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The Role of the Ombudsman in Curbing Corruption in Malawi

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ABSTRACT

Corruption in Malawi is a complex and sophisticated problem with causes ranging from bureaucratic shortcomings to cultural factors and outright greed. It, therefore, goes without saying that equally sophisticated and multifaceted control mechanisms and measures are required to curb it. One possible solution is to exploit the full potential of the oversight and accountability institutions that form the governance structure. But what role can each of these institutions play in the fight against corruption? Using data from 40 questionnaires, 6 key-informant interviews and previously published works, this paper endeavours to examine the role the Office of the Ombudsman can play in curbing corruption in Malawi. The paper finds that, by promoting accountability, the Ombudsman plays an important role in the fight against corruption, albeit there is a specific institution for the purpose—the Anti-Corruption Bureau (ACB). The paper recommends clarity on mandates and cooperation, civic education and recruitment of well-qualified staff.

KEYWORDS:

Corruption; Public Accountability; Ombudsman; Network Governance, Malawi.



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INTRODUCTION

It is no secret that corruption in Malawi is endemic. According to Transparency International's Corruption Perceptions Index (2023), Malawi has a score of 34/100 (100 means very clean, 0 means very corrupt and the average is 43), ranking 110 out of 180 countries. The causes of corruption in Malawi are diverse. Administrative factors, sociological factors such as cultural norms and practices, and greed are often cited as the main causes of corruption (see Hussein, 2005; Chisesa, 2015; and Tengtenga & Soyiyo, 2020). The leading agency in the fight against corruption in Malawi is the Anti-Corruption Bureau (ACB), and the general view among Malawians is that the ACB bears full responsibility for the fight against corruption (Hussein, 2005). However, there is a whole forum of institutions whose fields of work are closely linked to corruption. These institutions' work is to primarily promote accountability and protect the public from abuse and injustice. They include the Office of the Ombudsman, the Human Rights Commission, the Law Commission and the Financial Intelligence Unit. The question that lingers is how far can each of the institutions go in curbing corruption? The present study attempts to assess the role of the Ombudsman, perhaps the main public accountability institution, in curbing corruption in Malawi. Thus, the main objective of the paper is to determine whether and to what extent the Ombudsman can play a role in the fight against corruption, complementing the ACB without over shadowing it.

METHODOLOGY

The study used data collected using 40 questionnaires, 6 key-informant interviews and previously published works, including the Ombudsman's investigation reports. The participants from which the data was collected were selected purposively using their experience and knowledge of the topic as criteria. The collected data was then analysed in order to find common themes which were then put against previously published works.

CONTEXTUALISING AND CONCEPTUALISING KEY TERMS

This section provides conceptual considerations of key terms as they are used in this paper.

Ombudsman

The institution of the Ombudsman can be traced back to Sweden. According to the International Ombudsman Institute (2013), the institution was first introduced in 1809 in Sweden and it has since grown in popularity thanks to its usefulness, flexibility and adaptability to countries with different political and administrative backgrounds. Although the term "Ombudsman" bears the connotation of a male office holder, the Swedish word *ombudsman* is not in any way gendered and it simply stands for "agent or representative of the people" (LeBaron, 2008: 4).

Generally, the institution is responsible for receiving and investigating public complaints against government bureaucracy involving misconduct, abuse of power and maladministration (Reif, 2004). In Malawi, the Ombudsman is a creature of the 1994 Constitution, sections 15(2), 120-128, and is further guided by the Ombudsman Act of 1996. According to section 123 of the Constitution of Malawi, its main mandate is to investigate any and all cases where it is alleged that a person has suffered injustice and there is no remedy available by way of court proceedings. In addition, under section 5(1) of the Ombudsman Act, the Ombudsman has the mandate to inquire and investigate any complaint laid before him/her concerning any alleged instance including unfair treatment and abuse of power by any organ or employee of the government.

Corruption

The term corruption proves difficult to define because its definition tends to vary depending on the principles and mechanisms used to explain the phenomenon. Definitions tend to focus on public office, private market, public interest and some are public opinion oriented (Johnston, 1996). Since the focus of this article is on an institution that works closely with the public sector, the paper shall adopt the definition that focuses on public office. Thus, in this paper, corruption is considered as the abuse of entrusted public power for private benefit (Myint, 2000: 35). In this sense, corruption exists whenever an office bearer is induced by money or other rewards not legally provided for to take actions which favour whoever provides the rewards thereby doing damage to the public and its interests (Friedrich, 1966: 74).

Accountability and Public Accountability

The terms accountability and public accountability are not the same, albeit they are often used interchangeably. Accountability is general while public accountability is more specific.

Accountability

The term accountability is very broad and can be defined in a number of ways. Generally, the term is often associated with power delegation and openness. The concept is also related to other concepts such as answerability, transparency and responsibility (Sinclair, 1995). Some have argued that accountability goes beyond answer ability and transparency to include sanction and reward as a way of formalising it (Almquist, et al., 2013: 480). This paper basically considers accountability as being open and answerable.

According to Lekalake and Nkomo (2016), there are two main forms of accountability: horizontal and vertical. Horizontal accountability exists among state institutions charged with maintaining checks and balances, and vertical accountability is to the larger society, enforced by news media reporting, civil-society or citizen activism. Thus, the Ombudsman falls under horizontal accountability.

In Malawi, the concept of accountability is a fundamental constitutional principle firmly entrenched in the Constitution of the country in section 12 subsection 1 paragraph c and section 13 paragraph o.

Public Accountability

As indicated by Bovens (2007: 183), the word “public” in public accountability relates to two things. Firstly, openness and accessibility to citizens. Secondly, “public” refers to the public sector. Hence, in this paper public accountability means that the public agencies and its employees are accountable and their activities are open to the public. Ibietan (2013) noted that public officials are accountable on three things: stewardship of public funds and effective management systems, compliance with the law, government policies and initiatives, and delivery of acceptable levels of service to the public.

THE LINK BETWEEN CORRUPTION AND PUBLIC ACCOUNTABILITY

Public accountability has the potential to deter public officials from misusing their delegated powers. This is the case because it acts as a safeguard against corruption, nepotism, abuse of power and other forms of inappropriate behaviour (Rose-Ackerman, 1999). Klitgaard (1988) argues that corruption can be understood through the formula $C = M + D - A$ (corruption equals monopoly plus discretion minus accountability). Hence, corruption is more likely to occur when there is no accountability. The thinking here seems to be that accountability and transparency can more likely illuminate areas where corruption may be present, thereby providing an opportunity to prevent or make it known to the right

authorities. Thus, apart from improving public service delivery, promoting accountability can eradicate corruption.

FINDINGS AND DISCUSSION

This section provides and discusses the key findings of the study. In general, the findings show that, despite the existence of challenges and pitfalls, the Ombudsman in Malawi does play a significant role in the fight against corruption, especially bureaucratic corruption. The findings also show that there is room for improvement on the role the Ombudsman plays in the anti-corruption drive. The following are the main findings in no particular order:

Maladministration as a Breeding Ground for Corruption

The study found that maladministration, the mainstay of the mandate of the Ombudsman under the law, is considered by many as a breeding ground for corruption in the public sector in Malawi. Most participants pointed out that maladministration in Government Ministries, Departments and Agencies, often characterised by incompetence and abuse of power, almost always results in irregular and unauthorised use of public money and mismanagement of public resources. This is in agreement with the findings of the Australian Independent Commission Against Corruption (2016), that mismanagement of official functions, be it due to incompetence or negligence, often gives rise to corruption, specifically bureaucratic corruption. This makes it imperative for the fight against corruption to begin with the fight against maladministration.

Furthermore, most of the participants stressed that issues of nepotism, irregular recruitment, unfair dismissals and awarding contracts in exchange of bribes and kickbacks are common in the public sector and are often hidden under a thick layer of distorted complex bureaucratic rules and procedures. One participant in particular indicated that when allegations of bureaucratic corruption are reported to the ACB, the ACB often takes such allegations to the Ombudsman perhaps because it is not well conversant with administrative issues as is the Ombudsman. This point is strengthened by evidence found in the Ombudsman report titled *Secure in Deception* (2021: 7), in which the Ombudsman points out that the institution cannot investigate a case being handled by another platform but after discussions roles were divided allowing the Ombudsman to focus on administrative issues and the ACB to focus on the criminal aspects. These instances place the Ombudsman in a position in which it has to assume an anti-corruption mandate when corruption is hidden in or closely linked to administration issues under investigation.

Indeed, the Ombudsman has conducted a lot of investigations and handled cases that deal with issues of maladministration bordering on corruption. The work of the Ombudsman can be classified into the following main themes:

i. Employment

The institution looks into claims involving nepotism, unfair treatment, unfair dismissals, tribalism and bias in public positions employment in order to determine whether or not they comply with the relevant laws, policies, procedures and best practices. The Export Development Fund Limited (2022), the Blantyre Water Board (2021), the Tobacco Commission (2021), and the Malawi Communications Regulatory Authority (2021) are a few of the recent investigations. As in the case of Malawi Communications Regulatory Authority, the Ombudsman issues orders, to address any irregularities, maladministration and injustices, including terminating employment contracts.

ii. *Public Funds*

The Ombudsman also looks into maladministration issues in public expenditure. For instance, in December 2020, the Ombudsman released a report titled *Misplaced Priorities*, which detailed the results of an investigation into the management of COVID-19 response money. Maladministration cases were found during the examination, including instances of public officials misusing funds, a lack of accountability and transparency as well as disregard for procurement rules and regulations. Reimbursing misappropriated funds was one of the orders made by the Ombudsman.

iii. *Public Procurement and Disposal of Assets*

Chisesa (2015) identifies public procurement as one of the main domains in Malawi that are susceptible to corruption. When it comes to the procurement and disposal of public goods and services, the Ombudsman in Malawi looks into claims of maladministration and associated irregularities. As an example, in 2021 the institution looked into allegations regarding the hiring of a group of South African lawyers to handle a significant electoral appeal that the then-government of Malawi had made in 2020. Strict corrective actions were ordered, including ordering those involved to refund the costs, after it was determined that the procurement amounted to maladministration and an abuse of power with "all the elements of corruption".

Most Participants emphasised that by impartially investigating the conduct of public administrators, recommending changes, reporting to the legislature and the public and issuing remedial orders, the Ombudsman fights the main source of corruption in the public sector in Malawi. They pointed out that those in power always seek to put people in positions where they will be easily manipulated into corrupt acts and purchase goods and services from cronies as well as employ kinsmen and supporters. Thus, the Ombudsman stands in the way of Corruption in progress and in the making. Hence, thanks to the oversight provided by the Ombudsman, public institutions and public officials have reason to exercise their powers in accordance with laws, policies and procedures for fear of scrutiny. For many, this is a huge contribution to the fight against corruption.

The Ombudsman Is Inherently Not Fit To Fight Corruption

The study brought out Challenges and pitfalls that seem to point to and stress the point that the Ombudsman must tread carefully on issues of Corruption because it is not really fit for the purpose. The following are the main pitfalls:

i. *Inadequate Enforcement Powers*

Despite the fact that the Ombudsman is an independent public institution which was instituted to curb any acts of maladministration occasioned by public officials and organs of government on the citizens, the institution does not have power to enforce its remedies and recommendations for changes. This was the common challenge that was pointed out by most of the participants. They were of the view that the institution lacks appropriate 'teeth' as it can only direct the relevant office to act, but does not follow up or issue any sanctions when its directives are not followed. Hence, its effectiveness largely depends on the goodwill of the institution under investigation.

In the Judicial review case of *Air Malawi Limited and Ombudsman* (2000), the Malawi Supreme Court of Appeal held that, unlike courts which have statutory mechanisms to effectively enforce their judgements and orders, the Ombudsman has no power to enforce any of its directives except by reporting to the National Assembly. The court recommended that the Ombudsman and staff must know and understand the limits of their power, and that the Ombudsman must indicate clearly to

complainants the limits of his/her powers so that they are not disappointed when the Ombudsman's inquiries do not produce the complainant's desired result.

This lack of formal powers to coerce public officials into compliance makes the Ombudsman's work not as impactful as that of the ACB which has the power to investigate corruption and prosecuting its perpetrators. However, some participants opined that the Ombudsman can do its job even when it is inextricably linked to corruption and when the nature of the anti-corruption work demands that it be backed up by coercive power with enforceable sanctions, it can leave it in the hands of the ACB with all the necessary information. It goes without stating that this calls for a close and cordial relationship between the two institutions as well as a good understanding of their respective mandates.

ii. Lack of Accessibility

The study found that the Office of the Ombudsman mostly investigates complaints and usually does not institute investigations on its own volition. This means that there is need for the general public to be aware of the work of the Ombudsman in order for them to report on cases of maladministration they come across. However, according to some respondents, people in the rural areas as well as those who are illiterate have difficulties reporting cases because of a lack of understanding of the work of the Ombudsman and no access to proper offices for the Ombudsman has offices only in the main cities. Notwithstanding, one respondent indicated that the Ombudsman has partnered with civil society organisations, like the National Initiative for Civic Education (NICE), that cover a lot of districts in the country, with the aim of serving a lot of people. The respondent, however, agreed that many people do not really understand the work of the Ombudsman. Hence, taking the Ombudsman to the citizens through public rallies and radio as well as television programs is imperative.

Another issue related to accessibility that came up was the issue of whistle-blower protection. Some respondents pointed out that Malawians fear to report cases of maladministration bordering on corruption because of the risks associated with such behaviour. Notwithstanding, Section 13 (k) of the Ombudsman Act of Malawi protects whistle-blowers by stating that anyone who threatens or subjects anyone to reprisals for having referred any instance or matter to the Ombudsman shall be guilty of an offense with a specific penalty that may include a jail sentence. Be that as it may, several respondents indicated that better protection can be achieved by coming up with a general whistle-blower Act that cuts across the work of accountability institutions.

Too Much Emphasis on Integrity and Corruption Control May Lead To 'Proceduralism'

Some participants were of the view that too much emphasis on integrity and accountability with a focus on corruption control will lead to a huge bunch of rules and paperwork as well as some kind of fear which may seriously hamper the efficiency, effectiveness as well as innovation in public organisations. The participants felt that too much oversight may lead public officials to take too much time in discharging their duties as well as fear being flexible and innovative in their work. This is in agreement with research which found that an abundance of rules and regulations likely impairs rather than enhances performance (Pandey et al., 2007). Thus, the Ombudsman must ensure the right balance between relevant rules and unnecessary red tape.

Stretching Funds and Unnecessary Moonlighting

A Considerable number of participants were of the view that the scope and complexity of corruption investigations require the establishment of a special body which has the sole task of investigating and prosecuting corrupt practices and acts. For them, this is the main reason why there is the ACB. Hence,

focusing on corruption may mean that the Ombudsman somewhat sacrifices its mandate and gets into the work of the ACB thereby using its already meagre resources on ACB's work.

Nonetheless, most participants agreed with the assertion that the work of the Ombudsman overlaps with that of the Anti-Corruption Bureau as in the advancement of administrative justice the Ombudsman comes into direct contact with most vulnerable areas of corruption in Malawi, namely; public procurement and disposal of assets, public spending and employment. Hence, the Ombudsman can and plays a considerable role in the fight against corruption in Malawi.

Furthermore, most participants stressed that, in order to bring clarity and harmony in the fight against corruption, there is need for an institutional hub where overlapping issues are discussed, shared and responsibility apportioned. Therefore, a well-functioning network of non-hierarchical institutions of governance based on negotiated interaction between and among public, semi-public and private actors is required. According to them, if such a system is working well everything will move smoothly in the fight against corruption for when institutions like the Ombudsman come across evidence, that the ACB does not have, they can easily share it thereby reinforcing investigations. Not with standing, some participants argued that the institutions that form the governance structure in Malawi should not actually cooperate fully but act with mutual suspicion so as to provide oversight amongst themselves. This means that accountability institutions must endeavour to cooperate and provide oversight on one another as well.

CONCLUSION AND RECOMMENDATIONS

The main objective of the paper was to determine whether and to what extent the Ombudsman plays a role in the fight against corruption in Malawi. The paper finds that although challenges and pitfalls exist, the Ombudsman can and plays a significant role in the fight against corruption, especially in the public sector, by virtue of promoting accountability and checking maladministration in public procurement, public spending and recruitment. The paper further finds that despite there being an Anti-Corruption Bureau, some corruption investigations are inevitably interrelated with the work of the Ombudsman making a unified investigation procedure arguably more convenient, efficient and time-saving. Hence, a clear network of different independent institutions that collaborate to achieve goals by exploiting overlapping mandates as an advantage in the fight against corruption is imperative. Based on these conclusions, the following recommendations are offered: There must be clarity on mandates, cooperation and partnerships to avoid conflicting jurisdictions which may waste time and resources; efforts must be made to provide civic education and help the general public to understand and manoeuvre the terrain of accountability institutions; and accountability institutions must employ well-qualified staff who really know what they are doing so as to remain accountable themselves and avoid conflicting processes and results with other accountability institutions

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