

## TABLE OF CONTENTS

	<i>Executive Summary</i> .....	1
1.	<i>Introduction</i> .....	4
	1.1 <i>Background</i> .....	4
	1.2 <i>Methodology</i> .....	5
2.	<i>Forestry Framework Legislation</i> .....	5
	2.1 <i>Participatory Forestry</i> .....	6
	2.2 <i>Forest Management Agreements</i> .....	7
	2.3 <i>Powers of Village Natural Resources Management Committees</i> .....	10
	2.4 <i>Forest Tree Ownership and Forest Produce Utilisation</i> .....	10
	2.5 <i>Soil and Water Catchment Conservation</i> .....	11
	2.6 <i>Institutional Capacity</i> .....	12
	2.7 <i>International Cooperation</i> .....	13
3.	<i>Development of Recent Legislation Initiatives</i> .....	13
	3.1 <i>Historical Development</i> .....	13
	3.2 <i>International Assistance</i> .....	14
	3.3 <i>Parallel Policy Legislative Reviews</i> .....	14
	3.4 <i>Local Legal Expert Review</i> .....	15
	3.5 <i>Development of Legislative Objectives</i> .....	15
	3.5.1 <i>Guiding Principles</i> .....	15
	3.5.2 <i>Department Initiatives</i> .....	16
	3.5.3 <i>National Study Initiatives</i> .....	16
	3.5.4 <i>International Developments</i> ... ..	17
	3.5.5 <i>Comparative Models</i> .....	18
	3.6 <i>Feasibility Assessment of Proposals</i> .....	18
4.	<i>The Role of national Forestry Policy</i> .....	18
5.	<i>The Legislative Drafting Process</i> .....	20
	5.1 <i>Who Was Involved?</i> .....	20
	5.2 <i>Interdepartmental Consultations</i> .....	21
	5.3 <i>The Policy Planning Unit</i> .....	22
	5.4 <i>Role of Foreign Consultants</i> .....	22
	5.5 <i>Cross-sectoral Legislative Considerations</i> .....	22

5.6	<i>The common law, customary law and local community participation</i>	23
5.7	<i>Decision making</i>	27
6.	<i>Public Participation</i>	28
7.	<i>External Donor Assistance</i>	30
8.	<i>Incorporation of International Forestry Related Conventions and Policy</i>	31
9.	<i>Primary and secondary legislation</i>	32
10.	<i>Assessment of the law making process and quality of the legislation</i>	34
10.1	<i>Scope of the Act</i>	34
10.2	<i>Utilisation of Forestry Produce</i>	35
10.3	<i>Village Natural Resources Management Committee</i>	35
10.4	<i>Participation of Local Communities in Management of Government Forests</i>	36
10.5	<i>Institutional Mandate</i>	37
10.6	<i>Local Authorities</i>	38
10.7	<i>Enforcement</i>	39
10.8	<i>Traditional/Informal Rules</i>	39
11.	<i>Observations and Regulations</i>	41
11.1	<i>Policy and Legislative Planning</i>	41
11.2	<i>Creation of New Institutions</i>	41
11.3	<i>Involvement in the Drafting Process</i>	42
11.4	<i>Role of Foreign Consultants</i>	43
11.5	<i>Role of Donors</i>	43
11.6	<i>Public Participation</i>	44
11.7	<i>Incorporation of Public Comments</i>	44
	<i>References</i>	46
	<i>List of Acronyms</i>	47
	<i>List of Interviewees</i>	48
	<i>Report of the Workshop on Effective Forestry Law Making in Malawi</i>	49-60

## **EXECUTIVE SUMMARY**

The law making process in Malawi has traditionally been the province of the Government since the country attained independence in 1964. Bills are prepared by draftsmen at the Attorney General's chambers in the Ministry of Justice in liaison with the sponsoring (client) government department. It is then sent to cabinet for approval. Thereafter it is sent to Parliament for publication as a bill for Members of Parliament to deliberate on and pass as law. The first real change to this tradition first occurred in 1994 when the transitional Republic of Malawi Constitution was adopted through public consultation involving national workshops and public hearings. In relation to environment and natural resources legislation, the Environment Management Act 1996 also underwent some multisectoral reviews through workshops.

The Forestry Act 1997 also underwent some multisectoral review through workshops that dealt with policy and legislative review. In particular, two workshops may be mentioned. The first took place in Mangochi in 1995 and the second took place at Malawi Institute of Management in Lilongwe in 1996. These workshops considered a draft Forestry Bill 1993 which had been prepared by a FAO consultant. Despite these reviews, the Forestry Act 1997 still has problems in terms of quality of language used and the consistency of the rules which seem to suggest that somewhere the law making process was very far from gaining from proper interdepartmental consultations and public participation.

The issue in this study is to consider if and to what extent the quality of legal language and rules and provisions of the Forestry Act 1997 were influenced by the law making process. The study has thus reviewed the process starting from the commencement of the initiatives through intra-departmental and inter-departmental consultations as well as involvement of members of the general public including NGOs, the private sector and the local communities. A few interviews were conducted with stakeholders to determine their involvement in the process and how that involvement was reflected in the results of the process.

It has been observed that although some attempt was made to involve various stakeholders in the law making process, the consultations were narrow and not properly co-ordinated. The internal consultations within the Department of Forestry left much to be desired. The absence of properly recorded proceedings including proposals and recommendations on various positions taken at the workshops means that the draftsman at the Ministry of Justice had had no material to inform him on the various legislative provisions he was requested to incorporate. The draftsman relied heavily on the instructions of the Principal Secretary for Natural Resources and his perception of proposals and recommendations and had no consultations with professionals at the Department of Forestry. Finally, it seems that there was no mechanism for ensuring that stakeholder proposals were actually incorporated in the Forestry Act 1997.

The foregoing concerns did influence, in some measure, the result of the law making process. In the first place, the concept of local community participation in forest management was merely glossed over during consultative meetings and did not precisely articulate institutional forms and mandates resulting in muddled provisions that open up the Forestry Act 1997 to various possible interpretations. The process also did not adequately identify and examine traditional or customary law norms of natural resources management and the extent to which any such norms can be used by local communities.

Secondly, the law making process did not adequately take into account the role of other statutory agencies in forestry management. The most glaring omission concerns the role of local authorities which have lost the role they had under the repealed Forest Act 1942. The disturbing fact is that the Local Government Act 1998 had continued to mandate local authorities to be involved in forestry issues without any co-ordination with or mention of the provisions of the Forestry Act 1997. This reflects lack of proper consultation to capture such an important stakeholder in forestry issues as the local authorities. The same can be said with regard to the Land Act 1965 and the National Parks and Wildlife Act 1992.

Thirdly, it seems the legislative process for forestry had no mechanism for ensuring that the proposals from stakeholders or multisectoral reviews were incorporated. We therefore notice that some stakeholder concerns such as the exclusion of NGOs from the policing and monitoring of the Forestry Act 1997 and the failure to include enforcement officers from other departments such as agriculture, community services, fisheries and among others to be part of the enforcement machinery, has not improved the enforcement machinery as it should have.

Fourthly, donor assistance was somehow narrow and fragmented as some donors applied pressure on the Department of Forestry to finalise the Forestry Bill as a conditionality for releasing project funds. This may have prompted some officials to take drafting into their own hands and exclude equally important stakeholders.

The foregoing and other problems have prompted recommendations that forestry legislation should be sponsored by and exhaustively discussed within the Department of Forestry, that the Department of Forestry must strengthen its Planning Unit and utilise its Research Institute so that these should feed into policy and legislative enactments. It has also been recommended that proceedings of consultative workshops on policy and legislation should be properly recorded including proposals and recommendations to inform the draftsman in his work. Civil society needs to be empowered to follow up proposed provisions by lobbying concerned Government departments and Parliament to ensure their views are incorporated rather than having to watch helplessly as their efforts are swept aside. Finally, it has been recommended that donor assistance needs to be co-ordinated and that includes in relation to the pace of any changes being sponsored.

## **1. Introduction**

### **1.1 Background**

It is increasingly being realised that effective implementation and enforcement of any legislation depends to a large extent on the extent of involvement of various stakeholders in the process of adopting the legislation. Such stakeholders include government officials, local communities, non-governmental organisations (NGOs), the private sector and donor agencies. While most government departments and legislators accept and welcome this participatory approach, the form in which the participation must take place is still far from clear. This is partly due to the fact that the participatory approach concept is still new to most developing countries including Malawi. There is also the question of resources to undertaking such public participation exercise. In Malawi, in particular, much of the legislative making process has been the domain of central government departments, that is, the Attorney General's chambers working in liaison with the client department originating the proposed legislation. After a draft has been produced it is then sent to cabinet for approval. It would thereafter be sent to Parliament for enactment. Informed debate in Parliament may not be forthcoming to express public sentiments and quality proposals for several reasons, including lack of knowledge in technical subject matters, lack of consultation with constituents and funding constraints to carry out the consultations.

This project considers the legislative making process during the drafting of the Forestry Act 1997 in Malawi. It evaluates the procedure that was followed in producing the draft Forestry Bill including the role that relevant government and donor agencies, NGOs, the general public and the private sector played in the process. The aim is to provide guidance on overcoming obstacles to effective law making in the forest sector.

## **1.2 Methodology**

The first part of this report will survey current forestry legislative framework with particular emphasis on the Forestry Act 1997 which repealed and replaced the Forest Act 1942. This survey will also consider other related legislation such as the National Parks and Wildlife Act 1992, the Local Government Act 1998, the Land Act 1965 and the Environment Management Act 1996 (EMA 1996) as well as their impact on the Forestry Act 1997.

The second part will describe the process in the drafting and enactment of the Forestry Act 1997 that is, from the origin of initiatives up to passage in parliament. Any obstacles in the process to achieve the most effective result will be identified. Recommendations will then be made on how best to overcome those obstacles.

Interviews and or consultations were conducted with various stakeholders who were involved in the process of preparing the draft Forestry Bill. These included officials from the Department of Forestry (DOF), Department of Environmental Affairs (DEA), Ministry of Justice (MOJ), Wildlife Society of Malawi and the Co-ordination Unit for the Rehabilitation of the Environment (CURE). Names of officials interviewed are appended to this report. Due to constraints of time the exercise was limited in scope and some equally important stakeholders were not interviewed.

## **2. Forestry Framework Legislation**

The principal statute that regulates forestry matters is the Forestry Act 1997. This Act which came into force in 1998 repealed the Forest Act 1942. That repeal however saved any subsidiary legislation made under the old Act as long as that subsidiary legislation was not in conflict with the new Act and is not amended revoked or replaced by subsidiary legislation made under the new Act (section 87).

## 2.1 **Participatory Forestry**

One of the major reasons for the enactment of the Forestry Act 1997 was to introduce the concept of participatory approaches to forestry management. The foreword to the National Forestry Policy of Malawi put this point succinctly as follows:

*The use of a coercive heavy handed approach in the enforcement of the provisions of the Forest Act led to the alienation of local people who came to regard trees or forests as being conserved not for their benefit but for the benefit of the Government. This belief led to the people's disrespect for trees or forests that were being conserved, and the manifestation of the disrespect was the inception of the inordinate rate of deforestation.*

Thus there was a clear departure from command and control, top down administration of forest resources under the Forest Act 1942 to a participatory approach that took into account the needs, attitudes and aspirations of local communities. In this respect, the new Forestry Act 1997 specifically spells out its intent in section 3 as including, inter alia:

*to augment, protect and manage trees and forests on customary land in order to meet basic fuelwood and forest produce needs of local communities and for the conservation of soil and water;*

*to promote community involvement in the conservation of trees and forests in forest reserves and protected forest areas; and*

*to empower village natural resources management committees to source finance and technical assistance*



*from the private sector, Non-Governmental Organisations and other organisations.*

These objectives are further reflected within the responsibilities of the Director of Forestry (the Director) in section 5. Among the many broad mandates, duties and responsibilities, the Director is required to promote participatory forestry; facilitate the formation of Village Natural Resources Management Committees (VNRMCs); facilitate the establishment of rules of village forest areas; and promote the empowerment of local communities in the augmentation, control and management of customary land trees and forests.

## **2.2 Forest Management Agreements**

The repealed Forest Act 1942 brought about the concept of a village forest areas under its part IV. This concept was continued under the Forestry Act 1997 which empowers any village headman with the advice of the Director, to demarcate a part of unallocated customary land a village forest area to be managed for the benefit of that village community (section 30). Village forest areas are therefore established on customary land which is communal land and controlled by traditional leaders.

In order to facilitate the proper management of these village forest areas, the Director may enter into a forest management agreement with a management authority (section 31). According to section 2 of the Act, a management authority is defined in the following terms:

*“in relation to a village forest area, means a person designated as the management authority pursuant to the agreement establishing the village forest area”.*

It is clear from this definition that a management authority is a person, that is, natural or artificial. A village headman may qualify as a management authority, though it is not clear why the Act did not specify that a management authority

is or includes a village headman since this is a statutory office under the Chiefs Act 1967. It follows therefore that the Director may enter into a forest management agreement with a village headman, or a company which can provide for, inter alia, the formation of VNRMCs for the purposes of managing and utilising village forest areas.

A VNRMC is defined by section 2 of the Act as a “committee elected by stakeholders of the village forest areas”. A VNRMC therefore cannot be a “person” since it is an unincorporated body. It is established through election by stakeholders who, it may be assumed, even though the Act does not define means members of the village in which the village forest area is located. However, it seems, though this is not clear from the language of the Act, the VNRMC can be designated a management authority by a forest management agreement under section 31.

The question that arises then is who manages village forest areas? Is it a management authority or a VNRMC. There are a number of possible interpretations:

- (a) where there is a forest management agreement, a village forest area will be managed by either the Director and a village headman (if he qualifies as a management authority) or the Director and a VNRMC (if the VNRMC is designated as a management authority). What is disturbing, however, is that there can be no management authority without a forest management agreement between the Director and a management authority. And a VNRMC cannot be a management authority without a forest management agreement ! (section 31).
- (b) Where there is no forest management agreement, a village forest area will be managed in accordance with section 30 of the Forestry Act, 1997. That provision states that such village forest areas shall be managed in the prescribed manner for the benefit of that community. It is not clear

as to who shall prescribe and in what manner as to the management of such village forest area.

The foregoing are serious drafting errors and need to be remedied as a matter of urgency. The following proposals may be offered.

A management authority should be defined as either the village headman responsible for the village in which village forest area is located or a VNRMC. So that where there is no VNRMC the village headman will enter into a forest management agreement with the Director. And if there is a VNRMC such agreement will be between the Director and the VNRMC or its representatives. The VNRMC would be a more democratic and participatory institution than the traditional office of the village headman which, though it commands traditional respect, it has its own limitations in ensuring that each member of the community feels they have a stake in the efforts and decisions of the community. The village headman's role should be for purposes of land allocation and his participation within the management of the village forest area should be by election or as an honorary member who can provide wisdom and traditional guidance in the deliberations of the VNRMC.

A better approach would be amend the Act so that neither the VNRMC nor the village forest area is a product of a forest management agreement. The parties to the agreement and the subject matter thereof should precede the agreement. This approach would make the process truly participatory and make the institution legally constituted. A reading of sections 3,5,32 and 33 of the Act suggests that the VNRMC are to play a prominent role in the conservation and sustainable utilisation of forestry. The Forestry Act 1997, as it is now, subordinates their role to an agreement whose parties are not clear until it is entered into!

### **2.3 Powers of Village natural resources management committees**

Although a reading of sections 3,5,32 and 33 of the Forestry Act 1997 suggests VNRMCs have a big role to play, the Act does not clearly bring out their powers and functions. For example, section 9(3) which gives the VNRMCs power to seize and detain forest produce obtained in violation of the rules of the VNRMC, restricts their enforcement powers to village forest areas. The purport of part V of the Act as stated in section 29 also appears to confine the role of these committees to village forest areas. On the other hand section 3(d) which states that one of the purposes of the Act is, inter alia, to empower community involvement in the conservation of trees and forests in forest reserves and protected forest areas in accordance with the provisions of this Act, suggests that these VNRMCs should be involved not only in village forest areas but also protected forests and forest reserves which had prior to the Forestry Act 1997, been in the exclusive protection of the DOF. This is also in accordance with the National Forestry Policy which is aimed at identifying forestry resource management and utilisation with the needs and attitudes of the community. That must include resources within forest reserves.

The VNRMCs are also given power to make their own rules (section 33) for the protection and management of village forest areas within their jurisdictions. These rules will have to be approved by the Minister. It is clear that the role of the Minister is merely facilitative and to provide governmental authority to the rules.

### **2.4 Forest Tree Ownership and Forest Produce Utilisation**

The second new concept brought about by the new Forestry Act 1997 is the ownership of trees and forests by persons or communities which either protect or plant a tree or a forest. According to section 34, a person who or community which protects a tree or forest whether planted or naturally growing which that person is entitled to use, is the owner of that tree or forest “with the right to sustainable harvest and disposal of the harvest”. Section 37 on the other hand

states that a person who plants any tree on any land is the owner of such tree and has the “right to harvest the resulting produce and to dispose of it freely”.

The implication of sections 34 and 37 is that planted and naturally growing trees may be privately owned save that whereas a person who plants a tree may “freely dispose” of such tree, naturally growing trees must be sustainably utilised. On the other hand, all forests must be sustainably utilised whether they are planted or naturally growing. The implication clearly is that private trees plantations that do not qualify as forests can be harvested at will. In our view unsustainable harvest of private plantations can be detrimental to land use practices within the plantation owner’s holding or neighbouring land users. The state under the common law principle of eminent domain should have the power to superintend the harvest of private plantations.

Finally, section 83 restricts the utilisation of indigenous timber on leasehold land and requires a permit if a person wishes to transport such timber from such land. The revenue from the permit fees accrues to the VNRMCs. It is interesting to note that these VNRMCs will enjoy the fees even though the reversion of the lease in question is freehold or public land. There is no justification for this provision and it may dissuade private landowners from investing in forestry. It is also not clear from the Act as to who will receive the permit fees if there is no VNRMCs.

## **2.5 Soil and Water Catchment Conservation**

The control and prevention of soil and water degradation is also the responsibility of the DOF. The Forestry Act 1997 has for the first time made specific provisions to deal with the effects of deforestation, destruction of vegetation cover and loss of biodiversity. It gives power to the Minister to make rules to provide for the protection of water catchment and fragile areas, rehabilitation of degraded areas and any other activity that would promote good land husbandry (section 32 (2)(a)). This is a mandate for departments of agriculture and lands as well as physical planning and therefore requires consultation before rules can be promulgated as the same rules may be made

under the Land Act 1965 and the EMA 1996 (section 35 (2) and the Town and Country Planning Act 1988 (See Banda, 1999).

The Act has also provided for the concept of protected forests under which the Minister responsible for Forestry is given power to declare by order in the *Gazettee* an area of land as a protected forestry if he finds that the protection of soil and water resources, outstanding flora and fauna requires that the area be so declared. The Minister is required to consult the Ministers of Lands, Agriculture and Irrigation and Water development including owners or occupiers of such land or traditional authorities if the land is customary land. This provision caters for protection and management of any category of land that is degraded or is threatened with degradation and provides for measures that may be employed as well as the assistance the DOF may provide to the owner or occupier. It should be noted that these powers are also given to the Department of Physical Planning and lands and there is therefore need for co-ordination. The Act is silent in this regard.

## **2.6 Institutional Capacity**

The Implementing and enforcement agency for the Forestry Act 1997 is the DOF. There is, however, an advisory body such as the Forestry management Board which is a multisectoral body that, among other things, promotes inter-sectoral co-ordination in forestry management. The Act also recognises the role of traditional authorities as did the repealed Forest Act 1942 but the new Act goes a step further to mobilise local community involvement in forestry management through establishment of VNRMCs which are elected by stakeholders of a village forest area. There is, however, no attempt in the Act to involve enforcement personnel from other agencies such as agriculture, fisheries, water as is done under the Fisheries Conservation and Management Act 1997. Finally, although both the Forestry Act 1997 and the National Parks and Wildlife Act 1992 deal with the protection of endangered plant species, the latter Act has more detailed provisions which could be mutually enforced by the

two relevant institutions. Co-ordination is, however, lacking between the DOF and the Department of Parks and Wildlife.

## **2.7 International Cooperation**

For the first time again the Forestry Act 1997 has provided for international co-operation in cross border forests and gives power to the Director to enter into cross border forest management plans, the implementation and review of common plans at bilateral and regional fora and implementation of international conventions (part XI).

## **3. Development Of Recent Legislative Initiatives**

### **3.1 Historical Development**

The repealed Forest Act 1942 was based on the command and control strategy of protecting forests for conservation and industrial use backed by penal sanctions. It was also a reflection of the colonial style of administration which was intended to exploit resources in the colonies for the benefit of the colonial master. This style of management did not change after independence as the new state continued to ape capitalist accumulation strategies. During interviews with DOF officials it was stated that under the repealed Forest Act 1942, forests were utilised and managed primarily as assets of the state so that although some kind of decentralisation was established through involvement of traditional authorities in managing village forest areas and the local authorities in the control and management of forests on customary land, the DOF continued to be the ultimate owner and controller of forest produce. Village forest areas had to be exploited with the consent of the DOF save where their utilisation was for domestic purposes.

The National Tree Planting Day declared in 1976 was the first national forestry programme to involve the general public in forestry matters. On the other hand, developments in international forestry policy such as the 11th World Forestry Congress in 1979 and much later the Earth Summit of 1992 emphasised the

need to involve local communities in the conservation and management of forestry and signalled the change in policy direction within the DOF that culminated in the need to review the repealed Forest Act 1942.

### **3.2 International Assistance**

According to the DOF the Malawi Government requested the Food and Agriculture Organisation of the United Nations (FAO) to assist it in forestry policy and legislation review in the late. It seems, according to files in the MOJ, the FAO consultant who was responsible for legislative review, did his work sometime in 1990. And although information in both the DOF and MOJ is scanty, it appears it was this consultant who produced the first draft Forestry Bill 1993 that became the basis for various reviews within the DOF and between the MOJ and the Ministry of Natural Resources.

### **3.3 Parallel Policy and legislative Reviews**

The review of the Forest Act 1942 was carried out together with that of the forestry policy and both were initiated by FAO although it seems the development of the National Forestry Policy was much better co-ordinated and focused than that of the legislation. This may be due in part to the fact that the DOF has an established Planning Unit which is responsible for the development of forestry policy plans and programmes. Of course this is a reflection of the DOF having no legal expertise and relies on the MOJ to service its needs. Thus apart from the internal reviews of the draft forestry policy, there were also inter-departmental multisectoral reviews and two workshops organised in 1995 at which representatives from different departments, NGOs such as the Wildlife Society of Malawi, and the donor community were represented. Among the donors, there were representatives from FAO, the World Bank, the United Nations Development Programme (UNDP) and the then Overseas Development Administration (now called DFID).



### **3.4 Local Legal Expert Review**

It is interesting to note that, according to the foreword to the National Forestry Policy, at the second workshop that reviewed the draft forestry policy held in Mangochi in 1995 the then Principal Parliamentary Draftsman (now the Solicitor General) and a lawyer from the Department of Lands (DOL) provided their legal expert guidance “particularly on the policy’s section entitled Legal Framework which seeks to overcome major institutional obstacles and to increase interagency co-operation while avoiding overlapping jurisdictions, and to prevent vested interests from paralysing new initiatives” (page 2). While it may not be safe to conclude that this was the first local input in legislative review, it would appear it is the first properly recorded consultative process that included local lawyers. It is clear, however, that the MOJ already had a draft Forestry Bill which had been given to it by the Secretary for Natural Resources. It can only be surmised that this was the version prepared by Larry Christie but probably reviewed by the Secretary for Natural Resources. It is interesting again to note that it was also the Secretary for Natural Resources who prepared the draft forestry policy that was reviewed internally and at the two workshops already referred to.

### **3.5 Development of Legislative Objectives**

#### **3.5.1 Guiding Principles**

The formulation of principles, strategies, institutional structures and mandates that inform legislative development is a multifaceted process. It involves deliberate development of policy matrices, synthesis of experiences and results of studies and comparative models from comparable jurisdictions as well as developments in international forestry policy identified from international conventions, regional and bilateral agreements. This process can be diffuse and it may be difficult to determine in some cases how particular principles, strategies and institutional structural reforms were developed. This is the case

with the legislative process on forests in Malawi. The interviews conducted at the DOF confirmed this position. It was, however, frustrating that it was difficult or impossible to obtain recorded information on the process of the reviews.

### **3.5.2 Departmental Initiatives**

Thus when asked as to how the DOF identified the various problems and solutions in forestry regulation for purposes of legislative enactment, various factors were mentioned. Firstly, it was noted that, through a number of years of implementation and enforcement of the repealed Forest Act 1942, a number of problems were identified and sometimes solutions offered through intra-departmental initiatives. Thus forestry personnel working in the fields as guards or extension workers related their experiences to policy makers through field reports and other channels of communication including departmental consultations, training and workshops. These are processed within the Planning Unit and discussed by the DOF. It was not clear however whether and to what extent this process is properly organised and structured. These are very important initiatives which must be encouraged. The DOF confirmed they are continuing even after the enactment of the Act.

### **3.5.3 National Study Initiatives**

Secondly, studies such as that pertaining to the formulation of the National Environmental Action Plan 1994 (NEAP 1994) in which the DOF actively participated confirmed such problems and identified many more. It also offered a number of approaches to dealing with those problems. The NEAP 1994 noted two major problems. It identified the related problems of deforestation and destruction of vegetation cover on the one hand, and soil erosion and loss of biological diversity on the other hand. It noted that, although there was legislation such as the Forest Act 1942 and the Land Act 1965, there were still gaps and lack of enforcement of the existing provisions. Enforcement efforts were hampered mainly due to the heavy reliance on penal sanctions and lack of resources to carry out policing, monitoring and prosecution of offenders. The

absence of co-ordination in related and complementing pieces of legislation such as the Land Act 1965, the repealed Local Government (Urban Areas) Act and Local Government (District Councils) Act on the one hand and the Forest Act 1942 on the other, also contributed to ineffective enforcement. These Acts gave responsibility for forestry management to the DOL, local authorities and the DOF respectively yet failed to provide mechanisms for co-ordination and policy formulation. This particular problem was also articulated in the foreword to the National Forestry Policy 1996 and the National Environmental Policy 1996 which recommended that all legislation relating to conservation of natural resources be harmonised.

#### **3.5.4 International Developments**

As already noted the DOF has for a long time been involved in international forestry policy making through participation in international fora where international conventions, agreements and strategies are formulated. Among many that were mentioned during the interviews with DOF officials were the 11th World Forestry Congress in 1979 and the Earth Summit of 1992 that brought out emerging participatory concepts. It was also mentioned that Malawi is a party to the Convention to Combat Desertification (CCD) and the Convention on Biological Diversity (CBD) which have forestry related provisions and that the DOF in fact is national focal point for the CCD in Malawi. These international initiatives therefore informed policy and legislative making as officials who attended consultative sessions would be expected to articulate their provisions in departmental and national consultative debates.

Further, Malawi is a member of the Southern Africa Development Community (SADC) which has a sector co-ordinating Land and Environment and Malawi has the regional mandate for co-ordinating forestry and fisheries and the DOF is responsible for this forestry sector co-ordination. Again this particular involvement and the regional initiatives being thereby developed inform national policy and legislative development and promote collaborative arrangements in crossborder forestry issues.

### **3.5.5 Comparative Models**

The interviews revealed that some officials from the DOF and the DEA who participated in the policy and legislative reviews had had study visits to developing and developed countries. Although these visits were not necessarily part of the forestry policy and legislative making process, they informed departmental debate and initiatives. Examples given were study visits to Japan, the Philippines, India and Niger by Mr. Luhanga, a social economist of the DOF. Although other officers also undertook such study visits, it is noteworthy that the Assistant Chief Parliamentary Draftsmen (ACPD) who did the actual work of preparing the final copy of the draft Forestry Bill did not have such study visits. Finally we should not lose sight of the involvement of FAO Consultant, who had experience of legislative drafting from missions in various jurisdictions.

### **3.6 Feasibility Assessment of Proposals**

All the interviewees agreed that there were no assessment studies to test the feasibility of the proposals that were being suggested in the draft National Forestry Policy and the draft Forestry Bill. This is in spite of the fact that the policy and legislative review process commenced in 1990 and took six and seven years respectively to finalise. There were, however, proposals to carry out studies on the pricing and marketing policy for forest produce so as to come up with clear policy guidelines on pricing and marketing to be included in the legislation. It seems this study did not take place. However, it may still be necessary for subsidiary legislative making since the provisions on pricing and marketing will be incorporated in the subsidiary legislation.

## **4. The Role of National Forestry Policy**

As already noted, there was parallel development of the National Forestry Policy and the Forestry Act 1997. The National Forestry Policy was approved and adopted by the Cabinet in January 1996 while the Forestry Act 1997 was passed by Parliament in April 1997. It is noteworthy that a first draft of the Forest Bill was made available to the MOJ in 1993. No real progress was however made on this draft until February 1996 when the ACPD sent draft copies for consideration by the Cabinet Committee on Legal Affairs (interview

with ACPD). By this time the National Forestry Policy had already been developed, discussed and approved. The ACPD in fact confirmed that he used the National Forestry Policy in redrafting the draft Forest Bill 1995. In particular the 1993 draft Forest Bill did not clearly articulate the principles of participatory forestry as did the National Forestry Policy.

The delay in finalising the draft Forestry Bill 1993 prepared by the FAO consultant appears to have been as a result of lack of local initiatives to complete the task. The FAO initiative was purely donor driven and left little or no incentive for finalising the draft bill until 1995/1996 when it seems, as will be noted later, other donors got interested in forestry legislation.

It should also be noted that during this particular time (1995/1996) a number of initiatives on the protection and management of the environment and conservation and sustainable utilisation of natural resources were underway and these tended to feed into each other in terms of policy and legislative formulation including that of the forestry initiative. Examples include the National Environment Policy approved by Cabinet in February 1996, and the EMA 1996. These particular policy and legislative instruments dealt with cross-sectoral management and co-ordination of environmental and natural resources issues. Although it is not possible to conclude that the draftsman who prepared the draft Forestry Bill used all these initiatives in preparing the Forestry Act 1997, it will be seen later that some attempt was made to incorporate the new trends in environmental and natural resources law. In addition to these policy and legislative co-ordinating instruments donor agencies such as the United States Agency for International Development (USAID) and the United Nations Environment Programme (UNEP) through the UNDP initiated environmental and natural resources programmes whose aims were, inter alia, to harmonise policy and legislative initiatives so as to make the protection and management of the environment and the conservation and sustainable utilisation of natural resources effective (see for example, Banda 1997). These were cross-sectoral reviews intended to ensure that no department carried out policy and legislative reviews in isolation. This initiative also informed legislative review in forestry.

## **5. The Legislative Drafting Process**

### **5.1 Who was Involved?**

The first draft Forest Bill 1993 was prepared under the auspices of the Ministry of Natural Resources which was and is the mother Ministry for the DOF. It would appear in fact that the Principal Secretary for Natural Resources had a much more active role in modifying, redrafting and consulting with the MOJ as compared to the DOF. It was clear from interviews at the MOJ and the DOF that the prime mover of the draft Forest Bill was the personal initiative of the then Principal Secretary for Natural Resources who personally redrafted the draft bill, liaised with MOJ and pushed the process to ensure that it was finalised in good time. This particular observation is in fact confirmed in that it seems Dr. Maida was also responsible for drafting the National Forestry Policy. This is very clear from the foreword to the National Forestry Policy (page 1).

According to the ACPD, the draft he worked on was only exchanged between him and the Principal Secretary for Natural Resources aforesaid. The ACPD assumed that the Principal Secretary for Natural Resources was consulting with the DOF which was the client department. As it turned out, however, when the draft bill was approved by Cabinet in 1996, the Director of DOF expressed ignorance of the various amendments that had been made to the draft Forestry Bill 1993. While it may be that some officers in the DOF may have been involved in the redrafting of the draft bill, it is clear there was very little consultation between and within the Ministry of Natural Resources and the DOF on the draft bill. The ACPD who drafted the Forestry Act 1997 is a trained and seasoned draftsman having been in the drafting section of the MOJ since 1987 and, as is normal in the MOJ, the draft bill is circulated among other draftsmen for comment.

## 5.2 **Interdepartmental Consultations**

Consultations with other concerned agencies such as departments of lands, water, physical planning, local authorities were even scantier. The ACPD is emphatic that, to his knowledge, the draft Forestry Bill was not circulated to any other department apart from the Principal Secretary for Natural Resources. The DOF officers also confirmed this position. The first workshop to discuss the draft bill is that which was funded by the World Bank in 1995 in Mangochi which discussed both the draft national Forestry and Forestry Bill. The Author was unable to obtain a record of proceedings of this workshop from the DOF. The ACPD did not attend this workshop and there is no record of its proceedings in MOJ files. Any recommendations or proposals at this workshop were not directly considered by the ACPD, though it is possible that the Principal Secretary for Natural Resources may have incorporated recommendations and proposals from that workshop into the draft he and the ACPD were working on. The second workshop to discuss the draft bill was conducted at Malawi Institute of Management in Lilongwe in 1995. The author was also unable to get a record of that workshop and the ACPD did not have a copy. According to the DOF both workshops were attended by officials from other government departments and NGOs.

Interviews at the DEA showed that its Principal Environmental Officer (Legal) had discussions with MOJ particularly on issues such as community participation and ownership and utilisation of trees, forests and forest produce that helped to refine these issues within the draft bill. The Principal Environmental Officer (Legal) programmes is a lawyer who has undergone various training in environmental and natural resources law. He also mentioned that the DEA's Policy Advisor, a socio-economist, who was responsible for NATURE project funded by the USAID was also involved in promoting amendments to the draft forestry bill to incorporate broad principles that would ensure harmonisation of legislation and promotion of participatory forestry.

## 5.3 **The Planning Unit**

It has also been noted that the National Forestry Policy also substantially fed into the draft Forestry Bill. The DOF has a Planning Unit which is headed by a Senior Forestry Officer qualified in forestry matters and also has technicians in data processing. This unit works hand in hand with other sections of the DOF such as the forestry extension services, the forestry development division and forestry support services to come up with a policy.

From the foregoing it can be seen that the actual draft Forestry Bill, was not widely circulated. The major players were the Principal Secretary for Natural Resources and MOJ. The cost of the whole drafting process was estimated by the DOF at K1 million. This was just an estimated figure as the DOF had no record of the cost of the exercise.

#### **5.4 Role of Foreign Consultants**

The only foreign consultants that participated in the development of the forestry legislation are those from FAO who initiated the policy and legislative making process. In particular, the FAO Consultant came up with the first draft Forestry Bill 1993 which was amended later in the process.

#### **5.5 Cross-sectoral legislative considerations**

Forestry matters touch on a number of other related issues. In particular, issues of land use, wildlife protection and management, water resources conservation and management are relevant. On the other hand, institutional issues and obligations of other agencies impact on forestry management. In particular the cutting of trees for agricultural use, laying of electricity and telephone lines, road construction and brick making impact on forestry conservation and management. The draftsman needs to be sensitive to all these influences in coming up with a draft forestry bill. According to the ACPD consideration of other legislation is a normal drafting technique to avoid duplication, conflicts and gaps in related legislation. In the case of forestry legislation, he considered legislation such as the Land Act 1965, the National Parks and Wildlife Act 1992, and the Environment Management Act 1996.



These were the legislation that were mentioned as being relevant by the DOF and the DEA officials during the interviews.

While these statutes are some of the most important as far as forestry management issues are concerned, they are in no way exhaustive. The Electricity Act 1998, the Posts and Telegraphs Act 1955, the Public Roads Act 1962, the Natural Roads Authority Act 1998 and the National Construction Industry Act 1996 may be mentioned. Although these statutes have no apparent relevance to forestry issues, their operation can and do affect the conservation and sustainable utilisation of natural resources including forests. Some of these statutes give some institutions powers to cut trees without considering any conservation measures. Examples include the Electricity Act 1998, the Post and Telegraph Act 1955 and the Public Roads Act 1962. It was necessary for the Forestry Act 1997 to deal with such lacunae. There is, however, no reference in the either in the National Forestry Policy or in the Forestry Act 1997 requiring sustainable forestry management on the part of institutions such as Electricity Supply Commission of Malawi (ESCOM) and the Malawi Posts and Telecommunications Corporation (MPTC) when they clear trees or forests as they lay their power and telephone lines. Further, there is no evidence that any of these institutions were consulted during the policy or legislative making process.

## **5.6 The Common Law, Customary Law and Local Community Participation**

In addition to legislation, as mentioned in the foregoing paragraphs, common law principles have equally important ramifications on forestry law. In particular, the ownership and utilisation of trees and forest produce have an intimate relationship with the manner in which land is held (land tenure). In Malawi there are various ways in which land can be held: customary land tenure, freehold tenure, leasehold tenure and public land tenure. At customary law land is held owned or used by the community under the trusteeship of traditional authorities. Freehold tenure is almost absolute title while leasehold title is held of some other superior title holder for a definite term of years. Public

land is owned and held by the Government and is vested in the President as, head of Government (see definitions under section 2 of the Land Act 1965). These various aspects of tenure have very significant consequences on utilisation and management aspects of forestry matters. For example, where there is a forest on customary land the primary consideration is the local community which owns the forest. However, as the community may not be properly organised and may not consider sustainable forestry management in the exploitation of the forest resources, the state has powers under the common law principles of *eminent domain* to protect and conserve such property. The state may do this either by providing for its intervention in the Forestry Act 1997 or by acquiring the land under the Lands Acquisition Act 1969. The Forestry Act 1997 has specific provisions for dealing with forests on customary land and provides for reservation of pieces of land including land under customary tenure, freehold or leasehold tenure for forest reserves or protected forests (see part IV of the Act).

The concept of local community participation is another aspect that requires consideration of common law principles, traditional organisational structures as well as emerging concepts of government decentralisation. While there is no doubt at customary law that customary land and therefore customary forests are owned by the community, there has been misinterpretation of such ownership to mean that such land and such forests are ownerless and therefore available for unbridled exploitation (Banda, 1999). The State therefore needs to inculcate not only community responsibility but also individual responsibility. Only then can local community participation in management of forests ensure sustainable management.

On the other hand, forest reserves are government property. The Forestry Act 1997 suggests that there should be no local community participation in the management of such forests. The reasoning is clearly that such forests do not belong to the local communities. This particular reasoning is flawed. Firstly, one of the reasons for involving local communities in forestry management is to increase policing and monitoring personnel as it is recognised that DOF

personnel are not adequate. Secondly, though forest reserves are government property, they belong to the people of Malawi. This is clearly recognised by section 4 of the EMA 1996 which states that all “natural and genetic resources of Malawi shall constitute an intergral part of the natural wealth of the people of Malawi” and (a) shall be protected, conserved and managed for the benefit of the people of Malawi; and (b) save for domestic purposes, shall not be exploited or utilised without the prior written authority of the Government. Further, according to section 3 of the EMA 1996, it is the responsibility of every Malawian to conserve and protect natural resources.

It should follow therefore that the people of Malawi are the true owners of all natural resources. The role of the Government is to supervise the utilisation, protection and management of these natural resources for the benefit of all the people of Malawi and ensure that individuals do not exploit these resources for selfish profit motives without due regard to sustainable management. Local communities have therefore as much right and responsibility to protect and manage trees and forests as Government.

Further, while traditionally chiefs and village headmen control natural resources such as land, trees and forests their role has been that of allocating land and settling disputes, there has been no effort on their part to encourage conservation and sustainable management of natural resources. A recent survey showed that customary law which grows from practice did not develop a legal regime of soil, water or forest protection and conservation. This is because at the time this legal regime was developing (before English law became the major legal system) natural resources including soil, water, forests and trees were in plentiful supply and there was little or no need for developing principles of conservation and sustainable utilisation (Banda, 1999). It follows therefore that traditional authorities cannot be solely relied on to provide the guidance necessary to mobilise community responsibility in natural resources management.

Further, current conditions suggest that the authority of traditional authorities has been greatly eroded partly due to the colonial legal system which was sustained by the independence government that stripped away their powers and partly due to the new democratic dispensation that emphasises individual freedoms and people power. These conditions suggest that it is necessary to create and nurture community institutions that have participatory methods of approach.

The Malawi Government has adopted a decentralisation plan which seeks to devolve government administration to the grassroots level through local authorities. This plan will affect government institutional structures substantially and the manner in which local communities are to participate in development activities including environmental and natural resources management. While the EMA 1996 attempts to take into account this devolution process the Forestry Act 1997 is silent on this matter.

Finally, the Forest Act 1942 (repealed) gave certain powers of control of forests on customary land to local authorities such as district councils (part III). However, from the interviews at the DOF these local authorities considered forests as a revenue generating activities only and did not provide the necessary technical competence for sustainable utilisation and management of the forests. The Forestry Act 1997 seems to have removed the local authorities altogether from being responsible for forests. Whether this is because local authorities may have failed to properly perform their statutory functions is not clear. On the other hand the Second Schedule to the Local Government Act 1998 gives power to local authorities to establish, maintain and manage, inter alia, botanical gardens, forests, woodlands and nature reserves [clause 8(1)(a)]. There is, however, no any mention of how local authorities and the DOF will work together, consult or co-ordinate their efforts in forestry management. In fact interviews with the Director of Blantyre City Assembly's Leisure, Culture and Environment department revealed that the Blantyre City Assembly had not been consulted on the enactment of the new forestry legislation. It is possible

however that consultation may have been carried out with the Ministry of Local Government. This study was unable to establish if this was the case.

There also seems to have been little or no attempt to assess the relevance of traditional systems of regulation of forests during the time the Forestry Act 1997 was being drafted. While, as shall be seen below, traditional authorities were consulted on the new legislation the same was not about relevance or applicability of traditional or customary norms of forestry management. This is in spite of the recognition by the DOF of the fact that most of the forest reserves were connected to graveyards which have strict and effective customary regulations which could be utilised in forestry regulation. The ACPD was emphatic that no customary norms of forestry management were brought to his attention at the time of preparing the draft Forest Bill.

## **5.7 Decision Making**

The drafting of the Forestry Bill was an exercise that was mainly carried out through consultation between the Principal Secretary for Natural Resources and the MOJ. This is in contrast to the National Forestry Policy which, though was initially drafted by the Principal Secretary for Natural Resources, underwent two national workshops apart from intradepartmental consultations and the expert input of the Planning Unit of the DOF. Most of the issues relating to institutional mandates, obligations and resources were settled within the policy matrix.

It must also be remembered that there was at the time of drafting the Forestry Bill an ongoing general review of the environmental and natural resources legal regime. There was therefore interdepartmental concerted efforts to harmonise those issues within policy documents such as the National Forestry Policy and the National Environmental Policy and legislation such as the Forestry Act 1997 and the EMA 1996. The many harmonisation consultations that took place between departments during this process assisted in the making of decisions as

to institutional mandates, obligations and resources. It should also be noted that most of the decisions on financial resources were made in consultation with the Ministry of Finance and donor agencies and incorporated into policy.

Finally, it should be noted that while the Principal Secretary for Natural Resources and DOF officials made submissions on their requirements, the decision as to whether and how to incorporate such proposals into the legislation, is made by the draftsman in the MOJ.

## **6. Public Participation**

The Forestry Act 1997 did not go through much public consultation. According to the DOF, they conducted workshops in the country's three regions in 1996 at which traditional authorities from each region were gathered in Mzuzu (northern Region), Lilongwe (Central Region) and Blantyre (Southern Region). The only theme of the workshops was local community participation in forestry management. The DOF was seeking the views of traditional authorities on the most effective ways of involving them and their subjects in forestry management. Officials from the DOF explained the forestry legislative and policy exercise that the DOF was undertaking and received views of the traditional authorities on the subject. The author tried to get a record of the proceedings of the workshop from the DOF but has been unsuccessful. It is therefore difficult to determine as to the type of information the persons consulted were supplied with, how the various views expressed were processed and if any consensus, and in what form, was captured during the workshop.

According to the DOF the decision to involve traditional authorities only in relation to local community participation rather than include other members of the community was partly based on the fact that these leaders represent communities and are therefore in the best position to contribute to the aspirations and interests of these communities. The problem of inadequate resources to enable the DOF to conduct the consultations at grassroots level was another factor. The DOF also restricted the subject of consultation to community participation only possibly on the ground that the rest did not

concern the communities. This attitude is retrogressive and confirms the usual official attitude of treating rural people as ignorant subjects who must be dictated to.

The second workshop to discuss the draft Forestry Bill was the one at the Malawi Institute of Management in Lilongwe held in 1996. This workshop was attended by various stakeholders including NGOs. According to Director of the Wildlife Society of Malawi, the workshop was attended by government and NGOs. He remembers specifically that one of the issues raised by NGOs was their role in enforcement of the legislation since, according to the definition of forest officers under the draft Forestry Bill, only officers from the DOF were given powers of enforcement of the new legislation. NGOs who are involved in forestry felt that the new legislation was not improving the enforcement machinery at all. According to him, it was resolved that the amendments should be effected. The Forestry Act 1997, however, did not incorporate these concerns. Other NGOs such as CURE that co-ordinate the work of environmental NGOs were not involved in this process. A record of this workshop was however not made available to the author just as all the other workshops. It is therefore difficult to determine as to what happened at the workshop. It is clear, however, that the draftsman at the MOJ was not supplied with either the workshop proceedings of the Mangochi workshop or the Lilongwe workshop or any recommendations or proposals thereof. The ACPD was emphatic that not only did not attend these particular workshops, he was also not given any report of these workshops. It is possible however that the recommendations from the workshop may have been incorporated into the National Forestry Policy which the ACPD used in preparing the draft Forestry Bill. The Principal Secretary for Natural Resources may also have incorporated the recommendations and proposals from the workshops as he provided instructions to the ACPD.

Finally it should be noted that subsidiary legislation under the Forestry Act 1997 is being drafted by two consultants: a draftsman and a forestry consultant. There was a requirement for consultation to inform the drafting process but this has not been done. According to one of the consultants, there

was delay in providing the resources to undertake the exercise. The rules have therefore been drafted without this vital component.

## **7. External Donor Assistance**

The first donor to get involved in the review and reform of forestry legislation and policy is FAO who funded two consultancies: one on legislation and another on policy. This seems to have been about 1989/1990. Although a draft Forestry bill 1993 was produced, the process stalled until 1996 when there was a lot of activity again. From information in the MOJ and DEA, there was pressure from donors who were funding various projects in forestry who required that release of projects money would only be effected upon new forestry legislation being passed. These were the Social Forestry Project funded by the European Union and the Lilongwe Forestry Project by the African Development Bank. These conditionalities seem to have spurred most concerned departments into action so as not to lose the money.

As already noted there were a number of donors with an interest in forestry in addition to the above. These were the UNDP, the World Bank and some Scandinavian countries. According to FAO and UNDP whom the author interviewed, their assistance was either sector specific or project oriented (FAO) or general environmental and natural resources legislation and policy assistance (UNDP and USAID). The author remembers while researching for a project on Reform of Environmental legislation and Policy: Determining the Need and Scope for Review in 1996/1997, that there were co-ordinated efforts to harmonise donor assistance. The UNDP were carrying out a project entitled Environmental Law and Institutions in Africa on behalf of United Nations Environment Programme (UNEP) while USAID were carrying out the NATURE Project. Both these projects had legislative and policy reform efforts and their terms of reference not only required interdepartmental consultations to determine what, and how far, each department was doing in its environment and natural resources law reform but also consultations with other donors to harmonise efforts and ensure that the reforms were not fragmented and piecemeal.



It is noteworthy however that pressure from some donors to finalise legislative and policy review could make some departments want to quickly finalise their legislation before interdepartmental consultations had been finalised. The author remembers quite well that the Forestry Act 1997 was a victim of this unfortunate scenario. It should be noted however that there was little or no donor pressure for Malawi to adopt provisions in its policy and legislation that the country did not want. What was apparent however was that if a donor had specific interest in promoting a particular principle or strategy of forestry or environmental management it would put more emphasis on it in its project document such that the departmental officials may have felt it was part of the conditionality. While the interviewees did not bring out this point, observation during the environmental and natural resources reform programme suggested that some provisions were essential to donor assistance or continuation of ongoing programmes. These included local community participation and decentralisation of governmental powers to the grassroots.

The assistance given by the donors varied quite substantially. Thus while FAO sent their consultants who provided the first draft Forest Bill, the World Bank funded one workshop that discussed the draft National Forestry Policy and Forestry Bill. The UNDP and USAID projects made available some funds for drafting subsidiary legislation under the Forestry Act 1997. They also provided funds for producing guides to the Act after it passed as law. These guides will be in two or more vernacular languages to help people to understand the Forestry Act 1997 and the Fisheries Conservation and Management Act 1997. There was no donor assistance to get the legislation pass through Parliament.

## **8. Incorporation of International Forestry Related Conventions and Policy**

Interviews at the DOF showed that there are a number of conventions which are relevant to forestry management. These include the CBD and CCD as already mentioned. It was pointed out that a general provision was included in the new Forestry Act 1997 to the effect that the Minister may specify measures for the

proper implementation of forestry related conventions to which Malawi is a party (section 80). The reason for such a broad provision was to ensure that the DOF can adapt the provisions of any such convention to the local conditions, and ensure that implementation will not burden the Government.

A reading of the Forestry Act 1997 would tend to suggest that provisions of some of the conventions were duly incorporated within the Act. The CCD, for example, requires appropriate strategies to ensure proper soil and water conservation techniques are used and to promote afforestation programmes. The Forestry Act 1997 gives power to the Minister to make regulations to promote soil and water conservation (section 32) and provides for promotion of afforestation programmes that includes the private sector, NGOs and members of the general community (part IV). On the other hand it would seem that the CBD was not seriously taken into account. Apart from the shortcomings of the local community participation provisions already mentioned, there are very few and inadequate provisions which would cater for protection of biodiversity or endangered tree species and their management. While section 32 (2) (4) provides power to the Minister to declare endangered or essential tree species, this only applies in relation to customary land. It also does not provide for harnessing indigenous knowledge or exploitation of intellectual property rights accruing from use of forest produce. The DOF was of the view that in most of the international conventions the department is not a major player and that some of these issues, such as protection and management of biological diversity are cross-sectoral and better dealt with under the EMA 1996.

## **9. Primary and Secondary Legislation**

According to the ACPD the decision whether particular provisions should be incorporated in the Forestry Act 1997 or in subsidiary legislation under the Act is in the first place one of the normal rules of drafting. An Act should normally contain general provisions while details that may be subject to change as, for example, those relating to figures or technological processes that may change with time will go to subsidiary legislation. The reasoning is to avoid having to

continuously take the Act back to Parliament for amendment where there is little time. Subsidiary legislation can be amended or revoked by the Minister by a proper notice in the Gazette without having to take it back to Parliament (see section 17 of the General Interpretation Act 1966).

On the other hand the DOF stated that the decision may be based on the fact that studies have to be conducted in order to have precise information for inclusion in the Act. In that case it is not necessary to have to wait until the studies have been conducted in order to finalise the Act. This actually happened in relation to the pricing and marketing of forest produce.

What seems to be emerging, however, is clear willingness and readiness on the part of officials to fully involve members of local communities in relation to finer details of legislation whose information can only be found in the communities. This is very clear from the experience of the drafting of the regulations under the Fisheries Conservation and Management Act 1997 where there was a lot more involvement of communities in developing subsidiary community based management legislation than on the primary legislation itself. Even in relation to the Forestry Act 1997 officials only consulted local communities in matters they considered directly affected the community, namely, community based management of forestry. Government seems to think it knows better about the larger picture of natural resources policy than the communities and has the necessary mandate to promulgate legislation accordingly.

On the other hand, it would seem that Government would indeed decide to enact an issue in subsidiary legislation if it can only get the necessary information from the communities. In order to speed up primary legislation, a decision would be reached to deal with such an issue in subsidiary legislation.

## **10. Assessment of the Law-Making Process and Quality of the Legislation**

The question we would like to answer at this point is whether the nature of the process of drafting the Forestry Act 1997 affected the quality of the legislation. We are concerned with the extent to which the law making process affected the clarity of the rules and words used, the consistency between the various rules and if the rules are drafted in such a way that they are intended to achieve stated objectives.

The Forestry Act 1997 clearly stipulates its purposes in section 3 and in section 5 outlines the general duties and responsibilities of the Director who is responsible for the execution of the Act. A reading of these two provisions provides very good guidelines for determining what the Act intends to accomplish, that is by resolving the various shortcomings that had been identified in relation to the repealed Forest Act 1942.

### **10.1 Scope of the Act**

The repealed Forestry Act 1942 was criticised for having failed to deal with management of forests on categories of land other than public and customary land. The present Act clearly stipulates in section 3 as read with parts V, VI and VIII of the Act that it covers all categories of land including private land. However, the Act fails to capture one observation that was made in the NEAP 1994 that the Land Act Regulation that requires afforestation on leasehold land granted by the Minister responsible for Land matters suffers from lack of institutional capacity. It could better be implemented either solely by the DOF or in conjunction with the DOL. The present provisions which give power to the Minister responsible for lands to enforce the regulation misplaces institutional mandate in that it is the DOF that has the necessary technical expertise and personnel to enforce. The omission to deal with this aspect in the Forestry Act may be due to the lack of adequate consultation between the departments as noted elsewhere in the report. It is also possible that since the DOL was itself involved in the Presidential Commission on Land Reform, no decision had as yet been reached in the department as to the form its institutional mandate should

take. Meanwhile the DOF needed to have its legislation passed and could therefore not wait for the DOL to finalise its studies.

## **10.2 Utilisation of forestry produce**

It has been noted that although there seems to have been some attempt at involving members of the general public in considering the draft Forestry Bill through the workshops for traditional chiefs in the three regions and the workshop at Malawi Institute of Management in Lilongwe in 1995, other equally concerned stakeholders were not consulted. The workshop in Mangochi in 1995 seem to have mainly attracted government departments and some NGOs such as the Wildlife Society of Malawi. But even if both workshops did involve most of the stakeholders in forestry, there is no way of knowing whether and to what extent their views were incorporated in the recommendations and if and how any consensus was reached on the various issues. The author submits that if the private sector and NGOs had been properly consulted and their concerns properly considered, the confusion regarding utilisation of forest resources on freehold or leasehold land whose reversion belongs to private persons would have been settled in a manner that would have promoted investment in forestry by these stakeholders. As it is now, it seems under section 83 of the Forestry Act 1997 if a freeholder or leaseholder takes care of natural trees on his land, any fees for their exploitation would go to a VNRMC. The basis of such allocation of resources is not clear. The Act also fails to stipulate who should get the fees in the event that there is no VNRMC.

## **10.3 Village Natural Resources Management Committees**

There is considerable confusion in the Forestry Act 1997 as to whether VNRMCs are created by agreement under section 31 between the Director and a management authority or is elected by stakeholders of a village forest area as defined under section 2. This confusion is clearly due to lack of a clearly thought out concept of local community participation born out of a study in which the DOF and local communities should have participated or proper consultation that should have produced clear recommendations. What seems to have happened was that the draftsman confused local community participation

and traditional participation. Thus the village headman in whose village a village forest area is located was given a not so clear a role of a “management authority” to enter into agreement with the Director and therein provide for the establishment and role of VNRMCs. The new wine cannot be comfortable in old wine skins. The result is that we do not know for sure whether a village headman is indeed a management authority, whether the VNRMCs are a creature of the local community or of an agreement between the Director and a management authority.

The Forestry Act 1997 also fails to properly state the manner in which local communities are to participate in management of a village forest area if there is no VNRMCs. While section 30 mentions that in that event the village forest area shall be managed in a prescribed manner, it is not clear who shall prescribe, and whether by regulations or not.

#### 10.4 **Participation of Local Communities in Management of Government Forests**

According to section 3(c) of the Forestry Act 1997 one of the purposes of the Act is to promote community involvement in protected forests and forest reserves which are owned and controlled by the Government. This provision suggests that the participation of local communities in forestry management extends to forests not owned by local communities. However, the Act does not provide detailed provisions for management of these forests as is done in relation to forests on customary land. Section 25 merely states that the Director may enter into agreement with local communities for implementation of the management plan that is mutually acceptable to both parties. Whether that agreement will be entered into with the VNRMCs or village headmen is not clear. It does not also state whether there will be rules for co-management of forest reserves. It seems, on the one hand, that the agreement with local communities will be on implementation of management plans prepared by the Director (sections 5 and 24) and on the other hand, the agreement will be to implement management plans jointly produced by the Director and local communities: section 25. The language used is not clear as to which one is correct. It seems again a half-

hearted official attempt to involve local communities without obtaining the views of the concerned stakeholders. The people involved in the actual drafting seem to have given with one hand local communities power to participate in forestry management and with the other hand taken that power away.

It is generally an open secret that bureaucrats rarely wish to relinquish or share power in which they have vested interests. A donor driven programme such as the drafting of the Forestry Act 1997 can easily endorse the concept of participatory forestry so as to finalise the project and get the necessary funding. To internalise the prescriptions of the conditionalities and operationalise them through consultations with the relevant stakeholders is another matter. In a process such as the drafting of the Forestry Act 1997 where there was little or no circulation of drafts containing alternative options of principles, mandates and obligations, the likelihood that the process can incorporate the aspirations of the stakeholders is very slim. Interviews with the Director of Wildlife Society of Malawi showed that when he attended a workshop at Malawi Institute of Management in Lilongwe to discuss the draft Forestry Bill in 1996 most NGOs expressed concern with the fact that the draft had left out NGOs in policing and monitoring or enforcement of the legislation. These concerns were, however, not incorporated in the Forest Act 1997. His view is that it is a reflection of reluctance of Government to relinquish and share what has traditionally been their exclusive mandate, that is policy and law making.

### **10.5 Institutional mandates**

Forestry issues are cross-sectoral in nature. Various institutions are involved. It would appear that although the Forestry Act 1997 was being drafted at a time when a multisectoral legal review of environmental and natural resources law was in progress, it failed to capture some of the lessons from that process. It was recognised during the multisectoral review process funded by USAID and UNDP, that many of the mandates of the DOF were being undermined by Government and parastatal institutions with statutory mandates that clearly militated against sustainable forestry management. ESCOM and MPTC have already been mentioned as having mandates that allow them to clear forests for

laying power and telephone lines respectively. The draftsman did not take these into account either because the recommendations of the multisectoral reviews were not made available to him or because the DOF did not pay special attention to this institutional problem. The issue of forestry matters being handled by the DOL has already been mentioned in the same vein.

### **10.6 Local Authorities**

It would appear that the Forestry Act 1997 has completely discarded the involvement of local authorities in forestry management in contrast to the repealed Forest Act 1942 that gave powers of control and management of customary land forests to local authorities. This may be due to the problems of management that local authorities had as indicated at interviews with DOF. However, the Forestry Act 1997 failed to deal with mandates of local authorities either as they appeared in the repealed Local Government (Urban Areas) Act and the Local Government (District Councils) Act or in the new Local Government Act 1998. The fact that the new Local Government Act 1998 has no reference to the Forestry Act 1998 again shows that there was no consultation in the making of related legislation. It seems again that the draftsman was not given the basis for removing the role of local authorities from the forestry legislation. Further, in view of the ongoing decentralisation process the draftsman needed to have been provided with some indication of changing Government policy which was already in vogue even in 1997. Finally in this regard it is not possible due to lack of workshop records to assess if at all and to what extent local authorities were involved in the drafting of the Forestry Act 1997. Interview with the Blantyre City Assembly Director for Leisure, Culture and Environment, revealed that to his knowledge the Blantyre City Assembly was not consulted on the draft Forestry Bill. It is clear also that the draftsman was not provided with any proposals or comments from local authorities. The drafting of the Forestry Act 1997 was, after all, an affair between the Secretary for Natural Resources and the ACPD and no drafts were ever circulated to persons in other departments including the DOF.

### **10.7 Enforcement**



Although the repealed Forest 1942 had some gaps, it still had some workable provisions if they were being efficiently enforced. The repealed Act, however, relied on penal sanctions with low penalties and the enforcement machinery required heavy presence of forest enforcement personnel to police, monitor and prosecute offenders in addition to equipment and facilities for their use. These were and cannot be forthcoming in a poor country such as Malawi. There was therefore need to change the enforcement machinery and strategies. The Forestry Act 1997 seems to have done very little about this issue apart from enhancement of penal sanctions to deter offenders.

It fails to recognise, as does the Fisheries Conservation and Management Act 1997, that extending enforcement personnel to include enforcement officers from other department can increase capacity quite substantially. It still relies on forestry officers appointed under section 4 and police officers. These can never be enough. This is a clear manifestation of the fact that the drafting of the Forestry Act 1997 failed to take into account the multisectoral review that was in progress at the time and developments in other related agencies. The Forestry Act 1997 also fails to take advantage of involvement of VNRMCs or traditional authorities or NGOs as stated above to increase capacity in enforcement. The Act confines the role of local communities to forests owned by the communities. This a reflection of the half hearted incorporation of participatory forestry due either to the lack of internalisation of the concept within controlling officers or a feeling that communities know little or nothing born out of either out of ignorance or the need to protect vested interests.

#### 10.8 **Traditional/Informal Rules**

According to section 200 of the Republic of Malawi Constitution, customary law is part of the law of Malawi so long it is not inconsistent with the Constitution 1995. It follows therefore that it is necessary to have regard to customary norms of regulation especially with regard to local community participation in the regulation of forestry. It appears that there was no attempt to consider customary or traditional norms when the Forestry Act 1997 was being drafted. The ACPD in fact confirmed this fact during interviews. Such customary rules

may be incorporated in the rules of the VNRMCs under section 33 of the Forestry Act.

It is interesting to note however that interviews with staff in the Planning Unit of the DOF indicated that in some DOF pilot projects where there are VNRMCs which were given power to make their own rules to regulate their village forest areas, the rules contained substantial customary rules that are not available in the received English common law. For example, the punishment for violation of the rules can be in form of paying a goat or a chicken as a fine depending on the magnitude of the offence. Their assessment was that these penalties are more readily enforceable and acceptable than those in the ordinary received courts. The adjudication process is also swift as compared to the delay experienced in the ordinary courts. These types of penalties are only applicable to rules made under section 33 of the Forestry Act 1997 and in relation to village forest areas. It is noteworthy however that there are limits as to what punishment can be imposed under criminal law. Section 25 of the Penal Code, does not recognise punishment in kind such as paying a goat or a chicken. Further according to section 21 of the General Interpretation Act 1966, the maximum penalty that subsidiary legislation can impose is K500 or 3 months imprisonment or such penalty as the authority approving the subsidiary legislation may allow. It is not clear whether fines in form of a goat or a chicken are within the purview of this provision. These gaps suggest that inclusion of customary rules of forestry regulation was not properly considered. If for example, the regional workshops had produced recommendations to include customary law rules in management of village forest areas, there would have been opportunity to explore the applicability of the rules including their interface with the received English common law.

## **11. Observations and Recommendations**

### **11.1 Policy and Legislative Planning**

It would appear that the Forestry Act 1997 was enacted to cater for new situations that had taken place after the repealed Forest Act 1942. The identification of problems and solutions was done either internally within the Department of Forestry or through multisectoral reviews. Studies such as the NEAP fed into National Forestry Policy. The drafting of the Forestry Act 1997 failed to undergo a similar process.

It is recommended that the Planning Unit in the Department of Forestry be strengthened and the Forestry Research Institute of Malawi be properly utilised to ensure researched policy articulation. They should have more competent policy personnel who can sift information coming from the field and synthesise such information for full departmental review. It may be worthwhile for the DOF to consider employing its own lawyers rather than relying on consultants only or the MOJ.

It is also recommended that the focal point for the drafting process of forestry legislation should be the DOF and not the mother Ministry of Natural Resources as that leads to detachment of the process from the actual professionals who perceive and deal with the problems on a day to day basis and may result in lack of internalisation of legal norms in the Act.

### **11.2 Creation of New Institutions**

The Forestry Act 1997 had as one of its main objectives the promotion of local community participation in forestry management. This is a new concept that required some feasibility studies such as pilot projects in village forest areas. While it seems the Forestry Extension Services Division had some pilot projects, the results of such projects do not seem to have undergone assessment and evaluation for purposes of informing the legislative process. In fact it seems, from the quality of the provisions on this aspect, that the draftsman was

groping in the dark. He only relied on information provided by the Secretary for Natural Resources to come up with the draft Forestry Bill.

It is recommended that where new institutions are being created such as for the promotion of community involvement, it is necessary to set up pilot projects intended to inform the reform process. There should be proper project guidelines that seek to chart the course of the project. The results and recommendations from the project should be properly recorded, reviewed at stakeholders consultative workshops or meetings and proposals and recommendations for policy and legislative formulations properly set out. While such projects may delay the drafting process it is possible to incorporate the concept as a general principle in the Act and detailed rules left to subsidiary legislation. The Fisheries Conservation and Management Act 1997 seems to have avoided confusions experienced under the Forestry Act 1997 as to what form local community participation should take by leaving the details of the institutional structures to the rules to be made by the Minister. On the other hand, the Forestry Act 1997 in attempting to define the institutional form has brought about a number of mistakes that require amendments which are not easy to make as they must await available parliamentary time and the draftsman's convenience.

### **11.3 Involvement in the Drafting Process**

Although the draft National Forestry Policy was prepared drafted by one person, the Secretary for Natural Resources, it had a lot more involvement of forestry personnel in the Forestry Planning Unit and the DOF as a whole including other Government departments and stakeholders through workshops as compared to the draft Forestry Bill. The DOF has competent and qualified foresters and while their input in the policy must have been reflected in the draft bill, it is clear that the final product would have been different from the way it is had the internal consultations been emphasised. The draft would have further been enriched if it had been widely circulated outside the DOF for comments. This was not adequately done.

It is recommended that a department that sponsors any legislation must circulate drafts to other concerned institutions for their comments well before discussions are held to discuss the comments. It is further recommended that such workshops should as much as possible build consensus with regard to principles, obligations, mandates among the various stakeholders through fairing of comments.

#### **11.4 Role of Foreign Consultants**

Foreign consultants have an important role to play in providing comparative international experience in forestry management. These consultants should, however, only provide short term backstopping missions that help to build local capacity while providing much needed international experience. It seems that the drafting of the Forestry Bill stalled between 1993 and 1996 due to lack of or inadequate local participation as well as lack of funding to finalise the process.

It is recommended that while it is necessary to engage foreign consultants especially with regard to new innovative and technical aspects of forestry legislation, these should be supported by local consultants who must carry on and finalise the process after the expiry of the mission of the foreign consultant.

#### **11.5 Role of Donors**

It is commendable how donor agencies were able to co-ordinate in the multisectoral reviews on environment and natural resources that also dealt with forestry policy and legislation. However, the fact that some donors needed their projects to be underway sooner than the multisectoral reviews could allow, contributed to the derailing of the multisectoral approach to the review of the forestry legislation. That is why forestry legislation seems somehow to differ from other legislation that underwent multisectoral review process. It is disjointed in content and the language is not focussed to reflect detailed consultation and analysis.

It is recommended that donors should as much as possible avoid having to force the pace of legislation that involves a number of sectors as this will continue to create gaps and duplication in natural resources legislation. Where the lack of new legislation is crippling efforts to protect natural resources, multisectoral reviews can prioritise legislative reviews and deal with the most urgent.

### **11.6 Public Participation**

This may be hampered by inadequate funding or failure to design appropriate methodology for promoting the participation of the public especially the section of the public that is in the rural areas. Bringing chiefs together or workshops involving mainly Government departments are not enough.

It is recommended that public participation in legislation should be properly designed and planned. It may be done through the media, by phone in radio or television programmes or panel discussions as well as consultations through other community fora such as farmers clubs. The DOF could mobilise community participation through its extension services and request the assistance of other extension workers from agriculture, community services, fisheries or water to help in soliciting views. These then can be sifted and synthesised by the Planning Unit in the DOF and discussed by representatives of various stakeholders including traditional leaders, politicians, NGOs and others. Records of proposals and recommendations can greatly assist the draftsman in his work. On the other hand, the local communities would feel they 'own' the law and therefore easily identify and comply with it if there are deliberate attempts to involve them at the earliest possible time.

### **11.7 Incorporation of Public Comments**

It will usually happen that even where a credible participatory methodology is used the comments may be 'hijacked' by some officials who may not be happy with certain changes. As Malawi learns the democratic and participatory methods of decision making there will be resistance from persons who 'love the past' way of doing things. Examples may be cited from experiences during the adoption of the Republic of Malawi Constitutions 1995 and the enactment of the

Environment Management Act 1996 when proposals and recommendations made from consultations with the general public were turned down either at cabinet level or by Parliament. In the present study the Director of Wildlife Society of Malawi remembers that the concerns of NGOs to involve them in policing monitoring and enforcing forestry legislation were agreed upon at a workshop at Malawi Institute of Management in 1996. The Forestry Act 1997 did not however incorporate those concerns.

It is recommended that in addition to providing the draftsman with properly recorded proposals and recommendations from relevant workshops or consultation it is necessary for civil society to get involved in lobbying Parliament and the Government to incorporate concerns from local communities, the private sector and NGOs. Donors must provide facilities for this important exercise to ensure that change is not derailed by a few influential people in Government or Parliament.

## **REFERENCES**

### **1. Reports**

Banda, G.Z. (1997) "Reform of Environmental Legislation and Policy in Malawi: Determining the Need and Scope for Reviews" (Department of Environmental Affairs, Lilongwe).

Banda, G.Z. (1998) Land Use and Management Study (Department of Environmental Affairs, Lilongwe).

Banda, G.Z. and K. Nyirenda (1999) Study on Efficient Enforcement of Environmental Legislation and International Conventions (Department of Environmental Affairs, Lilongwe).

Banda, G.Z. (1999) Malawi Forestry Legislation (IUCN, Germany).

### **2. Policy Instruments**

National Environmental Policy 1996

National Forestry Policy 1996

### **3. Statutes**

Forestry Act 1997

Land Act 1965

Lands Acquisition Act 1969

Fisheries Conservation and Management Act 1997

Local Government Act 1995

Electricity Act 1998

Public Roads Act 1962

Posts and Telegraphs Act



## **LIST OF ACRONYMS**

<b>EMA</b>	: Environment Management Act
<b>VNRMC</b>	: Village Natural Resources Management Committees
<b>DOF</b>	: Department of Forestry
<b>SADC</b>	: Southern Africa Development Community
<b>NEAP</b>	: National Environmental Action Plan
<b>CCD</b>	: Convention to Combat Desertification
<b>NGOs</b>	: Non-Governmental Organisations
<b>CBD</b>	: Convention on Biological Diversity
<b>DEA</b>	: Department of Environmental Affairs
<b>DOF</b>	: Department of Forestry
<b>MOJ</b>	: Ministry of Justice
<b>ACPD</b>	: Assistant Chief Parliamentary Draftsman
<b>FAO</b>	: Food and Agriculture Organisation of the United Nations
<b>UNDP</b>	: United Nations Development Programme
<b>UNEP</b>	: United Nations Environment Programme

## **LIST OF INTERVIEWEES**

Mr. K. Nyasulu, Director of Forestry

Mr. J. Luhanga, Department of Forestry

Mr. J. Ngalande, Department of Forestry

Mr. E. Makawa, Department of Environmental Affairs

Mr. A. Chinula, Ministry of Justice

Ms C. Munthali, Co-ordination Unit for Rehabilitation of the Environment

Mr. D.D.C. Mauambeta, Executive Director, Wildlife Society of Malawi

R.I. Kawiya, Director for Leisure Culture and Environment, Blantyre, City Assembly.

**REPORT OF THE WORKSHOP**

**ON**

**EFFECTIVE FORESTRY LAW MAKING  
IN MALAWI**

**Held at Malawi Institute of Management, Lilongwe  
on 15<sup>th</sup> December 1999**

Prepared by  
**Gracian Z. Banda**  
Bernhard & Harris  
P O Box 30651  
Chichiri  
Blantyre 3  
**MALAWI**

## **I. INTRODUCTION**

- The workshop was organised by IUCN together with the Consultant who prepared the draft preliminary report on *Study on Forestry Law and Regulations: Obstacles for Improvement*. The initial date for the workshop was 6<sup>th</sup> October 1999 but it was postponed to 15<sup>th</sup> December 1999 due to prior engagements on the part of some key sectors. The opening address was delivered by the Director of Forestry. Mr. Skottke Martin, Project Manager for GTZ, SADC-FSCTU facilitated the workshop.
- In all there were 15 participants representing donor agencies, Malawi Government representatives especially from the Department of Forestry as well as from local authorities and Non-Governmental Organisations. A list of participants is appended hereto.

## **II METHODOLOGY**

- The methodology adopted was to ask the Consultant to present the report for a period of close to 45 minutes and thereafter participants were given a chance to ask questions, seek clarifications or make comments or observations on the presentation and the draft report. There was then a group session in which participants were grouped into two groups to discuss the various issues that had arisen during the presentation of the report as well as the ones identified by the consultant together with the facilitator of the workshop. Each group then finally presented its findings and recommendations to a plenary which made observations and final recommendations.

### **III PRESENTATION OF THE REPORT**

- In the presentation of the report the consultant first introduced the background to the study mentioning that the thrust of the report is on the forestry law making process and not a critique of forestry legislation. It was pointed out that while a short survey of the critical provisions of the relevant provisions has been made that is intended to inform the critique on the law making process.
- The consultant then went through the first part of the report that deals with the major provisions of the Forestry Act 1997 as read with other relevant legislation concentrating on emerging concepts touching on institutional co-ordination and capacity, and the various management techniques introduced by the Forestry Act 1997.
- Next was the development of the legislative initiatives that led to the enactment of the Forestry Act 1997 noting the involvement of international donors and experts, the participation of local legal expert reviews, the role of the Department of Forestry and Ministry of Natural Resources. A number of possible aids were assessed such as comparative approaches, use of feasibility studies and the influence that international developments in forestry law and policy have had on the new legislation and the National Forestry Policy.
- The legislative drafting process was then assessed with regard to the participation of the Department of Forestry, Ministry of Natural Resources, the Attorney Generals Chambers, foreign consultants and the impact of customary and common law norms. Finally the consultant assessed the decision making process and the extent to which views from consultations or workshops were incorporated in the draft Forestry Bill.
- The involvement of members of the public and external donors was then assessed noting the constraints that the Department of Forestry was

working within to reach members of the general public and the pressure to produce tangible results to meet donor targets for assistance.

- Finally the consultant made a general assessment of the law making process. An attempt was made to juxtapose the procedural aspects of the process against the quality of the substantive provisions of the Forestry Act 1997, particular attention being given to new concepts introduced by the Forestry Act 1997. A summary of the observations and recommendations were read out.

## **II COMMENTS FROM THE PLENARY**

Some of the major observations from participants were:

- The list of interviewees seems to have been restricted to senior staff of the various departments. Interviews with field staff could have provided more information. It was suggested that the interviews should have been held in all districts so as to capture the views of people close to the grassroots.
- Participants acknowledged that it is not enough to rely on legal expertise from Ministry of Justice since it is already understaffed. It was recommended that the Department of Forestry should strengthen its Planning Unit including employing legal staff who will be involved in the planning as well as enforcement of the legislation.
- It was noted that the present forestry legislation has not dealt with the impact of the decentralisation process currently being implemented.
- Participants acknowledged that even though the law making process has been protracted (1990-1997) it did not adequately assess the lessons learnt from pilot projects underway during that period. These could have gainfully informed the drafting process.

- It was noted that it would be worthwhile for the consultant to clearly and separately identify the process through which legislative drafting goes for purposes of future references.

### **III RECOMMENDATIONS FROM PLENARY PRESENTATIONS**

The two groups were given particular topics to discuss on how to improve the legislative making process. The role of various stakeholders and how their inputs can be harnessed was assessed. The following were the recommendations of the plenary after presentations from each group.

#### **1. Community participation in Policy and Legislative making.**

- Participatory Rural Appraisals to be conducted.
- Conduct meetings with the communities.
- Conduct awareness campaigns to inform communities of the process.
- Lobbying with parliament by Non-governmental organisations.
- Conduct workshops with representatives of stakeholders.

#### **2. Departmental involvement in Policy and Legislative making**

- Conduct consultative meetings with stakeholders;
- Enhance awareness campaigns;
- Conduct workshops involving concerned departments and NGOs;
- Conduct assessment and evaluation of past legislation;
- Draft legislation to be circulated to all stakeholders for comments;
- Cross checking of related Acts i.e. cross sectoral coordination;
- Conduct international comparisons on how other countries have dealt with the issues under review.

#### **3. The role of NGOs and the Private Sector in Policy and legislative making**

- DOF to consult NGOs and the private sector
- DOF to enhance awareness campaigns to attract participation of NGOs and the private sector.
- DOF to conduct workshops involving concerned NGOs and private sector;
- DOF to circulate draft legislation to NGOs and private sector
- Private sector and NGOs must lobby Parliament to ensure their concerns are addressed.

#### 4. **Steps in Policy and Legislative making successes and failures**

- Review of past Policy and Legislation - to include lessons learnt from past projects and activities;
- Phased development of Policy and legislation;
- Wide participation of Stakeholders in order to improve information collection;
- Identification of key elements and principles for the new legislation;
- International comparisons;
- Drafting of the legislation;
- Wide circulation of the draft legislation;
- Conduct meetings and workshops involving key stakeholders;
- Incorporation of comments from workshops;
- Submission to the Ministry of Justice;
- Submission to cabinet and Parliament;
- Lobbying Parliament by NGOs and the private sector;
- Translation into layman's language.



5. **Cross sectoral coordination in Policy and legislative making**

- Conduct meetings and workshops with all concerned lead agencies, NGOs and the private sector;
- Incorporation of comments;
- Provide comments to the Draftsman;
- Submission to cabinet/Parliament
- Lobbying Parliament

6. **Role of traditional/informal/customary norms in Policy and Legislative making**

- a. Understand and resolve sources of conflict in order to:
  - build local trust and support
  - take the communities on board in formulation of the policy and legislation.
- b. Collect baseline information for planning and policy formulations;
- c. Compare traditional legal norms and their variance with received law;
- d. Appreciate leadership roles in traditional norms and its impact on the concept of community participation.

7. **Role of gender in Policy and Legislative making**

- a. Consult men, women, boys and girls on their views in the formulation of the Policy. A good representation by gender in Policy and Legislative committees necessary;
- b. Identify gender needs;
- c. Appreciation of roles in gender sensitive matters and take advantage of the strengths in the process;
- d. To increase the participation of the marginalised;

- e. To gain support from communities.

**8. Regular Policy and Legislative reviews**

- a. Include/capture emerging issues;
- b. Policy review to be conducted every 5 years and legislative review after 3 years or review as need arises;
- c. Regular monitoring and utilisation of data - Create a Policy Planning Unit/Policy Analysis Unit in the DOF.

**9. Role of Donors and Consultants**

- a. Donors are responsible for funding, capacity strengthening, facilitating the process through funding and expertise and not directing;
- b. Consultants are responsible for capacity strengthening, and to facilitate the process through providing international expertise and their international experiences and to provide objective guidance.

**10. Decentralisation Impacts**

- a. advantages/benefits of decentralisation
  - Cuts down on bureaucracy, financial resources reach targets easily and promote efficiency;
  - Stakeholders roles are identified i.e. spell out the roles of Central Government and Assembly;
  - Delegation of powers at District Level
  - To include provisions of decentralisation in the Forestry Act.
  - Sharing of resources between the Assemblies and Central Government.

- Redefine powers of Director of Forestry in view of the decentralisation process.
- a. Disadvantages of decentralisation
- Teething problems to include Resistance to change and loss of revenue for new projects.

#### **IV CLOSURE OF WORKSHOP**

The Workshop was closed by Mr. Ligomeka Professional Officer for IUCN Malawi who thanked all participants for their contributions and promised that the comments from the workshop would be taken into account by the Consultant. The final report will be circulated to all participants.

**ANNEX**

**WORKSHOP ON EFFECTIVE  
FORESTRY LAW MAKING IN MALAWI  
MALAWI INSTITUTE OF MANAGEMENT  
15<sup>TH</sup> DECEMBER 1999**

**ATTENDANCE LIST**

**K M Nyasulu**

**Director**

Department of Forestry  
P O Box 30048  
Lilongwe 3  
Tel: 781 000  
Fax: 784 268

**Robert I. Kawiya**

**Director of Culture, Leisure &  
Environment**

Blantyre City Assembly  
Private Bag 67  
Blantyre  
Tel: 671 046  
Fax: 670 417

**Wellings W M Simwela**

**Assistant Divisional Head(FESD) &  
Social Forestry**

Department of Forestry  
P O Box 30048  
Lilongwe 3  
Tel: 782 721/829 877  
Fax: 782 721

**Alice Chapuma (Mrs)**

**Senior Economist**

Ministry of Natural Resources &  
Environmental Affairs  
Private Bag 350  
Lilongwe 3  
Tel: 782 600  
Fax: 780 260

**S. Kainja**

**Acting Deputy Director**

Department of Forestry  
P O Box 30048  
Lilongwe 3  
Tel: 781 000  
Fax: 784 268

**S N Banda**

**Environmental Officer**

Department of Environmental Affairs  
Private Bag 394  
Lilongwe 3  
Tel: 781 111  
Fax: 783 379

**L N Malembo**

**Forestry Programme Director**

Wildlife Society of Malawi  
P O Box 1429  
Blantyre  
Tel: 643 502  
Fax: 643 428

**Ernest Misomali**

**Assistant Divisional Head-  
Development**

Department of Forestry  
P O Box 30048  
Lilongwe 3  
Tel: 781 000  
Fax: 784 268

**M W M Shaba**

**Assistant Director**

Department of Forestry  
P O Box 30048  
Lilongwe 3  
Tel: 781 000  
Fax: 784 268

**R M Jiah**

**SADC FSTCU Head**

SADC WSTCU  
P O Box 30131  
Lilongwe 3  
Tel: 740 376  
Fax:

**Skottke Martin**

**Advisor/Project Manager**

GTZ/SADC-FSTCU

P O Box 31131

Lilongwe 3

Tel: 730 446

Fax: 784 268

**Elliah Ligomeka**

**Technical Assistant**

SADC NRMP Unit

P O Box 30131

Lilongwe 3

Tel: 743 675/723 340

Fax: 743 676

**Cormac Cullinan**

**FAO Consultant (Environmental &  
Natural Resource Lawyer)**

EN ACT International

(Environmental Law & Policy  
Consultancy)

Canon Collins House

64 Essex Road

London

U K or

6 Spin Street

Cape Town

South Africa

Tel: 44 171 704 9464

Fax: 44 171 704 0434

**Eero Helenius**

**Consultant**

FTP International

P O Box 484

Helsinki

Finland

Tel: 358-9-770131

Fax: 358-9-77013498