

# **The Effectiveness of Environmental Law in Malawi: An Analysis of the Principal Legal Tools for Achieving Environmental Protection with Emphasis on the Criminal Sanction**

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**Thesis presented for the degree of Doctor of Philosophy at the University of  
KwaZulu-Natal, Howard College Campus, Durban, South Africa**

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The financial assistance of the World Wildlife Fund's Russell E Train Education for Nature Program towards this research is hereby acknowledged. Opinions expressed in this thesis and conclusions arrived at are those of the author and are not to be attributed to the World Wildlife Fund

March 2006

To Mulungu-Amalimbikitsa (Mua) and the people of his generation



## Abstract

The magnitude of environmental degradation in Malawi suggests that environmental law has not been effective. While inadequate enforcement of the law is certainly a significant cause of ineffectiveness, it is demonstrated that the other cause is the current normative state of the law. Malawi uses three traditional legal tools for achieving environmental protection: the criminal sanction, administrative measures and civil measures. An examination of the current environmental laws reveals that the criminal sanction is the primary tool prescribed in Malawian environmental circles.

From a stage when the criminal sanction was used to reconcile the parties to a dispute and to discipline the recalcitrant party, the criminal sanction has evolved to the current stage when its purposes are retributive and utilitarian. It is contended that in the context of environmental protection the most acceptable aspect of retribution is just deserts, especially the notion of proportionality. With regard to utilitarianism, deterrence, prevention and reinforcement may in various degrees be regarded as legitimate purposes of the criminal sanction in environmental law.

In the current stage of the criminal sanction its operation is affected greatly by the Bill of Rights in Malawi's Constitution. It is suggested that in dealing with various aspects of the criminal sanction vis-à-vis the Constitution, Malawian courts should lean towards saving them from unconstitutionality in the interest of environmental protection.

An analysis of Malawi's environmental statutes shows that some of the criminal offences have not been articulated clearly and others conflict with constitutional provisions in a non-defensible way. The criminal sanction is also shown to have weaknesses. When these weaknesses are weighed against the criminal sanction's strengths, it is clear that the criminal sanction has more weaknesses than strengths. This scenario has led many scholars to conclude that criminal sanctions are not appropriate for crimes of all sorts. They suggest that criminal sanctions should be reserved for serious offences and that

other measures should be used for less serious offences. While this suggestion certainly has merit especially in respect of First World and Second World countries, the practical realities in Malawi as a Third World country urge a different – but related – approach. These practical realities relate to the availability of alternatives to the criminal sanction in Malawi. An analysis of the alternatives reveals that most of them are not viable alternatives to the criminal sanction in Malawi at present and so criminal sanctions inevitably remain the primary tool for achieving environmental protection. In these circumstances, it is suggested that certain aspects of the criminal sanction should be attended to in order to improve its performance. In this connection, it is suggested that corporate criminal liability must be reformed in order to make available additional bases upon which corporate offenders may be made answerable for their activities. Sentencing must also be reformed in order to prescribe more effective punishments. Further, the use of strict criminal liability should be discouraged: instead there should be wider use of negligence as the fault element and wider use of the due diligence defence. In addition, vicarious criminal liability may be retained as long as an element of fault on the part of an employer or principal is introduced or the defence of due diligence is made available to the employer or principal. Alternatively, vicarious criminal liability may be abrogated in favour of primary criminal liability. Finally, it is suggested that provision be made for the award of costs after successful prosecution of environmental offenders and for the payment of fines to government departments or public bodies responsible for environmental protection.

## ACKNOWLEDGEMENTS

Many have assisted me in the process of researching and writing this thesis. For practical reasons, it is not possible to list all of them here but I am grateful for their help. Without derogating from the generality of the foregoing – as the Parliamentary draftsman would say – I must thank Prof Michael Kidd, my promoter, for his immense contribution. His scholarship and achievements have mentored me for long possibly without his knowledge. His guidance in the production of this work has been invaluable.

The following also deserve special mention: Ed Couzens for his academic, logistical and hands-on support; Prof Jeremy Ridl, Mrs Judy Parker and Mr Gracian Banda for linking me to significant financial resources; Prof John Mubangizi for facilitating my practical involvement in environmental law (by way of lecturing); Prof David McQuoid Mason for his encouragement; Mr Krishna Savjani SC, Mr Pratap Sharma and the staff of Savjani & Co (Malawi) for providing me with necessary documentation. Edna, my wife, and Mulungu-Amalimbikitsa (Mua), my son, have had to bear the brunt of this work. Edna made the work easier and Mua provided the light moments I needed along the way.

The funds for this research were provided by World Wildlife Fund's Russell E Train Education for Nature Program. I am very grateful for their generosity.

Above all I thank the Lord God Almighty for being my strength and my ever-present help in time of need. You have been good to me, O Lord. To you be all the glory, in Jesus' name!

# Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:.....

Date:.....

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# CHAPTER ONE

## SETTING THE PARAMETERS

### 1.1 Introduction

The term “environmental law” is of fairly recent origin, having generally emerged within the last twenty-five to fifty years. However, the existence of legal provisions which today fall under the rubric of “environmental law” dates back to several centuries earlier. In some countries rudimentary wildlife laws and forestry laws appear as early as the 17<sup>th</sup> century. Over time, especially in the 20<sup>th</sup> century, most countries have developed a considerably large body of environmental laws, but the question is whether these environmental laws have had any impact – positive or negative – on the protection of the environment.

### 1.2 Too little, too late?<sup>1</sup>

It has been argued that ‘the destruction of the world’s life-support systems is proceeding at such a pace and, indeed, has already gone so far, has cut so deep into the delicate fabric of the natural world that no conventional response is adequate to deal with it.’ By conventional response is meant ‘a framework of environmental law to punish polluters, protect finite resources and steer society into a new way of living.’ It is said that such a response is totally inadequate to the scale of the problems we face and that the law has no ‘meaningful role to play in tackling or finding solutions to the multiple environmental crises we face.’<sup>2</sup> In essence this argument urges that environmental law is largely useless as a tool for achieving environmental protection. An environmental lawyer’s first reaction to this contention may be to dismiss it as misguided. But the contention appears to have

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<sup>1</sup> This subheading has been adopted from B Jones ‘Environmental law – too little, too late’ in Owen Lomas (ed) *Frontiers of Environmental Law* London: Chancery Law Publishing 1992 at 68.

<sup>2</sup> Jones op cit at 68-9.

substance when one considers that in many developing countries environmental laws have been in existence for quite some time and yet the tide of environmental degradation seems to progress unabated. One report from Malawi illustrates the point.<sup>3</sup>

In the early 1980s the population of elephants in Malawi was about 2000 individuals in eight discrete units country-wide. Approximately 200 of these (that is, about 10 per cent) were located in the Majete Wildlife Reserve. This reserve lies in the Middle Shire Valley which forms part of the Great Rift Valley in southern Malawi. Between 1985 and 1991 various reports indicated that the numbers of the elephant herd in the reserve were declining. Towards the end of this period the reports suggested that the whole Majete elephant population had been wiped out. In response, during 1992 and 1993, a survey was commissioned by the government's Department of National Parks and Wildlife and the Wildlife Society of Malawi<sup>4</sup> with support from the British Fauna and Flora Preservation Society. Through analysis of Majete field reports, liaison with the department's staff, extensive ground surveys and sample aerial inspections of both the Majete Wildlife Reserve and surrounding communal lands, it was confirmed that all the elephants of the reserve had been massacred. Fifty-two elephant carcass remains were located, evidently killed illegally with military weapons.<sup>5</sup> Thus over a period of about six years from 1986, the elephant herd disappeared, mostly having been systematically shot out within and around the boundaries of the reserve.<sup>6</sup> In a related development, it is

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<sup>3</sup> This report is based on B Y Sherry *The Demise of the Elephants of the Middle Shire Valley, Southern Malawi* Fauna and Flora Preservation Society United Kingdom 1995.

<sup>4</sup> This society has since changed its name to the Wildlife and Environmental Society of Malawi.

<sup>5</sup> The civil war that broke out after independence in Mozambique triggered an influx of refugees into Malawi especially between 1986 and 1990. It appears that the refugees brought with them military weapons and other poaching devices. Sherry op cit at 8 writes: 'During 1986 and 1987 the situation in Majete changed dramatically, following the first influx of refugees into the region from Mozambique. Along with the refugees came stories of hunting methods in Mozambique, and the where-with-all to carry these out. AK47 automatic assault rifles were introduced and the Mozambicans brought with them their skills in muzzle-loader manufacture, if not muzzle-loaders themselves.'

<sup>6</sup> Sherry op cit at 3-9.

significant to note that it was within the same period that Malawi's two last remaining black rhinoceros in nearby Mwabvi Wildlife Reserve were killed by poachers.<sup>7</sup>

It may be observed that the extermination of the Majete elephants occurred at a time when Malawi had environmental legislation<sup>8</sup> outlawing poaching and the indiscriminate killing of elephants.

The foregoing account of environmental degradation seems, on the face of it, to support Jones's contention. Indeed, if environmental degradation is continuing in the face of environmental law, then Jones or any critic is entitled to wonder as to what use environmental law has. However, the question is whether the contention is really justified after taking into account all relevant factors. This question calls for a substantive response and it is expected that the current research will produce such response. In a nutshell, it shall be contended that environmental law is an indispensable tool of environmental management, only that certain facets of it must be attended to. First, some environmental laws must be fine-tuned. Second, the implementation of environmental law must be greatly improved to make it effective. The emphasis in the present research is on the former. Ultimately this is a study of the effectiveness of environmental law in a typical Third World country.

A study of the effectiveness of environmental law cannot be complete without an understanding of what environmental law means. So environmental law will be defined in the next segment. It will be noted from the definition that there are many environmental laws. The current research is intended to consider mainly the principal environmental laws of Malawi and determine their effectiveness in the context of tools which will be developed towards the end of the present chapter.

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<sup>7</sup> Sherry op cit at 9.

<sup>8</sup> National Parks Act, cap 66:07 of the Laws of Malawi. This Act was later repealed and replaced by the National Parks and Wildlife Act 11 of 1992.

### 1.3 The province of environmental law

#### 1.3.1 General

There appears to be general agreement that environmental law is law relating to the environment.<sup>9</sup> Few would be the discordant voices who would detract from such an obvious proposition. However, attempts have been made to put flesh to this proposition. One attempt at this is that of David Hughes writing from England. He states that environmental law 'is not a coherent, logical body of principles and rules. What we have is a number of *diverse laws relating* to the environment. These can be found, inter alia, in criminal law, local government law, and the law of real property; however, the oldest sources of law on the topic are the law of public health, the law of town and country planning and the law of torts.'<sup>10</sup>

In the same vein Michael Blumm, an American writer, is of the view that environmental law 'is a loose amalgam of common law and (increasingly) statutory provisions designed to protect public health, ecosystems and dependent animal and plant species.'<sup>11</sup>

In South Africa Andre Rabie holds a similar view. In 1976 he wrote:

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<sup>9</sup> See, for instance, D E Fisher *Environmental Law in Australia: an Introduction* St. Lucia, Queensland: University of Queensland Press 1980 at 5 and 8; M A Rabie 'Nature and Scope of Environmental Law' in R F Fuggle and M A Rabie (eds) *Environmental Management in South Africa* Cape Town: Juta 1992 at 83; Gerry M Bates *Environmental Law in Australia* 3ed Sydney: Butterworths 1992 at 1. Cf Richard Burnett-Hall *Environmental Law* London: Sweet & Maxwell 1995 who argues as follows at page viii: 'Environmental law is in essence the body of law concerned with the protection of living things (including man) from the harm that human activity may, immediately or eventually, cause to them or their species, either directly or to the media and the habitats on which they depend.'

<sup>10</sup> David Hughes *Environmental Law* London: Butterworths 1986 at 3. Italics in original.

<sup>11</sup> Michael C Blumm 'Introduction' in Michael C Blumm (ed) *Environmental Law* Aldershot, Hampshire: Dartmouth 1992 at xi. Cf Roger W Findley and Daniel A Farber *Environmental Law Cases and Materials* 2ed St. Paul, Minnesota: West Publishing Co 1985 who at xvii contend that 'environmental law appears to be a hodgepodge of statutes, cases and regulations dealing with matters as diverse as automobile design, bottle deposits, and dam construction.'

‘The field of environmental law is bound together by the problems with which it deals, i.e. pollution and the depletion of natural resources, and by the purpose it serves, i.e. securing an adequate environment for man and conserving the earth’s natural resources. It does not, however, constitute a separate part of the law in the sense that it contains separate legal principles: Legal provisions relating to the environment are encountered in many conventional fields of law, such as administrative law, criminal law, tax law, the law of delict and jurisprudence. What these provisions have in common is therefore not so much their special legal character, but the subject which they regulate.’<sup>12</sup>

In a later publication<sup>13</sup> Rabie repeated his views when he said that environmental law ‘consists of a potpourri of legal norms encountered in a number of conventional fields of law, a feature it shares with other recognized areas of legal regulation, such as medical law, labour law, press law, social welfare law and the law relating to consumer protection.’

It may be observed that these attempts at elaborating what environmental law is are seeking to define it by focusing on the subject matter of environmental law. This is what Denis Cowen calls the subject-matter approach to the definition of environmental law.<sup>14</sup> This approach has been shown to be unsatisfactory. Cowen<sup>15</sup> discerned the following shortcomings of the subject-matter approach:

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<sup>12</sup> Andre Rabie *South African Environmental Legislation* Pretoria: University of South Africa Institute of Foreign and Comparative Law 1976 at 3. Cf Thomas F P Sullivan ‘Fundamentals of Environmental Law’ in J Gordon Arbuckle et al *Environmental Law Handbook* Ted Rockville, Maryland: Government Institutes 1983 at 2. Writing from an American perspective, Sullivan says, ‘Environmental law encompasses all the protections for our environment that emanate from the: (1) U.S. Constitution, (2) state constitutions, (3) Federal and state statutes and local ordinances, (4) regulations promulgated by Federal, state and local regulatory agencies, (5) court decisions interpreting these laws and regulations and, (6) common law.’

<sup>13</sup> Rabie op cit at 97.

<sup>14</sup> Denis V Cowen ‘Toward Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation’ 1989 (52) THRHR 3 at 7.

<sup>15</sup> Cowen op cit at 8 – 11. As much as possible the shortcomings have been listed in the words of Cowen. It must be noted, however, that Cowen’s fourth criticism has purposely been left out.



- It tends to cloak the fact that if lawyers concerned with the protection of the environment are to be relevant and effective, they must reach out beyond the principles, concepts and underlying philosophies of conventional branches of law; for these have grave inherent limitations in the specific context of the environmental challenge. The conventional branches of law were in large measure designed to cope with different problems from those presented by the need to protect the environment in modern industrialized societies and the developing countries.
- By emphasizing that environmental law is merely an amalgam of conventional laws without distinctive principles of its own, it tends to discourage the search for distinctive principles – even perhaps to encourage the belief that their non-existence is inevitable.
- The difficulty of defining ‘environment’ for legal purposes makes each exponent of the subject free to give rein to his own preferred area of interest or expertise, and by the same token makes him feel justified in restricting the scope of his enterprise.<sup>16</sup>

It is submitted that the outlined views of Cowen may be reconciled with the views of the subject-matter approach proponents. In the first place, to deny that environmental law at least presently consists primarily of legal norms drawn from a number of conventional fields of law is sheer falsehood. A legal norm prescribing a criminal penalty for polluting activity is not an independent or novel creation of ‘environmental law’; it is simply a criminal sanction which has been transplanted from the general field of criminal law to the specific garden of environmental law with a view to serving the interests of protecting the environment.

In the second place, acknowledging the current borrowing nature of environmental law does not mean that the borrowed wisdom will be retained in original state. The borrowed legal norms may just be used as the capital for the mega-business of formulating

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<sup>16</sup> This criticism is borne out by the texts on the subject. See, for instance, Burnett-Hall *op cit* at viii; Bates *op cit* at viii.

distinctive principles of environmental law. In the process of time the capital may, to complete the metaphor, be returned to the lenders in the sense that the borrowed legal norms may be developed so much as to lose their identity and graduate into distinctive environmental norms which can be emulated by the conventional fields of law. This process of development is, in the opinion of the writer, what Cowen is concerned with in the first and second shortcomings listed above. Certainly, the process of development of environmental law will be unduly hampered if environmental lawyers fail to reach out beyond the borrowed legal norms. Environmental lawyers worth the name have been called to the noble - and difficult - task of challenging the status quo where necessary and seeking better legal norms or improved legal norms for the protection of the environment.

Cowen's last listed shortcoming is significant in that the proponents of the subject-matter approach appear to unify the matters they point out by tying them to the environment. This adherence to the term 'environment' is by no means a speciality of the subject-matter approach proponents. As stated at the beginning of this chapter, legal pundits seem to agree that environmental law deals with the environment. A definition of environment is therefore crucial to an understanding of environmental law.

### 1.3.2 Definition of environment

It has been said that 'environment' means various things to various people. For instance, when applied to a city, the urban designer may understand the term to mean the spatial structure of the city; the architect may think of the fabric of buildings; the municipal engineer may envisage essential services; the medical officer of health may relate it to living conditions; and the horticulturist may think of parks and gardens.<sup>17</sup>

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<sup>17</sup> R F Fuggle 'Environmental Management: An Introduction' in Fuggle and Rabie op cit at 4. Bates op cit at 2 writes that the term environment "may be construed according to the context in which it is used, and may reflect the interests and concerns of the person using the term. For example, to a conservationist the 'environment' may be taken to mean the natural living and non-living surroundings of persons but not the 'urban' or 'built' environment, except perhaps for items and places of 'heritage' value. To a planner, primary focus may be precisely the opposite: that is, on the physical, human-made structures and surroundings in which people live and work, and on their associated infrastructure services - transport, water supply, sewerage, energy, education, health services and the like. To a social worker, the 'social'

Rabie<sup>18</sup> contends that 'environment' is a relational concept; it denotes an interrelationship between a person and his surroundings. He identifies at least two approaches to defining environment: the extensive approach and the limited approach.

### 1.3.2.1 Extensive approach

Under this approach 'environment' is defined widely. One definition in this approach is that of Albert Einstein who is reported to have once said, 'The environment is everything that isn't me.'<sup>19</sup> Fisher holds a similar view. He writes that the "ordinary meaning of the word refers to the conditions or influences under which any person or thing lives or is developed. A more detailed description includes 'everything external to the organism.'"<sup>20</sup> Several other writers subscribe to this tradition.<sup>21</sup> Environment so understood encompasses a multitude of elements. It includes the natural environment,<sup>22</sup> the spatial environment,<sup>23</sup> the sociological or social environment,<sup>24</sup> the economic environment, the

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environment of people may be more important; the way in which they relate to each other and to government and bureaucracy, something which may or may not be conditioned partly by their natural and non-natural surroundings. A health worker may adopt a similar view of the 'environment'; while 'health and safety' workers may concentrate more on the 'work' environment, on the protection of employees in the work place from physical hazards and environmental contaminants."

<sup>18</sup> Rabie op cit at 84.

<sup>19</sup> Justine Thornton and Silas Beckwith *Environmental Law* London: Sweet & Maxwell 1997 at 2.

<sup>20</sup> Fisher op cit at 5. Simon Ball and Stuart Bell *Environmental Law: the Law and Policy Relating to the Environment* London: Blackstone 1991 at 2 confess that the word 'environmental' is difficult to define and go on to say that its "normal meaning relates to 'surroundings', but obviously that is a concept that is relative to whatever object it is which is surrounded."

<sup>21</sup> For instance, William H Rodgers Jr *Handbook on Environmental Law* St. Paul, Minnesota: West 1977 at 1; Swaigen and Woods 'A substantive right to environmental quality' in Swaigen (ed) *Environmental Rights in Canada* (1981) referred to in Rabie op cit at 85.

<sup>22</sup> Rabie op cit at 84 defines the natural environment in a strict sense as 'the natural world in its pure state, but more generally regarded as referring to renewable and non-renewable natural resources such as air, water, soil, plants, animals, etc.'

<sup>23</sup> Rabie op cit at 84 defines the spatial environment as 'man-made and natural areas such as a suburb, town, city, region, province, country, as well as certain specific landscapes, for instance mountains, wetlands, rivers, sea-shore, forests, etc.'

<sup>24</sup> Rabie op cit at 84 defines the sociological or social environment as 'other people such as the family, group, society, etc.'

cultural – historic environment, the built environment, the political environment and the labour or work environment.<sup>25</sup>

Malawi's Environment Management Act 23 of 1996 adopts the extensive approach. Its section 2 defines environment as the 'physical factors of the surroundings of the human being including land, water, atmosphere, climate, sound, odour, taste, and the biological factors of fauna and flora, and includes the cultural, social and economic aspects of human activity, the natural and the built environment'.

The extensive understanding of environment defeats entirely any efforts at investigating the effectiveness of the law relating to the environment. For within its wide scope almost any law would qualify as environmental law. Thus, a law prescribing severe penalties for acts or omissions which upset a free trade economy would qualify as environmental law since it is aimed at conserving the economic environment.<sup>26</sup> In effect, the extensive definition of environment makes the purpose of the current research almost impossible of performance, as it has the effect of turning the inquiry in the present research into an investigation of the effectiveness of all law.

#### 1.3.2.2 Limited approach

Some authors have urged a limited approach to the definition of environment. According to this approach, environment is narrowly defined. The wide ambit of the extensive approach is restricted. One such author conceives of environment as natural environmental elements. By 'natural environmental elements' is meant 'air, water and soil, which have not been created by humans, but which they may modify either through exploitation or the introduction of foreign matter.'<sup>27</sup> It is said that this appears to be more realistic as it takes into account not only the natural environment in its pure state, but also

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<sup>25</sup> Rabie op cit at 84.

<sup>26</sup> Cf Rabie op cit at 86.

<sup>27</sup> Rabie op cit at 88.

modifications imposed on it by humans.<sup>28</sup> The definition of environment in South Africa's National Environmental Management Act 107 of 1998 goes further than this but falls short of the extensive approach. Section 1 defines environment as 'the surroundings within which humans exist and that are made up of

- i) the land, water and atmosphere of the earth
- ii) micro-organisms, plant and animal life
- iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.'

#### 1.3.2.3 Rationalization

The differing proposals on the definition of environment call for rationalization for purposes of the inquiry in the present research. To that end, the term environment is taken to have, in the words of Hart,<sup>29</sup> a 'core of meaning' surrounded by a 'penumbra of uncertainty'.<sup>30</sup> At its core environment refers to the earth's natural resources, both renewable and non-renewable. In this connection, it may be noted that almost all conservation and pollution-control measures are aimed, in one way or another, at these natural resources.<sup>31</sup> Everything else outside this core meaning may be regarded as part of the penumbra of uncertainty. In the current study, the writer does not include within the confines of environment mankind's own physical creations including the cultural heritage.

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<sup>28</sup> Ibid.

<sup>29</sup> H L A Hart *The Concept of Law* 2ed Oxford: Clarendon Press 1997 at 12.

<sup>30</sup> Thornton and Beckwith op cit at 2.

<sup>31</sup> Rabie op cit at 90.

### 1.3.3 Scope of environmental law

Having determined the meaning of environment and environmental law, the discussion will now focus on the specific laws in Malawi which fall under the rubric of environmental law. These laws fall, inter alia, into the following categories:<sup>32</sup>

- a) Exclusive environmental legislation: this is legislation aimed exclusively at environmental management and containing only environmentally specific norms e g the Environment Management Act 23 of 1996.
- b) Legislation predominantly containing environmentally specific norms but also having other provisions e g the Public Health Act 12 of 1948 (cap 34:01 of the Laws of Malawi).
- c) Legislation incidentally containing environmentally specific norms e g the Petroleum (Exploration and Production) Act 2 of 1983 (cap 61:02 of the Laws of Malawi).
- d) Common law norms: some common law norms may be useful in environmental management e g the law of nuisance. Equitable remedies e g the injunction (interdict) may also be instrumental in environmental conservation.

From this brief survey it is clear that there are many laws which may be considered as part of environmental law. The present research will mostly consider the principal

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<sup>32</sup> This categorization is almost entirely based on Rabie op cit at 92 – 95. However, it must be noted that Rabie's categorization identifies two more categories which may qualify as environmental laws: (a) Legislation with direct environmental relevance, that is, 'legislation not calculated to further environmental management' but comprising 'provisions that are of direct environmental relevance' and (b) Legislation with potential environmental relevance, that is, 'legislation which, although not aimed at environmental management, includes provisions that are potentially of environmental significance,' for example tax legislation. In the present research these are generally not regarded as part of environmental law. The decision may appear arbitrary but there must be a cutting point in every useful research. Further, the writer's concern is the core meaning of environment and the core meaning of environmental law. Debate on whether the ousted categories fall within or without the ambit of environmental law may not contribute anything significant to the present research. In this connection, it may be noted that Paul G W Henderson 'Some Thoughts on Distinctive Principles of South African Environmental Law' (2001) 8 *SAJELP* 139 at 143 has criticised Rabie's categorisation. He says that one difficulty with Rabie's approach is that 'even a law that deals exclusively with the environment may still share principles with other branches of law. This enquiry may therefore not qualify that law per se as representing an environmental norm or principle.'

environmental laws of Malawi and determine their effectiveness. As may be noted from the next segment, the research is not intended to be a clause-after-clause examination of the environmental laws; rather the emphasis is on effectiveness of the law with specific reference to identified tools for effectiveness.

## **1.4 Tools for effectiveness**

### 1.4.1 General

At the beginning of this chapter (segment 1.2 above) a report has been set out, demonstrating the magnitude of environmental degradation that occurred when relevant law was in place. It was impliedly suggested that the law did not achieve what the legislators intended. This suggestion will be explored in more detail in the present segment as it is essentially a question of effectiveness. The meaning of effectiveness will be discussed in the context of environmental law. Thereafter the tools for achieving the effectiveness of environmental law will be identified.

### 1.4.2 Effectiveness: what is it?

The noun 'effectiveness' is derived from the adjective 'effective'. The South African Concise Oxford Dictionary defines 'effective', inter alia, as 'producing a desired or intended result'. So effectiveness may be regarded as the state or condition of producing a desired or intended result. Accordingly, the effectiveness of law means the law's state of realizing its objectives, purposes or goals. Antony Allott writes that 'a *Law* or legal system is a purposive system existing in a society [and] a general test of its effectiveness will therefore be to see how far it realizes its objectives, i.e. fulfills its purposes.'<sup>33</sup> Although this statement is made in respect of a legal system, there is, it is suggested, nothing wrong in applying the same to a particular provision or norm in the legal system, since the legal system is essentially made up of these provisions or norms.

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<sup>33</sup> Antony Allott *The Limits of Law* London: Butterworth 1980 at 28. Italics in original.

Allott continues to say that the purpose of law is 'the shaping of behaviour in society in conformity with the goals of those having influence within it.'<sup>34</sup> The idea of shaping behaviour appears to be accepted by many writers. For instance, Rael Loon states that the 'primary role of law is the regulation of human conduct in order to protect that which is perceived to be of value.'<sup>35</sup> With regard to environmental law the human conduct would be regulated in order to protect the environment. Thus the purpose of environmental law is the shaping or regulation of human conduct or activity so as to protect the environment. Michael Kidd puts this point in this way:

'[T]he aim of environmental law must be protection of the environment. ... Most, if not all, environmental legislation throughout the world was devised in order to address the need to conserve resources for the benefit of humans, both living now and future generations, and protect human health.'<sup>36</sup>

The extent to which this purpose is realized determines the effectiveness of environmental law.

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<sup>34</sup> Ibid. Cf Iredell Jenkins *Social Order and the Limits of Law: a Theoretical Essay* Princeton: Princeton University Press 1980 at 118-119. At page x Jenkins writes: 'Law is a practical activity, having a decisive impact on the structure of society and the affairs of individuals. Viewed from this perspective, ... law is being employed in ways and toward ends that are unprecedented: the legal apparatus is being asked to intervene in areas of social and personal life that have hitherto been handled by other agencies in other ways.'

<sup>35</sup> Rael Loon 'The Effectiveness of the Law in the Conservation of Birds of Prey in South Africa' (1995) 5 *SAJELP* 168. See also P D Glavovic 'An Introduction to Wildlife Law' (1988) 105 *SALJ* 519 at 528.

<sup>36</sup> Michael Kidd 'Environmental Crime – Time for a Rethink in South Africa?' (1998) 5 *SAJELP* 181 at 182 (This article will in this chapter be referred to as 'Kidd Rethinking Crime'). At pages 182 – 183 Kidd continues to say that the rationale is anthropocentric and utilitarian and that the protection is not absolute: 'The degree of protection afforded by the anthropocentric, utilitarian rationale entails the notion of sustainable use of natural resources and control over pollution in the sense that this envisages a line being drawn between acceptable and unacceptable pollution, given that total prevention of pollution is impossible. The determination of what is acceptable and unacceptable is important in assessing what controls to use in ensuring adherence to the defined standards. In short, then, 'protection' is not to be understood in an absolute sense, but rather as contingent on policy goals, both national and international.'



### 1.4.3 Tools for effectiveness

It must be appreciated that the promulgation of environmental norms does not automatically lead to the shaping of human activity in favour of environmental protection. Sometimes the law may be deliberately disobeyed. This possibility of disobedience is reduced by the provision of measures or tools which persuade the subjects of the law to shape their conduct or activity in compliance with the environmental norm. Among the measures or tools used to encourage or ensure compliance are the criminal sanction, administrative action (administrative measures) and civil litigation (civil measures). These three may therefore be regarded as tools for effectiveness since they encourage or lead to the realisation of the purpose of environmental law, which is environmental protection.

Cheryl Loots identifies the criminal sanction, administrative action and civil litigation as the methods of enforcement of environmental legislation. She argues that in order to achieve effective enforcement all these methods must be fully utilized.<sup>37</sup>

Jan Glazewski<sup>38</sup> answers the question of effectiveness (as defined herein) indirectly. In the process of discussing implementation and enforcement of environmental law, he distinguishes between administrative and judicial measures. Under judicial measures he places criminal sanctions, civil sanctions, judicial review and interdicts, and under administrative measures he cites subordinate legislation, regulations, statutory directives, permit or licensing requirements, abatement notices and other indirect administrative remedies.<sup>39</sup> While the classification is different from that of Loots, it is significant to note

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<sup>37</sup> Cheryl Loots 'Making Environmental Law Effective' (1994) 1 *SAJELP* 17.

<sup>38</sup> Jan Glazewski *Environmental Law in South Africa* Durban: LexisNexis Butterworths 2000 at 142-143. Glazewski does not use the term 'effectiveness'. He writes, '... South Africa has at its disposal a plethora of environmental laws and statutory provisions. Given this sophisticated armoury of legislative weaponry the question arises as to why environmental degradation continues apace. While the solution to this question probably lies somewhere in the subject of implementation, this section does not purport to supply answers to this difficult issue, as it goes beyond the scope of this book.' The question he poses is essentially a matter of effectiveness as defined in the text of the present chapter.

<sup>39</sup> Glazewski op cit at 143-144.

that he at least acknowledges that the criminal sanction, administrative measures and aspects of civil litigation (civil sanctions, judicial review and interdicts) are instrumental in the enforcement of environmental law.

Rabie et al hold a similar view. They point out that environmental law may be implemented or enforced through administrative measures, criminal sanctions and the civil process.<sup>40</sup>

Finally Michael Kidd argues that 'criminal sanctions should be reserved for the most egregious contraventions of environmental law, with other measures being used for less serious offences.'<sup>41</sup> He indicates that these other measures broadly fall into two categories: administrative measures and civil measures. He says the former include notices or directives, withdrawals of authorizations and administrative penalties, whereas the latter include injunctive processes, civil penalties and delictual measures.<sup>42</sup>

From this brief survey it is clear that there is general agreement among environmental scholars that the criminal sanction, administrative action (administrative measures) and civil litigation (civil measures) are essential instruments in the enforcement of environmental law. Since these three have already been identified above as tools for effectiveness, it follows that the effectiveness of environmental law has something to do with enforcement. However, it may be observed that enforcement is not the only thing that brings about effectiveness: proper articulation of the environmental law and other factors also play a significant role in the effectiveness agenda. Some of the factors will be elaborated on in later parts of this study.

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<sup>40</sup> MA Rabie, C Loots, R Lyster and MG Erasmus 'Implementation of Environmental Law' in Fuggle and Rabie op cit at 120 and 128. See also MA Rabie 'Legal Remedies for Environmental Protection' (1972) V *CHLSA* 247.

<sup>41</sup> Kidd Rethinking Crime op cit at 197. See also Zada Lipman 'Corporations, Crime and the Environment' (1997) 4 *SAJELP* 69 at 88-89. Cf Gregor McGregor *Environmental Law and Enforcement* Boca Raton: CRC Press Inc 1994 at 100; Herbert Packer *The Limits of the Criminal Sanction* Stanford: Stanford University Press 1968 at 364-365.

<sup>42</sup> Michael Kidd 'Alternatives to the Criminal Sanction in the Enforcement of Environmental Law' (2002) 9 *SAJELP* 21 at 33-49. This article will in this chapter be referred to as 'Kidd Alternatives to Crime'.

#### 1.4.4 Scope of analysis

In subsequent chapters the three tools of effectiveness identified above will be analysed in the context of Malawian environmental laws. The emphasis is on the criminal sanction as this is the principal tool employed in the legislation for environmental protection. The analysis of the other tools will essentially focus on what scope they have in operating as alternatives to the criminal sanction. It is acknowledged that in-depth study of only one of these tools may have advantages, but the current researcher is of the view that for the sake of completeness, a few words must be said about the other tools. As noted by several authors above,<sup>43</sup> there is need to use all the tools in the quest for effectiveness of environmental law. If we can use all of them, then there is nothing wrong with considering them in one treatise.

Actually a review of the literature on these tools reveals that they have been considered together in several works. Virtually all the authorities cited in the text of segment 1.4.3 above examine these tools together with emphasis on the criminal sanction.<sup>44</sup> It is therefore not novel for the current research to consider all three tools. Where the present study departs from the other works is on the location of focus: this study examines the three tools in respect of a Third World country (Malawi) whereas the other works generally focus on First World countries and/or Second World countries; they generally leave out Third World countries. Thus one major difference between the present study and the other works is that in the present study the wisdom of the three tools will be tested in Third World circumstances.<sup>45</sup> It must be emphasised that the location of focus of

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<sup>43</sup> Kidd *Rethinking Crime* op cit; Kidd *Alternatives to Crime* op cit; Lipman op cit; Loots op cit at 17 and 34.

<sup>44</sup> Except Rabie et al op cit who put emphasis on administrative measures.

<sup>45</sup> For the meaning of the terms 'First World country', 'Second World country' and 'Third World country', see segment 2.3 in Chapter 2 hereof and Remigio E Agpalo 'Modernisation, Development, and Civilization: Reflections on the Prospects of Political Systems in the First, Second, and Third Worlds' in Kenneth E Bauzon (ed) *Development and Democratization in the Third World: Myths, Hopes, and Realities* Washington: Taylor and Francis 1992 81 at 84 – 86. See also Sixto K Roxas 'Principles for Institutional Reform' in Jo Marie Griesgraber and Bernhard G Gunter (eds) *Development: New Paradigms and Principles for the Twenty-first Century* London: Pluto Press 1996 1 at 26 and S A Kuz'min *The*

this study is Malawi – no comparative analysis with other Third World countries will be carried out due to the non-availability of current material.

Limiting the research to a Third World country is necessary due to the numerous differences that exist between Third World countries and other countries. There are differences in environmental conditions, most Third World countries being located in tropical areas whereas most First World countries and Second World countries are located in temperate areas. Environmental models and environmental quality standards appropriate to temperate conditions may therefore not apply to Third World countries. Further, the data needed to use the more sophisticated models developed in First World countries and Second World countries may not exist in Third World countries. There are differences in the significance of environmental impacts: the level of significance attached to particular environmental impacts may differ considerably between a 'typical' First or Second World country and a Third World country. In some traditional societies, much higher values are assigned to particular environmental assets than is the case in modern western societies. There are also technological differences, institutional and regulatory differences and differences in arrangements for consultation and public participation.<sup>46</sup> These differences, it is submitted, justify a separate treatment of the effectiveness of environmental laws of Third World countries from those of First World countries and Second World countries.<sup>47</sup>

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*Developing Countries: Employment and Capital Investment* New York: International Arts and Sciences Press 1969 at 1 – 7.

<sup>46</sup> <http://www.art.man.ac.uk/eia/Lf15.htm> (Accessed August 2001, but page no longer available).

<sup>47</sup> These differences may, however, not be taken too far as generalizations about conditions in the Third World are not always safe. The comments of Alan Milner on a related matter in Alan Milner (ed) *African Penal Systems* London: Routledge & Kegan Paul 1969 at 1 are apposite. Writing in respect of Africa (which has many Third World countries), he says: 'The making of generalizations about Africa is a foolish pastime. From the basic question of the forms of social organization to such matters as economic development, urbanization and industrialization, the level of inter-cultural contact, linguistic forms, monetary forms, religious affiliation and ethnic composition, it is a continent which displays the widest imaginable range of alternatives.'

## **1.5 Summary of Chapters**

In the next chapter (Chapter 2) a profile of Malawi will be set out. This profile is meant to introduce the reader to the historical, socioeconomic, environmental and legal status of the country. It will be noted, among other things, that Malawi has a Constitution which is the supreme law of the land – all laws (including the criminal sanction) must conform to it. For this reason it will be necessary to map out the constitutional framework of the criminal sanction and this will be done in Chapter 3. In Chapters 4 and 5 criminal offences created under Malawi's environmental legislation will be analysed. This analysis (when considered together with the account in Chapter 6 of how far the other tools of effectiveness are used) will demonstrate, *inter alia*, that in Malawi the primary tool for achieving environmental protection is the criminal sanction. It will also be noted in Chapter 5 that despite this reliance, the criminal sanction has weaknesses and that it is necessary to complement its use with alternative tools. Chapter 6 will investigate which alternative tools are available for use in environmental protection in Malawi. It will be demonstrated that most alternatives are not practically available for use, and so Malawian environmental protection is inevitably compelled to continue relying on the criminal sanction. In these circumstances Chapter 7 will explore the optimisation of the criminal sanction. This will be followed by conclusions and proposals for reform in Chapter 8.

## **1.6 Methodology**

This study is largely based on documentary research.

## CHAPTER TWO

### MALAWI: PROFILE OF A NATION IN TRAVAIL

#### 2.1 Introduction

Two reasons may be advanced for the inclusion of this chapter in the present study. In the first place, it seems that little is known in this country about Malawi and so the material in the present chapter will go a long way in providing an introduction. In the second place (and this is related to the first reason), some of the proposals that will be made towards the end of this study are likely to appear strange in the absence of prior knowledge of the historical background and social, economic, environmental and legal setup of Malawi. In essence this chapter will give a brief country profile which is relevant for present purposes. The narrative begins with the historical background, followed by a short report on the socio-economic status of the country. Thereafter the state of the environment will be briefly set out. The chapter will close with a discussion of the Malawi legal system

#### 2.2 Historical Background

Historians and anthropologists claim, apparently at the behest of archaeologists, that four or five racial groups live in Africa today and that the ancestors of these people (or at least of some of them) lived on the continent many years past.<sup>1</sup> It is claimed that early peoples in Malawi lived in three broad periods: the pre-Bantu period, the proto-Bantu period and the Bantu period. During the pre-Bantu period Malawi was inhabited by people who were larger than Bushmen in stature and more robust. They were hunters who adapted themselves to a woodland or forest environment. They depended heavily on vegetable foods. They used bows, arrows, traps and nets for hunting. Locally these people are known as Abathwa, Akafula or Amwandionerapati.

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<sup>1</sup> D D Phiri *History of Malawi: From Earliest Times to the Year 1915* Blantyre: Christian Literature Association In Malawi 2004 at 8 – 9.

In the proto-Bantu period non-Bantu speaking peoples known as the Pule, Lenda or Katanga migrated to Malawi from the north, apparently from the lands north of the Congo rain forest. They were tall and had well-built bodies. Their size and strength seem to have assisted them in fighting and displacing the pre-Bantu inhabitants. They lived in villages and were agriculturalists and pastoralists. They used big spears for hunting elephants. It is thought that they occupied Malawi in the third century A.D. and thereafter until they were absorbed by the Bantu speaking peoples of the Bantu period.

In the Bantu period Bantu speakers known as the Maravi moved from northern Katanga (located in modern Democratic Republic of the Congo) and settled in Malawi led by their chief Kalonga.<sup>2</sup> For various reasons the Maravi spread to central and southern Malawi under the leadership of tributary chiefs. For instance, Lundu led a band of followers and settled in southern Malawi: this group later came to be known as the Mang'anja.<sup>3</sup> The north of the country was occupied by other tribes of Bantu speakers including the Mzembe, Chiluba, Mwenekisindile, Mwenifumbo, Chilima and the 'Si clans'.<sup>4</sup> They were later joined by the Mbale, Ngulube and Ngonde. It is significant for present purposes that before the Ngonde Kingdom was established, some of the tribes living in northern Malawi were ruled politically by Simbowe who was an elephant hunter. Simbowe is reputed to have been keeping large stocks of ivory.<sup>5</sup> The migration of the aforementioned Bantu speakers took place between the 10<sup>th</sup> and 16<sup>th</sup> centuries A.D. In the 18<sup>th</sup> and 19<sup>th</sup> centuries A.D. more Bantu tribes came into Malawi. Of these note may be taken of five: first, the Yao who raided Malawi from Mozambique in search of slaves.

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<sup>2</sup> Bridglal Pachai *Malawi: The History of the Nation* London: Longman 1973 (hereinafter referred to as 'Pachai *History of the Nation*') at 1 – 5; Bridglal Pachai *Land and Politics in Malawi 1875 – 1975* Kingston, Ontario: Limestone Press 1978 (hereinafter referred to as 'Pachai *Land and Politics*') at 1- 3; A J Wilson *An Introduction to the History of Central Africa: Zambia, Malawi and Zimbabwe* 4ed Oxford: Oxford University Press 1985 at 13, 48 – 52.

<sup>3</sup> Bridglal Pachai 'The Zambezi Expedition 1858 – 1864: New Highways for Old' in Bridglal Pachai (ed) *Livingstone: Man of Africa* London: Longman 1973 (hereinafter referred to as 'Pachai *Livingstone: Man of Africa*') 29 at 35 – 37.

<sup>4</sup> Owen J M Kalinga *A History of the Ngonde Kingdom of Malawi* Amsterdam: Mouton 1985 at 32 – 41. 'Si clans' is a term coined by Kalinga: these are clans whose names start with 'Si'.

<sup>5</sup> Kalinga op cit at 42 – 46; Pachai *History of the Nation* op cit at 13.

Next, the Nguni (later called Ngoni) from South Africa who, it seems, were fleeing from the wars of Tshaka Zulu. Third, the Makololo, a small group which came with Dr David Livingstone and settled in southern Malawi (Lower Shire). Finally, the Sena and Lomwe who moved peacefully from Mozambique to Malawi.<sup>6</sup>

In some of these tribes there was a central political authority.<sup>7</sup> Its effectiveness is, however, debatable especially if we measure it by a modern yardstick. Some of the powerful chiefs could collect tribute from smaller chiefs under them. The tribute took various forms, for example, ivory.<sup>8</sup> It is worth noting that the collected tribute was generally used by the chief for his own purposes: there was, it seems, no practice of applying the tribute proceeds to environmentally friendly programmes. Pollution was not an issue in those days as populations were small and industrialization was unknown in this part of the universe. Land was plentiful and so land degradation did not have the same sting it has nowadays: land which was worn out was simply abandoned for a number of years under what is presently known as shifting cultivation. Other natural resources were also plenty. For instance, wildlife was in such abundance that one non-African is reported to have said that nowhere else in Africa had he seen 'such splendid herds of the larger animals as here'.<sup>9</sup> At that time exploitation of this wealth of wildlife was by traditional methods (nets, traps, etc) and so the numbers of animals killed were low. Consequently the absence of conscious preservation measures was ameliorated by the minimal harvesting. Things began to change when guns were introduced, initially by foreign traders in slaves and/or ivory from East Africa and other nations, and later by European colonizers. In the mid 19<sup>th</sup> century A.D. slave traders raided villages using guns and captured slaves. They also killed any of the larger animals they could find for food or

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<sup>6</sup>R B Boeder *Silent Majority: A History of the Lomwe in Malawi* Pretoria: Africa Institute of South Africa 1984 at 1.

<sup>7</sup> Cf J M Schoffeleers 'Livingstone and the Mang'anja Chiefs' in Pachai (ed) *Livingstone: Man of Africa* op cit 111 at 116 – 125.

<sup>8</sup> Elias C Mandala *Work and Control in a Peasant Economy: A History of the Lower Tchiri Valley in Malawi 1859 – 1960* Madison: University of Wisconsin Press 1990 at 16.

<sup>9</sup> Henry Drummond as quoted in Brian Morris *A Short History of Wildlife Conservation in Malawi* Edinburgh: University of Edinburgh 1996 at 1.



trade. When the European colonizers came they used guns openly to plunder the wildlife resources of the country. Attention will now focus on these colonizers.

As far back as the 15<sup>th</sup> and 16<sup>th</sup> centuries A.D. Portuguese citizens had been visiting the areas around the rivers Zambezi and Shire. They built ports such as Quelimane and Sena and later took control of the town of Tete. From these places they traded with Africans but made no significant effort to establish themselves in regions close to Lake Malawi and upper Shire. When Livingstone visited the Lake Malawi-Shire River Valley regions in the late 1850s and early 1860s, his reports about the region aroused interest in the area on the part of both the British and Portuguese governments. In the course of time a dispute arose. Portugal claimed sovereignty over the area but this was disputed by Britain at the behest of British missionaries, managers of the African Lakes Company and British nationals working in the area. Between 1860 and 1890 Portugal carried out a few military incursions into Malawi. In January 1890 Britain responded with an ultimatum, calling upon Portugal to stop these depredations or bear the consequences. Ultimately Portugal complied. On 14<sup>th</sup> May 1891 Britain proclaimed a protectorate over Malawi and appointed Harry Hamilton Johnston its first Commissioner and Consul General.<sup>10</sup>

One of the first issues which Johnston had to deal with was that of land settlement. More than a decade before the protectorate was proclaimed missionaries had entered Malawi and acquired tracts of land for use by their missions. The effect of these acquisitions was minimal when compared to the impact of land acquisitions by European individuals and companies from about 1884. The European individuals were mainly planters, traders, hunters and fortune-seekers. They entered into treaties with African chiefs for the alienation of land. Actually most of the so-called treaties were a product of misunderstanding. When the Europeans met the African chiefs looking for land on which to settle, the former usually gave the latter gifts such as plates, spoons, calico, guns, beads, money, etc. The chiefs interpreted these gifts as 'expressions of respect and

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<sup>10</sup> Phiri op cit at 200 – 214. On the publicity Livingstone gave to the Lake Malawi-Shire River Valley regions in the late 1850s and early 1860s, see some of his letters in Timothy Holmes (ed) *David Livingstone: Letters and Documents 1841 – 1872* London: Livingstone Museum & James Currey 1990 *passim*.

friendship' but the Europeans took them as 'payment for land'. In this way large tracts of land came into the hands of Europeans.<sup>11</sup> It appears that complications rose right from the beginning. The Johnston administration wondered whether the chiefs knew what they were doing in the treaties. The administration was also unclear as to what would happen in the event of a chief disputing the concessions claimed. These and other concerns caused Johnston to engage in a land settlement exercise commencing in 1892, which was guided by five principles:

- (i) the protection of the rights of Africans;
- (ii) the non-disturbance of existing villages and plantations;
- (iii) the availability of sufficient land for future expansion;
- (iv) the discouragement of land speculation; and
- (v) the securing of the rights of the British Crown in the interest of national development.<sup>12</sup>

Those who claimed to have obtained or purchased lands from chiefs were required to submit to Johnston proof of their claims. If sufficient proof was given, the administration would recognize that land acquisition by issuing a Certificate of Claim. The effect of the Certificate of Claim was to confer upon landholders freehold title to the land specified in the certificate. Of the 73 Certificates of Claim which were registered, only one was issued to an African and this African was Kumtaja of Blantyre.<sup>13</sup>

It is worth noting that in line with the second principle of Johnston's land settlement, most of the Certificates of Claim contained a non-disturbance clause which proscribed the disturbance or removal without the administration's consent of any native village or plantation existing on land granted under the certificate at the time of issuing the

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<sup>11</sup> Pachai *Land and Politics* op cit at 30 – 31; Phiri op cit at 233.

<sup>12</sup> Pachai *Land and Politics* op cit at 33 – 35.

<sup>13</sup> Pachai *Land and Politics* op cit at 35 – 47.

certificate.<sup>14</sup> This purported protection of African interests had little practical effect; it was a mere paper guarantee. One critique of the clause runs like this:

‘The history after 1894 of land tenure in Malawi or private estates is in effect a telling commentary on the weaknesses of the non-disturbance clause. Its intentions were good but its practical safeguards were almost non-existent. Whereas the estate holders’ rights were legally defined in terms of boundaries which were surveyed no such demarcation was required of existing villages and plantations. There was also no requirement calling for a record to be made of existing villages and plantations. No population statistics were noted for the various private estates in order to safeguard legal rights or to provide a base for comparisons when disputes arose over the interpretation of this clause in subsequent years. It would have been difficult to define village and plantation boundaries within the larger boundaries of the estates because of the traditional practice of shifting cultivation. But the absence of any recorded information, particularly census figures, played into the hands of the estate owners and made Johnston’s concern for the preservation of existing rights nothing more than a declaration of good intentions.’<sup>15</sup>

The consequence of this arrangement was the ill-treatment of Africans on European estates. The Africans were considered as being little more than slaves. They lived in congested and cramped circumstances on small pockets of the estate lands, which eventually led to land degradation. Further, they were divested of any right to engage in

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<sup>14</sup> Pachai *Land and Politics* op cit at 41 quotes the non-disturbance clause which reads as follows: ‘That no native village or plantation existing at the time of this certificate on the estate shall be disturbed or removed without the consent in writing of Her Majesty’s Commissioner and Consul-General; but when such consent shall have been given, the sites of such villages or plantations shall revert to the proprietor of the said estate. No natives can make other and new villages or plantations on the said estate without the prior consent of the proprietor.’

<sup>15</sup> Ibid. At page 45 Pachai states that the need to preserve the existing rights of Africans was impressed upon Johnston by Dr David Raffelle Scott, Superintendent of the Blantyre Mission, who had based his advice on ‘the Biblical incident when the kinsmen of Elimelech were reminded that they could only take their inheritance if they accepted with it Ruth, the widowed daughter-in-law of the dead man.’ This incident is recorded in Ruth 4:1 – 12.

meaningful development of their villages or plantations within the European estates. This problem of underdevelopment was exacerbated by the failure of the European settlers themselves to carry out the development of the land. The European settlers were able to retard the development of the country by clinging to enormous tracts of undeveloped land. The settlers were more interested in the speculative value of the land.<sup>16</sup> Thus selfish motives were at play. It is significant that this is not the only sphere in which the selfishness of the European settlers manifested itself. Selfishness also dominated the settler government's wildlife policy and law.

The attitude of the European settlers towards wildlife may be gleaned from the description of the country by one Scottish citizen towards the end of the 19<sup>th</sup> century as 'the finest hunting country in the world' filled with 'elephant, buffalo, eland, lion, leopard, zebra, hippopotamus, rhinoceros and endless species of antelope.'<sup>17</sup> When the British Government took the reins of power in 1891, it did not concern itself with the conservation of wildlife but rather reservation of wildlife for Europeans. The early game regulations (1897) were geared towards restricting the hunting of large game animals to Europeans only. This was achieved by the introduction of game licences which only the Europeans could afford. Different types of licences enabled the licensee to hunt different species of wildlife. All those who contravened these regulations were subjected to severe penalties. Thus Africans who hunted the specified animals without a licence found themselves being severely punished for enjoying a resource which they and their ancestors had accessed freely for centuries. The new game regulations of 1902 brought no joy to the Africans as the old order of things continued. Licences were still required and animals which could be shot on a particular licence were specified. The game ordinance of 1911 was not much different: apart from the usual licences, a special licence was introduced at a fee of 1 pound. Through this special licence Africans were allowed to kill animals threatening or damaging crops or molesting people. The 1911 ordinance gave way to the 1926 game ordinance. Though generally following the pattern of the earlier

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<sup>16</sup> Pachai *Land and Politics* op cit at 47.

<sup>17</sup> Henry Drummond as quoted in Morris op cit at 1.

ordinances, the 1926 game ordinance brought new restrictions. It proscribed traditional methods of hunting like the use of pits, dogs and nets. In this way the African populace was sentenced to perpetual malnutrition as their main means of acquiring meat protein was taken away. Most Africans could not afford a gun licence and so the alternative of using guns (just like the Europeans) was not available. Actually there was a deliberate policy of keeping rifles and ammunition in the hands of Europeans only as much as possible.<sup>18</sup>

From the early colonial period attempts were made to establish 'game reserves'. The 1897 game regulations established the Elephant Marsh and Lake Chilwa as game reserves. The 1902 game ordinance specified the Elephant Marsh and Central Angoniland as game reserves. In the 1911 game ordinance only the Central Angoniland was specified as game reserve; the other game reserves had been disestablished. The 1926 game ordinance made provision for four game reserves: Lengwe, Tangadzi, Chidyamphiri and Kasungu. Seven years later the 1926 ordinance was revised and this revision brought about two new game reserves: the Ngara and Nantundu reserves. Initially these reserves did not function in the way wildlife reserves normally function, as persons with hunting licences could hunt in them such that they could be called 'Europeans' hunting reserves'. It was only in the 1926 ordinance that real protection of wildlife commenced, for the ordinance articulated for the first time 'the need to conserve animals not as sporting game for an elite, but so that they might be seen and enjoyed by future generations.'<sup>19</sup>

In the period between 1933 and 1963 the colonial administration enacted a number of environmentally relevant pieces of legislation, for instance the Natural Resources Ordinances of 1946 and 1949, and the Land Use and Protection Ordinance of 1962. Most of these failed to achieve their objectives for several reasons. First, there was little enforcement as government did not have sufficient officers to carry out the various

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<sup>18</sup> Morris op cit at 1 – 24.

<sup>19</sup> Morris op cit at 18.

responsibilities. Second, the laws were not translated into local languages<sup>20</sup> and there was no environmental education amongst Africans who constituted the majority in the population. Third, there was growing opposition to colonial rule with its attendant vices. The political agitation that accompanied the struggle for independence made it impossible for environmental laws of the time to be implemented.

In 1964 Malawi attained independence from colonial rule. The new government of Dr Hastings Kamuzu Banda faced formidable challenges. The country was desperately in need of economic development. While the land in European hands had greatly been reduced, there was no easy route to the use of this land for development purposes. The wildlife reserves which the new government inherited from the colonial government needed attention. The other natural resources in the country needed to be protected from over-exploitation. In order to address all these challenges the government enacted several Acts of Parliament. Some of these are still in force and will be referred to in subsequent chapters. Others have been repealed and/or replaced.

In 1994 Malawi adopted a new Constitution. This Constitution is the supreme law of the land. All laws must conform to it. Any law that is inconsistent with it is invalid to the extent of the inconsistency.<sup>21</sup> It is significant that this Constitution expressly states, for the first time in Malawi's constitutional history, that policies and legislation be adopted and implemented with a view to achieving the responsible management of the environment in order to prevent environmental degradation, to provide a healthy living and working environment for the people of Malawi, and to accord full recognition to the

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<sup>20</sup> As early as 1915 a complaint to this effect was voiced by Rev Stephen M Kondecha who was the second African minister to be ordained by the Blantyre Mission (1911). Rev Kondecha complained (to the commission set up to inquire into the causes of the Chitembwe Rising) in the following words: 'The natives know very well that there is in the country a Legislative Council Meeting, but they do not know what laws they make. ... What stopped the law makers from publishing before the natives this Law, they don't know! Did they suggest that if they published before the natives the said Law perhaps there would be only few to fall into snare? They are begging that any Law they make which would have any connection with a native it must be translated into native tongue and then publish it': Pachai *Land and Politics* op cit at 100 – 102.

<sup>21</sup> Section 5 of the Constitution of the Republic of Malawi 1994.

rights of future generations.<sup>22</sup> In the years that came after 1994 a number of important statutes were passed, for example the flagship Environment Management Act 23 of 1996.

The aforementioned changes in government (from colonial rule to the Banda regime to the multiparty dispensation) did not necessarily translate into improvements in the economy or in environmental management. On the contrary it appears that environmental improvements generally followed international trends. The transfer of political power from the colonial masters to Dr Banda occurred at the beginning of real environmental concern in the world. Since environmentalism on a world scale was generally in its infancy, it seems that the Banda regime in its early years did not pay as much attention to environmental matters as it did in later years. The primary concern of this regime in the early years was apparently to economically develop the nation. In contrast when the multiparty dispensation came on stage, it coincided with heightened environmental concern in the world. So Malawi simply joined the global bandwagon of fine-tuning environmental laws. This was done at a time when Malawi was still struggling economically, with the result that noble environmental plans or programmes were crippled by the absence of a sound, supporting economic base. This point is easily understood when one considers the economic status of the nation. In the next segment the state of the economy will be examined briefly in the context of social needs and the discussion will lead to a short overview of the state of the environment.

### **2.3 Socioeconomic Status**

The United Nations Organization categorizes Malawi as a landlocked developing country.<sup>23</sup> It is evident from the categorization that Malawi is being compared to or contrasted with what are called 'developed' countries. The terms 'developing' country and 'developed' country are connected to development, the socio-economic reality that was once thought to be the arch-enemy of environmental conservation. For an inquiring

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<sup>22</sup> Section 13(d) of the Constitution of the Republic of Malawi 1994.

<sup>23</sup> <http://www.un.org/special-rep/ohrlls/ohrlls/allcountries.pdf> (Accessed 10 March 2005). The United Nations Organization also puts Malawi in the list of least developed countries.

mind to understand what a developing country or developed country is, there is need to know what development is all about. A number of expositors<sup>24</sup> have attempted to define development but, as is usual with definition, dissension or rather divergence of opinion has been loud and clear, making one author to conclude that development 'is a term that means many different things to many different people' and that it is 'so imprecise and vulgar that no doubt it should be stricken from any proper lexicon of technical terms.'<sup>25</sup> Be that as it may, a general understanding of the term may be gleaned from the various writings on the subject.

In this regard, development may be equated with modernization and may therefore signify 'the process of attaining the level of scientific and technological state of affairs of the most advanced country in the world.'<sup>26</sup> Thus the more advanced a country's state of science and technology in comparison to the most advanced nation in the world, the more

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<sup>24</sup> Three quotations will suffice for present purposes. Turid Sato and William E Smith 'The New development Paradigm: Organizing for Implementation' in Jo Marie Griesgraber and Bernhard G Gunter (eds) *Development: New Paradigms and Principles for the Twenty-first Century* London: Pluto Press 1996 89 at 92 report that in a development conference in 1993 development was described as 'an increase in one's capacity to pursue purposes, while taking into account the effects of achieving that purpose on others and on the whole community. The achievement of human purpose becomes the goal of development, the touchstone against which development is assessed.' David E Apter *Rethinking Development* London: Sage Publications 1987 at 16 describes development in the following terms: 'Here, *development* will refer to expanding choice. Choice refers to the range of articulated alternatives available to individuals and collectivities. Increasing choice was and remains the central developmental "project." Distributive in character, choice can be operationalized in terms of access through networks of roles, classes, and institutions. When organized and ranked functionally according to contributions to industrialization access, these networks connect choice to hierarchy. Organized in terms of functionally germane reciprocities of wealth and power, the degree of symmetry or asymmetry represents power in terms of distributive equity. How to control access to choice and promote the sharing of it according to approved rules and conditions of equity has been the special political concern of development.' C A O Van Nieuwenhuijze *Development: A Challenge To Whom?* The Hague: Mouton 1969 at 44 opines: 'the term development has an intriguing etymological ambivalence that reflects occasionally in some ambivalence of meaning in its current usage. There is an active meaning: development is action in order to make something develop. And there is a medial meaning: something goes through a developmental process.' At 46 he writes, 'Development is a variant of process (the common intelligible appearance of sociocultural reality) that involves perceptibility and an inherent moment of directedness.'

<sup>25</sup> Apter op cit at 7.

<sup>26</sup> Remigio E Agpalo 'Modernisation, Development, and Civilization: Reflections on the Prospects of Political Systems in the First, Second, and Third Worlds' in Kenneth E Bauzon (ed) *Development and Democratization in the Third World: Myths, Hopes, and Realities* Washington: Taylor and Francis 1992 81 at 85.



modern or developed it is. In this sense, three classes of countries have been identified. In the first place, there are First World countries which have the highest level of advancement in science and technology. Examples are the United States of America and the United Kingdom of Great Britain and Ireland. In the second place, there are Second World countries (for example South Africa and China) whose level of advancement in science and technology falls below that of First World countries but is higher than that of the last category of countries. In the third place, there are Third World countries which have the lowest level of advancement in science and technology (for instance Malawi and Zambia).<sup>27</sup>

It must be noted that this three-fold categorization is not universally used as some persons prefer a two-fold categorization: they divide the countries of the world into developed countries and developing countries. Developed countries are generally understood to be First World countries. Developing countries are generally understood as encompassing both Second World and Third World countries. Some scholars insist that since many Third World countries are not registering positive economic growth, calling them developing countries is a misnomer. They argue that alternative terms must be used for such countries. Among such alternative terms are Global South, the South, least developed countries, less developed countries, landlocked developing countries, poor countries, non-industrialized countries and underdeveloped countries.<sup>28</sup>

While the foregoing categorizations are useful to a point, what is of crucial importance for present purposes is the actual state of the economy and society in Malawi. It is the actual state of affairs that will assist in determining how far environmental reforms suggested by non-Third World scholars can go or how relevant such reforms are. Therefore the discussion will now turn to the actual state of affairs.

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<sup>27</sup> Cf Agpalo op cit at 84-6. Also see Sixto K Roxas 'Principles for Institutional Reform' in Griesgraber and Gunter op cit 1 at 26; S A Kuz'min *The Developing Countries: Employment and Capital Investment* New York: International Arts and Sciences Press 1969 at 1-7.

<sup>28</sup> [http://en.wikipedia.org/wiki/Developing\\_countries](http://en.wikipedia.org/wiki/Developing_countries) (Accessed 10 February 2005).

Malawi's economy is generally agriculture-based. Agriculture accounts for more than 90 per cent of its export earnings. It contributes about 45 per cent of gross domestic product (GDP). In the year 2003 Malawi's GDP (purchasing power parity) was estimated at US \$6.845 billion, in the year 2004 at US \$7.41 billion and in the year 2005 at US \$7.629 billion. In the year 2005 the GDP per capita (purchasing power parity) was estimated at US \$600, and the GDP real growth rate at 1 per cent. Major export crops include tobacco, tea, cotton, coffee, sugarcane and macadamia nuts. Tobacco takes up about 60 per cent of exports.<sup>29</sup>

The economy considerably depends on economic assistance from the International Monetary Fund (IMF), World Bank and individual donor agencies and nations. In the year 2005 its public debt stood at 208.6 per cent of GDP and its external debt was about US \$3.284 billion. In the year 2000 Malawi qualified for relief under the Highly Indebted Poor Countries (HIPC) Initiative but this was adversely affected in April 2004 by the cancellation of the country's Poverty Reduction and Growth Facility due to renewed fiscal indiscipline and slippages.<sup>30</sup>

Over 55 per cent of Malawi's population of about 12.3 million<sup>31</sup> is poor. These poor people live below the poverty line and they are unable to meet their basic needs. Most of the people do not have access to a balanced diet for the greater part of the year as food is not readily available. In many parts of the country food stocks do not last for the whole year (that is, from one harvest to the next). Starvation is not unheard of. Causes of the dire food shortage include 'selling food stuffs, as a coping mechanism to alleviate poverty, poor access to farm inputs such as fertilizer, crude farming methods such as the

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<sup>29</sup> [http://www.exxun.com/Malawi/e\\_ec.html](http://www.exxun.com/Malawi/e_ec.html) (Accessed 09 February 2005) and <http://web.worldbank.org> (Accessed 09 February 2005) and <http://www.cia.gov/cia/publications/factbook/geos/mi.html> (Accessed 14 December 2005 and 18 March 2006).

<sup>30</sup> *Ibid.*

<sup>31</sup> On [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/1068913.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1068913.stm) (Accessed 24 March 2005) it was stated that the estimated population below the poverty line was 65%. On <http://www.cia.gov/cia/publications/factbook/geos/mi.html> (Accessed 18 March 2006) the estimated population below the poverty line in 2004 was stated to have been 55%.

use of hoes, lack of technical advice on agriculture, overdependence on maize, and increasing population.<sup>32</sup> In a recent Integrated Household Survey<sup>33</sup> it was established that the per capita household food expenditure for the whole nation is about MWK3 030 which is about US \$23 at the current exchange rate (US \$1 = MWK133).<sup>34</sup> Poverty is worse in the rural areas, the per capita household food expenditure standing at MWK2 650 (US \$20), which may be compared to the urban areas' MWK5 035 (US \$38).<sup>35</sup>

Housing in rural areas is in an appalling state. While some houses are roofed with iron sheets, many houses have thatched roofs which are sometimes reinforced with plastic papers. It has been reported that in the rainy season community members sometimes 'spend nights standing in their houses because of leaking roofs'. Apparently this is so due to the scarcity of thatch and the non-availability of money to buy reinforcing plastics.<sup>36</sup>

Most of the rural households do not use electricity. Malawi produces 1.296 billion kWh of electricity annually,<sup>37</sup> which is principally used in urban areas. In rural areas energy is obtained from fuel wood. This has inevitably led to the disappearance of forests in some parts of the country.

From the foregoing it is evident that Malawi is in deep poverty. In the year 2000 it was estimated that it would take MWK17.3 billion (US \$130 million) to bridge the poverty

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<sup>32</sup> Garton Kamchedzera and Chikosa Banda 'We are People too: the Right to Development, the Quality of Rural Life, and the Performance of Legislative Duties during Malawi's First Five Years of Multiparty Politics' Faculty of Law, University of Malawi Research Dissemination Seminar Number Law/2001-2002/001.

<sup>33</sup> Published in the year 2000 by Malawi's National Statistical Office. The survey was apparently conducted between 1997 and 1998.

<sup>34</sup> <http://www.natbank.co.mw> (Accessed 10 March 2006).

<sup>35</sup> [http://www.nso.malawi.net/data\\_on\\_line/economics/ihs/ihs\\_summary\\_table.htm](http://www.nso.malawi.net/data_on_line/economics/ihs/ihs_summary_table.htm) (Accessed 11 March 2005).

<sup>36</sup> Kamchedzera and Banda op cit.

<sup>37</sup> [http://www.exxon.com/Malawi/e\\_ec.html](http://www.exxon.com/Malawi/e_ec.html) (Accessed 09 February 2005) and <http://www.cia.gov/cia/publications/factbook/geos/mi.html> (Accessed 18 March 2006).

gap in that year. This amount was considered to be the absolute minimum required to raise consumption levels of all the poor in the nation to above the poverty line.<sup>38</sup> Conditions have not improved since that year; actually, at the time of writing (March 2005) conditions seem to have worsened.<sup>39</sup>

It may be argued that Malawi is not beyond redemption from poverty. A look at the state of the environment, particularly the known natural resources, suggests that there are adequate resources which can be exploited to the benefit of the nation. It appears that in the past these natural resources were not put to full use. Exploitation of some of the known natural resources was minimal while efforts were not made to look for further resources. At present there is a general drive to discover new resources and exploit fully known resources. This drive is likely to lead to conflict between economic development and environmental concerns. While environmental optimists may hope that the powers that be will go the way of sustainable development, it is not farfetched to fear that all environmental caution may be thrown to the wind on at least two grounds. First, the demands of alleviating present poverty are so urgent that talk about environmental concerns may sound as sheer folly to policymakers and lawmakers. Secondly, it is not a secret that most of the developed world attained their economic development without taking into account environmental concerns. So enlightened policymakers and lawmakers may validly argue that Malawi should be allowed to attain economic development without being unduly hampered by environmental concerns. Only after attaining the economic development should the nation seriously concern itself with environmental matters. Countering these arguments is not easy but one way of addressing them is to put in place a legal framework that is cognizant of both Malawi's urgent need for economic development and Malawi's environmental needs.

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<sup>38</sup> [http://www.nso.malawi.net/data\\_on\\_line/economics/ihs/poverty\\_brief\\_2.pdf](http://www.nso.malawi.net/data_on_line/economics/ihs/poverty_brief_2.pdf) (Accessed 11 March 2005).

<sup>39</sup> Anonymous (Backbencher) 'Not an Inch Forward from Poverty' published in Nation Online and dated 31 October 2004: <http://www.nationmalawi.com> (Accessed 12 March 2005).

## 2.4 State of the Environment

Malawi's physiography consists of five zones: rift valley floor, rift valley scarp, hill, plain and high plateau. The differences in altitude influence the types of climate, soils and vegetation which occur in the country. The climate is generally tropical continental and it has two seasons: the rainy season (November to April) and the dry season (May to October). Annual rainfall is between 700mm and 1800mm. Temperatures (mean annual minimum and maximum) range from 12 to 32 degrees Celsius. Four main classes of soils have been identified. First, latosols which include ferruginous soils and ferrallitic soils. The ferruginous soils are found in some parts of the plain and are considered to be among the best soils suitable for agriculture. The ferrallitic soils are also found in the plains. Second, lithosols which occur in steep slopes. Soils on escarpment slopes and plateaux are heavily leached and have medium fertility. Soils in the hills are shallow. Generally hilly places operate as catchment areas and formal or informal sanctuaries of indigenous fauna and flora. Third, calcimorphic soils which include the alluvial soils of the plains near lakes and rivers. Alluvial soils of the rift valley are rich in nutrients and suitable for agriculture. Fourth, hydromorphic soils which occur in areas that are seasonally or permanently wet.<sup>40</sup>

With regard to vegetation, some of the major biotic communities are montane evergreen forest, montane grassland, semi-evergreen forest, mopane woodland, woodland savanna, and sand dune vegetation. Thirty eight per cent of Malawi's land area is forest – only three per cent of this is plantations; the rest is indigenous forest. The major forest species include brachystegia, julbernadia and isoberlinia which provide high quality firewood and poles for building. A significant portion of this vegetation falls under the protection of forest reserves, wildlife reserves and national parks.<sup>41</sup>

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<sup>40</sup> [http://www.gov.mw/enviro/action\\_plan/chap\\_3.html](http://www.gov.mw/enviro/action_plan/chap_3.html) (Accessed 06 January 2005).

<sup>41</sup> Ibid.

Water resources in Malawi are abundant. It has five lakes (Lakes Malawi, Malombe, Chilwa, Chiuta and Kazuni), the largest being Lake Malawi. These lakes are complemented by a network of rivers. The biggest river is Shire which empties its waters in the Zambezi. Quantification of the nation's groundwater resources has not yet been completed. However, two principal types of aquifers have been identified, one in the plateau area which is low yielding (1 to 2 litres per second) and the other in the lakeshore plains and lower Shire valley which is high yielding (up to 15 litres per second). Despite the apparent adequacy of these water resources, some rural areas experience domestic water shortages during the dry season. Water shortages also surface in urban areas during drought.<sup>42</sup>

Among other things, Malawi's water resources are used for hydro-power generation. Electricity contributes about 2.5 per cent of the energy consumed. Biomass is the main source of energy as it constitutes 93 per cent of total energy consumed. The remaining 4.5 per cent is taken up by petroleum products (3.5 per cent) and coal, ethanol, solar energy and other small sources (1 per cent). Electrical energy is generated locally, principally on the Shire River. Petroleum products are generally imported as there is no local production, with the notable exception of ethanol which is blended with petrol. Local ethanol production is about 18 million litres per year.<sup>43</sup> For some time now there has been a general feeling that crude oil is available underneath Lake Malawi: scientists are yet to verify this.<sup>44</sup>

Malawi has a wealth of mineral resources. When Malawi was under colonialism and the greater part of the Banda regime, it was thought that the country had few or no mineral resources. This was largely due to ignorance: no serious effort had been made to explore for minerals on a wide scale. The country was generally made out as an agricultural haven and a tourist attraction (mainly on account of the lake and fauna) with no potential

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid; [http://www.exxun.com/Malawi/e\\_ec.html](http://www.exxun.com/Malawi/e_ec.html) (Accessed 09 February 2005).

<sup>44</sup> <http://www.malawi.gov.mw/natres/geo/minerals.htm> (Accessed 14 March 2005).

for mineral extraction. In recent years scientific studies have been undertaken to determine the availability of minerals. These studies, though far from complete, have revealed the occurrence of a good number of minerals. The following minerals have potential for exploitation.

- Coal: 13 coalfields have been identified with speculated reserves of 800 million tons. Coal is used, inter alia, for raising steam in boilers, making cement and production of pharmaceuticals.
- Corundum: Thambani in southern Malawi has over 100 000 tons with extension prospects to over half a million tons. Corundum is used in the manufacture of refractory (furnace bricks) and abrasives (e.g. sand paper).
- Strontianite/monazite: Over 11 million tons of strontium have been proved at Kangankunde. About 11 600 tons of monazite have been delineated at Cape Maclear. Both these occurrences are in southern Malawi. Strontianite and monazite may be used to make permanent magnet generators of electricity, lenses for cameras and television tubes, and may also be used in the making of sugar and toothpaste. It is reported that 100 000 tons of strontianite/monazite may be produced per year for export to Japan, South Korea and Taiwan.
- Vermiculite: About 2.2 million tons have been proved around Mpatamanga in Mwanza (southern Malawi) with expansion possibilities. This vermiculite is of competitive quality on export markets and it is thought that 10 000 tons can be exported to the European market. Vermiculite is used for building insulation in temperate countries, for concrete and plaster aggregates and for soil conditioning in agriculture.
- Graphite: 2.7 million tons and 5 000 tons have been delineated at Katengeza in Dowa (central Malawi) and Lobi in Dedza (central Malawi) respectively. A much larger deposit has been identified in Lilongwe but it has not yet been evaluated. Graphite is useful for making lead pencils, refractories, foundries, carbon steel, graphite electrodes, batteries and brake linings.
- Phosphates: 2.3 million tons occur at Tundulu in Mulanje (southern Malawi). 8.76 million tons occur at Chingale in Zomba (southern Malawi). Phosphates

have also been identified in two other locations but these are yet to be delineated. Phosphates are useful in the production of fertilizers.

- Iron sulphide: Malingunde Hill in Lilongwe (central Malawi) has 10 million tons proven reserves. Chisepo in Dowa (central Malawi) seems to have large quantities of iron sulphide but there is need for further exploration. Iron sulphide is used in the manufacture of sulphuric acid and its by-product, iron ore, may be used in the steel industry.
- Ceramic clays: 15 million tons, 600 000 tons and 0.5 million tons have been delineated at Linthipe in Lilongwe (central Malawi), Nkhonde in Ntcheu (central Malawi) and Senzani in Balaka (southern Malawi) respectively. Ceramic clays may be used for the manufacture of cups and saucers, electric insulators on power lines, tiles and refractory furnace lining.
- Limestones: Widespread in southern Malawi and estimated at over 600 million tons. Limestones also occur at Uliwa, Mpata in Karonga (northern Malawi) and Nthalire in Chitipa (northern Malawi). Limestone is used in the production of cement, lime and dishwashing dust ('Vim').
- Bauxite: Mulanje mountain has over 25 million tons. Reserves have been estimated at 60 million tons. Bauxite is useful in the manufacture of refractories and aluminium sulphate for water purification.
- Uranium: Kayerekera in Karonga (northern Malawi) has a deposit of uranium found in karoo sandstones. Uranium is used in research, nuclear fuels and nuclear weapons.
- Heavy mineral sands: Over 112 million tons occur in all the three regions of the country. Those in Salima and Karonga (along Lake Malawi) have not been fully investigated.
- Silica (glass) sands: 1 million tons have been identified in low-lying moist areas ('dambos') in Mchinji (central Malawi) and 25 million tons at Lake Chiuta-Lake Chilwa Sand Bar (southern Malawi). These silica sands are suitable for making pale green glass and brown bottles.
- Kyanite: 300 000 tons reserves have been identified and 1 million tons inferred in Ntcheu (central Malawi). Kyanite is used as a refractory.



- Copper: 1 675 tons ore have been delineated at Namikunga Hill in Nsanje (southern Malawi).
- Gypsum: Over 450 000 tons have been proved in dambos of Dowa (central Malawi). Gypsum is used in the production of chalk and plaster of paris.
- Gemstones: Rubies and sapphires occur in Ntcheu (central Malawi), emeralds and aquamarines in Mzimba, Chitipa and Nkhata Bay (northern Malawi), and agates in Chikwawa (southern Malawi).
- Gold: Gold has been identified in Lisungwe valley in Mwanza (southern Malawi), at Dwangwa in Nkhotakota (central Malawi) and at Nathenje in Lilongwe (central Malawi). Further evaluation is required to identify the quantities and exploitability of the deposits.
- Hydrocarbons: Research carried out in 1985 showed that there is potential for the discovery of petroleum or gas especially in the northern part of Lake Malawi and the Shire Valley area in the south. Further research is required in order to have a clearer picture.
- Other: Nepheline syenites, talc and dimension stones occur in various parts of the country. These minerals have high potential for exploitation.<sup>45</sup>

Although the occurrence or availability of the foregoing minerals has been ascertained, there has been little exploitation of them. The current government (Mutharika administration) is encouraging investors and other stakeholders to participate in the development and exploitation of the country's resources for the ultimate benefit of the poor. So as development or exploitation of these resources gains momentum, the conflict between economic development and environmental concerns (as stated above) is likely to increase.

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<sup>45</sup> This summary of mineral resources is based on a document entitled 'Investment Opportunities: Mineral Resources of Malawi' published by Malawi's Geological Surveys Department in the Ministry of Natural Resources and Environmental Affairs. The document used here is that available on the internet: <http://www.malawi.gov.mw/natres/geo/minerals.htm> (Accessed 14 March 2005).

Malawi also has fish resources. There are between 500 and 1 000 species, six of which are endemic. Lake Malawi produces 40% to 60% of total fish landings and the main types of fish from this lake include *Oreochromis* spp (Chambo), *Baplochromis* spp (Kampango), *Clarias* spp (Mlamba), *Lebeo mesons* (Ntchila) and *Haplochromis* (Utaka). Annual fish yield in Lake Malawi is approximately 50 000 tons. Rivers collectively have some 30 species of fish. The potential sustainable catch for all lakes and rivers together is estimated to be in excess of 100 000 tons per year. Fish provides the people with 60% to 70% of animal protein. The fishing industry employs between 200 000 and 250 000 persons: this figure includes people working ashore as fish traders and in support industries such as boat-building and net-making. The fishing industry contributes about 4% of GDP.<sup>46</sup>

Apart from fish, Malawi has other wildlife resources. By early 1990s about 4 000 species of animals and 1 000 species of micro-organisms had been described. About 1 500 species of vertebrates, 163 species of mammals, 92 species of reptiles, 54 species of amphibians and 620 species of birds had been identified. Some of these wildlife species are protected in national parks and wildlife reserves. At present there are five national parks (Lengwe, Liwonde, Lake Malawi, Kasungu and Nyika Plateau) and four wildlife reserves (Majete, Mwabvi, Vwaza Marsh and Nkhotakota). Lake Malawi National Park is a United Nations world heritage site. It was established in 1980 and it is the first freshwater and underwater national park in Africa.<sup>47</sup>

This account of the state of the environment in Malawi will be incomplete if environmental problems are left out. Therefore it is intended that these problems be briefly stated in the next few paragraphs. Generally the following problems have been identified: soil erosion, deforestation, water resource degradation, threat to fish resources, threat to biodiversity, human habitat degradation, high population growth and air pollution.

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<sup>46</sup> [http://www.gov.mw/enviro/action\\_plan/chap\\_3.html](http://www.gov.mw/enviro/action_plan/chap_3.html) (Accessed 06 January 2005).

<sup>47</sup> Ibid.

In the early 1990s unconfirmed estimates were to the effect that soil loss ranged between 0 and 50 t/ha/year. The national average was put at 20 t/ha/year. The impact of soil loss on yield (mean yield loss) was said to be between 4% and 11%. Analysis revealed that the social cost of the soil erosion was about US \$165 million.<sup>48</sup> More recent figures are not easily accessible/available, but there is nothing to suggest that the situation has improved. The soil erosion is attributed to, among other things, inadequate information about the cost of degradation and the benefit of conservation leading to uncertainties about the effect of resource allocation decisions. It is also attributed to non-availability of credit for soil conservation investments.<sup>49</sup>

About a decade ago the rate of deforestation was 1.6 % per annum and the social cost of deforestation was estimated to be US \$55 million. It was established that deforestation was caused by agricultural expansion and wood fuel consumption in households, brick burning, tobacco leaf curing, fish curing and beer brewing. It was further established that harvest rates of wood fuel exceeded sustainable yields.<sup>50</sup>

Water resource degradation is slowly taking its toll. Factors responsible for the degradation include sedimentation, siltation, biological contamination and chemical contamination. Sedimentation occurs through the process of soil erosion: surface water run-off carries sediments which affect the quality of water downstream, rendering it unsuitable for human consumption. The heavy sediment loads in the principal rivers in turn bring about siltation of the rivers themselves and water reservoirs. Biological contamination of the water resources is caused by, inter alia, the non-availability of toilets and the siting of pit latrines near water sources. Chemical contamination arises when industrial waste is disposed of improperly especially in peri-urban areas; run-off of agrichemicals plays the same role in rural areas.<sup>51</sup>

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<sup>48</sup> [http://www.gov.mw/enviro/action\\_plan/chap\\_4.html](http://www.gov.mw/enviro/action_plan/chap_4.html) (Accessed 06 January 2005).

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

Fish resources are under threat. Habitats and spawning grounds have been lost due to sediment loads deposited in lakes by rivers. In one lake (Lake Malombe) over-fishing has led to a drastic drop in landings. It appears that factors contributing to over-fishing include increase in number of fishermen, fishing during 'off-season' periods (that is, breeding seasons) and inappropriate methods of fishing such as blocking rivers and setting fish traps at river outlets. Fish resources are also threatened by the increasing presence of water weeds (especially water hyacinth) and the introduction of non-indigenous fish. Other factors threatening fish resources include reduction in water flow, increasing sedimentation in rivers and water pollution from human, agricultural and industrial wastes.<sup>52</sup>

Threats to biodiversity may be considered on two levels: wild fauna and flora, and domesticated fauna and flora. Most terrestrial fauna is found in protected areas (national parks, wildlife reserves and forest reserves). Encroachment and poaching have been common. Government has had to change some boundaries of protected areas in order to free up land for cultivation or occupation by the growing population. Poaching is responsible for exterminating all the elephants from Majete wildlife reserve as reported in Chapter 1. Most of the wild flora is in protected areas. Some of those outside protected areas have a measure of legislative protection but policing of these is more difficult. Domesticated fauna (especially cattle and goats) cause overgrazing.<sup>53</sup> Domesticated flora (e.g. maize) generally give declining yields due to, inter alia, exhaustion of land.

Malawi faces severe human habitat degradation. Housing conditions are poor in many areas. In rural areas housing structures are reported to be in inhabitable condition. In urban areas low incomes and overcrowding have led to the creation of squatter settlements. The majority of the population uses pit latrines which may cause contamination of groundwater resources if poorly sited. Most households do not have

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

rubbish pits and urban areas do not have adequate solid waste disposal facilities.<sup>54</sup> Rural areas do not have landfill sites.

At present air pollution is not a big issue. Current sources of air pollution include quarrying and coal mining activities, uncontrolled bush fires, motor vehicle exhaust fumes, burning of old tyres and gaseous emissions from industries. Since it is expected that these activities (with the possible exception of bush fires and tyre burning) are likely to increase, air pollution could soon be a formidable environmental challenge.<sup>55</sup>

With regard to population growth, data from the 1977 census, 1987 census and 1998 census<sup>56</sup> suggests that Malawi's population grows by about 2 million in a period of 10 years. As of the last census (1998) the total fertility rate (children per woman) was at 6.5, which is lower than in previous censuses.<sup>57</sup> Overall these levels of population growth are unacceptable for Malawi as the current state of the economy cannot provide the swelling population with decent livelihoods. Further the resources of the nation (in their present undeveloped state) cannot sustain the increasing demand placed on them by growing numbers of people.

## **2.5 Malawi's Legal System**

### **2.5.1 General**

Black's Law Dictionary, 5<sup>th</sup> Edition, defines 'legal', among other things, as 'of or pertaining to law'. It defines 'system' as 'orderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> <http://www.nso.malawi.net> (Accessed 11 March 2005).

<sup>57</sup> In the 1977 census the total fertility rate was 7.6 whereas in the 1987 census the total fertility rate was 7.4: <http://www.nso.malawi.net> (Accessed 11 March 2005).

some rational principle'. On the basis of these definitions, we may define 'legal system' as an orderly combination or arrangement of parts or elements of or pertaining to the law.<sup>58</sup>

Joseph Raz has written on what is meant by a legal system, how a legal system can be identified, and what the criteria for the existence of a legal system are. His approach is generally analytical. He acknowledges that legal systems contain laws and that the law is 'institutionalized in that its application and modification are to a large extent performed or regulated by institutions.'<sup>59</sup> Meryll Dean, in her exposition of the Japanese legal system, discusses the laws applicable in that system and some institutions concerned with the law, for instance courts.<sup>60</sup> Similarly, Werksmans, in their analysis of the South African legal system, make reference to laws 'followed' in the country and the hierarchy and jurisdiction of the courts.<sup>61</sup> So apart from applicable laws, institutions are an important part of the legal system and some of these will be discussed below in the context of Malawi.

In Malawi the legal system is made up of three major institutions: the executive branch of government, the legislature and the judicature. The legislature and the executive have little to do with the daily machinations (workings) of the legal system. It is the judicature that is active in the day to day business of the legal system. The executive is responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of the Constitution.<sup>62</sup> The legislature is responsible for enacting laws. In doing so, it is

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<sup>58</sup> Cf Lawrence M Friedman *The Legal System: A Social Science Perspective* New York: Russell Sage Foundation 1975 at 5 – 6.

<sup>59</sup> Joseph Raz *The Concept of a Legal System: an Introduction to the Theory of Legal System* 2ed Oxford: Clarendon Press 1980 at 1 – 3.

<sup>60</sup> Meryll Dean *Japanese Legal System: Text and Materials* London: Cavendish 1997 *passim*.

<sup>61</sup> [http://www.werksmans.co.za/sabusguide/part\\_08.htm#40](http://www.werksmans.co.za/sabusguide/part_08.htm#40) (Accessed 30 March 2005). Werksmans is one of the biggest firms of attorneys in South Africa.

<sup>62</sup> Section 7 of the Constitution.

required to reflect in its deliberations the interests of all the people of Malawi and to further the values explicit or implicit in the Constitution.<sup>63</sup> The judicature has the responsibility of interpreting, protecting and enforcing the Constitution and all laws in accordance with the constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law. All courts and all persons presiding over those courts are required to exercise their functions, powers and duties independent of the influence and direction of any other person or authority. The judiciary has power over all matters of a judicial nature and has exclusive authority to decide whether an issue is within its competence.<sup>64</sup>

The presentation in this segment begins with a discussion of applicable laws and ends with the institutions. On the institutions it is intended to discuss the courts briefly and then mention the other institutions in passing.

### **2.5.2 Applicable laws**

The Malawi legal system has its roots in English law. Section 15 of the 1966 Constitution of the Republic of Malawi provided that the law to be applied in Malawi should be Acts of Parliament, the common law, doctrines of equity, customary law and statutes of general application<sup>65</sup> in force in England on 11<sup>th</sup> August 1902.<sup>66</sup> The 1994 Constitution of the Republic of Malawi ('the Constitution') has changed this significantly. The precise impact of this change is yet to be articulated by the courts. Section 199 of the Constitution declares that the Constitution is the supreme law of Malawi. Section 200 provides as follows:

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<sup>63</sup> Section 8 of the Constitution.

<sup>64</sup> Sections 9 and 103 (1) of the Constitution.

<sup>65</sup> It seems that in England there were/are some Acts of Parliament that applied/apply to specific areas while other Acts of Parliament applied/apply to the whole land. The latter are what are called statutes of general application.

<sup>66</sup> *Chongwe v Nkhonjera* [1991] 14 Malawi Law Reports 56.

‘Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day [that is, 18 May 1994]<sup>67</sup> shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution:

Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.’

Gracian Banda has expressed the view that section 200 continues the application of all pre-1994 laws except statutes of general application.<sup>68</sup> With due respect, this is not entirely correct. It is arguable from an examination of section 200 that the only laws the application of which has been continued are Acts of Parliament, common law and customary law in force on 18 May 1994. Statutes of general application have been excluded. Similarly doctrines of equity have been left out. It is submitted that the words ‘any laws currently in force’, which occur in the proviso to section 200, do not include laws that are not mentioned in the section: otherwise we will have the unsatisfactory result that the framers of the Constitution stipulated the continuation of some laws in the proviso and not in the main provision. It is an affront to common sense to think that the framers of the Constitution split the stipulation of the continuation of the laws into two: some in the main provision and others in the proviso. There is simply no reason or justification for that.

Further, it cannot be successfully argued that Acts of Parliament encompass statutes of general application as the latter were separately laid out in a similar provision of the 1902 British Central Africa Order in Council and in section 15 of the 1966 Constitution of the Republic of Malawi. Excluding them from the 1994 Constitution appears to have been deliberate. Perhaps the rationale was that after 30 years of independence, Malawi was

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<sup>67</sup> Section 215 of the Constitution states that in the Constitution ‘appointed day’ means 18<sup>th</sup> May 1994, the date when the Constitution came into operation.

<sup>68</sup>Gracian Z Banda ‘Report on Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews’ 1997 (unpublished) at 12.



mature enough to have or had had enough time to pass its own statutes. In any case Malawi loses little from this exclusion.

Difficulties arise when we consider the exclusion of doctrines of equity. By way of background, it must be recalled that equity is that portion of remedial justice in England which was, formerly, exclusively administered by a Court of Equity as contrasted from that portion which was, formerly, exclusively administered by a Court of Common Law.<sup>69</sup> In the 13<sup>th</sup> and 14<sup>th</sup> Centuries the Court of Equity was presided over by the Chancellor who was usually an ecclesiastic, generally a bishop, and learned in the civil and canon law. The Chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him. People chose to go to the Court of Equity in cases where the common law was inflexible and incapable of providing a remedy.<sup>70</sup> In the course of time a number of doctrines and devices were formulated from equity. Among these are equitable remedies, for instance the injunction and specific performance, which are among the most useful creations of equity. Therefore the exclusion of doctrines of equity from section 200 means that equitable remedies may no longer be applied in Malawi. This conclusion is inescapable since there is nothing in section 200 which suggests that doctrines of equity have been continued. Any attempt to interpret this section as including doctrines of equity will simply amount to rewriting the provision.

Doctrines of equity are crucial in the Malawi legal system. They are particularly important in environmental matters. Potential polluters may be restrained from going ahead with a polluting activity by an injunction. The non-applicability of doctrines of equity is consequently a major lacuna in the law which must be filled with urgency. In this connection, it is significant that legal practice in Malawi has apparently not realized

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<sup>69</sup> John S. James (ed), *Stroud's Judicial Dictionary of Words and Phrases*, 4ed., Vol 2, London: Sweet & Maxwell, 1972 at 928.

<sup>70</sup> Jill E. Martin (ed) *Hanbury & Martin's Modern Equity* 14<sup>th</sup> Edn., London: Sweet & Maxwell, 1993 at 5-7.

the non-applicability of doctrines of equity. To judges and lawyers it is business as usual: doctrines of equity have been used without objection in recent cases.<sup>71</sup>

Apart from the laws specified in section 200, there is room for the application of foreign case law and public international law. These two species of law may be applied during constitutional interpretation.<sup>72</sup> They are also applicable on a general level. The doctrine of precedent (which is part of the common law) enjoins courts to use foreign case law as persuasive authority.<sup>73</sup> Actually the general tendency in Malawian courts is to go for English decisions if local authority is lacking. Only when English decisions do not provide sufficient guidance do the courts look to other foreign jurisdictions. With regard to public international law, the Constitution declares that international agreements ratified by an Act of Parliament and international agreements entered into before 18 May 1994 and binding on Malawi, form part of the law of Malawi. In addition international custom may be applied.<sup>74</sup>

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<sup>71</sup> For instance in *Candlex Limited v Mark Katsonga Phiri* Civil Cause No. 713 of 2000 (Judgment of 11 May 2000); *Micahil Jama Ali t/a Putland Importing Company v Ali Dere and Others* Civil Cause No. 3684 of 2004 (Judgment of 10 January 2003) and *Jeffrey Chikumbanje v Indefund Limited* Civil Cause No. 340 of 2003 (Judgment of 28 April 2003).

<sup>72</sup> Section 11(2) of the Constitution provides: 'In interpreting the provisions of this Constitution a court of law shall ... where applicable, have regard to current norms of public international law and comparable foreign case law.'

<sup>73</sup> The Malawi Supreme Court of Appeal applied several foreign cases in *Attorney General v Malawi Congress Party and Others* MSCA Civil Appeal No. 22 of 1996 (commonly known as 'The Press Trust case'). A copy of this judgment was available on <http://www.judiciary.mw> when accessed on 24 March 2005. See also Thomas Trier Hansen 'Implementation of International Human Rights Standards through the National Courts in Malawi' [2002] 46 *Journal of African Law* 31 at 39.

<sup>74</sup> Sections 11(2)(c) and 211 of the Constitution. International agreements entered into before 18 May 1994 are applicable as long as Parliament has not provided otherwise and as long as the agreement has not lapsed. International custom is applicable as long as it is not inconsistent with the Constitution or an Act of Parliament. See Danwood Mzikenge Chirwa 'A Full Loaf is Better than Half: the Constitutional Protection of Economic, Social and Cultural Rights in Malawi' [2005] 49 *Journal of African Law* 207 at 233 – 234 for one view on the meaning of these clauses. Another view is provided by Redson E Kapindu and Justin M Kalima 'Malawi' in *Environmental Laws of Southern Africa* Juta (forthcoming).

### 2.5.3 Institutions of the law

#### 2.5.3.1 Courts

Malawi's judiciary is composed of the Supreme Court of Appeal, the High Court and Subordinate Courts.<sup>75</sup> Subordinate Courts may be divided into three: Industrial Relations Court, Magistrate Courts and Traditional or Local Courts.<sup>76</sup> There are five types of Magistrate Courts:

- Resident Magistrate Courts
- First Grade Magistrate Courts
- Second Grade Magistrate Courts
- Third Grade Magistrate Courts
- Fourth Grade Magistrate Courts

The Malawi Supreme Court of Appeal ("MSCA") is the highest appellate court in Malawi and it has jurisdiction to hear appeals from the High Court. MSCA may also hear appeals from other courts and tribunals as an Act of Parliament may prescribe.<sup>77</sup> MSCA is composed of the Chief Justice and three or more Justices of Appeal.<sup>78</sup> When determining any matter, other than a constitutional or an interim (i.e. not final) matter, the MSCA is composed of an uneven number of Justices of Appeal, not being less than three.<sup>79</sup>

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<sup>75</sup> See generally chapter IX of the Constitution; Courts Act cap 3:02 of the Laws of Malawi; Supreme Court of Appeal Act cap 3:01 of the Laws of Malawi.

<sup>76</sup> See generally Macnight R E Machika *The Malawi Legal System: An Introduction* Zomba: University of Malawi Law Department 1983 at 3 – 18.

<sup>77</sup> Section 104 (2) of the Constitution.

<sup>78</sup> Section 105 (1) of the Constitution; section 3 of the Supreme Court of Appeal Act.

<sup>79</sup> Section 105(2) of the Constitution.

The High Court of Malawi has unrestricted powers to hear and determine any civil or criminal proceedings under any law. The High Court may also review any action or decision of the Government, for conformity with the Constitution. In addition, the High Court may hear appeals from Subordinate Courts in both civil and criminal matters. A Subordinate Court may reserve for consideration by the High Court any question of law which arises during the trial of any civil action or matter and may give any judgment or decision subject to the opinion of the High Court and the High Court has power to determine every such question, with or without hearing argument.<sup>80</sup> The High Court is required to have three or more judges.<sup>81</sup> Every proceeding and all business arising out of the High Court is generally heard and disposed of by a single judge except in matters centering on the Constitution of the Republic of Malawi in which case a minimum of three judges is required.<sup>82</sup>

Subordinate Courts are courts which are subordinate to the High Court. As stated above, they are divided into three: Industrial Relations Court, Magistrate Courts and Traditional or Local Courts.

The Industrial Relations Court determines labour disputes and other issues relating to employment.<sup>83</sup> Its procedures are more “user – friendly” to people who have not been trained as lawyers. It is not really necessary to hire a lawyer to represent a person in this court.

Magistrate Courts have criminal and civil jurisdiction. Resident Magistrate Courts are the highest courts among the magistrate courts, followed by the First Grade Magistrate Courts. The jurisdiction of a magistrate court depends on its type. In respect of criminal jurisdiction, a Resident Magistrate Court, a First Grade Magistrate Court and a Second

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<sup>80</sup> Sections 108 and 110 (4) of the Constitution; sections 18, 19 and 21 of the Courts Act.

<sup>81</sup> Section 109 of the Constitution, section 5 of the Courts Act.

<sup>82</sup> Section 9 of the Courts Act.

<sup>83</sup> Section 110(2) of the Constitution.

Grade Magistrate Court may, with few exceptions, try any criminal offence.<sup>84</sup> The criminal offences which may be tried by Third Grade and Fourth Grade Magistrate Courts are specifically set out in the Second Schedule to the Criminal Procedure and Evidence Code.<sup>85</sup>

With the exception of the death penalty, a Magistrate Court may impose any sentence or order authorised by law.<sup>86</sup> Where, however, a fine or term of imprisonment is imposed, section 14 of the Criminal Procedure and Evidence Code prescribes the limits.

With regard to civil jurisdiction,<sup>87</sup> Magistrate Courts have power to deal with, try and determine any civil matter in which the amount in dispute or the value of the subject matter, does not exceed prescribed amounts. However, Magistrate Courts have no power to deal with, try or determine any civil matter:-

- (a) whenever the title to or ownership of land is in question;<sup>88</sup>
- (b) for an injunction;
- (c) for the cancellation or rectification (i.e. correction) of instruments;
- (d) in which the guardianship or custody of infants is in question;
- (e) in which the validity or dissolution of any marriage is in question;<sup>89</sup>
- (f) relating to the title to any right, duty or office; and
- (g) seeking any declaratory decree.

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<sup>84</sup> Section 13(1) of the Criminal Procedure and Evidence Code cap 8:01 of the Laws of Malawi. The exceptions are treason, concealment of treason, murder and manslaughter.

<sup>85</sup> Section 13(2) of the Criminal Procedure and Evidence Code.

<sup>86</sup> Section 12 of the Criminal Procedure and Evidence Code; David Newman, *Criminal Procedure and Evidence in Malawi Zomba*: University of Malawi Faculty of Law 1982 at 9.

<sup>87</sup> Section 39 of the Courts Act.

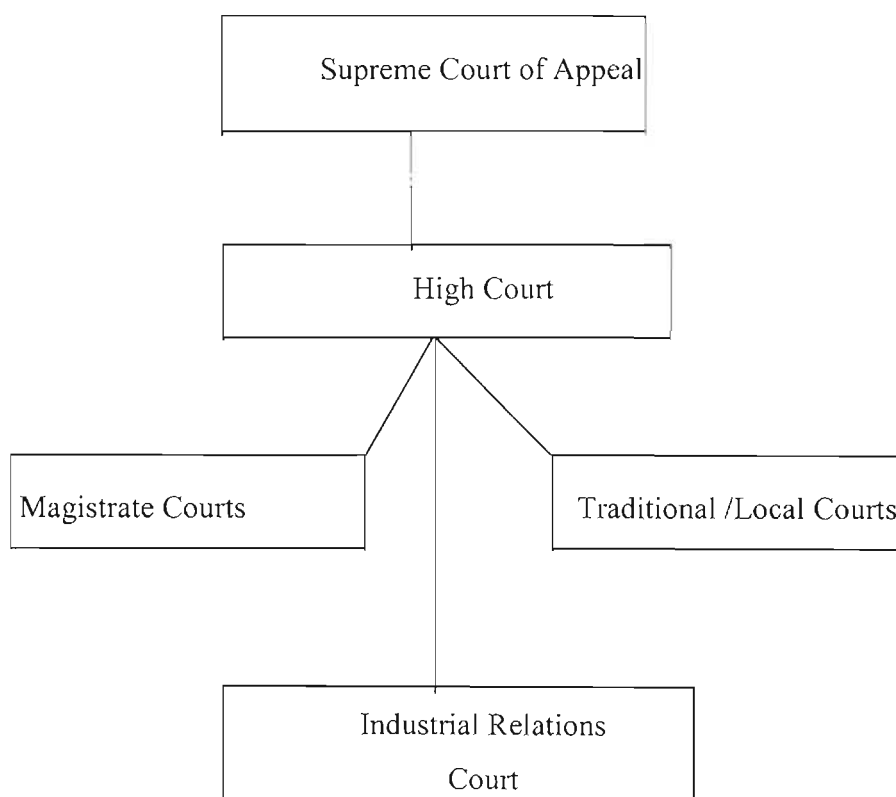
<sup>88</sup> Except as provided by section 156 of the Registered Land Act, cap 58:01 of the Laws of Malawi.

<sup>89</sup> Except as specifically provided in any written law for the time being in force.

On Traditional or Local Courts, the Constitution states that Parliament may make provision for Traditional or Local Courts presided over by lay persons or chiefs. The powers of these courts are limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.<sup>90</sup> At the time of writing (October 2005) these Traditional or Local Courts had not been established.

The following diagram shows the hierarchy of the Courts in Malawi.

*Hierarchy of Courts in Malawi*



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<sup>90</sup> Section 110(3) of the Constitution.

### 2.5.3.2 Other Institutions

Institutions which have potential for use in environmental protection include the Malawi Human Rights Commission, the Malawi Law Commission, the Office of the Attorney General and the Office of the Director of Public Prosecutions. The primary purpose of the Human Rights Commission is the protection and investigation of violations of the rights accorded by the Constitution or any other law.<sup>91</sup> This arguably includes the environmental right provided for in the Environment Management Act 1996. The Human Rights Commission may act upon the applications of an individual or class of persons. It has such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under the Constitution.<sup>92</sup>

The Law Commission is mandated to review and make recommendations relating to the repeal and amendment of laws.<sup>93</sup> This commission is therefore likely to be at the centre of amending or formulating new environmental legislation. The Attorney General is the principal legal adviser to the Government. The office of Attorney General may either be the office of a minister or may be a public office.<sup>94</sup> An environmentally sensitive Attorney General is likely to give independent and sounder advice affecting the environment.

The Director of Public Prosecutions (“DPP”) is a public officer. The DPP has power in any criminal case in which he considers it desirable so to do:

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

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<sup>91</sup> Section 129 of the Constitution.

<sup>92</sup> Section 130 of the Constitution.

<sup>93</sup> Section 132 of the Constitution.

<sup>94</sup> Section 98 of the Constitution.

- (b) to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or any other person in authority.

Thus the DPP is responsible for prosecuting environmental offenders. Where the DPP does the things specified in paragraphs (b) and (c) above, he must provide reasons for his action to the Legal Affairs Committee of Parliament within ten days. The DPP may not discontinue proceedings with respect to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person.<sup>95</sup> The DPP is assisted in his work mostly by police prosecutors.

## 2.6 Observations

In many respects the history of Malawi has followed the general pattern of the national histories of countries in the region in that Bantu speakers from other parts of Africa moved to the country followed by Europeans and people from other continents. With relatively small populations of the Bantu in old Malawi environmental problems were not pronounced. The arrival of foreigners brought new ways of exploiting resources and new problems: the colonial eco-drama staged elsewhere was performed with little change.<sup>96</sup> Increasing populations began to strain the environment and they continue to strain it.

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<sup>95</sup> Section 99 of the Constitution. See also section 42(2)(f)(viii) of the Constitution.

<sup>96</sup> Ravi Rajan 'The Colonial Eco-drama: Resonant Themes in the Environmental History of Southern Africa and South Asia' in Stephen Dovers, Ruth Edgecombe and Bill Guest (eds) *South Africa's Environmental History: Cases and Comparisons* Cape Town: David Philip 2002 at 259 - 260 reports that Timothy Weiskel has suggested that imperialism engenders a particular type of ecological drama involving five characteristic acts. The opening act 'depicts the acute social and ecological disruption caused by European colonisers, their plant and animal species, and their biotic regimes, in the immediate aftermath of colonial intrusion. The second act involves the colonisers occupying previously under-occupied eco-niches and then expanding into and exploiting others. Act Three portrays the immediate impact of such expansions on local peoples: the disruption of colonised societies, their eco-niches and biotic regimes; and the many acts of resistance by colonised societies against their forced ecological dislocation. The fourth act is about the processes of re-configuration following the radical disruption caused by the colonial encounter, and depicts the colonising populations moving into "neo-niches" such as the "virgin lands" of the white settler agriculturists. Finally, the last act explores the mature "predator-prey relationships within the colonial ecosystem" established during the earlier stages. These involve the creation of new kinds of relations, sometimes symbiotic and enduring, between indigenous and intrusive populations.'



The minimal exploitation of natural resources has been a blessing in disguise as the pollution from massive exploitation has not been encountered, suggesting that perhaps there should not be massive exploitation of natural resources (especially those in environmentally sensitive areas such as lakes) for the sake of environmental protection. This, however, may not be accepted by the majority of the citizenry as Malawi is desperately in need of these resources for economic development purposes. The country may actually be viewed as being in a birthing process: trying with all its energy to bring forth a middle-income economy that at least meets the needs of its people. Therefore conflict between economic development and environmental concerns is inevitable.<sup>97</sup> Against this backdrop there is hope: Malawi has a modern legal system which can be used to mediate the perceived conflict. Malawi can use its legal system in the campaign against environmental degradation and in encouraging only the kind of economic development which is sustainable. To this end, it is necessary to fashion the elements of the legal system in such a way that they take into account the economic and social state of the country. This is one of the central concerns in the present study especially with reference to applicable laws. In subsequent chapters proposals shall be made to alter or amend some laws so as to make them workable or more effective in the current socioeconomic atmosphere. This endeavour commences in the next chapter with a discussion of the criminal sanction.

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<sup>97</sup> It is commendable that in Malawi's National Long-Term Development Perspective (commonly known as 'Malawi Vision 2020') environmental concerns were explicitly included. The Malawi Vision 2020 statement reads, 'By the year 2020, Malawi as a God-fearing nation will be secure, democratically mature, environmentally sustainable, self reliant with equal opportunities for and active participation by all, having social services, vibrant cultural and religious values and being a technologically driven middle-income economy': <http://www.sdn.org.mw/~csaias/ettah/vision-2020/> (Accessed 01 April 2005).

# CHAPTER THREE

## THE CRIMINAL SANCTION: PURPOSE AND CONSTITUTIONAL FRAMEWORK

### 3.1 Introduction

Elements of the criminal sanction were imposed on wrongdoers by at least some of the tribes that lived in pre-colonial Malawi. A person who committed a wrong – which today may be classified as criminal – was generally required to pay a fine in kind. There is no record of imprisonment of wrongdoers before the arrival of Europeans.<sup>1</sup> It must be noted that the criminal process followed was markedly different from the criminal process of today. For instance, one authority remarks that the court proceedings were so open that any passerby had the liberty to cross-examine the witnesses.<sup>2</sup>

After the advent of the Europeans, particularly the British, the process and substance of the criminal sanction took a form similar to that of modern times. When Malawi (then known as Nyasaland) was declared a British protectorate in 1891, the Queen of England appointed Henry Hamilton Johnston first Commissioner and Consul General. In his appointment letter Johnston was mandated, inter alia, ‘to supervise the organisation of justice as regards foreigners.’<sup>3</sup> Courts were established and trials were conducted at first by district commissioners.<sup>4</sup> These trials were apparently modelled on the British system. In 1902 the

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<sup>1</sup> Gracian Z Banda ‘Report on Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews’ 1997 (unpublished) at 8; Owen J M Kalinga *A History of the Ngonde Kingdom of Malawi* Amsterdam: Mouton 1985 *passim*; R B Boeder *Silent Majority: A History of the Lomwe in Malawi* Pretoria: Africa Institute of South Africa 1984 *passim*; Elias C Mandala *Work and Control in a Peasant Economy: A History of the Lower Tchiri Valley in Malawi 1859 – 1960* Madison: University of Wisconsin Press 1990 *passim*.

<sup>2</sup> Banda op cit at 8.

<sup>3</sup> D D Phiri *History of Malawi: From Earliest Times to the Year 1915* Blantyre: Christian Literature Association in Malawi 2004 at 213.

<sup>4</sup> Phiri op cit at 230 – 231 reports that a white man known as Ziehl stole Africans’ cattle. The cattle was recovered and Ziehl was put on trial. He was, inter alia, fined fifty pounds. The trial was presided over by C A Cardew who at that time was district commissioner for Nkhata Bay.

British government enacted the British Central Africa Order in Council which extended to Malawi the application of principles of common law, doctrines of equity and statutes of general application in force in England before 11<sup>th</sup> August 1902. Customary law was retained as long as it was not contrary to justice, morality and good governance.<sup>5</sup> The effect of this was that English law essentially supplanted customary law. The criminal sanction as understood in England at that time was applied to Malawi.<sup>6</sup> It is significant that despite the numerous laws that have been passed since 1902 the nature of the criminal sanction in Malawi has not departed from the English lead. With this background in mind, the discussion will now focus on the purpose of the criminal sanction in environmental protection in Malawi followed by the constitutional framework of the criminal sanction.

### 3.2 Purpose of the Criminal Sanction in Environmental Protection

In Malawi tribal society the criminal sanction appeared to have two purposes: reconciliation of the parties to a dispute and the disciplining of a recalcitrant party.<sup>7</sup> At present the criminal sanction may be taken as having two general purposes: retributive purposes and utilitarian purposes.<sup>8</sup> The discussion will dwell first on retribution.

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<sup>5</sup> Banda op cit at 9. Emmet V Mittlebeeler *African Custom and Western Law: the Development of the Rhodesian Criminal Law for Africans* London: Holmes & Meier 1976 at 9 makes the following observation: 'In British Africa, policy varied from one territory to another, but in general the tendency was to disturb, at least overtly, African custom as little as possible. The standard procedure was to recognize custom, except insofar as it ran counter to what the British considered general principles of right and wrong. In Kenya, the phrase embodying the criterion of recognition was "not repugnant to justice and morality," while in Southern Rhodesia it was "not repugnant to natural justice and morality".'

<sup>6</sup> Phiri op cit at 271 – 273 records court proceedings (in the form of an inquest) on the death of John Chilembwe. The inquest was held on 4 February 1915 by Colin Grant, the Resident Magistrate at Mulanje. Some of Chilembwe's men were captured and put on trial. They were sentenced to death and shot. The most serious trials were conducted by High Court judge, Robert William Lyall Grant.

<sup>7</sup> Banda op cit at 8.

<sup>8</sup> J Burchell and J Milton *Principles of Criminal Law* Cape Town: Juta 1991 at 42 - 53. C R Snyman *Criminal Law* 3ed Cape Town: Butterworth 1995 at 17 – 19 refers to the purposes of the criminal sanction as 'theories of punishment'. He classifies these theories into three. First, the absolute theory; second, the relative theory; and third, the unitary theory. There is only one absolute theory which is retribution. The relative theory is divided into the preventive, deterrent and reformatory theories. The deterrent theory is further divided into individual deterrence and general deterrence. The unitary theory seeks to reconcile or unify all the other theories. J C Smith and B Hogan *Criminal Law* 6ed London: Butterworths 1988 at 3 – 16 identify retribution, protection of the public and reform of the offender as purposes of the criminal sanction. They include deterrence under the protection of the public.

### 3.2.1 Retributivism

Retributivism expresses the idea that those who have caused harm should themselves suffer harm. Justification for this is fourfold: first, the appeasement of society or revenge. It is said that the commission of a crime causes indignation on the part of the wronged person and the community generally. When the offender is punished for his crime the indignation is cancelled out or wiped clean.<sup>9</sup> Second, retribution is justified on the ground of expiation or atonement: the idea is that a person who has harmed society deserves to be punished. After suffering harm (in the punishment) proportionate to that which he inflicted, his debt to society is paid. His crime is said to have ‘expiated’.<sup>10</sup> Third, it is claimed that retribution may be justified on the basis of denunciation, that is, the public’s condemnation of the crime. Denning LJ once said as much:

‘The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. ...The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime...’<sup>11</sup>

Fourth, it is argued that retribution is necessary on the premise of just deserts: the offender simply gets what he deserves. Writers agree that inherent in this justification is the notion of proportionality.<sup>12</sup> Punishment must vary with moral blameworthiness: thus the maximum sentence for an offence is reserved for the worst case. Further, punishment must be proportionate to the harm done. Consequently the sentence for an attempt to commit a crime is generally less severe than the sentence for the same crime when completed.<sup>13</sup> Malawi’s

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<sup>9</sup> J Burchell and J Milton *Criminal Law* 2ed Kenwyn: Juta 1997 at 39; Cf Snyman op cit at 19. The validity of this justification was recognised by Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 235 – 236.

<sup>10</sup> Burchell and Milton op cit at 39 – 40.

<sup>11</sup> Quoted by Smith and Hogan op cit at 7.

<sup>12</sup> Smith and Hogan op cit at 4 – 11; Burchell and Milton op cit at 41 – 42; Snyman op cit at 19 – 20.

<sup>13</sup> Smith and Hogan op cit at 4 – 10.

Penal Code,<sup>14</sup> the principal criminal statute, takes cognizance of this principle. Section 402 provides:

‘Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for a term of fourteen years or upwards, with or without other punishment, shall be guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for seven years.’

Retributivism has been criticized at length by theorists. It is reported that philosophers in the first three decades of the 20<sup>th</sup> century were convinced of the ‘poverty of retributive justice’. ‘They found it isolating and asocial, practically useless, backward looking and cruel, and they saw as the core weakness the idea of an ideal moral relationship of requital between the individual and the State, that is, the theory’s abstract individualism.’<sup>15</sup>

In the environmental context retribution has a role to play although aspects of it do not assist much. If those who have caused environmental harm are punished for the harm done in order to appease society or mete out revenge on behalf of the society, the interests of environmental law are not met. What environmental law seeks to achieve is environmental protection. Mere appeasement or revenge, it is submitted, does not contribute to environmental protection. Similarly atonement or expiation does not provide a sound basis for the criminal sanction in environmental protection. With regard to denunciation, it may be argued that many environmental crimes lack moral turpitude; as such they may not attract condemnation or disapproval by the society.<sup>16</sup> It follows that for such environmental crimes denunciation may not justify retribution as a purpose of the criminal sanction.

Perhaps the most acceptable justification for retribution in environmental crimes is just deserts, especially the notion of proportionality. On the one hand, a person who commits a serious environmental crime must be punished severely. On the other hand, a person who

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<sup>14</sup> Cap 7:01 of the Laws of Malawi.

<sup>15</sup> A Norrie *Punishment, Responsibility and Justice: a Relational Critique* Oxford: Oxford University Press 2000 at 4. For further criticisms of retribution see Snyman op cit at 20 – 21.

<sup>16</sup> Cf Michael Anthony Kidd ‘The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa’ unpublished PhD Thesis University of Natal (2002) at 17 – 18.

transgresses a minor environmental regulation ought to be punished less severely. Further, an attempt to commit an environmental crime must be visited by a more lenient sentence than the commission of the full offence. It may therefore be concluded that retribution provides a theoretical framework for environmental crime to the extent that it ensures proportionality between punishment and moral blameworthiness and between punishment and the harm done.

### 3.2.2 Utilitarianism

Utilitarian theories of punishment contend that punishment has a social benefit for society and is thus justified by the advantage it brings to the social order. Four theories may be isolated. First, prevention or incapacitation: if the perpetrator of a crime is subjected to punishment, for instance imprisonment, it will (with few exceptions) be impossible for him to commit further crimes. Thus an English judge, after convicting a number of youths of crimes of violence and sentencing them to four years' imprisonment each, said:

'Nothing is more effective to stamp out crime than a long term of imprisonment. That may sound harsh, but we have to remember the twelve thousand or so of ordinary people who last year were the victims of crimes of violence. They, and their like, must be protected. And in these circumstances it does not wring my withers at all to be told how awful it is that a comparatively young man should be shut up for a long time.'<sup>17</sup>

In the same vein Malawi's Justice Dunstain Mwaungulu has commented that the criminal law is 'publicly enforced with the purpose of preventing crime. There is a public utility and public good in preventing crime...'<sup>18</sup>

This theory has been faulted on the ground, inter alia, that its application may result in the passing of sentences which are too severe, regardless of applicable circumstances, as long as the criminal can be kept away from committing further crimes.<sup>19</sup>

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<sup>17</sup> Per Salmon J [1960] CLJ 45 at 48, quoted in Smith and Hogan op cit at 13.

<sup>18</sup> *The Republic v Shabir Suleman and Aslam Osman* Criminal Case Number 144 of 2003 (High Court - unreported). A copy of the case was available on <http://www.judiciary.mw> when this website was accessed in December 2004.

<sup>19</sup> For further criticisms of the theory see Snyman op cit at 21.

In the second place, punishment may achieve individual or general deterrence. It has actually been contended that judges believe in the value of punishment as a deterrent to both the person sentenced and to other members in the community.<sup>20</sup> Individual deterrence entails teaching an individual convict a lesson that will persuade him to desist from committing crimes in future. It may be noted, however, that the basis of individual deterrence is undermined by the prevalence of recidivism (the repeated commission of crimes).<sup>21</sup> With regard to general deterrence, Rabie and Strauss state:

‘The idea [behind general deterrence] is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or of the imposition of punishment on others, which should cause man to think twice before he would commit a crime. This restraint is referred to as psychological coercion.’<sup>22</sup>

The learned authors continue to say that the success of general deterrence depends largely on ‘effective promulgation of the threat of punishment and of punishment which is in fact imposed, because in this respect it is publicity and not punishment which deters.’<sup>23</sup> It may be added that the success of general deterrence depends on the following complementary factors: the likelihood of being apprehended, being successfully prosecuted, being convicted and being sentenced to a significant penalty.<sup>24</sup>

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<sup>20</sup> Smith and Hogan *op cit* at 12.

<sup>21</sup> Snyman *op cit* at 21 – 22.

<sup>22</sup> M A Rabie and S A Strauss *Punishment: An Introduction to Principles* 3ed Johannesburg: Lex Patria 1981 at 92.

<sup>23</sup> *Ibid.* Quotation marks within the original quotation have been left out.

<sup>24</sup> C Reasons ‘Crimes Against the Environment: Some Theoretical and Practical Concerns’ (1991) 34 *Criminal Law Quarterly* 86 at 96 – 97 writes: ‘Unlike “crimes of passion”, which are emotive, situational and difficult to deter through punishment, white-collar and corporate crime (including polluting) is often intentional, rational, calculated, premeditated and a “normal” part of doing business. This type of “instrumental offence” is potentially more deterrable based upon the rational-person model of behaviour underlying penal sanctions. Studies of deterrence note the significance of the likelihood of apprehension, prosecution, conviction and significant penalty as *all* important facets of deterrence on both a “specific” and “general” level. That is, the law may have heavy potential penalties, but there may be little enforcement, use of prosecution, and relatively light penalties.’ Thus the listed factors are also necessary for the success of individual deterrence. Hans Zeisel *The Limits of Law Enforcement* Chicago: University of Chicago Press 1982 at 57 illustrates the power of the criminal law to deter through, *inter alia*, an empirical example. He writes that ‘a revealing involuntary experiment occurred in 1944, when the entire Danish police force was arrested by the German invaders. At that time, the number of robberies

Just like the other theories, general deterrence has been criticized. It has been forcefully argued that man does not always weigh the advantages and disadvantages of a prospective act before he acts, especially where the offence is committed in the heat of the moment. Further, there is no empirical proof of the theory's assumption that a reasonable person would be deterred from committing criminal offences by the punishment imposed on others.<sup>25</sup> This last criticism, it is submitted, does not have much merit as not everything can be proved empirically.

The third utilitarian theory is reform of the offender: it is said that punishment may lead to the reform of the offender. Some writers believe that a person engages in criminal conduct because of defects in his personality or psychological factors in his background. So the aim of punishment is alleged to be to reform the offending person so that at the end of it he can become a changed person, a law-abiding citizen. Thus the theory focuses its attention on the person of the offender.<sup>26</sup> While courts may take into account the circumstances of the offender when sentencing,<sup>27</sup> it seems that they seldom expressly pass sentences with rehabilitation of the offender in mind.<sup>28</sup> It appears that the predominant approach of the courts is to fix the punishment as justice demands and then let the penologist undertake the rehabilitation of the offender while the offender is undergoing the punishment.<sup>29</sup>

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in Copenhagen, normally around ten per month in that law-abiding country, quickly rose to over one hundred per month and kept rising.'

<sup>25</sup> Snyman op cit at 22; Smith and Hogan op cit at 12.

<sup>26</sup> Snyman op cit at 23.

<sup>27</sup> In *Republic v Lloyd Amani* Confirmation Case Number 144 of 2003 the Court said: 'Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.' The same sentiments were expressed in *Republic v Peter Chapendeka and Others* Confirmation Case Number 451 of 2000; *Republic v Fred Chabwera* Confirmation Case Number 728 of 2002; *Republic v Ganizani Banda* Confirmation Case Number 884 of 2002; and *Chimwemwe Gulumba v Republic* Miscellaneous Criminal Application Number 51 of 2003. All these are unreported High Court cases but copies were available on <http://www.judiciary.mw> when accessed in January 2005.

<sup>28</sup> The most likely time when the court takes into account the rehabilitation of offenders in sentencing is when dealing with juvenile offenders: see the Probation of Offenders Act cap 9:01 of the Laws of Malawi.

<sup>29</sup> Patrick Devlin (aka Lord Devlin) *The Judge* Oxford: Oxford University Press 1979 at 29 – 30 writes: 'There is at first sight an attraction about dovetailing the penologist into a judge, but consideration shows the attraction to be superficial. A lawyer is not by nature a social worker. The two characters have not the same sort of aptitudes; they have a different set of talents and a different framework for their ideas. The lawyer's working hypothesis is that all men are reasonable; but the social worker rarely finds that the individual with whom he has to deal has



The objective of reforming the offender may lead to the imposition of long periods of employment so that the offender is adequately rehabilitated. Further, it seems that ‘the rehabilitation of the offender is more often than not an ideal rather than a reality.’<sup>30</sup>

Finally, Burchell and Milton make reference to the utilitarian theories of reinforcement. They write that ‘the consistent punishment of offenders creates and reinforces in every citizen a respect for the criminal law and inhibits contraventions of it.’ Thus, the reinforcement theory takes punishment as an educational medium. Punishment assists in the formation and strengthening of the society’s moral code and in so doing brings about conscious and unconscious inhibitions against engaging in criminal conduct: it induces in the citizen ‘an attitude of obedience to the prohibitions of the criminal law.’<sup>31</sup>

It may be noted that the reinforcement theory is similar in many respects to the deterrence theory. It also has aspects of denunciation.<sup>32</sup> Accordingly, some of the criticisms of deterrence and denunciation may be levelled against reinforcement.

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just stepped off the Clapham omnibus. I am not saying that judges do not have compassion, but that the talents that led them to the vocation of the law are not the sort needed for treating the individual offender. ... When the period has been fixed as justice demands, the law authorizes and indeed encourages the penologist to use it for the work of reformation. It will allow some flexibility for this purpose, being willing within limits to make the sentence longer or shorter to accommodate different forms of treatment. But only within limits. The sentence must not be longer than is justified by the gravity of the crime and must not fall below the least that retribution demands. This is the lawyer’s objective. The penologist’s objective is to send the prisoner back into the world changed for the better. He may not always hope for complete reformation, but at least he does not want him to leave while there is still a reasonable chance that further treatment may improve his prospects. When these objectives clash, it is the just sentence that must prevail, notwithstanding that it deprives the expert of the time he wants. To hold otherwise would be to move on to the route, though doubtless with many stages still to go, which leads as in the U.S.S.R. to mental institutions for the dissident.’

<sup>30</sup> Snyman op cit at 24.

<sup>31</sup> Burchell and Milton op cit at 45 – 46. At page 46 they quote J Andenaes ‘General Prevention’ (1952) 43 *Journal of Criminal Law Criminology and Police Science* 176 at 179 as follows: ‘The idea is that the punishment as a concrete expression of society’s disapproval of an act helps to form and to strengthen the public’s moral code and thereby creates conscious and unconscious inhibitions against committing crime. ... Purely as a matter of habit, with fear, respect for authority or social imitation as connecting links, it is possible to induce favourable attitudes towards this and that action and unfavourable attitudes toward another action.’ It may be added that it was perhaps in the same spirit that Mwaungulu J in *Republic v Shabir Suleman and Aslam Osman* (cited above) said, ‘It is important that the court sends a right message to public officials and the public alike of the importance and need to resist and report corruption.’

<sup>32</sup> Cf Burchell and Milton op cit at 46 – 47.

These utilitarian theories will now be tested on the background of environmental law to determine whether they provide a sound basis for the criminal sanction in environmental protection.

Since environmental law seeks to protect the environment, criminal sanctions are acceptable in environmental law if they advance that objective. Prevention or incapacitation may therefore be admitted as a legitimate basis for environmental criminal sanctions. The imprisonment of a polluter who would have continued to pollute if he was enjoying freedom, is certainly in line with the goals of environmental protection.

Similarly deterrence may readily be welcomed as forming part of the necessary conceptual framework for environmental criminal sanctions. Smith argues that 'at the moment environmental crimes are punished chiefly because of the potential for social harm that they pose, not because of deep underlying conceptions of moral wrongfulness of conduct on individual victims.'<sup>33</sup> In effect Smith seems to support the deterrence theory in combating environmental crime as most environmental crimes lack moral turpitude. In fact Michael Kidd has demonstrated that the primary aim of the criminal sanction in the context of environmental regulation is deterrence.<sup>34</sup>

Reinforcement and reformation may also justify in varying degrees the use of criminal sanctions in environmental protection. In Malawi literacy levels are low.<sup>35</sup> As a result many people may not resort to formal sources of information to understand what is right or wrong environmentally. Further, poverty is on the increase and so many people may plunder natural resources for survival purposes. The punishment of environmental offenders may therefore create and reinforce in the people a respect for environmental criminal law and stop or

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<sup>33</sup> Susan I. Smith 'An Iron Fist in a Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environmental Enforcement System' (1995) 19 *Criminal Law Journal* 12 at 18, quoted in Kidd op cit at 17.

<sup>34</sup> Kidd op cit, particularly Abstract and Chapter 2.

<sup>35</sup> At national level only 34% of the female population and 50% of males aged 5 years and above were reported to have some education in the early 1990s. These statistics are recorded in the National Environmental Action Plan as captured on [http://www.gov.mw/enviro/action\\_plan/chap\\_3.htm](http://www.gov.mw/enviro/action_plan/chap_3.htm) (Accessed on 06 January 2005). Since more than ten years have passed since the statistics were taken, it is likely that the figures of educated persons have gone up.

discourage contraventions of it. The views of Kidd on this point are arguably applicable to Malawi even though he writes in respect of South Africa. He states:

‘Certain crimes, which would be regarded in other countries as very serious, would, for various reasons, probably only be regarded as serious by certain sectors of [this country’s] society today. By visiting criminal sanctions on serious environmental offences..., public attitudes could be shaped in such a way that people who would not at the moment regard such offences as serious might change their viewpoint.’<sup>36</sup>

Reformation has limited scope for justifying the environmental criminal sanction. Since reformation’s main focus is on the person of the offender, it cannot easily be adapted to satisfy the demands of environmental protection unless the rehabilitation is structured in such a way that the offender is fully persuaded that as a responsible citizen he must, where applicable, take necessary and appropriate measures to protect the environment and refrain from actions that prejudice the environment.

From the foregoing analysis it may be concluded that the purposes of the criminal sanction in environmental law are not exactly the same as those for the criminal sanction in the general law. While in both areas the criminal sanction has both retributive and utilitarian purposes, the purposes in environmental law are tempered with the goal of environmental protection. Accordingly it has been suggested that retribution is a sound purpose of the criminal sanction in environmental law only in respect of the theory of desert, particularly the notion of proportionality. With regard to utilitarianism, deterrence, prevention (incapacitation) and reinforcement may be regarded as legitimate purposes of the criminal sanction in environmental law. Reformation of the offender lies on the verge and it does not seem to lay a significant claim to the status of being a purpose of the criminal sanction in environmental law.

Having analyzed the purpose of the criminal sanction, the discussion will now focus on the constitutional framework of the criminal sanction. It is necessary to appreciate this aspect because the Constitution is the supreme law of Malawi.

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<sup>36</sup> Kidd op cit at 21.

### 3.3 Constitutional Framework

#### 3.3.1 General

The Constitution of the Republic of Malawi binds all executive, legislative and judicial organs of the State at all levels of government.<sup>37</sup> Accordingly when the courts are exercising their duties in respect of the criminal sanction in environmental protection, they are bound to operate within the confines of the Constitution. Section 10 of the Constitution declares that in the interpretation of all laws the provisions of the Constitution shall be the supreme arbiter and ultimate source of authority. The courts are enjoined to have due regard to the principles and provisions of the Constitution when applying any Act of Parliament and when applying and developing the common law and customary law. Any act of government or any law that is inconsistent with the provisions of the Constitution is invalid to the extent of the inconsistency.<sup>38</sup>

The unique character and supreme status of the Constitution has been widely recognized by the courts in Malawi. In the High Court case of *Registered Trustees of the Public Affairs Committee v Attorney General and Speaker of the National Assembly*<sup>39</sup> Justice Anacleit Chipeta affirmed the supremacy of the Constitution and struck down part of an Act of Parliament that offended the right to freedom of association and political rights in a manner which could not be saved by the limitations clause in the Constitution.<sup>40</sup>

There are two prongs to the constitutionality enquiry. Section 44 of the Constitution distinguishes between derogable rights and non-derogable rights. In the first prong of the inquiry, no derogation, restriction or limitation is permissible with regard to non-derogable

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<sup>37</sup> Section 4 of the Constitution.

<sup>38</sup> Section 5 of the Constitution.

<sup>39</sup> Civil Cause Number 1861 of 2003 (High Court – unreported). Copy available on <http://www.judiciary.mw> (Accessed in January 2005). The Malawi Human Rights Commission participated in this case as amicus curiae.

<sup>40</sup> The statute in question in the Constitution (Amendment) (No. 2) Act 2001. This statute sought to extend 'crossing the floor' to outside Parliament. It provided that Members of Parliament would be deemed to have crossed the floor if, inter alia, they joined a political party not represented in Parliament or any other association or organisation whose objectives or activities were political in nature. These extensions were declared to be illegitimate and invalid.

rights.<sup>41</sup> As such any act of government or any law that is inconsistent with these non-derogable rights is unconstitutional and invalid outright. In the second prong of the inquiry, restrictions or limitations are permitted in respect of derogable rights. In relation to these derogable rights, the courts appear to recognize two stages in the inquiry. When there is an allegation that a piece of legislation is contrary to the spirit and intendment of the Constitution, the Court first determines whether the legislation (or part of it) transgresses the Bill of Rights. If the legislation (or part of it) does infringe the Bill of Rights, the court moves to the second stage, which is to determine whether the infringement is permissible under the limitations clause (Section 44 of the Constitution). In the case of *Registered Trustees of the Public Affairs Committee v Attorney General and Speaker of the National Assembly* (cited above) the court first considered whether the Constitution (Amendment) (No. 2) Act 8 of 2001 infringed sections 32 and 40 (part of the Bill of Rights) of the Constitution. The court held that the Act significantly interfered with the enjoyment of the rights and freedoms provided for under those sections. The court then proceeded to examine the question of limitation. Ultimately the court held that part of the enactment could be saved but the rest was unconstitutional and invalid. Ackermann J in *Ferreira v Levin NO and Others*<sup>42</sup> expresses the two stage inquiry of a comparable constitutionality inquiry in the following way:

‘The task of determining whether the provisions of ... the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages: first, an inquiry as to whether there has been an infringement of the ... guaranteed right; if so, a further inquiry as to whether such infringement is justified under ... the limitation. The task of interpreting the ... fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage,

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<sup>41</sup> The non-derogable rights are listed in subsection 1 of section 44. They are: (a) the right to life; (b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment; (c) the prohibition of genocide; (d) the prohibition of slavery, the slave trade and slave-like practices; (e) the prohibition of imprisonment for failure to meet contractual obligations; (f) the prohibition on retrospective criminalisation and the retrospective imposition of greater penalties for criminal acts; (g) the right to equality and recognition before the law; (h) the right to freedom of conscience, belief, thought and religion and to academic freedom; and (i) the right to habeas corpus.

<sup>42</sup> 1996 (1) SA 984 (CC) at para 44. See also Iain Currie ‘Bill of Rights Jurisprudence’ (2001) *Annual Survey of South African Law* 37 at 55 – 58.

[it] is for the Legislature, or the party relying on the legislation, to establish this justification ...'<sup>43</sup>

The limitations clause (Section 44 of the Malawi Constitution), as far as is material, provides as follows:

'44 - ...

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.'<sup>44</sup>

In terms of this section a restriction of a fundamental right will pass constitutional muster if it meets the following conditions:<sup>45</sup>

- (a) it must be prescribed by law;
- (b) it must be reasonable;
- (c) it must be recognized by international human rights standards;
- (d) it must be necessary in an open and democratic society.

Each of these will now be considered in turn.

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<sup>43</sup> See also *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 100 - 102 per Chaskalson P, and *S v Zuma and Others* 1995 (2) SA 642 (CC) per Kentridge AJ. The quoted words of Ackermann J refer to the South African Constitution and legislation.

<sup>44</sup> It appears that section 44(3) of the Constitution is not grammatically perfect. A connecting word seems to be missing before the last mention of 'shall'. It is suggested that the word 'and' be inserted before the last mention of 'shall' in order to rectify this defect. When this is done, section 44(3) will read as follows: 'Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.'

<sup>45</sup> Justice Lovemore Chikopa in *Republic v Maggie Kaunda* Criminal Appeal Number 89 of 2001 (High Court, Mzuzu District Registry, unreported) recognised the importance of these conditions.

### 3.3.2 Prescription by law

The restriction must be prescribed by a law that does not negate the essential content of the right or freedom in question. On an ordinary and grammatical reading of subsections 2 and 3 of section 44, it appears that it is the law - not the restriction - that must not negate the essential content of the right or freedom. This wording may be compared with that of section 33(1) of the 1993 Constitution of the Republic of South Africa,<sup>46</sup> which relates the negation of the essential content of the right to the restriction itself. It may be observed that what, strictly speaking, must not negate the essential content is the restriction itself and not the whole law in which the restriction is found. For instance, an Act of Parliament may have twenty sections. Nineteen of these sections may not conflict with any provision of the Bill of Rights, and so may not be restrictions. One of the twenty sections may conflict with the Bill of Rights and so qualify as a restriction. In this scenario, to say that this Act of Parliament negates the essential content of a right would be inexact. Rather, one must single out the restriction provision and say that it (the restriction provision) negates the essential content of the right. It follows from this that the wording of the South African Constitution on this aspect is more exact. However, this does not mean that there is a substantive defect in the Malawian provision. It is submitted that relating law to the negation encompasses, inter alia, the restriction. For it is not possible to have a law which does not negate the essential content of a right but which at the same time contains a restriction which negates the essential content of the right. In other words, a law containing a negating restriction cannot be described as a law that does not negate the essential content of the right: the negating restriction disqualifies the law from that description.

In light of the foregoing analysis, it is legitimate to say that the restrictions or limitations (contained in the law) must not negate the essential content of a right if they are to escape being declared unconstitutional and invalid. Turning now to the meaning of the negation

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<sup>46</sup> Act 200 of 1993. Section 33(1) is in the following terms: '(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation –  
(a) shall be permissible only to the extent that it is  
    (i) reasonable; and  
    (ii) justifiable in an open and democratic society based on freedom and equality, and  
(b) shall not negate the essential content of the right in question,  
and provided further that any limitation to –  
(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or  
(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,  
shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.'

phrase, Stuart Woolman suggests that ‘to negate the essential content of a right, the restriction must either make it impossible for the right to serve its intended social function or bar permanently an individual from exercising the right.’<sup>47</sup> In *S v Makwanyane*<sup>48</sup> Chaskalson P states that the purpose of the negation provision is to ensure that ‘rights should not be taken away altogether’. In other words, the restrictions on rights are limitations and not confiscations.<sup>49</sup> Didcott J in *AZAPO and Others v President of the Republic of South Africa and Others*<sup>50</sup> wondered as to its meaning. He commented: ‘Negating the essential content of a constitutional right is ... a concept I have never understood. Nor can I fathom how it applies to a host of imaginable situations.’<sup>51</sup> A more authoritative meaning is awaited from the Malawi courts.

Apart from the absence of negation of the essential content of the right, section 44(3) requires the law prescribing the restrictions to be of general application. In searching for a meaning of ‘law of general application’ the sacrosanct words of Justice Anacleet Chipeta on interpretation of the Constitution must be borne in mind. His Lordship said:

‘I do believe that the answer we need on this issue and in this case will come directly from our own Constitution, which after all is the document that contains the wishes and aspirations of our people. The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi. ...

I have just advocated for a chance to be given to the Constitution to speak with

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<sup>47</sup> Stuart Woolman ‘Riding the Push-me Pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause’ (1994) 10 *SAJHR* 60 at 74.

<sup>48</sup> 1995 (3) SA 391 (CC) at para 134.

<sup>49</sup> J R L Milton and M G Cowling *South African Criminal Law and Procedure* Vol III 2ed Kenwyn: Juta 1988 (Service No. 7, 1995) at para 1-54.

<sup>50</sup> 1996 (4) SA 671 (CC) at para 66.

<sup>51</sup> Stuart Woolman ‘Limitation’ in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Dereck Spitz and Stuart Woolman (eds) *Constitutional Law of South Africa* Kenwyn: Juta 1996 (Revision Service 5, 1999) at 12-40 argues that ‘[the] judge should not be understood to be saying that he could find no possible meaning in the phrase nor that it defies application. Rather he should be read as commenting upon the difficulties of making sense of the phrase, his inclination to see it play a limited role in limitation analysis, and his pleasure in seeing it disappear from the text of the final Constitution.’



an uninterrupted voice and to first try and understand what it means before rushing to borrow the influence of decisions in other jurisdictions for the construction of our Constitution. I should think that it is only when a direct understanding of the Constitution proves difficult to capture that resort can be meaningfully had to such other guiding material and precedent. The exercise thus involves the employment of appropriate and effective ways of interpreting the Constitution.’<sup>52</sup>

Applying the learned judge’s wisdom to the present task, it will be noted that ‘law of general application’ may mean law that is applicable to the whole territory of Malawi or greater part of it and to all or most people in Malawi. Although prima facie this meaning seems legitimate, it ousts from the ambit of ‘law of general application’ pieces of subsidiary legislation which are enacted for specific locations under the direction of generally applying legislation. For instance, under the Local Government Act 42 of 1998 -- a generally applying statute -- the local authorities are required to make bylaws relating to, inter alia, solid waste disposal in their areas of jurisdiction.<sup>53</sup> Should these bylaws really be excluded from being ‘laws of general application’?

What ‘law’ means in section 44 is probably clarified by section 200 of the Constitution. The latter section acknowledges that law includes Acts of Parliament, common law and customary law as long as they are consistent with the Constitution. Since properly enacted subsidiary legislation is generally considered part of the principal Act, it may be argued that the subsidiary legislation qualifies as ‘law of general application’.<sup>54</sup> If this is accepted, it may be concluded that law of general application may include law which applies to a segment of the territory and to a portion of the people, provided that the demarcation of the territory and

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<sup>52</sup> Chipeta J made these remarks in the case of *Registered Trustees of the Public Affairs Committee v Attorney General and Speaker of the National Assembly* (cited above).

<sup>53</sup> Sections 6 and 103 of the Local Government Act 42 of 1998.

<sup>54</sup> In *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) at para 27 Mokgoro J (the other Constitutional judges concurring) held that subordinate legislation which applied generally to all educators in South Africa was a law of general application. Contra *African Lakes Corporation Limited v Director of Public Prosecutions* 7 Malawi Law Reports 154 at 162 where it was stated that ‘[r]egulations are not part of a statutory enactment, but, in our view, regulations made under the provisions of an Act may give a guide to interpretation of the Act.’ It is doubtful whether the first part of this statement is still the law.

people is not based on arbitrary reasons.<sup>55</sup> Writers seem to be agreed on this formulation. For instance, Gerhard Erasmus<sup>56</sup> writes that law of general application includes parliamentary legislation, provincial ordinances, regulations and rules of the common law, and that arbitrary restrictions and discriminatory measures will not be permitted. John Milton and Michael Cowling<sup>57</sup> identify parliamentary legislation, provincial laws, rules of the common law and municipal bylaws as falling within the confines of law of general application. Johan de Waal et al<sup>58</sup> are of the same view. They write:

“The ‘law of general application’ requirement is the expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law. There are two components to this principle. The first is that the power of the government derives from the law. The government must have lawful authority for all its actions; otherwise it will not be a lawful government but will be a despotism or tyranny. ... The second component of the rule of law relates to the character or quality of the law which authorises a particular action. Law must be general in its application. At the level of form, this means that the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. On a substantive level, it means that, at a minimum, the law must apply equally to all and must not be arbitrary. The ‘law of general application’ requirement ... therefore prevents laws which have unequal or arbitrary application from qualifying as legitimate limitations of fundamental rights ...

What forms of law qualify as ‘law of general application’? [It] seems that all forms of legislation (delegated and original) would qualify as ‘law’, as would the

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<sup>55</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC) at para 32 the Constitutional Court of South Africa held that section 277 of the Criminal procedure Act 51 of 1977 was a law of general application despite the fact that this section did not apply to the whole of South Africa. The dissenting judgment of Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) is to the effect that the Presidential Act considered in that case was a law of general application although it only applied to mothers in prison who had children under the age of twelve.

<sup>56</sup> Gerhard Erasmus ‘Limitation and Suspension’ in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* Kenwyn: Juta 1994 629 at 645. These authors have qualified their listing of municipal bylaws with ‘perhaps’.

<sup>57</sup> Milton and Cowling op cit at 1-51. These authors have qualified their listing of municipal bylaws with ‘perhaps’.

<sup>58</sup> Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* 4ed Lansdowne: Juta 2001 at 147 – 154.

common law (whether the rules of the private law or public law rules of the common law such as criminal law or administrative law) and customary law.”<sup>59</sup>

It may be observed from the foregoing that the meaning of ‘law of general application’ is wide. This mode of interpreting the phrase complies with the principles of constitutional interpretation established by the Malawi Supreme Court of Appeal.<sup>60</sup>

### 3.3.3 Reasonableness

The restriction of a fundamental right must be reasonable. This entails, it has been suggested, that at a minimum the restriction must serve some purpose.<sup>61</sup> The question is ‘whether the purpose sought to be achieved by limiting the right is of sufficient importance to outweigh the

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<sup>59</sup> De Waal et al op cit at 147 – 148. Cf Le Dain J’s dictum in *R v Therens* (1985) 13 CRR 193 as quoted in John D Whyte, William R Lederman and Donald F Bur *Canadian Constitutional Law: Cases, Notes and Materials* 3ed Toronto: Butterworths 1992 at 19-2. Le Dain J said: ‘Section 1 [of the Canadian Charter of Rights and Freedoms] requires that the limit be prescribed by law, that it be reasonable, and that it be demonstrably justified in a free and democratic society. The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.’ See also Peter W Hogg *Constitutional Law of Canada* Scarborough: Thomson Carswell 1997 at 35-11 to 35-15.

<sup>60</sup> In *Fred Nseula v Attorney General and Malawi Congress Party* MSCA Civil Appeal Number 32 of 1997 (unreported) the Supreme Court said: ‘Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution.’ In *Gwanda Chakuamba, Kamlepo Kalua, Bishop Kamfosi Mkhumbwe vs Attorney General, Malawi Electoral Commission and United Democratic Front* MSCA Civil Appeal Number 20 of 2000 (unreported) the Supreme Court said: ‘Section 11 of the Constitution expressly empowers this Court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society, we must take full account of the provisions of the fundamental constitutional principles and the provision on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution. There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society.’

<sup>61</sup> De Waal et al op cit at 157.

right.’<sup>62</sup> In the absence of local decisions on the meaning of ‘reasonable’ in section 44(2) of the Constitution, resort will be had to comparable foreign case law. In the Canadian case of *R v Oakes*<sup>63</sup> the court interpreted a provision of the Canadian Charter of Rights and Freedoms which partly reads: ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ Dickson CJC said that the inquiry into the meaning of this phrase involves a proportionality test. He continued:

‘Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are in my view, three important components of a proportionality test. First the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question. ... Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.’<sup>64</sup>

This approach was adopted by South African courts for some time. The cases of *Park-Ross and Another v Director: Office for Serious Economic Offences*<sup>65</sup> and *Nortje and Another v Attorney General, Cape, and Another*<sup>66</sup> are on the point. In *S v Zuma and Others*<sup>67</sup> the

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<sup>62</sup> Milton and Cowling op cit at 1-52.

<sup>63</sup> (1986) 26 DLR (4<sup>th</sup>) 200.

<sup>64</sup> At 227 (Quotation marks in original quotation have been left out). This exposition may be compared with that of Chaskalson P in *S v Makwanyane* (supra) at para 104 where he said: ‘[T]he requirement of proportionality ... calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of [the limitation clause] and the underlying values of the Constitution ...’. See also generally Francois Venter *Constitutional Comparison* Lansdowne: Juta 2000 at 189 – 190.

<sup>65</sup> *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (1) SACR 530 (C) at 549.

<sup>66</sup> *Nortje and Another v Attorney General, Cape, and Another* 1995 (1) SACR 446 (C) at 462.

<sup>67</sup> *S v Zuma and Others* 1995 (1) SACR 568 (CC) at para 35.

Constitutional Court accepted the applicability in appropriate circumstances of the proportionality enquiry as expounded by the Canadian courts but stated that in the case at hand it did not see any reason to attempt to fit its analysis into the Canadian pattern, since the South African limitation clause at that time set out the criteria which the court was to apply. This trend was followed in *S v Makwanyane* (cited above): Chaskalson P could also see no such reason and he was satisfied to apply the criteria specified in the limitation clause itself.<sup>68</sup>

The limitation clause in Malawi's Constitution is different from that in the Canadian Charter and that in the South African Constitution. Accordingly, courts in Malawi may adopt an interpretation of 'reasonable' that is not on all fours with either the Canadian or South African interpretation. The Constitutional Court of South Africa was able to resist adopting the Canadian pattern on the ground that the South African limitation clause contained in specific terms the criteria to be applied for the limitation of different categories of rights. The Malawian limitation clause does not have similar criteria. As such it is more open to a wide reception of the Canadian pattern. In the premises, it is submitted that Malawian courts may use the Canadian pattern as a springboard from which they can launch an appropriate meaning or understanding of 'reasonable' restriction as demanded by Malawi's limitation clause.

### **3.3.4 Necessity in an open and democratic society**

According to section 44(2) of the Constitution a restriction on the exercise of a right, apart from being reasonable, must be necessary in an open and democratic society. If the restriction is not necessary, it cannot be saved by the limitation clause. The official basis for the restriction must be in line with democratic rule. The purpose of the restriction must further the basic objectives of democratic rule.<sup>69</sup> It is accepted that democracy is sometimes compatible with limitations on rights and freedoms. For instance, democracy demands that restrictions be put in place to prevent the exploitation of rights and freedoms for the purpose of destroying democracy itself.<sup>70</sup>

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<sup>68</sup> At para 110. It is significant that the apparent change of heart on the part of the courts to follow fully the Canadian pattern took place in a space of about six months. *Park-Ross* was decided on 19 December 1994, *Nortje* on 7 February 1995, *Zuma* on 5 April 1995 and *Makwanyane* on 6 June 1995.

<sup>69</sup> Milton and Cowling op cit at 1-55.

<sup>70</sup> Erasmus op cit at 646.

It seems that necessity is part of the proportionality inquiry and that necessity and reasonableness may be considered together. In *S v Makwanyane* (cited above) Chaskalson P said that the limitation of fundamental rights and freedoms ‘for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality’ [Emphasis supplied]. He went on to say:

‘The fact that different rights have different implications for democracy ... means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.’<sup>71</sup> [Emphasis supplied].

### 3.3.5 Recognition by international human rights standards

For the restriction to pass constitutional muster, it is also required to be recognized by international human rights standards. The point of departure in defining this phrase is arguably section 11 of the Constitution which calls upon courts, in interpreting the Constitution, to have regard to current norms of public international law. Few, if any, would dispute the proposition that international human rights standards spring from public international law. The sources of public international law are international conventions or treaties, international custom, general principles of law recognized by civilized nations, judicial decisions, codification, *jus cogens* and binding decisions of international organizations.<sup>72</sup> It may be questioned whether all these sources contain international human rights standards. The answer seems to be in the affirmative, only that in some of these sources the standards may be few. Antonio Cassese writes that the Universal Declaration of Human

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<sup>71</sup> At para 104.

<sup>72</sup> William Edward Hall *A Treatise on International Law* 8<sup>ed</sup> edited by A Pearce Higgins Oxford: Clarendon Press 1924 at 1 – 12; L C Green *International Law Through the Cases* 3<sup>ed</sup> London: Stevens & Sons 1970 at 15 – 22; Anthony Carty *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* Manchester: Manchester University Press 1986 at 13 – 22; Antonio Cassese *International Law* Oxford: Oxford University Press 2001 at 117 – 161; D J Harris *Cases and Materials on International Law* 5<sup>ed</sup> London: Sweet & Maxwell 1998 at 21 – 67; Martin Dixon *Textbook on International Law* 2<sup>ed</sup> London: Blackstone Press 1990 at 18 – 40; D W Greig *International Law* 2<sup>ed</sup> London: Butterworths 1976 at 5 – 51; and John Dugard *International Law: A South African Perspective* Kenwyn: Juta 1994 at 23 – 35.



Rights (UDHR) and international human rights treaties are standard-setting.<sup>73</sup> Ian Brownlie states that the United Nations Organization, especially its General Assembly and Economic and Social Council, gave impetus to the development of standards concerning human rights. He then refers to a number of international human rights treaties as standard-setting.<sup>74</sup> Kathryn English and Adam Stapleton claim that the UDHR was aimed at setting basic minimum international standards for the protection of human rights, and that the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) flesh out the standards prescribed in the UDHR.<sup>75</sup> It may therefore be concluded from this brief survey that international human rights standards are primarily contained in the UDHR, ICCPR, ICESCR and other international human rights treaties.

It must be noted that section 44(2) of the Constitution does not qualify the international human rights standards by a requirement of acceptance by Malawi. So even though the standards are provided for in a treaty to which Malawi is not a party, the Courts are entitled to consider those standards. The courts, therefore, have a free hand to examine all international human rights standards. To be specific, the courts must decide whether a restriction of a right in the Constitution is recognized by these international human rights standards.

An analysis of the UDHR, ICCPR, ICESCR and other international human rights conventions reveals that the rights provided in them may generally be subjected to limitations or restrictions. Two species of limitations have been identified: general limitations and specific limitations. The general limitations purport to limit almost all the rights in the instrument concerned. The specific limitations are included in articles defining particular rights and they limit those particular rights. For example, Article 29(2) of the UDHR generally permits limitations determined by law, for the purpose of securing due recognition and respect for the

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<sup>73</sup> Cassese op cit at 357 – 360.

<sup>74</sup> Ian Brownlie (ed) *Basic Documents on Human Rights* 2ed Oxford: Clarendon Press 1981 at 1 – 2 and 117 – 170.

<sup>75</sup> Kathryn English and Adam Stapleton *The Human Rights Handbook* Kenwyn: Juta 1997 at 2, 13 and 15. At 15 they write: 'If governments pass laws that contravene the UDHR and ICCPR, whatever their justification, they are acting outside *internationally recognized standards of conduct*. What a government argues is 'lawful' just because it enacts legislation may turn out to be arbitrary or unlawful interference when compared with *international standards*' [Emphasis added]. Cf Richard B Lillich *International Human Rights: Problems of Law, Policy and Practice* 2ed Boston: Little, Brown and Company 1991 at 232 – 307.

rights of others and for meeting the just requirements of morality, public order and general welfare in a democratic society.<sup>76</sup> On the other hand Article 12(3) of the ICCPR contains a specific limitation on the right to liberty of movement to the effect that this right may be subject to restrictions which, inter alia, are necessary to protect national security, public order, public health or public morals. These restrictions, couched in identical or similar terms, are provided for in other instruments. Perhaps the best summary of the kinds of restrictions allowed or recognized by international human rights treaties is that by Paul Sieghart.<sup>77</sup> He writes that the treaties permit restrictions for protecting the rights of others, the general interest, specific interests and compatibility of purpose. Further, the restrictions are required to be prescribed by law, necessary in a democratic society and consistent with other protected rights. The restrictions must be justified by, among other things, national security, public safety, public order, prevention of disorder, prevention of crime, law and order, public health, public morals, territorial integrity, economic wellbeing of a country, cogent economic and social reasons, interests of justice and interests of juveniles.<sup>78</sup>

Since the foregoing restrictions are found in international instruments which have been shown above to be setting international human rights standards, it may be concluded that any restriction of a constitutional right which falls within the international restrictions, may legitimately be regarded as a restriction recognized by international human rights standards.

From the preceding analysis it is clear that an allegation of unconstitutionality may call upon lawyers and the court to enter into an exhaustive and long inquiry as described. This eventuality/development may become a feature of criminal prosecutions (whether based on environmental legislation or not) because it is undeniable that the Constitution (especially the Bill of Rights therein) has a tremendous impact on criminal law. Johan de Waal et al<sup>79</sup> suggest that there are four ways in which the Bill of Rights affects criminal law:

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<sup>76</sup> Asbjorn Eide, Gudmundur Alfredsson, Goran Mclander, Lars Adam Rehof and Allan Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* Oslo: Scandinavian University Press 1992 at 459 - 463. Cf Gert Westerveen (ed) *The International Bill of Human Rights: Normative and Institutional Developments 1948 - 1985* Utrecht: Netherlands Institute of Human Rights (SIM) 1986 at 120.

<sup>77</sup> Paul Sieghart *The International Law of Human Rights* Oxford: Clarendon Press 1983 at 85 - 103.

<sup>78</sup> See also Loukis G Loucaides *Essays on the Developing Law of Human Rights* Dordrecht: Martinus Nijhoff 1995 at 25 - 29.

<sup>79</sup> De Waal et al op cit at 585 - 586.



1. The circumstances under which a person may be deprived of freedom and the types of conduct which may be criminalized.
2. Some rights, e.g. the right to privacy, have a bearing on the investigation of crime.
3. The rights of arrested, detained and accused persons deal with the procedure before, during and after trial and the fairness of the criminal trial itself.
4. The right not to be subjected to cruel, inhuman or degrading treatment or punishment deals with sentencing of the convict.

These suggestions are made in relation to the South African Constitution and the South African criminal justice system. It is, however, submitted that they may be applied to Malawi's Constitution and criminal justice system. While the Constitutions and systems of the two countries are considerably different, they have fundamental similarities.

According to Kidd<sup>80</sup> the third way (listed above) in which the Bill of Rights affects the criminal justice system is very significant in environmental matters. He argues that found in many pieces of environmental legislation are presumptions which require accused persons to disprove something rather than putting the burden on the State to prove that thing, and that such presumptions are likely to transgress partly the letter and spirit of the Bill of Rights. The same may be said about Malawi's Constitution and criminal justice system. Specifically, such presumptions in environmental legislation may affect the rights of accused or detained persons set out in section 42 of the Constitution. This section is in the following terms:

*42- (1) Every person who is detained, including every sentenced prisoner, shall have the right –*

*(a) to be informed of the reason for his or her detention promptly, and in a language which he or she understands;*

*(b) to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;*

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<sup>80</sup> Kidd op cit at 25. Kidd is also writing for South Africa but his views may arguably be applied to Malawi.

*(c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;*

*(d) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religion counsellor and a medical practitioner of his or her choice;*

*(e) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and*

*(f) to be released if such detention is unlawful.*

*(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right*

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*(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;*

*(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;*

*(c) not to be compelled to make a confession or admission which could be used in evidence against him or her;*

*(d) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;*

*(e) to be released from detention, with or without bail unless the interests of justice require otherwise;*

*(f) as an accused person, to a fair trial, which shall include the right –*

*(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged;*

*(ii) to be informed with sufficient particularity of the charge;*

*(iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;*

- (iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;*
  - (v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;*
  - (vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;*
  - (vii) not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;*
  - (viii) to have recourse by way of appeal or review to a higher court than the court of first instance;*
  - (ix) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and*
  - (x) to be sentenced within a reasonable time after conviction;*
- (g) in addition, if that person is a child, to treatment consistent with the special needs of children, which shall include the right –*
- (i) not to be sentenced to life imprisonment without possibility of release;*
  - (ii) to be imprisoned only as a last resort and for the shortest period of time;*
  - (iii) to be separated from adults when imprisoned, unless it is considered to be in his or her best interest not to do so, and to maintain contact with his or her family through correspondence and visits;*
  - (iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;*
  - (v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role; and*

(vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.<sup>81</sup>

The rights entrenched in section 42 may affect the criminal enforcement provisions of environmental legislation in many areas. For present purposes, only two of these areas will be identified and discussed. These are:

1. Statutory presumptions violating the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.
2. The right to challenge evidence in circumstances in which expert evidence may be given by certificate or report.<sup>82</sup>

### **3.3.6 Statutory presumptions violating the right to be presumed innocent, to remain silent and not to testify**

A number of environmental statutes in Malawi contain presumptions which have the general effect of making easier the task of the prosecution in proving the environmental criminal

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<sup>81</sup> For a useful commentary on this section, see B P Wanda 'The Rights of Detained and Accused Persons in Post-Banda Malawi' [1996] 40 *Journal of African Law* 221.

<sup>82</sup> Cf Kidd *op cit* at 32. Kidd refers to two more areas: first, the gathering of evidence through search and seizure. This is based on section 35(5) of the 1996 South African Constitution which provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. There is no equivalent provision in the Malawian Constitution. As a result this impact area has been left out here. Comments on search and seizure will be made when dealing with the environmental legislation provision-by-provision. The second additional area identified by Kidd is the right against self-incrimination. Again this is based on the South African Constitution (section 35(3)(j)) which has no equivalent in the Malawian Constitution. In the Malawi scenario this right against self-incrimination is arguably subsumed under the right to be presumed innocent, to remain silent and not to testify. Actually, some authors regard the right against self-incrimination in the same way. In J J Joubert (ed) *Criminal Procedure Handbook* Sed Lansdowne: Juta 2001 at 8 it is written: 'Not unrelated to the presumption of innocence is the rule that *an accused can never be forced to testify; he has a right to silence, which is also called his privilege against self-incrimination or his right to a passive defence*. This applies to the pre-trial stage (i.e. the investigative or police phase, as well as the pleading phase), the trial phase and also the sentencing stage – *Dzukuda* 2000 (2) SACR 443 (CC)' [Emphasis added]. In the same vein Jack Watson 'Talking about the Right to Remain Silent' (1991) 34 *Criminal Law Quarterly* 106 at 107 writes (from a Canadian perspective) as follows: 'In sum the "right to remain silent" refers to the right of a person to choose whether or not to make (i.e., create), for the state, statements, the testimonial value of which statements can be employed by the state to incriminate that person in later legal proceedings. All of the currently cognizable common law or constitutional rights based in principle upon the "right to remain silent" are variants of the right as expressed in those terms.' As so understood the right against self-incrimination would encompass confessions and admissions before trial: a relevant case on this point is *Stanley Richard Palitu and Others v Republic* Criminal Appeal Number 30 of 2001 (High Court – unreported but copy available on <http://www.judiciary.mw> when accessed in January 2005).

offence. These presumptions have the potential to infringe the accused person's right to be presumed innocent, to remain silent and not to testify.

Three categories of statutory presumptions have been identified: evidential or factual presumption, reverse onus presumption and irrebuttable presumption. An evidential or factual presumption gives the evidence adduced by the prosecution the status of prima facie proof and then calls upon the accused to raise a reasonable doubt as to the existence of the presumed fact. A reverse onus presumption places a legal burden on the accused to convince the court on a preponderance of the evidence that the presumed fact does not exist. An irrebuttable presumption assumes the existence of a fact without proof and even when there is proof to the contrary.<sup>83</sup> Of these presumptions it is only the reverse onus presumption which greatly affects the burden of proof.

Recent Malawian jurisprudence is lacking on these matters.<sup>84</sup> In the circumstances it is suggested that in determining whether statutory presumptions in environmental legislation can still be used in the criminal prosecution of environmental offenders, the courts in Malawi should seek guidance from comparable foreign case law. A few suggestions will now be made.

The evidentiary or factual presumption does not violate the accused person's right to be presumed innocent since it does not shift the burden of proof.<sup>85</sup> It does, however, infringe the

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<sup>83</sup> De Waal et al op cit at 631. Chaskalson et al op cit at 26-9 to 26-11. De Waal et al (ibid) exemplify the presumptions by saying that an evidential or factual presumption is mostly cast in the form 'fact A is presumed if fact B is proved'; a reverse onus presumption in the form 'fact A follows fact B unless the contrary is proved'; and an irrebuttable presumption in the form 'if B is proved, A is deemed'.

<sup>84</sup> But it is generally understood that the accused has a right to be presumed innocent, that the onus of proof is on the prosecution and that the requisite standard is proof beyond reasonable doubt. Chipeta J summarized this general understanding in *Republic v Alice Joyce Gwazantini* Criminal Case Number 208 of 2003 (High Court judgment of 25 March 2004 on case to answer) (unreported but copy available on <http://www.judiciary.mw> when accessed in January 2005). The learned judge said: 'The premise we start from in matters criminal is that he/she who makes an allegation must prove it. The presumption at law is that every person who is accused of a crime is innocent and that he/she remains so until proven guilty. Since more often than not criminal allegations come from the State, as is the case here, the burden of proof in such cases necessarily throughout lies on the State. The age-old authority of *DPP vs Woolmington* [1935]A.C. 462 is I am sure, the *locus classicus* case in the mind of every criminal case lawyer in this respect in the Common Law system as ours is. The degree of proof expected to be discharged by the State at the end of every such case is quite a heavy and onerous one. For a Court of Law to convict an accused it needs to be satisfied beyond reasonable doubt about the guilt of the Accused. Any proof falling short of that standard is supposed to end up in an acquittal.'

<sup>85</sup> De Waal et al op cit at 632; contra Chaskalson et al op cit at 26-10.

accused person's right to remain silent and not to testify during trial, as the accused is required to adduce evidence raising a reasonable doubt as to the existence of the presumed fact.<sup>86</sup> Such infringement may be justified under the limitations clause in appropriate circumstances, for instance, where in the majority of cases the presumed fact is peculiarly within the knowledge of the accused and not the State.<sup>87</sup> In such cases there is 'nothing unreasonable, oppressive or unduly intrusive' in asking the accused to adduce evidence in order to set aside the presumed fact.<sup>88</sup>

Unlike the evidentiary or factual presumption, the reverse onus presumption clearly transgresses the accused person's right to be presumed innocent as the prosecution is relieved of the overall burden to prove the guilt of the accused beyond reasonable doubt, thus creating the risk of wrong conviction.<sup>89</sup> There is also no doubt that the reverse onus presumption infringes the right to remain silent and not to testify, for the moment the accused embarks on the task of discharging the reversed onus, he no longer can be said to be enjoying the right to remain silent and not to testify during trial. In spite of these glaring violations, it is accepted that reverse onus presumptions are justifiable in appropriate circumstances. In *S v Zuma and Others*<sup>90</sup> the Constitutional Court of South Africa said:

'Some [reverse onus presumptions] may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. ... Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself.'

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<sup>86</sup> Cf *Director of Public Prosecutions v Henderson* 8 Malawi Law Reports 9.

<sup>87</sup> In *R v Chunga* 1961 – 63 A.L.R. Mal 247 at 250 the High Court of Malawi (per Southworth AgCJ) did not see any problem in a statutory provision which required an accused person to prove that he held a driving licence, 'this being a matter peculiarly within his own knowledge.' See also *Mulonda s/o Chimombo v R* 1923 – 60 A.L.R. Mal 316.

<sup>88</sup> *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) at para 38.

<sup>89</sup> *S v Bhulwana* 1996 (1) SA 388(CC) at para 15; De Waal et al op cit at 634.

<sup>90</sup> 1995 (4) BCLR 401 (CC) at para 41.

Five years later the Court reiterated its position in *S v Manamela (Director-General of Justice intervening)*<sup>91</sup> as follows:

‘The effective prosecution of crime is a societal objective of great significance which could, where appropriate, justify the infringement of fundamental rights.

This Court has expressly kept open the possibility of reverse *onus* provisions being justifiable in certain circumstances. Ordinarily, a reverse *onus* could be justifiable only if the risk and consequences of erroneous conviction produced by a statutory presumption against the accused are outweighed by the risk and consequences of guilty persons escaping conviction simply because of categorical adherence to an impervious presumption of innocence.

A broad context in which reverse *onus* provisions might be justified concerns ‘regulatory offences’ as opposed to ‘pure criminal offences’. Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. The objective of such laws is to put pressure on the persons responsible to take pre-emptive action to prevent harm to the public.’

In Canada, United States of America and international law circles reverse onus provisions have been upheld on similar grounds.<sup>92</sup> It may therefore be argued that environmental legislation containing reverse onus presumptions should not be declared unconstitutional outright but should be examined carefully with a view to saving them as much as possible in the interest of achieving environmental protection. It is necessary to do so because the urgency of stemming the tide of environmental degradation in Malawi demands a paradigm shift in the way the courts handle issues pertaining to the environment.

With regard to irrebuttable presumptions, it was held in *Scagell and Others v Attorney General, Western Cape, and Others*<sup>93</sup> that an irrebuttable presumption is a rule of substantive

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<sup>91</sup>2000 (3) SA 1 (CC) at paras 27 – 29. Footnotes and paragraph numbers in the original text have been left out.

<sup>92</sup> Canada: *R v Downey* 90 DLR (4<sup>th</sup>) 449. United States of America: *In re Winship* 397 US 358 (1970). European Court of Human Rights: *X v United Kingdom* application number 5124/71, *Collection of Decisions* ECHR 135.

<sup>93</sup> 1997 (2) SA 368 (CC) at paras 30 and 31.

law, and not a rule of evidence. As such it cannot result in the conviction of an accused person despite a reasonable doubt as to his guilt in relation to an element of the offence. Thus an irrebuttable presumption does not infringe the accused person's right to be presumed innocent. Since the prosecution shoulders the onus to prove all the elements of the offence throughout, it follows that the accused person's right to remain silent and not to testify during trial is not violated.<sup>94</sup>

### **3.3.7 Right to challenge evidence where expert evidence is given by certificate or report**

Environmental issues are multidisciplinary in nature. Consequently, in some environmental crimes scientific evidence may be needed to establish the guilt of the accused. This evidence may be given by way of certificate or report. For instance, section 50 of the Environment Management Act 23 of 1996 provides that an analyst of a substance must produce a certificate showing the results of the test or analysis and the methods used in the test or analysis. Such a certificate is prima facie evidence of the results of that test or analysis.<sup>95</sup> Now, it may be objected that the admission of such certificate or report transgresses the accused person's right to challenge evidence since the author thereof is not required to tender it in court himself, thus obviating the possibility of testing its merits through cross-examination. Such a constitutional challenge is not farfetched. It will therefore be considered here, albeit briefly.

The right to challenge evidence entails the availing of an opportunity to an accused to cross-examine witnesses generally and authors of documents tendered in court particularly. So the acceptance of a certificate or report written by an environmental expert, on the face of it, infringes the right to challenge evidence. While the environmental statutes do not require that the certificate or report be presented to the court by the author thereof, it appears that in

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<sup>94</sup> The position here is just like in a case in which the prosecution calls a number of witnesses to testify for the State, and the accused does not testify nor call any witness as happened in *Sudi Sulaimana, Benard Chisala Chirwa and Samuel Edward Nthenda v Republic* MSCA Criminal Appeal Number 7 of 1998 (unreported but copy available on <http://www.judiciary.mw> when accessed in January 2005).

<sup>95</sup> The whole section 50 reads as follows: '(1) There shall be issued by every analyst in respect of any test or analysis, a certificate showing the results of the test or analysis. (2) The certificate shall state the method or methods used in carrying out the test or analysis and shall be signed by the analyst who carried out the test or analysis. (3) A certificate issued under this section shall be prima facie evidence of the results of any test or analysis carried out under this Act.'



criminal matters the Criminal Procedure and Evidence Code<sup>96</sup> may be used to bring the author to court for purposes of cross-examination. The Code provides that any person who appears to have useful information in respect of criminal proceedings may be summoned to appear before the court.<sup>97</sup> So the author of the certificate or report may be called as a witness. This will allow the accused to cross-examine the author on the certificate. In this way the accused person's right to challenge evidence is not infringed.<sup>98</sup>

Even in the absence of cross-examination, it appears that the certificate or report may be received in evidence constitutionally on the basis that the apparent infringement of the right to cross-examination (that is, the right to challenge evidence) is a justifiable limitation under the Constitution. This line of thinking is supported by the oft-cited South African case of *S v Van der Sandt*.<sup>99</sup> In this case a forensic analyst had given his testimony, inter alia, by way of a certificate in terms of a statutory provision. It was argued that this statutory provision curtailed the right of cross-examination. The court rejected the argument and held that the dictates of fairness did not prescribe that evidence be presented in a certain manner. Evidence could be tendered in any form. The mere fact that evidence was adduced by affidavit or certificate did not per se render the proceedings unfair. What mattered was the nature of the evidence. The evidence allowed by the impugned statutory provision was generally of a formal non-contentious nature and so allowing it to be adduced by way of affidavit or certificate was not only meaningful but it was also essential to the proper administration of justice. The court concluded that of course this had the effect of curtailing the right to cross-

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<sup>96</sup> Act No 36 of 1967, cap 8:01 of the Laws of Malawi.

<sup>97</sup> Section 195 of the Criminal Procedure and Evidence Code. The whole section reads as follows: 'If it is made to appear that evidence material to any criminal cause or matter before, or pending before, any court can be given by, or is in the possession of, any person, it shall be lawful for a police officer of the rank of Assistant Superintendent or above, or the Registrar of the High Court, or the magistrate having cognizance of such cause or matter, to issue a summons to such person requiring his attendance before such court or requiring him to bring and produce to such court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.'

<sup>98</sup> All expert certificates or reports which are not raised to the status of prima facie evidence by legislation, may be accepted in evidence on the basis of general rules relating to admission of expert documents. Section 180 of the Criminal Procedure and Evidence Code permits the admission of such documents as long as the parties to the case consent or as long as there is service of the document on the other party and that other party does not object to its admission: *Mphatso Chimangeni v Republic* Criminal Appeal Number 2 of 2003 (High Court – unreported but copy available on <http://www.judiciary.mw> when accessed in January 2005).

<sup>99</sup> 1997 (2) SACR 116 (W). This case has been cited by many authors, for instance, Chaskalson op cit at 27-94A; De Waal op cit at 643; Kidd op cit at 56.

examination but that such curtailment could be seen as a proper limitation of the right to fair trial in terms of the limitation clause in the South African Constitution of 1996.

### **3.4 Conclusion**

In this introductory chapter on the criminal sanction in Malawi, the purpose of the criminal sanction has been explored. It has been shown that the courts in Malawi do recognize at least aspects of the retributive and utilitarian purposes of the criminal sanction and that the purposes generally have varying degrees of relevance in the environmental sphere. The discussion then turned to the constitutional framework within which the criminal sanction works. Addressing the constitutional framework at this stage was necessary as it provides a solid foundation on which to build an analysis of the individual criminal offences provided for in environmental statutes, which is the focus of the next chapter.<sup>100</sup>

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<sup>100</sup> The analysis of individual criminal offences in environmental statutes will also be carried out in Chapter 5 hereof.

# CHAPTER FOUR

## ANALYSIS OF CRIMES IN MALAWI'S ENVIRONMENTAL LEGISLATION: PART ONE

### 4.1 Introduction

In general Malawian criminal law follows the traditional division of a crime into *actus reus* and *mens rea*.<sup>1</sup> Thus a person is not guilty criminally for his conduct unless he had the appropriate state of mind. This principle is sometimes expressed in Latin: *actus non facit reum nisi mens sit rea*.<sup>2</sup> Recently Mwaungulu J partly confirmed the position in Malawi when he said, 'Under our criminal law, the person who actually commits the act or omission with the requisite state of mind is guilty of the offence whether such act or omission was counselled or procured at the aegis of another.'<sup>3</sup> The learned judge's

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<sup>1</sup> D J Lanham [1976] Crim LR 276 is of the view that a crime is made up of three elements. This has not been followed in Malawi.

<sup>2</sup> J C Smith and B Hogan *Criminal Law* 6ed London: Butterworths 1988 at 32. In *Haughton v Smith* [1975] AC 467 at 491 – 492 Lord Hailsham of St Marylebone LC said: 'Before proceeding further, I desire to make an observation on the expression "actus reus" used in the quotation above [that is, statement of Lord Parker CJ in *Davey v Lee* [1968] 1 QB 366 at 370]. Strictly speaking, though in almost universal use, it derives, I believe, from a mistranslation of the Latin aphorism: "Actus non facit reum nisi mens sit rea." Properly translated, this means "An act does not make a *man* guilty of a crime, unless his mind be also guilty." It is thus not the actus which is "reus", but the man and his mind respectively. Before the understanding of the Latin tongue has wholly died out of these islands, it is as well to record this as it has frequently led to confusion.'

<sup>3</sup> *Republic v Shabir Suleman and Aslam Osman* Criminal Case No. 144 of 2003 (Judgment of 30 March 2004) (unreported). In *Republic v Lloyd Amani* Confirmation Case No. 144 of 2003 (unreported) Mwaungulu J said: 'Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and mental component comprising the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the *actus reus* or *mens rea* of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the *actus reus* or *mens rea* of the offence.' His Lordship made similar statements in *Republic v Peter Chapendeka and Others* Confirmation Case No. 451 of 2000 (unreported), *Republic v Fred Chabwera* Confirmation Case No. 728 of 2002 (unreported) and

confirmation is partial because he left out some elements of the actus reus. The act and omission he identified are not the only forms of actus reus. A consequence or a state of affairs may also constitute actus reus.<sup>4</sup> In addition, a specified state of mind on the part of the victim of a crime may form part of the actus reus.<sup>5</sup> Perhaps a more comprehensive way of describing actus reus would be that it is 'the external manifestation of the offence' and it includes 'all the elements in the definition of the crime except the accused's mental element.'<sup>6</sup>

Mens rea is the accused's mental state or degree of fault. It may take various forms. In *Director of Public Prosecutions v Morgan*<sup>7</sup> Lord Hailsham of St Marylebone said, 'The

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*Republic v Ganizani Banda* Confirmation Case No. 884 of 2002 (unreported). Cf *Austin Shaba v Republic* MSCA Criminal Appeal No. 12 of 2002 (unreported). All the cases cited in the current footnote were available on <http://www.judiciary.mw> when accessed towards the end of the year 2004 and in the first quarter of the year 2005.

<sup>4</sup> Peter Murphy (ed) *Blackstone's Criminal Practice* London: Blackstone Press 2000 at 3; Smith and Hogan op cit at 46.

<sup>5</sup> For instance, in the offence of rape contrary to section 132 of the Penal Code (cap 7:01 of the Laws of Malawi) the lack of consent on the part of the victim (that is, the victim's state of mind) is a component of the actus reus of the offence. See generally Smith and Hogan op cit at 5 – 6.

<sup>6</sup> Murphy op cit at 3. Footnote within the quotation has been omitted.

<sup>7</sup> [1976] AC 182 at 213. In fact what Lord Hailsham of St Marylebone said (at 213 – 214) is: 'The beginning of wisdom in all the "mens rea" cases to which our attention was called is, as was pointed out by Stephen J in *Reg v Tolson*, 23 QBD 168, 185, that "mens rea" means a number of quite different things in relation to different crimes. Sometimes it means an intention, e.g., in murder, "to kill or to inflict really serious injury." Sometimes it means a state of mind or knowledge, e.g., in receiving or handling goods "knowing them to be stolen." Sometimes it means both an intention and a state of mind, e.g., "dishonestly and without a claim of right made in good faith with intent permanently to deprive the owner thereof." Sometimes it forms part of the essential ingredients of the crime without proof of which the prosecution, as it were, withers on the bough. Sometimes it is a matter, of which, though the "probative" burden may be on the Crown, normally the "evidential" burden may usually (though not always) rest on the defence, e.g., "self-defence" and "provocation" in murder, though it must be noted that if there is material making the issue a live one, the matter must be left to the jury even if the defence do not raise it. In statutory offences the range is even wider since, owing to the difficulty of proving a negative, Parliament quite often expressly puts the burden on the defendant to negative a guilty state (see *per* Lord Reid in *Sweet v Parsley* [1970] AC 132, 150, or inserts words like "fraudulently," "negligently," "knowingly," "wilfully," "maliciously" which import special types of guilty mind, or even imports them by implication by importing such word as "permit" (cf *per* Lord Diplock in the same case at p. 162) or, as in *Reg v Warner* [1969] 2 AC 256, prohibit the "possession" of a particular substance, or as, in *Sweet v Parsley* itself, leaves the courts to decide whether a particular prohibition makes a new "absolute" offence or provides an escape by means of an honest, or an honest and reasonable belief. Moreover, of course, a statute can, and often does, create an absolute offence without any degree of mens rea at all.'

beginning of wisdom in all the “mens rea” cases ... is ... that “mens rea” means a number of quite different things in relation to different crimes.’ It is therefore necessary to examine particular criminal offences in order to determine the type of mens rea required. In some offences the requirement of mens rea is satisfied by intention, recklessness, negligence or some other state of mind. Intention does not have the same meaning in every context in the criminal law.<sup>8</sup> In some circumstances intention may mean the state of desiring a consequence to follow from one’s action. In other circumstances it may mean the state of not desiring the consequence to occur but of foreseeing the occurrence of a consequence as a by-product of one’s action: in two recent cases it was stated that foresight of virtual certainty or at least a very high degree of probability could give rise to an inference of intention.<sup>9</sup> With regard to recklessness, it is generally understood that the hallmark of recklessness is unjustifiable risk-taking.<sup>10</sup> A person is reckless if he has foreseen that a particular type of harm might be done and yet has gone on to take the risk.<sup>11</sup> He is also reckless if (1) he does an act which in fact creates an obvious risk that a particular type of harm will occur and (2) when he does the act, he either has not given thought to the possibility of there being any such risk or has recognized that there is some risk involved and has nonetheless gone on to do it.<sup>12</sup> One authority has commented that before the last version of recklessness was conceived, it was easy to draw a distinction between recklessness and negligence.<sup>13</sup> At present it is difficult but not impossible. In general terms, negligence is the failure to comply with the

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<sup>8</sup> *R v Woollin* [1999] AC 82 at 96 per Lord Steyn.

<sup>9</sup> *R v Bowden* [1993] Crim LR 379; *R v Woollin* [1999] AC 82. Ian Dennis ‘The Critical Condition of Criminal Law’ in Michael Freeman (ed) *Law and Opinion at the End of the Twentieth Century* Oxford: Oxford University Press 1997 at 223 – 228 notes the critical condition of the criminal law in the area of intention and other aspects of mens rea.

<sup>10</sup> Murphy op cit at 21; Smith and Hogan op cit at 61; D J Birch ‘The Foresight Saga’ [1988] Crim LR 4.

<sup>11</sup> *R v Cunningham* [1957] 2 QB 396. This type of recklessness is known as *Cunningham* recklessness.

<sup>12</sup> *Metropolitan Police Commissioner v Caldwell* [1982] AC 341. This type of recklessness is known as *Caldwell* recklessness. Both *Cunningham* and *Caldwell* were cited with approval by Mwaungulu J in *Chimwemwe Gulumba v Republic* Miscellaneous Criminal Application No. 51 of 2003 (unreported, but copy of judgment available on <http://www.judiciary.mw> when accessed in January 2005).

<sup>13</sup> Smith and Hogan op cit at 68.

standards of a reasonable man.<sup>14</sup> Other possible forms of mens rea are knowledge and belief.<sup>15</sup>

In this connection, it must be noted that in construing criminal legislation the courts operate from the presumption that Parliament intended that mens rea be part of the crime. In *Sweet v Parsley*<sup>16</sup> Lord Reid said:

‘[I]t is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word “knowingly”, is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say “must have been” because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.’

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<sup>14</sup> Murphy op cit at 28.

<sup>15</sup> Murphy op cit at 27.

<sup>16</sup> [1970] AC 132 at 149. The second sentence in the quotation begins a new paragraph. This paragraphing has been omitted. The presumption in favour of mens rea has recently been affirmed by the House of Lords. In *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 460 Lord Nicholls of Birkenhead stated: ‘As habitually happens with statutory offences, when enacting this offence Parliament defined the prohibited conduct solely in terms of the proscribed physical acts. ... In these circumstances the starting-point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence.’ The presumption was similarly given effect in *R v K* [2002] 1 A.C. 462.

In *Sherras v De Rutzen*<sup>17</sup> Wright J held that the presumption that mens rea is an essential ingredient of every offence can be displaced in three principal classes of cases, two of which are, firstly, cases where the prohibited acts are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty, and, secondly, cases of public nuisance. Wright J also said that the presumption 'is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.'<sup>18</sup> Wright J's formulation of principle was approved in *Lim Chin Aik v The Queen*.<sup>19</sup> In this case the Judicial Committee of the Privy Council said:

'Where the subject matter of the statute is the regulation for the public welfare of a particular activity – statutes regulating the sale of food and drink are to be found among the earliest examples – it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea.'<sup>20</sup>

In *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*<sup>21</sup> Lord Scarman, after considering the above three cases, summarized the law in this area in five statements:

- (1) There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;

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<sup>17</sup> [1895] 1 QB 918.

<sup>18</sup> [1895] 1 QB 918 at 921.

<sup>19</sup> [1963] AC 160.

<sup>20</sup> [1963] AC 160 at 174.

<sup>21</sup> [1985] AC 1 at 14. The *Gammon* case was considered and applied in *Wings Ltd v Ellis* [1985] AC 272, *R v Wells Street Metropolitan Stipendiary Magistrate ex p. Westminster City Council* [1986] 1 WLR 1046, *R v Brockley* 99 Cr App R 385, *R v Bezzina* 99 Cr App R 356 and *R v Blake* [1997] 1 All ER 963.

- (2) The presumption is particularly strong where the offence is 'truly criminal' in character;
- (3) The presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (4) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern;
- (5) Even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.<sup>22</sup>

It may be observed that many offences in environmental statutes are not 'truly criminal' in nature; they are quasi-criminal.<sup>23</sup> As such the presumption in favour of mens rea is not strong in respect of such offences. It may be added that the subject matter of environmental statutes is generally the regulation of particular activities for the public welfare. Undoubtedly environmental protection is an issue of social concern,<sup>24</sup> and since environmental statutes are aimed at achieving environmental protection, the presumption in favour of mens rea can be displaced in appropriate environmental offences, especially where that is clearly or by necessary implication<sup>25</sup> the effect of the statute. The creation

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<sup>22</sup> On 12 December 1945 the High Court of Malawi (per Jenkins CJ) in *R v D'Arcy* 1923 – 60 ALR Mal 121 endorsed a passage from *Kenny's Outlines of Criminal Law*, 15ed (1936) at 44 to the effect that the legislature creates offences of strict liability where: (a) the penalty incurred is not great; (b) the damage caused to the public by the offence is, in comparison with the penalty, very great; and (c) the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary mens rea, if that degree of guilt was to be required. Despite the attractiveness of these points, it is unlikely that a modern Malawian court would use only these points in determining whether an offence is one of strict liability. It is likely that a modern Malawian court will follow the *Gammon* case.

<sup>23</sup> On what offences are truly criminal or quasi-criminal in nature, see *R v Muhamad* [2003] QB 1031 and Neil Parpworth 'Unlicensed Tree Felling: A Further Example Of A Regulatory Offence' [2003] *Journal of Planning & Environment Law* 1234.

<sup>24</sup> In *Kirkland v Robinson* [1987] Crim LR 643 it was said that the Wildlife and Countryside Act 1981 was designed to protect the environment, an objective of 'outstanding social importance.' It was acknowledged that '[t]here are areas of national life which are regarded as being of such importance that there must be an absolute prohibition against the doing of certain acts which undermine the welfare of society.'

<sup>25</sup> The phrase 'necessary implication' was explained by Lord Nicholls of Birkenhead in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 464 as follows: "Necessary implication" connotes an



of strict liability in environmental offences is likely to promote environmental protection by encouraging greater vigilance to prevent the commission of the prohibited conduct, especially where there is great publicity of the strict liability nature of the offences.<sup>26</sup>

With the foregoing background in mind, the discourse will now centre on the analysis of crimes in the environmental legislation of Malawi. The analysis will begin with Malawi's flagship environmental statute, the Environment Management Act.

## 4.2 Environment Management Act 23 of 1996

### 4.2.1 General

The Environment Management Act 23 of 1996 ("EMA") is a coordinating statute on environmental matters. Its declared purpose is to make provision for the protection and management of the environment and the conservation and sustainable utilization of natural resources and related matters.<sup>27</sup> Subject to the provisions of the Constitution of

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implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.'

<sup>26</sup> Colin Howard *Strict Responsibility* London: Sweet & Maxwell 1963 at 25 argues that 'we have no idea what the social effect of strict responsibility has been. There is simply no relevant knowledge [evidence].' Whatever merit this argument has, it may be observed that the courts are prepared to find that strict liability has a deterrent effect. This is clear from the case of *Gammon* itself, decided over twenty years after Howard's criticism. Since court cases are generally decided by courts on the basis of precedent, Howard's argument may be dismissed as being contrary to authority. An example of the courts' readiness to find that strict liability has a deterrent effect is contained in the following statement from Lord Salmon in *Alphacell Ltd v Woodward* [1972] AC 824 at 848 – 9: 'If this appeal succeeded and it were held to be the law that no conviction could be obtained under the Act of 1951 unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence section 2 (1) (a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it.' Similar sentiments were expressed by Mitchell J in *Harrow London Borough Council v Shah* [2000] 1 WLR 83 at 89 and by the Court of Appeal in *R v Muhamad* [2003] QB 1031 at 1037 and 1039. See also J C Smith '*Kirkland v Robinson*' [1987] Crim LR 643 at 644 where he said that the approach of the court in *Kirkland v Robinson* – which is a typical strict liability approach – is understandable 'where the court wishes to discourage an activity altogether.'

<sup>27</sup> Long title of the EMA.

the Republic of Malawi, the EMA enjoys the status of an environmental constitution. Its section 7 declares that where a written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources is inconsistent with any provision of the EMA, that written law is invalid to the extent of the inconsistency. The language of section 7 is wide and suggests that a provision of the Constitution which is inconsistent with the EMA may be invalid to the extent of the inconsistency. However, such a construction stultifies the doctrine of constitutional supremacy as understood and applied in Malawi's legal system. Accordingly, it is submitted that in the present context the inconsistent written law does not include the Constitution. Thus section 7 must be read subject to the provisions of the Constitution.

#### **4.2.2 General offence**

Section 61 of the EMA states that a person who contravenes any provision of the Act for which no other penalty is specifically provided shall be guilty of an offence and liable to a fine of not less than MWK10 000 (US \$75) and not more than MWK500 000 (US \$3 759). In addition a fine of MWK5 000 (US \$38) may be imposed for each day the offence continues to be committed. The EMA has six sections dealing specifically with offences (sections 62 to 67). Contravention of these sections generally amounts to commission of the crimes specified therein. There is therefore no doubt as to the criminal nature of the acts, omissions, etc, set out in those sections. Problems arise when considering the purport or effect of section 61. From a literal interpretation of the content of this section, it appears that it seeks to criminalize every contravention of any provision of the EMA. While this may be a simple and easy way of creating offences which may have been inadvertently left out, it is unlikely that the courts will take this general criminalization on face value because it may lead to absurdity. For instance, section 8(2)(e) provides that the Minister must prepare and lay before the National Assembly at least once every year a report on the state of the environment. It is absurd to think that Parliament intended to criminalize the Minister's failure to do so.<sup>28</sup> It is arguable that the correct approach is for

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<sup>28</sup> Section 68 of the EMA provides that the Minister is immune from legal proceedings "in respect of anything done in good faith under the provisions of this Act." It is clear from the quoted words that the

the courts to disregard the literal meaning of section 61 and to select and say in what cases they think Parliament intended contravention of a particular section of the Act to amount to a crime the criminalization and penalty of which are prescribed in section 61. Thus the courts 'must ascertain, by ordinary techniques of construction of statutes, whether the legislature had intended that disobedience to a particular command or direction should attract the criminal sanction' as laid out in section 61.<sup>29</sup>

#### **4.2.3 Hindering, obstructing, etc, of inspectors**

The EMA makes provision for the appointment of environmental inspectors whose functions are to administer, monitor and enforce measures for the protection and management of the environment and for the prevention and abatement of pollution to the environment. Every inspector is issued with an identity card. On request by any person affected by the exercise of his powers, an inspector is required to produce the identity card for inspection. In the performance of his duties an inspector has various powers. He may enter any premises at any reasonable time to examine any activity which the inspector reasonably considers to be detrimental to the environment or natural resources and to collect from such activity samples of any pollutant or other substance for analysis. While on the premises the inspector may demand the production of any relevant book, document or record for retention by him. An inspector may also inspect and examine any vehicle in which he has reasonable cause to believe that a pollutant or other substance is being or has been transported. He may order the production of any document pertaining to the transportation of the pollutant or other substance, and may collect samples of the pollutant or other substance for analysis. He may also request information from any person who has or appears to have custody or control of the pollutant or other substance.<sup>30</sup>

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Minister's immunity is only in respect of acts; the immunity does not extend to omissions. So, theoretically, legal proceedings in respect of failure to carry out a duty may be brought against the Minister.

<sup>29</sup> J R L Milton and M G Cowling *South African Criminal Law and Procedure* Vol III 2ed Kenwyn: Juta 1988 (Service No. 7, 1995) at § 1-16. See also *R v Bornman* 1912 TPD 66 at 68 and *R v Mgibantaka* 1934 CPD 121 at 126.

<sup>30</sup> Section 46 of the EMA. Section 47 of the EMA provides for (a) prior notice of intention to collect samples to be given to the owner or occupier of the premises or vehicle or other person in control of the

In the context of these duties, functions and powers of inspectors, it is provided that any person who engages in any of the following acts or omissions shall be guilty of an offence:<sup>31</sup>

- (a) hindering or obstructing an inspector in the execution of his duties;
- (b) failing to comply with a lawful order or requirement made by an inspector;
- (c) preventing an inspector or any person duly authorized by the inspector from gaining entry into any premises which he is empowered to enter;<sup>32</sup>
- (d) impersonating an inspector or any person duly authorized by the inspector;<sup>33</sup>
- (e) preventing an inspector from having access to any relevant record or document required by the inspector;
- (f) misleading or giving false information to an inspector or any person duly authorized by the inspector;<sup>34</sup>
- (g) failing to comply with measures directed by the inspector for the protection and management of the environment and the conservation and sustainable utilization of natural resources.<sup>35</sup>

Upon conviction the punishment is a fine of MWK5 000 (US \$38) or more up to a maximum of MWK200 000 (US \$1 504) and imprisonment for two years.<sup>36</sup>

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vehicle; (b) placing of sample in three packages and delivering one package each to the Director, analysing laboratory and owner or occupier of the premises or vehicle or other person in control of the vehicle; and (c) referral of disputes in respect of the sample to the Environmental Appeals Tribunal.

<sup>31</sup> Section 62 of the EMA.

<sup>32</sup> Preventing the Director of Environmental Affairs or any person authorised by him is also criminalized.

<sup>33</sup> Impersonating the Director of Environmental Affairs or any person authorised by him is also criminalized.

<sup>34</sup> Misleading or giving false information to the Director of Environmental Affairs or any person authorised by him is also criminalized.

<sup>35</sup> The measures may also be those directed by the Minister or the Director of Environmental Affairs.

<sup>36</sup> Section 62 of the EMA.

It is not clear from the wording of the relevant section whether the acts or omissions listed above must be accompanied with mens rea for them to amount to criminal offences. There is a possibility that mens rea is not an element in these offences. Several reasons may be advanced for this. In the first place, it is in the public interest that the work of inspectors should not be hindered or interfered with unnecessarily as they are crucial agents in the enforcement of environmental law. A requirement of mens rea may render ineffectual the enforcement of environmental law by inspectors. In the second place, the use of words importing mens rea in other sections creating offences in the Act<sup>37</sup> and the non-use of such words in the present group of offences suggest (though not conclusively) that the offences under consideration do not require mens rea. The possibility of the accused being sentenced to a term of imprisonment does not detract from the conclusion that mens rea is not required as strict liability may be imposed even in such circumstances.<sup>38</sup>

Further, it may be observed that some of the proscribed acts listed above may be done in the name of the right to privacy. In this way the constitutionality of aspects of these offences may be brought into question. For instance, the owner of premises may contend that he prevented an inspector from gaining entry into his premises with a view to protecting his constitutional right to privacy. Similarly the owner of premises may argue that he prevented an inspector from accessing relevant records or documents in the interest of safeguarding his right to privacy. These challenges need to be examined. In essence the question is whether an inspector's powers of entry, search and seizure are constitutionally valid. If these powers are valid, preventing the inspector's entry into premises or preventing his collection of documents would be constitutionally valid offences.

Section 21 of the Constitution provides that every person has the right to personal privacy, which includes the right not to be subject to (a) searches of one's person, home

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<sup>37</sup> For example, sections 63, 64 and 66 of the EMA.

<sup>38</sup> *R v Blake* [1997] 1 WLR 1167; *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 1 WLR 903.

or property; (b) seizure of private possessions; or (c) interference with private communications (mail and all forms of telecommunications).<sup>39</sup> On the face of section 21 of the Constitution, it is unacceptable for the inspector to enter and search premises or vehicles and seize samples or documents. However, privacy is not an absolute right: it is a derogable right. It may be restricted or limited as long as the restrictions or limitations are prescribed by law, reasonable, recognized by international human rights standards and necessary in an open and democratic society.<sup>40</sup> For present purposes it is beyond dispute that the entry, search and seizure are prescribed by law.<sup>41</sup> What remains to be established is whether the entry, search and seizure are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

As suggested in segment 3.3 of Chapter 3, the yardstick for measuring the reasonableness of a restriction or limitation was laid out in *R v Oakes*.<sup>42</sup> The starting point is that the limitation must have a purpose or objective. The inquiry involves a proportionality test which has three components. Firstly, the limitation must be carefully designed to achieve the objective. Secondly, the limitation, even though rationally connected to the objective, should impair as little as possible the right in question. Thirdly, there must be proportionality between the effects of the limitation and the objective. Applying this yardstick to the present matter, it will be noted that entry, search and seizure have a good

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<sup>39</sup> William J Stuntz 'Privacy's Problem and the Law of Criminal Procedure' (1995) 93 *Mich L Rev* 1016 at 1020 – 1021 defines privacy as follows: 'In legal discourse privacy encompasses, among other things, the ability to engage in certain conduct free from government regulation, freedom from being stared at or stalked or "singled out" in public, the "right to be let alone," and the ability to keep certain information or aspects of one's life secret. If one takes privacy to mean all these things, or some fuzzy and varying combination of them, it quickly becomes impossible to say anything useful on the subject. ... A more refined definition is needed. In the law of criminal procedure, two kinds of privacy seem to matter. The first is fairly definite: privacy interests as interests in keeping information and activities secret from the government. The focus here is on what government officials can see and hear, what they can find out. ... The second kind of privacy is much harder to get one's hands on: it is easier to say what it is not than what it is. It is not, other than coincidentally, about protecting secrets and information. Rather it is about preventing invasions of dignitary interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests and street stops infringe privacy in this sense because they stigmatize the individual, single him out, and deprive him of freedom.'

<sup>40</sup> Section 44(2) of the Constitution.

<sup>41</sup> Sections 46 and 47 of the EMA.

purpose or objective. The rate of environmental crime is high in Malawi. The need to fight environmental crime is therefore an important objective in Malawian society. To this end, Parliament enacted the EMA which authorizes the appointment of environmental inspectors to administer, monitor and enforce measures geared towards environmental protection. In view of the complexities of environmental crime and the difficulty of identifying environmental criminal conduct which may or may not constitute a specified offence, there is arguably a need for the environmental inspectors to have entry, search and seizure powers.<sup>43</sup> Thus the entry, search and seizure are rationally connected to the objective of fighting against environmental crime. This important objective must be weighed against the premises/vehicle-owner's right to privacy. Of course that 'right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice system. On the other hand, State officials are not entitled, without good cause, to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and those of the State.'<sup>44</sup> In this regard, it may be observed that the environmental inspectors are not required to obtain a search warrant before the entry, search and seizure. All that is required of them is that they must enter at a reasonable time, that they must reasonably consider the activity under investigation to be detrimental to the environment, and that they must give notice of intention to collect to the owner of the premises or vehicle before collecting any samples. It may further be observed that the inspectors may exercise these powers of entry, search and seizure in respect of any premises which certainly includes dwelling houses. While on the premises, they may not only examine the activity in question, but they may also demand production of any book, document or record concerning any matter relevant to the administration of the EMA. The process of

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<sup>42</sup> (1986) 26 DLR (4<sup>th</sup>) 200.

<sup>43</sup> Cf Langa DP (as he then was) in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 at paras 48 and 53.

<sup>44</sup> Per Langa DP (as he then was) in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 at para 54. See also Scott E Sundby ' "Every man" 's Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?' (1994) 94 *Columbia Law Review* 1751 at 1765 – 1766.

obtaining these documents may lead to the possibility of inspectors accessing private letters and other private documents, a possibility which transgresses the core of the right to privacy.

In the recent case of *Mistry v Interim Medical and Dental Council of South Africa and Others*<sup>45</sup> the Constitutional Court of South Africa dealt with section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 which gave inspectors of medicines the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believed that there were medicines or other substances regulated by the statute, and to seize any medicine or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft which appeared to afford evidence of a contravention of any provision of the statute. No search warrant was required. Sachs J (the other justices concurring) held that to the extent that a statute authorized, in the absence of a warrant, entry into private homes and rifling through intimate possessions, such activities would intrude on the inner sanctum of the persons in question and the statutory authority would accordingly breach the right to personal privacy. The learned judge went on to say that it is necessary to decide on a case by case basis how invasive a regulatory inspection would be. The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records had to be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that were an inseparable part of an effective regime of regulation. In the case at hand the impugned section did not confine itself to authorizing periodic inspections of the business premises of health professionals. The impugned section was so wide and unrestricted in its reach as to authorize any inspector to enter any person's home without a warrant simply on the basis that medicines were or were reasonably suspected of being there. In the

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<sup>45</sup> 1998 (4) SA 1127 (CC). See also Iain Currie 'Constitutional Jurisprudence' (1998) *Annual Survey of South African Law* 51 at 80.



circumstances the court held that the section was inconsistent with the right to privacy and invalid.

The content of section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 is similar – not identical – to the content of section 46 of the EMA in material respects. In both provisions there is no requirement of a warrant. Both provisions do not confine themselves to periodic, regulatory inspections. Both provisions do not contain enough safeguards to impair the right to privacy as little as possible. Further, in both provisions the extent of the invasion of the right to privacy is substantially disproportionate to its objective or purpose. It may therefore be concluded that if Malawian courts are persuaded to follow the authority of *Mistry*, section 46 of the EMA in its present state will be held not to be a reasonable limitation to the right to privacy, that is to say, an environmental inspector's powers of entry, search and seizure as presently articulated are not constitutionally reasonable.

In *Hunter v Southam*<sup>46</sup> the Supreme Court of Canada held that search and seizure would be reasonable if, among other things, they were authorized before being conducted or performed. The court stated that the power to authorize a search and seizure must be given to an impartial and independent person (usually a justice) who is bound to act judicially in discharging that function. Further, the person seeking the authority must have reasonable grounds to suspect that an offence has been committed. The purpose of this prior authorization requirement is 'to provide an opportunity, before the event, for the conflicting interests of the State and individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the State are thus demonstrably superior.'<sup>47</sup> It follows that the search and seizure provided for in section 46 of the EMA are generally not reasonable since they are not required to be preceded by an authorization (valid warrant).

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<sup>46</sup> (1985) 14 CCC (3d) 97 SCC at 102 – 103. See also *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

<sup>47</sup> At 109.

However, it must be noted that in some searches and seizures prior authorization is not required. For example, in periodic regulatory inspections of business premises with a view to enforce public welfare laws warrants are generally not required. Similarly a warrant is not necessary if the object of the search or seizure would be frustrated by a delay.<sup>48</sup> One instance of this is where an enforcement officer intends to search a motor vehicle that could be quickly moved away.<sup>49</sup>

The discussion will now turn to an examination of the last two qualifications of an acceptable limitation: necessity in an open and democratic society, and recognition by international human rights standards. With regard to the former, the words of Sachs J in *Mistry* are apposite: 'The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State.'<sup>50</sup> This being the case, it cannot be said that section 46 of the EMA (with its lack of appropriate safeguards) is necessary in an open and democratic society. Similarly international human rights standards do not support entries and searches without warrants or appropriate safeguards. Article 12 of the UDHR prohibits 'arbitrary interference' with a person's privacy. In the same vein Article 17 of the ICCPR declares that no one should be subjected to 'arbitrary or unlawful interference with his privacy.' The word 'arbitrary,' it has been suggested, means 'without justification in valid motives and contrary to established legal

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<sup>48</sup>Michael A Kidd 'The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa' unpublished PhD Thesis, University of Natal 2002 at 34; Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* 4ed Lansdowne: Juta 2001 at 281; George E Devenish *The South African Constitution* Durban: LexisNexis Butterworths 2005 at 85 writes: '[S]ome kind of prior authorisation by an independent authority is usually necessary before a search may be carried out. The general rule is that a warrant must be obtained unless the object of the search would be hampered by delay. However, warrants are not obligatory when regulatory inspections are employed. These are routine in nature and are used to control potentially dangerous activities.'

<sup>49</sup> Peter W Hogg *Constitutional Law of Canada* Scarborough: Thomson Carswell 1997 at 45-26. Cf A C Oosthuizen 'The search, seizure and forfeiture provisions of the Customs Act: a cause for concern' [2002] *Acta Juridica* 220 at 222 – 223 where he says that although some arguments in support of warrantless search and seizure are compelling, 'they do not justify the creation of a regime where warrantless seizures are the order of the day.'

<sup>50</sup>*Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at para 25.

principles.’<sup>51</sup> It is arguable that searches and seizures without appropriate safeguards would readily be classified as ‘arbitrary’ and an unjustifiable infringement of the right to privacy.

From the foregoing analysis it may be concluded that an inspector’s powers of entry, search and seizure under section 46 of the EMA are inconsistent with section 21 of the Constitution (right to privacy) in that they are too wide and unrestricted in their reach and in that they do not require prior authorization in appropriate circumstances. The inspector’s powers of entry, search and seizure are therefore invalid to the extent of such inconsistency. It follows that an inspector’s warrantless entry, search or seizure that does not qualify as a periodic regulatory inspection or that is not urgent, can lawfully be opposed by the owner or occupier of premises or owner of a motor vehicle. In other words, the owner or occupier of premises may prevent an inspector from entering the premises or accessing documents therein as long as the inspector is conducting an unlawful entry, search and/or seizure. Thus the acts or omissions set out in section 62 of the EMA constitute offences only when the inspector is performing his constitutionally valid functions and powers.

It follows from this conclusion that the validity of the offences set out in section 62 of the EMA depends largely on the scope of the inspector’s powers and functions laid out in section 46 of the EMA. If the inspector’s powers in section 46 are exercised within the constitutionally acceptable scope, the offences in section 62 can be committed. Since the constitutionally acceptable scope of the inspector’s powers is not apparent from a reading of section 46, it is necessary to amend section 46 with a view to making it clear as to what an inspector can constitutionally do. To this end, it is suggested that section 46 should read as follows:

‘46. – (1) For the purpose of performing the functions referred to in section 45(1), a judge or magistrate may, on application by an inspector or any person

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<sup>51</sup> Asbjorn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* Oslo: Scandinavian University Press 1992 at 190.

duly authorized by the inspector, issue a warrant authorizing the inspector or person named therein to, without prior notice and at any reasonable time, enter any premises to examine any activity which the inspector reasonably considers to be detrimental to the environment or natural resources and to collect therefrom samples of any pollutant or other substance for analysis at any laboratory designated by the Minister under section 48.

(2) An application under subsection (1) shall be supported by information supplied under oath or affirmation, establishing the facts on which the application is based.

(3) A judge or magistrate may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that an activity detrimental to the environment or natural resources is taking place or took place in the premises specified in the application.

(4) A warrant issued under subsection (1) shall identify the premises to be entered and searched and the person alleged to be responsible for the activity.

(5) Upon entering the premises the inspector may require the owner or occupant or the agent of the owner or occupant of the premises to produce for inspection any book, document or record or copies thereof for retention by the inspector concerning any matter relevant to the administration of this Act.

(6) It shall be the duty of the owner or occupant or the agent of the owner or occupant of the premises to render an inspector reasonable assistance in the performance by the inspector of the functions referred to in section 45(1).

(7) Where the inspector has reasonable grounds to believe that –

- (a) the activity may pre-emptively be interfered with or relevant information, documents or things are about to be removed or destroyed; and
- (b) a warrant cannot be obtained timeously to prevent such interference, removal or destruction,

such inspector may enter the premises on which the activity is or the information, documents or things are and exercise all the powers granted by this section, as if a warrant under subsection (1) had been obtained.

(8) An inspector may –

- (a) inspect and examine any vehicle, in or upon which he has reasonable cause to believe that a pollutant or other article or substance which he believes to be a pollutant is being or has been transported;
- (b) order the production of any document pertaining to the transportation of the pollutant or such other article or substance;
- (c) collect any sample of the pollutant or such other article or substance from the vehicle or place where it has been delivered, for analysis at a laboratory designated by the Minister under section 48;
- (d) request information from any person who has or appears to have custody or control of the pollutant or such other article or substance or the vehicle in which it is or has been transported.’

The reworked section 46 is intended to avoid the criticisms of the current section 46 and the problems of determining whether the acts or omissions set out in section 62 of the EMA constitute valid offences.

#### **4.2.4 Offences relating to environmental impact assessments**

Section 63 of the EMA makes provision for offences relating to environmental impact assessments (EIAs). Of these offences one relates to section 24(3) and the remaining two offences are in respect of section 25. Section 24(3) is in the following terms:

‘Where, upon examining the project brief, the Director considers that further information is required to be stated in the project brief before an environmental impact assessment is conducted, the Director shall require the developer, in writing, to provide such further information as the Director shall deem necessary.’

What does section 63 mean when it says that any person who contravenes this provision commits an offence? Two meanings may be suggested. In the first place, it may mean that where the Director of Environmental Affairs unreasonably fails to require additional information from the developer, he (the Director) commits an offence.<sup>52</sup> The merit of this interpretation lies in that it has the potential of encouraging vigilance or adequate scrutiny on the part of the Director whenever a project brief is submitted to him. In the second place, it may mean that the developer who fails to provide further information as demanded by the Director commits an offence. This second meaning sounds more likely to be the meaning Parliament intended as this Act mainly seeks to *police* the activities of subjects (e.g. developers) and not necessarily government officials. However, there is scope for arguing that both interpretations are acceptable as they both further the purpose or object of the Act, which is the protection and management of the environment and the conservation and sustainable utilization of natural resources. The problem of interpreting this provision arises partly from the legislative device of criminalizing conduct by reference. It is likely that this problem would not have been there if section 63 had not made any reference to section 24(3) but simply stated what acts or omissions were criminalized.

As stated earlier on, the last two offences in section 63 are connected to section 25. The latter section states that upon being satisfied that sufficient information has been stated in the project brief, the Director shall require the developer to conduct an environmental impact assessment and to submit to him (Director), in respect thereof, an environmental

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<sup>52</sup> The immunity of the Director from legal proceedings articulated in section 68 of the EMA relates to acts only and not omissions. In the present context the Director’s failure to require additional information is an omission and so falls outside the ambit of the immunity.

impact assessment report containing specified information.<sup>53</sup> If the developer fails to prepare an environmental impact assessment report, he is guilty of an offence. It seems that for this offence mens rea is not an element. If the developer or any person knowingly gives false information in an environmental impact assessment report, he is guilty of an offence. The word 'knowingly' suggests that mens rea is an element of this offence of giving false information. It has actually been said that 'knowingly' is the word most apt to introduce an element of mens rea.<sup>54</sup> In *R v Taaffe*<sup>55</sup> it was said that 'the principle that a man must be judged upon the facts as he believes them to be is an accepted principle of the criminal law when the state of a man's mind and his knowledge are ingredients of the offence with which he is charged.' Accordingly, the question whether the developer or any person knowingly gave the false information will depend on what the developer or that other person believed the information to be. If the developer or other person believes that the information is not false, although in fact it is false, he cannot be found to have

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<sup>53</sup> According to section 25(1) of the EMA the report must have the following content: (a) a detailed description of the project and the activities to be undertaken to implement the project; (b) the description of the segment or segments of the environment likely to be affected by the project and the means for identifying, monitoring and assessing the environmental effects of the project; (c) the description of the technology, method or process to be used in the implementation of the project and of any available alternative technology, method or process and the reasons for not employing the alternative technology, method or process; (d) the reasons for selecting the proposed site of the project as opposed to any other available alternative site; (e) a detailed description of the likely impact the project may have on the environment and the direct, indirect, cumulative, short-term and long-term effects on the environment of the project; (f) an identification and description of measures proposed for eliminating, reducing or mitigating any anticipated adverse effects of the project on the environment; (g) an indication of whether the environment of any other country or of areas beyond the limits of national jurisdiction is or are likely to be affected by the project and the measures to be taken to minimize any damage to the environment; (h) an outline of any gaps, deficiencies and the adverse environmental concerns arising from the environmental impact assessment and from the compilation of the environmental impact assessment report; and (i) a concise description of the method used by the developer to compile the information required under this section.

<sup>54</sup> Per Lord Rawlinson of Ewell, counsel for the accused in *R v Taaffe* [1984] AC 539 at 544. See also Peter Hungerford-Welch and Alan Taylor *Sourcebook on Criminal Law* London: Cavendish Publishing 1997 at 34.

<sup>55</sup> [1984] AC 539 at 546. In *Nankondwa v Republic* 1966 – 68 ALR Mal 388 at 394 – 395 the Malawi Supreme Court of Appeal held that the test to be applied in determining whether an accused had the requisite knowledge for murder was not the objective test of whether a reasonable person would have contemplated that death or grievous harm was likely to result from the accused's action but the subjective test of what the accused himself contemplated. In essence this understanding of 'knowledge' appears to be the same as that for 'knowingly' in *R v Taaffe*. Cf *Menyani v Republic* 1966 – 68 ALR Mal 79 at 81 which may now be regarded as no longer good law.

knowingly given false information. If the developer or other person believes the information to be false, he obviously can be found to have knowingly given false information. The developer or other person will also be found to have knowingly given false information if he believes that the information is false in some respect but turns out to be false in another respect.<sup>56</sup> However, he does not knowingly give false information if he believes incorrectly that the information is false when in actual fact it is not false.<sup>57</sup>

Any person convicted of an offence relating to environmental impact assessments may be sentenced to a fine of not less than MWK5 000 (US \$38) and not more than MWK200 000 (US \$1 504) and to imprisonment for two years.<sup>58</sup>

#### 4.2.5 Offences relating to records

It is an offence to fail to keep records required under the EMA or under any regulations made thereunder.<sup>59</sup> The EMA confers on the Director of Environmental Affairs the power to prescribe activities in respect of which records must be kept for purposes of the Act. The records may be used by the Director or an inspector for purposes of environmental auditing, monitoring, control and inspection and other purposes related to the protection and management of the environment and to the conservation and sustainable utilization of natural resources.<sup>60</sup> Further, the Minister may cause to be kept proper books and other records of account in respect of receipts and expenditures of the Environmental Fund.<sup>61</sup> It

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<sup>56</sup> This is the effect of the decisions in *R v Ellis, Street and Smith* (1987) 84 Cr App R 235; *R v Hennessey* (1979) 68 Cr App R 419; and *R v Hussain* [1969] 2 QB 567.

<sup>57</sup> Cf *R v Taaffe* [1984] AC 539; G J Bennett and B Hogan 'Criminal Law and Sentencing' All ER Rev 1983 129 at 132 - 133. In such a scenario the actus reus is absent, so the developer or other person cannot be found guilty of the offence.

<sup>58</sup> Section 63 of the EMA.

<sup>59</sup> Section 64(a) of the EMA.

<sup>60</sup> Section 51 of the EMA.

<sup>61</sup> Section 58 of the EMA. The Environmental Fund is created under section 53 of the EMA. It is vested in the Minister and it is administered in accordance with his directions (subject to the provisions of the EMA and the Finance and Audit Act): section 55 of the EMA. According to sections 56 and 57 of the EMA the



appears that failure to keep any of these records is an offence even in the absence of mens rea as section 64(a) does not require any state of mind to accompany the failure.

It is also an offence to 'fraudulently or knowingly' alter any such records.<sup>62</sup> The meaning of 'knowingly' in the present context is similar to that explained above in relation to knowingly giving false information. It is submitted that the only difference is that the meaning here is informed by 'altering records' instead of 'giving false information.' However, 'fraudulently' means something else. Previously it was thought that in offences involving fraud terminology, dishonesty was not necessarily a part of the offence.<sup>63</sup> The position is now different. The meaning of 'fraudulently' is associated with the meaning of 'intent to defraud.' Both the word 'fraudulently' and the phrase 'with intent to defraud' have been held to import dishonesty.<sup>64</sup> In *Re Companies Acts, Ex p. Wilson*<sup>65</sup> Wills J lamented the misuse of the word 'fraud.' He said, " 'Fraud,' in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions." In the present context there is nothing in section 64 of the EMA suggesting that the word 'fraudulently' is being used in a sense other than that

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objects of the Fund are generally the protection and management of the environment and the conservation and sustainable utilization of natural resources. Specifically the Fund may be applied to: (a) research and training which is calculated to promote the protection and management of the environment and the conservation and sustainable utilization of natural resources; (b) the acquisition of land, equipment, materials and other assets and the construction of buildings in order to promote the objects of the Fund; (c) the cost of any scheme which the Minister considers to be in the interest of the protection and management of the environment and the conservation and sustainable utilization of natural resources; (d) meeting any expenses arising from the establishment and maintenance of the Fund; and (e) any purpose which the Minister considers to be in the interest of the objects of the Fund.

<sup>62</sup> Section 64(b) of the EMA.

<sup>63</sup> *Welham v DPP* [1961] AC 103; *Murphy* op cit at 395.

<sup>64</sup> *R v Cox and Hodges* (1982) 75 Cr App R 291; *Smith and Hogan* op cit at 127. in *Re Patrick and Lyon Ltd* [1933] Ch 786 at 790 Maugham J said: "I will express the opinion that the words 'defraud' and 'fraudulent purpose,' where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair-trading among commercial men, real moral blame." Maugham J has been so quoted at [1983] Crim LR 167.

<sup>65</sup> (1888) 21 QBD 301 at 309. See also John S. James (ed) *Stroud's Judicial Dictionary of Words and Phrases* 5ed Vol 2 London: Sweet & Maxwell 1986 at 1029 and the authorities cited there. One of these authorities states that fraud is inconsistent with a claim of right made in good faith to do the act complained of.

which it normally signifies (that is, the sense of dishonesty). In fact the use of 'fraudulently' in conjunction with 'knowingly' seems to suggest that Parliament intended to distinguish dishonest alteration of the records from other proscribed ways of altering the records. In this connection it must be noted that 'fraudulently' is generally taken as introducing an element of mens rea.<sup>66</sup>

Another offence relating to records is provided for in section 52 of the EMA. A person who, in the course of his duties under the EMA, gets to know the contents of any document, communication or information relating to the Act, is not permitted to publish or disclose such contents to any person otherwise than in accordance with the EMA without the written consent of the Director. So for a person to be guilty of this offence there must be:

- (a) publication or disclosure of the contents of any document, communication or information;
- (b) the publication or disclosure must be contrary to the provisions of the EMA;
- (c) the publication or disclosure must have been done without the consent of the Director;
- (d) the contents of the document, communication or information must relate to his duties under the EMA; and
- (e) the contents of the document, communication or information must have come to his knowledge in the course of his duties under the EMA.

In essence this offence seeks to criminalize improper disclosure of information. There are proper channels for disclosing information; channels which are generally beneficial to the environmental cause. One instance in which this offence may be committed is as follows. Suppose that the Director has information relating to the environmentally prejudicial

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<sup>66</sup> Smith and Hogan op cit at 127 claim that nothing could be more apt to introduce a requirement of mens rea than the word 'fraudulently' or the phrase 'with intent to defraud.' This claim is similar to that of Lord Rawlinson of Ewell in *R v Taaffe* [1984] AC 539 at 544 in respect of the word 'knowingly.' These claims do not add anything substantive to the legal discourse. The generally settled position is that both 'fraudulently' and 'knowingly' import a requirement of mens rea.

activities of a particular company and one of the officers in the Director's office discloses this information. If the company consequently covers up its sins with the result that the Director is not able to effectively take enforcement measures against the company, the disclosure has not benefitted the environmental cause. The disclosing officer may be charged with this offence.

The punishment for these offences relating to records varies. The offences of failure to keep records and alteration of records attract a fine of not less than MWK5 000 (US \$38) and not more than MWK200 000 (US \$1 504) and imprisonment for two years. With regard to improper disclosure, the punishment is a fine of between MWK2 000 (US \$15) and MWK100 000 (US \$752) and imprisonment for one year.<sup>67</sup>

#### **4.2.6 Offences relating to environmental standards and guidelines**

On the advice of the National Council for the Environment,<sup>68</sup> the Minister may prescribe environmental quality standards generally and, in particular, for air, water, soil, noise, vibrations, radiation, effluent and solid waste. The prescription of these standards is required to be based on scientific and environmental principles and to take into account the practicability and availability of appropriate technology for ensuring compliance with such standards. Different standards may apply in different areas of Malawi with respect

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<sup>67</sup> Sections 52(4) and 64 of the EMA.

<sup>68</sup> The National Council for the Environment was established under section 10 of the EMA. According to section 12, the Council's functions include: (a) advising the Minister on all matters and issues affecting the protection and management of the environment and the conservation and sustainable utilization of natural resources; (b) recommending to the Minister measures necessary for the integration of environmental considerations in all aspects of economic planning and development; and (c) recommending to the Minister measures necessary for the harmonization of activities, plans and policies of lead agencies and non-governmental organizations concerned with the protection and management of the environment and the conservation and sustainable utilization of natural resources. It must be noted that although it is the responsibility of the Council to advise the Minister on environmental quality standards, it is actually not the Council itself which comes up with the proposed standards. Strictly speaking, it is the Technical Committee on the Environment established under section 16 that prepares the standards, for section 17 states that the Committee is mandated to carry out investigations and conduct scientific studies of any activity, occurrence, product or substance and to recommend to the Council appropriate standards, criteria and guidelines for environmental control and regulation.

to different segments of the environment. The Minister has power to vary these standards from time to time.<sup>69</sup> It is an offence to violate any of these standards.<sup>70</sup>

Section 65(b) makes reference to ‘measure.’ It provides that violation of ‘any measure’ prescribed under the Act is an offence. The meaning of ‘measure’ is not clear. The word appears in fifteen other sections.<sup>71</sup> The following is a representative sample of the phrases in which it occurs: measures necessary for promoting the protection and management of the environment and the conservation and sustainable utilization of natural resources;<sup>72</sup> duty to take all necessary and appropriate measures to protect and manage the environment and to conserve natural resources and to promote sustainable utilization of natural resources;<sup>73</sup> take steps and measures as are necessary for promoting a clean environment;<sup>74</sup> measures to prevent or stop any act or omission deleterious to the environment;<sup>75</sup> take such measures as are necessary for achieving the objects of the Act;<sup>76</sup> measures necessary for the harmonization of activities, plans and policies of lead agencies and environmental non-governmental organisations;<sup>77</sup> measures for eliminating, reducing or mitigating any anticipated adverse effects of the project on the environment;<sup>78</sup> measures necessary to regulate safe disposal of waste by local authorities;<sup>79</sup> and measures for ensuring that the implementation of a project commenced

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<sup>69</sup> Section 30 of the EMA.

<sup>70</sup> Section 65(a) of the EMA.

<sup>71</sup> Sections 2 (definition of National Environmental Action Plan), 3(1) and (2), 5(2)(b), 8(1) and (2)(m), 12(b) and (c), 22, 25(1)(f) and (g), 27(3), 28, 31(b), 33(2)(a), 35(1)(d) and (e) and (2), 37(2) and 3(a), 40(2)(b), 45(1), and 62(g).

<sup>72</sup> Section 2 (definition of National Environmental Action Plan).

<sup>73</sup> Section 3(1) of the EMA.

<sup>74</sup> Section 3(2) of the EMA.

<sup>75</sup> Section 5(2)(b) of the EMA.

<sup>76</sup> Section 8(1) of the EMA.

<sup>77</sup> Section 12(c) of the EMA.

<sup>78</sup> Section 25(1)(f) of the EMA.

<sup>79</sup> Section 37(2) of the EMA.

before the Act came into force complies with the provisions of the Act.<sup>80</sup> It is arguable that the meaning of measure in these phrases is no more than ‘a means of achieving the specific purpose or object associated with the word.’ Thus a measure to regulate safe disposal of waste signifies a means for achieving the safe disposal of waste. On this understanding it may be concluded that the ‘measure’ in section 65(b) must be interpreted as ‘any means’ for achieving the objects of the Act. Since almost every provision of the Act is intended to assist in achieving the objects of the Act, this meaning of ‘measure’ may lead to the unsatisfactory conclusion that almost every provision of the Act is a measure and so contravention of it is an offence. It is unlikely that Parliament intended the word ‘measure’ in section 65(b) to have such a wide meaning. It is more likely that Parliament intended the word to mean some generally applicable action, step or activity that is not set out in the main body of the Act but which is specified by the appropriate authority identified in the Act. For example, section 31(b) directs the Minister, on the recommendation of the Council and in consultation with the Minister of Finance, to determine such measures as are necessary for preventing the unsustainable use of natural resources and controlling the generation of pollutants. Further, section 35(1)(d) requires the Minister, on the advice of the Council, to devise such measures as are necessary for, inter alia, mitigating the effect of threats to biological diversity. In such circumstances it makes sense to say that any person who contravenes these measures is guilty of an offence.

It must be pointed out that the hallmark of the preferred meaning of measure is generality, that is to say, the action, step or activity specified is general in application; it is not directed to a particular person. That general type of measure is the one contravention of which is proscribed under section 65(b). The Act makes separate provision (in section 62(f)) for contravention of measures directed to a specific person. If this were not so, there would be the unsatisfactory position that contravention of a specifically directed measure would be punished under two separate sections, namely section 62(f) and section 65(b).

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<sup>80</sup> Section 28 of the EMA.

The last part of section 65 proscribes the use of natural resources otherwise than in accordance with the Act.<sup>81</sup> According to section 4 it is permitted to use natural resources for domestic purposes without any specific authorization from the government. Any other use or exploitation must be authorized in writing by the government. So any person who utilizes or exploits natural resources for non-domestic purposes without the prior written authority of the government is guilty of an offence.

The punishment for all offences relating to environmental standards and guidelines is the same as that for offences relating to environmental impact assessments.

#### **4.2.7 Offences relating to wastes, chemicals, pesticides or hazardous materials, processes and wastes**

It is an offence to: (a) fail to manage hazardous materials, processes and wastes in accordance with the Act; (b) knowingly or fraudulently mislabel wastes, pesticides or chemicals; or (c) aid or abet the illegal trafficking in wastes, chemicals, pesticides or hazardous processes, wastes or substances.<sup>82</sup> The Act provides some background to these offences. With regard to (a) it is provided that importation or exportation of any hazardous waste or substance may only be done under a permit. In the case of exportation, the exporter is required, before a permit is issued, to produce to the Minister written confirmation from an appropriate authority of the receiving country that the hazardous waste or substance may be exported to that country.<sup>83</sup> A permit is also required

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<sup>81</sup> Section 65(c) of the EMA.

<sup>82</sup> Section 66 of the EMA.

<sup>83</sup> Section 39(1) of the EMA. The purpose of this prior written confirmation requirement is to avoid international conflicts and to meet Malawi's obligations under international law, particularly the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (the Basel Convention). Malawi acceded to this convention on 21 April 1994. At the time of writing (October 2005) Malawi had not yet ratified the Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Wastes within Africa 1991 (the Bamako Convention).

for transportation of hazardous wastes or substances within Malawi.<sup>84</sup> Failure to meet these and other requirements relating to hazardous materials, processes and wastes is an offence.

The Minister may make rules in respect of the registration, labelling and packaging of pesticides.<sup>85</sup> Any person who mislabels the pesticides is guilty of an offence. As may be apparent from (b) above, the offence of mislabelling may also be committed in connection with wastes or chemicals. It may be observed at this stage that the word 'hazardous' does not occur in paragraph (b) but it occurs in (a), suggesting that the word 'wastes' in (b) is more general and so may include both hazardous and non-hazardous wastes. Thus mislabelling may be committed in respect of any type of wastes.

For a person to be convicted of these offences of mislabelling, mens rea must be proved. The words 'knowingly' and 'fraudulently' make this clear. The meanings of these words have been explored already in segments 4.2.4 and 4.2.5 above.

Paragraph (c) addresses aiding or abetting illegal trafficking. It is noteworthy that the offence in (c) is not the illegal trafficking itself, but rather aiding or abetting the illegal trafficking. It has been recommended that the words 'aid and abet' in a statute should be given their ordinary meaning and that their separate listing suggests that there is a difference between them.<sup>86</sup> In this light to aid means to help or support, and to abet means to encourage or assist someone to do something wrong.<sup>87</sup> However, it is clear that the words may not be given their ordinary meaning in all circumstances.<sup>88</sup> For present

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<sup>84</sup> Section 39(2) of the EMA.

<sup>85</sup> Section 40(2)(a) of the EMA.

<sup>86</sup> *Attorney General's Reference (No 1 of 1975)* [1975] QB 773 per Lord Widgery CJ. See also P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at paras 18-9 and 18-10 where reference is made to the cases of *Ferguson v Weaving* [1951] 1 KB 814, *National Coal Board v Gamble* [1959] 1 QB 11, *Thambiah v R* [1966] AC 37 and *Blakely v DPP* [1991] RTR 405.

<sup>87</sup> South African Concise Oxford Dictionary (2002). See also Peter Hungerford-Welch and Alan Taylor *Sourcebook on Criminal Law* London: Cavendish Publishing 1997 at 45.

<sup>88</sup> Smith and Hogan *op cit* at 133.

purposes 'aid and abet' should be taken as covering assistance and encouragement given at the time of the offence.<sup>89</sup> The nature of this offence of aiding or abetting is that it is accessory to the commission of the principal offence or at least the execution of the actus reus of the principal offence. It is fairly settled that an aider or abettor can be liable as long as 'there is the actus reus of the principal offence even if the principal offender is entitled to be acquitted because of some defence personal to himself.'<sup>90</sup> If the actus reus of the principal offence has not been executed, there cannot be aiding or abetting of the principal offence. Thus aiding or abetting illegal trafficking only becomes an offence if the 'principal offence' of illegal trafficking is committed or if the actus reus of illegal trafficking is executed.

The trouble at present is that the EMA does not make specific provision for the offence of illegal trafficking in wastes, chemicals, pesticides or hazardous processes, wastes or substances. Section 66(c) is actually the only place in the EMA where the phrase 'illegal trafficking' is used. The phrase is not defined in the EMA. The ordinary meaning of trafficking is dealing or trading in something illegal.<sup>91</sup> So the target here may be the illegal commercial buying and selling of wastes, chemicals, pesticides or hazardous processes, wastes or substances.<sup>92</sup> An example of this illegal commerce may be the buying and selling without a permit (where a permit is required). If this ordinary meaning is adopted, the conclusion is inescapable that no such offence has been provided for in the Act, and so it is impossible to talk of the secondary offence of aiding or abetting illegal trafficking. This argument is based on the principle that there cannot be an accessory

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<sup>89</sup> Murphy op cit at 69.

<sup>90</sup> Murphy op cit at 76, cited with approval in *R v Millward* [1994] Crim LR 527.

<sup>91</sup> South African Concise Oxford Dictionary (2002). In *Republic v Ndhlovu* 1971 – 72 ALR Mal 467 and *Republic v Phiri* 9 Malawi Law Reports 159 Chatsika J used the word 'trafficking' but did not define it.

<sup>92</sup> On this understanding one difficulty arises: it does not seem proper to talk of 'buying and selling hazardous processes.' The word 'process' signifies a series of actions or steps towards achieving a particular end: South African Concise Oxford Dictionary (2002). So hazardous processes may mean actions or steps relating to hazardous substances; in other words, performance of services relating to hazardous substances. In this light 'buying and selling hazardous processes' may be taken as meaning buying and selling services relating to hazardous substances.



offence in the absence of a principal offence. No person can be convicted of aiding or abetting a non-existent offence or a lawful act or omission. It is recognized that there is an exception to this rule, namely accessory offences relating to suicide. Suicide is not an offence and yet a person can be convicted of aiding suicide.<sup>93</sup> It is not difficult to discern the justification for this exception. The person who successfully commits suicide cannot be prosecuted for the 'offence' of suicide as prosecution and criminal proceedings are the portion of the living and not the departed. Glanville Williams puts it in startling legal terms when he says that the person who commits suicide 'automatically puts himself outside the jurisdiction.'<sup>94</sup> On the other hand, those living persons who aid or abet the commission of the suicide can be prosecuted as they are available to answer for their acts or omissions which transgress the law's desire to preserve life. In this light, can it be contended that the offence of aiding or abetting illegal trafficking was meant to follow the example of aiding or abetting suicide in the sense that it can be valid in the absence of a principal offence? The answer to this question, it is submitted, must be in the negative. As demonstrated above, there is justification for not criminalizing suicide but no such or similar justification exists in respect of not criminalizing illegal trafficking. Since Parliament cannot be assumed to make irrational laws, it may be inferred that Parliament did not intend to make aiding or abetting illegal trafficking a secondary offence in the absence of its principal offence.

In order to solve the difficulty in section 66(c), it is suggested that the meaning of illegal trafficking should be informed by its context, specifically its object. It must be noted that the trafficking is done with respect to 'wastes, chemicals, pesticides or hazardous processes, wastes or substances.' Three of these matters (wastes, chemicals and pesticides) are the object of mislabelling under section 66(b) while the remaining three matters (hazardous processes, wastes or substances) are the object of illegal management

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<sup>93</sup> Section 228 of the Penal Code (cap 7:01 of the Laws of Malawi) provides for the secondary offences relating to suicide. It reads: 'Any person who – (a) procures another to kill himself; or (b) counsels another to kill himself and thereby induces him to do so; or (c) aids another in killing himself, is guilty of a felony, and shall be liable to imprisonment for life.'

<sup>94</sup> Glanville Williams *Criminal Law: the General Part* 2ed London: Stevens & Sons 1961 at para 131.

under section 66(a).<sup>95</sup> The lumping together of the two groups under section 66(c) seems to imply a relationship between mislabelling and illegal management on the one hand, and illegal trafficking on the other hand. It seems that mislabelling and illegal management may have been intended to make up the meaning of illegal trafficking. In other words, illegal trafficking may have been intended to mean or at least encompass mislabelling and illegal management. If this is so, illegal trafficking may be regarded as a shorthand method of expressing mislabelling and illegal management. This interpretation of illegal trafficking explains the omission of a specific provision for the offence of illegal trafficking in the Act as a specific provision is unnecessary in the circumstances. In effect this interpretation validates the offence of aiding or abetting illegal trafficking since aiding or abetting illegal trafficking in effect becomes aiding or abetting mislabelling and illegal management. Thus the secondary offence of aiding or abetting has mislabelling and illegal management as the principal offences.

Admittedly the suggested solution to the difficulty of interpreting the offence in section 66(c) is not very convincing. A better way of dealing with this difficulty must be found. Before getting to the better solution, two observations must be made on section 66(c). In the first place, it is strange that the draftsman articulates the offence of aiding or abetting illegal trafficking. This is unusual. The rules relating to parties to crimes form part of general principles of criminal law and they are generally implied in almost all crimes.<sup>96</sup> For example, there is no specific statutory provision for aiding, abetting, counselling or procuring murder but it is generally agreed that if a person aids, abets, counsels or procures murder, he will be convicted of the secondary offence of aiding, abetting,

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<sup>95</sup> There is a slight difference here. In section 66(a) the word 'materials' is used while in section 66(c) the word 'substance' is used. In common parlance, material is the matter from which a thing is or can be made; it may also mean items needed for an activity. On the other hand, substance is a particular kind of matter with uniform properties. There is scope in these definitions for using the words interchangeably. In addition, substance appears to be more general in its ambit than material and may therefore include material. It follows that the 'substance' of section 66(c) includes the 'materials' of section 66(a).

<sup>96</sup> In *R v Jefferson and Others* (1994) 99 Cr App R 13 at 22 Auld J, on behalf of the Court of Appeal, stated: 'An aider and abettor of an offence is a common-law notion, not a creation of statute. It is of general application to all offences, whether at common law or of statutory creation, unless expressly or impliedly excluded by statute.' See also J C Smith 'Public Order' [1993] Crim LR 880 at 882 and *R v James* (1890) 24 QBD 439.

counselling or procuring the murder.<sup>97</sup> So why did the draftsman specifically articulate the offence of aiding or abetting illegal trafficking? Can this be an indication that contrary to the general position, the secondary offences of aiding or abetting are excluded under the EMA except for section 66(c) under the maxim *expressio unius est exclusio alterius*? This manner of drafting does not make easy the implementation of the Act; rather it complicates it.<sup>98</sup>

In the second place, if the interpretation of section 66(c) is accepted or if another way of validating the offence of aiding or abetting illegal trafficking is found, the next hurdle will be to determine whether mens rea is an element of the offence. In general terms mens rea is required for aiding and abetting. The mens rea may take the form of knowledge, intention to aid or abet, and contemplation. This comes out of a number of decisions. In *Nyasaland Transport Company Limited v R*<sup>99</sup> Cram J said that an aider and abettor must have mens rea and that it is settled that an aider and abettor cannot be convicted in the absence of actual knowledge. In *Johnson v Youden*<sup>100</sup> Lord Goddard CJ expressed the view that before ‘a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence.’ In *National Coal Board v Gamble*<sup>101</sup> Devlin J added that apart from knowledge of the circumstances, there must be proof of an intention to aid. By intention to aid is not meant intention that the principal offence be committed.<sup>102</sup> Intention to aid may be found where the accused does not actually desire to assist or encourage the

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<sup>97</sup> According to section 21(c) of the Penal Code, such person may also be charged with actually committing the murder.

<sup>98</sup> Glanville Williams *Criminal Law: the General Part* 2ed London: Stevens & Sons 1961 at para 129 footnote 2 suggests that it is not necessary for Parliament to make express provision for secondary parties.

<sup>99</sup> 1961 – 63 ALR Mal 328 at 337 and 338.

<sup>100</sup> [1950] 1 KB 544 at 546.

<sup>101</sup> [1959] 1 QB 11 at 20.

<sup>102</sup> In *National Coal Board v Gamble* [1959] 1 QB 11 at 23 Devlin J stated: ‘If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive.’

commission of the principal offence, provided that the accused knows that his actions are extremely likely or virtually certain to have that result.<sup>103</sup> So contemplation or foresight of a real or serious risk can constitute part of the mens rea for aiding or abetting.

With regard to the best solution for the difficulty in section 66(c), it is submitted that most of the problems identified above will be avoided if the words ‘aids or abets’ in section 66(c) are replaced with the words ‘engages in’. This amendment will have the effect of making illegal trafficking the principal offence, leaving general principles of criminal law to deal with issues of secondary parties. There is nothing strange in this proposal to omit some words and add others. For long courts have done this in the process of interpreting statutes. In *Federal Steam Navigation Co v Department of Trade and Industry*<sup>104</sup> Lord Reid held that words can be struck out of a statute and others substituted in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute, and that in the case of substitution the words read in must be necessarily implied by words which are already in the statute. For example, the Judicial Committee of the Privy Council exercised these powers in *Salmon v Duncombe*.<sup>105</sup> The court had been called upon to interpret the Natal Ordinance of 1856 which made provision for the making of wills by natural-born British subjects resident in Natal. The draftsman had not made allowance for the provisions of English private international law which state that gifts by will of immovable property are governed by the law of the country where the property is located. In order to overcome the difficulties caused by the draftsman’s ignorance, oversight or omission, the court disregarded nine words from the Ordinance and read in eight words.

In the present matter involving section 66(c), if the words ‘aids or abets’ are left intact, the secondary offence created by that provision will be unworkable as the Act does not

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<sup>103</sup> Murphy *op cit* at 71 citing *R v Moloney* [1985] AC 905 and *R v Hancock* [1986] AC 455.

<sup>104</sup> [1974] 2 All ER 97 at 100. See also John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 47 and 102; Francis Bennion *Statutory Interpretation* London: Butterworths 1984 at 676; Francis Bennion *Statute Law* 2ed London: Oyez Longman 1983 at 158.

<sup>105</sup> (1886) 11 App Cas 627.

provide for the principal offence of illegal trafficking. So striking out the words ‘aids or abets’ from section 66(c) will prevent that provision from being unworkable. As for the words to read in (the words ‘engages in’), it is arguable that they are necessarily implied by the words already in section 66 for the proscription of illegal trafficking presupposes that someone may engage or participate in it.

The punishment for the foregoing offences relating to wastes, chemicals, pesticides or hazardous processes, wastes, substances or materials is a fine in the range between MWK20 000 (US \$150) and MWK1 000 000 (US \$7 519). If these penalties are anything to go by, it may be inferred that these offences are regarded as serious offences.

#### **4.2.8 Offences relating to pollution**

It is an offence to discharge or emit any pollutant into the environment otherwise than in accordance with the Act.<sup>106</sup> By pollutant is meant any substance whether in a solid, liquid or gaseous form, which directly or indirectly: (a) alters adversely or destroys the quality of the environment, or (b) is dangerous or potentially dangerous to public health, plant or animal life. Examples are objectionable odours, radioactive substances or particles, noise, vibration, or any substance or particle that causes temperature change or physical, chemical or biological change to the environment.<sup>107</sup>

It appears from the phrase ‘otherwise than in accordance with the Act’ that the discharge or emission of pollutants into the environment is not prohibited per se. What is prohibited is the discharge or emission which is contrary to the Act. For the law-abiding citizen to avoid contravening the section, he needs to know what the Act prescribes as the permissible discharge or emission of pollutants. There isn’t much guidance on this aspect from the Act. No criteria are clearly laid out for lawful discharges or emissions. The main section dealing with the discharge of pollutants (section 42) repeats the proscription

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<sup>106</sup> Section 67 of the EMA.

<sup>107</sup> Section 1 of the EMA.

against discharges or emissions contrary to the Act. Then it places a duty on every person to prevent discharges or emissions contrary to the Act and a duty to comply with general or specific directions of the Minister or Director of Environmental Affairs in respect of the prevention, minimization, cleaning-up, removal or disposal of pollutants. Thus it makes no mention of permissible discharges or emissions.

In this connection, it may be noted that the Act requires the other polluting activities (e.g. discharge of effluents or disposal of waste) to be undertaken on the authority of a licence.<sup>108</sup> It is surprising that the licence requirement is not expressly demanded by section 42 in relation to the discharge of pollutants. Perhaps there is scope for arguing that a licence is required for the discharge of pollutants. Since the definitions of waste and effluent under the Act<sup>109</sup> seem to be capable of falling under 'pollutants' as defined by the Act and since a licence is required for the discharge of waste or effluent, it may be argued that licences are required for the discharge of pollutants as long as the pollutant in issue is waste or effluent. Reference may also be made to the environmental quality standards which the Minister is empowered to prescribe generally and, in particular, for air, water, soil, noise, vibrations, radiation, effluent and solid waste.<sup>110</sup> It may be contended that any person who discharges or emits pollutants in such a way as to contravene the environmental quality standards discharges or emits the pollutants 'otherwise than in accordance with the Act' and consequently commits an offence under section 67. The defect in this argument apparently lies in the fact that section 65 already makes provision for offences arising from violation of environmental standards and so violation of environmental standards in respect of pollutants may seemingly be punished under two sections (section 65(a) and section 67). This, however, would be an incorrect

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<sup>108</sup> Section 67 of the EMA (for licence to discharge effluent) and section 38 of the EMA (for licence for waste). The licence may presumably indicate the permissible way of discharging the effluent or disposing of the waste.

<sup>109</sup> Section 1 of the EMA defines waste as including domestic, commercial or industrial waste whether in a liquid, solid or gaseous or radioactive form which is discharged, emitted or deposited into the environment in such volume, composition or manner as to cause pollution. Section 1 defines effluent as waste water or other fluid originating from a domestic or an agricultural or industrial activity, whether treated or untreated and whether discharged directly or indirectly into the environment.

<sup>110</sup> Section 30 of the EMA.

way of looking at the matter. The maxim *generalia specialibus non derogant*<sup>111</sup> suggests that the provision dealing generally with infringements of environmental standards (section 65(a)) does not override the provision dealing specifically with infringements of environmental standards by way of discharge of pollutants (section 67). So infringement of environmental standards generally would be punished under section 65(a) but infringement of environmental standards by way of discharge of pollutants would be punished under section 67. Justification for this difference may possibly be found in the more severe consequences that may result from the infringement of environmental standards through the discharge of pollutants. This agrees with the more severe punishment provided for discharge of pollutants.<sup>112</sup>

### **4.3 National Parks and Wildlife Act 11 of 1992**

#### **4.3.1 General**

The National Parks and Wildlife Act 11 of 1992 ('NAPWA') came into force on 01 April 1994.<sup>113</sup> It replaced the National Parks Act and repealed the Game Act, Wild Birds Protection Act and Crocodiles Act.<sup>114</sup> It is a consolidating statute. Its long title declares that the Act seeks to consolidate the law relating to national parks and wildlife management. The Act proceeds to do this by incorporating within its reach the substance of the aforementioned repealed Acts. Section 3 of NAPWA sets out the general purposes of the Act as:

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<sup>111</sup> This maxim means 'general provisions do not derogate from particular ones.' This maxim was applied in *Re Standard Manufacturing Co* [1891] 1 Ch 627.

<sup>112</sup> Under section 67 of the EMA the punishment for offences relating to pollutants are a fine of not less than MWK20 000 (US \$183) and not more than MWK1 000 000 (US \$9 174) and to imprisonment for 10 years. This may be contrasted with section 65's punishment: a fine of not less than MWK5 000 (US \$46) and not more than MWK200 000 (US \$1 835) and imprisonment for two years.

<sup>113</sup> G N 57/1994.

<sup>114</sup> Section 124(1) of NAPWA. The repealed Acts were cap 66:03, cap 66:04 and cap 66:06 of the Laws of Malawi respectively. The replaced National Parks Act was cap 66:07.

- (a) the conservation of selected examples of wildlife communities in Malawi;
- (b) the protection of rare, endangered and endemic species of wild plants and animals;
- (c) the conservation of wildlife throughout Malawi so that the abundance and diversity of their species are maintained at optimum levels commensurate with other forms of land use, in order to support sustainable utilization of wildlife for the benefit of the people of Malawi;
- (d) the control of dangerous vertebrate species;
- (e) the control of import, export and re-export of wildlife species and specimens; and
- (f) the implementation of relevant international treaties, agreements or any other arrangements to which Malawi or the Government is a party.

Of NAPWA's sixteen parts, six parts have specific purposes.<sup>115</sup> As all these purposes are indicative of legislative intent, they are crucial in understanding the crimes created by the Act. The discussion will now focus on the various criminal offences in the Act.

#### **4.3.2 Obstruction of officers and information to officers**

It is an offence to obstruct any officer in the performance of his functions under NAPWA.<sup>116</sup> By 'officer' is meant the Chief Parks and Wildlife Officer ('CPWO') and other officers subordinate to him responsible for the administration of the Act.<sup>117</sup> As for 'obstruct' it may be noted that obstruction does not necessarily involve a physical act: the obstruction may be verbal, for instance answering questions incorrectly.<sup>118</sup> The

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<sup>115</sup> Parts VI, VII, VIII, IX, X and XI. The relevant sections containing the specific purposes of the parts are 42, 46, 63, 73, 85 and 96.

<sup>116</sup> Section 15(a) of NAPWA. J W Cecil Turner (ed) *Russell on Crime* 12ed London: Stevens & Sons 1964 at 317 writes that obstructing the execution of lawful process is an offence against public justice.

<sup>117</sup> Section 1 as read with section 5 of NAPWA.

<sup>118</sup> *Ledger v DPP* [1991] Crim LR 439; *Green v Moore* [1982] QB 1044; *R v George* [1981] Crim LR 185. Cf *Rice v Connolly* [1966] 2 QB 414.



obstruction may also be by way of omission if the person obstructing is under a pre-existing duty to act.<sup>119</sup> Further, it appears from the wording of section 15 of NAPWA that mens rea may not be an element of the offence of obstruction as there is no word suggesting mens rea in section 15(a) whereas such words are used in section 15(c).<sup>120</sup>

It is an offence to refuse to furnish to any officer on request, particulars or information to which the officer is entitled under the Act: section 15(b). Again there is no indication that mens rea is an element of this offence.<sup>121</sup>

Section 15(c) provides that any person who wilfully or recklessly gives to any officer false or misleading information which the officer is entitled to obtain under the Act, is guilty of an offence. On the face of it, this provision gives the impression that the officer may be entitled to false or misleading information under the Act. This impression is, without doubt, wrong. The better way of construing this provision is to regard the officer as being entitled to certain information under the Act instead of which he receives false or misleading information. On this view, the elements of the offence would be: (1) officer's entitlement to obtain information under the Act; (2) giving of false or misleading information to satisfy or meet that entitlement; and (3) wilfully or recklessly. Of these elements (1) and (2) do not merit further discussion. With regard to element (3), the word 'recklessly' has already been defined at the beginning of this chapter, so only the word 'wilfully' will be defined here.

The leading authority on the meaning of 'wilfully' is *R v Sheppard*.<sup>122</sup> In that case Lord Diplock stated that the adverb 'wilfully,' where it qualifies a particular act or failure to

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<sup>119</sup> *Lunt v DPP* [1993] Crim LR 534. See also Murphy op cit at 161, Smith and Hogan op cit at 395 and *Willie s/o Kawinga v R* 1923 – 60 ALR Mal 551.

<sup>120</sup> Of course this point is not conclusive of the fact that mens rea is not required, but it is one factor that is considered: *Sherras v De Rutzen* [1895] 1 QB 918 at 921 and *Sweet v Parsley* [1970] AC 132 at 149.

<sup>121</sup> See the immediately foregoing footnote.

<sup>122</sup> [1981] AC 394.

act in the definition of a crime, makes it clear that the offence ‘requires mens rea, a state of mind on the part of the offender directed to the particular act or failure to act that constitutes the actus reus and warrants the description “wilful”.’<sup>123</sup> In agreement with him Lord Keith of Kinkel said that the word was used in the statute under consideration in that case to describe the mental element. His lordship went on to say that the primary meaning of ‘wilful’ is ‘deliberate’ and that as a matter of general principle, recklessness is to be equated with deliberation.<sup>124</sup> In the result the majority of the House of Lords equated ‘wilfully’ with recklessness as understood under common law.<sup>125</sup> In *R v Newington*<sup>126</sup> Watkins LJ, after concluding that the mens rea for ill-treating a mentally disordered patient was contained in the word ‘wilfully,’ said that the mens rea imported by that word was ‘a guilty mind involving either an appreciation by the appellant at the time that she was inexcusably ill-treating a patient or that she was reckless as to whether she was inexcusably acting in that way.’<sup>127</sup> The effect of these decisions is that the word ‘wilfully’ denotes basic mens rea in the sense of intention or recklessness.<sup>128</sup> This position has been accepted and applied in a recent Malawian case.<sup>129</sup> The accused had been convicted of assault occasioning actual bodily harm and malicious damage to property (namely, a shirt) contrary to sections 254 and 344 of the Penal Code. On appeal both counsel urged the court to acquit the accused on the malicious damage count because the accused, having only wanted to injure the complainant and only damaged the shirt in the course of the other crime, could not have damaged the shirt wilfully. Rejecting the argument, Mwaungulu J said:

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<sup>123</sup> [1981] AC 394 at 403.

<sup>124</sup> [1981] AC 394 at 418.

<sup>125</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17-48.

<sup>126</sup> (1990) 91 Cr App R 247.

<sup>127</sup> (1990) 91 Cr App R 247 at 254.

<sup>128</sup> Murphy *op cit* at 26.

<sup>129</sup> In this case it appears that counsel for the prosecution and counsel for the defence had been classmates in law school and the accused was a relative of counsel for the defence. This state of affairs may explain the kind of arguments that were made in court.

Both [counsel for the State and counsel for the defence] thought that on the facts the lower court accepted, the defendant did not wilfully destroy the clothes, she only intending to injure the complainant. The argument is, as I understand it, that the defendant never intended to destroy the property. This submission, in my judgment, can only be premised on the narrower understanding of the word 'wilfully.' The understanding of the word 'wilfully' under section 344 and, indeed, under other provisions in the Code, is informed, under section 3 of the Code, by the meaning of the word under English Criminal Law. The word there is not understood only to mean 'deliberately' or 'voluntarily'. It covers both intention and recklessness. One, in my judgment, acts wilfully not only where what one does is as [a] result of his volition but also, where the immediate acts [are] as a result of one's volition; the consequences of his wilful act are matters known by all reasonable men and women to follow naturally from his act of volition. If a man intends to shoot an attendant inside a shop through a glass window, destruction to the window, even though not the immediate concern, is a result of his wilful act and therefore acts wilfully in destroying the window.<sup>130</sup>

The conclusion that 'wilfully' encompasses both intention and recklessness does not fit nicely in section 15(c) of NAPWA. It will be recalled that this section specifically lists 'recklessly' and so to say that 'wilfully' in section 15(c) also includes 'recklessly' may mean that Parliament was repeating itself unnecessarily. It is suggested that to deal with this problem, 'wilfully' in section 15(c) should be regarded as importing mens rea in the form of intention only.

The penalties for the offences under section 15 of NAPWA are arguably laid out in section 108 of the Act. In the case of a first offence, a fine of not less than MWK200 (US \$1.50) but not more than MWK500 (US \$4) may be imposed together with imprisonment for a term of three months. In the case of a second or subsequent offence, the minimum

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<sup>130</sup> *Chimwemwe Gulumba v Republic* Miscellaneous Criminal Application No. 51 of 2003 (unreported, but copy of judgment available on <http://www.judiciary.mw> when accessed in January 2005).

fine is raised to MWK500 and the maximum is pegged at MWK1 000 (US \$8) and the term of imprisonment is increased to six months.

### 4.3.3 Official records

It is an offence, without lawful authority, to alter, deface or remove any 'official record' maintained in pursuance of the Act or any regulation or order made under the Act. It is also an offence to alter or deface any 'prescribed document' issued under the Act.<sup>131</sup> NAPWA makes provision for the keeping of records. For instance, it requires the Minister to ensure that proper books and other records of account be kept in respect of receipts and expenditures of the National Parks and Wildlife Fund.<sup>132</sup> Subsidiary legislation under the Act also provides for records in certain cases. For example, regulation 5 of the National Parks and Wildlife (Control of Trophies and Trade in Trophies) Regulations<sup>133</sup> requires an officer to whom a rhinoceros horn or other ivory is produced, to indelibly mark it with the acronym for the district where it was found, the year of registration and a serial number, and then enter these particulars in a register kept by the State. Altering, defacing or removing of such records arguably falls within the scope of this offence. It may be observed, in this regard, that the word 'official' is probably meant to distinguish records kept or owned by the State from records kept or owned by private persons.

With regard to the term 'prescribed document,' the reference is to documents issued under the Act, for example licences to take or hunt wildlife. These licences are required to be in the prescribed form.<sup>134</sup> Some of the licences limit the kinds of wildlife which

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<sup>131</sup> Section 16 of NAPWA.

<sup>132</sup> Section 105 of NAPWA.

<sup>133</sup> G N 86/1994. These regulations were made under section 87 of NAPWA.

<sup>134</sup> Section 48(4) of NAPWA.

may be taken or hunted. So altering or defacing such limitations may lead to a conviction under this provision.

The punishment seems to be the same as that for obstruction of officers, that is, the penalties laid out in section 108 of NAPWA.

#### **4.3.4 Offences relating to temporary management measures for protected areas**

NAPWA gives power to the Minister to declare any area of land or water within Malawi to be a national park or a wildlife reserve.<sup>135</sup> When an area is proposed for declaration as a national park or wildlife reserve and action to do so has been started, the Minister may, on the recommendations of the Wildlife Research and Management Board,<sup>136</sup> make administrative arrangements for managing the area by imposing temporary management measures for a period of up to six months pending declaration of the area as a national park or wildlife reserve. The CPWO presides over such temporary management measures and has power to direct or instruct any person in connection with the management of the area. The directives or instructions may also be issued by another officer provided he is duly acting on behalf of the CPWO. Any person who fails to comply with any directive or instruction of the CPWO or such other officer commits an offence of strict liability.<sup>137</sup>

It is significant that section 30 expressly says: ‘... for the avoidance of doubt, the offence hereby created is a strict liability offence.’ Does this mean that all offences under NAPWA which do not have this express indication of strict liability are offences which require mens rea? This question must be answered in the negative. An examination of the Act reveals that some of its provisions creating offences expressly require mens rea as an element of the offence by the use of such words as ‘wilfully’ or ‘recklessly’ (for example,

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<sup>135</sup> Section 28(1) of NAPWA.

<sup>136</sup> The Wildlife Research and Management Board is established under section 17 of NAPWA. According to section 19 of NAPWA its functions are to advise the Minister on all matters relating to national parks and wildlife management in Malawi, including in particular advising on the declaration of areas to be national parks or wildlife reserves, and advising on the import, export and re-export of wildlife specimens into and out of Malawi.

<sup>137</sup> Section 30 of NAPWA.

section 15(c)). A similar question may be asked here: does this mean that all offences under NAPWA which do not have this express requirement of mens rea are offences of strict liability? Again this question must be answered in the negative. It all depends on the particular provision creating the offence. A proper construction of a particular provision should lead to a finding as to whether the offence in issue is one of strict liability or of mens rea. In this endeavour, as indicated at the beginning of this chapter, the presumption that mens rea is an ingredient of the offence is not strong where the offence in issue is not truly criminal in nature, and many environmental offences are of this type.

The penalties for offences relating to temporary management measures for protected areas are provided for in section 108 of NAPWA.

#### **4.3.5 Prohibition of entering or residing in national park or wildlife reserve without authority**

It is an offence for any person to enter into or reside in, or attempt to enter into or reside in, any national park or wildlife reserve.<sup>138</sup> 'Entry' in this offence certainly means what as a matter of ordinary English usage one would say constitutes entry. It may also include placing the upper part of the body in the national park or wildlife reserve although both feet are outside it.<sup>139</sup> It is suggested that in understanding entry, use must be made of the definition of entry in the offences of burglary and housebreaking under the Penal Code.<sup>140</sup> If this is accepted, the entry in section 32(1) of NAPWA will mean that a person will be deemed to have entered a national park or wildlife reserve as soon as any part of his body or any part of any instrument used by him is within the national park or wildlife reserve.

As may be apparent, the offence in section 32(1) has two limbs: first, enter or reside; and second, attempt to enter or reside. The first limb is the completed offence whereas the

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<sup>138</sup> Section 32(1) of NAPWA.

<sup>139</sup> *R v Brown* [1985] Crim LR 212.

<sup>140</sup> Section 308 of the Penal Code provides, inter alia, that '[a] person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.'

second limb is a preliminary offence (or what is sometimes called an inchoate offence). The section does not provide for any mens rea for the complete offence of entry or residence and so there is a possibility that it may be an offence of strict liability. The section does not also indicate any mens rea for the preliminary offence of attempt to enter or reside. The difficulty with the attempt is that it cannot be an offence of strict liability: it is impossible to attempt to commit a crime without a guilty mind. Russell on Crime<sup>141</sup> puts it in this way:

‘[A] man cannot attempt to do that which he does not intend, if he is able, to do. Whether he is confident or doubtful as to his chances of success nonetheless the word “attempt” cannot be properly used to describe his activity unless he intends, by means of that activity, to succeed in reaching his objective.’

Accordingly, it must be implied that mens rea is an ingredient of the attempt to enter or reside. The relevant type of mens rea is intention: ‘there can be no question of “recklessness” or “negligence” amounting to sufficient mens rea.’<sup>142</sup> In *R v Mohan*<sup>143</sup> the court considered what is meant by ‘intention’ when that word is used to describe the mens rea in attempt. In the process of answering this question the court distinguished ‘intention’ from ‘motive’ in the sense of an emotion leading to action. The court held that in attempts ‘intention’ means ‘specific intent, a decision to bring about, in so far as it lies within the accused’s power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not.’

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<sup>141</sup> J W Cecil Turner (ed) *Russell on Crime* 12ed London: Stevens & Sons 1964 at 117.

<sup>142</sup> *Ibid*, especially footnote 27. In P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17 it is stated: ‘The mental element required to make a man guilty of an attempt to commit an offence is often, if not invariably, greater than that required for the full offence.’

<sup>143</sup> [1976] QB 1 at 8 and 11. See also Ian Dennis ‘The Law Commission Report on Attempt and Impossibility in relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt’ [1980] Crim LR 758 at 761 - 762.

Having ascertained the type of mental element required generally in attempts, the question remains whether mens rea is an essential ingredient of an attempt to commit an offence of strict liability. Put another way, the issue is whether an attempt to commit an offence of strict liability is itself an offence of strict liability. In Jamaica it was decided that the attempt in these circumstances is not an offence of strict liability.<sup>144</sup> It is submitted that Malawian courts should follow this lead. The effect of this is that it is acceptable for the offence of attempt to enter or reside in a national park or wildlife reserve to require proof of mens rea although the full offence of entry or residence in a national park or wildlife reserve may be an offence of strict liability.

With regard to the actus reus for the attempt, it may be pointed out that the law is not very settled. Perhaps a useful guide is that of Lord Parker CJ in *Davey v Lee*,<sup>145</sup> quoting a text writer: 'the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.' At present it is not possible to give a comprehensive list of acts which qualify as actus reus for attempt. All that can be said is that it will depend on the facts of each case.

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<sup>144</sup> Dorcas White 'Attempts: Initiatives in Common Law Caribbean' [1980] Crim LR 780 at 782 – 784. The particular case which decided this is *Lockhart* reported in *The Daily Gleaner*, December 6, 1977 at 13. The English case of *R v Mohan* [1976] QB 1 dealt with a situation in which the complete offence did not have mens rea as an ingredient. The court held in effect that even though this was the position, mens rea was an essential ingredient of an attempt to commit the complete offence.

<sup>145</sup> [1968] QB 366 at 371. Lord Parker quoted paragraph 4104 of the 36<sup>th</sup> edition (1966) of *Archbold's Criminal Pleading, Evidence and Practice*. See also *DPP v Stonehouse* [1978] AC 55 at 68 where Lord Diplock said: 'The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence. Acts that are merely preparatory to the commission of the offence ... are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so. As it was put in the locus classicus *Reg. v Eagleton* (1855) Dears. C.C. 515, 538: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; ..." In other words the offender must have crossed the Rubicon and burnt his boats.' [The format (paragraphing) in this quotation has been modified].



It is not clear why Parliament specifically provided for the offence of attempt in this particular instance. Every attempt to commit a criminal offence, whether such offence is created by statute or is an offence at common law, is itself a criminal offence at common law.<sup>146</sup> As a result an attempt to commit any of the full offences created in NAPWA is a criminal offence even in the absence of express statutory provision for such attempt. Therefore it was not necessary for Parliament to specifically provide for the offence of attempt to enter into or reside in any national park or wildlife reserve.

It must be noted at this stage that the offences of entry or residence or attempt to enter or reside can only be committed where the person does so without authority. The ‘authority’ is at two levels. In the first place, the Act allows certain persons to enter or reside in a national park or wildlife reserve without incurring any liability under section 32(1). These persons include the Minister, the CPWO, any member of the Wildlife Research and Management Board, any officer appointed for the purposes of the Act, any employee of the Department of National Parks and Wildlife and any police officer on official duties requiring his presence in a national park or wildlife reserve.<sup>147</sup> This group of people does not have to obtain any permit in respect of the entry or residence. In the second place, the Act exempts from liability under the section those people who enter or reside in the national park or wildlife reserve on the authority of a permit. They obtain the permit from the CPWO.<sup>148</sup>

Section 32 does not specify the penalty for its contravention. However, section 110(d) of NAPWA provides that the punishment for contravention of section 32 is a fine of MWK10 000 (US \$75) and imprisonment for five years.

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<sup>146</sup> *R v Scofield* (1784) Cald Mag Cas 397 at 402; 10 Halsbury’s Laws of England (3<sup>rd</sup> edition) 306, para 567. In *Haughton v Smith* [1975] AC 476 at 491 Lord Hailsham of St Marylebone LC said. “An attempt to commit a criminal offence, is itself a criminal offence at common law ...”

<sup>147</sup> Section 32(2)(a) and (b) of NAPWA.

<sup>148</sup> Section 32(2)(c) and (3) of NAPWA. The permit is required to be in the format of Form 1 of the Schedule to the National Parks and Wildlife (Miscellaneous Forms) Regulations promulgated under section 123 of NAPWA.

#### 4.3.6 Prohibition of conveyance, possession or use of weapons, traps, explosives or poisons

It is an offence to convey into, or possess or use within, any national park or wildlife reserve any weapon, trap, explosive or poison.<sup>149</sup> The word ‘convey’ must be given its primary ordinary grammatical meaning, that is, transport or carry to a place. Any attempt to employ the legal meaning of ‘convey’ (that is, transfer title to property) is unacceptable as it may lead to an absurdity. Similarly ‘use’ must be accorded its plain, ordinary meaning. As for ‘possess’ more must be said. There is general agreement that a person cannot ‘possess’ without a mental element.<sup>150</sup> The ‘legal concept of possession involves both the actus reus element of physical possession, and a state of mind, the *animus possidendi*, which can only be a part of the requisite *mens rea*.’<sup>151</sup> In *Warner v Metropolitan Police Commissioner*<sup>152</sup> the court held that a person may be said to ‘possess’ prohibited drugs if he knows that he possesses drugs, even though he is unaware of their precise characteristics.<sup>153</sup> It is no defence that the person did not know and could not be expected to know that the drugs were prohibited drugs.<sup>154</sup> The Malawian decision of *Republic v Chipole*<sup>155</sup> endorsed this interpretation of the word ‘possess’. In the present context a person will be convicted of possession under section 31 if he knows that he possesses the weapon, trap, explosive or poison even though he is unaware of its

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<sup>149</sup> Section 33(1) of NAPWA.

<sup>150</sup> Smith and Hogan op cit at 128.

<sup>151</sup> Murphy op cit at 64.

<sup>152</sup> [1969] 2 AC 256.

<sup>153</sup> Murphy op cit at 64.

<sup>154</sup> *R v Bradish* [1990] 1 QB 981; *R v Waller* [1991] Crim LR 381; and *R v Steele* [1993] Crim LR 298.

<sup>155</sup> 8 Malawi Law Reports 202.

characteristics. The actus reus of possession consists in a measure of control over the thing alleged to be possessed.<sup>156</sup>

It may be observed that conveyance, possession or use of weapons, traps, explosives or poisons in a national park or wildlife reserve is permissible in specified circumstances. In the first place, conveyance, possession or use by any officer acting in the performance of his duties is acceptable.<sup>157</sup> In the second place, the conveyance, possession or use is permitted where it is intended for harvesting resource within a national park or wildlife reserve. If this is the intention, the CPWO issues authority to any person not to comply with the prohibition against conveyance, possession or use to the extent specified in the authority.<sup>158</sup>

The Act makes provision for a specific penalty for these offences of conveyance, possession or use. Section 110(d) states that the penalties are a fine of MWK10 000 and imprisonment for five years.

#### **4.3.7 Prohibition of deposition of litter or waste**

It is an offence to discard or deposit any litter or any waste material in a national park or wildlife reserve otherwise than into a receptacle provided for the purpose.<sup>159</sup> NAPWA

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<sup>156</sup> Smith and Hogan op cit at 129.

<sup>157</sup> Section 33(2) of NAPWA. Arguably these duties include general duties and special duties received by virtue of section 40 of NAPWA. Under section 40 it is provided that if the CPWO is satisfied that an otherwise unlawful act specified by sections 34 to 37 should be carried out in any national park or wildlife reserve in the interest of better wildlife management, he may seek the opinion of the Wildlife Research and Management Board. If the board agrees with the CPWO, the board can, with the approval of the Minister, issue written instructions to any officer authorizing him to undertake the act. These acts include hunting or disturbing wild plants or animals. Obviously these acts may be executed through the use of or may involve the possession of or conveyance into the park or reserve of, weapons, traps, explosives or poison. Such use, possession or conveyance is permitted on account of the exemption in section 33(2).

<sup>158</sup> Section 39(a) of NAPWA. Section 39(b) vests in the CPWO the responsibility to regulate and control the harvesting in the national park or wildlife reserve. In carrying out this responsibility, the CPWO is under a duty to ensure that the annual harvest does not exceed sustainable yield level unless it is judged desirable by the Minister to exceed temporarily such level for the purposes of management.

<sup>159</sup> Section 34 of NAPWA.

does not define the terms 'litter' and 'waste material'. These words are also not defined in EMA. What EMA defines is 'waste' alone. It is suggested that the definition of 'waste material' should be informed by EMA's definition of 'waste',<sup>160</sup> since EMA is the supreme law in this area and any law inconsistent with it is invalid to the extent of the inconsistency.<sup>161</sup> No mens rea or specific penalty is indicated for this offence. It is likely that offenders of this provision will be sentenced to the general penalties set out in section 108 of NAPWA.

#### **4.3.8 Other prohibited acts in a national park or wildlife reserve**

Section 35 of NAPWA lists a number of acts which are prohibited in a national park or wildlife reserve. It declares that any person who performs any of these acts commits an offence unless he is authorized to perform it in terms of section 39 or section 40.<sup>162</sup> The prohibited acts are as follows:<sup>163</sup>

- (a) hunting, taking, killing, injuring or disturbing any wild plant or animal, or any domestic animal or cultivated plant occurring lawfully in a national park or wildlife reserve;
- (b) taking, destroying, damaging or defacing any object of geomorphological, archaeological, historical, cultural, or scientific interest, or any structure lawfully placed or constructed therein;

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<sup>160</sup> Section 2 of EMA defines waste as including domestic, commercial or industrial waste whether in a liquid, solid, gaseous or radioactive form which is discharged, emitted or deposited into the environment in such volume, composition or manner as to cause pollution.

<sup>161</sup> Section 7 of EMA.

<sup>162</sup> Section 39 deals with harvesting resource in a national park or wildlife reserve with the authority of the CPWO. Section 40 deals with carrying out an otherwise unlawful act by an officer at the instruction of the Wildlife Research and Management Board and with the approval of the Minister in the interest of better wildlife management.

<sup>163</sup> All the matters specified in section 35 can properly be described as acts with the exception of permitting a domestic animal to stray into a national park or wildlife reserve. So the language in the text should have been in terms of 'acts and omissions.' However, for the sake of convenience of expression, the reference to omissions has been left out.

- (c) preparing land for cultivation, prospecting for minerals or mines or attempting any of these operations;
- (d) driving, conveying or introducing any wild animal into a national park or wildlife reserve;
- (e) driving, conveying or introducing any domestic animal into a national park or wildlife reserve, or permitting any domestic animal, of which he is for the time being in charge, to stray into a national park or wildlife reserve.

There is an overlap of terminology in the above prohibitions. For instance section 2 of NAPWA defines 'take' in relation to an animal as 'to wound, capture, or kill the animal, or remove or destroy its nest or egg or any part of it.' Thus, taking, in relation to an animal, encompasses killing; yet the first set of prohibited acts above includes both taking and killing. It must be noted, however, that the first set of prohibited acts refers to both animals and plants and since the Act only defines taking in relation to animals, it may have been necessary to include both 'taking' and 'killing' for the sake of the plants. It may further be observed that here the word 'taking' has a broader meaning than that set out in section 2. The context suggests that while the section 2 meaning of taking may be maintained in respect of animals, an ordinary grammatical meaning of taking may be adopted in respect of the plants. The ordinary grammatical meaning of 'take' is to lay hold of with one's hands or to remove from a place.<sup>164</sup>

Interesting issues arise when one considers the meaning of 'hunt'. According to section 2 'hunt' means to attempt to take. Since 'take' is defined in the Act in relation to animals only, it follows that 'hunt' is allied with animals in terms of section 2. However, when 'hunt' is considered in the context of the first set of prohibited acts above, its meaning will have to follow the broader scope of 'take' as suggested. So apart from meaning an attempt to take as defined in section 2 in relation to animals, 'hunt' in relation to plants will have to mean an attempt to take in the ordinary grammatical meaning of 'take'. The effect of this is that 'hunt' in relation to plants means an attempt to lay hold of plants with

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<sup>164</sup> South African Concise Oxford Dictionary (2002).

one's hands or to remove plants from a national park or wildlife reserve. From these proposals on the meaning of 'hunt' it will be noted that the meaning of 'hunt' has two prongs, one relating to animals and the other relating to plants. This two-pronged meaning must be compared to a purely ordinary grammatical meaning of hunt. In common parlance there is no problem with the phrase 'hunting animals': people generally talk of hunting animals, but it is not normal or ordinary to talk of 'hunting plants'. Thus, strictly speaking, there is no ordinary meaning of 'hunting plants'. This suggests the impossibility of directly attaching an ordinary meaning to 'hunting plants'. It may be added that trying to attach an ordinary meaning to 'hunting plants' ignores the effect of section 2's interpretation of the word 'hunt'. For these reasons, a purely ordinary grammatical meaning of 'hunt' is not acceptable. It is submitted that the two-pronged meaning of 'hunt' outlined above is more sensible.

It is apparent from the preferred meaning of 'hunt' that 'attempt' is a crucial element of its meaning. So the law relating to attempts, set out above, applies. Accordingly, for a person to be convicted of hunting under section 35(a), it must be proved that he had the requisite mens rea and that he had executed the actus reus. In this case the requisite mens rea is a specific intent (or a decision) to take an animal or a plant. The actus reus is any act which is a step towards taking an animal or a plant, which is immediately and not merely remotely connected with the taking of the animal or plant, and the execution of which act cannot reasonably be regarded as having any other purpose than the taking of the animal or plant.<sup>165</sup>

Section 35(b) of NAPWA – containing the second set of prohibited acts listed above – makes reference to 'taking'. This time the object of the taking is not an animal. The ordinary grammatical meaning may therefore be adopted without difficulty.

Section 35(c) of NAPWA – containing the third set of prohibited acts listed above – proscribes the preparation of land for cultivation, prospecting for minerals or mines,

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<sup>165</sup> The suggested actus reus has essentially followed the language of Lord Parker CJ in *Davey v Lee* [1968] QB 366 at 371.

attempting to prepare land for cultivation and attempting to prospect for minerals or mines. Again the use of the word 'attempt' implies that the law relating to attempts discussed above applies. In this connection, it may be observed that, for reasons stated above, it was not necessary for Parliament to make specific provision for the attempt as an attempt will generally have been implied as a matter of general principle.

With regard to mens rea, section 35 of NAPWA does not expressly state the kind of guilty mind that must accompany the listed prohibited acts. The possibility of strict liability may therefore be explored, but it is clear that some of the offences cannot be committed in the absence of mens rea: attempts and hunting are examples.

The punishment for the offences listed in section 35 is set out in section 110(d) of NAPWA. This provision states that any person who is convicted of an offence involving contravention of, inter alia, section 35 of the Act, is 'liable to a fine of K10 000 and to imprisonment for a term of 5 years, and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence.' Section 110(d) was the subject of interpretation in the recent case of *Republic v Maria Akimu*.<sup>166</sup> The court said

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<sup>166</sup> Revision Case No. 9 of 2003 (unreported, but copy available on <http://www.judiciary.mw> when accessed in June 2005. The case appears to be based on the National Parks and Wildlife Act of 1992, that is, the NAPWA under discussion. Section 110 of this Act is in the following terms: 'Any person who is convicted of an offence involving –

- (a) taking, hunting, molesting, or reducing into possession any protected species other than game species; or
- (b) possession of, selling, buying, transferring or accepting in transfer any specimen of protected species other than game species;
- (c) contravention of provision of this Act which provides for the conduct of a licensee under a professional hunter's licence; or
- (d) contravention of sections 32, 33 and 35 of this Act,

shall be liable to a fine of K10,000 and to imprisonment for a term of 5 years, and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence.'

The court apparently did not use this section, for the section it used is different in material respects. The court said:

'Section 110 of the National Parks and Wildlife Act provides: "Any person who unlawfully possesses or who purports to buy, sell or otherwise transfer or deal in any government trophy shall be guilty of an offence ... and shall be liable to a fine of K10,000.00 and to imprisonment for a term of 5 years and in any case the fine shall not be less than the value of the specimen involved in commission of the offence".'

It is possible that the court used an earlier version of the Act. Nevertheless the authority of the case is not affected by these defects as the issue before the court was punishment for an offence, and the punishments for the offences in both versions of section 110 are identical.

that there were uncertainties in the wording of section 110. Several scenarios were noted. First, the section could mean that the court could impose a fine above MWK10 000. The difficulty was whether the MWK10 000 was the minimum, maximum or whatsoever. It could not be the minimum because the trophy could be less than MWK10 000 in which case the court could still impose a fine below MWK10 000. It was thought that the MWK10 000 was neither the minimum nor the maximum. Second, does the section mean that the defendant is only liable to a fine of up to the value of the trophy? Or does the section mean that the court should impose a fine equivalent to the value of the trophy? Third, assuming that the legislature thought that the value of any trophy would be less than MWK10 000, the section may mean that while the fine must not exceed MWK10 000, the court cannot impose a fine less or greater than the trophy's value and must impose that value. Faced with these difficulties the court applied the presumption that penal statutes are construed strictly and that where uncertainty arises in a penal provision, the courts construe the provision in a manner favourable to the subject. The court continued:

‘Where there are many divergent constructions of a statute and it is difficult to sufficiently ascertain what Parliament intended the construction favourable to the defendant must be preferred. The legislature cannot intend to affect a subject's liberty by unclear and ambiguous words. On the wording of the section, the lower court assumed, correctly in my judgment, that the maximum fine was K10 000.’

The effect of the court's decision in *Akimu* is that the words ‘not more than’ must be read into section 110 between ‘of’ and ‘K10 000’. Thereafter the 22 words after the last ‘and’ in the section, that is, the words ‘in any case the fine shall not be less than the value of the specimen involved in the commission of the offence’ must be read subject to the assumption that Parliament thought that the value of any specimen (or trophy) would be less than MWK10 000. It is submitted, with due respect, that this way of interpreting the section leaves much to be desired. In the first place, there is no ground for assuming that Parliament thought that the value for any trophy would be less than MWK10 000. It is a



fact of common notoriety that ivory sells at high prices<sup>167</sup> and one of the reasons for the continuation of the illicit trade in ivory is that it enriches its traders. Therefore the assumption is contrary to common knowledge, and Parliament cannot be taken to assume a fact that offends common sense. In the second place, the court's mode of application of the presumption of strict construction of penal statutes is somewhat anachronistic. In earlier times this presumption was more than an example of the presumption against unclear changes in the law. If a criminal provision was capable of two meanings, however unreasonable one of those meanings might be, it was applied if it favoured the accused.<sup>168</sup> For example, in *R v Harris*<sup>169</sup> a statute provided that it was an offence to 'unlawfully and maliciously stab, cut, or wound any person.' The accused bit off a joint of her victim's finger. It was held that the accused was not guilty of wounding within the meaning of this statute. Similarly, in another case a statute 'deprived a man of benefit of clergy if he stole *horses*, but the judges refused to apply this to the case of a man who stole a single horse.'<sup>170</sup> This ancient approach to the construction of penal statutes has given way in modern times to a purposive approach. In *Anderton v Ryan*<sup>171</sup> Lord Roskill declared:

'It is ... important that the question of construction should be approached by reference to well known principles, ignoring that which is irrelevant however interesting, but remembering that statutes should be given what has become known as a purposive construction, that is to say that the courts should where possible identify "the mischief" which existed before the passing of the statute

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<sup>167</sup> This argument is valid even for 1994 prices. 1994 is the year when NAPWA came into force.

<sup>168</sup> John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 174 – 175.

<sup>169</sup> (1836) 7 C & P 446.

<sup>170</sup> John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 175.

<sup>171</sup> [1985] AC 560 at 573. At 578 Lord Roskill warns: 'The principle ... that where more than one construction of a statute is possible that preferred should be the construction which eliminates the "mischief" at which the statute was directed must not be carried to extremes.'

and then if more than one construction is possible, favour that which will eliminate “the mischief” so identified.’

Thus, in general the modern court principally seeks ‘the interpretation which makes sense of the statute and its purpose, and the presumption of strict construction is merely an ancillary aid for resolving difficult cases.’<sup>172</sup>

In the *Akimu* case the court did not use a purposive approach in interpreting section 110. If the court had used a purposive approach the resultant meaning would have been different. The purposes of NAPWA are set out in its section 3. These include the conservation of selected examples of wildlife communities in Malawi, and the protection of rare, endangered and endemic species of wild animals. A proper interpretation of section 110 must conform to these purposes and seek to achieve them. Of the possible interpretations of the penalty in section 110, the following may be noted: Firstly, the MWK10 000 may be the minimum fine. Secondly, the MWK10 000 may be the maximum fine. Thirdly, the MWK10 000 may be neither the minimum fine nor the maximum fine, but simply a guide indicating that the offences punishable under this section are of a more serious nature than most of the other offences in NAPWA which are generally punished by fines of less than MWK2 000. The *Akimu* court opted to take the MWK10 000 as the maximum fine but this cannot fit comfortably in the scope of the last 22 words of section 110. If the value of the specimen involved in the commission of the offence is less than K10 000, for example MWK7 000, problems do not arise: the court can impose a fine of between MWK7 000 and MWK10 000. However, if the value of the specimen is more than MWK10 000, for example MWK13 000, a conflict arises. On the one hand, the last 22 words of section 110 require that the court should impose a fine that is not less than MWK13 000. On the other hand the *Akimu* court’s view suggests that the fine to be imposed should not exceed MWK10 000. This conflict must be resolved in favour of the last 22 words of section 110 because the 22 words permit the imposition of

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<sup>172</sup> John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 175. The purposive approach was also employed in *R v Bloxham* [1983] 1 AC 109, [1982] 1 All ER 582; *R v Clarke* [1985] AC 1037, [1985] 2 All ER 777.

a heavy fine in line with the benefit the offender would likely get out of the specimen. The imposition of such a heavy fine would teach the offender and society generally that crime in this area does not pay. This conforms to NAPWA's purpose of protecting species of wild animals. The *Akimu* court's suggestion that the MWK10 000 be regarded as the maximum fine would lead to smaller or illogical fines being imposed, with the likely result that there would be less compliance with the law and so defeating NAPWA's purpose of protecting species of wild animals. Thus the meaning adopted by the court is contrary to the purpose of NAPWA.

A more acceptable meaning is provided by the third interpretation above: the MWK10 000 is neither the minimum fine nor the maximum fine, but simply a guide indicating that the offences punishable under this section are of a more serious nature than most of the other offences in NAPWA. The merit of this meaning lies in three factors. First, this meaning does not necessitate the reading in or reading out of words in the section. Second, this meaning gives effect to the last 22 words of the section. In other words, the last 22 words are permitted to influence the penalty imposed on the offender in the sense that they provide the minimum fine that can be meted out. This minimum fine is based on the value of the specimen involved in the commission of the offence. So a person who commits an offence relating to a specimen worth MWK50 000 will be fined to a minimum fine of MWK50 000. If the specimen is valued at only MWK15 000, the minimum fine will be MWK15 000. This way of looking at section 110 commends itself to common sense. Third, the emancipation of the last 22 words of section 110 from the *Akimu* bondage of reasoning leads to the attainment of NAPWA's purpose of protecting species of wild animals as argued above.

All in all, it is submitted, with due respect to the learned judge in *Akimu*, that the MWK10 000 in section 110 is not the maximum fine as held by the judge. Such a meaning flies in the face of common sense, ignores the purpose of the enactment and becomes possible only after an unnecessary reading in of words coupled with an unacceptable assumption on Parliament's thoughts regarding the value of specimens. The better view, it is suggested, is to regard the value of the specimen as the minimum fine

and the MWK10 000 as a possible fine subject to the minimum and as a guide to the rank the offences under section 110 occupy in the general scheme of crimes under the Act.

It may finally be observed that the difficulties in the construction of section 110 have arisen from the way the section is worded. These difficulties would disappear if the reference to MWK10 000 is omitted, that is, if the words ‘of K10 000’ are left out. If this is done, the section will read: ‘... shall be liable to a fine and to imprisonment for a term of 5 years, and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence.’ An amendment along these lines is hereby recommended.

#### **4.3.9 Introduction of plants into national park or wildlife reserve**

Section 37(1) of NAPWA provides that ‘except as otherwise provided by section 39’ any person who conveys or introduces any plant, whether of a wild or cultivated species, into a national park or wildlife reserve, commits an offence. It appears that the words ‘except as otherwise provided by section 39’ do not add anything to the offence created by this section. Section 39 empowers the CPWO to issue authority to any person absolving him from compliance with section 35(a). In essence that person can hunt, take, kill, injure or disturb any wild plant or animal or any domestic animal or cultivated plant occurring lawfully in a national park or wildlife reserve, without incurring any liability. It is not easy to see the connection between this absolution from liability and the prohibition against introduction of plants into a national park or wildlife reserve. In general the words ‘except as otherwise provided by’, when they appear in a statutory provision, may signal the existence of a defence; they exclude from the ambit of that statutory provision conduct which would otherwise have been impugned under that statutory provision. In the statutory provision under discussion – section 37(1) – the words do not seem to indicate any defence nor do they seem to exclude from the ambit of section 37(1) any conduct set out in section 39 which would otherwise have been impugned under section 37(1). For the absolution from liability when hunting, taking, killing, injuring or disturbing plants or animals in a national park or wildlife reserve does not seem to affect

the prohibition against the introduction of plants in a national park or wildlife reserve. In fact section 37(1) deals with plants that are in the national park or wildlife reserve unlawfully whereas section 39 as read with section 35(a) deals with those plants and animals that are in the national park or wildlife reserve lawfully.<sup>173</sup> Perhaps the best way to make sense of the words is to envisage a situation where in the process of hunting, taking, killing, injuring or disturbing animals, the person uses plants. In other words, the person conveys or introduces plants in a national park or wildlife reserve for the purpose of hunting, taking, killing, injuring or disturbing animals. If this were to happen, such conveyance or introduction of plants would not constitute an offence under section 37(1) by virtue of the operation of the words ‘except as otherwise provided by section 39.’

The idea of conveying or introducing plants in a national park or wildlife reserve for purposes of hunting, taking, killing, injuring or disturbing animals, does not make a lot of sense. Therefore on its own, this idea cannot justify the retention of the words ‘except as otherwise provided by section 39.’ In the premises, it is recommended that these words be expunged from the section. Section 37(1) should simply read: ‘Any person who conveys or introduces any plant, whether of a wild or cultivated species, into a national park or wildlife reserve shall be guilty of an offence.’

From the wording of section 37(1), it is easy to see the actus reus of the offence: it is conveying or introducing a wild or cultivated plant into a national park or wildlife reserve. However, there is no suggestion from the wording of the section regarding the need for mens rea. Therefore, for reasons set out at the beginning of this chapter, there is a possibility that mens rea is not an ingredient of this offence.

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<sup>173</sup> Section 35(a) of NAPWA deals with domestic animals or cultivated plants occurring lawfully in a national park or wildlife reserve. It also deals with wild plants or wild animals. It is not clearly indicated whether these wild plants or wild animals occur lawfully or not in the national park or wildlife reserve. There is no suggestion in the text of the statute that they are occurring unlawfully. In the circumstances, it has been assumed that the wild plants or wild animals are occurring lawfully. In fact there is room for arguing that the words ‘occurring lawfully therein’ may be applied to the wild plants or wild animals as well.

Offenders under this section are liable to the general penalties prescribed in section 108 of NAPWA.<sup>174</sup>

#### **4.3.10 Prohibition against fire in national park or wildlife reserve**

It is an offence to start or maintain any fire in a national park or wildlife reserve.<sup>175</sup> A person may escape from liability under this offence if he has the written permission of the CPWO or the Wildlife Officer to light a fire or cause a fire to be lighted, or to leave any fire which has been lighted or which he has caused to be lighted, unextinguished, or to discard any burning object.<sup>176</sup>

Again this offence is introduced by the words 'except as otherwise provided by section 39.' These words would only make sense if it is assumed that in hunting, taking, killing, injuring or disturbing any plant or animal in a national park or wildlife reserve with the intention of harvesting resource, a person may use fire. An examination of section 39 even as read with section 35(a) reveals that it does not authorize the harvesting of resource in a national park or wildlife reserve through the use of fire. Accordingly, the reference to section 39 in the offence under discussion does not add anything. For this reason it is recommended that the reference to section 39 should be excised from section 38. The recommendation is not to excise the words 'except as otherwise provided by section 39,' but rather it is to excise only the words 'by section 39, or'. The reason for this is that section 38 makes reference to both section 39 and section 41(2)(b). The reference to section 41(2)(b) is valid, as such the words 'except as otherwise provided' may be saved for the sake of the reference to section 41(2)(b). After the suggested excision is effected, section 38 will read as follows: 'Except as otherwise provided by section 41(2)(b), any person who starts or maintains any fire in a national park or wildlife reserve shall be guilty of an offence.'

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<sup>174</sup> It must be added that apart from prosecuting offenders under this section, the CPWO is empowered under section 37(2) of NAPWA to order the destruction or removal of any plant and any seedling or offshoot thereof, brought into the national park or wildlife reserve.

<sup>175</sup> Section 38 of NAPWA.

<sup>176</sup> Regulation 9 of the National Parks and Wildlife (Protected Areas) Regulations apparently promulgated under section 41(2)(b) of NAPWA. The regulations were promulgated in GN 87/1994 and GN 73/1997.

In considering whether mens rea is an element of this offence, care must be taken to avoid likening this offence to arson. At common law arson is defined as ‘maliciously and voluntarily burning the house of another by night or by day’<sup>177</sup> and in *Holmes’ Case*<sup>178</sup> it was held, inter alia, that the offence of arson may be committed by wilfully setting fire to one’s house, provided the house of another be thereby burned. Thus, at common law mens rea is an element of arson. Similarly under section 337 of the Penal Code arson is proscribed and defined in terms of wilfully and unlawfully setting fire to building, etc.<sup>179</sup> From this it may be inferred that the Penal Code requires mens rea for a person to be convicted of arson.<sup>180</sup> It may be argued that since both the offences of arson and starting or maintaining fire in a national park or wildlife reserve are based on causing to burn, both offences must have mens rea as an element. This argument emphasizes the similarities between the two offences but overlooks the differences between them. One fundamental difference is that in arson some property, for example a building, must burn, whereas in starting or maintaining a fire in a national park or wildlife reserve, it is not necessary that some property or something, for example an animal or plant, burn. Secondly, arson is a more serious offence and is punishable by life imprisonment.<sup>181</sup> Thirdly, if the legislature intended to make mens rea an element of the offence of starting or maintaining fire in a national park or wildlife reserve, appropriate words would have been used in NAPWA similar to or along the lines of the words employed in the Penal Code. The different terminology in section 38 of NAPWA (for instance, the absence of words importing mens rea) suggests that mens rea may not be an ingredient of the offence of starting or maintaining fire in a national park or wildlife reserve.

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<sup>177</sup> J C Smith and B Hogan *Criminal Law* London: Butterworths 1965 at 494. Emphasis added.

<sup>178</sup> (1634) Cro Car 376, 79 ER 928.

<sup>179</sup> See *Republic v Metani* 7 Malawi Law Reports 341 and *Republic v Komhiwa* 7 Malawi Law Reports 325.

<sup>180</sup> Actually all the full offences committed by the use of fire (sections 337 and 339 of the Penal Code) require mens rea.

<sup>181</sup> Section 337 of the Penal Code.

Upon conviction of starting or maintaining fire in a national park or wildlife reserve, the offender is liable to imprisonment for a period of up to six months and a fine of up to MWK1 000.<sup>182</sup>

#### **4.3.11 Offences against regulations for use of national park or wildlife reserve**

The Minister is authorized, on the recommendation of the Wildlife Research and Management Board, to make regulations in respect of the use or integrity of national parks or wildlife reserves. Among other things, the regulations may provide for conditions under which any person, vehicle, boat or aircraft may enter, travel through, reside in or be kept in a national park or wildlife reserve.<sup>183</sup> Contravention of the provisions of these regulations is an offence.<sup>184</sup> The precise elements of these offences obviously depend on the wording of the particular regulation. The wording will determine the required actus reus and, if applicable, mens rea. The punishment for any of these offences is arguably the general penalty prescribed under section 108 of NAPWA. This is evident from the penalty clauses of the regulations that have been promulgated so far<sup>185</sup> and from the fact that where no other penalty is provided for an offence, the general penalty under section 108 applies.

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<sup>182</sup> Section 108 of NAPWA. Under regulations 9 and 18 of the National Parks and Wildlife (Protected Areas) Regulations a similar offence is punished in the same way.

<sup>183</sup> The other matters the regulations may provide for, according to section 41(2) of NAPWA, are: (i) prohibition or regulation of lighting camp or picnic fires in a national park or wildlife reserve; (ii) fees for entry into national parks or wildlife reserves or for services or amenities provided therein; (iii) prohibition or control of low flying aircraft over a national park or wildlife reserve; (iv) rules for persons within a national park or wildlife reserve; (v) prohibition or control of commercial enterprises within a national park or wildlife reserve; and (vi) efficient management of a national park or wildlife reserve.

<sup>184</sup> Section 41(3) of NAPWA.



#### 4.3.12 Hunting or taking without a licence

It is an offence to hunt or take any protected species, except in accordance with the conditions of a licence issued pursuant to Part VII of NAPWA.<sup>186</sup> Two broad exceptions are expressly set out in the section creating this offence. First, it is not an offence to hunt or take protected species contrary to the conditions of a licence if the Act itself authorizes it otherwise. This exception originates from the qualification of the offence by the words ‘except as otherwise provided by this Act.’ An example of the operation of this exception is where the CPWO authorizes a person to hunt or take any animal in a national park or wildlife reserve with the intention of harvesting resource therein.<sup>187</sup> The authority given by the CPWO in this instance is not in the form of a licence and so in the absence of the words ‘except as otherwise provided by this Act,’ the authority given by the CPWO would be in conflict with the offence of hunting or taking without a licence. As it is, there is no conflict. The second broad exception is contained in the proviso to section 47(1). This proviso states that any officer shall not be required to possess a licence while acting in the performance of his duties or in exercising his powers under the Act. So any officer who is authorized by the Wildlife Research and Management Board in the interest of better wildlife management and with the approval of the Minister, to hunt or take animals from a national park or wildlife reserve<sup>188</sup> does not incur liability under the offence of hunting or taking without a licence even though he hunts or takes without such a licence.

The elements of the offence of hunting or taking without a licence are: (a) hunt or take; (b) protected species; and (c) contrary to the conditions of a Part VII licence. The meanings of ‘hunt’ and ‘take’ have been elaborated on above (segment 4.3.8). The meanings are similar here. So ‘hunt’ in this offence has a two-pronged meaning. First, in relation to animals, it means an attempt to wound, capture or kill the animal, or remove or destroy its nest or egg or any part of it. Second, in relation to plants, ‘hunt’ means an

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<sup>185</sup> For instance, regulation 18 of the National Parks and Wildlife (Protected Areas) Regulations.

<sup>186</sup> Section 47(1) of NAPWA.

<sup>187</sup> Section 39(a) as read with section 35(a) of NAPWA.

<sup>188</sup> Such authority is given under section 40 as read with section 35(a) of NAPWA.

attempt to lay hold of plants with one's hand or to remove plants. With regard to 'take,' there are also two prongs to its meaning: one prong is based on section 2 of NAPWA and the other prong is its ordinary grammatical meaning. Thus, according to section 2, 'take' in relation to animals means to wound, capture or kill the animal, or remove or destroy its nest or egg or any part of it. In relation to plants, 'take' means to lay hold of plants with one's hand or to remove them. The effect of these meanings is that 'take' is the complete offence while 'hunt' is its inchoate offence, that is, the offence of attempt to take. Consequently mens rea may be added as an element of the offence of hunting without a licence since, as demonstrated above, mens rea is an absolute necessity in the offences of attempt. The mens rea in this respect is a specific intent (or a decision) to take protected species. Whether mens rea is also an element of the offence of taking without a licence is debatable.

By 'protected species' is meant any plant or animal declared as such under section 43.<sup>189</sup> Under this section the Minister may, from time to time, on the recommendations of the Wildlife Research and Management Board, declare any species of wild plant or wild animal as a protected species. The declaration may be in respect of individual species throughout Malawi or all or some species in a specified area, or varieties of a species including sex and age groups. The purpose of such declaration is to accord appropriate management priority to these particular species of plants and animals.<sup>190</sup> It must be noted that protected species of animals are known as game species.<sup>191</sup>

With regard to the last element identified above (that is, contrary to the conditions of a Part VII licence), two observations may be made. In the first place, it is obvious that a person who hunts or takes protected species without a licence issued under Part VII of the Act commits an offence. In the second place, a person who has the requisite licence may still be guilty of this offence if he does not abide by the conditions laid out in the licence.

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<sup>189</sup> Section 2 of NAPWA.

<sup>190</sup> Section 42 of NAPWA.

<sup>191</sup> Section 44 of NAPWA.

The word 'conditions' brings to mind a whole range of literature. That word has been used in bills of lading,<sup>192</sup> contract,<sup>193</sup> lease,<sup>194</sup> and even wills.<sup>195</sup> Of the meanings attached to the word in these fields, the closest to conditions in a licence is that expounded in the law of contract, since the licence to hunt or take protected species may in a sense be regarded as a sort of contract between the licence-holder and government. In the law of contract the terms of a contract are classified into three: conditions, warranties and intermediate or innominate terms.<sup>196</sup> Elizabeth Macdonald<sup>197</sup> has summarized the nature of these contractual terms as follows:

"The modern usage of the classification of terms as 'conditions,' 'warranties' and 'intermediate or innominate terms' categorises them according to the consequences which follow their breach. Basically, when a condition is breached the injured party has the right to sue for damages and also to rescind the contract. A breach of warranty gives rise to the right to sue for damages. When an innominate term is breached the legal consequences of the breach depend upon its factual consequences, i e there is a right to rescind the contract, in addition to suing for damages, if the breach of an innominate term is such as to deprive the injured party of substantially all the benefit which he, or she, was intended to derive from the contract."

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<sup>192</sup> See, for example, *Serraino & Sons v Campbell* [1891] 1 QB 283.

<sup>193</sup> See, for example, *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 at 1012.

<sup>194</sup> See, for example, 23 Halsbury's Laws (3<sup>rd</sup> Edn) at 599.

<sup>195</sup> See, for example, *Re Frame, Edwards v Taylor* [1939] Ch 700 at 703 – 704.

<sup>196</sup> *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 998. See also H G Beale et al (eds) *Chitty on Contracts* 29ed vol 1 London: Sweet & Maxwell 2004 at paras 12-019 to 12-040; T A Downes *Textbook on Contract* 5ed London: Blackstone Press 1997 at 246 – 256; A G Guest (ed) *Anson's Law of Contract* 25ed Oxford: Clarendon Press 1979 at 129 – 137; P S Atiyah *An Introduction to the Law of Contract* 3ed Oxford: Clarendon Press 1981 at 145 – 151; M P Furmston (ed) *Cheshire and Fifoot's Law of Contract* 10ed London: Butterworths 1981 at 128 – 138; G H L Fridman *The Law of Contract in Canada* Toronto: Carswell 1976 at 268 – 276, 278 – 289; and J C Smith *Smith and Thomas: A Casebook on Contract* 9ed London: Sweet & Maxwell 1992 at 416 – 433.

<sup>197</sup> 'Chapter 3: Contents' in M P Furmston (ed) *The Law of Contract* 2ed London: LexisNexis Butterworths 2003 at 562 para 3.34. Footnotes in quotation have been omitted.

From this summary it appears that a condition is a more serious term of a contract than a warranty or innominate term. It has actually been said that conditions 'go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.'<sup>198</sup> It may be argued that the conditions of the licence, breach of which amounts to an offence under section 47(1) of NAPWA, must be those of a nature similar to conditions under a contract. Such argument is acceptable as it obviates the possibility of convicting a person of breaches of trivial terms of the licence. This point is bolstered by the fact that upon conviction for this offence, the licence may be surrendered to the CPWO, thus bringing to an end the relationship previously created by the licence between the government and the offender, which may be likened to the rescission of a contract upon breach of a contractual condition. From the foregoing analysis, it follows that breach of a serious term in the licence may amount to an offence whereas breach of a subsidiary term of the licence may not. In this connection, it may be pointed out that the same or at least similar result may be reached by way of the application of the maxim *de minimis non curat lex* – the law does not concern itself with trifles.<sup>199</sup> Since the law does not deal in trifles, breaches of trivial terms of a licence fall outside the concern of the law, but breaches of central terms (conditions) of the licence constitute offences under section 47(1).

The offence of hunting or taking without a licence may not necessarily be proved throughout by the prosecution. Under section 47(2) it is provided that in any proceedings for the offence of hunting or taking without a licence, the onus of proving that the hunting or taking was in accordance with a valid licence shall rest upon the accused. This reverse onus has the potential to infringe the accused's right to be presumed innocent, to

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<sup>198</sup> Per Fletcher Moulton J in *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 at 1012: approved [1911] AC 394. In *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 Lord Reid said that a condition is of a fundamental character going to the root of the contract.

<sup>199</sup> Bryan A Garner *A Dictionary of Modern Legal Usage* Oxford: Oxford University Press 1987 at 176; Anon *Latin for Lawyers* 3ed London: Sweet & Maxwell 1960 at 137.

remain silent and not to testify.<sup>200</sup> 'It is by now axiomatic,' said Ngcobo J, ' that a provision in a statute that imposes a legal burden [also known as a reverse onus] upon the accused limits the right to be presumed innocent and to remain silent.'<sup>201</sup> It has been stated above that one of the elements of the offence of hunting or taking without a licence is that the hunting or taking was done not in accordance with the conditions of a licence. The presumption of innocence demands that this element be proved beyond reasonable doubt by the prosecution. By providing that the accused should bear the onus of proving that the hunting or taking was in accordance with a licence, section 47(2) essentially cancels the prosecution's duty to prove the abovementioned element. The prosecution may opt not to give any evidence at all proving the element, and if the accused fails to discharge the onus placed on him, he will be convicted even though there is a reasonable doubt as to whether the hunting or taking was out of accord with the conditions of a licence. It is therefore clear that the onus on the accused spelt out in section 47(2) limits the accused's right to be presumed innocent. In addition, the process of discharging that onus inevitably involves the accused breaking his silence. Thus the onus also limits the accused's right to remain silent. Having found that the reverse onus limits the presumption of innocence and the right to silence, the next task is to determine whether it is justifiable under section 44 of the Constitution (the limitations clause). In this regard, it may be recalled that for a restriction or limitation on a right to pass constitutional muster, it must be prescribed by law, reasonable, recognized by international human rights standards and necessary in an open and democratic society.<sup>202</sup>

The reverse onus is prescribed by section 47(2) which is part of NAPWA, a statute which is undoubtedly a law of general application. Whether the reverse onus under discussion is

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<sup>200</sup> Section 42(2)(f)(iii) of the Constitution of the Republic of Malawi 1994.

<sup>201</sup> *S v Singo* 2002 (4) SA 858 at para 25. Footnotes in quotation have been omitted. At para 26 Ngcobo J continued: 'A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to establish the guilt of the accused and not the accused to establish his or her innocence. That fundamental principle of our law is now firmly entrenched in ... the Constitution which provides that an accused person has the right to be presumed innocent. What makes a provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt.' Footnotes in quotation have been omitted.

reasonable depends on whether the purpose it seeks to achieve is of sufficient importance to outweigh the presumption of innocence or the right to silence. The declared purpose of the Part of the Act under which the reverse onus falls is to regulate the hunting and taking of wildlife resources. This regulation is done through, inter alia, the requirement that the hunting and taking must be done under the authority of a licence. Once the licence is issued, the State does not follow the licence-holder to ensure that he is complying with the conditions laid out therein. Compliance or non-compliance with the conditions is peculiarly within the knowledge of the licence-holder. So the reverse onus is rational in itself as it requires the licence-holder to prove only facts to which he has easy access.<sup>203</sup> The conditions in the licence are in essence duties imposed by the State, and it does not appear to be unreasonable or oppressive to require the licence-holder to account to the State how he has used his licence in respect of those duties. Of course the reverse onus makes easier the prosecution's task of proving the offence of hunting or taking without a licence, and this may ultimately lead to enhanced environmental protection. In *S v Manamela (Director-General of Justice intervening)*<sup>204</sup> it was stated that reverse onus provisions might be acceptable in regulatory offences, for example, regulatory statutes dealing with licensed activity in the public domain. NAPWA is such a regulatory statute and so it is not out of line with court decisions to say that the reverse onus in issue is reasonable.

With regard to recognition by international human rights standards, it may be observed that a reverse onus provision has been upheld on similar grounds.<sup>205</sup> As for necessity in an open and democratic society, it is accepted that democracy is sometimes compatible with limitations on rights and freedoms. Where facts are peculiarly within the knowledge of the accused, it has been found to be in line with democratic rule to require the accused

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<sup>202</sup> The meaning of these components of the limitations clause have been discussed at length under segment 3.3 in Chapter 3 hereof. In the discussion that follows in the text of the present chapter, knowledge of the Chapter 3 discussion is assumed.

<sup>203</sup> *S v Zuma and Others* 1995 (4) BCLR 401 (CC) at para 41.

<sup>204</sup> 2000 (3) SA 1 (CC) at paras 27 – 29.

<sup>205</sup> *X v United Kingdom* Application Number 5124/71, *Collection of Decisions* ECHR 135 (European Court of Human Rights).

to divulge those facts for his own benefit. All in all, it may be concluded that there is room for successfully contending that the reverse onus in section 47(2) does not offend the presumption of innocence or the right to silence; that it is a justifiable limitation of those rights. Admittedly, it is not easy to make out this contention, and there is a real possibility that a court which is not environment-friendly may reject the argument and strike down the reverse onus. To avoid the materialization of the possibility, it is suggested that section 47(2) of NAPWA should be amended in such a way that it is transformed into an evidentiary presumption. Such a presumption does not violate the accused person's right to be presumed innocent since it does not shift the burden of proof.<sup>206</sup> Courts more readily accept the validity of such presumptions. The proposed amendment may be effected by inserting the words 'there is a reasonable possibility that' between 'that' and 'the'. After this insertion, section 47(2) will read as follows: 'In any proceedings for an offence against subsection (1) the onus of proving that there is a reasonable possibility that the hunting or the taking was in accordance with a valid licence shall rest upon the accused.'

The punishment for the offence of hunting or taking without a licence is addressed in two sections of NAPWA: section 109 and section 110. The applicability of these two sections depends on the meaning of 'protected species'. It must be borne in mind that the term refers to game species on the one hand, and species of wild plants declared as protected species on the other hand. Section 109 prescribes the punishment for offences relating to game species.<sup>207</sup> It states that any person who is convicted of an offence involving (a) taking, hunting, molesting or reducing into possession any game species, or (b) possession of, selling, buying, transferring or receiving in transfer any specimen of game species, is liable to a fine and imprisonment. In the case of an offence committed in a

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<sup>206</sup> Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* 4ed Lansdowne: Juta 2001 at 632.

<sup>207</sup> According to section 2 of NAPWA game species are species of animals designated as game species under section 44 of the Act. Section 43 of the Act gives the Minister power, from time to time, on the recommendations of the Wildlife Research and Management Board, to declare any species of wild plant or wild animal as protected species. Section 44 says that protected species of wild animals shall be classified as game species. The stated purpose of this classification is to accord appropriate management priority to those particular species of plants and animals (section 42 of NAPWA).

protected area,<sup>208</sup> the offender is liable to a fine of not less than MWK800 (US \$6) but not more than MWK2 000 (US \$15) and to imprisonment for a term of one year. If the offence is committed outside a protected area, the offender is liable to a fine of not less than MWK50 (US \$0.38) but not more than MWK2 000 and to imprisonment for a term of one year. The offences of hunting or taking without a licence are punished under paragraph (a).

As for section 110, it sets out the penalties for offences relating to, inter alia, protected species other than game species. Since there are two groups of species under protected species (namely, game species and species of wild plants declared as protected species), the phrase 'protected species other than game species' must mean species of wild plants declared as protected species. According to section 110 as read with the phrase just defined, any person who is convicted of an offence involving taking or hunting species of wild plants declared as protected species is liable to a fine of MWK10 000 and to imprisonment for a term of 5 years, and in any case the fine is required to be not less than the value of the specimen involved in the commission of the offence. The scope of this penalty (especially the fine) has been elaborated on above when discussing various prohibited acts in a national park or wildlife reserve. Reference must be made to that discussion and the amendment suggested there must be noted.

#### **4.3.13 Offences relating to possession and production of licence and keeping of records of game**

Section 60 of NAPWA provides that every licensee under Part VII of the Act is required to: (a) have the licence in his possession whenever he is hunting or taking any animal or plant; (b) produce the licence for inspection by an officer or police officer upon request; and (c) keep a true record, in the prescribed form, of all game species hunted or taken by him during the validity of the licence. Contravention of any of these requirements is an offence. Each of these requirements will now be considered in turn.

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<sup>208</sup> Section 2 of NAPWA states that 'protected area' includes a national park, wildlife reserve and forest reserve.



Failure to have the licence in one's possession when hunting or taking any animal or plant may be likened to failure to have a driving licence in one's possession when driving. In the case of driving without a licence in possession, mens rea is not an element of the offence.<sup>209</sup> It is suggested that failure to have a licence in one's possession when hunting or taking any animal or plant should also not require proof of mens rea. The same is urged for failure to produce the licence for inspection by an officer or police officer upon request.

The offence of failure to keep a true record of all game species hunted or taken by him during the validity of the licence must be understood in its context. In computing the numbers or quantities of animals hunted or taken under the licence, only animals that are killed, wounded, captured or taken are counted. If any animal is killed or wounded through accident or error by any licensee whose licence entitles him to hunt, such animal is counted as having been hunted under such licence.<sup>210</sup> This mode of computing the numbers or quantities obviates the difficulty on the part of the licensee to record the numbers of animals he pursued but never managed to kill or capture. It must be noted that the record-keeping is only required with reference to game species; the licensee is not under a duty to keep a record of plants taken.

The punishment for contravention of paragraphs (a) and (b) is arguably set out in section 108 of NAPWA. As for paragraph (c), the penalties prescribed in section 109 are applicable, as paragraph (c) contains an offence involving taking or hunting of game species. Both section 108 and section 109 have been discussed above and so nothing more will be said here.

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<sup>209</sup> J R L Milton and M G Cowling *South African Criminal Law and Procedure* Vol III 2ed Kenwyn: Juta 1988 (Service No. 7, 1995) at G3-11. Cf *Taylor v Kenyon* [1952] 2 All ER 726; *John v Humphreys* [1955] 1 WLR 325.

<sup>210</sup> Section 61 of NAPWA.

#### **4.3.14 Prohibited hunting by guides, trackers or porters**

Any licensee under Part VII of the Act may employ or use another person to assist him as a guide, tracker or porter in hunting protected species. If such guide, tracker or porter is not himself a licensee, it is an offence for him to chase, drive or employ any weapon against any protected species.<sup>211</sup> The only exception to this prohibition relates to the holder of a professional hunter's licence issued under Part X of the Act. The holder of a professional hunter's licence may, in the process of assisting his employer, chase, drive or employ a legally permissible weapon against any protected species.<sup>212</sup> The word 'licensee' in the phrase 'not being himself a licensee' in section 62(2) must be taken to refer to a licensee under Part VII of the Act. If the 'licensee' is regarded generally as a licensee under the Act, then the exception in section 62(3) would not be necessary since it would be subsumed under that general licensee.

Offenders under this section are liable to fines of up to MWK2 000 (US \$15) and imprisonment for a term of one year, if the protected species involved are game species.<sup>213</sup> If the protected species involved are wild plants which have been declared protected species, the offenders are liable to imprisonment for a term of five years and to a fine of more or less than MWK10 000 but in any case the fine is required to be not less than the value of the specimen involved in the commission of the offence.<sup>214</sup>

#### **4.3.15 Use of fires for hunting**

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<sup>211</sup> Section 62(1) and (2) of NAPWA.

<sup>212</sup> Section 62(3) of NAPWA. It is necessary to qualify 'weapon' with the words 'legally permissible' because some weapons are not allowed for use in hunting or taking protected species. In the National Parks and Wildlife (Hunting Weapons) Regulations made under section 67 of the Act (and promulgated in G N 83/1994 and G N 70/1997) it is provided that the weapon to be used in hunting protected species shall be a rifle. It must be noted that by 'protected species' under these regulations is meant buffalo, crocodile, elephant or hippopotamus.

<sup>213</sup> Section 109 of NAPWA.

<sup>214</sup> Section 110 of NAPWA. The penalty here has been set out after taking into account the observations on the scope and effect of the fine in section 110. These observations were made when discussing prohibited acts in a national park or wildlife reserve.

It is an offence to cause any fire for the purpose of hunting, taking or assisting another to hunt or take, any wild animal or plant.<sup>215</sup> This offence is wide: it applies to the hunting of protected species and even species of wild animals and plants other than protected species. The elements of this offence are: (a) causing fire; and (b) for the purpose of hunting, taking or assisting another to hunt or take any wild animal or plant.

The word 'causes,' it has been held, demands proof of a positive act.<sup>216</sup> In *Price v Cromack*<sup>217</sup> the appellant entered into an agreement to allow effluent created by an

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<sup>215</sup> Section 64(1) of NAPWA.

<sup>216</sup> J L J Edwards *Mens Rea in Statutory Offences* London: Macmillan 1955 at 254 states: 'It will be recalled that "causing" is by no means identical with conduct envisaged by words like permitting or suffering. Whereas ... "permits," "suffers," and "allows" all denote passive acquiescence in the commission of the prohibited act, "causes" is a far more positive epithet and indicates an express authorisation of the forbidden event.'

<sup>217</sup> [1975] 2 All ER 113. See also *Alphacell Ltd v Woodward* [1972] 2 All ER 475, [1972] AC 824. Briefly, what happened in *Alphacell* was that the premises of the appellants, who manufactured paper from manilla fibres, were situated on the bank of a river. Their manufacturing process produced two effluents: boiling liquids which were taken away by tanker, and wash water which was run into two settling tanks and then recirculated and reused. From the lower of the settling tanks there was an overflow direct into the river, and the wash water was prevented from overflowing into the river by two pumps: one operating automatically when the water reached a certain level, the other being switched on by hand as a standby. The intake of each pump was protected by a strainer. The apparatus had been installed for about a year and had never given any trouble. The pumps were inspected each weekend. On the day in question the appellants' foreman inspected the tanks four times, at 8.15 am when he found that the automatic pump was working and everything was normal; at 11.30 am when he found that the water level was rising and switched on the standby pump; and at 1.15 pm and 3.45 pm when he found the level unchanged with both pumps working. At 4.30 pm an inspector of the river authority found that polluted water was overflowing into the river at an estimated rate of 250 gallons an hour. On inspection it was discovered that brambles, ferns and leaves had got through the strainers of the pumps and blocked the impellers. The appellants were charged with causing polluting matter to enter the river contrary to section 2(1) of the Rivers (Prevention of Pollution) Act 1951. The answer of the appellants was, inter alia, that they had not done anything which could be described as causation of the overflow into the river. They had installed a perfectly adequate system for dealing with the water which they had accumulated in the tanks, and they could not be said to have caused the entry of the effluent into the river merely because the pumps had failed and thus had proved ineffective to contain the water in the tanks. In the House of Lords the overwhelming opinion of their Lordships was that whatever else 'causing' might or might not involve, it did involve some active operation as opposed to mere tacit standing by and looking on. At [1972] 2 All ER 479, [1972] AC 834 Lord Wilberforce said 'causing' must involve 'some active operation or chain of operations involving as the result the pollution of the stream.' At [1972] 2 All ER 489, [1972] AC 846 Lord Cross of Chelsea said that a man cannot be guilty of causing polluting matter to enter a stream 'unless at the least he does some positive act in the chain of acts and events leading to that result.' At [1972] 2 All ER 488, [1972] AC 845 Lord Pearson said of the activities of the appellants, 'Those were positive activities and they directly brought about the overflow. What other cause was there?'

industrial company to pass on to his land and be dispersed. The amount of effluent increased and, with the consent of the appellant, two lagoons were built by the company on the appellant's land to contain the effluent. Subsequently, a district pollution prevention officer of the river authority found two cracks in the walls of the lagoons which had allowed the effluent to escape into a nearby river. The appellant was convicted of causing poisonous, noxious or polluting matter to enter the river, contrary to section 2(1) of the Rivers (Prevention of Pollution) Act 1951 of England. This provision, as far as is material, is in the following terms: 'Subject to this Act, a person commits an offence punishable under this section – (a) if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter ....' On appeal, it was held that the offence of causing polluting matter to enter a river required some positive act on the part of the accused and not merely a passive looking on. The effluent had come on to the appellant's land and passed from there into the river by natural forces without any positive act by the appellant. It could not therefore be said that the appellant had caused the polluting matter to enter the river. Accordingly the appeal was allowed and the conviction quashed.<sup>218</sup>

It is doubtful whether it is proper to adopt the approach in *Price v Cromack* to the interpretation of 'causes' in section 64(1) of NAPWA. For one thing, the statutory offence in that case was stated in terms of causing or permitting, the obvious effect of which was to exclude omissions from the ambit of 'causes' as they were taken care of by the word 'permits.'<sup>219</sup> In section 64(1) of NAPWA the offence is only stated in terms of

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<sup>218</sup> See also *Wychavon District Council v National Rivers Authority* [1993] 1 WLR 125. This case together with *Price v Cromack* were criticised by subsequent judges. In *National Rivers Authority v Yorkshire Water Services Ltd* [1995] 1 AC 444 at 452 Lord Mackay of Clashfern LC said that he regarded those cases as turning on their own facts and that the word 'cause' should be used in its ordinary sense and that 'it is not right as a matter of law to add further requirements.' In *Attorney General's Reference (No. 1 of 1994)* [1995] 1 WLR 599 at 615 Lord Taylor of Gosforth CJ said that the insistence in *Price v Cromack* and *Wychavon District Council v National Rivers Authority* on a positive act as the immediate cause of the escape was a 'further requirement' which should not have been added. The only question was whether something which the defendant had done, whether immediately or antecedently, had caused the pollution.

<sup>219</sup> In *Environment Agency v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350 at 354 Lord Hoffmann considered the effect of the structure of a similarly worded statutory provision on the meaning of 'cause'. He said: 'Putting the matter shortly, if the charge is "causing," the prosecution must prove that the pollution was caused by something which the defendant did, rather than merely failed to prevent. It is, however, very important to notice that this requirement is not because of anything inherent in the notion of "causing." It is because of the structure of the subsection which imposes liability under two separate heads: the first limb

causing; there is no reference to permitting. The section does not contain any express exclusion of omissions from the ambit of 'causes'. In the circumstances it is suggested that 'causes' in section 64(1) should be regarded as expressing the common sense idea of bringing about a result.<sup>220</sup> It should not matter whether the result (in this case, the fire) is brought about by way of an act or omission.<sup>221</sup> As long as the act or omission brings about the fire, that should be enough to constitute the requisite actus reus of this offence.<sup>222</sup>

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simply for doing something which causes the pollution and the second for knowingly failing to prevent the pollution. The notion of causing is present in both limbs: under the first limb, what the defendant did must have caused the pollution and under the second limb, his omission must have caused it. The distinction in [the section in question] between acts and omissions is entirely due to the fact that Parliament has added the requirement of knowledge when the cause of the pollution is an omission. Liability under the first limb, without proof of knowledge, therefore requires that the defendant must have done something.'

<sup>220</sup> In *F J H Wrothwell Ltd v Yorkshire Water Authority* (1983) *The Times* 31 October McCullough J said (on the meaning of 'cause' in various statutes): "The word 'cause' is to be given its ordinary common sense meaning and any attempt to introduce refinements is to be deprecated": quoted in Francis Bennion *Statutory Interpretation* London: Butterworths 1984 at 267.

<sup>221</sup> Bringing about the fire by way of omission only becomes relevant where the offender was under an appropriate duty. This is so because under Malawian law (based on English law) omissions do not generally create criminal liability: Smith and Hogan op cit at 48; Glanville Williams [1982] *Crim LR* 773.

<sup>222</sup> The recent decision in *Environment Agency v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350, [1999] 2 AC 22 should be understood on the background of the wording of the statutory provision. In this case the appellant maintained a diesel tank in a yard which was drained directly into a river. The tank was surrounded by a bund to contain spillage, but the appellant had overridden that protection by fixing an extension pipe to the outlet of the tank so as to connect it to a drum standing outside the bund. The outlet from the tank was governed by a tap which had no lock. On 20 March 1995 the tap was opened by a person unknown and the entire contents run into the drum, overflowed into the yard and passed down the drain into the river. The appellant was charged with causing polluting matter to enter controlled waters contrary to section 85(1) of the Water Resources Act 1991 which reads: 'A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.' The appellant was convicted and it appealed to the House of Lords. The appeal was dismissed. Delivering the majority judgment of the court, Lord Hoffmann at [1998] 2 WLR 362 summarised the law in the following terms:

- (1) Justices dealing with prosecutions for 'causing' pollution under section 85(1) should first require the prosecution to identify what it says the defendant did to cause the pollution. If the defendant cannot be said to have done anything at all, the prosecution must fail: the defendant may have "knowingly permitted" pollution but cannot have caused it.
- (2) The prosecution need not prove that the defendant did something which was the immediate cause of the pollution: maintaining tanks, lagoons or sewage systems full of noxious liquid is doing something, even if the immediate cause of the pollution was lack of maintenance, a natural event or the act of a third party.
- (3) When the prosecution has identified something which the defendant did, the justices must decide whether it caused the pollution. They should not be diverted by questions like "What was the cause of the pollution?" or "Did something else cause the pollution?" because to say that something else caused the pollution (like brambles clogging the pumps or vandalism by third parties) is not inconsistent with the defendant having caused it as well.

The word 'causes' has also been considered in the arena of the mental element – mens rea. Conflicting decisions have been delivered on the question whether 'causes' imports mens rea. On the one hand, in *Harrison v Leaper*<sup>223</sup> it was held that 'cause' implied the requirement of mens rea. In that case Harrison was the owner of a portable steam threshing engine and used to let it out to farmers who hired it. One day he sent his servant with it to a farm on hire. At the instruction of the farmer, the servant fixed it in the yard within twenty-five yards of the highway. Under section 70 of the Highway Act 1835 it was an offence to cause a steam engine to be erected within that distance. Harrison was not aware of what the servant had done. Harrison was charged with contravening section 70 of the Highway Act. It was held that as Harrison had no knowledge that the engine was being so placed, he could not be said to have caused it to be erected within the

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(4) If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether the act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

(5) The distinction between ordinary and extraordinary is one of fact or degree to which the justices must apply their common sense and knowledge of what happens in the area.

At [1998] 2 WLR 362 – 363 Lord Clyde added: 'A contravention of section 85(1) occurs where a person "causes or knowingly permits" a pollutant to enter controlled waters. *The context gives some guidance towards the identification of what is meant by "cause"*. It must involve some kind of active operation by the defendant whereby, with or without the occurrence of other factors, the pollutant enters the controlled waters. If the defendant has simply stood back and not participated to any extent at all, although he might have been guilty of knowingly permitting it, but he will not have caused the pollutant to enter the waters. It is sufficient that his activity has been a cause; it does not require to be the cause. Moreover, it is not necessary for the prosecution to prove knowledge, foreseeability, negligence or intention. ... Furthermore, in determining whether the prosecution has proved that the defendant caused the pollutant to enter the waters account has to be taken of natural forces, acts of God and the actions of third parties, if the evidence justifies taking such considerations into account either as contributing causes or even as excluding any operation of the defendant as a causative factor. The action of a third party may in some cases be merely one of the concurrent causes. Alternatively it may in other cases be so far out of the ordinary course of things that in the circumstances any active operations of the defendant fade into the background.' [Emphasis supplied].

The case of *Express Ltd (t/a Express Dairies Distribution) v Environment Agency* [2003] 2 All ER 778 may also be explained on the basis of the wording of the statutory provision under consideration in that case.

<sup>223</sup> (1862) 5 LT 640; 14 English and Empire Digest (Replacement Volume) at 43.

proscribed distance. Similarly, in *Hardcastle v Bielby*<sup>224</sup> a cart was damaged through contact with a heap of stone which had been allowed to remain after nightfall upon a highway. The stones had been laid there by a carter who acted under the orders of a person to whom a surveyor had given general directions as to repairing the road, but the surveyor did not himself know that the stone had been laid on the road. The surveyor was charged with causing to be laid on the highway a heap of stone, contrary to section 56 of the Highway Act 1835. It was held that the surveyor was not guilty of the offence charged as he did not know that the carter was going to and did lay the stones in the way he did.

On the other hand, there are decisions which hold that 'cause' does not import mens rea. In *Sopp v Long*<sup>225</sup> the defendant was the licensee of a number of railway station refreshment rooms at one of which a barmaid, in selling whisky by measurement to a customer, delivered a short measure. The defendant was charged with 'causing' to be delivered to the customer a lesser quantity than that purported, contrary to section 24(1) of the Weights and Measures Act 1963. The defendant had never met the barmaid, nor visited the refreshment room, and had delegated his authority to supervise such establishments to a general manager, then to a district manager and finally to the manageress of the refreshment room. He had drafted instructions to managers and manageresses of all refreshment rooms of which he was licensee, with the object of ensuring strict compliance with the law. It was held that knowledge or prior authorization was not an essential ingredient of the offence of causing a short measure to be delivered; that it was the defendant, as licensee, who had sold the short measure, and by the sale, conducted through his servant, the barmaid, he had 'caused' it to be delivered; and that, accordingly, he was guilty of the offence. Similarly, in *Alphacell Ltd v Woodward*<sup>226</sup> the appellants were charged with causing polluting matter to enter a river, contrary to section 2(1) of the Rivers (Prevention of Pollution) Act 1951. They contended, inter alia, that an

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<sup>224</sup> [1892] 1 QB 709. See also *Lovelace v Director of Public Prosecutions* [1954] 3 All ER 481, [1954] 1 WLR 1468.

<sup>225</sup> [1970] 1 QB 518, [1969] 1 All ER 855.

<sup>226</sup> [1972] AC 824.



overflow of the polluting matter had taken place without their knowledge and without negligence on their part and so they could not be convicted of the offence. The House of Lords held that the concept of mens rea was inapplicable and so the applicants were guilty of the offence even in the absence of knowledge or negligence.

Of the foregoing two approaches it is submitted that the latter is to be preferred. The word 'cause' should be regarded as being neutral on the question of mens rea; it should not be taken as importing mens rea. A person may cause something to happen intentionally or negligently or inadvertently without negligence and without intention. For instance, a person may intentionally smash a china flower vase; he may handle it so negligently that he drops and smashes it; or he may without negligence slip or stumble against it and smash it. In all these examples he has caused the destruction of the flower vase even though in the last example he did not have what is generally known as mens rea.<sup>227</sup>

In light of the foregoing, it is submitted that the word 'causes' in section 64(1) of NAPWA does not import mens rea. However, an element of mens rea is introduced in the offence by the words 'for the purpose of hunting, taking or assisting another to hunt or take any wild animal or plant.' These words introduce a kind of ulterior intent. The nature of this ulterior intent may be likened to that in the offence of burglary in which the offence is only committed upon entry with intent to commit a felony therein.<sup>228</sup> Even without reference to burglary, it may be observed that 'purpose' and 'intent' are synonyms in common parlance.<sup>229</sup> In *Chandler v Director of Public Prosecutions*<sup>230</sup> the House of Lords considered the meaning of 'purpose' in an English statute which prohibited the entry into a prohibited place for 'a purpose prejudicial to the safety or

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<sup>227</sup> This is essentially the argument of Lord Salmon in *Alphacell Ltd v Woodward* [1972] AC 824 at 847.

<sup>228</sup> Section 309 of the Penal Code; Smith and Hogan *op cit* at 71.

<sup>229</sup> See, for example, the definition of 'intent' in the South African Concise Oxford Dictionary.

<sup>230</sup> [1962] 3 All ER 142; J C Smith and B Hogan *Criminal Law: Cases and Materials* 3ed London: Butterworths 1986 at 51 – 54.



interests of the State.’ The appellants had planned by non-violent action to immobilize the aircraft at an airforce station for a space of six hours with a view to demonstrate their opposition to nuclear weapons. Lord Reid said:

“The first word in the section that requires consideration is ‘purpose’. One can imagine cases where this word could cause difficulty but I can see no difficulty here. The accused both intended and desired that the base should be immobilized for a time, and I cannot construe purpose in any sense that does not include that state of mind.”

On his part Lord Devlin said:

“I shall begin by considering the word ‘purpose,’ for both sides have relied on this word in different senses. Broadly, the appellants contend that it is to be given a subjective meaning, and the Crown an objective one. I have no doubt that it is subjective. A purpose must exist in the mind. It cannot exist anywhere else. The word can be used to designate either the main object which a man wants or hopes to achieve by the contemplated act, or it can be used to designate those objects which he knows will probably be achieved by the act, whether he wants them or not. I am satisfied that in the criminal law in general, and in this statute in particular, its ordinary sense is the latter one. In the former sense it cannot in practice be distinguished from motive which is normally irrelevant in criminal law. Its use in that sense would make this statute quite inept.’

The general purport or effect of these statements from Lord Reid and Lord Devlin is that in appropriate cases purpose may mean intention. It is submitted that such is the case here in the offence of using fire for the purpose of hunting. In addition it must be noted that the requirement of ulterior intent is not satisfied by proof of recklessness, that is to say, it is not sufficient to prove that the accused was reckless whether the fire would be used for hunting or taking or assisting another to hunt or take any wild animal or plant.<sup>231</sup>

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<sup>231</sup> Cf *R v Belfon* [1976] 3 All ER 46 at 49; Smith and Hogan op cit at 71.

Before moving on to the next offence, two things must be noted about the offence of causing fire for the purpose of hunting or taking. The first relates to an exception and the second relates to sentence. With regard to the former, not everyone who causes a fire for the purpose of hunting or taking or assisting another to hunt or take commits an offence. The owner of private land and any person acting on his authority may cause fire upon his land for the stated purpose without incurring any liability. The private land in issue excludes land held under lease.<sup>232</sup> As to the question of sentence, it all depends on the type of wild animal or plant to be hunted or taken. If the wild animal is game species, the offender is liable to a fine ranging from MWK50 (US \$0.38) to MWK2 000 (US \$15) and imprisonment for one year.<sup>233</sup> If the wild plant is protected species, the penalties prescribed under section 110 of NAPWA apply. If the wild animal or wild plant is not protected species, then the general penalty set out in section 108 of the Act is applicable.

#### **4.3.16 Hunting of dependent young**

It is an offence to hunt any dependent young or any female accompanied by dependent young of any protected species.<sup>234</sup> The elements of this offence are: (a) hunt; (b) dependent young or female accompanied by dependent young; and (c) of any protected species. The operative word in this offence is 'hunt'. As demonstrated above, hunt is an inchoate offence under the Act, namely, an attempt to take. As shown above, this imports mens rea. So mens rea is an element of the offence of hunting dependent young. By 'dependent young' is meant any juvenile animal patently depending on an adult of the same species for sustenance or protection.<sup>235</sup> The dependent young must belong to

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<sup>232</sup> Section 64(2) of NAPWA. According to the same section, this proviso to the offence does not absolve the owner of the private land or any person acting on his authority from any offence or other forms of liability under NAPWA or any other Act or law arising from the spread of fire or the movement of any animal to adjoining land or lands.

<sup>233</sup> Section 109 of NAPWA.

<sup>234</sup> Section 65 of NAPWA.

<sup>235</sup> Section 2 of NAPWA.

protected species. As discussed earlier on, 'protected species' includes both animals and plants, but the context of this offence suggests that the reference is to animals only, that is, game species. This is so because the definition of dependent young excludes plants and because it does not make sense to talk in terms of dependent young of plants actually young plants do not generally depend on old plants for growth, sustenance or protection.

The hunting of dependent young is not an offence in certain circumstances. It is permitted under a special licence for the purpose of scientific research or the furtherance of scientific research relative to the species, and for the purpose of scientific or educational or other proper use of the species in zoological institutions, botanical gardens, educational institutions, museums, herbaria and like institutions.<sup>236</sup> Hunting of dependent young is also permitted for purposes of killing where human life or property is threatened by the animals.<sup>237</sup>

Offenders under this offence are liable to a minimum fine of MWK50 and to a maximum fine of MWK2 000, and to imprisonment for one year.<sup>238</sup> Stiffer penalties in that range are imposed where the offence was committed in a national park, wildlife reserve and forest reserve.<sup>239</sup>

#### **4.3.17 Prohibited acts in relation to killing protected species, etc**

Section 66 of NAPWA sets out a number of acts which it declares to be offences. The section is in the following terms:

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<sup>236</sup> Section 65 as read with section 53 of NAPWA.

<sup>237</sup> Section 65 as read with section 73 of NAPWA.

<sup>238</sup> Section 109 of NAPWA.

<sup>239</sup> Section 109 of NAPWA as read with the definition of protected area in section 2.

‘66 – (1) Except as may be authorized by the conditions contained in any licence issued under this Act, any person who –

(a) for the purpose of or in connexion with hunting or taking of protected species, possesses, prepares, makes, buys, sells or uses any poison, birdlime, trap, net, snare or similar substance or device capable of killing, capturing or wounding any protected species;

(b) makes, prepares or uses any excavation, fence, enclosure or any device fixed to the ground or upon plants, capable of killing, capturing or wounding, any protected species,

shall be guilty of an offence.

(2) The onus of proving that an act under this section was done lawfully shall lie on the accused person.’

Theoretically, the introductory words ‘except as may be authorized by the conditions contained in any licence issued under this Act’ mean that the prohibited acts listed in the section may be done without incurring criminal liability as long as a licence permits them. In practice this is generally not possible, a notable exception being the professional hunter’s licence. The Act provides for six classes of licences: bird licence, game licence, hunting licence, special licence, visitor’s licence and professional hunter’s licence.<sup>240</sup> All these licences are required to be issued in the prescribed form.<sup>241</sup> The said prescribed forms are contained in the Schedule to the National Parks and Wildlife (Miscellaneous Forms) Regulations.<sup>242</sup> A perusal of the forms reveals that none of them authorize the acts forbidden in section 66(1). Actually these forms (except that for the professional hunter’s licence) do not leave room for adding special terms in appropriate circumstances. It is only the form for the professional hunter’s licence that has spaces for inserting appropriate conditions. It may therefore be concluded that it is only under a professional hunter’s licence that the acts proscribed in section 66(1) may be authorized.

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<sup>240</sup> Sections 48(1) and 92 of NAPWA.

<sup>241</sup> Sections 48(4) and 123(b) of NAPWA.

<sup>242</sup> G N 88/1994.

The phrase ‘for the purpose of’ introduces an element of mens rea as argued earlier on, but the phrase ‘in connexion with’ is neutral. Since these phrases are in the alternative, the result is that some of the offences under this section appear to be crimes of strict liability while others seem not to be, depending on which phrase is used together with the prohibited act. But few would be the cases where one of the prohibited acts would be done ‘in connexion with’ taking in the absence of mens rea. The better view is that all the acts listed in section 66(1)(a) must be accompanied with the requisite mens rea for them to amount to criminal offences. It seems that the appropriate mens rea in these offences is knowledge or intention.<sup>243</sup>

Section 66(1)(b) is not introduced by the abovementioned phrases. As such there is a possibility that mens rea is not an ingredient of the offences listed therein. As for the term ‘protected species’, it refers to game species in the context of this section, as the purpose of the Part of the Act under which this section falls is to regulate methods of hunting and taking of animals.<sup>244</sup>

Section 66(2) contains a reverse onus. The accused is required to prove that an act done under section 66 was done lawfully. This reverse onus is certainly a limitation or restriction on the accused’s right to be presumed innocent and the right to remain silent. By carving careful arguments this reverse onus provision may be justified under section 44 of the Constitution. Admittedly this is an uphill task and there is no decision from Malawian courts on the point so far. To avoid the risk of having this reverse onus provision struck down by the courts, it is suggested that it be amended by the introduction of the words ‘there is a reasonable possibility that’ between the word ‘and’ and the word ‘an’. The amendment is intended to transform the reverse onus into an evidentiary presumption which is more readily accepted by the courts. When the suggested amendment is effected, section 66(2) will read: ‘The onus of proving that there is a

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<sup>243</sup> Cf *Chandler v Director of Public Prosecutions* [1962] 3 All ER 142.

<sup>244</sup> Section 63 of NAPWA.

reasonable possibility that an act under this section was done lawfully shall lie on the accused person.’

Offenders under section 66 are liable to the penalties prescribed under section 109 of the Act as these offences relate to game species.<sup>245</sup>

#### **4.3.18 Offences against weapons regulations**

The Minister may from time to time, on the recommendations of the Wildlife Research and Management Board or the CPWO, make regulations specifying the types, sizes and calibers of weapons which may lawfully be used for hunting any protected species. A person who contravenes any of the provisions of these regulations commits an offence.<sup>246</sup>

The Minister has made the regulations. The National Parks and Wildlife (Hunting Weapons) Regulations<sup>247</sup> provide that the weapon to be used in hunting ‘protected species’ is a rifle.<sup>248</sup> The hunting of ‘game species’ may only be done using a rifle which has a calibre of more than 0.22 or a shotgun, provided that no person shall hunt crocodiles using a rifle which has a calibre of less than 0.375 or a shotgun.<sup>249</sup> When hunting ‘protected species’ the rifle is required to be of at least 0.375 calibre and of at least 4 000 foot pounds muzzle energy.<sup>250</sup> Hunting with a rifle that does not meet these specifications is an offence.

It must be noted that the regulations contain new definitions of the terms ‘protected species’ and ‘game species’. Under NAPWA (the principal Act) protected species include

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<sup>245</sup> Section 109 of NAPWA.

<sup>246</sup> Section 67 of NAPWA.

<sup>247</sup> G N 83/1994; G N 70/1997.

<sup>248</sup> Regulation 3 of the National Parks and Wildlife (Hunting Weapons) Regulations.

<sup>249</sup> Regulation 4 of the National Parks and Wildlife (Hunting Weapons) Regulations.

<sup>250</sup> Regulation 5 of the National Parks and Wildlife (Hunting Weapons) Regulations.

both plants and animals<sup>251</sup> whereas under the regulations protected species mean buffalo, crocodile, elephant or hippopotamus.<sup>252</sup> Similarly, under NAPWA game species are animals that have been declared protected species<sup>253</sup> whereas under the regulations game species exclude birds.<sup>254</sup> In effect the regulations have narrowed down the scope of protected species and game species. Essentially the regulations have created three groups of animals in relation to hunting weapons. In the first group, there are buffalo, crocodile, elephant and hippopotamus. Hunting of these may only be done with a rifle of at least 0.375 calibre and of at least 4 000 foot pounds muzzle energy. The second group consists of wild animals that have been declared protected species under section 43 of NAPWA other than those in the first group and birds. In other words, game species under section 44 of NAPWA excluding birds, crocodiles, elephants, buffalos and hippopotamuses. These may only be hunted using a rifle which has a calibre of more than 0.22 or a shotgun. The third group comprises of birds which are game species under section 44 of NAPWA. The regulations have not specified any weapon for the hunting of these birds. By implication it may be argued that any weapon may be used in the hunting of birds.

It may therefore be concluded that the offence against weapons regulations is only in respect of the first two groups of animals. In order to prove the offence the prosecution must show: (a) that the accused hunted; (b) any of the animals specified in the first and second groups; and (c) using a weapon contrary to the rifle specified. Since hunting is a crucial element of the offence and since NAPWA defines it in terms of attempt, it follows, as demonstrated above, that mens rea is also an ingredient. The mens rea here is a specific intent (or a decision) to take any of the animals listed in the first and second groups using a weapon other than the rifle specified.

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<sup>251</sup> Section 2 of NAPWA.

<sup>252</sup> Regulation 2 of the National Parks and Wildlife (Hunting Weapons) Regulations. According to this regulation 'crocodile' does not include a crocodile on a wildlife ranch.

<sup>253</sup> Section 44 of NAPWA.

<sup>254</sup> Regulation 2 of the National Parks and Wildlife (Hunting Weapons) Regulations.

The punishment for offences against weapons regulations is provided for in section 109 of NAPWA as these offences involve hunting of species of wild animals that have been declared protected species under section 43 of NAPWA.

#### **4.3.19 Hunting during hours of darkness**

It is an offence for any person, during the hours of darkness, to hunt or assist in the hunting of any protected species. By 'hours of darkness' is meant the period between one half hour after sunset and one half hour before sunrise.<sup>255</sup> This understanding of 'hours of darkness' involves a technical point. In the normal course of events it is not practically possible for an ordinary citizen to know the exact time of sunrise or sunset. It is the weather expert who knows more or less exactly the sunrise and sunset times for a particular place. Thus, it may not be possible for the State or the prosecution to know without expert advice the times of sunrise and sunset. What the State or the prosecution can more easily ascertain is the time when the offender was hunting or assisting in hunting. After ascertaining this, the State or the prosecution must find out from the weather expert the times of sunset and sunrise for the day(s) in issue. If the ascertained time is between one half hour after sunset and one half hour before sunrise, the offender can be said to have hunted or assisted in hunting during 'hours of darkness'. Observably the task of satisfying the ingredient of 'hours of darkness' is quite involving and it may delay the process of prosecution. It is suggested that proof of this ingredient could be simplified by defining 'hours of darkness' in terms of specific clock times. For example, it may be defined as the period between 1830 hrs and 0630 hrs. The disadvantage of specifying clock times is that it overlooks the different times at which the sun may set or rise and as such there is a possibility that in some parts of the year a portion of the period between the specified clock times may not be dark in the real sense of the word and yet the Act would describe even that portion as 'hours of darkness'. It is submitted that this objection does not carry much weight. The inconvenience in language is certainly far outweighed by the delay and cost involved in proving times of sunset and sunrise. A

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<sup>255</sup> Section 2 of NAPWA.



period demarcated by specific clock times is easier to prove or handle. Any Jim or Jack can simply look at his watch and then compare it to the period demarcated by the clock times in order to determine whether the hunting or assistance in hunting was done during the hours of darkness. Another way of dealing with the objection is to do away with the phrase 'hours of darkness' altogether. The Act could simply provide that any person who, during the period between 1830 hrs and 0630 hrs, hunts or assists in hunting would be guilty of an offence.

As stated above, the word 'hunt' introduces a requirement of mens rea. So mens rea in the form of a specific intent (or a decision) to take protected species must be proved where the offence alleged to have been committed is that of 'hunting'. If the offence charged is that of 'assisting' to hunt, there is more to the mens rea. As a preliminary point, it may be observed that assisting to hunt is strictly speaking in the form of a secondary or subsidiary offence, the principal offence being the hunting. In this connection, it may be recalled that the hallmark of aiding and abetting a crime is assistance, and so the mens rea for aiding and abetting may legitimately be applied to the offence of 'assisting' to hunt. If this is accepted, the mens rea for assisting will be knowledge or intention or contemplation.<sup>256</sup>

The phrase 'protected species' has the limited meaning of game species, that is, wild animals that have been declared protected species. The phrase does not include wild plants that have been declared protected species. The suggested meaning of protected species is gathered from the context of the section in which it appears (section 68). The context of section 68 is Part VIII the declared purposes of which are, inter alia, to regulate methods of hunting and taking animals and to make available the opportunity to

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<sup>256</sup> *Johnson v Youden* [1950] 1 KB 544 at 546 per Lord Goddard CJ; *National Coal Board v Gamble* [1959] 1 QB 11 at 20 and 23 per Devlin J; *R v Moloney* [1985] AC 905; and *R v Hancock* [1986] AC 455. See also Murphy op cit at 71. It must be noted that if 'assisting' is equated with aiding and abetting, the effect will be that the offence of assisting to hunt becomes the offence of 'aiding and abetting to hunt.' If 'hunt' is broken to reveal its meaning, the offence of assisting to hunt becomes 'aiding and abetting an attempt to take.' There should be no problem with this as the offence of aiding and abetting an attempt is known to the law: *R v Dunnington* [1984] 1 QB 472; *R v Hopgood and Wyatt* (1870) LR 1 CCR 221; *S v Robinson* 1968 (1) SA 666 (A).

hunt to as many eligible persons as possible.<sup>257</sup> From the declared purposes it may be noted that it is not the concern of this Part of the Act to regulate the taking of plants. So it is legitimate to cut down the province of ‘protected species’ to animals at least in respect of all sections appearing in this Part of the Act.

The offence of hunting or assisting to hunt during the hours of darkness is subject to one exception. If the hunting or assistance to hunt during the hours of darkness is authorized by the conditions of a licence issued under Part VII of the Act, such hunting or assistance will not amount to an offence.<sup>258</sup> As stated earlier on, the licences are required to be in the prescribed form. The forms that have been prescribed are set out in the National Parks and Wildlife (Forms) Regulations. These forms do not state any condition relating to the time period in a day when hunting may or may not take place. In the premises, the so-called exception to the offence of hunting or assisting to hunt is worth nothing. It is therefore suggested that the words ‘except as may be authorized by the conditions contained in any licence issued under Part VII’ should be deleted. After deleting the words, the section will read: ‘Any person who, during the hours of darkness, hunts or assists in the hunting of any protected species shall be guilty of an offence.’

Offenders under section 68 are liable to the penalties set out in section 109 as this offence involves hunting of protected species.

#### **4.3.20 Use of motor vehicle, aircraft, boat or radio communication**

Section 70(1) of NAPWA provides that any person who does any of the following acts commits an offence:

- (a) discharges any weapon at any protected species from or within fifty metres of any motor vehicle, aircraft or boat;

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<sup>257</sup> Section 63 of NAPWA.

<sup>258</sup> Section 68 of NAPWA.

- (b) uses any motor vehicle, aircraft or boat to drive or stampede any protected species;
- (c) uses any aircraft or radio communication system to locate any protected species for the purpose of hunting it.

Notwithstanding these provisions, it is not an offence to use a motor vehicle, an aircraft or a boat for the purpose of driving off any wild animal from the land or water upon which an aircraft is about to land or take off.<sup>259</sup> Section 70(2) also exempts from liability any person who performs any of the prohibited acts under the authority of a licence under the Act. None of the licences issued under Part VII of the Act has conditions authorizing any of the prohibited acts. It is only under Part X that such conditions may be found in a licence. Section 92 under Part X of the Act provides for the issuing of a professional hunter's licence. The prescribed form for this licence (Form 10)<sup>260</sup> gives the CPWO a discretion to impose appropriate conditions and these conditions, it is arguable, may authorize the performance of any of the proscribed acts. However, it is submitted that the CPWO should be slow to insert conditions that have the effect of authorizing acts which the Act has expressly prohibited. The CPWO should do so only where he has environmentally cogent reasons for doing so.

For reasons advanced in the discussion of the last preceding offence (hunting during hours of darkness) the phrase 'protected species' relates to game species only. The reference to 'boat' is necessary as two of Malawi's national parks have water systems in them: Lake Malawi National Park is largely under water, being part of Lake Malawi; and Liwonde National Park has a portion of Shire River in it. The words 'radio communication system' arguably include cell phones and walkie-talkie systems.

The offence of discharging a weapon at protected species does not expressly require any state of mind – perhaps mens rea is not needed. However, it seems that the other offences

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<sup>259</sup> Section 70(2) of NAPWA.

<sup>260</sup> See the Schedule to the National Parks and Wildlife (Miscellaneous Forms) Regulations (G N 88/1994).

under section 70(1) definitely have mens rea as an ingredient. In section 70(1)(b) the words 'to drive or stampede any protected species' suggest that the use of the motor vehicle, aircraft or boat must be performed with the intention of driving or stampeding protected species. Of course this does not mean that the offender must necessarily desire the driving or stampede. It is enough if he can foresee that his use of the motor vehicle, aircraft or boat will have the driving or stampede as a byproduct thereof. The foresight here is that of a virtual certainty or at least a very high degree of probability.<sup>261</sup> In the same vein, the words 'to locate any protected species for the purpose of hunting it' indicate the need for mens rea to accompany the use of the aircraft or radio communication system, but it must be noted that there are two parts to this mens rea. In terms of the first part, the words 'to locate any protected species' signify a general intention to locate the protected species: a desire to locate protected species or foresight that location of protected species will be a byproduct of the use of the aircraft or radio communication system. With regard to the second part, the words 'for the purpose of hunting it' import the requirement of an ulterior intent, the intent to hunt the located protected species. Both parts of the mens rea (that is, the general intention and the ulterior intent) must be proved for this offence to be made out.

Generally the punishment for offences under section 70(1) is prescribed by section 108 (the general penalty clause). Exceptions to this may be two. First, where the offence of discharging a weapon at protected species involves molesting the protected species, the appropriate penalties are those set out in section 109. Second, where the offence of using aircraft or radio communication system to locate protected species involves hunting, the applicable penalties are also those prescribed by section 109.

#### **4.3.21 Use of domestic animals in hunting**

The Minister may from time to time, on the recommendations of the Wildlife Research and Management Board, make regulations prohibiting the use of any domestic animal as

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<sup>261</sup> *R v Bowden* [1993] Crim LR 379; *R v Woollin* [1999] AC 82.

an aid to hunt any protected species, or specifying the conditions under which any domestic animal may be used to hunt any protected species. Any person who contravenes the provisions of any of these regulations commits an offence.<sup>262</sup> By domestic animal is meant any animal which is sufficiently tame to serve some purpose for the use of man, whether or not such use is utilitarian, and includes individual animals which were once tamed or which are in the process of being tamed.<sup>263</sup> For reasons given when discussing the offence of hunting during hours of darkness, the words 'protected species' here refer to game species.

To the knowledge of the present researcher, the Minister has not promulgated any regulations prohibiting or regulating the use of domestic animals as an aid in hunting protected species. Nevertheless the punishment for offences under the yet-to-be promulgated regulations should be in line with section 109 of NAPWA as such offences will involve hunting of protected species.

#### **4.3.22 Use of substances or devices in hunting**

The Minister may from time to time, on the recommendations of the Wildlife Research and Management Board, make regulations:

- (a) prohibiting or controlling the use of baits, decoys, calling devices, hides, blinds, stands, or any other substances or devices to bring protected species into closer range of hunters;
- (b) specifying the conditions under which any substance or device may be used to hunt any protected species;
- (c) prohibiting or controlling hunting in the vicinity of salt licks, water holes or isolated watering places used by wild animals; or

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<sup>262</sup> Section 71 of NAPWA.

<sup>263</sup> Section 2 of NAPWA.

- (d) specifying procedures which any hunter may be required to follow after killing any protected species.

Any person who contravenes the provisions of any of these regulations commits an offence.<sup>264</sup>

The Minister has promulgated regulations on some of these matters. No regulations have been promulgated in respect of procedures which any hunter may be required to follow after killing any protected species.

The National Parks and Wildlife (Use of Substances or Devices in Hunting) Regulations<sup>265</sup> provide for a number of offences in two regulations. Regulation 2 proscribes the possession of or use of a gin trap in hunting any animal.<sup>266</sup> Possession involves the actus reus of physical possession and a mental element (the *animus possidendi*).<sup>267</sup> In the offence under discussion (especially in relation to possession) the actus reus consists in a measure of control over the gin trap in hunting any animal. Regulation 3 provides that no person shall:

- (a) use or have in his possession for the purpose of hunting any animal, any net, trap, pitfall, snare or similar appliance;
- (b) use, together with any firearm, any light, lamp or flare for the purpose of hunting any animal;<sup>268</sup>
- (c) use any bait, decoy or calling device or any other substance or device to bring protected species into closer range for hunting;

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<sup>264</sup> Section 72 of NAPWA.

<sup>265</sup> G N 80/1994.

<sup>266</sup> According to regulation 2(2) this proscription does not apply to an officer while acting in the performance of his duties under the Act.

<sup>267</sup> Murphy op cit at 64.

<sup>268</sup> This proscription does not apply to any person lawfully hunting crocodiles: proviso to regulation 3(1)(b).

- (d) use hides, blinds or stands in hunting;
- (e) hunt any animal in the vicinity of salt licks, water holes or isolated watering places used by wild animals; or
- (f) discharge any weapon at any protected species from or within fifty metres of any motor vehicle, aircraft or boat.<sup>269</sup>

There are two qualifications to the offences under regulation 3. In the first place, the proscribed acts may be done with the written permission of an officer, in which case no criminal liability will be incurred. The only rider to this qualification is that such written permission is not necessary where a snare, pitfall or trap is used on or immediately adjacent to cultivated land.<sup>270</sup> In the second place, the offences cannot be committed by an officer while acting in the performance of his duties under NAPWA because regulation 3 does not apply to such an officer.<sup>271</sup>

The offence in regulation 3(a) above can be committed in one of two ways: it may be committed either by use or by possession. Apart from the mens rea inherent in possession, the ulterior intent to hunt any animal must be proved. It must be noted that the ulterior intent to hunt is in respect of 'any animal,' not just game species. Similarly the offence in regulation 3(b) above requires that the ulterior intent to hunt any animal be proved. In the same vein, the offence in regulation 3(c) demands proof of the ulterior intent to bring protected species<sup>272</sup> into closer range for hunting. As for the offence in regulation 3(e), what was said above on the actus reus and mens rea for 'hunt' applies, only that in the present offence the reference will be taking any animal in the vicinity of salt licks, water holes or isolated watering places used by wild animals. The offence in regulation 3(f) is essentially identical to the offence in section 70(1)(a) of NAPWA, the

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<sup>269</sup> This proscription does not fully apply to a person lawfully hunting crocodiles. Such a person may discharge a weapon from a boat.

<sup>270</sup> Regulation 3(1)(a).

<sup>271</sup> Regulation 3(2).

<sup>272</sup> For reasons advanced in the discussion of the offence of hunting during hours of darkness, the phrase 'protected species' refers to game species only.

only difference being that in the former there is a proviso permitting a person lawfully hunting crocodiles to discharge a weapon from a boat. This proviso is not of much consequence. Accordingly what has been said above in relation to section 70(1)(a) of NAPWA applies to the offence in regulation 3(f).

Of the acts proscribed under the Regulations it is only those in regulations 3(1)(c) and 3(1)(f) which are specifically related to protected species. The rest of the proscribed acts relate to 'any animal,' which arguably includes species of wild animals other than protected species. Consequently, the punishment for offences under regulations 3(1)(c) and 3(1)(f) is prescribed under section 109 of NAPWA since these offences involve hunting or molesting of game species. The rest of the offences in the Regulations are punishable under both section 109 and section 108. They are punishable under section 109 where the animal involved is protected species. They are punishable under section 108 where the animal involved is not protected species.

Apart from the penalties prescribed under section 108 and section 109, section 112 states that the court shall, in addition to those penalties, order the device to be destroyed or obliterated in such manner as the court may specify, and any expenditure incurred, if any, shall be recoverable from the offender as a civil debt owed to the government. This additional penalty is applicable only where the offence was in respect of an excavation, fence, enclosure or any other device fixed in or on the ground or upon vegetation, which the offender made, used or had in his possession for the purpose of hunting.

#### **4.3.23 Failure to report killing in self-defence of protected animal and to hand over carcass**

This offence is provided for in section 76 of the Act. It is inextricably related to sections 74 and 75. Section 74 permits the killing of any protected animal in defence of oneself or of another person or any property, crop or domestic animal if immediately and absolutely necessary. Section 75 allows any person to kill or attempt to kill any game animal which is causing material damage to any land, crop, domestic animal, building or equipment of



which the person is either the owner or the servant of the owner acting on his behalf in safeguarding the property. Section 76 deals with the position after the protected animal<sup>273</sup> has been killed. It says that the killing of the protected animal shall not be deemed to transfer ownership of the carcass thereof to any person. Up to this stage, there is little, if anything, in section 76 in the nature of an 'offence'. It is suggested that the matters that follow are what constitute the offence under section 76.

Any person who kills the protected animal is required, as soon as practicable, to report the facts to any officer and, unless otherwise entitled to retain the same under the conditions of any licence issued under Part VII of the Act, to hand over the carcass or such parts thereof as the officer may direct.<sup>274</sup> Failure to do so amounts to an offence.<sup>275</sup> The punishment for this offence is provided for under section 109 as this offence involves the taking of game species.

#### **4.3.24 Failure to report killing of protected animal through error or accident and to hand over carcass**

If any person kills any protected animal through accident or error, he is required as soon thereafter as may be practicable, to report the facts to an officer and to hand over the carcass or such parts thereof as the officer may direct. It is an offence to fail to report or hand over as described.<sup>276</sup> This offence is punishable under section 109 as it involves the

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<sup>273</sup> Section 74 refers to 'protected animal' and section 75 refers to 'game animal.' Section 76 refers to the animal in section 75 as 'protected animal'. The terms 'protected animal' and 'game animal' have not been defined in the Act. Whether they are meant to be distinguished from 'protected species' and 'game species' is not entirely clear. However, it appears to be in order to regard 'protected animal' as being identical to 'protected species', and 'game animal' as being identical to 'game species'.

<sup>274</sup> Section 76(2) of NAPWA.

<sup>275</sup> Section 76(3) of NAPWA. As suggested in the text, the failure to report and to hand over the carcass is what amounts to an offence in this section. This is so even though section 76(3) appears to suggest that contravention of everything in the section amounts to an offence. It is difficult to see how the non-deeming provisions of section 73(1) can be contravened.

<sup>276</sup> Section 78(1) and (3) of NAPWA. According to section 78(2) this offence does not apply to any person who is entitled under any licence issued under Part VII to hunt a protected or game animal of that species and sort, in the circumstances under which he killed such animal.

taking of game species. The difference between this offence and the offence under section 76 lies in the circumstances of the killing. The killing in the present offence is effected through error or accident whereas in the offence under section 76, the killing is effected in defence of person or property. In both offences the report is to be given to an officer. By 'officer' is meant the CPWO or any officer subordinate to the CPWO and appointed under the Act to be responsible for the administration of the Act.<sup>277</sup> Compliance with this reporting duty may be difficult if the animal is killed at a place far from the offices of such an officer. However, this difficulty may not necessarily lead to breach of the duty as the report is required to be made 'as soon as practicable'. An examination of what transpired after the killing and generally the circumstances attending the aftermath should indicate whether it was ever practicable to report the killing.

#### **4.3.25 Wounded protected animals**

A number of offences may be committed in relation to wounded protected animals. First, any person who wounds any protected animal and fails without reasonable cause to use all reasonable endeavours to kill such animal at the earliest opportunity, commits an offence.<sup>278</sup> It appears that the wounding of the protected animal may be intentional, reckless, negligent or even inadvertent. However, the failure to use all reasonable endeavours seems to require negligence. In other words, it must be determined what endeavours a reasonable man would have taken to kill the animal after wounding it. If the accused failed to take such endeavours without reasonable cause, he is guilty of this offence. In this regard, it must be remembered that 'the reasonable man is not a timorous faintheart always in trepidation lest he or others suffer some injury,' nor is he 'given to anxious conjecture and morbid speculation.'<sup>279</sup> The words 'reasonable cause' signify the

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<sup>277</sup> Section 2 as read with section 5 of NAPWA.

<sup>278</sup> Section 79(2) says that this offence should not be construed as authorizing any person to follow any wounded animal – (a) into a national park or wildlife reserve, unless the person holds a licence authorizing him to hunt the animal in the national park or wildlife reserve; or (b) onto private land upon which the person has no permission to enter.

<sup>279</sup> Per Hancke J in *S v Dzulani* 1991 (1) SACR 158 (TK) at 159 – 160, quoting *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490 and *South African Railways and Harbours v Reed* 1965 (3) SA 439 (A) at 443.

existence of a possible excuse. Again, for such an excuse to exculpate a person who has failed to use all reasonable endeavour, it (the excuse) must be of a quality that can objectively be regarded as a proper excuse, using the standard of a reasonable man. It follows that an honest but unreasonable excuse does not suffice.

Second, any person who believes that he has wounded any protected or game animal which in such wounded condition has entered a national park or wildlife reserve is required to immediately report the facts to an officer who shall, as he sees fit, decide whether or not the animal should be killed and shall issue instructions accordingly. Failure by the person to report the facts is an offence.<sup>280</sup> It must be noted that the person's belief is unqualified and so it may be inferred that the belief here is subjective. As long as he believes the wounding, he is required to report the facts immediately. It may further be noted that the report here is supposed to be immediate. This requirement of prompt reporting is perhaps justified on the ground that in almost every national park and wildlife reserve there are officers and that the wording of the offence suggests wounding the animal in the vicinity of a national park or wildlife reserve. It is therefore not necessary for the person to report 'as soon as practicable' as demanded under the offences of failure to report killing in self-defence and failure to report killing through error or accident. In these other offences there is no suggestion that the offence is committed in the vicinity of a national park or wildlife reserve.

Third, any person who believes that he has wounded any protected or game animal which in such wounded condition has entered private land upon which he has no permission to enter, is required to immediately report the facts to the owner of the land. Failure to report the facts to the landowner is an offence.<sup>281</sup> Upon receipt of the report, the landowner must decide whether or not the person making the report is to be permitted to enter his land for the purpose of hunting the animal.

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<sup>280</sup> Section 79(3) as read with section 79(6) of NAPWA.

<sup>281</sup> Section 79(4) as read with section 79(6) of NAPWA.

All these three offences involve the taking of protected animals (game species). As such offenders are liable to the penalties prescribed under section 109.

#### 4.3.26 Wounded dangerous animals

Any person who, in any circumstances whatsoever, wounds any dangerous animal and fails to kill or capture it within 24 hours after its wounding is required to immediately report the facts to an officer. Failure to report the facts is an offence.<sup>282</sup> The Act defines dangerous animal as including hyena, lion, leopard, hippo, elephant, rhinoceros, buffalo or crocodile.<sup>283</sup> It appears that the report is not required to be made immediately after wounding the dangerous animal, but rather after the expiry of the 24 hours. It seems that after wounding the animal, the person must endeavour to kill or capture it for a period of 24 hours. If he fails to kill or capture it and at the expiry of the 24 hours, he must report the facts to the officer.<sup>284</sup> This endeavour may involve pursuing the dangerous animal. If the dangerous animal enters private land, the person may enter such land in pursuit of the animal without obtaining consent from the landowner to enter the land, provided that as soon as practicable thereafter he reports the facts to the landowner. Failure to report to the landowner is arguably another offence.<sup>285</sup> The penalties for these offences are set out in section 109 because these offences involve the taking of protected species of wild animals (that is, game species).

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<sup>282</sup> Section 80(1) as read with section 80(4) of NAPWA.

<sup>283</sup> Section 2 of NAPWA.

<sup>284</sup> According to section 80(2) of NAPWA any officer who receives a report is required to take immediate steps to locate the wounded animal, assess its condition and decide, as he sees fit, whether or not to kill it and must either carry out the act himself or give instructions accordingly. If the dangerous animal enters a national park or wildlife reserve, the officer is required to decide, as he sees fit, whether or not the animal should be killed and then issue instructions accordingly.

<sup>285</sup> Section 80(3) as read with section 80(4) of NAPWA. It must be noted that section 80(3) makes reference to 'provisions of section 79(1) in respect to private land.' There is an obvious error here as section 79(1) does not provide for private land; actually section 79(1) does not mention private land at all. It is sections 79(4) and 79(5) that have provisions in respect of private land.

#### 4.3.27 Molesting or provoking animals

It is an offence, wilfully and without just excuse or cause, to molest or provoke any protected or game animal in a manner which results or is likely to result in its destruction. It is further an offence, wilfully and without just excuse or cause, to molest or provoke any wild animal in a manner which results or is likely to result in the provocation, harassment or destruction of any protected or game animal.<sup>286</sup> These are essentially two ways of committing one offence, the offence of molesting or provoking animals. These ways are similar in many respects. For example, in both there must be molesting or provoking; in both the molesting or provoking must be done wilfully and without just excuse or cause; and in both destruction of a protected or game animal must be a result or a likely result.<sup>287</sup> The major differences in the two ways of committing the offence relate to the object of the molesting or provoking. In the first way, the object of the molesting or provoking is any protected or game animal whereas in the second way the object of the molesting or provoking is any wild animal. Having said that, it must be pointed out that the apparent objective of the offence of molesting or provoking animals is to prevent the harassment and destruction of protected or game animals in the absence of valid grounds.

The word 'wilfully' imports mens rea in the form of intention or recklessness.<sup>288</sup> So proof of this offence demands satisfying the court that the molesting or provoking was done intentionally or recklessly. The words 'without just excuse or cause' create room for the applicability of a defence excluding liability. The defence is in the nature of valid,

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<sup>286</sup> Section 82 of NAPWA.

<sup>287</sup> The second mode of committing the offence does not always require that the molesting or provoking must result or must be likely to result in destruction. It is sufficient if the molesting or provoking results or is likely to result in the provocation or harassment of the protected or game animal.

<sup>288</sup> *R v Sheppard* [1981] AC 394; *R v Newington* (1990) 91 Cr App R 247; *Chimwemwe Gulumba v Republic* Miscellaneous Criminal Application No. 51 of 2003 (unreported but copy available on <http://www.judiciary.mw> when accessed in January 2005). See also the detailed discussion of the meaning of 'wilfully' under segment 4.3.2 (obstruction of officers and information to officers).

acceptable grounds justifying the molesting or provocation. It has actually been said that 'just cause' means reasonable cause or probable cause.<sup>289</sup>

Section 109 prescribes the penalties for the offence of molesting animals whereas section 108 provides for the penalties for provoking animals. This distinction is necessary because not every instance of provoking will lead or amount to molesting. Since section 109 deals with offences involving molesting (and not provoking), it is legitimate to restrict the applicability of the section 109 penalties to molesting, leaving the provoking to be punished under the general penalties laid out in section 108.

#### **4.3.28 Causing unnecessary or undue suffering to wild animals**

It is an offence to cause unnecessary or undue suffering to any wild animal, whether the animal lives in the wild or is being kept in captivity.<sup>290</sup> For the meaning of 'cause' reference must be made to the elaboration of its meaning under the offence of using fires for hunting. Briefly, it expresses the common sense idea of bringing about a result. So any act or omission that brings about unnecessary or undue suffering to any wild animal causes that suffering. In addition, the word 'cause' does not import mens rea. Offenders who cause the proscribed suffering are liable to the penalties under section 108 because no other penalties are provided for this offence.

#### **4.3.29 Possession, sale or purchase of specimens of protected species**

It is an offence to possess, buy or sell or attempt to possess, buy or sell any specimen of a protected species.<sup>291</sup> Specimen is defined as any wild plant or animal, alive or dead, whether or not native to Malawi, or any readily recognizable part or derivative of such

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<sup>289</sup> *Osgoode v Nelson* (1872) LR 5 HL 636; John B Saunders (general ed) *Words and Phrases Legally Defined* 2ed Vol 3 London: Butterworths 1969 at 115. The related phrase 'lawful excuse' was considered by the English Court of Appeal in *R v Smith* [1974] 1 All ER 632.

<sup>290</sup> Section 83 of NAPWA.

<sup>291</sup> Section 86 of NAPWA.

plant or animal.<sup>292</sup> The word 'sell' has attracted a substantial amount of discussion in the courts. It has a meaning under the law of sale of goods, but it also has a popular meaning. Under the law of sale of goods, the word 'sell' is defined in terms of 'a contract of sale' in which the property in the goods is transferred from the seller to the buyer. This is distinguished from 'an agreement to sell' which is regarded as a contract in which the transfer of the property in the goods is to take place at a future time or subject to some condition to be fulfilled later. Thus, according to the law of sale of goods, a person 'sells' a commodity when the property in the commodity is transferred from the seller to the buyer. 'Sell' involves both a contract and a conveyance whereas the 'agreement to sell' involves only a contract.<sup>293</sup> This legal sense of 'sell' must be contrasted with the popular meaning of 'sell'. In the popular sense 'sell' is not construed with reference to the niceties of the law of contract of sale, or to the distinction between a sale and an agreement to sell, or to the question whether the property in the goods has passed. In the popular sense 'sell' is what an ordinary man would say amounts to 'sell'.<sup>294</sup> It may therefore encompass an agreement for sale as would popularly be called a sale, although the property does not pass by it.<sup>295</sup>

Of the two meanings of 'sell' it is suggested that the popular meaning is to be preferred in the offence under discussion as this conduces to what the citizen will think of upon seeing the prohibition against sale of the specimens. If such a citizen enters into an agreement for the sale of a specimen, his liability should certainly not depend on minute distinctions about property passing, when he clearly understands that what he has done is to 'sell' the specimen.<sup>296</sup>

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<sup>292</sup> Section 2 of NAPWA.

<sup>293</sup> *Lambert v Rowe* [1914] 1 KB 38 at 47 per Scrutton J; *Mischeff v Springett* [1942] 2 KB 331 at 336; H G Beale (general ed) *Chitty on Contracts* 29ed Vol II London: Sweet & Maxwell 2004 at 1295 para 43-009.

<sup>294</sup> *Lambert v Rowe* [1914] 1 KB 38 at 44 per Ridley J.

<sup>295</sup> *Lambert v Rowe* [1914] 1 KB 38 at 49 per Scrutton J.

<sup>296</sup> Cf *ibid.*

The mens rea for possession and attempt has been discussed above. The same applies here. As for 'buy' or 'sell', it appears that the mens rea required is intention. With regard to punishment, offenders are liable to the penalties set out under sections 109 and 110. If the offence is committed in respect of game species, the penalties are those in section 109 as this section punishes offences involving the possession of, selling, buying, transferring or receiving in transfer, any specimen of game species. Where the offence is committed in respect of wild plants that have been declared protected species, the applicable penalties are those in section 110 as this section punishes the possession of, selling, buying, transferring or accepting in transfer, any specimen of protected species other than game species.

The present offence does not apply to possession of any specimen lawfully acquired on the authority of a licence under Part VII of the Act by a person who is in possession of a valid certificate of ownership.<sup>297</sup> The certificate is issued by the CPWO upon application by such a person.<sup>298</sup>

#### **4.3.30 Offences against regulations for controlling trade or dealings in protected animals**

The Minister has power to make regulations from time to time, on the recommendations of the Wildlife Research and Management Board, in respect of the following matters:

- (a) the control of trade in live animals of such species as the Minister prescribes in the regulations and the control of trade in the carcasses, meat and skins of such animals;
- (b) the control of industry engaged in the manufacture of articles derived from protected animals;
- (c) the control of the taxidermy industry; and

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<sup>297</sup> Section 86(2) of NAPWA.

<sup>298</sup> Section 88(1) and (3) of NAPWA.



(d) the issue of permits to persons engaged in the foregoing occupations and fees payable for such permits.

Contravention of any of the regulations on these matters is an offence.<sup>299</sup> It is necessary to examine these regulations to determine the nature of the offences provided for therein. In this regard, it must be pointed out that the Minister has not promulgated regulations on all the matters specified. For example, there are no regulations on the control of the taxidermy industry. In the following few paragraphs the regulations that have been promulgated will be examined with a view to identifying the offences that emanate therefrom.

The National Parks and Wildlife (Control of Trade in Live Animals) Regulations<sup>300</sup> proscribe the carrying on of trade in live wild animals unless the person involved is in possession of a live wild animal dealer's permit.<sup>301</sup> There is no other offence in these regulations. The punishment for the outlined offence is prescribed under section 108 and section 109 of NAPWA depending on whether the wild animal involved is game species or not.

The National Parks and Wildlife (Wildlife Ranching) Regulations<sup>302</sup> contain a number of sections but it is arguable that not all of these can amount to offences upon contravention. It is submitted that only five of these contain matters contravention of which may constitute an offence. First, regulation 3(1) states that no person shall operate a wildlife

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<sup>299</sup> Section 87 of NAPWA.

<sup>300</sup> G N 81/1994.

<sup>301</sup> Regulation 2. The permit is required to be in the form set out in the First Schedule to the Regulations, and it is issued subject to the payment of a MWK5 000 (US \$46) fee. The permit demands that an indication be made of the wild animals which the dealer is permitted to domesticate and the conditions for such domestication. The conditions must also include an indication of how the animals are to be obtained. These matters are clear from the prescribed form of the permit. The fee for the issue of the permit is set out in the Second Schedule to the Regulations.

<sup>302</sup> G N 82/1994. There is an indication beneath the heading (title) of these regulations that these regulations were promulgated under section 87 of NAPWA, but it is difficult to see the matter under which they fall in section 87(1).

ranch unless he has a wildlife ranching permit.<sup>303</sup> Second, regulation 5 declares that harvesting on wildlife ranches must be done with the approval of the CPWO. Third, regulation 6 requires a person operating a wildlife ranch on which crocodiles are raised to make available to the Department of National Parks and Wildlife for release into the wild at least ten per cent of the hatchlings of each egg collection effort after rearing to a length of at least one metre. Fourth, regulation 8 requires a person operating a wildlife ranch to keep and maintain records of stock levels; to submit to the CPWO a return of the stock levels and of the sales of specimens; to submit data on sales on an annual basis; and to give officers access to the wildlife ranch for collection of biological data. Fifth, regulation 9 proscribes the killing of an animal on a wildlife ranch in any manner other than by shooting it with a firearm. The punishment for contravention of any of these regulations is either in section 108 or section 109. Offences based on regulation 3(1) and regulation 8 are punishable under section 108.<sup>304</sup> Offences based on regulation 6 are punishable under section 109 as such offences involve transferring or possession of specimens of game species. Offences based on regulation 5 and regulation 9 are punishable under section 109 if the offence involves taking of game species and under section 108 if the offence involves species of wild animals other than game species.

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<sup>303</sup> The permit must be in the prescribed form set out in the First Schedule to the Regulations and it is issued subject to the payment of a fee of MWK5 000 set out in the Second Schedule to the Regulations. The matters specified in regulation 3(2) cannot amount to offences if they are transgressed. Regulation 3(2) states: 'A permit shall not be issued to any applicant unless –

- (a) the applicant has no record of previous conviction under the Act;
- (b) the applicant has title documents for landownership or use;
- (c) the area for the proposed wildlife ranch is wholly fenced;
- (d) the applicant has carried out an appropriate study on the numbers, species of animals, and suitability of the habitat;
- (e) the applicant has produced a management plan for the proposed wildlife ranch; and
- (f) the Chief Parks and Wildlife Officer has approved the study carried out pursuant to paragraph (d) and the management plan produced pursuant to paragraph (e).'

It is arguable that where any of these matters has not been satisfied, the penalty for that is not the criminal sanction, but rather denial of the permit.

<sup>304</sup> There is scope for arguing that any person who is convicted of operating a wildlife ranch without a wildlife ranching permit is liable to pay a fine and to be imprisoned as specified under section 109 as long as the operation of the wildlife ranch involves possession of, selling, buying, transferring or receiving in transfer any specimen of game species.

Other regulations promulgated under section 87 of NAPWA are the National Parks and Wildlife (Control of Trophies and Trade in Trophies) Regulations.<sup>305</sup> Just like in the regulations relating to trade in live animals, the regulations on trophies and trade in trophies contain only one regulation which can properly be described as constituting an offence once it has been contravened.<sup>306</sup> Regulation 3 states that no person shall carry on a trade in trophies or manufacture articles from trophies for sale unless he is in possession of a trophy dealer's permit.<sup>307</sup> Arguably transgression of this prohibition constitutes an offence punishable under section 109 as such trade or manufacture involves possession of, selling, buying, transferring or receiving in transfer specimens of game species. Trophy is defined by regulation 2 as ivory and the whole or any part of the horn, head, tusk, bone or skin of any protected species and includes the eggs, eggshells, nests or plumage of any protected bird, but does not include any article manufactured from any trophy. Ivory is defined as a tusk of an elephant or any part thereof.

#### **4.3.31 Offences relating to certificate of ownership of specimen of protected species**

Any person who, under a licence issued under Part VII of the Act, takes possession of a specimen of protected species other than specimen for human consumption, is required, within fourteen days, to present the specimen together with his licence to the CPWO and if he wishes to retain the specimen he may apply in writing or in a prescribed form, if

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<sup>305</sup> G N 86/1994.

<sup>306</sup> The regulations contain five provisions. Regulation 1 contains the citation. Regulation 2 contains the interpretation of terms. Regulation 3 deals with trading in trophies. Regulation 4 provides as follows: 'Where any person has brought to an officer a rhinoceros horn or other ivory which under section 90 of the Act is a government trophy, or has given information to any officer leading to the recovery of a rhinoceros horn or other ivory, the Chief Parks and Wildlife Officer may, subject to the directions of the Minister, pay a reward at 50 per cent of the value of ivory or, in the case of rhinoceros horn, K200 per kg.' Regulation 5 is in the following terms: 'The officer to whom a rhinoceros horn or other ivory is produced shall cause it to be weighed and indelibly marked with the particular mark allocated to the district as shown in the Third Schedule, the year of registration, and a serial number and shall enter such particulars in a register which shall be in the form set out in the Fourth Schedule.' It is clear from a reading of regulations 4 and 5 that they contain directions to the officer and not to the citizen. There is therefore no possibility that these regulations can amount to criminal offences capable of being committed by the citizen.

<sup>307</sup> The trophy dealer's permit is required to be in the prescribed form set out in the First Schedule to the Regulations and it is issued subject to the payment of a fee of MWK100 (US \$0.92) prescribed in the Second Schedule to the Regulations.

any, to the CPWO for a certificate of ownership in respect thereof. It is an offence to fail to present the specimen together with the licence.<sup>308</sup> It is suggested that failure to apply for the certificate of ownership is not an offence because at this stage the specimen has already been presented to the CPWO and the person's failure to apply for the certificate does not affect the specimen negatively in any way; the failure simply deprives him of the opportunity to own the specimen. The penalty for the failure to present the specimen together with the licence is prescribed under sections 109 and 110 as this offence involves possession of specimens of protected species. If the specimen is game species, section 109 applies. If the specimen is species of wild plants that have been declared protected species, section 110 applies.

Where the CPWO is satisfied that the applicant for a certificate of ownership is in lawful possession of the specimen, he may issue the certificate of ownership. If the certificate is issued through fraud, misrepresentation or error, the CPWO may revoke it and the person to whom the certificate was issued is required forthwith upon demand by the CPWO to surrender it to him for cancellation.<sup>309</sup> A person who, without valid reason, fails so to surrender the certificate commits an offence. The penalty for this offence is also set out under sections 109 and 110 as long as the offence is committed in such a way that it involves possession of protected species. It is possible for the offence of failure to surrender the certificate to be committed in the absence of possession. For example, it may happen that through error the CPWO issues a certificate of ownership to a person who at all material times had no possession of a specimen of protected species. If, upon demand by the CPWO, that person fails to surrender the certificate, he commits the

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<sup>308</sup> Section 88(1) and (2) of NAPWA.

<sup>309</sup> According to section 88(5) to (7) of NAPWA any person aggrieved by the cancellation of a certificate of ownership may, within thirty days of its cancellation, appeal in writing to the Minister. In determining the appeal the Minister may hear the views of the CPWO, and may uphold the decision of the CPWO or instruct him to reissue the certificate of ownership. The decision of the Minister is said to be final. The finality of the Minister's decision is open to challenge as it ousts the jurisdiction of the court. Section 103(2) of the Constitution of the Republic of Malawi gives the judiciary jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue is within its competence. It is therefore up to the judiciary to decide whether it can hear an appeal against or a review of the Minister's decision. It does not lie in the 'mouth' of the Legislature to say that the judiciary has no right to question or review the Minister's decision.

offence of failure to surrender the certificate even though possession of a specimen of protected species is absent. That person will not be punished under section 109 or section 110 as there is no possession. Instead he will be punished under section 108 (the general penalty clause).

#### **4.3.32 Offences in respect of transfer of ownership of specimen**

NAPWA provides that any person who contravenes its section 89 shall be guilty of an offence.<sup>310</sup> That section states, *inter alia*, that any person who transfers or purports to transfer ownership of any specimen of a prescribed species, whether by gift, sale or otherwise, shall, at the time of the transfer or purported transfer, be in possession of a certificate of ownership in respect of the specimen. Upon the transfer of any specimen, the transferor shall surrender the certificate to the CPWO who shall thereupon issue a new certificate to the new owner but the CPWO shall retain the certificate surrendered to him. The transferee is required, at the time of the transfer, to ‘obtain from the transferor in respect of the specimen a certificate of ownership endorsed pursuant to [section 89] subsection (2).’

Obviously not all matters specified in section 89 can amount to offences upon breach. It appears that the section can only be contravened in three ways. First, where a person transfers or purports to transfer ownership without possessing a certificate of ownership in respect of the specimen. Second, where upon transfer the transferor fails to surrender the certificate to the CPWO. Third, where the transferee fails to obtain a certificate at the time of the transfer. A few comments will now be made on these three. For ease of reference, they will be referred to as first contravention, second contravention and third contravention respectively.

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<sup>310</sup> Section 89(4) of NAPWA.

It is clearly stated that the word ‘transfer’ does not include any transfer of ownership occasioned by operation of law.<sup>311</sup> The first contravention may be committed in respect of either a transfer or a purported transfer whereas the second contravention and third contravention may be committed in respect of only a transfer. The word ‘purported’ signifies that which resembles the real thing (in this case, the transfer) but which in fact is false or defective. In *R v Keith*<sup>312</sup> Coleridge J said, “An instrument purports to be that which, on the face of the instrument, it more or less accurately resembles. The definition of ‘purporting’ is the same whether applicable to the whole or to a part of an instrument. There must be a resemblance more or less accurate.” Accordingly, the actions of a person with defective title to a specimen, who tries to transfer the specimen, will amount to a purported transfer. Similarly a transfer which is defective in other respects may amount to a purported transfer. If at the time of such purported transfer that person does not have a certificate of ownership in respect of the specimen, he commits an offence. The justification for criminalizing the absence of a certificate of ownership at the time of a purported transfer seems to be along the lines of the justification for criminalizing attempts. A purported transfer is an incomplete, invalid transfer, just like an attempt to do something criminal is an incomplete execution of the deed.

The subject matter of the transfer or purported transfer is a specimen of a ‘prescribed species’. The Act does not define ‘prescribed species’. The phrase arguably does not mean protected species generally because the change of language suggests a change in meaning. Possibly the phrase means species specifically set out by the Act for the purposes of section 89. If this is so, it may be observed that the Act has not prescribed such species. It is therefore necessary for Parliament or whoever is responsible to prescribe the relevant species. It is, however, suggested that the better approach to solving the current difficulty is to substitute the term ‘prescribed species’ with the term ‘protected species’. The suggested amendment is consonant with the subject matter of a

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<sup>311</sup> Section 89(5) of NAPWA.

<sup>312</sup> 24 L. J. M. C. 110 quoted in John S. James (ed), *Stroud's Judicial Dictionary of Words and Phrases* 4ed Vol 4 London: Sweet & Maxwell 1974 at 2214. The dictionary continues to say that the case of *R v Keith* shows that proof that a forged engraving ‘purports’ to be what it is not is furnished by comparing it with a genuine one.

certificate of ownership under the Act: according to section 88(1) of the Act certificates of ownership are issued in respect of specimens of protected species.

The third contravention is based on failure at the time of the transfer to ‘obtain from the transfer or in respect of the specimen a certificate of ownership endorsed pursuant to subsection (2)’ [Emphasis added]. It is difficult to attach a meaning to the quoted component of the third contravention. In terms of ordinary English usage, the conjunctive word ‘or’ is used to link alternatives or to introduce a synonym or explanation of a preceding word or phrase. It may also be used in place of ‘otherwise’ or ‘either’.<sup>313</sup> None of these usages of ‘or’ provides an acceptable meaning of the quoted component of the third contravention. In its present state the third contravention may have the effect of imposing a duty on the transferee to obtain ‘from the transfer’ a certificate of ownership endorsed pursuant to section 89(2) or to obtain ‘in respect of the specimen’ a certificate of ownership endorsed pursuant to section 89(2). The problem with this is that section 89(2) does not require the certificate to be endorsed; it requires a new certificate to be issued and the old certificate to be retained by the CPWO. So the phrase ‘endorsed pursuant to subsection (2)’ is, strictly speaking, meaningless in the context of section 89.

Perhaps the word ‘or’ that appears in the quoted component of the third contravention is out of place. It is also possible that the quoted component (which actually is part of section 89(3)) has a typographical error in it in the sense that the typist inadvertently put a space between ‘transfer’ and ‘or’ instead of typing the one word ‘transferor’. If this typographical error is corrected, the quoted component (that is, section 89(3)) will read: ‘obtain from the transferor in respect of the specimen a certificate of ownership endorsed pursuant to subsection (2).’ The general effect of the suggested correction in light of the provisions of section 89(2) and (3) is that at the time of the transfer, the transferee must obtain from the transferor in respect of the specimen a certificate of ownership endorsed pursuant to subsection (2). The difficulty with this is that the certificate cannot be obtained from the transferor firstly because he does not have any certificate that he can

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<sup>313</sup> The South African Concise Oxford Dictionary (2002).



give to the transferee upon transfer as he (the transferor) is required to surrender the old certificate to the CPWO, and secondly because it is the CPWO (and not the transferor) who issues the new certificate. In the face of the foregoing difficulties in construing section 89(3), it is submitted that the best way out is to amend this provision by substituting the words 'transfer or' with the words 'Chief Parks and Wildlife Officer'; substituting the words 'at the time of' with the word 'upon';<sup>314</sup> substituting the words 'prescribed species' with 'protected species'; and deleting the words 'endorsed pursuant to subsection (2).' After effecting these changes, section 89(3) will read as follows: 'Any person who receives by transfer the ownership of any specimen of a protected species shall, upon the transfer, obtain from the Chief Parks and Wildlife Officer in respect of the specimen a certificate of ownership.'

Section 89(1) and section 89(3) refer to transfer of ownership of a specimen whereas section 89(2) refers to transfer of specimen. There is no convincing reason for omitting the word 'ownership' from section 89(2). It is therefore suggested that for the sake of uniformity of language, section 89(2) should be amended by the insertion of the words 'ownership of' between the words 'of' and 'any'. Section 89(2) will therefore read: 'Upon the transfer of ownership of any specimen, the transferor shall surrender the certificate to the Chief Parks and Wildlife Officer who shall thereupon issue a new certificate to the new owner but the Chief Parks and Wildlife Officer shall retain the certificate surrendered to him.'

The penalties for all the three contraventions are set out in section 109 and section 110 because these offences involve possession of, selling, buying, transferring, receiving in transfer or accepting in transfer, protected species. Where the protected species involved is game species, the applicable section is 109. Where the protected species is any wild plant that has been declared protected species, section 110 applies.

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<sup>314</sup> The substitution of 'at the time of' with 'upon' is meant to streamline the language of section 89(3) with that of section 89(2).



#### 4.3.33 Failure to report or deliver government trophy

Government trophy is any specimen of a protected species the absolute ownership of which has not passed to any person under the provisions of NAPWA.<sup>315</sup> Any person who obtains a government trophy by any means is required, as soon after obtaining it as may be practicable, to report the facts to an officer and, if required, to deliver up the trophy to the officer. Failure to report the facts is an offence. It is also an offence to fail to deliver up the trophy if required to do so.<sup>316</sup> The punishment for failure to do either act is prescribed under sections 109 and 110 as these offences involve possession of protected species. They may also involve taking, hunting or reducing into possession any protected species; selling, buying, receiving in transfer or accepting in transfer specimens of protected species. If the failure to report or deliver is in respect of game species, section 109 applies, but if it is in respect of protected species of wild plants, section 110 will apply.

#### 4.3.34 Dealings in government trophy

It is an offence to unlawfully possess or to purport to buy, sell or otherwise transfer or deal in any government trophy. The elements of this offence are: (a) unlawfully possess, or (b) purport to buy, sell, transfer or deal in; and (c) a government trophy. The actus reus and mens rea for possession have been discussed above. To that discussion must be added a specific requirement under the present offence. It is required, for present purposes, that the accused must ‘unlawfully’ possess. In *Albert v Lavin*<sup>317</sup> Hodgson J said: ‘In defining a criminal offence the word “unlawful” is surely tautologous and can add nothing to its essential ingredients.’ This view was disapproved in *R v Kimber*<sup>318</sup> where the court said: ‘We cannot accept that the word “unlawful” when used in a

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<sup>315</sup> Section 90(1) of NAPWA.

<sup>316</sup> Section 90(2) and (3) of NAPWA.

<sup>317</sup> [1981] 1 All ER 628 at 639.

<sup>318</sup> [1983] 3 All ER 316 at 320.

definition of an offence is to be regarded as “tautologous”. In our judgment the word “unlawful” does import an essential element into the offence.’ From this and other authorities it is now settled that the word ‘unlawfully’ means without lawful justification or excuse.<sup>319</sup>

Proof of this offence is made easier by the presence of an evidentiary or factual presumption. Section 91(2) of NAPWA provides that possession by any person of a specimen of a protected species without a certificate of ownership shall, for the purposes of the offence under discussion, be prima facie evidence of the specimen being a government trophy and of unlawful possession thereof by such person. This evidentiary or factual presumption does not violate the accused’s right to be presumed innocent since it does not shift the burden of proof.<sup>320</sup> It does, however, infringe the accused’s right to remain silent and not to testify during trial, as the accused is required to adduce evidence raising a reasonable doubt as to the existence of the presumed facts that the specimen in his possession is a government trophy and that his possession thereof is unlawful. Such infringement is justifiable under the limitations clause since the presumed facts are peculiarly within the knowledge of the accused – the accused knows or ought to know the justification for his possession of the specimen without a licence. He also knows or ought to know the circumstances in which he obtained possession of the specimen. In the premises, there is ‘nothing unreasonable, oppressive or unduly intrusive’ in asking the accused to adduce evidence in order to set aside the presumed facts.

This evidentiary or factual presumption is subject to the provisions of section 90 because the presumption is introduced by the words ‘except as otherwise provided by section 90.’ Of the four subsections of section 90 only subsection (2) is relevant. It states that any

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<sup>319</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17-44; *R v Williams (G)* 78 Cr App R 276, [1984] Crim LR 163. In *Republic v Komihwa* 7 Malawi Law Reports 325 at 326 Jere AgJ stated that the word ‘unlawfully’ in the phrase ‘unlawfully sets fire to any building or structure whatever’ means that ‘the accused set fire to the property without justification e.g. that the property was his own, or excuse, e.g. mistake.’ See also *Republic v Metani* 7 Malawi Law Reports 341 at 343 per Chatsika AgCJ.

<sup>320</sup> Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* 4ed Lansdowne: Juta 2001 at 632.

person who obtains a government trophy by any means shall, as soon thereafter as may be practicable, report the facts to an officer and, if required, shall deliver up the trophy to the officer. From this subsection it seems that the delivery of the government trophy is only necessary where it is specifically required. It appears that if no one requires delivery up of the trophy, the person is entitled to keep it. Thus possession is automatically granted where delivery up is not required. This finding must be considered in light of the provisions of section 88. This section provides that a person who, under a Part VII licence, takes possession of a specimen of a protected species other than specimen for human consumption, may apply for a certificate of ownership if he wishes to retain the specimen. It must be noted that the obligation to apply for a certificate of ownership in section 88 is in respect of specimens of protected species obtained under a Part VII licence. It is submitted that the effect of this restriction to specimens obtained under a Part VII licence is that where the specimen is obtained otherwise (but lawfully), the person in possession of the specimen need not apply for a certificate of ownership. Transporting this analysis to section 90(2), it appears that where a person has possession of a specimen of protected species that is also a government trophy, he is required to apply for a certificate of ownership in order to retain the trophy if he obtained the trophy under a Part VII licence, but such a person is not required to apply for a certificate of ownership in order to retain the trophy if he lawfully obtained the trophy otherwise than under a Part VII licence; he may simply retain the trophy until he is required to deliver it up. It may therefore be concluded that it is not in respect of every trophy delivery up of which has not been demanded that possession can be maintained without more. Possession may be maintained without more (in the absence of a delivery up demand) only where the trophy was lawfully obtained otherwise than under a Part VII licence.

From the foregoing, it is clear that a person may lawfully possess a specimen of a protected species without a certificate of ownership. This is only possible where the specimen is a government trophy which was lawfully obtained otherwise than under a Part VII licence. Such possession without a certificate of ownership does not constitute prima facie evidence of unlawful possession. If the words 'except as otherwise provided by section 90' had not been included, the effect of the evidentiary or factual presumption

would have been to make such possession without a certificate of ownership evidence of unlawful possession.

The penalties for offences emanating from dealings in government trophy are set out in sections 109 and 110 depending on whether the trophy involved is game species or protected species of wild plants.

#### **4.3.35 Offences by non-professional hunters**

Any person who is not a licensee under a valid professional hunter's licence who does any of the following acts commits an offence. The prohibited acts are:

- (a) conducting business as a professional hunter;
- (b) advertising himself as a professional hunter;
- (c) soliciting any contract or commission under which or for which he is to act in the capacity of a professional hunter; or
- (d) for gain or reward, assisting any other person to hunt any protected or game animal except as a guide, tracker, porter or in some other like capacity.<sup>321</sup>

The person who has a professional hunter's licence is required to abide by certain conditions. The person who does not have the professional hunter's licence does not operate under such conditions and may not be aware of their existence; as such he may cause environmental damage that could be avoided. It is therefore justifiable that such person should be punished under the present offence. The penalties include a minimum fine of MWK200 (US \$1.50), a maximum fine of MWK1 000 (US \$8) and imprisonment for a term of up to six months.<sup>322</sup> Comment will now be made on the prohibited act marked (d) above.

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<sup>321</sup> Section 93 of NAPWA.

<sup>322</sup> Section 108 of NAPWA.

It is clear that assisting<sup>323</sup> any other person to hunt a protected or game animal is not always an offence. Such assistance can be rendered without incurring criminal liability under the present offence as long as the person assisting is doing so in the capacity of a guide, tracker, porter or in some other like capacity. The terms 'guide, tracker, porter'<sup>324</sup> are not defined anywhere in the Act. As a result they may be construed widely or narrowly. A wide construction has the effect of allowing any person who, for a fee or some consideration, assists another in hunting protected species, to claim that he was simply assisting as a guide, tracker or porter, so as to avoid liability. For example, a poacher may be accompanied by a number of individuals in his exploits. These individuals may be assisting him for gain or reward as guides, trackers or porters. If a wide construction is adopted, such individuals will be classified as guides, trackers or porters and so not liable to prosecution under section 93(d). This finding is environmentally unacceptable. These individuals must certainly be liable as aiders and abettors in their roles as guides, trackers or porters. In the circumstances it is suggested that the wide construction should be abandoned in favour of a narrow construction that takes into account other provisions of the Act. In this regard, it may be recalled that a licensee under Part VII of the Act has a right to employ or use another person to assist him as a guide, tracker or porter in hunting protected species, but such assistants (not being themselves licensees) are not permitted to chase, drive or employ any weapon against any protected species.<sup>325</sup> It is submitted that the 'guides, trackers, porters' under section 93(d) should be restricted to the guides, trackers or porters of licensees under Part

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<sup>323</sup> The word 'assisting' has not been construed narrowly in drug related offences in England. It has actually been held that it must be construed as an ordinary English word and, in practice, it is accorded a wide interpretation: *R v Vickers* [1975] 1 WLR 811; *R v Evans* (1977) 64 Cr App R 237; and *R v Panayi* (1987) 86 Cr App R 261; and *Murphy* op cit at 765. This wide interpretation may also be adopted for purposes of section 93(d) subject to the inbuilt limitations.

<sup>324</sup> In discussing these terms, the appropriate terms ought to include 'some other like capacity' but the words 'some other like capacity' have been left out for the sake of neatness and ease of reference. In any case the meaning of the words 'some other like capacity' is governed by the terms 'guide, tracker, porter' under the *ejusdem generis* rule, and so discussion of the terms 'guide, tracker, porter' inevitably brings into light the meaning of the words 'some other like capacity.' On how the *ejusdem generic* rule operates, see *Monteiro v Acme Construction Company Limited and Insurance Company of North America* 1923 – 60 ALR Mal 862.

<sup>325</sup> Section 62 of NAPWA. Please note that a licensee under Part VII of the Act does not include a professional hunter. Professional hunters are licensees under Part X of the Act.

VII of the Act. This will obviate the possibility of the poacher's assistants escaping liability for being willing parties to their master's depredations.

While a court may have liberty to adopt the suggested narrow construction, there is no guarantee that a court will not adopt the meaning from the wide construction. Actually a court that is obsessed with the presumption in favour of a strict construction of penal statutes – that is, the principle that where there is real doubt, the accused must be given the benefit of that doubt<sup>326</sup> – is likely to dismiss the meaning from the narrow construction and prefer the one from the wider construction as the latter is more lenient. So leaving the matter entirely in the hands of the courts may not be an environmentally safe move. It is proposed that section 93(d) be amended in order to do away with the possible reign of the meaning from the wider construction. The amendment should be effected by removing the comma between 'tracker' and 'porter'; inserting the word 'or' between 'tracker' and 'porter'; deleting the words 'or in some other like capacity'; and inserting after the word 'porter' the following words: 'employed by a licensee under Part VII of this Act.' What section 93(d) will look like after these changes is shown below.

It will be noted that the suggested amendment omits the words 'or in some other like capacity.' Section 62(1) does not contain these words. Since the suggested amendment links section 93(d) to section 62(1), it will be anomalous to have these words in one of the two. Either the words must be available in both sections or they must be absent from

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<sup>326</sup> The presumption in favour of a strict construction of penal statutes was expressed by Lord Esher in *Tuck & Sons v Priester* (1887) 19 QBD 629 at 638 as follows: 'If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for construction of penal statutes.' In *Re H P C Productions Ltd* [1962] 2 WLR 51 Plowman J declared: 'If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted.' See also the Malawian case of *Isaac v R* 1923 – 60 ALR Mal 724 at 726 per Spencer-Wilkinson CJ. Glanville Williams is quoted by Francis Bennion *Statutory Interpretation* London: Butterworths 1984 at 385 as having said: 'The ancient rule was that penal statutes are to be construed strictly – that is, in favour of the defendant and against the prosecution – on the theory that the legislature must make its intention clear if it proposes to have people punished. The rule was important at a time when many crimes were punishable by death, but it has not necessarily lost all its value in these more lenient days.' John Cyril Smith 'Evasion of Liability by Deception' [1983] Crim LR 470 at 472 wrote: 'Though lip-service is from time to time paid to the principle that a penal statute must be construed strictly in favour of the accused, in practice that approach is out of fashion. Even where a statute is wholly unambiguous and in favour of the defendant, it may be construed to his disadvantage as in *Duncalf* [1979] 2 All ER 116.'

both. The choice made here is that they must be absent from both because this is more in line with the purposes of the Act: the fewer the persons exempted from liability under the Act, the more protection wildlife will enjoy.

The last comment on section 93(d) relates to the words 'protected or game animal'. The Act makes reference to protected species of wild animals and says that these are to be known as game species.<sup>327</sup> It is debatable whether protected species of wild animals are the equivalent of protected animals or whether game species is the equivalent of game animal. The change of language in section 93(d) suggests a rejection of possible equivalence: it suggests a different meaning. It may be that 'protected animal' is meant to include protected species of wild animals (and consequently game species) but that 'game animal' encompasses species of wild animals that have not been declared protected species, but the latter term is unnecessarily confusing if the suggested meaning is accepted, since it is semantically difficult to distinguish it from 'game species'. It is suggested that the language should be streamlined with that of section 62(1). Instead of the words 'protected or game animal,' section 93(d) should reflect the words 'protected species'.

When all the suggested amendments are taken into account, section 93(d) will read as follows: '(d) for gain or reward, assists any other person to hunt any protected species except as a guide, tracker or porter employed by a licensee under Part VII of this Act.'

#### **4.3.36 Importation, exportation and re-exportation contrary to customs requirements**

It is an offence to import, export or re-export or attempt to import, to export or to re-export any specimen of a protected species or a listed species except through a customs post or port. It is also an offence to import, export or re-export or to attempt to import, to export or to re-export any specimen of a protected species or a listed species without

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<sup>327</sup> Sections 43 and 44 of NAPWA.

producing to a customs officer a valid permit to import, to export or to re-export the specimen.<sup>328</sup>

By way of background it may be pointed out that the CPWO is empowered to issue to any person a permit in the prescribed form to import, to export or to re-export any specimen of a protected species or listed species. In the case of a protected species, the CPWO first requires the applicant to produce a valid certificate of ownership in respect thereof. In the case of a listed species, the CPWO first requires the applicant to produce evidence of compliance with the requirements of regulations made pursuant to section 99 of NAPWA, or the requirements of NAPWA or the requirements of any other regulations made under NAPWA.<sup>329</sup> According to section 2, by 'listed species' is meant plant or animal species listed under any international, regional or bilateral agreement to which Malawi or the Government is a party, and under regulations made pursuant to section 99 of NAPWA.

Offenders under this offence are liable to the penalties prescribed by section 111 of NAPWA. These penalties are a fine of MWK10 000 (US \$75) and imprisonment for a term of five years, and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence. These penalties are the same as those provided for under section 110 and even the wording of the sections in respect of the penalties is identical. Accordingly, the comments made above on the penalties under section 110 apply to the penalties under section 111. For the same reasons given for the amendment of section 110 (see detailed discussion in segment 4.3.8 above), it is suggested that section 111 of NAPWA be amended by omitting the reference to MWK10 000, that is, leaving out the words 'of K10 000'. If this is done, the section will read: 'Any person who is convicted of an offence under section 98 or under regulations made pursuant to section 99 shall be liable to a fine and to imprisonment for a term of 5 years,

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<sup>328</sup> Section 98 of NAPWA.

<sup>329</sup> Section 97 of NAPWA.



and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence.’

#### **4.3.37 Offences against regulations imposing additional restrictions on imports, exports or re-exports of specimens**

The Minister may, after consulting the Minister responsible for Trade and Industry, make regulations imposing additional restrictions on imports, exports or re-exports of specimens of a protected species or listed species and for the purposes of such regulations the Minister may incorporate the requirements under any international, regional or bilateral agreement to which Malawi or the Government is a party.<sup>330</sup> Any person who contravenes such regulations commits an offence and is liable to the same penalties as those imposed for the offence of importation, exportation and re-exportation contrary to customs requirements.<sup>331</sup> In addition to those penalties, the court may declare any specimen, domestic animal or article used in connection with the commission of the offence, forfeited to the Government.<sup>332</sup>

The phrase ‘agreement to which Malawi or the Government is a party’ requires some elaboration. Should any significance be attached to the separate listing of ‘Malawi’ and ‘Government’? It appears that Parliament is recognizing a distinction between agreements to which Malawi is a party and agreements to which the government is a party. Parliament seems to suggest that agreements to which the government is a party may not necessarily be agreements to which the State is a party. This apparent distinction is not acceptable in international treaty law. A State becomes a party to an international agreement by signing and ratifying the agreement or by acceding to the agreement. If ‘Government’ is understood in its usual political sense of the governing power in a State or the body of persons charged with the duty of governing, it is generally settled that it is

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<sup>330</sup> Section 99 of NAPWA. To the knowledge of the present researcher, the Minister has not promulgated the regulations imposing the additional restrictions.

<sup>331</sup> Section 111 of NAPWA.

<sup>332</sup> Section 113(2) of NAPWA.

the government that bears the responsibility of signing, ratifying or acceding to a treaty, but that responsibility or action does not make the government a party to the agreement; it is the State that becomes a party to the agreement. However, after ratification or accession, the government is responsible for spearheading domestic implementation of the treaty where applicable or necessary.<sup>333</sup> In *Attorney General for Canada v Attorney General for Ontario and Others*<sup>334</sup> Lord Atkin, delivering the Opinion of the Privy Council, puts the point in the following terms:

‘It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.’

In the premises, it was not necessary to include in section 99 the words ‘or the Government’. It is suggested that these words be deleted.

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<sup>333</sup> Thomas Trier Hansen ‘Implementation of International Human Rights Standards through the National Courts in Malawi’ [2002] 46 *Journal of African Law* 31; Danwood Mzikenge Chirwa ‘Democratisation in Malawi 1994 – 2002: Completing the Vicious Circle?’ (2003) 19 *SAJHR* 316 at 327 – 328; and Danwood Mzikenge Chirwa ‘A Full Loaf is Better than Half: the Constitutional Protection of Economic, Social and Cultural Rights in Malawi’ [2005] 49 *Journal of African Law* 207 at 233.

<sup>334</sup> [1937] AC 326 at 347.

#### 4.3.38 Offences against regulations relating to protected areas

Section 123 of NAPWA empowers the Minister to make regulations for carrying the Act into effect. It appears that under this power the Minister made the National Parks and Wildlife (Protected Areas) Regulations.<sup>335</sup> It may also be that the Minister made the regulations under section 41 of the Act.<sup>336</sup> Regulation 18 declares that any person who contravenes the provisions of the regulations commits an offence and is liable, in the case of a first offence, to a fine of not less than MWK200 (US \$1.50) but not more than MWK500 (US \$4) and to imprisonment for a term of three months. In the case of a second or subsequent offence, the person is liable to a fine of not less than MWK500 but not more than MWK1 000 (US \$8) and to imprisonment for a term of six months. Regulation 18 is therefore at the same time a general criminalization clause and a general penalty clause. The difficulty with its operation as a general criminalization clause is that it can hardly be said that all the provisions of the regulations are proscriptions contravention of which will amount to an offence.<sup>337</sup> A perusal of the regulations reveals

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<sup>335</sup> GN 87/1994 and GN 73/1997. The set of these regulations annexed to the main Act does not indicate under which section of the main Act the regulations have been promulgated. Bearing in mind that the stated purposes of the main Act include conservation and protection of wildlife (section 3), that one way of conservation and protection of wildlife is through proper and effective management of protected areas, and that the regulations on protected areas deal with proper and effective management of protected areas, it is a reasonable inference that the regulations on protected areas were promulgated in the interest of 'carrying the Act into effect.' It is on this basis that it has been said in the text that the Minister promulgated the regulations on protected areas under section 123 of the Act.

<sup>336</sup> Section 41 of the Act provides that the Minister may make regulations specifying the conditions under which any person, vehicle, boat or aircraft may enter, travel through, reside in, or be kept in a national park or wildlife reserve and the efficient management of a national park or wildlife reserve. The regulations on protected areas define 'protected area' in terms of a national park or wildlife reserve. So these regulations meet the description of the kind of regulations the Minister is empowered to make under section 41. In essence the regulations could be renamed 'National Parks and Wildlife (Parks and Reserves) Regulations.' It must be noted in this connection that the definition of 'protected area' under section 2 of NAPWA is wider than national parks and wildlife reserves; it includes forest reserves. This wide meaning is generally not adopted under the regulations on protected areas.

<sup>337</sup> The South African approach to this problem was stated as follows by J R L Milton and M G Cowling *South African Criminal Law and Procedure* Vol III 2ed Kenwyn: Juta 1988 (Service No. 7, 1995) at para 1-16: "On occasions the criminalization clause will take the form of a 'blanket' or 'umbrella' provision that purports to criminalise each and every contravention of the legislation in question. Such clauses are by no means impermissible and provide a simple and easy method for creating offences. ... The approach adopted by the courts in such cases has been to disregard the literal meaning of the blanket clause and to approach the matter on the basis that it must ascertain, by ordinary techniques of construction of statutes, whether the legislature had intended that disobedience to a particular command or direction should attract the criminal sanction." In support of this approach, two quotations from two cases are cited. The first

that not all the provisions of the regulations are such proscriptions. In the following few paragraphs, provisions of the regulations which qualify as proscriptions the contravention of which amounts to an offence will be identified.

It is an offence to enter a protected area with or in a motor vehicle unless there is a valid permit in respect of that motor vehicle.<sup>338</sup> Regulation 2 defines 'protected area' as a park or wildlife reserve declared to be a national park or wildlife reserve under section 28 of NAPWA and includes any bridge, culvert, crossing or drift, but does not include a public road. The valid permit in respect of the motor vehicle is a permit issued under the regulations and not under the Road Traffic legislation.<sup>339</sup>

It is an offence for a person to camp or remain on a camping site during the hours of darkness unless he has paid the prescribed fee. A person may so camp or remain on the camping site without payment of the fee only if he has the written permission of the CPWO.<sup>340</sup> The term 'camping site' is defined as any site within a protected area which has been declared as such by the CPWO.<sup>341</sup> The phrase 'hours of darkness' is not defined

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quotation is from *R v Bornman* 1912 TPD 66 at 68 where Wessels J said: 'If we look through the regulations it is clear that the Legislature could never have contemplated that [the blanket clause] should apply to contravention of any and every section of the regulations, because in many cases it would be manifestly absurd to think that it could apply. That being so, we must start with the proposition that the Court will have to select and say in what cases it thinks that the Legislature intended that the penalty provided for by [the blanket clause] should apply to the contravention of a particular section of the regulations.' The other quotation comes from *R v Mgibantaka* 1934 CPD 121 at 126: 'The words of [the blanket clause] are wide and general but it is quite obvious that they cannot be construed in their literal sense. If they were, then everyone on whom a duty is laid in the Regulations who fails to perform it is guilty of a criminal offence. For instance there are all kinds of administrative duties imposed upon the Registering Officer and if he fails to perform them he would be guilty of a criminal offence. That could not have been intended and the Court therefore has in each case to examine the particular provision of the Act under which a charge is laid to ascertain whether the legislating authority intended to impose a duty upon the accused person and further whether it intended a breach of that duty to be a criminal offence.'

<sup>338</sup> Regulation 3(1).

<sup>339</sup> The permit is required to be in Form 1 set out in the First Schedule to the Regulations. According to regulation 3(4) and (5) a permit is not required for a motor vehicle which is in the protected area for transit purpose only, and a permit cannot be issued to a person who has been prohibited to enter a protected area under regulation 16.

<sup>340</sup> Regulation 4.

<sup>341</sup> Regulation 2.

by the regulations but it is likely to carry the same meaning as that under section 2 of NAPWA.<sup>342</sup>

Where, on the authority of the CPWO, any part of a protected area or of a road has been closed to the public or to any kind of traffic or to any class of vehicles, it is an offence for any person to travel in or on such part or cause the prohibited kind of traffic or the prohibited class of vehicle to travel in or on such part.<sup>343</sup> For reasons set out in segment 4.3.15 the word ‘cause’ signifies the common sense idea of bringing about a result. That result may be brought about by way of an act or omission. Again for reasons stated in that segment, the word ‘cause’ does not import mens rea.

Regulation 6 as read with regulation 18 provides that, except with the written permission of the CPWO or a Wildlife Officer, it is an offence to:

- (a) enter or leave a protected area other than at a place designated by the CPWO as an entrance or exit;
- (b) enter a protected area (other than Liwonde National Park and Lake Malawi National Park) otherwise than in a motor vehicle having four or more wheels;
- (c) enter or remain within water areas of Liwonde National Park and Lake Malawi National Park;
- (d) enter a protected area by means of an aircraft unless the aircraft is authorized so to enter and to land at an authorized landing ground;
- (e) be within a protected area unless he is within 25 metres of motor vehicle or boat or is in an observation place;
- (f) knowingly alight from a vehicle in a protected area within 200 metres of any live animal (other than an insect or bird) unless he is in an observation place;

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<sup>342</sup> Section 2 of NAPWA defines ‘hours of darkness’ as the period between one half hour after sunset and one half hour before sunrise.

<sup>343</sup> Regulation 5(2). According to regulation 5(3) a part of the protected area or of a road shall be deemed closed if, on the authority of the CPWO or a Wildlife Officer, there has been placed with respect thereto a notice, sign, mark, fence, gate, barricade or line of stones, indicating that it has been closed to the public or to any kind of traffic or class of vehicles.

- (g) exceed a speed of 40 kilometres per hour in a motor vehicle within a protected area;
- (h) sound a motor horn within a protected area;
- (i) cut or remove any vegetation in a protected area or damage or remove any object [of] geological, prehistoric, archaeological, historical or scientific interest in a protected area;
- (j) remove from a protected area any animal or vegetation whether alive or dead other than animal or vegetation lawfully introduced into a protected area by the person removing it;
- (k) in case of the Nyika National Park, drive any vehicle on those parts of the M9 road (Mphora – Kaperekezi) and S103 road (Chilinda turnoff – Kasaramba) which are inside the boundary of the said national park, between the hours of 6.00 p.m. and 6.00 a.m.;
- (l) in the case of Nkhotakota Wildlife Reserve, drive any vehicle on the section of the M10 road (Mbobobo – Wozi) which is within the boundary of the said wildlife reserve, between 6.00 p.m. and 6.00 a.m.; or
- (m) be allowed to enter Nyika National Park or Nkhotakota Wildlife Reserve after 4.00 p.m. and before 6.00 a.m.

Some of the acts proscribed under regulation 6 are similar or identical to offences discussed above. So no more comment will be made on them. The prohibition in regulation 6(b) against entry into a protected area otherwise than in a motor vehicle having four or more wheels excludes Liwonde National Park and Lake Malawi National Park because significant parts of these parks are made up of water and so entry is necessarily made by boat which is not a motor vehicle having four or more wheels. By ‘observation place’ in regulation 6(e) and (f) is meant, in relation to a protected area, a place which has been declared by the CPWO as the place for public observation of wildlife in that protected area.<sup>344</sup> As for the meaning of ‘knowingly’ in regulation 6(f),

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<sup>344</sup> Regulation 2.

the meaning is the same as that discussed above.<sup>345</sup> In regulation 6(i) the word between 'object and 'geological' is 'or', but the provision does not make sense when the word 'or' is maintained. It is arguable that the 'or' is a typographical error and that the correct word is 'of'. It is likely that courts, upon being asked to construe this provision, will read out the 'or' and read in the 'of'. With regard to regulation 6(m), the purport or effect of the provision is not entirely clear. The exact wording of part of it is 'no person shall be allowed to enter'. This kind of wording suggests that apart from an offence being committed by the person who enters, an offence may also be committed by the person who allows the other to enter.

Except with the permission of the CPWO, it is an offence, while within a protected area, to molest, provoke, feed or disturb any animal. For this purpose, any person who approaches or follows any animal, or makes any sudden movement or noise, or flashes a light or intentionally does something to cause an animal to move away from where it is, to change its direction of travel, to increase its pace or speed, to become frightened or to stampede, is deemed to have disturbed the animal.<sup>346</sup> It is noteworthy that the permission of the CPWO need not be in writing: the regulation under discussion simply requires 'the permission' of the CPWO to do the prohibited acts if a person is to avoid incurring criminal liability under the regulation. The penalties for molesting an animal under this offence are, as indicated earlier on, a minimum fine of MWK200 (US \$1.50), a maximum fine of MWK1 000 (US \$8) and imprisonment for a maximum period of six months. These penalties may be compared with the penalties for molesting game species in a protected area under section 109 of NAPWA, which are a minimum fine of MWK800 (US \$6), a maximum fine of MWK2 000 (US \$15) and imprisonment for a term of one year. There is therefore an inconsistency between the punishments for molesting. This inconsistency may be resolved by restricting section 109 penalties to the molesting of game species only. Since the molesting under the regulations is in respect of 'any animal,' it may be construed as molesting any animal other than game species, so as to

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<sup>345</sup> Segment 4.2.4.

<sup>346</sup> Regulation 7.

avoid the apparent inconsistency. Thus, molesting game species in a protected area should be punished under section 109 of NAPWA whereas molesting any animal other than game species in a protected area should be punished under regulation 18.

It is an offence, except with the written permission of the CPWO, to intentionally discharge any weapon or release any appliance so that a projectile therefrom passes over any portion of, or falls within, a protected area.<sup>347</sup> Unlike most of the other offences, this offence has mens rea in the form of intention as one of its ingredients.

It is an offence, except with the written permission of the CPWO or the Wildlife Officer, while within a protected area, to: (a) light a fire or cause a fire to be lighted; (b) leave any fire which has been lighted, or which he has caused to be lighted, unextinguished; or (c) discard any burning object.<sup>348</sup> Aspects of this offence are similar to the offence of use of fires for hunting discussed above in segment 4.3.15; recourse must therefore be had to that segment.

Regulation 10 proscribes the display of any notice or advertisement within a protected area or at any entrance to or on the boundary of a protected area. It also proscribes the collection of any money from members of the public, the selling of any goods, the offering of any goods for sale or the carrying on of any trade, within a protected area. Nevertheless these acts may be done without incurring criminal liability if the CPWO or Wildlife Officer permits them in writing.

Any person who places, erects, damages, moves, loosens, alters, breaks, cuts, destroys or in any way interferes with fencing, fence post, gate, beacon or boundary of a protected area, commits an offence. Similarly any person who places, erects, marks, spoils, damages, disfigures, alters, bends, covers, moves or removes any sign board, notice board or any notice within a protected area or on any boundary of a protected area, is guilty of

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<sup>347</sup> Regulation 8.

<sup>348</sup> Regulation 9.



an offence. No offence in these respects is committed if the CPWO or a Wildlife Officer permits the acts in writing.<sup>349</sup>

It is an offence to drive a public service motor vehicle within a protected area, except under and in accordance with a permit issued under the regulations. A bona fide tourist driving himself or being driven in a motor vehicle hired for visiting a protected area is exempted from criminal liability under this offence.<sup>350</sup>

It is an offence, unless in an emergency, to land any aircraft in a protected area except at an airfield at which landing of aircraft has been generally authorized by an order of the CPWO.<sup>351</sup> It is also an offence, except for the purpose of landing or taking off or in an emergency, to fly in a protected area an aircraft at an altitude of less than five hundred metres above the ground.<sup>352</sup>

Regulation 14(1) provides that any person, other than an officer, who makes use of or wears any badge, uniform or emblem authorized to be worn by an officer of a protected area, commits an offence. Regulation 14(2)(a) provides as follows: 'No person shall make use of or wear any badge, uniform or emblem or nearly resembling a badge, uniform or emblem authorized to be worn by an officer of a protected area.' It may be observed that as it stands, regulation 14(2)(a) is not entirely clear in its purport or effect. If the words coming before the third occurrence of 'or' in the sentence are read on their own, they give the impression that the wearing of any badge, uniform or emblem is prohibited. Of course such a prohibition would be irrational. Taking into consideration the provisions of regulation 14(1), it seems that the unclear language of regulation

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<sup>349</sup> Regulation 11.

<sup>350</sup> Regulation 12(1). The permit is issued by the CPWO or a Wildlife Officer in Form II set out in the First Schedule to the Regulations.

<sup>351</sup> Regulation 13(a). According to this regulation, no offence is committed if the prohibited acts are done with the written permission of the CPWO.

<sup>352</sup> Regulation 13(b). No offence is committed if the prohibited acts are done with the written permission of the CPWO.

14(2)(a) may be clarified by omitting the words 'or nearly' that appear immediately after the first mention of 'emblem'. When that is done, regulation 14(2)(a) will read: 'No person shall make use of or wear any badge, uniform or emblem resembling a badge, uniform or emblem authorized to be worn by an officer of a protected area.' This amendment fits in nicely with regulation 14(1) in the sense that regulation 14(1) prohibits the use or wearing of an officer's badge, uniform or emblem whereas regulation 14(2)(a) prohibits the use or wearing of any badge, uniform or emblem resembling an officer's badge, uniform or emblem.

Unlawfully holding oneself out as being an officer is also an offence. The offence of holding oneself out is similar to the common law offence of personation. One type of personation is personation of a juror in which it is not necessary to prove that the personator had any corrupt motive or anything to gain by his conduct or any specific intention to deceive other than that which is involved in his doing those things required of a juror; and it is no answer that he did not know that he was doing wrong.<sup>353</sup> In the absence of words importing mens rea and taking into account the effect of the word 'unlawfully',<sup>354</sup> it is suggested that in the offence of holding oneself out as being an officer, it is not necessary to prove that the person holding himself out had any corrupt motive or anything to gain by his conduct or any specific intention to deceive other than that which is involved in engaging in the relevant conduct of an officer as long as he (the person holding himself out) had no lawful justification or excuse in engaging in that conduct.

The foregoing examination of the provisions of the regulations on protected areas has dealt with the following clauses as containing criminal offences: 3(1), 4, 5(2), 6, 7(1), 8, 9, 10, 11, 12(1), 13 and 14. Each of these must be read together with regulation 18 as regulation 18 is the criminalization clause and penalty clause. It is arguable that the rest

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<sup>353</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 22-61; *R v Clark* (1918) 26 Cox 138; *R v Wakefield* [1918] 1 KB 216.

<sup>354</sup> The word 'unlawfully' means without lawful justification or excuse: P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17-44; *R v Williams (G)* 78 Cr App R 276; *R v Kimber* [1983] 3 All ER 316 at 320.

of the clauses cannot constitute criminal offences as they are more in the nature of advisory provisions.

#### 4.3.39 Additional penalties for offences under NAPWA

Upon the conviction of any person of an offence under NAPWA, the court is empowered, where it considers forfeiture<sup>355</sup> to be necessary, to declare any specimen, domestic animal or any firearm or other weapon, trap, net, poison, material or any motor vehicle, aircraft, boat, or any other article taken by or used in connexion with the commission of the offence to be forfeited to the government.<sup>356</sup> The court may do so 'subject to the provisions of section 108,' 'in addition to any other penalty imposed,' and 'notwithstanding any other written law.'<sup>357</sup> The phrase 'subject to the provisions of section 108' seems to have the effect of cutting down the scope of the court's powers of forfeiture. It may be recalled that section 108 is the general penalty clause: it prescribes the punishment for offences under the Act for which no other punishment is provided.

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<sup>355</sup> The literature on the subject of forfeiture reveals that there are two types of forfeiture: criminal forfeiture and civil forfeiture. Aaron Larson <http://www.expertlaw.com/library/criminal/forfeiture.html> (accessed on 21 July 2005) writes that criminal forfeiture is the taking of property by the State. It 'occurs when, after the owner is convicted of a crime, and where forfeiture is allowed under the laws of the prosecuting jurisdiction, it is demonstrated that the property has a sufficient relationship to the criminal activity to justify depriving the owner of his property rights.' He continues to say that 'Civil forfeiture is similar in many ways to criminal forfeiture. However, while criminal forfeiture means to impose an additional penalty upon the owner of property for his wrongful conduct, a civil forfeiture action is brought against the property itself. ... For criminal forfeiture to result, the owner of the property must be convicted of a crime, whereas civil forfeiture can occur even if the owner is acquitted. In some cases the property owner won't even be charged with a crime.' Andrew R Mitchell, Susan M E Taylor and Kennedy V Talbot *Confiscation and the Proceeds of Crime* 2ed London: Sweet & Maxwell 1997 at 205 – 206 draw similar distinctions between forfeiture in criminal cases and forfeiture in civil cases. From these expositions it is clear that the forfeiture in issue in the text is criminal forfeiture. See also generally Leonard W Levy *A License to Steal: the Forfeiture of Property* Chapel Hill, NC: University of North Carolina Press 1996 *passim*; <http://www.questia.com/library/sociology-and-anthropology/civil-and-criminal-forfeiture.jsp> (accessed on 21 July 2005) and <http://www.law.cornell.edu/background/forfeiture/> (accessed on 21 July 2005).

<sup>356</sup> Forfeiture is a common sanction in Malawian criminal law and it has been the subject of discussion in many cases. See, for example, *R v Khanyisi* 1923 – 60 ALR Mal 418; *R v Sande* 1923 – 60 ALR Mal 419; *R v Mwale* 1961 – 63 ALR Mal 483; *Republic v Sande* 1968 – 70 ALR Mal 199; *Republic v Brown* 8 Malawi Law Reports 190; *Republic v Sichinga* 10 Malawi Law Reports 126 and *Republic v Thomas and Issa* 10 Malawi Law Reports 117.

<sup>357</sup> Section 113(1) of NAPWA.

The words 'subject to' suggest that the provisions of section 108 take precedence over the court's powers of forfeiture.<sup>358</sup> So in offences where section 108 applies, it appears that the court does not have liberty to impose forfeiture in the same way it would in offences where section 108 does not apply. As much as possible the provisions of section 108 must reign in those offences to which it applies.<sup>359</sup>

The phrase 'in addition to any other penalty imposed' does not merit further discussion: it simply classifies forfeiture as an additional penalty, but more must be said on the phrase 'notwithstanding any other written law.' The latter phrase suggests superiority of the court's powers of forfeiture over 'any other written law.' This superiority may readily be accepted but there are two enactments against which the superiority must be tested: the Environment Management Act 1996 (EMA) and the Constitution of the Republic of Malawi.

EMA was enacted after NAPWA and it contains a clause declaring that any written law on the conservation and sustainable utilization of natural resources which is inconsistent with EMA shall be invalid to the extent of the inconsistency.<sup>360</sup> A perusal of EMA reveals that EMA does not make provision for forfeiture: EMA neither encourages it nor forbids it. It follows that the question of inconsistency does not arise. The court's powers of forfeiture can therefore be exercised without transgressing the spirit and intendment of EMA.

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<sup>358</sup> In *Akistan Apena of Iporo v Akinwande Thomas* [1950] AC 227 the words 'subject to' were construed as the equivalent of 'without prejudice to.'

<sup>359</sup> It may be observed that section 108 states that its provisions are 'subject to the provisions of this Act' which certainly include section 113(1). In other words, the provisions of section 108 are subject to the provisions of section 113(1). In turn section 113(1) says that the court's powers of forfeiture are subject to section 108. These two sections are therefore throwing the ball at each other. Since the 'subject to' clause of section 108 is more general, it may be that it does not subject its provisions to section 113(1) which has a specific 'subject to' clause. [Cf the applicability of the maxim *generalia specialibus non derogant* – general words do not derogate from special words – in *The Vera Cruz* (1884) 10 App Cas 59 at 68]. Perhaps a way of avoiding the difficulty created by the existence of two 'subject to' clauses is to do away with one of them especially the one in section 113(1) so that the court can freely exercise its discretion in imposing forfeiture as an additional remedy in potentially all offences.

<sup>360</sup> Section 7 of EMA.

As stated above, the other enactment against which the superiority must be tested is the Constitution. It is trite that any law that is inconsistent with the provisions of the Constitution is invalid to the extent of such inconsistency.<sup>361</sup> So it is necessary to determine whether the court's powers of forfeiture are inconsistent with any provision of the Constitution. In this regard, the most pertinent provisions of the Constitution are those relating to property and punishment (sections 44(4), 28(2) and 19(2)). Section 44(4) deals with expropriation of property. It states that expropriation is permissible only when done for public utility, only when there has been adequate notification and appropriate compensation. The definition of expropriation<sup>362</sup> is such that it does not amount to forfeiture as understood under NAPWA. So the question of forfeiture infringing section 44(4) of the Constitution does not arise. As for section 28(2) of the Constitution, it provides that 'no person shall be arbitrarily deprived of property.' It must be noted that the Constitution does not prohibit deprivation of property per se. What the Constitution proscribes is arbitrary deprivation. The question is: what is arbitrary deprivation? It has been suggested that an arbitrary deprivation is one which is 'dependent simply on the will of the party effecting the deprivation' and that even though Parliament has general constitutional authority to enact laws, it cannot 'make laws which capriciously interfere with property rights or which authorize such interference by executive organs of the State.'<sup>363</sup> It is therefore necessary to determine whether the court's powers of forfeiture amount to arbitrary deprivation. Certainly the court's exercise of its powers of forfeiture is not dependent simply on its will: these powers are only exercised upon conviction of the accused. In addition the court's discretion is obviously exercised in accordance with

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<sup>361</sup> Section 5 of the Constitution of the Republic of Malawi 1994.

<sup>362</sup> Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* 3ed Kenwyn: Juta 2000 at 386 – 388. Expropriation of property is distinguished from deprivation of property: Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Dereck Spitz and Stuart Woolman (eds) *Constitutional Law of South Africa* Kenwyn: Juta 1996 (Revision Service 5, 1999) at 31-14 para 31.6; M Chaskalson 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131 at 134 – 135. See also R Lyster "'Protected natural environments": difficulties with environmental land use regulation and some thoughts on the property clause' 1994 27 *De Jure* 136 at 147 – 152; A J van der Walt 'Notes on the interpretation of the property clause in the new constitution' 1994 (57) *THRHR* 181 at 195 – 199.

<sup>363</sup> Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Dereck Spitz and Stuart Woolman (eds) *Constitutional Law of South Africa* Kenwyn: Juta 1996 (Revision Service 5, 1999) at 31-13 para 31.5.

the law, taking into account only relevant factors. The problem which the court has to grapple with in the process of exercising its powers is to guard against the possibility that the forfeiture may amount to unfair, excessive additional punishment, or to use the language of section 19(2) of the Constitution, cruel punishment. The court may do this by employing proportionality jurisprudence 'to indicate whether it is reasonable and justifiable to forfeit the property in question, given the court's findings on the facts, the nature of the property forfeited, the guilt of the defendant and the sentence already imposed.'<sup>364</sup> Such forfeiture is likely to be justifiable under the limitations clause in the Constitution 'due to the public interest involved in ensuring that articles used in the commission of crime are removed from the offender.'<sup>365</sup> It may therefore be concluded that the court's powers of forfeiture are consistent with the Constitution.

Apart from forfeiture, NAPWA provides for another additional penalty, namely surrender of licence, permit or certificate. Section 116 states that if any holder of a licence, permit or certificate issued under the Act is convicted of an offence under the Act involving the licence, permit or certificate, the court shall, in addition to any other penalty imposed, order the person to surrender it forthwith to the CPWO.

#### 4.4 General Observations

A number of critical general observations may be made in respect of the offences analysed in the present chapter. However, since these observations also apply to other offences analysed in the next chapter, the observations will be deferred to the end of the next chapter.

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<sup>364</sup> A J van der Walt 'Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause' (2000) 16 *SAJHR* 1 at 7. See also Stefan D Cassella 'The development of asset forfeiture law in the United States' [2003] *Acta Juridica* 314 at 335 – 336 for the US position. See also generally L Jordaan 'Confiscation of the proceeds of crime and the fair-trial rights of an accused person' (2002) 15 *SACJ* 41. The application of the proportionality inquiry under NAPWA's forfeiture is made possible by the wording of section 113 of NAPWA, for it is clear that the court is given a real discretion in the matter.

<sup>365</sup> Michael A Kidd 'The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa' unpublished PhD Thesis, University of Natal 2002 at 101. See also Peter Alldridge *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* Oxford: Hart Publishing 2003 at 59 – 63 where the author considers the justifications for and objections to forfeiture.

## **CHAPTER FIVE**

### **ANALYSIS OF CRIMES IN MALAWI'S ENVIRONMENTAL LEGISLATION: PART TWO**

#### **5.1 Introduction**

Environmental crimes from 18 Malawian statutes will be analysed in the present chapter. This analysis concludes the detailed discussion of these crimes started in the previous chapter. In this connection, it must be noted that some statutes analysed in the current chapter may be regarded by some scholars as lying on the periphery of environmental law, for instance the Mines and Minerals Act 1 of 1981 and the Petroleum (Exploration and Production) Act 2 of 1983. These statutes are included due to the impact their subject matter or exploitation thereof may have on environmental protection. This treatment is in line with the classification of environmental laws set out in segment 1.3.3 in Chapter 1 hereof. It may be recalled that in that segment statutes of this type were classified as environmental laws under the category of legislation incidentally containing environmentally specific norms.

#### **5.2 Forestry Act 11 of 1997**

##### **5.2.1 General**

The Forestry Act 11 of 1997 was passed with a view to provide for participatory forestry, forest management, forestry research, forestry education, forest industries, protection and rehabilitation of environmentally fragile areas and international cooperation in forestry.<sup>1</sup> Its declared purposes include the identification and management of areas of permanent forest cover as protection or production forest in order to maintain environmental

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<sup>1</sup> Long title of the Act.



stability, to prevent resource degradation, and to increase social and economic benefits. Another purpose is to promote community involvement in the conservation of trees and forests in forest reserves and protected forest areas in accordance with the Act.<sup>2</sup>

The Forestry Act has fourteen parts. Half of these parts have specific purposes. Part X sets out most of the criminal offences and penalties in the Act. Section 63 declares that the purpose of Part X is to define offences against the Act and to provide for penalties. Despite this declaration some offences or parts thereof are found in other parts of the Act. Each of the offences in the Act will now be analysed.

### **5.2.2 Conveyance into or possession or use within a forest reserve or protected forest area of any weapon, etc**

Section 43 states that it is an offence to convey into, or possess or use within any forest reserve<sup>3</sup> or forest protected area<sup>4</sup> any weapon, trap, explosive, poison or hunting animal.<sup>5</sup>

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<sup>2</sup> Sections 3(a) and (c) of the Forestry Act. According to section 3 other purposes of the Act include: (i) to augment, protect and manage trees and forest on customary land in order to meet basic fuelwood and forest produce needs of local communities and for the conservation of soil and water; (ii) to empower village natural resources management committees to source financial and technical assistance from the private sector, non-governmental organisations and other organisations; (iii) to promote sustainable utilisation of timber, fuelwood and other forest produce; (iv) to promote optimal land use practices through agroforestry in smallholder farming systems; (v) to upgrade the capability of forestry institutions in the implementation of their resource management responsibilities and in development of human resources in forestry; (vi) to control trafficking in wood and other forestry produce including exportation and importation; (vii) to protect fragile areas such as steep slopes, river banks, water catchment and to conserve and enhance biodiversity; (viii) to provide guidelines in planning and implementation of forestry research and forestry education; (ix) to establish a forestry administration; and (x) to promote bilateral, regional and international cooperation in forestry augmentation and conservation.

<sup>3</sup> The term 'forest reserve' is not defined in the Act. However, sections 22 and 23 provide for the establishment of forest reserves. Section 22 states that the Minister responsible for forestry may, after consultation with the Minister responsible for land matters, by order published in the Gazette, declare any public land not already reserved for another public purpose to be a forest reserve. Section 23 adds that any area of land proposed for a forest reserve and which is not public land shall first be acquired in accordance with the provisions of the Land Act 25 of 1965 and the Land Acquisition Act (cap 58:04 of the Laws of Malawi).

<sup>4</sup> According to section 2 of the Forestry Act, a protected forest area is an area declared as such under section 26 of the Act. Section 26 states that where the Minister finds that the protection of soil and water resources, outstanding flora and fauna requires that any area of land be maintained or established as a forest, the Minister may, by order in the Gazette, after consultations with the Minister responsible for land matters, the Minister responsible for agriculture, the Minister responsible for irrigation and water development, the owner or occupier and, in case of customary land, the traditional authority, declare such



The section does not apply to any officer acting in the performance of his duties.<sup>6</sup> The terms ‘convey’, ‘possess’ and ‘use’ were explained in segment 4.3.6 in Chapter 4 hereof. Their import in the present statute is similar.

The penalties for the offences of conveyance, possession and use are set out in two conflicting clauses of the Act. On the one hand, section 67 provides as follows: ‘Any person who knowingly contravenes the provisions of section 43 of this Act shall be guilty of an offence and liable upon conviction to a fine of K10, 000 and to imprisonment for a term of five years.’ On the other hand, section 71 states:

‘(1) Any person who contravenes the provisions of section 43 shall be guilty of an offence and liable upon conviction to a fine of K20, 000 and to imprisonment for a term of ten years.

(2) This section shall not apply to any officer acting in the performance of his duties.’

It may be observed that both section 67 and section 71 refer to contravention of section 43 and yet they prescribe different penalties for that contravention. Of course section 67 demands that the contravention should have been done knowingly; there is no similar requirement for the contravention in section 71. It is suggested that this difference does not justify or explain adequately the difference in sentences. In order to deal with the current difficulty, it is submitted that section 67 must be read as making reference to section 42, and not section 43. Three reasons may be advanced in support of this position. In the first place, if Parliament intended to punish the person who contravenes section 43 differently from the person who *knowingly* contravenes section 43, it could do so in one

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land to be a protected forest area. Where the Minister considers that land which requires protection as a forest reserve or protected forest area, is liable to serious degradation if not immediately protected, the Minister may declare such land to be a protected forest area for such period not exceeding one year as may be necessary to complete the consultations required by section 22 or section 26(1) of the Forestry Act.

<sup>5</sup> Section 43(1) of the Forestry Act. The process of establishing forest reserves is provided for in sections 22 and 23 whereas that for protected forest areas is provided for in section 26.

<sup>6</sup> Section 43(2) of the Forestry Act.

section; there is no reason for Parliament to do so in two separate sections. Even if it is supposed that Parliament intended to do so in two sections, it would generally make the sections run one after the other for ease of comparison. There is no rational basis for separating the sections widely, with three intervening and independent sections dealing with different offences, between them.

In the second place, reference to section 42 in section 67 agrees with the sequence of offences. A perusal of the Act reveals that the criminalization of acts set out in the Act is done in ascending order. For example, section 26 provides for protected forest areas and then section 64 provides for offences relating to protected forest areas; section 39 prohibits fires and then section 65 provides for offences relating to fires; section 44 prohibits deposition of litter or waste and then section 72 provides for offences relating to deposition of litter or waste; section 47 deals with permits for exportation, importation and re-exportation of forest produce and then section 73 provides for offences relating to export, import and re-export of forest produce. Thus, the general provisions setting out the acts are sections 26, 39, 44 and 47 whereas the criminalization clauses are sections 64, 65, 72 and 73 respectively. It follows from this ascending sequence of numbering that section 42 would fit as containing the general provision with section 67 providing the criminalization clause. Similarly section 43 would fit as containing the general provision with section 71 providing the criminalization clause. If we add the suggested four sections to the sequence, the sequence of general provisions will be 26, 39, 42, 43, 44 and 47 whereas the sequence of corresponding criminalization clauses will be 64, 65, 67, 71, 72 and 73. From this it is arguable that if section 67 is to fit nicely in the scheme of the Act, its corresponding general provision must be section 42 and not section 43.

In the third place, guidance on the connection between section 67 and section 42 may be obtained from the side-notes (marginal notes). In this regard, it must be noted that courts have held that side-notes cannot be used as an aid to the construction of a statute.<sup>7</sup>

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<sup>7</sup> In *Republic v Banda (J)* 7 Malawi Law Reports 55 at 63 Chatsika J stated that 'marginal notes are not part of the section and do not therefore afford much assistance to the construction of the section.' Similarly in *Chandler v Director of Public Prosecutions* [1964] AC 736 at 789 Lord Reid said: 'In my view side-notes cannot be used as an aid to construction. They are mere catch-words and I have never heard of it being

However, this position has not been religiously followed. Two cases illustrate the point. In *Director of Public Prosecutions v Schildkamp*<sup>8</sup> Lord Reid said:

‘But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the court was never mentioned in debate in either House, and it may be that its wording was never closely scrutinized by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but the punctuation, cross-headings and side-notes do not.’

In the same vein, Upjohn LJ in *Stephens v Cuckfield RDC*<sup>9</sup> stated:

‘While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.’

From these quotations it is clear that a judge is not entitled to ignore the side-note; on the contrary, he may use it in determining the purpose of the provision in issue.<sup>10</sup> Applying this finding to the marginal note of section 67, it will be noted that the marginal note

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supposed in recent times that an amendment to alter a side-note could be proposed in either House of Parliament. Side-notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side-note. In that event I have reason to believe that alteration is made by the appropriate officer of the House – no doubt in consultation with the draftsman. So side-notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act.’ See also *Republic v White* 8 Malawi Law Reports 340 at 342 per Jere J.

<sup>8</sup> [1971] AC 1 at 10.

<sup>9</sup> [1960] 2 QB 373 at 383.

<sup>10</sup> John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 130 write: ‘[E]ven if it is the case that side-notes cannot be called in aid in order to resolve doubts, it can hardly be the law that they are to be disregarded by the judge when he is perusing the Act with a view to ascertaining whether he has any doubts. No judge can be expected to treat something which is before his eyes as though it were not there.’ See generally Bilika H Simamba ‘Should Marginal Notes be Used in the Interpretation of Legislation?’ (2005) 26(2) *Statute Law Review* 125.

reads: 'Offences relating to forest pests and diseases,' and therefore it may be concluded that the purpose of section 67 is to provide for offences relating to forest pests and diseases. The general provision that deals with forest pests and diseases is section 42 and so it follows that the reference to a section in section 67 should be a reference to section 42 and not section 43. An amendment of section 67 along these lines is hereby recommended.

For the foregoing reasons the penalties prescribed in section 67 will not be dealt with in the present segment: they will be considered in the next segment when dealing substantively with section 42. As for the penalties for the offences of conveyance, possession or use, section 71 applies: offenders are liable to a fine of MWK20 000 (US\$150) and to imprisonment for a term of ten years.

### **5.2.3 Offences relating to forest pests and diseases**

Any person who knowingly contravenes the provisions of section 42 of the Act<sup>11</sup> commits an offence and is liable upon conviction to a fine of MWK10 000 (US\$75) and to imprisonment for a term of five years.<sup>12</sup> Section 42 states that, notwithstanding anything to the contrary contained in the Act, the Minister may authorise the Director of Forestry to do the following:

- (a) order the spraying or clearing of a compartment of a plantation or of a whole plantation for the purpose of controlling the spreading of pests and diseases;
- (b) control movement of timber and other forest produce through issue of permits as the pest and disease situation may demand;
- (c) issue silvicultural notes and technical orders for purposes of controlling pests and diseases;

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<sup>11</sup> Section 67 actually refers to section 43. For the reasons stated in the previous segment (5.2.2), the reference has been changed to section 42.

<sup>12</sup> Section 67 of the Forestry Act.

- (d) suspend further planting of tree species which are susceptible to pests and diseases;
- (e) provide for control of vermin causing excessive damage beyond economic threshold in forest reserves; and
- (f) provide for effective phytosanitation for all forest produce and all parts of the tree in accordance with the Plant Protection Act<sup>13</sup> and to regulate importation of tree seed and other wood and forestry produce for purposes of pest and disease control.

One impression section 42 creates (as read with section 67) is that upon failure to do any of the listed acts, the Director of Forestry may be convicted of contravening the section. This, however, cannot generally be the case as the Director (or any other officer) is immune in respect of the exercise or non-exercise in good faith of the powers vested in him under the Act.<sup>14</sup> From the look of things it appears that section 42 will principally be contravened through disobedience to the actions of the Director. For instance, any person who infringes the Director's order to spray or clear a plantation in terms of section 42(a) commits an offence. Similarly any person who continues to plant tree species which are susceptible to pests and diseases, after the Director has suspended further planting, commits an offence.

#### **5.2.4 Offences relating to forest reserves and protected areas**

Section 64 of the Forestry Act provides that any person who –

- (a) fells, cuts, takes, destroys, removes, collects, uproots any indigenous tree or forest property in a forest reserve or protected area;

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<sup>13</sup> Cap 64:01 of the Laws of Malawi.

<sup>14</sup> Section 84 of the Forestry Act.

- (b) connives with or causes another person to fell, cut, take, destroy, remove, collect, uproot any indigenous tree or forest property in a forest reserve or protected area;
- (c) squats, resides, erects a building, hut, livestock enclosures or any structure in a forest reserve or protected area;
- (d) clears, cultivates, digs or breaks up land for any road or for any purpose whatsoever and grazes livestock in a forest reserve or protected area,

shall be guilty of an offence and liable to a fine of MWK5 000 (US\$38) and to imprisonment for a term of two years.

Several things may be noted about this section. In the first place, the proscribed acts may be done without incurring liability if the person doing them has authority under the Act to do them.<sup>15</sup> Such authority may arguably be in the form of a permit or licence. For example, a person may obtain a licence to fell, cut, take, destroy, remove, collect, uproot forest produce from a forest reserve or protected area.<sup>16</sup> Doing any of those acts does not generally attract liability on account of the licence. In the second place, the section uses the term 'forest property'. This term is not defined in the Act, but the Act defines 'forest produce' as including trees, timber, firewood, branch wood, poles, bamboos, chips, sawdust, plants, grass, reeds, peat, thatch, bedding, creepers, leaves, moss, fruits, seed, galls, slabs, roots, bark, rubber, gum, resin, sap, flowers, fungi, honey, wax, earth, water, soil, stones, vertebrates, invertebrates, wild animals, hides, horns, bones, ivory, meat and such other produce as the Minister may, by notice in the Gazette, declare to be forest produce.<sup>17</sup> The listed matters seem to be capable of being described as 'forest property'. It is not clear why Parliament decided to use two different terms: forest property and forest produce. It seems that the use of only one of these terms is sufficient for purposes of the Act.

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<sup>15</sup> The introductory clause to section 64 makes this point clear.

<sup>16</sup> Section 46(a) of the Forestry Act.

<sup>17</sup> Section 2 of the Forestry Act.

In the third place, the section employs the term 'protected area'. Related terms used are 'forest reserve' and 'protected forest area'. In environmental law the term 'protected area' is wider than forest reserve or protected forest area. It includes national parks, wildlife reserves, world heritage sites, national botanic gardens, national monuments, natural heritage sites, transfrontier parks, etc.<sup>18</sup> The question is whether the use of the term in the section was meant to encompass all these other areas. This question must be answered in the negative especially in cases where there is dedicated legislation dealing with the management and protection of the area. It is likely that the term was used to encompass protected forest areas and other areas which are the concern of the Forestry Act, for example, forestry-relevant fragile areas such as steep slopes, river banks and water catchment areas.<sup>19</sup>

In the fourth place, the words 'connives with' in section 64(b) require some clarification or comment. Conniving may take the form of feigning ignorance of or failing to take measures against a wrong, implying tacit encouragement or consent.<sup>20</sup> For instance, a forest guard who shuts his eyes to the unlawful felling of trees by people in a forest reserve may be said to be conniving. Such forest guard may be convicted of an offence under section 64(b). Conniving may also involve cooperating secretly in an illegal action.<sup>21</sup> It is arguable that such cooperation may amount to conspiracy and so the law relating to conspiracy may come into play. This is so because cooperation may sometimes involve agreement and an intention to be party to the agreement. These two factors (agreement and intention) are elements of conspiracy. It is settled that the

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<sup>18</sup> Jan Glazewski *Environmental Law in South Africa* 2ed Durban: LexisNexis Butterworths 2005 at 325 lists over thirty terms used to describe protected areas. He quotes the following definition of protected area from the International Union for the Conservation of Nature and Natural Resources (IUCN): 'An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.'

<sup>19</sup> Section 3(i) of the Forestry Act states that one of the purposes of the Act is to protect fragile areas such as steep slopes, river banks and water catchment, and to conserve and enhance biodiversity. It may be observed that these areas are forestry-relevant in the sense that their degradation may be caused by deforestation.

<sup>20</sup> <http://www.dictionary.com> (Accessed on 13 August 2005); Oxford English Dictionary.

<sup>21</sup> <http://www.dictionary.com> (Accessed on 13 August 2005).

hallmark of conspiracy is the agreement. Nothing need be done in pursuit of the agreement; repentance, lack of opportunity and failure are all immaterial.<sup>22</sup> Mens rea is an essential ingredient of conspiracy only to the extent that there must be an intention to be a party to an agreement to do an unlawful act.<sup>23</sup> The effect of this position is that in appropriate circumstances agreement (accompanied by the requisite mens rea) to fell, cut, take, destroy, remove, collect, uproot any indigenous tree or forest property in a forest reserve or protected area, is an offence regardless of the absence of any action to put that agreement into effect. Thus conniving does not necessarily involve any act of felling, cutting, etc. This must be contrasted with ‘causing another person’ to fell, cut, etc, which evidently requires that there must be an act of felling, cutting, etc by the other person if the accused is to be convicted of ‘causing’ that other person to do those things.<sup>24</sup>

### 5.2.5 Offences relating to fires

It is an offence to light or cause to be lit a fire in a forest reserve, protected forest area or village forest area<sup>25</sup> in contravention of section 39.<sup>26</sup> The said section 39 prohibits

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<sup>22</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at 2770 para 34-4. See also the leading case of *Director of Public Prosecutions v Dr Hastings Kamuzu Banda and Others* MSCA Criminal Appeal No. 21 of 1995 (commonly known as “the Mwanza Murders Case”) (copy of the judgment was available on <http://www.judiciary.mw> when accessed on 03 October 2005) where the court, among other things, said: ‘At law, each of the four persons who initially hatched the plot and agreed to kill the four victims would have committed the crime known as “conspiracy”. The crime would be complete as soon as the agreement was reached.’

<sup>23</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at 2772 para 34-12. In *R v Anderson* [1986] AC 27 at 39 Lord Bridge of Harwich said: ‘But, beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.’ Similarly in *Yip Chiu-Cheung v R* [1995] 1 AC 111 at 118 Lord Griffiths (delivering the judgment of the Privy Council) said: ‘The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence.’ The foregoing two quotations seem to suggest that all persons in a conspiracy must intend to play an active part in the agreed course of conduct, but this is not so. A person who organizes a crime and engages others to carry it out is equally guilty of conspiracy whether or not he intends to play an active role in it thereafter: per O’Connor LJ in *R v Siracusa* 90 Cr App R 340 at 349.

<sup>24</sup> For the meaning of ‘cause’ reference must be made to segment 4.3.15 in Chapter 4 hereof.

<sup>25</sup> According to section 2 of the Forestry Act a village forest area is an area of customary land established as such by an agreement under section 30 of the Forestry Act. The said section 30 states that, notwithstanding



lighting a fire or causing a fire to be lit in any forest reserve or protected forest area except in places designated for that purpose or as otherwise authorised by an officer.<sup>27</sup> The designated place may be closed by order of an officer and no person shall during such closure permit a fire to be lit in such place. The section further prohibits lighting fire or causing fire to be lit in any village forest area except with the authorisation of a management authority<sup>28</sup> subject to the provisions and conditions of a forest management agreement.<sup>29</sup> All these offences springing from section 39 are punishable by a fine of MWK10 000 and imprisonment for a term of five years.<sup>30</sup>

It is also an offence to permit a fire to burn out of control in, or to spread to, a forest reserve or village forest area.<sup>31</sup> It is noteworthy that protected forest areas are not included in this offence. The effect of this omission is that a person may not incur criminal liability under the Act if he permits a fire to burn out of control in, or to spread to, a protected forest area. There is no satisfactory reason for this omission. In the circumstances it is suggested that an amendment be effected to insert the words

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anything contained in the Act, a village headman may, with the advice of the Director of Forestry, demarcate on unallocated customary land a village forest area which shall be protected and managed in the prescribed manner for the benefit of that village community. Section 31 instructs the Director of Forestry to enter into a forest management agreement with a management authority for the proper management of the village forest area. By 'management authority' is meant a person designated as the management authority pursuant to the agreement establishing the village forest area: section 2 of the Forestry Act.

<sup>26</sup> Section 65(1) of the Forestry Act.

<sup>27</sup> By 'officer' is meant the Director of Forestry and any officers subordinate to him, who are responsible for the administration of the Act: section 2 as read with section 4 of the Forestry Act.

<sup>28</sup> As stated above, 'management authority' is a person designated as the management authority pursuant to an agreement establishing the village forest area.

<sup>29</sup> According to section 31(1) the forest management agreement must provide for: (a) the specifications of the nature of the forestry and other practices to be followed; (b) the assistance to be provided by the Department of Forestry and provision for use and disposition of the produce and revenue therefrom; (c) allocation of land to individuals or families for afforestation and revocation of such allocation if applicable provisions of the agreement are not adhered to by the occupier of the land so allocated; (d) formation of village natural resources management committees for the purposes of managing and utilising village forest areas. By 'village natural resources management committee' is meant a committee elected by stakeholders of the village forest areas: section 2.

<sup>30</sup> Section 65(1) of the Forestry Act.

<sup>31</sup> Section 65(2) of the Forestry Act.

‘protected forest area’ in section 65(2) between the words ‘reserve’ and ‘or’. After this amendment section 65(2) of the Forestry Act will read as follows: ‘Any person who permits to burn out of control in, or to spread to, a forest reserve, protected forest area or village forest area shall be guilty of an offence and liable upon conviction to a fine of K10,000 and to imprisonment for a term of five years.’

In addition an officer may require any person to assist in averting or extinguishing any fire threatening a forest reserve, protected forest area or village forest area.<sup>32</sup> Refusal, without reasonable cause,<sup>33</sup> to render such assistance is an offence punishable by a fine of MWK2 000 (US\$15) and imprisonment for a term of one year.<sup>34</sup>

### **5.2.6 Offences relating to wildlife**

Section 66 provides that, subject to the provisions of the Act, any person who –

- (a) pursues, kills, hunts, molests, captures or injures any animal, bird, fish or reptile; or
- (b) collects eggs or spawns from a forest reserve, protected forest area or village forest area,

commits an offence and is liable upon conviction to a fine of MWK10 000 and to imprisonment for a term of five years.

Two observations may be made about this section. Firstly, the animal, bird, fish or reptile referred to in section 66(a) need not be in a forest reserve, protected forest area or village forest area; it may be outside these areas. Secondly, it appears that the words ‘subject to the provisions of this Act’ do not have much significance, for the Act does not make

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<sup>32</sup> Section 41 of the Forestry Act.

<sup>33</sup> For the meaning of ‘reasonable cause’, see segment 4.3.25 in Chapter 4 hereof.

<sup>34</sup> Section 65(3) of the Forestry Act.

provision for pursuing, killing, hunting, molesting, capturing or injuring any animal, bird, fish or reptile outside a forest reserve, protected forest area or village forest area. So in respect of animals, birds, fish or reptiles outside these areas, the words 'subject to the provisions of this Act' have no effect at all. For those animals, birds, fish or reptiles inside the areas, the words have significance in so far as the animals, birds, fish and reptiles are considered to be forest produce.<sup>35</sup> A number of provisions in the Act deal with forest produce and such provisions include sections 45 and 46 which permit the taking, collection and removal of forest produce from a forest reserve and protected forest area under the authority of a licence. A person having such licence who pursues, kills, hunts, molests, captures or injures any animal, bird, fish or reptile will not incur criminal liability partly because of the operation of the 'subject to' clause in section 66. With regard to section 66(b), it may be observed that eggs and spawns<sup>36</sup> do not fall within the definition of forest produce and there is no provision of the Act dealing with them. The result of this is that the 'subject to' clause does not have significance in relation to section 66(b).<sup>37</sup>

### **5.2.7 Offences relating to possession or trafficking of forest produce**

It is an offence to knowingly<sup>38</sup> receive forest produce illegally. It is also an offence to be found in possession<sup>39</sup> of forest produce without a permit. In addition, any person who

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<sup>35</sup> The definition of forest produce in section 2 of the Act arguably encompasses 'any animal, bird, fish or reptile' as it includes vertebrates, invertebrates and wild animals.

<sup>36</sup> The meaning of 'spawn' adopted in the argument in the text is the minute eggs of fishes and various other oviparous animals. The argument does not apply to the other meaning of 'spawn' which is the young brood hatched from such eggs of fishes and oviparous animals, while still in an early stage of development. The young brood certainly qualify as forest produce as defined in section 2 of the Act and so those provisions relating to forest produce would affect them.

<sup>37</sup> If 'spawns' are regarded as the young brood of fishes and other oviparous animals and consequently part of forest produce, the 'subject to' clause does have significance in relation to section 66(b) much in the same way as the 'subject to' clause has significance in respect of animals, birds, fish and reptiles inside forest reserves, protected forest areas and village forest areas as explained when discussing section 66(a).

<sup>38</sup> For the meaning of 'knowingly', reference must be made to segment 4.2.4 in Chapter 4 hereof.

<sup>39</sup> For an explanation of the effect of 'possession', see segment 4.3.6 in Chapter 4 hereof.

trafficks<sup>40</sup> in forest produce without a licence commits an offence.<sup>41</sup> Any person who is convicted of any of these offences is liable to a fine of MWK20 000 and to imprisonment for a term of ten years.<sup>42</sup>

### **5.2.8 Offences relating to obstruction of officers**

Any person who obstructs or hinders any officer in the performance of his functions under the Act commits an offence.<sup>43</sup> Similarly any person who wilfully or recklessly gives to any officer false or misleading information which the officer is entitled to obtain under the Act is guilty of an offence.<sup>44</sup> Further, any person who refuses to furnish to any officer on request, particulars or information which the officer is entitled to obtain under the Act, commits an offence.<sup>45</sup> All these persons are liable upon conviction to a fine of MWK10 000 and to imprisonment for five years.<sup>46</sup>

### **5.2.9 Offences relating to official documents or stamps**

Section 70 provides that it is an offence, without lawful authority –

- (a) to counterfeit or alter any licence, permit or pass required under the Act;
- (b) to alter or deface any prescribed document issued under the Act; or

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<sup>40</sup> For the ordinary meaning of ‘trafficking’, reference must be made to segment 4.2.7 in Chapter 4 hereof.

<sup>41</sup> Section 68(1) of the Forestry Act.

<sup>42</sup> Section 68(2) of the Forestry Act.

<sup>43</sup> Section 69(a) of the Forestry Act. For the meaning of ‘obstruct’, see segment 4.3.2 in Chapter 4 hereof.

<sup>44</sup> Section 69(b) of the Forestry Act. For an explanation of this offence, reference must be made to the discussion of a similar offence under segment 4.3.2 in Chapter 4 hereof. The meaning of ‘recklessly’ is set out in segment 4.1 in Chapter 4 hereof.

<sup>45</sup> Section 69(c) of the Forestry Act. This offence is similar to the offence in section 15(b) of the National Parks and Wildlife Act (NAPWA) discussed in segment 4.3.2 in Chapter 4 hereof. Reference must be made to that segment.

<sup>46</sup> Section 69 of the Forestry Act.

(c) to make upon or affix to any forest produce a mark used in connection with forest produce by the Department of Forestry.<sup>47</sup>

These offences are punishable by a fine of MWK20 000 and imprisonment for a term of ten years.

### **5.2.10 Deposition of litter and waste**

It is an offence to deposit litter or noxious waste in forest reserves, protected forest areas and village forest areas.<sup>48</sup> Such deposition may, however, be permitted under a licence.<sup>49</sup> Offenders are liable to a fine of MWK5 000 and to imprisonment for a term of two years.<sup>50</sup>

### **5.2.11 Offences relating to import, export and re-export of forest produce**

It is an offence to import, export or re-export or to attempt to import, export or re-export any forest produce – (a) through any place other than a customs post or port; or (b) without producing to a customs officer a valid licence to import or export or re-export the forest produce as the case may be. Any person found guilty of this offence is liable to a fine of MWK10 000 and to imprisonment for a term of not less than five years.<sup>51</sup>

In many ways this offence is similar to the offence created by section 98 of NAPWA,<sup>52</sup> the major difference between the two offences being the penalties prescribed. In many

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<sup>47</sup> It appears that the marks referred to here are those prescribed in regulations for use by officers in connection with forest produce. The Minister is empowered to promulgate the regulations prescribing such marks: section 86(h) of the Forestry Act.

<sup>48</sup> Section 44 as read with section 72 of the Forestry Act.

<sup>49</sup> *Ibid.*

<sup>50</sup> Section 72 of the Forestry Act.

<sup>51</sup> Section 73 of the Forestry Act.

<sup>52</sup> For a discussion of this offence, see segment 4.3.36 in Chapter 4 hereof.

offences including that created by section 98<sup>53</sup> one of the penalties is stated as ‘imprisonment for a term of X years’. It is settled in Malawian criminal law that this wording allows the court discretion to impose a term of imprisonment less than X years.<sup>54</sup> It is arguable that this discretion is not available where the penalty is stated as ‘imprisonment for a term of not less than X years’ as provided for in section 73 (the present offence). This wording suggests that the court is bound to impose the X years as the minimum. Accordingly the minimum term of imprisonment for the offences relating to import, export or re-export of forest produce is five years.

### **5.2.12 Additional penalties or orders**

The Forestry Act provides that upon conviction of any person of an offence under the Act, the court may, in addition to any other penalty imposed by the Act, order:

- (a) that any forest produce which has been used in the commission of the offence be forfeited to the Government;
- (b) that where any forest produce has been damaged, injured or removed in the commission of the offence, the person convicted pay compensation equivalent to the value of the forest produce so damaged, injured or removed;
- (c) that the person convicted pay ten times the amount of any royalties and other fees which, had the act constituting the offence been authorised, would have been payable in respect thereof;
- (d) the demolition and removal of any building, enclosure, hut, kraal, structure or anything erected, standing or being in the area in contravention of the Act;
- (e) the destruction, uprooting or removal of any crop standing or being in the area in contravention of the Act;

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<sup>53</sup> The penalties for the offence created by section 98 of NAPWA are set out in section 111 of NAPWA.

<sup>54</sup> *Joseph Kungwezo Banda v Republic* Criminal Appeal No. 134 of 1996 (unreported but copy available on <http://www.judiciary.mw> when accessed on 03 October 2005). This case involved the offence of unlawful wounding contrary to section 241 of the Penal Code.

(f) the seizure of any carrier or vehicle which has been used in committing the offence.<sup>55</sup>

It is noteworthy that the word employed in the order numbered (a) is 'used' which is arguably narrower than 'involved'. The forest produce to be forfeited is that 'used' in the commission of the offence. This arguably excludes forest produce that is concerned or involved in the commission of the offence, short of being used. It is possible for forest produce to be 'involved' in the commission of an offence while not being 'used' in the commission of the offence. For instance, the clearing of land in a forest reserve – an offence under section 64(d) of the Forestry Act – may involve forest produce but such clearing may not use forest produce: a bulldozer clearing the land does not use forest produce, but its actions may affect or involve forest produce.

The order numbered (b) has the potential to take away from the offender the profits of the crime. In this way offenders are likely to learn that crime under the Act does not pay. The order may also assist government in the rehabilitation of the damaged or injured forest produce.

The order numbered (c) makes reference to royalties and other fees. The rates and manner of payment of these royalties and fees are required to be prescribed in regulations promulgated by the Minister.<sup>56</sup> In this connection, it may be noted that the Director of Forestry may direct in writing that any royalties or fees be waived in whole or in part for a specified period.<sup>57</sup> The effect of this is that order (c) may not be made by a court if it can be shown that the offence was committed at a time when a full waiver of royalties and fees was in place.

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<sup>55</sup> Section 74 of the Forestry Act.

<sup>56</sup> Section 86(c) of the Forestry Act.

<sup>57</sup> Section 49 of the Forestry Act.

In orders numbered (d) and (e) the demolition, destruction, uprooting and removal are restricted to things in an area in contravention of the Act. This restriction takes cognizance of the fact that some things may be in the area on the authority of a licence or other permission granted by law.

The provision for seizure as an additional remedy or punishment in order numbered (f) raises one difficulty relating to disposal of the carrier or vehicle. In general terms seizure involves taking possession of a thing.<sup>58</sup> Disposal of the thing seized is beyond the scope of seizure. On most occasions legislation provides for seizure before court proceedings begin or at least before conviction of the accused. Contrary to this general practice, the provision for seizure in order numbered (f) above allows the court to order seizure of a carrier or vehicle after conviction. The difficulty is that section 74(1)(f) – which contains the provision for seizure – does not state what should happen to the carrier or vehicle after the seizure. Will the carrier or vehicle be returned to the owner after some time? Will the carrier or vehicle be forfeited to the Government? Will the carrier or vehicle be sold? The lacuna is glaring and there is need to fill it.

In the absence of clear guidance on the matter, it is possible that a court faced with the difficulty may resort to those provisions of the Act that deal with seizures outside court and disposal of things seized outside court. These provisions<sup>59</sup> state that any officer or police officer may seize, inter alia, any article which the officer or police officer reasonably suspects of having been used in committing an offence under the Act.<sup>60</sup> The

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<sup>58</sup> It is clear from the literature that seizure may involve detention of individuals. It may also involve obtaining possession of contraband, fruits, instrumentalities and evidence of crime: Michele G Hermann *Search and Seizure Checklists* 2ed New York: Clark Boardman 1982 at 2 – 3; Richard Stone *Entry, Search and Seizure: A Guide to Civil and Criminal Powers of Entry* 2ed London: Sweet and Maxwell 1989 at 275 – 276; John Wesley Hall Jr. *Search and Seizure* New York: Lawyers Co-operative Publishing Co 1982 at 10; Roger E Salhany *The Police Manual of Arrest, Seizure and Interrogation* 4ed Toronto: Carswell 1988 at 99; Polyvios G Polyviou *Search and Seizure: Constitutional and Common Law* London: Duckworth 1982 at 20 – 93. See also generally James A Fontana *The Law of Search and Seizure in Canada* 2ed Toronto: Butterworth 1984.

<sup>59</sup> Sections 9, 10 and 11 of the Forestry Act.

<sup>60</sup> According to section 9(3) of the Forestry Act a village natural resources management committee may seize and detain any forest produce or article which the village natural resources management committee



seized article is required to be kept safely in the custody of an officer until the case in connection with which the article was seized has been tried and concluded or a decision not to prosecute has been made. Where the person has been tried and convicted, the article is to be disposed of at the discretion of the Director of Forestry.<sup>61</sup> Drawing upon these provisions the court may perhaps order that upon seizure of the carrier or vehicle, it should be disposed of at the discretion of the Director of Forestry. It is likely that such an order will be challenged on a number of grounds. For example, it may be contended that this being the end of the criminal process, it is wrong for the court to pass a sentence (that is, the order of seizure and then disposal by the Director) which gives a discretion to a non-judicial officer regarding sentence, a development which may ultimately lead to further court proceedings or even injustice. In light of this and other possible challenges, it is suggested that the best way out of the difficulty is to amend section 74(1)(f) with a view to introduce an indication as to what should happen to the carrier or vehicle after the seizure ordered by the court. In this regard, it is suggested that the section should empower the court to order a return of the carrier or vehicle after a period of time, or to order that the carrier or vehicle be sold and the money paid into the Forest Development and Management Fund,<sup>62</sup> depending on the seriousness of the offence.<sup>63</sup> Returning the carrier or vehicle after a period of time after seizure has the effect of punishing the offender through deprivation of use between the date of seizure and the date of return. Selling the carrier or vehicle is the more serious penalty and should be reserved for the

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reasonably suspects of having been obtained or removed from the village forest area in contravention of rules made by such village natural resources management committee.

<sup>61</sup> These provisions also relate to seized forest produce. Further, the forest produce or article may also be kept by a village natural resources management committee. In that event the forest produce or article may, upon conviction of the person, be disposed of at the discretion of the village natural resources management committee according to its rules: see sections 10 and 11(2)(a) of the Forestry Act.

<sup>62</sup> The Forest Development and Management Fund is established under section 55 of the Forestry Act. The objects of the Fund are the conservation, augmentation and management of forest resources and forest lands in Malawi and it may be applied to, among other things, the inculcation of the twin concepts of multiple purpose management and sustainability in forestry into local communities: sections 58 and 59 of the Forestry Act.

<sup>63</sup> The question whether penalties like these may amount to cruel punishment has been considered under segment 4.3.39 in Chapter 4 hereof. Reference must therefore be made to that segment.

worst of offences. The suggested amendment may be effected by adding after the word ‘offence’ in section 74(1)(f) the following words:

‘and the return of the carrier or vehicle at the expiry of a specified period or the sale of the carrier or vehicle, provided that –

- (i) in the event of seizure and subsequent return, the carrier or vehicle shall be kept at the Department of Forestry, a police station or any other proper place; and
- (ii) in the event of seizure and sale, the proceeds of such sale shall be paid into the Fund.’<sup>64</sup>

The suggestion that the proceeds of the sale should be paid into the Fund requires a complementary amendment of section 55(2) of the Forestry Act so that the proceeds can legally be paid into the Fund. In the present state of the Act, it is not possible for such payment to be made. The amendment of section 55(2) should be by way of adding another paragraph, that is paragraph (g) which should read as follows: ‘(g) payments made into the Fund under section 74(1)(f)’.

### **5.2.13 Compounding offences**

Instead of clinging to criminal prosecution on all occasions, the Director of Forestry may authorise any officer not below the rank of Principal Forestry Officer to compound an offence against the Act by charging a sum of money not exceeding one and half the maximum fine prescribed for the offence and from that moment no further court proceedings shall be taken. The Director of Forestry may give such authority only where he is satisfied that an offence against the Act has been committed, and the person who has committed the offence consents in writing to compounding.<sup>65</sup> It appears that the

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<sup>64</sup> It is provided by section 74(2) that where an order is made in terms of section 74(1) in respect of forest produce from a village forest area, the forest produce or article ordered to be forfeited and the amount ordered to be paid shall be forfeited and paid to the management authority in respect of that area.

<sup>65</sup> Section 75(1) of the Forestry Act.

Director cannot give authority to compound generally whenever an appropriate case arises; he is required to give the authority when 'an offence against this Act has been committed'. Every time an offence is committed and the accused consents to compound, the Director must authorise an appropriate officer to go ahead to compound. The advantage of this procedure lies in the fact that the Director is in effect in control of the compounding. There is scope for the Director to refuse compounding where he is convinced that the best way of handling the case is by way of criminal prosecution. It is suggested that a good example of a situation where the Director should refuse compounding is where the accused is a repeat offender (recidivist) and payment of fines or money does not seem to deter him and the Director feels that the State should ask the court to sentence the offender to a term of imprisonment.

Several other things must be noted about compounding. First, where a prosecution is actually pending in respect of an offence, compounding may only be done with the consent of the court presiding over the prosecution.<sup>66</sup> Second, if an article was seized in connection with the offence compounded, the officer compounding the offence is required to return the article to the owner.<sup>67</sup> Third, any money received from compounding an offence in respect of forest produce from a village forest area is required to be paid to the management authority in respect of that area.<sup>68</sup> The Act also provides in section 75(4) that 'any article confiscated under [section 75(1) or (2)] in respect of forest produce from a village forest area shall be paid to the management authority of that area.'<sup>69</sup> A perusal of section 75(1) reveals that it does not provide for confiscation of any article and so the reference in section 75(4) to section 75(1) does not have any effect. It is section 75(2) which provides for articles seized (confiscated). The problem with the reference in section 75(4) to section 75(2) is that the articles are required to be 'paid' to the management authority. Certainly it is semantically wrong to talk in terms of 'paying

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<sup>66</sup> Section 75(3) of the Forestry Act.

<sup>67</sup> Section 75(2) as read with section 11(1)(b) of the Forestry Act.

<sup>68</sup> Section 75(4) as read with section 75(1) of the Forestry Act.

<sup>69</sup> Section 75(4) of the Forestry Act.

an article' to the management authority. Even if the word 'paid' was to be construed as 'given' in respect of the article, the difficulty will not be cleared since the giving of the article to the management authority does not fit in the scheme of disposals of seized articles provided for under section 11 of the Act. In the circumstances it is suggested that the reference to 'article' in section 75(4) should be deleted in order to streamline the language and content of the provision. To this end, it is proposed that the words 'and any article confiscated' and 'or (2)' should be deleted from the section. After effecting these changes, section 75(4) will read: '(4) Any money received under subsection (1) in respect of forest produce from a village forest area shall be paid to the management authority in respect of that area.'

Lastly, in the case of money received from compounding offences other than offences in respect of forest produce from a village forest area, the Act does not indicate where the money is to be paid. It is suggested that such money should be paid into the Forest Development and Management Fund in order to prevent misuse of the money at departmental level. However, it is not possible at present for such money to be paid into the Fund as such money does not fall into any category of funds permitted or required to be paid into the Fund. It is therefore necessary to amend section 55(2) of the Act to allow the money from compounding to be paid into the Fund. The amendment should be by way of adding a new paragraph to section 55(2). In view of the amendment to section 55(2) suggested under segment 5.2.12 hereof, it is proposed that the new paragraph should be numbered (h). The amendment should be in the following terms: '(h) such sums as may be received from compounding offences other than offences in respect of forest produce from a village forest area.'

### **5.3 Plant Protection Act 11 of 1969**

#### **5.3.1 General**

The Plant Protection Act 11 of 1969 ("PPA") is one of the few environmental statutes that were enacted by independent Malawi in the first five years after the end of political

colonialism in the country. Its declared purpose or objective is to provide for the eradication of pests and diseases destructive to plants and to prevent the introduction and spread of pests and diseases destructive to plants.<sup>70</sup> It has twelve sections and only one of these (section 11) provides for criminal offences. These offences are wide-ranging and they cater for wrongs under both the principal Act and subsidiary legislation. More will be said about these offences in the discussion that follows.

### **5.3.2 Resisting or obstructing inspector**

It is an offence to wilfully resist, obstruct, impede or hinder an inspector in the exercise of his powers or the performance of his duties under the PPA or any regulations made under it.<sup>71</sup> The inspector referred to here is appointed by the Minister under the Act<sup>72</sup> and is empowered, among other things, to enter upon and inspect at all reasonable times any land, premises, buildings, vehicles or vessels on or in which growing media<sup>73</sup> or plants may be found, or on or in which he reasonably suspects that a pest may be found. He may declare any plants, growing media or containers to be infested with a pest and then order the destruction at any time of the plants so declared or any host plants.<sup>74</sup> If he reasonably suspects the presence of a pest on land, premises or in a building, he may declare the area in which the land, premises or building is situated to be an infested area,<sup>75</sup> and in writing prohibit for a period not exceeding fourteen days, the removal from the land, premises or building of growing media, plants, containers or other things whatsoever capable of spreading a pest. An inspector may also order the seizure, detention and destruction

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<sup>70</sup> Long title of the Act.

<sup>71</sup> Section 11(1)(a) of the PPA.

<sup>72</sup> Section 3 of the PPA.

<sup>73</sup> Section 2 of the PPA defines growing medium as a medium, including soil, capable of being used for the propagation or culture of plants.

<sup>74</sup> According to section 2 of the PPA, a host plant is a plant capable of being the host of a pest.

<sup>75</sup> Section 2 of the PPA defines infested area as any area or place in which a pest exists.

without compensation of any imported growing medium or plant or injurious organism<sup>76</sup> or invertebrate, together with the container thereof, which is imported in contravention of the Act, regulations under it or a permit to import issued under the Act or regulations and which is not at the time of importation accompanied by a certificate of origin, phytosanitary certificate<sup>77</sup> or other prescribed document.<sup>78</sup> Resisting, obstructing, impeding or hindering an inspector in the exercise of any of these powers is an offence. It must be noted, however, that the proscribed conduct is required to be ‘wilful’. For the meaning of ‘wilful,’ reference must be made to segment 4.3.2 in Chapter 4 hereof.

### **5.3.3 Contravention of Act or regulations**

It is an offence to contravene or fail to comply with any of the provisions of the PPA or regulations made under it or any order or direction made under the PPA or the regulations with which it is one’s duty to comply.<sup>79</sup> This offence contains a general criminalization clause and for reasons stated in segment 4.3.38 in Chapter 4 hereof, the literal meaning of this offence must be disregarded. Instead a court must engage in a pick and choose exercise aimed at identifying the provisions of the Act and regulations which qualify as proscriptions the contravention of which amounts to a criminal offence. It is suggested that, on account of the peremptory or imperative language used and/or the other ways in which they are couched, the following are some of the provisions the contravention of which will amount to an offence.

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<sup>76</sup> An injurious organism is defined by section 2 of the PPA as any organism or like agent including a virus which is: (a) inimical to the growth or existence of living plants; (b) injurious to plants or plant products; or (c) capable of producing a disease.

<sup>77</sup> By phytosanitary certificate is meant a certificate issued by an officer of the plant protection service of Malawi, or of any other country concerned, as to the health of a plant or a growing medium: section 2 of the PPA.

<sup>78</sup> Section 5 of the PPA. These are not the only powers of an inspector. Other powers of an inspector are set out elsewhere in the PPA (for instance in section 4) and in the regulations (for example in regulation 8 of the Plant Protection (Import) Regulations (GN 107/1969).

<sup>79</sup> Section 11(1)(b) of the PPA.

An owner of land or premises is required to take such measures as are reasonably necessary for the eradication, reduction or prevention of the spread of a pest or disease which an inspector may in writing order him to take.<sup>80</sup> An owner of land, premises, a building, vehicle or vessel, or of a growing medium or plant, and the agent of such owner is required to give such information and provide such labour and facilities as the inspector may require for the purposes of carrying out an inspection under the Act.<sup>81</sup> No person is allowed to export or cause to be exported any plants from Malawi without having applied for and obtained a phytosanitary certificate relating to such plants.<sup>82</sup> Further, no person is permitted, save as is otherwise provided, to import any vegetative material, mushroom or other fungi, spawn, seeds or any unmanufactured plant product, or any rooting composite, soil or other growing media, unless a permit authorizing such importation is submitted.<sup>83</sup> In addition, no person may import the following things without the written consent of the Minister:

- (a) any plant packed in soil which is not the product of a nursery approved by the Permanent Secretary and bearing a label certifying such origin;
- (b) fresh fruits from Asia or the Pacific Islands;
- (c) any plant or part of a plant specified in the First Schedule to the regulations;

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<sup>80</sup> Section 4(1) of the PPA.

<sup>81</sup> Section 6 of the PPA. This section also demands that such owner must afford an inspector access to the land, premises, etc. Failure to grant such access arguably falls under the offence of resisting or obstructing an inspector. Accordingly, it has not been included in the present list of proscribed acts.

<sup>82</sup> Regulation 4(1) of the Plant Protection (Export) Regulations (GN 106/1969 and GN 32/1982).

<sup>83</sup> Regulation 4(1) of the Plant Protection (Import) Regulations (GN 107/1969). The words 'save as is otherwise provided' suggest that in some circumstances the listed items may be imported lawfully without an import permit. Such exemption is exemplified by regulation 7 of the Plant Protection (Import) Regulations which lists a number of plants or plant associated items which may be imported without a permit. However, it must be noted that some things do not enjoy such exemptions, for instance any live insect or other invertebrate and any plant pathogen: importation of these may only be done with a permit – regulation 4(2) of the Plant Protection (Import) Regulations. It must further be noted that 'submit' is defined in regulation 2 of the Plant Protection (Import) Regulations as meaning, in relation to a permit or a phytosanitary or other certificate relating to a consignment of growing media, injurious organisms, invertebrates or plants, the submission of the permit or certificate to an inspector at the place of inspection or port of entry of the consignment.

- (d) any grain, pulse or similar produce unless it is accompanied by a phytosanitary certificate stating that it has been fumigated in an approved manner not more than fourteen days prior to entry into Malawi;
- (e) rooted vegetative material of any plant, unless it is certified as having been rooted in a sterile medium, from any country outside eastern and southern Africa;<sup>84</sup> and
- (f) vegetative material of any plant species or cultivar from any country outside eastern and southern Africa.<sup>85</sup>

With regard to fumigation, it is declared that no person shall commence any fumigation unless he has in his possession a Record of Fumigation Form and a Certificate of Clearance Form.<sup>86</sup> It is suggested that contravention of any of these provisions amounts to an offence in terms of section 11(1)(b) of the PPA.

#### **5.3.4 Contravention of conditions of a permit or other document**

It is an offence, without reasonable cause, to contravene or fail to comply with any of the conditions of a permit or other document issued in accordance with the Act or its regulations.<sup>87</sup> The term 'reasonable cause' has been discussed in Chapter 4 hereof (especially in segment 4.3.25) and so reference must be made to that chapter. As for the rest of the offence, it may be noted that the Act and its regulations require that certain acts be performed under the authority of permits, certificates or other documents. Proceeding with the acts in the absence of the permit, certificate or other document constitutes an offence. Such offence is partly the subject of the immediately foregoing

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<sup>84</sup> Regulation 2 of the Plant Protection (Import) Regulations states that by 'eastern Africa' in the regulations is meant Kenya, Uganda and Tanzania, and by 'southern Africa' is meant Angola, Botswana, Lesotho, Malawi, Mozambique, Rhodesia (that is, Zimbabwe), South Africa, Swaziland and Zambia.

<sup>85</sup> Regulation 10(1) of the Plant Protection (Import) Regulations.

<sup>86</sup> Regulation 4 of the Plant Protection (Fumigation) Regulations (GN 114/1973). The Record and Certificate are set out in the Second Schedule to the Regulations.

<sup>87</sup> Section 11(1)(c) of the PPA.



segment (5.3.3). The concern in the present offence is not on the failure to obtain any of those documents but rather on contravention of or failure to adhere to the conditions set out in the document. The significance and scope of the word ‘conditions’ was dealt with in segment 4.3.12 in Chapter 4 hereof.

### 5.3.5 Introducing a pest in Malawi

It is an offence to maliciously introduce a pest on to land or premises in Malawi.<sup>88</sup> The word ‘maliciously’ has been considered in a number of cases. In a nutshell, it means ‘an actual intention to do the particular kind of harm that was in fact done, or recklessness as to whether such harm should occur (*i.e.* the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it); it is neither limited to nor does it require any ill will towards the person injured.’<sup>89</sup> As for the word ‘pest’, it takes a specialized meaning. Section 2(1) of the PPA defines it as an injurious organism which has been declared to be a pest under section 2(2) of the PPA. The latter subsection provides that for the purposes of the Act, the Minister may, by notice, declare any injurious organism to be a pest either generally or in respect of a particular type of plant and either with a view to its control or the prevention of its introduction or spread, or for some other purpose. The effect of these provisions is that not everything known as a pest in common parlance qualifies as a pest under the Act. It is only those organisms whether known as pests in common parlance or not – which have been declared to be pests by the Minister that will qualify as pests under the Act. It is the introduction of such ‘declared pests’ that is proscribed under the present offence.

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<sup>88</sup> Section 11(1)(d) of the PPA.

<sup>89</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17-45. Archbold continues to say that in *R v Caldwell* [1982] AC 341 and *R v Lawrence* [1982] AC 510 it was laid down that foresight that the prohibited harm may occur is not an essential ingredient of recklessness in general, but that those decisions, however, do not affect the more restricted meaning of ‘recklessly’ which forms part of the definition of ‘maliciously’. In support of this Archbold cites a number of cases including *W (a Minor) v Dolbey* 88 Cr App R 1, DC; *R v Morrison (L.A.)* 89 Cr App R 17, CA and *R v Savage; DPP v Parmenter* [1992] 1 AC 699, HL. See also *R v Cunningham* [1957] 2 QB 396 and *R v Mowatt* [1968] 1 QB 421.

### 5.3.6 Failure to produce permit or other document

It is an offence for any person to fail or refuse to produce to an inspector (on being required to produce) a permit, certificate or other document which he is required to have in accordance with the Act or any of the regulations made under it.<sup>90</sup> It must be noted that the essence of this offence is the failure or refusal to produce the document and not necessarily the absence of the document. It is possible for a person to have the document but, on being called upon to do so, to fail or refuse to produce the document: even though that person has the document, he will still be convicted of this offence. The words ‘which he is required to have in accordance with this Act, or any regulations made thereunder’ are merely describing the document at stake; they are not meant to introduce absence of the document as a necessary element of the offence. This offence may be likened to the offence of failure to produce a driving licence upon being required to do so by a traffic officer: the motorist may have the driving licence at home and yet his failure to produce it will amount to an offence.

### 5.3.7 Failure to give information

Any person who fails or refuses without reasonable cause to give information to an inspector when required to do so in accordance with the Act or knowingly gives false or incomplete information, commits an offence.<sup>91</sup> It is clear that there are two ways in which the offence may be committed. Firstly, it may be committed by failing to give information. To this limb of the offence a ‘reasonable cause’ defence may be raised, that is, proof that there was reasonable cause for the failure or refusal to give the information will defeat a criminal case based on this limb. Secondly, the offence may be committed by knowingly giving false or incomplete information. It is suggested that whether the offender gave the false or incomplete information ‘knowingly’ depends on the facts as the offender believed the information to be. If the offender believed that the information

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<sup>90</sup> Section 11(1)(e) of the PPA.

<sup>91</sup> Section 11(1)(f) of the PPA.

was true or complete, although in fact it was false or incomplete, the offender cannot be found to have knowingly given false or incomplete information.<sup>92</sup>

### **5.3.8 False declaration or statement**

It is proscribed for any person:

- (a) to make a declaration or statement which he knows to be false in any particular or does not know or believe to be true; or
- (b) to knowingly make use of a declaration, statement or document containing the same.

Doing any of these acts is an offence if the purpose for doing it is to obtain for himself or any other person, the issue of a permit, certificate or other document.<sup>93</sup>

### **5.3.9 Penalties for offences under the PPA**

Section 11(1) of the PPA prescribes the penalties for the offences discussed above. It states that a person convicted of maliciously introducing a pest on to land or premises in Malawi is liable to a fine of £400 and imprisonment for four years. It further states that the penalties for the other offences are a fine of £100 and imprisonment for six months. The reference to pounds (£) and not Malawi Kwacha is a vestige of colonialism. As stated above in the introduction to the PPA (segment 5.3.1) the PPA is one of the first few statutes enacted by independent Malawi. At the time of enacting the PPA it appears that the colonial currency (the pound) was still being used as the currency of the country. Having changed the currency to Malawi Kwacha, it is not justifiable to maintain this reference to pounds. In the premises it is suggested that the reference to pounds should be deleted and replaced with a reference to Malawi Kwacha. It is further suggested that the

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<sup>92</sup> *R v Taaffe* [1984] AC 539 at 546. More on this issue is discussed in segment 4.2.4 in Chapter 4 hereof.

<sup>93</sup> Section 11(1)(g) of the PPA.

amounts of the fine (400 and 100) should be changed to appropriate amounts that reflect the current value of the Malawi Kwacha and that take into account the amounts of fines prescribed under the Environment Management Act 1996 (EMA). In this regard, the offence of contravention of the Act or regulations (discussed under segment 5.3.3 above) should be punishable by a fine of not less than MWK10 000 and not more than MWK500 000 (US\$3 759) and imprisonment for five years.<sup>94</sup> The penalties for the offence of maliciously introducing pest should be a fine of not less than MWK20 000 and not more than MWK1 000 000 (US\$7 519) and imprisonment for ten years.<sup>95</sup> The offences of resisting or obstructing an inspector (segment 5.3.2 above), contravention of conditions of a permit or other document (segment 5.3.4 above), failure to produce permit or other document (segment 5.3.6 above), failure to give information (segment 5.3.7 above) and false declaration or statement (segment 5.3.8 above) should be punishable by a fine of not less than MWK5 000 and not more than MWK200 000 (US\$1 504) and imprisonment for two years.<sup>96</sup>

## **5.4 Waterworks Act 17 of 1995**

### **5.4.1 General**

The Waterworks Act 17 of 1995<sup>97</sup> was enacted with a view to provide for the establishment of Water Boards and water-areas, for the administration of such water-areas, for the development, operation and maintenance of waterworks and waterborne

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<sup>94</sup> This is in line with the penalties for the general offence created under section 61 of the EMA. It may be noted that the PPA's offence of contravention of the Act or regulations is also in the nature of a general offence.

<sup>95</sup> The idea is to achieve uniformity of punishment between this offence and the EMA's pollution offences (section 67 of the EMA). It is arguable that the PPA's offence of introducing pest is akin to the EMA's pollution offences as both are based on the introduction into the environment of something that is environmentally unacceptable.

<sup>96</sup> Most of these offences relate to actions taken by inspectors. Under section 62 of the EMA such offences are punishable by a fine from MWK5 000 to MWK200 000 and imprisonment for two years. The suggestion in the text is meant to align the penalties for the offences under the PPA with the penalties for similar offences under the EMA.

<sup>97</sup> GN 68/1996.

sewerage sanitation systems in Malawi and for related matters.<sup>98</sup> By 'water-area' is meant an area declared as such by the Minister.<sup>99</sup> As for 'waterworks', section 2 of the Act defines it as all reservoirs, dams, weirs, tanks, cisterns, tunnels, boreholes, filter beds, conduits, aqueducts and all other structures or appliances used or constructed for the obtaining, storage, conveyance, supply, measurement or regulation of water which are so used or capable of use by or on behalf of a Water Board, and includes any land occupied by, or under the control of, the Water Board for the purposes of such structures or appliances.<sup>100</sup>

The Waterworks Act repealed the former Waterworks Act, the Blantyre Waterworks Act (cap 72:02 of the Laws of Malawi) and the Lilongwe Waterworks Act 19 of 1986.

In the process of making provision for the various matters specified above, the Waterworks Act creates a number of environmentally relevant criminal offences. The discussion will now focus on these offences.

#### **5.4.2 Passing prohibited matter into sewers or drains**

It is an offence to throw, empty, turn,<sup>101</sup> or suffer or permit to be thrown or emptied or to pass, into any public sewer or into any drain or private sewer communicating with a public sewer, any of the following matters:

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<sup>98</sup> Long title of the Act.

<sup>99</sup> Section 2 of the Waterworks Act.

<sup>100</sup> Section 2 of the Waterworks Act states that the term 'waterworks' does not include any service. It defines service as all pipes, valves, cisterns, casks, fittings and other appliances through which water flows or is intended to flow after leaving the meter on any premises, and which are intended for the supply of water to such premises only.

<sup>101</sup> The word 'turn' here must be understood in the sense of pouring, letting fall or otherwise releasing (contents) from or into a receptacle: <http://www.dictionary.com> (accessed on 23 August 2005). The other meanings of 'turn' do not make much sense in the context of this offence.

- (a) any matter likely to injure the sewer or drain, or to interfere with the free flow of its contents, or to affect prejudicially the treatment and disposal of its contents;
- (b) any chemical refuse or waste steam, or any liquid of temperature higher than forty-three degrees celcius, being refuse or steam which, or a liquid which when so heated, is, either alone or in combination with the contents of the sewer or drain, dangerous or the cause of a nuisance, or prejudicial to health; or
- (c) any petroleum spirit or carbide of calcium.

Offenders under this offence are liable to a fine of MWK200 and to a further fine of MWK100 for each day on which the offence continues after conviction.<sup>102</sup> The prohibited acts are essentially aspects of pollution. In the Environment Management Act 1996 offences relating to pollution are punishable by a fine of not less than MWK20 000 and not more than MWK1 000 000 and imprisonment for ten years.<sup>103</sup> It is suggested that in order to conform with the flagship environmental statute in the country, the penalties under the present offence must be repealed and replaced by those in the Environment Management Act.

#### **5.4.3 Communication of drains or private sewers with public sewers**

Section 33 of the Waterworks Act provides for the procedure for making communication with public sewers. It states that if a person wishes or is required to have his drains or private sewers made to communicate with a public sewer, he must give to the relevant Water Board notice of his proposal in writing in such manner as may be prescribed. The Board may refuse to make the communication on the grounds specified in the section.<sup>104</sup>

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<sup>102</sup> Section 29 of the Waterworks Act.

<sup>103</sup> Section 67 of the EMA.

<sup>104</sup> The grounds are: (1) where it appears to the Board that the mode of construction of the drain or private sewer is not in conformity with the rules in force governing the same; and (2) where the condition of the drain or private sewer or the matter carried or to be carried thereby is such that the making of the

If the Board does not refuse, it must, with all reasonable dispatch, cause the communication to be made by means of a lateral drain to the public sewer but it is not obligatory on the Board to make the communication until the estimated cost of the work has been paid to it or security for payment has been given to its satisfaction. If and so far as the expenses reasonably incurred by the Board in the execution of the work are not covered by the payment made to it, the Board may recover the expenses or balance thereof, from the person for whom the work was done. On this background it is provided in section 33(6) that any person (other than a person lawfully acting on behalf of the Board) who causes a drain or sewer to communicate with a public sewer commits an offence. It is further stated that any person who fails to comply with or acts in contravention of any of the provisions of the section commits an offence. Offenders are liable to a fine of MWK400 (US\$3)

The first offence created by section 33(6) is obviously meant to prevent unprofessional or unqualified persons from effecting the communication. Excluding such persons from this work is likely to reduce incidents of burst or malfunctioning sewers or connecting pipes. The second offence created by section 33(6) is general in nature. From a perusal of section 33 it appears that a person will commit this general offence if he does any of the following:

- (i) upon being required to do so, the person fails to take the necessary steps to have his drains or private sewers made to communicate with a public sewer;
- (ii) the person fails or refuses to lay the drain or private sewer open for inspection by the Board; or
- (iii) the person maintains, repairs or renews from time to time a lateral drain which is supposed to be maintained, repaired or renewed by the Board.

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communication would be prejudicial to the sewerage system of the Board: section 33 of the Waterworks Act.

#### 5.4.4 Offences relating to audit

A Water Board is required to keep a true account of its financial transactions during each financial year.<sup>105</sup> An auditor appointed by the Board is required to audit the accounts of the Board from time to time.<sup>106</sup> The auditor may in writing require the production of all books, deeds, contracts, vouchers, receipts and other documents relating to the accounts and investments of the Board which he may deem necessary for the purpose of the audit. He may in writing summon all such persons as he may think proper to appear before him personally at the offices of the Board at a time to be fixed in such summons, for examination in connection with any documents or matter relating to the audit. For the purpose of such examination, the auditor may administer oaths and take evidence on oath. Any person who without just cause fails or refuses to produce any document the production of which has been duly required by the auditor, commits an offence. In addition, it is an offence, having been so summoned, to neglect or refuse to comply with the summons without just cause. It is also an offence, having appeared before the auditor, to refuse without just cause to be examined on oath or to take such oath. It is further an offence, having taken such oath, to refuse without just cause to answer such questions pertaining to the audit as are put to him. Conviction for any of these offences attracts a penalty of MWK500 (US\$4) and, in default of payment, imprisonment for three months.<sup>107</sup>

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<sup>105</sup> Section 44(1) of the Waterworks Act.

<sup>106</sup> Section 45 of the Waterworks Act.

<sup>107</sup> Section 46 of the Waterworks Act. The section expressly states that conviction for any of the offences in it does not exempt the person convicted from liability to do or perform the act, matter or thing required of him under the section. So, for example, after conviction for refusing to answer questions pertaining to the audit, the person convicted may still be required to answer such questions.



#### 5.4.5 Damage to waterworks, etc and pollution of waterworks, etc

It is an offence to wilfully and negligently cause damage to any waterworks, public fountains, public sewers, services or meters.<sup>108</sup> As demonstrated in segment 4.3.2 in Chapter 4 hereof, the word ‘wilfully’ denotes both intention and recklessness. The word ‘negligently’ expresses ‘a failure to comply with the standards of the reasonable man.’<sup>109</sup> It has been suggested that a person acts negligently ‘if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise.’<sup>110</sup> It must be noted that according to the Act the damage must be caused both wilfully and negligently. So it must be proved that the accused caused the damage intentionally *and* negligently or recklessly *and* negligently. It seems too much to demand proof of both intention and negligence or both recklessness and negligence. Actually there is scope for contending that the existence of intention negatives negligence. Similarly there is room for convincingly arguing that the existence of recklessness (as understood in present-day courts) negatives negligence. If such arguments are accepted, the conclusion will be inescapable that it was not necessary for Parliament to require that the damage should be caused both wilfully and negligently. In the premises it is suggested that to avoid difficulties in the application of this offence, the words ‘wilfully’ and ‘negligently’ should be alternative requirements. To that end, the word ‘and’ that joins those words should be changed to ‘or’.

It is also an offence to unlawfully draw off, divert or take water from ‘the same’ or from any streams or waters by which the waterworks are supplied or to pollute any such water or allow any foul liquid, gas or other noxious or injurious matter to enter into the

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<sup>108</sup> Section 50 of the Waterworks Act. The term ‘public fountain’ is defined by section 2 of the Act as including any fountain, standpipe, valve, tap or appliance used or intended to be used for, or in connection with, the supply of water to the public from the waterworks erected by the Board and which is the property of the Board. ‘Meter’ is defined by the same section 2 as any appliance used to measure or ascertain the amount of water taken or used from the waterworks by means of any service.

<sup>109</sup> Peter Murphy (ed) *Blackstone’s Criminal Practice* London: Blackstone Press 2000 at 28.

<sup>110</sup> P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* London: Sweet and Maxwell 2004 at para 17-43.

waterworks, public sewers or any services connected therewith.<sup>111</sup> It is arguable from the context that the words ‘the same’ refer to waterworks, public fountains, public sewers or services. Meters are excluded from this list as they cannot keep water which can be drawn off, diverted or taken. It must further be observed that the word ‘unlawfully’ only qualifies the drawing off, diversion and taking; it does not qualify the polluting. The meaning and significance of ‘unlawfully’ has been discussed elsewhere.<sup>112</sup>

Any person convicted of an offence under the present segment is liable to a fine of MWK2 000 (US\$15) and to a further penalty of MWK500 (US\$4) for each day during which the offence continues.

#### **5.4.6 Misusing or wasting water**

Any person who wilfully or negligently misuses or wastes or causes or allows to be misused or wasted any water passing into, through or upon or near any premises from any waterworks commits an offence and is liable to a fine of MWK2 000.<sup>113</sup> Liability to such fine does not prejudice the Board’s powers to diminish, withhold, suspend, stop, turn off or divert the supply of water either wholly or in part.<sup>114</sup>

#### **5.4.7 Failure to give notice of change of occupancy**

Every change of occupancy of premises is required to be notified to the Board. It is the responsibility of the new occupier to make such notification within seven days after going into occupation. Failure to give such notification amounts to an offence and the offender is liable to a fine of MWK200.<sup>115</sup>

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<sup>111</sup> Section 50 of the Waterworks Act.

<sup>112</sup> Segment 4.3.34 in Chapter 4 hereof.

<sup>113</sup> Section 51 of the Waterworks Act.

<sup>114</sup> Section 51 as read with section 16 of the Waterworks Act.

<sup>115</sup> Section 52 of the Waterworks Act.

#### **5.4.8 Fraudulent measurements**

It is an offence to alter or cause or permit to be altered, any service with intent to avoid the accurate measurement or register of water by means of any meter, or to obtain a greater supply of water than he is entitled to and to avoid payment therefor or to wilfully or negligently cause damage to any meter. The punishment for this offence is a fine of MWK2 000. The Board may replace or repair the altered service or damaged meter at the expense of the person convicted, and the cost of replacing or repairing any such service or meter may be recovered upon the order of a magistrate in the same manner as any penalty provided for under the Act may be recovered upon conviction.<sup>116</sup> It must be noted that the words 'wilfully or negligently' describe only the causing of damage to a meter; they do not qualify the alteration of a service. The effect of this is that the mens rea for causing damage to a meter is contained in the words 'wilfully or negligently' whereas the mens rea for alteration of a service is partly introduced by the words 'with intent to ...'

#### **5.4.9 Foul accumulation of earth or other matter**

It is an offence to put or accumulate or allow to be put or to remain or to accumulate, on any premises occupied or owned by a person or his servants, any foul, noisome or injurious matter or any earth, deposit or excavated material in such manner or place that it may be washed, fall or be carried into the waterworks or the gathering grounds thereof. It is also an offence not to remove or cause to be removed or take such steps as may be necessary to prevent, upon notice in writing from the Board, any foul, noisome or injurious matter or any earth, deposit or excavated material in such manner or place that it may be washed, fall or be carried into the waterworks or the gathering grounds thereof. These offences are punishable by a fine of MWK2 000 and, for each day during which such matter, earth, deposit or excavated material remains unremoved after notice in writing from the Board requiring the same to be removed, a further penalty of MWK500.

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<sup>116</sup> Section 53 of the Waterworks Act.

It appears that the additional penalty of the MWK500 may also be imposed for each day during which the offence continues.<sup>117</sup>

The section is poorly worded especially on the penalty side. It partly reads ‘... liable to a fine of K2,000 and for each day during which such matter, earth deposits or excavated material remains unremoved after notice in writing from the Board, requiring the same to be removed, to a further penalty of K500 for each day during which the offence continues.’ If the section stopped at ‘K500’, the section would be fine grammatically. The words which come after the ‘K500’ are grammatically inconsistent with some of the words that come before the ‘K500’. This difficulty may be resolved by cutting all the words that come after ‘K500’ and pasting them after the words ‘K2,000 and’ and then inserting the word ‘or’ after the pasted words. After effecting these changes, the section will partly read as follows: ‘... liable to a fine of K2,000 and for each day during which the offence continues, or for each day during which such matter, earth deposits or excavated material remains unremoved after notice in writing from the Board, requiring the same to be removed, to a further penalty of K500.’

#### **5.4.10 Unauthorised building over or near pipes, etc**

Any person who, without the consent of the Board (which consent shall not be unreasonably withheld), knowingly causes any building, works or construction of any kind whatsoever to be erected, performed or carried out, over, abutting or adjoining any pipe or other equipment, the property of the Board, commits an offence and is liable to a fine of MWK2 000 and a further fine of MWK500 for each day during which the offence continues after written notice has been served on such person by the Board.<sup>118</sup>

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<sup>117</sup> Section 54 of the Waterworks Act. The extension of the additional penalty of MWK500 to ‘each day during which the offence continues’ is merely a suggestion as the position is not clear in the Act. The next paragraph in the text suggests amendments which will make the extension legally acceptable beyond all doubt.

<sup>118</sup> Section 55 of the Waterworks Act.

#### 5.4.11 Contravention of regulations

The Board has power, subject to the approval of the Minister (which approval is required to be given within a reasonable time) to make bylaws for such matters or things as may be found necessary for the proper carrying out of the Act and more especially for, among other things, the regulation of the use and the prevention of pollution, misuse, waste of, or any interference with, any water supplied by or under the control of the Board, or the prevention of pollution of gathering grounds, the waterworks and the water therein. Such bylaws may provide for a penalty for the breach of any of their provisions as follows:

- (a) upon first conviction, a fine of up to MWK1 000 or imprisonment for up to one month;
- (b) on a subsequent conviction, a fine of up to MWK2 000 or imprisonment for up to three months; and
- (c) in the case of a continuing offence, a fine of up to MWK200 in respect of each day on which the offence continues.<sup>119</sup>

From the various contexts in which the term 'gathering grounds' is used in the Act, it appears that it refers to a place where water collects, and which water may be used in the waterworks. Section 2 does not define the term but it defines the term 'fathering ground' as 'any natural or artificial surface which collects the rainfall or which contains any spring, well or stream from which water is or is intended to be drawn for the purpose of a waterworks.' This definition is more or less the same as the definition for 'gathering grounds' as gleaned from the aforementioned contexts. A perusal of the Act reveals that the term 'fathering ground' is not used elsewhere apart from the definition section. It is therefore likely that there is a typographical error or some other error in the Act relating to these two terms. In order to do away with this error, it is suggested that instead of the term 'fathering ground' section 2 should contain the term 'gathering ground'. The latter term is preferred because it accords with common sense: a person reading the term

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<sup>119</sup> Section 56 of the Waterworks Act.

'gathering ground' is likely to understand it as a place (grounds) where something (in this case water) collects or gathers. So an ordinary citizen is likely to understand the term 'gathering ground' without even having recourse to section 2 of the Act. The term therefore commends itself to usage in the Act. Such commendation is absent when considering possible usage of the alternative term 'fathering ground'.

#### **5.4.12 General provisions on criminal liability**

Several sections of the Act contain general provisions relating to criminal liability and penalties. Firstly, it is stated that all penalties under the Act may be recovered on summary conviction, and they are said to be in addition to any other remedy or proceeding, whether civil or criminal, taken pursuant to any other law in force in the country.<sup>120</sup> Secondly, any complaint or information in pursuance of the Act is required to be made or laid within three months from the time when the matter of such complaint or information arose and not afterwards.<sup>121</sup> Thirdly, when any person is summoned or otherwise dealt with in any proceedings as the occupier of premises, if he alleges that he is not the occupier of such premises, he thereupon bears the burden of proving such allegation.<sup>122</sup> For reasons stated in segment 3.3 in Chapter 3 hereof, this presumption and the shift in the burden of proof may be justifiable. Although the Act does not say it, it is almost certain that the standard of proof to be used in discharging the burden is the balance of probabilities. Lastly, it is provided that one half of all the fines imposed by a competent court for the contravention of the Act or the bylaws made by the Board shall be paid to the Board. Such fines become part of the annual revenue of the Board.<sup>123</sup>

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<sup>120</sup> Section 57 of the Waterworks Act.

<sup>121</sup> Section 58 of the Waterworks Act.

<sup>122</sup> Section 59 of the Waterworks Act.

<sup>123</sup> Section 37 of the Waterworks Act.

## 5.5 Water Resources Act 15 of 1969

### 5.5.1 General

The Water Resources Act 15 of 1969 (“WRA”) makes provision for the control, conservation, apportionment and use of the water resources of Malawi.<sup>124</sup> It vests ownership of all public water in the State President and prohibits use of such public water except in accordance with a water right granted under the Act.<sup>125</sup> However, the use of public water for domestic purposes does not require a water right.<sup>126</sup> By ‘domestic purposes’ is meant household and sanitary purposes including the watering and dipping of stock.<sup>127</sup>

‘Public water’ is defined widely. It means all water flowing over the surface of the ground or contained in or flowing from any river, spring or stream or natural lake or pan or swamp or in or beneath a watercourse and all underground water but excluding any stagnant pan or swamp wholly contained within the boundaries of any private land.<sup>128</sup> The effect of this definition is that all water except the stagnant pan or swamp wholly on private land is subject to control under the Act and use thereof for purposes other than domestic purposes may only be done on the authority of a water right.

The WRA creates only five criminal offences. In the next few paragraphs these offences will be set out.

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<sup>124</sup> Long title of the WRA.

<sup>125</sup> Section 3(1) and section 5(1) of the WRA. It must be noted that what is vested in the State President is only *ownership* of the public water. According to section 3(2) of the Act the *control* of public water is vested in the Minister and such control is required to be exercised in accordance with the provisions of the Act. It must further be pointed out that in terms of the proviso to section 5(1) of the Act, the taking of public water for fighting fires does not require a water right.

<sup>126</sup> Section 6(1) of the WRA.

<sup>127</sup> Section 2 of the WRA.

<sup>128</sup> Section 2 of the WRA.

### 5.5.2 Use of water without lawful authority

It is an offence to divert, dam, store, abstract or use public water or, for any such purpose, construct or maintain any works<sup>129</sup> except under and in accordance with the provisions of the Water Resources Act and any other written law.<sup>130</sup> The words 'in accordance with the provisions of the Water Resources Act' call for an examination of the WRA to see what the Act says are the requirements for diversion, damming, storage, abstraction or use of public water. Breach of any of those requirements would be an offence. For example, one requirement mentioned above is that the person using the water must have a water right granted under the Act. Use of water without such a right constitutes an offence. Similarly the reference to 'any other written law' requires a perusal of other laws with a view to ascertaining what those laws require in respect of the diversion, damming, storage, abstraction or use of public water. If any of such requirements is not met, an offence is committed. The penalties for these offences are a fine of MWK1 000 and imprisonment for one year.<sup>131</sup>

### 5.5.3 Failure to comply with a mitigation notice

Where in the opinion of the Water Resources Board<sup>132</sup> the use of public water for domestic purposes at any place is causing damage to the natural resources<sup>133</sup> of the area

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<sup>129</sup> The term 'works', according to section 2 of the WRA, includes canals, channels, reservoirs, embankments, weirs, diversions, dams, wells (other than hand operated wells), boreholes, pumping installations, pipelines, sluice gates, filters, sedimentation tanks or other works constructed for or in connection with the impounding, storage, passage, drainage, control, use or abstraction of public water, or the development of water power, or the filtration or purification of public water, or the protection of rivers and streams against erosion or siltation, or the protection of any work or in connection with or for flood control or the conservation of rain water.

<sup>130</sup> Section 5(2) of the WRA.

<sup>131</sup> Section 25(1) of the WRA.

<sup>132</sup> The Water Resources Board is established in terms of section 4 of the WRA. It exercises various powers and performs various duties specified in the Act. It is subject to any special or general directions of the Minister and the Minister may, for the better carrying out of the purposes of the Act, delegate additional powers and duties to it: section 4 of the WRA.

<sup>133</sup> By 'natural resources' is meant land, soil and water in their physical aspects together with the natural vegetation associated therewith, and the normal balance between them: section 2 of the WRA.



in the vicinity of that place, it may, by notice in writing served on any person making use of the water at that place, direct that such person takes such measures as may be specified in the notice for the purpose of avoiding or mitigating such damage.<sup>134</sup> The notice may, among other things, direct that any user of water at any place shall not water more than the number of stock specified in the notice or that no more than a stated number of stock may be watered at that place or that not more than a stated gallonage may be abstracted.<sup>135</sup> Failure to comply with the notice constitutes an offence.<sup>136</sup> Any person convicted of such offence is liable to a fine of MWK500 and to imprisonment for a period of six months.<sup>137</sup>

#### **5.5.4 Interference with or pollution of public water**

It is an offence, save under the authority of the WRA or any other written law, to interfere with or alter the flow of any public water, or to pollute or foul any public water.<sup>138</sup> For the purposes of this offence, polluting or fouling public water means the discharge into or in the vicinity of public water or in a place where public water is likely to flow, of: (a) any matter or substance likely to cause injury whether directly or indirectly to public health, livestock, animal life, fish, crops, orchards or gardens which are irrigated by such water, or any product in the processing of which such water is used; or (b) any matter or substance which occasions, or which is likely to occasion, a nuisance.<sup>139</sup> Any person found guilty of this offence is, in terms of the WRA, liable to a fine of MWK500 and to imprisonment for a period of six months.<sup>140</sup>

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<sup>134</sup> Section 6(2) of the WRA.

<sup>135</sup> Section 6(3) of the WRA.

<sup>136</sup> Section 6(4) of the WRA.

<sup>137</sup> Section 25(2) of the WRA.

<sup>138</sup> Section 16(1) of the WRA.

<sup>139</sup> Section 16(2) of the WRA.

<sup>140</sup> Section 25(2) of the WRA.

This offence must be considered in the light of section 67 of the Environment Management Act 1996 (“EMA”) which provides for offences relating to pollution. There is scope for the offence of polluting public water under the WRA to qualify as an offence under section 67 of the EMA. In that event there will be a conflict of penalty provisions as the WRA and the EMA specify different penalties for such offence. This conflict will have to be resolved in favour of the EMA since, according to section 7 of the EMA, any written law on the protection and management of the environment which is inconsistent with any provision of the EMA is invalid to the extent of the inconsistency. Thus, the applicable penalties for the offence of polluting public water under the WRA are a fine of not less than MWK20 000 and not more than MWK1 000 000 and imprisonment for ten years.

#### **5.5.5 Failure to comply with demolition or modification notice**

The Water Resources Board may by notice in writing require certain persons mentioned below to modify, demolish or destroy specified works within such period, not being less than thirty days, as may be set out in the notice. The aforementioned persons include a person who has constructed or extended, or caused to be constructed or extended, any works contrary to any provisions under which such person was required or authorised to construct or extend the same or cause them to be constructed or extended. The aforementioned persons also include a person whose water right in respect of which any works are in existence has been determined under the provisions of the WRA or has otherwise come to an end.<sup>141</sup> The Water Resources Board may issue the said notice to any of these persons. If these persons fail to comply with the notice, they commit an offence<sup>142</sup> and are liable to a fine of MWK500 and to imprisonment for six months.<sup>143</sup>

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<sup>141</sup> Section 20(1) of the WRA.

<sup>142</sup> Section 20(3) of the WRA.

<sup>143</sup> Section 25(2) of the WRA. Apart from criminalizing the failure to comply with the notice, section 20 of the WRA provides that if the person fails to comply with a notice served on him, the Board may cause such works to be modified, demolished or destroyed and recover the cost of the modification, demolition or destruction from the person in default by civil suit.

### 5.5.6 Interfering with or damaging hydrometeorological stations or works

The Water Resources Board may at all reasonable times enter upon any land for the purpose of making such investigations and surveys as the Board considers necessary in the interest of the conservation and best use of water in Malawi, and may establish and maintain or cause to be established and maintained on any such land, without other authority than the WRA, hydrometeorological stations and other works for the purpose of obtaining and recording information and statistics as to the hydrometeorological conditions of Malawi.<sup>144</sup> Any person who interferes with or damages any such station or works commits an offence.<sup>145</sup> This offence is punishable by a fine of MWK500 and by imprisonment for six months.<sup>146</sup>

## 5.6 Inland Waters Shipping Act 12 of 1995

### 5.6.1 General

The Inland Waters Shipping Act 12 of 1995 (“IWSA”) provides for the survey, registration, licensing and safety of all vessels<sup>147</sup> used on the inland waters<sup>148</sup> of Malawi. It also provides for the safety of passengers and cargo, and for the competency of masters

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<sup>144</sup> Section 21(1) of the WRA.

<sup>145</sup> Section 21(3) of the WRA.

<sup>146</sup> Section 25(2) of the WRA.

<sup>147</sup> Section 2 of the IWSA defines ‘vessel’ as a ship, drilling rig, production platform, sea plane and any vessel, lighter, tug, barge, structure or launch, however propelled, used or intended for use in navigation or mining.

<sup>148</sup> According to section 2 of the IWSA the term ‘inland waters’ means such waters as may be declared to be inland waters under section 42 of the Act. The said section 42 provides that the Minister may, by notice published in the Gazette: (a) declare any lake or river or area of water or port thereof to be inland waters for the purposes of the IWSA; (b) designate places or areas of inland waters or land as harbours; (c) make regulations for the management, control and safety of any such inland waters and harbours and of vessels and persons and cargo within them, the powers of persons to effect such control and the payment of fees for services within such harbours; and (d) after consultation with the Minister for the time being responsible for matters of the environment, make regulations for the prevention and control of pollution of the marine environment.

and crews. It creates numerous offences but only few of these are environmentally relevant. The most important of them is the prohibition against improper carriage of dangerous goods. This offence will now be analysed.

### **5.6.2 Improper carriage of dangerous goods**

Section 146(1) of the IWSA states that any person who sends by any vessel, or not being the owner or master of any vessel carries on the vessel, any dangerous goods without distinctly marking their nature on the outside of the package containing the goods commits an offence. The section also states that any person who sends by any vessel, or not being the owner or master of the vessel carries on the vessel, any dangerous goods without, at or before the time of sending the goods to be shipped or taking them on board the vessel, giving written notice to the owner or master of the vessel of the nature of the goods and the name and address of the sender or carrier of the goods, commits an offence. It is further an offence for any person to knowingly send or carry in any vessel any dangerous goods under a false description, or to falsely describe the sender or carrier of any such goods.<sup>149</sup> Any person found guilty of any of these offences is liable to a fine not exceeding MWK600 (US\$5) or imprisonment for a period not exceeding two years.<sup>150</sup>

The term 'dangerous goods' in respect of any vessel is defined by the Act. The definition has two limbs. In the first limb dangerous goods mean explosives, gases whether compressed, liquefied or dissolved under pressure, inflammable liquids, inflammable solids, or substances liable to spontaneous combustion, inflammable acids, or substances which when in contact with water emit inflammable gases, oxidizing substances, organic peroxides, poisonous toxic substances, infectious substances, radioactive substances and

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<sup>149</sup> Section 146(2) of the IWSA.

<sup>150</sup> Section 189(1) of the IWSA.

corrosives. In the second limb dangerous goods mean any other goods classified as dangerous in the International Maritime Dangerous Goods Code.<sup>151</sup>

It may be noted that the essence of the IWSA offences under discussion is mislabelling or failure to give notice of the nature of the dangerous goods. Since most of the dangerous goods are hazardous, the importance of proper labelling and notification of the nature of the goods cannot be overemphasized.

## **5.7 Noxious Weeds Act 17 of 1936**

### **5.7.1 General**

The Noxious Weeds Act 17 of 1936 (“NWA”) is a colonial statute enacted to assist in the eradication of noxious weeds. By ‘noxious weed’ is meant any plant declared as such by the Minister.<sup>152</sup> The Act empowers the Minister, at any time by notice published in the Gazette, to declare any plant to be a noxious weed, either throughout the whole of Malawi or in one or more districts or portions of districts of it, and, by like notice, to remove any plant from the list of plants declared noxious weeds.<sup>153</sup> It is clear from the declared purpose of the Act that protection of the ‘noxious weed’ is none of its business. The Act therefore offends one basic tenet of environmental legislation: the conservation and sustainable utilisation of natural resources. Consequently it may be argued that the Act is not an environmental statute and so it does not merit discussion in the present discourse. The argument is undoubtedly weighty but it overlooks the fact that characterization of a statute as environmental is based not only on the purpose of the legislation but also on the subject matter of the legislation. Proceeding on the subject matter approach, it will be easy to see that the Act is devoted to plants and as such can

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<sup>151</sup> Section 145 of the IWSA.

<sup>152</sup> Section 2 of the NWA.

<sup>153</sup> Section 15 of the NWA. According to this section, the Minister is required, by publication in the Gazette and in the local press, to signify his intention of declaring a plant to be a noxious weed. The notice must be given at least thirty days before the Minister makes the declaration.

properly be categorised as an environmental statute. The Act may be regarded as environmental in another sense. A look at the list of plants declared noxious weeds reveals that some of the plants (for example, water hyacinth) are prejudicial to the survival of other living organisms (for example, fish). So exterminating them from some areas complies with the basic tenet of conservation of those other living organisms. Accordingly, in respect of those other living organisms, the Act is certainly environmental.

The discussion will now focus on the offences provided for in the NWA.

### **5.7.2 Failure to execute duty to clear or report**

It is the duty of every ‘person responsible’<sup>154</sup> under the Act to clear<sup>155</sup> or cause to be cleared any noxious weeds growing or occurring on the land in respect of which he is responsible. It is further the duty of any person to report forthwith to the nearest known weed inspector<sup>156</sup> the occurrences of any noxious weeds on any land in respect of which such person is responsible. Failure to execute any of these duties amounts to an offence and offenders are liable to a fine of £10 or, in default of payment, to imprisonment for a term of one month.<sup>157</sup>

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<sup>154</sup> Section 2 of the NWA provides that ‘person responsible’, in relation to land, means: (a) the occupier of land, or in the case of unoccupied land, the registered owner thereof; (b) in the case of a mining location, the holder of such location; (c) in the case of public land or customary land over which grazing or other rights have been granted, the holder of such rights; (d) in the case of land in customary land, the occupier or person who has the use of such land, or the Chief who has jurisdiction thereover, or all or any of the inhabitants of the nearest village; and (e) in the case of commonage or town lands or roads or other areas, the Municipal Council or Town Council under whose control or within whose jurisdiction such land, road or other area is situate.

<sup>155</sup> By the word ‘clear’ is meant to dig up or pull up or burn noxious weeds, or to employ other means of destruction authorised by the Minister: section 2 of the NWA.

<sup>156</sup> According to section 2 of the NWA ‘weed inspector’ means any person authorised by the Minister to perform the duties of an inspector under the Act. Magistrates, District Commissioners, Assistant District Commissioners, and all members of the police force are ex officio weed inspectors for the purposes of the Act.

<sup>157</sup> Section 3 of the NWA.

Two observations may be made about the offences under discussion. First, they can only be committed by persons who satisfy the definition of ‘person responsible’ in the Act. Second, the amount of the fine in pounds is anachronistic. It is suggested that the amount should be changed to an appropriate amount in Malawi Kwacha.

### **5.7.3 Failure to comply with notice to clear noxious weeds**

If a weed inspector finds any noxious weed growing or occurring upon land, he may by notice in writing to the person responsible require him to clear such land within a reasonable time to be specified in the notice, and it is the duty of the person responsible to do so. The notice is required to indicate the particular noxious weed occurring upon the land and as nearly as practicable the portion or portions of the land on which the noxious weed occurs.<sup>158</sup> Any person responsible who fails to comply with such notice is liable to a fine of £25 or, in default of payment, to imprisonment for three months.<sup>159</sup>

### **5.7.4 Obstruction of weed inspector**

It is an offence to obstruct or hinder a weed inspector in the exercise of his duty under the Act. Any person convicted of this offence is liable to the same penalties as those prescribed for failure to comply with notice to clear noxious weeds.<sup>160</sup>

### **5.7.5 Wrongful disposal of noxious weed**

No person is allowed to throw any noxious weed or the seed of such noxious weed into any river or stream, or on to any road or land. Contravention of this prohibition

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<sup>158</sup> Section 5 of the NWA.

<sup>159</sup> Section 7 of the NWA. The suggestion to change the amount of the fine into Malawi Kwacha applies here too.

<sup>160</sup> Section 9 of the NWA. For more on the offence of obstruction, see segment 4.2.3 in Chapter 4 hereof.

constitutes an offence and offenders are liable to the penalties prescribed for failure to comply with the notice to clear noxious weeds.<sup>161</sup>

### **5.7.6 Selling plant that may spread noxious weeds**

It is an offence to knowingly sell or offer or expose for sale, any plant, seed or grain which is likely to propagate or spread the growth of noxious weeds. The penalty for this offence is a fine of £25 or, in default of payment, imprisonment for three months.<sup>162</sup>

### **5.7.7 Contravention of regulations**

Section 16 of NWA provides that the Minister may make, alter and amend regulations, 'not inconsistent with this Act', prescribing the measures to be taken to prevent the introduction and spread of noxious weeds, the authority and duties of weed inspectors and generally for the better carrying out of the objects and purposes of the Act. The penalty for contravention of any of these regulations is a fine of £25 or, in default of payment, imprisonment for three months.<sup>163</sup> It may be observed that the words 'not inconsistent with this Act' do not add anything to the section as no Minister or person or body is entitled under the general law to make regulations under a statute contrary to that statute. It is settled that regulations made under a statute must fall within the confines of the statute if they are to be valid. Otherwise they will be ultra vires.

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<sup>161</sup> Section 10 of the NWA.

<sup>162</sup> Section 12 as read with section 7 of the NWA.

<sup>163</sup> As read with section 7 of the NWA.



## 5.8 Protection of Animals Act 16 of 1944

### 5.8.1 General

The Protection of Animals Act 16 of 1944 (“PAA”) is another statute that has its origins in the colonial era. It makes provision for the protection of animals.<sup>164</sup> By ‘animal’ is meant any domestic animal<sup>165</sup> or captive animal.<sup>166</sup> This Act is of limited use in environmental protection as it focuses only on animals kept by man. It leaves out of its reach numerous species of wildlife. Its principal concern is to prevent cruelty to the aforementioned animals. Despite its limited use the Act has provisions relating to costs which could be modelled on by the main environmental statutes in Malawi. These provisions relating to costs will be set out after discussing the offences created by the Act.

### 5.8.2 Offences of cruelty

It is an offence: (i) to cruelly beat, kick, ill-treat, override, overload, torture, infuriate or terrify any animal, or (ii) to cause or procure or, being the owner, permit any animal to be so used, or (iii) by wantonly or unreasonably doing or omitting to do any act or causing or procuring the commission or omission of any act, to cause any unnecessary suffering or, being the owner, permit unnecessary suffering to be so caused to any animal.<sup>167</sup>

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<sup>164</sup> Long title of the PAA.

<sup>165</sup> Section 2 of the PAA defines ‘domestic animal’ as any horse, ass, mule, bull, sheep, pig, dog, cat, fowl, or any other animal of whatsoever kind or species, and whether a quadruped or not, which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man.

<sup>166</sup> According to section 2 of the PAA ‘captive animal’ means any animal (not being a domestic animal) of whatsoever kind or species, and whether a quadruped or not, including any bird, fish or reptile, which is in captivity or confinement, or which is maimed, pinioned or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement.

<sup>167</sup> Section 3(1)(a) of the PAA.

It is also an offence to convey or carry, or cause or procure, or, being the owner, permit to be conveyed or carried, any animal in such a manner or position as to cause that animal any unnecessary suffering.<sup>168</sup> It is further an offence to cause, procure or assist at the fighting or baiting of any animal; or to keep, use, manage or act or assist in the management of, any premises or place for the purpose, or partly for the purpose, of fighting or baiting any animal; or to permit any premises or place to be so kept, managed or used; or to receive or cause or procure any person to receive, money for the admission of any person to such premises or place.<sup>169</sup>

Any person who wilfully, without any reasonable cause or excuse, administers or causes or procures or, being the owner, permits such administration of any poisonous or injurious drug or substance to any animal, or who wilfully, without any reasonable cause or excuse, causes any such substance to be taken by any animal, commits an offence.<sup>170</sup> Similarly any person who subjects, or causes or procures, or, being the owner, permits to be subjected, any animal to any operation which is performed without due care and humanity, commits an offence.<sup>171</sup>

Here and there in these offences 'owner' is mentioned in connection with the proscribed acts or omissions. The PAA states that such owner is deemed to have permitted cruelty within the meaning of the Act if he has failed to exercise reasonable care and supervision in respect of the protection of the animal from the cruelty. Where the owner is convicted of so permitting cruelty, he may not be sentenced to imprisonment without the option of a fine.<sup>172</sup> No such restriction exists in the punishment for the other offences of cruelty. As

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<sup>168</sup> Section 3(1)(b) of the PAA.

<sup>169</sup> Section 3(1)(c) of the PAA.

<sup>170</sup> Section 3(1)(d) of the PAA.

<sup>171</sup> Section 3(1)(e) of the PAA.

<sup>172</sup> Section 3(2) of the PAA.

for these other offences, the penalties are generally a fine of £25 *and* imprisonment for six months.<sup>173</sup> The following are additional penalties prescribed under the PAA:

- (a) If the offender is the owner of the animal, the court may deprive him of the ownership of the animal.<sup>174</sup>
- (b) If the court directs destruction of the animal, the court may order the owner to pay the reasonable expenses incurred in destroying the animal.<sup>175</sup>
- (c) If damage or injury is caused to any animal, person or property, the court may order compensation of up to £10 to be paid to the person aggrieved.<sup>176</sup>

Apart from the additional penalties, the PAA makes provision for the payment of costs by the convict and the awarding of a portion of the fines paid under the Act to a private prosecutor or some other person. As for the former, the PAA states that in all cases of a conviction for an offence under the Act, the court may order the convict to pay all or any part of the costs and expenses of his prosecution.<sup>177</sup> The court may order the whole or a portion of the costs and expenses recovered from the convict to be paid to the prosecutor or complainant.<sup>178</sup> As for the latter, it is provided that where in any proceedings under the Act any fine is imposed, the court may award any sum or sums not exceeding half the

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<sup>173</sup> Section 3(1) of the PAA. It must be noted that section 10 of the PAA makes provision for an offence other than the offence of cruelty and then prescribes its punishment. The offence is to the effect that where proceedings are instituted under the Act against the driver or conductor of any vehicle, the court may issue a summons directed to the employer of the driver or conductor, as the case may be, requiring him, if it is in his power so to do, to produce the driver or conductor. If the owner or employer fails to comply with the summons without satisfactory excuse, he commits an offence. Similarly where proceedings are instituted under the Act, the court may issue a summons directed to the owner of the animal requiring him to produce either at, or at any time before, the hearing of the case, as may be stated in the summons, the animal for inspection of the court, if such production is possible without cruelty. If the owner fails to comply with the summons, he commits an offence. The penalties for these offences are a fine of £5 for the first occasion or £10 for the second or subsequent occasion on which he so fails, and may be required to pay the costs of any adjournment rendered necessary by his failure.

<sup>174</sup> Section 5 of the PAA.

<sup>175</sup> Section 4 of the PAA.

<sup>176</sup> Section 6 of the PAA.

<sup>177</sup> Section 11(1) of the PAA.

<sup>178</sup> Section 11(2) of the PAA.

total fine to the person, not being a police officer, who complained and prosecuted or to some other person or society as the court thinks fit.<sup>179</sup>

## 5.9 Control and Diseases of Animals Act 41 of 1967

### 5.9.1 General

The Control and Diseases of Animals Act 41 of 1967 (“CADA”) is one of the few early environmentally relevant statutes that were enacted in the Kamuzu Banda administration. It provides – as its name suggests – for the control of the diseases of animals and control of diseases generally. By ‘animal’ is meant domestic animals and certain wild animals.<sup>180</sup> The wild animals covered under the term ‘animal’ are those which fall under the expression ‘game’ or ‘game animal’ contained in the repealed Game Act.<sup>181</sup> Such wild animals include male bushbuck, warthog, common duiker, anthropoid ape, any animal in a game reserve<sup>182</sup> and others.<sup>183</sup> The CADA imposes a number of duties on specified persons in the event of a suspected disease or of an outbreak of disease. Those who do

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<sup>179</sup> Section 12 of the PAA.

<sup>180</sup> Section 2 of the CADA states that ‘animal’ means ‘any bull, cow, ox, heifer, calf, sheep, goat, horse, mule, donkey, pig, domestic fowl and any game animal as defined in the definition of the expression “game” or “game animal” contained under the Game Act, any wild carnivore tamed and kept as a pet, guinea fowl, pigeon, pea-fowl, dog, cat and any other creature which the Minister has, by order under section 4, declared to be an animal for the purposes of this Act.’

<sup>181</sup> Act 26 of 1953. The Game Act has been repealed by section 124(1)(a) of the National Parks and Wildlife Act 1992.

<sup>182</sup> The name ‘game reserve’ has been phased out of Malawian environmental law. All nature sanctuaries previously known as ‘game reserves’ have been renamed ‘wildlife reserves’.

<sup>183</sup> Section 2 of the Game Act provides that ‘game’ and ‘game animal’ mean any animal specified in any of the first three Schedules of the Act and, during a close season, any animal which is forbidden to be hunted during such season. The Schedules referred to list a number of animals. Apart from those mentioned in the text above, the animals include blue duiker, buffalo, bushbuck (not being a male bushbuck), cheetah, colobus monkey, eland, elephant, hartebeest, hippopotamus, impala, klipspringer, kudu, leopard, lion, Livingstone’s suni, nyala, oribi, puku, reedbuck, red duiker, rhinoceros, roan, sable, Sharpe’s steinbuck, waterbuck, wildebeest, zebra and blue (Nchima) monkey.

not carry out their duties are punished through the criminal sanction. The following are the most environmentally relevant offences in the Act.<sup>184</sup>

### 5.9.2 Offences relating to infected areas

It is an offence for any person:

- (a) to remove any animal from any one place in an infected area<sup>185</sup> to any other place therein without a written permit to do so from an inspector;
- (b) to remove any animal from any place in the infected area to any place outside without a written permit to do so from an inspector;
- (c) to fail to comply with the conditions stated in a permit;
- (d) if he is the holder of a permit, to fail to produce the same for inspection on demand by an inspector, police officer above the rank of sergeant or any other person duly authorised by an inspector or such police officer; or
- (e) to leave the infected area without having complied with such reasonable precautions for preventing the spread of disease as may be required by an inspector.<sup>186</sup>

It is also an offence for the owner of any animals liable to be affected by the named diseases in the infected area to fail to herd or keep them as far as reasonably practicable from any public road. An owner of any animal within the infected area also commits an offence where he fails, when required by an inspector, to isolate such animal from other animals or to remove it from the infected area. It is further an offence for the owner of an animal dying from disease to fail to forthwith cause the carcass either to be buried at a

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<sup>184</sup> Due to the fact that the CADA is not a core environmental statute, only offences in the principal statute will be set out here.

<sup>185</sup> According to section 4 of the CADA, the Minister, the Chief Veterinary Officer or any person duly authorised in writing by either of them, may at any time by order declare any area within Malawi to be an infected area as regards any disease named in such order.

<sup>186</sup> Section 5(1)(a),(b),(c),(d) and (g) of the CADA as read with section 5(2) of the CADA.

depth of not less than four feet below the surface of the ground, or to be totally destroyed by burning.<sup>187</sup>

A person found guilty of any of the foregoing offences relating to infected areas is liable to a fine of MWK200 and to imprisonment for six months, and any animal or carcass in respect of which such offence has been committed may be forfeited.<sup>188</sup>

### **5.9.3 Disposal of carcasses**

The carcass of any animal slaughtered under the Act is required to be buried or sold or otherwise disposed of, under such conditions as an inspector directs. This requirement is ‘subject to any rules made by the Minister.’<sup>189</sup> Anyone who fails to comply with the inspector’s direction commits an offence and is liable to a fine of MWK200 and to imprisonment for six months. In addition the carcass may be forfeited.<sup>190</sup>

The words ‘subject to any rules made by the Minister’ suggest that the Minister’s rules take precedence over the inspector’s direction. So if a person obeys any rule of the Minister in disposing of the carcass and in the process fails to comply with the inspector’s direction, that person will not be guilty of the offence under discussion.

### **5.9.4 Obstruction of inspector or police officer**

It is an offence to obstruct or impede, or to attempt to obstruct or impede, an inspector or a police officer in the execution of his duty under the Act.<sup>191</sup> The penalties for this offence include a fine of MWK200 and imprisonment for six months. If the offence is

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<sup>187</sup> Section 5(1)(e),(f) and (h) of the CADA as read with section 5(2) of the CADA.

<sup>188</sup> Section 22 of the CADA.

<sup>189</sup> Section 10(1) of the CADA.

<sup>190</sup> Section 10(2) as read with section 22 of the CADA.

<sup>191</sup> Section 15 of the CADA. For more on the offence of obstructing, see segment 4.2.3 in Chapter 4 hereof.

committed in respect of any animal, carcass, litter, dung or fodder, such animal, carcass, litter, dung or fodder may be forfeited.<sup>192</sup>

### 5.9.5 Complaints relating to dogs

Section 18(1) of the CADA provides that if a dog is dangerous, not under proper control or a nuisance by reason of its barking or otherwise, any person may complain to a court about it. On such complaint the court may issue a summons directed to the owner calling upon him to show cause why the dog should not be kept under proper control, or, if dangerous or a nuisance, destroyed. On the return of such summons, unless cause be shown to the contrary, the court may order that the dog be kept under proper control or destroyed. If the owner of the dog fails to comply with the order of the court, he is liable to a fine of MWK10 (US\$0.08).<sup>193</sup> It is significant that the Act does not declare the non-compliance with the order a criminal offence. All the Act says is that the non-compliance attracts a fine. In a sense the non-compliance amounts to contempt of court. It is necessary to determine whether this contempt is civil or criminal. That determination will enable us to categorise the non-compliance as civil or criminal. In *Scott v Scott*<sup>194</sup> Lord Atkinson (quoting Lord Moulton in the Court of Appeal in the same case) said:

‘An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act.’

It is clear from this statement that a fine and/or imprisonment may be imposed in civil contempt. Lord Atkinson also said:

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<sup>192</sup> Section 22 of the CADA.

<sup>193</sup> Section 18(2) of the CADA.

<sup>194</sup> [1913] AC 417 at 462.

‘[I]f a person be expressly enjoined by an injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court.’<sup>195</sup>

In *Hon J Z U Tembo and Hon Kate Kainja v Attorney General*<sup>196</sup> a unanimous Malawi Supreme Court of Appeal cited with approval Lord Atkinson’s statements and held that the appellants’ failure to comply with an injunction constituted civil contempt. The court, among other things, stated that:

‘... civil contempt is a species of contempt of Court which generally arises from a wilful failure to comply with an order of Court such as an injunction as contrasted with criminal contempt which consists of contumelious conduct in the presence of the Court. Punishment for civil contempt may be a fine or imprisonment, the objective of such punishment being compliance with the order of the Court. Such contempt is committed when a person violates an order of Court which requires that person in specific and definitive language to do or refrain from doing an act or a series of acts.’

From this it can be concluded that since breach of an injunction – a most solemn and authoritative order – amounts only to civil contempt (and not to a crime), it follows that breach of a similar or less solemn or less authoritative form of order should also amount to civil contempt only (and not to a crime). Accordingly, since the subject of the non-compliance under section 18 is arguably an order similar to or less solemn than an injunction, it may rightly be concluded that the non-compliance amounts to civil contempt. It is therefore submitted that section 18 of the CADA should not be treated as containing a criminal offence despite its mention of a fine.

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<sup>195</sup> [1913] AC 417 at 456.

<sup>196</sup> MSCA Civil Appeal No. 27 of 2003 (unreported but copy available on <http://www.judiciary.mw> when accessed on 02 September 2005).



### **5.9.6 Forfeiture when offender not found and disposal of forfeited animals**

Section 17 of the CADA makes provision for two matters. First, the forfeiture of animals when the offender is not found, and second, disposal of forfeited animals. With regard to the former, it states that when it is reported to a court that an animal has been seized and detained under section 16,<sup>197</sup> but that the person who is alleged to have committed an offence in respect of such animal is unknown or cannot be found, the court may order such animal to be forfeited. The court may only order the forfeiture if it is satisfied by evidence on oath that there is reason to believe that an offence against the Act has been committed in respect of the animal. As to the disposal of such forfeited animals and animals forfeited under the offences created by the Act described above, the section states that the animals are to be sold by auction unless the Chief Veterinary Officer directs that they be slaughtered.

## **5.10 Fertilizers, Farm Feeds and Remedies Act 12 of 1970**

### **5.10.1 General**

The Fertilizers, Farm Feeds and Remedies Act 12 of 1970 (“FFFRA”) was passed at a time when there was global alarm in respect of environmental degradation. Specifically the Act came at a time when the evils of persistent pesticides like DDT had been chronicled by a number of persons including Rachel Carson in her book *Silent Spring*.<sup>198</sup> It is therefore not surprising that the FFFRA seeks to regulate the use of pesticides. It does so under the term ‘remedy’. It also regulates, inter alia, the sale of fertilizers, farm feeds and certain remedies.

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<sup>197</sup> Section 16 of the Act provides that an inspector or police officer may seize any animal in respect of which he has reason to suspect that an offence against the Act is being committed, and remove any such animal to any pound, enclosure or other place selected by an inspector, and there detain such animal, subject to the orders of a court.

<sup>198</sup> Rachel Carson *Silent Spring* London: Hamish Hamilton 1963. In a more recent article P D Glavovic ‘Persistent Pesticides: Elixirs of Death or Boon to Mankind?’ 1985 102 *SALJ* 674 documents or comments on some of the adverse effects of the use of pesticides.

By 'remedy' is meant any substance which is intended or offered for the destruction of any noxious plant or insect; or in regard to poultry, domestic animals, livestock or plants, for the prevention, treatment or cure of any disease, infestation or other unhealthy or unfavourable condition, or for the maintenance of health, but does not include any substance prescribed by a veterinarian for a specific patient or group of patients.<sup>199</sup>

The following are the crimes created by the Act.

### **5.10.2 Non-compliance with registration condition**

The Act requires that a remedy or sterilizing plant<sup>200</sup> be registered under the Act.<sup>201</sup> An application for registration is made to the Registrar<sup>202</sup> for consideration by a relevant committee established by the Minister. If the committee is satisfied that the remedy or sterilizing plant in question is suitable and sufficiently effective for the purposes for which it is intended and complies with the prescribed requirements, it may register such remedy or sterilizing plant. The committee may impose such conditions in regard to the registration as it thinks fit.<sup>203</sup> These conditions may be amended by the Minister.<sup>204</sup> It is an offence to fail to comply with any of the conditions in their original format or as amended. Any person convicted of this offence is liable to a fine of MWK10 000 and to imprisonment for a period of twelve months.<sup>205</sup>

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<sup>199</sup> Section 2 of the FFFRA.

<sup>200</sup> Section 2 of the FFFRA defines 'sterilising plant' as a plant used for the sterilising of bones or other substances derived from an animal carcass.

<sup>201</sup> Sections 3(a) and 4 of the FFFRA.

<sup>202</sup> The Registrar is a public officer serving in the Ministry of Agriculture and appointed by the Minister to perform certain duties under the Act: section 7 of the FFFRA.

<sup>203</sup> Section 8(4) of the FFFRA.

<sup>204</sup> Section 10(2)(b) of the FFFRA.

<sup>205</sup> Section 8 of the FFFRA.

### 5.10.3 Contravention of a provision of the Act

Section 13(1) of the FFFRA states that any person 'who contravenes any provision of this Act' commits an offence and is liable to a fine of MWK200 and to imprisonment for a period of six months. This offence is too wide in scope and as observed elsewhere,<sup>206</sup> it cannot be taken on face value. There is need to go through the Act to identify those provisions contravention of which constitutes an offence. In this regard, it is suggested that sections 3 and 4 may qualify as such provisions. Accordingly, it is an offence to import, sell or distribute any remedy:

- (a) if it is not registered under the Act;
- (b) if it is not packed in the prescribed manner;
- (c) if the container in which it is sold does not comply with prescribed requirements and is not branded, labelled, marked or sealed in the prescribed manner;<sup>207</sup> and
- (d) if it is not of the composition, efficacy, fineness and purity specified in the application for its registration, and does not possess all other properties specified in such application.

Similarly it is an offence to use any sterilizing plant for the sterilizing of bones or other substances derived from an animal if such plant has not been registered.<sup>208</sup>

It must be noted that a special defence is available to a person who is charged with selling any remedy that is not of the composition, efficacy, fineness and purity specified in the application for its registration, and that does not possess all other properties specified in such application. Section 15 of the FFFRA states that it is a sufficient defence for such person to prove to the satisfaction of the court:

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<sup>206</sup> Segment 4.2.2 in Chapter 4 hereof.

<sup>207</sup> Section 3 of the FFFRA.

<sup>208</sup> Section 4 of the FFFRA.

- (a) that he purchased the remedy under a registered name or brand as being the same in all respects as the article which he purported to sell;
- (b) that he had no reason to believe at the time of the sale that it was in any respect different from such article;
- (c) that he sold it in the original container and in the state in which it was when he purchased it; and
- (d) that the container thereof was branded, labelled, marked or sealed in the prescribed manner.

Section 15 further states that the defence is also available where the offence is ‘the sale of fertilizer, farm feed ... in contravention of section 3(d)’. This portion of section 15 is problematic as the reference to section 3(d) does not make sense, for section 3(d) deals with remedies only; it does not say anything about fertilizers or farm feeds. It is therefore suggested that section 15(1) be amended by deleting the phrase ‘fertilizer, farm feed or’ from the two places in which that phrase occurs.

#### **5.10.4 Obstruction of inspector, analyst or other officer**

It is an offence to obstruct or hinder any inspector, analyst or other officer in the exercise of his powers or the performance of his duties under the Act.<sup>209</sup> The penalties for this offence are the same as those for the immediately foregoing offence.

#### **5.10.5 Tampering with sample**

An inspector or any specially authorised officer may take samples of any farming requisite<sup>210</sup> in such quantities as may be necessary for the purpose of examination or

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<sup>209</sup> Section 13(2) of the FFFRA. For an analysis of the offence of obstructing an officer, see segment 4.2.3 in Chapter 4 hereof.

<sup>210</sup> According to section 2 of the FFFRA, a farming requisite is any fertilizer, farm feed or remedy or any substance used in the manufacture of fertilizer, farm feed or remedy.

analysis under the Act.<sup>211</sup> Any person, who with fraudulent intent tampers with any such sample, commits an offence and is liable to a fine of MWK200 and to imprisonment for a period of six months.<sup>212</sup> The meaning of the words ‘with fraudulent intent’ is arguably the same as the meaning for the phrase ‘with intent to defraud.’<sup>213</sup>

#### **5.10.6 Improper use of certificate, invoice or other document in respect of any fertilizer, farm feed or remedy**

It is an offence to make use in connection with any fertilizer, farm feed or remedy of any certificate, invoice or other document issued in respect of any other fertilizer, farm feed or remedy. The penalties for this offence are the same as those for the offence of tampering with sample.<sup>214</sup>

#### **5.10.7 False or misleading statements**

Any person who makes a false or misleading statement in connection with any remedy in the application for registration, or in connection with any fertilizer, farm feed or remedy in any advertisement thereof or in the course of the sale thereof, commits an offence and is liable to the same penalties as those prescribed for the offence of tampering with sample.<sup>215</sup>

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<sup>211</sup> Section 12(1)(d) of the FFFRA.

<sup>212</sup> Section 13(1)(c) of the FFFRA.

<sup>213</sup> For the meaning of the phrase ‘with intent to defraud’, see segment 4.2.5 in Chapter 4 hereof.

<sup>214</sup> Section 13(1)(d) of the FFFRA.

<sup>215</sup> Section 13(1)(e) of the FFFRA.

### **5.10.8 Illegal sale of fertilizer, farm feed or remedy**

It is an offence to sell any fertilizer, farm feed or remedy upon the container of which a false or misleading statement in connection with the contents is printed or written.<sup>216</sup> It is also an offence to sell or supply any farming requisite which is not of the kind, nature, composition, strength, potency or quality described or represented when so sold or supplied. Offenders in both of these offences are liable to a fine of MWK200 and to imprisonment for a period of six months.<sup>217</sup>

### **5.10.9 Forfeiture as an additional penalty**

The court convicting a person of an offence under the Act may, upon the application of the prosecutor, declare any farming requisite in respect of which the offence has been committed, and all farming requisites in respect of which such person has been convicted, and of which such person is the owner or which are in his possession, to be forfeited.<sup>218</sup>

### **5.10.10 Presumptions**

Section 14(1) of the FFFRA makes provision for three presumptions relevant in the process of proving some of the offences under the Act. The first presumption is to the effect that any quantity of a farming requisite in or upon any premises, place or vehicle at the time a sample thereof is taken under the Act shall, unless the contrary is proven, be deemed to be of the same composition, to have the same degree of efficacy and to possess in all other respects the same properties as that sample. The second presumption is that any person who is proved to have tampered with any sample shall be deemed to have acted with fraudulent intent unless the contrary is proved. In the third presumption a certificate stating the result of an analysis or test of a sample and purporting to be signed

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<sup>216</sup> Section 13(1)(f) of the FFFRA.

<sup>217</sup> Section 13(1)(g) of the FFFRA.

<sup>218</sup> Section 13(2) of the FFFRA.

by the analyst who carried out such analysis or test shall be accepted as prima facie proof of the facts stated in it.

The third presumption appears to be an evidential or factual presumption and so courts may readily accept it as constitutionally valid. The first and second presumptions seem to be reverse onus presumptions. As stated elsewhere,<sup>219</sup> it is possible that Malawian courts may not regard such reverse onus presumptions as constitutionally valid. It is therefore suggested that the first and second presumptions be amended in such a way that they are turned into evidential or factual presumptions.

#### **5.10.11 Offences under regulations**

The FFFRA empowers the Minister to make regulations for the proper carrying out of the purposes and provisions of the Act,<sup>220</sup> a task which he has executed considerably. One set of these regulations is known as the Fertilizers Regulations.<sup>221</sup> Regulation 16 thereof states that any person not complying with any of the requirements of the regulations commits an offence and is liable to a fine of MWK1 000 and to imprisonment for six months. This is a species of a general offence. It requires a perusal of the regulations to identify the requirements. In common parlance a requirement is something that is obligatory. Of course not everything in a statute may qualify as a requirement. It is suggested that the following are 'requirements' in the Fertilizers Regulations, the breach of which amounts to an offence:

- (a) Fertilizers listed in the Third Schedule must have the specified composition set out in relation to such fertilizer in the Third Schedule;
- (b) Fertilizers in the Fourth Schedule must comply with the minimum fineness requirements listed in relation to such fertilizer in the Fourth Schedule;

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<sup>219</sup> Segment 4.3.12 in Chapter 4 hereof.

<sup>220</sup> Section 16(1) of the FFFRA.

<sup>221</sup> GN 142/1970, GN 123/1985 and GN 64/1996.

- (c) No product may be imported, sold or distributed as fertilizer if such product is contaminated with heavy metal or other substance that would be harmful to the soil or the environment or public health;
- (d) The container in which a fertilizer is sold must be duly and legibly marked or labelled in English with the relevant information set out in the Third Schedule, and any figures or numerals used for representing the chemical composition of a fertilizer must be preceded or followed by the appropriate symbol.<sup>222</sup>

Apart from the foregoing, it may be observed that the penalties prescribed for the general offence are inconsistent with the penalties prescribed by the principal Act. Under section 16(3) of the FFFRA it is provided that regulations may prescribe penalties for any contravention thereof but not exceeding a fine of MWK200 and imprisonment for six months. Regulation 16 and section 16(3) therefore prescribe conflicting fines. In these circumstances it is trite that the fine prescribed by section 16(3) takes precedence over the other. The MWK1 000 is ultra vires the principal Act, although it appears to be a more fitting penalty than the MWK200.

Regulation 13 of the Fertilizers, Farm Feeds and Remedies (Remedies) Regulations<sup>223</sup> (“the Remedies Regulations”) states that any person who fails to comply with the provisions of the regulations commits an offence and is liable to a fine of MWK200 and imprisonment for six months. Again this offence is general in character. A court called upon to interpret this section will have to go through the regulations to determine which provisions thereof are capable of constituting offences upon breach. It is suggested that only regulations 5, 7 and 8 are such provisions. Regulation 5 states that no person, except an approved research institution, shall import into Malawi any experimental remedy<sup>224</sup> unless he is authorised in writing on the prescribed form by the registering officer to do

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<sup>222</sup> Requirements (a) to (c) are from regulation 3 of the Fertilizers Regulations. Requirement (d) is from regulation 6 of the Fertilizers Regulations.

<sup>223</sup> GN 94/1989.

<sup>224</sup> Regulation 2 of the Remedies Regulations defines ‘experimental remedy’ as a chemical to be assessed in Malawi for primary biological activity, and not available to the public as a remedy.



so. Further, any person who imports an experimental remedy shall, within seven days of the arrival of the remedy in Malawi, complete a prescribed form and forward it to the registering officer. No experimental remedy shall be offered to any person other than a person approved by the registering officer to participate in the experimentation.<sup>225</sup> Regulation 7 deals with the labelling of containers: it forbids the sale of any remedy unless the label is securely affixed to the container and states a number of specified matters. Except with the permission of the registering officer, no label shall contain any information other than that provided for in regulation 7, and no label approved by the registering officer shall be altered without the written approval of the registering officer. Regulation 8 prohibits the sale, transportation or storage of a remedy unless the registering officer is satisfied that the container in which the remedy is packed or to be packed is of sufficiently durable construction and material. Further, no remedy is permitted to be packed in a container that resembles a container of a consumable<sup>226</sup> product.

## **5.11 Petroleum (Exploration and Production) Act 2 of 1983**

### **5.11.1 General**

The Petroleum (Exploration and Production) Act 2 of 1983 (“PEPA”) provides for the searching for and production of petroleum. It vests in the State President on behalf of the people of Malawi the entire property in, and control over, petroleum in land in Malawi.<sup>227</sup> It then sets out a scheme of licences and provisions relating to protection of the

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<sup>225</sup> Regulation 5 contains more stuff than that stated in the text. It is the view of the present researcher that there is nothing in the matters left out that can amount to a criminal offence.

<sup>226</sup> That is, eatable or edible.

<sup>227</sup> Section 2(1) of the PEPA. This section refers to ‘Life President’ and not ‘State President’. The PEPA was passed at a time when Malawi had a Life President. The office of a Life President was abolished on the advent of multiparty democracy in the early 1990s. Since 1994 the country has had a State President in terms of the Constitution. The section also uses the word ‘land’. According to section 3(1) of the PEPA the word ‘land’ includes land beneath water. So even petroleum beneath water vests in the State President.

environment and other matters. Enforcement mechanisms provided for in the Act include criminal sanctions. The following are the crimes created by the Act.

### **5.11.2 Exploration or production of petroleum without a licence**

It is an offence to carry on in Malawi exploration or production operations except under and in accordance with a licence.<sup>228</sup> There are two facets to this offence. In the first place, the words ‘except under ... a licence’ signify that the absence of a licence constitutes an offence. In the second place, the words ‘in accordance with a licence’ signify that even if one has a licence he may commit an offence if he does not comply with the conditions or generally what is stated in the licence. Any person who is convicted of either of these offences is liable, in the case of an individual, to a fine of MWK1 000 or to imprisonment for a term of two years or to both, or, in the case of a body corporate, to a fine of MWK50 000 (US\$376).<sup>229</sup>

### **5.11.3 Disclosure of information**

It is an offence to disclose, except with the consent of the licensee, information furnished, and information in a report submitted, pursuant to the Regulations by a licensee.<sup>230</sup> The regulations do require, among other things, that certain information be given upon renewal of a petroleum production licence.<sup>231</sup> However, no offence is committed if the disclosure is made: (a) for or in connection with the administration of the Act; (b) for the purpose of any legal proceedings; or (c) to any consultant to the Government, or to any public officer who is approved by the Commissioner for Petroleum Exploration and Production (“the Commissioner”) as a proper person to receive the information.<sup>232</sup>

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<sup>228</sup> Section 2(2) and (3) of the PEPA.

<sup>229</sup> Section 2(3) of the PEPA.

<sup>230</sup> Section 7(1) of the PEPA.

<sup>231</sup> Regulation 5 of the Petroleum (Applications) Regulations (GN 48/1984).

<sup>232</sup> Section 7(2) of the PEPA.

Offenders under this offence are liable to a fine of MWK1 000 and to imprisonment for a term of two years, or to both.<sup>233</sup>

#### **5.11.4 Non-disclosure of information**

Section 40(1) of the PEPA states that where the Minister has reason to believe that a person is capable of giving information or producing or making available data<sup>234</sup> relating to exploration or production operations or petroleum obtained or its value, he may, by notice in writing, require that person:

- (a) to furnish him that information or data within the period and in the manner specified in the notice;
- (b) to attend before him or a person identified in the notice, at such time and place as is specified in the notice, and there to answer questions relating to those operations or petroleum obtained or the value thereof; or
- (c) to furnish to a person identified in the notice, at such time and place as is specified in the notice, data in his custody or power relating to those operations or petroleum obtained or the value thereof.

It is an offence for any person to refuse or fail to comply with the requirement in the abovementioned notice from the Minister to the extent to which that person is capable of complying with it. It is also an offence to knowingly or recklessly furnish information or data that is false or misleading in a material particular, in purported compliance with a requirement referred to in paragraph (a) above. Further, it is an offence, when attending before the Minister or any other person under a requirement referred to in paragraph (b) above or when furnishing any data to any person under a requirement referred to in paragraph (c) above, to knowingly or recklessly make a statement or produce any data

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<sup>233</sup> Section 7(3) of the PEPA.

<sup>234</sup> For purposes of section 40, the word 'data' includes books, documents, tapes, diagrams, profiles and charts: section 40(5) of the PEPA.

that is false or misleading in a material particular. Any person found guilty of any of these offences is liable to a fine of MWK10 000.

#### **5.11.5 Non-compliance with direction on good oilfield practices**

The Minister may, by notice in writing served on a licensee,<sup>235</sup> give to the licensee a direction, consistent with good oilfield practices, as to any matter with respect to which regulations may be made under section 78 of the Act. A licensee who fails or neglects to comply with the direction commits an offence and is liable to a fine of MWK10 000.<sup>236</sup> By 'good oilfield practices' is meant all those things that are generally accepted as good, safe and efficient in the carrying on of exploration for petroleum or of operations for the production of petroleum.<sup>237</sup>

The accused under this offence has a due diligence defence. He can exonerate himself by proving that he promptly took all reasonable steps to comply with the direction.<sup>238</sup>

#### **5.11.6 Non-compliance with work practice requirement**

It is an offence for a holder of a licence to contravene a requirement of section 48 of the PEPA. Offenders are liable to a fine of MWK50 000 (US\$376).<sup>239</sup> A perusal of section 48 reveals that the holder of a licence is required to do a number of things. There are two general requirements and eight particular requirements. The general requirements are to carry out exploration and production operations in the exploration or production area in a proper, safe and workmanlike manner and in accordance with good oilfield practices; and

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<sup>235</sup> According to section 3(1) of the PEPA 'licensee' means the holder of a petroleum exploration licence or a petroleum production licence, or both.

<sup>236</sup> Section 35(1) and (2) of the PEPA.

<sup>237</sup> Section 3(1) of the PEPA.

<sup>238</sup> Section 35(3) of the PEPA.

<sup>239</sup> Section 48(6) of the PEPA.

to take all reasonable steps necessary to secure the safety, health and welfare of persons engaged in those operations in and about the exploration or production area. The particular requirements are:

- (a) to control the flow and prevent the waste or escape in the exploration or production area of petroleum, gas (not being petroleum) or water;
- (b) to prevent the escape in the exploration or production area of any mixture of water or drilling fluid and petroleum or any other matter;
- (c) to prevent damage to petroleum bearing strata in any area in respect of which the licence is not in force;
- (d) to keep separate in the prescribed manner –
  - (i) each petroleum reservoir discovered in the exploration or production area; and
  - (ii) such of the sources of water (if any) discovered in the exploration or production area as the Commissioner directs by notice in writing served on the licensee;
- (e) to prevent water or any other matter entering any petroleum reservoir through the wells in the exploration or production area except when required by and in accordance with good oilfield practices;
- (f) to prevent the pollution of any aquifer, estuary, harbour, lake, reservoir, river, spring, stream, water-well, and all other areas of water by the escape of petroleum, drilling fluid, chemical additive, gas (not being petroleum), or any waste product or effluent;
- (g) to furnish to the Commissioner, prior to the drilling of any well, a detailed report on the technique to be employed, an estimate of the time to be taken, the material to be used and the safety measures to be employed, in the drilling of the well; and

(h) to furnish to the Commissioner reasonable notice of his intention to abandon any well and to close or plug any well with the prior consent in writing of the Commissioner and in a manner approved by the Commissioner.<sup>240</sup>

As stated above, contravention of any of these requirements is an offence. Apart from the generally available defences, the accused may raise a due diligence defence: it is a sufficient defence if he proves that he promptly took all reasonable steps to comply with the relevant requirement.<sup>241</sup>

#### **5.11.7 Failure to maintain structures, equipment and other property**

A licensee who fails to maintain in good condition and repair all structures, equipment and other property in the area subject to the licence and used in connection with the operations in which he is engaged, commits an offence. Similarly, a licensee commits an offence by failing to remove from that area all structures, equipment and other property that are not either used or to be used in connection with those operations. The licensee also commits an offence if he fails to take reasonable steps to warn persons who may, from time to time, be in the vicinity of any such structure, equipment or other property of the possible hazards resulting therefrom. The penalty for any of these offences is a fine of MWK10 000.<sup>242</sup>

#### **5.11.8 Non-compliance with a direction relating to drilling near boundaries**

A licensee is not allowed to drill a well any part of which is less than one kilometre from a boundary of the area subject to the licence except with the consent in writing of the

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<sup>240</sup> Requirements (a) to (g) are based on section 48(2) of the PEPA and requirement (h) is based on section 48(5) of the PEPA.

<sup>241</sup> Section 48(7) of the PEPA.

<sup>242</sup> Section 49 of the PEPA. This section continues to say that there is no offence if the structure, equipment or other property was not brought into the area subject to the licence by or with the authority of the licensee.

Commissioner and in accordance with such conditions, if any, as are specified in the instrument of consent. Where the licensee goes ahead to drill without the consent or in contravention of the conditions of the consent, the Commissioner may, by notice in writing, direct the licensee to plug the well and/or close off the well and/or comply with specified directions relating to the drilling or maintenance of the well within a specified period. A person who fails or neglects to comply with the direction commits an offence and is liable to a fine of MWK10 000.<sup>243</sup> Although the offence refers to ‘a person’, the context suggests that the term should be restricted to a licensee under the Act, for the notice containing the direction is directed to licensees only. There is therefore no justification for extending liability to persons other than licensees.

#### **5.11.9 Non-compliance with a direction relating to cancellation or expiration of a licence**

Where a licence has been cancelled or has expired or has ceased by relinquishment to include any area, the Minister may by written notice direct the person who is or was the holder of the licence, within a specified period, to make provision for the conservation and protection of the natural resources in any area that was but is no longer subject to the licence; to plug or close off all wells made in that area by any person engaged or concerned in those operations; and to remove or cause to be removed from that area all property brought into the area by any person engaged or concerned in the operations authorised by the licence, or to make arrangements that are satisfactory to the Minister.<sup>244</sup> It is an offence to refuse or fail to comply with the Minister’s direction within the period specified in it. Offenders are liable to a fine of MWK5 000.<sup>245</sup>

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<sup>243</sup> Section 50 of the PEPA.

<sup>244</sup> The plugging or closing off of wells and the provision for natural resource conservation and protection are also required to be done to the satisfaction of the Minister: section 51(1)(b) and (c) of the PEPA.

<sup>245</sup> Section 51(3) of the PEPA. Section 51(2) expressly states that nothing in the section or in the Minister’s direction should be construed as requiring any person who is or was the holder of a licence to do anything which is not in accordance with good oilfield practices or to refrain from doing anything which is in accordance with good oilfield practices.

### **5.11.10 Failure to take out compulsory insurance against liability for pollution**

If petroleum is discharged during production operations, the licensee carrying on those operations is generally liable to reimburse any person who suffers damage caused directly by contamination following the discharge. He is also liable for the cost of any measures reasonably taken after the discharge for the purpose of preventing or reducing any such damage. He is further liable to reimburse any person who suffers damage caused directly by any measures so taken.<sup>246</sup> From these provisions it is clear that the liability of the licensee is considerable. In order to take care of eventualities or risks, the Act requires that the licensee takes out insurance or other security to cover the liability. Specifically section 61(1) prohibits any licensee from carrying on production operations unless there is in force in respect of the liability discussed above a contract of insurance or other security satisfactory to the Minister, in an amount determined by the Minister. A licensee who fails to take out such insurance or other security commits an offence and is liable to a fine of MWK5 000 for each day during which the offence continues.<sup>247</sup>

### **5.11.11 Failure to give notice of discovery of mineral**

When a significant discovery of any mineral<sup>248</sup> is made in an exploration area or a production area, the licensee is required, within thirty days after the date of discovery, to furnish to the Minister particulars in writing of the discovery. Failure to do so constitutes an offence punishable by a fine of MWK5 000.<sup>249</sup> It appears that it is not necessary for

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<sup>246</sup> Section 55(1) of the PEPA.

<sup>247</sup> Section 61(2) of the PEPA.

<sup>248</sup> Mineral here is required to be understood as defined in section 4 of the Mines and Minerals Act 1 of 1981: section 69(1) of the PEPA. The Mines and Minerals Act defines 'mineral' as any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, formed by or subject to a geological process, but does not include: (a) water, not being water taken from a borehole, well, excavation or natural saltpan for the extraction therefrom of a substance in solution therein and of commercial value; or (b) soil, not being soil taken from the earth for the extraction therefrom of a substance of commercial value contained therein or for the manufacture therefrom of a product of commercial value; or (c) petroleum as defined in section 3 of the PEPA.

<sup>249</sup> Section 69 of the PEPA.



the discovery to be made by the licensee. It seems that the discovery may be made by someone else in the licensee's exploration or production area and then the licensee may get to know of it. Upon acquiring that knowledge, the licensee must report it to the Minister, failing which he may be found guilty of the offence. This interpretation is possible on account of the way the offence has been formulated, for it does not require the discovery to be made by the licensee. It follows that if the discovery is made by the licensee and he fails to report it to the Minister, the licensee is a fortiori guilty of the offence.

#### **5.11.12 Hindering officer and false statements**

The Act gives to the Commissioner and authorised officers various powers relating to the exploration for or production of petroleum. Any person who, without reasonable excuse, obstructs, molests or hinders the Commissioner or authorised officer in the exercise of his powers, commits an offence. It is also an offence to knowingly or recklessly make a statement or produce a document that is false or misleading in a material particular to the Commissioner or an authorised officer engaged in carrying out his duties and functions under the Act. The penalties for these offences are a fine of MWK500 and/or imprisonment for a term of six months.<sup>250</sup>

#### **5.11.13 Offences relating to removal of petroleum**

Petroleum is required to be removed from any land from which it has been recovered or disposed of by a licensee for the purpose of sampling or analysis; by a licensee in accordance with the terms of the licence concerned; or as otherwise permitted by PEPA. In the case of removal from any land of samples of petroleum, the written consent of the Commissioner must be obtained. It is an offence to contravene any of these removal requirements. The penalties for this offence depend on the nature of the person who has committed the offence. If the offender is a natural person, the penalties are a fine of

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<sup>250</sup> Section 70 of the PEPA.

MWK500 and/or imprisonment for a term of six months. If the offender is a body corporate, the penalty is a fine of MWK5 000.<sup>251</sup>

#### **5.11.14 Obstruction of licensee**

It is an offence, without reasonable cause, to obstruct or hinder a licensee from doing any act which that licensee is authorised to do by PEPA. Any person convicted of this offence is liable to a fine of MWK1 000 or to imprisonment for a term of two years, or to both.<sup>252</sup>

#### **5.11.15 Miscellaneous offences**

Of these miscellaneous offences two relate to the giving of false or misleading information. The remaining two offences relate to doing something with a view to mislead any person as to, inter alia, the existence of a petroleum reservoir. The offences in the first category are as follows. Firstly, it is an offence to knowingly or recklessly give information which is false or misleading in a material particular in or in connection with any application under PEPA or in response to any invitation or requirement of the Minister or Commissioner under the Act. Secondly, it is an offence to knowingly or recklessly include or permit to be included in any report, return or affidavit submitted in pursuance of any provision of the Act, any information which is false or misleading in a material particular.<sup>253</sup>

The other two offences are in the following terms. It is an offence to place or deposit or to be accessory to the placing or depositing of, any petroleum or substance in any place with the intention of misleading any other person as to the possibility of a petroleum reservoir existing in that place. It is also an offence to tamper with samples of minerals, rock or petroleum taken in the course of exploration or production operations by adding

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<sup>251</sup> Section 71 of the PEPA.

<sup>252</sup> Section 74 of the PEPA.

<sup>253</sup> Section 76(a) and (b) of the PEPA.

to or taking from any such sample any substance, or by in any way modifying the physical or chemical properties of any such sample, with the intention of misleading any person as to the existence, extent or content of a petroleum reservoir.<sup>254</sup>

The penalty for any of these offences depends on the nature of the offender. If the offender is a natural person, the penalty is imprisonment for a period of two years. If the offender is a body corporate, the penalty is a fine of MWK20 000.<sup>255</sup>

#### **5.11.16 Contravention of regulations**

The Minister is empowered to make regulations necessary or convenient to be prescribed under or for giving effect to the Act. Such regulations may make provision for, among other things, the prevention of pollution and measures to be taken for the purpose of preventing or reducing damage from pollution; the underground disposal of petroleum, water and other substances produced in association with exploration for or production of petroleum; and safety standards and the health, safety and welfare of persons employed in or in connection with exploration for, or production or conveyance of, petroleum.<sup>256</sup> The regulations may provide for penalties for their contravention. The penalties are a fine not exceeding MWK2 000 and/or imprisonment for a period not exceeding six months.<sup>257</sup> In this connection, it is worth noting that the regulations that have so far been made by the Minister do not make provision for criminal sanctions.<sup>258</sup>

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<sup>254</sup> Section 76(c) and (d) of the PEPA.

<sup>255</sup> Section 76(e) and (f) of the PEPA.

<sup>256</sup> Section 78(1) of the PEPA.

<sup>257</sup> Section 78(3) of the PEPA.

<sup>258</sup> The following regulations have been made: Petroleum (Applications) Regulations, GN 48/1984; Petroleum (Constitution of Blocks) Regulations, GN 40/1984; Petroleum (General Provisions) Regulations, GN 39/1984; Petroleum (Prescribed Fees and Annual Charges) Regulations, GN 53/1984; Petroleum (Records, Reports and Accounts) Regulations, GN 42/1984; and Petroleum (Registration and Transfer of Licences) Regulations, GN 41/1984.

### **5.11.17 Imputation of offence committed by body corporate to director, manager, secretary or other similar officer**

When an offence which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly.<sup>259</sup>

## **5.12 Petroleum Act 1 of 1951**

### **5.12.1 General**

The Petroleum Act 1 of 1951 is a colonial statute. It is very brief, containing only five sections. Although the long title states that the Act was meant to regulate the storage of petroleum,<sup>260</sup> it is clear from the Act's content that it has a broader purpose that may be summarised as proper handling of petroleum and its products. Three of the five sections<sup>261</sup> in the Act deal with regulations. They give the Minister power to make regulations for, inter alia, regulating the transportation of petroleum by railway, road or inland navigation, the storage of petroleum and the importation or exportation of petroleum. The regulations may provide that any person who commits an offence against such regulations shall be liable to a fine not exceeding £50 and/or imprisonment not

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<sup>259</sup> Section 75 of the PEPA.

<sup>260</sup> The Act defines petroleum as including the liquids commonly known as rock oil, Rangoon oil, Burma oil, kerosene, paraffin oil, petrol, gasoline, benzoline, benzene, naphtha or any like inflammable liquid, whether a natural product or one that is made from petroleum, coal, schist, shale or any other bituminous substance, or from any products thereof.

<sup>261</sup> Sections 3, 4 and 5.

exceeding three months. The Minister has promulgated the Petroleum (Storage) Regulations.<sup>262</sup> These regulations provide for offences discussed in the next paragraph.

### 5.12.2 Miscellaneous offences

It is an offence to store on any premises petroleum exceeding four hundred litres without being in possession of a valid licence. The licence is issued by the District Commissioner of the district where the petroleum will be stored. The licence may contain conditions. It is an offence to contravene any such condition.<sup>263</sup>

Storage tanks are required to be made of mild steel or other approved material and to be designed and protected according to British standards or other standards approved by the Chief Inspector of Factories or any other authorised public officer.<sup>264</sup> The tanks, whether below or above ground, must meet certain requirements.<sup>265</sup> Storage sheds are required to be constructed entirely of non-inflammable material and to meet other specifications.<sup>266</sup> Storage areas are required to be operated in a certain way. Conditions applicable to the operation or management of storage areas include prohibition of any act which tends to cause fire and which is not reasonably necessary.<sup>267</sup> On this background it is provided that it is an offence to fail to comply with any condition applying to the construction or maintenance of any tank or storage shed or to the operation or control of any storage area in his occupation.<sup>268</sup>

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<sup>262</sup> GN 20/1960, GN 195/1961, GN 22/1963, GN 109/1982. The regulations came into force on 19 February 1961.

<sup>263</sup> Regulation 3(1) and regulation 22(1)(a) and (c).

<sup>264</sup> Regulation 11 as read with regulation 2(1).

<sup>265</sup> Regulation 12.

<sup>266</sup> Regulation 15.

<sup>267</sup> Regulation 14.

<sup>268</sup> Regulation 22(1)(b).

It is an offence to obstruct the District Commissioner or other authorised officer in the exercise of the powers conferred upon them by the regulations. It is also an offence to store any petroleum exceeding twenty litres in any building which, or part of which, is used as living accommodation or a place of habitual public resort. It is further an offence to endanger the life or safety of any person or property by any other contravention of the regulations.<sup>269</sup>

A person convicted of any of the foregoing offences under the regulations is liable to a fine of MWK100 (US\$1 approximately). In addition the offender may be required to repay any expenses incurred in consequence of the breach of the regulations constituting the offence he stands convicted.<sup>270</sup>

It must be noted that the accused has a special defence to the offences created by the regulations. The accused has a good defence if he can prove that the act or omission complained of was done or occurred without his knowledge and that he took all reasonable precautions to prevent the doing of such act or the occurrence of such omission.<sup>271</sup>

## **5.13 Mines and Minerals Act 1 of 1981**

### **5.13.1 General**

The Mines and Minerals Act 1 of 1981 (“MIMA”) makes provision for the searching for and mining of minerals. It replaced three statutes.<sup>272</sup> It vests in the State President on behalf of the people of Malawi the entire property in and control over minerals in

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<sup>269</sup> Regulation 22(1)(d), (e) and (f).

<sup>270</sup> Regulation 22(2).

<sup>271</sup> Proviso to regulation 22(1).

<sup>272</sup> Mining Act (cap 61:01 of the Laws of Malawi); Mining Regulation (Oil) Act (cap 62:01 of the Laws of Malawi); and Radioactive Minerals Act (cap 62:02 of the Laws of Malawi).

Malawi.<sup>273</sup> It then prohibits the carrying on of reconnaissance, prospecting or mining operations except under and in accordance with a relevant authorisation. The MIMA prescribes a number of enforcement tools. Some of these are criminal sanctions which will now be discussed.

### **5.13.2 Engaging in operations without authorisation**

It is an offence to carry on in Malawi reconnaissance, prospecting or mining operations, except under and in accordance with a Mineral Right, a non-exclusive prospecting licence, a claim or a mineral permit.<sup>274</sup> By ‘Mineral Right’ is meant a reconnaissance licence, an exclusive prospecting licence or a mining licence.<sup>275</sup> Any person convicted of this offence is liable, in the case of a natural person, to a fine of MWK1 000 and/or to imprisonment for two years. If the convict is a body corporate, it is liable to a fine of MWK20 000.<sup>276</sup>

This offence is subject to sections 115 and 116 of MIMA. The former states that a citizen may, without an authorisation, take minerals of any kind from customary land, to the extent and in the manner which custom permits, and from which it has been customary to take minerals of that kind. It further allows the taking of building and industrial minerals for the purpose of construction in certain circumstances without an authorisation. The latter states that the Commissioner for Mines and Minerals (“the Commissioner”) may give written consent to the carrying on by any person of reconnaissance or prospecting operations in the course of a scientific investigation with respect to the geology or mineral resources of Malawi. The effect of these two sections is that it is not an offence to take minerals from customary land or to engage in reconnaissance, prospecting or mining operations in respect of building and industrial minerals without or contrary to a

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<sup>273</sup> Section 2(1) of the MIMA.

<sup>274</sup> Section 1(3) and (4) of the MIMA.

<sup>275</sup> Section 3(1) of the MIMA.

<sup>276</sup> Section 2(4) of the MIMA.

Mineral Right, a non-exclusive prospecting licence, a claim or a mineral permit. Similarly it is not an offence to engage in reconnaissance or prospecting operations in the course of the stated scientific investigation without or contrary to any of the listed authorisations.

### **5.13.3 Prohibition against disclosure of information**

It is an offence to disclose information furnished, or information in a report submitted, by the holder of a Mineral Right for as long as the Mineral Right has effect. No offence is committed if the disclosure is made with the consent of the holder of the Mineral Right. Offenders are liable to a fine of MWK1 000 and/or imprisonment for a term of two years.<sup>277</sup>

### **5.13.4 Offences relating to registration**

The Commissioner is required to record in a Register every Mineral Right granted and any dealings with or affecting a Mineral Right. When a Mineral Right is granted, the grantee's name is required to be recorded in the Register as the registered holder of the Mineral right.<sup>278</sup> The offences in the next paragraph are created on this background.

It is an offence to wilfully make or cause to be made or concur in making a false entry in the Register. It is also an offence to wilfully produce or tender in evidence a document falsely purporting to be a copy of or extract from an entry in the Register or of or from an

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<sup>277</sup> Section 7(1) and (3) of the MIMA. According to section 7(2) of the MIMA the prohibition against disclosure of information mentioned in the text does *not* operate to prevent the disclosure of information where the disclosure is made: (a) for or in connection with the administration of the Act; (b) for the purpose of any legal proceedings; (c) for the purpose of any investigation or inquiry conducted under the Act; or (d) to any consultant to the Government, or to any public officer, who is approved by the Commissioner as a proper person to receive the information.

<sup>278</sup> Section 58 of the MIMA.



instrument lodged with the Commissioner.<sup>279</sup> Any person found guilty of this offence is liable to a fine of MWK250 (US\$2) and/or to imprisonment for a term of six months.<sup>280</sup>

### **5.13.5 Failure to give information, and false information**

Where the Minister has reason to believe that a person is capable of giving information or producing or making available books or documents relating to minerals obtained or the value of minerals obtained, he may, by written instrument, order that person to furnish to him any such information, to attend before him or a specified person to answer relevant questions, or to produce or make available to a specified person relevant books or documents in his custody, power or control.<sup>281</sup> Any person who fails to comply with the Minister's requirement to the extent to which he is capable of complying with it, commits an offence. It is also an offence, in purported compliance with such a requirement, to knowingly furnish information that is false or misleading in a material particular. It is further an offence, when attending before the Minister or another person in pursuance of such a requirement, to knowingly make a statement or produce a document which is, or produce books which are, false or misleading in a material particular. In addition, when making available books or documents in pursuance of such a requirement, it is an offence to knowingly make available books which are, or a document which is, false or misleading in a material particular.<sup>282</sup> The penalties for these offences are a fine of MWK1 000 and/or a term of imprisonment for two years.<sup>283</sup>

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<sup>279</sup> The 'instrument' referred to here is a written document by which a legal or equitable interest in or affecting a Mineral Right is created, transferred, assigned, effected or dealt with: Section 59(1) of the MIMA.

<sup>280</sup> Section 65 of the MIMA.

<sup>281</sup> Section 92(1) of the MIMA.

<sup>282</sup> Section 92(4) and (5) of the MIMA.

<sup>283</sup> Section 92(5) of the MIMA.

### 5.13.6 Non-compliance with conditions of Mineral Right for environmental protection

There may be included in a Mineral Right conditions with respect to the prevention, limitation or treatment of pollution, and with respect to the minimization of the effects of mining on adjoining or neighbouring areas and their inhabitants.<sup>284</sup> In addition, a prospecting or mining licence may contain conditions relating to the reinstatement, levelling, re-grassing, reforestation and contouring of any part of the prospecting or mining area that may have been damaged or deleteriously affected by prospecting or mining operations; and relating to the filling in, sealing or fencing off, of excavations, shafts and tunnels.<sup>285</sup>

Where a Mineral Right over any land is wholly or partly determined or cancelled, or expires, the Minister may, by notice served on the person who is or was the last holder of the Mineral Right, direct him to take such steps within a specified period of time as to give effect, in relation to the land which is no longer subject to the Mineral Right, to any of the above conditions included in the Mineral Right. Any person to whom a direction is given who, without reasonable excuse, fails or neglects to comply with the direction, commits an offence. The penalties for this offence depend on the nature of the offender. If the offender is a natural person, the punishment consists of a fine of MWK1 000 and/or imprisonment for a term of two years. If the offender is a body corporate, the punishment is only a fine of MWK20 000.<sup>286</sup>

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<sup>284</sup> Section 95(1) of the MIMA.

<sup>285</sup> Section 96(1) of the MIMA.

<sup>286</sup> Section 97(1) and (2) of the MIMA.

### **5.13.7 Possessing or buying reserved minerals without authorisation**

It is an offence for any person to possess any reserved minerals<sup>287</sup> unless they were obtained by him pursuant to the exercise of rights under a Mineral Right, a non-exclusive prospecting licence or a claim, of which he is the holder; or unless he is the holder of a reserved minerals licence authorizing him to buy the mineral concerned or an employee of any such holder duly authorised and acting as such. It is also an offence for any person to buy reserved minerals unless he is the holder of a reserved minerals licence authorizing him to buy the minerals.<sup>288</sup> The penalties for these offences are the same as those for the offence of non-compliance with conditions of a Mineral Right for environmental protection.

### **5.13.8 Buying reserved minerals from unlicensed person**

It is an offence for the holder of a reserved minerals licence to buy any reserved minerals from any person unless that person is entitled under Part VIII of the MIMA to possess those reserved minerals.<sup>289</sup> Under Part VIII of the MIMA a person is entitled to possession of reserved minerals if they were obtained by him under a Mineral Right, a non-exclusive prospecting licence or a claim of which he is the holder. A person may also be entitled to possess reserved minerals if he is the holder of a reserved minerals licence authorizing him to buy the mineral concerned or if he is an employee of such holder.<sup>290</sup> Offenders under this offence are liable to the same penalties as those for the offence of non-compliance with conditions of a Mineral Right for environmental protection.<sup>291</sup>

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<sup>287</sup> Section 98 of the MIMA states that 'reserved minerals' are precious metals, precious stones and any other mineral which may be prescribed.

<sup>288</sup> Section 99(1) as read with section 101 of the MIMA.

<sup>289</sup> Section 100(3) as read with section 101 of the MIMA.

<sup>290</sup> Section 99(1)(a) of the MIMA.

<sup>291</sup> Section 101 of the MIMA.

### 5.13.9 Obstruction of officers, and false statements

It is an offence, without reasonable excuse, to obstruct, molest or hinder the Commissioner or an authorised officer in the exercise of certain powers.<sup>292</sup> It is also an offence to knowingly or recklessly make a statement or produce a document that is false or misleading in a material particular to the Commissioner or an authorised officer engaged in carrying out certain duties and functions.<sup>293</sup> Any person convicted of this offence is liable to a fine of MWK500 and/or imprisonment for a term of six months.<sup>294</sup>

### 5.13.10 Removal of minerals

It is an offence to remove minerals from any land from which they have been obtained, or to dispose of minerals in any manner except:

- (a) by the holder of a Mineral Right, a non-exclusive prospecting licence or a claim for the purpose of sampling or analysis and such a holder must have the written consent of the Commissioner to send out of the land samples of the minerals;<sup>295</sup>
- (b) by such a holder in accordance with the terms of the Mineral Right, non-exclusive prospecting licence or claim concerned; or
- (c) as otherwise permitted by the MIMA.<sup>296</sup>

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<sup>292</sup> These powers are listed in section 117 of the MIMA.

<sup>293</sup> Section 117(7) of the MIMA states that the duties and functions are those prescribed under section 117 of the MIMA.

<sup>294</sup> Section 117(7) of the MIMA.

<sup>295</sup> Section 118(1)(a) and (2) of the MIMA.

<sup>296</sup> Section 118 of the MIMA.

It appears that it is a separate offence if the holder of a Mineral Right, a non-exclusive prospecting licence or a claim takes or sends out of any land samples of minerals without the written consent of the Commissioner.<sup>297</sup>

The penalties for these offences are, in the case of a natural person, a fine of MWK500 and/or imprisonment for a term of six months. In the case of a body corporate, the penalty is a fine of MWK10 000.<sup>298</sup>

#### **5.13.11 Exporting minerals without a permit**

The Minister may grant to any person a permit to export minerals from Malawi on conditions determined by the Minister and specified in the permit. Any person who exports any mineral from Malawi otherwise than under and in accordance with such a permit is guilty of an offence and liable, in the case of a natural person, to a fine of MWK1 000 and/or to imprisonment for a term of two years. In the case of a body corporate, the punishment is a fine of MWK20 000.<sup>299</sup> However, it must be noted that this offence cannot be committed in respect of certain minerals.<sup>300</sup>

#### **5.13.12 Failure or neglect to produce documents**

The Minister may direct the holder of a Mineral Right or a claim, at a reasonable time and place specified in the direction, to make available to, or produce for inspection by, the Commissioner or an authorised officer, any books, accounts, vouchers, documents or records of any kind, concerning the Mineral Right or claim. If the holder fails or neglects to do so, he commits an offence and is liable to a fine of MWK1 000.<sup>301</sup>

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<sup>297</sup> Section 118(2) and (3) of the MIMA.

<sup>298</sup> Section 118(3) of the MIMA.

<sup>299</sup> Section 119 of the MIMA.

<sup>300</sup> Section 119(3) of the MIMA.

<sup>301</sup> Section 121 of the MIMA.

### **5.13.13 Non-compliance with removal of property direction**

Where a Mineral Right has been wholly or partly determined or cancelled, or has expired, the Minister may, by notice served on the person who is or was the holder of the Mineral Right, direct that person to remove or cause to be removed from the relinquished area concerned, all property brought into that area by any person engaged or concerned in the operations authorised by the Mineral Right, or to make arrangements that are satisfactory to the Minister with respect to that property. Refusal or failure to comply with the direction constitutes an offence punishable by a fine of not more than MWK5 000.<sup>302</sup>

### **5.13.14 Obstruction of holder of authorisation**

It is an offence, without reasonable excuse, to obstruct, molest, hinder or prevent the holder of a Mineral Right, a non-exclusive prospecting licence or a claim, in or from doing any act which that holder is authorised to do by the MIMA. Offenders are liable to a fine of MWK1 000 and/or to imprisonment for a period of two years.<sup>303</sup>

### **5.13.15 Miscellaneous offences**

It is an offence to knowingly or recklessly give information which is false or misleading in a material particular, in or in connection with any application under the MIMA or in response to any invitation or requirement of the Minister or Commissioner under the MIMA.<sup>304</sup> It is also an offence, in any report, return or affidavit submitted under the Act,

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<sup>302</sup> Section 123 of the MIMA. Section 123(1) of the MIMA states that the Minister's power to issue a direction is 'subject to any relevant agreement of a kind referred to in section 10.' The said section 10 deals with the entry into an agreement by the Minister with any person with respect to, inter alia, the conditions to be included in the Mineral Right. It seems that the effect of this is that the Minister's powers to issue a direction may be curtailed or generally affected by the terms of a particular agreement.

<sup>303</sup> Section 125 of the MIMA.

<sup>304</sup> According to section 127(a) of the MIMA, the invitation or requirement in issue here is that which does not arise from the powers of the Minister or Commissioner provided for in section 117 of the MIMA. The offence for non-compliance with an invitation or requirement that arises from the powers of the Minister or Commissioner under section 117 has been discussed under segment 5.13.9 hereof.

to knowingly or recklessly include or permit to be included any information which is false or misleading in a material particular.

It is further an offence to place or deposit, or to be accessory to the placing or depositing of, any mineral or substance in any place with the intention of misleading any other person as to the mineral possibilities of that place. In the same vein, it is an offence to mingle or cause to be mingled with any sample of ore any substance which will enhance the value or in any way change the nature of the ore with the intention to cheat, deceive or defraud.

A person convicted of any of these offences is liable, in the case of a natural person, to imprisonment for a term of two years; or, in the case of a body corporate, to a fine of MWK30 000.<sup>305</sup>

#### **5.13.16 Imputation of offence committed by body corporate to a director, manager, secretary or other similar officer**

Section 126 of the MIMA states that when an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished.

#### **5.13.17 Offences under regulations**

Several sets of regulations have been promulgated under the MIMA. Of these only the Mines and Minerals (Claims) Regulations (“the Claims Regulations”) and the Mines and Minerals (Non-exclusive Prospecting Licence) Regulations (“the NEPL Regulations”)

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<sup>305</sup> Section 127 of the MIMA.

contain clear provisions on criminal sanctions. The discussion will now focus on these criminal sanctions, beginning with those in the Claims Regulations.

It is an offence for any person to take forcible possession of the whole or any part of a claim area<sup>306</sup> or to commence to work the same when his right to take possession of it or to work it is in dispute. This offence is punishable by a fine not exceeding MWK100 and by forfeiture of all right and title to possession of the claim.<sup>307</sup>

Any person who abandons his claim or whose claim expires or has been forfeited is required to fill up, fence or secure to the satisfaction of the Commissioner or an authorised officer all shafts, pits, holes and excavations in such manner as to prevent persons or stock inadvertently entering them. He is also required to remove all location beacons and all boundary posts thereon. Failure or neglect to do these things constitutes an offence and the offender is liable to a fine not exceeding MWK250 or to imprisonment for a term not exceeding six months. In addition he is liable to pay such sum as the Commissioner may certify to be the estimated cost of doing the thing(s) which ought to have been done by him (the offender).<sup>308</sup>

The holder of a non-exclusive prospecting licence is required, himself or by his agent, to be present and in control at the place at which prospecting work is being carried out under the authority of the licence. He is also required to produce his licence to the Commissioner, an authorised officer or a police officer when required to do so. If he fails or neglects to be so present and in control, and to so produce, he is guilty of an offence and liable to a fine of MWK250.<sup>309</sup>

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<sup>306</sup> By 'claim area' is meant an area of land subject to a claim: section 3(1) of the MIMA.

<sup>307</sup> Regulation 12 of the Claims Regulations.

<sup>308</sup> Regulation 13 of the Claims Regulations.

<sup>309</sup> Regulation 7 of the NEPL Regulations.



## 5.14 Land Act 25 of 1965

### 5.14.1 General

The Land Act 25 of 1965 regulates certain land matters. It classifies land into three groups: public land,<sup>310</sup> private land<sup>311</sup> and customary land.<sup>312</sup> It vests public land and customary land in the State President. It provides for user, acquisition and disposal of land and conversion of some of these groups of land into another group of land. It criminalizes certain actions by way of enforcement. In the following few paragraphs crimes created under the Act will be outlined.

### 5.14.2 Unlawful use of public land

It is an offence to use or occupy any public land without being entitled to such use or occupation by virtue of a valid grant, lease or other disposition made by the Minister under any law for the time being in force at the date of such grant, lease or disposition. Offenders are liable to a fine of £100 and to imprisonment for six months, and, in the case of a continuing offence, to a further fine of £5 in respect of every day during which the offence continues.<sup>313</sup>

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<sup>310</sup> Public land is defined by section 2 of the Land Act as all land which is occupied, used or acquired by the Government and any other land, not being customary land or private land, and includes: (a) any land held by the Government consequent upon a reversion thereof to the Government on the termination, surrender or falling-in of any freehold or leasehold estate therein pursuant to any covenant or by operation of law; and (b) any land which was, immediately before the coming into operation of the Land Act, public land within the meaning of certain Orders.

<sup>311</sup> Section 2 of the Land Act defines private land as all land which is owned, held or occupied under a freehold title or a leasehold title or a Certificate of Claim or which is registered as private land under the Registered Land Act 6 of 1967.

<sup>312</sup> According to section 2 of the Land Act, customary land means all land which is held, occupied or used under customary law, but does not include any public land.

<sup>313</sup> Section 10 of the Land Act.

### **5.14.3 Failure to give notice of intention to sell, etc, private land**

Any person who intends to offer for sale or otherwise to convey, lease, transfer or assign any private land is required to give written notice of his intention to the Minister. He must give the notice not less than thirty days before he makes such offer or otherwise conveys, transfers or assigns the private land.<sup>314</sup> Any person who acts or attempts to act in contravention of this requirement commits an offence punishable by a fine of MWK1 000 and imprisonment for a term of twelve months.<sup>315</sup>

### **5.14.4 Contravention of direction or regulation on user of land**

The Minister may, by order under his hand and published in the Gazette or by regulations or by written directions or instructions in any individual case, make provision for regulating, managing and controlling the user of all land other than public land or private land situated in a municipality or township. The order, regulation, direction or instruction may make provision for, inter alia, regulating and controlling the use to which land may be put, the maintenance of proper drainage of such land, the preservation and protection of the source, course and banks of streams and generally the good management and conservation of the soil, water, woodland, pasture and other natural resources thereof. Contravention of such order, regulation, direction or instruction constitutes an offence punishable by a fine of MWK200 and imprisonment for six months, and, in the case of a continuing offence, by a further fine of MWK10 (US\$0.08) for every day during which the offence continues.<sup>316</sup>

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<sup>314</sup> There are four exceptions to this requirement of notice. The exceptions are set out in section 24A(3) of the Land Act.

<sup>315</sup> Section 24A(1) and (2) of the Land Act.

<sup>316</sup> Section 31 of the Land Act. In exercising his powers in respect of the orders, regulations, directions or instructions, the Minister is required to consult with and have regard to the views of the Minister for the time being responsible for the administration of the Town and Country Planning Act 26 of 1988: proviso to section 31(1) of the Land Act.

It must be noted that the Minister has made numerous orders. These orders take the general format of specification of an area of land and prohibition against making a new garden, planting a tree or shrub and erecting a building, within the specified land unless the person doing so has obtained the prior written consent of the Minister or his authorised representative.<sup>317</sup> In line with what has been said above, contravention of any of these orders is an offence.

#### **5.14.5 Obstruction of person exercising powers**

It is an offence to obstruct or impede any person lawfully exercising any powers or performing any functions or duties conferred or imposed upon him by or under Part VI of the Land Act.<sup>318</sup> A look at the content of the said Part VI reveals that the persons who may exercise powers or perform functions or duties conferred by or under it are the Minister and an authorised officer. The Minister's powers relate to the issuing of orders, regulations, directions and instructions. The authorised officer's powers include entry upon land for the purpose of ensuring that Part VI is complied with.<sup>319</sup> So obstructing the Minister or the authorised officer in the exercise of those powers is an offence. The penalties for this offence are the same as those for the offence discussed in the immediately preceding segment.<sup>320</sup>

#### **5.14.6 Offences against regulations**

The Minister is empowered to make regulations for any of the purposes of the Act and to give effect to them. In particular, the Minister may by such regulations prohibit the unlawful or unauthorized use or occupation of land and may prescribe as penalties for

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<sup>317</sup> One exception to this general format is the Control of Land (Hara Irrigation Project) Order (GN 170/1969) which creates a criminal offence straight away.

<sup>318</sup> Section 34 of the Land Act.

<sup>319</sup> Section 33 of the Land Act.

<sup>320</sup> Section 34 of the Land Act.

breach of such regulations a fine not exceeding MWK200 and/or imprisonment for a term not exceeding six months. In the case of a continuing offence, a further fine of not more than MWK10 for every day during which the breach continues, may be imposed.<sup>321</sup> In exercise of these powers the Minister has made the Land (Trespass, Encroachment or Unlawful Occupation) Regulations.<sup>322</sup> Regulation 2(1) of these regulations creates an offence punishable by a fine of MWK200 and imprisonment for six months. The first element of this offence is trespassing or encroaching upon any public land, private land or customary land, or being (or being deemed to be) in unlawful use or occupation of any such land. The second element is couched in incoherent language: it appears that some words are missing and so the second element does not make sense. In order to deal with this problem, it is suggested that this element – regulation 2(1)(c) – be recast to clarify its meaning.

## **5.15 Town and Country Planning Act 26 of 1988**

### **5.15.1 General**

The Town and Country Planning Act 26 of 1988 (“TACPA”) regulates certain aspects of the development of land in Malawi. In particular it makes provision for town and country planning and related matters. It creates a number of criminal offences.

### **5.15.2 Miscellaneous offences**

Section 72 of the TACPA provides that any person who does or fails to do certain acts or omissions without lawful or reasonable excuse commits an offence. The acts or omissions are as follows:

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<sup>321</sup> Section 39 of the Land Act.

<sup>322</sup> GN 165/1965 and GN 215/1965.

- (a) failing to carry out any work or action required by an enforcement notice;<sup>323</sup>
- (b) obstructing or impeding an authorised officer or any member of the Town and Country Planning Board or any member of a Planning Committee, lawfully exercising a power of entry onto land or building, from entering any land or any building;
- (c) failing to comply with any order, direction, notice or instruction lawfully given by an authorised officer exercising any powers conferred by the Act;
- (d) failing to give information on any matter in respect of which one has been lawfully required to do so;
- (e) tearing down, defacing or otherwise marking or interfering with any notice lawfully affixed to any building or placed upon a board specially erected for that purpose in connection with the administration of the Act;
- (f) failing to comply with a condition subject to which a grant of development permission was made;
- (g) subdividing, or entering into a subdivision agreement with respect to any land or a portion thereof within any area in which such subdivision or subdivision agreement is prohibited;<sup>324</sup>
- (h) commencing any development without a grant of development permission where such permission is required;
- (i) displaying an advertisement without a grant of development permission where such permission is required; or
- (j) ignoring a stop notice.<sup>325</sup>

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<sup>323</sup> Enforcement notices are provided for under section 45 of the TACPA. They are issued by a responsible authority in any case where the authority considers that unauthorized development has taken place. The enforcement notice requires the owner or occupier of the land or building to which the notice relates, to take specified action.

<sup>324</sup> The terms 'subdivision' and 'subdivision agreement' are defined in section 2 of the TACPA. Subdivision means the division of any piece of land for the purpose of parting with possession or of disposing of any portion thereof, either by way of lease or sale or for the erection of a building upon any portion. Subdivision agreement is defined as including any agreement whereby any person is given: (a) any right whether vested or contingent to acquire, lease or obtain possession of any portion of land, whether immediately or upon fulfilment of any condition or upon the happening of any event, or after the lapse of any time, or upon the exercise of any option or upon the payment of any sum, whether by instalments or otherwise; or (b) a right to erect a building on any portion of land belonging to some other person.

The penalties for any of these offences are a fine of MWK5 000 or imprisonment for a term of twelve months together with, in the case of a continuing offence, a further fine of MWK100 for every day during which the offence continues after conviction.<sup>326</sup>

## **5.16 Monuments and Relics Act 16 of 1990**

### **5.16.1 General**

The Monuments and Relics Act 16 of 1990 (“MARA”) makes provision for the conservation, preservation and study of, among other things, places of distinctive natural beauty. The definition it offers for monument is wide: it includes graves, buildings, inscriptions and many other things. Of particular relevance for present purposes is the part of the definition which says that a monument is an area of land which has distinctive scenery or which contains rare or distinctive vegetation.<sup>327</sup> In the following discussion of offences created by the Act, references to monument are confined to the last-stated meaning.

### **5.16.2 Alteration or damage to a monument**

It is an offence, without the prior written consent of the Minister, to make any alteration to, or to destroy or damage, any monument or any part of it. It is also an offence, without the prior written consent of the Minister, to carry out any cultivation or mining project or other work so as to cause, or to be likely to cause, damage or disturbance to any protected monument.<sup>328</sup>

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<sup>325</sup> According to section 49(1) of the TACPA, where a responsible authority is of the opinion that a person is carrying out unauthorized development, the authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.

<sup>326</sup> Section 72 of the TACPA.

<sup>327</sup> Section 2 of the MARA.

<sup>328</sup> Section 13 of the MARA. A ‘protected monument’ is a monument which has been declared by the Minister to be a protected monument; section 11(1) of the MARA.

### **5.16.3 Demolition, alteration or extension of listed monument without or contrary to consent**

Any demolition, alteration or extension of a listed monument<sup>329</sup> is required to be undertaken only with the written consent of the Minister which may be granted subject to such conditions as the Minister may impose. It is an offence to engage in such demolition, alteration or extension without the written consent or in contravention of any condition of the consent.<sup>330</sup>

Any person accused of this offence has a defence. He can free himself from liability by proving that the unauthorized works of demolition, alteration or extension were urgently required in the interest of health and safety and that the Minister was notified as soon as was reasonably practicable.<sup>331</sup>

### **5.16.4 Engaging in archaeological excavations for monuments without authorisation**

Archaeological excavations for monuments may be undertaken only by the Chief Antiquities Officer and organisations or individuals holding a valid excavation permit issued by the Minister. Any person, other than these, who excavates on any land including his own for monuments, commits an offence.<sup>332</sup>

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<sup>329</sup> The Minister is required to compile a list of national monuments (other than protected monuments) of exceptional or special interest or of particular importance. In addition a local authority may compile a list of monuments of local importance. A monument included in either list is known as a listed monument (sections 2, 22 and 23 of the MARA).

<sup>330</sup> Section 24(1) and (5) of the MARA.

<sup>331</sup> Section 24(6) of the MARA.

<sup>332</sup> Section 28(1) and (2) of the MARA.

### **5.16.5 Failure to restore or repair excavation site**

The Minister may cancel an excavation permit in certain circumstances.<sup>333</sup> Notwithstanding the cancellation, the Minister may require the permit holder to restore or repair the excavation site and the most important findings (e.g. monuments) that it contains in such a way as to indicate the stratigraphy of the site. Failure to comply with such a requirement from the Minister amounts to an offence.<sup>334</sup>

### **5.16.6 Trading in a monument without a licence**

It is an offence for any person to trade in any monument, whether or not such monument is registered, unless he is the holder of a valid licence under the Act.<sup>335</sup>

### **5.16.7 Prohibition of fraud in monuments**

It is an offence to do any of the following things without the written consent of the Minister:

- (a) to reproduce, retouch, rework or forge any monument deriving its principal value from a monument which is twenty-five or more years old, or any monument which is less than twenty-five years old but deemed by the Minister to be of national importance or interest;
- (b) to make any object, whether copied or not, or to falsely label, describe, identify or offer for sale or exchange any object, with the intention to represent the same to be an original and genuine monument;

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<sup>333</sup> According to section 34(1) of the MARA, the circumstances are: (a) where the holder of the permit suspends excavation or is otherwise inactive without reasons accepted as valid by the Minister; (b) where the holder of the permit fails to comply with the requirements of the Act; and (c) where the Minister considers it in the public interest so to do.

<sup>334</sup> Section 34 as read with section 31(n) of the MARA.

<sup>335</sup> Section 36 of the MARA.



- (c) to offer for sale or exchange any object with the knowledge that it has previously been collected or excavated in contravention of the Act;
- (d) being a licensed dealer in monuments, to encourage any other person to excavate for monuments without an excavation permit issued under the Act.<sup>336</sup>

### **5.16.8 Illegal exports of monuments**

A person, who exports any monument without a valid licence or otherwise in contravention of Part VIII of the MARA, commits an offence.<sup>337</sup>

### **5.16.9 General offences**

It is an offence, without authority, to knowingly alter, destroy, deface, damage, demolish, remove from the original site, or reproduce a protected monument or a listed monument whether in the possession of the government or a private organisation or an individual. It is also an offence to possess an unregistered monument without having shown it to the Minister for registration. Further it is an offence for any person, in any application to the Minister under the Act, to make any statement which he knows or ought reasonably to know to be false in any material respect. It must be noted that all these offences are introduced by the words 'Save as is provided in this Act'. These words suggest that the Act may authorise the performance of the proscribed acts without incurring criminal liability.<sup>338</sup>

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<sup>336</sup> Section 39 of MARA.

<sup>337</sup> Section 47 of the MARA.

<sup>338</sup> Section 55 of the MARA.

#### **5.16.10 Penalties for offences under the MARA**

All offences under the MARA are punishable by a fine of MWK10 000 and imprisonment for three years.<sup>339</sup>

### **5.17 Fisheries Conservation and Management Act 25 of 1997**

#### **5.17.1 General**

The Fisheries Conservation and Management Act 25 of 1997 (“FCMA”) provides for the regulation, conservation and management of fisheries in Malawi.<sup>340</sup> It repeals and replaces the Fisheries Act 16 of 1973. It creates a number of offences which will now be analysed.

#### **5.17.2 Fishing without registration and licence**

Every owner of a local registrable fishing vessel<sup>341</sup> who intends to use it for fishing is required to register the vessel with the Director of Fisheries.<sup>342</sup> It is prohibited to use a local registrable fishing vessel for fishing in the fishing waters<sup>343</sup> unless it is so registered and the person using the vessel (or a person working on his behalf) is authorised so to

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<sup>339</sup> Section 56 of the MARA.

<sup>340</sup> Long title of the FCMA.

<sup>341</sup> Section 2 of the FCMA defines a ‘local fishing vessel’ as any fishing vessel (a) wholly owned by one or more persons ordinarily resident in Malawi; or (b) wholly owned by a company, society or association of persons incorporated in or established under the laws of Malawi and controlled by one or more persons ordinarily resident in Malawi. By ‘registrable vessel’ is meant a vessel that is required to be registered under the Act.

<sup>342</sup> Section 10(1) of the FCMA.

<sup>343</sup> According to section 2 of the FCMA ‘fishing waters’ means: (a) all waters within the land borders of Malawi capable of supporting fish; and (b) those parts of Lake Malawi over which Malawi exercises sovereignty. The limitation specified in (b) is necessary because Lake Malawi is shared by Malawi and Mozambique.

fish by a licence.<sup>344</sup> A licence is required only in respect of commercial fishing. Use of a local registrable fishing vessel for commercial fishing without the registration or the licence constitutes an offence punishable by a fine not exceeding MWK50 000 (US\$376) and imprisonment for ten years and a further fine of MWK200 per day for each day that the offence continues after conviction. The persons upon whom the prescribed punishment may be imposed are the master, owner, charterer or hirer of the vessel.<sup>345</sup>

### **5.17.3 Fishing without a licence by foreign fishing vessel**

No foreign fishing vessel<sup>346</sup> may be used for commercial fishing in the fishing waters unless the owner or charterer thereof is authorised to fish by a licence. Where this prohibition is contravened, the master, owner and charterer may be convicted of an offence and sentenced to a fine of not less than MWK20 000 and not more than MWK1 000 000, imprisonment for ten years and a further fine of MWK200 per day for each day that the offence continues after conviction.<sup>347</sup>

### **5.17.4 Failure to give notice of fish on foreign fishing vessel**

The master of a foreign fishing vessel that has fish on board is required to notify a fisheries protection officer of the amounts and descriptions of the fish on board the vessel. He must give that notification prior to entry of the vessel into the fishing waters or prior to the vessel leaving an area of the fishing waters in which the owner or charterer is

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<sup>344</sup> Section 11(1) of the FCMA.

<sup>345</sup> Section 11(2) of the FCMA. Actually the section states that the listed persons are the ones who would be guilty of the offence under the section.

<sup>346</sup> A 'foreign fishing vessel' is defined by section 2 of the FCMA as any fishing vessel other than a local fishing vessel or a convention fishing vessel.

<sup>347</sup> Section 12 of the FCMA.

licensed to fish. Failure to give the notification amounts to an offence punishable by a fine not exceeding MWK50 000 and imprisonment for ten years.<sup>348</sup>

### **5.17.5 Prohibition of commercial fishing without a licence**

A person who desires to engage in commercial fishing is required to apply to the Director of Fisheries for a licence. The grant of the fishing licence is in the discretion of the Director and the licence may authorise fishing generally or may confer limited authority by reference to the area in which fishing is authorised; the period, times or particular voyages during which fishing is authorised; the quantities, description and size of fish which may be taken; or the method of fishing. The fishing licence may specify the fishing gear that is permitted to be used for fishing by or on behalf of the licensee, and may authorise fishing either unconditionally or subject to such conditions as may appear to the Director to be necessary or expedient for the regulation of fishing, the conservation or management of fisheries in the fishing waters or for the economic benefit of Malawi.<sup>349</sup>

Any person who engages in commercial fishing in the fishing waters not under the authority of a licence commits an offence and is liable to a fine of MWK20 000 and to imprisonment for four years.<sup>350</sup> Where a licence was granted but a condition thereof is contravened, the licensee or the master, as the case may be, of the fishing vessel concerned in such contravention commits an offence and is liable to a fine of MWK20 000 and to imprisonment for four years.<sup>351</sup>

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<sup>348</sup> Section 13 of the FCMA. Subsection (3) of section 13 states that the notification does not of itself constitute a defence to a prosecution for the offence of illegal holding of fish under section 16 of the Act.

<sup>349</sup> Section 15 of the FCMA. The conditions *may* relate to the landing of fish caught under the authority of the licence, the use to which the fish may be put, the marking of fishing vessels used by the licensee, the marking of fishing gear, the records of fishing operations that must be kept on board fishing vessels, the navigation equipment and charts to be carried on board fishing vessels, and the place or places where the licensee may carry out transshipment of fish: section 15(2) of the FCMA.

<sup>350</sup> Section 14 of the FCMA.

<sup>351</sup> Section 15(2) of the FCMA.

### **5.17.6 Illegal holding of fish**

Section 16(1) of the FCMA provides that no master shall take or allow remaining on board a fishing vessel, within the fishing waters, fish which has not been taken under the authority of and in accordance with a fishing licence or other licence provided for under the Act. It may be observed that this provision does not declare the prohibition therein to be an offence nor does it specify a penalty for contravention of the prohibition. It is arguable, however, that this prohibition is a criminal offence. Support for this position emanates from section 13(3), section 16(2) and section 45 of the FCMA. Section 13(3) provides that the giving of notification of fish on board a fishing vessel does not constitute a defence to 'a prosecution for an offence under section 16.' Section 16(2) states that it shall be a defence to 'a prosecution for an offence arising under' section 16(1) if the person charged satisfies the court that the fish was not taken or caught in the fishing waters. Thus section 13(3) and section 16(2) suggest that an offence is created under section 16(1). In addition section 45 declares that any person who contravenes any provision of the Act 'for which no offence is specifically provided' shall be guilty of an offence. It is arguable that section 16(1) is a provision 'for which no offence is specifically provided' and so contravention thereof amounts to an offence.

The penalties for illegal holding of fish are arguably MWK20 000 and imprisonment for four years. These are the penalties prescribed under section 45(2) for offences under the Act for which no penalty is specifically provided. It may be recalled that section 16(1) does not specify the penalty for the offence created under it and so may qualify for the penalties under section 45(2).

### **5.17.7 Improper stowage of gear**

Where a fishing vessel is in an area of the fishing waters and the person using the vessel is prohibited under the FCMA from fishing in that area or is permitted by fishing licence or otherwise to fish only for certain species or descriptions of fish in that area, it is required that fishing gear of the fishing vessel or so much of the gear as is not required

for permitted fishing, should be stowed in such manner that it is not readily available for use for fishing or in such manner as may be prescribed. Contravention of these requirements is an offence and the master of the vessel concerned may be convicted thereof and sentenced to a fine of MWK10 000, imprisonment for two years and a further fine of MWK200 per day for each day that the offence continues after conviction.<sup>352</sup>

### **5.17.8 Aquaculture offences**

Any person interested in establishing or operating an aquaculture establishment is required to obtain from the Director of Fisheries an aquaculture permit before such establishment or operation. The aquaculture permit, *inter alia*, confers on the permit holder exclusive rights to harvest the products of the aquaculture establishment within the area specified in the permit. The permit is subject to such conditions as appear to the Director to be necessary or expedient for the regulation of aquaculture, the management of fisheries or for the economic benefit of Malawi.<sup>353</sup> Any person who establishes or operates an aquaculture establishment otherwise than under the authority of, and in accordance with the conditions of, an aquaculture permit, commits an offence and is liable to a fine of MWK20 000 and imprisonment for four years.<sup>354</sup>

Apart from obtaining the aquaculture permit, the person must also have obtained rights to use water for the aquaculture establishment under the Water Resources Act 15 of 1969.<sup>355</sup>

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<sup>352</sup> Section 17 of the FCMA.

<sup>353</sup> Section 21 of the FCMA.

<sup>354</sup> Section 20 of the FCMA. It must be noted that not every aquaculture establishment requires the obtaining of an aquaculture permit or water right. These requirements only apply to such aquaculture establishments as are prescribed by the Minister by notice published in the Gazette: section 20(3) of the FCMA.

<sup>355</sup> Section 20(1)(b) of the FCMA. The Water Resources Act 15 of 1969 (“WRA”) prohibits the diversion, damming, storage, abstraction or use of public water except in accordance with a water right (section 5 of the WRA). An application for the grant of a water right is required to be made to the Water Resources Board which forwards it together with its recommendations to the Minister. It is the Minister who grants the water right in his discretion (section 10 of the WRA).

Failure to have the water right renders the establishment or operation of the aquaculture establishment in those circumstances an offence.<sup>356</sup>

It is also an offence to harvest the products of an aquaculture establishment without the authority of the owner thereof.<sup>357</sup> This offence must be understood in the context of what an aquaculture permit confers, that is, the exclusive right to harvest the products of the aquaculture establishment.<sup>358</sup> Unlawful harvests are punishable by the same penalties as those for the establishment or operation of an aquaculture establishment without an aquaculture permit or licence.<sup>359</sup>

#### **5.17.9 Offences against convention enforcement powers of officers**

Section 30 of the FCMA lays down the general powers of fisheries protection officers<sup>360</sup> relating to fishing vessels in the fishing waters.<sup>361</sup> By section 36 of the FCMA the exercise of these powers is extended to a convention fisheries officer<sup>362</sup> (in relation to a

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<sup>356</sup> Section 20 of the FCMA. The person who establishes or operates an aquaculture establishment without a water right may be prosecuted under this section of the FCMA or under section 5 of the WRA, but the penalties under the latter are low: only MWK1 000 fine and one year's imprisonment (section 25 of the WRA). Until these penalties are amended upwards, it is recommended that prosecutors should prefer prosecutions under section 20 of the FCMA.

<sup>357</sup> Section 20(2) of the FCMA.

<sup>358</sup> Section 21(2)(b) of the FCMA.

<sup>359</sup> Section 20(2) of the FCMA.

<sup>360</sup> 'Fisheries protection officer' means the Director of Fisheries, fisheries officers in the Department of Fisheries, members of the Malawi Police Force, forest officers, wildlife officers, environmental officers, persons in command or in charge of any vessel, aircraft or hovercraft of the armed forces of Malawi or of the Government of Malawi, such other public officers as the Minister may designate by notice published in the Gazette, and any person authorised by or acting under the orders of any of the aforementioned persons except the Director of Fisheries: sections 2 and 3(7) of the FCMA.

<sup>361</sup> Generally the powers are required to be exercised within the fishing waters. However, where a fisheries protection officer has reasonable grounds for believing that an offence has been committed against the FCMA using or in relation to a foreign fishing vessel, he may stop, board and search such vessel *outside* the fishing waters: section 30(2) of the FCMA.

<sup>362</sup> A convention fisheries officer is a person appointed by the government of another country to enforce, or having power under the laws of another country to enforce, a convention that provides for the safeguarding or conduct of fishing operations or operations ancillary thereto to which Malawi is a party: section 2 of the FCMA.

convention fishing vessel)<sup>363</sup> and to a fisheries protection officer (in relation to a local fishing vessel or a foreign fishing vessel) anywhere within a convention area.<sup>364</sup> This has been done for the purpose of enforcing the provisions of any convention with respect to the conduct or safeguarding of fishing operations to which Malawi is a party. On this background section 36(3) provides that any person who, on any fishing vessel within the fishing waters or on a local fishing vessel outside fishing waters, does any of the following commits an offence:

- (a) failing without reasonable excuse to comply with any requirement imposed or to answer any question asked by a fisheries protection officer;
- (b) preventing or attempting to prevent any other person from complying with any requirement imposed or answering any question asked by a fisheries protection officer; or
- (c) obstructing any fisheries protection officer while exercising any of the powers conferred on him here or wilfully obstructing such officer in the exercise of any of those powers.

The foregoing provisions of section 36(3) also apply in relation to things done on a local fishing vessel in a convention area outside the fishing waters by or in relation to a convention fisheries officer who is exercising powers to enforce the provisions of a convention relating to that area as they apply in relation to things done on any fishing vessel within those limits by or in relation to a fisheries protection officer.<sup>365</sup>

The punishment for any of these offences is a fine of MWK20 000 and imprisonment for four years.<sup>366</sup>

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<sup>363</sup> A convention fishing vessel is a fishing vessel registered in a country which is a party to a convention to which Malawi is also a party: section 2 of the FCMA.

<sup>364</sup> By 'convention area' is meant, in relation to any bilateral or multilateral convention, the area to which the convention relates: section 2 of the FCMA.

<sup>365</sup> Section 36(4) of the FCMA.

<sup>366</sup> Section 36(3) of the FCMA.



#### **5.17.10 Transfer, stocking and introduction of fish**

It is an offence, without a permit, to stock any water with fish or to introduce into any water any fish not indigenous thereto. It is also an offence, without a permit, to transfer fish from an aquaculture establishment or any other water to a different aquaculture establishment or water.<sup>367</sup> The penalties for these offences are the same as those for offences against convention enforcement powers of officers.<sup>368</sup>

#### **5.17.11 Offences relating to fishing methods**

It is an offence to use any explosive, device capable of producing an electric current, poison or other noxious substance for the purpose of killing, stunning, disabling or catching fish or in any way rendering such fish more easily caught. It is also an offence to use any other method of fishing or gear that is unlawful. In addition it is an offence to carry or have in one's possession or control any explosive, device capable of producing an electric current, poison or other noxious substance, or gear that is unlawful in circumstances indicating an intention of using such explosive, device, poison, noxious substance or gear for the purpose of killing, stunning, disabling or catching fish or in any way rendering such fish more easily caught.<sup>369</sup> If any unlawful explosive, device, etc, is found on board any vessel or in the possession or control of any person within the vicinity of any of the fishing waters, it shall be presumed that such unlawful explosive, device, etc, was intended for the purpose of killing, stunning, disabling or catching fish or in any way rendering such fish more easily caught.<sup>370</sup> For reasons stated in segment 3.3 in Chapter 3 hereof, this presumption may be constitutionally justifiable.

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<sup>367</sup> Section 41 of the FCMA.

<sup>368</sup> Section 45(2) of the FCMA.

<sup>369</sup> Section 42(1) of the FCMA.

<sup>370</sup> Section 42(2) of the FCMA.

Further, any person who lands, sells, receives or is found in possession of fish knowing or having reasonable cause to believe it to have been taken in contravention of the prohibitions relating to fishing methods set out in the immediately foregoing paragraph, commits an offence.<sup>371</sup>

The penalties for these offences are a fine not exceeding MWK30 000 and imprisonment for six years.<sup>372</sup>

#### **5.17.12 Pollution, etc, of rivers, lakes or other parts of the fishing waters**

It is an offence to disturb, injure, poison, kill or detrimentally affect any fish, fish spawning ground, including any aquatic plant life or food for fish in any river, stream, lake or other part of the fishing waters by casting, introducing, discharging or allowing to fall, flow or percolate into such waters any sawdust or sawmill refuse, oil, chlorinated hydrocarbon, biocide, pesticide, toxic or any other substance, heavy metal or other material or rubbish which could lie on the bed of such waters.<sup>373</sup>

For purposes of this offence, section 43(2) of the FCMA sets out a presumption in favour of the prosecution: a person is considered to discharge any of the aforementioned substances if he places or discharges or causes or permits to be placed or discharged any waste or natural water containing waste in a position where that waste or any other waste emanating as a result of a natural process from that waste is liable to fall or descend into or be washed or percolate into or to be carried by wind, tide or current into any natural water. It is arguable that this presumption is constitutionally defensible on the grounds set out in segment 3.3 in Chapter 3 hereof.

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<sup>371</sup> Section 42(3) of the FCMA.

<sup>372</sup> Section 42(3) of the FCMA.

<sup>373</sup> Section 43(1) and (3) of the FCMA.

After being convicted of the offence under discussion, the offender may be convicted of another offence if he neglects or refuses to remove the material in respect of which the former contravention arose within a reasonable time after having been ordered so to do by a fisheries protection officer.<sup>374</sup>

Offenders under these offences are liable to a fine of not less than MWK20 000 and not exceeding MWK1 000 000 and if the offence is a continuing one, to a further fine of MWK1 000 per day for each day that the offence continues after conviction.<sup>375</sup>

#### **5.17.13 Offences against the general powers of fisheries protection officers**

It is an offence to resist arrest or wilfully<sup>376</sup> obstruct a fisheries protection officer in the exercise of his powers under the FCMA or to refuse or neglect to comply with any order, requisition, direction or notice lawfully made or given under the FCMA. Further, any person who, without reasonable excuse, fails to answer any question asked by a fisheries protection officer or to produce anything required to be produced under the Act, commits an offence. In addition any person who fails to allow a search or inspection under the Act or who prevents or attempts to prevent another person from complying with orders, requisitions or directions or from answering such questions or producing anything or allowing a search or inspection, commits an offence. These offences attract a fine of MWK30 000 and imprisonment for six years.<sup>377</sup>

#### **5.17.14 False information**

It is an offence to provide information which the person providing it knows to be false in a material particular or to recklessly provide information which is false in a material

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<sup>374</sup> Section 43(4) of the FCMA.

<sup>375</sup> Section 43(5) of the FCMA.

<sup>376</sup> For the meaning of 'wilfully' see segment 4.3.2 in Chapter 4 hereof.

<sup>377</sup> Section 44(1) of the FCMA.

particular. Thus the mental element required is either knowledge or recklessness. For such provision of information to amount to an offence, it must be done either for the purposes of obtaining any licence, permit or registration, or in purported compliance with any requirement to provide information under the Act. Offenders are liable to a fine of MWK10 000 and imprisonment for two years.<sup>378</sup>

#### **5.17.15 Alteration of documents**

Any person who, without lawful authority, alters or defaces any registration certificate, licence, permit, return or other document issued, furnished or kept pursuant to the FCMA commits an offence and is liable to a fine of MWK5 000 and to imprisonment for one year.<sup>379</sup>

#### **5.17.16 General offence**

Section 45(1) of the FCMA states that contravention of any provision of the Act for which no offence is specifically provided is an offence. As stated elsewhere,<sup>380</sup> the correct approach in interpreting provisions like this is to disregard the literal meaning and to select and say in what cases the court thinks Parliament intended contravention of a particular section of the Act to amount to a crime the criminalisation of which is prescribed in section 45(1) of the FCMA.

Persons convicted of this offence are liable to a fine of MWK20 000 and to imprisonment for four years.<sup>381</sup>

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<sup>378</sup> Section 44(2) of the FCMA.

<sup>379</sup> Section 44(3) of the FCMA.

<sup>380</sup> For example in segment 4.2.2 in Chapter 4 hereof.

<sup>381</sup> Section 45(2) of the FCMA.

### **5.17.17 Dealing with fish caught or transhipped illegally**

It is an offence for any master to tranship, receive on board a fishing vessel, transport or in any other manner deal with fish caught or transhipped in contravention of the FCMA. Offenders are liable to the same penalties as those for the offence analysed in the immediately foregoing segment.<sup>382</sup>

### **5.17.18 Convention offences**

The Minister is empowered, by order published in the Gazette, to provide for the enforcement of any restriction or obligation relating to fishing contained in a convention to which Malawi is a party. Any person who uses a fishing vessel within the fishing waters in contravention of such restriction commits an offence and is liable to the same penalties as those for the offence analysed in the immediately foregoing segment.<sup>383</sup>

### **5.17.19 General matters of criminal liability**

The FCMA makes provision for a number of general matters of criminal liability. In the first place, where a person is convicted of an offence under the Act, the court may, in addition to any other penalty it may impose, order forfeiture to the Government of any fishing gear, instrument or appliance or fishing vessel<sup>384</sup> used in the commission of such

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<sup>382</sup> Section 45(2) and (7) of the FCMA.

<sup>383</sup> Section 47 of the FCMA.

<sup>384</sup> A court may order forfeiture of a fishing vessel only in the circumstances laid out in section 51 of the FCMA. This provision states that if any fine or amount of costs is adjudged to be due by the owner, master or charterer of any fishing vessel in respect of a contravention of any provision of the Act, the court may, if no security or if it considers that insufficient security has been given to the Government, order that in default of payment the defendant shall give security for the payment of the amount due and if such security is not given, the court may order the detention of the fishing vessel used in the contravention and such fishing vessel may be detained in Malawi until the amount due is paid or sufficient security is given. If the fine is not paid or security is not given within 30 days of the order of the court or such longer period as the court may determine, the court may order that in the case of an offence under sections 11, 12 or 13 any vessel and equipment used in the commission of the offence be forfeited to the Government and, if so forfeited, be disposed of in such manner as the Director of Fisheries may direct. Section 11 deals with the control of fishing by registrable local fishing vessels. Section 12 deals with fishing by foreign fishing

offence and any fish on board a fishing vessel or the proceeds of sale thereof if already sold. The court may order that upon forfeiture, the things forfeited be disposed of in such manner as the Director of Fisheries may direct.<sup>385</sup> The court may also forfeit any licence, permit or registration granted or made under the Act and any fees paid for that licence, permit or registration. In addition the convicted person may be ineligible, for a period of three years from the day of the conviction, to hold any such licence or permit or to be so registered under the Act.<sup>386</sup>

In the second place, section 45 of the FCMA contains two rebuttable presumptions. The first is to the effect that for the purposes of proceedings under the Act, any fish found on board a fishing vessel shall be presumed (unless the contrary is proved) to have been caught: (a) within the fishing waters or in an area where the vessel is required to have a licence or permit to fish; and (b) within the vicinity of the vessel at the time the fish is so found where the licence or permit to fish specifying the vessel restricts fishing to a particular area.<sup>387</sup> The second runs like this: a certificate signed by the Director or any officer authorised by him to the effect that on a date specified in the certificate –

- (i) a fishing vessel specified in the certificate was not registered, licensed or specified in a permit under the Act;
- (ii) the accused person or any other named person was not the holder of a licence or permit under the Act; or
- (iii) a person was registered as the owner of a vessel or was the holder of a licence or permit under the Act,

is, in the absence of proof to the contrary, sufficient evidence of the matter stated in the certificate.<sup>388</sup>

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vessels while section 13 addresses the issue of notification of fish on board a foreign fishing vessel entering the fishing waters.

<sup>385</sup> Section 45(4) of the FCMA.

<sup>386</sup> Section 49 of the FCMA.

<sup>387</sup> Section 45(5) of the FCMA.

<sup>388</sup> Section 45(10) of the FCMA.

It is arguable that these presumptions are constitutionally justifiable on the basis of the reasons stated in segment 3.3 in Chapter 3 hereof.

In the third place, secondary offences and attempts to commit offences are deemed principal offences and full-fledged offences respectively. Specifically, it is provided that an attempt to commit an offence under the FCMA is itself to constitute an offence and may be dealt with in like manner as if the attempted offence had been committed.<sup>389</sup> With regard to secondary offences, it is stated that any person who aids, abets, counsels or procures an offence under the Act shall be guilty of the offence so aided, abetted, counselled or procured. Further, any person who conspires to commit an offence under the Act shall be guilty of the offence conspired to be committed.<sup>390</sup>

## **5.18 Occupational Safety, Health and Welfare Act 21 of 1997**

### **5.18.1 General**

The Occupational Safety, Health and Welfare Act 21 of 1997 (“OSHAWA”) is primarily concerned with the regulation of the conditions of employment in workplaces as regards the safety, health and welfare of persons employed therein. The most environmentally relevant part of the Act is the one dealing with hazardous substances and other dangerous substances. By ‘hazardous substance’ is meant any matter which by virtue of its chemical, physical or toxicological properties constitutes a risk to the safety, health or welfare of persons.<sup>391</sup> The Act creates one general offence that is stated to apply to every provision of the Act.

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<sup>389</sup> Section 45(6) of the FCMA.

<sup>390</sup> Section 45(8) of the FCMA.

<sup>391</sup> Section 2 of the OSHAWA. The term ‘dangerous substance’ is not defined in the Act.

### 5.18.2 General offence

Section 82(1) of the OSHAWA provides that every occupier<sup>392</sup> or owner<sup>393</sup> of a workplace who contravenes or fails to comply with any provision of the Act or regulations made under it shall be guilty of an offence. For reasons stated in segment 4.2.2 in Chapter 4 hereof, this provision should not be interpreted literally. Instead a court must select and say in what cases it thinks Parliament intended contravention of a particular provision of the Act to amount to a crime. Following this approach it is arguable that due to the nature of hazardous substances and other dangerous substances and taking into account other factors, contraventions of certain provisions of the Act relating to hazardous substances and dangerous substances constitute offences. It is suggested that these provisions include parts of section 51 (hazardous substances), section 52 (vessels containing dangerous substances), section 53 (bulk storage of dangerous substances) and section 54 (precautions in relation to explosives, etc).

### 5.18.3 Penalties

Offenders under the OSHAWA are liable to a fine of MWK10 000 and if the offence in respect of which they were convicted continued after the conviction, they are liable to a further fine of MWK500 (US\$4) for each day the offence continues.<sup>394</sup> Where any person dies or suffers bodily injury as a result of the occupier or owner of a workplace having contravened any provision of the Act, the occupier or owner is, without prejudice to any other penalty, liable to a fine of MWK20 000 and imprisonment for twelve months, and the whole or any part of that fine may be applied for the benefit of the deceased person or the injured person as the court may order.<sup>395</sup>

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<sup>392</sup> By 'occupier' is meant the person in actual occupation of a workplace, whether that person be the owner of it or not: section 2 of the OSHAWA.

<sup>393</sup> Section 2 of the OSHAWA defines 'owner' as the person for the time being receiving the rents or profits of the premises in connection with which the workplace is used, whether on his own account or as agent or trustee for any other person, or who would so receive the rents if the premises were leased.

<sup>394</sup> Section 83 of the OSHAWA.

<sup>395</sup> Section 85 of the OSHAWA.



Where the occupier or owner of a workplace is convicted of an offence under the Act, the court may, in addition to or instead of a penalty, order the occupier or owner, within the time specified in the order, to take such steps as may be so specified for remedying the matters in respect of which the contravention occurred. If after the expiration of the time specified the order is not complied with, the occupier or owner is liable to a fine of MWK500 for each day the non-compliance continues.<sup>396</sup>

## **5.19 Public Health Act 12 of 1948**

### **5.19.1 General**

The Public Health Act 12 of 1948 (“PHA”) is a colonial statute that has seen numerous amendments over the years. It is probably Malawi’s longest environmentally relevant statute. It has sixteen parts but only two of them merit consideration here. These are Part IX (sanitation and housing) and Part X (conveyance, sewerage and drainage). The following are the major environmental offences under the Act.

### **5.19.2 Passing prohibited matter into sewers or drains**

It is an offence to throw, empty or turn, or to suffer or permit to be thrown or emptied or to pass, into any public sewer or into any drain or private sewer communicating with a public sewer, any of the following matters:

- (a) any matter likely to injure the sewer or drain, or to interfere with the free flow of its contents, or to affect prejudicially the treatment and disposal of its contents;
- (b) any chemical, refuse or waste steam, or any liquid of a temperature higher than one hundred and ten degrees Fahrenheit, being refuse or steam, which, or a liquid which when so heated, is, either alone or in combination with the contents of the sewer or drain, dangerous or the cause of a nuisance or prejudicial to health; or

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<sup>396</sup> Section 84 of the OSHAWA.

(c) any petroleum spirit or carbide of calcium.

Offenders are liable to a fine of £10 and to a further fine of £5 for each day on which the offence continues after conviction.<sup>397</sup>

This offence is in many respects similar to the offence of passing prohibited matter into sewers or drains under the Waterworks Act 17 of 1995 analysed in segment 5.4.2 above, and the comments and recommendations made there are arguably applicable here.

### 5.19.3 Making communication with public sewers

A person who wishes or who is required to have his drains or private sewers made to communicate with a public sewer is required to give to the local authority notice of his proposals in writing in such manner as may be prescribed. At any time within 21 days of the receipt thereof, the authority may by notice to him refuse to make the communication.<sup>398</sup> If a notice of refusal is not served on the person, the authority is required, with all reasonable dispatch, to cause the communication to be made by means of a lateral drain to the public sewer.<sup>399</sup> It is an offence for any person (other than a person lawfully acting on behalf of a local authority) to cause a drain or sewer to communicate with a public sewer.<sup>400</sup> It is also an offence to fail to comply with or to act in contravention of any of the provisions of section 86 of the PHA.<sup>401</sup> It is suggested that

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<sup>397</sup> Section 82 of the PHA.

<sup>398</sup> The permissible grounds for refusing to make the communication are: (1) where it appears to the authority that the mode of construction of the drain or private sewer is not in conformity with the rules in force governing the same; and (2) where the condition of the drain or private sewer or the matter carried or to be carried thereby is such that the making of the communication would be prejudicial to the sewerage system of the authority: section 86(1) of the PHA.

<sup>399</sup> The authority may make the communication in such manner as may be prescribed or as the authority may decide, but it is not obligatory on the authority to make the communication until the estimated cost of the work has been paid to it or security for payment has been given to its satisfaction: section 86(2) of the PHA.

<sup>400</sup> Section 86(6) of the PHA.

<sup>401</sup> Section 86(6) of the PHA.

failure to comply with or contravention of the following provisions of section 86 constitutes an offence:

- (i) failure to give to the local authority notice of one's proposals in respect of the communication with a public sewer;
- (ii) failure to lay open for inspection a drain or private sewer the mode of construction and condition of which the authority intends to examine; or
- (iii) maintaining, repairing or renewing a lateral drain which is supposed to be maintained, repaired or renewed by the authority.

The penalty for any of these offences is £20.

It is worth noting that the offences here are in many ways similar to the offences relating to communication of drains or private sewers with public sewers provided for in section 33 of the Waterworks Act 17 of 1995 and discussed in segment 5.4.3 above. It is instructive to read these offences together.

#### **5.19.4 Failure to comply with notice other than by execution of works**

Where it appears to a local authority that any latrines provided for or in connection with a building are in such a state as to be prejudicial to health or to be a nuisance, but that they can without reconstruction be put into a satisfactory condition, the authority is mandated, by notice, to require the owner or the occupier of the building to execute such works, or to take such steps by cleansing the latrines or otherwise, as may be necessary for that purpose. In so far as such a notice requires a person to take any steps other than the execution of works, he commits an offence if he fails to comply with the notice. This offence is punishable by a fine of £5 and a further fine of £2 for each day on which the offence continues after conviction.<sup>402</sup>

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<sup>402</sup> Section 92 of the PHA. This section continues to say that in any proceedings relating to this offence it is open to the defendant to question the reasonableness of the authority's requirements, or of its decision to address the notice to him and not to the occupier or, as the case may be, the owner of the building.

## 5.20 General observations

### 5.20.1 Preliminary

From the foregoing analysis of crimes in Malawi's environmental legislation (both in the present chapter and in chapter four) a number of observations may be made. The presentation of these observations in the current segment will begin with general comments and will be followed by a note on the strengths and weaknesses of criminal sanctions. Thereafter a few concluding remarks will be made.

### 5.20.2 General comments

In the first place, it must be noted that the number of statutory provisions devoted to criminal sanctions in the enforcement of environmental law in Malawi is not matched by any other sanction. Malawian environmental legislation places more reliance on the criminal sanction than any other sanction. This reliance is expressed in two modes: criminal penalties are applied as a primary sanction; and they are also applied as a subsidiary or supporting sanction. By primary application is meant that the environmentally prejudicial activity is proscribed directly.<sup>403</sup> An example is section 30 of the National Parks and Wildlife Act 11 of 1992 which criminalizes the discarding or depositing of any litter or waste material in a national park or wildlife reserve otherwise than into a receptacle provided for the purpose.

Use of the criminal sanction as a subsidiary sanction occurs where 'reliance for compliance with legislative precepts is placed primarily upon administrative control, the criminal penalty being invoked only if and when such administrative control fails.'<sup>404</sup> An

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<sup>403</sup> M A Rabie, C Loots, R Lyster and M G Erasmus 'Implementation of Environmental Law' in R F Fuggle and M A Rabie *Environmental Management in South Africa* 120 at 128. See also Simon Ball and Stuart Bell *Environmental Law: the Law and Policy Relating to the Protection of the Environment* London: Blackstone 1991 at 85 where they state: 'The criminal law can be used either to provide direct criminal sanctions for environmental harm, or in a subsidiary and complementary role within a regulatory system.'

<sup>404</sup> Rabie et al *ibid*.

example is section 6 of the Water Resources Act 15 of 1969. This provision states that where in the opinion of the Water Resources Board<sup>405</sup> the use of public water for domestic purposes at any place is causing damage to the natural resources<sup>406</sup> of the area in the vicinity of that place, it may, by notice in writing served on any person making use of the water at that place, direct that such person takes such measures as may be specified in the notice for the purpose of avoiding or mitigating such damage.<sup>407</sup> Failure to comply with the notice constitutes an offence.

Applying the criminal sanction in a subsidiary fashion has several advantages. On many occasions it is easier to prove the commission of such offence than to prove the commission of a substantive environmentally prejudicial activity.<sup>408</sup> Further, subsidiary application allows preventative action to be taken before an environmentally prejudicial activity occurs.<sup>409</sup> Subsidiary application also has its disadvantages. Since the criminal sanction in this set up rides on the back of administrative controls, its effectiveness depends on the effective implementation or enforcement of administrative controls.<sup>410</sup> In a study of institutional capacity Gracian Banda established that administrative bodies in Malawi do not effectively enforce administrative controls.<sup>411</sup> It follows from this that the 'shortcomings in environmental administration' will automatically be transferred to criminal-law enforcement.<sup>412</sup> In addition, where an administrative body authorizes an

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<sup>405</sup> The Water Resources Board is established in terms of section 4 of the WRA. It exercises various powers and performs various duties specified in the Act. It is subject to any special or general directions of the Minister and the Minister may, for the better carrying out of the purposes of the Act, delegate additional powers and duties to it: section 4 of the WRA.

<sup>406</sup> By 'natural resources' is meant land, soil and water in their physical aspects together with the natural vegetation associated therewith, and the normal balance between them: section 2 of the WRA.

<sup>407</sup> Section 6(2) of the WRA.

<sup>408</sup> Rabie et al op cit at 85.

<sup>409</sup> Ibid.

<sup>410</sup> Rabie et al op cit at 129.

<sup>411</sup> Gracian Z Banda 'Report on Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews' 1997 (unpublished) at 93.

<sup>412</sup> Rabie et al op cit at 129.

environmentally detrimental activity, there is no room for 'protection by the criminal law, even if such authorization may be highly questionable from an environmental point of view.'<sup>413</sup>

In the second place, it may be noted that the legislation analysed in the present study makes provision for a range of penalties, fines and imprisonment being the most common. Additional penalties include forfeiture of instrumentalities and proceeds of environmental crime,<sup>414</sup> surrender or revocation of authorisations,<sup>415</sup> destruction or removal of any unauthorized building, structure or crop and compensation for damage caused.<sup>416</sup> The maximum term of imprisonment is 10 years. Fines can go as high as MWK1 000 000.<sup>417</sup>

In the third place, it may be observed that some of the criminal offences have not been articulated clearly and others conflict with constitutional provisions. Unclear articulation will undoubtedly lead to difficulties in the process of interpretation. Conflicting with constitutional provisions will lead to invalidity of the inconsistent parts of the offences.

The discussion will now focus on the strengths and weaknesses of criminal sanctions in the enforcement of environmental law in Malawi.

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<sup>413</sup> Ibid.

<sup>414</sup> For example this penalty is provided for under section 113(1) of the National Parks and Wildlife Act 11 of 1992.

<sup>415</sup> For example this penalty is provided for under section 116 of the National Parks and Wildlife Act 11 of 1992.

<sup>416</sup> See, for instance, section 74 of the Forestry Act 11 of 1997.

<sup>417</sup> Theoretically a fine of more than this sum may be ordered where the Act provides that the offender may be sentenced to a fine without specifying the maximum amount.

### 5.20.3 Strengths and weaknesses of criminal sanctions

Writers have identified the strengths and weaknesses of using criminal sanctions in environmental protection. Most of these are applicable to Malawi. One strength of the criminal sanction is that it has a stigmatizing quality.<sup>418</sup> Another is that it is arguably the only adequate remedy when it comes to serious offences which merit imprisonment.<sup>419</sup> Yet another strength is familiarity.<sup>420</sup> State enforcement machinery in Malawi is more familiar with the use of criminal sanctions than any other sanction. This is evident from the number of personnel devoted to the use of criminal sanctions as compared to the numbers devoted to the other sanctions. In every district the machinery for using criminal sanctions is more available than the machinery for using the other sanctions.

As for the weaknesses, many have been identified but only a few will be set out here.<sup>421</sup> Firstly, the use of criminal sanctions is costly in terms of money, manpower and time.<sup>422</sup> The criminal process demands the employment of various personnel from its inception to conclusion: police officers, prosecutors, judicial officers and correctional officials are all involved at various stages. The criminal process also demands considerable amounts of financial resources. The process may also take years to run its course. Secondly,

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<sup>418</sup> Michael A Kidd 'The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa' unpublished PhD Thesis, University of Natal 2002 at 263. In A P Simester and G R Sullivan *Criminal Law: Theory and Doctrine* 2ed (Revised 2004) Oxford: Hart Publishing 2003 at 22 write: 'Even though alternative methods of regulation, if practical, should normally be preferred to the criminal law, it is worth noting that there are sometimes advantages in resorting to the criminal law. Unlike any other area of law, the criminal law systematically stigmatises activities (through prohibition) and persons (through conviction and punishment. ... Sometimes that stigmatisation is appropriate.'

<sup>419</sup> Cf Kidd *ibid*.

<sup>420</sup> Michael A Kidd 'The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa' unpublished PhD Thesis, University of Natal 2002 at 264; M A Rabie 'Legal remedies for environmental protection' (1972) *V CILSA* 247 at 259.

<sup>421</sup> For a comprehensive treatment of this subject, see Michael A Kidd 'The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa' unpublished PhD Thesis, University of Natal 2002 at 264 – 276.

<sup>422</sup> Michael Kidd 'Environmental crime – time for a rethink in South Africa?' (1998) *5 SAJELP* 181 at 189; Cheryl Loots 'Making environmental law effective' (1994) *1 SAJELP* 17 at 17 – 18.

environmental crimes may sometimes be complex, requiring specialised knowledge<sup>423</sup> which in Malawi is not generally available due to insufficient specialised officials. As a result the investigation of environmental criminal offences is difficult. The absence of judicial officers with expert environmental knowledge presents a further difficulty in the process of adjudication. Thirdly, the criminal law standard of proof – proof beyond reasonable doubt – is difficult to achieve: this weakness partly follows from the previous one. To this may be added the difficulty of complying with the due process of law required in criminal proceedings. Fourthly, criminal sanctions may not stop an on-going environmentally prejudicial activity.<sup>424</sup> Fifthly, there is little public awareness of the threat to the environment and the public appears generally not to know what constitutes an environmental offence. Further, policing of prohibited activities is inadequate due to resource constraints; consequently the chances of discovery (being caught) are minimal.<sup>425</sup> In addition some penalties are low.

#### 5.20.4 Concluding Observations

It is clear from the foregoing discussion that the use of criminal sanctions has more weaknesses than strengths. This scenario begs the question whether it is necessary to use criminal sanctions at all or to use them to the extent to which they are currently used. It also calls for investigation into ways of optimising the use of criminal sanctions. The answer to the first question is that it is necessary to use criminal sanctions, especially in serious cases. It has actually been suggested that criminal sanctions should be used sparingly and that ‘rather than being invoked solely to deter, criminal sanctions should be reserved for conduct that is clearly recognized as criminal.’<sup>426</sup> Another author suggests

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<sup>423</sup> Kathleen F Brickey ‘Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory’ (1996) 71 *Tulane Law Review* 487 at 494, 495 and 501. See also Judson W Starr ‘Countering Environmental Crimes’ (1986) 13 *Boston College Environmental Affairs Law Review* 379 at 381.

<sup>424</sup> Cf Fiona Darroch and Peter Harrison *Environmental Crime* London: Cameron May 1999 at 382.

<sup>425</sup> Banda op cit at 93.

<sup>426</sup> Brickey op cit at 511.



that ‘criminal sanctions should be reserved for the most culpable subset of offences and not used solely for their ability to deter.’<sup>427</sup> In the same vein it has been said in the context of environmental wrongs that ‘criminal sanctions should be reserved for the most egregious contraventions of environmental law, with other measures being used for less serious offences.’<sup>428</sup> The present researcher *generally* agrees with these assertions. However, the acceptability of these assertions in the Malawi scenario depends on the availability of the ‘other measures’ for use in less serious offences. If the ‘other measures’ are not viable options, the logical inference would be to allow the criminal sanctions to continue their work, only that there may be need to reform them with a view to strengthening them. In the next chapter the viability in Malawi of the ‘other measures’ will be investigated.

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<sup>427</sup> Richard J Lazarus ‘Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime’ (1994) 27 *Loyola Law Review* 867 at 883 quoted in Michael Kidd ‘Alternatives to the Criminal Sanction in the Enforcement of Environmental Law’ (2002) 9 *SAJELP* 21 at 25. Kidd quotes several other authors who have made similar statements.

<sup>428</sup> Michael Kidd ‘Environmental Crime – Time for a Rethink in South Africa?’ (1998) 5 *SAJELP* 181 at 197.

## CHAPTER SIX

# ALTERNATIVES TO THE CRIMINAL SANCTION IN ENVIRONMENTAL PROTECTION IN MALAWI: MYTHS AND REALITIES

### 6.1 Introduction

Over the years the traditional way of achieving environmental protection has been through the use of command and control mechanisms, also called direct regulation. Legislative prescriptions of what polluters - or potential polluters - should do or not do in the interest of the environment have been common. Governments took upon themselves the responsibility to police these 'dos and don'ts'. A leading South African authority<sup>1</sup> writes that at the apex of these command and control mechanisms are criminal sanctions. He suggests that alternatives to command and control are self-regulatory instruments, co-regulatory instruments, information-based instruments and market-based or economic instruments. He further suggests that at an instrumental level, alternatives to the criminal sanction include administrative measures and civil measures.<sup>2</sup> The suggested alternatives will form the outline of the inquiry in the present chapter. Generally each alternative will be explained and a determination made as to its applicability to Malawi in its present circumstances. The discussion assumes knowledge of the socioeconomic status of the country as set out in Chapter 2 hereof.

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<sup>1</sup> Michael Kidd 'Alternatives to the Criminal Sanction in the Enforcement of Environmental Law' (2002) 9 *SAJELP* 21 at 26. The order in which these alternatives have been listed has been changed here.

<sup>2</sup> *Ibid.*

## 6.2 Self-regulation

Sometimes known as environmental voluntarism, self-regulation is a ‘strategy of environmental governance that relies on voluntary action from the private sector.’<sup>3</sup> Private enterprises develop and implement self-regulatory instruments without direct governmental intervention with a view to maintain ‘acceptance in the market place and to develop a competitive advantage.’<sup>4</sup> For self-regulation to work effectively several essentials must be in place. Jonathon Hanks<sup>5</sup> has identified the following motivations as necessary if industry is to adopt self-regulatory instruments:

- (a) *The threat (ultimately) of strict government sanction:* While the emphasis of self-regulation is principally on self-monitoring and the use of internal incentives for enforcement, the statutory and enforcement powers of the government are necessary as the ultimate sanction; the threat of legislation being passed as opposed to existing regulations being enforced is itself an incentive, with companies that are able to pre-empt legislation often gaining a competitive advantage.
- (b) *The implementation of peer pressure:* This typically requires the existence of effective sectoral organisations that have the ability to exert meaningful and credible sanctions on their members.
- (c) *The technical and/or marketing benefits associated with participation in voluntary initiatives:* Examples include the marketing benefits associated with having ISO 14001 certification and the technical assistance offered for example

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<sup>3</sup> Bruce Pardy ‘Asking the Dog to Guard the Puppy Chow: Three Objections to Environmental Voluntarism’ (2003) 12 *Journal of Environmental Law and Practice* 129 at 130. There is a general lack of clarity on the use of these terms: Alastair R Lucas ‘Voluntary Initiatives for Greenhouse Gas Reduction: the Legal Implications’ (2000) 10 *Journal of Environmental Law and Practice* 89 at 93.

<sup>4</sup> Jonathon Hanks ‘Achieving Industrial Sustainable Development in South Africa: What Role for ‘Self-regulatory’ and ‘Co-regulatory’ Instruments?’ (1998) 5 *SAJELP* 298 at 318. He continues to write that ‘[i]n an environmental context, self-regulation is a strategy in terms of which companies or sectors of industry, responding to various pressures, choose to regulate themselves by setting standards and codes of practice, introducing monitoring programmes, achieving pollution reduction targets, and so on.’

<sup>5</sup> Hanks op cit at 318 – 319.

by government or governmental agencies to participants in voluntary programmes. For such initiatives to be of value there needs to be sufficient technical capacity within government and/or a willingness to dedicate resources to access such capacity.

- (d) *An appreciation of the direct cost-savings associated with environmental management:* Business must appreciate that there are useful cost-savings to be achieved by implementing cleaner production programmes, as well as acknowledge that sustainable use of resources is an essential element of successful long-term business.
- (e) *The requirement to disclose environmental impacts:* By publicising emission levels, business leaders come to appreciate the true level of their business's environmental impact, as a result of which they may be prompted to improve their performance, not only to reduce newly recognised costs, but also in response to both public and peer pressure.
- (f) *General public pressure:* Environmental issues must receive an increasingly high public profile, to which industries have to respond so as to avoid public loss of confidence. In this regard an important role is played by public interest groups. To be effective these groups should be suitably vocal, relatively well informed, and with access to sufficient financial resources. Similarly consumers need to be able to exercise the power of choice in their consumption patterns.

In the context of Malawi, acceptance in the market place does not depend on environmental considerations nor do businesses develop a competitive advantage through environmental compliance.<sup>6</sup> This is principally due to the low levels of environmental consciousness in the country. Accordingly the assertion that private enterprises would go for self-regulation with a view to maintain 'acceptance in the market place and to develop a competitive advantage' does not have substance in the Malawi scenario.

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<sup>6</sup> Acceptance on the international market may sometimes depend on environmental considerations and businesses may develop a competitive advantage on the international market through environmental compliance. However, most Malawian companies or businesses do not go for the international market. As a result there is no incentive to engage in environmental compliance on the basis of expected international performance.

The threat of strict government sanction referred to in motivation (a) above does not have as much force as possibly in other countries. The private sector in Malawi has been around for too long to be deceived about such threats. The private sector knows that rarely does government implement such threats. To all intents and purposes such threats are empty. So the private sector cannot be motivated to adopt self-regulation on the basis of such threats.

Motivation (b) depends on the existence of sectoral organisations that can exert peer pressure. Industry in Malawi does not have strong sectoral organisations that can impose meaningful sanctions on their members. As for motivation (c) two observations may be made. In the first place, marketing benefits associated with ISO 14001 certification are minimal. Success in the local market does not depend on ISO 14001 certification; only when companies decide to sell their products on the international market does this matter. In fact only a few companies go for the international market with the result that there is little interest in ISO 14001 certification. In a recent survey on ISO 14001 certification it was found that no company had the certification.<sup>7</sup> In the second place, technical benefits may not be significantly available. For sure, the EMA does provide for a Technical Committee on the Environment composed of environmental professionals but it is essentially an advisory body to government and public organisations<sup>8</sup> and may not be

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<sup>7</sup> 'The ISO Survey of ISO 9001:2000 and ISO 14001 Certificates – 2003' [http://halweb.uc3m.es/esp/docencia/master/CD%20ISO%20survey/survey/industrial\\_sectors/countries/malawi.html](http://halweb.uc3m.es/esp/docencia/master/CD%20ISO%20survey/survey/industrial_sectors/countries/malawi.html) (Accessed 22 December 2005). The survey covered the period up to 31 December 2003. This lack of interest in ISO certification is in line with recent criticism that ISO 14001 cannot meet the environmental needs of developing countries: see Christine Mikulich 'ISO 14000 – 14001: The Developing World's Perspective' (2003) 17 *Tulane Environmental Law Journal* 117. It must further be noted that this lack of interest is there despite measures taken by the International Organisation for Standardisation, Malawi Bureau of Standards and Malawi's Department of Environmental Affairs to encourage the use of environmental management systems: *The Nation* 10 February 2003 at 5.

<sup>8</sup> The Technical Committee on the Environment is established under section 16 of the EMA. According to section 17 of the EMA its functions are to: (a) examine any scientific issue which may be referred to it by the Minister, the Council, the Director or any lead agency relating to the protection and management of the environment and sustainable utilization of natural resources and to recommend to the Minister, the Council or lead agency, as the case may be, such action as is necessary for achieving the purposes of the EMA; (b) carry out investigations and conduct studies into the scientific, social and economic aspects of any activity, occurrence, product or substance which may be referred to the Minister, the Council, the Director or any lead agency, and at the completion of the investigation or study, to recommend to the Minister, the Council or lead agency, as the case may be, such action as is necessary for achieving the objectives of the EMA;

available to offer much technical assistance to the private sector. Apart from the committee, public servants may provide the technical assistance, but not many of these have the technical know-how. It is actually a fact of common notoriety that government does not have sufficient technical capacity to meet its environmental challenges.<sup>9</sup> All this boils down to the inference that technical and/or marketing benefits may not attract Malawian industry into the adoption of self-regulation.

With regard to motivation (d) it is debatable whether Malawian businesses know or appreciate cost-savings that may be achieved by implementing cleaner production programmes. It is, however, likely that they are aware that sustainable use of resources is an essential element of successful long-term business; but it is arguable that the attractiveness of immediate gain in an impoverished economy may render this awareness of little environmental consequence. In the present economic hardships in Malawi characterised by frequent closures of business, it is possible that in the name of survival, businesses may plunder resources without much environmental consideration in order to satisfy current demands.

The motivation numbered (e) has no precedent in Malawi. It is noteworthy that this motivation is in the nature of 'naming and shaming' (otherwise known as adverse publicity). Such a practice is non-existent in Malawi. Even if it were to be introduced, it is unlikely that it would have much environmental impact due to low environmental awareness. A stronger objection, however, lies in the general lack of measuring devices to determine emission levels. In the absence of such devices the bad publicity cannot be precise and may therefore not be credible apart from being easy to counter by the industry itself. In that kind of setup disclosure of environmental impacts may not influence industry to adopt self-regulation.

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and (c) recommend to the Council the criteria, standards and guidelines for environmental control and regulation, including the form and content of environmental impact assessments.

<sup>9</sup> Gracian Z Banda and Kenyatta Nyirenda 'Study on Institutional Capacity for Efficient Enforcement of Environmental Legislation and Conventions' 1999 (unpublished).

Similarly general public pressure cannot provide a sound incentive for implementing self-regulation in Malawi. The nation does have a number of environmental public interest groups, but many of these are not sufficiently funded.<sup>10</sup> They are also not adequately vocal. In recent years there have been development projects that have been undertaken without conducting an environmental impact assessment. This researcher is unaware of strong advocacy against such projects from any public interest group.<sup>11</sup> This state of affairs must be contrasted with the kind of advocacy that has attended human rights abuses. Public interest groups have condemned these and even taken legal action against the perpetrators.<sup>12</sup> It is also debatable whether some of these organisations are well informed about environmental matters. Perhaps the dearth of meaningful environmental advocacy on their part may be an indication of ignorance and the consequent fear of being caught off guard. Further, it is sheer daydreaming to think that environmental issues in Malawi receive a high profile to which industry has to respond 'so as to avoid public loss of confidence.' As far as this researcher knows, there is no such a thing in Malawi as industry incurring public loss of confidence on account of environmental matters. Perhaps in the years to come this may be so, but certainly it is not the case now. In addition, as one of the poorest countries in the world, with most people living below the poverty line, consumers are unable to exercise the power of choice in their consumption patterns. In these circumstances it is wishful thinking to suggest that general public pressure may motivate the private sector to adopt self-regulation.

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<sup>10</sup> For instance, Greenwigs, an environmental non governmental organisation made up of lawyers, has perpetually been cash-strapped. It is perhaps the single most important organisation that could take up public interest litigation in environmental matters but it had not done so by the beginning of the year 2004 despite being in existence for many years. I have no information about the activities of this organisation from the second quarter of 2004 onwards.

<sup>11</sup> There have certainly been a few noises here and there about environmental issues but these have mostly been of a common sense nature. For instance, it was reported in the *Daily Times* 20 January 2003 at 5 that Active Youth Initiative for Social Enhancement had bemoaned the wanton cutting down of trees and appealed to people to continue planting more trees.

<sup>12</sup> For example, litigation in *Registered Trustees of the Public Affairs Committee v Attorney General* Civil Cause No. 1861 of 2003 (unreported but copy available on <http://www.judiciary.mw> when accessed in December 2005) was spearheaded by a public interest organisation, the plaintiff.

Finally, in the context of corporations (which are by far the most significant players in environmental degradation) two objections may be raised against the adoption of self-regulation. Firstly, self-regulation may be inconsistent with principles of corporate governance. In short, directors and officers of companies have no right to put environmental protection above the best interests of the company. Certainly companies must comply with environmental laws whatever the cost, but going beyond the law at financial expense to the company appears to be breach of the duty to act in the best interests of the company.<sup>13</sup> Secondly, there is much force in the argument that companies are economically compelled to use environmental resources to the maximum regardless of the damage they may occasion thereby and that they are 'unable to voluntarily protect the environment on their own.'<sup>14</sup> Bruce Pardy<sup>15</sup> fleshes out this argument in the following terms:

'The tragedy of the commons reveals the choices open to contemporary commercial enterprises operating in competitive market places. To compete, they make maximum use of the common resources to keep their costs as low as their competitors. They must externalise as many costs as possible, not because they are greedy or uninformed, but because their competitors are doing the same. They do not have the option of voluntarily reducing environmental impact in a way that increases costs unless they are a monopoly or control a market in such a way as to be able to dictate the price of their goods. Industrial manufacturers dispose of effluent into waterways not because they are evil or stupid but because they must sell their goods in the marketplace. Those goods must be offered at a competitive price. If they incur costs to prevent the pollution of a nearby stream, they increase the costs of producing their products, costs which their competitors have not experienced. Like the lone herder [who bears the costs of feeding his own

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<sup>13</sup> Pardy op cit at 132-135.

<sup>14</sup> Pardy op cit at 135.

<sup>15</sup> Pardy op cit at 136.



animals], they price themselves out of the market and eventually cause themselves to go out of business.’<sup>16</sup>

This argument carries a lot of weight in the Malawi scenario. Poverty is rampant and consequently any goods that are priced even slightly higher than others in the same category may not find a market. The struggle to keep products as cheap as possible is therefore the rule of the game. In these circumstances it is unlikely that self-regulation can work.

From the foregoing, it is arguable that self-regulation currently is not a viable option in environmental protection in Malawi. Perhaps in future it may have the scope for operation, but as of now the nation is not ripe for the adoption of self-regulation.

### 6.3 Co-regulation

Related in some ways to self-regulation,<sup>17</sup> co-regulation has been defined as ‘a form of environmental regulation in which industry and government work in partnership to achieve environmental protection.’<sup>18</sup> On many occasions co-regulation takes the form of agreements between industry and government. In the words of Michael Kidd: ‘A co-regulatory approach involves an interactive relationship, typically an agreement or covenant between the regulator and the regulated. In this situation, the overall policy objectives are set by the regulator whilst the details are subject to negotiated agreement

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<sup>16</sup> Phillip A Wellner ‘Effective Compliance Programs and Corporate Criminal Prosecutions’ (2005) 27 *Cardozo Law Review* 497 observes that companies may sometimes implement less-than-ideal internal environmental compliance programs as a form of window-dressing. In some companies the inclination to implement even such despicable programs may not be there; they may simply do nothing positive about environmental matters.

<sup>17</sup> Jody Freeman ‘Collaborative Governance in the Administrative State’ (1997) 45 *University of California Law Review* 1 at 33 (footnote 84) writes that ‘[e]ven ostensibly “self-regulatory” regimes can be viewed as coregulatory because they emerge in the context of government regulation and rely on government intervention when the system breaks down.’ Hanks op cit at 319 – 320 appears to be of a similar view when he writes: ‘The issue of free-riding also emphasises the continuing important role of public intervention as a means of increasing the incentive of firms to comply with any voluntary commitments, and arguably thus confirms the role of “co-regulation” as an option that may be of wider and more significant application.’

<sup>18</sup> Mikulich op cit at 119.

between the two parties.<sup>19</sup> Some authors refer to these agreements as voluntary environmental agreements (VEAs)<sup>20</sup> while others call them negotiated environmental agreements (NEAs).<sup>21</sup> A further search in the literature may reveal more names, but these names do not add anything of value to the substance of the agreements. According to John Moffet and François Bregha<sup>22</sup> the substance of the agreements may be along the following lines:

- Negotiated compliance or negotiated performance: The agreements may describe how participants will comply with existing regulatory obligations (negotiated compliance) or may address as yet unregulated issues (negotiated performance).
- Retroactive or proactive practice: Some agreements address past practice e.g. by stipulating terms for the resolution of historic contamination problems. Others deal with obligations to prevent, minimise or reduce the environmental impacts of on-going and future activities.
- Statutory or non-statutory: The agreement may be codified in legislation. Otherwise the agreement would be a private law agreement governed by the general rules of contract law.
- Binding or non-binding: Some agreements impose only general obligations regarding environmental objectives without indicating what specific action must be taken and when, how performance will be measured, or what might occur in the event of non-performance. Increasingly, however, agreements are designed to impose binding legal obligations related to clearly defined targets.
- Pre-established goals or negotiable goals: Some agreements are predicated on pre-established objectives. In other cases the objective of the agreement is negotiated as part of the agreement.

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<sup>19</sup> Kidd op cit at 29. A slightly different view on the setting of policy objectives is expressed by other writers: see the discussion in the text on the substance of the agreements.

<sup>20</sup> John Moffet and François Bregha 'An Overview of Issues with respect to Voluntary Environmental Agreements' (1998) 8 *Journal of Environmental Law and Practice* 63.

<sup>21</sup> Hanks op cit.

<sup>22</sup> Moffet and Bregha op cit at 72 – 74.

- Extent of third party involvement: The role of third parties in the agreements varies from non-existent to that of key instigator of, and party to, the final agreement. Some agreements do not include community representatives either in the negotiations or as parties to the final agreement. Other agreements involve government, industry and the public.

Co-regulation may benefit both industry and government. Benefits that accrue to industry include an improved public image, increased regulatory certainty, a new relationship with government in which they are treated as equals and reduced costs as a result of the increased flexibility in terms of how and when to address an issue.<sup>23</sup> Benefits to government include the opportunity to avoid a protracted regulatory development process, more and better information about the precise nature of the problem, and the assumption by industry of ownership of the problem, which can result in a more proactive approach and reduced enforcement costs.<sup>24</sup>

The feasibility of co-regulation in a particular jurisdiction depends on a number of factors. Jonathon Hanks<sup>25</sup> lists the following as some of the necessary institutional factors:

- (i) Sufficient business and government motivation to use the agreements
- (ii) Mutual trust between the partners and other key stakeholders
- (iii) High level of political, industrial and social environmental awareness
- (iv) Access to adequate baseline data for setting targets
- (v) Sufficient ability to control free-riders: credible threat of legal and/or fiscal sanctions; proactive, well-structured sectoral organisations; active and sufficiently resourced public interest groups; and existence of consumer pressures.

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<sup>23</sup> Moffet and Bregha op cit at 74. See also Freeman op cit at 22 – 33.

<sup>24</sup> Moffet and Bregha op cit at 75. See also Freeman op cit at 22 – 33.

<sup>25</sup> Hanks op cit at 331 – 335. The listing is restricted to institutional factors. Procedural factors have been omitted.

- (vi) Positive incentive to participate: availability of information and technical assistance
- (vii) Availability of pre-determined goals, preferably as part of a national strategy for sustainability
- (viii) Clarity regarding the costs and financial benefits associated with developing and administering agreements.
- (ix) Existence of credible verification system, including provision of technical assistance and mediation service.
- (x) Ability to integrate technology innovation requirements with other policy objectives.

Factors numbered (iii), (v) and (vi) have been dealt with above when considering the essentials for adopting and implementing self-regulatory instruments. It was argued or shown that the level of environmental awareness in Malawi is low; that the threat of legal sanctions is empty or at best weak; that there were no strong sectoral organisations that could impose meaningful sanctions; that active and sufficiently resourced public interest groups were generally absent; that consumer pressures were non-existent and that technical assistance was unlikely to come from government due to severe resource constraints. These arguments or findings apply with equal force to co-regulation. The effect of this is that the factors numbered (iii), (v) and (vi) are generally not available in Malawi to support the use of co-regulation in environmental protection.

With regard to factor (i) there are no solid indications of general government motivation to use agreements in environmental protection in Malawi. The EMA does not expressly authorise government to enter into such agreements, but it is arguable that government may enter into such agreements on the basis that they are 'measures [which] are necessary for preventing the unsustainable use of natural resources and controlling the generation of pollutants' as provided for under section 31(b) of the EMA. Two sectoral statutes make provision for the use of agreements. The Forestry Act 11 of 1997 allows the Director of Forestry to enter into a forest management agreement with a management

authority in the interest of the proper management of village forest areas.<sup>26</sup> The definition of 'management authority' in the statute arguably excludes industry as the whole scheme of the forest management agreement is meant to benefit the village communities and not industry and so industry may not be inclined to act as a management authority.<sup>27</sup> The Forestry Act also provides for forest plantation agreements. It states that the Minister may authorise the Director of Forestry to enter into a forest plantation agreement with any non-governmental organisation or community who may wish to plant trees in forest reserves, public land, customary land and private land. The purpose of the forest plantation agreement is to promote tree growing in the specified areas by government, non-governmental organisations and the community.<sup>28</sup> Industry is conspicuously omitted from the list of possible parties to the forest plantation agreement. The last type of agreement provided for in the Forestry Act is an international agreement on forestry to which Malawi is a party.<sup>29</sup> Industry is generally not a party to such international agreements.

The other sectoral statute that makes provision for agreements is the Fisheries Conservation and Management Act 25 of 1997. It permits the Director of Fisheries to

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<sup>26</sup> According to section 31(1) of the Forestry Act 11 of 1997 the forest management agreement may provide for: (a) the specifications of the nature of the forestry and other practices to be followed; (b) the assistance to be provided by the Department of Forestry and provision for use and disposition of the produce and revenue therefrom; (c) allocation of land to individuals or families for afforestation and revocation of such allocation if applicable provisions of the agreement are not adhered to by the occupier of the land so allocated; and (d) formation of village natural resources management committees for the purposes of managing and utilising village forest areas. Section 31(2) suggests that such agreement may also provide for the performance of obligations in favour of third parties.

<sup>27</sup> Section 2 of the Forestry Act 11 of 1997 defines 'management authority' in relation to a village forest area as a person designated as the management authority pursuant to the agreement establishing the village forest area. And section 30 of the Act states that any village headman may, with the advice of the Director of Forestry, demarcate on unallocated customary land a village forest area which shall be protected and managed in the prescribed manner for the benefit of that village community.

<sup>28</sup> Sections 35 and 36 of the Forestry Act 11 of 1997. According to section 36, the forest plantation agreement is required to: (a) provide for the obligation to grow and manage tree species as specified in the agreement and in accordance with the plantations management plan which shall be approved by the Director of Forestry; (b) convey the right to harvest the forest plantation in accordance with the terms of the agreement; (c) provide for advice and assistance from the Department of Forestry in growing and managing the plantations; and (d) specify obligations of each of the parties to the agreement.

<sup>29</sup> Section 80 of the Forestry Act 11 of 1997.

conclude a fisheries management agreement with a fisheries management authority with a view to facilitate local community participation in the conservation and management of fisheries.<sup>30</sup> By 'fisheries management authority' is meant a local community organisation established for the purposes of promoting local participation in the conservation and management of fisheries.<sup>31</sup> Arguably industry is not included in this meaning of fisheries management authority for industry is not established for such purposes. The Fisheries Conservation and Management Act also provides for international agreements on fisheries access with foreign states.

From the foregoing description of the kind of agreements specified in current environmental legislation in Malawi, it is arguable that government has not displayed any interest in concluding environmental agreements with industry (business). The indications so far are that government is willing to enter into agreements with community folk and non-governmental organisations in respect of forestry and fisheries. Such willingness is evidently narrow in scope and half hearted. Consequently it is foolhardy to suggest on the basis of such willingness that generally there is sufficient government motivation to use agreements in environmental protection. The only safe conclusion is that there is insufficient government motivation to use agreements.

There is still one more aspect of factor numbered (i) that must be dealt with: the question whether there is sufficient business motivation to use agreements. In the absence of relevant evidence it is difficult to hazard any conclusions on this question. However, if it is assumed that such business motivation does exist, factor (i) will still be absent in Malawi because its second half (government motivation) is missing. In the premises, it may be concluded that there is insufficient 'business and government motivation' to use agreements in environmental protection.

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<sup>30</sup> Sections 7 and 8 of the Fisheries Conservation and Management Act 25 of 1997. Section 8(1) states that the fisheries management agreement may provide for a management plan and the assistance to be provided by the Department of Fisheries.

<sup>31</sup> Section 2 of the Fisheries Conservation and Management Act 25 of 1997.

As for factor (ii), it is doubtful that there is mutual trust between government and industry. One way in which trust may be drummed up is where there is a display of honesty in respect of wrongs committed. In this regard, it may be observed that a number of urban rivers have been polluted by industry but there has generally been no admission on the part of industry as to the companies responsible. Even in other environmental sectors industry has not come in the open regarding its adverse environmental activities. In these circumstances it is unlikely that government may trust industry in environmental matters.

Access to adequate baseline data for setting targets (factor iv) is arguably an area of weakness.<sup>32</sup> In Malawian environmental circles there is no laudable history of environmental monitoring and reporting. Accordingly, adequate baseline data is not available for setting targets. The position is different when it comes to the availability of predetermined goals (factor vii). In the year 2004 the government adopted the Malawi National Strategy for Sustainable Development, which may be used as the predetermined goals necessary for the operation of environmental agreements.

On the issue of costs and financial benefits associated with developing and administering agreements (factor viii), there is no relevant experience or data in Malawi. Experiences in other countries suggest that negotiating, implementing, monitoring and reporting on agreements are costly. The costs have been found to be particularly onerous for small and medium sized enterprises. As a result small and medium sized enterprises are not keen to take advantage of the benefits offered by such agreements.<sup>33</sup> It is unlikely that Malawi's small and medium sized enterprises will be in a better position: a boycott of these agreements is more likely.

With regard to the existence of a credible verification system (factor ix) this requires an independent body that can conduct regular audits, authenticate reports, give technical

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<sup>32</sup> Cf Hanks *op cit* at 334.

<sup>33</sup> Moffet and Bregha *op cit* at 78 - 79.

assistance and/or provide mediation services.<sup>34</sup> In Malawi such an independent body is non-existent. During the process of enacting the EMA, a suggestion was made to create an Environmental Protection Agency, an independent statutory corporation. The suggestion was shot down on the basis that there was no guarantee that public bodies and sectoral government departments would comply more with the directives of a statutory corporation than with a government department like the Department of Environmental Affairs. The suggestion was also rejected on the premiss that it was not desirable as a nation to create more statutory bodies.<sup>35</sup> In agreements entered into between government and industry, it is unacceptable that the work of such an independent body be performed by one of the contracting parties. All this leads to the inference that in Malawi there is no credible verification system necessary for the operation of co-regulatory instruments.

Finally, the operation of environmental agreements requires the existence of an ability to integrate technology innovation requirements with other policy objectives (factor x). Hanks states that this may be achieved by the appointment of a lead agent for ensuring more effective coordination of the activities of various government departments and that this may also be facilitated by the adoption of well considered and integrated national objectives as part of national environmental strategies and action plans.<sup>36</sup> It is arguable that this factor is present in the Malawi scenario: the Department of Environmental Affairs may undertake coordinating duties and the National Strategy for Sustainable Development 2004 and the National Environmental Action Plan 1994 appear to have the necessary national objectives.

Having considered all the factors listed above, it may be observed that most of the factors are absent in Malawi. It is therefore concluded that co-regulation cannot operate in Malawi at present. Accordingly, co-regulation is not available as a viable strategy in environmental protection in Malawi's current circumstances.

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<sup>34</sup> Hanks op cit at 334.

<sup>35</sup> Banda and Nyirenda op cit at 20 – 21.

<sup>36</sup> Hanks op cit at 334.



#### 6.4 Information-based instruments

At the heart of information-based instruments are education and training. They are measures taken to deal with ignorance and increase awareness of environmental matters. Examples are 'technical assistance programmes, advertising, eco-labelling, performance reporting, group empowerment programmes and small business incentive schemes.'<sup>37</sup>

Technical assistance programmes and group empowerment programmes may not be implemented successfully in Malawi in the short term due to the non-availability of sufficient technical know-how and resources in government. Similarly eco-labelling may not be a success on account of the low levels of environmental awareness and the general absence of consumer choice in consumption patterns. Performance reporting is currently not feasible: if it is done by industry itself, it will face challenges similar to those encountered by self-regulation. If it is done by government, resource constraints will prevent meaningful implementation. A different picture emerges when considering advertising. Many types of advertising are simple to implement and the government has not had great difficulty in carrying them out.<sup>38</sup>

Although information-based instruments may be used in respect of companies of all sizes, empirical evidence suggests that they are crucial when handling small and medium enterprises (SMEs).<sup>39</sup> This is so because most SMEs do not have in-house resources and inspiration to surmount the environmental challenges they meet.<sup>40</sup> Ignorance is a common explanation for poor performance in SMEs – SMEs are not aware of many financially attractive opportunities for environmental improvements; they underestimate the impact

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<sup>37</sup> Hanks op cit at 309 – 310.

<sup>38</sup> In the *Daily Times* 20 January 2003 at 3 it is reported that Hon Harry Thomson, the then Minister of Natural Resources and Environmental Affairs, had on Thursday 16 January 2003 officially launched the "Save the Chambo Awareness Campaign" with a view to saving the chambo fish in Lake Malawi. Chambo is Malawi's trademark fish.

<sup>39</sup> Neil Gunningham 'Regulating Small and Medium Sized Enterprises' (2002) 14 *Journal of Environmental Law* 3 at 6.

<sup>40</sup> Ibid.

of their activities on the environment and have a narrow view of the connection between business performance and the environment.<sup>41</sup> According to Neil Gunningham<sup>42</sup> the following are critical issues for successful implementation of information-based instruments in respect of SMEs:

- (1) Capitalising on win-win solutions: As a starting point, information dissemination and education should focus on those circumstances in which good environmental practice can also be good business practice.
- (2) Developing industry-government partnerships: Engaging industry in developing cleaner production strategies tailored to the industry's circumstances generates ownership, thus increasing awareness and the level of commitment to their implementation.
- (3) Developing codes of practice: SMEs often require specific guidance on what is required of them. Codes of practice provide the practical guidance SMEs need on how to achieve compliance and they may also promote appropriate cleaner production benchmarks within an industrial sector.
- (4) Exploiting third party leverage: Most SMEs have frequent interaction with professionals (banks, lawyers, insurance companies) and larger companies along the supply chain, and rely on them as credible sources of information. Such professionals may be used to disseminate information and to exert pressure on SMEs to pursue opportunities for using environmental improvements to achieve greater business success. Larger companies may impose environmental management system (EMS) requirements.
- (5) Integration with other strategies: information and education cannot be relied upon in isolation. They must be seen as one component of a broader, integrated preventative strategy.

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<sup>41</sup> Gunningham op cit at 5 – 6.

<sup>42</sup> Gunningham op cit at 6 – 7.

Most of these issues seem not to present severe feasibility difficulties in the Malawi scenario. The only one that may raise problems is the exploitation of third party leverage. The professionals may not be willing to disseminate the information in the absence of sanctions or incentives. Similarly the larger companies may not impose the EMS requirements in the absence of sanctions or incentives. These problems are arguably addressed by the requirement of integration with other strategies (issue numbered 5).

From the foregoing, it may be concluded that some information-based instruments are usable in Malawi's present circumstances while others are not. It is the latter which are more in number.

## **6.5 Market-based Instruments (Market Mechanisms)**

### **6.5.1 General**

By definition<sup>43</sup> market mechanisms are 'economic instruments aimed at implementing and enforcing environmental objectives.'<sup>44</sup> Economic instruments, as defined by the Organisation for Economic Cooperation and Development (OECD), are instruments that affect costs and benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way favourable to the environment.<sup>45</sup> In a similar vein, Ball and Bell define market mechanisms as 'all approaches which seek to use prices or economic incentives and deterrents to achieve environmental objectives. This could be done, for example, by encouraging pricing systems that signal the true environmental

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<sup>43</sup> This is just a working definition. There appears to be no universally agreed definition of 'market mechanism'.

<sup>44</sup> Klaus Bosselmann and Benjamin J Richardson 'Introduction: New Challenges for Environmental Law and Policy' in Klaus Bosselmann and Benjamin J Richardson (eds) *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* The Hague: Kluwer Law International 1999 1 at 5.

<sup>45</sup> OECD *Environmental Policy: How to Apply Economic Instruments* Paris: OECD 1991 at 10; Bosselmann and Richardson *op cit* at 7.

costs of products to consumers, thereby making environment-friendly items cheaper than those that pollute or waste natural resources.<sup>46</sup>

Market mechanisms are of different types and their content is not entirely clear as is evident from the many formulations that have been put forward.<sup>47</sup> Nevertheless, their core elements are fairly settled. These instruments seek to reduce the costs of environmental protection and they generate incentives for continued environmental improvement and technological innovation; give more flexibility and thereby promote a broader range of responses from producers and consumers; provide a source of government revenue; and promote directly the economically efficient allocation of scarce resources.<sup>48</sup>

Market mechanisms are not entirely divorced from government direct regulation. Some of them cannot stand or operate on their own: they need government facilitation. Further, government retains its role of designing and enforcing environmental standards that can be used as the operating medium for the market mechanisms. Since the change from command and control approaches may alter the distribution of the costs and benefits of environmental protection, government may intervene to make such change more politically acceptable and address social justice and intra-generational equity issues.<sup>49</sup> The continued governmental participation may legitimately be regarded as a new form of environmental direct re-regulation.<sup>50</sup>

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<sup>46</sup> S Ball and S Bell *Environmental Law: the Law and Policy Relating to the Protection of the Environment* 2ed London: Blackstone 1994 at 92.

<sup>47</sup> This point is borne out when one compares the exposition of Ball and Bell op cit at 92 – 97 with that of R Stauth and P Baskind 'Resource Economics' in R F Fuggle and M A Rabie *Environmental Management in South Africa* Cape Town: Juta 1992 26 at 40 – 45.

<sup>48</sup> Bosselmann and Richardson op cit at 7 – 8; Hanks op cit at 316 – 317.

<sup>49</sup> Bosselmann and Richardson op cit at 2, 12 and 13.

<sup>50</sup> Cf Bosselmann and Richardson op cit at 4.

In the following paragraphs a number of market mechanisms will be discussed in the context of Malawi.

### 6.5.2 Marketable permits (Tradeable rights)

Different expositors offer slightly different views regarding what marketable permits or tradeable rights are. For present purposes, the OECD's elaboration is adopted:

'Marketable permits are quotas, allowances or ceilings on pollution emission levels of specified polluters that, once allocated by the appropriate authority, can be traded subject to a set of prescribed rules. Hence, marketable permits provide an incentive for dischargers releasing less pollution than their limits allow, to trade the differences between actual discharges and allowable discharges to other dischargers which then have the right to release more than allowed by initial limits. Under different approaches, these trades can take place within a plant, within a firm, among different firms, or possibly between countries. The objective is to reach the overall pollution ceiling with maximum efficiency. Equally, marketable permits can be used as a device to encourage efficient use of natural resources such as scarce water supplies.'<sup>51</sup>

Essentially, therefore, marketable permits are dealings in pollution rights. Industries are not banned from engaging in polluting activity but are given a recognizable quasi-property right to pollute. They can pollute as much as they want as long as they are within the pollution emission quota allocated to them. The first thing to be done for the mechanism to come into operation is for the relevant authority to decide the environmental quality it seeks to achieve. For instance, the Minister of Environmental Affairs in Malawi may determine the total amount of allowable discharge of pollutants into the atmosphere for Lilongwe. Thereafter, he may issue permits to the industries in

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<sup>51</sup> OECD Doc. C (90) 177/FINAL (hereinafter 'OECD Doc') reprinted in P Sands, R G Tarasofsky and M Weiss (eds) *Documents in International Environmental Law* Manchester: Manchester University Press 1994 at 1185 – 1197.

the district, allowing them to discharge pollutants of a specified amount. If one company's emissions are lower than the specified amount, the industry may sell the unused part of the quota to an incoming company or the old establishments that need more room for pollution. By restricting the available emissions, prices would be driven up and this would compel the major polluting companies to reduce emissions or develop or acquire less polluting technologies.<sup>52</sup>

As the OECD statement above indicates, the strength of marketable permits lies in encouraging polluters to reduce their emissions of pollutants with a view to profiting from the sale of the unused part of their quotas. In doing so, environmental protection is achieved at 'minimum cost to society. Marketable permits are therefore economically efficient, and they are equitable because the polluter pays for the damage he causes' and 'they generate revenue for, rather than deplete the resources of the environmental authority.'<sup>53</sup> In these days of economic hardship, such generation of income is an attraction especially to countries like Malawi.

However, marketable permits have several weaknesses. In the first place, the distribution of emissions may cause unacceptable risks to individuals where there are concentrations of emissions in one place, the so called 'hot spots.'<sup>54</sup> Secondly, tradeable permits 'abandon the dynamic component of the precautionary principle, in that they do not provide for a permanent or periodic stiffening of performance requirements according to best available technology.'<sup>55</sup> Thirdly, it may not be easy to establish the market in the first place: the founding distribution of permits may be shrouded in controversy and politics. There may even be opposition from existing and aspiring polluters.<sup>56</sup> Fourthly, there is

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<sup>52</sup>Ball and Bell op cit at 96.

<sup>53</sup>Stauth and Baskind op cit at 43.

<sup>54</sup> E Rehbinder 'States Between Deregulation and Environmental Responsibility' in Bosselmann and Richardson op cit 93 at 98.

<sup>55</sup> Ibid; S E Gaines and R A Westin (eds) *Taxation for Environmental Protection: A Multinational Legal Study* New York. Quorum 1991 at 6.

<sup>56</sup> Stauth and Baskind op cit at 44.

danger that the big players in industry may buy up marketable permits in order to put competitors out of business or prevent new establishments in the relevant category from mushrooming.<sup>57</sup>

In the context of Malawi, marketable permits may not work effectively at present, the reason being that they need a lot of information about the receiving environment and the levels of pollution acceptable. This information is generally not available and therefore the operation of marketable permits may not be effective. Further, it is unlikely that an efficient market will develop because of the small size of Malawi's industrial and commercial sectors.<sup>58</sup>

### **6.5.3 Pollution charges (Emission or environmental charges)**

Pollution charges, also known as emission charges or environmental charges, are payments on the emission of pollutants into air or water or onto or into soil and on the generation of noise.<sup>59</sup> Their basis of calculation is quantity and type of pollutant emitted. Their objective is to internalise the externalities of an activity: the environmental costs of an activity are taken into account. Society is not left to bear directly the costs of pollution.<sup>60</sup>

The OECD advises that in choosing what economic instruments to apply, pollution charges can be given particular consideration for stationary pollution sources and where marginal abatement costs vary across polluters (the wider the variation, the greater the cost-saving potential).<sup>61</sup>

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<sup>57</sup> Ibid; Gaines and Westin op cit at 6.

<sup>58</sup> Cf Stauth and Baskind op cit at 44 who make a similar point in respect of South Africa.

<sup>59</sup> OECD Doc op cit Annex paragraph 2.

<sup>60</sup> Ball and Bell op cit at 94; Stauth and Baskind op cit at 42.

<sup>61</sup> OECD Doc op cit Annex paragraph 10.

A number of advantages attach to the use of pollution charges as a tool of environmental protection policy. In the first place, they are equitable: in line with that fundamental tenet in pollution control - the polluter pays principle - those responsible for pollution are made to pay according to the extent to which they contribute to environmental degradation. Unlike command and control approaches, which permit pollution at no cost to the point that the regulatory standard applies, pollution charges have the potential of ensuring that the full cost of pollution is realized.<sup>62</sup>

Secondly, Staath and Baskind show that pollution charges lead to an economically more efficient outcome than does direct regulation. They articulate their case in the following terms:

‘Those polluters for whom the cost of pollution is lowest will be the first to limit their discharges, while those for whom the costs are greater - more than the charge - will elect to pay the charge. This ensures that a certain amount of control will be achieved at least cost to society, so freeing resources to satisfy other needs in the country. Conversely, regulations interfere directly in the internal operations of the acting party. Control becomes mandatory and in some instances the necessary equipment is specified - there is no distinction in terms of the relative costs of control. The envisaged amount of control will therefore not be achieved at minimum cost to the society.’<sup>63</sup>

Thirdly, pollution charges provide flexibility to polluters. They encourage polluters to find ways and means of reducing their emissions so that their cost burden may be lightened. In searching for those ways and means, they may develop new technologies at their own cost, thus contributing to environmentally beneficial technological advancement.<sup>64</sup>

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<sup>62</sup>Staath and Baskind op cit at 42.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid.



In spite of these strengths, pollution charges have weaknesses. They are open to opposition from concerned persons especially in the initial stages 'since a previously 'free' activity now carries a cost.'<sup>65</sup> However, they may be welcomed by society in general and the State. Secondly, pollution charges fix an artificial price on pollution and it may not be clear from the beginning that the fixed price will influence the behaviour of polluters. So several reviews of the price may be necessary before the charge achieves the desired goal. In effecting the adjustments the State may have to incur expense.<sup>66</sup>

Just like the tradeable permits, the operation of pollution charges in Malawi will meet the difficulty of lack of relevant information on the receiving environment. This information is necessary for the State Authority responsible to set the appropriate charges. Further, many people in Malawi live below the poverty line. Since the internalization of environmental costs is likely to cause industry to increase consumer prices in the age old tradition of passing on costs, the operation of pollution charges is likely to increase the hardship of the people. The price increases may also result in fall of demand which may ultimately lead to shrinking of the industry and consequent unemployment.<sup>67</sup>

#### **6.5.4 Subsidies (Financial assistance)**

The gist of subsidies is the provision of financial aid to polluters as an incentive to reduce pollution or to resource users as a way of encouraging sustainable use and management of scarce resources.<sup>68</sup> In the area of pollution control, subsidies, with few exceptions,<sup>69</sup> offend the polluter pays principle. They do not ensure that there is no increase in

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<sup>65</sup>Ibid.

<sup>66</sup>Cf Reh binder op cit at 100.

<sup>67</sup>Stauth and Baskind op cit at 46.

<sup>68</sup> Ball and Bell op cit at 95 state that subsidies must be used with care. Some subsidies on forestry and agriculture in England have been accused of having detrimental environmental effects because of their inability to choose between beneficial and non-beneficial projects.

<sup>69</sup> OECD states that in a few specific cases, financial assistance may not offend the polluter pays principle, for example, when in compliance with the exceptions to the principle as defined by OECD or when applied in the framework of appropriately designed redistributive charging systems: OECD Doc op cit Annex.

pollution when the cost of pollution equals the subsidy. It is also possible that parties who see the possibility of receiving a subsidy may increase pollution with a view to getting it. After receiving the subsidy, they may use it to maximise profits and in so doing they may attract others into the polluting activity.<sup>70</sup> Further, the funds to be used in the operation of the subsidies may be obtained from the general fiscus. With the highlighted defects of subsidies in mind - especially the possibility of increasing pollution - using money from the general fiscus may result in the public financing their own destruction and the prejudice of future generations.

Malawi, as a Third World country, is in economic crisis. Its economy depends on developed countries for investments, trade, finance and technology.<sup>71</sup> Former State President Bakili Muluzi declared in public on numerous occasions that he would continue begging from the rich countries. Far from being a prophet of doom, Muluzi acknowledged that faced with a steadily crumbling tobacco crop (the principal foreign exchange earner) and a global anti-smoking campaign, there was little else he could do in the short term. The Structural Adjustment Programme, forced on the government by the International Monetary Fund, compelled the removal of almost every subsidy: not even the keystone subsidy on fertilizer was spared, making this all-important commodity in an agrarian economy inaccessible to the many. It was only recently that the current administration of Dr Bingu wa Mutharika has brought back a limited subsidy on fertiliser. On this background it is sheer folly to suggest that environmental subsidies be introduced. They are simply unworkable. The Environmental Fund<sup>72</sup> established under

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<sup>70</sup> Stauth and Baskind op cit at 43.

<sup>71</sup> Anon *Third World: Development or Crisis?* Third World Network and Consumers' Association of Penang 1985 at 15 - 16.

<sup>72</sup> The Fund has the potential of being used to finance environmental subsidies. According to section 56 of the EMA the objects of the Fund are the protection and management of the environment and the conservation and sustainable utilization of natural resources. Section 57(c) of the Act provides that the Fund may be applied, inter alia, to the cost of any scheme which the Minister considers to be in the interest of the protection and management of the environment and the sustainable utilization of natural resources. Section 57(e) allows the Fund to be applied to any purpose which the Minister considers to be in the interest of the objects of the Fund. It is arguable that these provisions pave the way for the use of the Fund as a source of environmental subsidies. However, this possibility is ruled out by current state policy as expounded in the text.

section 53 of the Environment Management Act 1996 is unlikely to be used for such purposes. Actually, the Fund is at present a mere paper guarantee.

### 6.5.5 Environmental bonds

Even though the underlying logic behind environmental bonds and deposit refund schemes may be the same,<sup>73</sup> the former is more complicated and markedly different from the latter, meriting separate treatment. The latter shall therefore be considered in the next segment.

An environmental bond is a sum of money ‘equal in value to the best estimate of potential environmental damage in the future,’ that is posted by an acting party with government authorities in an interest-bearing account. The posting is done before embarking on the proposed activity. If the activity is carried out and there are no significant negative environmental effects needing rehabilitation, the bond and interest are paid back to the party. On the other hand, if the potential environmental damage occurs, the money is used for rehabilitation. In environmental protection terms, it is said that the hope of getting back the bond is attractive to the acting party and acts as an incentive to him to adopt environmentally friendly measures to avoid any damage. These measures may include the development of cost-effective and innovative technologies.<sup>74</sup> Stauth and Baskind suggest that the use of this economic instrument is suitable where the environmental consequences of production and consumption activities are uncertain or unknown in advance.<sup>75</sup>

Environmental bonds may stifle development if the bond is set at too high an amount in the sense that companies not able to pay the bond may not proceed with development projects. This concern makes more sense in the case of Malawi because of the

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<sup>73</sup>Stauth and Baskind op cit at 44 – 45 implicitly draw the similarity.

<sup>74</sup>Ibid.

<sup>75</sup>Ibid.

underdevelopment of the country. Every possible measure must be taken to encourage development.<sup>76</sup>

One major difficulty which the operation of environmental bonds may meet is government's delay in paying money. It is not uncommon for government to delay for many years the disbursement of funds to successful litigants against the State. If this delay occurs in the arena of environmental bonds, potential investors may be unwilling to post bonds with the government for fear that they may not get back their money in time or at all. This aside, environmental bonds have room for operation in Malawi: they do not require any funds from the government and section 3(1) of the Environment Management Act 1996 requires every person to take measures to protect the environment (which, it may be observed, a person may do by posting an environmental bond).

#### **6.5.6 Deposit refund systems**

In a deposit refund system 'a deposit is paid on the acquisition of potentially polluting products. When pollution is avoided by returning the products or their residuals, a refund follows.'<sup>77</sup> The refund acts as an incentive for the return of the products or residuals. The advantage is that if the purchaser carelessly discards them, some one else is likely to pick them up and return them to the seller for the refund. Thus, there is some kind of double protection. This economic instrument is suitable for products or substances which can be reused, recycled or which should be returned for destruction. OECD advises that since some deposit refund schemes may be expensive and complicated to operate, it is important that products be easy to identify and to handle and that users and consumers should also be willing to participate in the scheme.<sup>78</sup>

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<sup>76</sup> Environmental bonds are unlikely to offend development in Malawi if they are reasonable in amount.

<sup>77</sup> OECD Doc op cit Annex paragraph 6.

<sup>78</sup> OECD Doc op cit Annex paragraph 10.

The usefulness of deposit refund systems in environmental protection was accepted by the European Court of Justice in *EC Commission v Denmark*<sup>79</sup> ('the Danish Bottles Case'). The EC Commission impugned the operation in Denmark of a deposit and refund scheme on beverage containers. In delivering its judgment, the Court stated that a deposit and return system for empty containers was an indispensable element of a system intended to ensure the reuse of containers and was necessary to achieve the objective of environmental protection.

Bohm<sup>80</sup> demonstrates that deposit refund systems may provide the same economic incentives as subsidies and taxes and at the same time avoid some of the weaknesses of these economic instruments. Some of the strengths of deposit refund schemes he lists are the following:

- In a deposit refund system the owner of a commodity has an incentive to prove that the commodity has not been disposed of in an improper fashion; in alternative systems the owner may have an incentive to hide the fact that it has been disposed of in an improper fashion.
- In some cases it is simpler and less expensive to administer deposit refund systems in which one is paid for choosing a certain kind of activity or disposal than in systems in which one has to pay for alternative kinds of activity or disposal.
- By paying a deposit or by being told about the refund prospect by the seller as a sales argument, the buyer or user is informed about the conditional refund and thus about (maximum) liability; making similar information available and effective is usually quite costly under alternative systems.
- The collection costs in deposit refund systems may in some cases be lower than the corresponding costs under a regulatory system or a system of charges that, to

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<sup>79</sup> [1989] ECR 4627 Judgment of 20 September 1988 reprinted in Sands et al op cit at 1234 et seq.

<sup>80</sup> P Bohm 'Deposit-Refund Systems: Theory and Applications to Environmental, Conservation and Consumer Policy' in Richard L Revesz (ed) *Foundations of Environmental Law and Policy* London: Oxford University Press 1997 141 at 142 – 143.

be effective, may require extensive checking operations, prosecution and so on.

- Deposit refund systems tend to leave the budget intact to the extent that refunds approach the volume of deposits.

Deposit refund systems are not without their weaknesses. They have the tendency to raise commodity prices. This may affect adversely people living at or below the poverty line.<sup>81</sup> However, it may be noted that the commodities on which they are often used are not necessities of life and therefore the impact on the poor is minimal. Further, they may fail to influence environmentally friendly behaviour on the part of people in the high income bracket since the refund is negligible to them.

In the context of Malawi the system has been used in the beverage bottle industry. Since the simpler forms of deposit refund systems operate without government intervention in any way and if experiences so far are anything to go by, their continued success as tools of environmental protection is guaranteed.

### **6.5.7 Environmental taxes (Eco-taxes)**

Environmental taxes are of the same genus as pollution (environmental) charges. However, the latter are distinct from the former in that they do not have to be in the nature of a tax (as understood in common parlance) to qualify as economic instruments in environmental protection policy. Some writers treat environmental taxes and pollution charges together as falling under the umbrella of fiscal measures or incentives.<sup>82</sup> For present purposes, they are treated separately: pollution charges have already been considered above and this section dwells on environmental taxes.

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<sup>81</sup>Bohm op cit at 144.

<sup>82</sup> Gaines and Westin op cit at 7 – 10; Paul G W Henderson 'Fiscal Incentives for Environmental Protection - Introduction' (1994) | *SAJELP* 49 at 49 – 50.

Henderson has identified the objectives that underlie environmental taxes.<sup>83</sup> First, environmental taxes cure market failures caused by the presence of externalities. As noted earlier on, micro-economic theory does not include the environmental costs of production in the commodity price. The producer does not pay for the air and water pollution he causes in the process of production. In order to correct this failure in the market, a tax is imposed to internalise the environmental costs. A second objective of environmental taxes is to influence economic behaviour to promote environmental goals. A tax may be levied on products that are harmful to the environment when used in production processes, consumed or disposed of. If the tax is of a significant amount, it will lead to an increase in the product's price. This will cause a fall in demand (if demand is not inelastic) and trigger reduction in production. In this way the environment is protected. An example of an environmental tax in this realm is a tax on chlorofluorocarbons and other ozone depleting substances.

Thirdly, environmental taxes may raise revenue to finance environmental expenditure. Bubna-Litic and de Leeuw appear to suggest another objective. They contend that eco-taxes must be introduced to subsidize those industries that are developing more sustainable practices and products; and that such subsidies will create 'care for our environment.'<sup>84</sup> It is submitted that on a proper assessment, this suggestion is merely an extension of the objective of raising revenue to meet environmental expenditure.

In light of the foregoing, the strengths of environmental taxes are three-fold: they cure market failure; they influence economic behaviour in the interest of environmental protection; and they generate funds for environmental initiatives. On the other hand, environmental taxes have weaknesses. In the first place, Rowan-Robinson and Ross rightly observe that taxation is not an easy alternative to direct regulation for bringing about behavioural change. For instance, it does not free those subject to the tax from

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<sup>83</sup> Paul G W Henderson 'Fiscal Incentives for Environmental Protection - Conceptual Framework' (1995) 1 *SAJELP* 55 at 57 - 60. As is evident from the title of this article, the objectives he discusses may apply to 'fiscal incentives' in general. However, his concentration is on income tax: see (1994) 1 *SAJELP* 49 at 50.

<sup>84</sup>K Bubna-Litic and L de Leeuw 'Can our Taxation System Support "New" Sustainable Industries? The Argument for Ecotaxes' (1999) 16 *Environmental and Planning Law Journal* 140 at 140 - 141.

compliance costs, nor does it dispense with the need for a bureaucracy to implement and enforce its provisions.<sup>85</sup> In the second place, environmental taxes may so greatly burden industry that economic growth may be hampered.<sup>86</sup>

In Malawi section 31(a) of the Environment Management Act 1996 provides that the Minister responsible for environmental affairs shall, on the recommendation of the National Council for the Environment and in consultation with the Minister of Finance, determine such fiscal incentives as are necessary for promoting the protection and management of the environment and the conservation and sustainable utilization of natural resources. It is arguable that such fiscal incentives may include environmental taxes. In this regard, the Minister may recommend the enactment of legislation or the amendment of existing legislation to introduce environmental taxes. Even though taxpayers are already burdened, environmental taxes are an attraction as they will assist the cash-strapped government to engage in meaningful environmental protection projects. However, industry has for long been complaining about the prohibitive taxes it faces. The 2000 revolutionary tax adjustments brought in by the then Minister of Finance, Dr Matthews Chikaonda, raised no small alarm across the whole stratum of society. It is therefore unlikely that environmental taxes will be welcomed.

### **6.5.8 Observations**

The foregoing analysis demonstrates that marketable permits, pollution charges and subsidies cannot be employed in environmental protection in Malawi at present. Environmental taxes are also unlikely to be used. Only deposit refund systems and, to a certain extent, environmental bonds may be used. Thus, most of the market-based instruments are currently not viable strategies for achieving environmental protection in Malawi.

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<sup>85</sup>Rowan-Robinson and Ross 'Non-Regulatory Instruments and Public Access to Environmental Information' in Bosselmann and Richardson op cit 265 at 272.

<sup>86</sup> Paul G W Henderson 'Fiscal Incentives for Environmental Protection - Conceptual Framework' (1995) 1 *SAJELP* 55 at 63.



## 6.6 Civil Measures

### 6.6.1 General

For long, even before the principal environmental legislation had been passed, civil litigation was instrumental in curbing pollution. In the present day civil litigation may be employed by individuals and/or administrative bodies in the enforcement of environmental protection endeavours. Civil litigation may also bring to the fore issues that should be solved by legislation. In addition, it may serve a publicity function.<sup>87</sup>

In civil litigation a court may make (a) an order for payment of money; (b) an order compelling or interdicting the performance of an Act; and (c) a declaration as to the legal rights of the parties.<sup>88</sup>

### 6.6.2 Damages (compensation)

In Malawi damages from civil law may be awarded to a person in respect of environmental harm where there is proof of the following torts: nuisance, negligence, breach of statutory duty and *Rylands v Fletcher* liability.<sup>89</sup>

Any unreasonable interference with a person's quiet enjoyment of his property may be a private nuisance, and so is any unlawful act or omission which adversely affects a person's health, comfort, convenience or enjoyment of life. There has to be an unreasonable and substantial interference for the act or omission to constitute an

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<sup>87</sup> MA Rabie 'Legal remedies for environmental protection' V *CILSA* (1972) 247 at 254.

<sup>88</sup> *Khalidwe Chilivumbo v GDC Haulage and United General Insurance Co* Civil Cause No. 462 of 2001, decision of Chimasula Phiri J (14 April 2004); *Dr Cassim Chilumpha v Chendawaka Family and Blantyre Print and Publishing Company Ltd* Civil Cause No. 984 of 2004, decision of Chipeta J (26 March 2004); and *Maggie Chimbayo v I & E Malawi Ltd* Civil Cause No. 1635 of 1997, decision of Kapanda J (16 January 2001). All these decisions are unreported but copies were available on <http://www.judiciary.mw> when accessed on 13 September 2005). Cf C Loots 'Making Environmental Law Effective' (1994) 1 *SAJELP* 17 at 27.

<sup>89</sup> Damages may also be awarded in criminal law as an additional remedy (see Chapter 5 hereof).

actionable nuisance. Everything has to be considered from a reasonable point of view. Time and locality are factors to be taken into account. If a person is for some reason more sensitive than usual to the nuisance, his action will not succeed.<sup>90</sup>

In the tort of negligence the plaintiff is required to prove that there was a duty of care owed to him by the defendant; that the duty of care has been breached by the defendant; and that as a result of that breach of duty of care, the plaintiff has suffered loss and damage.<sup>91</sup> In order to establish a duty of care a number of factors are taken into account: there must be a foreseeability of damage; the relationship between the parties must be one of proximity or neighbourhood; and the situation must be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on one party in favour of the other.<sup>92</sup> Breach of duty is established by evidence that the defendant's conduct falls below the standard required by law, which is the standard of a reasonable and prudent person.<sup>93</sup>

Elements of the tort of negligence may sometimes be found in the tort of breach of statutory duty but the two torts are different.<sup>94</sup> For a person to succeed in an action for breach of statutory duty, he must prove that the injury he has sustained is within the ambit of the statute; that the statutory duty imposes a liability to civil action; that the statutory duty was not fulfilled; and that the breach of duty has caused his injury.<sup>95</sup>

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<sup>90</sup> G Whitehead and A Kadar *A Foundation in English Law* (1992) 374 – 375.

<sup>91</sup> *Beston Mikeyasi v Aaron Ching'amba, Surfacing Enterprises and National Insurance Company* Civil Cause No. 2726 of 1999, decision of Kapanda J (15 June 2001) (unreported but copy available on <http://www.judiciary.mw> when accessed on 27 December 2005). See also *Mwase v Lilongwe City Council* [1991] 14 Malawi Law Reports 327.

<sup>92</sup> *Caparo Industries plc v Dickman* [1990] 2 WLR 605 at 617 – 618 per Lord Bridge; *Baxall Securities v Sheard Walshaw Partnership* [2001] PNLR 9. See also Michael P Reynolds 'The Rise and Fall of the Atkin Doctrine: Searching for a Will-O'-the-Wisp' (2004) 20 *Construction Law Journal* 105 at 109 – 111.

<sup>93</sup> Margaret R Brazier (general ed) *Clerk & Lindsell on Torts* 17ed London: Sweet & Maxwell 1995 at para 7-112.

<sup>94</sup> *Bux v Slough Metals Ltd* [1974] 1 All ER 262; Barrett (1974) 37 *Modern Law Review* 577.

<sup>95</sup> *Clerk & Lindsell on Torts* op cit at para 11-06. See how these principles worked out in *Bisiketi v Ruo Tea Estates Ltd* [1992] 15 Malawi Law Reports 26 and *Kapito v David Whitehead and Sons (Mal) Limited* [1993] 16(2) Malawi Law Reports 541.

Whether the injury is within the ambit of the statute depends on the interpretation of the statute. The injury will be outside the ambit where the plaintiff does not come within the category of persons contemplated or where the type of damage was not that which the statute was meant to guard against.<sup>96</sup> Again whether the statutory duty imposes liability to civil action depends on the interpretation of the statute. In the absence of express provision for civil action, the general rule appears to be that specification of some other sanction excludes enforcement by way of civil action, but this rule is subject to two exceptions.<sup>97</sup>

Tort liability based on the rule in *Rylands v Fletcher* has its origins in that case. The rule is that ‘the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.’<sup>98</sup> The rule is restricted to situations where the defendant made a ‘non-natural use’ of land. For long the essence of the rule was regarded as the imposition of strict liability, but this view has been qualified recently. In *Cambridge Water Co v Eastern Counties Leather plc*<sup>99</sup> the House of Lords said that foreseeability of harm was a prerequisite of liability under the rule and that the rule was an extension of the law of nuisance. This stand was confirmed by a later sitting of the House of Lords in *Transco plc v Stockport MBC*<sup>100</sup> where it was emphasised that the rule was a remedy for damage

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<sup>96</sup> *Wentworth v Wiltshire County Council* [1993] 2 All ER 256; *Hartley v Mayoh & Co* [1954] 1 QB 383.

<sup>97</sup> *Lonrho v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173. At 185 – 186 the Court said that the exceptions are: (1) where the obligation or prohibition was imposed for the benefit of a particular class of individuals; and (2) where a statute provides for a public right and an individual member of the public suffers particular, direct and substantial damage other than and different from that which is common to the rest of the public.

<sup>98</sup> *Rylands v Fletcher* (1866) LR 1 Ex 265 at 279.

<sup>99</sup> [1994] 2 AC 264.

<sup>100</sup> [2004] 2 AC 1. At 10 Lord Bingham of Cornhill restated the rule as follows: ‘The rule in *Rylands v Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. From this simple proposition two consequences at once flow. First, as very clearly decided by the House in *Read v J Lyons & Co Ltd* [1947] AC 156, no claim in nuisance or under the rule can arise if the events complained of take place wholly on the land of a single occupier. There must, in other words, be an escape from one tenement to another. Second, the claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land.’ On his part Lord Hobhouse of Woodborough said at 23: ‘The

to land or interests in land, that only those holding proprietary interests in the land affected by an escape could sue and that the rule was a species of nuisance.<sup>101</sup>

It may be observed at this juncture that one thread runs through all the foregoing torts and this is the requirement that some harm must be occasioned to the plaintiff or his interests. So any environmentally prejudicial action the plaintiff complains about must not only harm the environment but it must also harm the plaintiff or his interests. A plaintiff cannot go to court on the basis of harm to the environment alone. In this lies one fundamental limitation to the tort-based claims for compensation. No compensation can be awarded for environmental harm generally. Other limitations are stated below.

The value to society of a compensation judgment lies in the fact that it renders pollution expensive, and thereby economically motivates polluters and potential polluters to refrain from such activities. However, compensation has serious limitations in the environmental sphere. Compensation is often difficult to measure. Pollution damage is difficult to attribute to a particular defendant and is often diffuse. Further, compensation does not prevent the continuation of the harmful practice, and so it may be imperative to complement the compensation with an injunction restraining the continuance of the polluting activity.<sup>102</sup>

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salient features of the rule are easily identified: the self interest of the landowner, his conduct in bringing or keeping on his land something dangerous which involves a risk of damaging his neighbours' property, the avoidance of such damage by ensuring that the danger is confined to his own property and liability to his neighbours if he fails to do so, subject to a principle of remoteness. The subsequent complications and misunderstandings have arisen, not from the original rule and its rationale, but from additional criteria, often inappropriately expressed, introduced in later cases.'

<sup>101</sup> For an excellent analysis of the rule, see Donal Nolan 'The Distinctiveness of Rylands v Fletcher' (2005) 121 *LQR* 421. See also Gerry Cross 'Does Only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance' (1995) 111 *LQR* 445; Richard Mullender and Lesley Dolding 'Environmental Law: Notions of Strict Liability' [1995] *Journal of Business Law* 93; and John C O'Quinn 'Not-so-strict Liability: A Foreseeability Test for *Rylands v Fletcher* and Other Lessons from *Cambridge Water Co v Eastern Counties Leather Plc*' (2000) 24 *Harvard Environmental Law Review* 287.

<sup>102</sup> *Rabie op cit* at 259.

### 6.6.3 Injunction

An injunction - known in other jurisdictions as an interdict - is a double-edged sword: it has the potential of compelling administrative bodies and officials to comply with their environmentally relevant statutory duties. At the same time it may serve the interests of administrative bodies and officials in compelling persons to comply with environmental law generally.<sup>103</sup>

The authority for granting injunctions in environmental protection has been confirmed by statute. Section 5 of the EMA allows any person to bring an action in the High Court to enforce the right to a clean and healthy environment. In that action the person may seek: (a) to prevent or to stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources; (b) to procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any written law; or (c) to require that any on-going project or other activity be subjected to an environmental audit in accordance with the EMA. However, it must be noted that the matters specified in (a) to (c) may be ordered under a remedy other than injunction because section 5 does not restrict its application to injunctions. So it is possible to obtain the remedies specified in (a) to (c) under sundry orders.

A court may grant either an interlocutory or perpetual injunction.<sup>104</sup> For an interlocutory injunction to be granted a number of elements must be satisfied and these include: (i) existence of a serious question to be tried; (ii) apprehended harm which may be irreparable; and (iii) a balance of convenience in relation to the inadequacy of damages as

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<sup>103</sup> Section 5 of the EMA provides clear authority on these matters.

<sup>104</sup> *Dr Cassim Chilumpha v Chendawaka Family and Blantyre Print and Publishing Company Ltd* Civil Cause No. 984 of 2004, decision of Chipeta J (26 March 2004) (unreported).

a remedy.<sup>105</sup> Generally an interlocutory injunction is granted upon application while a perpetual injunction is normally granted by way of action.<sup>106</sup> However, a perpetual injunction may be granted on application if no bona fide factual dispute exists.<sup>107</sup> The requisites for establishing the right to a perpetual injunction are a clear right, injury actually committed or reasonably apprehended and the absence of adequate protection by any other ordinary remedy.<sup>108</sup> Where the applicant's interests will be adequately safeguarded by an action for damages, a perpetual injunction may not be granted.<sup>109</sup> Since in actions relating to the environment, damages will usually not suffice as a remedy, it is likely that more often than not perpetual injunctions will be granted.

The injunction is a very useful tool, having regard to the preventive and precautionary principles of environmental law. It has a number of advantages. It can be obtained within hours if the matter at hand is sufficiently urgent. It is easier to prove the need for an injunction than for a criminal sanction since the standard of proof is the preponderance of the evidence and not proof beyond reasonable doubt. Further, the applicant may recover the costs of the application if the application is successful.<sup>110</sup>

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<sup>105</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; Richard Scott et al (eds) *The Supreme Court Practice 1999* Vol 1 London: Sweet and Maxwell 1998 at paras 29/L/2 to 29/L/11; and 21 Halsbury's Laws of England (3ed) paras 763 to 766.

<sup>106</sup> *The Supreme Court Practice* op cit at para 29/1 A/2.

<sup>107</sup> *Eaden v Firth* (1863) 1 Hem & M 573 at 574.

<sup>108</sup> 21 Halsbury's Laws of England (3ed) paras 740, 742 and 745.

<sup>109</sup> 21 Halsbury's Laws of England (3ed) para 739.

<sup>110</sup> *Agricultural Development and Marketing Corporation v Bina Kakusa* Civil Cause No. 713 of 2000, decision of Justice Mwaungulu (11 May 2000); *Micahil Jama Ali t/a Pulland Importing Company v Ali Dere and Others* Civil Cause No. 3684 of 2002, decision of Justice Chimasula Phiri (10 January 2003). Both cases are unreported but copies were available on <http://www.judiciary.mw> when accessed in September 2005.

## 6.6.4 Judicial review

### 6.6.4.1 General

Malawian statute and case law suggests that there are two forms of judicial review, one based on the Constitution and the other based on common law. For want of better terminology the former will be referred to as constitutional judicial review and the latter common law judicial review. Though related in some respects they are different in many areas as will be apparent from the analysis below.

### 6.6.4.2 Constitutional judicial review

Section 108(2) of the Constitution confers upon the High Court original jurisdiction to review any law, and any action or decision of the Government for conformity with the Constitution. When determining the validity of the decisions of the executive branch of Government the court may take into account environmental considerations.<sup>111</sup> However, in the absence of a constitutional environmental right, this power of judicial review is of limited use in environmental law. The principle of national policy relating to the environment declared in the Constitution is only directory in nature.<sup>112</sup> The obvious suggestion to strengthen this species of judicial review is to elevate the environmental right provided for in the EMA into a constitutional right.

### 6.6.4.3 Common law judicial review

The High Court's *general* powers of judicial review are another species of judicial review – this is actually the type that has been used most by litigants in Malawian courts but most of this litigation has taken place outside environmental law. Statute empowers the High Court to make orders akin to the United Kingdom orders of mandamus, prohibition

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<sup>111</sup> Section 13(d) as read with section 14 of the Constitution.

<sup>112</sup> *Ibid.*

and certiorari.<sup>113</sup> So a decision-maker empowered by public law to make a decision or take action may have the decision or action reviewed and subjected to an appropriate order.<sup>114</sup> There is scope for using this form of judicial review in challenging environmentally prejudicial decisions or actions.

It is fairly settled that there are three grounds for common law judicial review. In *State v Commissioner General of Malawi Revenue Authority ex parte Chipiliro Phiri Anganile*<sup>115</sup> it was stated that the grounds are illegality, irrationality and procedural impropriety. By illegality is meant the failure by a decision-maker to understand correctly and/or give effect to the law that regulates his decision-making power. Irrationality – also known as Wednesbury unreasonableness<sup>116</sup> – ‘applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’<sup>117</sup> Procedural impropriety encompasses failure to observe basic rules of natural justice, failure to act with procedural fairness towards the person to be affected by the decision and failure by an administrative tribunal to observe procedural rules expressly laid down in the legislation by which its jurisdiction is created even where that failure does not amount to denial of

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<sup>113</sup> Section 16(2) of the Statute Law (Miscellaneous Provisions) Act cap 5:01 of the Laws of Malawi.

<sup>114</sup> *State v Commissioner General of Malawi Revenue Authority ex parte Chipiliro Phiri Anganile* Miscellaneous Civil Cause No 89 of 2002, decision of Justice Tembo (12 March 2003) (unreported but copy available on <http://www.judiciary.mw> when accessed in September 2005).

<sup>115</sup> *Ibid.* The court approved the restatement of the law in this regard by Lord Diplock and Lord Roskill in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

<sup>116</sup> Named after the case of *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>117</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 at 410 per Lord Diplock.



natural justice.<sup>118</sup> These grounds are tempered with the constitutional clause on administrative justice.<sup>119</sup>

An applicant for judicial review (both constitutional and common law) is also required to demonstrate locus standi: he must show that he has a sufficient interest in the matter.<sup>120</sup> In *Administrator of the Estate of Dr H. Kamuzu Banda v Attorney General*<sup>121</sup> Chimasula Phiri J was of the opinion that section 5 of the EMA confers wide locus standi on litigants in environmental matters. He said:

‘In recognition of the pressing need to preserve the environment, the Environment Management Act has given locus standi to ‘any person’ to bring suits to enforce the right to a clean and healthy environment, which right is of course, also not localised. In a nutshell, the Environment Management Act departs from orthodox requirements for locus standi and gives any person the right to involve himself or herself in environmental litigation.’

However, it is doubtful whether this is indeed the position, having regard to the decision of the Malawi Supreme Court of Appeal, delivered three months after Chimasula Phiri J’s judgment, in *Civil Liberties Committee v Minister of Justice and Registrar General*.<sup>122</sup>

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<sup>118</sup> [1985] AC 374 at 411 per Lord Diplock. On all the three grounds see also Lord Woolf, Jeffrey Jowell and Andrew Le Sueur (eds) *De Smith, Woolf and Jowell’s Principles of Judicial Review* London: Sweet & Maxwell 1999 at 147 – 518.

<sup>119</sup> Section 43 of the Constitution provides as follows: ‘Every person shall have the right to:– (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests (sic) if those interests are known.’ There appears to be a grammatical error in this section. It seems that this error may be corrected by inserting the words ‘are affected or threatened,’ between the last-but-one occurrence of the word ‘interests’ and the word ‘if’.

<sup>120</sup> Order 53 rule 3(7) of the Rules of the Supreme Court; sections 15(2) and 46(2) of the Constitution.

<sup>121</sup> Civil Cause No. 1839(A) of 1997, unreported decision of 11 January 2004 (but copy available on <http://www.judiciary.mw> when accessed in December 2005).

<sup>122</sup> MSCA Civil Appeal No. 12 of 1999 (unreported but copy available on <http://www.judiciary.mw> when accessed on 13 September 2005).

The Registrar General had cancelled the registration certificate of an organisation called Chikonzero Communications which was the publisher and distributor of an antigovernment newspaper, *The National Agenda*. The Registrar General also banned the publication, printing and distribution of the newspaper. Civil Liberties Committee (CILIC), a human rights non-governmental organisation, sought judicial review of these decisions of the Registrar General. The government resisted the action on the basis that CILIC did not have locus standi. The relevant legislative provisions that fell to be construed were sections 15(2) and 46(2) of the Constitution.<sup>123</sup> The court held that these provisions should not be interpreted literally. On the contrary they should be regarded as requiring locus standi 'expressed in terms of sufficient interest, special or substantial interest or existence of a legal right or interest in the outcome of the suit.' On the facts before it the court was of the view that CILIC did not have locus standi. The court intimated that there were other organisations which could successfully show sufficient interest in the subject matter or outcome of the action and these were the Media Council of Malawi, the National Media Institute of Southern Africa (NAMISA) and the Journalists Association of Malawi (JAMA). Unlike CILIC these organisations were specifically concerned with the rights and freedoms relating to the press.<sup>124</sup>

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<sup>123</sup> Section 15(2) provides: 'Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.' Section 46(2) states: 'Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled – (a) to make application to a competent court to enforce or protect such a right or freedom; and (b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.' See A Peter Mutharika 'The 1995 Democratic Constitution of Malawi' [1996] 40 *Journal of African Law* 205 at 216 for a brief comment on section 15.

<sup>124</sup> This narrow approach follows a number of previous decisions delivered by the court. The narrow approach has been criticised: see Fidelis Edge Kanyongolo 'The Limits of Liberal Democratic Constitutionalism' in Kings M Phiri and Kenneth R Ross (eds) *Democratisation in Malawi: a Stocktaking* Blantyre: CLAIM 1998 353 at 367; Danwood Mzikenge Chirwa 'A Full Loaf is Better than Half: the Constitutional Protection of Economic, Social and Cultural Rights in Malawi' [2005] 49 *Journal of African Law* 207 at 237 – 239; Danwood Mzikenge Chirwa 'Democratisation in Malawi 1994 – 2002: Completing the Vicious Circle?' (2003) 19 *SAJHR* 316 at 333 – 334.

The Supreme Court rehabilitated two of its own judgements that had been questioned in the High Court previously.<sup>125</sup> In impugning the High Court decision of *Registered Trustees of the Public Affairs Committee v Attorney General and Others*<sup>126</sup> the Supreme Court condemned the presiding judge's preference to follow a decision on the issue of locus standi which totally contradicted the two Supreme Court cases. Without mincing words the Supreme Court labelled such preference professionally wrong and unacceptable. Although the Supreme Court did not identify the 'contrary decision', it is clear from a perusal of the High Court case of *Public Affairs Committee* that the decision in issue was either the *Kamuzu Banda* case above or *Thandiwe Okeke v Minister of Home Affairs and Controller of Immigration*.<sup>127</sup> In these circumstances it may be that the statement of Chimasula Phiri J quoted above is no longer good law despite its attractiveness. This finding is in line with the developments that attended the enactment of the EMA. It is reported that the draft bill of the EMA had provided for 'a right to commence court action by any person who felt the environment was being threatened by some person's activities without the need for him or her to show that they had personally suffered injury or harm as a result of such activity.'<sup>128</sup> When finally enacting the EMA this provision was shot down on the official basis that it was superfluous but it is more likely that the real basis of the rejection was fear of environmental litigious maniacs.<sup>129</sup>

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<sup>125</sup> The two decisions are *Attorney General v Malawi Congress Party and Others* MSCA Civil Appeal No. 22 of 1996 (commonly known as 'the Press Trust case') (Copy used is that available on <http://www.judiciary.mw> ) and *President of Malawi and Another v Kachere and Others* MSCA Civil Appeal No. 20 of 1995 (unreported). These decisions were questioned by Chipeta J in *Registered Trustees of the Public Affairs Committee v Attorney General and Others* Civil Cause No. 1861 of 2003 (unreported but copy available on <http://www.judiciary.mw> when accessed in December 2005).

<sup>126</sup> Civil Cause No. 1861 of 2003 (unreported but copy available on <http://www.judiciary.mw> when accessed in December 2005).

<sup>127</sup> Civil Cause No. 73 of 1997 (unreported but copy available on <http://www.judiciary.mw> when accessed on 29 December 2005).

<sup>128</sup> Gracian Z Banda 'Report on Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews' 1997 (unpublished) at para 3.4.1.

<sup>129</sup> *Ibid.*

The current state of the law on locus standi is not fully supportive to the environmental cause. It is generally understood that individuals may not have the knowledge and resources to bring court action in favour of the environment. On those rare occasions when an individual takes up the challenge or when a public interest organisation decides to take court action, the individual or the organisation may not have the required sufficient interest: the only reason for bringing the action may be to move the environmental cause forward. Sometimes even organisations may fail to take up court action due to financial constraints.<sup>130</sup> These concerns are arguably applicable to Malawi. In the premises it is suggested that a provision be introduced in the EMA with a view to conferring locus standi upon 'any person' or 'any group of persons' literally and alleviating the burden of costs. A useful precedent for such a provision is section 32 of South Africa's National Environmental Management Act 107 of 1998 which is in the following terms:

'32. Legal standing to enforce environmental laws

(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources –

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.

(2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or

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<sup>130</sup> Frederick R Anderson, Daniel R Mandelker and A Dan Tarlock *Environmental Protection: Law and Policy* Boston: Little Brown 1984 at 75 - 76. See also David Robinson and John Dunkley (ed) *Public Interest Perspectives in Environmental Law* London: Wiley Chancery 1995 *passim*.

threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

(3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act or any other statutory provision concerned with the protection of the environment, a court may on application –

(a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and

(b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.’

### **6.6.5 Appraisal**

All civil measures analysed above can only be taken at significant cost. Except for the injunction, the other civil remedies can only be obtained at the instance of private individuals or organisations. In Malawi’s poverty individuals are preoccupied with satisfying their basic needs (food, clothing and shelter) and have no time and no money to engage in litigation that merely serves the public interest in environmental protection. Few are the occasions when litigation serves their immediate personal interests as well as the public interest in environmental protection, but even on those few occasions the cost implications hinder the people from going to court. Likewise environmental organisations face the cost obstacle. Even if the law were to be amended to make it easier to access costs from the defendant, it is unlikely that individuals and environmental organisations would suddenly wake up from their current slumber and take up significant numbers of

court actions -- the environmental awareness and zeal are not that high.<sup>131</sup> These circumstances suggest that environmental enforcement cannot be left in the hands of private individuals and private organisations. It follows that civil measures are not reliably practical alternatives to the criminal sanction in environmental protection in Malawi's current socioeconomic state.

## **6.7 Administrative measures**

### **6.7.1 General**

Environmental statutes impose various environmentally relevant powers and duties on administrative bodies, that is to say, central government departments, local authorities, statutory and other public bodies. The successful implementation of such powers and duties is sometimes decisive in making environmental law effective. Administrative bodies may be given direct environmental functions usually undertaken in respect of land owned by the State, for instance, they may be required to perform certain actions necessary to conserve some resource. An example is the National Parks and Wildlife Act 11 of 1992 which confers on administrative bodies powers relating to the management of national parks. Administrative bodies may also be authorized to establish environmental control provisions in the form of regulations in respect of the environmental aspects subject to their control. For instance, local authorities under the Local Government Act 42 of 1998 are responsible for promulgating bylaws on, among other things, the prevention and control of nuisances.<sup>132</sup> In addition environmental statutes may require administrative bodies to authorize persons to perform actions that would otherwise be

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<sup>131</sup> As a member of Greenwigs, the only environmental non governmental organisation of lawyers in Malawi, I witnessed how disinterested in environmental litigation lawyers could be. What was more interesting appeared to be to attend funded seminars (local and international) organised by other organisations. All the lawyers were actually too busy with their personal business: this was admitted in the Minutes of the Meeting of Greenwigs held on 16 October 2002. (I have a copy of these minutes on file). The best way in which these lawyers could spring to action was to engage them in fee-earning litigation in favour of the environment, but no individual or organisation engaged them.

<sup>132</sup> Sections 6 and 103 of the Local Government Act 42 of 1998.

prohibited or restricted (that is, the permit or licence system)<sup>133</sup> or to grant rights or exemptions.

Administrative bodies may secure persons' compliance with environmental laws in a number of ways. A preliminary duty is to inform the persons to whom the legislation concerned is applicable of their obligations arising from the legislation. Although there may not strictly be a legal duty to inform those persons, such a move is prudent. Of course it is said that every person is supposed to know the law but this is a blind statement that does not take cognizance of the facts on the ground, for it is a fact of common notoriety that legislation – especially subsidiary legislation – is generally inaccessible to the people.<sup>134</sup> Apart from informing the relevant persons, administrative bodies may themselves take action in the form of abatement. In the next few paragraphs the discussion will focus on abatement and several ways in which administrative bodies secure people's compliance with environmental laws. These ways are statutory directives, suspension or cancellation of authorisations, and entry and seizure.

### 6.7.2 Abatement and Other Forms of Self-help

Abatement is a right to self-help against a nuisance. Where pollution amounts to a nuisance, administrative bodies or officers may abate the nuisance (that is, terminate it by their own acts). They may do so with or without giving prior notice of the intended abatement.<sup>135</sup> Under the Public Health Act 12 of 1948 a local authority may serve a notice on the author of a nuisance requiring him to abate it and if he fails to do so, the local authority may abate it.<sup>136</sup> As will become clear shortly, this notice operates in a way similar to a statutory directive or order.

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<sup>133</sup> Section 47 of the National Parks and Wildlife Act 11 of 1992 outlaws the hunting or taking of protected species, except in accordance with the conditions of a licence.

<sup>134</sup> Cf M A Rabie, C Loots, R Lyster and M G Erasmus 'Implementation of Environmental Law' in Fuggle and Rabie op cit 120 at 126.

<sup>135</sup> *Clerk and Lindsell on Torts* op cit at para 29-22 to 29-28; and R F V Heuston and R A Buckley (eds) *Salmond and Heuston on the Law of Torts* 19ed London: Sweet & Maxwell 1987 at 682 – 685.

<sup>136</sup> Sections 64 – 66 of the Public Health Act 12 of 1948.

There are also forms of self-help other than abatement which administrative bodies or officers may employ, for example closure of offending sewer or drain connections<sup>137</sup> and demolition of offending things or structures.<sup>138</sup>

### 6.7.3 Statutory directives (Notices and Orders)

An administrative body or officer may issue a directive against a person causing or likely to cause environmental harm or pollution. The directive calls upon the person to perform certain actions in order to control the environmental harm or pollution or to prevent its aggravation or recurrence. A number of statutes make provision for such directives. Under the Environment Management Act 23 of 1996 a directive of this nature is known as an Environmental Protection Order (“EPO”). The Director of Environmental Affairs may issue an EPO against any person whose acts or omissions have or are likely to have adverse effects on the protection and management of the environment. The EPO may, inter alia, require the person to take measures necessary for the restoration of any land degraded by reason of the activities of the person. If the person fails to take the action specified in the EPO, the Director may take such action as he deems appropriate for achieving the purpose for which the EPO was made. Once this is done, the Director is entitled to recover in full from the person the expenses reasonably incurred by the Director in taking such action.<sup>139</sup>

The following are the other provisions in Malawi’s environmental statutes which contain statutory directives: sections 71, 77, 89, 90, 91 and 92 of the Public Health Act 12 of 1948; section 35 of the Fisheries Conservation and Management Act 25 of 1997; section 76 of the Occupational Safety Health and Welfare Act 21 of 1997; section 42 of the Forestry Act 11 of 1997; sections 6, 19 and 20 of the Water Resources Act 15 of 1969; sections 54 and 55 of the Waterworks Act 17 of 1995; section 17 of the Monuments and

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<sup>137</sup> Section 33(6) of the Waterworks Act 17 of 1995.

<sup>138</sup> Section 32(1)(e) of the Fisheries Conservation and Management Act 25 of 1997.

<sup>139</sup> Sections 33 and 34 of the EMA.



Relics Act 16 of 1990, sections 4 and 5 of the Plant Protection Act 11 of 1969, sections 45 and 49 of the Town and Country Planning Act 26 of 1988, section 117 of the Mines and Minerals Act 1 of 1981, sections 35 and 38 of the Petroleum (Exploration and Production) Act 2 of 1983, section 5 of the Noxious Weeds Act 17 of 1936 and section 32 of the Land Act 25 of 1965.

#### **6.7.4 Suspension or cancellation of authorizations**

Another sanction for securing compliance is administrative suspension or cancellation of authorizations. Administrative bodies may be given discretion to suspend or cancel authorisations usually where the holders of the authorisations have failed to comply with the terms of the authorizations. The threat of suspension or cancellation arguably provides an incentive to operate within the confines of the terms of the authorizations. An example of such power is provided by the Mines and Minerals Act 1 of 1981: the Minister is empowered to suspend or cancel any reconnaissance licence where the holder has failed to comply with a condition of the licence.<sup>140</sup> The Minister has also power to cancel a mineral permit where he considers it necessary or desirable to do so.<sup>141</sup>

Other statutory provisions containing this sanction are: sections 49 and 57 of the Fisheries Conservation and Management Act 25 of 1997; sections 51 and 53 of the Forestry Act 11 of 1997; section 14 of the Water Resources Act 15 of 1969; section 16 of the Waterworks Act 17 of 1995; sections 34 and 38 of the Monuments and Relics Act 16 of 1990; sections 57, 59 and 94 of the National Parks and Wildlife Act 11 of 1992, section 9 of the Fertilizers Farm Feeds and Remedies Act 12 of 1970, section 42 of the Town and Country Planning Act 26 of 1988, sections 57, 80 and 84 of the Mines and Minerals Act 1 of 1981 and section 41 of the Petroleum (Exploration and Production) Act 2 of 1983.

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<sup>140</sup> Section 57 of the Mines and Minerals Act 1 of 1981.

<sup>141</sup> Section 84 of the Mines and Minerals Act 1 of 1981.

### 6.7.5 Entry and seizure

Administrative bodies are sometimes empowered to enter premises, vehicles, etc to ascertain whether environmental precepts are being complied with. They may also seize anything which may provide proof of any contravention of the precepts. In the Fertilizers, Farm Feeds and Remedies Act 12 of 1970 it is stated that an inspector or other authorised officer may enter upon any premises, place or vehicle suspected of having a farming requisite<sup>142</sup> or sterilizing plant.<sup>143</sup> He may seize any farming requisite, book, record or document which appears to afford evidence of a contravention of the Act.<sup>144</sup>

Similar powers are found in the following statutory provisions: sections 30 and 32 of the Fisheries Conservation and Management Act 25 of 1997; section 9 of the Forestry Act 11 of 1997; sections 13, 14 and 16 of the Control and Diseases of Animals Act 41 of 1967; section 46 of the Monuments and Relics Act 16 of 1990; section 9 of the National Parks and Wildlife Act 11 of 1992, section 11 of the Plant Protection Act 11 of 1969, section 69 of the Town and Country Planning Act 26 of 1988, section 117 of the Mines and Minerals Act 1 of 1981, section 70 of the Petroleum (Exploration and Production) Act 2 of 1983, section 3 of the Petroleum Act 1 of 1951, section 4 of the Noxious Weeds Act 17 of 1936, section 8 of the Protection of Animals Act 16 of 1944 and section 33 of the Land Act 25 of 1965.

### 6.7.6 Administrative penalties

Sometimes instead of prosecuting an offender an administrative officer or body may demand a monetary penalty from the offender as long as the offender opts not to go to court. Under section 50 of the Fisheries Conservation and Management Act 25 of 1997

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<sup>142</sup> Section 2 of the Fertilizers, Farm Feeds and Remedies Act 12 of 1970 defines 'farming requisite' as any fertilizer, farm feed or remedy, or any substance used in the manufacture of a fertilizer, farm feed or remedy.

<sup>143</sup> According to section 2 of the Fertilizers, Farm Feeds and Remedies Act 12 of 1970 a 'sterilizing plant' is a plant used for the sterilizing of bones or other substances derived from an animal carcass.

<sup>144</sup> Section 12(1) of the Fertilizers, Farm Feeds and Remedies Act 12 of 1970 .

the Director of Fisheries is empowered to offer to an alleged offender the alternatives of prosecution or payment of a penalty. This offer can only be made where the Director has reasonable grounds for believing that a minor offence created by the Act has been committed and that it would be appropriate to impose a penalty. The monetary penalty does not exceed one half of the maximum penalty to which the person would be liable if he were convicted of the offence by the court. The marginal note to section 50 of the Fisheries Conservation and Management Act 25 of 1997 describes this penalty as an administrative fine. This description is contrary to what writers regard as an administrative fine or penalty.

It appears from the literature that administrative penalties are closely related to admission of guilt fines but are not identical. In an admission of guilt fine procedure, an offender is called upon to pay a fine in respect of an offence. If he pays the fine, the matter ends there. If he does not pay and opts for trial, the matter is prosecuted in the normal criminal way which entails proof of the offence beyond reasonable doubt by the prosecution.<sup>145</sup> In an administrative penalty procedure an offender is served with a document specifying a penalty for an offence. If the offender pays the penalty, the matter ends there. If the offender is unwilling to pay, he may appeal to the relevant authority (an administrative official or tribunal).<sup>146</sup> In that event the appealing offender has a duty to convince the appellate forum that his case is stronger and he does so on a standard of proof that is different from proof beyond reasonable doubt.<sup>147</sup> Thus it is the appealing offender who has to make out his case before the appellate forum instead of the State machinery proving the case.<sup>148</sup> One advantage of an administrative penalty is the possibility of

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<sup>145</sup> Kidd op cit at 38. In the Malawi scenario admission of guilt fines are mostly used under the Road Traffic Act, cap 69:01 of the Laws of Malawi.

<sup>146</sup> See samples at <http://www.epi.umn.edu/alcohol/local/adminpen.shtm> (Accessed 06 March 2006), [http://www.ene.gov.on.ca/envision/ergreport/downloads/report\\_paper1.htm](http://www.ene.gov.on.ca/envision/ergreport/downloads/report_paper1.htm) (Accessed 06 March 2006) and [http://www.deh.enr.state.nc.us/pws/rules/SECTION\\_1900.pdf](http://www.deh.enr.state.nc.us/pws/rules/SECTION_1900.pdf) (Accessed 06 March 2006). See also <http://www.customs.govt.nz> (Accessed 06 March 2006).

<sup>147</sup> Kidd op cit at 38 – 39.

<sup>148</sup> Kidd op cit at 39 demonstrates, rightly it is submitted, that the use of administrative monetary penalties does not fall foul of the Constitution. Although he writes in relation to South Africa, it is arguable that his reasoning can apply to Malawi. Among other things, he writes: '[If it were found – which is disputed -] that

keeping the case out of court<sup>149</sup> and so expediting its disposal: time and cost may be saved.<sup>150</sup>

Applying the foregoing elaboration to section 50 of the Fisheries Conservation and Management Act 25 of 1997, it appears that the fine specified in that section is more in the nature of an admission of guilt fine than an administrative penalty, and yet the Act calls it an administrative fine. From this it may be concluded that section 50 does not distinguish an admission of guilt fine from an administrative penalty. It is suggested that this state of affairs be modified by introducing in the procedure changes that will transform the section 50 sanction into a real administrative penalty. The changes will include the possibility of appealing to an administrative forum instead of a court. The proposed specific changes are reflected in Chapter 8 hereof.

### 6.7.7 Appraisal

The operation of the administrative measures analysed above does not depend on private citizens or private organisations, unlike most of the civil measures. It therefore appears that administrative measures have potential for immediate use in Malawi just like criminal sanctions. Accordingly administrative measures are possible alternatives to criminal sanctions in Malawi's current circumstances. However, there is need to make administrative penalties (fines) generally available especially in minor offences. This proposal is being made in light of the fact that they are provided for imperfectly and only under one environmental statute. In this regard, it is suggested that a section along the

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the imposition of administrative penalties does infringe a person's fair trial rights, it is submitted that the limitation on these rights will be justifiable. The reason for this is the important rationale (effectiveness of the administration of justice) behind the use of administrative penalties, coupled with the relatively minor impact that it will have on "victims".

<sup>149</sup> If the matter goes for judicial review, it cannot be said that the case is kept out of court. The statement in the text is only valid where there is no judicial review.

<sup>150</sup> Kidd *op cit* at 39. If there is an appeal against the imposition of the administrative penalty, the time and cost may be more or less the same as the time and cost involved in a normal court case. All depends on the nature and substance of the proceedings. However, the administrative penalty still retains its attractiveness due to the fact that it is the appealing offender (and not State machinery) who has the onus of proving his case in the appellate forum.

lines of section 50 of the Fisheries Conservation and Management Act 25 of 1997 (with the modifications suggested above) be introduced in the EMA. That section should apply to all environmental offences of a minor nature.

## **6.8 Conclusion**

The foregoing analysis has established that self-regulation, co-regulation, most information-based instruments, most market-based mechanisms and most civil measures are not viable alternatives to the criminal sanction in Malawi at present. It is only administrative measures which have great scope for operation as a reliably practical alternative. In these circumstances it is unsafe to recommend that the criminal sanction be reserved for serious crimes and that the other crimes be addressed by alternatives to the criminal sanction. Such a suggestion is impossible on account of the fact that the alternatives are largely unavailable in practical terms in Malawi. It is submitted that in the case of Malawi a different but related – approach be taken. In this approach reliance on the criminal sanction will inevitably continue, only that there should be more use of administrative measures. In particular it is suggested that minor offences should generally be removed from the realm of the criminal sanction to the realm of administrative penalties. It is arguable that consigning minor offences to administrative penalties will be cost effective in terms of money, manpower and time.

It is *not* suggested that the criminal sanction should be used in serious crimes entirely in the way it has been used up to now. There is need to attend to several aspects of the criminal sanction with a view to improving its performance. These aspects are considered in the next chapter.

# CHAPTER SEVEN

## OPTIMISING THE USE OF CRIMINAL SANCTIONS IN ENVIROMENTAL PROTECTION IN MALAWI

### 7.1 Introduction

Over the years a number of devices have been employed to strengthen the use of criminal sanctions. Strict liability, vicarious liability and corporate liability are some of the devices. There have also been suggestions that sentences and certain procedural aspects should be revisited with a view to improving the use of criminal sanctions generally.<sup>1</sup> The purpose of this chapter is to examine these devices in the context of environmental protection in Malawi.

### 7.2 Strict liability

It has been stated in Chapter 4 hereof that Malawian criminal law follows the traditional division of a crime into actus reus and mens rea: a person is not guilty criminally for his conduct unless he had the appropriate state of mind at the relevant time. To this rule there is an exception: in some offences 'the prosecution is required to prove the actus reus, but in relation to one or more elements of the actus reus, there is no mens rea element to prove. The defendant will be convicted even if he was entirely without fault.'<sup>2</sup> However, the accused is still entitled to any generally applicable defences.<sup>3</sup> Such offences are

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<sup>1</sup> See, for example, Martha Grekos 'Environmental fines – all small change?' [2004] *Journal of Planning and Environment Law* 1330.

<sup>2</sup> A P Simester and G R Sullivan *Criminal Law: Theory and Doctrine* 2ed (Revised 2004) Oxford: Hart Publishing 2003 at 167.

<sup>3</sup> Glanville Williams *Criminal Law: the General Part* 2ed London: Stevens & Sons 1961 at 215 writes: '[Those offences] not requiring any kind of legal fault on the part of the accused ... are said to be crimes of

known as offences of strict liability.<sup>4</sup> Comparative studies have been undertaken on the meaning and understanding of strict liability in various countries.<sup>5</sup> The studies show that there are differences.

Supporters of strict liability put forward a number of justifications for the doctrine.<sup>6</sup> Opponents of the doctrine refute the alleged justifications with vigour.<sup>7</sup> It is not intended to reproduce this debate here, as there is not much use in doing so but it must be noted that the weight of learned opinion favours the abrogation of strict liability on the basis that the alleged justifications are not valid.<sup>8</sup> This position is certainly well grounded. However, history tells us that these opinions of scholars have not progressed beyond the stage of mere babblings, at least in Malawian law.<sup>9</sup> Strict liability is still with us today

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strict responsibility or absolute prohibition, and the necessity for *mens rea* or negligence is wholly or partly excluded. There is no indication in the authorities that other defences are excluded, such as infancy and duress. The word "strict" is therefore preferable to "absolute", though either term may be used if its meaning is understood.'

<sup>4</sup> *Ibid.* The alternative term 'absolute' liability' is used in some of the literature, but this may cause confusion as some writers define 'absolute' liability' in terms which are different from the definition given in the text: Cf *Sweet v Parsley* [1970] AC 132 at 149 per Lord Reid.

<sup>5</sup> C R M Dlamini 'Strict liability in South African criminal law' (2002) 15 *SACJ* 1; Michael Kidd 'The use of strict liability in the prosecution of environmental crimes' (2002) 15 *SACJ* 23. This article of Kidd will hereinafter be referred to as 'Kidd Strict Liability'. See also Angelo Pantazis 'Criminal law' [1994] *Annual Survey of South African Law* 557.

<sup>6</sup> Francis Bowes Sayre 'Public Welfare Offences' (1933) 33 *Columbia Law Review* 55.

<sup>7</sup> Colin Howard *Strict Responsibility* London: Sweet & Maxwell 1963; L H Leigh *Strict and Vicarious Liability: A Study in Administrative Criminal Law* London: Sweet & Maxwell 1982.

<sup>8</sup> An example of the opposition to strict liability is that expressed by Jerome Hall in Mueller (ed) *Essays in Criminal Science* (1961) at 162 quoted in Howard op cit at 27. He said: 'It is becoming increasingly recognised that strict liability has no place whatever in the criminal law; indeed, that it smacks of barbarism to punish people despite the fact that there is no reason for blaming them at all.' More recent criticism of strict liability may be found in Dlamini op cit and Kidd Strict Liability op cit.

<sup>9</sup> Malawian cases on strict liability abound: *Republic v Chipole* 8 Malawi Law Reports 202 (cultivation of dangerous drugs); *Macholowe v Republic* 7 Malawi Law Reports 335 (using an uninsured vehicle: at 338 the court said that 'the interests of the public' required that this offence be one of strict liability); *Msungama v R* 1961 – 63 ALR Mal 498; *Kamil and Yaghi v Republic* 7 Malawi Law Reports 169 (possessing explosives without a permit); *Republic v Martins and Noronha Limited* 1971 – 72 ALR Mal 79 (failure to prevent danger from falling materials or substances in a quarry); *General Construction Company Limited v Republic* 1971 – 72 ALR Mal 41 (manufacturing explosives without a licence); *R v Rustambhai Miansaheb Munshi* 1923 – 60 ALR Mal 89 (employing an unlicensed driver to drive a motor vehicle); *R v Carattella* 1923 – 60 ALR Mal 119 (trading without a licence); and *R v D'Arcy* 1923 – 60 ALR Mal 121

and there is no sign that it will be discarded in the foreseeable future.<sup>10</sup> Both the legislature and the judiciary invoke it now and again. The adherence to the doctrine is explicable on several counts. One obvious explanation is that the legislature and the judiciary still hope to exploit its benefits. For sure the doctrine does lessen the burden on the prosecution in proving the elements of the offence and correspondingly the duty of the court in satisfying itself that the offence has been proved. Denying these benefits would amount to sheer falsehood.<sup>11</sup>

The purists do concede that strict liability has benefits but they contend that there are less drastic methods which may be used to achieve the same ends as those aimed at by the doctrine.<sup>12</sup> The suggested less drastic methods include the introduction of negligence as the fault element of an offence or the introduction of a due diligence (no-negligence) defence to strict liability offences.<sup>13</sup> An examination of Malawian criminal legislation reveals that the suggested less drastic methods have largely not been adopted by Parliament. It is true that they form part of certain offences (including certain environmental crimes analysed in Chapters 4 and 5 hereof) but such offences are a minority.

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(making a false declaration on an immigration form). Strict liability has also been applied in civil cases, for instance, in *Ribeiro v Martins* 1968 – 70 ALR Mal 151.

<sup>10</sup> Dlamini *op cit* considers the question whether strict liability is permissible in terms of the South African Constitution. He appears to answer this question in the negative, with the result that strict liability may currently be regarded as invalid. If this is a fair interpretation of his writing, it must be put on record that the South African courts have not decided as much. It is very unlikely that Malawian courts, with their deep roots in English law, will adopt this line of reasoning.

<sup>11</sup> Cf the remarks of Botha JA in *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (3) SA 646 (A) at 654.

<sup>12</sup> Howard *op cit* at 28 – 45.

<sup>13</sup> Williams *op cit* at 261 – 265; Howard *op cit passim*; Simester and Sullivan *op cit* at 185 – 186; Kidd *Strict Liability op cit* at 39 – 40. At 40 Kidd demonstrates that there is a difference between ‘requiring fault in the form of negligence and strict liability allowing the defence of due diligence.’ He writes that the difference is that ‘the accused is required to prove due diligence under a strict liability provision, whereas the State bears the onus, in proving negligence, of proving that the accused did not take the steps that were reasonable in the circumstances.’



The question that now arises is whether Malawi should encourage or abrogate the use of strict liability in environmental criminal law. Bearing in mind the valid objections to the use of strict liability and the availability of less drastic methods of achieving the same ends as those aimed at by strict liability, it is suggested that Malawi should discourage the use of strict liability in environmental criminal law. If the less drastic methods are fully utilised, it is likely that most of the benefits from strict liability will be reaped. However, some difficulties associated with strict liability may remain. As Colin Howard puts it:

‘The abolition of strict responsibility ... would not bring with it the automatic solution of the underlying problems of which it is a sign. There would still remain such questions as whether it is desirable to try a person accused of a regulatory offence upon the same principles of criminal responsibility as are appropriate to more serious crimes; if not, upon what principles he should be tried; and in what courts he should be tried.’<sup>14</sup>

The difficulties pointed out by Howard can, it is suggested, be considerably solved by removing regulatory offences (especially minor environmental offences) from the sphere of criminal sanctions to the sphere of administrative penalties. The principles of responsibility under administrative penalties are different and more suitable for regulatory (and especially minor) offences, and the forums where issues relating to administrative penalties are tried are mostly administrative, for example administrative tribunals.<sup>15</sup>

In light of the foregoing, it is suggested that the use of strict liability in environmental criminal law in Malawi should be discouraged. Instead there should be wider use of negligence as the fault element and wider use of the due diligence defence.<sup>16</sup>

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<sup>14</sup> Howard *op cit* at 29.

<sup>15</sup> For more material on administrative penalties, see segment 6.7.6 in Chapter 6 hereof. See also Michael Kidd ‘Alternatives to the Criminal Sanction in the Enforcement of Environmental Law’ (2002) 9 *SAJELP* 21 at 37.

<sup>16</sup> Cf Justice Arden ‘Criminal Law at the Crossroads: the Impact on Human Rights from the Law Commission’s Perspective and the Need for a Code’ [1999] *Crim LR* 439 at 450 where she makes the

### 7.3 Vicarious criminal liability

In criminal law the term ‘vicarious liability’ refers to the imputation on a person of the conduct of another person and sometimes states of mind of that other person. In a sense its hallmark is the same as the hallmark of vicarious liability in the law of tort, the difference being the extent of application. Whereas in the law of tort employers are saddled with extensive liability for torts committed by their servants in the course of their employment, the same is not true with vicarious liability in criminal law. There is no general rule to the effect that the crimes of employees should be attributed to their employers. In criminal law the general rule is that criminal liability is personal, only that a person may implicate himself in a crime committed by another through the doctrines of complicity.<sup>17</sup> Accordingly, employers will bear liability for the crimes of their employees only when they qualify as participants in those crimes in terms of the doctrines of complicity.<sup>18</sup> To the stated general rule several exceptions exist. The exceptions come from English common law and statutory law. It is the substance of these exceptions that contains the current scope of vicarious liability in criminal law.<sup>19</sup> Under common law vicarious criminal liability could be imposed in the crimes of criminal libel and public nuisance.<sup>20</sup> With regard to statutory law, the doctrine was mostly applied in the interpretation of the licensing legislation of 19<sup>th</sup> century England. The practice spread considerably. At present four ways may be discerned in which vicarious criminal

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suggestion to read in due diligence defences. Kidd *Strict Liability* op cit at 39 makes another suggestion. He proposes that minor environmental crimes should be removed from the sphere of criminal law to alternative systems of regulation or social control. These two suggestions were made in the context of First World and Second World countries. The possible adoption of the latter suggestion in Malawi has been considered in Chapter 6 hereof. On the constitutionality of the due diligence defence (especially where it imposes a reverse onus), see segment 7.4.3 below.

<sup>17</sup> Peter Murphy (ed) *Blackstone's Criminal Practice* London: Blackstone Press 2000 at 65; *Huggins* (1730) 2 Stra 883. See also Simester and Sullivan op cit at 243; J C Smith and B Hogan *Criminal Law* 6ed London: Butterworths 1988 at 163.

<sup>18</sup> Smith and Hogan op cit at 163.

<sup>19</sup> Smith and Hogan op cit at 163; Leigh op cit at 18.

<sup>20</sup> The position regarding criminal libel appears to have been modified by section 7 of the Libel Act 1843 (England): Simester and Sullivan op cit at 243 – 244.

liability arises in respect of statutory offences.<sup>21</sup> In the first place, it may arise by express provision in legislation. Atkin J (as he then was) expressed the point as follows:

'I think that the authorities ... make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed and the person upon whom the penalty is imposed.'<sup>22</sup>

Adoption of this principle in Malawi as a basis of vicarious criminal liability took place over a period of several decades. Three cases merit consideration in this regard. On 20 August 1945 Jenkins CJ delivered a judgment in *R v Carattella*<sup>23</sup> where the owner of a store was accused of trading without a licence. Contrary to his instructions, trading had been carried out by his employees on premises which were not covered by a licence. It was argued that the owner could not be held responsible for he was absent and had given instructions that trading should not be carried out. Dismissing the argument, Jenkins CJ held that the offence was a minor statutory offence and came within those offences which

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<sup>21</sup> Simester and Sullivan *op cit* at 244.

<sup>22</sup> *Moussell Brothers Limited v London and North Western Railway Company* [1917] 2 KB 836 at 845. See also *R v Tyler* [1891] 2 QB 588 at 592 – 593 where Bowen LJ said: 'Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment.'

<sup>23</sup> 1923 – 60 ALR Mal 119.

were absolute, requiring no mens rea and in which a master was liable for the actions of his servant. Although not expressed in vigorous language, this decision may be regarded as having planted the seeds of the principle under consideration.

In 1971 the High Court of Malawi in two separate cases confirmed this basis of vicarious criminal liability. In the first case, *General Construction Company Limited v Republic*,<sup>24</sup> decided on 18 May 1971, the appellant (a limited liability company) was charged with manufacturing explosives without a licence contrary to section 15 of the Explosives Act,<sup>25</sup> an offence stated to be ‘absolutely prohibited.’<sup>26</sup> The appellant entered into a partnership agreement with two foreign companies with the object of carrying out a road construction contract. While the partnership was in operation, explosives were manufactured without a licence by persons employed by the partnership. It was not established that such persons were also employed by the appellant. At the trial the appellant was convicted of the offence. On appeal, the court approved the first part of the dictum of Atkin J quoted above and went on to say that partners in a partnership are liable for the acts done by their servants within the general scope of the servants’ employment where such acts are absolutely prohibited by statute. Accordingly, since the offence was of absolute prohibition and the employees of the partnership had executed the relevant acts in the general scope of their employment, the appellant was vicariously liable for those acts.

This line of reasoning was followed by the High Court on 10 September 1971 in the second case of *Republic v Martins and Noronha Limited*.<sup>27</sup> Without specifically referring to Atkin J’s proposed considerations, the court stated that regulation 4(1) of the Quarries Regulations<sup>28</sup> (summarised below) imposes an absolute unqualified duty on a quarry

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<sup>24</sup> 1971 – 72 ALR Mal 41.

<sup>25</sup> Cap 14:09 of the Laws of Malawi.

<sup>26</sup> 1971 – 72 ALR Mal 41 at 45 per Skinner CJ.

<sup>27</sup> 1971 – 72 ALR Mal 79.

<sup>28</sup> Made under the Factories Act, cap 55:07 of the Laws of Malawi.

owner and creates absolute liability for any contravention of it, and that if an employee fails to comply with it, the failure is that of the quarry owner and such quarry owner is vicariously liable.<sup>29</sup>

In the second place, vicarious criminal liability may arise through the application of the delegation principle. This principle is to the effect that where a licence is awarded to a named individual to manage a property or an activity within the terms of that licence and that individual delegates the performance of the terms of the licence to another person, then in matters relevant to the licence, the conduct and the state of mind of the other person is imputed to the individual who delegated.<sup>30</sup> For the principle to apply there must be complete delegation.<sup>31</sup> In *Republic v Martins and Noronha Limited*<sup>32</sup> the accused was the owner of a stone quarry at Mount Soche in Blantyre, Malawi. At about noon on 28 October 1969 there was a fall of earth and rock at the quarry, which killed seven workers. The accused was charged with failing to ensure that its quarrying operations were carried on in such a way as to avoid danger from falls. Its quarrying operations were under the direction and supervision of its quarry foreman, a man of 45 to 50 years' experience. Shortly before the material date, there had been heavy rain which had saturated porous rock at the top of the west quarry face. Rain-water had been allowed to collect in a cut at the top of the face which had been made by a bulldozer some months earlier. On the day before the accident, blasting had been carried out on the adjacent south face and the rock had precipitated to the floor of the west face. It was while a gang of 22 workers was breaking up the stone that they were buried by a slid of some 1 500 tons of rock and earth down the west face. The expert evidence for the prosecution was that the place of work

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<sup>29</sup> 1971 – 72 ALR Mal 79 at 83 per Weston J.

<sup>30</sup> Simester and Sullivan op cit at 244; *Mullins v Collins* (1874) LR 9 QB 292; *Allen v Whitehead* [1930] 1 KB 211. P J Pace 'Delegation – a Doctrine in Search of a Definition' [1982] *Crim LR* 627 lists the following aspects as still being in doubt: (1) the doctrine's restriction to crimes requiring mens rea; (2) what must be delegated; (3) who may be a delegate; (4) the significance of the delegator's absence from the licensed premises; (5) whether delegation is a question of law or fact; and (6) defences to delegation. It may be that point (1) is no longer in doubt: see Smith and Hogan op cit at 163.

<sup>31</sup> *R v Winson* [1969] 1 All ER 197, [1969] 1 QB 371 and *Bradshaw v Ewart-James* [1983] QB 671.

<sup>32</sup> 1971 – 72 ALR Mal 79.

was unsafe. The quarry foreman also admitted that the west face was dangerous. Regulation 4 of the Quarry Regulations required the accused to ensure that all quarrying operations were carried on so as to avoid danger from falls, whether of the materials worked or any other substance. It was held that the accused had delegated the carrying on of its quarrying operations to the quarry foreman; that the quarry foreman, in the course of carrying on those operations, had failed to comply with the aforementioned duty; that the acts or omissions of the quarry foreman had to be imputed to the accused; and that accordingly the accused was vicariously liable.<sup>33</sup>

In the third place, vicarious criminal liability apparently may arise where the actions of an employee or agent are regarded as the actions of an employer or principal.<sup>34</sup> In *Republic v Martins and Noronha Limited*<sup>35</sup> Weston J stated: ‘... the acts and omissions of Mr Meyer [the quarry foreman] in the course of his employment are the acts and omissions of the accused, and in so far as the accused – a limited company and an abstraction – can be personified, it is for the practical purposes of this case, personified in the figure of Mr Meyer.’ It has been argued, correctly it is submitted, that ‘this is not an instance of vicarious liability, since it requires no attribution of another person’s actus reus to the defendant.’<sup>36</sup>

Finally, vicarious criminal liability may be imposed for the acts of employees in the absence of delegation provided the acts are performed in the course of employment. It

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<sup>33</sup> Another case worth mentioning is *Republic v Issa and Grey* 12 Malawi Law Reports 157. In this case the first accused was employed at a photographic studio where he took and printed an obscene photograph of the second accused (a woman). One L W Chitenje was the licensee and owner of the studio. The first accused was charged with and convicted of making an obscene picture and the court a quo ordered the revocation of the studio’s business licence. On confirmation, the High Court restored the licence to the licensee/owner, arguing, inter alia, that the first accused’s criminal act could not be imputed to the licensee/owner since for him to be vicariously liable, it was necessary that he should have delegated responsibility for the management of the studio to the first accused and it was not sufficient merely that the first accused had committed the actus reus of the offence in the course of his employment. On the evidence, no such delegation had taken place.

<sup>34</sup> *Simester and Sullivan op cit* at 244.

<sup>35</sup> 1971 – 72 ALR Mal 79 at 83.

<sup>36</sup> *Simester and Sullivan op cit* at 244.

has been observed that this way of imposing liability on an employer is actually ad hoc and unacknowledged at the time it is being imposed.<sup>37</sup> Examples of English cases in this last category are *James & Son Ltd v Smee*<sup>38</sup> and *Coppen v Moore (No. 2)*.<sup>39</sup> There is no local case that falls neatly in this category.<sup>40</sup>

The principal justification for the doctrine has been stated by Lord Reid in the following terms:

‘The courts relied on the fact that it must have been known to Parliament that the things prohibited would frequently be done by servants of the licence holder and that in many cases the licence holder would have no knowledge of what his servant had done or at least that it would be difficult to prove his knowledge or connivance. As there was no provision making the servant himself liable to prosecution it would be impossible to enforce the law adequately if it was necessary in every case to prove mens rea in the licence holder.’<sup>41</sup>

Leigh suggests subsidiary justifications, arguing that ‘it would no doubt have been unjust to punish a mere servant for the act of sale of, for example, adulterated milk, when he lacked the means of detecting or preventing adulteration. Furthermore, even had he been aware of the facts constituting the offence, it might have meant his livelihood if he had failed to do the acts prohibited.’<sup>42</sup>

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<sup>37</sup> Simester and Sullivan op cit at 244 and 251.

<sup>38</sup> [1955] 1 QB 78.

<sup>39</sup> [1898] 2 QB 306.

<sup>40</sup> In *Republic v Issa and Grey* 12 Malawi Law Reports 157 it was mentioned that an employer would not be vicariously liable merely because an employee had committed the actus reus of an offence in the course of his employment. This case is contrary to the case of *Coppen v Moore (No 2)* which is binding on Malawi being a pre-1902 case. It appears that resolution of this conflict is left to a future case.

<sup>41</sup> *Vane v Yiannopoulos* [1965] AC 486 at 496.

<sup>42</sup> Leigh op cit at 19.



In the sphere of environmental protection vicarious criminal liability has the potential to assist in visiting criminal sanctions upon the persons who really matter in the offence charged.

Opponents of vicarious criminal liability point out, inter alia, that where vicarious criminal liability results in blameless persons being convicted of criminal offences, the doctrine is contrary to the established tenets of criminal justice.<sup>43</sup> This objection may be addressed in at least two ways. In the first place, the possibility of convicting blameless persons may be obviated or reduced by requiring that the employer or principal be held liable only where the offence was committed by the employee or agent at least partly due to the fault of the employer or principal. That is to say, there must be some blameworthiness or fault on the part of the employer or principal before he is convicted of the offence committed by the employee or agent. The fault may take various forms: one form is negligence or failure to take reasonable steps to prevent the execution of the proscribed conduct by the employee or agent.<sup>44</sup> Alternatively the employer or principal may be provided with a due diligence defence.<sup>45</sup>

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<sup>43</sup> This sounds like a criticism of strict liability but it must be noted that vicarious criminal liability is different from strict liability. An Act of Parliament may require mens rea and yet impose vicarious liability. On the other hand, an Act of Parliament may create strict liability without imposing vicarious liability: Smith and Hogan op cit at 163. Michael Kidd 'Vicarious Liability for Environmental Offences' [2003] *Obiter* 186 (hereinafter referred to as 'Kidd Vicarious Liability') writes that 'most commentators are unanimous in criticising the use of vicarious *criminal* liability, for essentially the same reasons as strict liability is criticised – that an individual may be held liable without fault.'

<sup>44</sup> Section 34(5) of South Africa's National Environmental Management Act 107 of 1998 contains this form of fault. This provision is in the following terms: 'Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, and the act or omission of the manager, agent or employee occurred *because the employer failed to take all reasonable steps to prevent the act or omission in question*, then the employer shall be guilty of the said offence and, save that no penalty other than a fine may be imposed if a conviction is based on this subsection, liable on conviction to the penalty specified in the relevant law, including an order under subsections (2), (3) and (4), and proof of such act or omission by a manager, agent or employee shall constitute prima facie evidence that the employer is guilty under this subsection.' [Emphasis added]. Kidd Vicarious Liability op cit at 187 and 191 opines that section 34(5) is probably constitutionally acceptable but he warns that this view cannot be expressed with certainty.

<sup>45</sup> For a discussion of the constitutionality of the due diligence defence (especially where it imposes a reverse onus), see segment 7.4.3 below.



In the second place, the above objection will be avoided entirely by recasting vicarious liability laws with a view to replace vicarious liability with primary liability.<sup>46</sup> It has actually been contended that the objective of vicarious criminal liability<sup>47</sup> is adequately met by imposing primary liability on the employer or principal<sup>48</sup> and that in light of the problems associated with vicarious liability, primary liability should be preferred.<sup>49</sup>

A look at the environmental legislation analysed in Chapters 4 and 5 reveals that vicarious criminal liability is not expressly provided for therein. However, there is scope for implying it in some offences relating to licences and permits. An example would be the pollution offence created under section 67 as read with section 43 of the EMA. From these provisions it appears that the discharge of effluent may only be done on the authority of and in accordance with the terms of a licence. The licensee who fails to comply with the terms of a licence may be convicted of an offence. It seems that the doctrine of vicarious criminal liability may be applied in those circumstances to obviate the possibility of the licensee using an agent or employee to discharge the effluent contrary to the conditions of the licence so as to avoid incurring criminal liability.

In the light of the foregoing, the question arises as to whether vicarious criminal liability should be retained or abrogated in Malawi for purposes of environmental protection. It is suggested that this question should receive a qualified response. Vicarious liability may

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<sup>46</sup> Kidd Vicarious Liability op cit at 192 – 193.

<sup>47</sup> The objective of vicarious criminal liability is to ensure that ‘the implementation of legislation is not “hindered by masters or employers evading their duties and responsibilities by hiding behind the sins and omissions of their servants or employees”’: Kidd Vicarious Liability op cit at 191 quoting J Burchell and J Milton *Criminal Law* 2ed Cape Town: Juta 1997 at 380. C R Snyman *Criminal Law* 3ed Cape Town: Butterworth 1995 at 237 states the objective as follows: ‘The policy underlying the creation of such vicarious liability is that it will encourage the employer to ensure that his employees’ conduct complies with the provisions of the law; he should not be allowed to hide behind his employees’ mistakes; their mistakes are imputed to him; he delegated his powers to them and therefore their actions are deemed to be his actions.’

<sup>48</sup> Kidd Vicarious Liability op cit at 192. Kidd (ibid) seems to argue that the satisfaction of the objective is achieved without encountering some of the drawbacks of vicarious criminal liability. He demonstrates that where primary liability is used, there is no question of constitutional invalidity, and the burden of proof rests firmly on the State throughout the trial (and hence no violation of the right to a fair trial).

<sup>49</sup> Kidd Vicarious Liability op cit at 193.

be retained as long as an element of fault on the part of an employer or principal is introduced or the defence of due diligence is made available to the employer or principal. Alternatively vicarious liability may be abrogated in favour of primary liability. Both of these are viable options even though the latter seems to be the better option.

## **7.4 Corporate criminal liability**

### **7.4.1 General**

Many pages have been written about the role and impact of corporations and bodies corporate in the environmental sphere. For many years now attempts have been made to fix them with environmental liability for their actions. The reasons for this may be those suggested by Diane Saxe.<sup>50</sup> She writes that:

- ‘(a) [corporations] are major sources of environmental degradation, although by no means the only sources;
- (b) they wield extensive economic and political power;
- (c) larger corporations commit a disproportionate number of violations of the law;
- (d) Corporations handle the most dangerous types of pollutants – individuals rarely have the resources or the need to handle heavy metals, radioactive waste or chemical residues;
- (e) the environmental degradation which corporations cause is relatively concentrate and large in scale compared to the activities of individuals; as a result, corporate activity is more likely to overwhelm natural equilibria;
- (f) corporations have very extensive resources with which to reduce pollution, resources which they have accumulated in part by using up clean air, clean water and other public goods; and

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<sup>50</sup> *Environmental Offences: Corporate Responsibility and Executive Liability* (1990) at 21 quoted in Michael A Kidd ‘The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa’ unpublished PhD Thesis, University of Natal 2002 at 350.

(g) the localization and scale of corporate pollution typically make it easier to control than the equivalent amount of pollution from individuals.’

The above mentioned liability is generally of two kinds: civil liability and criminal liability. The focus of this segment is the latter: it is intended to consider corporate criminal liability in the environmental sphere beginning with a brief background.

On the date of reception of English law in Malawi (11 August 1902), English law had not yet developed the modern concept of corporate criminal liability. The foundation had, however, been laid. To be sure corporations could be indicted for nonfeasance resulting in a nuisance. Specifically, corporations could be prosecuted for failure to perform duties laid upon them by charter, prescription or statute when the failure to perform resulted in a public nuisance. Corporations could also be held criminally liable for misfeasance in cases of public nuisance. Further, corporations could be convicted of minor crimes of strict liability and crimes to which vicarious liability was recognized as applying, regardless of whether or not mens rea was required as a necessary ingredient. However, criminal liability did not go as far as covering crimes, regarded as truly criminal in nature, which required mens rea for their commission.<sup>51</sup> It was therefore left open for Malawi to develop its own unique and comprehensive theory or basis for corporate criminal liability, but this did not happen. It appears from the literature that Malawi generally followed developments in English law,<sup>52</sup> albeit at a slow pace. The Malawian developments are set out below after a survey of corporate criminal liability in English law is conducted.

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<sup>51</sup> L H Leigh *The Criminal Liability of Corporations in English Law* London: Weidenfeld and Nicolson 1969 at 15 – 24.

<sup>52</sup> Thus, after it was held in *Lennards Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 that the element of personal fault on the part of Lennards Carrying Co Ltd was supplied by Mr Lennard, the Managing Director of the company, on the basis that he was the directing mind of the company, his action being the very action of the company itself, Malawi followed suit as will be demonstrated below. The most recent statement on this point was made in *Naidoo v Mazi Import & Export Ltd and Tchongwe* Civil Cause No. 706 of 1985 (unreported) where it was held that the liabilities incurred by one of the directors in the name of the company, were the liabilities of the company itself and the director had incurred them as its ‘directing mind and will’: Cassim Chilumpha *Introduction to Company Law of Malawi* 2ed Limbe: Commercial Law Centre 1999 at 55 – 56. *Lennards* is the English case in which the doctrine of identification first appeared: Simester and Sullivan op cit at 254.

In general there are two facets of corporate criminal liability: the first deals with the liability of the corporation as an artificial personality (hereinafter referred to as 'corporate criminal liability' for lack of a different and better term), and the second deals with the liability of natural persons who run the activities of the corporation (hereinafter referred to as 'individual criminal liability'). It has been objected that there is no need for this duality and that individual criminal liability is capable of doing the work of corporate criminal liability. This objection has been found wanting. Brent Fisse<sup>53</sup> suggests, correctly it is submitted, the following merits/reasons for the coexistence of corporate and individual criminal liability:

- (1) Organizational secrecy: When faced with a criminal investigation, corporate personnel tend to close ranks out of loyalty or through fear of dismissal. If they do so, the result may be de facto immunity from individual criminal liability, at least for highly placed officers who can stay at a safe distance from criminal acts performed lower in the corporate hierarchy. Where individual criminal liability is blocked by organizational secrecy, corporate criminal liability becomes a viable option.
- (2) Number of suspects: Hordes of lower-level employees and numerous upper and intermediate personnel may be involved in one way or another in the commission of the crime. There are insufficient enforcement resources to investigate such a large number of suspects in such circumstances. It is preferable to take only the corporation to court.
- (3) Corporate profit motive: Many offences, including environmental offences, can produce sizable corporation profit, whether in terms of direct gain or, as is usual in the case of pollution offences, through savings made by not installing effective preventive equipment. Since the profits accruing from offences committed on behalf of the corporation almost always flow into corporation coffers (and not into the coffers of the personnel involved), to leave these illicit profits untouched would

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<sup>53</sup> 'The Duality of Corporate and Individual Criminal Liability' in Ellen Hochstedler (ed) *Corporations as Criminals* Beverly Hills: Sage Publications 1984 69 et seq. Where possible the exact words employed by the author are used. Cf Janet Dine *Criminal Law in the Company Context* Aldershot: Dartmouth 1995 at 148-149. See also Brent Fisse and John Braithwaite 'Corporate Offences: the Kepone Affair' in Rae Weston (ed) *Combating Commercial Crime* Sydney: The Law Book Company 1987 31 at 31-32.

encourage the commission of offences. It is imperative to fine the corporation with a view to cancelling out the illicit profit.

- (4) Expendability of personnel: Corporate criminal liability helps to ensure that corporations bear the social costs of offences committed on their behalf. To impose individual liability alone would be to allow corporations to externalise the criminal costs of their enterprise by getting expendable personnel to take the rap.<sup>54</sup>
- (5) Personnel beyond jurisdiction: Guilty personnel may lie beyond the reach of extraterritorial process, or, where within reach, may nonetheless be difficult to bring to justice. Where these difficulties arise and a local corporation can be held liable for the relevant conduct, corporate criminal liability provides a convenient alternative to individual criminal liability, the aim being to stimulate internal discipline proceedings and to prompt more effective supervision and control.
- (6) Offences defined by reference to corporate status: Numerous statutory offences are defined in terms of which either invariably or on particular facts, presuppose a corporation as principal offender. Where corporate personnel are not covered by the terms of a principal offence, corporate criminal liability enables their conviction for complicity.
- (7) Corporate negligence: Corporate offences often result from corporate negligence, a form of fault which invokes the need for corporate rather than individual criminal liability. Tacit operation of authority within organisations is one factor conducive to corporate negligence. Subordinates, instead of acting on explicit instructions, normally anticipate the reactions of their superiors and act accordingly. Group pressures to conform can also give rise to corporate negligence. Another prevalent source of corporate negligence is collective oversight.
- (8) Corporate intentionality: To the extent that corporations can and do have criminal policies, the blameworthiness inherent in those policies can be reflected by imposing corporate criminal liability. Through their policies corporations exhibit an intentionality which is irreducible simply to the intentionality of directors, officers

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<sup>54</sup> At 73 Fisse continues to say that bureaucracies have greater staying power than their human functionaries and then he quotes Kenneth Boulding who is reported to have once said that the corporation 'marches on its elephantine way almost indifferent to its succession of riders.'

or employees. If corporations can possess an intention, it follows that they can possess a criminal intention where a corporate policy either expressly or impliedly contemplates the commission of crime. Once this is seen, corporate criminal liability emerges as a form of liability which cannot be sufficiently covered by solely relying on individual criminal liability.

- (9) Surrogate liability: Corporations provide convenient surrogates in situations where it is harsh to impose individual criminal liability, whether by reason of corporate pressures, harsh rules of criminal liability, or need to inflict exemplary punishment. Personnel may commit offences on behalf of their corporations at a time when they are exposed to pressures to make profits, or to conform to pre-existing illicit practices within the organisations. These pressures usually fall short of what is required to make out a defence of duress, but can be very strong nonetheless. Where such pressures exist, corporate criminal liability provides a far less drastic alternative than crucifying individual offenders.

Having justified the existence of corporate criminal liability, the stage has now been reached to consider in a bit more detail how corporate criminal liability works. Since Malawi generally follows the English tradition in this area, the English position will be set out first, followed by the Malawian position. Then new concepts of corporate criminal liability will be outlined and suggestions will be made on reforming corporate criminal liability in environmental matters in Malawi. Thereafter the discussion will turn to individual criminal liability.

## **7.4.2 Liability of the corporation as an entity**

### **7.4.2.1 The position under English law**

The liability of a corporation as an entity may be considered at two levels: the level of strict liability offences and the level of mens rea offences. However, this neat division in determining a corporation's criminal liability runs into difficulties when dealing with "hybrid" regulatory offences which either allow a due diligence defence or a defence

based on lack of knowledge or where constructive knowledge forms part of the definition of the offence.<sup>55</sup> Be that as it may, the division provides a useful starting point in analysing the criminal liability of the corporation's artificial personality.

In crimes of strict liability, few conceptual difficulties arise. The weight of learned opinion is to the effect that the corporation is liable where the actus reus committed by an employee can be imputed to the corporation or can be regarded as the corporation's act. Whether this amounts to vicarious liability or not is a point on which there is divergence of opinion. Celia Wells maintains that the corporation is liable vicariously<sup>56</sup> but Simester and Sullivan assert that the corporation is liable directly;<sup>57</sup> they contend that in legal terms 'companies will commit offences of strict liability directly: the company, of itself, will fulfil the offence specifications of regulatory crimes (in terms of selling, leasing, possessing, using etc) if done in the course of business of the company.'<sup>58</sup>

In crimes requiring mens rea the central conceptual difficulty lies in attributing mens rea (an entirely human capability) to a corporation which in its artificial form may be said to be incapable of possessing.<sup>59</sup> Faced with this challenge, the courts have developed strategies for fixing corporations with the necessary mens rea. The primary strategy is the use of the doctrine of identification. The secondary strategy – which is a more recent development – is the use of vicarious liability. The doctrine of identification will be considered first.

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<sup>55</sup> Celia Wells 'Corporate Liability for Crime: the Neglected Question' (1995) 14(4) *International Banking and Financial Law* 42.

<sup>56</sup> Wells op cit at 43. For more on vicarious liability see above.

<sup>57</sup> Simester and Sullivan op cit at 753.

<sup>58</sup> Ibid.

<sup>59</sup> In *Director of Public Prosecutions v Kent and Sussex Contractors Limited* [1944] KB 146 at 157 Hallett J said: '... the liability of a body corporate for crimes was at one time a matter of doubt, partly owing to the theoretical difficulty of imputing a criminal intention to a fictitious person and partly to technical difficulties of procedure.'

The doctrine of identification – also known as the *alter ego* principle – is to the effect that the conduct and state of mind of certain high-ranking officers of the corporation should be regarded as the conduct and state of mind of the corporation itself. This doctrine was introduced in English criminal law by the case of *Director of Public Prosecutions v Kent and Sussex Contractors Limited*.<sup>60</sup> The company was accused of making use of a document with intent to deceive and of making a statement which they knew to be false in a material particular. It was proved at the hearing that the company sent to the proper authority on the prescribed form a fortnightly vehicle record containing the alleged misstatement, the document being signed by the transport manager of the company. The justices found the record false in the material particular alleged to the knowledge of the transport manager, but they held that the body corporate could not in law be guilty of the offences charged since an act of will or state of mind, which could not be imputed to a corporation, was implicit in the commission of those offences. They, accordingly, dismissed the charges against the company. On appeal, it was held that the justices were wrong and that the company could be convicted of the offences charged. Macnaghten J declared: ‘If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that ... his knowledge must be imputed to the company.’<sup>61</sup>

At the expiry of exactly six months the wave of thinking demonstrated in the *Kent and Sussex Contractors* case was confirmed in *R v ICR Haulage Limited*<sup>62</sup> where the company was charged (together with ten other accused) with conspiracy to defraud, an

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<sup>60</sup> [1944] KB 146.

<sup>61</sup> [1944] KB 146 at 156. At 155 – 156 Viscount Caldecote CJ stated: ‘The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged.’

<sup>62</sup> [1944] KB 551. The *Kent and Sussex Contractors* case was decided on 11 November 1943. The *ICR Haulage* case was decided on 10 May 1944.



offence which required proof of mens rea. The officer who allegedly bore the relevant mens rea was the company's managing director. The court held that the company could be convicted of the offence. It stated that the criminal act of an employee or agent, including his state of mind, intention, knowledge or belief, is the act of the company or principal but that this depends, inter alia, on the relative position of the officer or agent and other relevant facts and circumstances of the case. In the case before the court, the court was satisfied that the acts of the managing director were the acts of the company and the fraud of that person was the fraud of the company.

The point that it is only certain officials of the company whose conduct and states of mind will be regarded as the corporation's is one of the hallmarks of the doctrine. The point was expressed in the following analytical terms by Denning L J (as he then was):<sup>63</sup>

'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and acts in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. So ... in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or managers will render the company itself guilty.'<sup>64</sup>

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<sup>63</sup> *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172.

<sup>64</sup> In *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 171 Lord Reid warned against the improper use of the quoted words. He said: 'There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who "represent the directing mind and will of the company, and control what it does."'

The House of Lords put its stamp of approval on the doctrine in *Tesco Supermarkets Ltd v Natrass*<sup>65</sup> reiterating that only those who represent the directing mind and will of the company and control what it does could be identified with the company. In other words, the directors, the managing director and other superior officers of the company who carry out the functions of management and speak and act as the company. What matters is not the status per se but rather whether the person in question has authority to determine and direct company policy.<sup>66</sup>

It may be observed that the doctrine is narrow in its scope: it leaves out of its reach the actions and states of mind of most of the personnel in a corporation. Secondly, the doctrine makes it difficult to establish corporate criminal liability against large companies. Crimes committed on behalf of large companies are often visible only at the level of middle management whereas the doctrine requires proof of fault on the part of a top-level manager. By contrast, fault on the part of a top-level manager is much easier to prove in the context of small companies. Yet that is the context where there is usually little need to use corporate criminal liability in addition to or in lieu of individual criminal liability.<sup>67</sup> Thirdly, the doctrine is ill-adapted to generate convictions against companies for some crimes: save in the smallest companies, senior corporate officials are unlikely to be involved in certain 'sharp-end' incidents, thereby largely precluding the finding of any corporate culpability arising from the specifics of any particular incident.<sup>68</sup> Fourthly, the doctrine ignores the reality of corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions.<sup>69</sup> Fifthly, it is not an

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<sup>65</sup> [1972] AC 153. See also the more recent cases of *R v Redfern* [1993] *Crim LR* 43, (1992) 13 Cr App R (S) 709, *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72, *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182, *Meridian Global Funds v Management Asia Ltd* [1995] 2 AC 500 and *Seaboard Offshore Ltd v Secretary of State for Transport* [1994] 1 WLR 541.

<sup>66</sup> See also James Gobert 'Corporate Criminality: New Crimes for the Times' [1994] *Crim LR* 722 at 723.

<sup>67</sup> Brent Fisse and John Braithwaite 'The Allocation of Responsibility for Corporate Crimes: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468 at 504 – 505.

<sup>68</sup> G R Sullivan 'Expressing Corporate Guilt' (1995) 15 *Oxford Journal of Legal Studies* 281 at 282 – 283.

<sup>69</sup> C M V Clarkson 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 *Modern Law Review* 557 at 561.

easy task to determine who in a particular corporation qualifies as ‘brains’ or ‘hands.’<sup>70</sup> Sixthly, it fails to identify what exactly it is that the company has done wrong to merit being subjected to criminal sanctions, thereby offending the fundamental principle of *nulla poena sine culpa*.<sup>71</sup> Finally, the doctrine fails to capture the full extent of the corporation’s wrongdoing: when a crime occurs in the course of business, it is likely to be the result of a breakdown in more than one sphere of the corporation’s operation. Policies may be misguided in conception, inadequately supervised and incompetently carried out.<sup>72</sup>

In spite of these criticisms the identification doctrine has held sway as a basis for corporate criminal liability. Its exclusive reign, however, has been shaken in recent times by the application of vicarious corporate liability in circumstances where the identification doctrine ought to have been used. In *Tesco Stores Ltd v Brent London Borough Council*<sup>73</sup> a 14 year old boy was given money by a trading standards officer and told to buy a video with an “18” classification certificate at a Tesco supermarket. The boy bought the video and immediately handed it to the trading standards officer. Tesco was charged with supplying a video with an “18” classification certificate to a person who had not attained that age, contrary to a certain statute. Tesco relied, *inter alia*, on the statutory defence that they had neither known nor had reasonable grounds to believe that the purchaser was under “18.” It was found that the checkout assistant did have reasonable grounds to believe that the boy was under 18 and it was not proved that those persons in Tesco who would be regarded as the directing mind and will of the company knew or had reasonable grounds to believe that the boy was aged less than 18. It was held that the checkout assistant’s state of mind could be identified with Tesco and so the statutory defence was not available since the checkout assistant had reasonable grounds to believe

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<sup>70</sup> Louise Jordaan ‘New Perspectives on the Criminal Liability of Corporate Bodies’ [2003] *Acta Juridica* 48 at 55.

<sup>71</sup> Emilia Mugnai and James Gobert ‘Coping with Corporate Criminality - Some Lessons from Italy’ [2002] *Crim LR* 619 at 620.

<sup>72</sup> Gobert *op cit* at 723.

<sup>73</sup> [1993] 1 WLR 1037.

that the boy was under 18. Staughton LJ stated that it was absurd to suppose that those who manage a vast company would have any knowledge or any information as to the age of a casual purchaser of a video film; that it is the employee who sells the film at the checkout point who will have knowledge or reasonable grounds for belief; and that it is the checkout point employee's knowledge and reasonable grounds that are relevant. Similarly, in *Director General of Fair Trading v Pioneer Concrete Ltd and Another*<sup>74</sup> injunctions were obtained against companies restraining them from giving effect to certain unlawful agreements. Subsequently employees of the companies, contrary to express instructions and without the knowledge of the companies, made an unlawful arrangement to give effect to the unlawful agreements by fixing prices and allocating work. It was alleged that the companies were in contempt of court as a result of the activities of their employees. In a unanimous House of Lords it was found that the knowledge and conduct of a company's sales force sufficed to place the company in contempt of court.

It may be noted that in the cases of *Brent* and *Pioneer Concrete*, the officers who provided the conduct and states of mind were not high-ranking officers; on the contrary they were junior officers. It is therefore clear that the courts did not apply the doctrine of identification; they simply used vicarious criminal liability.

#### 7.4.2.2 The position under Malawian law

The leading Malawian case on corporate criminal liability is probably *Nyasaland Transport Company Limited v R*.<sup>75</sup> The appellant, a limited liability company, operated public service vehicles and owned a motor omnibus. This omnibus was used in the course of the company's business on a public road for the carriage of passengers and driven by a company driver. The driver had to halt the vehicle because the steering mechanism became to him obviously defective and it was found to be in a dangerous condition since

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<sup>74</sup> [1995] 1 AC 456.

<sup>75</sup> 1961 – 63 ALR Mal 328 decided on 08 November 1962 by Cram J (High Court of Malawi).

faulty service and inspection by company employees on 05 May, the breakdown having taken place on 18 May. The inspection, service and supervision were inadequate and proper precautions were not taken. The defect should have come to light at the time of inspection.

The company's internal regulations envisaged that every omnibus was to be inspected at intervals of 14 days in the company's own workshops which it maintained for the service of its omnibuses. A staff of mechanics was employed by the company for this purpose. Inspection sheets were provided and supervisors were charged with the duty of checking all important parts of the mechanism including the steering. The evidence was to the effect that the defect must have been obvious but deliberately disregarded or, at any rate, recklessly left in a dangerous condition. The appellant was charged with the offence of operating a motor vehicle on a road in a condition likely to cause danger to persons on the road contrary to regulation 65(1) of the Motor Traffic Regulations<sup>76</sup> which is in the following terms: 'Every motor vehicle ... and all parts and accessories of such vehicle ... shall at all times be in such condition ... that no danger is caused or likely to be caused to any person on the vehicle ... or on a road.' Regulation 4(1) declares that any person committing a breach of any of the Regulations commits an offence. Regulation 4 continues to say that the driver of the motor vehicle at the time of the offence shall be guilty of an offence. In addition Regulation 4 states that 'the owner of the motor vehicle shall also be guilty of an offence, if present at the time of the offence, or, if absent, unless the offence is committed without his consent and was not due to any act or omission on his part, and he had taken all reasonable precautions to prevent an offence.'

It was held that the Regulations created, inter alia, a liability on the part of the appellant company as principal in the first degree, provided there was mens rea on the part of the company (i.e. on the part of a directive servant) and also created vicarious liability so that a criminal act committed by an inferior servant of the company could be brought home to the company provided mens rea on the part of the company was established and this

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<sup>76</sup> Cap 146 of the Laws of Nyasaland 1957.

mens rea would also have to be that of a directive servant of the company. In the instant case the supervisors and mechanics were not directive officers and so their states of mind could not be imputed to the appellant company. Further it was no criminal offence to fail to cure a defect in a motor omnibus or to leave it in a dangerous condition, and so the mechanics and supervisors could not have been charged with this non-existent offence. The mechanics and supervisors could also not be charged with the offence of operating a motor vehicle on a road in a condition likely to cause danger to persons on the road, for they did not use the omnibus. Thus there was no offence committed by the mechanics and supervisors as inferior officers, which could be brought home to the appellant company. Accordingly, the appellant company was not guilty of the offence charged.

It is clear from the foregoing that the court was dealing with a crime of mens rea. In the process of determining whether the company could be held criminally liable, the court considered the identification doctrine and vicarious criminal liability. The court referred to the identification doctrine as the alter ego doctrine, and officers who represent the directing mind and will of the company as directive servants or 'organs' of the company. The court also adverted to crimes of strict liability and said that a company nowadays can be convicted as a principal in the first degree for using a motor vehicle in contravention of regulations creating strict liability.<sup>77</sup> These views on strict liability offences were obiter, as the offence in issue in that case was not one of strict liability.

About nine years later the High Court was afforded an opportunity to consider the criminal liability of a company in respect of a strict liability offence. In *Republic v Martins and Noronha Limited* (discussed above) the accused company was found guilty of a strict liability offence in respect of the conduct of its quarry foreman in the course of his employment. This decision arguably completes the general picture of Malawian

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<sup>77</sup> In *General Construction Company Limited v Republic* 1971 – 72 ALR Mal 41 at 45 Skinner CJ approved this aspect of the decision. The learned Chief Justice said: 'There is an abundance of authority to support the proposition that a corporate body which is an employer is liable for the criminal acts committed by its servants where such acts constitute offences of absolute liability and are done within the general scope of the servants' employment. It is only necessary to refer to a case decided in our courts, namely *Nyasaland Transp. Co. Ltd v R* ... which restates the proposition of law that any corporation can be guilty of a crime of absolute prohibition where the *actus* is that of its servants.'

courts' approach to questions of corporate criminal liability. In this regard, it may be observed that the Malawian courts are treading the English path almost faithfully. They do not have difficulties in convicting companies of strict liability offences and they base their decisions in respect of mens rea offences on the doctrines of identification and vicarious criminal liability.

The question that now arises is whether in respect of mens rea offences these two doctrines (identification and vicarious criminal liability) suffice for the purpose of environmental criminal liability on the part of the corporation in Malawi. The answer to this question is that they do not suffice, especially when their defects outlined above are taken into account. It is suggested that a comprehensive approach be taken, whereby the benefits of the doctrines are allowed to continue operating while the defects are discarded. To this end, it is submitted that aspects of the aggregation theory of attaching criminal liability be used. It is also submitted that a considerable measure of organizational models of corporate criminal liability be incorporated. The aggregation theory and the organizational models will now be explained. Thereafter an appropriate amendment to Malawi's EMA shall be proposed with a view to put into effect the expanded version of corporate criminal liability. For the sake of completeness two other theories or models of corporate criminal liability will be noted and rejected as improper for Malawi: these are the doctrine of reactive fault and the American version of vicarious corporate liability.

#### 7.4.2.3 New concepts of corporate criminal liability

##### (a) The principle of aggregation

The point of departure in the theory of aggregation is the rejection of the idea that a corporate body can only be held liable through the unlawful conduct and state of mind of one particular individual. Instead it is argued that the conduct and state of mind of any two or more persons associated with the corporation may be put together or aggregated and attributed in toto to the corporation. Thereafter an assessment is made as to whether

the totality of the consolidated conduct and states of mind amounts to the offence. Specifically, a judgment is made as to whether the consolidated fault constitutes the requisite culpability for the offence. The principle is based upon the concept of collective responsibility.<sup>78</sup> It has been observed that ‘the theory can attain some degree of metaphysical coherence, only if one assumes that the company has the moral agency properties of a real person; absorbing over time and space, the faults of those associated with it. In that sense, the theory of aggregation is a theory genuinely concerned with *corporate corporate* guilt.’<sup>79</sup> It has further been hailed as appropriate in offences of negligence. A couple of minor failures by officials of a corporation may add up to a gross breach by the corporation of its duty of care.<sup>80</sup> In other words, where individual fault based on negligence is absent, there is a possibility of finding that there was a collective failure to exercise reasonable care and in this way culpability for a particular corporate offence may be established.

The principle of aggregation was acknowledged in *United States of America v Bank of New England*.<sup>81</sup> The bank had been convicted of 31 violations of a currency transaction statute. On appeal the bank argued that it was error to find (as the court a quo found) that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half. Rejecting the argument the appeal court said: ‘Corporations compartmentalize knowledge subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.’<sup>82</sup>

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<sup>78</sup> Jordaan op cit at 58 – 59; Simester and Sullivan op cit at 260.

<sup>79</sup> Simester and Sullivan op cit at 260.

<sup>80</sup> J Smith *Smith and Hogan Criminal Law* 9ed (1999) at 186 quoted in Jordaan op cit at 59.

<sup>81</sup> 821 F 2d 844.

<sup>82</sup> 821 F 2d 844 at 856. Similar sentiments were expressed by District Judge Dalton in *United States of America v TIME DC Inc* 381 F Supp 730 at 738: ‘[A] corporation cannot plead innocence by asserting



Although the principle is not part of English law, its usefulness may be demonstrated by the events that attended the Zeebrugge disaster. On 06 March 1987 the ferry ship 'Herald of Free Enterprise' capsized off Zeebrugge, resulting in the death of 188 people which included passengers and crew. Shortly thereafter a public inquiry was conducted by Sheen J, which culminated in a full report and recommendations. It was established that the immediate cause of the vessel's loss was that she sailed with her bow doors open trimmed by the head, that is, with her nose down. The manoeuvre in which she engaged led to the entry of water into the vehicle deck, the heavy listing of the vessel and her speedy capsize. Sheen J found that certain individuals had failed to perform their duty, in particular those responsible for failing to close the bow doors, failing to see that the doors were closed and sailing without knowing that the doors were closed. These individuals were the assistant bosun, the master, the chief officer and the captain. It was further established that the Board of Directors of the company that owned the vessel (Town Car Ferries Ltd and P & O European Ferries (Dover) Ltd) did not appreciate their responsibility for the safe management of their ships: there was a lack of thought about the way in which the vessel had to be organised for the Dover/Zeebrugge run. 'All concerned in management,' declared Sheen J 'from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.'<sup>83</sup>

Subsequently the company was prosecuted for manslaughter together with two members of senior management and five staff members who had been on the vessel at material times including the senior master and the captain. Ultimately the presiding judge stopped the proceedings and directed that all the accused be acquitted.<sup>84</sup> Although it was clear that

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that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.'

<sup>83</sup> Quoted by Bingham LJ in *R v H M Coroner for East Kent ex parte Spooner and Others* (1989) 88 Cr App R 10 at 12.

<sup>84</sup> Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 17 – 18.

certain individuals had failed to carry out their duties, there was insufficient evidence to support a finding that any of those individuals who could be regarded as the embodiment of the company itself bore the requisite fault in order to fulfil the demands of the identification doctrine. Before the case was halted, an attempt had been made to rely on the principle of aggregation. It had been argued that a charge of manslaughter could be founded on the aggregation of individual acts which do not individually constitute gross negligence. Dismissing this argument, it was ruled that a case against a personal defendant cannot be fortified by evidence against another defendant and that, similarly, a case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such through individuals who could be identified as the embodiment of the company itself.<sup>85</sup>

It is submitted that the company would have been convicted if the principle of aggregation had been used. It is clear from the findings of Sheen J that the total effect of the individual fault of the various persons in the company would, upon aggregation, have amounted to the requisite fault upon which the liability of the company could rest. In these circumstances it is lamentable that the company – which was clearly at fault in the public eye as evidenced by the moral condemnation in the report of the public inquiry – escaped corporate criminal liability.

It is suggested that the Zeebrugge scenario – or similar catastrophe – may replay itself in the environmental sphere. In that event, following English law, Malawi would not be in a position to punish the offending corporation. In order to prevent this from happening, it is proposed that the principle of aggregation be incorporated in Malawian law, especially in negligence based environmental crimes. This proposal is being made with full knowledge that the principle is not perfect. It has been criticised, for example, on the ground that it may stigmatise individuals whose conduct and mental states are attributed to the corporation. The conviction of a corporation may imply fault on the part of individuals, which may not be justifiable because, if prosecuted separately, they would be acquitted

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<sup>85</sup> *R v H M Coroner for East Kent ex parte Spooner and Others* (1989) 88 Cr App R 10 at 16 – 17. See also *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

for lack of the requisite culpability.<sup>86</sup> It has further been contended that it is not possible artificially to create mens rea by aggregating subjective states of mind: 'Two innocent states of mind cannot be added together to produce a guilty state of mind.'<sup>87</sup> But the latter criticism appears to miss the point, for the principle of aggregation does not seek to bring together innocent states of mind, but rather those states of mind which are blameworthy, though not to the same extent as a state of mind that can sustain a conviction on its own. In any case no principle of law is criticism-proof: even the most time-honoured principles of law have their detractors. The task at present is to find practical solutions and not necessarily utopian principles. The discussion will now focus on organisational models of corporate criminal liability.

#### (b) Organisational models of corporate criminal liability

Organisational models of corporate criminal liability assert that organisations function as real entities, in ways that are not reducible to propositions about individuals. 'Organisations comprise not only individuals but also institutionalized relationships among individuals,' writes Colvin. 'The resulting entities involve more than the sum of the individual parts. They shape the outlook and channel the conduct of their members in ways that may not be chosen or even understood by any of the individuals concerned. They can possess knowledge or means of knowledge that may be unavailable in total to any single individual. They are therefore commonly treated as "real" entities in ordinary language and in moral discourse. They can be and commonly are "blamed" when they have failed to exercise reasonable care to prevent harm to other persons. Moreover, they

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<sup>86</sup> Jordaan op cit at 59 – 60.

<sup>87</sup> J Smith *Smith and Hogan Criminal Law* 9ed (1999) at 185 – 186 quoted in Jordaan op cit at 59. Colvin op cit at 22 – 23 criticises the principle in the following terms: 'The major objection to aggregation is not that it does violence to ordinary language. It is, rather, that it distorts the nature of corporate criminal liability. As long as aggregation is presented within a framework of vicarious or identification liability, it carries an air of artificiality. The qualification to the model of derivative liability is so great that the usefulness of the basic model is called into question. Moreover, once the derivative model is abandoned in favor of a model of true organizational responsibility, aggregation becomes a weak conceptual tool. The question to be asked is not whether responsibility can be constructed from bits and pieces of information about individuals, but rather whether it inheres in the organization itself. At best, aggregation can be viewed as only one part of a broader conceptual framework for tackling issues of organizational responsibility.' [Footnote omitted].

can be and are commonly blamed while excuses are made for individual representatives. An individual may not have been in a position to appreciate all the risks or to take appropriate protective measures, but the same excuse may not be available to a corporation.<sup>88</sup> In other words, corporations can acquire 'a momentum and a dynamic of their own which temporarily transcends the actions of their officers'<sup>89</sup> and in that state incur criminal liability on their own.<sup>90</sup> It is contended that the aims, intentions and knowledge required for criminal liability may be located in the policies, regulations, standing orders and institutionalised practices of corporations and that these aims, intentions and knowledge are not reducible to the aims, intentions and knowledge of individuals within the corporation. Nico Jorg and Stewart Field continue to say:

'Such regulations and standing orders are authoritative, not because any particular individual devised them, but because they have emerged from a decision-making process recognised as authoritative within the corporation. These regulations and standing orders are also evidence of corporate capacity to differentiate right from wrong and act accordingly, to think ethically in terms of the consequences of corporate actions for others and to give reasoned explanations to the outside world. There is a strong argument for seeing such capacities for reasoning, understanding and control of conduct as the essence of moral personality and the basis of moral responsibility.'<sup>91</sup>

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<sup>88</sup> Colvin *op cit* at 23 – 24. Similarly Gobert *op cit* at 723 – 724 writes: 'A conceptually different approach to corporate criminality would locate fault within the company itself without reference to individual liability. The company is treated as a distinct organic entity whose "mind" is embodied in the policies it has adopted. Corporate policy is often different from the sum of the inputs of those who helped to formulate the policy, and typically is the product of either a synthesis of views or a compromise among competing positions. Policy may also reflect the company's corporate ethos. This ethos, which often is unwritten, may have been forged by founders of the company who are no longer actively involved in its day-to-day affairs. When company policy or corporate ethos leads to the commission of a crime, the company should be liable in its own right and not derivatively.' [Footnote omitted].

<sup>89</sup> A Ashworth *Principles of Criminal Law* 4ed (2003) quoted in Jordaan *op cit* at 61.

<sup>90</sup> Jordaan *op cit* at 61.

<sup>91</sup> Nico Jörg and Stewart Field 'Corporate Liability and Manslaughter: Should we be Going Dutch?' [1991] *Crim LR* 156 at 159.

It may be observed that the principle of aggregation is related to these organisational models of corporate criminal liability. It has actually been suggested that aggregation is only one part of a broader conceptual framework for tackling issues of organisational responsibility.<sup>92</sup> It follows from this relationship that the strengths of the aggregation principle are also applicable to the organisational models. For instance, they have the common factor that they do not insist on culpability residing in the directing mind and will of the corporation. Similarly, some defects of the aggregation principle apply to the organisational models. By the same token it is suggested that aspects of the organisational models be incorporated in Malawian law for reasons similar to those advanced for incorporating the principle of aggregation in Malawian law.

(c) Reactive fault

The originators of reactive fault as a new basis for corporate liability are Brent Fisse and John Braithwaite.<sup>93</sup> Due to the novelty of their proposal, it is hereby set out in extenso together with its justifications:

‘Corporate blameworthiness can also be judged within a reactive time-frame, a time-frame which generates the concept of reactive corporate fault. Reactive corporate fault may be broadly defined as unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organisation. This concept reflects three commonplace factors:

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<sup>92</sup> Colvin *op cit* at 23.

<sup>93</sup> This statement is based on the fact that these two authors jointly published an article entitled ‘The Allocation of Responsibility for Corporate Crimes: Individualism, Collectivism and Accountability’ (1988) 11 *Sydney Law Review* 468 which, *inter alia*, deals with reactive fault. However, it seems fair to say that the real originator is Brent Fisse as he had earlier on individually authored an article covering the subject: see Brent Fisse ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions’ (1983) 56 *Southern California Law Review* 1141 at 1192 – 1213.

- (1) the strength of communal attitudes of resentment towards corporations that stonewall or otherwise fail to react diligently when their attention is drawn to the harmful or excessively risky nature of their operations.
- (2) the inevitability in large or medium size organisations of management by exception, whereby compliance is treated as a routine matter to be delegated to inferiors and handled by them unless a significant problem arises; and
- (3) the extensive reliance on civil modes of enforcement in corporate regulation and the typical perception among enforcement agencies that criminal prosecutions against companies usually are warranted only where civil enforcement has failed.

The concept of reactive fault offers a way of attributing intentionality to a corporation in a manner both workable and corporate in orientation. Corporations can and do act intentionally in so far as they enact and implement corporate policies. Frequently, however, a boilerplate compliance policy will be in place, and it is rare to find a company displaying a criminal policy, at least not a written one, at or before the time of commission of the *actus reus* of an offence. The position is different if the time-frame of inquiry is extended so as to cover what a defendant has done in response to the commission of the *actus reus* of an offence. What matters then is not a corporation's general policies of compliance, but what it specifically proposes to do to implement a programme of internal discipline, structural reform, or compensation. This reorientation allows blameworthy corporate intentionality to be flushed out more easily than is possible when the inquiry is confined to corporate policy at or before the time of the *actus reus*.<sup>94</sup>

It is submitted that the suggested easy ride is not worth trying. Looking for blameworthiness in conduct and states of mind which arise after the execution of the *actus reus* is radically different from the way the system of finding blameworthiness

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<sup>94</sup> Brent Fisse and John Braithwaite 'The Allocation of Responsibility for Corporate Crimes: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468 at 505 – 506.

works at present. The current law is to the effect that culpability is sifted from the conduct and states of mind at the time of commission of the actus reus.<sup>95</sup> Once reactive fault is adopted, culpability will be established from a review of corporate safety and other procedures within an open-ended time frame. As a result the prosecutorial and forensic burden would be huge.<sup>96</sup> When these factors are considered on the backdrop of Malawi's economy, it becomes abundantly clear that reactive fault is an expensive basis for corporate criminal liability, which Malawi cannot afford.

(d) Vicarious liability – the American version

In the United States of America corporate criminal liability is based principally on vicarious liability. The courts operate from the basic finding that the acts of a corporation are simply the acts of all of its employees operating within the scope of their employment. It is said that a corporation, being not a natural living person, can act only through its agents and that the purposes, motives and intent of those agents are just as much those of the corporation as are things done.<sup>97</sup> In *Commonwealth v Angelo Todesca Corporation*<sup>98</sup> the corporation was a subcontractor involved in a road widening and improvement project. The corporation's trucks were used to haul asphalt to the construction site. On 01 December 2000 the corporation's truck while reversing at the construction site with the help of a police officer, ran over the police officer's legs. The corporation was charged with motor vehicle homicide. In delivering its judgment, the court stated that because the defendant was a corporation, and not a living natural person, it could act only through its agents. To prove that a corporation is guilty of a criminal offence, the prosecution must prove the following three elements beyond a reasonable doubt: (1) that an individual committed a criminal offence; (2) that at the time of committing the offence, the individual was engaged in some particular corporate business

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<sup>95</sup> *Fowler v Padget* (1798) 7 Term Rep 509, 101 ER 1103.

<sup>96</sup> Simester and Sullivan at 259 – 260.

<sup>97</sup> *State v Ice & Fuel Co* 81 S E 737 per Clark CJ.

<sup>98</sup> 62 Mass App Ct 599, 818 N E 2d 608.

or project; and (3) that the individual had been vested by the corporation with the authority to act for it, and on its behalf, in carrying out that particular corporate business or project when the offence occurred.<sup>99</sup>

Similarly in *Commonwealth v L.A.L. Corporation*<sup>100</sup> the corporation (a close corporation) was accused of violating a statute which proscribed the sale or delivery of any alcoholic beverages or alcohol to any person under the age of 21. The corporation was licensed to sell alcoholic beverages. On specified dates a minor purchased an alcoholic beverage from a bartender employed by the corporation at its licensed premises. The minor was not asked for identification. All the sales by the bartender violated the statute. The court was required to consider the circumstances in which a close corporation may be criminally liable for the criminal acts of its employees. It was held that the rule applicable to this question was the same for both endocratic corporations (that is large, publicly-held corporations) and close corporations. It was further held that any corporation is criminally liable for criminal conduct, performed for its benefit, by its agent or employee authorised to act for the corporation in relation to the particular sphere of corporate business in which the agent was engaged when the criminal conduct took place. The court rejected the corporation's argument that a corporation should only be criminally liable for the conduct of its servants or agents where such conduct was performed, authorised, ratified, adopted or tolerated by the corporation's directors, officers or other 'high managerial agents' who are sufficiently high in the corporate hierarchy to warrant the assumption that their acts in some substantial sense reflect corporate policy. The court emphasised that it was not necessary for the Commonwealth to prove that the individual who acted criminally was a member of the corporation's board of directors, or that he was a high-ranking officer in the corporation, or that he held any office at all.

The justification for holding the corporation criminally liable in these circumstances is similar to the justification for the tort law doctrine of respondeat superior: since the

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<sup>99</sup> 62 Mass App Ct 599 at 605, 818 N E 2d 608 at 613. On the facts before the court it was held that the case against the corporation had not been made out. Consequently the corporation was acquitted.

<sup>100</sup> 400 Mass 737, 511 N E 2d 599.



employee's act is done for the corporation's benefit, justice requires that the corporation be held liable for the damage caused by the employee's conduct. Further, when a corporation delegates responsibility to its agent, it should be responsible for the consequences of that delegation. It seems fair that a corporation, which is a product of the law and has ability to break the law, should be held liable for its criminal acts committed through its servants or agents.<sup>101</sup>

It may be observed that the American species of vicarious criminal liability is expansive. Virtually any employee or agent can commit a crime which will be attributed to the corporation. The range of employees is not limited to high-ranking officers as in English law. While the wide scope has its advantages, it may be objected that it is unrealistic to expect a corporation to police the actions of a huge workforce, possibly numbering in the thousands. It may further be argued that even if the corporation were to take exemplary steps to police such action, it cannot escape vicarious liability for the crime of a disgruntled employee who manages to circumvent the relevant safeguards.<sup>102</sup>

It is submitted that Malawi does not need such an expansive version of vicarious criminal liability for the reasons stated in the previous paragraph and for the further related reason that expansive liability may stifle the much-needed economic development in Malawi. Instead of adopting this, it is recommended that Malawian law extend the scope of corporate criminal liability through the incorporation of aspects of the aggregation principle and organisational models. The suggested extension takes Malawian law a few steps ahead of English law but does not go as far as the American species of vicarious criminal liability.

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<sup>101</sup> Phillip A Wellner 'Effective Compliance Programs and Corporate Criminal Prosecutions' (2005) 27 *Cardozo Law Review* 497 at 503 – 504.

<sup>102</sup> Gobert *op cit* at 722 – 723.

#### 7.4.2.4 The future of corporate criminal liability in Malawi

The suggested extension of corporate criminal liability is not an entirely new idea. In some parts of the British Commonwealth (former English colonies and dependencies) attempts have been made to effect such changes. For example, in Canada various stakeholders had for long urged an expansion of corporate criminal liability. It appears that the 1992 Westray mining disaster<sup>103</sup> portrayed further to the authorities the need for reform of the law in this area. In the year 2003 the Criminal Code<sup>104</sup> was amended with a view to extend the boundaries of corporate criminal liability. Three crucial definitions relating to corporate criminal liability were introduced and these are the definitions of 'organisation,' 'representative,' and 'senior officer.' An 'organisation' is defined in section 2 as a public body, body corporate, society, company, firm, partnership, trade union or municipality. It also covers an association of persons that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons. It is clear from this definition that the intention of the legislature was to capture not only the traditional corporation but also similar bodies. However, in the interest of consistency in presentation, the word 'organisation' is generally not used hereinafter; in its place the word corporation is used.

The Code then distinguishes between a 'representative' and a 'senior officer.' A representative in respect of an organisation refers to a director, partner, employee, member, agent or contractor of the organisation. By senior officer is meant a representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities

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<sup>103</sup> Twenty-six miners were killed in the Westray mining disaster. An inquiry into the disaster found that the deaths were 'the catastrophic result of a series of failures in mining practices': 'Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights - Corporate Liability' November 2002 - <http://www.justice.gc.ca> (Accessed on 24 November 2005). This document will hereinafter be referred to as 'Canadian Government Response'.

<sup>104</sup> R S 1985, c C 46.

and in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.<sup>105</sup>

In crimes requiring fault other than negligence there are three bases for saddling a corporation with criminal liability. The first is essentially the identification doctrine: the corporation is liable if, with the intent at least in part to benefit the organisation, one of its senior officers acting within the scope of their authority, is a party to the offence.<sup>106</sup> The second is to the effect that a corporation will be liable if, with the intent at least in part to benefit the corporation, one of its senior officers having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the corporation that they do the act or make the omission specified in the offence. The third is to the effect that a corporation will be liable if, with the intent at least in part to benefit the corporation, one of its senior officers knowing that a representative of the corporation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.<sup>107</sup> It is arguable from these provisions that the liability of the corporation in crimes requiring fault other than negligence is not engaged unless and until a senior officer conducts himself wrongfully with the intent at least in part to benefit the corporation.<sup>108</sup>

In negligence-based crimes the Canadian Criminal Code provides that a corporation is liable if, acting within the scope of their authority, (i) one of its representatives is a party to the offence; or (ii) two or more of its representatives engage in conduct, whether by act

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<sup>105</sup> Section 2 of the Criminal Code.

<sup>106</sup> The difference between this basis of liability and the identification theory lies in the former's requirement that the senior officer must have an intent at least in part to benefit the organisation.

<sup>107</sup> Section 22.2 of the Criminal Code.

<sup>108</sup> This argument is in line with what the Canadian Government said before the amendments were effected. In the Canadian Government Response *op cit* the Government stated that it intended to reform Canadian criminal law to 'hold a corporation criminally liable for crimes of subjective intent that are committed on behalf of or for the benefit of the corporation where a senior person with policy or operational authority (a) committed the offence personally; or (b) had the necessary intent and directed the affairs of the corporation so that lower-level employees carried out the prohibited conduct; or (c) was aware of or wilfully blind to criminal activity carried out by lower-level employees and failed to take remedial action as soon as practicable to stop the criminal conduct.'

or omission, such that, if it had been the conduct of one representative, that representative would have been a party to the offence.<sup>109</sup> It is arguable that the liability under (ii) reflects the principle of aggregation as the conduct of more than one representative is taken together and assessed as the conduct of only one representative. The Code continues to say that in either requirement (i) or (ii) the corporation's liability will only attach if the senior officer who is responsible for the aspect of the corporation's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.<sup>110</sup>

It is clear from the foregoing that the Canadian law on corporate criminal liability is wider than the identification doctrine. Although the current Canadian version still requires the involvement of a senior officer, some of the relevant activities may be conducted by junior officers, and the principle of aggregation may be applied. However, it may be observed that the Canadian version does not espouse organisational modes of corporate criminal liability as explained above. For this reason, it is not advisable for Malawi to adopt this version in its entirety. It is suggested that from the Canadian version Malawi should adopt the definition of 'organisation' and rework it to fit in the scheme of its own legislation. This has been done in the proposed reform of Malawian law in Chapter 8 hereof.

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<sup>109</sup> Section 22.1(a) of the Criminal Code.

<sup>110</sup> Section 22.1(b) of the Criminal Code. There is scope for reading this last requirement conjunctively with requirement (i) or (ii) as has been done in the text, but there is also scope for reading these three requirements disjunctively. It appears that disjunctive reading was not intended as requirement (i) would have the effect of operating like vicarious liability under American law, a possibility which was rejected in the hearings for the reform of the law in this area. The Canadian Government Response *op cit* states: 'Vicarious liability in [the American] form was not the preferred option of any witness before the Standing Committee. The Government shares the concerns expressed by many witnesses that vicarious liability as applied in the United States is contrary to the principles that underlie Canada's criminal law. While its rigours are somewhat attenuated by the United States Sentencing Guidelines which allow for reductions in the prescribed fine in accordance with the corporation's culpability score, many would argue that under Canadian law it would be wrong in principle to impose the stigma of a criminal offence on a corporation when its actions are not morally blameworthy.' In light of these comments and considering the use of the word 'and' at the end of requirement (ii), the approach adopted in the text is conjunctive reading.

Another attempt at extension of corporate criminal liability in the British Commonwealth was made in Australia. The changes that have now been effected in that country are more extensive than those in Canada. In the Australian Criminal Code Act<sup>111</sup> aspects of the aggregation principle and organisational models of corporate criminal liability are incorporated. It is necessary to quote the provisions of the Code in this respect (section 12) since they have potential for operating as a precedent for Malawi. Section 12 of the Code is in the following terms:

#### ‘12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

#### 12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

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<sup>111</sup> Act No. 12 of 1995.

### 12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate;

"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;

"high managerial agent" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

#### 12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was

substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

#### 12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

#### 12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.'



The Australian Criminal Code Act departs from the identification doctrine where, *inter alia*, it permits the prosecution to lead evidence that the corporation's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. This feature will address situations in which non-compliance was expected, although formal documents appeared to require compliance.<sup>112</sup> In addition, this feature reflects organisational models of corporate criminal liability, especially when one considers the meaning of 'corporate culture.' The corporate culture cannot be identified with any employee, agent, or officer. It can only be identified with the corporation or part of it. So liability based on corporate culture is truly corporate in nature.<sup>113</sup> Further, the Australian Criminal Code Act incorporates the principle of aggregation when it states that negligence as a fault element of an offence may exist on the part of a corporation if the corporation's conduct is negligent when viewed as a whole, that is, by aggregating the conduct of any number of its employees, agents or officers. The overall effect of these features, together with other corporate liability provisions, is that the Australian Criminal Code Act applies general principles of criminal responsibility to natural and corporate persons almost uniformly with few exceptions aimed at accommodating the fact that criminal liability is being imposed on corporations rather than natural persons.<sup>114</sup>

Although the corporate criminal liability provisions of the Australian Criminal Code Act are laudable, their adoption in Malawi needs to take into account local circumstances. For

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<sup>112</sup> Alan Rose '1995 Australian Criminal Code Act: Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* 129 at 136.

<sup>113</sup> Celia Wells 'The Law Commission Report on Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] *Crim LR* 545 at 552 – 553 writes: 'The Act legislates general principles of criminal responsibility and the section dealing with corporate liability provides that for offences of intention, knowledge or recklessness "that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence." Authorisation or permission can be shown in one of three ways--the first echoes the *Tesco v. Nattrass* version of identification liability, and the second extends the net wider to "high managerial agents". *It is the third which represents a clear endorsement of an organisational or systems model, based on the idea of "corporate culture."* [Emphasis added. Footnotes omitted].

<sup>114</sup> Rose *op cit* at 137 – 138. The author continues to say, 'The justification behind this approach to corporate criminal liability is that the pervasive role played, especially by large national and multinational companies, in economic, financial, social, and political affairs on the national and the international level requires tools to force compliance across the full civil, criminal, and administrative/regulatory spectrum.'

instance, it is not necessary in the Malawi scenario to make specific provision for the test of negligence. Similarly, it is not necessary to state expressly that in offences of strict liability bodies corporate have a defence of mistake of fact. Actually reference to 'strict liability' in the Australian Criminal Code Act is not exactly the same as reference to 'strict liability' in Malawi. The confines of strict liability in the two jurisdictions are somewhat different. In the light of these concerns and differences, it is suggested that the Australian provisions be modified appropriately to fit in the Malawian mould. This has been done in Chapter 8 hereof.

### **7.4.3 Liability of controlling officers**

Several environmental statutes in Malawi contain provisions dealing with the liability of controlling officers, that is, those natural persons who run the activities of the corporation. These provisions may be split into two categories: provisions which do not have an inbuilt defence and those which have an inbuilt defence. The former occur in the Petroleum (Exploration and Production) Act 2 of 1983, the Mines and Minerals Act 1 of 1981 and the Public Health Act 12 of 1948. The latter occur in the Environment Management Act 23 of 1996 and the Fisheries Conservation and Management Act 25 of 1997. These provisions will now be analysed.

Section 126 of the Mines and Minerals Act 1 of 1981 and section 75 of the Petroleum (Exploration and Production) Act 2 of 1983 are identical. They state that when an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly. From this it is clear that there must be two factors for liability of the controlling officer to attach: (a) an offence committed by a body corporate; (b) relevant consent or connivance or neglect on the part of the controlling officer. Proof of these factors beyond reasonable doubt rests on the prosecution throughout the trial. It appears that 'consent' and 'connivance' extend the

common law slightly, since the controlling officer who expressly consents or connives at the commission of the offence may be held liable under the principles of secondary participation in the crime.<sup>115</sup> The word 'neglect' introduces broader negligence-based liability: the controlling officer may be convicted for negligently failing to prevent the offence. Whether the controlling officer is under a relevant duty depends on the facts of a particular case and, as stated above, it is the obligation of the prosecution to show the existence of that duty and breach thereof by the controlling officer.<sup>116</sup>

In this connection, the special position of directors must be noted. In order to ascertain the duties of a director, it is necessary to consider the nature of the company's business and the manner in which the work of the company is in fact distributed between the directors and other officials of the company. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director is not bound to give continuous attention to the affairs of his company. In respect of all duties that may properly be left to some other official, a director is generally justified in trusting that official to perform such duties honestly.<sup>117</sup> In *Huckerby v Elliott*<sup>118</sup> a company was convicted of providing gaming premises without an appropriate licence contrary to a statute. A charge was brought under the same statute against a director in that the offence was attributed to her neglect. The evidence revealed that she knew little of the conduct of the premises and that she had no knowledge of whether or not a licence had been obtained. The court dismissed the charge against the director, holding that a director of a company cannot be said to be neglectful if he fails to enquire about certain matters which are dealt with by a fellow director or a company official, that the accused director was entitled to leave certain

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<sup>115</sup> Smith and Hogan *op cit* at 175.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427 – 429 per Romer J. See also Chilumpha *op cit* at 144 – 149.

<sup>118</sup> [1970] 1 All ER 189.

matters to a fellow director or a company official and that in the circumstances neglect on her part had not been shown.

Another statute which has a provision dealing with the liability of controlling officers without an inbuilt defence is the Public Health Act 12 of 1948. Its section 139 provides that where a contravention of the Act or any rule made under it is committed by any company or corporation, the secretary or manager thereof may be summoned and held liable for such contravention and its consequences. It is worth noting that the controlling officers mentioned are only the secretary and the manager. It is suggested that 'manager' should mean a person managing the affairs of the company and not necessarily everyone bearing the title of 'manager' in the company set-up.<sup>119</sup> It is further suggested that the number of controlling officers who may potentially be liable should be increased expressly in the section by adopting the more common formula/phrase 'director, manager, secretary or other similar officer.' Confining potential liability to the secretary and manager only appears to be unduly restrictive.

Of the provisions on the criminal liability of controlling officers with an inbuilt defence, the most important is section 75 of the EMA. It declares that where an offence under the EMA is committed by a body corporate, every director, manager or similar officer of the body corporate shall be guilty of the offence. Where the offence is committed by a partnership, every partner is jointly and severally liable for the offence.<sup>120</sup> A person is not liable on these grounds if he proves to the satisfaction of the court that the act constituting the offence was done without his knowledge, consent or connivance and he did his part to prevent the commission of the offence having regard to all the circumstances of the case.

It is suggested that section 75 of the EMA creates an offence of strict liability. In *R v Howells*<sup>121</sup> the court stated that in an offence not containing an express requirement of

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<sup>119</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 178; Smith and Hogan op cit at 175.

<sup>120</sup> This is a time-honoured principle: see *R v Mahomed Hanif* 1923 – 60 ALR Mal 145 and *R v Patel and Sons* 1923 – 60 ALR Mal 569.

<sup>121</sup> [1977] QB 614 at 626. See also *R v Bradish* [1990] 1 QB 981.

mens rea, the existence of a defence of proof of lack of knowledge may indicate that the offence is one of strict liability as the defence seeks to alleviate its strictness. Writers have accepted this line of thinking and have expanded on it. It is said that where an offence ‘apparently cast in absolute terms’ allows the applicability of a due-diligence defence or no-negligence defence, the offence is one of strict liability.<sup>122</sup> On a more general level it has been argued that a clearer indication of the strict liability nature of an offence occurs where the statute itself creates a specific defence, e.g. of no-negligence. It is contended that such a defence would be otiose if full mens rea was a necessary ingredient of the offence.<sup>123</sup> Applying these authorities to section 75 of the EMA, it will be noted that section 75 does not expressly require mens rea on the part of a controlling officer and it also has a no-knowledge and due diligence defence. It follows that section 75 is an offence of strict liability. Upon establishing that an offence has been committed by the company there is no need to prove fault on the part of the controlling officer. The defence provided to the controlling officer alleviates the strictness of the offence and it is unlikely on this score that Malawian courts will strike it down as being unconstitutional.<sup>124</sup>

Section 48 of the Fisheries Conservation and Management Act 25 of 1997 is couched in considerably different language. It provides:

‘Where any offence under this Act is committed by a company or by any member of a partnership, firm or business, society or association of persons, every director or officer of that company or any other member of the partnership or other person

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<sup>122</sup> *Blackstone’s Criminal Practice* op cit at 64.

<sup>123</sup> Simester and Sullivan op cit at 177.

<sup>124</sup> Writers accept the use of strict liability when it is coupled with a relevant defence: Simester and Sullivan op cit at 185 – 186 and Jordaan op cit at 69. Even Lord Reid implicitly accepted this in *Sweet v Parsley* [1970] AC 132 at 150 when he said: ‘The choice would be much more difficult if there were no other way open than either mens rea in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention.’

concerned with the management of such partnership, firm or business, society or association of persons shall be liable for the offence unless he proves to the satisfaction of the court that –

- (a) he used due diligence to secure compliance with this Act; and
- (b) the offence was committed without his knowledge, consent or connivance.’

This section spells out more clearly the types of organisation the officer should be part of for him to be held liable: the controlling officer may be part of a company, partnership, firm, business, society or association of persons. The section does not use the term ‘body corporate.’ Further, apart from company directors and officers, liability will only attach to those members who are concerned with the management of the partnership, firm, business, society or association. These comments aside, it appears that the section has largely the same effect as section 75 of the EMA. Accordingly, for the reasons advanced above in respect of section 75, it is suggested that section 48 contains a strict liability offence. As long as it is proved that an offence has been committed by a company, etc, the controlling officer will be held liable without proof of mens rea unless he can make out the due diligence and no-knowledge defence.

It may be argued that the so-called defences are actually reverse burdens of proof<sup>125</sup> and that such reverse burdens may conflict with an accused person’s right to a fair trial, in particular the accused person’s right to be presumed innocent as provided for in section 42(2)(f)(iii) of the Malawian Constitution. The challenge appears to have considerable force. Actually in some jurisdictions the challenge has been the subject of litigation for

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<sup>125</sup> A reverse burden, it may be recalled from Chapter 3 hereof, is an onus on an accused to prove some matter the effect of which is that he is not guilty of the offence charged. Such a burden may require the accused to prove the absence of one of the ingredients of the actus reus or the absence of a particular type of mens rea or the existence of a defence: Ian Dennis ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] *Crim LR* 901 at 901–902. At 902 Dennis draws a distinction between the legal burden (also known as persuasive burden) of proof and the evidential burden. He writes: ‘A defendant who bears a legal burden will lose if he fails to persuade the fact-finder of the matter in question on the balance of probabilities. An evidential burden in relation to a matter is a burden of adducing sufficient evidence to raise an issue regarding the existence of the matter. The burden of disproof will then fall on the prosecution in accordance with the normal rule. The significance of the distinction ... is that evidential burdens are regarded as compatible with the presumption of innocence.’

long. Malawi has not had such litigation, but it is likely to arise in the near future. What should be the response of Malawian courts? The approaches in South Africa and the United Kingdom will be considered and then recommendations will be made as to how Malawian courts should deal with the matter.

In South Africa the matter was essentially settled by *S v Coetzee*.<sup>126</sup> In this case the accused had been charged with, inter alia, fraud. On his request the trial was suspended in order to have the guidance of the Constitutional Court on the constitutionality of section 332(5) of the Criminal Procedure Act 51 of 1977. That section provided that a servant or director of a body corporate that had committed an offence was deemed to be guilty of that offence and personally liable to punishment unless the servant or director could prove on a balance of probabilities that he or she had not participated in the offence and could not have prevented it. Delivering the majority judgment, Langa J (as he then was) held that section 332(5) imposed an onus on the accused to prove an element which was relevant to the verdict and that the onus provisions of the section violated the right to be presumed innocent. Specifically he said:

‘The fact that section 332(5) requires that the accused director should, on pain of conviction, prove that he or she did not take part in the commission of the offence and could not have prevented others from doing so, even if it is formulated as an exception, has the same consequences as a reverse onus provision which relates to an essential element of the offence. Such accused will be convicted unless he or she discharges the onus; this despite the existence of a reasonable doubt with regard to such accused’s participation in the offence and the ability to have prevented it.’<sup>127</sup>

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<sup>126</sup> 1997 (3) SA 527 (CC).

<sup>127</sup> 1997 (3) SA 527 (CC) at para 39. See the analysis of this case by Angelo Pantazis ‘Criminal Law’ [1997] *Annual Survey of South African Law* 610 at 611 – 614 and by M P Larkin and Julia Boltar ‘Company Law (including Close Corporations)’ [1997] *Annual Survey of South African Law* 403 at 433 – 435.

The court went on to hold that the violation of the right to be presumed innocent could not be justified in terms of section 33(1) of the South African Constitution and that, notwithstanding the legitimate purposes served by the section in relation to the honest conduct of the affairs of corporate bodies, the section was impermissibly overbroad in imposing an onus on a director or servant of a corporate body to avoid liability for an offence committed by the corporate body. The type of offence by the corporate body for which an accused director or servant could be held liable was not limited. All the offences were included notwithstanding their nature, purpose or degree of remoteness from the ordinary activities of the corporate body and therefore from the legitimate purpose of the section. In these circumstances section 33(5) was declared unconstitutional, invalid and of no force or effect whatsoever. No severance of the invalid provisions of the section was possible that would leave the section constitutionally valid while giving effect to the purpose of the legislative scheme.

In the United Kingdom several recent cases have grappled with the question whether statutory defences which in effect impose reverse burdens on the accused are compatible with the presumption of innocence. In *R v Lambert*<sup>128</sup> the strongest and most forceful views on the point were expressed by Lord Steyn but these views were obiter. Subsequently in *R v Johnstone*<sup>129</sup> Lord Nicholls of Birkenhead suggested the principles to be applied, but again his speech on these issues was obiter. In *Attorney General's Reference (No 1 of 2004)*<sup>130</sup> the Court of Appeal advised that courts should not follow *R v Lambert* but *R v Johnstone* and the ten-point guidance advanced by the Court of Appeal.<sup>131</sup> Not long after the delivery of the judgment of the Court of Appeal, Andrew

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<sup>128</sup> [2001] 2 Cr App R 511, [2002] 2 AC 545 (House of Lords).

<sup>129</sup> [2003] 1 WLR 1736 (House of Lords).

<sup>130</sup> [2004] 2 Cr App R 27, [2004] 1 WLR 2111.

<sup>131</sup> *Attorney General's Reference (No 1 of 2004)* [2004] 2 Cr App R 27, [2004] 1 WLR 2111 at para 52. For a commentary on this case, see P W Ferguson 'Reverse Burdens of Proof' (2004) 22 *Scots Law Times* 133. Ferguson is of the opinion that the guidance appears to be intended to make justification of reverse burdens easier for the prosecution.



Ashworth prophesied that the decision would be short-lived.<sup>132</sup> This prophecy was fulfilled about six months later in *Sheldrake v Director of Public Prosecutions*<sup>133</sup> where Lord Bingham of Cornhill (delivering the majority judgement) refused to endorse the guidance given by the Court of Appeal save to the extent that it was in accordance with the opinions of the House of Lords in several cases, the most prominent of which were *Lambert*, *Johnstone* and *Sheldrake* itself.<sup>134</sup> After tearing down the ten-point guidance of the Court of Appeal, Lord Bingham did not offer clear alternative guidance on how to interpret statutes that impose reverse burdens.<sup>135</sup> The consequence is that there is no single United Kingdom decision that contains the relevant principles, but the effect of several decisions is that in determining whether reverse burdens are compatible with the presumption of innocence, a three-stage inquiry must be followed:

(1) Interpretation of the statute: does the provision in question, interpreted in accordance with the ordinary principles of construction, place a burden on the accused? If so, is it a legal or an evidential burden? If it is evidential no further inquiry need be made about compatibility with the presumption of innocence. If it is a legal burden, the court must move to stage 2 to assess the question of compatibility.

(2) Justification of the reverse onus: does the provision in question serve a legitimate aim and is it proportionate to that aim? If the answer is Yes, the

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<sup>132</sup> Andrew J Ashworth [2004] *Crim LR* 832 at 835.

<sup>133</sup> [2005] 1 AC 264, [2005] 1 All ER 237.

<sup>134</sup> [2005] 1 AC 264 at para 32. At para 30 Lord Bingham of Cornhill declared: 'Both *R v Lambert* [2002] 2 AC 545 and *R v Johnstone* [2003] 1 WLR 1736 are recent decisions of the House, binding on all lower courts for what they decide. Nothing said in *R v Johnstone* suggests an intention to depart from or modify the earlier decision, which should not be treated as superseded or implicitly overruled. Differences of emphasis (and Lord Steyn was not a lone voice in *R v Lambert*) are explicable by the difference in the subject matter of the two cases.'

<sup>135</sup> Andrew J Ashworth [2005] *Crim LR* 215 at 219 writes that the only certainty from the judgment is that 'courts should use section 3 of the Human Rights Act 1998 fully, and should not defer to the intention of Parliament, least of all where there is no evidence that the legislature had the presumption of innocence in mind. Beyond that, there seem to be three major factors to be taken into account – maximum penalty, the danger of convicting the innocent, and the ease of proof.' See also P W Ferguson 'Proof of Innocence' (2004) 36 *Scots Law Times* 223.

provision is an acceptable qualification to the presumption of innocence. The defendant will then bear the burden of proof on the matter in question, although to a lower standard of proof than the prosecution (namely the balance of probabilities). If the answer is No, the court must move to stage 3.

(3) Reading down the provision: if the reverse legal burden cannot be justified, can the court 'read down' the burden to an evidential one? If it can, it should do so. If it cannot, the court should make a declaration of incompatibility of the provision.<sup>136</sup>

The process of interpretation of the statute must consider three factors. First, the object of the legislation (i.e. the mischief at which the statute was aimed). Second, practical considerations affecting the burden of proof, for instance the relative ease or difficulty of proof. Third, the seriousness of the offence. These same principles are applied in the process of justification of the reverse onus, coupled with several others among which are judicial deference and classification of offences.<sup>137</sup>

It may be observed that following the South African approach will mean that the defences specified in section 75 of the EMA and section 48 of the Fisheries Conservation and Management Act will be declared null and void on the basis of incompatibility with the presumption of innocence. On the other hand, adopting the English approach has scope for saving the defences or at least reading them down into evidential burdens. The English approach therefore commends itself to adoption. However, its adoption should be meant only to inform the local constitutionality adjudication process. It may be recalled that in Chapter 3 hereof it was demonstrated that whenever there is an apparent violation (limitation) of a particular human right or freedom, the violation (limitation) may be justified if it satisfies the following conditions: (a) it must be prescribed by law; (b) it

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<sup>136</sup> Dennis *op cit* at 905.

<sup>137</sup> Dennis *op cit* at 907 – 918. Judicial deference deals with the question of how much weight courts should give to the decisions of Parliament as to the imposition of the burden of proof. The courts appear to accept that deference is a matter of degree. As for classification of offences, a distinction is sometimes drawn between acts which are truly criminal and those which are merely regulatory or quasi-criminal. It is said that it is easier to justify an interference with the presumption of innocence when the relevant offence is quasi-criminal or regulatory in nature: *ibid*.

must be reasonable; (c) it must be recognised by international human rights standards; and (d) it must be necessary in an open and democratic society. It is recommended that in going through these elements, courts should bear in mind the crucial importance of environmental protection. The scientific evidence worldwide suggests that there is need for strong action to protect the environment. We are living in an environmental crisis, an environmental emergency. In these circumstances the present generation of humankind has no basis for unnecessarily maintaining strict adherence to these so-called time-honoured fundamental principles of criminal law especially in areas like the liability of controlling officers of companies. These principles can be qualified where necessary and it is submitted that it is necessary in the present scenario. If the defences (reverse burdens) in issue do indeed infringe the accused's right to be presumed innocent - which is disputed below - such infringement can be justified on the ground that it is meant to deal with the special problems created by companies that engage in criminal activity. When a corporation is convicted of a crime, the commonest punishment meted out against it is a fine which can simply be dismissed as the cost of doing business. The corporation cannot be imprisoned. Making controlling officers liable for the sins of the corporation provides an opportunity for the sanction of imprisonment to be employed.

In the process of imputing liability to the controlling officers it is unrealistic to require that the prosecution prove fault – the prosecution would meet insuperable difficulties to prove fault beyond reasonable doubt on the part of the controlling officer. When corporations are faced with criminal investigation, corporate personnel tend to close ranks out of loyalty or through fear of dismissal resulting in the shielding of controlling officers.<sup>138</sup> In such circumstances it is almost impossible for the prosecution to gather evidence of fault on the part of the controlling officers. This problem is exacerbated in large corporations. In contrast the controlling officers know their corporate systems and are better placed to show lack of fault on their part. Requiring them to show that lack of fault doesn't appear to be unfair when the severity of the environmental threat is borne in

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<sup>138</sup> Brent Fisse 'The Duality of Corporate and Individual Criminal Liability' in Ellen Hochstedler (ed) *Corporations as Criminals* Beverly Hills: Sage Publications 1984 69 at 70.

mind. After all, these are offences of strict liability and permitting the accused to rely on the defences is in essence doing him a favour. This point leads to the next.

From the literature on the subject it seems that the opposition against the defences (reverse burdens) in this area is highly premised on their alleged violation of the presumption of innocence (and hence the right to a fair trial) through the possibility of the accused being convicted where there is reasonable doubt as to the accused's complicity in the crime.<sup>139</sup> This argument is misguided especially when considering section 75 of the EMA and section 48 of the Fisheries Conservation and Management Act. As indicated above, these provisions contain strict liability offences: once it is established that an offence has been committed by the corporation, the prosecution is not required to prove any fault on the part of the controlling officer in order to hold him liable for the offence. If these sections had stopped here (that is, if the sections had not included the defences) no question would generally arise as to the infringement of the presumption of innocence or the unfairness of the trial. In the circumstances, it does not make sense to say that the defences – which are meant to mitigate the strict liability nature of the offences – lead to unfairness of the trial or the conclusion that the accused is not being presumed innocent. In the language of Kentridge AJ, 'if an offence of absolute liability had been created, it would not in itself have given rise to any question of unfairness of the trial of such an offence. When the severity of such a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial.'<sup>140</sup> This South African judge has not been a lone voice in the wilderness. Cory J (a Canadian) has declared:

'Criminal offences have always required proof of guilt beyond a reasonable doubt; the accused cannot, therefore, be convicted where there is a reasonable doubt as to guilt. This is not so with regulatory offences, where a conviction will lie if the accused has failed to meet the standard of care required.... If the false

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<sup>139</sup> See, for instance, Lord Nicholls of Birkenhead in *R v Johnstone* [2003] 1 WLR 1736 at para 50.

<sup>140</sup> *S v Coetzee* 1997 (3) SA 527 (CC) at para 93. It is clear from the judgment that by 'offence of absolute liability,' Kentridge AJ means an offence of strict liability.

advertiser, the corporate polluter and the manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on the balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context, there is nothing unfair about imposing the onus; indeed it is essential for the protection of our vulnerable society.<sup>141</sup>

Similarly McIntyre J stated that if the accused 'is convicted in the face of such a defence, it is not because he has been presumed guilty or because the commission of the crime has not been shown, but because his excuse was rejected after proof of the commission of the offence. An accused raising such a defence or excuse is not seeking relief because of an absence of guilt. He seeks relief despite his commission of the offence.'<sup>142</sup>

Even in the United Kingdom Lord Rodger of Earlsferry (Lord Carswell concurring) has acknowledged the validity of rejecting the argument that the defences (reverse onuses) in issue permit a conviction in spite of the existence of a reasonable doubt as to the guilt of the accused.<sup>143</sup>

In light of the foregoing, the present researcher is of the view that the reverse onuses in the form of statutory defences provided for in section 75 of the EMA and section 48 of the Fisheries Conservation and Management Act do not violate an accused person's right to be presumed innocent or right to a fair trial. The reverse onuses in this context are necessary in the interest of environmental protection. It is suggested that Malawian courts should uphold the validity of these two sections.<sup>144</sup>

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<sup>141</sup> *R v Wholesale Travel Group Inc* (1992) 84 DLR (4th) 161 at para 100.

<sup>142</sup> *R v Holmes* (1988) 50 DLR (4th) 680 at para 63.

<sup>143</sup> *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at paras 65, 69 and 71. For Lord Carswell's concurrence, see para 79. P W Ferguson 'Proof of Innocence' (2004) 36 *Scots Law Times* 223 described Lord Rodger's and Lord Carswell's line of thinking as more compelling than that of the rest of the Lords who presided over the matter (Lord Bingham of Cornhill, Lord Steyn and Lord Phillips of Worth Matravers MR).

<sup>144</sup> It must be pointed out that in Malawian environmental legislation it is only these two sections (section 75 of the EMA and section 48 of the Fisheries Conservation and Management Act) which deal with the *liability of controlling officers* and contain inbuilt defences in the form of reverse onuses. There are other

The discussion will now focus on sentencing.

## **7.5 Sentencing environmental offenders**

### **7.5.1 General**

Proper sentencing is crucial in environmental protection, but this is only possible where legislation or the law generally makes provision for appropriate punishments. The present segment will investigate the types of punishments available for use in Malawi's environmental protection. Thereafter a number of punishments used in other jurisdictions or suggested by writers will be explored and proposals shall be made as to the possible adoption of such punishments in Malawi.

### **7.5.2 Current sentencing for environmental crimes**

#### **7.5.2.1 Generally applicable penalties**

The Penal Code<sup>145</sup> specifies the following punishments for crimes: death, imprisonment, fine, payment of compensation, finding security to keep the peace and be of good behaviour or to come up for judgment, liability to police supervision, forfeiture, community service and any other punishment provided by the Code or by any law or Act.<sup>146</sup> Death is out of the question in environmental matters: actually there is no environmental crime that allows the imposition of the death penalty. As for most of the other punishments, there is scope for applying them in environmental crimes. However, section 2(1) of the Penal Code states that nothing in the Code 'shall affect the liability,

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environmental statutes in Malawi which contain reverse onuses but these other statutes do *not* deal with the *liability of controlling officers* and so they are not in issue here.

<sup>145</sup> Act No 22 of 1929, cap 7:01 of the Laws of Malawi.

<sup>146</sup> Section 25 of the Penal Code. Before 1994 this section included corporal punishment among the possible punishments. This sanction has now been expressly repealed by section 19(4) of the Constitution which states: 'No person shall be subject to corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of State.'

trial or punishment of a person for an offence against the Common Law or against any other law in force in the Republic other than the Code.’ The effect of this provision seems to be that the punishments specified in the Code have no application to offences created by other statutes including environmental statutes, but other provisions in the Code have the opposite effect. For instance, section 29(3) provides, among other things, the periods of imprisonment which may be imposed in default of payment of a fine ordered under *any Act*.<sup>147</sup> The difficulty here may be solved by construing the reference to ‘any other law in force in the Republic other than this Code’ as meaning any other law that was in force at the date of commencement of the Code. This construction is in line with available authority on saving clauses.<sup>148</sup> The function of a saving clause is to preserve existing rights or powers and not to alter them.<sup>149</sup> Unless it expressly says so, it is no function of a saving clause to preserve non-existing rights. In the instant case it is arguable that section 2(1) of the Code is a saving clause: there is arguably nothing in section 2(1) that suggests that it intended to preserve rights or powers provided for in subsequent legislation. Accordingly, it may be concluded that section 2(1) preserves rights and powers provided for in legislation which was in force at the date of commencement of the Code. Since most environmental statutes were enacted after the commencement of the Code, the effect of the suggested construction is that the Code can affect the punishment of environmental offenders at least in appropriate cases. After adopting the suggested construction, it is still necessary to examine each relevant provision on punishment in the Code to see whether it strictly applies to offences in the Code only or not. When this is done, it is arguable that section 27 (imprisonment) and section 29 (fines) are of general application whereas the other provisions on punishment are either debatable on this aspect or strictly applicable to offences in the Code only.

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<sup>147</sup> See also section 25(9) and section 27 of the Penal Code.

<sup>148</sup> John Bell and George Engle (eds) *Cross: Statutory Interpretation* 2ed London: Butterworths 1987 at 121 state that ‘[a] saving clause resembles a proviso in its function of qualifying the main provision, but has no particular form. It often begins with a phrase such as “Nothing in this section shall be construed as ...”’

<sup>149</sup> *Ibid.* See also *R v Brent Health Authority ex parte Francis* [1985] QB 869, [1985] 1 All ER 74.

Apart from the foregoing penalties, Malawian courts are mandated to impose probation and ancillary orders and to order an offender to perform public work. These are generally applying penalties and so may be used in environmental circles. In imposing them courts may specifically tailor them to serve the demands of environmental protection. Due to their potential importance, they will be fleshed out in a bit more detail in the next few paragraphs.

Where in any trial for an offence, other than an offence the sentence for which is fixed by law, the court thinks that the charge is proved but that it is inexpedient to inflict any punishment, the court may impose probation or ancillary orders.<sup>150</sup> The permissible grounds for the opinion that it is inexpedient to inflict any punishment are the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, or the fact that the offender has not previously committed an offence, or the nature of the offence or the extenuating circumstances in which the offence was committed.<sup>151</sup>

A probation order may be imposed after or without convicting the offender. In either case the offender must express his willingness to comply with the probation order. The court cannot issue a probation order in the absence of the offender's willingness. Further, before making the order, the court is required to explain to the offender that if he commits another offence during the probation period, and if he fails in any respect to comply with the order, he will be liable to be sentenced or convicted and sentenced for the original offence.<sup>152</sup>

The probation order requires the offender to be under the supervision of a specified probation officer for a period of between one and three years. Conditions attaching to the

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<sup>150</sup> Where a convicted person is detained, it is not possible for the court to make a probation order at the same time: *R v Tselize* 1923 – 60 ALR Mal 331.

<sup>151</sup> Section 337 of the Criminal Procedure and Evidence Code, Act 36 of 1967, cap 8:01 of the Laws of Malawi.

<sup>152</sup> Section 337(1)(c)(i) and (5) of the Criminal Procedure and Evidence Code.



order may be such as are necessary for securing the offender's supervision and good conduct and for preventing the commission of further offences by him.<sup>153</sup> If the offender under a probation order fails to comply with the probation order or commits further offences, he may be sentenced or convicted and sentenced in respect of the original offence in connection with which the probation order was made.<sup>154</sup> Probation orders are generally not made against adult offenders although there is scope for doing so.<sup>155</sup>

The orders ancillary to a probation order include a probation bond, security for keeping the peace and conditional discharge. With regard to a probation bond, section 337(1) of the Criminal Procedure and Evidence Code provides that where punishment is inappropriate<sup>156</sup> and it is expedient to release the offender on probation, a court may convict the offender and direct that he be released on his entering into a probation bond, with or without sureties, subject to the condition that during a specified period not exceeding three years, he shall appear and receive sentence when called upon and in the meantime shall keep the peace and be of good behaviour. The court may require the offender to comply with additional conditions relating to supervision, residence, employment, associations, abstention from intoxicating liquor or *any other matter whatsoever as the court may think desirable to impose*.<sup>157</sup> It appears from this (especially the words in italics) that the court has a wide discretion as to what terms to impose. This

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<sup>153</sup> David Newman *Criminal Procedure and Evidence in Malawi* Zomba: University of Malawi Faculty of Law 1982 at 241; section 4(1) and section 6 of the Probation of Offenders Act 10 of 1945, cap 9:01 of the Laws of Malawi.

<sup>154</sup> Sections 6 and 7 of the Probation of Offenders Act 10 of 1945. Failure to comply with a probation order may also attract a fine not exceeding £10 without prejudice to the continuance in force of the probation order: section 7(3)(a) of the Probation of Offenders Act 10 of 1945.

<sup>155</sup> In *Republic v Nasoni* [1990] 13 Malawi Law Reports 400 at 403 Tambala Ag J acknowledged this fact. He said: 'Probation orders affecting adult offenders are never, or very rarely, made by courts in this country. The reason is simply that there is no probation service for adult offenders at the moment in the country. There is however probation service provided by the Ministry of Community Services in connection with juvenile offenders.'

<sup>156</sup> The permissible grounds for the opinion that punishment is inexpedient are the same as those for a similar opinion relating to a probation order.

<sup>157</sup> Section 53 of the Criminal Procedure and Evidence Code.

apparently wide discretion was cut down in *Republic v Kumwenda*<sup>158</sup> where the court ruled that the conditions ‘must be reasonable, capable of precise construction so that a court can readily ascertain any breach, and be associated in some way with the circumstances surrounding the offence.’<sup>159</sup> Upon failure to comply with the conditions or upon commission of another offence during the probation period, the offender may be sentenced for the original offence.<sup>160</sup>

In many ways security for keeping the peace operates like a probation bond. An offender convicted of an offence the punishment for which is not fixed by law may, instead of or in addition to any punishment to which he is liable, be ordered to enter into a bond with or without sureties, in such amount as the court thinks fit, that he shall keep the peace and be of good behaviour for a specified time.<sup>161</sup> The difference between this sanction and the probation bond lies in the absence in the former of the possibility of the offender being called upon in the future to receive sentence. Upon failure to keep the peace and failure to be of good behaviour, the offender or any other surety will be required to pay the amount secured under the bond as a penalty.<sup>162</sup>

A conditional discharge is also similar to a probation bond. Where in a trial for an offence the sentence for which is not fixed by law it is inexpedient to inflict any punishment, the court may convict the offender and, if probation is not appropriate, make an order discharging him subject to the condition that he commits no offence during a specified period not exceeding 12 months.<sup>163</sup> If the offender commits an offence during

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<sup>158</sup> 1971 – 72 ALR Mal 425.

<sup>159</sup> Newman op cit at 243.

<sup>160</sup> Section 337(5) of the Criminal Procedure and Evidence Code.

<sup>161</sup> Section 338 of the Criminal Procedure and Evidence Code.

<sup>162</sup> Section 125 of the Criminal Procedure and Evidence Code.

<sup>163</sup> Section 337(1)(b) of the Criminal Procedure and Evidence Code. The permissible grounds for the opinion that punishment is inexpedient are the same as those for a similar opinion relating to a probation order.

the period of conditional discharge, he is liable to be sentenced for the original offence, whereupon the order for conditional discharge ceases to have effect.<sup>164</sup>

Sometimes a court may make an absolute discharge. The court may do this where it thinks that the charge is proved but that it is inexpedient to inflict any punishment. The court may, without proceeding to conviction, make an order dismissing the charge after giving the offender an appropriate admonition or caution. Alternatively, the court may convict the offender and, if probation is not appropriate, make an order discharging him absolutely.<sup>165</sup>

Another sanction related to a probation order is police supervision. When a person, having been convicted of an offence punishable with imprisonment for a term of three years or upwards, is again convicted of an offence punishable with imprisonment for a term of three years or more, the court may, at the time of passing the second sentence of imprisonment, also order that he shall be subject to police supervision for a term not exceeding five years from the date of his release from prison.<sup>166</sup> During the period of supervision the offender reports himself personally once a month to the officer in charge of a police station nearest to his place of residence.<sup>167</sup>

With regard to community service, the Criminal Procedure and Evidence Code authorises the imposition of it as a condition of a suspended sentence. When a person is convicted of an offence, not being an offence the sentence for which is fixed by law, the court may, if it is of the opinion that the person would be adequately punished by a fine or

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<sup>164</sup> Section 337(5)(i) and (6) of the Criminal Procedure and Evidence Code.

<sup>165</sup> Section 337(1)(a) and (b) of the Criminal Procedure and Evidence Code. The permissible grounds for the opinion that punishment is inexpedient are the same as those for a similar opinion relating to a probation order.

<sup>166</sup> In *Petro v R* 1923 – 60 ALR Mal 589 at 590 Spenser-Wilkinson CJ stated that it is undesirable to impose a police supervision order on a convicted person in addition to a removal order, as this is likely to work unnecessary hardship on him. On the requirement that the total period of supervision must not exceed five years, see *R v Bester* 1923 – 60 ALR Mal 426.

<sup>167</sup> Sections 342 and 343 of the Criminal Procedure and Evidence Code.

imprisonment for a term not exceeding twelve months, fine the person or sentence the person to a term of imprisonment not exceeding twelve months but the court may, as the case may be, order the suspension of the payment of the fine or operation of the sentence of imprisonment on condition that the person performs community service for such number of hours as the court may specify in the order.

In the same family with community service is the sanction of performing public work. The Convicted Persons (Employment on Public Work) Act 16 of 1954 (“CPEPWA”)<sup>168</sup> provides that where the offence for which the accused has been convicted would be adequately punished by a sentence of imprisonment not exceeding six months, a court may, in lieu thereof, order the accused to perform public work for a period of up to six months.<sup>169</sup> The court may also order an offender to perform public work in default of payment of a fine.<sup>170</sup> An offender ordered by a court to perform public work is required to work for a period not exceeding eight hours each day (excluding Sundays and public holidays) on such work as is allotted to him by the District Commissioner of the district in which the offender was convicted.<sup>171</sup> Such offender may also be required to reside in such place as the District Commissioner may direct or in a camp if the court so orders.<sup>172</sup> If the offender without reasonable cause fails to perform the allotted work or absents himself from his place of work or residence, or fails to comply with any rules made under the CPEPWA, he may be imprisoned for six months. The court imposing such imprisonment may, in its discretion, revoke the order to perform public work.<sup>173</sup> The court has no power to impose an additional term of public work.<sup>174</sup>

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<sup>168</sup> Cap 9:03 of the Laws of Malawi.

<sup>169</sup> Section 3(1) of the CPEPWA.

<sup>170</sup> Section 3(3) of the CPEPWA.

<sup>171</sup> The District Commissioner may authorise another person to allot the work to the offender: section 5(a) of the CPEPWA.

<sup>172</sup> Section 5 of the CPEPWA. The Convicted Persons (Employment on Public Work) Rules (GN 149/1948 and GN 152/1964 (M)) empowers the Minister to declare any place to be a labour camp for the purpose of housing offenders ordered to perform public work.

<sup>173</sup> Section 6 of the CPEPWA. See also *R v Watchman s/o Soda and Jarson s/o Mbega* 1961 – 63 ALR Mal 94 and *R v Gilliam* 1961 – 63 ALR Mal 129.

### 7.5.2.2 Penalties from environmental statutes

Although the Penal Code and other statutes discussed above do not speak with a clear voice on the applicability of certain types of punishments to environmental crimes, it is virtually beyond dispute that punishments other than imprisonment and fines may be imposed in environmental crimes. The analysis of environmental crimes in Chapters 4 and 5 hereof established this fact. It was demonstrated in those chapters that the following penalties may be imposed upon environmental offenders:

- Imprisonment: The maximum period of imprisonment is ten years. There is no environmental statute that prescribes a longer term of imprisonment than this.<sup>175</sup>
- Ordinary fines: These are once-off fines, meted out in respect of proscribed conduct which is not being continued.<sup>176</sup> The maximum fine expressly prescribed so far is MWK1 million.<sup>177</sup>
- Continuing offence fines: These fines are imposed in respect of continuing offences. These fines are apposite in pollution offences or offences of omission. Often an ordinary fine is exacted for proscribed conduct already committed and then a continuing offence fine is imposed to deal with the possibility of the conduct continuing. Such a penalty obviates the need for fresh prosecutions whenever the conduct recurs.<sup>178</sup>

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<sup>174</sup> *R v Stefano s/o Chikoti* 1923 – 60 ALR Mal 197 at 199 per Rigby Ag CJ.

<sup>175</sup> For instance, under section 67 of the EMA.

<sup>176</sup> For instance, under section 64 of the Forestry Act 11 of 1997.

<sup>177</sup> See section 67 of the EMA. However, there is a possibility of a higher fine under section 74(1)(c) of the Forestry Act 11 of 1997. This section provides that upon conviction of any person for an offence under that Act the court may order that the person convicted pay ten times the amount of any royalties and other fees which, had the act constituting the offence been authorised, would have been payable in respect thereof.

<sup>178</sup> An example of the application of this penalty is section 61 of the EMA.

- Value-equivalent fines: Here the fine is pegged to the value of the property or resource which was the subject of the offence. Fines of this nature are fitting for natural resource legislation.<sup>179</sup>
- Compensation: Upon conviction, the court may order compensation to be paid by the offender to any person who suffered injury.<sup>180</sup>
- Demolition or removal of offending structures or things: Where a structure or a thing is erected or found in a prohibited area, the court may, upon conviction, order that the structure or thing be demolished or removed.<sup>181</sup>
- Seizure: The only place (in environmental legislation) where this is provided for is section 74(1)(f) of the Forestry Act 11 of 1997. Any carrier or vehicle which has been used in the commission of an offence may be seized. This penalty is different from forfeiture as there is in the penalty of seizure the possibility of returning the carrier or vehicle to the offender after some time.
- Forfeiture: A number of statutes make provision for the forfeiture of 'contraband' objects and instrumentalities of crime.<sup>182</sup>
- Surrender or revocation of authorisations and disqualification: Upon conviction of an offence involving an authorisation, the court may order that the offender surrender the authorisation to a relevant authority or the court may revoke the authorisation. The court may also disqualify the offender from holding an authorisation for a specified period.<sup>183</sup>

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<sup>179</sup> Section 35 of the National Parks and Wildlife Act 11 of 1992 provides for this type of penalty.

<sup>180</sup> Section 6 of the Protection of Animals Act 16 of 1944 and section 74(1)(b) of the Forestry Act 11 of 1997. The payment of the compensation may be direct or indirect. The compensation may be paid directly from funds provided by the offender as compensation. The compensation may also be paid indirectly, that is, from fines paid by the offender – this occurs where substantial compensation is in the opinion of the court recoverable by civil suit: section 145(1)(b) of the Criminal Procedure and Evidence Code.

<sup>181</sup> Section 74(1)(d) and (f) of the Forestry Act 11 of 1997.

<sup>182</sup> For example section 17 of the Control and Diseases of Animals Act 41 of 1967 and section 13(2) of the Fertilizers Farm Feeds and Remedies Act 12 of 1970. The language in the text has been adopted from Michael Kidd 'Sentencing Environmental Crimes' (2004) 11 *SAJELP* 53. This article will hereinafter be referred to as 'Kidd Sentencing'.

<sup>183</sup> See section 116 of the National Parks and Wildlife Act 11 of 1992 and section 49 of the Fisheries Conservation and Management Act 25 of 1997. The latter section is a good precedent for the generally applying provision that is needed for the EMA.

### 7.5.2.3 Evaluation

The picture that emerges from the foregoing outline of penalties is that there is a wide variety of penalties from which a court may choose to impose on an environmental offender. This picture is misleading because the court's choice is severely limited by the specific provisions of the statutes. Most of the penalties are available only in respect of offences in a particular statute. There are no generally applying penalties, only that imprisonment and fines occur most often. Actually imprisonment and fines are the standard penalties. The other penalties are mostly used as additional penalties.

Some penalties are apposite for certain proscribed conduct wherever the conduct is proscribed, an example being surrender or revocation of authorisations. This penalty can be imposed regardless of which statute makes provision for the offence involving the authorisation. It is not suggested that this be a mandatory penalty; rather it is proposed that it should be a discretionary penalty, which may be imposed in the most serious of violations.

In this connection, it has been claimed that the penalties prescribed by Malawi's environmental legislation are too low to deter offenders.<sup>184</sup> This is not entirely correct. The analysis in Chapters 4 and 5 reveals that the penalties prescribed in the EMA go as high as MWK1 000 000 (US\$ 9 174). These amounts may not be considered reasonably capable of deterring offenders in the United States of America and other developed countries or in Second World countries, but Malawi is not one of them. As a Third World country the economy is small and so the fines prescribed in the EMA are reasonably capable of deterring offenders at least for a couple of years to come. Certainly as the economy improves, there will be need to increase the amounts.

As for the fines prescribed under other statutes, it is true that they are *prima facie* low. However, the amounts of some of these fines should not be taken on face value because

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<sup>184</sup> Gracian Z Banda 'Report on Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews' 1997 (unpublished) at 92.

some of these fines have been impliedly amended by the EMA. It may be recalled that section 7 of the EMA declares that where a written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources is inconsistent with any provision of the EMA, that written law is invalid to the extent of the inconsistency. From this it is arguable that where a statute creates an offence which is identical to or encompassed by an EMA offence, the penalty prescribed by the EMA will take precedence over the penalty in the other statute. For instance, the Waterworks Act 17 of 1995 creates the offence of passing prohibited matter into sewers or drains and prescribes for it the penalty of MWK200 fine and a further fine of MWK100 for each day on which the offence continues after conviction.<sup>185</sup> The prohibited acts in this offence are essentially aspects of pollution. In the EMA offences relating to pollution are punishable by a fine of not less than MWK20 000 and not more than MWK1 000 000 and imprisonment for ten years.<sup>186</sup> An inconsistency in terms of penalty is therefore evident in these two provisions. In light of the provisions of section 7 of the EMA, the Waterworks Act provision is invalid to the extent of the penalties prescribed. It follows that the punishment for the Waterworks Act offence is a fine of MWK20 000 or more up to a maximum of MWK1 000 000 and imprisonment for ten years. As stated above, these penalties are not low by Malawian standards. So even though on the face of it the penalties prescribed in the Waterworks Act are low, they are in fact not so due to the operation of section 7 of the EMA. This state of affairs applies to many offences created by statutes other than the EMA.

However, it must be observed that not all offences have been affected by the EMA in that way. There are still many offences the penalties of which have not been impliedly amended by the EMA. For example, the offence of failure to give notice of discovery of a mineral provided for in the Petroleum (Exploration and Production) Act 2 of 1983<sup>187</sup> is not identical to or encompassed by any offence in the EMA. So no scope for

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<sup>185</sup> Section 29 of the Waterworks Act 17 of 1995.

<sup>186</sup> Section 67 of the EMA.

<sup>187</sup> Section 69 of the Petroleum (Exploration and Production) Act 2 of 1983.



inconsistency between it and the EMA exists and consequently implied amendment does not apply. Its penalty of MWK5 000 therefore applies. Bearing in mind that offenders under this offence are likely to be corporate bodies or juristic persons generally, the fine is merely small change: it cannot deter them from committing the offence.

In light of the foregoing discussion, it may be concluded that the correct position regarding penalties in Malawi is that some environmental statutes prescribe adequate penalties for the time being, but others prescribe penalties which are too low to deter offenders. The obvious recommendation is that the low penalties should be increased. Thereafter there should be periodic reviews of the penalties in order to ensure that they are in line with the state of the economy and the value of the currency (Malawian Kwacha). It is further recommended that those offences that have been impliedly amended by the operation of section 7 of the EMA should be identified and expressly amended to reflect the correct penalties for the avoidance of doubt. In Malawi the bulk of criminal trials are presided over by magistrates, most of whom are lay (non-lawyers) and the prosecutors are mostly police officers who again are generally lay. This combination of factors suggests that when faced with an environmental offence that has been impliedly amended by the EMA, the prosecutors and the court may not readily recognize the implied amendment. Actually they may not even have the urge to look elsewhere when the statute before them clearly indicates a penalty for the offence, albeit small.

It may further be observed that many of the penalties discussed above are apparently meant for natural persons. Even though 'person' is defined in the General Interpretation Act 36 of 1966<sup>188</sup> as including any company or association or body of persons, 'corporate or unincorporate,' it is clear from the elaboration of many offences and penalties that there is a general leaning towards expected commission by natural persons and consequent imposition of the prescribed penalties on natural persons. In fact some of the penalties can only be imposed on natural persons, for example imprisonment. This fact reduces the number of penalties that can be meted out against the most dangerous

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<sup>188</sup> Cap 1:01 of the Laws of Malawi.

environmental culprit, the corporation. In addition, some of the penalties are defective in application or require reworking in order to achieve the goals of deterrence when applied to corporations. Prominent among these is the fine which is by far the most common sanction that can be levied against the corporation in the present legislative setup. One difficulty about this is that our ability to deter the corporation by way of fines is 'confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources.'<sup>189</sup> Other difficulties are that fines do not necessarily encourage the delinquent corporation to put in place sufficient internal controls or to rectify defective procedures;<sup>190</sup> that the fines are ultimately passed on to shareholders, creditors, employees and consumers;<sup>191</sup> and that faced with the implications of fines on innocent or less culpable parties, courts may refuse to impose high fines.<sup>192</sup> These difficulties call for an adoption of sanctions that can adequately meet the challenges posed by the corporate criminal. One of such sanctions is probation in a revised form. This needs further explanation.

It will be recalled that the Malawian version of probation requires that the offender should consent to its imposition. The court is not permitted to impose probation in the absence of consent on the part of the offender. The problem with this requirement is that a corporation which foresees the possibility of being saddled with stringent costly and incapacitating probation conditions may not consent to probation; instead it may opt to pay a fine or incur some other penalty.<sup>193</sup> This possibility of refusing to consent must be negated in order to allow the use of probation in all appropriate cases. It is suggested that

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<sup>189</sup> John C Coffee Jr ' "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386 at 390. The author calls this barrier 'the deterrence trap'. See also Poonam Puri 'Sentencing the Criminal Corporation' (2001) 39 *Osgoode Hall Law Journal* 611 at 617 – 619.

<sup>190</sup> Kidd Sentencing op cit at 69.

<sup>191</sup> Coffee op cit at 400 – 402. The author calls this 'the externality problem' or 'the overspill problem'.

<sup>192</sup> Coffee op cit at 405 – 407. The author calls this 'the nullification problem'. Further difficulties have been summarised by Kidd Sentencing op cit at 69 – 70.

<sup>193</sup> Cf Coffee op cit at 448 – 449.

the offender should not have a choice in the matter: the requirement of consent should be removed.

It may further be recalled that the Malawian version of probation requires the offender to be put under supervision. The supervision is generally done by probation officers.<sup>194</sup> In environmental matters, it is crucial that such probation officers be environmental experts who can effectively and professionally supervise the implementation of the conditions of probation. These experts may be drawn from government circles or the private sector. If they are drawn from the private sector, they should be paid by government and in turn the government should recover such payments from the offending corporation. This strategy is likely to stimulate professionalism by obviating bias in favour of the corporation. The argument here is that if the corporation is allowed to pay the private-sector expert, the expert may feel obligated to act favourably towards the corporation. This possibility is negated by the suggested payment from the government.

In addition the Malawian version of probation must be reformed in two other respects if it is to be of great use in sentencing corporations which engage in environmental crime. In the first place, probation should be regarded as a criminal sanction in its own right. It may be recalled that the applicable legislation currently requires probation to be imposed only where 'it is inexpedient to inflict any punishment.'<sup>195</sup> This requirement suggests that probation is not punishment (criminal sanction). Requiring an offender to take specified steps or to follow a specified course of conduct and then denying that those steps or that conduct amount(s) to punishment does not seem to be logical especially when the specification of the steps or conduct follows after a criminal charge is proved and when the steps or conduct lead(s) to loss of freedom in the way the offender conducts his or its affairs. Accordingly it is suggested that probation should be regarded as punishment (criminal sanction). In the second place, the legislative obsession with natural persons as offenders should be done away with. The legislation should acknowledge the corporation

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<sup>194</sup> Section 8 of the Probation of Offenders Act 10 of 1945.

<sup>195</sup> Section 337(1) of the Criminal Procedure and Evidence Code.

as an offender and as a candidate for the sanction of probation especially in environmental crime.

In order to effect the foregoing proposals on probation especially in respect of corporations, it is suggested that a new provision be introduced in the EMA. It is not advisable to effect the reforms in this regard by amending the Criminal Procedure and Evidence Code or the Probation of Offenders Act because these statutes are general enactments; they cover crimes of all sorts. Since the suggested reforms are limited to environmental crimes, a better vehicle of reform is the EMA.

After effecting the suggested probation reform, it shall be possible to craft environmentally beneficial probation conditions. For instance, a condition may require the corporation to put in place sufficient internal controls or to rectify defective procedures.

The discussion will now dwell on penalties that are currently not available for use in Malawi. This is not intended to be an exhaustive discussion of such remedies; rather it is intended to be a brief description of selected penalties and an indication of their possible adoption in Malawi. The omission of some penalties is deliberate: the current researcher is of the opinion that the omitted penalties would not contribute much to the environmental cause in the country.

### **7.5.3 Other sentencing options in environmental crime**

Of the sentencing measures not in current use in Malawi the following will be considered: adverse publicity, reparation order and disqualification from government contracts.<sup>196</sup>

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<sup>196</sup> I have borrowed these terms from Kidd Sentencing *op cit*.

### 7.5.3.1 Adverse publicity

The sanction of adverse publicity entails requiring an offender to publicise his conviction and the details of the offence he committed. While it may be used in respect of both natural persons and corporations,<sup>197</sup> it is more potent in respect of the latter.<sup>198</sup> It is said that corporate prestige is a huge asset in the corporate world and that consequently corporations hate unfavourable publicity that dents the prestige. One common effect in certain societies is that consumers may shun the delinquent corporation's products and this may lead to loss of profits. Although it has been shown to be effective in deterring criminal conduct, adverse publicity has been faulted on a number of grounds. Among these are that corporations can dilute adverse publicity through engaging in counter-publicity; and that the exact impact of adverse publicity cannot be estimated reliably.<sup>199</sup> These perceived faults are not insurmountable. The former loses much of its force when one considers the possibility of restricting rebuttals. The latter is adequately met by the observation that uncertainties of impacts attend all sentencing and it is not legitimate to reject the use of adverse publicity on this perceived defect alone.<sup>200</sup>

In the Malawi scenario adverse publicity has a role to play in environmental sentencing albeit not a prominent one. It may be used as an additional sanction. It is arguable that environmental consciousness among the citizenry has not reached a stage where the public can drastically react to adverse publicity (for example, by shunning the corporation's products). However, in the course of time this consciousness may grow and the sanction of adverse publicity may graduate into a fully-fledged sanction.

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<sup>197</sup> David A Skeel Jr 'Shaming in Corporate Law' (2001) 149 *University of Pennsylvania Law Review* 1811.

<sup>198</sup> Grekos *op cit* at 1336 – 1337; Duncan Chappell and Jennifer Norberry 'Deterring Polluters: the Search for Effective Strategies' (1990) 13 *University of New South Wales Law Journal* 97 at 108; Kidd Sentencing *op cit* at 73.

<sup>199</sup> Coffee *op cit* at 426 – 428. At 425 – 434 the author outlines more criticisms of adverse publicity.

<sup>200</sup> Kidd Sentencing *op cit* at 73.

### 7.5.3.2 Reparation orders

By ‘reparation order’ is meant an order after conviction that the offender take steps to rectify any damage resulting from the offence he has been convicted of. This is similar to an administrative order that requires a person whose acts or omissions have adverse impacts on the environment to take such measures as are necessary to deal with those adverse impacts. The major difference between the two orders lies in the legal sphere in which they are imposed: the reparation order is part of the criminal process whereas the administrative order is, as the name suggests, part of administrative action.

The reparation order encapsulates the polluter pays principle – those responsible for environmental damage are made to bear the costs of remediation thereof. It is a sanction that easily commends itself for adoption in Malawi especially in the light of its ‘blood-relationship’ to the above mentioned administrative order which is well known in Malawian environmental circles.<sup>201</sup> It is recommended that the Malawian provision on this sanction should use section 29(7) and (8) of South Africa’s Environment Conservation Act 73 of 1989 as precedents as those provisions are laudable enactments.<sup>202</sup>

### 7.5.3.3 Disqualification from government contracts

This sanction entails the suspension or debarring of persons or corporations from contracting with government once the persons or corporations have been convicted of environmental crimes.<sup>203</sup> Many Malawian corporations depend on government contracts for their survival. As a result this is a particularly severe penalty against such

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<sup>201</sup> An example of an administrative order of the kind discussed in the text is provided by section 33 of the EMA.

<sup>202</sup> A Malawian attempt at a reparation order is contained in section 84 of the Occupational Safety, Health and Welfare Act 21 of 1997 but it is unclear whether such an order can be made in any environmental offence under the Act. The difficulty is that it is unclear whether contravention of the environmental provisions in the Act amounts to a criminal offence.

<sup>203</sup> Kidd Sentencing op cit at 76.

corporations for it may ultimately lead to their insolvency. Thus its deterrent effect may not be difficult to perceive. However, the sanction has been criticised as being inappropriate for imposition by a court: it is said that it is not the function of a court 'to distribute government largesse.'<sup>204</sup> This criticism may not be taken too far as the nature of the so-called 'largesse' is not very different from some natural resources which the government distributes by way of authorisations. If in the case of the natural resources the court is mandated to prevent further benefiting from the natural resources through revocation of authorisations, it does not seem extraordinary to allow the court to prevent further benefiting from government contracts through a disqualification order.

Another criticism is to the effect that disqualification from government contracts may cause hardship in small economies like Malawi where the only supplier of a particular product or service is prevented by the disqualification order from satisfying the government's needs.<sup>205</sup> This is certainly a valid argument but it may be met at least partially by making the sanction discretionary so that the court should only impose it in appropriate cases.<sup>206</sup> It may further be observed that the criticism is a limited objection: it allows the operation of the sanction in those instances in which suppliers are many. Consequently, it does not oust disqualification from government contracts from possible application in Malawi as a criminal penalty.

#### 7.5.4 General evaluation

From the foregoing it is clear that Malawian statute law prescribes various types of penalties which may be used in sentencing environmental crimes. The most commonly prescribed are imprisonment and fines. These, however, are not the best penalties for all

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<sup>204</sup> Rachel Mulheron 'Criminal enforcement of environmental law: limitations and "flat-earth thinking" sanctions' (1996) *Queensland Law Society Journal* 427 at 442 referred to in Kidd Sentencing op cit at 76.

<sup>205</sup> Kidd Sentencing op cit at 76.

<sup>206</sup> Kidd Sentencing op cit at 76 suggests that disqualification from government contracts 'would be useful not as a stand-alone sanction, but a condition of probation. For example, a corporation ordered to implement a corporate compliance programme might be disqualified from government contracts until such time as the compliance programme is implemented to the satisfaction of the court.'

offences and offenders. The existence of other penalties is therefore a strength of the law in this area. Regrettably, the other penalties are not generally applicable; they apply to offences in the particular statute in which they occur. This defect may be rectified by the introduction in the EMA of appropriate provisions that make the relevant penalties generally applicable. The proposed provisions are set out in Chapter 8 hereof. Some penalties require substantial revision for them to operate effectively. Such revision may also be done by effecting appropriate amendments. The suggested revision includes provisions which target corporate offenders.

It is arguable that although the criminal sanctions provided for in the legislation are apparently adequate to counter the challenges posed by environmental offenders, there is still room for adopting several new penalties, among which are reparation orders and disqualification from government contracts. An amendment incorporating these proposed changes is set out in Chapter 8 hereof.

## **7.6 Orders as to costs and recipients of fines**

### **7.6.1 General**

The finding made in Chapter 6 hereof to the effect that in Malawi's current socioeconomic state the criminal sanction has no viable alternatives with the exception of administrative measures, raises the concern that Government may not have sufficient financial resources to service its duties in this respect. This concern is particularly pointed when it is remembered that in criminal trials there are generally no orders as to costs and that when fines are ordered, they are invariably paid into the general fiscus to which environmental enforcement departments have no easy access. There is need to reconsider the law in these areas with a view to lightening the State's financial burden.



### 7.6.2 Costs

As a starting point it may be recalled that the Protection of Animals Act 16 of 1944 (“PAA”) makes provision for the payment of costs by the convict. The PAA states that in all cases of a conviction for an offence under the Act, the court may order the convict to pay all or any part of the costs and expenses of his prosecution.<sup>207</sup> The court may order the whole or a portion of the costs and expenses recovered from the convict to be paid to the prosecutor or complainant.<sup>208</sup> It is arguable that the term ‘prosecutor’ encompasses both a public prosecutor and a private prosecutor.<sup>209</sup> In the case of the former, he cannot receive the costs on his own account since the costs incurred in the prosecution are borne by the State. He is under a fiduciary duty to hand over the awarded costs to the State. Although this contention may readily be accepted, it is suggested that for the avoidance of doubt the State’s entitlement to the costs should be stated expressly. Apart from this, the operation of the PAA costs clause is limited to criminal trials in that statute and so it is not of much use in other environmental offences. For the State (and possibly in future, private prosecutors) to access the costs more widely, there is need to have a generally applying costs clause. The right location for such a clause is the EMA. The clause may be partly modelled on section 11 of the PAA and section 34(4) of South Africa’s National Environmental Management Act 107 of 1998.<sup>210</sup>

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<sup>207</sup> Section 11(1) of the PAA.

<sup>208</sup> Section 11(2) of the PAA.

<sup>209</sup> Under section 82 of the Criminal Procedure and Evidence Code it is provided that a private person may be given permission to conduct the prosecution of a crime. He may do so personally or through counsel. So reference in the text to a private prosecutor means the complainant or any other person prosecuting and not necessarily the lawyer representing him or her.

<sup>210</sup> Section 34(4) of South Africa’s National Environmental Management Act 107 of 1998 provides: ‘Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence.’

### 7.6.3 Recipients of fines

Again the PAA provides a starting point as it makes provision for the awarding of a portion of the fines paid under the Act to a private prosecutor or some other person. It states that where in any proceedings under the Act any fine is imposed, the court may award any sum or sums not exceeding half the total fine to the person, not being a police officer, who complained and prosecuted or to some other person or society as the court thinks fit.<sup>211</sup> It may be observed that this section impliedly includes the State in the receiving of fines, but the fines are payable into the Consolidated Fund.<sup>212</sup> The result is that the fines cannot easily be used for environmental purposes by environmental departments or relevant public bodies. It may further be noted that the fines may be awarded to some other person or society in the discretion of the court. There is no requirement that such person or society must have participated in the prosecution of the offender or done anything in relation to the offence. The wide province of this provision does not seem to be justified, especially where the award of the fine does not operate as compensation for injury or harm sustained and arising from the offence.

It is suggested that a general clause be included in the EMA providing for the direct payment of all the fines from environmental criminal proceedings to government departments or public bodies responsible for environmental matters. Actually some departments administering certain environmental statutes are mandated to operate Funds, for instance the Fisheries Fund.<sup>213</sup> The fines may be paid into such Funds where this is possible.<sup>214</sup>

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<sup>211</sup> Section 12 of the PAA.

<sup>212</sup> Section 172 of the Constitution states that all revenues or other moneys raised or received for the purposes of the Government shall, subject to the Constitution and any Act of Parliament, be paid into and form one fund to be known as the Consolidated Fund.

<sup>213</sup> Established under section 22 of the Fisheries Conservation and Management Act 25 of 1997.

<sup>214</sup> Some of the statutes creating the Funds specify the sources of the money to be put in them. It is clear that some statutes do not envisage fines as a possible source: see, for example, the Forest Development and Management Fund established under section 55 of the Forestry Act 11 of 1997.

## 7.7 Appraisal

As the primary tool for achieving environmental protection in Malawi, the criminal law needs to be reformed in certain respects. In this light corporate criminal liability must be reformed in order to make available additional bases upon which corporate offenders may be made answerable for their activities. Sentencing must also be reformed in order to prescribe more effective punishments. Further, the use of strict criminal liability should be discouraged: instead there should be wider use of negligence as the fault element and wider use of the due diligence defence. With regard to vicarious criminal liability, it is suggested that it may be retained as long as an element of fault on the part of an employer or principal is introduced or the defence of due diligence is made available to the employer or principal. Alternatively vicarious criminal liability may be abrogated in favour of primary criminal liability. Finally, it is imperative that provision be made for the award of costs after successful prosecution of environmental offenders and for the payment of fines to government departments or public bodies responsible for environmental protection.

# CHAPTER 8

## CONCLUSION

### 8.1 General

Many arguments relating to environmental protection in Malawi have been advanced in the preceding chapters. A number of general proposals for reforming the law have also been made. In the present chapter the main arguments will be summarized. Thereafter specific draft legislative proposals will be set out. These will be followed by a few concluding remarks.

### 8.2 Main arguments in a Nutshell

The magnitude of environmental degradation in Malawi suggests that environmental law has not been effective. While inadequate enforcement of the law is certainly a significant cause of ineffectiveness, it has been demonstrated that the other cause is the current normative state of the law. Malawi uses three traditional legal tools for achieving environmental protection: the criminal sanction, administrative measures and civil measures. An examination of the current environmental laws reveals that the criminal sanction is the primary tool prescribed in Malawian environmental circles.

From a stage when the purposes of the criminal sanction were reconciliation of the parties to a dispute and the disciplining of the recalcitrant party, the criminal sanction has evolved to the current stage when its purposes are retributive and utilitarian. In the context of environmental protection the most acceptable aspect of retribution is just deserts, especially the notion of proportionality: a person who commits a serious environmental crime must be punished severely whereas a person who transgresses a minor environmental regulation ought to be punished less severely. Further, an attempt to commit an environmental crime must be visited by a more lenient sentence than the

commission of the full offence. Thus retribution provides a theoretical framework for environmental crime to the extent that it ensures proportionality between punishment and moral blameworthiness and between punishment and the harm done. With regard to utilitarianism, deterrence, prevention (incapacitation) and reinforcement may be regarded as legitimate purposes of the criminal sanction in environmental law. Since environmental law seeks to protect the environment, criminal sanctions are acceptable in environmental law if they advance that objective. The theories of deterrence, prevention (incapacitation) and reinforcement are in line with the goals of environmental protection and so they may readily be welcomed as forming part of the necessary conceptual framework for environmental criminal sanctions. Reformation lies on the verge of acceptability and does not seem to lay a significant claim to the status of being a purpose of the criminal sanction in environmental protection.

In the current stage of the criminal sanction its operation is affected greatly by the Bill of Rights in Malawi's Constitution. One environmentally significant way in which this happens concerns the rights of arrested, detained and accused persons. These rights deal with the procedure before, during and after trial and the fairness of the criminal trial itself. In many environmental statutes are found presumptions that infringe the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial. Whether these presumptions can escape being declared constitutionally invalid is a matter on which Malawian jurisprudence is lacking. It is suggested that in dealing with these presumptions, Malawian courts should lean towards saving them. In particular, it is contended that the evidentiary or factual presumption doesn't violate the accused person's right to be presumed innocent since it does not shift the burden of proof. Although it infringes the accused's right to remain silent and not to testify during trial, such infringement may be justified under the limitations clause in appropriate circumstances, for instance where in the majority of cases the presumed fact is peculiarly within the knowledge of the accused and not the State. Similarly an irrebuttable presumption should be saved from unconstitutionality because it is a rule of substantive law and not a rule of evidence and so cannot result in the conviction of an accused person despite a reasonable doubt as to his guilt in relation to an element of an offence. Thus an

irrebuttable presumption does not infringe the accused person's right to be presumed innocent. In addition an irrebuttable presumption does not violate the accused person's right to remain silent and not to testify during trial since the prosecution shoulders the onus to prove all the elements of the offence throughout. With regard to reverse onus presumptions, it is suggested that even though they transgress the presumption of innocence and the right to silence, environmental statutory provisions containing them should not be declared unconstitutional outright but should be examined carefully with a view to saving them as much as possible in the interest of achieving environmental protection. It is necessary to do so because the urgency of stemming the tide of environmental degradation in Malawi demands a paradigm shift and a more favorable stance in the way the courts handle issues pertaining to the environment.

Further, it has been contended that environmental statutes which allow the giving of expert evidence (e.g. scientific evidence) by way of certificate or report do not violate the accused's right to challenge evidence on two grounds. In the first place, the accused person may avail himself of the provisions of the Criminal Procedure and Evidence Code under which the author of the certificate or report may be brought to court and cross-examined: in this way the accused's right to challenge evidence is guaranteed. In the second place, even in the absence of cross-examination, the certificate or report may be received in evidence constitutionally on the basis that the apparent infringement of the right to challenge evidence is a justifiable limitation under the Constitution especially where the evidence allowed by the impugned statutory provision was generally of a formal non-contentious nature. Allowing such evidence to be adduced by way of certificate or report is not only meaningful but it is also essential to the proper administration of justice in Malawi.

As stated above, an analysis of Malawi's environmental statutes shows that the criminal sanction is prescribed more often than any other sanction. Actually the number of statutory provisions devoted to criminal sanctions in the enforcement of environmental law is not matched by any other sanction. This reliance on the criminal sanction is expressed in two modes: criminal penalties are applied as a primary sanction and they are

also applied as a subsidiary or supporting sanction. However, some of the criminal offences have not been articulated clearly and others conflict with constitutional provisions in a non-defensible way. Unclear articulation will undoubtedly lead to difficulties in the process of interpretation. Conflicting with constitutional provisions will lead to invalidity of the inconsistent parts of the offences. In order to cure these defects legislative amendments will be set out in segment 8.3 below.

On a more general level the prescribed criminal sanctions have weaknesses. Firstly, their use is costly in terms of money, manpower and time. Secondly, environmental crimes may sometimes be complex, requiring specialized knowledge which in Malawi is not generally available due to insufficient specialized officials. Thirdly, the criminal law standard of proof – proof beyond reasonable doubt – is difficult to achieve. To this may be added the related difficulty of complying with the due process of law required in criminal proceedings. Further criminal sanctions may not stop an on-going environmentally prejudicial activity. In addition, policing of prohibited activities is inadequate due to resource constraints, consequently the chances of offenders being caught are minimal. When these weaknesses are weighed against the criminal sanction's strengths (its stigmatizing quality, its being the only adequate remedy in serious offences and its familiarity), it is clear that the criminal sanction has more weaknesses than strengths. This scenario has led many scholars to conclude that criminal sanctions are not appropriate for crimes of all sorts. They suggest that criminal sanctions should be reserved for serious offences and that other measures should be used for less serious offences. While this suggestion certainly has merit especially in respect of First World and Second World countries, the practical realities in Malawi as a Third World country urge a different approach. These practical realities relate to the availability of alternatives to the criminal sanction in Malawi.

The literature suggests that alternatives to the criminal sanctions include self-regulatory instruments (self-regulation), co-regulatory instruments (co-regulation), information-based instruments, market-based instruments (economic instruments), administrative measures and civil measures. An analysis of these alternatives reveals that self-

regulation, co-regulation, most information-based instruments, most market-based mechanisms and most civil measures are not viable alternatives to the criminal sanction in Malawi at present. It is only administrative measures which have great scope for operation as a reliably practical alternative. In these circumstances, it is unsafe to recommend that the criminal sanction be reserved for serious crimes and that the other crimes be addressed by alternatives to the criminal sanction. Such a suggestion is impossible on account of the fact that the alternatives are largely unavailable in practical terms in Malawi. It is submitted that in the case of Malawi a different – but related – approach be taken. In this approach reliance on the criminal sanction will inevitably continue, only that there should be more use of administrative measures. Specifically minor offences should attract administrative penalties instead of criminal sanctions. Such an approach is likely to make the business of environmental protection more efficient and more cost effective in terms of money, manpower and time in Malawi's current socioeconomic state.

It is not suggested that the criminal sanction should be used in serious crimes entirely in the way it has been used up to this stage. There is need to attend to several aspects of the criminal sanction with a view to improving its performance. In this light it is recommended that use of strict criminal liability should be discouraged; instead there should be wider use of negligence as the fault element and wider use of the due diligence defence. Similarly, use of vicarious criminal liability should be discouraged: it should only be used where an element of fault on the part of the employer or principal is introduced or where the due diligence defence is made available to the employer or principal. Alternatively primary liability should be imposed on the employer or principal.

With regard to corporate criminal liability, it must be reformed in order to make available additional bases upon which corporate offenders may be made answerable for their activities. The identification doctrine – the principal basis of corporate criminal liability – is narrow in its scope: it leaves out of its reach the actions and states of mind of most of the personnel in a corporation. Secondly, the doctrine makes it difficult to establish corporate criminal liability against large companies. Thirdly, the doctrine is ill-adapted to



generate convictions against companies for some crimes. Fourthly, the doctrine ignores the reality of corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions. Fifthly, it is not an easy task to determine who in a particular corporation qualifies as 'brains' or 'hands.' Sixthly, it fails to identify what exactly it is that the company has done wrong to merit being subjected to criminal sanctions, thereby offending the fundamental principle of *nulla poena sine culpa*. Finally, the doctrine fails to capture the full extent of the corporation's wrongdoing.

In recent years courts have used vicarious criminal liability to attach liability to a corporation, but they have done so on a comparatively minimal level. Even with this development, it is argued that the current bases for corporate criminal liability (identification doctrine and vicarious criminal liability) do not suffice for the purpose of environmental criminal liability on the part of the corporation in Malawi. It is suggested that new bases be adopted: in particular, aspects of the aggregation theory of attaching criminal liability be used and a considerable measure of organizational models of corporate criminal liability be incorporated.

Sentencing must also be reformed in order to prescribe effective punishments. The fines prescribed in many environmental statutes are low. Although some of them are upgraded or updated through the operation of the EMA's superiority clause, the scope of operation of that clause is narrow. The upgrading of fines in environmental statutes may, therefore, not be left to the operation of the EMA's superiority clause. It is recommended that the fines in all environmental statutes should be amended to reflect current trends as set by the EMA.

It is further suggested that the Malawi version of probation be reformed in at least four respects. Firstly, the requirement that a court can impose probation only where the offender consents, must be removed in order to allow the use of probation in all appropriate cases. Secondly, probation should be regarded as a criminal sanction in its own right. Thirdly, probation officers in environmental offences should be environmental experts drawn from government circles or the private sector, but if drawn from the

private sector, they should be paid by the government and in turn the government should recover such payments from the offender in order to stimulate professionalism by obviating bias in favour of the offender especially where the offender is a corporation. Finally, the legislative obsession with natural persons as offenders should be done away with. The legislation should expressly acknowledge the corporation as an offender and as a candidate for the sanction of probation especially in environmental crime.

In addition it is recommended that Malawi adopt two new punishments in order to beef up the current sanction weaponry. The new punishments are reparation orders and disqualification from government contracts.

Finally, it is recommended that there be legislative provision for a court to make orders as to costs in appropriate criminal trials relating to the environment and to make orders directing the payment of fines (paid into court) to government departments or public bodies responsible for environmental protection. These provisions (especially the orders as to costs) are likely to go some way in providing financial resources to the government departments or public bodies and so lightening the State's financial burden.

### **8.3 Specific Legislative Proposals for Reform**

#### **8.3.1 General**

The draft statutory proposals for reform set out below are limited to those that are likely to effect wide-ranging fundamental change of the law. For this reason, only suggested changes to the EMA are dealt with at this stage. Suggested amendments to other environmental statutes are laid out in Chapters 4 and 5<sup>1</sup> and it has not been felt necessary to repeat these amendments.

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<sup>1</sup> See, for instance, segments 4.2.3, 4.2.7, 4.3.8, 4.3.9, 4.3.10, 4.3.12, 4.3.19, 4.3.32, 4.3.35, 4.3.36, 4.3.37, 4.3.38, 5.2.2, 5.2.5, 5.2.12, 5.2.13, 5.4.2, 5.4.5, 5.4.9, 5.7.2, 5.10.3 and 5.14.6.

It must be pointed out that the proposed reforms set out below are meant to be a starting point of the overhaul of the law in this area. In this regard, it will be noted that some of the reforms are based on the legislation of other countries, for example South Africa and Australia. Although some of this legislation has been criticised or has scope for criticism, it is submitted that this fact does not entirely disqualify the legislation from being used as initial precedents for Malawi. In any case the criticisms would not necessarily apply to the proposals below because the proposals are not direct transplants: the foreign legislation has been modified in order to suit the Malawi scenario.

For convenience of presentation suggested side-notes are not typed in the margins; instead they appear as the first words of a particular provision. Normally Malawian statutes have side-notes in the margin of particular provisions. All proposed provisions are indented and set in Univers font. Where necessary the proposals are followed by a brief commentary.

### **8.3.2 Proposed Statutory Clauses**

It is proposed that a new Part containing relevant provisions on corporate criminal liability be inserted in the EMA. This Part should largely be based on Part 2.5 of the Australian Criminal Code Act 12 of 1995. It is suggested that the new Part be numbered 'Part XIII.' The current Part XIII should be renumbered 'Part XIV', its title should be changed to 'General Compliance and Enforcement' and sections 76 and 77 should be renumbered 86 and 87 respectively. It is further suggested that the current section 75 should be modified, renumbered 80 and put under the new 'Part XIII'. After effecting these and other changes, the EMA will read as follows from section 75 onwards:

#### PART XIII—CORPORATE CRIMINAL RESPONSIBILITY

##### 75. Interpretation

In this Part:

“board of directors” means the body (by whatever name called) exercising the executive authority of the body corporate.

“corporate culture” means a formal or informal attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

“high managerial agent” means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

## 76. General principles

(1) All written criminal laws on the protection and management of the environment or the conservation and sustainable utilization of natural resources apply to bodies corporate in the same way as they apply to individuals. They so apply with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment: provided that where the offence is punishable by imprisonment only, the court may, instead of imprisonment, impose a fine of not more than K2 000 000.

## 77. Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

## 78. Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body

corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Subsection (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of subsection (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

## 79. Negligence

(1) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(2) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

## 80. Liability of controlling officers

(1) Where an offence under this Act, or any other written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources, is committed by a body corporate or a partnership—

(a) in the case of the body corporate, every director, manager or similar officer of the body corporate shall be guilty of the offence; and

(b) in the case of a partnership, every partner shall jointly and severally be guilty of the offence.

(2) A person shall not be guilty of an offence under subsection (1), if he proves to the satisfaction of the court that the act constituting the offence was done without his knowledge, consent or connivance and that he did his part to prevent the commission of the offence having regard to all the circumstances of the case.

*Commentary:* The justification for introducing the foregoing provisions on corporate criminal liability has been set out in segment 7.4 in Chapter 7 hereof. The phrase ‘the protection and management of the environment or the conservation and sustainable utilization of natural resources’ is commonly used in the EMA and it is used in these legislative proposals for the sake of consistency of language in the Act.

## PART XIV–GENERAL COMPLIANCE AND ENFORCEMENT

### 81. Sentencing in environmental offences

(1) A court may impose any of the following punishments in respect of offences created under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources:

- (a) Imprisonment;
- (b) Fine;
- (c) Compensation;
- (d) Forfeiture;
- (e) Suspension or revocation of authorisations;
- (f) Probation;
- (g) Reparation; or
- (h) Disqualification from government contracts.

(2) Nothing in subsection (1) shall prevent a court from imposing any other penalty prescribed by any written law: Provided that the court may in its discretion impose any of the punishments specified in subsection (1) in addition to or in substitution for that other penalty.

(3) Whenever any person is convicted of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court

may order the award of damages or compensation or a fine equal to the amount so assessed.

(4) Any person convicted of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources, and who after such conviction persists in the act or omission which constituted such offence, shall be liable to a fine not exceeding K20 000 or to imprisonment for a period not exceeding 30 days or to both such fine and such imprisonment in respect of every day on which such act or omission continues.

(5) Whenever any person is convicted of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources and it appears that such person has by that offence caused loss or damage to the State or any lead agency or other person, including the cost incurred or likely to be incurred by the State or lead agency in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the State or lead agency or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

(6) Upon proof of the amount referred to in subsection (5), the court may give judgment therefor in favour of the State or lead agency or other person concerned against the convicted person, and such judgment shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

(7) A court convicting any person of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources may declare to be forfeited to the State:



(a) any vehicle or other thing by means whereof the offence concerned was committed or which was used in the commission of such offence, or the rights of the convicted person to such vehicle or other thing; and

(b) any natural resource or other thing obtained from or in the commission of such offence.

(8) A declaration of forfeiture under subsection (7)(a) shall not affect the rights which any person other than the convicted person may have to the vehicle or other thing concerned, if it is proved that he did not know that the vehicle or other thing was used or would be used for the purpose of or in connection with the commission of the offence concerned or that he could not prevent such use.

(9) If any person holding a licence, permit or other authorisation issued under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources is convicted of an offence which involves the licence, permit or other authorisation, the court may:

(a) suspend the operation of such licence, permit or other authorisation for a period of up to three years from the date of conviction; or

(b) revoke such licence, permit or other authorisation.

(10) When imposing probation under subsection (1) –

(a) the court shall not seek the consent of the offender to be put under probation;

(b) the court shall impose conditions that advance the protection and management of the environment or the conservation and sustainable utilization of natural resources;

(c) the court shall appoint suitably qualified persons from the public sector or private sector to serve as probation officers, provided that where a probation officer is appointed from the private sector, he shall be remunerated for his services by the Government; provided further that the Government may recover such remuneration from the offender where it is just and reasonable to do so.

(11) Whenever any person is convicted of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources, the court may order that any damage

to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the State or a lead agency.

(12) If within a period of 30 days after a conviction or such longer period as the court may determine at the time of the conviction, the reparation order made in terms of subsection (11) has not been complied with, the State or a lead agency may take the necessary steps to repair the damage and recover in full the expenses incurred in taking such steps from the person so convicted, and if the expenses remain unpaid for a period of more than 30 days from the date of first demand in writing, the amount in respect of the expenses shall be recoverable as a civil debt.

*Commentary:* This long provision is meant to make certain penalties generally available in environmental criminal proceedings, to fine-tune some of these penalties, to introduce new penalties and to obviate the need for commencing separate civil proceedings for the recovery of damages associated with loss or damage incurred or for the recovery of the costs associated with rehabilitating the environment or preventing damage to the environment. The doing away with separate civil proceedings will assist in cutting the costs of enforcement and is particularly attractive in Malawi's current Third World status. The removal of any advantage gained or likely to be gained from the offence – provided for in subsection (3) – arguably sends a message to the offender that environmental crime does not pay. Subsection (1) follows the format of section 25 of the Penal Code. Subsections (5), (6) and (3) are largely based on sections 34(1), 34(2) and 34(3) of South Africa's National Environmental Management Act 107 of 1998 respectively.

It must be noted that the term 'lead agency' is currently used in the EMA. According to section 2 of the EMA it means 'any public office or organization including every Ministry or Government department which is conferred by any written law with powers and functions for the protection and management of any segment of the environment and the conservation and sustainable utilization of natural resources of Malawi.'

Subsections 11 and 12 address the issue of reparation orders. The need for such orders was expounded in segment 7.5.3.2 in Chapter 7 hereof. Subsection 12 aligns the recovery of default reparation expenses with a similar remedy provided for under section 34 of the EMA. Subsections (4), (11) and (12) are based on sections 29(6), 30(1) and 30(2) of South Africa's Environment Conservation Act 73 of 1989. Subsection (9) is based on section 116 of the National Parks and Wildlife Act 11 of 1992 and section 49 of the Fisheries Conservation and Management Act 25 of 1997.

#### 82. Orders as to Costs in Criminal Proceedings

Whenever any person is convicted of an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources, the court convicting such person may order such person to pay the reasonable costs and expenses incurred by a private prosecutor, the State and/or any lead agency in the investigation and prosecution of the offence, and such costs and expenses shall be paid to the private prosecutor, the State and/or the lead agency, as the case may be.

*Commentary:* This clause is based on section 34(4) of South Africa's National Environmental Management Act 107 of 1998. The rationale behind it is to lighten the State's financial burden in prosecuting environmental offenders.

#### 83. Payment of Fines

All fines paid in respect of offences under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources shall be paid to lead agencies responsible for the protection and management of the environment or the conservation and sustainable utilization of natural resources.

*Commentary:* The purpose of the above provision is to provide lead agencies with easier access to the financial resources they need for carrying out their environmental duties which include enforcement endeavours.

#### 84. Administrative Penalty

(1) Where the Director or any responsible public officer has reasonable grounds to believe that:

(a) an offence under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources has been committed by any person;

(b) the offence is of a minor nature; and

(c) having regard to the previous conduct of the person concerned and to the dictates of environmental protection, it would be appropriate to impose an administrative penalty under this section,

he may cause a notice in writing, in accordance with subsection (2), to be served on that person.

(2) A notice under subsection (1) shall specify:

(a) the nature of the offence and the date of its commission;

(b) a summary of the facts upon which the allegation that an offence has been committed is based; and

(c) any other matter that the Director or responsible public officer considers relevant to the imposition of a penalty,

and shall be endorsed with a statement setting out the provisions of this section.

(3) Any person on whom a notice under subsection (1) is served may, within thirty days after such service, by notice in writing to the Director or responsible public officer require that the proceedings in respect of the alleged offence be dealt with by the court or admit the offence or appeal to the Tribunal against the allegation that he has committed an offence.

(4) Where, pursuant to subsection (3), a person opts to have the alleged offence dealt with by a court:

(a) no further proceedings shall be taken under this section by the Director or responsible public officer; and

(b) nothing in this section shall be construed as preventing proceedings in respect of the alleged offence to be dealt with by the court or as preventing the imposition by the court of any penalty upon conviction in such proceedings.

(5) Where, pursuant to subsection (3), a person opts to admit the offence, he may, by notice in writing to the Director or responsible public officer:

(a) admit the offence; and

(b) make submissions to the Director or responsible public officer as to the matters he wishes the Director or responsible public officer to take into account in imposing any penalty under this section.

(6) Where a person on whom a notice under subsection (1) is served does not, within thirty days after the notice is served on him:

(a) require that proceedings in respect of the alleged offence be dealt with by the court; or

(b) admit the offence; or

(c) appeal to the Tribunal against the allegation that he has committed an offence,

he shall, on the expiration of that period, be presumed to have admitted the offence.

(7) Where pursuant to this section a person admits or is presumed to have admitted an offence, the Director or responsible public officer may, after taking into account any submissions by the person under subsection (5), impose a monetary penalty on the person in respect of the offence not exceeding two-thirds of the maximum penalty to which the person would be liable if he were convicted of the offence by the court.

(8) Where the Director or responsible public officer imposes a penalty on a person under this section in respect of an offence, the Director or responsible public officer shall serve that person with a notice in writing of the particulars of the penalty and place where the penalty should be paid.

(9) A person on whom a penalty is imposed under this section shall pay the penalty within thirty days after the notice of the penalty is served on him in accordance with subsection (8) and the penalty shall be paid into the Fund or into any other relevant Fund established under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources or to any relevant lead agency.

(10) A person on whom a penalty is imposed under this section may appeal to the Tribunal against the penalty imposed within thirty days after the notice of the penalty is served on him in accordance with subsection (8).

(11) Without prejudice to the requirements of subsection (9), a penalty imposed under this section shall be recoverable by the Government from the person on whom it has been imposed in the same manner as a fine is recoverable on conviction of an offence.

(12) Where an offence has been admitted or is presumed to have been admitted under this section, no criminal charge may be laid in respect of the offence against the person who has admitted or is presumed to have admitted the offence.

*Commentary:* The foregoing long-winded section is a transplant from the Fisheries Conservation and Management Act 25 of 1997 (section 50). It has been slightly modified to cater for situations in all environmental statutes where administrative penalties are necessary. The need for this provision arises from the fact that administrative penalties are the only reliably practical alternative remedies in Malawi's present socioeconomic state as demonstrated in Chapter 6 hereof.

The Tribunal referred to in this section is the Environmental Appeals Tribunal established under section 69 of the EMA. Under its current jurisdiction the Tribunal cannot hear appeals against any decision or action of any person other than the Minister, Director or inspector under the EMA. For the suggested appeals to be legally possible, there is need to extend the categories of decision makers. So section 69(a) of the EMA must be

amended by deleting the words after 'Director' and replacing them with the words 'or any other responsible public officer under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources.' After effecting this amendment, section 69(a) will read as follows: 'consider appeals against any decision or action of the Minister, Director or any other responsible public officer under any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources.'

#### 85. Legal standing to enforce environmental laws

(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources –

(a) in that person's or group of persons' own interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment.

(2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of any written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

(3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of any written law on the

protection and management of the environment or the conservation and sustainable utilization of natural resources, a court may on application –

(a) award costs on an appropriate scale to any person or persons entitled to practise as a legal practitioner in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and

(b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.

*Commentary:* It is proposed that the above provision should be introduced in the EMA with a view to alleviate the locus standi barrier environmental litigants face and are likely to face in environmental litigation. More on this has been stated in segment 6.6.4 in Chapter 6 hereof. As indicated in that segment the above provision is based on section 32 of South Africa's National Environmental Management Act 107 of 1998.

#### 86. Closure of premises

(1) Where the Director believes, on reasonable grounds, that this Act or any regulations made thereunder, has or have been contravened, the Director may, subject to subsection (2), order the closure of any premises by means of, or in relation to which the Director reasonably believes the contravention was committed.

(2) The closure of any premises shall cease after the provisions of this Act or any regulations made thereunder have, in the opinion of the Director, been complied with, unless before that time court proceedings have been instituted in respect of the contravention, in which event the premises shall remain closed until the proceedings are finally concluded.

*Commentary:* This section and the one below are the sections currently numbered 76 and 77 in the EMA. They have not been modified.



## 87. Regulations

The Minister may make regulations for the better carrying out of the purposes of this Act.

### **8.4 Concluding Observations**

Although Malawi has a considerable body of environmental law, many aspects of it are defective. It is tempting to think that rectification of these defects will automatically translate into enhanced environmental protection, but this is arguably not so. While rectification of the defects will certainly contribute towards enhanced environmental protection, it is acknowledged that enforcement is a necessary partner in this enterprise. For this reason, what the present study has striven to achieve is modest, namely, to clarify the normative state of environmental law in Malawi (with emphasis on the criminal sanction) so that when the enforcement official or agent goes about his business, he should face less obstacles than before. It is hoped that this modest contribution will go some way in safeguarding Malawi's environment for present and future generations.

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