ADMINISTRATIVE LAW AND ENVIRONMENTAL GOVERNANCE IN MALAWI

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Contents

1. 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. Existing literature has documented the growing importance of administrative law and judicial review of administrative action in Malawi since 1992.[1] This 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. It attributes this to the political transition to multiparty democracy which had its genesis around 1992.

The increasing importance of administrative law in environmental governance has also been documented in existing literature. Glazewiski, an eminent environmental law scholar has described environmental law as administrative law in action.[2] He attributes this to the fact that environmental rule-making, rule-application and rule-adjudication primarily involve "state structures, processes and officials."[3] Administrative decision-making by environmental agencies is one of the primary concerns of administrative law.[4]

The development and implementation of environmental law essentially involves administrative decision-making within the context of environmental agencies.[5] These agencies are also given the responsibility of initiating and promulgating environmental regulations. Administrative decision-making is thus the primary mode of implementing and enforcing environmental law.

It is generally believed that administrative law is a useful tool for good environmental governance. However, one issue that remains underexplored is whether the principles of administrative law are reflected in the daily operations of environmental agencies. There is a dearth of empirical research to assess the validity of the above dominant understanding, especially in the environmental context. No empirical research has been done to determine the

[1] Matembo Nzunda (1998), "The Quickening of Judicial Control of Administrative Action in Malawi, 1992-1994" in Kings M Phiri and Kenneth R Ross, *Democratization in Malawi A Stocktaking* (Kachere), pp 283-315.
[2] Jan Glazewski (2000), *Environmental Law in South Africa*, (Butterworths) p97.
[3] L. J. Kotze (2004), The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence, *P.E.R.*, Volume 7(2), p. 64.
[4] *Ibid*.
[5] *Ibid* p. 59.

impact of administrative law generally and judicial review on the quality of environmental rule-making, application and adjudication in Malawi.

Some literature has attempted to explain the increase of judicial review in the post-1992 era.[6] However, there has been no attempt to analyse the qualitative significance of judicial review across a broad spectrum of decision making bodies ranging from environmental agencies to revenue authorities to local government. Similarly, no attempt has been made to try to understand the impact of the quickening of judicial review on the work of administrative agencies, including environmental agencies. Even attempts to understand the quickening of judicial review have not been empirically grounded.

The dearth of empirical research on the impact of judicial review is not surprising given that, globally, there is very little empirical evidence to support the accuracy of dominant understandings around the role 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.[7]

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.

1.2. **Study objectives**

This study has the following objectives:

(a) To determine how environmental agencies in Malawi make, apply rules and adjudicate disputes.

(b) To establish the nature and forms of public participation in environmental agency rulemaking, decision making and adjudication processes.

(c) To determine the role and impact of judicial review, parliamentary intervention and presidential oversight on the conduct of environmental agencies in the delivery of administrative justice.

(d) To suggest policy and legislative interventions that can help mainstream the principles and policies of administrative law in the conduct of environmental agencies.

1.4. A theoretical framework for Administrative Law and environmental governance

[6] Phiri and Ross, *supra,* note 1.

[7] Ross Cranston (1994) , ‘ Reviewing Judicial Review, ‘ in G. Richardson and H. Genn(eds.) Administrative Law and Government Action, pp 72-73.

1.4.1. Administrative Law and environmental governance

Bradley and Ewing, define administrative law as "the branch of law concerned with the composition, procedures, powers, duties, rights and liabilities of government that are engaging in administering public policies."[8] This branch of law governs relations between government agencies and between government agencies and private entities/individuals that are affected by the power and duties of such agencies.[9] Key activities of public agencies are generally directed or constrained by administrative law. These include rule-making, rule-application and rule-adjudication. Specific government actions that are shaped by administrative law include, making rules and regulations, issuance of orders, and granting of licences as well as permits.[10]One of the key functions of administrative law is to ensure that the responsibilities and operations of public agencies are provided for and supported by law.

It has been argued that administrative law can play a critical role in the realisation of "good administration, the rule of law and meaningful democracy in African countries, including Malawi.[11] This is because administrative law is considered to be a valuable tool for ensuring that individual interactions with public officials are characterised by legality, fairness, impartiality, procedural propriety and respect for human rights generally. Through Judicial review, administrative 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.

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.[12] 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.'[13] Administrative law is also believed to be a

[8] A.W Bradley and K.D. Ewing (2007), Constitutional and Administrative Law, (Pearson Education Ltd), p657.
[9] Bradley and Ewing, p657-658.
[10] Cary Coglianese (2016) Administrative Law: The US and Beyond, University of Pennsylvania Law School, Public Law Research Paper No. 16-20. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818505
[11] Migai Akech (2013), Administrative Law and Governance in East Africa (Proposal for IDRC Research Grant).
[12] Prof. John McMillian (2009), Can Administrative Law Foster Good Administration, (The Whetmore Lecture), p1. Available at: http://www.ombudsman.gov.au/__data/assets/pdf_file/0010/31303/16-September-2009-Can-administrative-law-foster-good-administration.pdf
[13] Ibid

tool for promoting public trust in government and public officers because it requires public officials to abide by their promises.[14]

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

Contemporary administrative law and governance is increasingly characterised by what Jayasuriya terms 'decentring'.[15] Decentring, according to him, happens "when governance is located in multiple sites, engage a number of non-state actors, and deploys a range of techniques of governance that move beyond the traditional structures of public law."[16] The realities of modern government are such that state power is sometimes exercised or at least influenced by entities outside traditional branches of government. As Jayasuriya argues, "the exercise of public power is now taking place in sites outside the formal structures of governmental power, a process which decentres and fragments the state."[17] This suggests that formal institutions are gradually losing their monopoly over rule making, application and adjudication. Entities outside the formal structures of governmental power including, public-private partnerships (PPPs), Civil Society Organizations (CSOs), development partners, political parties, vigilantes and other non-state actors are increasingly becoming involved in the exercise of state power. Accountability machinery also exists "outside formal state institutions."[18] Ironically, these entities are not subjected to administrative law. As Sedley observes, "with the systematic dispersal of the sites of power beyond the confines of what we had learned to recognise as the state, old certainties of public law are no longer there."[19] 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.

[14] Akech, p4.
[15] Kanishka Jayasuriya (2007), Riding on the Accountability Wave? Politics of Global Administrative Law, Working Paper, No. 142, p2.
[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid*.
[19] Stephen Sedley (1997), 'Foreword', in Michael Taggart, ed., The Province of Administrative Law Oxford: Hart, 1997

This paper will, however, offer insights from field work on the application of administrative to environmental governance. It will also shed light how administrative law is shaping environmental governance in the Malawian context.

1.4.2. **Public participation in environmental management**

Reed defines participation as "as a process where individuals, groups and organisations choose to take an active role in making decisions that affect them."[20] There is a general consensus that public participation is an integral part of environmental decision-making, environmental justice and participatory democracy.[21] This is especially because environmental management, generally, embraces complex and uncertain issues which are of concern to a multiplicity of actors including government agencies, public-spirited citizens, specific interest groups as well as the general public.[22]

The principle of public participation is premised on the fact that effective development and implementation of environmental law and policy is dependent on the participation of the governed in rule making, rule application and rule adjudication.[23] From a pragmatic perspective public participation is considered important because it is regarded as a tool for improving the quality of rule-making, rule-application and rule-adjudication. This is because participation exposes decision-maker to a diversity of knowledge, views and perspectives.[24] Consequently, rule makers, implementers and adjudicators are exposed to a wide range of environmental perspectives and are able to direct their mind to many relevant considerations.

The importance of public participation in environmental decision-making has been stressed in a number of international instruments and domestic instruments. These include Principle 10 of the 1992 Rio Declaration on Environment and Development which enshrines the principle of public participation in environmental governance. Principle 10 highlights the fact that "environmental issues are best handled with the participation of all concerned citizens, at relevant levels." The Malawi National Environmental Policy also stresses the importance of public participation in environmental decision-making. Specifically, it emphasizes the role of

[20] Mark Reed (2005), Stakeholder participation for Environmental Management: A Literature Review, *Biological Conservation*, Vol.141, 2417-2431.2418.
[21]Neil F. Papovic (1993), The Right to Participate in Decisions that Affect the Environment, 10 Pace Environmental Law Review, 683; A. du Plessis (2008) ,Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights, *PER* (2), p2.
[22]R.E Fuggle and M.A. Rabbie, 2000, *Environment Management in South Africa, (Juta and Co.),* p99
[23] Maurice Sunkin and David Ong (2002), *Source Book on Environmental Law*, (Cavendish Publishing), p 33.
[24] Mark Reed (2005), Stakeholder participation for Environmental Management: A Literature Review,

"public participation as a tool for consensus building and for strengthening public support for environmental decisions."[25]

Commentators have also highlighted the benefits of public participation in environmental rulemaking, rule application and adjudication.[26] Chinsinga, for example, notes that involving communities in policy decisions at the design stage exposes policy and rule makers to local level knowledge. It also enables policy-makers to appreciate the community-level policy goals and incentives while allowing them to factor in their own.[27] Apart from leading to the formulation of more appropriate and effective policy, public participation in policy and rule-making creates a sense of ownership and legitimacy of the resultant rules. This effectively enhances the chances of compliance. [28] Scholars also contend that participation also helps to legitimize environmental related-decisions taken by public officials. This in turn enhances the prospects of compliance with resultant decisions. [29] As observed by Russel and Dobson, institutions that engage the active support and /or leadership of communities have a greater chance of achieving social acceptance and adherence to regulations than those which do not.[30]

However, there is little empirical evidence in the Malawian context to support most of the above claims. In practice, it is not clear how the space for participation is created and who creates it. It is not always clear who sets the agenda and defines the objectives as well as parameters of participation. It is also not clear how the problems are framed and how the stakeholders are identified. The criteria for inclusion and exclusion are not always clear. The barriers to effective participation are also not well understood. This paper accordingly presents evidence from empirical research that provides some insights on the above issues.

Moreover, the potential impact of public participation on environmental decision-making is largely dependent on its nature, quality and process. The degrees of public participation may range from what Reed terms "passive dissemination of information" or "manipulation," and

[25] Paragraph 4.6(b)
[26] J. Ebbesson, (1997), The Notion of Public Participation in International Environmental Law, 8 *Yearbook of International Environmental Law*, 51-97; Sunkin and Ong, p744.
[27] Chinsinga B (2005), The Clash of Voices: Community –Based Targeting of Safety-net interventions in Malawi, *Social Policy and Administration*, 39(3) 284-301.
[28]CEPA, (2010), Report of Land and Agrarian Reform in Malawi, Available at: www.cepamw.com (Accessed 18/03/2014).
[29]Ibid, p101
[30]Aaron J.M Russel and Tracy Dobson (2011), Chiefs as Critical Partners for Decentralized Governance of Fisheries: An Analysis of Co-management Case Studies in Malawi, 24 Society and Natural Resources, pp734-750.

"mere tokenism," to active stakeholder engagement or "citizen control."[31] Commentators have also distinguished "functional", "instrumental" or consultative participation from participation that is "transformative".[32] Transformative participation has also been described as participation that is characterised by meaningful engagement of stakeholders in the rule making, rule application and adjudication processes. In *Schubart Park Residents Association and others v City of Tshwane,*[33]the South African Constitutional Court held that "many provisions in the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives."[34] Transformative participation is form of participation is preferred over other forms because it enables stakeholders contribute to the transformation of policies, rules, structures and institutions.

Principle 10 of the Rio Declaration spells out the prerequisites for effective participation.[35]These include appropriate access to environmental information, public awareness and access to judicial and administrative proceedings. Accordingly, Principle 10 urges States to promote and stimulate public awareness and participation through ensuring that information is widely available. The principle also urges States to provide "effective access to judicial and administrative proceedings, including redress and remedy." Principle 10 also highlights effective access to judicial and administrative proceedings, as well as effective redress and remedies as critical prerequisites for public participation.

A review of the existing literature indicates that there are a number of barriers to effective participation in environmental rule making, rule application and rule adjudication. These include legal illiteracy, high science, and commercial confidentiality. Public participation can also be hampered by methodological, procedural and political challenges.[36]In this context, scholars have noted the limited involvement of local people and institutions in policy development and implementation as a serious barrier to local level environmental management.[37] The tendency to assume that traditional leaders are representatives of rural communities and guardians of their interests have also been highlighted a barrier to

[31]Mark Reed (2005), Stakeholder participation for Environmental Management: A Literature Review; IDS (2003), p2419.
[32] Mark Reed, p2419.
[33] [2012] ZACC 26.
[34] Page 20 of the transcript. Available at: http://www.saflii.org/za/cases/ZACC/2012/26.pdf
[35]Article 19 (2007), Access to Information: An Instrumental Right for Empowerment , (Article 19 , London and ADC)http://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf
[36] IDS (2003), Public Participation and the Cartagena Protocol on Biosafety, (A review for DFID and GEF), p22, 35.
[37] J. Kamoto, G. Clarkson and D. Shepherd (2013), Doing More Harm than Good? Community Based Natural Resource Management and the Neglect of Local Institutions in Policy Development, Land Use Policy pp293-301.301

meaningful engagement.[38] This study, therefore, set out to examine at a more in-depth level the nature and forms of public participation in environmental governance in Malawi.

1.4.3. Judicial review and its impact

Judicial review by definition refers to the supervisory power of courts over the way public bodies exercise their powers and carry outs their duties.[39] The focus of judicial review is not on overturning decisions of public authorities that judges are uncomfortable with. Rather than consider merits of a particular decisions, judicial review primarily examines the process of decision-making to ascertain that decisions have been validly taken in compliance with the law.[40] 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.*[41] These are 'illegality', 'irrationality' and 'procedural impropriety'. 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.[42] Procedural impropriety, on the other hand embraces failure to comply with the common law duty to be fair and the principles associated with it.

Most judicial review cases primarily focus on administrative action. Section 43 of the Constitution provides for a right to lawful and procedurally fair administrative action. However, the Malawi Constitution does not define "administrative action." Nonetheless, it empowers courts to have regard to comparable foreign case law when interpreting its provisions. [43] In this regard, recourse can be had to South African case law that interpreted section 33 of the Constitution which identical to section 43. Administrative action by definition refers to tasks of public officers that are public and administrative in nature.[44] These actions include "adjudicative administrative decisions, regulations, legislation and

[38] J.F Kamoto *et al*, p8
[39] The Judge Over Your Shoulders (2nd Edn. 1994), p4
[40] Le Sueur and Sunkin (1998), p469.
[41] [1985] 1 AC 374.
[42] Le Sueur and Sunkin (1998), p469.
[43] Section 11(c) of the Constitution.
[44] *President of the Republic of South Africa v South African Rugby Football Union*, 2000 (1)SA 1 (CC) ; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transnational Metropolitan Council and Others, 1999* (1) SA 374.

administrative decisions made by the executive branch of government."[45] They may also include, passing of resolutions and implementation of legislation.[46]

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.[47]This is especially because it is regarded as a useful tool for holding public officials accountable to aggrieved parties and the wider public.[48] Within the context of rule-making commentators note that judicial review operates as an institutional mechanism that guarantees that public authorities provide requisite information to interested parties, and take the views of interested parties seriously and make well-reasoned decisions.[49] This in turn encourages transparency and openness. The realisation that decisions of public officers will be scrutinised and may be amenable to challenge forces public officers to be accountable and helps them to enhance the quality of their decision-making.[50] Judicial review is also regarded as a valuable tool for guaranteeing that agencies confine their discretion, application and interpretation of the rules within reasonable bounds. [51] It serves as a reminder to public authorities that "there is an institution that can intervene to review" their decisions.[52] Consequently, they are compelled to operate within the law and avoid arbitrary or capricious actions.

While commentators have examined the impact of judicial decision-making in specific instances, they have seldom considered the legal, policy or administrative changes that are effected in administrative agencies following judicial review.[53] Growing evidence suggests that what happens in practice might not reflect the above conventional wisdom that judicial review necessarily results in improvement of the quality of decision-making. To this end, a number of administrative law scholars highlight the fact that judicial review sometimes tends to result in unintended consequences. Specifically, they note that judicial review has a tendency to impact more on administrative systems', official defensiveness and bureaucratic behaviour than the quality of decision-making. These scholars note that contrary to

[45] Kotze, p68
[46] *President of the Republic of South Africa v South African Rugby Football Union,* 2000 (1)SA 1 (CC) ; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transnational Metropolitan Council and Others, 1999* (1) SA 374.
[47] Wendy Wagner (2012), "Revisiting the Impact of Judicial Review on Agency Rule-makings: An Empirical Investigation," 53 William and Mary Law Review 1717.
[48] Ibid, p1723.
[49] Ibid.
[50] Sunkin and Ong, p 743.
[51] ibid, 1724.
[52] Ibid, 1756.
[53] Skelly Wright (1977), New Judicial Requisites for Informal Rule-making: Implications for the Environmental Impact Assessment Process, 29(1) Administrative Law Review, pp59-64.

conventional wisdom, judicial review might unwittingly encourage "more formal and more cumbersome procedures."[54] It might also incentivise agencies to compromise on substantive aspects of rules in favour of procedural propriety, given that judicial review focuses on process as opposed to merits.[55] Scholars also suggest that judicial review may also increase the cost of rule-making and application due to resource drains associated with following procedures and consultations.[56]

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. This evidence indicates that sometimes agencies consider judicial review as an unwelcome intrusion into their work. Consequently, they do not always comply with the judicial directives.[57] It is, therefore, common to see agencies refusing to comply with Court directives that they consider as unwanted judicial encroachment into their turf. As Wagner observes, "a sizeable body of literature suggests that agencies actually are quite bold about explicitly rejecting judicial precedent."[58] More subtle forms of non-compliance with judicial dictates have also been recorded. There also seems to be evidence of legal risk taking by agencies. It has thus been argued that the cumulative disadvantages of judicial review may well outweigh its advantages in advancing the public interest.[59]

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.[60] Accordingly, they:

> "find judicial review an especially bitter pill to swallow when their rules are set aside, not because the agency lacked authority to adopt them, but rather because of procedural flaws in their promulgation."[61]

These specialist agencies consequently perceive the judges as "obstructionist or even activist."[62]

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[54] Ibid, p98.
[55] Wagner, p1770
[56] Wagner, p1768
[57] Wagner p1730
[58] Wagner, p1730.
[59] Wagner, p 1732.
[60] The Hon. David S. Tatel (2010), 'The Administrative Process and the Rule of Environmental Law,' Harvard Environmental Law Review, Vol.34,pp1-8.p1.
[61] Ibid.

Accordingly, the question whether judicial review improves the quality of decision-making in the environmental sector is an open question that necessitates more comprehensive empirical research.[63]

Moreover, it is also apparent that agencies are subjected to other forces of influence and pressures apart from judicial review. Consequently, it is not always clear whether agencies act in a particular manner because of judicial influence or other influences. As Wagner notes, "agencies do not generally treat court reprimands as hard constraints on their authority."[64] 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."[65] This, in turn, mitigates the stated benefits of judicial review. The impact of judicial review on agency behaviour thus remains generally unclear.

It is against this backdrop that this study sought to interrogate the significant disconnects between dominant understandings of judicial review and the realities of rulemaking, application and adjudication. This study offers the first empirical analysis of judicial review and its impact on the operations of environmental agencies since the adoption of the new Constitution. The main focus of this study was on whether judicial review has had any impact on agency rule-making, rule implementation and adjudication. In this context, the study will focus on the following questions:

(a) How do environmental agencies and other stakeholders respond to judicial review?
(b) Are there any unintended effects of judicial review that could ultimately impede the ability of environmental agencies to fulfil their statutory mandates?
(c) If so, what are they?
(d) How have the narrow interests represented by litigation between parties translated into wider public interests?

1.5 Methodology

1.5.1. Study design and methodological approach

The development of policy and rules ideally follows what public policy scholars have termed the 'policy cycle.' The term refers to a tool designed by social scientists to analyse how public

[62] Tatel, p2.
[63] Ibid, p98.
[64] Wagner, p1732.
[65] Wagner, p1732.

policies are "formulated, put on a legal footing and implemented. "[66] The policy cycle model is particularly useful in revealing the factors, including legal constraints that influence decision making at different stages of the policy-making and implementation process. These include administrative law. Briefly, the policy cycle involves: identification of the problem to be solved, proposing a policy, providing legal authority for policy (rule making), applying a policy and political and legal challenges to policy implementation (which includes rule adjudication) and policy evaluation.

As an analytical tool, the policy cycle helps policy analysts understand the various stages of the rule and policy-making process and the role that the law, including administrative law, plays in the policy and rule making, implementation and adjudication process.[67] Its utility lies in the fact that it reveals how the law plays a dual role of enabling government to pursue its policies while at the same time operating as a tool for controlling government power. [68]The policy cycle model also enables researchers to assess how close the legal system under scrutiny is to the ideal.

The utilization of the policy cycle model as a tool for analyzing how environmental agencies formulate, implement and enforce rules is critical to this study given that, hitherto, there has been no systematic study to evaluate how environmental policies are formulated, given legal force and implemented by environmental agencies. Similarly, there has been no systematic study on the impact of the environmental policy making process on administrative law and governance in Malawi. Most existing studies have been rather descriptive and focused on the substance of environmental legislation and policy, paying little attention to the process of rule-making and implementation.[69] This is problematic given that the process of policy formulation, implementation and implementation, almost invariably affects the quality of environment.

This study was mainly qualitative in nature. A qualitative study was considered ideal because it would enable the researcher to gain an in-depth understanding of how environmental agencies operate and how members of the public interact with environmental agencies on a daily basis. Qualitative research offers methods to understand people's views and perspectives in their natural settings thus enables the researcher to investigate the meaning of

[66]Andrew Le Sueur and Maurice Sunkin (1997), Public Law, (Longman), p4
[67]Sunkin (1997) p99
[68]Ibid.
[69]CEPA, Assessment of Policy Implementation and Legal Compliance in theEnvironment and Natural Resources Management Sector (2008), p4.

a social phenomenon as experienced by the relevant people themselves.[70] It is also the best design for an inquiry into experiences of the public and unfolding the meaning of these experiences as it about 'persons' lives, lived experiences, behaviours, emotions and feelings as well as about organisational functioning, social movement...'[71] Qualitative research is ideal for a project of this nature because environmental governance is highly interdisciplinary. Research in environmental governance thus benefits from going beyond textual research of primary and secondary legal sources.[72]

The study centered on key principles of administrative law making, implementation, adjudication. These principles are legality, rationality and procedural propriety.

An urban-rural dichotomy approach informed the research. This was necessary because there is a clear divide between urban and rural areas as far as environmental governance structures are concerned besides other characteristics. For instance, it is in the urban areas where main or headquarters offices for government agencies are situated while rural areas have branch offices. The institutional interfaces, coordination, cooperation and impact were an important part of the study. Thus the dichotomy ensured that beyond the government agencies established to exercise general supervision and co-ordination over all matters relating to the environment, many other players and experiences at the lowest level were captured. It was important to capture whether the principles of administrative law are followed at all levels from the top to the lowest one i.e. from the headquarters offices to the district branch offices The different levels and types of local government were also separately considered as each offers a different level of exercise of power and reflects the urban-rural divide. There are three main types of local government; there are District Councils, which are predominantly in the rural while City and Municipal Councils are in the urban areas. The different types of local government have differences in terms of their constitution and decision making, bureaucracy and structure, population size and public demand of services and types of services, level of awareness by the public and access to courts. Hence the local governments' structures such as the city, the municipal and the district were all considered as part of the research.

[70] Salvin-Baden M & Major CH *Qualitative Research: The Essential Guide to Theory and Practice 2013* 11
[71] Strauss A & Corbin J *Basics of qualitative research: Techniques and procedures for developing grounded theory* (1998) 11
[72] Owen D & Noblet C 'Interdisciplinary Research and Environmental Law' (2015) 41:4 Ecological Law Quarterly 887, at 890

1.5.2. Sites for the study

The study sites were chosen purposively, bearing in mind the urban-rural dichotomy, the different types of local government authorities, cost effectiveness and socio-cultural and demographic characteristics of the populations. The research sites were selected in all three geographical regions of Malawi (Southern, Central and Northern regions).

The Southern region sites that were selected were Blantyre and Mulanje. Blantyre was selected because it is the commercial capital and represents an urban area in the Southern Region. Blantyre is the main industrial city in Malawi and hence it experiences multiple environmental governance challenges. Blantyre is also the seat of the Supreme Court of Appeal and the Principal Registry of the High Court. Mulanje district was selected because it is a populous rural and boarder district that is characterised by commercial farming. Mulanje district has highest mountain in Malawi, Zambia and Zimbabwe. This mountain is a biological hotspot with approximately 500 globally unique and threatened plants and animal species. Recently, the District has been embroiled in disputes between local communities and mining companies over mining exploration activities that have been taking place on the Mountain and surrounding areas. The district is also embroiled in controversies surrounding the conservation of the mountain and the way eco-tourism licences are granted. It was felt that interrogating these issues has provided rich data on decision making and participation at the lowest level. Additionally, this study focused on Mwanza district, another environmental hotspot, which was recently involved in environment-related controversies between communities and a railway line construction company.

Two sites were selected in the Central Region, namely Lilongwe and Ntchisi. Lilongwe was selected because it is the capital city and hence the seat of most central government departments including the Department of Environmental Affairs. Ntchisi district represents rural areas that are governed by District Councils. Lilongwe City Council was considered ideal for this study because environmental rule making, implementation and adjudication at city level falls under the jurisdiction of the City Council. Thus, it presents a good opportunity to study the interface between Central and Local Government. This is particularly important given that the jurisdictions of the Central and Local Government tends to overlap in large urban places like Lilongwe.

In the Northern Region, the study focused on Mzuzu City and Karonga district. Mzuzu City was chosen owing to its status as an economic hub of the Region. The growth of the city has brought with it attendant environmental governance problems which are worthy studying.

Karonga District is rural district at the northern tip of Malawi which was chosen on the premise that it is a rural district which is rapidly transforming into an urban town. It is an environmental hotspot in that it hosts Malawi's first Uranium Mine and also has a coal mine. Karonga was also chosen because of its long distance from Lilongwe. This was because this study assumed that the distance from the Headquarters would have a bearing on how public authorised exercised their discretion. These characteristics made the district a worthwhile potential study site.

1.5.3. Sample Design and Sampling Procedure

At the outset, the researchers endeavoured to draw an appropriate survey sample representing the population which is involved in agenda setting, rule-making, rule implementation and rule adjudication. Ordinary citizens who interact with administrative agencies and local authorities on a daily basis were also identified and included in the study. A multistage strategy of sampling was adopted to ensure inclusion of diverse sections of society. Guidelines were agreed on by team members on how to identify potential respondents that reflect the key informants at every level of decision-making, including representatives of those who are affected by decisions. The following guidelines below informed the sampling process.

For triangulation purposes for triangulation purposes five tiers of potential respondents were identified. These are:

1. Rule makers and actors
2. Street- level bureaucrats (implementers)
3. People affected by decisions of the above officials (e.g consumers or direct users of their services)
4. Rule adjudicators
5. Other stakeholders and relevant NGOs, including community leaders.

The key informants that were identified in this study represented the broad categories of rule makers, implementers and adjudicators. The list of those targeted included the Principal Secretary for Environmental Affairs, Director of Environmental Affairs, Environmental Inspectors, Director of Forestry Judges of the High Court and those responsible for environmental management at Local Authority level. The list also included frontline or implementation-level workers- (those who make decisions that are subject to challenge i.e.

environmental inspectors, district environmental officers). In order to gain an in-depth understanding of the actual operations of environmental agencies, this study mainly targeted those who make daily operational decisions as opposed to those who are charged with the overall responsibility of managing government Ministries, such as Principal Secretaries. Representatives of other stakeholders, including academic institutions and nongovernmental organizations were also targeted. These included members of the academia, civil society organizations and community leaders. The list of persons that are usually affected by the decisions of environmental agencies included consumers or direct users of the services of environmental agencies. Applicants for planning permission, permits and licences fall under this category.

This study paid attention to the practical interface and interaction between gender and environmental governance during the interviews. In order to achieve this it was decided that women who interact with environmental and natural resource managers be deliberately targeted. This would present an opportunity to interrogate the gender dynamics of environmental governance.

1.5.4 Data Collection tools

The data collected in this study came from two main sources. The primary sources of the data presented herein include key informant interviews, in-depth interviews, focus group discussions and observations. The study also relied on secondary sources of data including reports, case law, newspaper articles and other publications.

2. COUNTRY CONTEXT AND HISTORY

2.1 Country profile

Malawi is a small country in South-East Africa that is characterised by poor socio-economic indicators. Malawi covers a total area of 118,484 km^2, 20% of which is covered by water, mainly Lake Malawi. According to the 2008 Population and Housing Census Report, the population of Malawi in that year was 13, 077, 160 people representing a population density of 139 people per square kilometre. For 2016, the projected population is at 17, 663 620 with a growth rate of 3.24%[73]. Thus, Malawi is one of the most densely populated countries in continental Africa and this causes a lot of pressure on its limited environmental/land resources.

[73] National Statistics Office Website, 2016

The country is divided into three regions: the Northern, Central, and Southern Regions. There are 28 districts in the country. Six districts are in the Northern Region, nine are in the Central Region, and 13 are in the Southern Region. Administratively, the districts are subdivided into traditional authorities (TAs), presided over by chiefs. Each TA is composed of villages, which are the smallest administrative units, and the villages are presided over by village headmen.

The 2010 State of Environment and Outlook Report by Ministry of Natural Resources, Energy and Environment outlines the key environmental problems facing Malawi. These include soil erosion, deforestation, pollution, water resources depletion and degradation, high population growth, depletion of fish stocks, threats to biodiversity, human habitat degradation, poor waste management, and climate change and air pollution. Similar problems were identified in the 2004 National Environmental Policy and the National Environmental Action Plan (NEAP) 1994. Malawi's high population density and its over-dependence on agriculture are highlighted as substantial causes of continued environmental degradation. The problems are aggravated by poverty since a significant proportion of the population relies on the exploitation of natural resources for survival[74]. The State of the Environment Report also cites poor environmental governance as one of the major drivers of environmental degradation.[75]

Malawi is one of the world's poorest countries. Out of 185 countries on the United Nations Development Programme (UNDP) Human Development Index (HDI) in 2015, she was ranked 173.Over 90% of the value of Malawi's exports is accounted for by natural resource sectors most of which originates from agriculture[76]. Malawi's economy is therefore very much linked to its environment and environmental degradation threatens its social and economic development. The need for sustainable use of its environmental resources and good environmental governance cannot be over-emphasised.

2.2. Country Environmental History

Prior to the advent of colonialism, communities used various local conservation practices to sustain their production systems.[77] At this time, communities were governed by chiefs whose

[74] The Malawi State of the Environment and Outlook Report (SOEOR), 2010
[75] SOEOR,p254.
[76]Commission of the European Communities, 'Country Environmental Profile for Malawi', 2006
[77] Oliver W Mulwafu, *Conservation Song: A History of Peasant-State Relations and the Environment in Malawi; 1860-2000* (Cambridge: The White Horse Press, 2011) 235.

authority was often antithetical to democratic processes.[78] Public participation in environmental matters was almost non-existent.

Malawi (previously known as Nyasaland) became a British protectorate in 1891. During the colonial era, the main law making authority was the British crown. Colonial legislators were appointed by and served at pleasure of the crown. They were entirely from the white settler community such that they made laws as representatives of the British crown.[79]Invariably, their law making could only reflect and fulfil the wishes of the crown as opposed to the natives. Natives were not allowed to be members of the legislative council until the 1949 when two natives appointed by the colonial authorities were admitted into the Council.[80] But even then these had no real influence in the Council.[81] It can therefore be said that there was no direct participation by local communities in law making prior to the 1940s and very minimal even ineffective participation/representation in the period immediately after. Such absence of representation alienated people from their resources but it also removed the essential linkage between policy making and its implementation.[82]

Colonial rule application was generally characterised by the implementation of British ideas about the environment. The draconian colonial regime by its nature was not representative of the interests of local people. The only material interests in the colonial era were those of the crown. The colonial government had no regard for the views of the natives who were considered primitive and retrogressive. Africans were viewed as irrational actors who could not be entrusted with environmental management and whose ways required modification to suit the 'sophisticated' British view.[83] In order to operationalize their perceptions of environmental conservation, the colonial government believed in using laws and accompanying penal sanctions to drive policy in many issues including the environmental protection. They also wished to control resources. [84] Consequently, they promulgated

[78]Gracian Z. Banda, 'Representing Constituents, Servicing Nature: The Role of An MP in Environment & Natural Resources Management in Malawi' (2006) CEPA, Blantyre 11

[79]Gracian Banda (n 94) 11
[80]*E. Kanyongolo, PHD Thesis extract*
[81]Gracian Banda (94) 11
[82]Gracian Banda (94) 13
[83]*Ibid*, 236
[84] *Ibid*, 235

stringent environmental regulations and accompanying penal sanctions targeting natives.[85] Colonial policy entrenched the view that natural resources were government property particularly where natives had to be displaced to conserve resources.[86]

Between 1933 and 1963 the colonial administration enacted a number of environmentally relevant pieces of legislation. Of particular note were the Natural Resources Ordinances of 1946 and 1949, and the Land Use and Protection Ordinance of 1962.These laws aimed to ensure effective utilisation and management as well as conservation of soil, water and forestry resources to curb what the colonial administration referred to as 'an impending environmental disaster.'[87]The implementation of measures to solve environmental problems appears to have been selective and designed to serve the privileged race. The enforcement of environmental law generally favoured white people and was particularly harsh on the natives. Enforcement was generally coercive and prosecutorial.[88] This era thus seems to have been characterised by non-consultation or very minimal involvement of the public generally and local communities in particular.

Malawi attained its independence in 1964. This coincided with the emergence of the autocratic one party system of government led by Dr Hastings Kamuzu Banda. The autocracy, which endured for almost thirty years, was characterised by limited public participation in rule-making, implementation and adjudication.[89] The one party government's major preoccupation was consolidation of political power. Accordingly, it gave little room for consultation or participation by the masses in many areas of governance, including the environment. The government thus controlled the making and implementation of policies and laws to achieve its political interests.

However, to some extent compliance with policies and regulations was good given the autocratic political environment. On some environmental issues including forestry, the post-independence government did not want to lose the gains already made by the colonial masters. Consequently, it continued with centralised policies of management adopted wholly

[85]Justin M Kalima, 'The Effectiveness of Environmental Law in Malawi: An Analysis of the Principal Legal Tools for Achieving Environmental Protection with Emphasis on the Criminal Sanction' (2006) PHD Thesis Kwazulu Natal University, p25.

[86]Gracian Banda,p 13
[87]Gracian Banda,p 14
[88]Kalima, p 25, Mulwafu, p 236
[89] Henry G. Chingaipe and Chimwemwe Msukwa (2012), Whose Voice?: Citizen Participation and Influence in Public Policy Processes in Malawi, Malawi Economic Justice Network, p1.

from the colonial period.[90]Nevertheless, it made it clear that it would not enforce environmental conservation measures which were a colonial burden.[91]

Commentators have observed that prior to the advent of political pluralism, citizen participation in policy processes "was an empty ritual."[92] Policy formulation was highly centralized and fell squarely within the realm of a powerful executive. All rule-making processes were initiated by government, whose decisions prevailed.[93] Environmental rule-making in Malawi thus seems to have transitioned from a point of no representation/participation by natives (pre-1960) to indirect, albeit ineffective participation through elected partisan local representatives (1960-1994).

Prior to 1994, there were more than 40 environment-related laws.[94] A major weakness of the pre-1994 environmental management regime was that it was sector specific and responsive to environmental issues in an adhoc manner.[95] It was characterised by the absence of a general environmental law to establish national environmental principles and "provide guidance and coherence" to environmental management.[96] There was no legal framework to deal with cross-sectoral issues.[97]1990s could be described as the 'watershed' decade for modern environmental law in Malawi. This is because it witnessed more focused legislative and policy reforms relating to the environment than the preceding decades. One of the major catalysts for these reforms was the upsurge of global interest in the deteriorating state of the environment, which characterised the early 1990s. Global concern about the environment led to the adoption of the Rio Declaration on the Environment and Development as well as Agenda 21 and Programme of Action at the 1992 United Nations Conference on the Environment and Development ("Earth Summit").[98] Sustainable development, a concept that

[90]Kamoto, p
[91]Zibelu , p 13
[92] Henry Chingaipe and Chimwemwe Msukwa (2014), Whose Voice? : Citizen Participation and Influence in Public Policy Processes in Malawi (Malawi Economic Justice Network),p1
[93]Gracian Zibelu Banda (2006), Representing the Constituents, Serving Nature : The Role of an MP in Environment and Natural Resources Management in Malawi, (CEPA),p6
[94]Malawi National Environmental Action Plan 1994, http://www.sdnp.org.mw/.
[95] Michael Kidd observes that this was the state of environmental law in most countries, including South Africa (See Michael Kidd (1997), Environmental Law in South Africa (Juta and Co. Ltd),
[96] *Ibid*.
[97] The NEAP highlights the following issues: "overall environmental policy formulation, environmental planning, environmental quality criteria and standards, environmental impact assessment, pollution of environmental media, institutional co-ordination and conflict resolution, and the monitoring of implementation of environmental policies by Pectoral agencies."
[98]Kalima, p

gained momentum following the "Earth Summit" was the ideology that informed the radical policy and legal reforms that occurred in Malawi between 1994 and 1999.[99]

Domestic level developments also triggered legislative and policy reforms. The realisation that Malawi was being overtaken by environmental degradation prompted calls for action from various stakeholders. The1992-1994 period was also characterised by Malawi's political transition from a one party State to a multi-party democracy and the adoption of a democratic Constitution in 1994. Section 13 of the Constitution requires the state, actively, to promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at responsible environmental management. Specifically, the State is required to adopt and implement policies and laws aimed at preventing environmental degradation, providing a healthy living and working environment for the people of Malawi, according full recognition to intergenerational equity and sustainable development, and conserving, as well as enhancing Malawi's biological diversity.[100] The 1994 Constitution embraces the ethos of public participation and contains a number of provisions that support public participation in all aspects of governance.[101] This signalled a new direction for legislative and policy reforms.

Pursuant to the above commitments and with strong encouragement from development partners the government of Malawi formulated a National Environmental Action Plan (NEAP) in 1994, followed by a National Environmental Policy in 1996. This policy laid the foundation for the development of the Environment Management Act (EMA), 1996 and further legislative action targeting various natural resource sectors.[102] The EMA was the first piece of legislation to attempt to address issues of the environment in an integrated manner, a departure from existing legislation which was sectoral in nature.

The advent of multiparty democracy ushered in opportunities for openness and public participation in rule-making, implementation and adjudication processes.[103] As Chingaipe and Msukwa suggest, the political reforms of 1994 heralded a new era characterised by what

[99] Dobson , p 160
[100] Section 13(d)
[101] Sections 12, 13, 14 and the Bill or Rights.
[102] Dobson, p159
[103]Tracy Dobson (1997-98), Radical Restructuring of Environmental Policy to Preserve Biodiversity in Southern Africa: Malawi at the Crossroads, Journal of Natural Resources and Environmental Law, Vol.13(1), pp149-175. Chingaipe and Msukwa, p2.

Chingaipe and Msukwa call "genuine participation in policy processes."[104] The transition to multiparty democracy also changed the world-view of many Malawians who increasingly came to the realization that they could impact on the way they are governed. This was in contrast to the colonial and one-party eras where, as Dobson observes, "life seemed to unfold as an unchangeable matter of fate."[105] These observations seems to be corroborated by existing literature which suggest that environmental and natural resources laws are generally adopted using a participatory approach characterised by wide stakeholder consultation.[106] Makawa, a former Legal Officer for the EAD, for instance, has observed that "there has been a deliberate shift in legal and policy instruments to enhance the role of citizens at different levels" in rule making.[107] He notes that environmental policy and rule-making in Malawi involves the consultation of a wide range of stakeholders, including traditional and other local leaders, religious leaders and agricultural extension workers. This paper, however, considers the nature and quality of that participation.

2.3 The legal and normative framework for environmental management in Malawi

2.3.1. Constitutional principles underlying environmental management

The Constitution is the supreme law of Malawi. It defines the basic framework for government and defines the operations of its branches. Of particular importance for environmental rule-making, application and adjudication is section 5 which enshrines the principle of constitutional supremacy. The section 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." This provision impacts on environmental governance insofar as it subjects all rule-making, application and adjudication functions of environmental agencies to the test of constitutionality. Courts have a duty to ensure that public agencies exercise their functions in accordance with the Constitution. 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.

[104] Ibid p2; See also J.F. Kamoto, P.T Dorward and D.D Shepherd (), Decentralized Governance of Forest Resources: Analysing Devolution Policy Processes and their Effects on Decision-making in Communal Forest Management in Malawi.
[105] Tracy Dobson (1997-98), p157.
[106] J. Kamoto, G. Clarkson and D. Shepherd (2013), Doing More Harm than Good? Community Based Natural Resource Management and the Neglect of Local Institutions in Policy Development, Land Use Policy pp293-301.
[107] Makawa, p173.

The most important milestone 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, 1994. Section 13(d) provides a constitutional basis for environmental rulemaking and rule application in Malawi. The section requires the government progressively to adopt and implement laws and policies aimed at managing the environment responsibly. The principles of national policy according to section 14 of the Constitution are merely directory in nature. 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."[108]

Although it is generally believed that the principles of national policy cannot be equated to constitutional rights,[109] there have been judicial pronouncements which suggest to the contrary. One such pronouncement was made in the Phillipine case of *Oposa et al v Fulgencio S Factoran, Jr.et al.*[110] 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. The Court observed that the inclusion of the right in 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."[111]

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. These include the right to life, the right to property and the right to development. The Bill of Rights also provides for access to information and access to justice.

The Bill of Rights contains a provision which is particularly relevant to environmental governance, namely the administrative justice clause. Section 43 of the Constitution provides that every person shall have the right to—

[108]Section 14; Justice Chimasula, the Administrator of the Esatate of Dr Kamuzu Banda v the Attorney General, HC Civil Cause No. 1839 (A) of 1997, p17 of the transcript.
[109] Justin Kalima (2011)
[110] G.R. No.101083.
[111] See also *Kinkri Devi and Anor v State of Himashal Pradesh and Ors*, AIR 1988 HP 4.

(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.

There have been some judicial pronouncements to the effect that section 43 merely restates the common law principles of natural justice.[112] However, these decisions have been criticised 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."[113] He notes that the notion of lawfulness under section 43 is wider than the notion of legality under the common law. This, according to him is because, in determining whether a public officer acted lawfully, the Court will not merely consider whether he or she acted *intra-vires*. It may also consider whether the officer complied with the Constitution. Procedural fairness is broader than the compliance with rules of natural justice and reflects the general duty to act fairly. [114] Furthermore, the Constitutional right to reasons, in writing, for decisions that affect an individual's rights, interests and legitimate expectations is not available at common law.[115] Chirwa also correctly opines that section 43 provides for justification as a ground for review. He observes that the requirement that administrative action should be justifiable in relation to reasons given is much broader than the ground of rationality under the common law.[116]

Chirwa's observations find support in minority judicial opinion. In the High Court case of *The State v Blantyre City Assembly, ex.p. Ngwala*[117] Justice Mwaungulu opined that the statements made by some Judges that section 43 merely repeats the principles of natural

[112] In *Chawani v Attorney General*,[2000-2001]MLR 79.83 (MSCA), 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." See also: *Attorney General v Lunguzi and Another*, [1996] MLR 8 (MSCA). There are a number of pronouncements from the High Court that echo the Supreme Courts 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.

[113] Danwood Mzikenge Chirwa (2013), Liberating Malawi's Administrative Justice Jurisprudence from its Common Law Shackles, Journal of African Law, 55(1), 105-127.108.

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

[115] 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.

[116] Danwood Mzikenge Chirwa (2013), Liberating Malawi's Administrative Justice Jurisprudence from its Common Law Shackles, Journal of African Law, 55(1), 105-127.109; See also Mureinik (1994), A bridge to Where? Introducing the Interim Bill of Rights, South African Journal of Human Rights, 31.40.

[117] Miscellaneous Civil Application No.183 of 2012.

justice were "not very accurate conceptually."[118] Mwaungulu's opinion finds support in South African jurisprudence. In the case of *Van Huyssteen & Others v Minister of Environmental Affairs & Tourism & Others,*[119] for example, the High Court of South Africa disagreed with the contention that section 24(b) of the South African Constitution (a provision identical to section 43) merely codified the common law principles of natural justice. Justice Farmlam observed as follows:

> "I do not think that one can regard section 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."[120]

Academic commentators have also supported the argument that the administrative justice clause does not merely reinstate common law rules. Rather it affords the courts a chance to consider the "merits of a decision by developing a theory of what is desirable."[121] In this context, DeVille argues that section 24 of the South African Constitution, which is identical to its counterpart in Section 43 of the Malawi Constitution, introduces the continental notion of proportionality into administrative law.[122] Justifiability, according to him, demands that administrative action to be ".....suitable and necessary to attain the statutory prescribed purpose and which does not result in harm to individual(s) which is out of proportion to the gains to the community."[123] Justifiability cannot just be equated to rationality.

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[118] Page 3 of the transcript

[119] 1998 (1) SA 283

[120] Mwaungulu's opinion finds support in the case of *President of the Republic of South Africa v South African Rugby Football Union,* 2000 (1) SA 1 (CC) 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 section 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 section 33, but also its content. The principal function of section 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."

[121] Jan Glazewski (2000), Environmental Management in South Africa, (Durban: Butterworths).

[122] De Ville (1994), Proportionality as a Requirement of the Legality in Administrative Law in Terms of the New Constitution, SA Public Law 360.

[123] DeVille, 365.

The foregoing position finds support in judicial opinion from South Africa. In the South African case of *Roman v Williams*[124] , Justice Van Deventer cited with approval DeVille's writings. He observed as follows:

> "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."[125]

He further observed that

> "judicial 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."

Accordingly he rightly concluded that:

> "Like the test of reasonableness, the new constitutional test of justifiability 'in relation to the reasons given for the decision' must obviously be an objective one. Administrative action in order to qualify as justifiable in relation to the reasons given must meet the three requirements of suitability, necessity and proportionality."[126]

The incorporation of Section 43 into the Malawi Constitution has profound implications for administrative law generally and environmental rule-making, 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 is on the claimant. However, the rights-based approach imposes the onus of justifying why a citizen's right to administrative justice should be limited on the public officer. Accordingly, it provides a basis for challenging the manner in which environmental agencies make rules, apply rules and adjudicate upon matters related to

[124] 1998(1)SA 270 (Western Cape High Court).
[125] https://lawblogsa.files.wordpress.com/2013/01/roman-v-williams-no.pdf
[126] *Ibid*

environmental management. Section 43 thus heralds the introduction of a rights-based approach to judicial review and renders administrative decisions of environmental agencies amenable to judicial review under the Constitution.

Another important provision of the Constitution that is relevant to environmental governance is section 15 (2). This provision, as observed below, virtually liberalises the *locus standi* requirement and potentially paves way for more public participation in environmental adjudication processes.

The inclusion of the above provisions in our 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.

2.3.2 Framework Legislation

Like many other countries, Malawi reformed its environmental policies and laws following the 1992 United Nations Conference on the Environment and Development. The policy and law reform process commenced in 1994 with the development of the National Environmental Action Plan. It culminated in the development of the National Environmental Policy and the Environment Management Act (EMA) in 1996. From an environmental governance perspective, the enactment of the EMA served a number of key objectives, including the improvement of cross-sectoral coordination in environmental management.[127]

The EMA 1996 will soon be superseded by the recently enacted Environment Management Act 2016 (EMA, 2016). Upon coming into force, the EMA, 2016, will repeal the EMA 1996. The new law purports to provide for a more responsive legal framework for the protection and management of the environment, as well as the conservation and sustainable utilisation of natural resources.

2.3.3 Sectoral legislation

[127] Gracian Zibelu Banda (2004), Revision of the Environment Management Act – Draft Report, Environmental Affairs Department, p2.

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. No single legal instrument comprehensively makes provision for environmental rule-making, application and adjudication in Malawi. While the Environment Management Act, 1996 attempts to provide for a comprehensive legal framework for environmental management in Malawi, it falls short of regulating all aspects of the environment. Consequently, the government has developed sector specific legislation to regulate environmental and natural resource management in various sectors. For instance, the Forestry sector is regulated by the Forestry Act is responsible for the management of Forests. The Fisheries sector is regulated by the Fisheries Conservation and Management Act, 1997, the Fisheries Management Regulations, 2000 and the Local Community Participation Rules, 2000. The Wildlife Sector is regulated by the National Parks and Wildlife Act. The Water sector is governed by the Water Resources Act, Water-Works Act and Public Health Act. The Government has also devolved some environmental management functions to local level institutions under the Local Government Act, 1998.

However, the EMA still remains the overarching statute on environmental management. All the sectoral laws are subordinate to it. Section 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. For that reason the EMA is generally considered as the environmental constitution in Malawi.

In order to ensure that environmental management functions are well coordinated, the EMA contains a number of provisions aimed at ensuring coordinated environmental management. Section 10 of the EMA establishes the National Council for the Environment which comprises Principal Secretaries from all government ministries. The primary role of the Council is to advise the Minister on all matters affecting the Environment.[128] Among the responsibilities of the Council is recommending "measures necessary for the harmonization of activities, plans and policies of lead agencies and non-governmental organizations."[129] The EMA also establishes the Technical Committee on the Environment, whose primary role is to advise the

[128] Section 12 of the EMA.
[129] Section 12(c) of the EMA

Minister, Council, Director and any lead agency on technical issues relating to the environment.[130]

3. RULE MAKING

3.1 Actors

Part III of the EMA outlines the institutional framework for environmental management in Malawi. Section 8(1) of the EMA 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. The section explicitly requires the Minister to take necessary measures for achieving the objectives of the EMA in consultation with lead agencies. Section 9 of the EMA establishes the office of Director of Environmental Affairs. The Director's Office is responsible for coordination of environmental management in Malawi. The Director heads the Department of Environmental Affairs and is responsible to the Minister for the proper discharge of environmental management functions.[131]

The diffuse nature of environmental law in Malawi means that there is no agency that is solely responsible for environmental rule-making in Malawi. Apart from the Department of Environmental Affairs, there are not less than 15 lead agencies responsible for rule-making in the environmental arena.[132] The key players in this sector are government departments including Forestry, National Parks and Wildlife, Fisheries, Lands and Water. Environmental management functions at local authority level fall under the mandate of Councils. The Local Government Act, 1998 gives Council power to make by-laws.

The multiplicity of rule-making agencies in the environmental sector gives almost invariably gives rise to uncertainties and overlapping rulemaking functions. This creates the potential for rule incoherence, overlaps and contradictions.[133] For example, section 30 of the EMA authorizes the Minister responsible for environmental affairs to "prescribe environmental quality standards generally, and in particular, for water, effluent etc." Section 91 of the Water Resources Act, gives the Minister responsible for water power to prescribe "standards for

[130] Sections 16 and 17 of the EMA.
[131] Section 9(2)(b).
[132] 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.
[133] In fact, the National Environmental Policy, 2004, indicates that sectoral environmental laws and policies are characterised by "gaps, conflicts and duplications which adversely affect" their effective implementation. (p.iii).

effluent quality." [134] This, as some commentators have observed, has the potential to generate conflicts of jurisdiction and "confusion of roles among actors."[135]

3.2 Roles

The task of developing environmental laws and policies remains within the realm of central government agencies, including Cabinet and Parliament. However, most environment-related statutes contain provisions that delegate policymaking and rulemaking powers to certain public officials. [136]

Section 8 of the EMA confers on the Minister the power to formulate environmental management policies. The Minister is also charged with the task of recommending to government environmental Treaties to which Malawi should be a party.[137] Specifically, the Minister has regulation-making powers on different subjects. These include environmental impact assessments (EIAs), [138]environmental quality criteria and standards, [139]access to genetic resources,[140]protection of the ozone layer,[141] waste management, [142]management of pesticides/hazardous substances,[143]recommendation of fiscal incentives and general environmental management.[144] The Acts stipulates that the functions of the Minister in this regard are supposed to be exercised in consultation with lead agencies and the National Council. In formulating policies, legislation, regulations, criteria, standards and guidelines the Minister acts on the advice of the National Council and the Technical Committee on the Environment.[145] The Council is also charged with the responsibility of recommending to the Minister measures necessary for the integration of environmental considerations in economic planning and development. These measures invariably include policies and rules.

[134] Section 85 of the Water Resources Act , for example, authorises empowers the Water Resources Authority to declare certain areas to be protected areas. 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.
[135] O'neill et al, p21.
[136] Section 51(1) of the EMA gives the Director power to "prescribe the activities in respect of which records shall be kept."

[137] Section 8(2)(i)
[138] Section 24.
[139] Section 8(2)(l)
[140] Section 36(1)
[141] Section 41
[142] Section 37
[143] Section 40
[144] Section 77.
[145] Section 12 and 17 of the EMA.

The prescribed forum for notifying the public about the promulgation of the above rules is the *Gazette*. This raises questions relating to access to these rules by the general public which does not have access to the *Gazette*.

According to Kidd, legislative functions include "the responsibility of public officials to activate control provisions in legislation."[146] These responsibilities include declaration of protected areas. For example, Section 32 of the EMA empowers the Minister to declare environmental protection areas. The section also obliges the Director to set out policies for environmental management in protection plans for environmental protection areas.[147]The EMA also empowers the Director to issue environmental protection orders.[148]

Sectoral environmental laws also confer quasi-legislative or rule-making authority on Lead Agencies. Examples of these laws abound.[149] While the Environmental Affairs Department (EAD) is primarily responsible for cross-sectoral coordination of environmental management, sectoral agencies are responsible for sector level, rule-making.

The government of Malawi pursuant to the Decentralization Policy has developed policies and legal instruments that purport to create an enabling environment for devolved environmental management. Environmental rule-making activities at local authority level are primarily guided by the Local Government Act, 1998. Section 4 of the Local Government Act, 1994 and the Second Schedule thereof, authorizes Municipal and City Councils to perform certain rule-making functions pertaining to environmental management.[150] Similarly, section 103 of the Local Government Act gives wide powers to Councils "to make by-laws.....for the prevention and suppression of nuisances therein and for any other purpose."

[146] Kidd, p 19.
[147] Section 32(3)(a).
[148] Section 33.
[149] Section 40 of the Forestry Act gives, for instance, empowers the Director power to "declare any forestry area to be a fire protection area" and to "regulate the lighting of fires in such area." The Act also gives the Director the responsibility of establishing rules for village forest areas [section 5(e)]. Section 91 of the Water Resources Act empowers the Minister responsible for water resources to prescribe effluent quality standards.
[150] Section 2(1) of the Second Schedule authorizes Councils to establish services for the collection and removal of solid and liquid waste. It also authorizes them to regulate various aspects of sanitation and waste management. Section 2 of the Second Schedule, empowers the Council to "prohibit or control any noxious or offensive trade within the meaning of the Public Health Act and the use of premises which may be a source of nuisance, danger, discomfort or annoyance to the neighbourhood." The schedule also empowers Councils to make rules for the control of nuisances [section 4], control of hazardous materials [section 6], prohibition and control of water pollution [section 2(6)]

Sectoral laws also delegate some environmental rule-making functions to local government agencies and communities.[151] City, Municipal and District Councils have pursuant to these laws also been mandated to formulate and implement environmental rules as well as adjudicate upon environmental disputes at local authority level. The government has also established environmental offices at district level. These offices are managed by District Environmental Officers provided for under Section 20 of the Act. Pursuant to the decentralization policy Local Authorities are also empowered to make rules relating to environmental management. The EMA, for instance, authorizes the Minister to recommend to Minister responsible for Local Government the promulgation of waste management rules for local authorities. [152]

In terms of legality of rule-making, this study found evidence of compliance with the law at all levels. Respondents were able to point at source of authority for their rulemaking powers. It was clear from the study that Councillors, Directors and DCs routinely consult laws prior to promulgating rules.

However, this study has found that despite the existence of the above institutional framework a number of problems still persist in terms of rule-making.

First, notwithstanding the enactment of the EMA and the establishment of the above institutional framework, environmental rulemaking still appears fragmented. It is still characterised by a multiplicity of institutions and actors with overlapping and conflicting mandates. Cross-sectoral coordination of rulemaking still appears weak. Of course, it is the responsibility of the National Council for the Environment (NCE) to recommend measures that are necessary for the harmonization of policies of lead agencies. However, there is evidence from this study suggests that the effectiveness of the NCE has failed to perform this role in practice. This is for a number of reasons. First, while section 10 of the EMA envisages that representation on NCE comprises high level officers from lead agencies (Principal Secretaries, in practice such officers rarely attend NCE meetings. NCE meetings are usually attended by lower level representatives who do not have the requisite clout to influence environmental rulemaking. This undermines the quality of coordination relating to rulemaking.

[151] The Forestry Act empowers Village Natural Resource Management Committees (VNRMCs) to make by-laws. Section 33 subject any rules made by VNRMCs to the approval of the Minister.
[152] Section 37(2)

The EMA, 2016, has recognized this problem and has provided for the establishment of a National Environment Protection Authority, which will be the principal agency for environmental management in Malawi.[153] The new law also contains provisions aimed at strengthening environmental coordination in Malawi. These include section 9 which empowers the authority to coordinate, monitor and supervise all activities of stakeholders relating to utilisation and management of the environment. The authority is also empowered to direct other agencies to perform their environmental management functions and impose sanctions in the event of default.[154]The EMA, 2016, also imposes reporting obligations on lead agencies. Section 24 of the Act requires Lead Agencies to submit annual reports to the authority with respect to the segment of the environment they are charged with.

Second, between 2004 and 2014 the Government of Malawi did not hold local government elections. This had implications for the legality of rules that local authorities made during this period.[155] The absence of Councillors meant that there were no vibrant Councils and environmental rulemaking entities at local authority level. This forced Courts to develop the principle of 'necessary legality' in order to address the absurdities and adverse consequences of this legal vacuum. The case of *Zomba Municipal Assembly v the University of Malawi*,[156]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. The Court was requested to determine whether Zomba Municipal Assembly had the legal mandate to revise rates in the absence of elected Councillors. 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. However, the Court noted that the law was silent on what is supposed to happen in the absence of the Assembly. Accordingly, it proceeded to decide that Zomba Municipal Assembly was legally entitled to levy taxes. The Court based its ruling on necessity. It noted that Local Assemblies had a constitutional and statutory duty to provide essential services to their residents. This duty, according to the Court, subsisted irrespective of whether there was an assembly or not. 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

[153] Section 7.
[154] Section 22.
[155] Michael Chasukwa,Asiyati Chiweza and Tiyesere Chikapa (2014), Public Participation in Local Councils in Malawi in the Absence of Local Elected Representatives-Political Eliticism or Pluralism, Journal of Asian and African Studies, vol. 49 no. 6, 705-720
[156] High Court Civil Cause Number 3567 of 2006.

must be avoided."[157] However, the notion of "necessary legality" was rejected by Justice Chikopa in *GH Bandawe (trading as Kaka Motel) v Mzuzu City Assembly.*[158] In that 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." Accordingly, he correctly held that in the absence of Councillors an Assembly cannot be deemed to be lawfully constituted. Consequently, it cannot legally levy and collect taxes.[159]

3.3 Processes and mechanisms

3.3.1 The duty to ensure public participation

Section 3(2)(d) of the EMA obliges persons that are required by law to perform environment management functions to take necessary steps and measures for "promoting public awareness and participation in the formulation and implementation of environmental and conservation policies of government." This suggests that environmental agencies have a general duty to ensure public participation in policy and rule formulation processes. However, specific provisions of the EMA do not generally impose procedural constraints or obligations on environmental rule-making by designated agents. The only exceptions are provisions which require the Minister to make prescribe rules and standards based on the recommendations of the NEC.[160] The EMA also requires the Minister to consult lead agencies when taking environmental management measures.[161]

The Local Government Act, however, contains inbuilt mechanisms to facilitate public participation in the development of by-laws. Section 104 of the LGA makes provision for the procedures to be followed when making by-laws. These include the requirements for Councils to seek Ministerial approval and to invite objections from the public before implementing by-laws.[162] Subsection 2 of the section requires Councils to publish a notice of intention to apply for approval of by-laws to be published in the Gazette and local newspapers that circulate in the area to be governed by the by-laws. The notice is supposed to "include representations in writing from any person wishing to make any observation upon or an objection to such proposed by-law."[163] Subsection (3) obliges local authorities to ensure that copies of by-laws are open to public inspection 14 days prior to the submission of an application for approval.

[157] Page 34 of the transcript.
[158] HC Civil Cause No. 63 of 2006.
[159] Page 37 of the transcript.
[160] Sections 8(2), 24(1), 30(1),31,36(1)
[161] Sections 8(1),
[162] Section 104(1)
[163] Section 104(2)

This provides an opportunity for members of the public to make observations upon or objections to the by-laws.

3.3.2 Stakeholder Consultation and Public participation in rule making

As noted above, the EMA obliges duty bearers to promote public awareness and participation in the formulation of environmental policies. According to evidence from this study, this requirement seems to be strictly adhered to by environmental agencies in practice. For example, the respondents noted that the Minister generally adhered to the EMA which requires him/her to consult Lead Agencies or NCE before making rules. Other stakeholders are also routinely consulted. Those responsible for approving policies and rules also routinely check whether policy or rule development processes adhered to consultation requirements. But what is still not clear whether agencies operate in this manner because they believe that stakeholder involvement in rule-making is useful and beneficial or merely to satisfy legal or procedural requirements.

The process for consultation is generally top-down. Usually, the consultations initially involve a narrow set of purposively selected key informants, and are subsequently expanded to involve wider stakeholders. Specifically, those that are first consulted include lead agencies, line ministries, academics, parliamentary committees and CSOs. The public is usually consulted through Traditional Authorities. After these consultations, a document is formulated and sent to Ministry of Justice for its input before being taken it to cabinet.

The above process is designed to ensure that the views of stakeholders are taken into consideration in the rulemaking process. However, in practice consultations tend to usually involve a narrow set of stakeholders and hardly involve new voices. The democratic credentials of traditional leaders as community representatives are also questionable.

An important concern of most respondents, however, was the fact that there is no systems for ensuring that public contributions are not unjustifiably disregarded in the rule making processes. There is also no system for challenging the rules on the basis that the contributions of the public were not considered.

4. RULE APPLICATION -

4.1. Actors

The EMA provides for a number of duty-bearers who are responsible for the implementation of environmental law and policy in Malawi. These include the Minister, the Director of

Environmental Affairs, District Environmental Officer and Environmental Inspectors. Sectoral laws also confer specific rule application duties on various lead agencies that are charged with environmental management responsibilities. However, as noted above, apart from the Department of Environmental Affairs, there are more than 15 lead agencies responsible for rule application in the environmental arena.[164] These include the departments of Forestry, Fisheries, National Parks and Wildlife, and Mining

Various laws also empower local authorities to perform environment management functions. These laws have mandated City, Town, Municipal and District Councils to apply and implement environmental rules. The EMA has also provided for environmental offices at district level. These offices are managed by District Environmental Officers provided for under Section 20 of the Act. However, it is not clear how this office relates to the Director of Environmental Affairs and other offices at District level within the framework of devolution.

The LGA imposes a number of environmental management functions on Councils.[165] Sectoral laws also delegate some environmental rule-application functions to local government agencies and communities.[166]

The Department of Environmental Affairs is primarily a coordinating agency. The daily implementation of environmental management functions is the responsibility of Lead Agencies. This view finds support in section 6 of the EMA which provides that the provisions of the EMA should not be interpreted as divesting lead agencies of powers, functions, duties or responsibilities conferred upon them by relevant environmental legislation. [167] The above institutional framework is designed to ensure that there is effective coordination of environmental management at all levels.

However, the findings of this study suggest otherwise. This multiplicity of agencies with conflicting, overlapping and inconsistent mandates has posed a barrier to effective

[164] 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.
[165] Section 6 and the Second Schedule.
[166] Part III of the Fisheries Conservation and Management Act provides for local community participation in the conservation and management of fisheries in Malawi; Part IV of the Forestry Act authorizes the Director of Forestry to forge forestry co-management agreements with local communities. Part VI of the Act provides for participatory management of customary land forests by local communities; Part III A of the National Parks and Wildlife Act provides for the involvement of Local Communities and the Private Sector in the conservation and management of wildlife.
[167]

environmental coordination and management in Malawi.[168] It has also posed obstacles to legality, rationality and procedural propriety of the functions of environmental agencies.

In terms of legality, this study has found that the current structures for coordinating the implementation of environmental rules are hardly doing what they are legally mandated to do. One such structure is the NCE whose weaknesses have been alluded to above. Under section 12(3) of the EMA the Council is primarily charged with the task of recommending measures necessary for the harmonization of mandates of Lead Agencies. But evidence from this study suggests that the NCE rarely does that. Of particular concern of some respondents was that representatives of Lead Agencies on the NCE primarily focus on defending narrow sectoral interests as opposed to resolving cross-sectoral conflicts. This invariably affects the NCEs effectiveness as a coordinating agency. The NCE's effectiveness is also undermined by the fact that it has no policymaking powers and its decisions are subject to the Minister, who is a politician.

One of the major criticisms advanced against the current state of environmental management is that its legal framework contradicts what was envisaged by the National Environmental Policy (NEP). The NEP provides that "the environmental affairs institution should be seen as a professional body whose opinions are considered as such and should be beyond political or business intrigue." The low-level status of the EAD and its lack of independence from the executive branch undermine its capacity to coordinate environmental management and to enforce the law.[169] The fact that the EAD is mandated to police more powerful agencies with an exploitative interest in environmental resources further complicates its position. Sectoral laws also fail to give the office of the Director of Environmental Affairs the prominence it deserves. For example, the laws do not include the office of the Director of Environmental Affairs in their multi-sectoral Boards or Committees.[170] This is problematic given that the Director's role is to coordinate the activities of all sectors pertaining to the environment.

[168] Part VI of the National Parks and Wildlife Act empowers the Wildlife Research and Management Board to conduct Environmental Impact Assessment. This part overlaps with Part V of the EMA, but does not make any cross-reference to it. It is therefore not clear how the wildlife impact assessments conducted under this part relate to the EMA.

[169] GZ Banda

[170] This is with the exception of the Wildlife Research and Management Board which includes the Director of Environmental Affairs (section 17 of the National Parks and Wildlife Act).

Another critical concern of most respondents in this study was the problem of incomplete devolution of environmental functions to local authorities. In particular, the decentralization policy has led to the creation of local level institutions that are responsible for environmental management. But the DEA has been slow to devolve its functions to local level institutions and still centralizes too many powers. For example, the EMA establishes the position of District Environmental Officer (EDO) who, ideally, should be part of District Administration. The EDO ideally is supposed to report to the District Commissioner (DC). However, most of the respondents to this study were not clear as to how this office relates to both the Director of Environmental Affairs and District level agencies within the framework of devolution. But in practice the EDO is more aligned with EAD than the DC. According to the respondents DCs do not recognize EDOs as part of their staff. The organogram of District Councils do not officially include the EDO. EDOs are taken as independent technical staff. The office is directly funded by the Department of Environmental affairs which is also responsible for auditing the accounts of EDOs. Monthly reports of the EDOs are sent to the Director of Environmental Affairs. The Director of Environmental Affairs liases with EDOs directly and sometimes through the DCs who have nominal authority over them. This potentially undermines lower level rule-application functions because it creates dual administration systems at district level. As O'neill and others note, dual administration at district level is problematic because it results in "unclear mandates, multiple reporting lines and weak accountability mechanisms."[171]

This is problematic considering that Section 19 of the EMA gives the EDO supervisory powers over the District Executive Committees (DECs) on environmental matters. DDCs are an integral part of the decentralisation framework.

The absence of local authorities between 2005 and 2014 magnified the problem of inadequate coordination in environmental rule application at local level.

4.2. Roles

Section 8 of the EMA imposes the overall duty of environmental management upon the Minister, but obliges him/her to act in consultation with lead agencies. The specific duties of the Minister under section 8 include issuance of licences and permits, receiving and

[171] Tam O'neill, et al (2014), Fragmented Governance and Local Service Delivery in Malawi, (ODI); O'neill et al highlights the pitfalls of dual administration, including multiple reporting lines. According to them dual administration affects "accountability relationships, performance management and loyalties within local government. " p25. It also enhances the prospect of "coordination failures, as do the multiple streams and actors within local government."p32.

investigation of complaints relating to the management of the environment, coordination and monitoring of all environmental management activities, and preparing plans and developing strategies for environmental management. Other duties of the Minister include approval of projects following environmental impact assessments, declaration of environmental protection areas and protection of biological diversity. The Minister is also a licensing authority responsible for granting licences and permits under the Biosafety Act.[172] Obviously, these far reaching powers and duties make the Minister a good candidate for judicial scrutiny.

The EMA obliges the Minister to consult Ministers responsible for particular segments of the environment in performance of his duties.[173] It also authorizes the Minister to delegate some of his functions to the Director.[174]

The Director's Office has wide ranging functions and powers under the EMA. It is responsible for the administration of the Act. The Director is responsible to the Minister for the proper discharge of his/her functions under the EMA. He/she is also responsible for the implementation of such environmental policies as may be determined and delegated to him by the Minister.[175] The Director heads the Department of Environmental Affairs which is charged with the responsibility of coordinating environmental management. The specific duties of the Director include implementation and enforcement of Environmental Impact Assessment (EIA) laws and regulations, enforcement of environmental audit requirements, preparation of environmental protection plans and enforcement of environmental protection orders, as well as closure of premises where violations occur.[176] The Director is also responsible for the administration of the Atomic Energy and Biosafety Acts.[177]

The Act also empowers the Minister to designate some public officers as environmental inspectors.[178] The main responsibility of Environmental Inspectors is to "monitor and enforce measures for the protection of the environment and for the prevention and abatement of pollution."[179] The functions of Environmental Inspectors include administration, monitoring and enforcement of environmental management, and pollution prevention and abatement of

[172] Section 6 of the Biosafety Act.
[173] Section 8(3)
[174] Section 9(2)(b)
[175] Section 9.
[176] Section 72
[177] Section 4 of the Biosafety Act provides that the "Act shall be administered by the Minister responsible for Environmental Affairs and such other officers subordinate to him."
[178] Section 45.
[179] Section 45.

measures.[180] The EMA thus gives Environmental Inspectors far-reaching powers which make them amenable to judicial review.

The responsibility of environmental management at local authority level falls within the mandate of Local Councils. The District Development Committee is charged with the responsibility of coordinating environmental management activities of lead agencies and non-governmental organizations.[181] Environment management functions of Councils include sanitation and waste management, pollution control, nuisance control and control of hazardous material. The idea behind decentralized environmental management is to ensure enhance community participation in environmental governance through devolving administrative authority at local authority level.[182]

One of the cardinal principles of good administration is that those who make decisions should have "legal authority for their actions".[183] This study reveals, however, that compliance with legislation is not a simple matter in practice. While the mandates of various environmental agencies appear clear on paper, the situation is more complex on the ground. Public officers sometimes fail to appreciate statutory powers must only be performed by those who have statutory power to do so. The involvement of 'informal' actors in rule application processes (albeit behind the scene) also adversely impacts on the legality of decisions. The case of *The State v The Secretary For Environment and Climate Change Management, exparte Vijay Kumar on Behalf of the Members of the Plastic Manufacturers Association of Malawi*[184] (The Thin Plastics Ban Case) illustrates the above point.

On 13 April 2013 the Secretary for the environment made a decision to ban the, production, importation and distribution of thin plastics. Through a newspaper notice the Secretary informed the general public that from the 30th June 2014 it would be illegal to produce, use thin plastics. The notice indicated that non-compliance with the ban is an offence punishable by law. Surprisingly, the notice makes no reference to a specific provision of the law that authorized the Secretary to ban thin plastics. In response the manufacturers of thin plastics appealed to the Minister who extended the ban to 30 June 2015. It is not clear what the legal basis of the appeal was. Neither was it clear what law authorized the Minister to extend the

[180] Andrew Le Sueur and Maurice Sunkin (1997), Public Law, (Longman) p528.
[181] Section 19.
[182] Ministry of Local Government (2012), Decentralized Environmental Management Guidelines, MOLGLD, January 2012.
[183] The Judge over your shoulder (1994), p 7
[184] Judicial Review Cause No.54 of 2014.

ban. It is also alleged that the manufacturers appealed to the Head of State. The Secretary subsequently issued another advert that the ban was still effective and enforcement action would commence.

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.

The ban has since been given effect, but the case is still in court. However, a number of observations may be made. First, this case raises multiple questions of illegality given that the public officials involved in this case are not able to point at a law that authorizes them to act in the manner they purportedly acted. In fact, the respondent's advice merely states that "the ban is an implementation of a policy issue that affects a wider group than the Applicants and has been a subject of sustained consultations between Government and all stakeholders prior to" its implementation. This does not respond to the question whether the EMA authorises the Secretary of Environmental Affairs to impose a ban on thin plastics. Interestingly, the Applicant's affidavit also fails to raise this issue as an aspect of illegality and concentrates on whether the Secretary's action to reverse the extension for the commencement date of the ban was legal. This is problematic considering that both the Minister and Secretary do not seem to have any legal basis for the powers they used in this case. The use of informal appeal structures by plastic manufacturers also raises questions of legality.

Another classic demonstration of illegality is the case of *The State v Parliament (Parliamentary Committee on Natural Resources, Environment and Climate Change) and others, ex-parte Stephen Phiri*.[185] The applicant in this case acquired hardwood which he wanted to export to China. The Department of Forestry duly granted him a Forest Produce Export Licence to export the same. The applicant subsequently cleared export duty for the consignment and embarked on the process of exportation of the wood to China. However, the consignment was stopped at the Mozambique Border on the basis that the Parliamentary Committee on Natural Resources, Environment and Climate Change had issued a verbal suspension on all hardwood exportation licences. In response, 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. The Director sought approval for the waiver of the ban from the Principal Secretary, which was duly granted.

[185] Judicial cause No.20 of 2015

However, MRA and Forestry officers at the Border refused to comply with the directive of the PS. The applicant commenced judicial review proceedings against the above defendants. The Court quashed the ban on the basis that the Parliamentary Committee had no power to make such an order. The judge also ruled that the decisions of the Forestry and MRA officers were unreasonable. This case obviously involved multiple breaches of section 43 of the Constitution.

Another worrisome trend that this research found was that sometimes courts condoned illegal conduct by environmental agencies by reference to what can be termed "necessary illegality". This has the potential to undermine the entrenchment of a culture of legality. The case of *Diab Properties Ltd and Lilongwe City Council v Rui Francisco,*[186] illustrates this point. Rui Francisco applied for an injunction against Lilongwe City Council to order Diab properties to stop constructing a shopping complex pending judicial review proceedings. One of the grounds of the application was that Diab Properties had not conducted an environmental impact assessment before the commencement of the project. The Court, however, set aside the injunction on the basis that failure to conduct an EIA was not so fatal to warrant the demolition of the complex. The Court took account the fact that Diab Properties had invested K20 Million Kwacha in the project and that it would be imprudent to throw that money down the drain. The Judge observed as follows: " a reasonable state institution would first weigh the overall investment benefit to the nation before condemning DPL."[187] He concluded that the social and economic benefits of the project far outweighed the inconvenience that Rui Francisco would suffer.

It is obvious from the above 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 favour of a developer who had clearly broken the law.

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. The case of *Ismail Khan and Kamulepo Kalua v African Parks Network Limited*

[186] HC, Misc. Civil Cause No. 10 of 2003.
[187] Page 7 of the Transcript.

a*nd others*[188] 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. The translocation exercise had received endorsement from the government and some traditional leaders. 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. 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 if the elephants were translocated. The court vacated the injunction. In the process, it 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. The Court held that the 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."[189] 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."[190] The Court also dismissed the contention that an environmental impact assessment was supposed to be conducted before translocating the elephants. 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. 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."[191]

It should be noted that the Judges 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. However, it does not require the Minister to specify and gazette areas for which EIAs should be conducted. In any case, the translocation of elephants Phirilongwe clearly fell within the provisions of the *Environment (Specification of Projects*

[188] High Court Civil Cause Number 1185 of 2005 (Unreported).
[189] P14 of the Transcript; 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."
[190] P14 of the transcript.
[191] P14 of the transcript.

Requiring Environmental Impact Assessment) Notice.[192] 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 or protected areas.

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. Unsurprisingly, some respondents felt that 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. In this regard the respondent observed as follows:

> *"I attended the hearing, but the judge summarily vacated our application for an injunction without any reference to the need for an EIA as stipulated in the Environmental Management Act, upon which we had based our submission. To me, it looked like it had all been predetermined and nothing we could do would shake them - much to my profound sorrow."*[193]

4.3. Processes and mechanisms

The principles of legality and procedural propriety require that environmental agencies must comply with procedures stipulated in the Constitution, enabling statutes and regulations when applying rules. Where applicable agencies must also apply procedures provided by the common law. Failure to do so exposes public officers to challenges of illegality and procedural impropriety.

However, failure to pay attention to the meaning of rules was evident from this study. It is not uncommon for agencies to adopt procedures that do not are not in compliance with required procedures. The EIA approval process is a case in point. Section 25 of the Act gives the Director the responsibility of recommending EIA approvals to the Minister. However, this study established that in practice EIA reports are reviewed by the TCE which sends its recommendations to the NCE. The reports are then referred to the Minister after approval by NCE. This procedure raises questions of legality. According to EIA Guidelines, TCE members are entitled to participate in the EIA process and "recommend courses of action to

[192] G.N. 58/1998.
[193]

the Director." [194] 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."[195] The statutory responsibilities to regulate the EIA process are conferred on the Director and the Minister. The TCE and NCE are only supposed to perform advisory roles. Failure to pay careful attention to the meaning of the Act and the Guidelines leads to the above illegality. Moreover, the guidelines are vaguely drafted and not well aligned with the EMA.

Serious lapses of procedural propriety were also evident from the study. In *The State v Lilongwe Town Planning Committee &Ors ex parte Mirza, [196]* the government designated a certain area in Lilongwe as new City Centre and indicated that land would be available for lease. Applicant applied for a lease of part of the land and the City Council allocated the land to him. He incurred K18 million on the development of the land and US48000 on consultants. When he 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. In the interim he was still required to pay ground rentals. Subsequently, after persistent reminders, he was allocated a smaller plot in a different location. He commenced proceedings against the City Council. It was held that the function of the Court was to ensure that lawful authority is not abused by unfair treatment. 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 60 months amounted to procedural impropriety towards the applicant meriting reversal of the decision of the City Council. Similarly, the judge ruled that the decision to defer making a decision for five years was unreasonable and in bad faith. Justice Chombo held that the 1st respondent had the right to defer making a decision in accordance with Section 37(3) of the Town and Country Planning Act. However, the impropriety was characterised by "failure to inform the applicant of the progress of the application and the likely date on which the decision will be taken." [197] The Judge also classified other forms of conduct on the part of the defendants as procedural impropriety. These includes failure to consult or notify the Applicant before allocating a new plot to him and collecting land rentals from him prior to making a decision. [198]

[194] Paragraph 2.1. The participation may include: reviews of Project Briefs, EIA ToRs and EIA reports, and development of project approval terms and conditions. http://www.sdnp.org.mw/enviro/eia/chap2.html
[195] Paragraph 2.1
[196]
[197] Page 9 of the transcript.
[198] Page 10 of the transcript.

Another case that raises triable issues relating to procedural propriety is *Diab Dairy Farming Ltd vs Lilongwe Water Board and Attorney General*. [199] In 2005 the plaintiff purchased land for purposes of dairy farming from the District Commissioner Lilongwe. In order to get authorization for the establishment of the farm he engaged consultants to conduct an EIA. The Minister of Environmental Affairs issued an EIA certificate in favour 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 defence 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?"

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

4.4 Public participation in rule application

4.4.1 Current state

Principal 10 of the Rio Declaration urges the state to facilitate public awareness and public participation in environmental decision making. This requirement is also contained in international agreements that are binding on Malawi.[200] Courts have also emphasized the importance of citizen participation in decision making processes. In the *State v Blantyre City*

[199] Commercial Case No. 29 of 1992.
[200] Article 4(1) of the United Nations Framework Convention on Climate Change; Article 14(a) of the Convention on Biological Diversity; Article 3(a) and (c) of the Desertification Convention.

Council, ex parte Ngwala, Justice Mwaungulu emphasized the "importance and the need for public officials, performing public functions and exercising public power to afford citizens, notwithstanding public interest concerns, a hearing or some audience, when making decisions critically affecting citizens rights."[201]

The EMA contains a number of provisions that aim at facilitating public participation in rule implementation and other administrative decision making processes. These include section 3 (2) which obliges persons required under written laws to exercise environmental management functions to take such steps and measures aimed at promoting public participation in the implementation of environmental policies. Section 25(3) stipulates that EIA reports shall be open for public inspection. This is to facilitate public participation in the EIA process. Subjecting EIA reports to public inspection ideally invites interventions from the public on the proposed project. Section 26 (1) of the EMA, which obliges the Director of Environmental Affairs to invite written or oral comments from the public upon receiving an EIA report. Section 26(1)(a) gives the Director discretion to conduct public hearing in order to assess public opinion. Section 32 of the EMA empowers the Director to declare any area of Malawi to be an environmental protection area. But the section obliges the Director to consider representations from persons with sufficient interest in a particular area and the interests of local communities in or around the area before taking that measure.[202] Failure by decision makers to comply with the above requirements may conceivably render their actions subject to judicial review.

However, the EMA falls short of fully domesticating Principle 10 of the Rio Declaration. It does not provide for a robust right of access to information, which is intricately connected to and instrumental for effective public participation. There is no general right of access to information clause under the EMA. Section 52 only provides for access to "*information submitted to the Director or any lead agency relating to the implementation of the provisions of this Act or any other"* environmental management law. This raises questions as to whether there is a right of access to information that has not been submitted to the Director. The right of access to information under the EMA is also restricted. Specifically proprietary

[201] Page 1 of the transcript.
[202] Section 32(2)(a) and (g).

information can only be accessed if the owner of that information gives prior written consent.[203]

This is surprising considering that access to information is a constitutional right in Malawi.[204] Section 37 of the Constitution provides that *"Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights."*

While commentators have lauded the inclusion of this right in the Constitution, they have highlighted a number of problems relating to the way section 37 is couched. First, the section restricts the right of access to information to state held information. There is no Constitutional right of access to information to information in the custody of private entities. Second, access to information can only be guaranteed where it can be shown that the information in question is necessary for the exercise of the rights of the person seeking those rights. This means that it would not be easy for individuals and groups wishing to champion public interest causes to obtain information under this provision. Third, the absence of a mechanism for enforcing the right of access to information renders section 37 illusory and practically ineffective. Accordingly, the commentators argue for the enactment of legislation to give practical effect to the right of access to information. The legislation would provide for more detailed and concrete provisions on access to information as well as foster the development of guidelines to facilitate access to information.[205]

Sectoral laws also provide for public participation in environmental rule application processes.[206]

In practice, however, there seems to be reluctance to embrace the notion of public participation fully. While the law provides an enabling framework community participation-

[203] Section 52(2) : "No person shall be entitled to have access to proprietary information (to which the Trade Mark Act or the Patents Act applies) submitted to or received by the Director under this Act unless with the prior written consent of the owner of the proprietary information."

[204] Section 37 of the Constitution stipulates that every person has the right to access information held by the State and its organs if such information is necessary for the exercise of his or her rights.

[205] CEPA (), Policy Brief: Enhancing Access to Environmental Information and Justice, (Centre for Environmental Policy and Advocacy, p 2

[206] Part IIIA of the National Parks and Wildlife Act provides for local community participation and private sector involvement in conservation and management of wildlife. Similarly, othe responsibilities of the Director of Forestry include promoting participatory forestry and facilitating the formation of village natural resources management committees [section 5 (d) and (e) of the Forestry Act; Part III of the Fisheries Conservation and Management Act, provides for local community participation in conservation and management of fisheries in Malawi. Fisheries Conservation and Management Rules provide for the establishment of Beach Village Committees whose duties include fisheries conservation and management.

the state seems reluctant to entrust the communities with full responsibility. A number of factors hamper public awareness in rule application processes. These include inadequate access to information on the part of community members,

The field of EIA presents an interesting case study for the nature and quality of public participation in rule application. This is because EIA is an important tool in environmental management. The reason why Section 25(3) stipulates that EIA reports shall be open to the public for inspection is to ensure that the public participates in EIA decisions.

In practice, the duty to conduct public consultation falls on EIA consultants. However, there was a general understanding on the part of respondents from EAD that there is a mandatory duty to make EIA reports open to the public. The respondents also understood that the Director has a duty to invite comments from the public and discretion to conduct public hearings. The idea is to ensure that public concerns have been addressed in the report and to validate the EIA reports. When asked whether the public is actually engaged in prcactice, the respondents noted that public consultations are routinely done. But public hearings are discretionary.[207] The respondents also noted that the Director normally uses newspapers of wide circulation to solicit public comments.

However, there is evidence from this study suggesting that in practice public participation in the EIA process is very limited and characterised by lack of meaningful engagement. A number of reasons were advanced by the respondents. Among the factors that hamper public participation is the limited public awareness of EIA processes. For example, the EMA requires projects for which EIA is mandatory to be published in the Gazette. However, it is difficult to imagine how the majority of Malawians who have no access to the Gazette come across this vital information. The Gazette is also not widely circulated in Malawi.

Other factors that undermine meaningful engagement by the public in the EIA process include the tendency for local traditional leaders to dominate the discussions and thereby effectively suppressing the views of most ordinary people. The democratic credentials of traditional leaders as representatives of public opinion are also questionable. Meaningful engagement in consultation processes is also hampered by high illiteracy on the part of community members and the complexity of environmental issues. This is exacerbated by the fact that community members are not given enough information on the possible impacts of particular projects.

[207] Examples, were given of intensive public and nationwide consultations that were done in relation to the Kayelekera Uranium and Kanyika Nobium mining projects. These consultations involved government officials. The respondents from EAD also claimed that EIA reports are placed in strategic places for the public to view.

Respondents also noted that sometimes there is donor or political pressure to speed up the EIA processes, even where it is not technically feasible to do so. This sometimes undermines public participation. The strict deadlines that some donors and development banks give for the commencement of their projects effectively leave little time for engaging the public.

Respondents who had previously consulted the public on the Atomic Energy Bill highlighted how meaningless public participation can be on technical issues characterised by scientific complexity. Similarly, the Biosafety registrar recently requested for public submission on the general release of Biotech Cotton. It was difficult for the public to engage because of the complexity of the issues involved.

This study also found evidence of methodological, procedural and political challenges that undermine the quality of participation. These include the criteria for inclusion and exclusion of the members of the public to be consulted. Within the environmental sphere there is a tendency to invite like-minded people for public consultations. Similarly, environmental agencies place too much reliance on dominant NGOs and traditional leaders. This obstructs new voices from contributing to environmental management.

4.4.2 Recent legal developments

The EMA, 2016, has recognised the shortfalls in the existing law relating to public participation. It contains a stand-alone provision that seeks to strengthen public participation in environmental decision-making processes. Section 5 of the EMA, 2016, explicitly makes provision for public participation in environmental management. The section imposes a number of duties on the authority aimed at ensuring effective public participation in environmental management. Specifically, the Authority has the obligation to promote the right of access to information and impose a duty on lead agencies, the private sector and NGOs to provide such information in a timely manner. The Authority also has a duty to promote direct or indirect public participation in environmental decision-making processes.

6. ADJUDICATION OF ADMINISTRATIVE DISPUTES

6.1. Actors and roles

The general mandate to interpret and settle environmental disputes is given to the judiciary. However, some laws provide for possibilities of internal adjudicative mechanisms and administrative appeals. For instance, Section 69 of the EMA establishes an Environmental Appeals Tribunal (the "Tribunal") which is supposed to consider appeals against the decisions

of the Minister, Director or Inspector under the EMA.[208] The provision establishes the which is a quasi-judicial body comprising a Chairperson who is suitably trained and qualified in environmental management and two other persons who are sufficiently qualified in environmental management. The Chairperson and other members are supposed to be appointed by the President on the recommendation of the Minister.[209] The Tribunal is mandated to handle appeals against any of the following—(a) actions or decisions of the Minister, Director or inspector Act;(b) the rejection of licence applications by the Minister or Director;(c)the revocation of licences issued by the Minister or Director;(d) the closure of premises. The Tribunal is also mandated to handle such other issues relevant to environmental management and sustainable use of resources as may be referred to it by the Director or other persons.

The Tribunal, however, has not been established despite passage of 18 years since the EMA was enacted. The reasons for this status quo are not clear. Some commentators, however, attribute the non-establishment of the tribunal to resource constraints. Considering that this is speculative and warrants further investigations, the present study sought out to determine the reasons for the non-establishment of the Tribunal.

Another administrative appeal mechanism is found in section 5(2) of the EMA which gives any person who believes that his or her right to a clean or healthy environment has been violated the option of filing a written complaint to the Minister instead of commencing High Court proceedings. The provision requires the Minister to institute an investigation into the matter complained of within thirty days from the date of the complaint. The Minister is also obliged to respond to the complainant within the same period "indicating what action the Minister has taken or shall take to restore the claimant's right to a clean and healthy environment." The Minister's actions may include instructing the Attorney General to take appropriate legal action.

A major drawback of this provision is that this procedure is only accessible to those who have reasons to believe that their rights have been violated. It does not accommodate those who may want to file an appeal in the public interest.

[208] Section 33(4), for instance, gives the any person aggrieved with an environmental protection order the right to appeal to the Tribunal; The Tribunal is also entitled to hear disputes relating to the collection of samples and laboratory testing of samples by inspectors.
[209] Section 70 of the EMA.

Moreover, the Section 5(2) procedure seems to have been of little value to Malawians because there appears to be no record of its use. This study therefore sets out to investigate why this is the case.

6.2 Processes

6.2.1. Public participation in the adjudication process

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 adjudication process.[210] 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 An important issue, once thought settled, that is again controversial 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. 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. This makes it difficult for public-spirited individuals/entities "of all sizes and resource levels" to challenge unfair rules and raise them for public scrutiny in the absence of liberalized standing decisions.

rules as well as reasonably accessible and low cost access to courts.[211] The standing requirement may, therefore, 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, natural or legal, with sufficient interest in the promotion, 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 the Government to ensure the promotion protection and enforcement of those rights and the redress of any grievances in respect of those rights."

[210] Wendy Wagner (2012), "Revisiting the Impact of Judicial Review on Agency Rule-makings: An Empirical Investigation," 53 William and Mary Law Review 1732.
[211] Wendy Wagner (2012), "Revisiting the Impact of Judicial Review on Agency Rule-makings: An Empirical Investigation," 53 William and Mary Law Review 1717.

Section 5 of the EMA provides for the right to a clean and healthy environment. It also stipulates that for purposes of enforcing this right, "any person may bring an action in the High Court."

Commentators seem to disagree on the meaning of the above provision. The major bone of contention is whether the provision allows for a fairly flexible approach to *locus standi*. One school of thought argues that the flexibility of the wording of this section would embrace persons who have not suffered direct violation of the right to a decent environment. Public-spirited entities, including environmental NGOs, may consequently be allowed to commence proceedings under this provision.[212] Conservative scholars, however, contend that the way the provision is currently "drafted raises serious doubts as to whether indeed environmental NGOs can have *locus standi* to bring an action where no directly affected individuals come forward to commence legal proceedings."[213] Proponents of this school contend that the words "any person" in this section have a hidden meaning. As a result judges may adopt a common law interpretation which might restrict the meaning of the words 'any person' to " a person who has suffered harm."[214]

The above doubts are reinforced by the fact that the original draft of the EMA Bill provided for the right to enforce the right to a clean and healthy environment without the need to establish standing. The provision was revised due to concerns by senior government lawyers that removal of the standing requirement from the Bill would open floodgates of litigation and eventually clog the court with cases.[215] Tracy Dobson argues that the inclusion of a restrictive standing clause in the EMA potentially stifles the participation of interest groups in the adjudication process because it places the sole responsibility of enforcement of environmental regulations on government. She argues that this is problematic considering that "government enforcement of environmental regulations is extremely limited and viewed with great hostility by local people."[216]

However, the only judicial interpretation of section 5 seems to indicate that courts may be willing to interpret this provision liberally. In *The Administrators of the Estate of Dr H*

[212] Ralph Kasambara (2002), 'Public Interest Litigation Under the EMA of Malawi: Challenges and Opportunities,' in Approaches to Environmental Litigation and Advocacy in Southern Africa, IUCN-ROSA Handbook, series No.3 2002, p39at 41.
[213] Ngwira and Banda, p 27; Makawa, p173
[214] G.Z Banda, p
[215] Tracy Dobson (1997-98), p163.
[216] Ibid, p164.

Kamuzu Banda v The Attorney General, [217] Justice Chimasula held that the right to a clean and health environment was not localised and the words 'any person' should be interpreted liberally. 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."[218]

While justice Chimasula's position represents a progressive approach to standing. Justice Chimasula's position represents a progressive approach to standing. This approach has been incorporated into the recently enacted revised Environment Management Act (EMA, 2016). 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. In order to ensure that this right is realised in practice, the 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.[219] 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 injury.

The subsection contains two proviso aimed at avoiding floodgates of litigation. These are that the legal action must not be frivolous and vexatious and must not be an abuse of court process.[220]

The EMA, 2016 is not yet in force and cannot be invoked in a court of law. 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

[217] High Court Civil Cause No. 1839 (A) of 1997.
[218] Page 17 of the transcript.
[219] Section 4(4)
[220] Section 4(5)(a) and (b)

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. *The Administrators of the Estate of Dr H Kamuzu Banda v The Attorney General,* still remains the best precedent that environmental activists can rely on in order to promote the right to a clean and healthy environment. The decision of the Supreme Court in the Case of *Civil Liberties Committee v The Minister of Justice and Registrar General,*[221] 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.[222]

An alternative mechanism which would have facilitated public participation in the adjudication process would have been the Environmental Appeals Tribunal. This is especially because it presents a cost effective alternative to litigation which is generally costly and time consuming. However, as observed above the Tribunal has not been operationalized after almost two decades of its establishment. The reasons why it has not been made operational are not yet clear. But it would appear that there is no political will on the part of government to set it up. This is evidenced by the fact that in the 2007/2008 financial year parliament allocated MK60000 to the Tribunal. This was described by commentators as 'mockery' considering its expected composition and mandate.[223]

6.3 Judicial review and its impact

Commentators have noted that the "impact of judicial review cannot be isolated from the purpose ascribed to it."[224] In this regard, court decisions are an important source of primary data on the purpose of judicial review. 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.

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[221] M.S.C.A., Civil Appeal No. 12 of 1999.

[222] "It is the view of this court that the appellant is unable to establish locus standi even upon a liberal interpretation of the term sufficient interest recommended in the World Development Movement case…There are other organizations which could, in our view, successfully show that they possess the required sufficient interest in the subject matter or outcome of the present action. The proper organizations would include the Media Council of Malawi, the National Media Institute of Southern Africa (Namisa) and the Journalists Association of Malawi (Jama). These organisations, unlike the appellant, are specifically concerned with the rights and freedoms relating to the press, and we are of the view that such organizations could successfully claim sufficient interest in terms of section 15(2) of the Constitution." Tambala J

[223]

[224] Cane, p12.

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.[225] 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.[226] Judicial review also aims at controlling executive action in order to ensure that public officers act legally, rationally and follow proper procedures.[227] 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.

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.

Against this backdrop, this study set out to inquire whether indeed judicial review achieves what the judges and commentators claim to be its objectives and purposes. To investigate whether judicial review had any impact on the practical operations of environmental agencies we asked the respondents the following questions: whether the prospect of judicial review influenced public officer to adjust their behaviour 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. 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.

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[225] *Gable Masangano v Attorney General and Others*, [2009] MLR 171; Du Chisiza v Minister of Education and 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.

[226] 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

[227] Chawani v The Attorney General [2000-2001] MLR 77; The State v The Director of Public Prosections and another , exparte Dr Cassim Chilumpha, Misc. Civil Cause No 315 of 2005 (Justice Ansah).

Generally, this study found mixed findings relating to the impact of judicial review. 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.[228]

Respondents who viewed judicial review positively highlighted both the direct and indirect impacts of judicial review on the behaviour of public officers. These respondents generally observed that judicial review not only influenced the behaviour of public officials directly involved in particular disputes but also indirectly affected the behaviour 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 behaviour of individual public officers. Public officers observed that they generally complied with court decisions, save for cases that have wider political ramifications.

As regards 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. 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 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.[229] In this regard, this study found evidence of environmental agencies rethinking their decisions after judicial review challenges. For instance, the Department of Environmental Affairs

[228] 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.[228] Broadly, the responses can be categorised 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 Halliday, p79).

[229] Cane, p 11.

promulgated the Environment Management (Plastics) Regulations, 2015, 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. 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. 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. The courses, which were facilitated by Judges, the office of the Solicitor General and academics, were described as very helpful by respondents. 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 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.

Notwithstanding the above, this study found that individual public officers sometimes failed to adjust their behaviour in compliance with court decisions because they were subject to diverse influences and pressures from several sources. 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 behaviour of some bureaucrats. For example, some technocrats have developed a negative attitude against judicial review and view is 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 fulfil the technical requirements that would help them avoid judicial review challenges.

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 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.

6.4 "Administrative soup of influences"

It would be intellectually naive to regard judicial review as the only factor that impacts on 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."[230] The factors that determine the bureaucratic behaviour are multiple and multifaceted. Sunkin terms these factors "an administrative soup of influences in decision-making."[231] A major challenge for researchers who want to determine the impact of judicial then becomes how to determine the relative significance of judicial review in influencing agency behaviour. A study of the impact of judicial review would thus not be complete without considering other factors that influence decisions of public officers.

Against this backdrop, this study found that political considerations affect the rate and direction of rulemaking more than judicial considerations. 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.[232]

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[230] Peter Cane, p18.

[231] M Sunkin, 2004, 'Issues in Researching the Impact of Judicial Review' in M Hertogh & S Halliday (eds) Judicial Review and Bureaucratic Impact, (Cambridge University Press)),p 43 at 71.

[232] 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.

Political patronage, pressure and interference were also cited among the major factors that undermine the ability of public officers to effectively apply environmental law.[233] Most respondents noted that pressure from politicians was one of the major obstacles to compliance with principles of administrative law. The areas that are most prone to political interference include the granting of approvals, licences, permits and concessions.[234] Similarly, respondents observed a worrisome trend whereby persons aggrieved by decisions of designated duty bearers lodged appeals with Ministers or even the office of the Presidency. This exposes such duty bearers to political pressure.[235]

Other factors that were mentioned as adversely impacting on 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. 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." [236] However, environmental Inspectors fail to monitor compliance with EIA conditions because of inadequate financial capacity and technical capacity. Accordingly, it is not uncommon for projects to reach completion without being monitored. Resource constraints at national and local levels thus undermined the ability of environmental agencies to perform their statutory duties.

CONCLUSIONS AND RECOMMENDATIONS

This study set out to examine the map of environmental agencies in Malawi and to determine how these agencies make rules, apply rules and adjudicate on disputes. It also set out to examine the nature and extent of public participation in rule making, application and adjudication. The study also examined the role and impact of judicial review in environmental

[233] 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.

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

[235] In this context one respondent noted: "unless our politicians appreciate the value of the environment in Malawi, we are heading nowhere."

[236] Paragraph, 2.2.4.

governance and to suggest possible reforms to the system of environmental governance in Malawi. The following section summarises the findings and recommendations of this study.

(a) 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 characterised by a multiplicity of lead agencies that govern various sectors of the environment. These agencies have jurisdictional overlaps and inconsistent mandates. Their legal frameworks are characterised by gaps, conflict of mandates, and duplications which hamper the overall effective enforcement of environmental law.

The Environment Management Act was enacted in 1996 to provide an overarching legal framework for environmental management in Malawi and to create institutions to coordinate environmental management in Malawi. The principal institution for coordinating environmental management in Malawi is the Environmental Affairs Department headed by the Director. This office, however failed to effectively perform its coordination role because it remains weak and lacks the requisite autonomy as well as .political clout to coordinate rulemaking, application and adjudication functions. A lot more needs to be done to ensure the effective coordination of environmental management in Malawi.

(b) The current institutional framework in Malawi inadequately supports coherent rulemaking, application and adjudication because of weak cross-sectoral coordination. This problem is exacerbated by the fact that the current structures for coordinating environmental management, including the NCE are hardly doing what they are mandated to do

(c) The current legal framework for environmental management attempts to create a legal framework for stakeholder participation in environmental rule-making, application and adjudication. However, it falls far short of creating systems for meaningful engagement of stakeholders in the rule-making and application processes. For example, the law contains no mechanisms for ensuring the incorporation of stakeholder views in the rule-making and application processes. The legal framework also places too many restrictions to access to information in the environmental arena. Neither does it create a system for ensuring that stakeholders participate in environmental adjudication without being barred by standing rules. Another major weakness of the current legal framework is that it concentrates too much power in central government institutions and inadequately devolves some functions to local level institutions.

(d) One tool for promoting access to environmental accountability is judicial review. 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.

(e) 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 taken. This confirms earlier studies that judicial review leads to more bureaucracy, a greater attention to detail, and a greater role for lawyers within government.[237]

Worse still, some agencies viewed court decisions negatively to the extent that and raised questions as to why their technocratic autonomy should be encroached upon by judges who had limited knowledge of environmental science and management.

(f)There are a number of factors that tend to undermine the development of a culture of legality, rationality and procedural propriety in environmental agencies. These according include outdated 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.

Against this backdrop, this study makes the following recommendations:

(a) It would be critical for the law to create a strong statutory framework that would facilitate coordinated environmental management, stakeholder participation and effective rulemaking, application and adjudication. There is thus a need to create a strong and autonomous institution for coordinating environmental management in Malawi. This would be in line with the National Environmental Policy which stipulates that "environmental management needs a powerful voice not only for advocacy for environmental protection and conservation, but also to ensure effective cross-sector coordination. This can best be achieved through establishment of a high level institution within the government administrative structure. It accordingly calls for the establishment of an environmental affairs institution which "shall be a professional body whose decisions are beyond political or business interference or manipulation." [238] In consideration of the perennial problem of political interference in

[237] Le Sueur and Sunkin (1997), p98.
[238] Clause 4(1)(d) of the Policy

the operations of environmental agencies the policy rightly calls for the creation of "an autonomous professional body that can compel lead agencies to comply with their mandates and enforce cross-sector environment and natural resources policies. Such a body should be appointed by and report to the highest political office to ensure political visibility and authority."[239] The establishment of the National Environmental Protection Authority under the EMA (2016) may be a step in the right direction.

(b) The need to operationalize the Environmental Appeals Tribunal is imperative. The current setup where aggrieved persons informally lodge appeals with the Minister and the Head of State is problematic in that it opens room for political interference in the application of rules.

(c) There is need to build capacity in administrative law at all levels. Government should take a keen interest in the professional development of its workers.

(d) There is also an urgent need for the law to create mechanisms for facilitating active participation of local communities and other stakeholders in environmental management. The law should create mechanisms for ensuring the consideration of views of stakeholders in final decisions. Mechanisms should also be provided for providing ensuring accountability and provision of feedback to stakeholders. The law should also be amended in line with the policy which calls for a broad rule of legal standing (locus standi) to empower persons or institutions to take legal action *even if they cannot show injury or loss to them arising from the subject matter of the action.*

(e) The law should provide for more decentralisation of environmental management and eliminate dual reporting structures at local authority level.

(f) There is need for harmonization of environmental law to eliminate overlaps, duplications and conflicts of mandates.

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