

# Administrative Justice, Environmental Governance and the Rule of Law in Malawi

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## ABSTRACT

*It is generally believed that administrative law is a tool for promoting the rule of law, constitutionalism and good governance. This belief stems from the fact that governance is about legality, procedural propriety, rationality and public participation in the exercise of power. Commentators have repeatedly contended that administrative law contributes to the realization of good governance by ensuring that those who make decisions comply with the law and ensure that decisions are fair and rational. Administrative law is thus believed to be an invaluable tool for preventing arbitrary and capricious governance. However, one issue remains underexplored. This is whether the principles of administrative law are reflected in the daily operations of public agencies, including environmental agencies. There is a dearth of empirical research to assess the impact of administrative law generally and judicial review on the quality of governance and the rule of law. Similarly, no attempt has been made to try to understand the impact of the quickening of judicial review on the work of administrative agencies generally and environmental agencies in particular.*

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\*The Editors and the Maryland Journal of International Law thank the author for his contribution to Volume 34 and note that the author is solely responsible for the content and accuracy of the references published.

*Against this backdrop, this Paper examines the impact of administrative law on the rule of law and governance in Malawi, using environmental agencies as a case study. This Paper draws insights from empirical research recently conducted by the author with funding from the International Development Research Centre (Canada). Its findings expose a number of limitations of administrative law as a tool for facilitating good environmental governance and the rule of law. These include regulatory or power capture by “invisible Barons” who wield their power to undermine the effectiveness of administrative law.*

## I. BACKGROUND

### A. Introduction

The advent of multiparty democracy in 1993 heralded the dawn of the prominence of administrative law and administrative justice on the constitutional landscape of Malawi.<sup>1</sup> This has been noted in existing literature which documents the growing importance of administrative law and judicial review of administrative action in Malawi since 1992.<sup>2</sup> The literature suggests that, over the past two decades, judicial review has become an important tool for testing the compatibility of the actions of government agencies with the Constitution. This dramatic rise in the scope and intensity of judicial review has partly been attributed to the political transition to multiparty democracy which had its genesis around 1992.<sup>3</sup> Existing literature has also documented the increasing importance of administrative law in environmental governance.<sup>4</sup>

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1. Matembo S. Nzunda *The Quickening of Judicial Control of Administrative Action in Malawi, 1992–1994*, in DEMOCRATIZATION IN MALAWI: A STOCKTAKING 283, 283 (Kings M. Phiri & Kenneth R. Ross eds., 1998).

2. *Id.*; Danwood Mzikenge Chirwa, *Liberating Malawi’s Administrative Justice Jurisprudence from Its Common Law Shackles*, 55 J. AFR. L. 105 (2011).

3. See Nzunda, *supra* note 1; Chirwa, *supra* note 2.

4. See, e.g., LJ Kotzé, *The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence*, 7(2) P.E.R., 58 (2004); Lye Lin Heng, *The Judiciary and Environmental Governance in Singapore*, 3 J. CT. INNOVATION 133 (2010).

Administrative law according to one commentator “defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures those agencies must follow and determines the availability and scope of review of their actions by the independent judiciary.”<sup>5</sup>

Glazewski, an eminent environmental law scholar, has described environmental law as “administrative law in action.”<sup>6</sup> He bases his assertion on the fact that the administration of environmental law involves “administrative decision-making and environmental conflicts invariably turn on the exercise of administrative decision-making powers.”<sup>7</sup> Administrative decision-making by environmental agencies is one of the primary concerns of administrative law.<sup>8</sup> The development, implementation and enforcement of environmental law essentially involves administrative actions as well as decision-making within the context of environmental agencies.<sup>9</sup> These agencies are also given the responsibility of initiating and promulgating environmental regulations.<sup>10</sup> Administrative decision-making is thus the primary mode of implementing and enforcing environmental law.<sup>11</sup>

It is generally believed that the central purpose of administrative law is to promote good administration and adherence to the rule of law. As Jayakumar observes, administrative law has two functions, namely prevention of governmental excesses and promotion of good governance.<sup>12</sup> However, one issue that remains underexplored is whether the principles of administrative justice are reflected in the daily operations of governmental agencies, generally and environmental agencies in particular. There is a dearth of empirical research to assess the validity of the dominant understanding that administrative law catalyzes good governance, especially in the context of environmental governance.<sup>13</sup> No empirical research has been done to de-

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5. Richard B. Stewart, *Administrative Law in the 21st Century*, 78 N.Y.U. L. REV. 437, 438 (2003).

6. JAN GLAZEWISKI, ENVIRONMENTAL LAW IN SOUTH AFRICA 97 (2000).

7. *Id.*

8. *Id.*

9. Kotzé, *supra* note 4, at 59.

10. MIGAI AKECH, ADMINISTRATIVE LAW 239–77 (2016).

11. M.A. Rabie et al., *Implementation of Environmental Law*, in ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 120–28 (R.F. Fuggle & M.A. Rabie eds., 2000).

12. Srividhya Jayakumar, *Administrative Law in India: The Fire Fighting and the Fire Watching Functions*, 4 L. QUEST 81, 82 (2011).

13. VARDA BONDY ET AL., THE VALUE AND EFFECTS OF JUDICIAL REVIEW: THE NATURE OF CLAIMS, THEIR OUTCOMES AND CONSEQUENCES 1 (2015); Marc Hertogh & Simon Halliday, *Judicial Review and Bureaucratic Impact in Future Research*, in JUDICIAL REVIEW AND

termine the impact of administrative law and judicial review on the quality of environmental rule-making, application and adjudication in Malawi. Attempts to understand the rise of judicial review have not been empirically grounded. Although there is some literature that attempts to explain the proliferation of judicial review cases in the post-1992 era, there has been no attempt to analyze the qualitative significance of judicial review in environmental governance.<sup>14</sup> Similarly, no attempt has been made to try to understand the impact of the quickening of judicial review on environmental governance and the rule of law.

The deficiency of empirical research on the impact of judicial review is not surprising given that, globally, the relationship between administrative law and governance is assumed. There is inadequate empirical evidence to support the accuracy of dominant understandings around the purpose of administrative law and judicial review. Much of what is known about the impact of judicial review on the decision-making culture within government is based on anecdotal evidence.<sup>15</sup>

Against this backdrop, this paper examines the operations of administrative law in the environmental sphere and how its mechanisms influence the ways in which environmental agencies function.

### *B. Study Objectives*

This study has the following objectives:

- (a) To determine how environmental agencies in Malawi make and apply rules and adjudicate disputes,
- (b) To analyze the qualitative significance of administrative justice on environmental governance and the rule of law, and
- (c) To determine the role and impact of judicial review on environmental governance and the rule of law.

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BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES (Marc Hertogh & Simon Halliday eds., 2004); Patrick C. Wohlfarth, *How the Prospect of Judicial Review Shapes Bureaucratic Decision Making*, 14 (2010) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository, University of North Carolina).

14. Nzunda, *supra* note 1, at 283; Chirwa, *supra* note 2.

15. Ross Cranston, *Reviewing Judicial Review*, in *ADMINISTRATIVE LAW AND GOVERNMENT ACTION* 45, 72–73 (Genevra Richardson & Hazel Genn eds., 1994).

### C. Theoretical Framework

#### i. Administrative Law and Environmental Governance

Bradley and Ewing define administrative law as “a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies.”<sup>16</sup> This branch of law governs relations between government agencies and private entities/individuals that are affected by the power and duties of such agencies.<sup>17</sup> Key powers and activities of public agencies are generally controlled by administrative law.<sup>18</sup> These include rule making, rule application and rule adjudication.<sup>19</sup> One of the key functions of administrative law is to ensure that the responsibilities, as well as operations, of public agencies are provided for and supported by law.<sup>20</sup>

It has been argued that administrative law can play a critical role in the realization of good administration, the rule of law and meaningful democracy in African countries, including Malawi.<sup>21</sup> This is because it is considered to be a valuable tool for ensuring that individual interactions with public officials are characterized by legality, fairness, impartiality, procedural propriety and respect for human rights generally.<sup>22</sup> Apart from embracing the foregoing traditional values that have defined judicial review, administrative justice has adopted other values that characterize good governance. These include transparency and accountability, fair procedures and due processes, and citizen engagement.<sup>23</sup> Through judicial review, adminis-

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16. ANTHONY W. BRADLEY & KEITH D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 657 (14th ed. 2007).

17. *Id.* at 657–58.

18. NEIL HAWKE & NEIL PARPWRTH, INTRODUCTION TO ADMINISTRATIVE LAW 1 (1998).

19. Simon Halliday & Colin David Scott, *Administrative Justice*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert Kritzer, eds., 2010); Alexander H. Türk, *Oversight of Administrative Rulemaking: Judicial Review*, 19 EUR. L.J. 126 (2013); Katie E Eyer, *Administrative Adjudication and the Rule of Law*, 60(3) ADMIN. L. REV. 648 (2002); Rabie et al., *supra* note 11.

20. Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (HL) 410 (appeal taken from Eng.) (Lord Diplock).

21. Migai Akech, *Globalisation, the Rule of (Administrative) Law and the Realisation of Democratic Governance in Africa: Realities, Challenges and Prospects*, 20 IND. J. GLOB. LEGAL STUD. 339, 343 (2013).

22. *Id.* at 346.

23. Gordon Anthony, *Administrative Justice in the UK*, 7 ITALIAN J. PUB. L. 9, 10 (2015); see also Kobus Müller, *Environmental Governance in South Africa*, in ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 68, 72 (H.A. Strydom & N.D. King eds., 2d ed. 2009).

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trative law empowers courts to check whether the actions of public agencies are confined within the scope of their authorizing laws and fundamental principles of administrative law.<sup>24</sup> Administrative law is thus considered to be a tool for promoting administrative justice.<sup>25</sup>

Administrative law is also believed to be a catalyst of better decision-making beyond individual cases and has been said to be a stimulant for broader and systemic improvements in decision making.<sup>26</sup> In this regard, administrative law is said to be an invaluable tool for improving “the quality and consistency of government decision-making,” and for shaping “the way decision-makers exercise their functions.”<sup>27</sup> Administrative law is also believed to be a tool for promoting public trust in government and public officers because it requires public officials to abide by the dictates of legality, rationality and procedural propriety.<sup>28</sup> In this regard, administrative law is considered as an invaluable tool for promoting good governance and the rule of law.<sup>29</sup>

However, from a methodological perspective, it is extremely difficult to determine the impact of administrative law on the practical operations of environmental agencies.<sup>30</sup> This is because factors that inform and influence governance are complex and multifaceted.<sup>31</sup> The task of determining how administrative law impacts governance is made particularly complex by the profound changes that are taking place in the sphere of governance in most countries.<sup>32</sup> For instance,

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24. Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (HL) 410 (appeal taken from Eng.) (Lord Diplock); *see also* Lord Dyson, Master of the Rolls, The Sultan Azlan Shah Lecture for the Judiciary of England and Wales: Is Judicial Review a Threat to Democracy (Nov. 2015), <https://www.judiciary.uk/wp-content/uploads/2015/12/is-judicial-review-a-threat-to-democracy-mr.pdf>.

25. Anthony, *supra* note 23.

26. John McMillan, Commonwealth Ombudsman, Whitmore Lecture: Can Administrative Law Foster Good Administration? (Sept. 16, 2009), [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0010/31303/16-September-2009-Can-administrative-law-foster-good-administration.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0010/31303/16-September-2009-Can-administrative-law-foster-good-administration.pdf).

27. *Id.*

28. Akech, *supra* note 21, at 346.

29. EFFECTIVE JUDICIAL REVIEW A CORNER STONE OF GOOD GOVERNANCE (Christopher Forsyth et al. eds., 2010).

30. Hertogh & Halliday, *supra* note 13.

31. *Id.*; *see also* Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rule-Makings: An Empirical Investigation*, 53(5) WM. & MARY L. REV. 1717, 1770 (2012), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3435&context=wmlr>.

32. *See generally* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES (Tom Ginsburg & Albert H. Y. Chen eds., 2009).

contemporary administrative law and governance is increasingly characterized by what Jayasuriya terms ‘decentring.’<sup>33</sup> Decentring, according to Jayasuriya, happens when “governance is located in multiple sites, engage[s] a number of non-state actors, and deploys a range of techniques of governance that move beyond the traditional structures of public law.”<sup>34</sup> The realities of modern government are such that state power is sometimes exercised, or at least influenced, by entities outside traditional branches of government.<sup>35</sup> Consequently, as Jayasuriya argues, “the exercise of public power is now taking place in sites outside the formal structures of governmental power, a process which decenters and fragments the state.”<sup>36</sup>

The exercise of power outside the formal structures of governmental power gradually erodes formal institutions of their monopoly over governance.<sup>37</sup> Entities including, public-private partnerships (PPPs), transnational non-governmental standard-setting organizations, Civil Society Organizations (CSOs), development partners, political parties, vigilantes, and other non-state actors are increasingly becoming involved in the exercise of state power.<sup>38</sup> Ironically, some of these entities are not subjected to administrative law. According to Sedley, “with the systematic dispersal of the sites of power beyond the confines of what we had learned to recognize as the State, old certainties of public law are no longer there.”<sup>39</sup> This renders it extremely difficult to determine the extent to which the operations of public agencies are influenced by administrative law or other external factors.

Against this background, this paper offers insights from recently conducted research on the implications of administrative law for environmental governance. It will also shed light on how administrative law is shaping environmental governance and the rule of law in the Malawian context.

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33. Kanishka Jayasuriya, *Riding on the Accountability Wave? Politics of Global Administrative Law*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 59 (Tom Ginsburg & Albert H. Y. Chen eds., 2009).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.*

39. Stephen Sedley, *Foreword*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 1, 1 (Michael Taggart ed., 1997).

## ii. Judicial Review and Impact

Judicial review by definition refers to the supervisory power of courts over the way public bodies exercise their powers and carry out their duties.<sup>40</sup> In the present constitutional context, two kinds of judicial review can be identified. These are judicial review of administrative action and constitutional review.<sup>41</sup> According to Justice Kapindu:

[I]n modern day Malawian constitutional law there are two types of judicial review, viz: The former is the review procedure by courts of conduct by public authorities or bodies ... The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.<sup>42</sup>

The focus of judicial review of administrative action is not on overturning decisions of public authorities that judges are uncomfortable with.<sup>43</sup> Rather than consider merits of particular decisions, judicial review primarily examines the process of decision-making to ascertain that decisions have been validly made in compliance with the law.<sup>44</sup> At common law, the broad grounds for challenging decisions of public authorities were outlined by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* as ‘illegality’, ‘irrationality’ and ‘procedural impropriety’.<sup>45</sup> Illegality refers to failure to comply with statutory powers and duties; irrationality means failure to arrive at rational decisions or to follow a proper process of reasoning.<sup>46</sup> Procedural impropriety, on the other hand embraces

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40. GOV'T LEGAL DEP'T, THE JUDGE OVER YOUR SHOULDER—A GUIDE TO GOOD DECISION MAKING 7 (1994), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746170/JOYS-OCT-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf) (U.K.).

41. Chirwa, *supra* note 2, at 117.

42. *State v. Council of the Univ. of Malawi, ex parte Univ. of Malawi Workers Trade Union* [2015] Miscellaneous Civil Cause No. 1, 13–14 (High Court of Malawi).

43. ANDREW LE SUEUR & MAURICE SUNKIN, PUBLIC LAW 469 (1998).

44. Ian David Turner, *Judicial Review, Irrationality and the Review of Merits*, 15 NOTTINGHAM L. J. 37 (2006), [http://clouk.uclan.ac.uk/8961/1/8961\\_turner.pdf](http://clouk.uclan.ac.uk/8961/1/8961_turner.pdf).

45. [1985] 1 AC 374 (HL) 410 (appeal taken from Eng.).

46. ANDREW LE SUEUR, JAVAN HERBERG & ROSALIND ENGLISH, PRINCIPLES OF PUBLIC LAW 227 (2d ed. 1999).



failure to comply with the common law duty to be fair and to adhere to laid down procedural standards.<sup>47</sup> These include the duty to give a fair hearing and to avoid bias.<sup>48</sup>

Most judicial review cases primarily focus on administrative action.<sup>49</sup> Section 43 of the Constitution provides for a right to lawful and procedurally fair administrative action.<sup>50</sup> However, the Malawi Constitution does not define “administrative action.”<sup>51</sup> Nonetheless, it empowers courts consider comparable foreign case law when interpreting its provisions.<sup>52</sup> In this regard, deference is given to South African case law that interpreted Section 33 of the Constitution, which is identical to Section 43.<sup>53</sup> Administrative action by definition refers to tasks of public officers that are public and administrative in nature.<sup>54</sup> These actions include adjudicative administrative decisions, regulations, legislation and administrative decisions made by the executive branch of government.<sup>55</sup> They may also include, passing of resolutions and implementation of legislation.<sup>56</sup>

It is widely believed that judicial review of agency rule-making, application and adjudication serves the public interest by helping to improve the quality of decision-making.<sup>57</sup> This is especially so because judicial review is regarded as a useful tool for holding public officials accountable to aggrieved parties and the wider public.<sup>58</sup> Within the context of rule-making commentators note that judicial review operates as an institutional mechanism that guarantees that

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47. *Id.*

48. *Id.*

49. *See* Chirwa, *supra* note 2.

50. *Id.* at 106.

51. *Id.*

52. CONSTITUTION OF THE REPUBLIC OF MALAWI May 16, 1994, § 11(c) (Malawi) [hereinafter MALAWI CONSTITUTION].

53. Section 33 of the South African Constitution provides as follows: “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.” CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA Oct. 11, 1996, § 33 (S. Afr.).

54. *President of the Republic of S. Afr. v. S. African Rugby Football Union*, 2000 (1) SA 1 (CC) at ¶140 (S. Afr.); *Fedsure Life Assurance Ltd v. Greater Johannesburg Transnational Metropolitan Council*, 1999 (1) SA 374 (CC) (S. Afr.).

55. Kotzé, *supra* note 4, at 68.

56. *President of the Republic of S. Afr.*, *supra* note 54, at ¶ 140; *Fedsure Life Assurance Ltd*, *supra* note 54.

57. Wagner, *supra* note 31, at 1717.

58. *Id.* at 1723.

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public authorities provide requisite information to interested parties, and take the views of interested parties seriously and make well-reasoned decisions.<sup>59</sup> The whole process of litigation enhances the visibility of particular issues and in turn facilitates accountability and transparency of rulemaking processes.<sup>60</sup> Litigation according to Sunkin, “provides access to the government arena, helps to elicit answers and information from public agencies and achieves publicity.”<sup>61</sup> As Wagner observes, “additional transparency benefits also accrue ex post, after the rulemaking is briefed and resolved by the court. The court’s opinions make the agency’s foibles more accessible to a broader audience, allowing political and related forces to sanction and discipline the agency.”<sup>62</sup>

The realization that decisions of public officers will be scrutinized and may be amenable to challenge also forces public officers to be accountable and helps them to enhance the quality of their decision-making.<sup>63</sup>

Judicial review is also regarded as a valuable mechanism for guaranteeing that agencies confine their discretion, as well as the application and interpretation of the rules within reasonable bounds.<sup>64</sup> It serves as a reminder to public authorities that “there is an institution that can intervene to review” their decisions.<sup>65</sup> Consequently, judicial review has a huge potential “to influence bureaucratic processes” and behavior beyond the courtroom.<sup>66</sup> Judicial review is thus believed to be a tool for promoting good governance.

While researchers have found it relatively easy to examine the impact of judicial review in specific cases, they have found it more difficult to determine the legal, policy, or bureaucratic changes that are effected in administrative agencies following judicial review.<sup>67</sup>

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59. *Id.*

60. *Id.* at 1776.

61. Maurice Sunkin, *Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies*, in *JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL PERSPECTIVES* 43, 47 (Marc Hertogh & Simon Halliday eds., 2004).

62. *Id.*

63. MAURICE SUNKIN, DAVID ONG & ROBERT WIGHT, *SOURCEBOOK ON ENVIRONMENTAL LAW* 743 (2d ed. 2002).

64. Wagner, *supra* note 31, at 1724.

65. *Id.* at 1756.

66. Hertogh & Halliday, *supra* note 13, at 9.

67. Peter Cane, *Understanding Judicial Review and its Impact*, in *JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES* 15, 40 (Marc Hertogh & Simon Halliday eds., 2004); Sunkin, *supra*, note 61, at 56.

Growing evidence suggests that what happens in practice might not always reflect the conventional wisdom that judicial review necessarily results in improvement of the quality of decision-making.<sup>68</sup> To this end, a number of administrative law scholars highlight the fact that judicial review sometimes tends to result in unintended or negative consequences.<sup>69</sup> Specifically, they note that judicial review has a tendency to impact more on administrative systems', official defensiveness and bureaucratic behavior than the quality of decision-making.<sup>70</sup> These scholars note that contrary to conventional wisdom, judicial review might impose significant costs on public Agencies by *encouraging* more formality and emphasis on cumbersome procedures, "at the possible expense of substance."<sup>71</sup> It might also incentivize agencies to compromise on substantive aspects of rules in favor of procedural propriety, given that judicial review focuses on process as opposed to merits.<sup>72</sup>

Similarly, there is a growing body of evidence that suggests that the effect of judicial review on government policy is usually temporary and sometimes counterproductive.<sup>73</sup> This evidence indicates that sometimes agencies consider judicial review as an unwelcome intrusion into their work.<sup>74</sup> Apart from the general belief that it imposes substantial costs on public agencies, it is also believed that judicial review slows down decision-making processes.<sup>75</sup> This is because public agencies "try to be very careful in their decisions to avoid [challenge] as best as they can."<sup>76</sup> Evidence in existing literature also reveals that public bodies have mixed motives for "being 'more careful.'"<sup>77</sup> While some public officers have a genuine concern to introduce good administrative practices in their daily undertakings, others may be motivated purely by the desire to "'avoid' future challenge" and seek proof against judicial review.<sup>78</sup> Moreover, some public

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68. See BONDY ET AL., *supra* note 13.

69. Genevra Richardson, *Impact Studies in the United Kingdom*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 103, 109, 113–14 (Marc Hertogh & Simon Halliday eds., 2004).

70. *Id.*

71. Richardson, *supra* note 69, at 114. See also BONDY ET AL., *supra* note 13, at 45–46.

72. Wagner, *supra* note 31, at 1770.

73. Richardson, *supra* note 69, at 113–14.

74. BONDY ET AL., *supra* note 13, at 45–46.

75. *Id.* at 45.

76. *Id.*

77. *Id.*

78. *Id.*

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agencies do not always comply with the judicial directives.<sup>79</sup> There is evidence in existing literature to the effect that it is common to see agencies refusing to comply with Court directives that they consider as unwanted judicial encroachment into their turf.<sup>80</sup> More subtle forms of non-compliance with judicial dictates have also been recorded including reinterpretations of court rulings by agencies.<sup>81</sup> There also seems to be evidence of legal risk taking by agencies.<sup>82</sup> As Wagner observes: “Perhaps it is better to risk a remand or vacatur, for example, than to anger an influential constituent or find oneself crosswise with the Chief Executive.”<sup>83</sup>

Commentators have also observed that sometimes judicial review is met with outright hostility from public officials. According to Tatel, environmental officials ordinarily have considerable technical expertise in their field and belong to the executive branch, which is considered politically accountable to the electorate.<sup>84</sup> These specialist agencies consequently perceive the judges as “obstructionist or even activist.”<sup>85</sup>

Moreover, it is also apparent that agencies are subjected to other forces of influence and pressures apart from judicial review.<sup>86</sup> Consequently, it is not always clear whether agencies act in a particular manner because of judicial influence or other influences.<sup>87</sup> As Wagner notes, “agencies do not generally treat court reprimands as hard constraints on their authority.”<sup>88</sup> It would appear that sometimes a public official may find it more attractive to risk the wrath of the judiciary “than to anger an influential constituent or to find oneself crosswise with the Chief Executive.”<sup>89</sup> This, in turn, mitigates the stated benefits of judicial review. The impact of judicial review on agency behavior thus remains generally unclear.

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79. Wagner, *supra* note 31, at 1770.

80. *Id.* at 1731.

81. *Id.*; see also Bradley C. Canon, *Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches*, in *JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES* 76, 79–80 (Marc Hertogh & Simon Halliday eds., 2004).

82. Wagner, *supra* note 31, at 1731–32.

83. *Id.* at 1732.

84. David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 *HARV. ENVTL. L. REV.* 1, 2 (2010).

85. *Id.*

86. Cane, *supra* note 67, at 33.

87. *Id.*

88. Wagner, *supra* note 31, at 1732.

89. *Id.*

Furthermore, judicial review is just one amongst many tools for achieving administrative justice.<sup>90</sup> There are other tools at the disposal of the citizenry including administrative tribunals, ombudsmen and alternative dispute resolution.<sup>91</sup> It is therefore difficult to determine how these interact with judicial review to define the behavior of bureaucrats.

Against this backdrop, this study sought to interrogate the significant disconnects between dominant understandings of judicial review and the realities of rulemaking, application and adjudication.<sup>92</sup>

#### *D. Methodology*

The study commenced with a comprehensive review of all the relevant literature on administrative law and governance.<sup>93</sup> 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 instrument. Documents reviewed included statutory and policy documents that set out the rule-making, application and adjudication mandates of environmental agencies sampled for the study, peer reviewed and academic literature, as well as official and semi-official reports and other documents and newspaper reports.

Literature review was followed by key informant interviews which targeted a carefully selected sample of public officers, ordinary citizens and other stakeholders including Civil Society Organizations (CSOs).<sup>94</sup> 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 environmental governance is undertaken in Malawi. Informed by these considerations, the sample of study sites included rural, urban and peri-urban centers. 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 were considered adequate for establishing administrative practices by the vari-

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90. Cane, *supra* note 67, at 18.

91. Anthony, *supra* note 23, at 9.

92. CHIKOSA BANDA, ADMINISTRATIVE LAW AND ENVIRONMENTAL GOVERNANCE IN MALAWI: RESEARCH REPORT 13 (2018).

93. RICHARD TAMBULASI & KONDWANI FARAI CHIKADZA, SOCIAL SCIENTIST REPORT: ADMINISTRATIVE LAW AND GOVERNANCE IN EAST AFRICA RESEARCH PROJECT 6 (2018).

94. *Id.* at 3-4.

ous environmental 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.

## II. NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL GOVERNANCE

### *A. Constitutional Principles Underlying Environmental Management*

The Constitution is the supreme law of Malawi.<sup>95</sup> Like other Constitutions, it defines the basic framework for government, the operations of its branches, and the fundamental rights of citizens.<sup>96</sup> Of particular importance for environmental rule-making, application and adjudication is covered in Sections 5 and 199, which enshrine the principle of constitutional supremacy.<sup>97</sup> Section 5 provides that “any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.”<sup>98</sup> This provision impacts environmental governance insofar as it subjects all rule-making, application and adjudication functions of environmental agencies to the test of constitutionality.<sup>99</sup> Courts have a duty to ensure that public agencies exercise their functions in accordance with the Constitution.<sup>100</sup> Section 108(2) gives the High Court “original jurisdiction to review any law, and any action or decision of the Government, for conformity with [the] Constitution.”<sup>101</sup>

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95. Justin Kalima, *Environment and Development in Malawi – Any Balancing of Interests*, in THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA 219, 228 (Michael Faure & Willemien du Plesis eds., 2011); MALAWI CONSTITUTION, *supra* note 52, § 5. See also MALAWI CONSTITUTION, *supra* note 52, § 199 (providing as follows: “This Constitution shall have the status as supreme law and there shall be no legal and political authority save as is provided by or under this Constitution”).

96. ELLIOT BULMER, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, WHAT IS A CONSTITUTION: PRINCIPLES AND CONCEPTS 3 (2d ed. 2004).

97. Section 5 of the Constitution stipulates that “any act of government or any law that is inconsistent with provisions of this Constitution shall, to the extent of such inconsistency be invalid.” MALAWI CONSTITUTION, *supra* note 52, § 5.

98. MALAWI CONSTITUTION, *supra* note 52, § 5.

99. See *id.* This is in line with Section 4 of the Constitution which provides that “this Constitution shall bind all executive, legislative and judicial organs of the State at all levels of government.” MALAWI CONSTITUTION, *supra* note 52, § 4. See also *Mayeso Gwanda v. State et al.* [2015] Constitutional Case No. 5, 6 (High Court of Malawi) (holding that the Court is mandated to “declare any law invalid if it inconsistent with the Constitution”).

100. According to Section 9 of the Constitution, “the Judiciary shall have the responsibility of interpreting, protecting and enforcing the Constitution and all laws in accordance with this Constitution....” MALAWI CONSTITUTION, *supra* note 52, § 9.

101. See *Nangwale v. Speaker of the Nat’l Assembly* [2005] MWHC 80, Miscellaneous

One of the most important milestones in the history of Malawi's environmental law has arguably been the incorporation of an environmental management provision in Section 13 of the Constitution of the Republic of Malawi, 1995.<sup>102</sup> Section 13(d) provides a constitutional basis for environmental rulemaking and rule application in Malawi by setting out the specific goals that the State must pursue in the field of the environment.<sup>103</sup> The Section requires the government to progressively adopt and implement laws and policies aimed at managing the environment responsibly.<sup>104</sup> The principles of national policy, according to Section 14 of the Constitution, are merely "directory in nature."<sup>105</sup> However, courts are entitled to take them into consideration when "interpreting and applying any of the provisions of [the] Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of [the] Constitution."<sup>106</sup>

It is generally believed that the principles of national policy are of unclear status and may not therefore be equated to constitutional rights.<sup>107</sup> But there have been judicial pronouncements which suggest to the contrary. One such pronouncement was made in the Philippine case of *Oposa et al. v. Fulgencio S Factoran, Jr. et al.*<sup>108</sup> In this case, the Supreme Court of the Philippines was asked to determine the status of 'the right to a balanced and healthful ecology' which is contained in the 'Declaration of Principles and State Policies' part of the Constitution.<sup>109</sup> The Court observed that the inclusion of the right in

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Civil Case No. 1 (High Court of Malawi), <https://malawilii.org/mw/judgment/high-court-general-division/2005/80>.

102. GOV'T OF MALAWI, NATIONAL ENVIRONMENTAL POLICY, Clause 1.4 (2004), <http://extwprlegs1.fao.org/docs/pdf/mlw169499.pdf> [hereinafter NATIONAL ENVIRONMENTAL POLICY].

103. Kalima, *supra* note 95, at 235.

104. *Id.*; see also FIDELIS KANYONGOLO, LOCAL GOVERNMENT IN MALAWI-ADMINISTRATIVE LAW AND GOVERNANCE IN EAST AFRICA RESEARCH 8 (2018).

105. Kalima, *supra* note 95, at 235–36.

106. MALAWI CONSTITUTION, *supra* note 52, § 14. See also Administrator of the Estate of Dr. Kamuzu Banda v. Attorney General [2004] MWHC 3, Civil Cause No. 1839 (A) of (1997), 17 (High Court of Malawi) (Justice Chimasula Phiri); Gable Masangano v. Attorney General & Others [2009] MWHC 31, Constitutional Cause No. 15 of 2007 (High Court of Malawi).

107. Carl Bruch et al., *Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa*, 7 S. AFR. J. ENVTL. L. POL'Y. 21, 36 (2000).

108. G.R. No.101083 (S.C., Jul. 30, 1993) (Phil.).

109. UNEP, COMPENDIUM OF JUDICIAL DECISIONS IN MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 24–25, 29 (1998).

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the Declaration of Principles section, as opposed to the Bill of Rights, did not make it any “less important than any of the civil and political rights enumerated in the latter.”<sup>110</sup>

Apart from explicitly including the environment in the principles of national policy, the Constitution also contains a Bill of Rights which enshrines human rights that are pertinent to environmental management.<sup>111</sup> Specifically, Section 43 provides for administrative justice.<sup>112</sup> It stipulates 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.<sup>113</sup>

There have been some judicial pronouncements to the effect that Section 43 merely restates the common law principles of natural justice.<sup>114</sup> However, these decisions have been criticized by some commentators. Chirwa, for instance, contends that the Constitution “provides for new and expansive grounds for review than was the case under the common law.”<sup>115</sup> He notes that the notion of lawfulness under Section 43 is wider than the notion of legality under the common law.<sup>116</sup> This, according to Chirwa, is because in determining whether a public officer acted lawfully, the Court will not merely

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110. *Id.* See also *Kinkri Devi & Anor v. State of Himashal Pradesh and Ors*, (1988) AIR 4 PC (1987) (India).

111. These include, the right to life (Section 16), the right to property (Section 28), the right to economic activity (Section 29), the right to development (Section 30) and the right of access to information (Section 37). MALAWI CONSTITUTION, *supra* note 52, §§ 28–30, 37.

112. Chirwa, *supra* note 2, at 106.

113. MALAWI CONSTITUTION, *supra* note 52, §§ 43(a) & (b).

114. In *Chawani v. Attorney General*, Justice Tambala observed as follows: “In our view, Section 43 of the Constitution is simply an entrenchment of the principles of natural justice which requires that no person shall be condemned without being heard. The section has of course stretched the principle a bit to include the requirement to give reasons which must support an administrative action.” MCSA Civil Appeal No. 18 of 2000 (unreported) [2000-2001] MLR 79.83 (MSCA) (Malawi). See also *Attorney General v. Lunguzi & Another* [1996] 19 MLR 8 (MSCA) (Malawi). There are a number of pronouncements from the High Court that echo the Supreme Court’s position. These include, *Zaibula v. Council of the University of Malawi* [1997] 1 MLR 356; *Mbewe v. Registered Trustees of Blantyre Adventist Hospital* [1997] 1 MLR 403; and *Buliyani v. Malawi Book Service* [1994] MLR 24.

115. Chirwa, *supra* note 2, at 108.

116. *Id.*



consider whether he or she acted *intra-vires*.<sup>117</sup> It may also consider whether the officer complied with the Constitution.<sup>118</sup> Procedural fairness is broader than the compliance with rules of natural justice and reflects the general duty to act fairly.<sup>119</sup> Furthermore, the Constitutional right to reasons, in writing, for decisions that affect an individual's rights, interests and legitimate expectations is not available within the common law.<sup>120</sup> Chirwa also correctly opines that Section 43 provides for justification as a ground for review.<sup>121</sup> Chirwa observes that the requirement that administrative action should be justifiable in relation to reasons given is much broader than the ground of irrationality under the common law.<sup>122</sup>

Chirwa's observations find support in a minority judicial opinion.<sup>123</sup> In the High Court case of *The State v. Blantyre City Assembly, ex.p. Ngwala*<sup>124</sup> Justice Mwaungulu opined that the statements made by some Judges that Section 43 merely repeats the principles of natural justice were "not very accurate conceptually."<sup>125</sup> Mwaungulu's opinion finds support in South African jurisprudence.<sup>126</sup> In the case of *Van Huyssteen & Others v. Minister of Environmental Affairs & Tourism & Others*,<sup>127</sup> for example, the High Court of South Africa disagreed with the contention that Section 24(b) of the South African Constitution (a provision in the South African interim Constitution<sup>128</sup> which was identical to Section 43) merely codified the common law principles of natural justice. Justice Farlam observed as follows:

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117. *Id.*

118. *Id.*

119. *See* Re H.K. (an infant), [1967] 2 QB 617; *Van Huyssteen & Others v. Minister of Env'tl Affairs & Tourism & Others* (1998) 1SA 283.

120. The Supreme Court recognized this point in *Chawani v. Attorney General*, [2000-2001] MLR 79, and observed that Section 43 has stretched the principles of natural justice to include the duty to give reasons.

121. Chirwa, *supra* note 2, at 109.

122. *Id.*; *see also* Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. OF HUM. RTS. 31 (1994).

123. *State v. Blantyre City Assembly ex.parte Ngwala*, Miscellaneous Civil Application No. 183 of 2012 (High Court of Malawi).

124. *Id.*

125. *Id.* at 3.

126. *See, e.g., Police & Prison Civil Rights Union v. Minister of Correctional Services & Others* 1999, Case No. D511/99 (Labor Court of South Africa) at ¶¶ 55-56 (S. Afr.); *Van Huyssteen & Others v. Minister of Env'tl. Affairs & Tourism & Others* 1998 (1) SA 283 (C) (S. Afr.).

127. UNEP, *supra* note 109, at 59.

128. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Apr. 27, 1994, Act 200.

Mr. Helberg contended that s 24(b) merely codifies the common law relating to natural justice ... I cannot agree with this submission ... I do not think that one can regard s 24(b) as codifying the existing law and thus read down, as it were, the wide language of the paragraph, unless the existing law was already so wide and flexible that it was covered by the concept of procedural fairness.<sup>129</sup>

Mwaungulu's opinion also finds support in the case of *President of the Republic of South Africa v. South African Rugby Football Union*, in which the Constitutional Court observed as follows:

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see [S]ection 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of [S]ection 33, but also its content. The principal function of [S]ection 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.<sup>130</sup>

Academic commentators have also supported the argument that the administrative justice clause does not merely reinstate common law rules.<sup>131</sup> Rather it affords the courts a chance to consider the "merits of a decision by developing a theory of what is desirable."<sup>132</sup> In this context, De Ville argues that Section 24 of the South African Constitution, which is identical to its counterpart in Section 43 of the

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129. UNEP, *supra* note 109, at 59, 73.

130. 2000 (1) SA 1 (CC) at ¶¶ 135–36 (S. Afr.).

131. GLAZEWISKI, *supra* note 6, at 97; Jacques De Ville, *Proportionality as a Requirement of the Legality in Administrative Law in Terms of the New Constitution*, S. AFR. PUB. L. 360, 361 (1994).

132. De Ville, *supra* note 131.

Malawi Constitution, introduces the continental notion of proportionality into administrative law.<sup>133</sup> Justifiability, according to De Ville, demands that administrative action be “suitable and necessary to attain the statutorily prescribed purpose and which does not result in harm to an individual(s) which is out of proportion to the gains to the community,” justifiability cannot just be equated to rationality.<sup>134</sup>

The foregoing position finds support in judicial opinion from South Africa.<sup>135</sup> In the South African case of *Roman v. Williams*,<sup>136</sup> Justice Van Deventer cited with approval DeVille’s writings.<sup>137</sup> He observed as follows: “[J]udicial review no longer has an independent existence apart from constitutional review, which casts the net much wider and renders the common law irrelevant in this case, as I said earlier. In my view the constitutional test of legality clearly overrides the common law review grounds.”<sup>138</sup>

The incorporation of Section 43 into the Malawi Constitution has profound implications for administrative law generally, environmental rule-making, and rule application and rule adjudication. This is especially so because the Section reflects a rights-based approach to administrative justice. Under the common-law, the onus of proving whether a public officer has breached his legal duty or acted *ultra vires* is on the claimant.<sup>139</sup> However, the rights-based approach imposes the onus of justifying why a citizen’s right to administrative justice should be interfered with on the public officer.<sup>140</sup> According-

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133. De Ville, *supra* note 131, at 361.

134. *Id.* at 365.

135. *See, e.g., Kotzé v. Minister of Health* 1996 (3) BCLR 417 (S. Afr.).

136. *Roman v. Williams* 1997 (4) All SA 210 (CC) (S. Afr.).

137. *Id.* at 219 (“I have borrowed extensively from the excellent synopsis of South African comparative foreign authority and well-founded submissions of JR de Ville in his articles “Proportionality as a requirement of the legality in administrative law in terms of the new Constitution”, published in 1994, and “The Right to Administrative Justice: An Examination of Section 24”, which was written in 1995 with reference to section 24 of the Interim Constitution Act. I find myself fully in agreement with the learned author that the constitutional test imports the requirement of proportionality between means and end and that the role of the courts in judicial reviews is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits.”)

138. *Id.*

139. T. R. Hickman, *The Reasonableness Principle: Reassessing its Place in the Public Sphere*, 63 CAMBRIDGE L.J. 166, 186 (2004).

140. *Id.*; *see also* Thomas Poole, *The Reformation of English Administrative Law*, 2, (L. Soc’y Econ., Society and Economy Working Paper 12/2007, 2007); *see also* M. Taggart, “The Tub of Public Law,” in *THE UNITY OF PUBLIC LAW* 475 (D. Dyzenhaus ed., 2004); Jason Varuhas, *The Reformation of English Administrative Law? Rights, Rhetoric and Reality*, 13 (Legal Research Paper Series University of Cambridge, 2013); LE SUEUR, HERBERG & ENGLISH, *supra* note 46, at 478.

ly, it provides a basis for challenging the manner in which environmental agencies make rules, apply rules and adjudicate upon matters related to environmental management.

The inclusion of Section 43 in the Malawi Constitution makes it imperative for administrative law scholars to endeavour to understand the effect of the constitutional order on administrative law and the extent to which the above provisions impact on the work of environmental agencies. Unfortunately, there is a dearth of literature in this regard. This paper thus attempts to shed some light on this issue.

### *B. Framework Legislation*

Like many other countries, Malawi reformed its environmental policies and laws following the 1992 United Nations Conference on the Environment and Development (UNCED).<sup>141</sup> The policy and law reform process commenced in 1994 with the development of the National Environmental Action Plan.<sup>142</sup> It culminated in the development of the National Environmental Policy and the Environment Management Act (EMA 1996) in 1996.<sup>143</sup> The EMA 1996 provides for “the protection and management of the environment and the conservation and sustainable utilization of natural resources.”<sup>144</sup> The salient features of the Act include the provision of an elaborate institutional framework for the coordination of environmental rule-making, rule-implementation and rule adjudication in Malawi.<sup>145</sup>

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141. SOSTEN CHIOTHA ET AL., MALAWI’S PROGRESS TOWARDS ACHIEVING SUSTAINABLE DEVELOPMENT GOALS: 20 YEARS SINCE THE 1992 EARTH SUMMIT IN RIO 5, 7–8 (2012), <https://sustainabledevelopment.un.org/content/documents/1037malawi.pdf>.

142. *Id.* at 5; MALAWI GOV., THE MALAWI NATIONAL ENVIRONMENTAL ACTION PLAN (1994), <https://cepa.rmportal.net/Library/governmentpublications/National%20Environmental%20Action%20Plan%20Vol%20I%201994.pdf/view>; Redson Kapindu & Justin Kalima, *Wither to Malawi? A Brief Statement of the Law on the Environment in Malawi* (Unpublished 2015), at 3.

143. Kapindu & Kalima, *supra* note 142, at 3; GRACIAN ZIBELU BANDA, REVISION OF THE ENVIRONMENT MANAGEMENT ACT: DRAFT REPORT 2 (2004).

144. Environmental Management Act (Act No. 23 of 1996) (Malawi) [hereinafter EMA 1996].

145. BANDA, *supra* note 143, at 2.

It is worth noting that Parliament recently enacted the Environment Management Act, 2017.<sup>146</sup> The Act, *inter alia*, repeals the EMA 1996.<sup>147</sup> However, it is not yet in force.<sup>148</sup> It will only come into force upon being assented to by the President and after being published in the Gazette by the Minister.<sup>149</sup>

### C. Sectoral Legislation

One defining characteristic of Malawi's environmental law is its diffuse nature. Environmental law is provided for in a wide range of Acts of Parliament and subsidiary legislation.<sup>150</sup> No single legal instrument comprehensively makes provisions for environmental rule-making, application and adjudication in Malawi. While the Environment Management Act of 1996 attempts to provide for an overarching legal framework and coordination mechanism for environmental management in Malawi, it falls short of regulating all aspects of the environment.<sup>151</sup> Consequently, the government has developed or revised sector specific legislation to regulate environmental and natural resource management in various sectors.<sup>152</sup> Sector specific laws include the Forestry Act, 1998, Fisheries Conservation and Management Act, 1997, the National Parks and Wildlife Act, 1992, the Water Resources Act, 2013, Water-Works Act, 1995, and Public Health Act, 1948.<sup>153</sup>

However, the EMA 1996 still remains the overarching statute on environmental management, until the time it will be replaced by the EMA 2017.<sup>154</sup> All the sectoral laws are subordinate to it.<sup>155</sup> Section 7

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146. Environmental Management Act (Act No. 19 of 2017) (Malawi) [hereinafter EMA 2017].

147. *See id.* § 118.

148. Information sourced from the office of the Chief Legislative Counsel in the Ministry of Justice.

149. EMA 2017, *supra* note 146, § 1.

150. *See* Kapindu & Kalima, *supra* note 142, at 6.

151. *See* Tracy Dobson, *Radical Restructuring of Environmental Policy to Preserve Biodiversity in Southern Africa: Malawi at the Crossroads*, 13 J. NAT. RESOURCES & ENVTL. L. 149, 162–66 (1997).

152. *See* ENVTL. AFFAIRS DEPT., MALAWI STATE OF ENVIRONMENT AND OUTLOOK REPORT: ENVIRONMENT FOR SUSTAINABLE DEVELOPMENT 265 (2010); *see also* NATIONAL ENVIRONMENTAL POLICY, *supra* note 102, at iii.

153. *See generally* GRACIAN ZIBELU BANDA & THOKOZANI JAMES NGWIRA, INTRODUCTION TO ENVIRONMENTAL LAW IN MALAWI (2007).

154. Gift Dorothy Mkanje, *The Environment Management Act (2017) and Natural Resources Regulation in Malawi: Opportunities and Limitations for Effective Enforcement*, in LAW ENVIRONMENT AFRICA 393 (Patricia Kameri Mbote et al. eds, 2019).

155. EMA 1996, *supra* note 144, § 7.

of the EMA renders any written law on the protection and management of the environment that is inconsistent with any of its provisions invalid to the extent of such inconsistency.<sup>156</sup>

#### *D. Institutional Framework*

Part III of the EMA 1996 outlines the institutional framework for environmental management in Malawi.<sup>157</sup> Section 8(1) of the EMA 1996 places the Minister at the helm of environmental management. The Section recognizes the Minister as the main duty-bearer for environmental protection and management in Malawi.<sup>158</sup> The Section explicitly requires the Minister to take necessary measures for achieving its objectives in consultation with lead agencies.<sup>159</sup> Section 9 of the EMA 1996 establishes the office of Director of Environmental Affairs.<sup>160</sup> The Director's Office "is responsible to the Minister for the proper discharge of his functions under [the] Act and for the implementation of such policies relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources[.]"<sup>161</sup> The Director heads the Department of Environmental Affairs, which is responsible for coordination of environmental management in Malawi.<sup>162</sup> The above scenario will change once the EMA 2016 becomes operational.<sup>163</sup> Section 7 of the EMA 2016 establishes the Malawi Environmental Protection Authority which "shall be the principal agency for the protection and management of the environment."<sup>164</sup>

The diffuse nature of environmental law in Malawi means that there is no agency that is solely responsible for environmental rule-making, as well as rule application and rule-adjudication in Malawi.<sup>165</sup> Apart from the Department of Environmental Affairs, there are

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156. *Id.*

157. *Id.* §§ 8–18.

158. *Id.* § 8(1) (providing that "[i]t shall be the duty of the Minister to promote the protection and management of the environment and the conservation and sustainable utilization of natural resources").

159. *Id.*

160. *Id.* § 9(1).

161. *Id.* § 9(2)(b).

162. MINISTRY OF LOCAL GOV'T & RURAL DEV., REVISED DECENTRALIZED ENVIRONMENTAL MANAGEMENT GUIDELINES 6 (2012).

163. The EMA 2016 establishes a different institutional framework for environmental management. Environmental Management Act (Act No. 19 of 2016) (Malawi).

164. *Id.* § 7(1).

165. MINISTRY OF LOCAL GOV'T & RURAL DEV., *supra* note 162, at 4–13.

no less than fifteen lead agencies responsible for rule-making, application and adjudication in the environmental arena.<sup>166</sup> The key players in this sector are government departments including Forestry and Climate Change and Meteorological Services.<sup>167</sup> Environmental management functions at local authority level fall under the mandate of Councils.<sup>168</sup> The Local Government Act 1998 gives Council power to make by-laws.<sup>169</sup>

The multiplicity of agencies in the environmental sector almost invariably gives rise to fragmentation, jurisdictional conflicts and overlapping functions.<sup>170</sup> This creates the potential for rule incoherence, overlaps and contradictions.<sup>171</sup> For example, Section 30 of the EMA authorizes the Minister responsible for environmental affairs to “prescribe environmental quality standards generally and, in particular, for air, water ... effluent and solid waste.”<sup>172</sup> Section 91 of the Water Resources Act gives the Minister responsible for water the power to “prescribe standards of effluent quality.”<sup>173</sup> Legal frameworks of this nature, as some commentators have observed, have the potential to generate conflicts of jurisdiction and “confusion of roles among actors.”<sup>174</sup> Such legal frameworks, also have implications for

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166. These Lead Agencies administer and enforce environmental laws relating to water, air, land, fisheries, forestry, national parks and wildlife, pollution and waste management, and public health. See MINISTRY OF LOCAL GOV'T & RURAL DEV., *supra* note 162; BANDA & NGWIRA, *supra* note 153.

167. MINISTRY OF LOCAL GOV'T & RURAL DEV., *supra* note 162, at 5. See also Tracy Dobson, *Community Participation in Natural Resources Management in Malawi: Charting a New Course for Sustainability*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 153 (1999).

168. MINISTRY OF LOCAL GOV'T & RURAL DEV., *supra* note 162, at 8–9.

169. Local Government Act (Act No. 42 of 1998), §§ 103, 6(1)(f) (Malawi).

170. M.A. Rabie et al., *Environment Conservation Act*, in ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 99, 101 (R.F. Fuggle & M.A. Rabie eds., 2000).

171. In fact, the National Environmental Policy, 2004, indicates that sectoral environmental laws and policies are characterized by “gaps, conflicts and duplications which adversely affect [their] effective implementation.” NATIONAL ENVIRONMENTAL POLICY, *supra* note 102, at iii.

172. EMA 1996, *supra* note 144, § 30(1).

173. Water Resources Act (Act No. 2 of 2013), § 91 (Malawi). Section 85 of the Water Resources Act, for example, authorizes and empowers the Water Resources Authority to declare certain areas to be protected areas. *Id.* § 85. This is where doing so may be necessary to protect catchment areas from deforestation. The Minister of Environmental Affairs has similar powers under Section 32 of the EMA. EMA 1996, *supra* note 144, § 32.

174. TAM O'NEIL ET AL., ODI, FRAGMENTED GOVERNANCE AND LOCAL SERVICE DELIVERY IN MALAWI 21 (2014), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8943.pdf>.

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administrative justice and good environmental governance in so far as they give rise to disjointed and uncoordinated decision making processes.<sup>175</sup>

### III. PUBLIC PARTICIPATION, STANDING AND ACCESS TO ADMINISTRATIVE JUSTICE

The effectiveness of judicial review as a tool for promoting environmental accountability largely depends on the participation of a wide range of affected interests in the judicial review process.<sup>176</sup> In order to participate effectively in environmental management, citizens need to be guaranteed the right of access to courts and tribunals to enable them to challenge environmental decisions.<sup>177</sup>

An important issue once thought to have been settled, that has generated a lot of controversy, is whether citizen groups, as opposed to individual citizens, would have the right to commence proceedings for infringement of the right to a clean and healthy environment.<sup>178</sup> However, Malawi, like other common law jurisdictions, has traditionally required applicants to demonstrate a degree of sufficient interest in a matter in order to have standing to challenge an action by a public agency.<sup>179</sup> The absence of liberalized standing rules, as well as

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175. JG Nel & LJ Kotzé, *Environmental Management: An Introduction*, in ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA 1, 18 (H.A. Strydom & N.D. King eds., 2d ed. 2009).

176. Wagner, *supra* note 31, at 1732.

177. This is in line with Principle 10 of the Rio Declaration on Environment and Development 1992 which provides as follows: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. ... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 17, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

178. See Dobson, *Radical Restructuring*, *supra* note 151, at 163–64. The issue was thought to have been settled by Justice Chimasula in *Administrator of the Estate of Dr. Kamuzu Banda v. Attorney General*, [2004] MWHC 3, Civil Cause No. 1839 (A) of (1997), 17 (High Court of Malawi).

179. *UDF v. Attorney General*, High Court, Civil Cause No. 11 of 1994. In *President of Malawi and Another v. Kachere and Others*, the Supreme Court observed as follows:

[T]he powers of the court to . make a binding declaratory judgment is discretionary. This being the case the plaintiff must have locus standi, that is, a real interest which he wants to protect. If he has no interest, such declaratory judgement may not be granted. For example, a declaratory judgment may not be granted to a plaintiff whose claim is too indirect and insubstantial and could not give him any relief in “any real sense” ... A person who has no sufficient interest in the matter has no right to ask a court of law to give him a



reasonably accessible and low cost access to courts, makes it difficult for public-spirited individuals/entities “of all sizes and resource levels to challenge unfair rules and raise them for public scrutiny.”<sup>180</sup> The standing requirement may prove to be a substantial hurdle to citizen participation in environmental management. Section 15 of the Constitution provides as follows:

Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievances in respect of those rights.<sup>181</sup>

Section 5 of the EMA 1996 provides for the right to a clean and healthy environment.<sup>182</sup> It also stipulates that for purposes of enforcing this right, “any person may bring an action in the High Courts.”<sup>183</sup> However, commentators seem to disagree on the meaning of the above provision.<sup>184</sup> The major bone of contention is whether the provision allows for a fairly flexible approach to *locus standi*.<sup>185</sup> One school of thought argues that the flexibility of the wording of this Section would embrace persons who have not suffered a direct violation of the right to a decent environment, including ‘public-spirited’ individuals.<sup>186</sup> Others, however, contend that the way the provision is drafted still requires applicants to have *locus standi* to commence legal proceedings.<sup>187</sup>

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declaratory judgment. He must have a legal right of substantial interest in the matter in which he seeks a declaration. “Sufficient interest” is the one which is over and above the general interest. [1995] MWSC 2, MSCA Civil Appeal No. 20 of (1995) (internal citation omitted).

180. Wagner, *supra* note 31, at 1724.

181. MALAWI CONSTITUTION, *supra* note 52, art. 15.

182. EMA 1996, *supra* note 144, § 5(1).

183. EMA 1996, *supra* note 144, § 5(2).

184. See, e.g., BANDA & NGWIRA, *supra* note 153, at 13–14; Dobson, *Radical Restructuring*, *supra* note 151, at 163–64; Kapindu & Kalima, *supra* note 142, at 21.

185. BANDA & NGWIRA, *supra* note 153, at 13–14.

186. Ralph Kasambara, Environmental Rights Litigation, Human Rights and the Role of Civil Society, APPROACHES TO ENVIRONMENTAL LITIGATION AND ADVOCACY IN SOUTHERN AFRICA [25], 39–41 (IUCN, Regional Office for Southern Africa ed., 2002).

187. BANDA & NGWIRA, *supra* note 153, at 27–29.

The only judicial interpretation of Section 5 suggests that courts may be willing to interpret this provision liberally.<sup>188</sup> In *Estate of Dr. H. Kamuzu Banda v. Attorney General*, Justice Chimasula held that the right to a clean and healthy environment was not localised and the words ‘any person’ should not be interpreted in an orthodox manner.<sup>189</sup> He observed as follows:

In recognition of the pressing need to preserve the environment, the Environment Management Act has given locus standi to ‘any person’ to bring suits to enforce the right to a clean and healthy environment, which right is, of course, also not localized. In a nutshell, the Environmental Management Act departs from orthodox requirements for locus standi and gives any person the right to involve himself or herself in environmental litigation.<sup>190</sup>

Justice Chimasula’s position, which has been incorporated into the recently enacted EMA 2016, represents a progressive approach to standing.<sup>191</sup> Section 4 of the EMA 2016 provides for the “right to a clean and healthy environment” and the “duty to safeguard and enhance the environment.”<sup>192</sup> In order to ensure that this right is realised in practice, this Section entitles persons who are interested in enforcing the right to a clean and healthy environment to commence legal proceedings against persons whose activities are potentially deleterious to the environment.<sup>193</sup> The most significant reform to the law of standing in environmental law is Section 4(5) of the EMA 2016. The subsection stipulates as follows: “Any person proceeding under subsection (4) shall have the capacity to bring an action notwithstanding that the person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury[.]”<sup>194</sup> The subsection contains two proviso aimed at avoiding floodgates of litigation, the legal action must not be frivolous or vexatious and it must not be an abuse of court process.<sup>195</sup>

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188. See *Administrator of the Estate of Dr. Kamuzu Banda v. Attorney General* [2004] MWHC 3, Civil Cause No. 1839 (A) of (1997), 17 (High Court of Malawi).

189. *Id.*

190. *Id.*

191. See EMA 2016, *supra* note 163, § 4(5).

192. *Id.* §4(1).

193. *Id.* § 4(4).

194. *Id.* § 4(5).

195. *Id.* §§ 4(5)(a)–(b).

The EMA 2016 is not yet in force and cannot be invoked in a court of law.<sup>196</sup> However, once it comes into force, it will bring the much needed certainty to controversies around standing in environmental law. It will also open up opportunities for environmental NGOs and public-spirited individuals to use their competences and expertise to promote good governance and the rule of law in the environmental sector.

In the interim, the status quo remains. *Estate of Dr. H. Kamuzu Banda v. Attorney General* still remains one of the best precedents that environmental activists can use in order to promote the right to a clean and healthy environment.<sup>197</sup> Moreover, the decision of the Supreme Court in the Case of *Civil Liberties Committee v. Ministry of Justice and Registrar General*,<sup>198</sup> suggests that courts may be more willing to embrace a liberal approach where the concerned NGO specializes in the promotion and protection of a particular right. A recent decision of the High Court in *State v. Lilongwe Water Board, Minister of Irrigation and Water Development, The Director of Environmental Affairs, The Minister of Natural Resources Energy and Mining, and Khato Civils Proprietary Ltd, ex parte Malawi Law Society*<sup>199</sup> supports this conclusion. In confirming that the Malawi Law Society had standing to commence proceedings in this case, Justice Kapindu observed as follows:

The Applicant states that the matters that it raises are matters of public interest and are intended to protect the public on an issue that directly touches on the law, namely compliance with various legal processes relating to environmental protection before a project of the nature of the instant one is commenced. Prima facie, I agree that this is indeed a matter of public interest and that the MLS has a legal duty to take measures intended at protecting the public, within the meaning of Section 26(1)(d) of the [Legal Education and Legal Practitioners Act].<sup>200</sup>

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196. Information sourced from the Chief Legislative Council, Ministry of Justice; see also EMA 2016, *supra* note 163.

197. See Kapindu & Kalima, *supra* note 142, at 21.

198. [2004] MWSC 1, Civil Appeal No. 12 of (1999), 12–13 (Malawi Supreme Court of Appeal).

199. Judicial Review Cause No. 16 of (2017) (High Court of Malawi).

200. *Id.* ¶ 1.13.

#### IV. Administrative Justice and Environmental Governance

##### *A. Legality and Irrationality*

One of the cardinal principles of good administration is that those who make decisions should have “legal authority for their actions.”<sup>201</sup> A decision maker must have an accurate understanding of the law that governs his “decision-making power and must give effect to it.”<sup>202</sup> This study concluded “that compliance with legislation is not a simple matter in practice.”<sup>203</sup> Additionally, it was found that “while the mandates of various environmental agencies appear clear on paper, the situation is more complex on the ground.”<sup>204</sup> The study also found that “public officers sometimes fail to appreciate that statutory powers may only be performed by those who have the power to do so.”<sup>205</sup> The study added that the “involvement of ‘informal’ actors in rule application processes (albeit behind the scenes) also adversely impacts the legality of decisions.”<sup>206</sup> The Thin Plastics Ban Cases illustrate the above point.<sup>207</sup>

In December 2012, the Secretary for the Environment made a decision to ban the production, importation and distribution of thin plastics with effect from April 30, 2019.<sup>208</sup> Prior to the enforcement of the ban, the Department of Environmental Affairs convened a meeting of various stakeholders, including the Plastic Manufacturers Association of Malawi, to solicit feedback on this issue.<sup>209</sup> Among the concerns raised by stakeholders was that the notice given for enforcement was too short.<sup>210</sup> This was because both the manufacturers and consumers required more time to clear existing stocks and raw

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201. GOV'T LEGAL DEP'T, *supra* note 40, at 7.

202. Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (HL) 410 (appeal taken from Eng.).

203. BANDA, *supra* note 92, at 42.

204. *Id.*

205. *Id.*

206. *Id.*

207. See State v. Secretary for Env't & Climate Change Management, *ex parte* Vijay Kumar on Behalf of the Members of the Plastic Manufacturers Association of Malawi [2014] Judicial Review Cause No. 54 (High Court of Malawi); State v. Director of Env'tl. Affairs, *ex parte* Aero Plastic Indus. Ltd. t/a Rainbow Plastics & 12 Others, Judicial Cause No. 20 of 2016 (High Court of Malawi) [hereinafter Aero Plastic Indus.].

208. *Malawi Introduces a Ban on Thin Plastics*, UNDP MALAWI (Sept. 8, 2018), <http://www.mw.undp.org/content/malawi/en/home/presscenter/articles/2015/09/08/malawi-introduces-ban-on-thin-plastic.html>; *Aero Plastic Industries*; *supra* note 207, at 6.

209. Aero Plastic Indus., *supra* note 207, at 6.

210. *Id.*

materials.<sup>211</sup> It was also observed that the ban would adversely impact the plastic manufacturing business, employment and the wider economy.<sup>212</sup> During this meeting, it was resolved that the Department would begin working on developing regulations to govern the importation, manufacturing, trade and distribution of plastics.<sup>213</sup> It was also decided that implementation of the ban would be delayed until June 30, 2014.<sup>214</sup> Through a newspaper notice, the Secretary informed the general public that from the June 30, 2014, it would be illegal to produce and/or use thin plastics.<sup>215</sup> The notice indicated that non-compliance with the ban would be an offense punishable by law.<sup>216</sup> However, it made no reference to a specific provision of the law that authorized the Secretary to ban thin plastics.<sup>217</sup> In response, the plastic manufacturers appealed to the Minister to extend further the ban to June 30, 2015.<sup>218</sup> The Minister extended the ban, clearly stating that it would be the last extension.<sup>219</sup> Curiously, neither the letter from the plastic manufacturers nor the response from the Minister was copied to the Director of Environmental Affairs.<sup>220</sup> It is not clear what the legal basis for the appeal was or what law authorized the Minister to extend the deadline of the ban. It was also alleged that the manufacturers appealed to the Head of State.<sup>221</sup> Unsurprisingly, the Secretary for Environmental Affairs ignored the Ministerial extension and issued another advert that the ban was still effective and enforcement action would commence on June 30, 2014.<sup>222</sup> In a subsequent judicial review hearing, the Department of Environmental Affairs claimed that it “started enforcing the ban as it was not aware of the ministerial extension.”<sup>223</sup>

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Robert Ngwira, *No Manufacturing, Importation and Use of Thin Plastic Bags – Government*, FACE OF MALAWI (Aug. 14, 2014), <http://www.faceofmalawi.com/2014/08/no-manufacturing-importation-and-use-of-thin-plastic-bags-govt/>.

216. Mercy Malikwa, *Government Bans Thin Plastics*, THE NATION (Aug. 4, 2014), <https://mwnation.com/government-bans-thin-plastics/>.

217. Aero Plastic Indus., *supra* note 207, at 7.

218. *Id.*

219. *See id.*

220. *Id.*

221. This information was revealed by some government officials who were interviewed during the research.

222. *See* Aero Plastic Indus., *supra* note 207, at 7.

223. *Id.*

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In response, the plastic manufacturers commenced legal proceedings to challenge the Secretary's action on the basis that it was unreasonable, ultra-vires, illegal, and violated the principles of natural justice as well as the right to reasons.<sup>224</sup> The matter was settled out of court.<sup>225</sup> The settlement sought to take into account the economic concerns of the plastic manufacturers.<sup>226</sup>

The above case raised questions of legality, specifically the "informal appeals" to the Minister and the Head of State by plastic manufacturers. The fact that the communications between the Minister and the plastic manufacturers were not copied to the Director for Environmental Affairs raises serious questions of usurpation of powers of technocrats by the Minister. Second, the public officials involved in this case were not able to point at the exact law that authorized them to act in the manner they purportedly acted.<sup>227</sup> In fact, the respondent's affidavit merely stated that the ban was "an implementation of a policy issue that affects a wider group than the Applicants and had been a subject of sustained consultations between Government and all stakeholders prior to" its implementation.<sup>228</sup> The affidavit, however, did not respond to the question whether the EMA authorized the Secretary of Environmental Affairs to impose a ban on thin plastics.<sup>229</sup> Interestingly, the Applicant's affidavit also failed to raise this issue as an aspect of illegality and concentrated on whether the Secretary's action to reverse the extension for the commencement date of the ban was legal.<sup>230</sup> This was problematic considering that both the Minister and Secretary for the Environment did not seem to have any legal basis for the powers they used in this case.

In order to cure the above defects and to address the gap in the existing law, the Minister responsible for environmental affairs promulgated the Environment Management (Plastics) Regulations,

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224. State v. Secretary for Env't & Climate Change Management, *ex parte* Vijay Kumar on Behalf of the Members of the Plastic Manufacturers Association of Malawi [2014] Judicial Review Cause No. 54 (High Court of Malawi) (Application for Leave for Judicial Review and the Supporting Affidavit).

225. Interview with the applicant's lawyer.

226. Interview with the applicant's lawyer.

227. State v. Secretary for Env't & Climate Change Management, *ex parte* Vijay Kumar on Behalf of the Members of the Plastic Manufacturers Association of Malawi [2014] Judicial Review Cause No. 54 (High Court of Malawi) (Brief for Respondent).

228. *Id.*

229. *Id.*

230. State v. Secretary for Env't & Climate Change Management, *ex parte* Vijay Kumar on Behalf of the Members of the Plastic Manufacturers Association of Malawi [2014] Judicial Review Cause No. 54 (High Court of Malawi) (Affidavit for Respondent).

2015.<sup>231</sup> Regulations 3 of the Plastics Regulations prohibits “the importation, manufacturing, trade and commercial distribution of plastics, plastic bags and plastic sheets made of plastic film with a wall of thickness of less than 60 micrometres . . . for use within Malawi.”<sup>232</sup>

Another classic demonstration of illegality and irrationality is the case of *The State v. Parliament (Parliamentary Committee on Natural Resources, Environment and Climate Change) and Others, ex-parte Stephen Phiri*.<sup>233</sup> In this case, the applicant “acquired hardwood which he wanted to export to China.”<sup>234</sup> The applicant was granted a license by the Department of Forestry to export hardwood.<sup>235</sup> After “clear[ing] export duty for the consignment,” the applicant “embarked on the process of exportation of the wood to China.”<sup>236</sup> However, due to the Parliamentary Committee on Natural Resources, Environment and Climate Change’s “verbal suspension on all hardwood exportation licences,” the consignment was held at the Mozambique border.<sup>237</sup> After this, the applicant “requested the Director of Forestry to waive the suspension in his favour because the exportation process had already started and hence the ban could not be enforced retrospectively.”<sup>238</sup> Once the applicant made the request, the “Director sought approval for the waiver of the ban from the Principal Secretary [PS], which was duly granted.”<sup>239</sup> Even after the waiver was granted, “MRA and Forestry officers at the Border refused to comply with the directive of the PS.”<sup>240</sup> This led the applicant to “commence[] judicial review proceedings against the above defendants.”<sup>241</sup> During the proceedings, the “Court quashed the ban on the basis that the Parliamentary Committee had no power to make such an order.”<sup>242</sup> In addition, the “Judge [] ruled that the decisions of

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231. Government notice number 4, 2015. *See also* Aero Plastic Indus., *supra* note 207, at 7.

232. Regulation 3.

233. Judicial Review Cause No. 20 of 2015.

234. BANDA, *supra* note 92, at 43.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 44.

241. *Id.*

242. *Id.*

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the Forestry and MRA officers were unreasonable.”<sup>243</sup> Overall, “this case obviously involved multiple breaches of Section 43 of the Constitution.”<sup>244</sup>

Another worrisome trend that this study found was that sometimes courts condoned illegal conduct by environmental agencies by what can be termed as “necessary illegality.”<sup>245</sup> This has the potential to undermine the entrenchment of a culture of legality. The case of *Diab Properties Limited and Lilongwe City Council v. Rui Francisco*, illustrates this point.<sup>246</sup> This case involved an application “for an injunction against Lilongwe City Council to order Diab [P]roperties to stop constructing a shopping complex pending judicial review proceedings.”<sup>247</sup> The application claimed “that Diab Properties had not conducted an environmental impact assessment before the commencement of the project.”<sup>248</sup> The injunction was set aside “on the basis that failure to conduct an EIA was not so fatal to warrant the demolition of the complex.”<sup>249</sup> It was taken into account by the Court that “Diab Properties had invested 20 Million Kwacha in the project and that it would be imprudent to throw that money down the drain.”<sup>250</sup> The Court observed: “a reasonable state institution would first weigh the overall investment benefit to the nation before condemning DPL.”<sup>251</sup> The Court “concluded that the social and economic benefits of the project far outweighed the inconvenience that Rui Francisco would suffer.”<sup>252</sup>

Based on the facts discussed above, it is obvious that the judge misdirected himself as to the issues raised by this question. Consequently, he failed to vindicate the rule of law. The EIA requirement is not a requirement of convenience. It is a legal requirement aimed at preventing serious environmental degradation. Section 26(3) of the EMA prohibits licensing authorities from issuing licences to developers whose projects have not satisfied the EIA requirements. The Judge therefore condoned illegal activity by setting aside an injunction in favor of a developer who had clearly broken the law.

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243. *Id.*

244. *Id.*

245. This term was coined during the study.

246. HC, Misc. Civil Cause No. 10 of 2003.

247. BANDA, *supra* note 92, at 44.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* See also Kapindu & Kalima, *supra* note 142, at 22.



Another case which evidences “judicial condonation” of illegality was the case of *Lilongwe Water Board, Minister of Agriculture Irrigation and Water Development, Director of Environmental Affairs, Minister of Natural Resources Energy and Mining and Khato Civils Proprietary Limited v. The State, ex parte Malawi Law Society*.<sup>253</sup> This case arose in the context of the Salima-Lilongwe/Lake Malawi Water Project.<sup>254</sup> The Malawi Law Society sought leave to commence judicial review proceedings against the Lilongwe Water Board, the developer of the Salima-Lilongwe/Lake Malawi Water Supply Project, on grounds of failure to conduct an environmental impact assessment (EIA) as required by law before abstracting water from Lake Malawi.<sup>255</sup> Lilongwe Water Board engaged a contractor, Khato Civils Proprietary Limited, to implement the project.<sup>256</sup> Accordingly, the Society sought a declaration that the Project should be stopped pending the conduction of an EIA and the receiving the necessary approvals.<sup>257</sup> The Society also challenged the failure of the Minister of Agriculture, Irrigation and Water Development as the lead Minister to stop the implementation of the project until EIA requirements were complied with.<sup>258</sup> The Director of Environmental Affairs was also added as a party for failure to take measures to ensure compliance with EIA requirements, including stopping the implementation of the project.<sup>259</sup> The High Court granted leave for the Society to commence legal proceedings on the basis that the information that the Applicant had gathered raised issues that were fit for determination upon a full judicial review hearing.<sup>260</sup> Khato Civils subsequently sought the leave of the Supreme Court to Appeal against the grant of leave for judicial review.<sup>261</sup>

Upon appeal, Justice Chikopa observed that in responding to the question whether or not there was a dispute between the Parties, it was important to understand the nature of the contract entered into

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253. MSCA Civil Appeal No. 59 of (2017) (Malawi Supreme Court of Appeal) [hereinafter *Lilongwe Water Board*].

254. *Id.* at 9.

255. *Id.*

256. *Id.*

257. *Id.*

258. *State v. Lilongwe Water Bd. & Others, ex parte Malawi Law Soc’y* [2017] MWHC 135, Judicial Review Cause No. 16 of (2017), 3 (High Court of Malawi).

259. *Id.* at 4.

260. *Id.* at 1, 5.

261. *Lilongwe Water Board, supra* note 253.

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between Lilongwe Water Board and Khato Civils.<sup>262</sup> According to the Justice of Appeals, the Law Society narrowly understood the contract as that of “abstracting water from Lake Malawi in Salima, purification of the water and pumping it over a distance of 120kms to Lilongwe.”<sup>263</sup> The Justice of Appeal noted that the contract was broader than envisaged by the Society.<sup>264</sup> Rather it was an “Engineering, Procurement and Construction contract.”<sup>265</sup> According to the Judge:

Even on a cursory perusal of the Contract it is obvious that an EIA was not necessary for the first two components of the contract. There would be nowhere to do it seeing as the pipeline route would not be known until, at the very least, after completion of the engineering component. It is on the other hand a fact that an EIA would be necessary before the construction component of the contract commenced. If something had to be stopped before an EIA was conducted it is in our judgment the construction component. If the Society wanted an interlocutory injunction to ensure that an EIA was conducted it should have asked for and been granted a targeted injunction. One that only stopped the construction works which admittedly required an EIA before they could commence and not the engineering and procurement components that did not require an EIA to commence.<sup>266</sup>

The Judge then concluded that there was no dispute in this case given that Khato Civils and other respondents had agreed that “an EIA would be undertaken before construction works commenced” and that a process was already in place for the identification of an EIA consultant.<sup>267</sup>

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262. *Id.* at 9.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 9–10.

267. *Id.* at 10.

Curiously, Justice Chikopa refused to consider the fact that Kha-to Civils had brought construction equipment into Malawi prior to this incident as indicative of the fact that it was not intending to comply with EIA requirements.<sup>268</sup> He made the following observation:

The Society referred to the Interested Party bringing into Malawi equipment particularly the trenchers and spoke of it as evidence that the first Respondent and the Interested Party had already started implementing the Contract without doing an EIA. The Society was perhaps reading too much into the above. To begin with a proper reading of the Contract and the briefing Notes shows that the Interested Party had to prove capacity including possession of requisite equipment. Possession out of Malawi would not make too much sense. There should therefore be nothing wrong with the Interested Party bringing trenchers into Malawi. It is not evidence that they have started trenching. Or will soon start. Only perhaps that they would be ready to do so when necessary. And we do not think that they should be punished for flaunting their capacity to execute the contract. In fact they ought to be lauded.<sup>269</sup>

In these circumstances it would be difficult to come to a conclusion other than that Justice Chikopa was at pains to justify and even lauding the possible illegality within this case.<sup>270</sup> This is especially clear because the Justice of Appeal's statement contradicted an earlier statement by the Attorney General who expressed surprise as to why an EIA was not made a condition precedent of the contract.<sup>271</sup>

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268. *Id.* at 11.

269. *Id.*

270. *See id.*

271. *State v. Lilongwe Water Bd. & Others, ex parte Malawi Law Soc'y* [2017] MWHC 135, Judicial Review Cause No. 16 of (2017), 39 (High Court of Malawi).

Justice Kapindu observed that in a Memo to Lilongwe Water Board the Attorney General queried as follows: "Please address me on why an Environmental Impact Assessment Report has not been made a condition precedent to the validity of the contract. My concern here arises because...such a project shall not be implemented unless an environmental impact assessment is carried out."; *see also Malawi Lawyers Halt Multi-Million Salima-Lilongwe Water Project, Judicial Review Pending*, MARAVI POST (Sept. 16, 2017, 6:22 AM), <http://www.maravipost.com/malawi-lawyers-halt-multi-million-salima-lilongwe-water-project-judicial-review-pending/>.

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This, according to Justice Kapindu, was indicative of the fact that an EIA is supposed to precede the implementation of the contract.<sup>272</sup> He noted:

What emerges here is that the Attorney General was asking the 1st Respondent why the design of the project was not such that the contract should only take effect once an environmental impact assessment Report had been issued. Put differently, the Attorney General was advising that according to his understanding of the law, an environmental impact assessment should be made to precede the commencement of the contract because the project, in law, can only be commenced once a satisfactory environmental impact assessment Report is issued.<sup>273</sup>

In his reasoning, Justice Kapindu highlighted a number of issues that were in support of the Society's case.<sup>274</sup> This included that in response to the Attorney General's query, the Lilongwe Water Board amended "the Conditions Precedent (CPs) to include recruitment of an ESIA consultant before project effectiveness."<sup>275</sup> And rightly so the Judge concluded that:

[T]he overarching question as to what constitutes project implementation and whether the current activities which are part of the Interested Party's contractual performance are part of implementation, is a question fit for consideration on a full hearing of judicial review. For purposes of the principles on the granting of interlocutory injunctions, it presents a serious question to be tried.<sup>276</sup>

On the contrary, Justice Chikopa went beyond what is required at the leave stage and delved into questions that could best be determined at a full judicial review hearing.<sup>277</sup>

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272. *State v. Lilongwe Water Bd. & Others, ex parte Malawi Law Soc'y* [2017] MWHC 135, Judicial Review Cause No. 16 of (2017) (High Court of Malawi).

273. *Id.*

274. *Id.* at 38–39.

275. *Id.* at 39.

276. *Id.* at 38.

277. *Lilongwe Water Board, Ministry of Agriculture Irrigation and Water Development, Director of Environmental Affairs, supra* note 253, at 10-11.

This study also unearthed perceptions that courts and environmental agencies are sometimes reluctant to stop illegal conduct where doing so would inconvenience powerful actors within the system.<sup>278</sup> The case of *Ismail Khan and Kamulepo Kalua v. African Parks Network Limited and others*<sup>279</sup> was often cited as an example. The case involved community members and interest groups who had obtained an injunction against the translocation of elephants from Phirilongwe in Mangochi District to Majete Wildlife Reserve by African Parks.<sup>280</sup> The translocation exercise had received endorsement from the government and some traditional leaders.<sup>281</sup> However, the applicants opposed the translocation on grounds that it was conducted without consulting the local community and without any Environmental and Wildlife Impact Assessment.<sup>282</sup> The applicants also argued that every Malawian had the right to “enjoy the environment, life and economic activity” and that the translocation of elephants would seriously jeopardize this if the elephants were translocated.<sup>283</sup> The Court vacated the injunction.<sup>284</sup> In the process, the Court considered whether the translocation process complied with Wildlife Impact Assessment and Environmental Impact Assessment requirements stipulated in the National Parks and Wildlife Act and the Environment Management Act respectively.<sup>285</sup> The Court held that Section 23 of the National Parks and Wildlife Act clearly stipulated that “it is ‘any person’ not necessarily the State who may request that such impact assessment be conducted.”<sup>286</sup>

Accordingly, the Court held that in this case the applicants could not complain because there was nothing in their affidavits to suggest that “such an assessment was requested or that indeed if it was, the same was refused.”<sup>287</sup> The Court also dismissed the contention that an environmental impact assessment was supposed to be conducted

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278. Disclosed during interviews with the respondents.

279. High Court Civil Case No. 1185 of 2009 (Unreported).

280. *Id.* at 1-2.

281. *Id.* at 8.

282. *Id.* at 3.

283. *Id.* at 5-6.

284. *Id.* at 20-21.

285. *Id.* at 14.

286. *Id.* at 14. Section 23 provides that “any person who has a good and sufficient reason to believe that any proposed or existing government process or activity of the government or any other organization or person may have an adverse effect on any wildlife species or community such person may request, through the Board, the Minister that an environmental impact assessment be conducted.” *Id.* at § 23.

287. *Id.* at 14.

before translocating the elephants.<sup>288</sup> It observed that Section 24 of the Environment Management Act required an EIA if the responsible Minister specified in the Gazette the types and sizes of projects which could not be implemented in the absence of an EIA.<sup>289</sup> The Judge observed that he could not enforce EIA provisions on this project because there was nothing in the affidavits to show that the area in question was specified and gazetted as an area “for which an impact assessment has to be done before any project is carried out.”<sup>290</sup>

It should be noted that the Judge’s reasoning in the above case was rather faulty. Section 24 gives discretion to the Minister to specify the types and sizes of projects which should not be implemented without an EIA.<sup>291</sup> However, it does not require the Minister to specify and gazette areas for which EIAs should be conducted.<sup>292</sup> In any case, the translocation of elephants from Phirilongwe clearly fell within the provisions of the *Environment (Specification of Projects Requiring Environmental Impact Assessment) Notice*.<sup>293</sup> The notice, among others, provides that an EIA is required for “projects in proximity to, or which have the potential to affect ... national parks, game reserves and protected areas.”<sup>294</sup> What is particularly interesting in this case is that the Judge found that an EIA was unnecessary even though Phirilongwe is a forest reserve in close proximity to Lake Malawi National Park and Nankumba Peninsula.<sup>295</sup> Unsurprisingly, some respondents felt that the Judge could not enforce the law in this case because of powerful corporate and political interests associated with the translocation of elephants.<sup>296</sup>

This study has further found that courts have a tendency to condone illegality on the basis of necessity.<sup>297</sup> For instance, between

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288. *Id.*

289. *Id.*

290. *Id.* See also Chirwa, *supra* note 112.

291. EMA 1996, *supra* note 144, §24(1).

292. *Id.*

293. Environment (Specification of Projects Requiring Environmental Impact Assessment) Notice, G.N. 58 (1998).

294. *Id.* at § 13.

295. High Court Civil Case No. 1185 of 2009, *supra* note 279, at 3. See also *Phirilongwe Forest Reserve*, GEOVIEW, [http://mw.geoview.info/phirilongwe\\_forest\\_reserve,924178](http://mw.geoview.info/phirilongwe_forest_reserve,924178) (last visited May 4, 2019).

296. Martin Chipofya, *Right Drowning in a Market, the Court Cannot Rescue it: What is the Solution?*, U. MALAWI, 10-13 (2018) [https://www.academia.edu/32087546/red5\\_RIGHT\\_DROWNING\\_IN\\_A\\_MARKET\\_THE\\_COURT\\_CANNOT\\_RESCUE\\_IT\\_WHAT\\_IS\\_THE\\_SOLUTION?auto=download](https://www.academia.edu/32087546/red5_RIGHT_DROWNING_IN_A_MARKET_THE_COURT_CANNOT_RESCUE_IT_WHAT_IS_THE_SOLUTION?auto=download).

297. See Banda, *supra* note 213, at 35; see also KANYONGOLO, *supra* note 104, at 13.

2004 and 2014 the Government of Malawi did not hold local government elections.<sup>298</sup> This had implications for the legality of rules that local authorities made during this period.<sup>299</sup> The absence of Councillors meant that there were no vibrant Councils and environmental rulemaking entities at local authority level.<sup>300</sup> This forced Courts to develop the principle of ‘necessary legality’ in order to address the absurdities and adverse consequences of this legal vacuum.<sup>301</sup> The case of *Zomba Municipal Assembly v. the University of Malawi*,<sup>302</sup> illustrates how the High Court was more than keen to condone illegal rule-making of the Municipality of Zomba in order to ensure that the Municipality of Zomba collected rates to support service delivery.<sup>303</sup> The Court was requested to determine whether Zomba Municipal Assembly had the legal mandate to revise rates in the absence of elected Councillors.<sup>304</sup> The Court conceded that, legally, the power to the Local Government Act (LGA) conferred the power to levy taxes on Assemblies and that this power was not delegable.<sup>305</sup> However, the Court noted that the law was silent on what is supposed to happen in the absence of the Assembly.<sup>306</sup>

Accordingly, the Court proceeded to decide, based on the need to avoid creating an absurdity and to fulfil the Constitutional obligations of the Assembly, that Zomba Municipal Assembly was legally entitled to levy taxes.<sup>307</sup> It noted that Local Assemblies had a constitutional and statutory duty to provide essential services to their residents.<sup>308</sup> This duty, according to the Court, subsisted irrespective of whether there was an assembly or not.<sup>309</sup> Consequently, “any interpretation of the LGA that would result in the invalidating of constitutional duty imposed on the assembly to levy taxes was invalid and must be avoided.”<sup>310</sup> However, the notion of “necessary legality” was

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298. *Id.*

299. Michael Chasukwa et al., *Public Participation in Local Councils in Malawi in the Absence of Local Elected Representatives-Political Eliticism or Pluralism*, 49 J. OF ASIAN & AFR. STUD. 705, 705–20 (2014).

300. Banda, *supra* note 92, at 35.

301. KANYONGOLO, *supra* note 104, at 13; GH Bandawe (trading as Kaka Motel) v Mzuzu City Assembly High Court Civil Cause No. 63 of 2006.

302. [2000] Civil Cause No. 3567 (Malawi High Court).

303. *Id.* at 7-8.

304. *Id.* at 4.

305. *Id.* at 8.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

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rejected by Justice Chikopa in *GH Bandawe (trading as Kaka Motel) v Mzuzu City Assembly*.<sup>311</sup> In this case, the Judge stressed the needs for Assemblies to be run in accordance with the law and for Courts to avoid sanctioning illegality under the pretext of “avoiding absurdities.”<sup>312</sup> Accordingly, the Judge correctly held that in the absence of Councillors, an Assembly cannot be deemed to be lawfully constituted.<sup>313</sup> Consequently, it cannot legally levy and collect rates.<sup>314</sup> In rejecting the notion of necessity the Judge observed:

The doctrine of necessity also has no application herein. As we understood the defendants it is necessary that Assemblies be deemed to still be in existence the absence of councillors notwithstanding because to proceed otherwise would bring local governance to a standstill. That local government might come to a standstill might be true. We have no doubt however that those who deemed it fit to dissolve Assemblies and hold no local government elections were well aware of the consequences of their actions. We have above narrated some of them. . . . The way to deal with such consequences however is not to call upon the doctrine of necessity. It is to call for fresh local government elections so that new Assemblies can come about.<sup>315</sup>

#### *B. Procedural Propriety/Impropriety*

The principle of procedural propriety requires that environmental agencies must comply with procedural rules that are stipulated in the Constitution, enabling statutes and regulations when applying rules.<sup>316</sup> Where applicable, agencies must also comply with common law rules of natural justice and procedural fairness.<sup>317</sup>

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311. HC Civil Cause No. 63 of 2006.

312. *Id.* at 34.

313. *Id.* at 35.

314. *Id.*

315. *Id.* at 40.

316. See GCHQ, *supra* note 202, at 411.

317. *Id.*



Failure to do so exposes public officers to challenges of procedural impropriety.<sup>318</sup> Courts in Malawi have consistently upheld the orthodox common law principle to the effect that judicial review is not concerned with the merits of particular decisions.<sup>319</sup> Rather, it is concerned with procedural fairness, except for exceptional circumstances.<sup>320</sup> The jurisdiction of courts in matters of judicial review is restricted to scrutinizing the decision-making process in order to determine whether the complainant was treated fairly.<sup>321</sup>

The case of *The State and the Director of Environmental Affairs exparte Aero Plastic Industries Ltd and Abdul Majid Sattar T/A Rainbow Plastics and 12 Others* illustrates the above point.<sup>322</sup> Subsequent to the adoption of the Plastics Regulations the Director of Environmental Affairs shut down some factories and imposed fines on them on grounds that they were contravening Regulation 3.<sup>323</sup> The decision was challenged by some plastics manufacturers who advanced two grounds for challenging the actions of the Director: first, the manufacturers argued that the Director acted without giving them the right to be heard; second, it was argued that the Director did not take into consideration factors including “the hardship the decision would cause to the applicants, their distributors and consumers.”<sup>324</sup> The applicants also contended that the Director disregarded similar regulations on “minimum microns within the Southern African Development Community (SADC) region and beyond.”<sup>325</sup> The court held that the applicants were given sufficient opportunity to be

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318. *Id.*

319. *JZU Tembo and Another v Speaker of the National Assembly*, MSCA Civil Appeal No. 1 of 2003; *Masangano v Attorney General and Others*, Constitutional Case No. 15 of 2007 at 9; *The State v Council of the University of Malawi, Ex-parte University of Malawi Workers Trade Union*, High Court Misc. Civil Cause No. 1 of 2015 at 13.

320. In *State v. Council of the University of Malawi, ex parte University of Malawi Workers Trade Union*, [2015] Civil Cause No. 1, 14 (High Court of Malawi), Justice Kapindu observed that “in some cases of judicial review of administrative action courts may also delve, in some cases, into the substance or merits of the decision, an instance is where the claim is grounded in unreasonableness. It makes sense, in such a case, for the Court to appropriately delve into the merits of the decision. However, the court still does so with restraint and only as far as is necessary.” *Id.* at 14.

321. See *State v. Council of the Univ. of Malawi, ex parte Univ. of Malawi Workers Trade Union*, [2015] Civil Cause No. 1, 14 (High Court of Malawi); *Mpinganjira & Others v. Council of the Univ. of Malawi*, [1994] Civil Cause No. 4 (High Court of Malawi); *Upile Chioza suing by Andrew Chioza v. Bd. of Governors of Marymount Secondary Sch.* [1996] Civil Cause No. 254 of 1996 (High Court of Malawi).

322. [2016] Judicial Review Cause No. 20 (High Court of Malawi).

323. *Id.* at 3.

324. *Aero Plastic Industries, supra* note 207, at 2.

325. *Id.*

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heard.<sup>326</sup> According to Justice Potani, the Director inspected the premises of the applicants prior to the closures and issued warning letters to the applicants.<sup>327</sup> He observed as follows:

The position of the law is therefore very clear and settled that the jurisdiction of the court in judicial review is not to question the merits of the decision(s) complained of but to scrutinise the decision making process if it accorded the complainant a fair treatment. As it is said at times, judicial review is concerned with procedural fairness.

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Certainly, the respondent having earlier warned the applicants who did not make representations but continued with the mischief, the respondent cannot be accused of not having heard the applicants before closing the factories. The respondent made every effort to treat the applicants fairly.<sup>328</sup>

Procedural fairness is required in rule-making, rule-application and rule adjudication processes.<sup>329</sup> In *The State v. The Director of Environmental Affairs, ex parte Aero Plastic Industries Ltd and Abdul Majid Sattar T/A Rainbow Plastics and 12 Others*, Justice Potani considered whether the process of making the Environment Management (Plastics) Regulations, 2015 was fair.<sup>330</sup> He observed as follows:

From the evidence, as it has just been shown, the respondent conducted extensive consultations with all relevant stakeholders including the applicants and only came up with the regulations on the ban and implementation after taking into account the feedback and relevant factors including economic implications of the ban. In the end result, the applicants' complaint that the respondent did not pay due regard to relevant

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326. *Id.* at 5.

327. *Id.*

328. *Id.* at 4–6.

329. KANYONGOLO, *supra* note 104, at 9, 18–19. See also Genevieve Carter, *Procedural Fairness in Legislative Functions: The End of Judicial Abstinence*, 13 U. OF TORONTO J. 217–64 (2003); CHRISTOPHER FORSYTH, *MANUAL OF ADMINISTRATIVE LAW IN MALAWI: A GUIDE FOR MINISTERS AND PUBLIC SERVANTS* 22–32 (2002).

330. High Court Judicial Cause No. 20 of 2016 at 7–8.

factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers, is baseless and unsustainable.<sup>331</sup>

However, failure to pay attention to the meaning of rules was evident from this study.<sup>332</sup> It is not uncommon for agencies to adopt rule-application processes that are not in compliance with procedures required by statutes and regulations.<sup>333</sup> The EIA approval process is a case in point. Section 26 of the EMA 1996 gives the Director the responsibility of recommending EIA approvals to the Minister.<sup>334</sup> However, this study established that in practice EIA reports are reviewed by the TCE, which sends its recommendations to the NCE.<sup>335</sup> The reports are then referred to the Minister after approval by NCE.<sup>336</sup> This procedure raises questions of legality.<sup>337</sup> According to EIA Guidelines, TCE members are entitled to participate in the EIA process and “recommend courses of action to the Director.”<sup>338</sup> However, according to the Guidelines, the Director has discretion whether to follow the advice of the TCE or not, “he is not bound by it.”<sup>339</sup> The statutory responsibilities to regulate the EIA process are conferred on the Director and the Minister.<sup>340</sup> The TCE is only supposed to perform technical and advisory roles.<sup>341</sup> Failure to pay careful attention to the meaning of the Act and the Guidelines leads to the above illegality.

Serious procedural improprieties were also evident in this study.<sup>342</sup> In *The State v Lilongwe Town Planning Committee and Others ex parte Mirza*,<sup>343</sup> the government designated a certain area in Lilongwe as new City Centre and indicated that land would be available for lease. The applicant applied for a lease of part of the land and the City Council allocated the land to him.<sup>344</sup> The applicant incurred

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331. *Id.* at 8.

332. Banda, *supra* note 92, at 46.

333. *Id.*; Responses from interviews.

334. EMA 1996, *supra* note 144, § 26(1)(d).

335. Banda, *supra* note 92, at 46.

336. *Id.*

337. *Id.*

338. *Environmental Impact Assessment Guidelines*, MALAWI SDNP ¶ 2.3.2.4., <http://www.sdn.org.mw/enviro/eia/chap2.html#2.2> (last visited May 5, 2019).

339. *Id.*, ¶ 2.1.

340. EMA 1996, *supra* note 144, §§ 24–26.

341. *Environmental Impact Assessment Guidelines*, *supra* note 338.

342. Banda, *supra* note 92, at 47.

343. *Lilongwe Water Board*, *supra* note 271.

344. Banda, *supra* note 92, at 47.

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costs of K18 million during the development of the land and US\$48,000 on consultants.<sup>345</sup> When the applicant submitted an application for development permission, the City Council deferred consideration of the application under the pretext that it was supposed to approve the layout plan prior to granting development permission.<sup>346</sup> In the interim, the applicant was still required to pay ground rentals.<sup>347</sup> Subsequently, after persistent reminders, the applicant was allocated a smaller plot in a different location.<sup>348</sup> The applicant commenced proceedings against the City Council.<sup>349</sup> It was held that the function of the Court was to ensure that lawful authority is not abused by unfair treatment.<sup>350</sup> The Judge observed that any reasonable person directing his mind to this case would conclude that failure by the respondents to lift a notice of deferment for over sixty months amounted to procedural impropriety towards the applicant meriting reversal of the decision of the City Council.<sup>351</sup> Similarly, the Judge ruled that the decision to defer making a decision for five years was unreasonable and in bad faith.<sup>352</sup> Justice Chombo held that the first respondent had the right to defer making a decision in accordance with Section 37(3) of the Town and Country Planning Act.<sup>353</sup> However, the impropriety was characterized by “failure to inform the applicant of the progress of the application and the likely date on which the decision will be taken.”<sup>354</sup> The Judge also classified other forms of conduct on the part of the defendants as procedural impropriety, including failure to consult or notify the Applicant before allocating a new plot to him, as well as collecting land rentals from him prior to making a decision.<sup>355</sup>

Another case that raises triable issues relating to procedural propriety is *Diab Dairy Farming Ltd vs Lilongwe Water Board and Attorney General*.<sup>356</sup> In 2005, the plaintiff purchased land for purposes of dairy farming from District Commissioner Lilongwe. In order to get authorization for the establishment of the farm, the plaintiff en-

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345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Page 9 of the transcript [on file with author].

355. Page 10 of the transcript [on file with author].

356. [1992] Commercial Case No. 29 (Malawi High Court).

gaged consultants to conduct an EIA. The Minister of Environmental Affairs issued an EIA certificate in favor of the dairy farm project in 2006. The Water Resources Board subsequently gave him water rights from the Likuni River with the approval of Lilongwe Water Board. Subsequently, the Water Board objected to the development on grounds that the proposed development was too close to the intake point of Lilongwe Water Board and that there was a high potential for water pollution from animal waste and an increase in nitrates. The Board also cited “non-compliance with EIA requirements as evidenced by sinking borehole and requests to abstract water from Lilongwe River” as grounds for the objection. In response, the Plaintiff commenced proceedings against the Defendants for interfering with its business. In its defense, the EAD has pleaded that it only issues an EIA certificate upon consultation of all stakeholders and on condition that no stakeholder raises objections. The EAD states that it no longer supports the project because Lilongwe Water Board, a key stakeholder, raised an objection and changed its stance on the project. This Commercial Court held that the case was improperly before the Court and referred it to the Town and Country Planning Board. Justice Manda observed as follows: “I find it curious that the Department of Environmental Affairs did issue an Environmental Impact Assessment Certificate for this project. Thus the question would be; under what grounds did the Town and Country Planning Committee reject the development permission in view of the Environmental Impact Assessment?”<sup>357</sup>

In other words, this case raises issues of procedural propriety including whether Section 43 of the Constitution was followed before revocation of planning permission.

## V. IMPACT OF JUDICIAL REVIEW

Commentators have noted that the impact of judicial review cannot be isolated from its functions, purposes and objectives.<sup>358</sup> This is because “the impact of judicial review can be effectively researched only in the light of the assumed or asserted purposes and functions of judicial review.”<sup>359</sup> In this regard, court decisions are an important source of primary data on the purpose of judicial review.<sup>360</sup>

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357. Banda, *supra* note 92, at 48.

358. Cane, *supra* note 67, at 15.

359. Sunkin, *supra* note 61, at 43

360. *Id.* at 51.

This is because when determining judicial review matters, judges offer great insights on what they consider to be the role and impact of judicial review.

Malawian Courts have repeatedly observed that the purpose of judicial review is to ensure the fair treatment of applicants and that lawful authority is not abused by unfair treatment.<sup>361</sup> Beyond individual applicants, courts have held that judicial review aims to ensure transparency in decision making and that relevant authorities use their powers in a proper manner.<sup>362</sup> Judicial review also aims to control executive action in order to ensure that public officers act legally, rationally and follow proper procedures.<sup>363</sup> There is thus a general belief that judicial review of agency rule-making, application and adjudication aims to stimulate good governance. This is by ensuring that agencies comply with the principles of legality, rationality and procedural propriety.<sup>364</sup> Courts have even gone as far as claiming that judicial review “is the most effective means by which courts control administrative actions by public functionaries.”<sup>365</sup> However, as observed above, claims of this nature have not been empirically tested within the context of Malawi. Little is known about the value of judicial review in practice.

Against this backdrop, this study set out to inquire whether judicial review achieves what the judges and commentators claim to be its objectives and purposes.<sup>366</sup> To investigate whether judicial review had any impact on the practical operations of environmental agencies we asked the respondents the following questions: whether the pro-

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361. *Gable Masangano v. Attorney General & Others*, [2009] Constitutional Case No. 15, 171 (High Court of Malawi); *Du Chisiza v. Minister of Educ. & Culture*, [1993] 16(1)MLR 81; *Jamadar v Attorney-General*, [2000-2001] MLR 175; *Khembo v The State (National Compensation Tribunal)* [2004]MLR151; *Mpinganjira and others v Council of the University of Malawi*, HC. Civil Cause No. 4 of 1994.

362. In the matter of the Constitution of the Republic of Malawi and in the matter of the removal of MacWilliam Lunguzi as the Inspector General of Police and in the matter of judicial review, HC. Miscellaneous Application No.55 of 1994; *Chawani v The Attorney General* [2000-2001] MLR 77.

363. *Chawani v The Attorney General* [2000-2001] MLR 77; *State v. Dir. of Pub. Prosecutions & Another, ex parte Cassim Chilumpha*, [2005] Misc. Civil Cause No. 315 (High Court of Malawi).

364. See *GCHQ*, *supra* note 202; *Banda*, *supra* note 92, at 58.

365. *State v. Attorney General (Ministry of Agriculture and Food Security)*, *ex parte* *McWilson Qongwane & Others*, High Court, Miscellaneous Civil Cause No. 36 of 2012, per Madise, J.

366. See *TAMBULASI & CHIKADZA*, *supra* note 93, at 2.

spect of judicial review influenced public officer to adjust their behavior in order to align it with the principles of legality, rationality and procedural propriety.

One challenge that was experienced in this study, however, was failure by some respondents to grasp the meaning of the term ‘judicial review’ and to distinguish it from other forms of litigation against environmental agencies.<sup>367</sup> However, the researchers mitigated this problem by clarifying the meaning of judicial review to the respondents and guiding the respondents to focus on judicial review as opposed to other forms of litigation. The following sections present finding that correspond to these questions.

Generally, this study had mixed findings relating to the impact of judicial review.<sup>368</sup> While some respondents felt that judicial review had generally had a positive impact on environmental governance, others thought its impact was negative, yet others were indifferent.<sup>369</sup> Respondents who viewed judicial review positively highlighted both the direct and indirect impacts of judicial review on the behavior of public officers. These respondents generally observed that judicial review not only influenced the behavior of public officials directly involved in particular disputes but also indirectly affected the behavior of all other officials who were potentially subject to judicial review. Specifically, the evidence collected in this study suggests that judicial review generally has a positive impact on the behavior of individual public officers. Public officers observed that they generally complied with court decisions, save for cases that have wider political ramifications.

With regard to direct impacts, public officers who had no direct experience of judicial review challenges noted that threats of legal challenges generally force them to act cautiously.<sup>370</sup> Anticipation of possible challenges compels them to follow proper procedures before making decisions that may potentially be challenged. The respondents also noted that anticipation of judicial review compels them to engage a little more with potential challengers before implementing

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367. Banda, *supra* note 92, at 58

368. *Id.* at 59.

369. The above findings are in line with existing literature that notes that there are generally three responses that agencies generally give to court decisions that require them to change their policies, decisions and processes. Broadly, the responses can be categorized as positive, neutral or indifferent, and negative. Negative responses generally arise when agencies perceive judicial review as an unwarranted obstacle to their mission and objectives. See Richardson, *supra* note 70, at 109.

370. *Id.*

rules than otherwise. Of course, some respondents looked at this from a negative perspective and observed that the fear of judicial challenges sometimes forced them to be more bureaucratic than they should be. This in turn tended to delay decision making and implementation processes.

One way of determining the impact of judicial review is to consider whether judicial review decisions lead to reconsideration of decisions by the original decision-makers.<sup>371</sup> In this regard, this study found evidence of environmental agencies rethinking their decisions after judicial review challenges.<sup>372</sup> For instance, the Department of Environmental Affairs promulgated the Environment Management (Plastics) Regulations, 2015, partly in response to a judicial review challenge by plastic manufacturers.

There were many suggestions from interview responses that judicial review is considered to have had significant impacts beyond the parties to specific cases.<sup>373</sup> In particular, the responses suggested that judicial review has triggered observable systemic changes in the way public agencies make decisions. In this context, respondents who have served government for more than a decade were able to give concrete examples of systemic changes that have taken place in government that could be attributable to judicial review. These include changes in internal policies, procedures and administrative practices to avoid legal challenges.

The capacity building initiatives that government has been undertaking in the field of administrative law are also attributable to the quickening of judicial review since 1992.<sup>374</sup> For example, some respondents noted that the Ministry of Justice and the Office of the President and Cabinet regularly organized administrative justice courses for senior government officials between 2000 and 2005.<sup>375</sup> The courses, which were facilitated by Judges, the office of the Solicitor General and academics, were described as very helpful.<sup>376</sup> The organization of the courses, according to them, was indicative of the impact of judicial review and the recognized need on the part of government to build practical capacity in administrative law. The development of administrative law manuals for senior public officials was

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371. Cane, *supra* note 67, at 11.

372. Banda, *supra* note 92, at 59

373. *Id.* at 60.

374. FORSYTH, *supra* note 329, at v.

375. *Id.*

376. *Id.*



also cited as an indicator of the impact of judicial review. The idea behind the above capacity building initiatives is essentially to address systemic failures in decision making that have been identified in successive judicial review decisions. Representatives of CSOs that we interviewed tended to consider judicial review as a way of bringing issues onto the national political agenda. According to them, the publicity that accompanies judicial review ensures that issues at stake are discussed in the public domain. This in turn influences the way public officials make their decisions.

Notwithstanding the above, this study found that individual public officers sometimes failed to adjust their behavior in compliance with court decisions because they were subject to diverse influences and pressures from several sources.<sup>377</sup> This sometimes effectively eroded the impact of judicial review. The findings of this study also reveal that, contrary to conventional wisdom, judicial review may have unintended negative side-effects on the behavior of some bureaucrats. For example, some technocrats have developed a negative attitude against judicial review and view it as an interference with technocratic autonomy by Judges who do not understand environmental science. Opponents of judicial review also decried the growing trend towards ‘judicialization’ of government, as evidenced by the ever-growing increase in the number of challenges against public authorities. They equated judicial review to inappropriate judicial activism and an undue interference with their technocratic autonomy by judges who had very little appreciation of the science which informs environmental management. Similarly, some public officials did not seem to appreciate the real value of judicial review and regarded judicial review decisions as “mere technicalities.”

As a result, some bureaucrats merely adopted cosmetic practices and procedures in order to fulfill the technical requirements that would help them avoid judicial review challenges.<sup>378</sup> Evidence of explicit risk taking by agencies was also gathered, especially in cases that had political implications. Some respondents observed that in the event of a conflict between the views of their political superiors and the possible views of courts they were more inclined to follow

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377. Banda, *supra* note 92, at 60.

378. *Id.* at 61. See also Lorne Sossin, *The politics of soft law: how judicial decisions influence bureaucratic discretion in Canada*, in *JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES* 129–160 (Marc Hertogh and Simon Halliday eds., 2004).

the directives of their superiors and risk judicial review. This study found only one case in which a public officer challenged the views of a Minister.

However, it would be intellectually naive to regard judicial review as the only factor that impacts rulemaking, rule application, and rule adjudication. It would also be misleading to think that it is “the only or perhaps the most important mechanism of legal accountability.”<sup>379</sup> The factors that determine the bureaucratic behavior are multiple and multifaceted. Sunkin terms these factors “an administrative soup of influences in decision-making.”<sup>380</sup> A major challenge for researchers who want to determine the impact of judicial review then becomes how to determine the relative significance of judicial review in influencing agency behavior.<sup>381</sup> A study of the impact of judicial review would thus not be complete without considering other factors that influence decisions of public officers.

In this context, this study found that political considerations affect the rate and direction of rulemaking more than judicial considerations.<sup>382</sup> For example, in 2012, the EAD produced a cabinet paper to combat deforestation which proposed the promulgation of rules to ban the use of burnt bricks because of their impact on deforestation. However, no progress has been made on this proposal because of intense opposition from politicians.<sup>383</sup>

Political patronage, pressure and interference were also cited among the major factors that undermine the ability of public officers to effectively apply environmental law.<sup>384</sup> Most respondents noted that pressure from politicians was one of the major obstacles to compliance with principles of administrative law.<sup>385</sup> The areas that are most prone to political interference include the granting of approvals, licenses, permits and concessions.<sup>386</sup> Similarly, respondents observed

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379. Cane, *supra* note 67, at 18.

380. Sunkin, *supra*, note 61, at 71.

381. *Id.* at 72; *see also* Marc Hertogh & Simon Halliday, *supra* note 13, at 269, 277, 280.

382. Banda, *supra* note 92, at 61.

383. The reasons for the rejection of this ban include the fact that the idea will be difficult to sell in the absence of alternatives. Politicians were also opposed to the ban because on the basis that it was arbitrary considering that the tobacco industry is allowed to use wood for curing tobacco.

384. An example was cited of the construction of a new Parliament Building where trees were cleared before the approval of the EIA report: The Forestry sector was cited as one of the most prone sectors to political interference.

385. Banda, *supra* note 92, at 62.

386. Some of our respondents cited examples of projects which were done without EIAs due to political pressure. These include the construction of Nkhatabay Hospital (in Kalwe

a worrisome trend whereby persons aggrieved by decisions of designated duty bearers lodged appeals with Ministers or even the office of the Presidency.<sup>387</sup> This exposes such duty bearers to political pressure.<sup>388</sup> Informal influences were also evident in this study.<sup>389</sup> Evidence of political party functionaries influencing the way environmental agencies make decisions was also unearthed by the study. This demonstrates that real power seldom lies with environmental agencies but rather with “invisible Barons” who influenced decision-making behind the scenes. Decentering was thus clearly evident in this study. Other factors that were mentioned as adversely impacting the ability of agencies to comply with administrative law principles in their rule application functions included corruption, lack of administrative law training/orientation and

Chronic underfunding was cited as a major challenge that impaired the capacity of EAD to apply and enforce environmental law.<sup>390</sup> For instance, it was noted that EIA Guidelines provide that compliance with EIA terms and conditions should be managed through “proper audits developed by the TCE and approved by the Director.”<sup>391</sup> However, environmental inspectors fail to monitor compliance with EIA conditions because of inadequate financial capacity and technical capacity.<sup>392</sup> Accordingly, it is not uncommon for projects to reach completion without being monitored.<sup>393</sup> Resource constraints at national and local levels thus undermined the ability of environmental agencies to perform their statutory duties.<sup>394</sup>

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Forest reserve) and the construction of the new parliament building in Lilongwe.

387. Banda, *supra* note 92, at 62.

388. In this context one respondent noted: “unless our politicians appreciate the value of the environment in Malawi, we are heading nowhere.”

389. Evidence obtained from respondents during field research.

390. Banda, *supra* note 92, at 62.

391. Paragraph, 2.2.4 of The Guidelines for Environmental Impact Assessment [on file with author]; Ishmael Bobby Mphangwe Kosamu, *Environmental Impact Assessment Application in Infrastructural Projects in Malawi*, SUSTAIN SCI. (2011), [https://www.researchgate.net/publication/226521438\\_Environmental\\_impact\\_assessment\\_application\\_in\\_infrastructural\\_projects\\_in\\_Malawi](https://www.researchgate.net/publication/226521438_Environmental_impact_assessment_application_in_infrastructural_projects_in_Malawi).

392. Banda, *supra* note 92, at 62.

393. *Id.*

394. *Id.*

## VI. CONCLUSION

This study set out to analyze the qualitative significance of administrative justice on environmental governance and the rule of law.<sup>395</sup> The study also examined the role and impact of judicial review in environmental governance and to suggest possible reforms to the system of environmental governance in Malawi. The following section summarizes the findings of this study:

One of the defining characteristics of Malawi's environmental law is that it is diffuse in nature. There is no single legal instrument that governs all aspects of environmental management. Neither is there a single institution responsible for environmental governance. As a result, the map of environmental agencies in Malawi is characterized by a multiplicity of lead agencies that govern various sectors of the environment. These agencies have jurisdictional overlaps and inconsistent mandates, which creates implications for environmental governance and the rule of law.

One tool for promoting environmental accountability is judicial review of administrative action. However, the effectiveness of judicial review largely depends on the participation of a wide range of affected interests in the adjudication process. In order to participate effectively in environmental management, citizens need to be guaranteed the right of access to courts and tribunals to enable them to challenge environmental decisions. This has so far been restricted because of stringent standing rules which have been reviewed by the recently enacted EMA, 2016. This Act, however, is not yet in force.

The impacts of judicial review are complex and multifaceted. On the one hand judicial review has had the impact of making officials more aware that their decisions could be challenged and thus encouraging them to seek legal advice, to draft their decisions more carefully and to be more thorough in internally reviewing decisions. On the other hand however, the threat of legal challenges tends to make administrators defensive and compels them to adopt procedures which would enable them to demonstrate to the courts (if they were challenged) that their decisions had been properly made. This confirms earlier studies that judicial review leads to more bureaucracy, a greater attention to detail, and a greater role for lawyers within government. Worse still, some agencies viewed court decisions nega-

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395. See the objectives above.

tively and raised questions as to why their technocratic autonomy should be encroached upon by judges who had limited knowledge of environmental science and management.

There are a number of factors that tend to undermine the development of a culture of good governance and the rule of law in the environmental sector. These factors include outdated and incoherent legislation, political patronage/ interference, capture of the rule application process by the powerful, resource constraints, poverty and the difficulty of enforcing the law without providing alternatives to people whose livelihoods are at stake.

To conclude, good environmental governance and the rule of law will only become a reality if deliberate efforts are taken to address the above factors.