

*Full Length Research Paper*

# Struggling to weaken the giant: Litigation as a measure to compel the adoption of tobacco control instrument in Malawi

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**The tobacco companies continue to resist the adoption of tobacco control laws in developing countries in spite of the predicted high risk of a tobacco epidemic in those areas. In contrast to previous studies which focused on the developed and middle income countries and concluded that interest groups impact policy making, this study examines the strategy of anti-tobacco interest groups to promote the regulation of tobacco smoke in Malawi using data collected through interviews of experts and review of existing materials on tobacco control. The study finds that the anti-tobacco groups are resorting to litigation to compel their government to enforce environmental provisions stipulated in the Constitution and other legal documents as means of regulating tobacco smoke. Finally, it concludes that litigation for the implementation of legal provisions to protect public health might be the strategy used by interest groups to regulate substances detrimental to public health in developing countries.**

**Key words:** Tobacco smoke, Malawi, constitutional provisions, interest groups, policy adoption, litigation, tobacco control.

## INTRODUCTION

Almost all countries have some form of tobacco control instruments because of research evidence indicating that the adoption of effective tobacco control instruments can curtail tobacco health hazards (WCTOH, 2000; Lopez et al., 1994; Cairney et al., 2012; Owusu-Dabo et al, 2009). For many developing countries, the adoption was inspired by the rise in smoking prevalence rates in the last decade. The high prevalence rates are attributed to the increasing activities of the tobacco companies in the developing countries because of the success of tobacco control campaigns in some developed countries. The success has translated into the adoption of restrictive tobacco instruments and created unfavorable environment for tobacco business in the developed world. Consequently, many tobacco companies have been forced to transfer their activities to the developing countries where there are weak or no tobacco control instruments.

The World Health Organization (2008) observes that middle income countries such as Thailand have witnessed favorable result with tobacco control by adopting effective tobacco control ideas. Therefore, some interest groups are promoting the adoption of some tobacco control ideas that have been tried and found to be effective in controlling tobacco often referred to as *best practices* as domestic laws, with the hope that it will help to curtail the persistent rise in the smoking rate (Asare, 2009; WB, 1999; WCTOH, 2000; Owusu-Dabo et al, 2010; Studlar 2003). However, a country such as Malawi, which relies heavily on tobacco production, has been struggling with efforts to adopt effective tobacco control measures. Tobacco is often referred to as *green gold* in the country because of the reliance of the economy on tobacco leaf production. The tobacco industry employs between 12 to 40% of the workforce and generates over 70% of the foreign earnings (Otaney

et al., 2009). Therefore, the companies use their resources and economically interested affiliates as political power to oppose the adoption of any policy perceived to negatively affect their profit making activities (Mamudu and Glantz, 2009). Some of the affiliated groups are governmental official who are directly involved in the tobacco business (Brenya, 2012).

In spite of the political power of the tobacco companies, recent evidence shows that the anti-tobacco interest groups are resorting to the use of litigation to promote the regulation of tobacco smoke in the country. Scholarly studies have shown that litigations can be an effective means for controlling the activities of the tobacco companies and also to promote tobacco control (Derthick, 2002; Spill et al, 2001). For instance, Studlar (2004a) observes that Australia adopted second hand smoke laws following the outcome of a successful litigation by the affected group and some interest groups. Workers exposed to second hand smoke collaborated with some interest groups to bring a court case against the Tobacco Institute of Australia for publishing a misleading story about second hand smoke and won the case (Chapman and Woodward, 1991). Similarly, Laugusen et al. (2000) argues that litigation against tobacco companies in California, USA has promoted the adoption of tobacco control measures in the state.

This study investigates the strategy of the anti-tobacco groups to use litigation to promote the regulation of tobacco smoke in Malawi. The importance of the study stems from the excessive reliance of the Malawian's economy on tobacco leaf production and the nature of the litigation. Malawi is one of the few countries that has not sign or ratify the Framework Convention on Tobacco Control (FCTC) protocol and has been used by the tobacco industry to make a case for the economic importance of tobacco because of excessive dependence of the economy on tobacco production (Mamudu and Glantz, 2009). In addition, litigation, despite its advocacy, has not been pursued as a tobacco control strategy in the developing countries, especially in Africa. Particularly, the Malawian litigation is interesting because it is targeted at the government to regulate tobacco smoke to indirectly neutralize the political influence of the tobacco companies, which is different from the nature of litigation presented in the tobacco control literature. Therefore, the examination of the Malawian litigation strategy presents an interesting insight to tobacco control. In that regard, the study contributes to the literature of policy process and political science by presenting an interesting strategy of litigation as a policy instrument in Malawi.

## METHODOLOGY

Methodologically, the study uses a triangulation approach that combines the review of secondary research materials and policy documents with the interviews of eight tobacco control experts. The

policy documents are tobacco control directives/voluntary agreements, Constitution, Environmental Act, the documents of interest groups, non-governmental and intergovernmental organizations. The interviewees are leading experts on tobacco control and research on Malawi, who were purposively selected based on their research and involvement in the tobacco control activities of the country. The interviews were conducted between July 2010 and March 2011. In most cases, the initial interviews were done on telephone and followed up with emails for further interviews and cross checking of some information to ensure consistency.

Some of the interviewees also forwarded relevant information as email attachment after the initial interviews. The interviewees are de-identified in the study in compliance with the promise of confidentiality indicated in the letter of the Institutional Review Board of West Virginia University that approved the interview questions before the experts were interviewed. The study uses the interest group theory to analyze data and to draw its conclusion. In using the interest group theory, this study seeks to explain three issues: (1) why the anti-tobacco groups in Malawi see litigation as a good strategy to control tobacco smoke; (2) how the anti-tobacco groups intend to use litigation as a tobacco control strategy; and (3) the possible ramifications of this strategy on other countries in Africa in particular and the developing world in general.

## Interest groups and policy adoption

Generally, interest groups have been described as organized groups and associations who promote the adoption of specific issues of importance as public policy. There is substantial evidence in the literature of the policy process on the role interest groups play in the design, adoption, and implementation of public policy. In fact, the role of interest groups in the policy process clearly posits them as actors who exert excessive influence in the politics of design, adoption and implementation of public policies in a political system. While the members of these groups are mostly well organized and tightly connected, there are some that are related in a looser form of association but are only connected by issues of common interest (Studlar, 2002). Some of the groups focus on the adoption of policy to promote the interest of their members and others champion policy adoption that promotes public good (Asare, 2009). However, the delineation of what is considered the interest of the group and that of public is sometimes difficult, as the groups are known to sway public policy in the direction that satisfies the interest of its members (Ethridge and Handelman, 2004).

The issues promoted by interest groups place them in a specific group, either as farmers associations, medical and health associations, labor unions, religious groups, business organizations, gender, age, ethnic groups, or epistemic communities (Asare, 2009). In some scenario, leaders of traditional institutions also operate as interest group to influence policy making (Brenya and Asare, 2011). Mostly, the interest groups promote their ideas as new policy solutions for addressing certain public problems. The activities of these organized groups create a paradigm shift (Hall, 1993) or a punctuated equilibrium (Baumgartner and Jones, 2003) in the way certain issues are perceived and this leads to the adoption of new policy ideas (Baumgartner and Jones, 2003). Consequently, the interest groups influence and are influenced by governmental institutions and bureaucracies in the policy process (Studlar, 2002).

Asare (2009: 100) observes that the level of influence of interest groups depend on nature of political system and how well the groups are organized. The political system argument focus on the degree of corporatism and how the interest groups are allowed to take part in negotiations and bargaining during the design, adoption

and implementation of public policy. In that regards, the three types identified by scholars are democratic corporatism, corporatism without labor and the least corporatist systems – (Wilensky, 2002; Lijphart, 1999; Asare, 2009). In the democratic corporatism, organized labor/interest groups are allowed to take part in the bargaining process for adopting a public policy alongside the government and management (Wilensky, 2002; Asare, 2009). In the second scenario, the organized labor is partially involved in the political economy, while the least corporatist systems exclude organized labor in the political economy.

The pluralist environment tends to be characterized by struggles among the different groups in such a way that no single group has total dominance over decision making in the political system (Ethridge and Handelman, 2004:163-165). Asare (2009) argues that well organized interest groups operating within a pluralist environment tries to lobby for the adoption of policies that satisfies their interests. He observes that the groups normally engage in negotiations, bargaining and compromises with other groups who are also seeking to influence policy within the system. In view of competition among the groups, scholars have identified them with different terms such as iron triangle, issue network, policy community, subsystem, advocacy coalition, and global advocacy network, etc. However, the core concern of each of the group is to ensure that adopted policies satisfy their interest, in spite of the different characterizations of the groups by scholars (Asare, 2009).

#### **Interest groups and tobacco control**

The interest groups in the tobacco control policy system operate in pluralistic political system. The interest groups affiliated with the tobacco industry and the anti-tobacco groups compete to maintain dominance in the adoption of policies related to tobacco in the system. The anti-tobacco interest groups operate globally to promote the adoption of new ideas as instruments for preventing the consumption of tobacco products to avoid a tobacco epidemic (Studlar, 2004b; ACS, UKCR & IUAC, 2004; IDRC, 2009). The groups use different strategies including information, symbolic, accountability, and leverage politics to promote the adoption of tobacco control instruments to protect public health (Keck and Sikkink, 1998). The groups through information politics transmit vital tobacco control information to areas where it has potential to make great impact on the adoption of tobacco control policies. Secondly, the anti-tobacco groups also symbolically present the stories and problems of distant individuals who have had negative experiences with tobacco products as means of drawing attention to the issue politically.

The leverage politics centers on a strategy whereby powerful actors are used to champion issues in areas where weaker actors may lack the needed influence (Keck and Sikkink, 1998). Finally, the groups under accountability politics compel compliance with agreements that their target actors have become a party to. For instance, the actors try to ensure compliance with the FCTC protocol for parties to the convention. Nevertheless, the well-resourced International Non-governmental Organizations (INGOs) and intergovernmental organizations (IGOs) fund the activities and provide information on tobacco control ideas to interest groups in the developing countries (Brenya, 2012b).

On the contrary, the tobacco industry also has affiliated interest groups whose main activities are to protect the business of the industry. These interest groups mostly prevent the adoption of stricter tobacco control policy that can negatively affect the profit making of the tobacco companies. The groups use their economic power, which translates into political power to discourage the adoption of strict tobacco control measures. In some instances the pro-tobacco groups promote the adoption of voluntary agreements

favorable to the tobacco industry through negotiation with the Ministry of Health. In other scenario, the tobacco companies use their resources to fund research that produce findings favorable to the companies (Mamudu and Glantz, 2009). The groups also influence the tobacco farmers and workers to protest any attempt by the government to adopt stricter tobacco instruments by offering them some form of financial incentives (Otanez et al., 2009).

#### **TOBACCO PRODUCTION IN MALAWI**

Malawi has a subsistence agricultural economy and heavily relies on tobacco growing as the greatest contributor to its economy. The country is also one of the world's least-developed countries in sub Saharan Africa with over 90% of its population living in the rural areas. Tobacco accounts for 43% of agricultural gross domestic product, 13% of total gross domestic product, and 23% of the tax base of the country (Otanez et al., 2007; 2009; Otanez et al., 2006; Personal communication, 2010/2011). Malawi also has 2.95% of its agricultural land allocated to tobacco farming, produces about 2% of the world's total tobacco production, and exports about 5% of the world's tobacco (Eriksen et al., 2012; Otanez et al., 2007; Semu-Banda, 2007). For instance, the country produced 208,155 tons of tobacco in 2009 (Eriksen et al., 2012; ACS & WLF, 2009). Malawi has a high male tobacco prevalence rate of about 26% and that of female is about 3.7% (Eriksen et al., 2012).

Malawi started producing tobacco leaves in the 1800s when settlers from the Virginia, USA, introduced the activity to the country. Since then, tobacco leaf farming has become a major economic activity and the country has attracted many leaf-buying and auction companies. The tobacco industry network comprising the Ministries of Agriculture, Finance, and Industries, the Ministry of Economics, certain government officials, Tobacco Association of Malawi (TAMA), Tobacco Tenants and Allied Workers Union of Malawi (TOTAWUM), tobacco leaf processing companies, auction holding companies, and tobacco leaf buying companies - Universal Corporation, Alliance One International, Limbe Leaf Tobacco, and the Continental Tobacco Company – continue to push for favorable environment for tobacco business in the country. In fact the country is one of the largest producers of tobacco leaf in Africa and is among the top-ten tobacco leaf producers in the world (Makoka et al., 2011). The leaf buying companies export the tobacco leaves to places where companies like Phillip Morris and BAT have manufacturing plants (Personal communication, 2010; Otanez et al., 2007; Semu-Banda, 2007).

The tobacco leaf buying companies generate over 65% of the country's export earnings (Makoka et al., 2011). The US tobacco-growing subsidiaries - Limbe Leaf and Alliance One - purchase over 95% of

Malawian tobacco leaves (Makoka et al., 2011). Therefore, the tobacco leaf companies act as agents of penetration and consolidation of market for the pro-tobacco network in Malawi and they are very influential players in the Malawian tobacco business (Cairney et al., 2012). Another major player in the Malawian tobacco business is Premium TAMA, a joint venture company owned by the tobacco growers association of Malawi (TAMA) and the UK-based Premium Tobacco. Premium TAMA has an investment of over US\$22 million in the tobacco business and in October 2009, established the Kanego Tobacco Processors to process tobacco leaf in Malawi. Although the international tobacco manufacturing companies are not visibly involved in the tobacco activities, a recent report indicates that companies such as BAT have a key interest in ensuring that Malawi remains a major tobacco producing economy so that it can continue to make a case for economic importance of tobacco by using the country (Makoka et al., 2011)<sup>1</sup>. As earlier indicated the tobacco leaf and buying companies offer funding to TAMA and uses the members of the Association to resist any attempt by the government to adopt tough tobacco control laws. TAMA is an association of local tobacco farmers and workers of the tobacco leaf processing companies. The leaf buying companies often offer money and farming materials to the TAMA members to assist them with their farming (Personal communication, 2010; Makoka et al., 2011). Although the funding to individual farmers is normally small, it is a viable strategy used to influence the farmers to lobby the Ministry of Agriculture consistently and also to mount pressure on the government against adopting tobacco control legislation. The majority of the farmers have argued that adopting tobacco policies will make them unemployed, increase the level of poverty, and decrease the agricultural gross domestic product of Malawi. As noted earlier, top politicians from the ruling party including cabinet ministers and the opposition have special interest in protecting the activities of the tobacco industry because of their investments in tobacco farms and businesses. (Makoka et al., 2011). For instance, Mr. John Tembo, the President of the main opposition Malawi Congress Party (MCP) is a well-known tobacco farmer, who has also served as the Board Chairman for the Limbe Leaf Tobacco Company for many years (Makoka et al., 2011). Mr. Tembo is known to be a very influential person in the Malawian Parliament, who assigns membership to the committees in the National Assembly. Therefore, he has a great influence on the way members vote on issues and uses his influence to lobby against the

adoption of tobacco legislation in the country (Personal communication, 2011).

The tobacco industry network also uses the media and sponsored researchers to project tobacco as an economically important product to the Malawian economy (Otaney et al., 2006). The network promotes advertising that targets the youth to lure them to smoke (Kapito, 2000; Semu-Banda, 2007). For instance, billboards featuring state-of-the-art digital images are normally positioned at places mostly frequented by the youth (Personal communication, 2010; 2011). Normally, the images of famous musicians are used in print advertisements with warning such as “smoking may be hazardous to your health”. The tobacco control activists argue that the word “may” in the warning is deceptive and accompanying it with a picture of a famous celebrity who is smoking might send a negative message that tobacco use is not hazardous to people. Mostly, individual sticks of cigarette are sold to make them accessible to the poor instead of packs, even though recent legislative changes in developed countries like the U.S.<sup>2</sup> allows only sales of packs to consumers. In 2009, BAT (Malawi) undertook an active publicity campaign and many of the posters used in the vigorous advertising activities indicated the price of individual cigarette sticks to attract the youth and the poor. The tobacco companies also sponsor events in which famous artists and musicians are invited as guest speakers to attract and lure the youth to smoke. The companies offer cigarettes and other tobacco products as free samples at such events or sometimes as winning prizes (Makoka et al., 2011). Nevertheless, guests at hotels are offered free samples of cigarette packs (Personal communication, 2010). Additionally, the tobacco manufacturing and leaf buying companies, through the corporate social responsibility promotions, offer educational facilities, wells for potable water, and campaigns against child labor as means of redeeming their corporate image to the public, but at the same time they actively promote and sell their products (Otaney et al., 2006; Munthali, 2009). Recently, Alliance One, the largest tobacco leaf buying company in Malawi, has handed over a school building worth USD \$130, 000.00 to the Ministry of Education for the Kalonga Primary School (Tobacco Control in Africa, 2009)<sup>3</sup>. In 2009, the Ministry of Agriculture also received a donation of 28 bicycles from the British American Tobacco Company (Personal communication, 2011). The Limbe Leaf Buying Company also donated an equivalent of US \$ 17,142.00 to the Church of Central Africa Presbyterian (CCAP) for its

<sup>1</sup> Also refer to <http://www.un.org/ecosocdev/geninfo/afrec/vol118no3/183tobacco.htm>.

<sup>2</sup> For more on this see <http://tobaccofreemalawi.blogspot.com/>

<sup>3</sup> For details on the social responsibility, visit <http://blogsofbainbridge.typepad.com/africa/2010/01/malawi-lawsuit-against-a-tobacco-control-advocate.html>

**Table 1.** Timeline of tobacco control efforts in Malawi.

<b>Malawi</b>	
1989	The labor and human rights activists started to use the media and other avenues to draw attention of the government to the use of child labor in Malawian tobacco production and its consequences on the health of the children (public health)
1994	The country adopted a constitutional provision to protect the economic exploitation and interference of education of children by using them to harvest tobacco leaves
1999	The Ministry of Health issued a directive to ban smoking in some public and private places including Air Malawi domestic flights, airports and in fuel stations
2003	The FAO released a report on the impact of tobacco control and importance of the FCTC on world economies. The report noted Malawi's extreme reliance on tobacco.
2003	The World Health Organization surveyed tobacco prevalence in Malawi
2005	The Ministry of Health issued another directives to ban radio and television advertisement and also to require advertisement in print to carry a health warning
2005	The Ministry of Health issued another directive to ban tobacco sponsorship and promotional activities for sports and the entertainment in the country
2006	The global youth tobacco survey (GYTS) surveyed the prevalence of tobacco among the youth
2008	The Minister of Finance introduced an excise tax on imported cigarettes that does not use Malawian tobacco. The taxes essentially to promote the use of Malawian tobacco leaves
2009	The Nyasa Tobacco Manufacturing Company was established to produce cigarettes in the country as the first ever tobacco manufacturing company in the country
2009	Plan release a report indicating that children who work on tobacco farms are exposed to nicotine levels equivalent to the levels obtained from smoking 50 cigarettes a day
2009	The government signed a MOU with the US government under the United States African Development Foundation (USADF) to diversify the economy and make it less dependent on tobacco products.
2010	The National Parliament adopted a Tenancy Bill that makes it illegal to hire any child below the age of 18 years to work on the tobacco farm. The adoption of the bill strengthened the labor laws to prevent the use of child labor on the tobacco farms.

Source: Makoka et al. (2011), Otanez et al. (2006, 2007, 2009), Semu-Banda (2007), Munthali (2009).

reforestation program in 2009 (Makoka et al., 2011). However, anti-tobacco groups argue that the donations should be considered as atonement for some of the damages caused to Malawians by the tobacco industry network due to their activities in the country.

They maintain that the donation towards reforestation is repayment for the lost forest in the tobacco growing areas (Makoka et al., 2011).

The pro-tobacco industry network also uses lawsuits and the threat of lawsuits to scare and silence tobacco control activists.

For instance, a leading tobacco control activist, John Kapito, was sued for libel and defamation by the Nyasa Tobacco Manufacturing Company for commenting on the deceptive advertisements by the company, in spite of the Ministry of Health's directive that has banned tobacco advertisement on the radio and television (Munthali, 2009).

The tobacco farmers also use children on the tobacco farms (Otanez et al., 2006). It is estimated that 78,000

boys and girls are employed in tobacco harvesting and are paid a meager income of 17 cents for a 12 h day of back-breaking and bare-handed work (Plan International, 2009)<sup>44</sup>. The seriousness of the child labor issue is that the children handle the burley tobacco leaves with bare hands and often do not bath or wash their clothes.

Therefore, they absorb nicotine levels equivalent to smoking fifty cigarettes a day by harvesting tobacco (ibid). However, there are few voluntary agreements adopted through the directives of the Ministry of Health to curtail the consumption of tobacco but the agreements are poorly enforced (Table 1).

In addition, the government has adopted some laws such as tougher labor laws that indirectly control tobacco health hazards.

The anti-tobacco interest groups - international and

<sup>44</sup> For detail of the report see <http://plan-international.org/about-plan/resources/news/child-tobacco-pickers-poisoned-reveals-report> and <http://edition.cnn.com/2009/HEALTH/09/25/child.tobacco.picking/index.html>

domestic - collaborated with other interest groups to compel the government to adopt labor laws for controlling the exposure of children to nicotine on the tobacco farms. Nonetheless, the policy behavior of the government on tobacco control is changing gradually (Personal communication, 2010). For instance, the policy position of the government in the 1990s was that the tobacco has only economic benefits and no adverse health consequences.

However, a representative of the government at the Commonwealth Health Ministers' Conference in 2009 acknowledged a rise in cases of tuberculosis, which was attributed to tobacco (Personal communication, 2011). Nevertheless, the government has signed a memorandum of understanding with the US to provide a viable alternative to the tobacco farming to provide alternative means of economic activities to farmers.

## **OVERVIEW OF TOBACCO CONTROL EFFORTS IN MALAWI**

In spite of the fact that commercial production of tobacco leaf in Malawi dates back to the 1800s, it was not until the 1990s that public health concerns about tobacco production became a major issue in the country. Prior to 1990s, the focus was on the economic importance of the tobacco and the government promoted programs to advance the tobacco business. For instance, the government established the tobacco control commission in 1938 to monitor the quality of tobacco product and to promote tobacco industry activities (Makoka et al., 2011). The commission was also tasked to supervise the auction of tobacco leaves by the auction companies.

The focus on economic importance of tobacco enabled interest groups and individuals affiliated to the tobacco industry to promote the adoption of policies that favored the industry. However, tobacco control, labor and human rights groups became worried about the alarming rates of child labor in the tobacco farming business by 1989 and they started to raise awareness on the excessive use of child labor on the tobacco farms and its social and health consequences (Otanez et al., 2006). The activities of the interest groups eventually resulted in the adoption of constitutional provisions to prohibit economic exploitation and non-interference of the education of children in 1994 (Semu-Banda, 2007). The law protected the rights of the children to obtain education because many of them were prevented from attending schools in order to work on the tobacco farms. Simultaneously, the law was an important tobacco control and public health measure because it prevented the children from exposure to nicotine. It decrease the cheap labor that made tobacco farming attractive and profitable to

tobacco farmers because it prohibited the use of children to work on the tobacco farms (Personal communication, 2011). On the tobacco control front, anti-tobacco interest groups intensified the call for the adoption of tobacco control measures to protect public health in the 1990s. In response, the Ministry of Health issued directives to ban smoking in some public and private places, including domestic flights of Air Malawi, airports, and fuel stations in 1999 (Otanez et al., 2007). Similarly, a directive to ban radio and television advertisement and also to require a health warning in print advertisements was issued by the Ministry of Health in 2005. The Ministry also banned tobacco sponsorship and promotional activities for sports and the entertainment industries in the same year with another directive. Unfortunately, the directives are not effective because they were not legislated by the National Assembly, which is the official law making body of Malawi. Therefore, there are no punitive measures for violating the directives and compliance is left to the will of the tobacco companies and the people to voluntary comply with the directives.

In spite of this, the Ministry of Health of Malawi continues to spearhead tobacco control activities to prevent an epidemic in tobacco health hazards. The Ministry works with other groups such as Smoke Free Malawi, operated by the Youth Alliance Social and Economic Development (YASED), the Consumers Association of Malawi (CAMA), Centre for Social Concern, Cancer Registry of Malawi, Health Journalists Network, Journalists Union of Malawi, Medical Doctors Association of Malawi, National Youth Council of Malawi, World Health Organization Communication Office, Drug Fight Malawi, Link for Education and Governance, lawyers, researchers, and individuals with the passion for ending the activities of the tobacco industry. It needs to be noted that it was the collaboration with international nongovernmental and intergovernmental organizations to protect public health that led to the adoption of the directives and indirect tobacco control laws in Malawi (Personal communication, 2011). Some members of the anti-tobacco groups indicated that the collaboration gave them access to information on best practices adopted in other countries, which were recommended to the Ministry of Health.

The anti-tobacco groups also indicated that a broad and sustained educational program that targets the public - government officials, women, youth/children and tobacco farmers - can help to galvanize support for tobacco smoke regulation in Malawi (Makoka et al., 2011; Personal communication, 2011). Therefore, some members of the group such as the Youth Alliance in Social and Economic Development highlights the negative health effects of smoking on public health (Munthali, 2009). The group has instituted a two-year

public campaign to mobilize support aimed at putting pressure on the government to ban public smoking in the entire country (Makoka et al., 2011, Personal communication, 2010). In addition, YASED has collaborated with the National Youth Council of Malawi (NYC) and the Centre for Agriculture Research and Development (CARD) of Bunda College, Germany to educate young people on the dangers of smoking to protect public health (Munthali, 2009). A member of the group observed that the youth are the major target of the tobacco companies and so educating them on the health hazards of smoking will arm them with the tool to resist the deceptive activities of the tobacco companies. The anti-tobacco interest groups use frames and reframes of the tobacco issues to promote the adoption of tobacco control instruments. They argue that the framing of the tobacco issue as second hand smoke by anti-tobacco groups in US and Canada in the 1990s, which placed emphasis on the need to protect innocent victims – children and non-smokers – gave impetus to the tobacco control campaign (Studlar, 2002; Asare, 2007). Therefore, the groups in Malawi have framed the tobacco issue as public health, arguing that it is an important strategy that can help to neutralize the political power of the tobacco industry and promote the adoption of direct or indirect tobacco control laws in Malawi (Personal communication, 2010; 2011). An interviewee indicated that their belief: is premised on the fact that increased public awareness on the dangers of tobacco will shift the focus from the political economy debate on the role of tobacco that the government and its tobacco allies have exploited by using fear to quash attempts to create awareness on dangers of tobacco. A good strategy of using it as a public health issue creates personal awareness as individuals will reflect on causes of death within their own set up, which would easily counter the political-economic rhetoric that has been used to silence tobacco control efforts. With high awareness levels, very few people would voluntarily wish to grow, smoke or produce tobacco and government will be under pressure to identify alternatives to the economy with urgency (Personal communication, 2010).

So far the public health focus of the tobacco campaign seems to have some impact because the highlight of the report of PLAN-Malawi<sup>5</sup> on the exposure of children who work on tobacco farms to high levels of nicotine by the anti-tobacco groups has resulted in the adoption of several laws to address the issues, the latest of which was the 2010 labor law passed by the National Assembly to raise the minimum age for labor to 18 years from 14 years

(Personal communication, 2010). The adoption of new labor laws to make 18 years the minimum age for labor kept a lot of children off the tobacco farms and also made it easy for implementation of the labor law because young children are mostly afraid to admit that they were being used to work on tobacco farms. The interest groups in collaboration with intergovernmental and other nongovernmental groups used the exposure of children to high levels of nicotine to solicit the support of the public by stressing that if nothing is done by the government, Malawi may witness an epidemic of tobacco related deaths of children. Consequently, the people are avoiding the use of children on the farms because of the fear of exposing their children to nicotine, a deadly substance and health hazards. Prior to adopting this law, the Ministry of Labor and Vocational Training (MOLVT) recruited over 300 labor officers to monitor and report child labor cases, especially on tobacco farms and also to assist the police in enforcing previous child labor laws since the first was passed in 2000 (Otanez et al., 2007).

The government also collaborates with non-governmental organizations to organize youth committees in the villages and towns and task them to report cases of child labor for prosecution. So far, significant convictions have been made, in which violators were fined up to an equivalent of US \$200 or a maximum of 5 years in prison as required by the Employment Act of 2000 (Otanez et al., 2007). The Ministry of Gender, Child Welfare, and Community Services and the Department of Social Welfare also offers assistance to children on the street to avoid exploitation by tobacco farmers. In addition, the government, in 2002, adopted a Free Primary Education policy to decrease child labor by providing stability for children to remain in schools (Kayange, 2003)<sup>6</sup>. Kayange (2003) further maintains that the government has continuously allocated substantial budgetary resources to the Ministry of Education to operate this program.

As previously noted, the MOU that the government signed with the US government under the United States African Development Foundation (USADF) in April 2009 was to promote development, diversify the economy, and increase participation of groups in trade and investment activities<sup>7</sup>. The Roots and Tubers Enterprises Farmers Group (CMRTE) were among the core groups who received funding to promote the growing of roots and tuber crops and reduce the dependence of the economy on tobacco. It needs to be noted that the adoption of viable alternative to tobacco farming is one of the measures recommended by the FCTC.

<sup>5</sup> PLAN Malawi is the Malawian branch of PLAN International, a nongovernmental child development organization that works in over 48 countries in Africa, Asia and American continents to promote child rights and lift millions of children out of poverty

<sup>6</sup> See Kayange, G (2003) "Child Labor Situation in Malawi: An Overview" *Child Rights Information and Document Center* Retrieved from website: [http://www.cridoc.globalmarch.de/child\\_labour.html](http://www.cridoc.globalmarch.de/child_labour.html) on 4/15/2010

<sup>7</sup> For details on the MOU, visit <http://www.adf.gov/USADFFirstGrantSignedinMalawi.htm>

Therefore, the signing of the MOU is considered a significant achievement because it helps to neutralize the political economy argument espoused by the pro-tobacco groups to grip the Malawian economy to tobacco production. The government was compelled to adopt the measure, which provides farmers with alternative crops to grow because the interest groups reframed the tobacco issue as an issue of poverty of the farmers generated by the lack of alternative means of livelihood or other economic activities than tobacco growing (Personal communication, 2010).

In spite of the symbolic nature of these policies, it is a significant success chalked up by the anti-tobacco campaign because many farmers have been forced to abandon the use of child labor that makes tobacco leaf farming in Malawi cheap and attractive. Significant number of farmers has lost interest in growing tobacco products and is seeking alternative crops to grow because it is expensive to grow tobacco without the cheap or free labor from children (Personal communication, 2010). Some anti-tobacco groups observed that the MOU and the labor law have not attracted major criticism from the pro-tobacco groups, especially the farmers because the policies are not considered direct tobacco control measures (Personal communication, 2011). The anti-tobacco groups argue for the continuance of such strategy by promoting the enforcement of legally mandated provision of a healthy environment for Malawians through regulation of tobacco smoke.

In spite of the activities of the anti-tobacco interest groups, the pro-tobacco groups have not relented on the effort to grip the Malawian economy to tobacco production. For instance, the establishment of the Nyasa Tobacco Manufacturing Company in 2009, as the first company to manufacture cigarettes in the country, was championed by the Ministries of Finance and Industries (Makoka et al., 2011). In addition, the Minister of Finance in 2008/2009 budget statement increased the excise tax on tobacco through the introduction of a system of tax stamps that sought to promote the purchase of Malawian grown tobacco leaves and also to control smuggling (Hajat and Milanzi, 2008). Therefore, cigarettes that contain 70% or more of Malawian tobacco attract a much reduced tax rate (Makoka et al., 2011).

The policy introduced a new flat tax rates ranging from the equivalent of \$18 per thousand sticks for hinge-lid packets and \$12 per thousand sticks for soft-lid packet of cigarettes without Malawian tobacco (Hajat and Milanzi, 2008: 14). On the contrary, cigarettes with Malawian tobacco attracted much lower rates of the equivalent of \$9 per thousand sticks for hinge-lid packets and \$6 per thousand sticks for soft-lid packet. The hinged-lid packet of cigarettes comprise of an inner package defined by a group of cigarettes wrapped in a sheet of foil inner

wrapping and a rigid outer package housing the inner package that helps to prevent loss of essential ingredient of the cigarette or becoming soft once the lid is open. Therefore, the hinge-lid cigarettes tend to be more expensive than the soft-lid packet, which are basically the cigarettes in one layer soft box (Personal communication, 2011).

The tobacco control situation in Malawi is often considered as driven by the leaf buying companies. An interviewee indicated that: the absence of a strong anti-tobacco lobby, and the opposite being true about the industry, sees Malawi's position as being industry driven. The last position after the Uruguay conference of parties meeting was to sign the FCTC by January 2011, but it seems the industry wants to play a wait and see approach. They use Malawi as the last post for making their case about the impact of poverty and employment should the FCTC continue introducing what they consider as stifling measures. Should Malawi sign the FCTC, I am sure the industry will create another excuse not to force the implementation. However, just by signing, it would be a great opportunity for tobacco control to take up the campaign and force government to follow the FCTC to the letter (Personal communication, 2011).

The anti-tobacco groups believe that there are good prospects for promoting tobacco control, and every effort needs to be taken to take advantage of the policy window before it closes. The groups maintain that they can put pressure on the government to regulate tobacco smoke as means of providing a healthy environment, while waiting on the government to become a party to the FCTC. Therefore, they are resorting to the use of litigation to compel the implementation of constitutional and legal requirement to provide a healthy environment through the regulation of substances such as tobacco smoke that pollutes the environment. An interviewee indicated that the new President who is a strong advocate for women and children welfare is also something that needs to be taken advantage of by making a clear case for how environmental tobacco smoke affect pregnant women and children. He expressed optimism that an emphasis on public health will attract support of the new administration for the implementation of any court ruling to the letter.

## **LITIGATION AS THE WAY FORWARD TO CONTROL TOBACCO**

The tobacco control interest groups continue to explore new avenues to weaken the activities of the tobacco leaf buying companies and their affiliates so as to promote the implementation of policies to protect public health. Litigation is one measures perceived as having the possibility to promote the regulation of tobacco smoking



in the country. The anti-tobacco interest groups maintain that litigation will compel the government to enforce any court order to regulate tobacco smoke to fulfill its obligation of providing a healthy environment for the Malawian people. Moreover, some members of the group observed that the action may not attract any backlash from the pro-tobacco groups because it will not be considered a direct tobacco control law in a similar way as the passage of the labor laws and signing of MOU to introduce farmers to alternative farming. Given the fact that the judiciary is a component of the legal system and also litigations in Canada, Australia and some states in the U.S. were effective tobacco control instruments, the anti-tobacco interest groups see it as a possible strategy that can compel the government to regulate tobacco smoke in the country (Personal communication, 2011). A tobacco control activist observed that: litigation has so far greater chances of pushing for tobacco control agenda in the country than any other channel, as any court ruling will force the government to implement measures as contained in the court order without a chance. Litigation process will bring attention to the issues and evidence presented; courting much needed publicity to the tobacco control cause. Litigation in face of uncertainty by government is the only strongest available option for tobacco control in Malawi (Personal communication, 2011).

### Malawian judicial system

The judiciary of Malawi is one of the three main organs of government created by the 1994 Constitution to impartially and independently interpret, protect, and enforce the Constitutional provisions and other laws of the land. The Constitution provides for the principle of judicial independence to ensure that decisions of the courts are not influenced by the executive or the legislative branches of government. This is against the backdrop that the appointment of judges is invested in the President, which gives impetus for influence from the executive. In addition, the legislature approves individuals nominated by the executive to the bench. The legislature and the executive also control the budgetary allocation of the judicial institution. The principle of judicial independence addresses the issue of appointment, tenure and condition of service as well as the removal and retirement of the judges. It provides for immunity, remuneration, professional secrecy, and the procedure for disciplining, suspending and removing judges. Therefore, the principle helps to insulate the judges from unnecessary interference from the executive and legislative arms of government.

Justices and judges are protected from unlawful dismissal once appointed to the bench and are also entitled to serve till the retirement age of sixty five years or to voluntarily retire at any age. However, the President

in consultation with the Judicial Service Commission can authorize an extension of service for some judges to complete proceedings that commenced before their retirement age. The Constitution also provides for a retirement age of seventy years for Magistrates and officers appointed by the Chief Justice. The minimum age of appointment for all judges is forty years. The National Assembly has the Constitutional mandate to determine the remuneration of holders of judicial offices and to increase it from time to time so that it maintains its original value. The Constitution prevents a reduction in the remuneration of judicial officers without their consent. The Constitution provides for these offices in the judicial system: the Chief Justice, Justices of Appeal, Judge of High Court, Registrars, Chairpersons of Industrial Relations Courts, Magistrate of different categories including those that preside over traditional courts and local courts. The courts associated with the offices are the Supreme Court, the High Courts, Industrial Relations Courts, Magistrates' Courts and Traditional or Local Courts.

### Malawian judicial system and litigation

Malawi is a member of the common law tradition in which the legal system is reactive and driven by litigation (Gloppen and Kanyongolo, 2007). Malawi has a complex legal bureaucratic system and the litigants have the burden of proving their case with no assistance from the government. Litigants are obliged to comply with the rules of standing that enable their case to be admitted for hearing by any court. Therefore, the litigation process is very difficult and expensive and often inaccessible to the individuals, especially the poor. On the contrary, it gives nongovernmental organizations and interest groups upper hand in litigating cases in the courts on behalf of affected groups. Sections 15 and 46 (2) of the Malawian Constitution permits "any person or group of persons with sufficient interest" to seek remedy of the courts to promote, enforce, and protect their rights, which have been infringed or threatened in any way.

However, the courts have interpreted the standing rule in both liberal and a restrictive manner. When the court adopts a liberal interpretation, it enables nongovernmental organizations and interest groups to use litigation to promote public interest and vice versa. For instance, the Supreme Court adopted a liberal interpretation of standing in the *Registered Trustees of PAC v. Attorney General and others*<sup>8</sup> in 2003, in which "it ruled that sufficient interest in section 15 of the Constitution should not be interpreted restrictively, particularly not in relations to judicial review of decisions that affect human rights"

<sup>8</sup> *PAC v Attorney General and Others* (Civil Cause No. 186, 2003). The case centered on the decision of Parliament to pass a constitutional amendment that violates human rights.

(Gloppen and Kanyongolo, 2007: 283). The liberal interpretation adopted by the Court enabled the PAC, an NGO, to litigate the case and it also allowed the Human Rights Commission to bring its perspectives to the courts as *amicus curiae*<sup>9</sup>.

In the *CILIC v. Attorney General*<sup>10</sup>, the Supreme Court denied some nongovernmental organizations standing in the case on grounds that the interest of the nongovernmental groups was too remote and they could only claim their interest in the case to "being a registered body established to promote, protect, and enforce human rights, democracy, and the rule of law" (Gloppen and Kanyongolo, 2007: 258). The Court further indicated that a litigant needs to have "a legal right or substantial interest in the matter in which he/she seek a declaration" (*ibid*). It argued that the litigant can only seek redress for an infringement on his/her rights and not the rights of other people. The adoption of the restrictive interpretation of standing makes it difficult for interest groups and NGOs to promote the interest of Malawians. The decision to adopt the liberal or restrictive interpretation of standing by the courts is not predictable because it is the sole prerogative of the Justices and Judges. However, the judges are more likely to adopt a liberal interpretation when the case has to do with human rights and welfare of the people. Therefore, the anti-tobacco interest groups in Malawi believe that the courts will adopt a liberal interpretation of standing in any litigation on tobacco smoke regulation because of the public health implications.

The Forum for a Clean Environment (FORCE) recently notified the Ministry of Natural Resources, Energy and Environmental Affairs of an intended lawsuit under the Environmental Management Act of 1995 and the 1994 Constitution, for the failure to regulate smoking in the country. The group argues that both the 1994 Constitution and the 1995 Environmental Management Act mandates a clean and healthy environment for all citizens. The group identifies the Ministry as the responsible party mandated by the Constitution to adopt and implement laws that will promote the welfare of the citizens which include promoting a healthy environment for Malawians. They further indicates that the Environmental Management Act in Section 3(1) grants individuals the rights to take all measures which are necessary and appropriate for protecting and managing the environment and also to conserve and promote sustainable utilization of natural resources of the country.

In addition, individuals are also granted the rights by the Act to sue for protection of their rights to a clean and healthy environment in the High Court. Nevertheless, Section 77 of the Act grants the Minister of Natural

Resources Energy and Environmental Affairs the responsibility for implementing the mandate of the Act. Unfortunately, Malawi has no regulations against tobacco smoking in spite of the scientific evidence indicating that tobacco smoke is a strong environmental pollutant, which has chemicals detrimental to a healthy environment and hazardous to nonsmokers who are exposed to the smoke. The group argues that the failure of the government to regulate tobacco smoke infringes on the rights of Malawians to healthy living and working environment granted by both the Constitution and the Environmental Management Act. Therefore, the group is seeking a court order to compel the government to protect the right to a healthy environment for Malawians by regulating substance that pollutes the environment such as tobacco smoke.

## DISCUSSION

Scholarly evidence shows that class action litigation has been an effective means of promoting the adoption of tobacco control laws in certain jurisdictions where there are strong activities of tobacco companies. Countries such as Australia have used litigation to promote the adoption of laws against second hand smoking (Studlar, 2004; Chapman and Woodward, 1991). In the U.S. states such as California and Minnesota, litigation has forced the tobacco companies to decrease their activities because of enormous settlements the companies paid to the litigants (Blanke and Hubert, 2006; Laugesen et al., 2000). In almost all of the cases identified earlier, the litigations were against the tobacco companies leading to the adoption of regulatory measures to restrict the activities of the tobacco companies. However, the outcome of the litigation was based on collaboration between interest groups and other intergovernmental and nongovernmental organizations.

The intended litigation by FORCE in Malawi is targeted at the government to force it to implement constitutional provision and legal mandate to guarantee a healthy living and working environment for the citizens. This makes the nature of the Malawian litigation to be slightly different from the ones earlier identified. However, the objective and intended outcome of the litigations are similar. In addition, the collaboration of the anti-tobacco interest groups with the intergovernmental and nongovernmental organizations has given them knowledge on how litigation has been used in other jurisdictions to promote tobacco control. The anti-tobacco groups observed that the provision of scientific evidence on the harm of tobacco smoke to the health of nonsmokers in the lawsuit by workers exposed to tobacco smoke influenced the decision by the court, which led to the adoption of second hand smoke laws in Australia (Chapman and Woodward, 1991).

The landmark study of the U.S. Centers for Disease

<sup>9</sup> An *amicus* means friend of court and the principle enables an entity who is not a party to the case to bring relevant perspectives on a case to the attention of the court.

<sup>10</sup> *CILIC v. Attorney General* - Civil Appeal No. 12 of 1999 (MSCA)

Control and Prevention in the 1999 provides scientific evidence of the negative health hazards of tobacco smoke to passive smokers, which has been made available to the anti-tobacco groups in Malawi (CDC, 1999). Therefore, the provision of such evidential testimonies on the harmful effect of tobacco smoke on public health will undermine the arcane theories the pro-tobacco groups use to make a case for the positive effect of tobacco for the Malawian economy and motivate the courts to order the government to protect the welfare of the citizens by implementing the 1995 Environmental Management Act and the 1994 Constitutional provision for environmental regulation to satisfy its constitutional mandate (Asare, 2009; Personal communication, 2011). A tobacco control activist indicated that certain members of the court are already sympathetic to the tobacco control cause. Therefore, he was optimistic that the judges will support the litigation as means of protecting public health.

The anti-tobacco interest groups argue that the outright disrespect for the administrative directives of the Ministry of Health by the Nyasa Tobacco Manufacturing Company and their affiliates will be another key motivator for the court to rule in favor of the lawsuit by FORCE. The directive prevents the advertisement of tobacco products in the country but the Nyasa Company openly advertises their tobacco products in all media outlets because it was not a party to the voluntary agreement with the Ministry of Health. Some members of the judiciary do not take it lightly when administrative rules are disrespected because it increases the caseload brought before the courts. Therefore, the court may order the implementation of the Environmental Management Act by regulating substances that pollute the air and make it unhealthy for Malawians for which tobacco smoke looms large (Personal communications, 2011). The action of the court will indirectly promote compliance with administrative orders of the Ministry of Health.

An interview argues that once the court issue an order, the government will be forced to respect the order to avoid contempt of court and the fines that sometimes comes with the contempt. Nevertheless, the new administration will ensure the implementation of any court order to show its commitment to protecting the welfare of women and children and also the respect for the rule of law (Personal communication, 2011). In the end, the hold of the tobacco companies on the policy makers, which has been hampering the adoption of tobacco control instruments, will be curtailed if a court order is issued. Nonetheless, the tobacco companies will also comply with any regulation of tobacco smoke by the government to avoid fines and related lawsuit for noncompliance.

## Conclusion

The aforementioned analysis shows the activities of anti-

tobacco interest groups to regulate tobacco smoke in spite of the resistance by the pro-tobacco interest groups. The anti-tobacco groups have not been successful because the tobacco leaf buying companies are using their political power to prevent the adoption of effective tobacco control instruments in the country. For instance, the companies use top politicians and the farmers' association to champion the activities of the tobacco industry in the country. In addition, the Nyasa Tobacco Manufacturing Company continues to ignore the advertising ban adopted as tobacco control instrument in the country because the violation of the directives has no punitive consequences due to the fact that they were not legislated by the National Assembly.

Therefore, the anti-tobacco interest groups are resorting to litigation to compel the government to regulate tobacco smoke and indirectly regulate the activities of tobacco companies in the country. The interest groups are collaborating with international counterparts who provide them with ideas and funds to litigate the case. FORCE is seeking a court order that will compel the government to implement a constitutional and legal obligation under the 1994 Constitution and the 1995 Environmental Management Act to promote a healthy environment. The group is convinced that the court will issue the order because of the scientific evidence showing the harm of tobacco smoke to passive smokers, which infringes on their constitutional rights to a healthy environment. In addition, the adoption of tobacco laws to prevent a tobacco epidemic by neighboring countries such as South Africa will motivate the courts to issue an order to regulate tobacco smoke to protect public health.

Hopefully, the success of the legal battle will compel the government to regulate tobacco smoke in the country. But even if the legal battle is not successful, the anti-tobacco interest groups in Malawi are setting precedent, which will likely be the new trend for promoting the regulation of tobacco smoke and protection of public health in sub Saharan Africa. Public health groups can learn lesson from the outcome of the litigation and promote similar actions to promote the enforcement of constitutional and legal provisions to compel policy-makers to address public concerns. Therefore, interest groups are likely to seek the assistance of the courts to compel the enforcement of constitutional and legal provisions on preventing substances considered detrimental to the health of society to protect public health in individual countries. By so doing, the anti-tobacco interest groups will have proven to other groups that effective organization and legal action can force their governments to address public health concerns through the implementation of existing laws.

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