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Democratization and Anti-Corruption: Lessons from Malawi's Political Transition

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Abstract

Despite Malawi's transition to democracy, corruption remains a significant challenge undermining the country's political and legal institutions and thereby frustrating meaningful progress. Existing anti-corruption strategies have proven insufficient in curbing the vice, prompting the need for innovative approaches. This paper examines how integrating the use of trust law into Malawi's formal legal framework could provide a more robust approach to combating corruption. Through a critical analysis of Malawi's political and legal history, alongside a review of current anti-corruption efforts, the study highlights the limitations of current methods and proposes a novel hybrid framework that incorporates trust law as a complementary mechanism to established legal structures. The findings suggest that this approach could foster a more effective and sustainable fight against corruption.

Keywords: Corruption, Criminal Law, Trust Law

1.0 Introduction

Corruption has become deeply ingrained and widespread across much of Africa (Anders , Seim, & Kanyongolo, 2020) and Malawi has not been spared from the vice. Corruption has remained one of the most persistent and harmful problems affecting Malawi, with its devastating socio-economic impacts felt across all sectors of society (Bande, 2017). Research has shown that corruption causes significant harm to society and high levels of corruption reduce investment and the flow of capital into a country, ultimately leading to slower economic growth (Sandgren, 2005). In Malawi, the most commonly cited effects of corruption include economic underperformance and the perpetuation of poverty (Siyasiya, 2024). This enduring cycle of corruption in Malawi is traced back to the autocratic rule of Dr. Kamuzu Banda, where restrictive legislation such as the 1965 Public Security Regulations[1] and the 1968 Censorship and Control of Entertainment Act suppressed public awareness of governmental wrongdoing[2]. Under this system, the press was strictly controlled, and journalists were regularly detained without charge for alleged offenses (Sturges, 2019). Though corruption was tacitly acknowledged through the Penal Code (Government of the Republic of Malawi, 1994), particularly Section 90[3], the autocratic era offered limited opportunities for meaningful anti-corruption reforms.

With the advent of democracy, Malawi took positive steps by enacting various pieces of anti-corruption legislation, including the Corrupt Practices Act[4], and establishing specialized institutions like the Anti-Corruption Bureau[5] and the Financial Crimes Division of the High Court[6]. However, the fight against corruption has traditionally relied on criminal law as the primary tool, driven by values and interests, and heavily focused on repressive methods like criminalizing individuals or entities (Aaken, 2024) . This approach is based on the assumption that people act rationally and weigh the likelihood of punishment (Aaken, 2024). However, its limited success in curbing corruption highlights the need for alternative measures to complement existing frameworks. This paper proposes integrating trust law as an innovative strategy to combat

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[1] The act was enacted to restrict and control the residence and movement of persons and to prohibit publications considered prejudicial to public security.

[2] 840 books, 100 periodicals, and 16 films were banned.

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

[4] Chapter 7:04 of the Laws of Malawi

[5] Established under the Corrupt Practices Act, s4.

[6] Courts (Amendments) Act No. 36 of 2022 s 6A (f)

corruption in Malawi, suggesting it could provide a more sustainable and effective solution.

This study adopted a doctrinal research methodology to analyse the legal frameworks, principles, and case law surrounding the issue of corruption in Malawi. Doctrinal research is mainly underpinned by positivism and a view of the world where the law is fixed, neutral, and objective (Malhotra, 2021) and it essentially helps one understand what the law is. The research employed a qualitative approach, specifically desk research, focusing on the analysis of primary sources, and secondary sources, including government reports, legal frameworks, academic articles, and relevant case law. The research also drew on a comparative analysis of the strides made in Kenya and examined how the trust law has been applied. This approach provides a broader understanding of how trust law can complement formal legal structures to address systemic issues such as corruption.

The paper is structured as follows: First, it explores corruption during the Kamuzu Banda era, tracing its historical evolution and assessing the effectiveness of legal measures from that period. Next, it examines the Democratic era, highlighting its shortcomings in addressing corruption. The subsequent section defines corruption within the Malawian context and identifies the limitations of criminal law in combating it. Finally, the paper discusses the potential role of trust law in tackling corruption and concludes with recommendations for future anti-corruption strategies.

2.0 Corruption in the Kamuzu Banda Era: A System of Autocracy and Patronage (1964-1994)

Malawi achieved independence in 1964 and was ruled as a dictatorship state under the leadership of life president Dr. Kamuzu Banda under a one-party system (Lwanda, 2006). The Banda regime inherited a system of governance from colonial rule that had a very strong executive that monopolized power (Lwanda, 2006). Banda's government exploited its monopoly on power for the private gain of a small, privileged clique (Phiri, 2013). Under Banda's regime, the strict control, and arbitrary arrests of so-called "confusionists" and "separatists" fostered a culture of fear and silence, where the media rarely spoke openly about corruption (Lwanda, 2006). This privileged and stratified segment of society relied on a wide security apparatus comprising of Military Intelligence, the Security Intelligence Service, the Malawi Young Pioneers, the Criminal Investigations Department, the Youth League and other party and government organs to keep their actions hidden (Phiri, 2013). Banda had absolute control of all aspects of Malawian life with extrajudicial executions commonplace, and through the Public Security Act, security agents detained opponents without trial (Phiri, 2013).

Numerous legislations that restricted individuals from publishing various information related to the government were enacted. The 1965 Public Security Regulations for example made it an offence, punishable by up to five years imprisonment to publish anything likely 'to undermine the authority of, or public confidence in, the government' and the punishment was life imprisonment. Additionally, the Censorship and Control of Entertainment Act of 1968 established a Censorship Board that prohibited works on various grounds, including 'the interests of public safety or public order', and under this system the press was strictly controlled. With that in mind, people did not dare to talk openly about the misconduct of public officials. As a result, corrupt practices that may have occurred before democratization were neither openly discussed nor acknowledged, which does not imply their absence but instead thrived in a society where citizens lived in fear (Phiri, 2013). The lack of transparency and accountability during this period is evident. Accountability has been said to be necessary as it occupies a prominent place in considering the corruption question (Myint, 2000). Accountability, which is critical in addressing corruption, requires that those responsible for enforcing rules and regulations be held answerable for their actions (Myint, 2000). However, under the autocratic regime, such mechanisms were absent. The system eventually became stagnant, facing growing internal and external pressures that demanded administrative reforms to promote good governance and the rule of law (Phiri, 2013).

Despite the stringent legislation used to control the press and prevent the publication of materials that could undermine the government, the Penal Code[7], which was the primary legal framework for addressing criminal offenses, remained in place. The penal code dealt with corruption and abuse of office-related crimes under Chapter 20. Any person employed in the public service who corruptly solicited, received, obtained, or attempted to receive any benefits for himself or corruptly gave, conferred or promised to give any person employed in the public service any benefit was guilty of a felony and liable to imprisonment for a term not less than five years and not more than twelve years[8]. It can therefore be concluded that while a legal framework to address corruption existed during the autocratic era, cases of corruption were seldom reported, limiting the public's awareness of its extent due to the widespread media restrictions in place at the time.

[7] Chapter 7:01 of the Laws of Malawi

[8] The Penal Code, s90

3.0 The Transition to Democracy: Challenges in Combating Corruption

The new president, Bakili Muluzi, was elected in the first free elections in 1994 and replaced the 30-year dictatorship of Dr. Kamuzu Banda's Malawi Congress party (Posner, 1995). The government and parliament took several anti-corruption measures to ensure that an anti-corruption regime was created. Malawi passed its first anti-corruption policy, the Corruption Practices Act[9] in 1995 which was followed by the Public Procurement Act[10] and the Public Audit Act[11] in 2003, the Money Laundering, Proceeds of Serious Crime and Terrorist Act[12] in 2006, the National Anti-Corruption Strategy (NACS) in 2009, the Public Officer's Declaration of Assets, Liabilities and Business Interests Bill in 2013, the Access to Information Act[13], The Financial Crimes Act 2017[14] (which repealed the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act) and the Political Parties Act[15] in 2018, just to mention to a few (Tengatenga, 2020). The above-mentioned legislation exists alongside different institutions that deal with corruption including the Anti-Corruption Bureau (ACB)[16], Office of the Ombudsman[17], National Audit Office (NAO)[18], Office of the Director of Public Procurement (ODPP) and Office of the Director of Public Officers' Declarations (ODPOD) with the ACB being the main face of anti-corruption in Malawi and having its mandate spanning across the areas of corruption prevention, prosecution, public education, and investigations (Tengatenga, 2020). Furthermore, the access to information act[19] was enacted in response to the media restrictions that where present during Dr. Kamuzu Banda's era. The Act provides for the right of access to information in the custody of public bodies and relevant private bodies and the processes and procedures related to obtaining that information[20] The consensus is therefore that Malawi does not lack a legal or institutional framework to fight corruption since institutions have been established and legislation enacted in response to the vice with the ultimate goal of promoting public accountability, transparency and ultimately reducing corruption (Tengatenga, 2020).

However, despite all the initiatives put in place to tackle corruption, it remains a major issue in Malawi. The media consistently reports on corruption offenses, which raises the question of why corruption continues to take center stage in the country. The most famous example of a corruption case in Malawi is the cash-gate scandal in 2013. The Cash gate scandal is remarkable for two reasons. On one hand, it was the largest corruption scandal ever uncovered in Malawi, while on the other, the scale of the law enforcement response was unmatched (Anders , Seim, & Kanyongolo, 2020). The cash gate scandal involved the misappropriation of government funds through the transfer of funds from the government bank accounts to private companies in disguise for payment of goods and services (Chiwala, 2018). The scandal was dubbed cash gate because low-level public officers who were arrested for committing the offenses under this scheme were found with stockpiles of cash in their homes and vehicles and it was uncovered in September, 2013, when a government accounts clerk whose monthly emoluments were less than \$100 was found with huge sums of cash estimated at over \$300,000.00 in his car (Chiwala, 2018). An audit conducted showed that public officers drew checks through the system in favor of private contractors on the pretext that they had supplied goods or services to the government when they had not and once a check was issued, they would delete the transaction from the system (Chiwala, 2018).

As if this was not enough, the media recently saw the mass reporting of the case of businessman Zuneth Sattar who was being jointly investigated by Malawi's Anti-Corruption Bureau (ACB) and Britain's National Crime Agency (NCA) for alleged bribery over 10 years in Malawi (African Confidential, n.d.). In a story published by Gregory Gondwe, working with Platform for Investigative Journalism, quoted unnamed military officials saying the Malawi Defense Force paid a firm associated with businessman Zuneth Sattar millions of dollars for military equipment. The story said the transaction involved a \$4.98 million payment, part of a nearly \$20 million deal for the procurement of 32 armored personnel carriers for the Malawi Defense Force. Using leaked documents from the Malawi Defense Force, or MDF, Gondwe reported that the deal defeats the Malawi government's commitment to combating corruption. The Anti-Corruption Bureau arrested the vice president Chilima in 2022, leading Malawian President Lazarus Chakwera to suspend the powers of the vice president. Investigative journalist Gregory Gondwe, who exposed the Malawian government's planned purchase of 32 armored vehicles from a company implicated in corruption, went into hiding, fearing arrest by the military (VOA News, n.d.).

[9] Chapter 7:04 of the Laws of Malawi
[10] Chapter 37:03 of the Laws of Malawi
[11] Chapter 37:01 of the Laws of Malawi
[12] Chapter 8:07 of the Laws of Malawi
[13] Act 13 of 2017
[14] Chapter 7:07 of the Laws of Malawi
[15] Act 1 of 2018
[16] Established under the Corrupt Practices Act, s4.
[17] Established under the Constitution of Malawi s120 and The Ombudsman Act Chapter 3:07 of the Laws of Malawi
[18] Established under the Public Audit Act number 6 of 2003
[19] Access to Information Act, 2016
[20] Ibid

The increased attention given to corruption today raises the question: why now? Is it because corruption has become more widespread than before, or is it simply that a phenomenon that has always existed is now receiving the focus it had previously been denied, though not entirely ignored? (Vito, 1998) Perhaps this is because corruption has resulted in mass suffering of the people of Malawi specifically those who are underprivileged (Siyasiya, 2024) Antonio Guterres has characterized corruption as both criminal and immoral, describing it as the ultimate betrayal of public trust. He emphasizes that corruption can deprive people of essential services such as healthcare, education, and economic opportunities, ultimately stripping them of hope for a better future (Secretary-General Antonio Guterres). This is particularly true for Malawi (Siyasiya, 2024). The cash gate scandal for example led to foreign donors withdrawing their budgetary aid worth about 40% of Malawi's budget (about $150 million) and the government started borrowing domestically leading to high inflation and a massive increase in prices for goods and services (Chiwala, 2018). Furthermore, because corruption negatively affects economic growth, The failure to effectively fight the iniquity has led to a failure of the country to attain its development goals which has resulted to poverty and underdevelopment (Nkhata & Chipofya, 2024).

Malawi's response towards corruption has nonetheless been the use of criminal law sanctions to apprehend corruption suspects. In, *The State v Dennis Spax John Kambalame*[21]. Mr. Kambalame, the General Manager of the Petroleum Control Commission, was found guilty and properly convicted of corruption use of official powers by a public officer as provided for in Section 25(1) of the Corrupt Practices Act. He had corruptly awarded contracts, accepted, and received gratification for himself amounting to MK 101,958,448.22. He was sentenced to six years imprisonment with hard labour and no recovery of the stolen funds was ordered. Similarly, in *Republic v Maxwell Namata and Luke Kasamba*[22], the first accused was charged with theft and Money Laundering of K24 million whilst the second accused was charged with Money laundering of the same amount. The first accused was only sentenced to 3 years of theft and 4 ½ years for Money Laundering that were to run consecutively, and the second accused was only sentenced to 5 years for Money Laundering and no order for recovery of the public funds laundered was made. All of this suggests that relying solely on criminal law in the fight against corruption is inadequate. It may be time for the country to adopt trust-based approaches to ensure that misappropriated funds are returned to society, as corruption has a disproportionate impact on citizens.

4.0 Defining Corruption in the Malawian Context

Corruption at its onset is a term difficult to define. However, even though it may be difficult to describe, it is generally not difficult to recognize when observed (Vito, 1998). In most cases, observers would generally agree on whether a particular behavior constitutes corruption. However, the challenge lies in the fact that such acts are often difficult to observe directly, as corruption typically occurs in private rather than in the open (Vito, 1998, p. 8). Corruption is often defined as a form of untrustworthy behavior and a violation of the impartial administration of rules and institutions, where the principle of equal treatment is undermined (Wenyan, 2023). In such cases, corrupt individuals intentionally manipulate rules for personal or particular interests (Wenyan, 2023).

The main piece of legislation at the forefront in guarding against corruption in Malawi, the Corrupt Practices Act[23] defines a 'corrupt practice' as the offering, giving, receiving, obtaining or soliciting an advantage to influence the action of any public officer, any official or any other person in the discharge of the duties of that public officer, influence peddling and the extortion of any advantage[24]. In that regard therefore, a person acts 'corruptly' when he engages in a corrupt practice which means one of the three namely: the offering, giving, receiving, obtaining, soliciting of a bribe, influence peddling and lastly extortion of an advantage (Bande, 2017). As highlighted under section 3 of the Corrupt Practice Act, corruption takes several forms. Firstly, is bribery. Under section 3 of the Corrupt Practices Act, for one to establish that there was bribery, there has to first be a two-way affair involving two persons; the one who gives the bribe and the other who receives the bribe. Secondly, an advantage must be offered to the receiver of the bribe and lastly, an advantage must be offered to influence the action of a public officer in the discharge of their duties. Similarly, the United Nations Convention against Corruption states that for an act to be called 'bribery' there has to be the promise, offering, or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties[25]. Furthermore, the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the

[21] Criminal case number 108 of 2002
[22] Criminal case number 45 of 2013
[23] Chapter 7:04 of the Laws of Malawi
[24] Corrupt Practices Act, s3
[25] United Nations Convention against Corruption, Article 15

exercise of his or her official duties can also be termed as bribery[26].

A workable definition of bribery can also be formalized in the context of an agent-principal framework (James , 2002). An agent has been defined as a person who has the legal authority to bind another by entering into a contract with a third party on that person's behalf[27]. A principal-agent framework exists when a principal delegates some tasks to the agent who is then made responsible for acting in the principal's interests (James , 2002). The principal-agent problem arises when the interests of the principal and agent are not consistent with each other so that the agent is induced into taking actions that benefit himself at the expense of the principal (James , 2002, p. 210). In that regard, a bribe can thereby be seen as a payment made by a third party to an agent of a principal in which the agent explicitly or implicitly agrees to take action that is contrary to his duty as an agent of the principal and is thus not in the interest of the principal (James , 2002, p. 210).

The second form of corruption is influence peddling. The term refers to the conduct of using, promising to use, or offering to use one's influence over government officials or connections with persons in authority in order to obtain favors or preferential treatment mostly for payment (Bande, 2017). Lastly, is extortion of an advantage which involves the demanding or receiving by a person in office of a fee or other payment for services, work, supplies or other thing which should be performed, done, delivered, offered, provided or given gratuitously or where compensation is permissible, the demanding or receiving of a fee or other payment larger than is justified or which is not due (Bande, 2017, p. 710).

5.0 Criminal Law and its limitations in addressing corruption in Malawi.

Criminal law at its onset is concerned with the pursuit of human purposes through the forms and modes of social organization (Hart, 1958). The method uses a series of commands that dictate actions, are binding on everyone, and are enforced with sanctions for disobedience (Hart, 1958). Criminal law serves a number of functions as far as the fight against crime is concerned including retribution, deterrence, reformation, incapacitation, and restoration (Bande, 2017). An examination of these purposes suggested for criminal law reveals that they are complex and interconnected highlighting that none can be viewed in isolation from the others (Hart, 1958). The Penal Code and the Corrupt Practices Act define corruption offenses and their elements, each requiring specific proof for a conviction to be made.

One obstacle impairing the utility of criminal law is the limitation placed on the prosecution by rigid rules of evidence for example the rule requiring corroboration[28] of accomplice testimony and the rule against self-incrimination[29]. These have made it particularly difficult to punish the more cunningly executed cases of corruption, specifically bribery (Lenhoff, 1954). Furthermore, prosecuting corruption cases in Malawi presents unique challenges due to the covert nature of corrupt activities and the complexities of gathering adequate evidence (Kamanga). To begin with, the burden of proof lies with the prosecution to provide the court with any means of evidence, amongst those permitted under law, in order to prove the allegations made in its claim and the court has no autonomous powers of investigation[30]. However, corruption transactions are rarely conducted openly, making it difficult for prosecutors to identify witnesses who can provide reliable evidence in court[31]. Justice Kamanga notes that in some cases, witnesses are co-offenders, which complicates matters as such individuals often become hostile during proceedings, thereby undermining the prosecution's case[32]. When the prosecution obtains evidence proving corruption but does so unlawfully, they face the risk of that evidence being excluded. This reflects the current legal stance in Malawi, where evidence obtained through illegal means is deemed inadmissible in court[33] thereby potentially undermining the successful prosecution of corruption cases.

Furthermore, Justice Kamanga argues that prosecutorial challenges, for example, lack of expertise pose a challenge in determining a corruption-related offense (Kamanga). She observes that in many instances, corruption cases are handled by young and inexperienced lawyers or non-lawyers without the requisite investigative or prosecutorial skills (Kamanga). This shortfall arises partly because the public sector struggles to attract skilled legal professionals due to insufficient incentives hence the absence of experienced prosecutors often results in poorly built cases reducing the likelihood of successful convictions (Kamanga).

The challenges outlined above underscore the limitations of relying solely on criminal law to address corruption. While criminal law remains a critical tool in prosecuting offenders, its effectiveness is hampered by

[26] United Nations Convention against Corruption, Article 15
[27] *Chirwa v Ndaferankhande* [2016] MWHC 433 (17th January 2016)
[28] *Kagwa v Rep* 14 MLR 3
[29] Constitution of Malawi, s 42(2)(f)(iv)
[30] Criminal Procedure and Evidence Code, s187
[31] Ibid
[32] Ibid
[33] *Chanthunya v Rep* MSCA Criminal Appeal number 1 of 2021

procedural and structural weaknesses. Incorporating alternative mechanisms such as trust-based frameworks to ensure that misappropriated resources are recovered and redirected to benefit the people of Malawi could strengthen anti-corruption efforts.

6.0 The Role of Trust Law: Informal Institutions in Anti-Corruption Efforts

Corruption in public office is a persistent and corrosive issue that consistently generates public outrage and demands for action (Lenhoff, 1954). However, despite these demands, efforts to combat corruption through traditional criminal law measures often prove inadequate, and many investigations fail to result in meaningful change. As Oly Ezekwesili puts it, "Anyone who wants to tackle corruption must be willing to go all the way. There are no shortcuts."[34] This sentiment reflects the growing recognition that tackling corruption requires a comprehensive approach that extends beyond the limited scope of criminal prosecutions.

It is not news that the media has consistently reported corruption-related crimes causing public outrage and frustration. Unfruitful investigations have in turn been conducted in the hope of apprehending the perpetrators but to no avail. One such approach that has the potential to complement criminal law and improve anti-corruption efforts is the application of trust law a framework that could significantly enhance the mechanisms available for recovering stolen assets, ensuring accountability, and strengthening public trust. While criminal law is essential in holding corrupt officials accountable, it often suffers from slow processes, loopholes, and the inability to fully recover assets looted by the corrupt[35]. This is where civil remedies, specifically the application of trust law, can play a vital role. According to Willebois and Brun, civil remedies are an effective tool for asset recovery when criminal procedures are unlikely to yield results (Willebois, 2012). They emphasize that civil remedies not only target the perpetrators of corruption but also focus on the victims; the citizens and institutions that suffer as a result (Willebois, 2012). These remedies work by targeting the financial base of corruption, depriving wrongdoers of the ill-gotten wealth and returning those resources to the rightful beneficiaries: the people (Willebois, 2012).

7.0 The Fiduciary Duty of Public Officials: A Trust-Based Approach

Trust law, by its very nature, operates on the premise that individuals (trustees) are entrusted with the management of property or resources for the benefit of others (beneficiaries) (Underhill & Hayton, 1987). In the public service context, this concept is enshrined in the legal framework of Malawi. Under Section 12(1)(b) of the Republic of Malawi Constitution, all public officials are considered trustees, with a clear obligation to exercise the powers of the state for the benefit of the people, within the boundaries of their lawful authority. Similarly, Section 12(1)(c) of the Constitution of Malawi underscores that public authority is conditional upon the trust and confidence of the people and that such trust can only be maintained through transparent, accountable governance.

A fiduciary relationship places high expectations on public officials. The trustee is guided by three fiduciary principles, the breach of which may give rise to remedies. In *Sympathy Katengeza Chisale v Willie Mphoka Phiri*[36] Mbendera J, as he then was, quoting Millet L.J in *Bristol and West Building Society v Mothew*[37] explained that a fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence and the distinguishing obligation of a fiduciary is the obligation of loyalty. The duties are to act fairly to all beneficiaries[38], manage resources with reasonable prudence[39] and not put himself in a position where duty may conflict with interest[40]. Breaches of this duty whether through embezzlement, bribery, or the mismanagement of public resources demand remedies that restore justice and protect the interests of the public. The traditional view of fiduciary duty, articulated by Underhill, holds that a trustee's obligations to the beneficiary are paramount, and a breach of these obligations warrants the intervention of equity (Underhill & Hayton, 1987) (Underhill & Hayton, 1987). Some of the remedies available under trust law include injunctions, accounts, and tracing, each of which offers a powerful tool for restoring the misappropriated assets to the rightful beneficiaries.

For instance, through tracing[41], a beneficiary can follow the trail of assets and establish their rightful ownership, even when the assets have been moved or disguised. This tool is particularly useful in the context of corrupt

[34] Oly Ezekwesili at a roundtable on anti-corruption with Transparency International Nigeria, CISLAC in Abuja (2018).
[35] As seen in the cases of *The State v Dennis Spax John Kambalame* Criminal case number 108 of 2002 and *Republic v Maxwell Namata and Luke Kasamba* Criminal case number 45 of 2013 discussed earlier.
[36] Commercial case number 29 of 2009
[37] [1998] 1 Ch. 1 at page 18
[38] Simpson v Bathurst (1869) 9 Ch App
[39] Speight v Gaunt (1883) 22 Ch D 727
[40] Bray v Ford [1896] AC 44
[41] Boscawen v Bajwa [1996] 1 WLR 328

officials who attempt to conceal their misdeeds by funneling stolen funds through complex financial transactions or offshore accounts. By applying tracing remedies, the public can recover assets that may otherwise have been hidden from view. Similarly, accounting requires corrupt official to disclose their financial dealings, providing transparency and exposing the scale of their wrongdoing. Finally, injunctions compel the corrupt official to take or refrain from certain actions, such as returning stolen assets or ceasing their illicit activities. Together, these equitable remedies provide a robust framework for addressing corruption in a manner that criminal law alone cannot.

8.0 The Case for Asset Recovery: Lessons from Kenya

Kenya, like many other nations, has grappled with the pervasive and systemic issue of corruption, and in response to the vice, the Kenyan government has implemented various anti-corruption strategies to curb malfeasance and promote transparency in the utilization of public resources (Daud, 2024). These strategies comprise of legal reforms, institutional strengthening, and international collaborations, where each addresses specific facets of corruption within the country (Daud, 2024) Kenya has employed asset recovery a tenet of the law of trust and this strategy is intended to reclaim ill-gotten gains acquired through corrupt practices (Daud, 2024). This approach involves identifying and seizing assets obtained through corruption, depriving wrongdoers of their illicitly acquired wealth. Furthermore, the legal framework for asset recovery (Proceeds of Crime and Anti-Money Laundering Act 2009) has been strengthened to facilitate the identification and confiscation of such assets (Omondi, 2021). Despite progress, challenges persist, particularly in tracking and recovering concealed assets, both within the country and abroad. However, Kenya has seen notable successes, such as the case where 25 employees of the Kenya Revenue Authority (KRA) were dismissed between July and September 2024 for corruption. During this period, the agency successfully recovered Sh549 million in illicit wealth (East Leigh Voice, n.d.).

The application of this principle in Malawi could serve as a powerful deterrent against corruption, as it directly targets the wealth accumulated through dishonest means and returns it to the people. Incorporating informal trust-based institutions into Malawi's criminal law system requires a multifaceted approach. This could involve amending laws to formalize trust mechanisms, creating hybrid frameworks that blend informal networks with formal legal processes, and fostering public-private partnerships. Additionally, promoting citizen engagement and whistleblowing through legal protections would support collaboration. Ultimately, the integration would require both legal amendments and cultural shifts toward trust and cooperation. In the case of corrupt officials in Malawi, asset recovery under trust law could work in tandem with criminal sanctions to ensure that stolen resources are not simply left in the hands of the wrongdoers. For example, if a corrupt official embezzles government funds, the application of trust law would allow the state to trace the stolen funds, expose the extent of the corruption, and return the money to the people. This dual approach, combining criminal punishment with civil remedies, would not only punish the wrongdoers but also serve to deter future corruption by demonstrating that illicit wealth will not be tolerated and will be recovered.

The public service is inherently a trust-based institution. Public officials, as trustees of the nation's resources, are tasked with managing those resources for the benefit of the people (Nimenibo & Samuel , 2020). When corrupt officials steal from the public purse, they breach this trust, undermining the very foundation of democratic governance. As Justice Kapindu highlighted in *R v. Lutepo*[42], corrupt officials often exhibit a "get-rich-quick" mentality, living extravagantly off stolen taxpayer funds while the majority of citizens suffer from inadequate public services. A strong sanction for such actions is not only necessary to punish the wrongdoing but also to restore public confidence in the government's ability to act as a faithful steward of national resources[43]. However, without effective recovery mechanisms, the punishment alone may not suffice to deter corruption. If corrupt officials know that they can return to their illicit wealth after serving their sentence, there is little to stop them from continuing their corrupt practices (Lenhoff, 1954). Conversely, if the public is able to recover all stolen assets, this offers a powerful deterrent against corruption (Lenhoff, 1954). Trust law allows the state to go beyond punishing the offender and focus on making the public whole again. It shifts the focus from simply penalizing individuals to restoring the integrity of public institutions and ensuring that the people's resources are used for the public good (Lenhoff, 1954).

9.0 Conclusion

To conclude, corruption can be characterized as an abuse of power for private gain and is a phenomenon that compromises the rule of law, weakens public institutions and democracy, impacting negatively on productivity and the economy (Razzante , 2020). It is apparent that Malawi has felt and continues to feel its effects which have in turn adversely affected the citizens in spite significant efforts tabled to combating the vice with established structures and institutions in place. There is therefore a pressing need to strengthen these

[42] Criminal Case number 02 of 2013

[43] *R v Lutepo* Criminal Case number 02 of 2013

systems to eradicate corruption and bury it once and for all, given its disproportionate impact on the less privileged. Employing trust mechanisms could play a pivotal role in achieving this goal. As Oly Ezekwesili aptly noted, "*Anyone who wants to tackle corruption must be willing to go all the way, there are no shortcuts*[44]. Malawi, too, must demonstrate the resolve to confront this challenge and spare no effort in the fight against corruption.

10.0 Statutes and Case Law

- Access to Information Act 2016
- Courts (Amendments) Act No. 36 of 2022
- Criminal Procedure and Evidence Code Act Chapter 8:01 of the Laws of Malawi
- The Corrupt Practices Act Chapter 7:04 of the Laws of Malawi
- The Penal Code Chapter 7:01 of the Laws of Malawi
- *Chanthunya v Rep* MSCA Criminal Appeal number 1 of 2021
- *Chirwa v Ndaferankhande* [2016] MWHC 433 (17th January 2016)
- *Kagwa v Rep* 14 MLR 3
- *R v Lutepo* Criminal Case number 02 of 2013
- *Republic v Maxwell Namata and Luke Kasamba* Criminal case number 45 of 2013
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