The Unceasing War Against Corruption - A Study on the Financial Resources Plunder During the Covid-19 Pandemic In Malawi

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Introduction

Corruption has been described as an 'AIDS of democracy' and a harbinger of destruction to Africa's future. These views have remained true, especially for a country like Malawi amidst COVID-19, the worst global Pandemic in more than a century. The article discusses financial resources plundered in Malawi amidst the COVID-19 Pandemic, using it to highlight pre-existing corruption problems in Malawi and its effects on the country's global and regional economic participation. It argues that domestic systems are insufficient to root out corruption and highlights the role of international systems in addressing corruption, thereby calling for more investment in international enforcement.

COVID-19 Pandemic

As of 10th June 2022, the global infections from the Pandemic had surpassed half a billion people, with a death toll exceeding 6 million, with Africa accounting for more than 9 million infections and 91 thousand deaths. Malawi has suffered more than 86,000 infections with 2,600 deaths. Although most countries in Africa have fared relatively well from the Pandemic thus far, the region has nonetheless been adversely impacted by the socio-economic fallout of the Pandemic. The world is expected to suffer its worst economic crisis since the great depression in 1930s. This is expected to cause Africa's GDP to drop by 1.4%, with a drop in total exports of 16.7% and the resultant revenue losses of up to 5.3%. Exports of agricultural raw materials will take a huge knock which will be detrimental to the African economies that depend primarily on this sector. Recognising the socio-economic threat posed by the Pandemic; governmental, non-governmental and private actors have contributed substantial financial and material resources to the global COVID-19 response. As of June 2022, it is reported that palliative measures worth 21.7 trillion US Dollars (USD) had been introduced as part of the global responce. This is more than 180,000% of the GDP of the southern Africa country, Malawi.

This piece blog focuses on acts of public entities and officers in divesting public resources, including government contracts aimed at the procurement of machinery and medications in the fight against COVID-19 and public revenues made available for the pandemic response, from their intended public use in favour of private beneficiaries.

Corruption in Malawi amidst the Pandemic

Malawi has historically been plagued by corruption scandals. A 2020 forensic audit exposed yet another misappropriation and abuse, involving about 7.8 million USD earmarked for the country's COVID-19 response, accounting for 3.7% of its Covid-19 response plan as of March 2021. The exposé occurred around a period when Malawi was battling the worst wave of COVID-19, which saw a doubling of infection rates every four to five days and claimed the lives of two cabinet Ministers within a week. A second audit report was expected on an additional 21.6 million USD earmarked for the Pandemic's response, contents of the second report have been withheld by the Government, but unverified

reports are painting a grim picture. In response to the exposé, a Minister was fired, and about 64 persons were initially arrested but later released.

International law anti-corruption standards

Three main international anti-corruption instruments are relevant for a country like Malawi, the United Nations Convention against Corruption (UN Convention), African Union Convention on Preventing and Combating Corruption (AU Convention), and the Southern African Development Community Protocol Against Corruption (SADC Protocol).

The UN Convention, adopted in 2003, was ratified by Malawi on 4th December 2007. Unfortunately, Malawi is a dualist state; as such, ratification is insufficient to make the treaty enforceable unless it has been domesticated. This has not happened to date for unknown reasons. Among its goals, the UN Convention promotes integrity, accountability, and the proper management of public affairs[1]. It imposes obligations on states to develop and implement effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency, and accountability[2]. However, the Convention is rendered toothless as it gives wide discretion to each State by requiring compliance 'in accordance with the fundamental principles of its legal system'[3]. It may as well be argued that the Convention is 'all bark and no bite.' Its monitoring body is the Conference of State which is empowered to promote its implementation[4]. The Conference may establish a body or mechanism to assist it in implementing the UN Convention[5]. However, such a mechanism is yet to be established.

On the other hand, the AU Convention was adopted in July 2003 but only ratified by Malawi on 26th December 2007 though it has not been domesticated. It was developed in response to concerns about the negative effects of corruption and its devastating effects on the economic development of African peoples[6]. The AU Convention appeals to similar principles as the UN Convention[7]. It guarantees access to information for the public, as may be required in the fight against corruption, and ensures the participation of civil society and media in monitoring government activities and implementing the Convention[8]. It creates an Advisory Board within the African Union to receive

periodic reports from state parties but does not empower the body to monitor and enforce its objectives[9]. Furthermore, its focus on adopting legislative measures ignores the fact that legislation on corruption is usually ignored in practice[10].

For the Southern African region, the SADC Protocol was adopted in Malawi in August 2001 and has since been ratified. Like the other instruments, it has not been domesticated in Malawi. It acknowledges corruption as a serious international problem, the subject of concerted action, and one which countries in every stage of development should tackle[11]. Like the other Conventions, it calls for the elimination of corruption through domestic legislation[12] and leaves the responsibility of ensuring accountability and enforcement to member states[13]. Its provisions are similar to the UN and AU Conventions.

Article 11 of the Protocol establishes the SADC Anti-Corruption Sub-Committee (SACC) to oversee its implementation, which appears to have been operationalised around 2015. Among other things, the Committee receives periodic reports from state parties[14]. The Committee does not have adjudicative functions but reports matters of compliance to the SADC Council of Ministers[15]. Ironically, the Council cannot adopt binding decisions on states but advises the Summit of Heads of State and Government on overall policy matters. The SADC Summit is a supreme decision-making body comprised of heads of State and Government which can adopt legal instruments for the implementation of the SADC Treaty[16]. Fortunately, Article 22 of the Protocol empowers the Tribunal of the SADC Community to resolve any dispute arising from the interpretation or application of the Protocol which cannot be settled amicably. It is unlikely that the Tribunal can hear disputes on enforcement of the Protocol. But in any case, in 2010, after a set of decisions made against the Government of Zimbabwe based on the SADC Treaty, there was a massive clampdown on the Tribunal, rendering its continued relevance in question. The Tribunal was suspended de facto due to an impending review of the Jurisdiction of the Tribunal. In 2011, the SADC Summit decided to prohibit the Tribunal from hearing any new cases or completing existing cases. Finally, in 2014, a new protocol establishing a new SADC Tribunal was adopted but is yet to enter into force. The new Tribunal will have powers to hear only interstate disputes and is even more unlikely to be of any use in enforcing the SADC Corruption Protocol, as SADC member states typically do not take each other to Court for breach of

SADC treaties.

Malawi’s Response to COVID-19 Funds Corruption

Amid rising calls for the Malawi government to account for COVID-19 funds and demands for transparency in the COVID-19 response, the President ordered an audit on how the 7.8 million USD COVID-19 funds were used. After the conclusion of the audit report, there was general reluctance to have the contents made public despite numerous promises to make the contents public. The report later was leaked by an unknown person to the public, disclosing its grim details of plunder and generating public outrage. A reluctance to be transparent, accountable and to allow access to information runs like a thread throughout Malawi's dealing with the corruption scandal involving COVID-19 funds. The Government sat on a second audit report on other COVID-19 funds, which was ready in January 2022 but was not released when writing this piece. This is despite the obligations of Malawi under the instruments above to be transparent and accountable, to ensure public participation in government activities on procurement and decision making, and to ensure its decisions are objective and verifiable especially emphasised in Articles 5, 9, 12, and 13 of UN Convention and Articles 9 and 12 of AU Convention.

In the domestic legal framework, Malawi's international obligations are reinforced legislatively under the country's Constitution. Section 12(1)(c) of the Constitution gives authority to exercise the power of the State conditional upon the sustained trust of the people of Malawi to be sustained by an open, accountable and transparent Government. As a constitutional policy, measures are to be introduced guaranteeing accountability, transparency, personal integrity and financial probity, which will strengthen confidence in public institutions by virtue of their effectiveness and visibility[17]. Furthermore, section 37 of the Constitution guarantees the right of access to all information held by the State or any of its organs at any level of Government, with the caveat that such information must be required for the exercise of individual rights. Despite these principles and more, there exists no established process by which one can demand the release of information on public expenditure or public finance management. The Supreme Court of Appeal has generally shut the judiciary from supporting access to information efforts as it developed tight rules on locus standi requiring a personal and direct interest even where

corruption allegations are involved. In one case, an anti-corruption activist was ordered by the Court to pay more than 20,000 USD as legal costs for demanding the resignation of a Minister embroidered in corruption allegations. In another case, a Newspaper has similarly been ordered to pay the same Minister an amount awaiting quantification for its publications on the allegations.

After the embarrassment caused by the first report, the Malawi government is now reluctant to release funds for undertaking a further audit on other COVID-19 funds. This is despite undertakings it made to the International Monetary Fund that it would be accountable, effective, efficient and transparent in the use of public funds associated with the COVID-19 Pandemic and that there would be quarterly audits of COVID-19-related spending. It seems the domestic anti-corruption system, with its penal system, legislative framework and policy directions, has generally failed to address rampant corruption associated with the COVID-19 funds or any other corruption scandals to date.

Identifying the Causes

In Malawi, like in most African countries, corruption thrives due to high levels of economic inequality, an insufficiently funded public sector, and patronage networks.

Inequality

A direct correlation between economic inequality as a cause, not just an effect, of corruption has been traced by Jong-Sung You and Sanjeev Khagram. They observe that as inequality increases, the poor demand more economic redistribution and the rich have greater motivation to use political corruption to lower taxes and circumvent tax collection. The poor lack basic materials to organise and monitor corrupt activities, rely on petty corruption for access to basic services and are vulnerable to bureaucratic extortion to secure basic payments. As of 2022, Malawi's Gini index is estimated at 44.7%, which is even lower than that of the Democratic Republic of Congo, Zimbabwe and Mozambique countries which are perceived to be amongst the most corrupt in southern Africa as of May 2022.

Insufficiently funded public sector

A 2006 World Bank Survey concluded that low salaries, the lack of incentive mechanisms for public officials, and the lack of corruption reporting systems are the top three reasons for public sector corruption in Malawi. Ironically, during the Pandemic, health workers in Malawi took industrial action against the Government to improve working conditions and risk allowances for front-line workers. This occurred while the then Ombudsman found that 80% of public funds meant for the Pandemic response were used for allowances and training conferences for government officials.

Patronage networks

Patronage networks are present where appointments in public sector positions and awards of lucrative contracts are reserved for party loyalists and/or opposition MPs willing to provide cash and favours. The audit report on the funds used for the COVID-19 response disclosed the award of contracts for the supply of Personal Protective Equipment (PPE) to entities related to public officials. In one instance, a Minister, who was subsequently fired, allowed the redirection of COVID-19 funds for his unrelated trip to South Africa.

Recommendations

For Malawi and across Africa, the standards in the UN Convention, the AU Convention and the SADC Protocol appear to have had little impact on the massive misappropriation of funds associated with the COVID-19 response. It is doubtful that the problem is domestication because countries like Malawi have local frameworks that should have by now brought some control to the repeated stories of financial resources plunder. Furthermore, good anti-corruption policies and frameworks mean little in the face of widespread non-compliance. It is time to take another look at the international anti-corruption regime. The obstacle remaining is the lack of effective enforcement mechanisms. When domestic regimes fail, the anti-corruption stance of other states may affect domestic jurisdictions[19]. While a corrupt official may enjoy legal, factual, or political protection in their State, their political protections may not extend abroad, except for diplomatic protections offered to heads of State and other foreign dignitaries[20]. That is where the UN Convention, AU Convention and SADC Protocol can come in handy.

Thus, it is necessary to strengthen the international anti-corruption regime to create an autonomous system that is independent of the influence of those it seeks to check to give effect to global, continental, and regional anti-corruption aspirations. The system must be able to monitor adherence to anti-corruption instruments and take decisive action to spur adherence in case of failure. There are lessons to be drawn from the working relationship created by the African Commission on Human and Peoples Rights (the Commission) and the African Court on Human and Peoples Rights (the African Court) for creating a collaborative and complementary synergy towards international goals. The Commission, like the SADC Anti-Corruption Sub-Committee, has powers to receive reports and investigate steps towards protection, promotion and fulfilment of human rights by member states, but unlike the Sub-Committee, it can prosecute States before the African Court for violation of Human Rights treaties. To complement this, the African Court is not only accessible for the prosecution of human rights disputes by the African Commission but is accessible to member states (who rarely take the opportunity). The African Court is also accessible to non-governmental organisations and individuals where States make a declaration to that effect. This could be replicated with the international anti-corruption agenda. On the domestic front, Malawi has a chance to ride the wave of public outrage and the excitement of a new government to achieve massive reforms on anti-corruption. However, the reluctance to be transparent and allow access to information remains a stumbling block for the local cause.

The possibility of this working is hinted at in Malawi after new revelations of state capture. In April 2021, Malawi had a new Director of the Anti-Corruption Bureau, Martha Chizuma. Ironically, she was who revealed the first gross misappropriation of COVID-19 funds during her work as the country's Ombudsman. In her new position, she is responsible for leading the anti-corruption agenda of the country and has collaborated with the United Kingdom crime enforcement agency on the state capture, with the main player being pursued through UK Courts. Through this collaboration, one of the biggest corruption scandals, which is still unravelling and has so far implicated all branches of Government and very high-level individuals may be brought to heel. This is in an attempt to mitigate the use of the same tainted systems to fight their corruption. It is yet to be known if this will be successful, but it has

certainly brought some optimism.

Conclusion

A crisis is always an opportunity for the Government to review its policies and adapt them to the new reality. Malawi has a chance with the corruption revelations from the COVID-19 Pandemic, a new President who campaigned on a slogan vowing to 'clear the rubble' and who has taken over SADC Chairmanship, a fresh scandal brewing on state capture and an iron lady leading the anti-corruption fight. It can make bold moves and proposals with lasting impact on the domestic and international stage. Corruption has now become a pandemic worthy of a crusade that permeates national borders and utilises independent international systems' promise and potential. Maybe then, can the impeding destruction be averted.

References

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[1] Article 1(c) read with Preamble, paragraph 3

[2] Article 5(1)

[3] Articles 5, 6, 7, 8, 9, 10, 11, 12, 13, 20, 23, 30, 31, 34, 36, 37 and 65.

[4] Article 63

[5] Ibid

[6] Preamble

[7] Preamble, paragraph 7

[8] Articles 9 and 12

[9] Article 22

[10] Preamble paragraphs 9 and 11 and articles 5, 6, 16, and 19(3)

[11] Preamble, paragraph 3

[12] Preamble, paragraph 9

[13] Preamble, paragraph 10

[14] Article 11(2) of SADC Protocol Against Corruption

[15] Article 11(3)(e) of SADC Protocol Against Corruption

[16] Article 10(1) as read with Article 10(3) of the Treaty of the Southern African Community

[17] Section 13(o) of the Constitution

[18] Jong-Sung You, and Sanjeev Khagram. 'A Comparative Study of Inequality and Corruption' (2005) American Sociological Review 70(1) 136-5 http://www.jstor.org/stable/4145353 accessed August 4, 2021

[19] Edward Elgar Publishing, Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa (Edward Elgar Publishing, 2014) 33

[20] Ibid

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