
EXPERIENCE OF MALAWI: PUBLIC ROLE IN ENFORCEMENT

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SUMMARY

The environmental law reform process in Malawi has revealed “new challenges” in the protection, management of environment and the conservation and sustainable utilization of natural resources. A brief evaluation of the current legislation is given focusing on major weaknesses. An attempt is made to explain the low or non-existent enforcement. The “Issues Paper on Legislation, Policies and Institutional framework” prepared for the National Environmental Action Plan (NEAP) catalogued various reasons for non-compliance ranging from defective legislation, poor arrangement of institutions, lack of political will, economic constraints to cultural and social attitudes. An attempt shall be made to explore the role of communities in enforcement and the effect of their contribution to natural resource protection.

With the current political changes and new initiatives and efforts in the protection and management of the environment resulting in the preparation of the National Environmental Action Plan, National Environment Policy and the Environment Management Act, is there hope of halting environmental degradation?

1 INTRODUCTION

1.1 Nature of existing environmental legislation

The existing body of sectoral legislation on environment and natural resources dates back to the colonial era. Sectoral legislation with provisions on environment or natural resources spans across a ‘forest’ of over forty statutes which unfortunately does not appear to have any coordinating strand (Phiri, 1994). Its most glaring defect is an emphasis on penalties (command and control) rather than on incentives, public participation and co-management to induce compliance.

The situation is compounded by the lack of financial and human resources necessary for effective enforcement and compliance. With a dictatorship single party government and its broad interpretation of issues threatening “public security” there had existed a genuine aura of fear of crossing the thin line of political or economic interests². Yet even in the cases where there was no such fear there is no evidence of any environmental case prosecutions. What exactly then is the problem?

1.2 Institutions

The administration and enforcement of various sectoral legislation was conferred on a number of ministries and departments, city, town and district councils as well as some parastatal organization. The NEAP (Malawi Government 1994) identified not less than 13

central government departments which administer and enforce environmental legislation affecting land, water, fisheries, forestry, plants, wildlife and parks, pollution and public health in general.

In addition, city, town and district councils have been conferred wide powers to make regulations and by-laws affecting any segment of environment and natural resources. These range from provision and maintenance of health services, aesthetic and recreational facilities to enforcement of environmental standards. They are cross-sectoral and more exacting than those shouldered by the government department that deals with the environment.

For instance, councils are empowered to prohibit and control water pollution, to regulate closure of buildings that are unfit for human habitation as well as prohibit and control sale of any wares in the streets. In addition, much of the Public Health Act that deals with sanitation, control of communicable diseases and pests are also administered and enforced by City Councils.

This same observation also is true of parastatal organizations like Water Boards (Blantyre and Lilongwe) and Electricity Supply Commission of Malawi (ESCOM) who have powers to enforce environmental provision in their statutes.

How these institutions related to one another in the performance of these overlapping and sometimes conflicting functions is not clear from legislation (Banda, 1995) indeed, although there seems a clear division of labor between different government departments dealing with various segments of the environment, the weakness lies in the lack of coordination on cross-sectoral environmental issues.

Thus it will be observed that although the Malawi Bureau of Standards is supreme in the formulation of standards, on various fields including the environment, there are other institutions involved in the preparation of standards. A number of organizations, particularly the public sector including government ministries have an element of standardization built into their statutes, creating an apparent conflict and proliferation of standards (Phiri 1994). The glaring defect of this development is that there are other equally important segments of the environment that have not been addressed fully either because other institutions claim responsibility or just that uncertainty exists over who should perform which functions and exercise what powers.

Another inconsistency is that the enforcement of regulations made under the Land Act, which stipulate that 10% of all leased land for agriculture purposes must be devoted to forest cover, is supposed to be the province of the Ministry of Lands and Valuation and not the Department of Forestry (Malawi Government 1994:45). There is also lack of general environmental principles to provide guidance and coherence to natural resources (ibid. 13).

In order, therefore, to achieve effective environmental management coordination there is need for a comprehensive national environmental policy supported by umbrella framework legislation to operate like a kind of environmental constitution. Without such comprehensive and unified policy the result would be a collection of fragmented short term and often conflicting policies. This naturally would result in uncoordinated and sometimes confusing legislation. The Environmental Management Act therefore foregrounds the need for review, formulation and harmonization of sectoral legislation and implementing regulations.

2 LEGISLATIVE REFORMS

2.1 National Commitment

Malawi's statement of Development Policy (1997-1996) states that the country's development objective is sustainable economic growth with poverty reduction. Sustainable development is a people centered objective and it has at its core the need to meet peoples' basic needs without compromising the ability of future generations to meet their own needs (khalikane, et al 1994: 4, 5) i.e. reconciliation of environmental and economic values.

It requires a change in attitudes and priorities toward population growth, environmental and economic values. The “laws “ of nature are unaffected by human choice, but behavior that disregards those “laws” invites environmental degradation and ultimately economic and ecological impoverishment (Cadwell 1990: 210).

The current government has also taken as its major development priority the theme “poverty alleviation.” Such a program can only be successful within the confines of sustainable development. It can be observed that nature is not wholly beneficent but is nonetheless the foundation of human welfare, survival and opportunity. It was in recognition of these reasons that when the Malawi Government launched the National Environmental Action Plan (NEAP) it stated that: “It should be used as a reference document by all planners and developers to ensure that environmental protection and management are integrated into development programs”.

This is amplified in the Constitution (Section 13 and 13 (d) which requires the state to promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:

- 1) To manage the environment responsibly in order to:
 - (i) to prevent the degradation of the environment;
 - (ii) provide a health living and working environment for people of Malawi;
 - (iii) accord full recognition to the rights of future generations by means of environmental protection and sustainable development of natural resources; and
 - (iv) conserve and enhance the biological diversity of Malawi:

3 ENVIRONMENTAL MANAGEMENT ACT 1996

In a serious effort to resolve some of the problems highlighted in this discussion the Government recently enacted the Environment Management Act. It confers the duty to promote the management and protection of the environment and the conservation and the sustainable utilization of natural resources’ to the Minister for Forestry, Fisheries and Environmental Affairs (MOFFEA). It further outlines explicitly the role of MOFFEA as follows: to formulate and implement policies; to coordinate and monitor activities; and prepare plans and develop strategies for the protection and management of the environment and the conservation and sustainable utilization of natural resources and to facilitate cooperation between Government, local authorities, private sector and the public in the protection and management of the environment and conservation and sustainable utilization of natural resources.

MOFFEA is required to ‘initiate, facilitate or commission research and studies ‘ on ‘any aspect of the protection of the environment and natural resources’. MOFFEA is given the duty to coordinate the promotion of public awareness on the protection and management of the environment and the conservation of the natural resources; monitor trends in the utilization of natural resources and the impact of such utilization on any segment of the environment, and to receive and investigate any complaint by any person relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources. The Act recognizes the need for joint efforts in the protection of the environment and natural resources and calls upon MOFFEA to play a leading role in the promotion of international and regional cooperation in the protection and management of the environment and the conservation and sustainable utilization of natural resources shared between Malawi and other countries.

In addition there has been created under the Act a body called the Council which shall consist of private sector, academic and interministerial representation. This body shall be responsible for:

- a. advising the minister on all matters and issues affecting the protection and management of the environment and the conservation and sustainable utilization of natural resources;
- b. recommending to the Minister measures necessary for the integration of environmental consideration in all aspects of economic planning and development; and recommending to the Minister measures necessary for the harmonization of activities, plans and policies of lead agencies and non governmental organizations concerned with the protection and management of the environment and the conservation and sustainable utilization of natural resources.

This private sector/interministerial council has broad membership due to the multilateral Nature of Environmental issues and the need to ensure that concerns of all relevant sectors are taken into account in policy formulation. This council shall be served by a Technical Committee consisting of not less than ten members, each of whom shall have sufficient knowledge and training in the protection and management of the environment and the conservation and sustainable utilization of natural resources.

In keeping with the on-going decentralization process the District Development Committee has been given the duty to promote environmental management and ensuring sustainable usage of natural resources and confers on them the additional power to coordinate various activities of government and non-governmental organization in the protection and management of the environment at district level.

Malawi is a signatory to a number of international and regional treaties, conventions and agreements, and yet follow up and implementation of their obligations is still defective. In order therefore to ensure proper coordination the duty to recommend to Government which conventions, treaties or agreements Malawi should ratify is conferred to MOFFEA and the Council.

Finally, MOFFEA shall on recommendation of the Council prescribe projects or classes or types of Environmental Impact Assessment; environmental quality criteria and standards and take such steps and other measures necessary or expedient for the administration and achievement of the objects of the Act.

The Act goes on to allay fears of other Ministries, Departments and organizations of being "divested of their powers" conferred by existing pieces of legislation and emphasizes that MOFFEA shall act in consultation with the 'Minister responsible for any segment of the environment'.

It explicitly stipulates that all organizations and institutions shall continue to exercise the powers, functions, duties or responsibilities conferred or imposed on them by any written law relating to the protection and management of the environment and the sustainable utilization of natural resources (EMA Section 6). Further, the Act says, "all natural and genetic resources belong to the people of Malawi". This marks a departure from the previous position where all such resources were held by the President on trust for the people.

4 SECTORAL LEGISLATION AND ENFORCEMENT

Sectoral legislation consists of the largest body of environmental “regulations”. Consisting of statutes spreading tentacles over a broad spectrum of environmental segments ranging from land, soil, water, fisheries, forestry, wildlife, pollution, physical planning and construction. In their “Issues Paper” the Legal Task Force No. 15 (Phiri 1994) observed that the corpus of environmental sectoral law in Malawi had developed in a rather reluctant, piecemeal and ad hoc fashion evidenced by rather numerous and sometimes apparently conflicting statutory instruments relating to environmental protection and sustainable development.

Another report prepared by the Government entitled the “Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews” observed that Malawi relies heavily on a command and control approach, as evidenced by the heavy reliance on penalties to induce compliance with environmental and natural resource norms and legislation. The level of penalties was in some cases extremely low particularly among sectoral laws besides the obvious lack of capacity to enforce those penalties. This is mostly due to not having personnel to police natural resources and prosecute; not enough vehicles or fuel to monitor; no requisite equipment necessary to quantify the levels of violation in cases of pollution and low incomes for, rangers (i.e. game, forest, fisheries and land) making them prone to bribes and not being motivated³. The Director of Public Prosecutions and Police are often overwhelmed by various crimes that have blossomed since multiparty system of Government was adopted. This has been worsened by the ending of the Civil War in neighboring countries which has resulted in most arms ending in the hands of criminals, hence the rise in armed robberies. With such background prosecutions have concentrated on the crimes regarded by society as more serious than cutting down trees, disposing waste carelessly and illegally or cases of pollution.

It is not surprising therefore that (Phiri 1994) concludes “that the laws are observed more in breach, and the observance of regulations in this regard seem to be more of an exception than the general rule.”

5 ENHANCEMENT OF PUBLIC ROLE IN ENFORCEMENT

In order to improve environment management and the protection of natural resources there has been deliberate shift in policy and legal instruments to enhance the role of citizens at different levels. It is almost the practice now that chiefs, religious leaders, extension workers and other local leaders are consulted on most legal and policy issues concerning the environment and natural resources.

Further the Environment Management Act has provided for the participation of local communities at various stages.

5.1 Citizen Rights

The Act provides that every person shall have a right to a clean and healthy environment and any person may bring an action in the High Court. However, as experienced in other common law countries “locus standi” has been the problem and an attempt was made in Malawi to circumvent this hurdle by providing that “any person may bring an action without having to show that they have suffered any harm or injury” This however met with very stiff resistance so that the clause had to be amended before being tabled for debate in the National Assembly.

As observed by Susan Casey- Lefkowitz in her article "A Comparative Look at the Role of Citizen in Environmental Enforcement", a substantial hurdle to citizen participation exists if government agencies and courts are reluctant to grant standing to citizen groups or individuals in administrative or court proceedings. This is so because citizen or local community participation has to be linked to a personal stake in the outcome of the case. The citizen must be able to show personal injury or harm or show potential threat of some personal harm.

It had been anticipated that NGO's and environmental groups with citizens support would have been able to fill the gap and force the Government in certain cases to act. It was a radical proposal and many feared that it would open "floodgates" of litigation, whilst others despite being sympathetic to the proponents, genuinely feared that it would have offered a chance to "dubious" groups, whose intention is to frustrate the Government with unnecessary, frivolous and vexatious actions. No wonder, Tracy Dobson in her article; "Radical Restructuring of Environmental Policy to Preserve Biodiversity in Southern Africa; Malawi at the Crossroads laments that the "loss of the standing provision will mean that the status quo prevails, in which, the government remains solely in charge of enforcement."

5.2 Role of Communities as Reflected in New Sectoral Legislation Regime

5.2.1 Forestry Act, 1997

There is however, an improvement and hope in the new sectoral legislation relating to natural resource protection. The new Forestry Act (1997) has provided for community participation. In particular Part Five provides for the promotion of participatory forestry on customary land through protection, control and management of trees and forests by the people on customary land, the demarcation and management of village forest areas, ownership of indigenous forest trees, establishment of tree nurseries and regulation of forest produce.

The Director of forestry representing the government may allocate to any village headman or chief a village forest area which would be protected and managed by the village community in a prescribed manner. Further the Director may provide assistance, and allow the community to dispose of the forest produce and use revenue for their own needs. In view of this, various Village Natural Resources Committees have been formed and forestry management agreements concluded. The Blantyre City Fuelwood Project has provided assistance to Village Natural Resources Committee through the provision of equipment, training in forest management and organization and formation of Village Natural Resources Committees. These committees have formulated their own rules for the protection of forests and are able to enforce penalties on violators.

There is a need, however, to strengthen this concept through public awareness. One Forest Officer recounted that on one occasion a Village Natural Resource Committee member was arrested by the police when he tried to stop a group of people cutting their Village Forest Reserve. He observed sadly that when the committee member tried to stop the group of offenders from cutting the trees without authority from the Chief, a fight broke out and the police just arrested everyone, and worse still, the Committee member had no money to pay as security to be granted bail. The Director of Forestry eventually paid the security sum required to secure bail for the member. The Forest Officer felt that it was clear that the concept of public enforcement or participation needed to be imparted to the police force as well as the judiciary. Several chiefs and village headmen felt that the role of communities could be enhanced by the reintroduction of Traditional Courts. Traditional Courts were abolished in Malawi in 1994 because their notorious record during the previous one party reign of Dr. Banda⁴.

5.2.2 The Fisheries Conservation and Management Act, 1997

Just like the new Forestry Act 1997, the new fisheries legislation has gone a long way towards the strengthening of village communities to play a leading role in the protection of fish stocks. In particular the Act has provided for local community participation in Part Three. The purpose of this Part is to allow for the development of local participation in the conservation and the management of fisheries. It paves the way for the establishment of village community institutions, such as, Beach Village Committees referred to in the Act as fisheries management authorities (Section 2). It further outlines conditions for setting out such committees. It provides for the preparation of fisheries management agreements. These are mutually acceptable agreements that may be entered into between the Director of Fisheries and Beach Village Committees, on how best to set out regulations and manage fish sustainably. Further the Minister responsible for fisheries has been conferred powers to make rules and by-laws for the better operation of Fisheries Management Authorities (Section 9).

However, I regard to the role of the public or local community, the provisions in the fisheries conservation and management are more elaborate than in the Forest Act which has tended to limit the participation of community to customary land. This could be as a result of lessons drawn from a pilot community management on Lake Malombe, one of Malawi's lakes. This has been a carefully watched project that involves the formation of what are called Beach Village Committees (BVC). The Beach Village Committees cooperate in carrying out their tasks with the Fisheries Department to develop regulations and report violation cases where efforts to persuade offenders to change their behavior have failed.

6 THE WAY FORWARD

The examples set out by the two pieces of natural resource legislation i.e. Forestry and Fisheries need to be emulated and encouraged in Malawi. There is a need, however, to invest a lot more resources to continue meeting training needs of the communities and help them to acquire necessary skills to develop better agendas, maintain records and become well informed communities. There is a greater need for commitment on the part of Fisheries and Forestry Department officials, and enhancement to encourage communities by exploring more and more innovative ways of cultivating change of attitude towards natural resources and encourage sense of responsibility, and ownership. Susan Casey Lefkowitz (June, 1997) in her article makes similar observations when she concludes that "the strengthening of civil society around the world, allows citizens to have a better understanding of their role, rights and responsibilities related to social, political environmental conflicts and be more willing and able to supplement government efforts in the enforcement of environmental and natural resources laws⁵. Another observation is that public involvement has the potential to transform environmental protection statutes and regulations from aspirations into reality⁶.

7 CONCLUSION

The crippling financial constraints which have resulted in reduced funding to various agencies responsible for the management and protection of the environment and natural resources in Malawi, lack of trained personnel to assist in policing, besides the obvious avalanche of problems besetting environmental and natural resource enforcement substantiated in this Paper, should encourage policy makers to invest in strengthening the role of citizens and community institutions to enable them to meaningfully and effectively supplement government

efforts in enforcement. In return government should provide incentives and give tangible benefits to the communities. There is a need however, for patience, sacrifice and commitment by those involved in the implementation of this radical and pragmatic change of policy in environmental protection for it might take a little more time to yield positive results.

ENDNOTES

1. Views expressed in this paper are not necessarily those of the Government of Malawi but of the author writing as a scholar of environmental law.
2. Malawi was ruled by a despot Dr. Hastings Kamuzu Banda, who for over 30 years ruled with an iron fist, resisting any kind of opposition and eliminating his enemies until he was defeated in 1994 Presidential Elections, following a referendum of 1992 which ushered in a multiparty system of Government.
3. This claim was refuted by various Departments but of late evidence has surfaced confirming claims that some forest rangers and land rangers have been involved in receiving bribes in exchange of various mal practices.
4. Tradition Courts which administered customary law were notorious because of their lack of independence due to obvious political manipulation in their proceedings. Their standard of proof was not "not guilty until proven guilty" but "no smoke without fire" (Republic versus Albert Andrew Muwalo and Focus Martin Gwede) (unreported) "The mere fact that one is alleged to have committed an offence, is itself enough evidence that he or she must have committed the offence.
5. Casey-Lefkowitz, Susan, Comparative Look at the Role of Citizens in Environmental Enforcement, National Environmental Enforcement Journal, June 1997, page 42.
6. The Role of the citizen in Environmental Enforcement, Environmental Law Institute, August 1992, page 37.

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