

## Chapter 18:

# The Environmental Management Act (2017) and natural resource regulation in Malawi: opportunities for and limitations to effective enforcement

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## 1 Introduction

Malawi's first significant policy document on environmental issues was the National Environmental Action Plan<sup>1</sup> (NEAP) published in 1994. The NEAP was set out to document and analyse all the major environmental issues and proposed measures to alleviate them as well as to promote the sustainable use of natural resources in Malawi. The NEAP highlighted that one of the greatest challenges to effective environmental protection and management was poor enforcement of the legal framework. In particular, NEAP highlighted that the legislative framework was uncoordinated and had several gaps, inconsistencies, duplications and conflicts all of which made enforcement difficult. This was the main reason for the adoption of the National Environmental Policy<sup>2</sup> (NEP) in 1996 (revised in 2004) and the subsequent enactment of a framework environmental law, the Environmental Management Act<sup>3</sup> (EMA) in 1996. The EMA (1996) provided for an elaborate institutional framework for implementing the environmental and natural resource management provisions prescribed in the Act, expanded opportunities for stakeholder consultations and enabled coordination. However, there is little indication that it improved environmental management in general or sector coordination to any significant degree.<sup>4</sup>

In an attempt to address the above concerns, a second Environmental Management Act (EMA) was assented to by the President in February 2017. EMA (2017) provides for a coordinated and comprehensive future legal framework for environmental protection and management as well as the conservation and sustainable use of natural resources. EMA (2017) will replace EMA (1996), when the former commences by way of notice in the future. Until this occurs, EMA (1996) remains the applicable law.

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1 Republic of Malawi (1994).

2 Republic of Malawi (1996).

3 Act 23 of 1996.

4 Banda (2004).

The enforcement of environmental laws remains a challenge in many jurisdictions. In Malawi, environmental degradation and the unsustainable exploitation of natural resources continue to occur notwithstanding the existence of several laws regulating these issues. What guarantee is there that the introduction of EMA (2017) will remedy the situation? This chapter examines EMA (2017) in a bid to highlight the opportunities and limitations it presents with respect to improving enforcement in the natural resource sector, particularly relating to forest, fish and wildlife resources. It critically evaluates the enforcement mechanisms provided for in EMA (2017) and highlights outstanding barriers to enforcement, and opportunities for reform.

## 2 Overview of Malawi's environment

Malawi is one of the most densely populated countries in Africa which imposes significant pressure on its limited natural resources. The Malawi State of Environment and Outlook Report<sup>5</sup> (2010) outlines the following key environmental problems: soil erosion; deforestation; water resources depletion and degradation; high population growth; depletion of fish stocks; threats to biodiversity; human habitat degradation; climate change; and air pollution. Similar problems were identified in the NEAP (1994) and the NEP (2004). Malawi's high population density and its over-dependence on agriculture are the main causes of continued environmental degradation. These problems are exacerbated by poverty since a high proportion of the population relies on natural resources, like firewood and fish stocks, for survival.<sup>6</sup>

Over 90% of Malawi's exports stem from the natural resource sector, most notably from agriculture.<sup>7</sup> Malawi's economy is therefore very much linked to its environment, and environmental degradation threatens its social and economic development. The importance of domestic legislation regulating environmental protection, environmental management and the conservation and sustainable use of natural resources is therefore critical.

## 3 Forestry, fisheries and wildlife regulation in Malawi

Malawi continues to suffer tremendous declines in forest, fishery and wildlife resources.<sup>8</sup> The unsustainable exploitation of forest resources and land clearing associated with agricultural expansion due to rapid population growth have largely

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5 Ministry of Natural Resources, Energy and Environment (2010).

6 Ibid: iii.

7 Commission of the European Communities (2006).

8 Dobson & Lynch (2003).

contributed to acute deforestation in Malawi. Constant power outages plaguing the country since 2015 have worsened forest degradation as the demand for firewood and charcoal rises even in urban areas. The threat to fish resources is largely due to increased numbers of fishermen, fishing undertaken during breeding seasons, the use of inappropriate fishing methods, encroachment of water weeds (water hyacinth), reduction in water flow, increased sedimentation in rivers and water pollution.<sup>9</sup> With respect to wildlife, encroachment and poaching are common.<sup>10</sup> The degradation of natural resources therefore continues to be a major threat to socio-economic development in Malawi.

The Forestry Act<sup>11</sup> provides for participatory forestry, forest management, forestry research, forestry education, forest industries, protection and rehabilitation of environmentally fragile areas, and international cooperation in forestry. The Fisheries Conservation and Management Act<sup>12</sup> (FCMA) makes provision for the regulation, conservation and management of the fisheries; while the National Parks and Wildlife Act<sup>13</sup> (NAPWA) consolidates the law relating to national parks and wildlife management. All these statutes have various provisions to ensure the conservation and sustainable use of forests, fish and wildlife in Malawi. However, enforcement has always been weak with the sad result that natural resource degradation continues unabated. It therefore becomes imperative to examine whether EMA (2017) will improve the regulation of natural resources in Malawi.

#### 4 Environmental Management Act (2017) – enforcement mechanisms

As indicated above, EMA (2017) is the integrated and comprehensive future legal framework for environmental and natural resource management in Malawi. It is the coordinating statute on all environmental and natural resource matters in Malawi. When it commences, it will repeal EMA (1996) and hopefully provide a more responsive legal framework for protecting and managing the environment and conserving and sustainably using natural resources. This is its prescribed purpose. ‘Sustainable utilisation’ has been defined in the Act as “the use or exploitation of natural resources which guards against the extinction, deletion or degradation of any natural resource of Malawi and permits the replenishment of natural resources by natural means or otherwise”; while ‘conservation’ has been defined as “the preservation of natural resources and their protection from misuse, fire or waste”.<sup>14</sup>

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9 Kalima (2011: 219).

10 Ibid.

11 Act 11 of 1997.

12 Act 25 of 1997.

13 Act 15 of 2004.

14 Section 2 of the EMA (2017).

Section 6 highlights its supreme status by providing that any environment and natural resource law that is inconsistent with the provisions of EMA (2017) shall, to the extent of such inconsistency, be invalid, thereby making this law subject only to the Constitution of the Republic of Malawi (1994) (the Constitution). EMA (2017) makes provision for the following substantive enforcement mechanisms: the right to a clean and healthy environment and the issue of *locus standi*; the establishment of the Malawi Environmental Protection Authority (MEPA); accountability and institutional arrangements; local community participation; the establishment of an environmental tribunal; environmental and social impact assessments, monitoring and auditing; environmental protection orders; inspection, analysis and records; administrative penalties and offences. Each of these mechanisms and the opportunities they present for effective enforcement are addressed below.

#### 4.1 The right to a clean and healthy environment and the issue of *locus standi*

Section 4(1) of EMA (2017) affords every person the right to a clean and healthy environment and the corresponding duty to safeguard and enhance the environment. The Constitution does not explicitly provide for an environmental right which undermines its value in environmental protection. In Section 13, the Constitution merely provides for principles of national policy which include that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving specified goals which include the environment. In this regard, the goal is to manage the environment responsibly in order to: prevent degradation of the environment; provide a healthy living and working environment for the people of Malawi; accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and to conserve and enhance the biological diversity of Malawi.<sup>15</sup> However, this provision is merely directory in nature and not justiciable.

While Section 4 of EMA (2017) may not have the same status as a constitutional right, it is nevertheless an essential provision for the enforcement of environmental and natural resource regulation. EMA (1996) contains a similar provision, but its implementation has been frustrated by restrictive interpretations of the requirement of *locus standi*.<sup>16</sup> EMA (2017) has addressed this problem and expanded the right significantly in two respects.

Firstly, Section 4(4) of EMA (2017) enables MEPA, any concerned environmental agency or any person to bring an action against any person whose activities or omissions have or are likely to have a significant impact on the environment to: prevent or

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15 Section 13(d)(i-iv) of the Constitution of the Republic of Malawi (1994).

16 Kalima (2009: 235).

stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources; procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any law; require that any on-going project or other activity be subject to an environmental audit or monitoring in accordance with the act; and seek a court order for the taking of other measures that would ensure that the environment does not suffer significant harm. EMA (1996) accords no similar power to the coordinating institution or other lead environmental institutions to take action on behalf of the public. Hence the public is currently compelled to rely on the Attorney General's office which is problematic as this office is understaffed and environmental concerns are regarded as peripheral. Section 4(4) of EMA (2017) is accordingly a significant addition in the context of enforcement.

Secondly, Section 4(5) of EMA (2017) provides that:

...any person proceeding under section 4(4) shall have capacity to bring an action notwithstanding that the person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury: provided that the legal action –

- (a) is not frivolous or vexatious; or
- (b) is not an abuse of the court process;

provided further that in every case the determining factor shall be whether such person is acting in the best interest of the environment and in exercise of the duty to safeguard and enhance the environment.

Legal actions are a powerful tool for compelling compliance and imposing sanctions for violations of environmental laws. However, a person wishing to bring an action before court to enforce a right is required to demonstrate that they have *locus standi* (in other words sufficient interest in the matter). *Locus standi* is critical to the exercise of the right of access to court since the more liberal the interpretation given to the rules of standing, the more individuals are guaranteed access to the courts.<sup>17</sup> One of the most commonly lamented barriers to the enforcement of environmental law under EMA (1996) has been the issue of *locus standi*. The Malawian judiciary has historically adopted a very restrictive approach to *locus standi* which commentators have argued has in turn limited the growth of public interest litigation in the country.<sup>18</sup> Public interest litigation has, however, been recognised as a key tool for promoting the interests of the poor, vulnerable and marginalised sectors of Malawi's population who cannot access the courts on their own.<sup>19</sup>

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17 Chirwa (2011: 70).

18 Nkhata (2008). The article compares the treatment of the *locus standi* requirement in decisions of the High Court and the Supreme Court of Appeal. The Supreme Court of Appeal required to establish a personal interest or substantive interest surpassing that of other citizens in order to be held to have sufficient standing to commence an action.

19 Gloppen & Kanyongolo (2007: 258).

EMA (2017) is therefore to be commended for settling this question in clear terms. It has not only granted the right to a clean and healthy environment to all citizens, but has also made enforcement of the right possible. In a country where poverty and illiteracy levels are high, and political interference spans many sectors, non-governmental organisations (NGOs) and other interested stakeholders are often best positioned to enforce environmental rights through public interest litigation. These parties can help in detecting violations, notifying the authorities, applying public pressure and bringing suits to enforce the law. The recent case of *State v. Lilongwe Water Board, Minister of Agriculture, Irrigation and Water Development, the Director of Environmental Affairs, the Minister of Natural Resources Energy and Mining Ex parte the Malawi Law Society*<sup>20</sup> (*Salima-Lilongwe Water Pipeline case*) emphasises the relevance of interested stakeholders in enforcing environmental law. It involved the Malawi Law Society bringing action to secure compliance with the environmental impact assessment (EIA) provisions contained in EMA (1996). Section 4(5) of EMA (2017) is broad enough to allow persons or organisations to commence court actions in the sole interest of the environment and natural resources. Such persons would only be required to establish that they were acting in the best interests of the environment as required by the proviso contained in Section 4(5). This provision should therefore go a long way in encouraging much needed public interest litigation and with it effective enforcement of legislation regulating natural resources.

## 4.2 The Malawi Environmental Protection Authority

As indicated above, the main motivation for the enactment of EMA (1996) was that Malawi's environmental legal and institutional framework was too diffuse for effective coordination and enforcement. Although EMA (1996) attempted to improve stakeholder consultation and provides for sectoral coordination, it has not been successful in this regard.<sup>21</sup> The Act fails to outline clearly the functions of lead agencies and provided no workable mechanisms for promoting coordination. In addition, too many powers were given to the Minister and the fact that the coordinating agency, the Environmental Affairs Department (EAD), is a government department could be seen to compromise its independence and professionalism.

EMA (2017) addresses the above concerns. Section 7 establishes an autonomous body, MEPA, which shall be the principal agency for the protection and management of the environment and sustainable use of natural resources. MEPA shall have powers to coordinate, monitor, supervise and consult with all stakeholders on all activities

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20 Judicial Review Case No. 16 of 2017, High Court (Zomba District Registry) (unreported). This case is more fully discussed in part 4.6 below.

21 Banda (2004).

relating to the use and management of the environment and natural resources. Functions currently vested in the Minister for Environmental Affairs under EMA (1996) will be transferred to MEPA in the future.

Some of MEPA's key functions are outlined in Section 9, and include: to advise the Minister for Environmental Affairs on the formulation and implementation of policies for environmental protection and management; to initiate legislative proposals, standards and guidelines; to enforce the right to a clean and healthy environment; to monitor and enforce compliance with environmental and natural resource related policies and legislation by lead agencies (in this case MEPA has been given powers to direct lead agencies to submit regular reports on their activities); to review and approve environmental and social impact assessments; to receive and investigate complaints; and to prepare and publish a national state of the environment report every five years and an annual report on the status of the environment. MEPA shall accordingly be a critical enforcement institution for environmental policies and legislation in Malawi in the future.

EMA (2017) also contains provisions that enable MEPA to strengthen coordination, implementation and enforcement of environmental and natural resources management laws. Being an independent institution means MEPA can work efficiently and professionally with minimal political interference. The only hiccup may relate to the appointment of persons to it. Section 10 of EMA (2017) states that MEPA shall consist of a chairperson, vice-chairperson and five other members all of whom shall be appointed by the President. The Secretary for Environmental Affairs and the Solicitor General shall be ex-officio members of MEPA. Presidential appointments can negatively impact on the autonomy and professionalism of the authority and eliminate any hopes of non-political interference in MEPA. Presidential appointees have not historically inspired confidence as they are perceived to owe allegiance to the appointing authority which might affect their efficiency. However, this remains to be seen.

### 4.3 Accountability and institutional arrangements

One of the biggest challenges to effective environmental management in Malawi has been the uncoordinated legislative framework that has several gaps, inconsistencies, duplications and conflicts thereby making enforcement difficult.<sup>22</sup> The EMA (2017) addresses this problem. It refers to institutions like the forestry directorate, the fisheries directorate and the wildlife directorate as lead agencies. 'Lead agency' has been defined in the Act as "any public office or organisation including a ministry or government department which is conferred by any written law or policy with powers and functions for the protection and management of any segment of the environment and

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22 See generally: Department of Research and Environmental Affairs (1994).

the conservation and sustainable utilisation of natural resources in Malawi”.<sup>23</sup> Section 23 provides that MEPA shall, in consultation with lead agencies, issue guidelines for the elimination of gaps, conflicts, inconsistencies and duplications in environmental and natural resource policies and legislation and their implementation. This is especially important for interconnected natural resource sectors like forestry, fisheries and wildlife.

MEPA will have an oversight role over all the lead agencies and can delegate functions to any of them.<sup>24</sup> Under Section 22, MEPA has the power to direct any lead agency to perform, within such time and such manner as it shall specify, any of the duties imposed on the lead agency by the Act or any written law. If the lead agency fails or neglects to comply with such directions, MEPA may itself perform, or cause to be performed, the duties in question. This will hopefully guard against neglect of duties on the part of the various natural resource institutions and ensure that even where duties have been neglected, the omission is not left unattended to.

Section 23 of EMA (2017) indicates that the Act should not be construed as divesting any lead agency of the powers, functions, duties or responsibilities conferred or imposed on it by any written law relating to the protection and management of the environment and the conservation and sustainable use of natural resources; or limiting such powers. Lead agencies shall perform functions and responsibilities as provided under relevant written laws and EMA (2017), and shall ensure sustainable realisation of national development by preventing activities that degrade the environment; undertake appropriate precautionary measures and enforcement of standards applicable to their sector; and report on their implementation and enforcement activities to MEPA.<sup>25</sup> Lead agencies will also be required to report on their operations, the state of their sector and the measures taken by the lead agency to maintain or improve the environment.<sup>26</sup> Considering that enforcement is currently weak under the various natural resource institutions, requiring them to report on enforcement to MEPA should compel them to strengthen their enforcement mechanisms. It will also create a mechanism for holding them accountable, which has not historically been available.

Accountability in environmental and natural resource management should accordingly be strengthened under EMA (2017). Even MEPA shall be required to publish and lay before parliament (through the minister) a report on the exercise and performance of its functions annually.<sup>27</sup>

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23 Section 2 of EMA (2017).

24 Sections 20 and 21 of EMA (2017).

25 Section 23(3) of EMA (2017).

26 Section 24 of EMA (2017).

27 Section 18 of EMA (2017).



#### 4.4 Local community participation

Failure of existing regulatory management institutions to conserve natural resources has led to the recognition of the value of stakeholder involvement in natural resource management.<sup>28</sup> In Malawi, the current policy and legislative framework shows a clear shift from the command-and-control approach to participatory environmental and natural resource governance, which has the local communities at its core.<sup>29</sup> Under the Forestry Act (1997), this has been done through the creation of village forest areas and village natural resource management committees for the purpose of promoting the participation of local communities and the private sector in forest conservation and management. Under the NAPWA (2007), this has been done through the creation of wildlife management authorities which are local community organisations tasked with promoting local community participation in the conservation and management of wildlife. The FCMA (1997) also creates beach village committees with similar purposes. However, the creation of these committees creates needless proliferation and duplication at the local level.

The EMA (2017) attempts to address this problem while retaining an emphasis on the importance of local community participation. Section 5 provides that for the purpose of ensuring effective public participation and the enforcement of rights and duties created under the Act, the MEPA shall promote the right of every person to participate in environmental decision-making processes directly or through representative bodies. It also compels lead agencies to create mechanisms for effective, direct and indirect public participation. MEPA is further obliged, in consultation with local authorities, to issue guidelines for the establishment of a committee on the environment for each district known as the district environment sub-committee. The functions of these committees include to coordinate the activities of a local authority relating to the management of the environment and natural resources.<sup>30</sup> Each local authority shall, on the advice of the district environment sub-committee, establish a Local Environment and Natural Resources Committee (LENRC) responsible for undertaking environmental and natural resource management activities in their jurisdiction.<sup>31</sup>

The LENRC has been defined as:<sup>32</sup>

the village and area development committees as established under the Local Government Act to initiate, coordinate and mobilise local community participation in environmental and natural resource management issues and to represent interests of such local communities and includes any local community institution participating in the management and protection of the environment and natural resources under any written law.

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28 Dobson & Lynch (2003).

29 Banda & Ngwira (2007: 38).

30 Section 26 of EMA (2017).

31 Section 27 of EMA (2017).

32 Section 2 of EMA (2017).

The LENRC must, among other things, mobilise local communities in its jurisdiction to sustainably manage and conserve the environment and natural resources, and restore degraded environmental resources through self-help.<sup>33</sup> Section 27(2) of EMA (2017) provides that the LENRC must be established with special recognition of the roles and responsibilities of traditional leaders; and the need to integrate traditional knowledge in environmental and natural resource strategies, plans programs. This is another advantageous provision for enforcement considering that the committees created under the Forestry Act (1997), FCMA (1997) and NAPWA (2007) overlooked the critical role of traditional authorities in the rural areas.

#### 4.5 The Environmental Tribunal

Effective dispute resolution mechanisms greatly impact on the enforcement of any law. The EMA (1996) makes provision for the establishment of an Environmental Tribunal. The Tribunal, however, is granted very limited administrative jurisdiction under the Act and its role is largely limited to considering appeals against decisions and actions of the minister, director or inspectors under the Act. Some 21 years since the enactment of EMA (1996), this Tribunal is yet to be established.

The EMA (2017) also makes provision for an Environmental Tribunal.<sup>34</sup> It has, however, considerably expanded the jurisdiction and powers of the Tribunal. The Tribunal can hear and determine petitions on violations of the right to a clean and healthy environment, any other provision under the Act or any written law relating to environmental and natural resource management; and receive complaints from any person, lead agency, private sector and NGOs relating to the implementation and enforcement of environmental and natural resource management policies and legislation.<sup>35</sup> Decisions of this Tribunal will have the same force and effect as High Court decisions.<sup>36</sup>

Given its wide jurisdiction, the Tribunal should become an essential institution in the enforcement of environmental law, especially considering the cost and delays that come with taking matters to court in Malawi. The Tribunal has the potential to quickly and efficiently deal with environmental disputes and enforce the law accordingly. A further advantage of this Tribunal is that it shall be chaired by a legal practitioner who is conversant with environmental law and who shall be appointed by the Malawi Law Society.<sup>37</sup> This differs from the provisions in EMA (1996) that provide for the Tribunal to be chaired by a person appointed by the President. This may address the political interference concerns raised above. The Tribunal also has the advantage of non-rigid

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33 Section 27(4)(c) of EMA (2017).

34 Sections 107-115 of EMA (2017).

35 Section 107 of EMA (2017).

36 Section 115 of EMA (2017).

37 Section 107(2)(a) of EMA (2017).

compliance with common law rules of procedure and evidence, which may lead to the more cost-effective and expedient disposal of cases,<sup>38</sup> something of great advantage to the protection of natural resources.

Nevertheless, considering the extensive delays in establishing the similar Tribunal under EMA (1996), there is no guarantee that the government will establish the Tribunal under EMA (2017) without delay. Perhaps EMA (2017) should have prescribed deadlines by which the Tribunal should be established.

#### 4.6 Environmental and social impact assessments, monitoring and auditing

Part VI of EMA (2017) makes extensive provision for environmental and social impact assessments, monitoring and auditing. EMA (1996) only made provision for an EIA without the social element.<sup>39</sup> An ‘environmental and social impact assessment’ (ESIA) is defined in EMA (2017) as “a systematic evaluation of a project to determine its impact on the environment and the conservation of natural resources”.<sup>40</sup> These are powerful mechanisms for the enforcement of environmental and natural resource policies and legislation as they ensure that developmental projects should not be implemented at the expense of the environment. However, although EMA (1996) contains similar provisions for EIAs, environmental audits and monitoring are scarcely used, the challenge being the lack of personnel, technical expertise and funding in the enforcement agency. As long as there is no commitment to address these issues, these mechanisms though good on paper, will prove ineffective in practice.

The recent *Salima-Lilongwe Water Pipeline* case<sup>41</sup> is relevant. It involved the need for an EIA in the Salima-Lilongwe/Lake Malawi Water Supply Project. Khatho Civils Proprietary Limited was contracted by the Lilongwe Water Board and Malawi Government to install a water pipeline pumping water from Salima to Lilongwe (a distance of about 130 kilometres). The Malawi Law Society was of the view that the contractor had commenced the project without an EIA and initiated judicial review proceedings against the Lilongwe Water Board, Minister of Agriculture, Irrigation and Water Development, Director of Environmental Affairs and the Minister of Natural Resources Energy and Mining to compel them to undertake an EIA. The parties agreed that the project was of such magnitude that the contractor could not commence with it in the absence of an EIA and ESIA. The contentious question was whether the project had commenced. The court of first instance and the Supreme Court of Appeal, however, both never had an opportunity to deal with the substantive issue as the matter was

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38 Sections 110 and 116 of EMA (2017).

39 Section 24 of EMA (1996).

40 Section 2 of EMA (2017).

41 Judicial Review Case No. 16 of 2017, High Court (Zomba District Registry) (unreported).

disposed of on procedural grounds. Nonetheless, this case highlights the fact that there is a potential danger to sacrifice environmental concerns in the implementation of developmental projects perceived as beneficial to the country. This makes mandatory requirements for ESIA's so critical. The case also illustrates how interested stakeholders and NGOs are essential in addressing environmental concerns and ensuring accountability of the relevant authorities.

#### 4.7 Environmental protection orders

Part XI of EMA (2017) gives MEPA the power to issue environmental protection orders against any person whose acts or omissions have, or are likely to have, adverse effects on the protection and management of the environment and the conservation and sustainable use of natural resources. This, if efficiently utilised, is another powerful enforcement mechanism.

#### 4.8 Inspection, analysis and records

Section 81 of EMA (2017) states that MEPA must establish an inspectorate with the necessary technical staff and facilities to administer, monitor and enforce measures for the protection and management of, and for the prevention and control of, pollution to the environment. Inspectors play a very important role in the enforcement of environmental and natural resource standards. Subject to adequate availability of technical staff and facilities (which is not the case now), inspectors can prevent the occurrence or aggravation of actual environmental harm and also facilitate the conviction of offenders by providing the necessary proof in environmental and natural resource cases.

#### 4.9 Administrative penalties

Section 108 of EMA (2017) has introduced various administrative penalties. These include written warnings, monetary penalties, directing the wrongdoer to do or refrain from doing an act, directing wrongdoers to remedy the effects of contravention or to compensate victims. The prescribed monetary penalties are reasonably hefty.

Of all the current laws regulating the forestry, fisheries and wildlife sectors, only the FCMA (1997) makes provision for administrative penalties for offences of a minor nature. These are, however, very limited in scope. Provision in EMA (2017) for more extensive administrative penalties is a welcome development and is in line with principles of environmental law since they allow preventive action to be taken before environmental damage occurs. The introduction of these administrative penalties should

hopefully ensure that recourse to legal action is the last option thereby reducing the number of matters that go into the court system with its attendant costs and delays. If used efficiently, these penalties should complement the criminal sanction that has been popular in the enforcement of environmental law in Malawi, and help in eliminating the problems associated with criminal enforcement.

#### 4.10 Penalties

Part XV of EMA (2017) provides for various criminal offences in relation to environmental and natural resource protection and management. Criminal sanctions are commonly used to enforce environmental law. However, it has often been lamented that fines provided under EMA (1996) are too weak to have any deterrent effect.<sup>42</sup> Similarly, weak sanctions are available under the Forestry Act (1997), FCMA (1997) and NAPWA (2007). EMA (2017) attempts to address this concern by providing for reasonably hefty fines. The Act also fortunately provides for recurring offences and an additional fine for each day that environmental harm continues after conviction. This may motivate offenders to expeditiously remedy environmental harm and offending behaviour. Criminal offences are commonly prosecuted by the Malawi Police Service prosecutors and officers from the Director of Public Prosecution's chambers. However, these officers may not have the requisite expertise in technical environmental matters. Coordination between these departments and MEPA is therefore imperative for the successful prosecution of these offences.

### 5 Barriers to enforcement and possible solutions

With the exception of the significant differences noted above, most of the enforcement mechanisms contained in EMA (2017) are currently also provided for under EMA (1996). Barriers like poverty, lack of alternative income and energy options, illiteracy and attitudinal problems, resource constraints, institutional weaknesses and political interference greatly undermined the success of EMA (1996). These issues remain today and may accordingly also stifle the success of EMA (2017) if they are not effectively addressed. Each of these barriers and solutions to possibly overcome them are discussed in turn below.

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42 See, for example, *R v. Maria Akimu* (Revision Case No. 9 of 2003).

## 5.1 Poverty

Poverty remains the primary cause of the unsustainable use of the environment and natural resources, and an underlying challenge to effective enforcement. Related to this is the overdependence of Malawi's energy economy on biomass fuels like firewood and charcoal, a factor which has significantly contributed to environmental degradation in Malawi. Poverty also reduces motivation among people to care about environmental degradation or pursue environmental justice, with their primary concern being about survival. While there are many poverty alleviation policies and schemes in Malawi, many of them remain in form rather than substance, and until serious efforts are made to actually alleviate poverty and provide alternatives to biomass fuels, this will remain a challenge to the conservation and sustainable use of the country's natural resources.

## 5.2 Lack of alternate income generating activities and energy options

Lack of alternative income generating activities remains a challenge that drives most people to unsustainably exploit natural resources, especially fish and forest resources. The Malawi Labour Force Survey<sup>43</sup> (2013) indicated that Malawians are predominantly engaged in informal work with 45% of the labour force engaged in skilled agricultural, forestry and fishery occupations. As regards fishing, limiting access as a solution to conserving diminishing fish stocks was once considered by the government, although subsequently rejected owing to the extreme poverty of many people who depend on fishing for survival.<sup>44</sup> The incessant electricity outages being experienced in Malawi since 2015 have also increased the demand for charcoal even by those in urban areas. This in turn contributes to forest degradation. For the urban population, improving electricity supply can help. However, for the majority living in rural areas, it is essential that the government eases the overdependence on biomass fuels by providing alternatives. As long as the demand for firewood and charcoal is high, suppliers will always be available in the presence or absence of law. Alternative income generating activities must also be encouraged.

## 5.3 High illiteracy levels and attitudinal problems

Another barrier to effective enforcement of environmental law is the high illiteracy levels coupled with societal attitudes to environmental wrongs. The extent to which

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43 National Statistics Office (2013).

44 Dobson & Lynch (2003: 235).

people regard environmental crimes as being morally wrong will determine their demand for justice, reporting and identification. Unfortunately, most Malawians do not seem to consider environmental crimes as moral wrongs as can be evidenced by brazen littering across the country. Another example is the case of *R v. Maria Akimu*,<sup>45</sup> where officials of the National Parks and Wildlife Department, posing as would-be purchasers of ivory, met the defendant at her house. They agreed to buy some pieces of ivory at the defendant's house, at the defendant's father's house and another person's house. They eventually arrested the defendant and recovered the ivory, but not without stiff resistance from the defendant's neighbours and relations who could not understand why an individual should be prosecuted for selling animal products. There have also been media reports of forestry officials being assaulted for confiscating charcoal from sellers.

To overcome this, implementing intensive public awareness campaigns and making environmental and natural resource education an integral part of primary and secondary education can help to impress upon children the importance of these resources and help them grow into adults who utilise natural resources responsibly. Primary education has already assisted with HIV awareness even among young children, and if well integrated into the education curriculum, natural resource management issues may also benefit. A complete change of mentality is imperative if Malawi is to move toward conserving and sustainably using its natural resources.

#### 5.4 Resource constraints

Related to the poverty challenge, is the fact that government allocates minimal resources to environmental and natural resource matters. Lack of resources, material and human, is a significant challenge for all natural resource enforcement institutions. In the area of wildlife, most national parks and wildlife reserves lack personnel, vehicles, fuel, guns and ammunition, and this causes ineffective policing and increased poaching.<sup>46</sup> The Environmental Affairs Department remains underfunded and understaffed and this negatively impacts on their enforcement mandate. For instance, inspectors cannot efficiently enforce environmental standards because they are very few in number and lack technical expertise as well as other necessary facilities. Adequate budgetary support to MEPA and lead agencies is therefore critical if EMA (2017) is to make much impact.

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45 Revision Case No. 9 of 2003.

46 Kalima (2009: 235).

## 5.5 Delays in establishing institutions

Although EMA (2017) makes provision for essential enforcement institutions like MEPA and the Environmental Tribunal, delays in their establishment may undermine their potential. It is hoped that the MEPA and Environmental Tribunal do not take 21 years to establish, as has been the case for the latter institution under EMA (1996). As mentioned above, perhaps EMA (2017) should be amended to include minimum periods within which these key institutions should be created.

## 5.6 Political interference

Political interference has proven to be a constant challenge to enforcing laws in Malawi. One way this happens is through political appointments. Practice has shown that most presidential appointees are prone to political manipulation. Consequently, though MEPA has been given autonomy as an environmental enforcement agency, it is a cause for concern that Section 10 of EMA (2017) places the appointment of its chairperson, vice-chairperson and remaining members in the hands of the President. Presidential appointments have the potential to compromise the autonomy and professionalism of MEPA and with it effective enforcement. The proposed composition and appointment process therefore bears rethinking.

## 6 Further recommendations

### 6.1 Optimising criminal sanctions

Malawian environmental law places more reliance on the criminal sanction than any other sanction for environmental protection, and criminal sanctions will accordingly remain an important device for securing compliance with the law.<sup>47</sup> Criminal sanctions are either applied as a primary sanction or as a supporting sanction where administrative measures fail. However, this is not ideal since the criminal law is reactive not proactive. It is furthermore contrary to one of the fundamental principles of environmental law, the preventive principle, which requires that environmental damage should as much as possible be prevented in advance rather than rectified or punished retrospectively. Since most environmental disputes will culminate in criminal cases, there is a need to optimise benefits from the use and outcome of criminal sanctions, such as depositing fines paid for environmental offences into an environmental fund to be used to remediate current and prevent future environmental degradation. Strengthening the

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<sup>47</sup> Kalima (2006).



involvement and technical expertise of public prosecutors, investigators and courts in enforcing environmental laws also warrants serious consideration.

## 6.2 Judicial activism

Some 21 years have passed since the enactment of EMA (1996) and very few cases have been brought before the High Court praying for relief in terms of its provisions. This is a lost opportunity for the courts to articulate and enforce the right to a clean and safe environment. Given the chance, which might arise with the broad *locus standi* provisions now contained in EMA (2017), Malawi's judiciary should be encouraged not to be conservative and use their role to develop the law as a mechanism for environmental and natural resource protection. Furthermore, it has been argued that one reason why activists have been discouraged from bringing environmental matters to court is the fear of adverse cost orders.<sup>48</sup> While EMA (2017) is silent on cost orders, it is encouraging to note the approach of the Supreme Court of Appeal in the *Salima-Lilongwe Water Pipeline* case<sup>49</sup> where the court said:

We are a big believer of public interest litigation. We have therefore always done our part to encourage it by especially being careful with how we deal with matters of costs. At the same time we think it our duty to urge all that find it necessary to resort to public interest litigation to do so responsibly so that it does not lead to needless waste especially of treasury.... Because costs must follow the event we were minded to award costs against the Society. We are mindful however of the role, in many ways via litigation, the Society plays in safeguarding, promoting and protecting our people's rights. An award for costs against the Society might put a dampener on their activities and enthusiasm. Such an award would also not sit comfortably with our belief in the benefits to be had from public interest litigation.

The court then proceeded to order each party to pay their own costs. It is therefore recommended that courts should do their part in responsibly encouraging environmental litigation by making proactive cost orders.

## 7 Conclusion

The enforcement of environmental law remains a challenge in Malawi. An attempt was made to address this problem through the enactment of EMA (1996). This Act has, however, been rather unsuccessful, which has triggered the introduction of EMA (2017). The latter is an integrated and comprehensive legal framework for environmental and natural resource management in Malawi. This chapter examined this law in a bid to highlight the opportunities and limitations that it presents with respect to

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48 Kalima (2009: 223).

49 MSCA Civil Appeal No. 59 of 2017.

effective enforcement in the natural resources sector. It has been highlighted that while EMA (2017) presents tremendous potential for natural resource conservation and sustainable use, the outstanding limitations discussed above must be addressed to improve enforcement.

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