

LAW ENFORCEMENT AND HIGH-LEVEL CORRUPTION IN MALAWI: LEARNING FROM CASHGATE



POLICY BRIEF

This brief highlights key takeaways and recommendations published in the report 'Law Enforcement and High-level Corruption in Malawi: Learning from Cashgate' (2021) GI-ACE Working Paper No. 8 by Dr Gerhard Anders (University of Edinburgh).¹ It is one of two country case studies of the project 'Fighting high-level corruption in Africa: Learning from effective law enforcement', which is part of the FCDO- funded Global Integrity Anti-Corruption Evidence Programme (GI-ACE) (2019-21). The research project is the first systematic study of law enforcement efforts targeting high-level (grand) corruption in Africa, presenting case studies of Nigeria and Malawi. It aims at identifying both enabling and constraining factors for effective law enforcement. The focus on the specifics of enforcement practice is new and provides evidence that has been missing in anti-corruption research.

According to the conventional view, law enforcement in Africa is inherently problematic due to the scale of the problem, the lack of resources and external influences on anti-corruption efforts. However, in Malawi, there have been law enforcement efforts targeting a massive high-level corruption scandal in 2013, known as Cashgate. This has triggered law enforcement activities aimed at tackling grand corruption more broadly. These efforts deserve more attention and serious consideration by scholars and policymakers

ANALYTICAL FRAMEWORK

The analytical and comparative framework differentiates five principal factors shaping law enforcement activities in Malawi:

- The legal framework;
- The institutional architecture, focusing on inter-agency relations and intra-agency dynamics;
- External influences exercised by politicians, officials, superiors and other national actors;
- Foreign involvement by donor agencies and the transnational dimension;
- The characteristics of the individuals who are prosecuted and punished.

¹ The paper is available at <http://gint.info/Cashgate>.

LEGAL FRAMEWORK

- In Malawi, there have been instances of effective law enforcement in grand corruption cases that resulted in convictions in several high-profile cases. More than a dozen perpetrators have been found guilty and convicted. Further, the Cashgate scandal has spurred investigations in other high-level corruption cases, resulting in several convictions against corrupt government officials and businesspeople.
- The legal framework is characterised by a patchwork of statutes resulting in discrepancies, overlap, gaps and lack of clarity. The layering of new laws, such as the 1995 Corrupt Practices Act and the 2006 Money Laundering Act, on top of older provisions with some dating back to the colonial period, has not been matched by efforts to address inconsistencies, gaps and ambiguities. This has had direct effects on the prosecutions and trials targeting the perpetrators of the Cashgate offences. The Penal Code provisions are not well-suited to prosecute 'modern' crimes of theft of intangible assets, computer-based fraud and associated offences.
- Whistle-blower protection has been facing significant challenges due to bureaucratic culture, lack of incentives and feelings of insecurity by would-be whistle-blowers.
- Trials experience significant delays, due to adjournments, lack of resources and other disruptions. The criminal trials against the Cashgate offenders have been hindered by frequent and lengthy delays. Multiple adjournments are one of main reasons for the slow progress. The backlog of cases and recurrent delays are by no means unique to the Cashgate prosecutions. They affect all aspects of the justice system in Malawi.

INSTITUTIONAL ARCHITECTURE

- The Integrated Financial Management Information System (IFMIS), the system for supporting budget planning, accounting and auditing that was introduced in 2005, played a major role in the Cashgate scandal. It was not only employed to facilitate the fraudulent transfers of public funds but it also proved key in tracking the money. The effectiveness of the (IFMIS) continues to be affected by considerable weaknesses in system security and auditing.
- Law enforcement is hampered by lack of resources and sufficiently trained staff. The lead agencies are understaffed and the universal inadequacy of funding affects the efficacy of operations of all law enforcement agencies and accountability institutions.
- The interface between investigators and prosecutors is characterised by a lack of consistent cooperation and coordination. In Malawi, law enforcement agencies continue to operate mainly according to the traditional Common Law model, in which one team of investigators (Police or ACB) conducts the evidence gathering and upon conclusion of the investigation hands over the file (docket) to the prosecutor. This has proved problematic in complex money laundering cases, especially when the investigators have only limited familiarity with this type of offence and assembling evidence to prove it.
- Investigators and prosecutors work in a largely hostile, or at least indifferent, environment. In Malawi, there is a lack of deeply entrenched moral values and social sanctions that compel compliance with the law of the modern state.
- In Malawi, the principal law enforcement agencies tend to operate separately, with limited strategic coordination and only little tactical cooperation in investigations. Instead, the relationships between the various agencies are typified by rivalry and competition. This is particularly striking with regard to the ACB's statutory independence. Originally deemed one of its greatest strengths, it can cause problems, as our research shows.

EXTERNAL INFLUENCES

- Politicians and other members of the elite occasionally seek to influence the law enforcement agencies despite their organisational independence. The official hierarchy is only one aspect of governance in Malawi where formal and informal modes of governance have been closely intertwined since independence. Informal governance is mainly organised along patron-client relationships, usually based on kinship and friendship. The intertwined modes of formal and informal governance have affected the operations of the ACB, as well as the other law enforcement agencies.
- The analysis of law enforcement efforts against high-level corruption has to take into account the role of the various development partners both in relation to general development policies and to the support of law enforcement specifically. On the one hand, the pressure exercised by the international development partners has spurred the government into action. The support provided by Malawi's development partners has considerably fortified the law enforcement agencies. On the other hand, the influence exercised by foreign donor agencies can also be an inhibiting factor. The financial and technical support for specific departments or agencies may undermine the cohesion of the government apparatus.

DEFENDANTS' CHARACTERISTICS

- Malawi's political and bureaucratic classes are closely knit and the networks of kith and kin are easily adapted to be exploited in high-level corruption scandals. In the media and the general public there have been widespread concerns about selective prosecutions due to political influence. Selective justice is a common theme in media reports, with the assumption that certain people are targeted in or protected from investigation, arrest and punishment. This was confirmed during the Cashgate trials when several defendants stated that they had been promised protection from prosecution.

RECOMMENDATIONS

LEGAL FRAMEWORK

Review of legislation

To ensure uniformity and clarity, there should be a comprehensive review of the Penal Code, Corrupt Practices Act, Public Finance Management Act, Financial Crimes Act, Public Procurement and Disposal of Public Assets Act and Malawi Public Service Regulations.

Witness protection, safeguards for whistle-blowers and managing cooperating defendants

It is recommended that a commission examine the case for a suite of legislative measures for the provision of safe space for and protection of whistle-blowers; the ethical handling of those assisting the authorities, namely informants and accused or convicted persons (offering intelligence and/or evidence); and the care and security of witnesses in criminal cases.

Reducing delays

It is highly recommended to conduct a review of the Criminal Procedures and Evidence Code with the aim to reduce delays and exceedingly long trials. Rules of court, for the management and expedition of trials, are necessary for improving public confidence in the criminal justice system. Further, the length of time between first arrest and actual commencement of the trial should be reduced by concluding investigations prior to arrest.

A commission should urgently examine the allocation of cases between the Magistrate's Courts and the Criminal Division of the High Court, identify measures to reduce congestion of court lists and recommend rules of court for the expedition of complex and/or high-profile cases of financial/economic crime, including corruption. A trained judicial cadre, presiding in eligible cases, will acquire the necessary experience. Swift and sure justice will build public confidence in the courts, deter criminal activity and support prompt recovery of the proceeds of crime.

Prosecution strategy

Prosecution strategy development should begin before executive action, so discussions might include all or some of DPP, ACB, MPS, FIA and institutions with comparable powers and duties, e.g. RBM, MRA, DNPW and even Immigration, Forestry and the Ministry of Health Drug Theft Investigation Unit. Guided by experienced prosecutors, investigation strategies should be tailored to complement holistic casework strategies. Both should include financial investigations and profiling, leading to asset tracing and recovery, also involving civil litigators (AG's office) where necessary.

Asset recovery

Expropriation of illicit wealth should be integrated into all forms of disciplinary and court proceedings against malefactors in both public and private sectors. To be consistent and effective, this practice should be founded on policy. A new National Economic Crime Strategy would establish a structure for policy-making and a whole system response, including a multiagency asset-tracing and recovery scheme.

INSTITUTIONAL ARCHITECTURE

Resources

It is acknowledged that the demands on Malawi's limited budget are considerable and that it is a challenge to ensure an equitable distribution between all government functions. It is important, however, that law enforcement agencies have sufficient funding to

support high-level corruption investigations and prosecutions. The Court Service should be adequately resourced to ensure timely proceedings.

Inter-agency and intra-agency cooperation

It is highly recommended that the DPP, ACB, FIA and Malawi Police Service, with the support of their Ministries, follow the guidance on the establishment of integrated teams for investigations and prosecutions of high-level financial crimes and corruption, as provided by the UN Convention against Corruption and 2012/15 FATF Recommendation 30 and FATF's October 2013 Best Practice Paper. Following an integrated model, one multi-disciplinary team handles investigation and prosecution of the predicate crimes generating profits for laundering. These teams should have access to adequate forensic tools, modern IT-resources and a case management system.

EXTERNAL INFLUENCES

Political influence

To ensure the independence of law enforcement agencies tackling high-level corruption it is important to establish and adhere to transparent appointment procedures based exclusively on applicants' merit, performance and potential; robust vetting procedures; rules for nominations and appointments and; even more importantly, enforcement of regulations regarding dismissals and suspensions from service. It is key to the independence of officials that their employment is not subject to ad hoc executive decisions.

The role of international development partners

It should be recognized that well-intentioned interventions by foreign development partners can undermine the cohesion of the government apparatus and may fuel inter-agency rivalries. There is also the issue of ownership, which can be seen to be a problem due to external support. This is of particular importance in a domain as central to national sovereignty as law enforcement. International development partners should further strengthen their current efforts to coordinate their input with each other and the government of Malawi.

Free press, media and civil society

Free news media as well as civil society are essential to the successful campaign against high-level corruption. Law enforcement agencies and international development partners should support and engage with these pillars of open public debate.

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