ADMINISTRATIVE LAW AND GOVERNANCE IN EAST AFRICA RESEARCH PROJECT

Local Government in Malawi

(Draft 1)

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1. INTRODUCTION

This chapter presents the results of a component of the study of the interplay between administrative law and governance in East Africa.

1.1. Objectives of the study

The general objective of the study was to examine the rule making, implementation and adjudication practices of administrative agencies, and evaluate the impact of judicial review on public administration, in order to contribute to enhancing the quality of governance in East Africa by generating knowledge and recommendations on administrative law and its application. In more specific terms, the study sought to determine how administrative agencies in East Africa make, apply rules and adjudicate disputes; establish the nature and forms of public participation in agency rulemaking, decision making and adjudication process; determine the role and impact of judicial review, parliamentary intervention and presidential oversight on the conduct of administrative agencies in the delivery of administrative justice; develop pedagogical tools that can help improve the capacity of the future generation of lawyers and public administrators in the use of administrative law principles; propose policy and legislative interventions that can help mainstream the principles and policies of administrative law in the conduct of public agencies.

In order to achieve its objectives, the study set out to answer the following research questions

- What is the map of administrative agencies? What are their legal rules and constitutional framework?
- How do administrative agencies make and apply rules and adjudicate disputes? What informs and constrains their decision making? Where are the decisions formulated
- To what extent does the public participate in the rule making, rule application and adjudication processes of administrative agencies and local authorities?
- Is the public aware of the rule making, rule application and adjudication processes? To what extent does the public use these mechanisms? How does it perceive them? In particular, does the public consider these procedures and mechanisms to be fair mechanism for accountability that can contribute to the democratic exercise of power?
- Does judicial review facilitate the democratic and accountable exercise of power by administrative agencies and local authorities? How does judicial review transform patterns of bureaucratic behavior? Do administrative agencies obey or implement judicial review decisions? Further, do they review their decision making procedures where they have been faulted by courts in judicial review proceedings? And does judicial review have an educative effect?
- To what extent do other institutions, (Parliament, Executive) processes and practical realities influence the democratic and accountable exercise of power?

- What interventions can facilitate the democratic accountable exercise of power? What are the pedagogical tools that can help improve the capacity of the future generation of lawyers and public administrators in the use of administrative law principles?

1.2 A theoretical framework of administrative law and governance

The study was informed by the rich body of literature that theorises the conceptual and instrumental linkages between administrative law and democratic governance. Critical to understanding those linkages is an appreciation of the aims of administrative law. There are two major competing theories on the fundamental aims of administrative law, which are often categorized into "red light" and "green light" theories.[1] The former argue that administrative law exists mainly to restrain state power in order to uphold individual liberty, while the basic view of the latter is that the aim of administrative law latter is to facilitate efficient and effective public administration which, in turn, facilitates the attainment of the state's policy objective. As is the case with most theoretical debates, however, the polarisation between the red light and green light theorists obscures a more complex reality in which particular administrative law regimes are capable of pursuing both aims depending on contextual factors. The experience of Malawi is a case in point. Influenced by the historical experience of the country in which the one-party dictatorship wielded virtually unlimited power which eroded individual liberties, courts have emphasised the need to keep authoritarian state power in check to prevent a repeat of the excesses of the past. At the same time, however, courts have exercised restraint and subordinated judicial/legal judgment to political and bureaucratic judgment on the basis that the law must be slow to interfere with administrators' exercise of discretion, especially in matters involving policy judgments.[2]

The polarisation between red light and green light theories should also be placed in perspective by considering that, if viewed through the conceptual lens of "democratic governance," both red light and green light theories ultimately posit democratic governance as the goal of administrative law and only differ with respect to emphasis. The former emphasise the liberty aspect of democratic governance, while the latter emphasise the preservation of the democratic mandate of policymakers, unencumbered by undue legal restrictions.

Despite the diversity of emphasis, therefore, the literature appears to reflect consensus on the broad proposition that the administrative law is to promote democratic governance.[3] One critique of this view is that, by focusing on procedural safeguards, administrative law diverts attention

[1] See Harlow, Carol, and Richard Rawlings. *Law and administration*. Cambridge University Press, 2006; Adam, and Martin Loughlin. "In Defense of the Political Constitution." (2002): 157-175.
[2] Judge-Lord, Devin. "Why Do Courts Defer to Administrative Agency Judgment?." (2016). Almendares, Nicholas, and Patrick Le Bihan. "Increasing leverage: judicial review as a democracy-enhancing institution." *Quarterly Journal of Political Science* 10.3 (2015): 357-390.
[3] Akech, Migai, 2013: "Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects," *Indiana Journal of Global Legal Studies*, Vol. 20, No. 1 (2013), pp. 339-375

from critical substantive problems of governance.[4] It is arguable that this critique is predicated on an untenable conceptual dichotomization of substance and procedure, and a disregard of empirical evidence which proves that, at least in some contexts, systematic and sustained enforcement of procedural rules generates substantive political, economic and social changes.[5]

Another debate that informed this study's understanding of the conceptual and practical linkages between administrative law and democratic governance is that which focuses on the question whether administrative law principles are grounded in the common law (and are merely restated by constitutions)[6] or in the constitution (with the common law only serving as an interpretive tool).[7] The doctrinal significance of this debate lies in the fact that if administrative law principles are rooted in the constitution, they enjoy more enhanced protection from legislative and judicial interference than they would if they existed only in the form of the common law or statute. Additionally, if administrative law principles are grounded in the constitution, it will be imperative that their interpretation and application be grounded in the broader principles of the constitution such as the rule of law, transparency, accountability, separation of powers and equality before the law.

Finally, the theoretical perspective of the study was also influenced by the view that the linkage between administrative law and democratic governance is dynamic and interactive in that variations in the form and substance of administrative law produce particular democratic governance outcomes and, in a similar vein, particular configurations of the governance terrain influence the making, application and adjudication of administrative law. The elements of the governance terrain that are identified in the literature as having a direct impact on the operationalisation of administrative law principles include the existence of clear legal mandates of administrative decision-makers, the institutional capacity of the agencies, their decisional independence, the increased technical and specialized character of administrative decisions,[8] the persistent centralization of power, citizen's awareness of , and ability to demand and enforce their rights to administrative justice; the increased participation in public policymaking, the existence of epistemic community, network, and interest groups;[9] the sectoral interests of particular stakeholder groups;[10] and the level of organization of citizen groups.[11] A significant

[4] Smith
[5] See Nzunda, Matembo. "The quickening of judicial control of administrative action in Malawi 1992-1994." In Phiri, Kings Mbacazwa, and Kenneth R. Ross, eds. *Democratization in Malawi: A stocktaking*. No. 4. Christian Literature Association in Malawi, 1998.
[6] See *Lunguzi v Attorney General*
[7] This was the view of high Court Justice Mwaungulu in *The State v Blantyre City Assembly, ex.p. Ngwala* Miscellaneous Civil Application No.183 of 2012. In his own words, to state that section 43 of the Constitution merely restates the common law "is not very accurate conceptually".
[8] Shapiro, Martin, "Administrative Law Unbounded: Reflections on Government and Governance", *Indiana Journal of Global Legal Studies* 369, 375 (2000-2001).
[9] Ibid.
[10] Berner, Maureen; Amos, Justin and Morse, Ricardo (2011): What Constitutes Effective Citizen Participation in Local Government? Views from City Stakeholders, *Public Administration Quarterly*, Vol. 35, No. 1 (Spring 2011), pp. 128-163

part of the study, therefore, examined the presence or absence of these elements and the influence of that situation on the prospects of democratic governance in Kenya and Malawi.

The study further examines the data with respect to the governance outcomes of the current practices in the implementation of administrative law principles. In particular, the study focused on outcomes that appeared to be reflect the influence of the specificities of Malawi's and Kenya's political, economic and social conditions. Such outcomes of the application of administrative law included Finally, the theoretical perspective of the study was also influenced by the view that the linkage between administrative law and democratic governance is dynamic and interactive in that variations in the form and substance of administrative law produce particular democratic governance outcomes and, in a similar vein, particular configurations of the governance terrain influence the making, application and adjudication of administrative law. Grounded in this view of the dynamism and interactivity of the relationship, the study located itself in on-going debates related to the nexus between law and governance: the criminalization of informality[12], citizens demand for governance, the tension between legality and legitimacy/pragmatism, the quality of participation of citizens (deliberative democracy-Habermas), the cause and effect of legal lacunae, the tensions between technical versus political decision-making,[13] access to public information and the impact of judicial review on governance.

1.3 Methodology

The selection of local government as an arena in which to study administrative rulemaking, rule-application and adjudication is justifiable by the fact that the constitution and operation of local government raises important questions with respect to administrative law theory. The first question relates to the legitimacy of administrative authority. While theory posits the authority of administrative agencies as being based on the principle of delegation, formal local government structures derive theirs directly from the Constitution. The theoretical debates over whether administrative agencies are agents or principals, in the legal sense, therefore gain added significance in connection to local government .The second defining characteristic of local government is the multiplicity of actors and the varying degrees of the formality of their authority. Unlike central government agencies, formal local government administrations interact directly with informal community structures, some of which exercise de facto authority which significantly affects administrative rulemaking, rule application and adjudication. In that regard, local government offers an ideal referent for investigating how the processes and mechanisms of rulemaking, rule application and adjudication are shaped by costellations of formal and informal institutions and their synoptic interaction.

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[11] Hornstein, Donald 2005: Complexity Theory, Adaptation, and Administrative Law, *Duke Law Journal*, Vol. 54, No. 4, Thirty-Fourth Annual Administrative Law Issue: Incrementalism and the Administrative State (Feb., 2005), pp. 913-960.

[12] Hayden, Tiana Bakić. " The taste of precarity." *Street Food: Culture, Economy, Health and Governance* (2014): 83; Bandauko, Elmond, and Gladys Mandisvika. "Right to the City? An Analysis of the criminalisation of the informal sector in Harare, Zimbabwe." *Journal of Advocacy, Research and Education*, 2015, Vol.(4), Is. 3 (2015).

[13] Shapiro, Sidney A. "The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences." Available at SSRN 2720970 (2016); Fisher, Elizabeth C., Pasky Pascual, and Wendy E. Wagner. "Rethinking Judicial Review of Expert Agencies." *Texas Law Review* 93 (2015).

The study commenced with a comprehensive review of all the relevant literature on administrative law and governance in Malawi. For this purpose, three main types of documentation were identified and reviewed to inform the development of the study's conceptual and theoretical frameworks and the design of research instruments. Documents reviewed included statutory and policy documents that set out the rule-making, application and adjudication mandates of administrative agencies sampled for the study; peer reviewed and gray academic literature; official and semi-official reports and other documents and newspaper reports.

Literature review was followed by key informant interviews which targeted a purposively selected sample of officials of district, city and municipal councils; elected local government representatives; officers of civil society organisations and other citizen's voluntary organisations. The interviews were conducted in geographic sites that were purposively selected based on the objectives of the study and the imperative to cover the widest range of contexts in which local government administration is undertaken in Malawi. Informed by these considerations, the sample of study sites included rural, urban and peri-urban centres. For the urban component, the study sampled Blantyre and Lilongwe cities, while for the peri-urban, the research selected Luchenza, Dedza and Karonga, and for the rural, sampled Mwanza. exemplified by Mwanza District, Blantyre City and Municipality of Luchenza. The sample was also designed to purposively cover all the country's three regions- Northern , Southern and Central. Although in all the study sites, interviews with key informants was considered adequate for establishing administrative practices by the various local government actors, the study also used observation and focus group discussions as means to gather data which was used to confirm the findings yielded by the interviews.

A more detailed description of the methodology as it applied to the whole project is provided elsewhere in the main report of the study.

1.4 Order of presentation

In this introduction, the paper presents the objectives of the study, briefly outlines its theoretical basis, and outlines the methodology employed in the research. In the next section, the paper describes the background and context of the study and includes, in that description, milestones in the historical development of local government administration in Malawi, the political economic context in which local government administration has evolved and is currently operationalized and the constitutional and other legal provisions which establish the normative framework within which administrative law and democratic governance interact. The rest of the paper presents and discusses the findings of the study. The final section of the paper states the conclusions from the findings and makes recommendations.

In its analysis and discussion of the findings of the study, the paper firstly focuses on rule-making, then rule-application and, finally, adjudication. In the discussion of study findings each of the three functions, the chapter presents the findings and their analysis and discussion under heads that correspond to the following key variables identified by the study: actors, their roles and operational processes and mechanisms. The analysis and discussion of the findings is guided by the overarching question of the research project, namely, whether, and to what extent, which administrative law and practice in the context of local government in Malawi promotes or undermines the principles of participation, the rule of law, accountability and transparency through the enforcement of norms of legality, reasonableness and fairness in everyday governance.

2. BACKGROUND AND COUNTRY CONTEXT

2.1 A brief history of local government administration in Malawi

The genesis of formal local government administration in Malawi is traceable to the end of the 19th Century, when the British Government declared the territory that is now Malawi to be the British Central Africa (later Nyasaland) Protectorate. The declaration was formalised by the British Central Africa Order-in-Council (1902), the Nyasaland Order-in-Council (1907) and various subsequent statutory instruments. In the implementation of its imperial objectives, the colonial administration initially established various bureaucratic forms at central government level whose operations were, however, hampered by the fact that there were too few officials to administer the whole territory.

The experiences of the first thirty years of the colonial administration had underscored this reality. During this period, which lasted from 1891 to 1912, the colonial administration appointed "District Residents" who were, in essence, agents of the central government. The mandate of Residents was wide-ranging and unconstrained by any notions of democratic local governance such as legality, reasonableness or procedural fairness. On the contrary, Residents exercised executive, legislative and judicial functions in processes and mechanisms that did not allow for citizen participation or accountability. From 1912 to 1933, the administration incorporated chiefs into district administration by empowering them to perform various functions, including the maintenance of law and order, encouragement of the payment of taxes, and providing sanitation. Despite this arrangement, by 1933, it had become obvious to the colonial administration that the use of Residents and chiefs to implement local administration faced many challenges, including the lack of enough Residents to effectively administer the territory and the Residents' lack of legitimacy among the "natives." In response, the colonial administration enacted the Native Administration and Native Courts Ordinances which, among other things, authorised traditional authorities to make and enforce a wide range of rules in their localities. The process and mechanisms for making and applying the rules were evidently undemocratic, with the traditional authorities were appointed by the colonial Governor, who also

had power to veto their decisions. The rules could also be replaced by those imposed by the colonial administration.

The next phase in the development of local government was in the period between 1953 and 1961 when, for the first time, local government was entrusted to "District Councils" which were established under the 1953 Local Government (District Councils) Ordinance. Members of the councils were appointed by the colonial administration. Most powers that had hitherto been exercised by traditional authorities were transferred to the Councils. In 1954, the Local Government Ordinance stripped Councils of legislative powers and empowered the Minister to abolish them. It was only in 1961, that the country had its first experience of elected local government councils. An amendment to the Local Government Ordinance provided that district councils would consist of elected members, District Commissioners would have only an advisory role and chiefs would only be ex officio members. This arrangement remained in place until 1994 when the Constitution of the Republic set up local government authorities consisting of elected councillors as full members, with chiefs and Members of Parliament as ex officio members. Underpinned by the Local Government Act (1998) and the Local Government Elections Act (1998), this is the structure of local government that remains in place to date.

2.2 The legal and institutional framework of local government

Malawi's transition from authoritarian one-party rule to a constitutional democracy in 1994 was characterised by not only the adoption of a new constitution predicated on the principles of democratic governance. It was also followed by the establishment of a legal normative framework for the democratic decentralization of state power. The cornerstones of this framework were the National Decentralisation Policy (NDP) and the Local Government Act, both of which became operational in 1998. Aimed at operationalising democratic decentralization, the policy and the Act set up an institutional structure to facilitate governance and development at the local level; to make public service more efficient, more economical and cost effective; to promote accountability and good governance at the local level; and to mobilize citizens for socio–economic development at the local level.

The legal framework for administrative law in Malawi consists of "underlying principles" and "principles of national policy" prescribed by the Constitution; constitutional provisions that guarantee human rights, including the right to administrative justice; and constitutional and statutory norms that establish administrative agencies, define the scope of their power and regulate its exercise. While some of the legal norms and rules apply to the government and its organs, in general, others apply specifically to particular governmental functions such as environmental management, revenue collection and decentralisation. Cumulatively, the different elements of the legal framework set down the institutional mechanism for administrative rulemaking, rule-application and adjudication by local government agencies..

The relevant constitutional "underlying principles" of general application provide that all holders of legal and political power are bound to uphold the principles of accountability, transparency, the rule of law and human rights. These principles are equally binding on all agencies responsible for public administration. The Constitution also stipulates principles of national policy, which consist of specific goals which the State must pursue by progressively adopting and implementing relevant policies and legislation. Among the principles of national policy that affect administrative law in general are those which set as national goals: humane application and enforcement of laws and the adoption of "measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions."

The Constitution expressly permits courts to take account of principles of national policy in interpreting and applying the law. Although courts are not bound to take into account the principles of national policy, such an obligation is found in other provisions of the Constitution, including those which guarantee human rights and establish specific administrative institutions and impose on them specific their legal obligations. Examples of relevant constitutional provisions include section 43 which guarantees every person the right to 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 to be "furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected." The Constitution also includes provisions which establish and define rulemaking and adjudicatory powers of various administrative bodies such as the office of the Ombudsman and local government councils .

Of particular interest to this study are provisions of the Constitution which establish local government in the following terms: "There shall be local government authorities which shall have such powers as are vested in them by this Constitution and an Act of Parliament."[14] The Constitution vests in local authorities the mandate to represent the people over whom they have jurisdiction, for their welfare and the responsibility for the promotion of infrastructural and economic development, through the formulation and execution of local development plans and the encouragement of business enterprise; the presentation to central government authorities of local development plans and the promotion of the awareness of local issues to national government; the consolidation and promotion of local democratic institutions and democratic participation; and such other functions, including the registration of births and deaths and participation in the delivery of essential and local services, as may be prescribed by any Act of Parliament.[15]

The constitutional provisions are complemented by a range of statutes which establish structures of local government, grants them legal powers and provide for the mechanisms and processes

[14] Section 146(1).
[15] Section 146(2).

through which such powers may be exercised. The most far-reaching of the statutes is the Local Government Act which stipulates the objectives of local government to be "to further the constitutional order based on democratic principles, accountability, transparency and participation of the people in decision-making and development processes."[16] The Act classifies local government authorities into District, Municipal and City Councils[17] and vests them with a wide range of rule-making, rule-application and adjudication powers. Among other things, the Act mandates Councils to make by-laws" for the good governance" of the areas of their jurisdiction,[18] and regulate and control environmental management in their areas and implement measures to enforce local rates and taxes.[19] Rule-making, rule-application and adjudication powers are also derived from other statutes, including the Town and Country Planning Act which designates District, Municipal and City Councils as Planning Committees with power to approve development plans for their respective areas of its jurisdiction,[20] the Public Health Act which requires Councils to take measures to safeguard and promote public health in the areas of their jurisdiction,[21] the Business Licensing Act which mandates Councils to issue business licences in the areas of their jurisdictions on behalf of the Minister of Trade,[22] the Chiefs Act which empowers traditional authorities "to assist in the general administration of the District in which his area of jurisdiction is situate";[23] the Parliamentary and Presidential Elections Act which empowers District Commissioners to act as election returning officers for all the constituencies in their respective districts, and for such purpose to carry out such functions as the District Commissioner may require.[24]

The statutory framework that governs administrative agencies also imposes various obligations on the agencies requiring them to observe procedural fairness in the exercise of their rulemaking and adjudicatory functions and powers. Examples of this include provisions that seek to prevent bias or its appearance such as those which require disclosure of interests by participants at meetings local government Councils and their committees, and disqualify any member of a Council who has a pecuniary interest in a matter under consideration at any meeting is disqualified from voting on the matter.

2.3 Organisational structure

The principal administrative bodies vested with rulemaking and adjudication powers at local government level in Malawi are District, Municipal and City Councils. For purposes of local government administration, Malawi is demarcated into 28 Districts (see Annex 2). In four of the districts, a geographic area is constituted into an autonomous local government authority which

[16] Section 3.
[17] Section 4(2) and (3).
[18] Section 6(f).
[19] Section 78.
[20] Section 61, Town and Country Planning Act.
[21] Section 7, Public Health Act.
[22] G.N. 77/1970 issued under section 7 Businesses Licensing Act.
[23] Section 7(e).
[24] Section 34(2).

is vested with a separate legal existence and designated to be a city or municipality. The power to declare an area to be a municipality is vested in the Minister,[25] while that to declare a city is vested in the President.[26]

Established by the Constitution (1994) and the Local Government Act (1998), membership of a council consists of local councillors elected by registered voters in the area of its jurisdiction. Members of Parliament and Chiefs whose constituencies and areas of jurisdiction fall within the boundaries of the district, municipality or city; and administrative personnel "subordinate to local councillors" as shall be required to execute and administer the lawful resolutions and policies of those councillors.

The functions of councils are defined by the Local Government Act (1998), and include making policy and decisions on local governance and development for the local government area; consolidating and promoting local democratic institutions and democratic participation; promoting infrastructural and economic development through the formulation, approval and execution of district development plans; mobilizing resources within the local government area for governance and development; maintaining peace and security in the local government area in conjunction with the Malawi Police Service; making by-laws for the good governance of the local government area; registering births and deaths; and participating in the delivery of essential local services. Each council has a "secretariat" which is responsible for providing administrative and management support to council and leading in implementing decisions of the council. In city and municipal councils, the secretariats are headed by Chief Executive Officers, while in district councils, the heads are designated District Commissioners.

Although not provided for under any law, a structure of committees operates as a mechanism through which communities participate in development planning and decision-making. The committees are organized hierarchically, with the Area Development Committees (ADCs) at the apex of the order. The geographic scope of the jurisdiction of each ADC coincides with that of a Traditional Authority. Below ADCs are Area Executive Committees (AECs) which communicate to ADCs needs assessments, project identifications and project proposals originating from Village Development Committees (VDCs) which serve as representative bodies at the level of the village, and are charged with the responsibility of facilitating, planning and development at the grassroots level.

The administrative functions and powers of District, Municipal and City Councils overlap with those of locally-based administrative units of the central government and traditional authorities. Virtually all central government Ministries have offices and officials at district level as part of the de-concentration of central government's institutional structure and organisation. Thus, for

[25] Local Government Act, section 4(2).
[26] Ibid., section 4(3).

example, the Ministry of Health has a District Health Officer (DHO), the Ministry of Education has a District Education Manager (DEM), the Ministry of Water has a District Water Development Officer (DWDO), the Ministry of Forestry has the District Forestry Officer (DFO) and the Ministry of Agriculture has a District Agricultural Development Officer (DADO). The district offices of central government ministries, departments and agencies embody the overlap between central and local government because, in addition to performing central government functions, the offices and their officers are also an integral part of some Council structures such as the District Executive Committee (DEC) and the District Coordinating Team (DCT) which serve essentially as sub-committees of the councils.

On its part, the overlap of powers and functions of councils arises because statutory and customary laws empower traditional authorities to exercise authority over matters and geographic areas that are also vested in councils by the Chiefs Act which establishes a hierarchy of traditional authorities consisting of, in descending order: Paramount Chiefs, Senior Chiefs, Traditional Authorities, Group Village Heads and Village Heads. Paramount Chiefs, Senior Chiefs and Traditional Authorities are appointed by the President provided, among other things, that the prospective appointee has the support of the majority of the people in the area of jurisdiction of the office in question; and, in the case of the office of Senior Chief, is a chief and is recognized by all chiefs in his district as being entitled under customary law.[27] On their part, Group Village Heads and Village Heads are appointed by Traditional Authorities although, as noted in the case of *Robeni v Senior Chief Makanjira*,[28]the Act curiously does not require that the appointee be entitled according to customary law. Traditional authorities are an integral part of local government administration. By virtue of the Local Government Act, Paramount Chiefs, Senior Chiefs and Traditional Authorities are *ex officio* members of District and Municipal Councils.

3. RULE-MAKING

Rule-making by administrative agencies occupies the space between framework legislation and ground-level decision-making (Thomas, 2013: 135). In practical terms, this places on administrative decision-makers the responsibility of translating broad legislative intent into specific decisions in particular cases, whose facts, in some cases, could not have been foreseen by the legislature when it enacted the framework legislation. This is the case with respect to specific rules that administrative agencies are mandated to make in different circumstances. The potential of those rules to work for the public benefit depends significantly on the type of rules that administrators choose to formulate and apply (ibid.). The key factors that are likely to influence that choice towards rules that promote administrative justice are whether the actors

[27] Chiefs Act, Section 4(b),
[28] Civil Cause No.476 of 2012.

involved in making the rules, the norms that the actors adopt and the procedures and mechanisms that they use in making the rules adhere to principles of administrative law.

Assessment of whether, and to what extent, administrative rule-making by local government comply with principles of administrative justice, therefore, requires an investigation of the actors, norms and procedures and mechanisms. This study undertook that investigation and its findings are reported and discussed below.

3.1 Actors

Informed by the literature on the importance of actors in influencing the quality of rulemaking, the study identified a number of factors that influence the decisional choices made by actors who have the mandate to make rules at local government level in Malawi. The study grouped the factors into those that relate to actors with respect to legality, procedural fairness and rationality and respectively. Data were collected on the role of administrative agencies in rule-making and adjudication in order to establish the legal basis of the power and authority that they exercise as well as the rationality and procedural fairness of their decisions and actions within the processes.

The first main finding was that rule-making at local government level is undertaken by a proliferation of administrative agencies and other actors which may be classified into three broad categories. The first consists of actors who are part of the formal structure of local government, the second comprises actors who are formally part of both local government and central government; and the third consists of actors who are part of neither local nor central government. The multiplicity of actors and the variations in their institutional character affect the potential of administrative rulemaking to contribute to governance. This is discussed in greater detail in the section of this report that deals with jurisdictional overlaps and conflicts.

Legality

The second main finding regarding actors who make rules at local government level is that a significant number of them lack the necessary legal mandate. The study found the most far-reaching instance of rulemaking by actors who had no legal mandate occurred in the period between 2005 and 2014. Although the Constitution required local government elections to be held one year after presidential and parliamentary elections, the executive, whose responsibility it was to facilitate them, chose not to do so in 1995, 2005 and 2010 although the presidential and parliamentary elections had taken place in 1994, 2004 and 2009. Consequently, from 2005 to 2014, local government structures did not include elected councillors who are the only actors in whom the law vests rule-making powers. In practice, the gap was filled by administrative structures which purported to exercise the rulemaking powers that the law vests exclusively in elected councillors. The most notable of the structures that were established in every district, municipality and city formation were Consultative Forums and Executive Committees which, among other things, made various rules, including some which purported to regulate revenue collection by the councils. Although in one case, the High Court declared such exercise of power to be ultra vires, in another, the same court, albeit with a different judge presiding, held that the necessity of having a functioning local government administration outweighed the lack of a legal mandate by administrative structures which exercised powers that legally could only be exercised by elected councils. The two cases are described in more detail in Box 1.[29] Of particular relevance for this study is the fact that the case that subordinated legality to pragmatic necessity in effect undermined the potential of administrative law to contribute to democratic governance. Since that decision was made, however, the High Court has delivered another judgment in which it stated that legality should never be sacrificed for necessity.[30]

BOX 1

Necessary illegality?

Malawi did not hold local government elections in 1995, 2004 and 2009. There were therefore no elected local authorities between 1995 and 2014 when the elections were held. Under the Local Government Act (1998), only elected councils have the power to regulate, collect and vary local government fees and other payments of revenue, including rates. In the absence of elected local authorities, decisions and actions, including the raising of rates and collection of fees, were taken by technocrats, employed to serve councils, and make-shift "District/Urban Consultative Forums" (DCF) comprising traditional chiefs, MPs and representatives of interest groups.

In 2005, the Chief Executive Officer of the city of Mzuzu informed some rate-payers in the city that their properties would be sold by the council as they had failed to pay city rates due. One of the affected ratepayers commenced a legal challenge against this decision on the basis that the DCF had no legal mandate to regulate or administer revenue-collection as this was the exclusive mandate of elected councillors [*Bandawe v Mzuzu City Assembly* et. al. Civil Cause No. 63 of 2006]. The High Court agreed with the ratepayers and held that the DCF had acted ultra vires. However, in a case with similar facts, the High Court held that although the DCF had no legal mandate, its actions were justified by the fact that revenue collection was necessary in order to sustain the delivery of public services [*Municipality of Zomba v Council of the University of Malawi*].

[29] In a case based on a similar issues, the High Court held that in the period when there were no elected councilors, officials could legally enforce resolutions that had been made in the past by duly-constituted councils: see *Blantyre City Assembly v Kammwamba* 2008 MLR 21.

[30] *The State v Blantyre City Assembly, ex.p. Ngwala* Misc. Civil Application No.183 of 2012.

Rulemaking by actors who lack the requisite legal mandate is not confined to the historical experience of consultative fora and executive committees established in local councils. The study found this to be currently the case also with VDCs , ADCs and EDCs which, despite not being established or granted rulemaking power by any law , are involved in the rule-making process by councils. The study found that the nature and extent of the involvement of the committees varied from place to place. Thus, for example, in Mwanza District, the Council's Director of Finance indicated that in the making of finance-related rules by the Council, ADCs and VDCs are "normally consulted." This was corroborated by the District Commissioner who indicated that VDCs and ADC's were part of "consultative forums" that the Council arranges.

Another example of an institution that plays a significant role in rule-making despite having no legal mandate is the "town chief." Chosen by residents of particular residential areas or having been hereditary traditional chiefs before their areas were incorporated into cities, municipalities or district centres, "town chiefs" lead in the making and enforcement of rules for communities in urban and peri-urban residential areas. "Town chiefs" make rules applicable in their assumed areas of jurisdiction mainly with respect to collective social activities such as funerals, and serve as the foremost primary justice forum for the adjudication of disputes among community members. Previous studies have established that many communities accept the legitimacy of "town chiefs" and submit to their authority. The central government has, on a number of occasions, declared that "town chiefs" have no legal mandate to exercise any power and directed them to cease to operate. The government's declaration was based on section 3(5) of the Chiefs Act which effectively prohibits chiefs from exercising jurisdiction within cities, municipalities or towns.

The present study found that, despite that prohibition, the government's directive has been resisted by a significant number of "chiefs", using a number of actions including an unprecedented march in the country's commercial city It is telling that, in the wake of that resistance, the central government has taken no further action to enforce the abolition of the institution and continues to pay some urban chiefs the same honoraria as is paid to chiefs whose legal mandate is uncontested because they exercise jurisdiction in areas outside cities, municipalities and towns. Further, city and municipal authorities continue to recognise the de facto authority of town chiefs and permit them to make rules that apply in their areas with the support of the councils. It is arguable that this is another example of the subordination of legality to legitimacy in that the central and local government authorities recognise the political risks of enforcing the law against an institution that is regarded as an essential part of Malawian community life.

Another group of actors who play a significant role in rule-making despite having no specific legal mandate are voluntary citizens' associations. The decisions and actions of many of such

associations are accepted as legitimate by both the people affected by them as well as the formal structures of local government. The groups were essentially special interest lobby groups established to promote and protect their members' sectoral interests. Associations in this category that the study identified included "market committees," which were found to operate in all markets managed by city, municipal and district councils; associations of providers of services or goods, for example the Bicycle Taxi Operators Association in Luchenza Municipality, Mzuzu Street Vendors Association and Mzuzu Kabaza Operators in Mzuzu City, Balaka Taxi Operators in Machinga District, Blantyre Street Vendors Association and Blantyre City Garden Owners Association in Blantyre City and Lilongwe Street Vendors Association in Lilongwe City.

The study found that, despite having no legal basis for their purported power to make rules, VDCs, ADCs, EDCs "town chiefs" and citizens' voluntary groups are involved in rulemaking on the initiative of local councils in at least two respects. First, they are consulted by councils in the course of exercising their formal rulemaking power, as was found in Mwanza District Council, where its Director of Finance stated that the council consults market committees as part of its process of making finance-related by-laws. Second, they make various rules that apply to not only their members but also members of the public. In the making of the rules, the committees receive active support from the formal local government authorities.

BOX 2

Notice of The Central Market Election Re-Run.
Following the information that Council has gathered from both sides on how the process of electing the central market committee went, it has been observed that there were some problems that affected the election process. The problems include the failure to count the votes and the faulty procedures used in the election process. Hence the first election has been nullified and the market neither has a committee or a chairman.

Due to the problems stated above, council has decided to have an election re-run of the central market committee on 21st May 2015. All those who took part in the election are being invited. The procedure of the election will be communicated before the election day.

Although most of the voluntary associations sampled in this study were found to be self-regulating, market committees appeared to attract external interference in their rulemaking in the form of direct interventions by council officials in key governance processes of the committees such as the conduct of elections of their leaders. Although some council staff interviewed in the study claimed that market committees were permitted to operate independently, with the council playing only a facilitative role, evidence suggests that councils play a more interventionist role. In 2015, for example, the Chief Executive Officer of Zomba City Council "nullified" election of a market committee for Zomba City's Central Market (See Box 2).

Significantly, the notice did not provide sufficient details of the reasons why the election was nullified, and merely alleged that there had been "some problems' including the failure to count votes and "faulty procedures." In the same notice the Chief Executive Officer indicated that procedures for the re-run of the elections would be communicated to all participants by the Council at an unspecified day before the election.

In a significant number of instances, the legality of the power and authority of rulemaking administrative agencies is not absent- as is the case with the development committees, town chiefs and citizens' associations described above- but contested. Two forms of contestation were identified by the study. The first is where it was the legal basis authority of particular office-holders that was challenged on the basis that they were not entitled to hold their rule-making offices. This type of challenge does not question the legal basis of the office itself, but that of the authority of particular incumbents. The study established that this is most prevalent with respect to chiefs who, as was noted earlier, play an important role in rule-making both as ex officio members of councils as well as in their own right as promulgators and arbiters of rules of customary law. Increasingly, chiefs have also made rules aimed at addressing various social challenges confronting their communities. In this regard, some chiefs have unilaterally proclaimed rules, which some members of the public and the media refer to as "by-laws" although under the law, by-laws can be made at the local government level by councils. Although the legality of such rule-making by chiefs is debatable, the making of such rules has received widespread public support mainly because most of the rules are aimed at addressing negative social practices such as truancy, early marriages and other "harmful" cultural practices.

However, the legal mandate of some of those traditional authorities has been contested. In almost all instances of such challenges, the contestation has related to competing interpretations of customary law on which the traditional authorities base their claims to office. In some cases, competing claims have resulted in vacancies in chieftaincies pending the resolution of disputes, thereby, creating gaps in institutional framework involved in rule-making, such as councils, VDCs, ADCs and EDCs. A striking example of such competing claims which the study discovered was that involving the position of Senior Chief Kabunduli in Nkhata-Bay District in which a vacancy existed in the office for eight years as various attempts were made to resolve the contestation over the office.

The other type of contestation over the legality of rule-making power identified by the study was that in which two or more actors claim rule-making powers over the same subject-matter or geographical area. The study found the most significant of such jurisdictional overlaps to exist between local government councils and central government Ministries, Councillors and Members of Parliament, councillors and chiefs. The finding is best exemplified by comparing the power of local government councils and chiefs. The Local Government Act empowers councils

to make by-laws "for the good rule and government of the whole or any part of the local government area or, as the case may be for the prevention and suppression of nuisances therein and for any other purpose." On its part, the Chiefs Act empowers chiefs to preserve the public peace and to carry out the traditional functions of their office under customary law. The geographic scope of the respective jurisdictions of councils and chiefs overlap, thereby raising the likelihood of conflicts between the two over the power to make rules in particular cases. The study found evidence of such overlaps and conflicts. For example, while councils are obliged to prohibit the disposal of human bodies otherwise than by interment in any cemetery or cremation at any crematorium established or permitted under the Public Health Act,[31] under customary law, it is chiefs who have the power to decide where community burial places should be located. Similarly, while councils are empowered to control or prohibit "singing, dancing, … the making of any noise whatsoever likely to disturb any person,"[32] under customary laws these functions fall within the statutory mandate of chiefs to preserve the public peace[33] and to carry out the traditional functions of their office under customary law such as the regulation of public nuisances.

To the extent that the legal mandates of actors who make rules at local government lebvel There are wide variations in the quality of actors who do not have specific legal mandates because there are no legal prescriptions of their minimum qualifications and experience. It follows from this that there are wide variations among the actors with respect to their levels of knowledge of administrative law principles and appreciation of the necessity of applying them.

Procedural fairness

In Malawi, procedural fairness in administrative processes is not only a requirement of the common law, but also a human right guaranteed expressly by the Constitution which provides that: "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 are affected."

The right to administrative justice as guaranteed by the Constitution and the common law is reinforced by various statutes which provide for the right to be heard and the rule against bias in local government rulemaking. An example of such a provision identified by the study is section 103 of the Local Government Act which entitle any person wishing to make any observation upon or an objection to any proposed by-law to present such observation or objection to the council before it submits the bye-law for approval. Another example is section 12 of the same Act which promotes procedural fairness by obliging any member present at a meeting of the

[31] Local Government Act, Second Schedule, Part 3(b).
[32] Local Government Act, Second Schedule, Part 4(c).
[33] Chiefs Act, section 21.

Council or of any committee of the Council who has an interest in a matter under discussion by the meeting to disclose such interest and, unless the Council or committee otherwise directs, to recuse himself or herself.

The study found very few instances in which citizens had presented observations or objections to proposed by-laws. One of the few exceptional instances was found in Luchenza where the Bicycle Taxi Owners Association raised objections relating to a proposal by the municipal council to relocate their designated place of business. In another instance, the Minibus Owners Association of Malawi objected to a by-law proposed by Blantyre City Council aimed at relocating a bus terminus. Except for the few instances in which interest groups objected to by-laws, there was no evidence indicating a widespread exercise of the right to object by individual citizens. It is also important to note that the study found documented cases of objection to by-laws only in the cities and peri-urban centres and noted that in almost all cases of objection, the objectors consisted of relatively powerful interest groups.

The declaration of principles of procedural fairness in the law can contribute to governance only if it is followed by the willingness and ability of decision-makers to apply the relevant rules in practice. Gauging such ability and willingness requires an investigation of the competence of the decision-makers and the totality of incentives which motivate their decisional choices. The study made four main findings with respect to the specific internal and external factors that drive local government actors in Malawi to apply legal principles and rules of procedural fairness in rulemaking.

The first finding was that the vast majority of administrative decision-makers at local government level have either very limited or no knowledge of the scope and limits of the roles of various actors who are involved in rulemaking at local government level. The practical consequence of such limited knowledge is uncertainty regarding whom to hold accountable and how; undue jurisdictional conflict among actors which militates against the development of common administrative standards. Literature reviewed for the study, indicated that the most pronounced of such conflicts is that between councilors and Members of Parliament. In addition to counterproductive jurisdictional conflicts, low levels of awareness and knowledge of the roles of local government actors has more profound consequences for administrative law and democratic governance. Among the citizenry, low levels of awareness and knowledge contribute to low citizens' demand that administrators comply with the principles legality, rationality or procedural fairness by administrators. The study found very low levels of awareness of the actors who make rules. This finding resonates with the observation by an earlier study which found that among " few ordinary citizens understand the process of democratic decentralisation.....A few local elite are aware that the councillors will have an accountability function vis-à-vis sector staff

and the DC. But beyond that, there is little knowledge of the structure of council and committees or their detailed work."[34]

The second finding was that the vast majority of administrative decision-makers at local government level have either very limited or no knowledge of the formal principles of procedural fairness that the Constitution obliges them to apply in rulemaking. The exception is District Commissioners(DCs) , Chief Executive Officers (CEOs) of cities and municipalities, almost all of whom are graduates of the University of Malawi where they studied administrative law as part of their public administration studies. In contrast, levels of knowledge of formal administrative law principles of procedural fairness were generally lower, or non-existent, among councillors, mid- and lower-level local government officers, chiefs and leaders of citizens' voluntary associations. Without such knowledge, rule-makers cannot be expected to apply principles and rules of procedural fairness consistently or at all. Although it is possible to gain knowledge of principles of procedural fairness through experiential learning, the study found that this is impeded in practice by a number of factors, the most significant of which appeared to be limited information-sharing and lesson-learning within and across local government administrative units. The study found no systematic institutional forums or processes through which knowledge of principles of procedural fairness in rulemaking could be transferred from DCs, CEOs and Directors to those who have a deficit of such knowledge. The situation is compounded by poor record-keeping and documentation of rule-making processes and outcomes by most actors involved in rulemaking. In most offices where records of proceedings were kept, the filing was done manually, hundreds- if not thousands- of records were stored in limited physical space and were hardly accessible to officials, let alone members of the general public.Comprehensive and systematic records of rulemaking processes would provide a resource that would facilitate self-learning on the part of decision-makers who might not have been formally trained in administrative law.

Key Informants also reported that there is no systematic method by which court judgments are distributed to local government administrators to enable them to become familiar with judicial interpretations of the principle of procedural fairness. These include, lower level officials, Councilors, Members of Parliament, chiefs and members of informal institution. On the demand side, levels of knowledge are equally low.

Overall, the data suggest that compliance with the requirements of procedural fairness in rule-making at local government level in Malawi is very limited, especially in relation to decisions and actions of lower-level officials in administrative agencies who have limited or no formal knowledge of principles of procedural fairness laid down by the Constitution, statutes and the common law.

[34] (Cammack)

Rationality

The principle of rationality requires that decisions and actions be rational in the sense that they must be based on relevant considerations, aimed at proper purposes, be proportional and not be actuated by bad faith. The principle has constitutional authority by virtue of section 43 which requires, among other things, that administrative decisions be "justifiable in relation to reasons given" and has been endorsed by the courts on numerous occasions. This study sought to investigate the application of the principle in rulemaking by local government actors, informed by literature which suggests that, in practice, the capacity and willingness of the various actors involved in rule-making to make decisions that comply with the principle of rationality depends on the relative weight of the various incentives and disincentives that motivate actors to comply or not comply with the law.

The study found that the vast majority of local government actors in rulemaking who were interviewed had no knowledge of the legal guarantee of principle of rationality, although many appeared to state intuitively that decision-makers must not make absurd decisions. Unsurprisingly, actors who had received training in administrative law, such as District Commissioners, Municipal and City Executive Officers and some Directors, demonstrated some knowledge of the elements of the principle and rules of rationality. However, the study found that knowledge of the requirements of the principle of rationality did not necessarily result in rational rule-making because the obligation to comply with the principle is occasionally outweighed by various disincentives.

The study found the most influential disincentive to be political pressure that is exerted on actors to make decisions regardless of their compliance with the principle of rationality.

As indicated in the discussion of legality in rulemaking, the legal framework requires rationality in administrative processes.

For example, the power of the central government to demote or transfer of Chief Executives of cities and municipalities and district commissioners to less desirable postings is used to encourage them to make decisions favourable to the party in government, regardless of their rationality. The study found one case in which a Chief Executive Officer had been demoted and transferred to a smaller district apparently for having decided to permit a leader of an opposition party to use premises under the control of the council to conduct an election campaign rally. It also found one case in which a Minister effectively threatened a District Commissioner with unspecified action for making a decision that did not favour the party in government.

The complying with the requirements of rationality, therefore, depends on the ability of the decision-maker to resist countervailing political pressure. One District Commissioner interviewed in the study suggested that decision-makers who have knowledge of the legal limits of the power of the central government to abuse ministerial powers are better able to resist

political pressure than those who are not. Although the study did not investigate the involvement of political pressure in the circumstances, there have been a number of cases in which District Commissioners have obtained High Court injunctions against ministerial directives to demote or transfer them.

The study identified two contextual issues that have a significant impact on actors with respect to their ability and willingness to apply principles of rationality in rule-making. The two issues are the dominance of a neo-patrimonial political culture and judicial independence. The former is manifested in the tendency of the dominant political regime to capture public administration for its own political ends. The incidence of this tendency in relation to local government and its effects in Malawi are well documented, including in a study of Malawi and Uganda conducted in 2007.[35] Essentially, in the context of a political culture which is characterized by the dominance of neo-patrimonialism decision-makers are vulnerable to negative incentives that militate against rational rule-making and adjudication.

Judicial independence acts as a countervailing factor that provides an incentive to administrators to resist political pressure to make irrational decisions. The judiciary in Malawi is generally perceived to be independent. As such, administrators who are pressured into making irrational decisions can rely on the judiciary to come to their protection by exercising its power of judicial review independently. The potential of the judiciary to contribute to the upholding of principles of administrative law is, however, limited because very few of the numerous actors involved in rule-making and adjudication at the local government level in Malawi have the knowledge and means to access the High Court and apply for judicial review. This reflects the general limitations of access to justice in Malawi that have been documented in available literature and is discussed in more detail in the section that analyses the study's findings on adjudication.

3.2 Processes and mechanisms

Rule-making at local government level is undertaken through a complex set of formal and informal processes and mechanisms which are driven by either central or local government agencies. Rules made the central government mainly take the form of legislation passed by Parliament using standard parliamentary procedures stipulated in Parliamentary Standing Orders and subsidiary legislation made by Ministers under the authority of specific legislation. Examples of primary legislation with local government application include the Town and Country Planning Act, which, among other things, vests councils with the power to approve development plans for the area of its jurisdiction ; the Police Act, which empowers District Commissioners to receive and process notices of public demonstrations and assemblies intended to be held in their jurisdiction; the Public Health Act which among other things imposes on local authorities obligations to take measures to safeguard and promote public health in the areas of their jurisdiction; and the Business Licensing Act, under which local Councils are mandated to issue business licences in the areas of their jurisdictions, on behalf of the Minister of Trade,

[35] Cammack 2007

On its part, Parliamentary and Presidential Elections Act empowers District Commissioners to act as Returning Officers for all the constituencies in their respective districts, under the Land Act , a chief can authorize the use and occupation of customary land within his area.

The central government also contributes to rulemaking at local government level through the making of delegated legislation. Such delegation has played a significant role in the regulation of a wide variety of social, economic and political issues, including development control, environmental management. In respect of development control, for example, the Town and Country Planning Act empowers the Minister to make regulations including those that prescribe the forms of applications for grants of development permission and the type of materials to be used in the construction of buildings and fences. The exercise of the power of Ministers to make delegated legislation must comply with the principles of legality, rationality and fairness. The most significant finding of the study in this regard was that the process of making most delegated legislation in Malawi violates the principle of legality.

The processes and mechanisms for rulemaking by the formal structures of local government are regulated by a variety of legal provisions. The primary of these is the Constitution which stipulates in section 146 that the structure and general mandate of local councils to include the formulation and execution of local development plans and the consolidation and promotion of local democratic institutions and democratic participation. More specifically, section 103 of the Local Government Act empowers Councils "to make by-laws for the good rule and government of the whole or any part of the local government area or, as the case may be for the prevention and suppression of nuisances therein and for any other purpose." The Act further stipulates the procedural requirements for the making of by-laws (see Box 1).

The bulk of rulemaking at the local government level is, however, undertaken by local government councils. The process through which such rules are made varies with the type of rule in question. Ideally, the making of bye-laws starts with proposals made by councilors based on recommendations from the District, City or Municipal Development Committee. The proposals are then formulated in appropriate form by technocrats at district level who consist of Chief Executive Officers or District Commissioners and heads of directorates of various sectors, including planning and development, finance, health, education, agriculture, water and administration. The formulated proposals are then tabled before the council which deliberates and votes on them. The study established that once adopted by the council, by-laws are then transmitted to the Ministry of Local Government which has the responsibility of laying them before Parliament as required by the Constitution.

In theory, the prescribed process for making by-laws provides for a significant degree of both indirect and direct public participation in local government processes, including rulemaking. The primary form of indirect participation is through the agency of elected councilors whose responsibility it is to represent their constituents' interests in the deliberation and enactment of by-laws. In all the study sites, there are also a number of administrative structures which are intended to provide citizens the opportunity to participate in rulemaking through elected representatives. Such structures include Village and Area Committees which, inter alia, make inputs into rulemaking by the council. In addition to the formal mechanisms, councils also occasionally set up *ad hoc* consultative forums at which representatives of selected non-governmental organisations participate in deliberations over various matters, including the making of rules.

Box 1

Section 103, Local Government Act (1998)

(1) The by-laws shall be made under the common seal of the Council and shall not have effect until they are approved by the Minister.
(2) At least fourteen days before application for approval of the by-laws is made, notice of the intention to apply for approval shall be published in the Gazette and in one or more local newspapers circulating in the area to which the by-laws are to apply and such notice shall include representations in writing from any person wishing to make any observation upon or an objection to such proposed by-law. A copy of every such representation or objection shall be forwarded by the Council to the Minister.
(3) For at least fourteen days before application for approval is made, a copy of the by-laws are made, and shall be deposited at the offices of the Council by whom the by-laws are made, and shall be open to public inspection without payment of any fee during the Council's normal hours of business.
(4) The Council by whom the by-laws are made shall, on application, furnish to any person a copy of the by-laws, or of any part thereof, on payment of such sum as the Council may determine.
(5) The Minister may approve or refuse to approve any by-laws, and may fix the date on which the by-laws are to come into operation and if no date is so fixed the by-law shall come into operation at the expiration of fourteen days from the date of its approval.
(6) A copy of the by-laws, when approved, shall be published in the Gazette and shall be printed and deposited at the offices of the Council by whom the by-laws are made, and shall at all reasonable hours

Given the formal existence of processes and mechanisms aimed at facilitating public indirect participation in the making of rules at local government level, the study investigated the incidence of such participation and its transformative or instrumentalist effect. The main finding in this regard was that the level of participation in the formal rulemaking processes of councils is low both in frequency and effectiveness. Councillors are not accessible enough to provide their constituents the opportunity to make inputs into the councilors contribution in the making f by-laws. With respect to *ad hoc* consultative forums at which participation by selected citizens' groups is invited, respondents who had participated were generally of the view that their participation had had little effect on the outcomes of the "consultation." Representatives of vendors attending council meetings who were interviewed during the study, for example, viewed their inputs into the making of rules as futile because it appeared to them that the content of the rules had already been decided by the council's bureaucrats and councillors. Other community members generally felt that participating in debates of draft by-laws was pointless as there appeared to be no possibility of effectively influencing any changes. The majority of civil society and other citizen respondents viewed the processes and mechanisms for public participation to be aimed more at legitimizing pre-determined rules than to allow the public to influence their content and form. The study further found that almost invariably, it was mostly well-established non-governmental organisations which were invited to participate in *ad hoc* consultative forums. From a democratic governance perspective, this militates against equality of participation which is a cardinal principle of deliberative democracy.[36] It also highlights the pedagogical need to factor an understanding of the nature, roles and influence of special interest groups into the explanation of administrative participation.[37]

The study found a number of legal provisions that provide for direct public participation by the public in rulemaking. One of the most significant examples of such provisions is section 103(2) of the Local Government Act which provides that: "*At least fourteen days before application for approval of the by-laws is made, notice of the intention to apply for approval shall be published in the Gazette and in one or more local newspapers circulating in the area to which the by-laws are to apply and such notice shall include representations in writing from any person wishing to make any observation upon or an objection to such proposed by-law.*" The study found that the vast majority of members of the public do not have an adequate opportunity to make inputs into by-laws before they are submitted for Ministerial approval because their publication as required by section 103(3) is limited to notices pasted on the notice boards of council offices, places that are not readily accessible to the majority of citizens, some of whom live as far away as 50 kilometers away from their nearest council offices.////////// [38]

With respect to direct participation, the study found that members of citizens' voluntary groups perceived their participation on rulemaking by the organisations to be substantial. The majority

[36] Habermas, 1984.
[37] Seifter, Miriam. "Second-Order Participation in Administrative Law." *UCLA Law Review, Forthcoming* (2015).
[38] Kutengule et. al. 2004: 15.

of market traders, for example, considered themselves to be effective in influencing the content of rules especially those made by traders in the same section of the market for their own regulation.

A notable feature of the legal provisions that regulate rulemaking through local government processes and mechanisms is that it empowers the central government to control them. Examples of provisions that enable central government control include the provision that allows which empowers the Minister to approve or refuse to approve any by-laws, and to fix the date on which the by-laws come into operation; that which empowers Members of Parliament to be voting members of local councils; that which vests in the Minister the discretionary power to appoint, transfer and discipline city and municipal Chief Executive Officers and District Commissioners. The involvement of central government at the local government level, limits the autonomy of local government rulemaking processes and mechanisms. It also makes it more difficult for the people who will be affected at local government level by central government decisions to participate in those decisions. To illustrate this challenge to democratic governance, respondents cited the amendments to the Local Government Act which gave more control of local government by the central government which were passed by Parliament without any significant input by citizens.

The general stipulations of the Constitution and the Local Government Act are complemented by guidelines that seek to regulate rulemaking in particular cases, including the Malawi Public Service Regulations (MPSR) and the Local Government Authorities Service Staff issued by the central government and the Ministry of Local Government respectively. The study established that accessibility of these guidelines to actors involved in rulemaking processes and mechanisms is extremely limited, even among those with the most influence within those processes and mechanisms, such as heads of directorates of local councils and members of local councils. The study further found that the incorporation of administrative law principles in the guidelines is neither systematic nor comprehensive. By default, rule making processes and mechanisms mainly rely on the discretionary judgment of decision-makers to ensure that rulemaking processes and mechanisms are lawful, rational and procedurally fair. The situation is compounded by the lack of clear procedural rules in some instances. As observed in an earlier study, glaring omissions are evident in relation to procedures governing local authorities' meetings, revenue collection and discipline.[39]

Other rule-making processes and mechanisms are less rigidly regulated than those directly controlled by formal local government structures. This is the case mainly with rules made by informal actors, such as the various formations of stakeholders, such as the committees and associations of businesspersons and other providers of goods and services. As indicated earlier,

[39] Hussein, M. 2005: "Good governance and the new local government system in Malawi: challenges and prospects." D.Phil Thesis, University of Johannesburg, available at https://ujdigispace.uj.ac.za/handle/10210/1373, accessed on 11 May 2015.

the such committees and associations are not established by law. The study also established that the vast majority of such groupings do not have written constitutions or codes to regulate their processes and mechanisms. It is therefore not surprising that their rule-making processes and mechanisms are largely informal and that the study was not able to establish common rules that govern those processes and mechanisms. In general, though, there appeared to be an expectation on the part of stakeholders that the regulation of rulemaking processes would be consultative and include inputs from those affected by the rules. The study found this to be the expectation of members of market committees in all the districts sampled. Committees in all the markets studied were expected by stakeholders to make rules based on inputs from the heads of the different sections in respective markets.

The study investigated the incidence and quality of public participation in the processes of rulemaking and made a number of findings. The first is that the law makes some provision for public participation in the making of by-laws by local government councils,

Three main findings emerged from the data collected on the legality of the processes and mechanisms of local government rulemaking. The first was that there is a clear legal framework that underpins rulemaking by local councils, while the legality of rulemaking processes and mechanisms is unclear and debatable. The second is that the central government plays a direct role in rulemaking at local government level, thereby limiting the autonomy of local government process and mechanisms, contrary to the letter and spirit of decentralized democratic governance. The third is that there is no systematic or comprehensive incorporation of administrative law principles in the subsidiary legislation and other guidelines that regulate rulemaking processes and mechanisms at the local government level.

Data collected in this study indicates that the other factor that impedes the application of administrative law principles in rulemaking processes is the limited accessibility of relevant rules and guidelines to decision-makers. Most administrative decision-makers at the local level have no access to up-to-date texts of the Constitution, the Local Government Act or judgments of the High Court which stipulate the elements of procedural fairness. Consequently, many administrators exercise rulemaking and adjudicatory powers oblivious of current constitutional, statutory and common law norms of procedural fairness. To some extent, this challenge is mitigated by the fact that many such administrators have better access to lower-level instruments which require procedural fairness in administrative action. However, there are few of such rules and regulations, and where they exist, their coverage of principles of procedural fairness is incomplete. This the case with the Malawi Public Service Regulations and the Handbook, and more sector-related instruments such as the Decentralized Environmental Management Guidelines.

The study identified a number of contextual factors that impede the effective incorporation of principles of administrative law into local government rulemaking and adjudication processes.

The first is the significant role played by informal processes and mechanisms in government rulemaking. The study established the existence of processes and mechanisms that make a significant contribution to rulemaking either parallel to, or in conjunction with, the formal ones. A good example which the study found was the process by which, in the implementation of their projects, some non-governmental organizations engage communities directly and establish rules that regulate the community members with respect to project-related activities. There is evidence from elsewhere which suggests that informal mechanisms can facilitate the contribution of administrative law to democratic governance because they facilitate the revision and updating of their rules outside of such formal requirements in a process labelled "dynamic rulemaking."[40]

The co-existence and interplay of formal and informal processes and mechanisms complicates the question of legality with respect to local government rulemaking and adjudication. This is particularly the case where formal processes recognize informal ones in practice despite the latter not having any identifiable legal basis. The case of Town Chiefs is an interesting exemplar in this regard. Town Though not officially recognized by the law or vested with any legal powers, Town Chiefs undertake processes and establish mechanisms that generate rules which are regarded as binding by not only by the members themselves, but also officials of the formal local government structures. A 2009 study on Town Chiefs found that among the rules that they had generated were those pertaining to socio-cultural issues, such as funerals; land and property; socio-economic development; justice and order; and administration.[41]

4. RULE APPLICATION

This section presents and discusses the findings of the research pertaining to the application of rules by local government administrative agencies in Malawi. The analysis of the relevant data is informed by theories that identify the actors involved in the application of rules and the mechanisms and processes that they use as critical factors in determining whether administrative law impedes or facilitates governance in particular contexts. This section thus analyses and discusses the empirical findings of the study with specific reference to the actors, processes and mechanisms involved in the application of administrative rules in Malawian local government. The findings of the study are analysed in relation to the benchmarks of administrative law principles of legality, rationality and procedural fairness as applied in the context of rule application by local government actors in Malawi. Implicit in the discussion is the acknowledgement that there are often overlaps between application and adjudication of rules.

[40] Wagner et. al. Dynamic Rulemaking, Working Paper, University of Chicago Law School, available at http://www.law.uchicago.edu/files/file/mcgarity_-_dynamic_rulemaking_for_chicago.pdf.
[41] Cammack, Diana; Kanyongolo, Edge and O'Neil, Tam 2009: "Town Chiefs in Malawi" *Africa Power and Politics Series.* London, UK: Africa Power and Politics Programme, Overseas Development Institute (2009)

4.1 Actors

Legality

Broadly, the role of administrative agencies in the application of rules involves the interpretation and application of rules as the basis for making decisions and taking particular actions in the exercise of their legal authority. In Malawian local government, the application of rules is undertaken mainly by three categories of actors: local and central government officials, traditional authorities and informal institutions. Local government officials derive their legal mandate to apply rules primarily from the Local Government Act which empowers Councils, on whose behalf they act, to apply rules in a wide range of areas, including revenue collection, environmental management, health and safety, the use of roads, building standards and business and trade.[42] Local government officials also derive their powers to apply rules from other statutes, for example, the Town and Country Planning Act which designates District, Municipal and City Councils as Planning Committees with power to approve development plans for their respective areas;[43] the Public Health Act, which requires Councils to take measures to safeguard and promote public health in the areas of their jurisdiction;[44] the Business Licensing Act, which mandates Councils to issue business licences in the areas of their jurisdictions on behalf of the Minister of Trade.[45]

On its part, the legal mandate of local government level functionaries of central government ministries and departments to apply rules is derived primarily from the Constitution, which vests in the executive branch of the government the responsibility to implement all laws.[46] Based on this legal mandate, central government officials of Ministries operating at the district, city or municipality level undertake the application of rules that apply to their different sectors. Among such officials are managers and officers who administer the remits of their respective ministries and departments at district, municipal and city levels. Such officials include District Education Managers, District Health Officers, District Water Development Officers, District Agriculture Development Officers, District Forestry Officers, District Environmental Health Officers, District Trade Officers, District Labour Officers, District Social Welfare Officers, District Information Officers and Officers-in-Charge of district police stations.

On their part, traditional authorities play a significant role in rule application within local government areas in at least two capacities. First, in their own right, chiefs apply customary law rules in almost all aspects of life as an inherent aspect of their traditional authority. The study found that the application of customary law rules by chiefs is sometimes characterised by uncertainty and contestation inherent which results from the difficulties of defining customary law and distinguishing it from non-binding traditional practices which are reified as customary

[42] See Second Schedule to the Local Government Act.
[43] Sections 9 and 10, Town and Country Planning Act
[44] Section 7 of the Public Health Act.
[45] General Notice No. 77 of 1970 issued under section 7 of the Businesses Licensing Act.
[46] Section 7.

law by dominant social groups. Notwithstanding the conceptual and doctrinal debates on the nature and scope of customary law, the study identified a wide range of rules of customary law that are applied by chiefs and accepted as legally binding by their "subjects" at local government level. In addition to applying rules of customary law in their own right, chiefs also apply statutory rules as agents of the local government by virtue of the Chiefs Act which mandates them to assist in the general administration of districts as the District Commissioner may require.[47]

The third category of actors involved in rule application at the local government level in Malawi which was identified by the study were informal institutions such as voluntary organisations and "town chiefs" which are described above in the discussion on rulemaking. Organisations, such as market committees, taxi-owners'/drivers' associations, apply rules not only to their members but also some that directly affect the public. On their part, "town chiefs" apply rules that regulate different aspects of the lives of residents in the areas over which the "town chiefs" claim jurisdiction. As was mentioned earlier, though, the legal basis of town chiefs and voluntary organisations is, at best, contested and, at worst, non-existent. This is evidently antithetical to the promotion of the principle of legality and, by extension, democratic governance.

Rationality

The obligation of local government actors to comply with the administrative law principle of rationality in the application of rules is not only stated in the Constitution but has also received judicial emphasis.

A number of findings emerged from the preceding identification of actors involved in the application of rules and the scope of their legal mandates. The first, which resonates with the findings with respect to rulemaking and adjudication, is that there is a proliferation of actors involved in rule-application which breeds jurisdictional overlaps and conflicts. This is exemplified in the relationship between the local government officials and chiefs. while the local government act empowers local government functionaries to apply rules to a wide range of subject matters, such as the areas of environmental management, health and safety, the use of roads, building standards and business and trade, for example, the language by which chiefs are granted powers under the Chiefs Act is broad enough to authorise them to apply rules of customary law in the same areas. The implication of the multiplicity of actors which have the de jure or de facto power to apply rules results in variations in their interpretation and implementation by the different agencies. This militates against the development of consistent standards of rationality in administrative rule application. The absence of such consistency undermines the capacity of administrative law to contribute to democratic governance based on equality before the law and non-doscrimination.

[47] Chiefs Act, Section 7(d).

The second main finding on actors involved in rule application was that very few officials who are directly involved in the application of rules possess the requisite knowledge and skills to identify applicable rules, interpret them and implement them in accordance with administrative law principles which, among other things, require them to understand the notions of "relevant/irrelevant considerations", "proper/improper purposes", "proportionality" and "rationality" as they apply to the exercise of discretionary powers.[48] Except for District Commissioners of the country's 28 districts and Chief Executive Officers of the three cities and one municipality that the country has and the Municipalities who have had formal training in administrative law, as was discussed with respect to rule-making, the vast majority of actors involved in rule-application who were interviewed for this research confessed to having little or no knowledge of the prescriptions of the constitutional principles of administrative law. In practice, such actors determined the legality, rationality and procedural fairness of their administrative decisions and actions on the basis of their intuition and experience. A telling example of this approach is the "procedure" used in applying rules in cases of alleged indiscipline by local government officers, as was described by a senior local government official during this study. According to the official, in such cases, "*We do talk to the person before interdicting them. We write the person a warning letter and give him/ her counseling sessions. If the situation does not improve then the person is interdicted."* The response is revealing in its lack of any reference to the requirements of procedural fairness, such as the official's right to be heard or the need to avoid the appearance of bias. Also worthy of note was his inclusion of "counselling", which is not part of the procedure prescribed by law.

Procedural fairness

As with all other institutions, local government actors have a constitutional obligation to observe procedural fairness in their administrative actions and decisions.[49] In addition, a number of statutory provisions stipulate procedural fairness measures that apply to rule application scenarios. In this regard, it is worth noting that where a Council refuses to grant a licence for the operation of a private market, it is required to give reasons in writing for the refusal.[50] It is, notable, however that specific legal provisions that set out particular functions of councils, including those involving the application of rules do not restate the obligation of procedural fairness. Thus, the Local Government Act does not expressly require the Council to observe procedural justice in the following the rule-application scenarios: demolition or closing of buildings deemed to be unfit for human habitation, prohibition or control the sale of any wares

[48] For the significance of these concepts, see the landmark case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, whose conceptualization of these notions as elements of unreasonableness has been cited with approval in numerous Malawian cases including Kwame Phiri and 14 others v *Minister of State in the President's Office* Civil Cause No. 60 Of 1997, *Nyirenda v Attorney General* Miscellaneous Civil Cause No. 33 Of 1996, Du Chisiza jnr v Minister of Education , Miscellaneous Civil Cause No. 10 Of 1993; *Ex Parte Zaibula and Council of the University* of Malawi Civil Cause No. 34 Of 1997; *Mchawi v Minister of Education, Science and Technology* Miscellaneous Civil Cause No. 82 Of 1997.

[49] The Constitution of the Republic of Malawi, section 43.

[50] Paragraph 7(2), Second Schedule, Local Government Act.

on any street or any public place for the purpose of carrying out any trade, business or profession, the levying of fees for services, the prohibition of the playing of music or the use of any loudspeaker or amplifier for advertising purposes in any public place.[51]

The study also found that the application of rules was often contrary to principles of fairness which underlie administrative law. Two case studies demonstrate an apparently discriminatory approach to rule application. The first case relates to the differentiation between informal traders and formal traders in relation to the application of by-laws. In successive "sweeping exercises," all the country's city councils have strictly applied by-laws regulating street trading and evicted informal street traders from the cities' streets. At least two attempts by associations of street vendors to use judicial review to stop the councils from implementing the evictions were successfully challenged by the latter.[52] Currently vendors who trade on the streets are liable to be arrested and, in some cases, prosecuted.[53] In contrast, formal traders using buildings that were found to be in violation of Blantyre City by-laws as long ago as 1996 continue to do so despite occasional threats by the council to demolish the buildings. An injunction obtained by the traders in January 2016 remains unchallenged by the council for various legal reasons,[54] although some experts have argued that the Council has enough legal tools to enforce the law against the property owners.[55] It is estimated that Blantyre City has over 160 buildings whose demolition is overdue.[56]

The perceived bias of Blantyre City Council in the application of its by-laws is not the only instance of breach of the administrative law principle of fairness that the study found. In at least three other well-documented cases, the city councils of Lilongwe and Blantyre have in the past failed to enforce development control by-laws and permitted the construction of buildings in areas in which such buildings were permitted. In two of the prominent cases, property development which violated city zoning regulations was condoned by city councils allegedly because the developers had political connections.

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[51] Schedule 2, Local Government Act.

[52] See *Lilongwe Street Vendors Association v Lilongwe City Assembly* (Civil Case No 618 of 2006) ((Civil Case No 618 Of 2006)) [2006] MWHC 98 (09 May 2006).

[53] See "Malawi police clash with recalcitrant vendors" available at http://www.panapress.com/Malawi-police-clash-with-recalcitrant-vendors--13-580913-17-lang1-index.html, accessed on 1 August 2016; Malawi: Govt destroys shacks at Blantyre market, vendors left destitute available at http://www.thezimbabwean.co/2009/08/malawi-govt-destroys-shacks-at-blantyre-market-vendors-left-destitute/; BCC laws to target illegal buyers, *Daily Times*, 5 September 2016.

[54] See "Malawi 'Red Star' campaign hits a snag, landowners obtain court order" available at http://www.nyasatimes.com/malawi-red-star-campaign-hits-a-snag-landowners-obtain-court-order/.

[55] For example, see "Blantyre 'Red Star' campaign hits snag" available at http://timesmediamw.com/blantyre-red-star-campaign-hits-snag/, accessed on 2 August 2016 in which a University of Malawi Associate Professor of Law observed that" *To say that the council cannot enforce its own laws before the Lands Act is amended is, to say the least, a sheer lie. All the past administrations enforced the laws using the same legal instruments. If anything apart from the Lands Act there are also the Town and Country Planning Act and the Local Government Act that give the councils legal mandate in areas of their jurisdiction."*

[56] See "BCC shifting goal posts on red star campaign' available at http://www.capitalradiomalawi.com/component/k2/item/4919-bcc-shifting-goal-posts-on-red-star-campaign, accessed on 1 September 2016.

As mentioned earlier, another category of actors who play a significant role in local government administration consists of chiefs, who are also referred to as traditional leaders and draw their mandate from both legislation and customary law. In the discharge of their functions, traditional leaders routinely apply various rules, including council by-laws and rules of customary law. Historical evidence reviewed during the study suggested that in their application of by-laws, chiefs do not use any shared set of standards of interpreting and applying specific by-laws, but rely on their individual traditional knowledge and skills. Constitutional principles of administrative justice do not feature in any of their experiences of applying by-laws and other rules. Given that chiefs are appointed by virtue of blood relation and do not require a professional qualification in administration, they can gain knowledge of the administrative law principles of legality, rationality and procedural fairness and their applicability to local government rule-application by

4.2 Processes and mechanisms

In general, Malawian law establishes processes and mechanisms that are intended to ensure compliance with the principles of legality, rationality and procedural fairness in the application of rules. The Constitution guarantees every person the human right to lawful and procedurally fair administration action and to reasons in writing for adverse administrative action.[57] Courts have also on numerous occasions confirmed the obligation of administrative decision-makers to ensure that processes and mechanisms they use in the application of rules comply with principles of administrative law.[58] A number of particular processes and mechanisms for rule-application also stipulate compliance with principles of administrative law. For example, section 68(5) of the Town and country Planning Act provides that the High Court may quash a decision of a Planning Board if it discloses an error of law or a failure to comply with procedural requirements.

With respect to the application of formal rules such as legislation and by-laws, the study found that consistency in the application of rules was undermined by the fact that, in addition to interpreting the laws, which are written in English, decision-makers often have to translate them into local languages in applying them to factual situations. In the absence of standard guidelines to assist officials and other actors who are mandated apply rules in their translation of rules into local languages, the matter is left to the discretion of individual officials and actors, with the result that the interpretation, and thus application of rules varies from place to place. The situation is compounded by the fact that in many cases, local government officials are not required to be native speakers of the language of the area in which they operate. Thus the task, in the application of rules, will often involve an official translating between two languages, neither of which is his or her first language.

[57] The Constitution, section 43.

[58] See the cases of: *Limbe Town Council v Kirkcaldy* 1 ALR(Malawi) 133 in which the High Court stated that by-laws must be reasonable; *The State v Blantyre City Assembly, ex.p. Ngwala* Miscellaneous Civil Application No.183 of 2012 in which the High Court quashed a purported application of a by-law empowering the council to control and prohibit public nuisances partly on the ground that the council had not given affected parties the right to be heard.

Another finding on the application and enforcement of rules by local government-level actors is that the processes are either not documented at all or are documented only partially. This particularly the case with the application of rules by informal institutions such as market committees and 'town chiefs" whose decisions and actions are not recorded systematically in writing. In contrast, formal actors such as council staff do keep written records of their application of rules in the form of memoranda, letters, minutes of meetings and activity reports. However, the study found that the archiving of such records, where they exist, is largely unsatisfactory as most councils lack the basic facilities for systematic and comprehensive record-keeping. This makes it difficult to determine whether, in particular instances of rule application, actors complied with norms of legality, rationality and procedural fairness. It also militates against the maintenance of a system of precedents which would assist decision-makers in maintaining consistency in their application of rules, thereby, promoting the administrative law principle of fairness.

5. ADJUDICATION.

The study identified the actors, processes and mechanisms involved in administrative adjudication in Malawian local government, and investigated their compliance with administrative law principles of legality, rationality and procedural fairness. One broad definition of adjudication is that it is *"the entire system for resolving individualized disputes between private parties and government administrative agencies, starting with an administrative investigation and the agency's preliminary or "frontline" decision continuing through the process by which a private party challenges the frontline decision, and concluding with judicial review."* For the purposes of this study, however, the primary focus is on "adjudication" undertaken by administrative agencies and their officials, although that undertaken by the courts in judicial review was also investigated, albeit only with respect to its impact on the former.

The study conceptualized "adjudication" as acts that involve the admission of evidence, its analysis and assessment, based on prescribed norms, and the issuing of an order which may be affirmative, negative, injunctive, or declaratory. The study also took an expansive view of "administrative agencies" and did not strictly confine the term to functionaries of formal government structures but included, in the term, formal and hybrid institutions, whose adjudicative activities have a significant effect on the enjoyment of the right to administrative justice by citizens. In the context of Malawi, including the formal and hybrid institutions in a broadened definition of "administrative agencies" for purposes of this study is further justified by the fact that under the Constitution, human rights guarantees have both a horizontal and vertical application.

5.1 Actors

Informed by the preceding conceptual view of adjudication, the study inquired into the normative and empirical reality which constitute administrative adjudication in local government in Malawi. From the inquiry, the study made four main findings that have implications for the

potential of administrative law to contribute to democratic governance. The first was that adjudication of matters at local government level in Malawi is undertaken by a multiplicity of actors who may be classified into three categories, the first of which consists of formal local government actors, the most active of which were found to include District Commissioners and Chief Executive Officers of cities and municipalities, Town and Country Planning Boards and Plot Allocation Committees." With respect to the principle of legality, the study established that the respective adjudicative mandates of each of the said formal local government actors are clearly provided for in the law, either implicitly or explicitly. In the case of District Commissioners and city and municipal Chief Executive Officers, the Local Government Act mandates them to be responsible for implementing the resolutions of the Council, the day to day performance of the executive and administrative functions of the Council, the supervision of the departments of the Council, and the proper management and discipline of the staff of the Council. These responsibilities necessarily involve some degree of adjudication. On their part, Town and Country Planning Boards are empowered by section 67 of the Town and Country Planning Act to hear appeals against decisions of Planning Committees relating to approvals or rejections of development plans, while Plot Allocation Committees are empowered to "hear and settle plot disputes in Townships and Improvement Areas."[59]

The second category of actors who exercise adjudicatory powers at local government level consists of Chiefs who exercise adjudicative powers derived from customary law, with license from the Chiefs Act, which empowers Chiefs "to carry out the traditional functions of his office under customary law." Under virtually all customary laws in Malawi, adjudication is one of the most significant areas of any chief's mandate and authority. The study, however, focussed only on adjudication by chiefs that related to administrative rules and excluded the broader adjudicative authority of chiefs which is quasi-judicial in nature. In this vein, the study regarded chiefs as administrative adjudicators mainly with respect to the adjudication of disputes related to by-laws.

The third category of adjudicative actors at local government level consists of various informal actors, including "town chiefs," who exercise such power notwithstanding the lack of any specific statutory authority.

5.2 Processes and mechanisms

The study found that the Constitution and a number of statues clearly stipulate the norms with which all actors engaged in adjudication must comply. The most authoritative of such provisions is section 43 of the Constitution which guarantees every person the right to: 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 the right to be furnished with reasons, in writing, for administrative action where his or her rights,

[59] By-law 4(2)(c), Local Government (Blantyre City Council) (Plot Allocation In Townships And Improvement Areas) By-Laws.

freedoms, legitimate expectations or interests are affected. The duty of administrative decision-makers to act lawfully and to be procedurally fair is also stipulated in a number of statutory provisions that provide for adjudication at the local government level. An example of such a provision is section 7(b) of the Chiefs Act which empowers chiefs to carry out the traditional functions of their office under customary law provided that the discharge of such functions is, among other things, " not repugnant to natural justice."

The duty of administrative decision-makers to uphold legality, reasonableness and procedural fairness is also reinforced by a long line of judicial authorities which have enforced the duty against actors performing adjudicative functions in local government, among other sectors. In their various judgments, the courts have underscored the importance of administrative law principles in promoting democratic governance. Some quotations from a few of the notable High Court judgments are presented in Box 4.

On its part, subsidiary legislation under the Town and Country Planning Act also requires compliance with procedural fairness in the exercise of adjudicatory powers. Rules 7 to 18 of the Town and Country Planning Board Rules include provisions which require the Board when seized of an appeal to, among other things, send to the appellant and respondent not less than fourteen days' notice of the place and date of the hearing of the appeal; permit parties to appear either in person or through a representative, including a legal practitioner; to call witnesses; to allow them to be subjected to cross-examination and re-examination at the hearing of the appeal; to hold the hearings in public; and to record its decisions in writing.

The study identified a number of factors that impede compliance with administrative law in the exercise of adjudicative powers. . The first is the multiplicity of formal and informal actors who participate in adjudication at local government level. This situation creates uncertainty in the respective roles that the various actors are entitled to play, especially in the absence of rules to resolve cases of jurisdictional overlaps and conflicts. It also makes it difficult to attain consistency in the interpretation of rules and their application to factual situations. Members of the public appear to be aware that there are differences in the quality of adjudication dispensed by different adjudicating authorities, as is evidenced by the incidence of forum shopping which is undertaken in search of a preferred decision-maker.

The differences in the appreciation of the legal standards of administrative justice among different adjudicators is compounded by the varying levels of knowledge of constitutional standards of administrative justice both among different decision-makers within the same institution and between different institutions. As noted in the discussion of rule making and application, formal knowledge of principles of administrative law is limited to a few senior officials of councils, while the vast majority of decision-makers lack such knowledge although they routinely undertake adjudicative tasks and, in the process, exercise wide discretionary powers. In this respect, it is important to note that the law governing adjudication at local government level does not stipulate knowledge or experience of principles of administrative

justice as a condition for qualifying to exercise adjudicative powers. This is the case with some of the most significant adjudicators at local government level, including Chiefs whose only qualifying criteria is that they must be entitled to chieftaincy under customary law. The other adjudicative institution whose members are not required to have knowledge of administrative law is Town and Country Boards whose members are appointed by the Minister under the Town and Country Planning Act. In appointing individuals to the Board, the Minister is required to take into account the desirability of having members of the Board who have knowledge and experience in town and country planning, land management and valuation, economics, law, civil engineering, surveying, housing, architecture and social welfare. Although "law" is included in the competencies, it is stated too broadly to ensure that the appointee will have specific knowledge and experience of administrative law.

The finding in the preceding paragraph gains added significance in light of the fact that the vast majority of local government councils and town and country planning boards in Malawi cannot afford to engage legal counsel who can advise them on the application of the principles of legality, rationality and procedural fairness in the adjudication of cases. At the time of the collection of data for this study, only two- City of Blantyre and City of Lilongwe- out of the thirty-two local government councils had an in-house lawyer. The rest use either private law firms to provide advice in individual cases or rely on the Ministry of Justice and Constitutional Affairs (MJCA) to provide them advice in reaction to particular circumstances. Private lawyers and lawyers from the MJCA are largely reactive in their engagement with the agencies that seek their advice, while an in-house lawyer is largely proactive. Since in-house lawyers are embedded in their agencies, they also have more opportunities than private or MOJC lawyers have, to proactively and continually influence their agencies to apply administrative law principles in adjudication

Another finding of the study with respect to adjudication was that procedures for adjudication in a significant majority of cases are *ad hoc*, reflect the combined use of formal and informal institutions and are characterised by the blurring of boundaries between adjudication and other forms of conflict management processes such as mediation and negotiation. The ad hoc nature of many adjudication interventions was evident in the establishment of ad hoc committees to undertake adjudication of particular matters, as was reported in Mwanza District Council; the absence of any written procedures for adjudication by lower level decision-makers such as Market Masters; the lack of any rules regarding qualifications of people who participate in the adjudication.

In virtually all the study areas, the study found that adjudication of disputes between the Council and ratepayers were addressed by a combination of formal and informal institutions, including mediation by chiefs and non-governmental organisations and adjudication by the Chief Executive Officer and other technical officials of the municipality. Unsurprisingly, almost all respondents interviewed for the study were unable to distinguish between adjudication, strictly so-called, and other forms of conflict management and resolution, let alone to identify the

constitutional and statutory principles and rules of administrative law with which officials undertaking adjudication must comply. Consequently, many decision-makers interviewed for the study relied on their intuition and invoked wide discretionary powers in deciding cases, except where the law that granted them power was prescriptive in both the procedures to be applied and the principles of legality, rationality and procedural fairness to be applied.

The other situations in which decision-makers demonstrated a more informed appreciation of the nature of adjudication and the norms which apply to it were those in which the decision-makers had reasonable access to legal advice. In this regard, the study found that the retention of in-house legal counsel by administrative agencies, as was the case with the Lilongwe and Blantyre City Councils improved their awareness of the norms of legality, rationality and procedural fairness. However, the study found that such awareness did not necessarily translate into adjudicative decisions that complied with administrative law principles. Many respondents reported that the most significant factors that constrain compliance were financial cost considerations and political pressure.

5.3 The impact of judicial review

As stated earlier, in the context of the study, "adjudication" was also used with reference to that undertaken by the courts, especially in the form of judicial review of administrative action. Of particular interest to the study was the impact of judicial review on the actions and decisions by administrative agencies and officials. In investigating such impact, if any, the researcher interviewed a sample of local government level decision-makers with a view to establishing whether, and to what extent, judicial review incentivized them towards compliance with principles of administrative law.

The study was predicated on the widely-held view that judicial review can have a direct impact on the quality of administrative rulemaking and adjudication.[60] Administrators who are subjected to judicial review are likely to be influenced by their experience and, in future decisions and actions, are likely to be aware of the principles of administrative law and the consequences of not complying with them. At the same time, other administrators who are aware of the judicial review of the decisions and actions of their peers may also be encouraged to comply with principles of administrative law laid down by the courts in order to protect their own decisions and actions from the risk of nullification through judicial review. For purposes of investigating the role of judicial review in this context, the study sought to answer the following questions: Does judicial review facilitate the democratic and accountable exercise of power by administrative agencies and local authorities? How does judicial review transform patterns of bureaucratic behavior? Do administrative agencies obey or implement judicial review decisions? Further, do they review their decision making procedures where they have been faulted by courts in judicial review proceedings? And does judicial review have an educative effect? In order to answer the questions, the researchers collected and analysed qualitative data on the nature of

[60] Halliday 2004

judicial review in Malawi and its impact on administrative rulemaking, rule application and adjudication in the setting of local government in Malawi, and came up with the findings discussed below.

The study found that in Malawi, administrative decisions of public bodies may be subjected to judicial scrutiny in at least three types of circumstances. The first is where courts adjudicate disputes which revolve around questions of private rights such as contract and torts. Even if the breach of a contract is essentially the result of the decision of a public body, the matter is adjudicated as a private law issue. The second circumstance in which a court may scrutinize the decision of a public official is where the court is granted appeal powers in particular administrative processes. The High Court has such powers under the Parliamentary and Presidential Elections Act, the Town . The third form of judicial scrutiny is judicial review which seeks to review the lawfulness of the administrative decision and not its merits.

The study found that the legal framework is unequivocal in its provision for judicial review of administrative action. The Constitution expressly empower the High Court to "review any law, and any action or decision of the Government, for conformity with this Constitution ….[61]" Conformity with the Constitution includes compliance with the constitutional provisions which entitle every person to administrative justice.[62] Judicial review, in fact, predates the Constitution because it has been part of the law of Malawian law ever since Malawi became a British Protectorate and imposed colonial law to the territory. That law included the common law, which included judicial review of administrative action. In addition to the Constitution, judicial review in Malawi is also anchored in the common law.

The study established that there is a body of case law which indicates that judicial review has been used to promote and enforce administrative principles of legality, rationality and procedural fairness in local government rulemaking, rule application and adjudication. Before discussing specific findings on the cases, it is important to note the apparent correlation between the frequency of judicial review applications and the nature of decision-makers who are challenged through it, on the one hand, and the degree of liberalization of the broader political environment. Thus, it has been demonstrated that the political liberalization that accompanied the transition from a one-party authoritarian political system to a multiparty democracy in the early 1990s resulted in the increased use of judicial review as a mechanism to control the exercise of public power.[63]

On the nature and character of judicial review itself, the study made at least four main findings . The first is that judicial review is used much less frequently that other forms of judicial processes

[61] Section 108(2).
[62] Section 43.
[63] Nzunda, Matembo. "The quickening of judicial control of administrative action in Malawi 1992-1994." In Phiri, Kings Mbacazwa, and Kenneth R. Ross, eds. *Democratization in Malawi: A stocktaking*. No. 4. Christian Literature Association in Malawi, 1998.

to challenge decisions and actions of local government authorities. In all reported cases in the period between 1990 and 1997 in which local councils were parties, for example, only in less than five percent were decisions of local government officials challenged through judicial review. Similarly the vast majority of cases in a sample of over fifty cases reported in the Malawi Law Reports in which one of the parties was a district, city, municipal or town council or assembly, the overwhelming number involved causes of action based on the enforcement of private rights, and not judicial review aimed at enforcing public duties. A related finding was that the delineation of public and private law rights by Malawian courts for purposes of judicial review reflects some of the uncertainty that has historically dogged judicial review doctrine.[64] A case in point is *Makono v Lilongwe City Council*[65] whose facts included plausible evidence that services of the the plaintiff as a Deputy Town Clerk for Lilongwe City Council, had been terminated by the City Council following a directive issued by the President of the Republic. In terminating the plaintiff's employment, the Council did not cite the presidential directive but referred to other grounds for their decision. Despite strong circumstantial evidence indicating that the Council's decision effectively amounted to the public law issue of abdication of discretion on its part, the court preferred to proceed with the matter as one involving private law rights involving contract law.[66]

The second main finding in this part of the study was that judicial review has limited impact on administrative decision-makers' preference for legality, rationality and procedural fairness in rulemaking, rule application and adjudication by local government actors in Malawi. The evidence suggested at least two factors that account for this state of affairs. The first relates to challenges in access to public information. Many administrative decision-makers are unaware of of particular cases of judicial review and the principles that the cases prescribe because they cannot easily access copies of judgments of the courts. This state of affairs was largely due to the limited publication of judgments by the judiciary. Capacity constraints of the judiciary prevent them from establishing a system for publishing all reports regularly and comprehensively.[67]

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[64] For the classic common law exposition of the doctrine, see the case of *O'Reilly v Mackman* [1983] 2 AC 237. debates on the history and current challenges of the public/private divide, see Bamforth, N. 1993. 'The scope of Judicial Review- Still Uncertain?', *Public Law,* 239-248; Mwanza, Mandhlase. "The Public/Private Divide: An Outdated Concept Of Governance In English Law." *Diffusion-The UCLan Journal of Undergraduate Research* 6.1 (2013).

[65] *Makono v Lilongwe City Council* [1999] MLR 147.

[66] Also see the case of *Chatsika v Blantyre City Assembly* [2005] MLR 34 in which the High Court dismissed an application for leave for judicial review on the ground that although the action complained of had been done by a public body, the subject matter of the case before the court was the private law enforcement of a contract. Also see *Nyasaland Electricity Supply Commission v Blantyre Municipality* [1961-63] African Law Reports (Malawi) 306 in which despite formally being an appeal against rating valuation, the case was substantially about whether the Municipality had taken into account irrelevant considerations or had failed to take into account relevant considerations in the exercise of its statutory valuation powers under the Town and Country Planning Ordinance. Further see the case of *Mzuzu City Assembly v Chitete* Civil Appeal No.26 of 2007 in which the Supreme Court of Appeal treated damage to property occasioned as a result of the breach of a statutory duty by Mzuzu City as a private law matter although, in the words of the court "the basis of the respondent's claim therefore was the illegality [of the exercise] of a public dutyand to that end ideally a ground for judicial review."

[67] The limited accessibility of legal information is discussed

There is also no system for distributing judgments and rulings, even among public institutions. On their part local government actors interviewed for the study did not appear to consider the accessing of information on judicial review to be a priority. As it happens, therefore, it is only actors who have had personal experience of judicial review proceedings who displayed some awareness of the judicial prescriptions of administrative law principles, although even in those exceptional cases, the knowledge was limited to that of the cases in which they had participated directly. The only cases in which decision-makers had the means to improve their awareness of judicial review practices if they were so minded were those in which the decision-makers had legal counsel. This is current the case with only two of the country's local government councils, namely Blantyre City Council and Lilongwe City Council, which can afford to employ in-house lawyers.[68]

In the limited number of cases in which decision-makers demonstrated awareness of judicial review and the standards of administrative decision-making that they prescribe, their willingness to translate that awareness into practice was impeded by more compelling considerations which overrode the imperative to be comply with administrative law principles enunciated by the courts. The study found that, for the majority of decision-makers, the prospect of judicial review was a less weighty consideration in decision-making than the risk of incurring the disapproval of powerful local and national politicians. Given a choice between following judicial prescriptions and offending powerful political forces or pleasing the politician and disregarding the dictates of the judiciary, many respondents identified the former as a more pragmatic choice. In any case, many respondents considered the probability of being subjected to judicial review for violation of administrative law principles to be much lower than that of being victimized by politicians disgruntled with their decisions. The fear of political victimization is made more real by reported cases of public officials who have been transferred from their duty stations on the demand of politicians whom they offended, sometimes by insisting of strict application of rules.[69]

7. CONCLUSIONS AND RECOMMENDATIONS.

The conclusions of the study are presented below in correspondence to the research questions of the study.

(a) The map of administrative agencies in Malawian local government reveals that rulemaking, rule-application and administrative adjudication are undertaken by a proliferation of formal and informal institutions. The interrelationships among the institutions are characterized by a significant degree of jurisdictional overlaps and conflicts which are caused largely by a

[68] Interview, Blantyre City Council Chief Executive.
[69] Chiweza, Asiyati, "The Political Economy of Local Governance in Malawi", available at http://tilitonsefund.org/wp-content/uploads/2013/05/The-Political-Economy-of-Local-Governance-in-Malawi-2011.pdf, accessed 10 July 2016.

legal framework that is largely sound but nevertheless has gaps, ambiguities, unclear provisions and no principles to reconcile customary and state law.

(b) There is wide variation among agencies with respect to the legal basis for their rulemaking, rule application and adjudication. The agencies range from those whose legal mandates are unambiguous to those which appear to act without any legal mandate at all. In the case of the latter, a number of institutions that play an important social role are permitted to operate notwithstanding the absence of legal mandates based on their legitimacy with the public or necessity, although with respect to the latter, judicial opinion appears to be divided.

(c) Although the Malawian legal framework establishes mechanisms and process that have the potential to facilitate effective public participation in rule making, rule application and adjudication processes of administrative agencies and local authorities, in practice such participation is limited due to a number of factors including limited access to information by the public, the unduly technical nature of some of the decisions in which the public is invited to participate, language barriers that are created by the fact that the majority of Malawians are not literate in English, which is the country's official language.

(d) The vast majority of members of the public have little or no awareness of the rule making, rule application and adjudication processes that are used by the formal structures of local government in Malawi, such as city and district councils. Consequently very few members of the public directly use the mechanisms. A majority of individuals and community organisations are more conversant with the rule making, rule application and adjudication processes that are used by informal local government institutions, such as town chiefs and voluntary organisations. In general, the public does not consider the procedures and mechanisms used by city and district councils to be fair mechanism for accountability that can contribute to the democratic exercise of power because, in their view, councilors, who are supposed to be their primary representatives on councils are more accountable to their political parties than they are to the constituents. This appears to be because, unlike the latter, the former have sanctions which they can impose on councilors who do not serve their interests.

(e) Judicial review does facilitate the democratic and accountable exercise of power by administrative agencies and local authorities as is evident by the cases in which courts enforced against local councils the obligation to act consistently with the requirements of legality, rationality and procedural fairness. Councils and other local government actors who are the subject of judicial review orders, appear to obey them and use them to review their procedures, although the application of such procedures is often impede by political considerations.

(f) Other institutions, processes and practical realities have a very significant influence on the democratic and accountable exercise of power by local government actors involved in rulemaking, rule application and adjudication. The most significant of such external influences

are those exerted by the Executive branch of government, which has the legal power to appoint and discipline the highest ranking bureaucrats in city and municipal councils, and to use political pressure to incentivize bureaucrats away from democratic and accountable practices.

In light of the conclusions summarized above, the study makes the following recommendations:

1. The Law Commission, in consultation with local government councils, the Ombudsman, the Ministry of Justice and the judiciary, must undertake a comprehensive and systematic review of all laws that set up and govern the institutional framework for rulemaking, rule-application and adjudication at local government level in order to remove the jurisdictional overlaps and conflicts that result from the prevailing institutional proliferation.

2. Parliament must amend the Local Government Act in order to improve the insulation of public officials from political interference, for example, by expressly guaranteeing local government officials security of tenure, stipulating penal sanctions against any person or institution which induces a duly mandated public official to act contrary to the requirements of legality, rationality and procedural fairness. The third is to build the capacity of actors who are mandated to enforce laws and provide them incentives to motivate them to perform their functions and end the impunity which appears to characterize local government administration in which many actors continue to act without the necessary legal mandates or in blatant violation of clear rules.

3. The curricula for the training of lawyers in administrative law must be improved by revising learning outcomes to include deepened knowledge and understanding of the linkages between administrative law, constitutionalism and democratic governance and expanded appreciation of the political, social and economic forces which counterweigh principles of administrative law in influencing administrative decision-making.

4. There must also be a substantial material investment in systems for information-sharing, both within and across institutions, with a view to improving the accessibility of court judgments, legislation, by-laws and other legal resources which are essential for the development of common standards in the application of administrative law principles.

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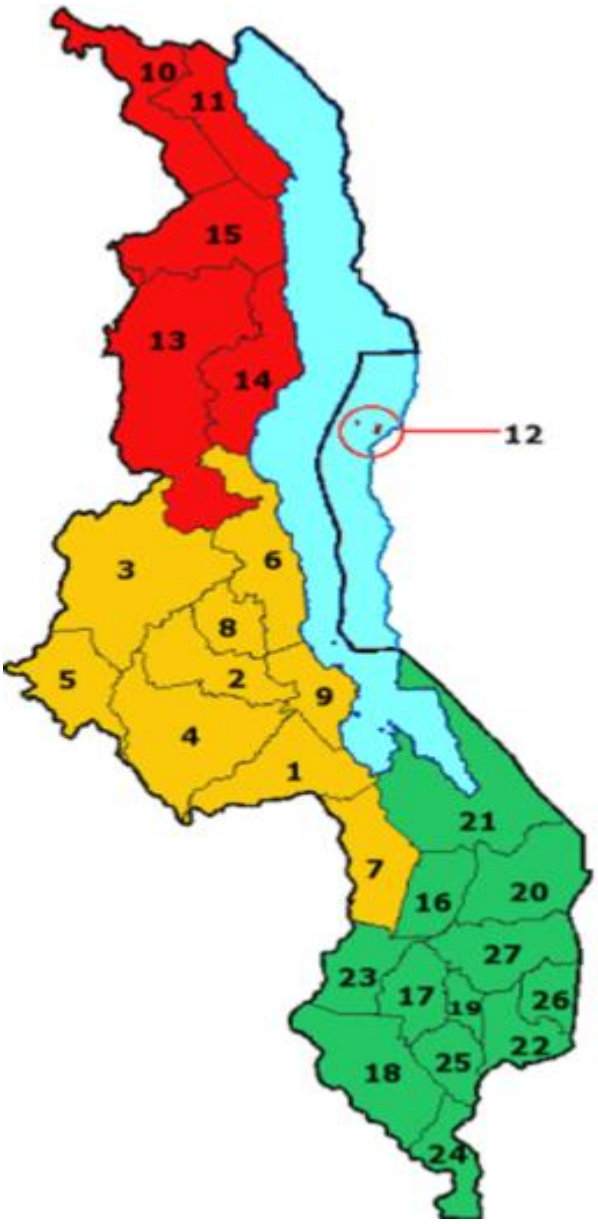
Annex 1: List of people interviewed

Munthali-Ngwira, Thokozile	Ag. Director, Planning and Development. Luchenza Municipal Council
Nandolo, Ted	Chief Executive Officer, Blantyre City Council
Nkhoma, Abubakar	Chief Executive Officer, Luchenza Municipal Council
Rapozo,	District Commissioner, Mwanza District Council
Wane, Victoria	Acting Director of Administration Luchenza Municipal Council

Annex 2: District Map of Malawi



Central Region
1 – Dedza
2 – Dowa
3 – Kasungu
4 – Lilongwe
5 – Mchinji
6 – Nkhotakota
7 – Ntcheu
8 – Ntchisi
9 – Salima
Northern Region
10 – Chitipa
11 – Karonga
12 – Likoma
13 – Mzimba
14 – Nkhata Bay
15 – Rumphi
Southern Region
16 – Balaka
17 – Blantyre
18 – Chikwawa
19 – Chiradzulu
20 – Machinga
21 – Mangochi
22 – Mulanje
23 – Mwanza
24 – Nsanje
25 – Thyolo
26 – Phalombe
27 – Zomba
28 – Neno

Annex 3: Local Government Councils by population

Note: delayed filling of table due to current inaccessibility of National Statistical Office database

Local government authority	Projected Population (2019)