



POLICY BRIEF

Enhancing Access to Environmental Information and Justice

1.0 Introduction

The Constitution of the Republic of Malawi provides every person the right to access information held by the state or any of its organs if such information is necessary for the exercise of his rights (Section 37). This provision therefore limits the right to access information only as held by a state and only if such information is necessary for the exercise of the person seeking information. Information held by a private entity is not covered by this provision. The only way a private entity can be compelled to disclose information would be legal action where a court may order discovery of documents held by a party to an action. A person may however require information even where litigation is not commenced or contemplated, hence this limitation in case of private entities may adversely affect such persons.

On the other hand, the constitutional provision does not provide the mechanisms for enforcing the right of access to information. There is therefore need for legislation to provide detailed provisions expanding the right of access to information under the Constitution and providing the procedural guidelines to facilitate access to information. A draft Access to Information Bill has been prepared and sponsored by a media association. This bill provides for the right of access to information, the obligation of those required to provide access, the procedural guidelines and the institutional framework for implementing and enforcing the right of access to information.

The above instruments seek to enhance access to information in general. However, it is important to note that different sectors of the economy gather; process; store; and facilitate access in different ways. This calls for sectoral coordination of the right of access to information. In this respect access to environmental information needs specialized consideration. Agenda 21 recognized this right as crucial for sustainable development as it ensures maximum participation of the public in the management of the environment and sustainable utilization of natural resources. The National Environmental Policy (2004) provided the policy thrust for implementing this right; subsequently a revision of the Environment Management Act 1996 was commissioned to provide, *inter alia*, for access to environmental information including the procedural guidelines and institutional framework for implementing this right.

The Malawi Constitution further expressly provides for the right of access to justice under section 41 and provides for the right to an effective remedy. Considering the situation of the general courts and the special nature of environmental disputes, the Environment Management Act provides for a separate complaints procedure and a fairly flexible *locus standi* provision to ensure that the right to a clean environment under the Act is readily enforceable. In addition the Act provides for an Environmental Appeals Tribunal, though this has not seen the light of day up to now. The revised

Environmental Management Bill has provided for the establishment of a mechanism for promoting access to environmental justice. It proposes the setting up an Environmental Tribunal to facilitate the implementation and enforcement of the right to a clean and healthy environment.

This policy brief reviews the current drafts of the Access to Information Bill and the Environmental Management Bill to determine the manner in which they address the access principles as well as mechanisms for improving access to environmental information and justice as well as public participation in general. The brief will be used to engage policy makers and other stakeholders involved in enactment of these draft bills and monitoring compliance to the legislation.

2.0 Access to Environmental Information

2.1 Draft Access to Information Bill

This Bill has been in draft for some 5 or so years and is being sponsored by an association of journalists in Malawi. The draft bill defines information on any material which communicates facts, opinions, data or any other matter regardless of its form or characteristics. The Bill gives every person the right of access to information which is under the control of a public authority. In addition, the Bill imposes an obligation on every public authority to make available to the general public or on request to any person information which is under its control as well as access to its meetings and places where the information may be accessed.



A vendor in Blantyre selling newspapers

The definition of public authority covers any government entity and includes private bodies carrying out public functions and organizations in receipt of public funds or those contracted by Government to carry out government services. The definition is wide enough to cover many institutions handling information to which the public may have an interest. It is clear however that information in the hands of private bodies not discharging public functions or not contracted to undertake public services would be outside the reach of this Bill.

Hence information relating to pollution or other omissions by industry would not be covered by this Act. An interested person would have to obtain such information through discovery, normally after commencement of legal proceedings. Yet information may be required without any contemplated litigation.

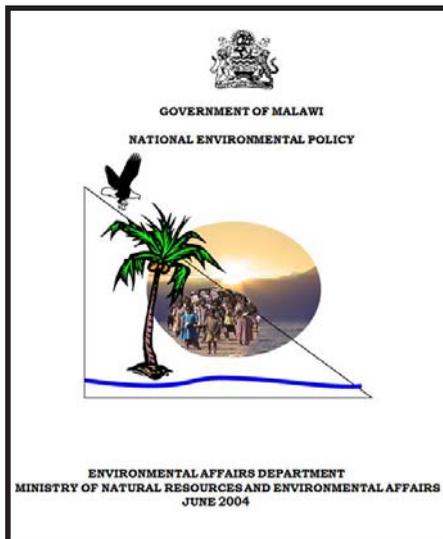
The Bill provides a comprehensive procedure for necessary information held by public authorities and establishes the requisite institutional framework to facilitate access to information by members of the general public. The process for accessing information held by public authorities includes the request to the head of the public authority or other authorized person either orally or in writing. A public authority is required to respond within 15 days whether the information exists or whether access thereto will be given. The Bill further stipulates the forms in which the information may be provided by a public authority including providing a copy in the form acceptable to the applicant, the language in which the applicant understands; opportunity to inspect the record containing the information; and in case of a person with a sensory disability, by providing a record in a form that allows the applicant to read or listen. An applicant may elect to request information through the Commission proposed under the Bill. The Commission can therefore act as a conduit for accessing information; in addition the Commission has mandate to review decisions of public authorities relating to access to information. The Commission has wide jurisdiction to facilitate access to information through providing general directions to members of the general public, undertaking investigations relating to applications for review of decisions of public authorities.

The Access to Information Bill therefore provides a more comprehensive framework for facilitating access to information, including access to environmental information. The Bill reinforces the provisions of the Environment Management Bill by providing institutional and procedural guides to enable members of the general public to access to information. However the Environment Management Bill should further strengthen its own institutional and procedural framework to ensure that the specialized environmental information is packaged and made accessible to those who need it.

2.2 National Environmental Policy

Cabinet approved a National Environmental Policy (NEP) in June 2004, replacing the National Environmental Policy 1996. The NEP 2004 Policy, *inter alia*, mandated the drafting of a law to provide for:

- A fundamental right to an environment suitable for the health and well being of the people of Malawi;
- Access to environmental information, environmental justice and effective public participation in environmental decision making; and
- Encouraging maximum participation of individuals, communities and the private sector in the development of policies, laws and plans for management of the environment.



The National Environmental Policy

Section 4.3 addressing planning makes a provision for environmental impact assessments and statements to be made public. This allows for public commenting and taking such comments into consideration.

Then too, section 4.5 of the NEP specifically deals with environmental education and public awareness. The objective is to increase public and political awareness and understanding of the need for sustainable environmental protection, conservation and management. In addition, one of the objectives of section 4.6 is to involve local communities in environmental planning and actions at all levels and empower them to protect, conserve and sustainably manage and utilize the nation's natural resources.

The Environment Management Act 1996 which put the NEP 1996 into law did not provide for the right of access to information. The adoption of the NEP 2004 therefore necessitated the revision of the Environment Management Act 1996 so as to provide, *inter alia*, the right of access to environmental information, justice and public participation.

2.3. Draft Environmental Management Bill

Section 3 of the draft Environmental Management Bill (2006) imposes a duty on every person or public authority, non governmental organization or the private sector to take measures to protect and manage the environment and to promote sustainable utilization of natural resources such measures include:

- Promoting a clean and healthy environment; and
- Promoting public awareness and participation in the formulation and implementation of environment and conservation policies of the Government.

In addition, section 4 seeks to expand the standing of persons seeking to enforce the right to a clean and healthy environment. It dispenses with the requirement that a person enforcing this right must prove personal harm or injury. The enforcement includes requiring a public authority to prevent or stop acts that are harmful to the environment or to require that any on going project or activity be subject to environmental audit or monitoring; as well as seeking court orders to ensure that the environment does not suffer significant harm.

Furthermore, section 5 specifically addresses the right of access to environmental information as a mechanism for promoting or ensuring effective public participation, enforcement of right and duties created under the Act. The revised Bill imposes a duty on the National Environmental Protection Authority created by the Bill to promote:

- The right of every person to access environmental information held by public authorities, private sector or non governmental organizations;
- The right of every person to participate in environmental decision making processes either directly or through representative bodies; and
- The right of every person to adequate and effective administrative judicial remedies.

In a bid to promote access to information the revised Environmental Management Bill proposes several mechanisms including:

- Requiring the authority to establish guidelines or regulations to regulate access to information; and
- Designating the authority as a repository for all environmental information in Malawi.

Finally the revised Bill prohibits derogation from the right to environmental information unless such derogation is necessary in a free, accountable and democratic society and in accordance with the Constitution of the Republic of Malawi.

3.0 Access to Environmental Justice

In order to improve access to environmental justice, the draft Environmental Management Bill (section 166) proposes the establishment of an Environmental Tribunal (the current Environmental Management Act provides for Environmental Appeals Tribunal). According to section 167, the Tribunal shall consist of a well qualified environmental lawyer; and two other members appointed by the President both of whom shall be sufficiently qualified in the protection and management of the environment and the conservation and sustainable utilization of natural resources.

One of the mandates of the Tribunal is to determine petitions brought by persons complaining of a violation of any right under the Bill and any written law related to environment and natural resources management. These would include:

- Enforcing the right to a clean and healthy environment and the right to access environmental information; and
- Considering the legality of decisions made by public authorities including those relating enforcing the right to access environmental information.



Emissions from Njuli Quarry-Chiradulu

The Environmental Tribunal will enforce the right to a clean and healthy environment as well as the access principles that seek to promote procedural fairness and improve citizen access to mechanisms for an effective remedy.

4.0 Concluding Observations

The Constitution guarantees every person the right of access to information held by the state. Similarly the draft Access to Information Bill outlines detailed provisions for improving access to environmental information including the rights and obligation of the relevant stakeholders, the procedures for granting access, review of decision making and the institutional framework for ensuring that citizens have an accessible channel for accessing information. However both the Constitution and this Bill limit their application to information held by the state or any of its organs. The draft Environment Management Bill seeks to address some of these limitations by expanding the scope of the environmental information that may be accessed to include that held by private entities. The provisions for promoting access to environmental information and justice are adequate; the challenge will be ensuring that an independent authority is established which can make public institutions to respond to requests for environmental information. Nevertheless it is important that the draft Access to Information Bill is enacted as it will compliment the enforcement and implementation of the draft Environment Management Bill. The institution proposed under the Access to Information Bill will focus on enhancing accessing to information and be in a better position to develop guidelines for facilitating access compare to the institution under the Environment Management Bill which will too many other responsibilities, hence limiting its ability to focus on facilitating access to information, albeit environmental information.

In addition, effectiveness on access will depend on the actual mechanisms within the proposed environmental protection authority which will be set up to promote access to environmental information. These will include setting up and managing a comprehensive data base which the public can easily access as well as facilitating other sectoral agencies to provide information tom the public.

Bibliography

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