the AU Convention makes provision for public officials to declare their assets to guard against unjust enrichment. Where public officials execute their duties for their own

¹⁹⁰ <https://anticorruption.au.int/en/documents/2021-06-11/status-ratification> (accessed 24 August 2024).

¹⁹¹ AU Convention, Preamble.

¹⁹² AU Convention, art 2.

¹⁹³ AU Convention, art 2.

¹⁹⁴ AU Convention, art 3.

enrichment, it implies that they are not working in the interests of the public, and thus the public should be able to hold them to account. Article 7 further provides that subject to domestic law, the immunity afforded to public officials shall not hinder the investigation or prosecution of corruption. This is one of the criticisms of the Convention as it places a lot of weight on domestic law thus bringing into play clawback clauses especially if the state parties are authoritarian states.¹⁹⁵ High-ranking officials often evade consequences for corruption due to immunity, leaving citizens without recourse. However, the HRBA implementation removes this protection, making rights and duties the focus.

There is no clarity as to how the protection, fulfilment and respect of human rights by member states can be implemented in combating corruption by the AU Convention. What is left is an implied obligation by member states by virtue of the AU mandate under the AU Constitutive Act.¹⁹⁶ Unlike the UNCAC which allows for victims to seek remedies,¹⁹⁷ the AU Convention focuses on criminal sanctions, thus leaving the victim whose rights were violated because of the corrupt act without a remedy.¹⁹⁸ The lack of effective mechanisms to hold states in breach of their obligations under the Convention is a missed opportunity.¹⁹⁹ The Convention provides for an advisory board against corruption comprised of experts with integrity, impartiality and competence in matters concerning corruption.²⁰⁰ The function of the board is to promote and develop the anti-corruption agenda, however, there is no provision for it to deal with human rights violations that occasion as a result of corruption.²⁰¹

3.3.2 SADC Protocol against Corruption

The Southern African Development Community (SADC) is a regional organisation that aims to achieve peace, security, and economic development, enhance the standard of life for the people in the region, and support the socially disadvantaged through democratic principles and equitable, sustainable development.²⁰² Malawi ratified the SADC Protocol against Corruption in 2002.²⁰³ The SADC Protocol recognises the adverse effects of corruption on the economic,

¹⁹⁵ K Olaniyan 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 4 *African Human Rights Law Journal* 85.

¹⁹⁶ As above 75.

¹⁹⁷ UNCAC, art 35.

¹⁹⁸ As above.

¹⁹⁹ Olaniyan (n 195) 86.

²⁰⁰ AU Convention, art 22

²⁰¹ Olaniyan (n 195) 86.

²⁰² SADC website <https://www.sadc.int/pages/sadc-objectives> (accessed 5 September 2024).

²⁰³ O Chinhamo 'Tracking progress by SADC member states in signing and ratifying anti-corruption instruments and treaties' <http://www.sacon.org/sites/default/files/2020-06/31-5->

cultural, political and social foundations of society and that it undermines good governance, which is signified by accountability and transparency.²⁰⁴

The Protocol deals with corrupt practices such as bribery, illicit enrichment, diversion of public resources, offering, receiving, solicitation of undue advantages and concealment of proceeds of these acts.²⁰⁵ The Protocol like the UNCAC and AU Convention is primarily focused on the prevention, eradication, detection and punishment of corruption in the public and private sectors.²⁰⁶ There is little to no attention given to the link and effects between human rights and corruption.

The Protocol doesn't address human rights but provides that state parties combating corruption should adopt codes of conduct for public officials, promote information access, protect whistleblowers, penalise false reports, and ensure media and civil society participation in the fight. These provisions are reminiscent of the HRBA. The HRBA promotes citizen participation in the fight against corruption and holds the perpetrators of corruption to account. Accountability can only be effective in a system where the state is transparent, and access to information plays an important role in this.

3.4 National Framework

3.4.1 The Constitution

The Constitution of the Republic of Malawi does not address the issue of corruption. However, it sets out principles that advocate for HRBA such as equality, accountability, and transparency. The Preamble establishes the desire of the people for a democratic and accountable government which guarantees the welfare and development of Malawians. The Constitutional Principles state that all governing power derives from the trust of the Malawian people, which must benefit them through an open, transparent, and accountable government.²⁰⁷ The Constitution also imposes duties on all citizens towards society, the state, the international community and the family, including respecting and exercising individual rights with due regard for the rights of others and common benefit.²⁰⁸ Further, the state must introduce measures to ensure

[2018%20Progress%20on%20Signature%20and%20Ratification%20of%20Anti-Corruption%20Instruments%20by%20SADC%20Member%20States_0.pdf](#) (accessed 5 September 2024).

²⁰⁴ SADC Protocol, Preamble.

²⁰⁵ SADC Protocol, art 3.

²⁰⁶ SADC Protocol, art 2.

²⁰⁷ The Constitution, sec 12(1)(a) (b) & (c).

²⁰⁸ The Constitution, sec 12(2).

accountability, transparency, personal integrity and financial probity to strengthen public confidence in the state.²⁰⁹

Chapter 4 of the Constitution contains the Bill of Rights, which binds all branches of the state, individuals, and legal persons.²¹⁰ These rights are enforceable and any aggrieved person may seek assistance from the courts, Ombudsman, and Human Rights Commission to promote and protect them.²¹¹ The biggest hurdle to HRBA with regard to the Bill of Rights is the requirement for sufficient interest or legal standing when it comes to enforcement. Malawi's courts tend to require claimants to prove direct rights violations, resulting in CSOs and citizens often lacking sufficient interest to enforce rights.²¹² However, as stated in Chapter 2, corruption can lead to the direct or indirect violation of human rights, and to restrict remedies to those directly affected would be a disservice to a majority of Malawians.

Public officials have a duty to discharge their powers in a way that sustains the trust of the people of Malawi in the government. In *R v Kambalame*,²¹³ the court considered corruption by a public official as an aggravating factor in sentencing. The court emphasised that corruption erodes the people's trust in their public officials and institutions and must be condemned fully. Although the Constitution fails to directly address corruption, other scholars like Nkhata have argued that Constitutional Principles should be interpreted as imposing anti-corruption duties on public officials.²¹⁴ Using HRBA as a means for corruption victims to seek remedies will help the state maintain public trust by involving the people in the accountability process.

3.4.2 Corrupt Practices Act

The Corrupt Practices Act (CPA) of 2022 is the governing law with regard to combating corruption in Malawi. The CPA was first enacted in 1996 and has been amended several times, with the 2022 amendment removing the requirement to obtain consent from the DPP before prosecuting offences under the Act. The CPA provides for the establishment of the Anti-Corruption Bureau (ACB), which is the organ responsible for fighting corruption and other matters related to dealing with corruption.²¹⁵ The ACB's functions are prevention, investigation

²⁰⁹ The Constitution, sec 13(o).

²¹⁰ The Constitution, sec 15(1).

²¹¹ Constitution, sec 15(2).

²¹² *Chaponda & Anor. v Kajoloweka & Others MSCA Civil Appeal 5 of 2017.*

²¹³ *R v Dennis Spax John Kambalame Criminal Case No. 108 of 2002.*

²¹⁴ Nkhata (n 46) 212-234.

²¹⁵ CPA, short title.

and prosecution of corruption.²¹⁶ In preventing corruption, the ACB is mandated with examining practices and procedures of institutions, both public and private, to prod for any weaknesses that may facilitate corruption.²¹⁷ The ACB is further mandated to disseminate information on the dangers of corruption.²¹⁸ This is a way to empower the masses in the fight against corruption. By learning about how corruption affects them, people understand that they have a duty to report the vice thus participating in the fight against corruption.²¹⁹

The CPA criminalises corrupt practices, which are stated to be bribery, influence peddling and extortion.²²⁰ These offences are further categorised into corruption by or with public officers,²²¹ public officers performing their functions corruptly,²²² misuse of public office,²²³ corrupt transactions by or with private bodies,²²⁴ dealing with contracts corruptly,²²⁵ failure to declare interest,²²⁶ advantage for giving assistance²²⁷ and being in possession of unexplained property²²⁸ among others. These offences are punishable by a maximum of 12 years imprisonment.²²⁹ Apart from the custodial sentence that courts can impose, the Act also provides for the confiscation and forfeiture of the proceeds of corruption to the government.²³⁰ In practice, the courts have accepted corruption's negative effects on society. In the *Kambalame* case,²³¹ the court stated that corruption distorts the growth of the economy as it leads to poverty and inequality. In *R v Leonard Karonga*,²³² the court stated that the effects of 'cashgate' cases on the health sector and the economy had devastating effects on Malawians. In *R v Mpinganjira*²³³, the accused person attempted to bribe judges of the Constitutional Court in order to influence their decision in disputed presidential elections. The court considered the potential impact of the accused's actions and stated that if successful, he would have curtailed

²¹⁶ CPA, sec 10.

²¹⁷ CPA, sec 10(1)(a)(i).

²¹⁸ CPA, sec 10(1)(a)(iii).

²¹⁹ Peters (n 99)1252.

²²⁰ CPA, sec 3.

²²¹ CPA, sec 24.

²²² CPA, sec 25A.

²²³ CPA, sec 25B.

²²⁴ CPA, sec 26.

²²⁵ CPA, sec 25C.

²²⁶ CPA, sec 25D.

²²⁷ CPA, sec 29.

²²⁸ CPA, sec 32.

²²⁹ CPA, sec 34.

²³⁰ CPA, sec 37.

²³¹ (n 214).

²³² *The Republic v Leonard Karonga, Criminal Case No. 68 of 2014.*

²³³ *The Republic v Thomson Frank Mpinganjira, Criminal Case No. 7 of 2020.*

Malawians' rights and freedoms, thus necessitating appropriate remedies by the courts to protect them.

The Act does not address the human rights issues that are affected by corruption with a few implied exceptions. The Act making provisions for the confiscation of corruption proceeds ensures that the perpetrator does not benefit from his crimes and that the money is returned to its rightful owners, which are the people of Malawi.²³⁴ Further, the offence of unexplained property has been utilised to ensure that public officers do not unjustly enrich themselves using public funds. In *Collins Monte Ng'ambi v The Anti-Corruption Bureau*²³⁵ the Court found the Applicant's salary and acquired property inconsistent, leading to a restriction notice and investigation. This provision holds public servants accountable for misusing public funds, thus ensuring their protection.

Section 40 of the CPA bars anyone convicted under Chapter 4 from holding public office. This ensures that perpetrators of corruption who have violated citizens' rights, should not be able to repeat their actions. This is in line with the Constitutional principle where power and authority can only be exercised on the sustained trust of the people of Malawi.²³⁶ Where the people of Malawi no longer trust their public officials due to acts of corruption, they should be permitted to hold them to task.

3.4.3 National Anti-Corruption Strategy (NACS)

The National Anti-Corruption Strategy (NACS) was launched in 2009 and is a policy framework that implements a holistic approach to combating corruption in Malawi.²³⁷ Through NACS, the fight against corruption is seen not only as the duty of the ACB but rather as requiring the participation of different sectors.²³⁸ It proposes that corruption can be combated by improving service delivery, strengthening the rule of law and promoting integrity.²³⁹ NACS I, which was the first phase of the National Anti-Corruption Strategy, was implemented through 8 pillars of society namely: the executive, legislature, judiciary, private sector, faith-based organisations, traditional leaders, media and civil society. These sectors were designated

²³⁴ World Economic Forum 'Asset recovery: a powerful tool in the fight against global corruption' <https://www.weforum.org/agenda/2022/02/asset-recovery-corruption/> (accessed 14 February 2022).

²³⁵ *Collins Monte Ng'ambi v The Anti-Corruption Bureau*, Miscellaneous Criminal Case No. 6b of 2009.

²³⁶ The Constitution, sec 12.

²³⁷ Republic of Malawi 'National Anti-Corruption Strategy II 2019-2024' executive summary.

²³⁸ NACS II, executive summary.

²³⁹ NACS II, executive summary.

‘pillars’ as they were considered as relevant stakeholders in the fight against corruption and that promoting a culture of integrity in these sectors will assist in making a dent in the anti-corruption efforts. NACS I phased out in 2014 and was succeeded by NACS II which was implemented in 2019.

According to NACS II, one of the drivers of corruption in Malawi is the lack of a culture of holding duty bearers accountable.²⁴⁰ This is attributed to the citizen’s lack of knowledge, a culture of secrecy, fear of retaliation and a feeling that it is not the duty of the citizen to safeguard government resources.²⁴¹ NACS II identifies 12 pillars of society that are vital in preventing and combating corruption. These pillars in addition to the initial 8 includes women, youth, academia, media, traditional leaders, CSOs and local government. All these pillars are tasked with raising awareness of the vice that is corruption and encouraging reporting in their various sectors. Institutions are also encouraged to establish Internal Integrity Committees (IICs) whose aim is to improve the integrity of the institutions by conducting investigations into corruption allegations in the offices and developing, implementing and reviewing anti-corruption strategies for their institutions.

NACS II as a strategy is a useful tool for implementing the HRBA. It already incorporates the most critical aspects of the HRBA, including empowerment, participation, accountability, and non-discrimination. The work of the pillars ensures that the people in their sectors have knowledge of corruption and are thus empowered. There is participation from all sectors of society, including the youth and women, which brings in the element of non-discrimination. The only issue is that the policy document does not provide the victims with the mechanisms to seek remedies except through the ACB. Further, the IICs have not proven effective as corruption is still rampant in most institutions. Thus the pillars should be empowered enough to have the option of initiating legal proceedings in instances where as members of society, their rights have been violated as a result of corruption.

3.4.4 The Penal Code

Chapter 10 of the Penal Code of Malawi criminalises corruption and abuse of office. It states that any person who engages in official corruption is liable to imprisonment for 12 years.²⁴² The offence applies to persons employed in public service and deals with instances where

²⁴⁰ NACS II, 9.

²⁴¹ NACS II, 9.

²⁴² Penal Code, sec 90.

individuals use their official positions to obtain, solicit, or receive any advantage, interest, or property in exchange for performing or failing to perform a duty associated with their official responsibilities.²⁴³ The Penal Code offence of corruption applies specifically to public officers and private citizens in their transactions with public officers. The Penal Code also criminalises extortion by public officers, the receipt of property by public officers to show favour, and abuse of office by public officers. However, under the penal code, abuse of office is a felony punishable with 3 years imprisonment, in contrast to the CPA, where the same offence attracts a maximum sentence of 12 years.

Although the Penal Code makes a general provision for compensation as a punishment for an offence, this is rooted in ‘personal injury’ claims and not necessarily human rights violations.²⁴⁴ Further, the penal code focuses on identifying and punishing the offender, thus failing to address the crime's harm to the victim.²⁴⁵ Further, the focus on the criminal aspect of corruption deals with one problem at a time and fails to address the collective and structural problems of corruption such as gaps in institutional policies that create an environment conducive for the vice.²⁴⁶

3.4.5 Financial Crimes Act

The Financial Crimes Act (2017) (FCA) was enacted to establish the Financial Intelligence Authority (FIA) which is mandated to prevent, investigate and combat financial crimes.²⁴⁷ The FCA also deals with the tracing, freezing and confiscation of proceeds of crime.²⁴⁸ It criminalises offences such as money laundering²⁴⁹, terrorist financing²⁵⁰ and general financial crimes, which include fraud, dealing with the proceeds of a crime and financing a crime²⁵¹. The Act applies to both natural and legal persons and does not make a distinction between a public officer and a private citizen. The offences attract a prison sentence and a fine.

The most important part of the Act with regards to a HRBA deals with asset seizure and forfeiture. The Act makes provision for both conviction and non-conviction-based forfeiture.

²⁴³ Penal Code, sec 90.

²⁴⁴ Penal Code, secs 25 & 30.

²⁴⁵ B de Castro e Silva ‘Humanizing (Anti) corruption: The Socio-Legal Values of a human rights-based approach to corruption’ *Kyiv-Mohyla Law & Politics Journal* (2019) 5 63.

²⁴⁶ As above (n 245).

²⁴⁷ FCA, short title.

²⁴⁸ As above.

²⁴⁹ FCA, sec 42.

²⁵⁰ FCA, sec 43.

²⁵¹ FCA, sec 2.

Section 48 of the FCA provides that upon conviction, the court shall order the confiscation or forfeiture of tainted property. The use of the word ‘shall’ makes it mandatory for the courts to order forfeiture of tainted property, which the courts have done. Section 48 goes further to state that the court may order the compensation of victims who have been affected by the crime.²⁵² However, this is not mandatory and courts in Malawi have been reluctant to order compensation for victims of financial crimes. Further, there is no procedure on how victims can be identified and the quantification of the compensation.

Non-conviction-based forfeiture employs a civil route to the matter of confiscation and forfeiture. If a competent authority, which includes the FIA and ACB²⁵³ have reasonable grounds to believe that certain property is proceeds of crime or tainted, they can make an application before the courts for a preservation order.²⁵⁴ The competent authority may then make an application for forfeiture of the assets.²⁵⁵ This property includes that which is in possession of third parties.²⁵⁶ Once the property has been confiscated, it is deposited to the Confiscation Fund which is a fund established under the FCA to hold funds and property confiscated under any law.²⁵⁷ In *Financial Intelligence Authority v Lefnos Omigo Chigamula*²⁵⁸ the court held that the sum of 12 Million Kwacha be forfeited to the Confiscation fund as it represented proceeds of money laundering. These funds are used to pay costs and fees of the administrator²⁵⁹, costs for maintaining the funds or property confiscated or any other purpose approved by the National Assembly.²⁶⁰

The confiscation and forfeiture of tainted property and proceeds of crime is meant to ensure that the perpetrator does not benefit from his or her crime.²⁶¹ However, it is important that the property be returned to its rightful owner which in cases of corruption, are the people of Malawi. For instance, in cases where money meant to construct a market has been abused by a public official who uses it to purchase a car, upon confiscation of that vehicle, the proceeds from the car should be used for their intended purpose, which was the construction of a market.

²⁵² FCA, sec 48(3).

²⁵³ FCA, sec 2.

²⁵⁴ FCA, sec 65.

²⁵⁵ FCA, sec 72.

²⁵⁶ FCA, sec 66.

²⁵⁷ FCA, secs 128, 129, 130 & 131.

²⁵⁸ *Financial Intelligence Authority v Lefnos Omigo Chigamula Civil Cause No. 28 of 2022*.

²⁵⁹ The administrator is an official appointed by the minister under section 99 of the Financial Crimes Act whose duties are to assume control of the property, care for the property, and to perform any act necessary pertaining to confiscated and forfeited property.

²⁶⁰ FCA, sec 132.

²⁶¹ *DPP & others v Norman Chisale & 6 Others, Constitutional reference 1 of 2021*.

However, under the FCA, the funds are put in a consolidated fund that is liable to abuse by other public officials. Under the HRBA, the victims, who are the people who would have benefited from the market, will be able to claim that the confiscated property and funds be used for its intended purpose.

3.4.6 Public Officers (Declaration of Assets, Liabilities, and Business Interests) Act

Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (2014)²⁶² (The Declaration of Assets Act) was enacted with the aim of promoting public confidence in public officers and elected officials.²⁶³ The Act is guided by principles of ethical conduct including integrity, honesty, accountability, transparency and professionalism among others.²⁶⁴ The Act ensures public officers do not unjustly enrich themselves, avoid conflicts of interest, misuse public funds, or engage in activities inconsistent with their duties.²⁶⁵

After assuming office, every public officer is required to submit the asset declaration form within 3 months and every year subsequently.²⁶⁶ This information is public record, accessible through the Director of Public Officers' Declarations.²⁶⁷ Providing false information on the declaration forms is an offence and can disqualify a person from holding public office for 7 years.²⁶⁸ Any public officer who contravenes the Act can be referred to the Director of Public Prosecutions, police or Director of ACB for further investigations.²⁶⁹

The disclosure of assets by public and elected officials is important in a country plagued with corruption like Malawi. Public officers often misuse their positions and resources for personal gain, aligning with the unexplained property offense in the CPA. Through the declaration of assets, there is an increase in transparency that curbs the need for public officers to unjustly enrich themselves. This transparency will lead to citizens holding public officers accountable if they cannot explain the source of their wealth. This is a key component of ensuring that there is participation from the citizenry when it comes to combating corruption. The public will be able to pinpoint if public officers are using public resources for personal gain through assessing

²⁶² Public Officers (Declaration of Assets, Liabilities and Business Interests) Act, Chapter 1:04 of the Laws of Malawi.

²⁶³ Declaration of Assets Act, sec 3.

²⁶⁴ Declaration of Assets Act, sec 4.

²⁶⁵ As above.

²⁶⁶ Declaration of Assets Act, sec 14.

²⁶⁷ Declaration of Assets Act, sec 17.

²⁶⁸ Declaration of Assets Act, sec 19(1)(b).

²⁶⁹ Declaration of Assets Act, sec 19(1)(c).

the wealth that the public officers have acquired. However, the sanctions imposed for false reporting, are also punitive in nature. The Act fails to make provision for confiscation or restitution of the illicitly acquired property unlike the FCA.

3.4.7 Public Procurement and Disposal of Assets

The Public Procurement and Disposal of Assets Act (2017) ²⁷⁰(PPDA Act) establishes the Public Procurement and Disposal of Assets Authority whose function is to regulate procurement in public institutions by among other things, setting a monetary threshold that regulates how much institutes can spend during procurement, where the institute exceeds this amount, issue a ‘no objection’ to the procurement and declare misprocurement where necessary and institute disciplinary proceedings.²⁷¹ It also mandates public institutions to set up Internal Procurement and Disposal of Assets Committees (IPDC) that handle the procurement on an internal level.²⁷²

The PPDA Act also makes provision for the conduct of bidders and public officials involved in procurement. Bidders and suppliers are prohibited from engaging in corrupt practices, fraudulent practices and collusion amongst themselves.²⁷³ Any bidder or supplier found in contravention of these actions shall be referred to the Authority and those found liable are subject to debarment from public procurement for a period commensurate with the gravity of the offence.²⁷⁴

Public officers involved in procurement are obligated to act with integrity in the discharge of their duties.²⁷⁵ They are to discharge their duties impartially, always act in the public interest, not commit corrupt or fraudulent practices, including soliciting or accepting bribes as inducements, avoid conflict of interest, and maintain confidentiality.²⁷⁶

The running theme of integrity, accountability and acting in the public interest all promote the HRBA. By impressing on the need to act in the interest of the public, they are imposing a duty on public officials, and where there is a duty, there is a corresponding right. Thus, if the public

²⁷⁰ PPDA Act, Chapter 37:03 of the Laws of Malawi.

²⁷¹ PPDA Act, sec 6.

²⁷² PPDA Act, sec 26.

²⁷³ PPDA Act, sec 55.

²⁷⁴ PPDA Act, sec 56.

²⁷⁵ PPDA Act, sec 57.

²⁷⁶ PPDA Act, sec 57.

officials fail to execute their duties, the right holders should be allowed to come and hold the duty bearers accountable.

3.4.8 The Access to Information Act

The Access to Information Act,²⁷⁷ provides the right to access information required in the exercise of rights, which is in the custody of public bodies or relevant private bodies.²⁷⁸ Private bodies have been defined as any person or organisation that carries out business that concerns public interest or rights and freedoms of the public.²⁷⁹ The Human Rights Commission is empowered with overseeing the implementation of the Act²⁸⁰ whose objective is to provide information to the public in line with Constitutional principles of trust and good governance.²⁸¹ Where an information holder refuses to provide information, they are liable to a fine and can be brought before a court of law.²⁸²

This Act is essential in implementing the HRBA as it promotes empowerment, transparency, participation and accountability. In the case of *Gift Trapence and others v Democratic Progressive Party and others*²⁸³, the claimants, who were members of Civil Society Organisations, demanded information about donations made by statutory institutions to the ruling political party during their fund-raising event. The court held that the claimants had a right to access this information and ordered the political party to return the money donated. This case shows the impact that HRBA has in fighting corruption. If the criminal route had been explored, there is a likelihood that the case would still be ongoing whilst the people who were supposed to benefit from the utilisation of the money, would have no tangible remedy.

3.5 Conclusion

Malawi has an extensive legal and policy framework that deals with corruption. However, both the international and national frameworks fail to consider the victim in their fight against corruption. All legal frameworks place a great degree of importance on punishing the

²⁷⁷ Access to Information Act, Act 13 of 2017.

²⁷⁸ Access to Information Act, sec 5.

²⁷⁹ Access to Information Act, sec 2.

²⁸⁰ Access to Information Act, secs 2 & 8.

²⁸¹ Access to Information Act, sec 49.

²⁸² Access to Information Act, secs 51,52,53 & 54.

²⁸³ *Gift Trapence and others v The Democratic Progressive Party and Others Miscellaneous Civil cause number 41 of 2017.*

perpetrator of corruption as opposed to providing remedies to the victim. The international frameworks rely on state parties to come up with appropriate legislation that deals with corruption. Some treaties, such as the AU Convention, attempt to link human rights to corruption but fall short in clarifying the impact of corruption on human rights or how an HRBA can be utilised in combating corruption. The national framework is more concerned with punitive measures and the harm done to the state as a whole. It fails to take into consideration the duty imposed on state parties to protect the rights of its citizens and how corruption violates such rights. Whilst there is provision for key elements of the HRBA such as participation and accountability, there is no specific law that provides for the implementation of the HRBA in combating corruption. This chapter has argued however, that these key elements of the HRBA embedded in all the legal and policy frameworks dealing with corruption in Malawi, should be utilised to promote a victim-centred approach in combating corruption.

Chapter Four

Human Rights and Corruption: Interweaving Human Rights with Anti-Corruption Efforts in Malawi

4.1 Introduction

Corruption has always been considered as an enemy of development. Most anti-corruption treaties and legislation, such as the UNCAC and the AU Convention have connected corruption to the lack of development. However, it is only recently that the international community has started to address corruption's impact on human rights. This chapter discusses the impact of corruption on human rights in Malawi. The chapter focuses on three rights in particular, the right to food, right to health and right to access to justice. The paper then discusses how countries such as South Africa and the UK have implemented a HRBA in combating corruption. Finally, the chapter will draw lessons from the 2 countries and discuss how Malawi can implement a HRBA in its fight against corruption.

4.2 Human Rights Abuses: The Malawian Corruption Chronicles

4.2.1 The right to health

The right to health is a socio-economic right provided for under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 16 of the African Charter on Human and Peoples' Rights (African Charter). In the Constitution of Malawi, the right to health is provided for under principles of national policy which states that the state shall take steps such as implementing policies and legislation to actively promote the welfare of the people of Malawi and achieve adequate healthcare.²⁸⁴ Section 14 of the Constitution states that these principles are directory but the courts shall have regard to them when interpreting the law and in determining the validity of decisions of the government. Under section 30 of the Constitution, which forms part of the Bill of Rights, the right to development is guaranteed, and it provides that the state must take necessary measures to realise the right to development by ensuring equal access to basic resources, including health.²⁸⁵

However, the reality on the ground is that the right to health is far from being realised in Malawi. Not only is the health sector affected by corruption in the procurement of drugs, but it

²⁸⁴ The Constitution, sec 13.

²⁸⁵ The Constitution, sec 30(2).

has also led to the withholding of donor funds, which make up a big chunk of the health budget.²⁸⁶ In 2013, following the *cashgate* scandal, donors withheld aid leading to delays in salaries for health workers and failure to procure drugs by the state. As a result, the health workers decided to down their tools which meant that the poor in society, who rely on public hospitals, could not access healthcare services.²⁸⁷ Leaked HSBC files showed that the revenue that Malawi lost through illicit transfers was enough to pay 800 nurses for one year.²⁸⁸ Further, the lack of drugs in public hospitals meant that people had to buy their own medicine.²⁸⁹ For a country where most of its population is living below the poverty line, it meant that their right to equal access to health was violated.

Further, there is a culture in most public hospitals where health workers ask for informal payments to provide services to the people.²⁹⁰ If people have to pay bribes in order to access basic services such as health care, it means that those who cannot afford to pay will not have access to these services thus depriving them of the right to health.

4.2.2 The right to food

The right to food is part and parcel of the right to an adequate standard of living under the ICESCR.²⁹¹ One of the principles of national policy under the Constitution of Malawi is to ensure that the people achieve adequate nutrition and self-sustenance.²⁹² The Constitution goes further to provide under the right to development²⁹³ that the state has a duty to take all necessary measures to ensure that the people have equal access to food.²⁹⁴ Although the right to food is not explicitly provided for in most human rights treaties and legislation, in the case of *SERAC v Nigeria*²⁹⁵ the African Commission on Human and Peoples' Rights (the Commission) held that the implicit right to food can be linked to the right to life under article 4, the right to health

²⁸⁶ Government corruption cripples Malawi's health sector *The New Humanitarian* 24 October 2013 <https://www.thenewhumanitarian.org/news/2013/10/24/government-corruption-cripples-malawi-s-health-sector> (accessed 26 September 2024).

²⁸⁷ As above.

²⁸⁸ Max Lawson 'My friend died last week- tax could have saved his life' *Huffpost* 24 February 2015 https://www.huffingtonpost.co.uk/max-lawson/oxfam-tax-avoidance_b_6721390.html (accessed 29 September 2024).

²⁸⁹ S Mazengera 'Missing medicines in Malawi: campaigning against stock-outs of essential drugs' (2012) *Local Governance and Community Action Programme Insights* <http://hdl.handle.net/10546/226732> (accessed 29 September 2024).

²⁹⁰ Mphande-Namangale (n 34)1.

²⁹¹ ICESCR, art 11.

²⁹² The Constitution, sec 13.

²⁹³ The Constitution, sec 30.

²⁹⁴ The Constitution, sec 30(2).

²⁹⁵ *SERAC* (n 87).

under article 16 and the right to economic and cultural development under article 22 of the African Charter.²⁹⁶ The Commission held that the right to food is linked to the right to dignity and thus essential in the enjoyment of other rights such as the right to health, education, work and political participation.²⁹⁷

Malawi heavily relies on the agricultural sector, which makes up one-quarter of the country's domestic products.²⁹⁸ People rely on agrarian produce for food and as a source of income. In response to poverty, the government launched what is now known as the Affordable Input Program (AIP) to offer subsidised fertiliser and hybrid seeds to low-income households, addressing hunger and food security.²⁹⁹ However, the program, which has been in implementation for the past 19 years has been a breeding ground for both petty and grand corruption.³⁰⁰ Not only is the program subject to bribery at the rural level when the chiefs who are responsible for identifying potential beneficiaries ask for bribes from them,³⁰¹ but the bureaucrats who are responsible for the procurement of the cheap fertiliser have been implicated in embezzling funds meant for the program. In 2022, the government lost 750 million kwacha due to misprocurement.³⁰² The government awarded the fertiliser contract to a butchery in the UK. This led to a delay in the AIP program which meant that poor Malawians could not access fertiliser during the planting season. This led to increased prices in maize in the following years as there were low yields.

In 2002, the President of Malawi declared a state of emergency due to a hunger crisis in the country.³⁰³ Multiple reasons have been advanced for the cause of the hunger including drought, flooding and the sale of the reserve maize by the National Food Reserve Agency (NFRA). The World Bank and IMF advised Malawi to reduce its food reserves, which were meant for

²⁹⁶ *SERAC case* (n 87) para 64.

²⁹⁷ As above, para 65.

²⁹⁸ Malawi commercial country guide <https://www.trade.gov/country-commercial-guides/malawi-agricultural-sector> (accessed 29th September 2024).

²⁹⁹ H Walls and others 'The politics of agricultural policy and nutrition: a case study of Malawi's farm input subsidy program (FISP)' (2023) 3 *PLOS Global Public Health* 2.

³⁰⁰ <https://www.canr.msu.edu/news/redesigning-the-farm-input-subsidy-programme-fisp-for-malawi> (accessed 29 September 2024).

³⁰¹ Office of the Ombudsman 'A report on systemic investigations on the affordable inputs programme implementation for the 2022/23 and 2023/2024 growing seasons: the successes, the irregularities and the failures – a call for re-thinking and reprogramming' (2024) 57.

³⁰² Malawi graft agency on UK's Barkaat dubious fertiliser procurement deal *The Maravi Post* 16 October 2022 <https://africannewsagency.com/the-maravi-post/malawi-graft-agency-on-uks-barkaat-dubious-fertilizer-procurement-deal-6891fcfb-337e-5aa4-939c-ce4ff1f2eedd/> (accessed 29 September 2024).

³⁰³ Sarah King 'Malawi food shortage: how did it happen and could it have been prevented?' 1 August 2002 <https://www.enonline.net/fex/16/malawi> (accessed 29 September 2024).

disasters. This was sensible since some stock had been in reserves for years, and rotating it was prudent. The entire stock was sold without replenishment because government officials, including Agricultural Development and Marketing Corporation's Managing Director Mr Jumbe, allegedly used the proceeds to build a hotel.³⁰⁴ Mr Jumbe was arrested in 2004, but the criminal case remains unresolved nearly 20 years later.³⁰⁵ The aftermath of the famine was that at least 3 million Malawians needed food aid and an estimated 300-3000 people died.³⁰⁶ The famine of 2002 resulted in the violation of the right to food and life for Malawians. Although it cannot be said that corruption directly caused the violation of human rights, it still played a big role as the state failed to purchase maize to offset the famine due to lack of funds.³⁰⁷ The perpetrators who benefitted from the embezzlement are yet to be punished and the victims have had no remedy since this tragedy.

4.2.3 The right of access to justice

The right termed as 'access to justice' refers to the ability of an individual to bring a case before a court of law and have a judicial process.³⁰⁸ People need access to a free and fair judicial system. The ICCPR provides for the right to access to justice under article 14 which states that everyone is entitled to a fair and public hearing before an independent and impartial tribunal. Article 7 of the African Charter makes provision for the right to a fair trial, and the Constitution of Malawi states that everyone shall have the right to access any court or tribunal and to have a remedy to any violation of any rights under the Constitution or any law.³⁰⁹ There are many aspects to the right to access to justice with most of it focusing on the right to representation and to access the courts physically. However, this section of the dissertation will focus on the right to have your matter heard before an impartial and independent judiciary.

After the 2019 general elections, there was a lot of dissatisfaction amongst the population regarding the results. With the Malawi Electoral Commission (MEC) announcing that Peter Mutharika had won the presidency, two of the presidential candidates, Lazarus Chakwera and Saulos Chilima petitioned the courts to review the election results alleging irregularities in the

³⁰⁴ D Hall-Matthews 'Tickling donors and tackling opponents: the anti-corruption campaign in Malawi in S Bracking (ed) *Corruption and Development: the anti-corruption campaigns* (2007) 86-87.

³⁰⁵ <https://reliefweb.int/report/malawi/malawi-ex-minister-arrested-over-sale-state-grain> (accessed 30 September 2024).

³⁰⁶ S Devereaux 'The Malawian famine of 2002' (2002) 30(4) *IDS Bulletin* 70.

³⁰⁷ Anders (n 5) 24.

³⁰⁸ F Francioni 'Access to justice, denial of justice and international investment law' *The European Journal of International Law* (2009) 20 1.

³⁰⁹ Constitution, section 41.

electoral process.³¹⁰ The matter which was famously known as ‘the elections case’³¹¹ was referred to the Constitutional Court, and 5 judges were appointed to preside over it. This case was fraught with drama both in and out of the courtroom, threatening the rights of Malawians.

There was an allegation that Thomson Mpinganjira, a prominent businessman who had ties to Peter Mutharika and his political party, had attempted to bribe the Constitutional judges. The judges complained to the Chief Justice who lodged a complaint with the Anti-Corruption Bureau leading to the arrest and eventual conviction of Mr Mpinganjira.³¹² During the sentencing of Mr Mpinganjira, the judge stated that not only had the accused attempted to destroy the democratic principles and institutions in the country, but his actions threatened to curtail the rights and freedoms of the people of Malawi.

The Constitutional Court nullified the election results, ordering a re-election. This decision was confirmed by the Supreme Court of Appeal during the appeal hearing. In what appeared to be a retaliatory move, President Mutharika placed the Chief Justice and other senior judges on leave pending their retirement. The Malawi Law Society and another CSO commenced a judicial review matter where they alleged that the decision of the executive to force the Chief Justice to retire was unconstitutional and a threat to judicial independence.³¹³ The court in its ruling stated that the independence of the judiciary is one of the core elements of the Constitution and a cornerstone of modern democracy and good governance. The court went on to state that the Constitution is clear that in the execution of its duties, the judiciary should be free of any influence or directions from any person and authority.³¹⁴ However, this also entails that the judiciary must be accountable to the people of Malawi. Courts should not be above reproach as their authority comes from the people, and they exist to serve the public.³¹⁵

These cases just go to show the impact that corruption has on the right to access to justice. If the bribery attempts against Constitutional Court Judges in the ‘elections case’ had succeeded, the nation would have encountered chaos from the violent protests triggered by the election results.³¹⁶ Further, the attempt by former president Mutharika and his regime to have a judiciary

³¹⁰ MJ Nkhata, A W Mwenifumbo and A Majamanda ‘The nullification of the 2019 presidential election in Malawi: a judicial coup d’etat?’ (2021) 2 *Journal of African Elections* 59.

³¹¹ *Chilima & Anor. v Mutharika & Others Constitutional Reference 1 of 2019*.

³¹² n 233.

³¹³ *State obo HRDC & others. v President of Malawi & others Judicial Review 33 of 2020 para 52-54*.

³¹⁴ As above para 58.

³¹⁵ n 313.

³¹⁶ n 233

that was ‘loyal’ to him would have seriously violated the rights of the people of Malawi to access justice from an impartial and independent judiciary.

4.3 Corruption and human rights in other jurisdictions

4.3.1 South Africa

South Africa has one of the most human rights-centred constitutions in the country. It is one of the few countries in the world to recognise the enforcement of socio-economic rights.³¹⁷ Although the South African Constitution does not directly address corruption, it establishes institutions that ensure the transparency and accountability of government officials such as the office of the Public Protector which is empowered to investigate any conduct of impropriety or prejudice in state affairs or in the public administration of any sphere of government.³¹⁸ The Public Protector may then report on this conduct and take ‘appropriate remedial action.’³¹⁹ The main legislation on combating corruption in South Africa is the Prevention and Combating of Corrupt Activities Act (PCCA).³²⁰ The preamble to PCCA recognises the rights enshrined in the Constitution, the duty the state owes to protect, respect and fulfil these rights and the role that corruption play in undermining the enjoyment of these rights. It further recognises the need for a comprehensive, multidisciplinary approach in combating corruption.³²¹ The PCCA makes provision for the offence of corruption in general and corruption by particular groups such as public officers, judicial officers, members of prosecuting authorities and legislative authorities.³²² These offences are punishable by fines, custodial sentences with the maximum sentence being life imprisonment.³²³ Where there has been a conviction regarding corruption in respect of tenders, procurement, and contracts, the PCCA makes provision for the establishment of a register that blacklists persons or enterprises guilty of this offence from obtaining state contracts or tenders.³²⁴

³¹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) where the Court held that the state had a duty to provide access to housing to its citizens.

³¹⁸ Constitution of South Africa, section 182(1).

³¹⁹ As above.

³²⁰ Prevention and Combating of Corrupt Activities Act 12 of 2004.

³²¹ PCCA, Preamble.

³²² PCCA, secs 3-9.

³²³ PCCA, sec 26.

³²⁴ PCCA, secs 29-33.

South African courts have dealt with corruption's effects on human rights. However, they have opted to use 'weaker' language such as 'negative impacts' and 'undermining' of human rights by corruption.³²⁵ Such language undermines corruption's impact on human rights and the remedies that can be provided. In the case of *Hugh Glenister v. President of the Republic of South Africa and Others*³²⁶, the Court stated that it is undoubted that corruption undermines the rights in the Bill of Rights, and fighting it requires an integrated and comprehensive response. The duty of the state to respect, promote, protect and fulfil human rights means that the state must be sure to create effective corruption-fighting mechanisms.³²⁷ In the case of *Khumalo and Another v Member of the Executive Council for Education*³²⁸ the court further stated that the duty placed on the state to protect, promote, fulfil and respect the Bill of Rights means that public officers, when faced with irregularities in public administration, must seek to redress it. This is a privilege stemming from serving the public who put their trust and taxes in the government.³²⁹

In the case of *President of the Republic of South Africa v The Office of the Public Protector and others*,³³⁰ President Zuma had been implicated in a case of 'state capture' where the Gupta family was said to have been bribing top government officials for procurement favours and that they were even influential in the appointment of cabinet ministers. Complaints were brought before the office of the Public Protector, who, upon initial investigations, made a proposition for remedial action to the president under section 182(1)(c) of the South African Constitution. The president commenced a judicial review case on the lawfulness and rationality of the remedial action stating among other things that the power to appoint a commission of inquiry is vested in the president and if he were to act based on the directive of the Public Protector, then his decision would be subject to review. The court held that 'a state functionary has a duty to investigate and if there is need, to correct any unlawfulness through appropriate avenues. This duty is founded on values of accountability and transparency.'

³²⁵ *South African Association of Personal Injury Lawyers v. Health and Others*, 2001 (1) SA 883, para 4.

³²⁶ *Hugh Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para. 177.

³²⁷ As above.

³²⁸ *Khumalo and another v Member of the Executive Council of Education KwaZulu Natal* 2014 (5) SA 579 (CC) para 35.

³²⁹ As above, para 36.

³³⁰ *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP).

The South African Courts, in dealing with corruption, have focused on public officers' duty towards the people. In line with the *ubuntu* philosophy, public officers have a duty to act for the benefit of the community at large through their conduct. Although not emphasising the importance of the connection between human rights and corruption, by promoting principles like accountability and transparency and even accepting that there is a need for an integrated and comprehensive response, South Africa adopts a human rights perspective, effectively applying a Human Rights-Based Approach (HRBA). Further, the provision of remedial actions by the Public Protector can be utilised to provide remedies to victims of corruption which are binding on other branches of government.

South Africa has also utilised 'The People's Tribunal on Economic Crime.' People's tribunals are forums of justice set up by social justice movements and organisations to look into cases, usually against states or state institutions.³³¹ Although the decisions of the tribunals are non-binding, they give the people a sense of power as they feel part of the accountability process, and they draw the attention of the international community to the violation of human rights.³³² In 2018, following allegations of 'state capture', a people's tribunal was set up in South Africa. The tribunal panel comprised legal experts, including former chief justice Zak Yacoob and renowned jurist and former UN high commissioner for Human Rights Navi Pillay. Through the tribunal, the people had a chance to participate and bring evidence on economic crimes in South Africa and their link to corruption.³³³ The tribunal contained all the essential elements of a HRBA to combating corruption as it employed a victim-centred approach by giving power to the people to hold their government accountable. Unfortunately, since the tribunal was not state sanctioned, its recommendations were not implemented. However, if these tribunals were made part of the accountability process and given actual legal backing and powers under an Act of Parliament, they would be a useful tool in the fight against corruption.

4.3.2 United Kingdom (UK)

In the UK, the Serious Fraud Office (SFO), the Crown Prosecutions Service (CPS) and the National Crime Agency (NCA) are some of the departments tasked with combating corruption in the UK. Under the Bribery Act of 2010, it is an offence to bribe foreign public officials, and

³³¹ A Shahshahani 'People's tribunals: holding power to account' <https://www.nlg.org/wp-content/uploads/2021/03/Peoples-Tribunals.pdf> (accessed 1 October 2024).

³³² Shahshahani 1.

³³³ <https://corruptiontribunal.org.za/> (accessed 1 October 2024).

it is under this section that the HRBA has really been utilised in the UK.³³⁴ Commercial organisations are under a duty to ensure that it, or any person associated with it does not engage in bribery.³³⁵ The SFO, CPS, and NCA have come up with general principles to compensate victims of bribery, financial crimes and corruption.³³⁶ These guidelines apply to foreign victims which includes states. The guidelines state that in all appropriate cases, they shall employ legal means to secure compensation for victims of corruption. Where there has been a conviction, the departments make use of provisions under the Proceeds of Crime Act and The Powers of Criminal Courts (Sentencing) Act for compensation. The departments will seek that the courts confiscate the proceeds of crime, then make a holding on the compensation to the victims of corruption and other financial crimes. Where the case has been settled under a Deferred Prosecution Agreement (DPA), compensation to victims must be one of the terms of the DPA.

In the case of *Regina v Smith & Ouzman*,³³⁷ two corporate officials and their company were convicted of corrupting foreign public officials in Kenya and Mauritania. In Kenya, the company bribed public officers to secure contracts for printing ballot papers and IDs for a by-election and to obtain printed materials for public examinations. In all these transactions, Smith & Ouzman would overcharge on the prices and the surplus was given back to the public officials as bribes. In the ruling on conviction, the court stated that the people of the countries where the crimes were committed were the victims not only for the money lost but because they had now lost faith in the electoral and examination system. In sentencing, the court went further to reiterate the words of the former UN Secretary-General, Kofi Annan in the foreword of the UNCAC that corruption has corrosive effects especially on developing states. In this case, the court failed to make a compensation order as it held that it did not have enough evidence before it that the compensation would reach the right entities and there had been no evidence that the foreign governments were making efforts to recover the money from their offending officials. However, the court made a confiscation order against the company and its two officials. The SFO then paid 349,000 pounds to the government of Kenya as compensation, money which was used to purchase ambulances.³³⁸

³³⁴ Bribery Act of 2010, sec 6.

³³⁵ Bribery Act, sec 7.

³³⁶ <https://www.sfo.gov.uk/publications/information-victims-witnesses-whistleblowers/compensation-principles-to-victims-outside-the-uk/> (accessed 18 October 2024).

³³⁷ *R v Nicholas Smith, Christopher Smith and Smith and Ouzman*, <https://www.sfo.gov.uk/cases/smith-ouzman-ltd/> (accessed 28 September 2024).

³³⁸ As above.

In the case of *SFO v ICBC SB PLC*³³⁹, Standard Bank PLC was indicted for failure to prevent its sister company Standard Bank Tanzania which had attempted to bribe public officials in Tanzania. The matter was settled through a deferred prosecution agreement in which Standard Bank was fined 25.2 million pounds plus 7 million pounds as compensation to the government of Tanzania. Meanwhile, the public officials involved in Tanzania were arrested. They made a plea deal in which they were fined the sum of 1 million TZS and ordered to pay 1.5 billion TZS as compensation to the government of Tanzania.³⁴⁰

Although the compensation process by the UK government leaves a lot to be desired, for instance, the fact that it is their government that decides how best the compensation can be utilised in the foreign country, and that they appear to benefit more as the fine is higher than the compensation ordered, it is reminiscent of a HRBA as it takes a victim-centred approach. By making provision for compensation, the courts consider corruption not to be a victimless crime, and thus, ensure that there is a direct remedy for those affected. Although the compensation process tries to identify clear victims and how the corrupt act led to their loss, in the case of *Smith & Ouzman*, the SFO and the government of Kenya, were able to make a decision that benefited the public in general where these factors were not clear.

4.4 How can Malawi implement the HRBA from the lessons learnt

4.4.1 Taking a page out of South Africa's People's Tribunal

The People's Tribunal on Economic Crimes is a good example of an HRBA for combating corruption. Although the findings of the Tribunal were not binding, it was a reminder of the role of CSOs in holding the state accountable.³⁴¹ The tribunal itself stated that its existence highlighted the failure of state institutions to hold the perpetrators of economic crimes accountable.³⁴² Tribunals are a great way for victims to participate in the accountability process which is one of the key elements of the HRBA. They provide a platform for the citizens to speak on issues that the state is failing to speak on and thus bringing international attention to matters

³³⁹ <https://www.sfo.gov.uk/download/deferred-prosecution-agreement-statement-facts-sfo-v-icbc-sb-plc/> (accessed 28 September 2024).

³⁴⁰ *Harry Msamire Kitilya & Others vs Republic* (Criminal Appeal No. 498 of 2022) [2024] TZCA 388 (23 May 2024)

³⁴¹ <https://corruptiontribunal.org.za/2018/09/12/press-release-delivery-tribunal-panels-final-report/> (accessed 2 October 2024).

³⁴² As above.

that would otherwise go unnoticed.³⁴³ Since the tribunals are informal set-ups, they are not bound by the strict rules that come with courts of law such as procedure on evidence or decorum, thus making them accessible to the ordinary man.³⁴⁴ Further, this means that they will not be bound by undue delays that come with time-wasting tactics employed by the defence in court.³⁴⁵

There is a level of dissatisfaction in Malawi on the state's efforts to combat corruption. In an Afrobarometer report conducted in 2022, 66% of Malawians stated that the government is doing a bad job when it comes to fighting corruption.³⁴⁶ Implementing a People's Tribunal will foster participation from the people in holding the state and all perpetrators of corruption accountable, especially where the corrupt acts have led to the violation of the people's rights. Further, the tribunal empowers the people, as they will be able to understand the impact that corruption has on their communities and their duty in combating it.

4.4.2 Offering compensation

The anti-bribery laws in the UK, recognising that corruption has visible victims, provides for compensation, particularly to victims of overseas corruption. Corruption, as already stated, affects the poor disproportionately. Where the state loses funds meant for development or health care through corrupt acts, the people initially entitled to the funds should be compensated. Although the anti-corruption laws in Malawi make provision for the confiscation of proceeds and compensation of victims of financial crimes,³⁴⁷ they fail to provide rules on how the confiscated assets will be utilised and courts are yet to order compensation as a remedy.³⁴⁸ The law states that the funds will be deposited into the confiscation fund, which will be used to pay the costs of the Administrator of the fund and any purpose as approved by the National Assembly.³⁴⁹ This is a very vague approach on how to deal with the confiscated funds and may easily lead to abuse. Further, letting the National Assembly decide how the funds will be spent does not guarantee that the funds will benefit the victims of corruption. Thus, the law should be amended to include compensation as one of the penalties for financial crimes and there must

³⁴³ C Chinkin 'People's tribunals: legitimate or rough justice' (2006) 24 *Windsor Yearbook of Access to Justice* 212.

³⁴⁴ As above.

³⁴⁵ The people's tribunal held hearings and reached findings within months, while the Zondo Commission took years to conclude its investigations amidst legitimacy challenges.

³⁴⁶ Chunga (n 23).

³⁴⁷ FCA, sec 48(3).

³⁴⁸ FCA, sec 128 & 132.

³⁴⁹ FCA, sec 132.

be a proper framework on how the compensation can be used to remedy the consequences of corruption and how to identify the recipients of this compensation.

The amended law can make provision for a designated committee with powers to identify the individuals eligible for this compensation. This committee may include members from law enforcement agencies focused on corruption and other financial crimes and representatives from the Human Rights Commission and the Ombudsman. A category of eligible compensation recipients must also be outlined which includes, direct victims of the violation, public institutions who can prove a need that would benefit from the fund and the law enforcement agencies themselves. Priority should be given to direct and indirect victims of the offence. However, where they cannot be identified, a public institution like a hospital with a proven need can be allocated the funds. This will give the public a feeling of justice regarding the crime's outcome.

4.4.3 The role of the people in combating corruption

Under the Constitution of Malawi, the power to govern is derived from the people and is exercised based on the sustained trust of the public. Where this trust has been betrayed through acts of corruption, be it embezzling of public funds, bribery, abuse of power for personal gain, the people should have access to a civil remedy. In *Gift Trapence and others v The Democratic Progress Party and others*³⁵⁰, the court held that private individuals, who were members of CSOs had standing in a matter where they sued the ruling Democratic Progressive Party (DPP) and statutory corporations to refund public funds that the statutory corporations had ‘donated’ at the political party’s fundraising event known as the ‘blue night’. This contrasts with the court’s past position regarding legal standing of private individuals who are also members of CSOs.³⁵¹ The claimants not only sought that the money donated be returned, but they also demanded that the statutory corporations, which are public entities, apologise to the people of Malawi for abusing their funds. The court held that citizens, had the right to access information that concerned public funds. The political party was ordered to refund the money to the state-owned institutions and the statutory corporations issued apologies to Malawians. This case is of particular importance as it influenced the law reform on funding for political parties in an Act that was adopted a year after the case was commenced, known as the Political Parties Act

³⁵⁰ *Gift Trapence and others v The Democratic Progressive Party and Others*, Miscellaneous civil cause number 41 of 2017.

³⁵¹ See n 212.

of 2018. Although the Bill was already in the works prior to the commencement of the case, a new section was added to the Bill prohibiting political parties from receiving donations from state-owned institutions.³⁵²

The actions of the court and claimants in the ‘Blue Night’ case have a significant impact on the fight against corruption in Malawi. It opens the door for private individuals to seek remedies where their rights have been violated by setting a precedent on the standing of private individuals in such cases. However, this is only possible where you are dealing with a progressive judiciary that is truly independent and willing to implement the HRBA by recognising the rights of victims and the duty that the state owes its citizens.

4.5 Conclusion

In conclusion, corruption is a multifaceted crime that cannot be dealt with simply through punitive measures. By linking corruption and the violation of human rights in Malawi, this chapter explores how corruption directly and indirectly impact the right to food, the right to health and the right to access to justice. Further, the chapter established a basis as to why a HRBA is important to complement the fight against corruption. It also looked at how certain countries, such as South Africa and the UK have utilised human rights in combating corruption. Finally, it identified the people’s tribunal on economic crimes, utilising CSOs and the victims to claim their rights and compensation of victims as some of the lessons that Malawi can learn and implement in combating corruption. By implementing these HRBA measures, the people will be empowered to participate in holding the state accountable. Further, there will be transparency in the work of the state, thus creating an environment that curbs corruption rather than fosters it.

³⁵² Political Parties Act, Section 27(3).

Chapter Five

Conclusions and Recommendations

5.1 Conclusion

Corruption is a scourge that has plagued Malawi for years. Not only does it affect development, it also erodes trust in state institutions. The government has enacted a number of legislations to combat the vice, most of which take the criminal route in punishing corruption, but there appears to be little strides made in eradicating it. This research set out to find whether a human rights-based approach (HRBA) can be utilised to complement the fight against corruption.

This research established that corruption is a product of entrusted power being abused for the benefit of a few rather than the many. Corruption takes many forms, including bribery, embezzlement, money laundering, and fraud. Corruption has been linked to the violation of human rights and it is a human rights violation in itself. It thrives in environments where rights such as freedom of expression are violated and may lead to violation of rights such as health, food and access to justice. The state thus has a duty to promote, fulfil and respect human rights. In order to execute this duty, the state must remove all obstacles that will prevent the full enjoyment of rights including corruption.

Since corruption is an impediment to the enjoyment of human rights, a solution based in human rights must be implemented to help combat it. An HRBA does not seek to replace the criminal aspect of corruption but is rather complements it by focusing on the victim. HRBA employs key principles of human rights such as participation of citizens, accountability, transparency, non-discrimination and equality, empowerment and legality in fighting corruption. HRBA requires that there must be a link between the corrupt act and the human rights violation to identify victims. Upon identifying the victims, remedies must be provided.

The anti-corruption legal framework in Malawi has elements that support HRBA. Malawi is a state party to international and regional anti-corruption treaties such as the UNCAC, AU Convention on Combating and Preventing Corruption and SADC Protocol. These treaties recognise the impact that corruption has on human rights and provides transparency, accountability, participation as well as a multi-faceted approach to combating corruption. these treaties have been domesticated through various legislations which have elements of a HRBA.

The research links corruption to the violation of human rights in Malawi, focusing on the right to food, health and access to justice. Finally, this dissertation then looks at how countries such as South Africa and UK have utilized human rights principles in combating corruption and what lessons Malawi can learn in implementing HRBA.

5.2 Recommendations

There must be an amendment to the law about the utilisation of the confiscation fund. There must be proper regulations on how the confiscation fund that holds proceeds of financial crimes such as corruption can be utilised to benefit the victims of corruption. A committee must be set up comprising of members from law enforcement agencies, Malawi Human Rights Commission and the Ombudsman who can identify recipients of the proceeds of corruption as compensation.

Compensation must be one of the penalties awarded by the courts where corruption has led to the violation of human rights. Courts must view corruption through a human rights lens, considering both criminal and human rights aspects thus adopting a progressive approach to combating corruption.

The anti-corruption laws must be amended to reflect the impact that human rights have on corruption. It is not enough to criminalise corruption, the laws governing the fight against corruption should be able to link the effect that corruption has on the enjoyment of human rights and good governance.

Anti-corruption agencies such as ACB and FIA must apply a human rights lens in combating corruption. Every case must be analysed as to whether there has been a violation to human rights. In prosecuting the case, emphasis must be paid to the consequences of the corrupt act to human rights. This will inform how the court will rule in the case as well.

CSOs and citizens must participate in holding state institutions accountable for corrupt practices. This can be achieved if courts adopt a progressive stance on legal standing. When rights are violated or the state fails its duty to benefit the people, those affected should be allowed to challenge state decisions in court.

Finally, law enforcement agencies like ACB must educate the public on the impact of corruption on human rights. This will empower citizens, who will be more inclined to combat corruption if they are aware of its effects on their rights.

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