

# ADMINISTRATIVE LAW AND GOVERNANCE IN EAST AFRICA PROJECT CASE STUDY: TAXATION IN MALAWI

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## Table of Contents

1.	Introduction.....	1
2.	Administrative Law and Taxation in Malawi: Background and Context .....	2
2.1	Pre-colonial and Colonial Period and the Administration of Tax.....	2
2.2	Independence Era (1964- 1994) and Tax Administration.....	3
2.3	The Democratic Era and the Institutional Framework of the Malawi Revenue Authority.....	5
3.	Research Objectives and Methodology .....	8
3.1	Study Objectives .....	8
3.2	Research Questions.....	8
3.3	Study Design and Approach.....	8
3.4	Research Data Tool for Qualitative Research .....	9
3.5	Data Analysis.....	9
4.	Research Findings .....	10
4.1	Rule- Making.....	10
4.2.1	Legality in Rule- Making.....	11
4.2.2	Procedural Fairness in Rule-Making .....	15
4.2.3	Reasonableness in Rule -Making.....	16
4.2	Rule-Application.....	17
4.2.1	Legality in Rule Implementation .....	18
4.2.2	Procedural Fairness in Rule Implementation .....	21
4.2.3	Reasonableness in Rule Implementation .....	23
4.3	Adjudication of Disputes .....	25
4.3.1	Legality in Adjudication.....	25
4.3.2	Procedural Fairness in Adjudication .....	27
4.3.3	Reasonableness in Adjudication.....	32
4.3.4	Contextual issues.....	32
4.4	Nature and forms of public participation in rule making, implementation and adjudication processes .....	32
4.4.1	Administrative Autonomy and Public Participation in Decision- Making .....	32
4.4.2	Direct and Indirect Public Participation .....	34
4.4.3	Processes of Public Participation in Revenue Decisions .....	35
4.4.4	Access to Information on Revenue.....	39
4.4.5	Gender Considerations in Public Participation .....	40

4.5	The Role and Impact of Judicial Review on the functions of Malawi Revenue Authority...	41
5.	Summary of Key Findings and Recommendation.....	43
5.1	Rule-Making.....	43
5.2	Rule Application.....	44
5.3	Adjudication.....	44
5.4	Public Participation .....	45

CASE STUDY: TAXATION IN MALAWI

**1. Introduction**

The attainment of democratic governance requires that the institutions of governance abide by various constitutional and administrative law principles that further transparency, openness, accountability and the rule of law. With regard to administrative law, the principles of legality, reasonableness, and procedural fairness in rule-making, implementation and adjudication ensure that the quality of decision making furthers democratic governance. The case study focuses on an administrative agency that is responsible for collecting revenue in Malawi, the Malawi Revenue Authority (MRA). The agency has been given powers under law to make and apply rules, investigate and adjudicate disputes. The Agency interacts directly with the citizenry and makes decisions that affect the general populace. It is therefore pertinent that the revenue agency abides by administrative law principles in the exercise of its powers and conduct of functions to promote good governance.

It is noted that the implementation of revenue laws by the Malawi Revenue Agency raises pragmatic challenges that relate to the effective implementation of administrative law principles. With regard to agency rule making, the issues of concern relate to the balance between technocratic autonomy and meaningful engagement of the general citizenry in rule making; a balance between technical and political decision making and meaningful engagement with the citizenry in the light of the complexity of revenue laws. With regard to rule implementation, issues of concern relate to how the agency ensures that there is meaningful engagement in rule implementation and whether there is demand for good governance in revenue administration by the general citizenry in this democratic era in Malawi. With regard to adjudication, the issues of concern relate to how the Agency protects the privacy of an individual tax payer and ensure that there is public participation in adjudication process to advance accountability, the plethora of adjudicating bodies and how the general public engages with the various mechanisms. There is dearth of literature on rulemaking, implementation and adjudication practices of the Malawi Revenue Authority and hence subjects of inquiry in this case study.

## 2. Administrative Law and Taxation in Malawi: Background and Context

### 2.1 Pre-colonial and Colonial Period and the Administration of Tax

The section presents a historical context of taxation during the pre-colonial, colonial and post colonial period. The focus is on the extent to which revenue rule-making, implementation and adjudication processes were inclusive of administrative law principles to further good governance in the different historical periods. There is dearth of information on the history of taxation in Malawi during the pre-colonial period (i.e., before 1891). Oral history, however, reveals that locals were paying some form of taxes to Tribal Chiefs who in turn provided them security from other invading tribes.<sup>1</sup>

Malawi was later colonised by the British after they had declared it a British Protectorate in 1891. During this colonial period (1891-1964), there was a form of tax called Hut Tax.<sup>2</sup> The British Commissioner, Sir Harry Johnston, used local chiefs who collected the tax through messengers.<sup>3</sup> However, the atmosphere under which this was done seems to have been an unhappy one, unilaterally-imposed, and devoid of public participation in policy-making. Baker stipulates that:

‘the British Commissioner “was a persuasive talker and was prepared to use force to “pacify” the country” and that “the collection of hut taxes was one of the evils [as] the messengers ill-treated the people. If any person delayed in bringing out his money he was tied up with his arms around his back. He was untied only if his wife and friend paid the amount due. Sometimes part of the money was stolen by the messengers....If any of those who were robbed dared which was heavily resisted by the locals as it was seen as a tool for oppression. In the 1890s, to go near the collector to complain was pushed away and beaten up by the messengers. If a person showed any sign of

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<sup>1</sup> Chiumya, C. 2006: “Counteracting Tax Evasion in Malawi: An Analysis of the Methods and a Quest for Improvement”, International Graduate School of Social Sciences, *Munich Personal RePEc Archive* (MPRA), 19 May, 2005

<sup>2</sup> A hut had three people and the annual tax was at six shillings per it

<sup>3</sup> Baker, C. 1975: “Tax Collection in Malawi: an Administrative History”, 1891-1972, *International Journal of African Historical Studies*, vol. 8, No. 1 (1975), <http://www.jstor.org/stable/217485>, accessed: 30-05-2016 1920 UTC

resistance to pay tax, even if such resistance should have somewhat been justified, then “some harsh methods-burning huts, manacling, and arresting wives-were used.”<sup>4</sup>

It is evident that the revenue rule-making processes were the sole domain of the executive and the citizenry was not given opportunity to bargain or participate in tax issues. However, it is also evident in this regard that there was a demand for good governance by the general populace as such forms of oppression were heavily resisted and there was no compliance. Such resistance was met by punitive sanctions.

By late 1930s, there was a change in the administration of tax as District Administrators oversaw tax collection and fostered its compliance. The District Administrators delegated their power to other personnel who did the actual collecting at various fora:

‘Tax clerks were stationed at markets and places of employment [and there was] constant checking on censuses and on the possession of tax receipts, tax drives, many of which were planned with the care of a military operation using district and native authority messengers, tax clerks and census clerks...to bring in as much as possible.’<sup>5</sup>

In 1963, however, the colonial government, realising that the Hut Tax had been inequitable, seeing as it had been levied without regard for wealth or ability to pay, passed the Income Tax Ordinance<sup>6</sup> in which the local government integrated Africans in the system. However, in that piece of legislation penalties were retained and exemptions generally restricted. Therefore, it is arguable that the change which the Ordinance brought was just a minimal one, if at all. Yet, it is remarkably notable that the integration of Africans into the system can be equated to affording African representation hitherto non-existent.

## **2.2 Independence Era (1964- 1994) and Tax Administration**

Malawi got its independence on 6<sup>th</sup> July, 1964. However, it appears that, although it now attained independence, it simply inherited the already-administratively-flawed colonial government which was characterised by lack of public participation and not much was improved. During this era, the responsible institution in administering tax was the Departments of Customs and Excise and Income Tax. It is noted that decisions on tax were

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<sup>4</sup> Supra

<sup>5</sup> Ibid., p. 58

<sup>6</sup> Ordinance No. 19 of 1962 (Zomba, 1963)

just being imposed on taxpayers. Comparing the colonial regime with that of Dr Banda, it is stated that:

‘The colonial period was characterised by paternalistic rule by the British colonial power. At independence, Prime Minister Banda took over this authoritarian system. Rather than trying to modify it substantially, he kept himself at the pinnacle and quickly installed a highly personalistic neo-patrimonial regime.’<sup>7</sup>

Supportive to that view is the observation that after independence, Malawi inherited a tax system in which personal and income taxes provided tax revenue.<sup>8</sup> Consequently, the people did not have a say in policy-making issues (which inevitably includes tax issues) under the one-party regime.<sup>9</sup> Banda’s Malawi exemplified the personal dictatorship in which he took exclusive charge of policy-making and implemented instructions through personal emissaries.<sup>10</sup> On the same token, it has been stated that:

‘Banda’s regime, though far from the most oppressive in the twentieth century African history, was nevertheless one in which the state security apparatus enforced the power of a dictator and his elite with considerable ruthlessness.’<sup>11</sup>

One wonders therefore if, in such a dictatorial state of affairs, the taxpayer would confidently have any input in matters of taxation. There is a measure of doubt in that regard. In 1968, the Taxation (Amendment) Act<sup>12</sup> was passed which attempted to provide “a firm base from which more vigorous collection can be pursued [since] many who can pay are avoiding their responsibility and [therefore] must expect severe penalties than in the past”<sup>13</sup> and “persistent defaulters were to be imprisoned”.<sup>14</sup> But what is surprising is that the taxpayers were not

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<sup>7</sup> Stephen Brown in Shadrack Wanjala Nansong’o, Ed. *The African Search for Stable Forms of Statehood: Essays in Political Criticism* (Lewiston, NY: Edwin Mellen Press, 2008), pp187-227

<sup>8</sup> Zmarak Shalizi and Wayne Thirsk “Policy, Research, and Eternal Affairs”, *Working Papers*, Public Economics, Country Economics Department, The World Bank, August 1990, WPS 493, p2

<sup>9</sup> The other author being Bratton, Michael, and Nicolas van de Walle. “Neopatrimonial Regimes and Political Transition in Africa.” *World Politics*, Vol. 46, No. 4 (July 1994), pp.453-89

<sup>10</sup>Note 28, *supra*.

<sup>11</sup> P. Sturges, 1998. “The Political Economy of Information: Malawi under Kamuzu Banda, 1964-1994”. *International Information and Library Review*, 30, p2

<sup>12</sup> No. 2 of 1968 (Zomba, 1968)

<sup>13</sup> Colin Baker, “Tax Collection in Malawi: an Administrative History, 1891-1972”, *International Journal of African Historical Studies*, vol. 8, No. 1 (1975), p. 60, <http://www.jstor.org/stable/217485>, accessed: 30-05-2016 19:20 UTC, citing Hansard, Malawi Parliament, Sixth Session, Second Meeting, December 1968 (Zomba, 1968), 216-217

<sup>14</sup> *Ibid.*, p60

being consulted at all to have their input ushered in, despite the fact that they were the ones to shoulder the burden when “the rate of tax was raised by twenty-five percent”.<sup>15</sup> This was so despite the observation that the increase was more than many taxpayers were able or prepared to pay (Baker, 1975) and, as seen, this Act determined more *positive* means for dealing with defaulters, thereby having the probability of adversely affecting the taxpayers.

### **2.3 The Democratic Era and the Institutional Framework of the Malawi Revenue Authority**

In 1994, Malawi embraced multiparty democracy which saw the development of the new constitutional order that advocates for good governance in all matters that affect the citizenry.<sup>16</sup> The Constitution also provides for the right to administrative justice.<sup>17</sup> In matters of revenue, the constitution clearly provides that no tax, rate, duty, levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local government authority otherwise than by or under the authority of the law.<sup>18</sup> There must therefore be regard to good governance principles and administrative justice in matters of revenue. Consequently, there are structural and institutional reforms that were made to tax administration which saw the creation of the Malawi Revenue Authority (MRA).

The Malawi Revenue Authority (MRA) is a body corporate created under section 3 of the Malawi Revenue Authority Act.<sup>19</sup> The agency was instituted with the aim of curing the administrative flaws of the former departments with a view to enhancing the efficiency and effectiveness of revenue collection.<sup>20</sup> In terms of its structural composition, the Agency is headed by the Commissioner General and the Deputy Commissioner, themselves appointed by the Board of the Malawi Revenue Authority.<sup>21</sup> It should however be noted that various departments exist in the MRA which are headed by Revenue Commissioners and Directors.

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<sup>15</sup> *ibid*

<sup>16</sup> Section 12 of the Constitution provides for fundamental principles that embody the rule of law, accountability, openness and transparency

<sup>17</sup> Section 43 of the Constitution

<sup>18</sup> Section 171 of the Constitution

<sup>19</sup> Cap 39: 07 of the Laws of Malawi.

<sup>20</sup> Report by Centre for Social Concern: Study of Malawi Taxation System

<sup>21</sup> See section 15 of the Malawi Revenue Authority Act which creates the Board, gives instructions on the management, performance and operational policies of the revenue department.



MRA is mandated to assess, collect and receive specified revenue<sup>22</sup> required by the law. It is also responsible for the enforcement of tax laws on behalf of the State.<sup>23</sup> It is also the MRA that is responsible for the administration of the tax laws and the promotion of voluntary tax compliance.<sup>24</sup>

MRA is further responsible for proposing measures on how to counteract tax fraud and forms of fiscal evasion and to take such measures as may be required to improve the standards of service given to taxpayers with a view to improving efficiency, effectiveness and maximization of revenue collection.<sup>25</sup> Further, the Agency gives advice to the Minister of Finance on matters of revenue policies, administration and collection. Being an Agency of the State, MRA is accountable to, and operates, under the general supervision of the Ministry of Finance. It therefore follows that the executive arm of the government, through the Ministry of Finance, is responsible for proposing changes to tax laws and is the custodian of the tax policy.

The law has also given extensive powers to MRA. Section 5 of the MRA Act empowers it to study revenue laws and identify necessary amendments which may be made to any law in a bid to improve the administration of, and compliance with, revenue. It is further empowered to study the administrative costs and the operational impact of the intended legislative changes, to collect and process statistics needed to provide forecast of revenue receipts. More importantly, the MRA is given wide discretion to take such other measures as the authority deems necessary or desirable in a quest to effectuate the general aspirations of the provisions in the MRA Act. Being at the pinnacle of the MRA, the Commissioner General has vast discretionary powers in taxation governance and is empowered to appoint the Revenue Commissioners. The Commissioner General also plays a key role in the rule-making processes by the MRA.

The MRA also acts as an adjudicative body on various complaints pertaining matters under the Taxation Act,<sup>26</sup> the Customs and Excise Act,<sup>27</sup> and the Value Added Tax Act.<sup>28</sup>

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<sup>22</sup> In this connexion, as interpreted under section 2 of the MRA act, revenue includes taxes, duties, fees and fines imposed or collected under the written laws.

<sup>23</sup> See section 4(1) of the MRA Act.

<sup>24</sup> See section 4(2) of the MRA Act.

<sup>25</sup> Note 31, *supra*.

<sup>26</sup> Cap 41: 01 of the Laws of Malawi

<sup>27</sup> Cap 42: 01 of the Laws of Malawi

<sup>28</sup> Cap 42: 02 of the Laws of Malawi

Complaints relate to non-taxable income, exemption from income tax, deductions on allowances, amount of duty payable over imported goods and the amount of Value Added Tax to be paid. In that connexion, there exist various complaints' systems and procedures. Any decision made under the tax law, therefore, is appealable to other bodies created for the purposes of adjudication and, finally, to the courts of law.

A study that focused on the extent of citizen participation in tax administration in Malawi noted that the current institutional framework has improved tax administration in theory but in practice it still mirrors the administrative flaws of the past:

‘Under Banda, Malawi knew three decades of brutal dictatorship. However, many autocratic practices and other problems of the past still remain, though often in a new form. The poor majority may speak, but are not heard. They are still largely excluded from participating not by armed thugs and repressive laws, but by a lack of institutional mechanisms of representation and participation.’<sup>29</sup>

It has further been observed that citizens are not involved in the discussion of tax issues in Malawi:

‘Civil society, private sector, donors and government often have different interests in tax debate. The unfortunate fact is that the citizens are almost always outside the discussion, largely due to the perceived complexity of issues to do with taxation, or the perceived low levels of influence that they have. The fact remains though that taxes being mandatory, it is the same citizens that pay directly or indirectly.’<sup>30</sup>

This invariably means that there is still a fundamental lack of taxpayer participation in tax matters on the one hand; and lack of transparency and accountability by tax governors, on the other. The current study then focuses on understanding the rule-making, implementation and adjudication practices of the Malawi Revenue Authority and the nature and form of citizenry participation in these processes. The focus is on how good governance is promoted through adherence to principles of administrative law.

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<sup>29</sup> Stephen Brown in Shadrack Wanjala Nansong'o, Ed. *The African Search for Stable Forms of Statehood: Essays in Political Criticism* (Lewiston, NY: Edwin Mellen Press, 2008), pp187-227

<sup>30</sup>Collins Magalasi, “Unmasking the Malawi Taxation System”, *Consultancy Report For Malawi Economic Justice Network*, April 2009, p28

### **3. Research Objectives and Methodology**

#### **3.1 Study Objectives**

- To determine how the Malawi Revenue Authority make rules, apply rules and adjudicate disputes
- Establish the nature and forms of public participation in rule making and application and adjudication of disputes
- Determine the role and impact of judicial review, parliamentary and presidential oversight on agency functions

#### **3.2 Research Questions**

- How does the Malawi Revenue Authority make rules, apply rules and adjudicate disputes
- What is the nature and forms of public participation rule making, application and adjudication of disputes
- What is the role and impact of judicial review, parliamentary and presidential oversight on agency functions

#### **3.3 Study Design and Approach**

The study research sites were selected through purposive sampling of relevant areas that would assist in achieving the study objectives. It was considered that the appropriate research site on decisions on taxation would be the Malawi Revenue Authority (MRA). Its headquarters is located in Blantyre, Southern Region of Malawi. This is where policy level and final decisions are made and where the tribunal is also housed. With regards to operational level decisions, specifically how the actual operations affect people, two main importing routes were identified namely Blantyre main port in the Southern Region and Songwe Boarder in the Northern Region of Malawi. The Northern Region was chosen also because of its distance from the central office; the further away the boarder the wider the discretion. As such, it would be a good area to base the research and study how discretion is exercised in the implementation of revenue laws. Kamuzu International Airport, the biggest airport in Malawi, and the side entry border post called Biriwiri in Ntcheu were also selected as being relevant to the research. It was expected that the urban and rural divide will present a range of findings and capture any significant differences in terms of findings.

### **3.4 Research Data Tool for Qualitative Research**

Key Informant Interviews were conducted in all the four main stations. At the Malawi Revenue Authority Headquarters offices, interviews were conducted with the Commissioners, Directors and officers in the Customs and Excise Division, Domestic Tax Divisions, Legal Affairs Department, Policy Planning Division and Tax Investigations Division. At the Blantyre main station, interviews were conducted with the Station Manager, Customs Agents and clients. At the Songwe Border Post, Interviews were conducted with the Station Manager, Stations Supervisors, Station Clerks, Clearing Agents and customers whose offices are also located at the Border Station. At Kamuzu International Airport, interviews were conducted with the Station Manager and Station Supervisors. The officials in the Policy Department at the Ministry of Finance were also consulted.

It was also considered relevant, through reference in the interviews, to include Non-Governmental Organisation and interviews were conducted with the Malawi Economic Justice Network (MEJN) which engaged government on revenue matters. Interviews were also conducted with other private citizens. The interviews elicited insights into the rule making processes, rule implementation and adjudication of disputes and the extent of public participation in the processes.

### **3.5 Data Analysis**

The data was analysed through content and discourse analysis methods. The tool of analysis identified recurrent themes and analysed them in the light of administrative law principles of legality, procedural fairness and irrationality. The tool required the identification of key actors in rule making, implementation and adjudication processes and how this relates to the principles of legality, irrationality and procedure propriety. Processes and mechanisms that are involved in rule making, implementation and adjudication were identified and analysed in the relation to legality, procedural propriety and irrationality principles. The nature and form of public participation was analysed in the light of direct and indirect participatory theories. The Impact of Judicial Review, Parliamentary and Executive oversight on agency functions was also analysed.

## 4. Research Findings

### 4.1 Rule- Making

Rule -making is a process that an agency uses to formulate rules, implement and interpret the law that the Agency administers.<sup>31</sup> The definition entails that there are three aspects of rule-making namely: rule formulation, rule/law implementation and rule/law interpretation. MRA administers the following statutes: the Taxation Act, the Customs and Excise Act and the Value Added Tax Act. The rule-making function involves the drafting of rules, interpreting the revenue laws into digestible material for ease of application, drafting informal rules and engaging stakeholders in rule formulation.

Administrative agencies are sometimes given legislative functions to make laws/rules.<sup>32</sup> Section 5 of the MRA Act empowers the agency to study revenue laws and identify amendments which may be made to any law for the purpose of improving the administration of and compliance with revenue. MRA is further empowered to study the administrative costs, compliance costs and the operational impact of intended legislative changes.<sup>33</sup> In the year 2013, MRA made the Income Tax (P.A.Y.E) (Deductions and Payment) and (Information Rules) and the Customs and the Excise (Amendment) Regulations of 2013. Further, in 2014, the Agency proposed a 3 % withholding tax which is now operational. In that regard, the Agency participates indirectly in the formulation of legislation through coordinating with the Ministry of Finance.

It should be noted that administrative law governs the law/rule- making functions of revenue agencies.<sup>34</sup> In the case of *Mayo Foundation for Medical Education and Research v United States*<sup>35</sup>, the court rejected the idea of tax exceptionalism and approved that the general administrative law principles are equally applicable to tax administration. The principles of legality, rationality and procedural fairness of the actors, roles, processes and mechanism that are involved in the rule making and legislative functions are interrogated to determine the extent to which they promote democratic governance.

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<sup>31</sup> Gellhorn, E. et al, 2006, Administrative law and process in a Nutshell. 5<sup>th</sup> ed. West Publishing Co. USA

<sup>32</sup> Hoexter, C. et al 2002. The New Constitutional and Administrative law. Vol 2 JUTA Law. A number of terms are used for this kind of legislation such as regulations, proclamations, rules, orders, declarations, directives, decrees and schemes

<sup>33</sup> Section 5 of the MRA Act

<sup>34</sup> (Professor Grewal, 2014) in *Taking Administrative Law to Tax*, *Duke Law Journal*, Volume 63, Number 8, May 2014

<sup>35</sup> 131 S. ct. 704(2011)

#### 4.2.1 Legality in Rule- Making

The concept of legality considers whether the agency in its law/rule- making functions has acted within the law thus not exceeding its powers (*ultra vires*).<sup>36</sup> Thus, it is important that the Malawi Revenue Authority operates within the framework of the Constitution and the revenue laws to further democratic governance. The research considered the legality of both actors who are involved and processes and mechanisms that are followed in rule- making.

The research findings are that MRA is the only key institution that is involved in revenue rule-making and rule interpretation. Specifically, the Technical Department in the Customs and Excise Division, based at the Headquarters in Blantyre, is responsible for the administration and interpretation of the Customs and Excise Act. The exercise involves developing forms that aid the effective implementation of the Act. The Inland Revenue officers, Border Station officers and Customs Agents do not take part or participate in rule interpretation as they belong to the Operations Department within the Customs Division. Further, the Domestic Tax Division, based at the Headquarters in Blantyre, is responsible for interpreting the Taxation Act and the Value Added Tax Act. The implementation of the rules is done by different officers who are also based at the Headquarters.

With regard to law-making, the Policy and Planning, Legal Affairs, Customs and Excise and Domestic Taxes Divisions within MRA participate in law making in a delegated capacity as the MRA is an agent of the Ministry of Finance. The divisions propose new tax laws or amendments to existing laws which are then forwarded to the Ministry of Finance. The rationale is that the Ministry of Finance facilitates the adoption of new rules especially those that come in the form of statutory instruments. The Ministry of Finance further performs the law-making function independent of the input from the Revenue Agency. The Ministry develops policies relating to tax and engages various stakeholders when coming up with revenue laws.<sup>37</sup> The Ministry then makes the ultimate decision on which proposals to carry forward to Parliament. Within the Ministry of Finance, the Revenue Department is involved in drafting the final proposed laws or amendments and coordinates with the Ministry of Justice.

Further, members of the general public do participate in revenue law-making through consultations during pre-budget consultation sessions led by the Ministry of Finance. Proposals or amendments to new laws are also discussed through the same consultations.

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<sup>36</sup> The State v DPP and Lilongwe CRM ex parte Chilumpha Miscellaneous Cause No. 315 of 2005

<sup>37</sup> The Consultations target the specific groups of stakeholders who are likely to be affected by the decision

Further certain sectors of the population, such as traders or professional bodies, are consulted in rule making where a decision on tax law will affect them. The other actors who are involved in rule making are various stakeholders from public institutions as well as private institutions. Their main role is to input into the rule making process of the tax administration. Some of the stakeholders who were mentioned are Society of the Public Accountants, NGOs such as MEJN, traders, industries, government ministries such as the Ministry of Trade and Industry, associations and sometimes the general public.

The analysis on the legality of actors evidences that actors that are involved in law and rule-making are from within MRA and hence authorised by revenue laws. However, certain key actors are not included in the law/rule making processes viz officers who are outside the MRA headquarters such as Border Stations and the Inland Revenue offices. The outside officers reported that they are just given the rules to implement and are not asked to input into the process. One would have thought that due to the fact that those who are not stationed at headquarters are the ones who mostly implement the rules and receive feedback or complaints from clients, they would be very much suited to input in the process of rulemaking. Further, members of the general do not effectively participate in the law making processes as the pre-budget consultation processes are held regionally.<sup>38</sup> There are also no mechanisms that have been put in place to ensure that women and ordinary citizens in Malawi participate in the revenue law/rule making processes. It is also noted that members of the general public are totally excluded from the internal rule- making function and are not consulted in rule interpretation. Whilst key actors are involved in rule- making, the exclusion of other stakeholders and the limitations that have been placed on other actors do not further good democratic governance.

With regard to the legality of processes and mechanism in rule- making,<sup>39</sup> the research findings are that the processes and mechanisms that are followed are internally driven and involve only MRA and the Ministry of Finance. The MRA Act and revenue laws give the Commissioner General a wide discretion which can be said to empower the Commissioner to make such type of rules.<sup>40</sup> The rules are more informal and they do not go to parliament for approval and others have been termed as ‘quasi legislation<sup>41</sup>.’ Examples of these regulations

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<sup>38</sup> In Blantyre, Lilongwe and Mzuzu thus excluding 23 districts in Malawi.

<sup>39</sup> which includes codes of practice, policies, guidelines, regulations and procedures mostly on how to administer and collect and enforce tax,

<sup>40</sup> See section 4 of the MRA Act

<sup>41</sup> Leyland, P. 2009. 89.

include: the Air Traffic Code<sup>42</sup> and the Temporary Importation Code which was prepared by the Customs and Excise Division within MRA. The processes and mechanisms that are involved in rule formulation or interpretation are sector-led hence diverse. The Customs and Excise Divisions interpret the Customs and Excise Act by developing customs forms and regulations through the use of their internal technical department. In other instances, an issue is noted by a division, such as the Legal Affairs Department or Tax Investigation Unit or Customs and Excise, within MRA. A study is then conducted that considers the revenue, economic and social impact of the proposed law or rules. A decision is then made to formulate a rule that is later implemented by a concerned division.

With regard to law-making, the processes and mechanisms followed are both internally and externally driven. The internal processes involve MRA proposing an amendment to the tax laws that impede on the effective administration of tax. Specifically, the Legal Affairs Department will formulate the rules and engage the policy department on the social and economic implications of the proposed amendment or new revenue law. Within MRA, research is done widely to learn from the practices within the region and internally from the concerned departments. The draft law is then sent to the Ministry of Finance for approval and further processing. Further, the Executive arm of the State (Malawi) each year revises all types of taxes and this revision has to be finally approved by Parliament. The mandate to formulate the law is on the Ministry of Finance. The Ministry of Finance takes the initiative of proposing changes to tax laws without consulting MRA. Examples given include that of the removal of duty for importation of minibuses in the 2014-15 financial year and removal of tax on electricity. In certain instance the Ministry of Finance collaborates with the MRA to draft proposed tax laws. The Legal Affairs Department within MRA drafts the proposed rules which are then forwarded to the Ministry of Finance for approval. The Ministry of Finance consults with the Ministry of Justice to perfect the rules. When the Ministry is satisfied, the draft rules are sent to parliament for approval. The Ministry of Finance has a lot of powers in the final outcome of tax rules.

Some reforms to tax laws are externally driven by various stakeholders who will engage the Commissioner General directly and their concerns are referred to the Ministry of Finance. An example was given of Minibus Owners Association which proposed that there be a reduction in import duty on minibuses. MRA was then responsible for studying the feasibility of the

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<sup>42</sup> The Air Traffic Code provides for airport procedures and is also meant among others to regulate the collection of taxes in airports.



proposal and recommend to the Ministry of Finance. It is noted that the external mechanisms advances citizen participation in rule making processes and promotes democratic governance. However, only robust concerned groups have used the mechanisms as it is not easy for the ordinary citizens in Malawi to engage directly with the MRA. Further, it is also not plausible to state the legitimacy of such processes without clear guidelines under the law.

The analysis on the legality of processes and mechanisms evidences that the revenue laws do not specify the exact processes and procedures that are to be followed in the formulation and interpretation of revenue laws. The gap makes it very difficult to determine the legality of the processes and mechanisms that are followed in practice. It is also noted that the processes are fragmented, sector-led within MRA and diverse. The multiplicity of processes of rule making do not allow for any form of participation by the general citizenry. Hence, there is no engagement with the public in administrative rule-making processes. The analysis further evidences that there is technocratic autonomy in revenue rule making as only the internal technical departments in MRA are involved in rule making and they do not involve any outside stakeholders. The general perception at MRA is that rule-making is a technical exercise that is best undertaken by the Agency alone. The informants further indicated that tax laws are very complex and it may not be prudent to engage members of the public on their formulation. Thus, general technical incompetence is assumed on the citizenry and hence hampering good governance. The paper recommends that the MRA engages with the general public in rule-making whilst retaining the powers to oversee that the rule interpretation accords with the general revenue laws.

With regard to statutory rules, it is noted that there is a lot of deference to the Ministry of Finance in revenue law-making by the Legislature. However, the Ministry of Finance, in its executive law-making function does not effectively consult members of the general public. Further, there is technocratic autonomy in revenue law-making as it is generally considered that members of the general public may not have the technical competency in revenue matters. The legislative oversight that attains in parliament during the presentation of revenue bills does not effectively cure the defects in pre- budget consultations.

#### 4.2.2 Procedural Fairness in Rule-Making

The concept of procedural fairness is expanded under section 43 of the Republic of Malawi Constitution. The provision states that every person shall have the right to lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and to be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected. In the case **Viola and another –v- the Attorney General** <sup>43</sup> the court stated that a decision has to be assessed as to whether the process followed in making it are procedurally proper.

The process of procedural fairness embodies the cardinal rules of natural justice vis. the right to be heard and avoidance of likelihood of bias when making a decision. It is noted that the MRA has a duty to ensure that they abide by procedural fairness in their rule making functions. Further, the Agency has the mandate of ensuring that legitimate expectations are respected and protected, no decision is to be made without hearing from a person who will be potentially affected by the decision and that reasons must be made in writing to the person who is affected by a decision. Procedural fairness demands that where the statute places the decision-making power in one person's hands, then that person must make the decision and conduct any hearing that may be necessary otherwise the decision will be null and void.

On procedural fairness and rule making, it is noted that there is limited public participation in rule making and hence people who are likely to be affected by revenue decisions are not consulted or informed of the decisions. Considering the mandatory nature of tax payment and the Malawi Revenue Policy that advocates fairness and voluntary compliance by the general citizenry, there is a need to engage the tax payers before making revenue laws, ensure that their economic and financial circumstances are taken into account before legislating on the amount of tax payable. Further, there is total exclusion of the general public with regard to processes that are internally driven due to assumed technical incompetency in tax matters by ordinary citizens. The exclusion affects public interest and legitimate expectations. An in-depth discussion of procedural fairness in rule-making is further discussed under public participation.

With regard to exercise of powers by decision makers, Section 17(3) and (7) of the MRA Act has the power to delegate his function to a revenue commissioner or any officer. Further,

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<sup>43</sup> Civil Cause No. 34 of 1998

Revenue Commissioners and Controllers are mandated by law to delegate certain functions to other officers. <sup>44</sup>It is noted that the rule-making function by technical departments within MRA is performed by officials in a delegated capacity. In that regard then decisions on rule-making are performed by officials who are mandated by law and hence there is no abdication of authority in revenue law making by the Commissioner General.

#### 4.2.3 Reasonableness in Rule -Making

The concept of unreasonableness is two-fold: it includes making a decision in bad faith and taking into account irrelevant considerations when making decisions.<sup>45</sup> In *The State –v- Council for the University of Malawi, ex parte, Zaibula*<sup>46</sup> in which he said:

“Where exercise of power by a statutory body is on irrelevant or extraneous grounds or in bad faith, it is susceptible to judicial review.”

Indeed, Lord Greene considered at length what amounts to “unreasonable” exercise of discretion in the *Wednesbury* case, *supra*, in the following way:

“It is true that discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often used the word ‘unreasonableness’ in a rather comprehensive sense. It is usually used as a general discretion of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said, and is often said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority (or a corporation). Warrington L.J. gave example of a red-haired teacher, dismissed because she had red hair (**Short –v- Poole Corp. (1926) Ch. 66**). That is unreasonable in one sense. In the other sense, it is taking into consideration

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<sup>44</sup> Section 7 of the Customs and Excise Act

<sup>45</sup> Associated Provincial Picture House Limited v Wednesbury Corporation (1947) 2 ALLER 680

<sup>46</sup> Civil Cause No. 34 of 1997, High Court, Principal Registry

extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and in fact all these things run in one another.”<sup>47</sup>

The concept of unreasonableness therefore requires that an Agency must not act in bad faith or take into account irrelevant factors when making revenue laws/rules. The adherence to reasonableness ensures that there is no arbitrariness in the law/rule making processes and ultimately the promotion of the rule of law which is one of the elements of good governance.

The research found that there are various factors that are taken into account in the making of revenue laws and rules. With regard to the MRA, the specific needs of sector, e.g. Bankers Association, Minibus Association, Buses Association and the telecommunication or extractive industries, will be considered before deciding on the new tax laws. Further, research is done within MRA that considers the political, social and economic impact of a proposed reduction or increase in payable tax or its impact on the tax net. In terms of statutory laws, the Ministry of Finance, Revenue Department, designs tax policies. The tax policies direct the process of revenue law making. The Ministry of Finance also conducts research on proposed laws before proposing changes or amendments to tax laws. The analysis evidences that the practice of taking into account relevant consideration before making a decision is pivotal as it promotes the rule of law and ultimately furthers good governance.

However, instances of political interference in rule making were evident. There are instances where a decision has been made to remove import duty on a particular tax base basing on political influences. Examples were given of the decision to remove import duty on buses which was purely based on the interest of certain traders and not the impact on revenue collection. It was noted that political influences are in certain instances taken into account when making a decision on the tax base. Such political interference and influences results in irrelevant considerations being taken into account on revenue law making and do not further good governance.

## **4.2 Rule-Application**

MRA is responsible for the assessment, collection and receipt of specified revenue<sup>48</sup> and enforcement of tax laws on behalf of the State.<sup>49</sup> MRA is also responsible for the

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<sup>47</sup> [1947] 2 All ER 680, at 683

<sup>48</sup> Revenue includes taxes, duties, fees and fines imposed or collected under the written laws- see section 2 of the Malawi Revenue Authority Act.

<sup>49</sup> Section 4(1) of the MRA Act.

administration and enforcement of tax laws and the promotion of voluntary tax compliance.<sup>50</sup> MRA has also been given powers under the law to take such other measures as the Authority deems necessary or desirable for the achievement of the purposes or provisions of the MRA Act. In the application of tax rules, the Agency is to have regard to Section 13 (m) of the Republic of Malawi Constitution which requires the state to promote among others humane application and enforcement of laws.

Further, Section 13(o) of the Constitution encourages the adoption of measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions. Specifically, Section 171 of the Constitution provides that no tax, rate, duty or levy shall be raised, levied or imposed for the purposes of the government or any local government otherwise than by the authority of the law. The legal framework governing the functions of MRA includes the Republic of Malawi Constitution of 1994, the Taxation Act<sup>51</sup>, the Customs and Excise Act<sup>52</sup> and the Value Added Tax Act.<sup>53</sup> The statutes on revenue then provide the framework within which tax is collected and the specific calculations of various taxes. There are also regulations that have been made under the various revenue statutes that ensure effective administration of taxes. The Commissioner General has vast discretionary powers in the administration of tax matters.<sup>54</sup>

#### **4. 2.1     Legality in Rule Implementation**

There are various actors that are involved in the enforcement and implementation of revenue laws and rules. With regard to Customs and Excise Duty, the Border Station Officers and Inland Revenue officers are responsible for implementing the Customs and Excise Act. The Commissioner of Customs is the overseer and works closely with the operations and enforcement departments. The Commissioner for Domestic Taxes handles Income Tax and Value Added Tax. The Tax Investigation Unit has police powers of arrest, search or seizure of goods and is a key player in tax enforcement. It is duly noted that the actors are empowered

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<sup>50</sup> Section 4(2) of the MRA Act.

<sup>51</sup> Cap 41:01 of the Laws of Malawi

<sup>52</sup> Cap 42:01 of the Laws of Malawi

<sup>53</sup> Cap 42:02 of the Laws of Malawi

<sup>54</sup> Some of the discretionary powers of the Commissioner General include the power to determine taxable income from which Export allowance is deducted, determination of allowable deductions against assessable income arising from the sale of timber and extension of time to pay taxes and remission of penalties.

by law to implement revenue laws as they perform functions on behalf of the Commissioner General.

The research findings are also that there are Clearing Agents that are stationed at border Station Offices, Inland Revenue offices and Airports that engage directly with the general citizenry in the process of clearing goods and revenue payment. Section 128 of the Customs and Excise Act allows the Controller to, on application, license persons as customs agents for the purpose of transacting business with the Department on behalf of other persons. The Controller has granted several licenses to clearing houses. The Clearing Agents have access to the online system of the Malawi Revenue Authority and also give updates to the citizenry on whether goods have been cleared or not. It was observed that the clearing agents act as a bridge between the Agency and the general citizenry in most cases. However, the respondents found at the Border Station, Inland Revenue offices and airport were not aware of the link between MRA and the clearing institutions. It is also generally difficult to identify the licensed agents as they also appoint other personnel to find customers for them and hence the general citizenry is prone to abuse. The clearing agents also do not assist the citizenry effectively as their knowledge is limited to the filling of custom forms and are mostly not conversant with customs and excise laws generally. Further, it was also observed that where a person makes the initiative of clearing goods on their own, there are referred to an agent and not allowed to engage direct with the Station Officers. Further, there is a lot of malpractice that results between the clearing agents and the station officers resulting from the close and daily interactions between the clearing houses and MRA officers. Whilst the legal basis for appointing of clearing agents is clear and that they assist MRA in their conduct of their responsibilities, their conduct and interaction with the citizenry does not further democratic governance.

Finally, it is noted that the powers of implementation under the law are given to the Commissioner General and he may delegate his functions to a Revenue Commissioner or any officer. In that regard, the implementation officers discharge their functions in a delegated capacity. The legality of further delegation to outside institutions such as clearing house agents and other institutions through licensing and appointment raises governance problems. The clearing agents are the first point of contact at the border stations and a lot of malpractices occur as they do not operate under the direct supervision of the Station Managers at the border office.

With regard to the processes and mechanisms, the MRA implements all taxation statutes in Malawi, namely, the Taxation Act, Customs and Excise Act and Value Added Tax Act. It is noted that the implementing officials find the rules to be very complex and a lot of flexibilities and compromises are adopted to ensure that there is effective implementation. It was reported by respondents that the Customs and Excise division at the Headquarters of MRA simplify the laws into simple language for internal use by making procedures and guidelines for its officers to follow. The process involves the interpretation of provisions in the various statutes for ease of application and enforcement by MRA officers. It was not clear how the new simplified rules are the same with the original rules in the revenue laws. However, the respondents were quick to say that they ensure that the guidelines are within the law and not go outside what the laws stipulates.

It was also reported that since the simplified rules are for internal use, they do not involve outside players to comment or assist in the interpretation of the law. It was also reported that if there is a change in procedure; they usually inform various stakeholders who may be affected by the change. An example was given where MRA had to change its procedure in clearing of goods using an Inland Examination Centre. Upon the introduction of this centre, MRA is said to have engaged transporters and clearing agents with the view of informing them about the change in procedure. The change was to affect goods that are cleared inland other than at the border posts. Notices and circulars informing the public of the changes are also issued. The Commissioner General is the one who has the final authority of what is to be contained in the procedures within MRA.

In terms of legality, the implementation of the rules and all processes and mechanisms ought to be done in accordance with the law. The law provides that customs and Excise assessments are to be done in accordance with the valuation, classification, rules of origin and standard assessment procedures provided by the World Customs Office (WCO) and the Customs and Excise Act. However, in practice the rules are said to be complex and give problems enforcing officers such as inland and border post officials. It is also problematic to make distinctions between certain classification of goods and this raises problems between the customs officers, clearing agents and clients. Whilst most of the customs officials were able to identify with the Customs and Excise Act and the Rules of the WCO, there were not

able to understand the technical rules that are contained in the laws. As such, in their day to day implementation of the rules, they rely on the simplified guidelines and forms that are made by the Customs Technical Department at the MRA- Head Office. The officers were not able to state whether the simplified rules are in tandem with the rules under statute. The situation results in actual bias in rule implementation.

The research then concludes that the process and mechanism followed rule implementation largely do follow the law and are therefore lawful. However, in instances where rule interpretation does not accord with the revenue laws and where implementation is hampered by the complexity of tax rules, there is illegality in the conduct of affairs and hence bad governance.

#### **4. 2.2 Procedural Fairness in Rule Implementation**

The implementing officers work with members of the general public on a day to day basis. As such, decisions must be made by legally appointed personnel, reasons must be given in writing where legitimate expectation will be affected by a decision and the officers must adopt procedural fairness in the discharge of their functions.

The research findings were that most decisions that are made by the Agency are done by legally appointed actors save for instances where there is abdication of authority through delegation to other Agents. The implementing officers do not engage in dialogue with clients and members of the general public in the discharge of their responsibilities both at the border and inland stations. That dialogue would have enabled the officer to explain the tax computation to a client and enable the client to make a voluntary declaration of documents or goods that are a subject of tax assessment.

The research interrogated the processes and mechanisms followed in the implementation of the Electronic Fiscal Device (EFD) which raised controversies amongst the general populace in Malawi. The EFD is an advanced version of an electronic cash register, records all sales transactions and provides evidence of such transaction in a technically easy and undisputed way. It is used in the collection VAT and customers are encouraged to demand a fiscal receipt for purchases made. The EFD raised problems in terms of implementation. The focus of the study was on how decisions were made with regard to the device and what procedures were adopted in the implementation of the EFD.



The research findings are that there are a number of processes that were involved by MRA and most of the initiatives were internally driven within the Agency. A decision was made by a project implementing team from MRA that it was necessary to utilise the EFD in collection of VAT after internal studies were made of the need to adopt the device. It was further reported that usually when MRA wants to embark on new measures or policies they do research in and outside the country to assess best practices, and that research results into concept notes which are discussed within MRA and sometimes if there is a need the Minister of Finance is involved. After that the project or measure gets implemented through various phases. That this was what happened with the introduction of the EFD.

The MRA continually referred to EFD as just a ‘method’ of collecting tax and not an introduction of new tax. The procedure of coming up with EFD was said to be the procedure which is used in coming up with any other policy in MRA. The Policy Planning Division specifically highlighted that the EFD was a new device that was going to assist the Revenue Agency in efficient collection of taxes. The Corporate Affairs Department raised public awareness on the new measure through stakeholder meetings with the business community, issued leaflets and brochures and conducted radio programmes on TV to raise public awareness.

During implementation, a number of business communities did not comply with the requirement that they use the EFD. The reasons for non compliance related to the lack of consultation before introducing the device and the traders disputed the process of identifying the suppliers of the device. MRA, however, stated the concerned traders were not tax compliant and resisted the implementation as it would lead to them paying more tax. The view of MRA is that since EFD is a means of collecting taxes its inception was no concern for outside players and there was no need for their involvement in coming up with the tool. The Agency, however, engaged the business community after it faced resistance but the internal procedures were not effective to resolve the matter which matter was then filed in Court.

The analysis evidences that the members of the general public were not consulted in the initial conceptualisation of the EFD i.e. when the agency was making a rule to introduce the device. Consultations were only done before implementing the said device. It is also observed that when problems arose during the implementation stage, the internal mechanisms were not effective as a strong stance was taken by MRA that the EFD was not a new tax that would

require extensive public participation and that closed the room for any meaningful engagement to be done with the concerned traders. It is also observed that procedural fairness is mostly considered with regard adjudication and not the day to day decisions that are made during implementation. It was further noted that MRA does not consult where a rule is made relating to methods of tax collection and this result in problems during implementation. It is recommended that MRA should have engaged in more meaningful consultations with the affected business groups to ultimately promote good governance.

#### **4. 2.3 Reasonableness in Rule Implementation**

Reasonableness mandates that the officers do take into account relevant matters when making a decision and that bad faith must be avoided in decision making.<sup>55</sup> The implementing officers make decisions with regard to tax assessment on a day to day basis. It is important that they embrace the concept of reasonableness, to avoid making decisions that are arbitrary and that impinge on the rule of law, in order to further good governance.

The research findings are that the Station Officers, Inland Revenue Officers, Airport Officers, and those based at the Malawi Revenue Authority are guided by the revenue laws in making decisions on payable tax and in the day to day implementation of tax laws. However, there are several factors that constrain decision making. In instances where a person has political connections or is in fact a politician,<sup>56</sup> they interfere with decision making and influence the decision maker to the extent that they pass with goods without paying duty at the Border Stations or not pay income tax on their businesses. The high ranking officials reported that the problem is faced by both inland and border posts offices and that they receive calls from the Head Offices commanding that goods or vehicles be left to pass without paying customs duty. A specific example was given of a well known transport company whose vehicles were impounded by MRA because they had information that there was conduct of tax evasion. The Tax Investigative Unit conducted research and there was evidence to that effect. The high ranking official was given instructions by a high ranking Executing Officer to release the vehicles without any further process taking place.

Further, the Commissioner General has been given wide discretion to make decisions on behalf of the Agency. It was reported that there are several instances where the Commissioner General has made final decision on the amount of payable taxes after considering a request made by a citizen through his office. The decisions, either to reduce or

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<sup>55</sup> Supra Note 44

<sup>56</sup> Such as a Member of Parliament, a Minister or a high ranking executive officer

confirm payable tax, have been made without any explanation and no further inquiries are made since the powers have been vested in his office to make decisions on behalf of the Agency.

The Station and Inland Revenue Officers further stated other outside factors that constrain their decision making relating to Customs Agents and the general citizenry. Agents and clients produce fake invoices<sup>57</sup> so that pay less duty on the goods or items they want to clear at the officers. Inquiries are sometimes made through the Data Processing Unit to verify the authenticity of the invoice but where there is connivance between the parties, the fake invoice is used in processing goods. Some clients do not produce invoices and others do undervalue goods that make it difficult to assess their goods. The officers face challenges in implementing the rules and have to find ways of assessing payable duty without invoices. There is further diversion of goods at the border posts and this involves clients hiring motorist to by-pass the border post.<sup>58</sup> The problem is more common amongst small and medium business traders and not large corporations. The Tax Investigation Unit specifically raised the problems of tax planners and tax evaders who are not 100% tax compliant. The investigations officer stated that they have exceptional powers and do deal with such categories with strict penalties and enforcement of the law.<sup>59</sup>

The analysis evidences that there are instances of arbitrariness in decision making by the Commissioner General and this involves the lack of judicious exercise of discretion. Such practices do not further democratic governance as other categories of tax payers are made to be above the law. It is important that the Commissioner General, though having been given wide discretion, to have regard to the revenue laws before making a decision on reduction or increase on payable tax. Further, the increase in executive and political interference in decision making does not further good governance as it promotes non payment of tax and consequently affects the delivery of public services and also oppresses the poor. With regard to the Station and Inland Revenue Officers, they must take into only relevant factors when making a decision. The continued use of fake invoices in the assessment of payable import duty does not further good governance. It is important in this regard that MRA strongly supervises the conduct of Clearing House as the production of fake invoices is done on

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<sup>57</sup> this involves reproducing an invoice and stated a lower purchase price for the goods

<sup>58</sup> other routes such as rivers

<sup>59</sup> The current practice of using extensive police powers by MRA mirror the punitive sanctions that were met out on the general citizenry in the Colonial times in Malawi.

premises that are near their border and Inland Revenue offices. The powers of search and seizure have already been given to officers under the Customs and Excise Act.<sup>60</sup>

### **4.3 Adjudication of Disputes**

Adjudication is the legal process by which an arbiter hears and reviews evidence given by witnesses and legal arguments advanced by the parties to come to a decision which determines the rights and obligations of the parties.<sup>61</sup> Principles of administrative law are to be applied in the process of adjudication so as to promote fairness, transparency and accountability by decision makers. The study considered the legality of the actors and processes involved in hearing disputes by the MRA, whether the hearings embody procedural fairness and whether the decisions made embrace the concept of reasonableness.

#### **4.3.1 Legality in Adjudication**

The revenue laws provide for specific adjudicating personnel and bodies that handle complaints relating to assessment of value added tax, income tax or import or export duty. The law further mandates specific officers to hear matters on appeal and resolve complaints within the Agency. The personnel and bodies under the Taxation Act<sup>62</sup> include: the Commissioner of Taxes<sup>63</sup>, Administrative Officer,<sup>64</sup> Special Arbitrator,<sup>65</sup> Traditional Appeal Court and the High Court. Under the Customs and Excise Act, an appeal against payable duty is made to the Special Referee who is appointed by the Minister of Finance. The duty must be paid before an appeal is made in writing and a final appeal lies with the Resident Magistrate Court.<sup>66</sup> The Commissioner General and Resident Magistrate have the powers to hear disputes under the Value Added Tax Act.<sup>67</sup>

The research findings are that in practice, with regard to Customs and Excise Duty, the Border and Inland Revenue ports set up Station Committees comprising of four people that handle complaints. The committees comprises of the Station Manager or Deputy Station

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<sup>60</sup> Section 13 of the Customs and Excise Act

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<sup>62</sup> Cap 41:01 of the Laws of Malawi, sections 97, 98, 100.

<sup>63</sup> Section 97 of the Taxation Act

<sup>64</sup> Section 100 of the Taxation Act

<sup>65</sup> Section 98 of the Taxation Act

<sup>66</sup> Cap 42:01 of the Laws of Malawi, sections 120 and 152

<sup>67</sup> Cap 42:02 of the Laws of Malawi, section 43 and 44

Manager, a Supervisor, Clerk and the officer whose decision is being challenged. The matter is only referred to the Committee when the Revenue Officer who made the decision and the complainants (taxpayer and clearing agents) cannot resolve the dispute. There are no gender considerations in the setting up of the Committee. If the complainant is not satisfied with the decision, they are given a chance to appeal to the MRA Headquarters. An Appeals Committee comprising of Heads from the various sections is constituted as cases arise. The Committee only handles formal complaints and a bulk of the informal complaints are handled by other officers. The Committee is constituted by the Commissioner General and once a decision is made, it is referred to the Commissioner General for endorsement. The Commissioner can make a decision that is contrary to the recommendation by the Committee. The complainants may appeal to the court when not satisfied with the decision on appeal. The Committees that are set up at the MRA Headquarters also hear complaints on income and value added tax.

The analysis evidences that there are multiple actors and a multiplicity of adjudicating bodies under revenue laws. Most of the bodies created by law have not been constituted and those that are operational are not accessible to members of the general public.<sup>68</sup> Further, the bodies are ad hoc and operate only when there is dispute before them. The responsible officers such as the Commissioner or Administrative officers do not handle disputes on appeal as they delegate the functions to appointed personnel who handle appeals when a complaint under Taxation Act or Value Added Act is received. The Committees will comprise of a member from each division within MRA. There are no guidelines that stipulate the competence, gender balance, qualification or mandate of the Committees. It may be argued that the formulation of the committee is valid as the Commissioner has powers under section 4 of the Taxation Act to delegate some of his functions. However, there is over abdication of authority as all cases are held by the Committee on first instance. It is also noted that the Commissioner sits on appeals when an appeal is made against the decision of the Committee which makes a decisions on his behalf hence sitting as a judge in his own cause.

In terms of legality, it is noted that the Committees that are formulated in Inland and Border posts do not have a legal mandate to handle disputes under Customs and Excise Act as the powers lie with the Controller of Customs and Excise. Further, the composition has no legal basis as the law requires that a Special Referee should hear the complaints relating to customs

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<sup>68</sup> The MRA Headquarters is situated in Blantyre and it hears all complaints from across the three regions in Malawi.

and excise duty after a decision is made by the Controller of Customs and Excise. The Customs and Excise Act provides that the Special Referee, and not the Commissioner General or his delegate, should hear matters on appeal under the Customs and Excise Act. Further, the Traditional Appeal Court is not in existence. Although the law provides for different tribunals to handle matters under the various statutes, the Committees that are formulated within the agencies handle all complaints. It was stated by the Legal Affairs department that the Committee performs delegated functions as allowed under the law.

#### 4.3.2 Procedural Fairness in Adjudication

The right to procedural fairness<sup>69</sup> embodies the cardinal rules of natural justice namely the right to be heard and the rule against bias. The right to be heard entails that a complainant must be given an opportunity to prepare for the case made against them, dispute the evidence, to be accorded an oral hearing and be given reasons in writing before a decision is made. The requirement of sufficient notice was stated in the case of **R –v- Thames Magistrates, ex parte Polemis**,<sup>70</sup> where the Applicant was served with summons at 10.30am, itself returnable to the Magistrate’s court at 2.00pm the same day. It was held that the notice was insufficient. Accordingly, Widgery CJ held that an order of *certiorari* would be granted quashing the conviction of the magistrate court because it was a basic and elementary requirement of the rules of natural justice that a party to proceedings should be given a reasonable opportunity to present his case and that included a reasonable opportunity to prepare his case before being called upon to present it.

In **Chakhaza –v- Portland Cement Company**,<sup>71</sup> Justice Potani cited with approval the following statement by Lord Denning in **Kanda –v- Government of Malaya**:<sup>72</sup>

“If the right to be heard is to be real which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict it.”

Thus, in **Wiseman –v- Borneman**,<sup>73</sup> Lord Morris had this to say:

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<sup>69</sup> Section 43 of the Constitution

<sup>70</sup> [1974] 1 WLR 1371; [1974] 2 All ER 1219

<sup>71</sup> [2008] MLR 118 at 127

<sup>72</sup> [1962] AC 322

“I feel bound to express my prima facie dislike of a situation in which the tribunal has before it a document (which contains both facts and arguments) which is calculated to influence the tribunal but which has not been seen by a party who will be affected by the tribunal’s determination.”

The requirement of the law is not only that the charges must be known but that they should be set down with sufficient particularities to allow the accused properly prepare their defence. In **Lameck Moyo –v- National Bank of Malawi**,<sup>74</sup> the court stated:

“As for the procedural fairness, it is important that the particulars of the charge should be clearly specified....Failure to do this would be unfair...and would lead to miscarriage of procedural justice.”

When, tax issues arise, MRA should be giving the taxpayer the right to challenge the evidence offered against him. This means that the taxpayer must be given the liberty of cross-examining or confronting the accuser. **Kanda –v- Government of Malaya, supra**, makes it very clear that a man is supposed to be afforded a fair opportunity to correct or contradict evidence against him. In **Lameck Moyo –v- National Bank of Malawi, supra**, the court properly stated the principle in the following terms:

“Moreover, it is trite law that an employee need be given a chance to confront whoever is accusing him of any misconduct. In the present case, the applicant was not given that chance, the respondent heard the accuser in the absence of the applicant and he only had a chance to question the accuser in this court.”

Similarly, in **Khoswe –v- National Bank of Malawi**,<sup>75</sup> the court said:

“It is a fundamental principle of natural justice that where a duty to act fairly demands an oral hearing, the right to cross-examine witnesses existed.”

On the other hand, the rule against bias demands that a person must not be judge in their own cause.<sup>76</sup>

The research findings are that revenue laws provide for processes and mechanism that are followed in the adjudication of disputes. The Taxation Act provides two appellate procedures.

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<sup>73</sup> [1971] AC 297 at 309

<sup>74</sup> Matter No. 257 of IRC of 2007

<sup>75</sup> Civil Cause No. 718 of 2002

<sup>76</sup> Masupayi v Council of the University of Malawi (1994) MLR 181

The first appellate procedure under section 97 of the Taxation Act allows a tax payer to appeal to the Commissioner of Taxes if aggrieved by any assessment made upon him or any decision by the Commissioner of Taxes in relation to an assessment. If the tax payer is not satisfied with the decision of the Commissioner of Taxes, they may appeal to a Special Arbitrator.<sup>77</sup> Section 98 of the Taxation Act provides that the Special Arbitrator may appoint assessors to assist during the hearing and the proceedings are conducted in private. The second appellate procedure is stated under section 100 of the Taxation Act which provides that a tax payer may appeal to an Administrative Officer who has made a decision. If not satisfied, an appeal may be lodged with the Traditional Appeal Court that is present in the district concerned. The Complainant must pay duty before appealing.<sup>78</sup>

The rules of procedure are provided under the 8<sup>th</sup> Schedule to the Taxation Act. Procedures for Courts are exhaustive. However, the procedures for the Commissioner and Administrative officer have not been clearly stated. Where an appeal is heard before the Commissioner or an Administrative Officer, a statement in writing must be written by the complainant within 30 days after decision is made, the Commissioner or an Administrative Officer may require the personal attendance of the complainant and that they may adopt their own rules of procedures. Where proceedings are held before a Special Arbitrator who is currently the Chief Resident Magistrate, the complainant is required to submit a written notice of intention to appeal to the Commissioner within 21 days after his decision, a written statement containing grounds of appeal and arguments in law to be relied on.<sup>79</sup> The Commissioner is mandated to serve his reply and finally the final determination of the Special Arbitrator is made. All proceedings are held in English and not any of the local languages. If a complainant is not satisfied with the final decision then they may appeal to the High Court only on points of law within 21 days.<sup>80</sup> The normal rules of procedure of the court during appeals apply.

In respect to the Customs and Excise Act which governs the matters of customs and excise duties, section 120 permits the Minister of Finance to appoint a Special Referee who hears appeals against a decision of the Controller of Customs and Excise. The complaint may appeal to the Resident Magistrate if not satisfied by the decision of the Special Referee. The rules of procedure are also stated under the Act that a complainant must pay duty before

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<sup>77</sup> The Special Arbitrators are Senior, Principal and Chief Resident Magistrates as per G.N 136/1980

<sup>78</sup> Section 105 of the Taxation Act

<sup>79</sup> Part 11 of the Eighth Schedule to the Taxation Act.

<sup>80</sup> Section 101 of the Taxation Act



appealing and must state the grounds of appeal in writing within 3 months from the date of the decision.<sup>81</sup> The Special Referee must publish in the Gazette the date of the hearing of the appeal. Members of the public who have legitimate trade interest or a legal practitioner may be heard if they file the notice of intent to appear and where proceedings relate to classification of goods. The procedure on appeal shall be determined by the Special Referee. If not satisfied the applicant may apply to the Resident Magistrate Court which hears the complaint according to laid down procedures.

In respect to the Value Added Tax Act, section 43 allows a tax payer to appeal to the Commissioner General within 30 days after a decision is made by the tax officer. The complaint must be made in writing and supported by documents.<sup>82</sup> If not satisfied, the complainant may appeal to the Resident Magistrate Court but only after payment of the amount of tax charged to MRA.

It was evidenced by the research that the law fairly incorporates principles of procedural fairness to an extent however in practice problems arise. The right to be heard has not been fully protected in the hearing of disputes. The procedure adopted at the Inland and Border Station offices is that a complainant or an agent will fill in details on the Valuation Appeals Questionnaire<sup>83</sup>. A brief description of the appeal is made with supporting letters, invoices, receipts, airway bills or bill of lading. When the Committee is sitting the written complaint is read out and discussed by the Committee without adopting any specific procedures. The revenue officer who made the decision is present and is allowed to dispute and clarify matters but is not involved in decision making. The customer or the agent are not present at the hearing and may only be called in rare circumstances when the documents are not sufficient. Thus, the complainant is not accorded the right to be orally heard whilst the revenue officer, whose decision is disputed, is given that right. The complainants are not present to dispute the evidence given against them and their participation is dependent on the discretion of the tribunal hearing the disputes.

Further, the rule against bias requires that the hearing be made by an impartial and independent tribunal. Sections 97 and 100 of the Taxation Act allow the taxpayer to appeal to the Commissioner or Administrative Office when aggrieved by their decision. In essence ,the

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<sup>81</sup> Section 121 of the Customs and Excise Act.

<sup>82</sup> Section 44 of the Value Added Tax

<sup>83</sup> The Valuation Appeals Questionnaire contains a brief description of the appeal, details of importer, details of clearing agents, detail of supplier, valuation details, checklist of documents attached and declaration by the appellant

Commissioner and Administrative officer will sit on the appeal case and yet the decision being dispute were made by them. In practice, the Commissioner of Taxes constitutes an Appeals Committee composed members from different departments to sit on Appeals. The appeal, however, is still against a decision that was made by him and the Commissioner is present during hearings. This is a blatant violation of the rule against bias which states that you cannot be judge in your own cause. The rule against bias is further violated in the proceedings as interested parties sit as adjudicators during appeals.

It is further noted that these is no public participation in tax adjudication and the tax laws clearly excludes members of the general public from the hearings except in cases where an appeal is made on classification of goods and the member of the public has a legitimate trade interest in that. The decisions that are made are also not made public and where a publication is made, the particulars of the tax payer are not disclosed. Section 98 (4) of the taxation Act clearly provides that proceedings before a Special Arbitrator shall not be public and a Special Arbitrator shall exclude or require withdrawing from the place of hearing all or any persons whose attendance is not considered by him to be necessary, and shall take appropriate measures to preserve the anonymity of the taxpayer. The justifications for such exclusion are to protect the right to privacy of the tax payer and to abide by the undertaking to keep matters confidential. However, there is a need to interrogate such justification in the light of the need for transparency and accountability in all decision making processes. A balance must be made that allows public participation by making the records public and keeping the details of the tax payer confidential.

The revenue laws are also restrictive as they only allow the individual tax payer to appeal to the High Court only on points of law and not facts. Section 101 of the Taxation Act provides that either party to proceedings before a Special Arbitrator under section 98 or a Traditional Appeal Court under section 100 may appeal in the prescribed manner to the High Court on a point of law. The High Court is also restricted to make findings only on points of law or procedure and not make an inquiry on the facts. A comparison with other laws, such as Section 346(2) of the Criminal Procedure and Evidence which provides that an appeal may be upon a matter of fact as well as on a matter of law, evidences that there is an undue restriction in revenue appeals. It is further argued most of the disputes that are brought under revenue laws relate to factual disputes and hence the restriction does not further fairness in the adjudication system.

The analysis also notes several other factors that impede on procedural fairness in the adjudication process. It is noted that the Commissioner of Taxes, Special Referee and Administrative Officer have been given the discretion to adopt their own rules of procedure in the handling of disputes. It was very difficult to determine the extent to which the discretion has been used in practice as the records of proceedings are confidential and not easily accessible. A tax payer is further obliged to pay the amount of tax before filing a notice of appeal under the various mechanisms. The requirements affects the right to appeal of the tax payer as the mechanisms are not accessible where one fails to pay the amount.

#### **4.3.3 Reasonableness in Adjudication**

With regard to matters that are taken into consideration before a decision is made, it was noted that decision that are made by MRA are not made public and proceedings are heard in camera. The officials stated that they base their decisions on revenue laws and not any other outside factors. It is argued that the judicial oversight that is available by way of appeal ensures that there is correct application of law.

#### **4.3.4 Contextual issues**

The dispute adjudicating bodies have not performed to the satisfaction of the complainants. In cases held at the border posts, it has taken a lot of time to receive the decision of the Controller on Appeal. Most of the customers would proceed to pay duty and not follow up on the appeal as they cannot leave their goods at the border posts because of prolonged appeals processes. The Malawi Revenue rated the entire adjudicating process fair and attributed the delays to lack of knowledge on the part of the tax payers and agents.

### **4.4 Nature and forms of public participation in rule making, implementation and adjudication processes**

#### **4.4.1 Administrative Autonomy and Public Participation in Decision- Making**

Administrative autonomy was historically present in the administration of tax. It was generally thought that the administrators of revenue have wide discretionally powers to make decision without engaging with the general public. Participation ought to be limited to law-making by the legislature and that administrative rule-making is essentially the implementation of policy in which participation is not the norm since this is the exclusive

purview of the executive branch.<sup>84</sup> Related to this is the argument that administrative rulemaking is a technical exercise that is best undertaken by technocrats with minimal interference by the politics that come with public participation.<sup>85</sup> However, it has been argued that such exceptionalism is unwarranted considering the impact of revenue decisions on the general public.<sup>86</sup> The general citizenry should be given an opportunity to participate in tax administration as attain the bargaining power against the State through paying taxes.<sup>87</sup> It has also been noted instead of putting confidence in an expert bureaucrat to accomplish public purposes; there should be more accountability, participation and transparency in administrative bodies.<sup>88</sup> Public participation is hence understood as a process whereby the general citizenry is given an opportunity to meaningfully contribute and engage with the political or administrative decision making processes.

Public participation is important for a number of reasons. It potentially improves the quality of decision-making due to the broadened perspectives as well as improved public compliance with such decisions.<sup>89</sup> Public participation improves the quality of government decision-making through increased accountability, “educating public officials about the local effects of their decisions” and bringing a wide range of stakeholder perspectives into a particular issue.<sup>90</sup> Public participation also furthers the legitimacy of decisions made, increases a sense of ownership and legitimacy of decisions made and enhances the chances of compliance.<sup>91</sup> Public participation is “most successful at achieving social acceptance and adherence to... regulations.....”<sup>92</sup> Considering the relevance of public participation, there is a need to balance between public participation and administrative or technocratic autonomy. The challenge for any administrative law regime is to formulate and ensure the enforcement of norms that strike a balance between optimal participation against administrative autonomy that ultimately promotes governance without negating administrative efficiency and effectiveness

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<sup>84</sup> Rossi

<sup>85</sup> Laird 1993

<sup>86</sup> (Professor Grewal, 2014) in *Taking Administrative Law to Tax*

<sup>87</sup> Farhan Zainulabedeem, Taxation and Good Governance and the Influence of Non- Tax Revenue on a Polity: The Pakistan Experience accessed at [www.jstor.org/stable/42909238](http://www.jstor.org/stable/42909238) accessed on 1/08/2016

<sup>88</sup> Francesca Bignami, From Expert Administration to Accountability Network: A new Paradigm for Comparative Administrative Law, *American Journal of Comparative Law* Vol59 No4 2011

<sup>89</sup> Ibid, p101

<sup>90</sup> Uma Outaka (2006), NEPA and Environmental Justice: Integration, Implementation, and Judicial Review, 33 *Boston College Environmental Affairs Law Review*, p601.

<sup>91</sup> CEPA, ( ), Report of Land and Agrarian Reform in Malawi, [www.cepamw.com](http://www.cepamw.com) (Accessed 18/03/2014)

<sup>92</sup> 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.

It is noted that public participation in revenue rule making has been limited to a greater extent and where consultations are done they are mostly with members of the organised community such as professions bodies. MRA and the Minister of Finance mostly propose revenue laws and rules by using the technocrats within their departments. Whilst the law/rule-making power and discretion is given to MRA and the Ministry of Finance, it is important that they meaningfully engage with the general populace so that their lived experiences are taken into account in revenue laws and this will increase the level of compliance. Further, it is also noted that public participation will further openness, transparency, accountability and legitimacy in revenue operations.

#### **4.4.2 Direct and Indirect Public Participation**

There are generally two forms of public participation in rulemaking, implementation and adjudication processes. Public participation is either direct or indirect. Direct participation means a fulfilment of one's legal rights and duties as specified in the Constitution, or alternatively, active involvement in substantive issues of government and community<sup>93</sup>. Whilst in indirect participation, individual members of the public, express their opinions through their representatives, agents or other intermediaries.<sup>94</sup> The right to directly and indirectly participate in political and public life is important in empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating marginalization and discrimination. Participation rights are inextricably linked to other human rights such as the rights to peaceful assembly and association, freedom of expression and opinion and the rights to education and to information.<sup>95</sup>

In practice it was found that most public contributions in revenue issues do not come from the general citizenry but from associations and professional bodies such as the accounting profession. That these associations are the ones who mostly discover areas that need refinement or review in revenue issues. The proposals by associations are made in writing and are addressed to the Commissioner General or the Minister of Finance. The proposals are then forwarded to policy planning of MRA which also seek inputs on such proposals from various departments within the agency to assess the implications of the proposals on

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<sup>93</sup> Roberts, N. 2004. Public Deliberation in Age of Direct Citizen participation. American Review of Public Administration. Vol 34. No.4. 315-353.

<sup>94</sup>Perry, J. et.al Handbook of Public Administration Available at : <https://books.google.mw/books?id=s1IqBgAAQBAJ&pg=PA141&lpg=PA141&dq=%27direct+and+indirect+public+participation.%27>

<sup>95</sup> United Nations Human Rights; Office of the High Commissioner for Human Rights. Available at; <http://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>

operations of their departments. And if they are good proposals they get implemented. It is thus evident that public participation in revenue matters is mainly indirect as opposed to direct participation. However, most of the professional bodies do represent the interest of their members and not the interest of the wider populace. Further, there are no general consultations with the public or ordinary citizen before they make their proposals to the revenue authorities.

On the other hand, it is also observed that there is lack of robust demand for good governance from the general citizenry. The general citizenry has deferred the demand for justice to NGO such as MEJN and other professional bodies. Unlike in the colonial times where the citizens did demand tax justice by protesting, the current scenario evidences that citizens do not actively engage with institutions due to lack of effective mechanisms for public engagement.

#### **4. 4.3 Processes of Public Participation in Revenue Decisions**

Governments and agencies employ a number of mechanisms to engage and support citizen participation. Participatory procedures include; referenda, parliamentary inquiries, surveys, roundtable conferences, workshops, local meetings and consensus conferences.<sup>96</sup> The type of decision to be made informs the appropriate type of procedure to be had.<sup>97</sup> Whatever form public participation takes, a relevant consideration should always be whether the participation will be meaningful and whether it is likely to have an impact on the policy, decision or legislation finally adopted.<sup>98</sup> Arnstein,<sup>99</sup> notes that there is a critical difference between going through an empty ritual of participation and having the real power to affect the outcome of the process. She identifies the eight important rungs on her 'ladder' of citizen participation. Firstly, there is what she refers to as; therapy and manipulation (non-participation), that its real objective is not to enable people to participate but to enable power holders to 'educate' or 'cure' the participants. She states that merely following a series of sequential, mechanical steps intended to 'win over' or 'educate' citizens on a major policy proposal risks failing to

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<sup>96</sup> Mc Donald, J. 1999. 'Mechanisms for Public Participation in Environmental Policy Development- Lessons from Australia's First Consensus Conference' 16 Environmental and Planning Law Journal 258.

<sup>97</sup> Hoexter, 2002.

<sup>98</sup> Ibid.

<sup>99</sup> Ainstein, 1969

engage them and risks losing an opportunity for citizens to form a relationship with the issue.<sup>100</sup>

Placation, consultation and informing (degree of tokenism) are another level of citizen participation that Arnstein identifies. She notes that this step allows the have-nots to hear and have a voice. She states that, informing can be the most important legitimate first step for citizen participation. However, it is often based on a one way flow of information from officials to citizens with no channels for feedback and no power for negotiation, under these circumstances people have no power to influence the program designed for their benefit. She notes that the most frequent tools used for such one way communications are pamphlets, news media and response to inquiries. Meetings can also be turned into vehicles for one way communication where superficial information is provided, questions are discouraged and irrelevant answers given. The most frequent means of consulting people are attitude surveys, neighbourhood meetings, and public hearings. When participation is restricted to this level, it remains a window dressing ritual. Citizens are perceived as statistical abstractions and participation is measured by how many people come to meetings, take brochures home or answer a questionnaire. In placation, Arnstein explains to say that a degree of citizen participation is slightly seen and gives an example where a few handpicked 'worthy' poor are chosen on boards of agencies. The degree to which citizens are placated depends on two factors; the quality of technical assistance they have in articulating their priorities and the extent to which the communities have been organized to press for those priorities.

On the upper levels of Arnstein's rung is partnership, delegated power and citizen control (degree of citizen power), where citizens hear and are heard. At partnership level, power is redistributed through negotiation between the citizens and the power holders. Partnership work effectively where there is organized powerbase in the community to which the citizen leaders are accountable. Negotiations results in delegated power where citizens achieve dominant decision making authority over a particular plan or program. She argues that effective participation can only occur only on the last three rungs of the ladder where the state is prepared to enter into a partnership with interested and affected parties and power may be redistributed through negotiation between citizens and the power holder.<sup>101</sup> At this level citizens are also able to achieve a dominant decision making authority where power is

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<sup>100</sup> Levi, 1994

<sup>101</sup> Arnstein S. 1969. 'A Ladder of Citizen Participation' American Institute of Planners Journal. 216

delegated to them and in some programs they may even be in full control of all the policy and managerial aspects.

The public and various interest groups are engaged at various levels in rulemaking processes of the tax administration in Malawi. It was reported by MRA that different avenues for engaging the public are used depending on the type of group they are dealing with. The different avenues were never clarified. It must be noted that there is no standardized procedure of engaging the public in rule making processes in Malawi and the avenues will thus depend on what the agency or a particular Ministry deems appropriate. MRA emphasized the importance of engaging the public that it does have an input in the quality and enforcement of rules that comes about.

It is important to involve the public in coming up with rules because there are some things that we people in the office do not know about, the public has the hands on experience. It is just up to MRA to shape the policies to be in accordance with international as well as local interests and the interests of the sectors involved. For example we would involve environmental affairs department when considering issues that affect them so that we are not inconsistent with their interests. *A senior officer at MRA.*

The agency reported that experience has taught them that when the public is involved, their ideas get accepted easily and they rarely encounter problems in implementing the rules unlike where the public was never engaged. Where the agency had not engaged the people it met resistance in various forms one of which was court injunctions. An example was given where the agency wanted to introduce a system to license clearing agents due to a lot of cheating and distortion of information by the agents. The initiative was not consultative and this affected implementation.

One example in which the revenue administration gets the public to participate is through the pre-budget consultation meetings which are a yearly event. It was reported that in these meetings institutions such as the Malawi Chamber of Commerce and other associations make presentations outlining their proposals on revenue matters. That the proposals made are analyzed and considered by the agency. Most respondents indicated that these consultation meetings are open to the public and people who are interested can attend the meetings. Public engagement was said to be initiated by the agency or Minister of Finance in pre-budget consultation meetings. The public rarely initiates meetings with revenue authorities. The



consultation meetings are often held in Blantyre representing the southern region, Lilongwe for the central region and Mzuzu for the northern region. This excludes a majority of Malawians who live in other districts and especially those in remote areas. The agency reported that some programs within the organization have been implemented as a result of input from the public such as the introduction of 10% tax on airtime, payee threshold was also said to have had come from the public. Public engagement was said to be mainly made through the involvement of recognized bodies such as MCC and Bankers Association. The above raises concerns about adequate representation of the needs of the public in the above processes. It seems only well resourced societies afford to participate. Effective participation needs money, time, organization and expertise and there is always the risk that government will only respond only to the wealthy and the well-organized<sup>102</sup>. There is no systematic way of engaging the public let alone disadvantages groups in the nation.

Further, it was reported that in some policy measures for example when devising rules of collecting tax, the agency does not consult the public. The public and other stakeholders will only be engaged to inform them about the tool and not to seek their input. Referring to the EFD for example most MRA officials said that they did not involve the public in coming up with the device. The officials said that there was no need to consult as it is just a methodology of collecting tax. Using Arnstein ladder, it can be argued that public participation in rulemaking of the revenue administration is still an empty ritual of participation where the public have no real power to affect the outcome of the process. The Malawi tax administration seems to follow pluralism type of rulemaking as against civic republicanism. Pluralism as a theory regards laws and administrative decisions as the outcome of a process whereby decision makers are lobbied by various interest groups in society and then make decisions which ‘aggregate citizen preferences<sup>103</sup>.’ In Pluralism laws are seen as a commodity, subject to the forces of demand and supply. Pluralism is therefore committed to familiar conceptions of majority rule. On the other hand civic republicanism favours the situation in which decision makers stand back from the lobbying process and seek new information and different perspectives before making decisions. In civic republicanism

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<sup>102</sup> Hoexter, 2002.

<sup>103</sup> Cass, R. Sustain. *Beyond the Republican Revival.* (1998). Yale Law Journal.

deliberation of issues among interested parties is encouraged rather than cutting deals with self-interested pressure groups<sup>104</sup>.

Pluralism is evident in the Malawi tax administration where it was reported that, consultation of the public is done by dealing with the several sectors separately. The various sectors are not consulted together. It was also indicated that most of the times the individual sectors would want to advance their own interest which are mostly egoistic. The agency and the Ministry of Finance then have a role to balance all interests of the different sectors. However, most of the clearing agents at borders indicated that they are not consulted when new rules are being formulated. The agents bemoaned the legal process of clearance as very tedious, and the rates punitive, as a result, many of them turn to illegal and corrupt means of clearing goods, because it is faster and cheaper. The taxes were said to be very high, and that officials still charge taxes on goods of the value of less than a hundred thousand, contrary to the law.

It is argued that public participation which takes a pluralism approach is not suited for a society which encompasses various categories of people with different levels of power and a wide gap between the rich and the poor. This is a situation which is obtaining in Malawi as such lots of people are left out in the rule making process and their needs not taken into account.

#### **4.4.4 Access to Information on Revenue**

Accountability of governmental institutions is linked to their transparency.<sup>105</sup> Citizens need have access to information relating to the functioning of public bodies in many different contexts for example in how rules are made and in how matters are adjudicated. It was reported that MRA has a corporate department which its main functions is to advertise its activities and to get in touch with the public. The agency also has a website to share information with the public. The agency also produces different materials for the public on revenue e.g. brochures, leaflets and they do have newspaper, radio and TV adverts. These are produced both in Chichewa and English. It was said that reports are produced from the agency's discussions with the public. All channels of communications were said to have contact numbers so that when people have issues they would be able to contact the agency. This was said to have enabled people to call directly to the agency's head office or engage

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<sup>104</sup> Pierce, R. 1994. Public Policy Consensus Building: Connecting to Change for Capturing the Future.' North Dakota Law Review. 311

<sup>105</sup> Leyland , P. et al. 2009. Textbook on Administrative law. Oxford University Press: United Kingdom.

their nearest MRA stations. The agency also has suggestion boxes and said to have benefited from valuable suggestions from the boxes. However, missing in the information that is imparted to the public is information relating to rule formulation and how the public can participate in that. Most of the information relates to enforcement mechanism, payment of tax and penalties for non-compliance in tax payment.

Further, as regards adjudication, public participation in adjudicating disputes is problematic because of the complexity and multiplicity of dispute resolution bodies and the lack of available information to the public on the same. Members of the general public are not aware of the adjudicating bodies because they are ad hoc. Public participation in adjudication is hampered by the fact the proceedings with the MRA are private hearing and hence not open to members of the general public. The findings made on various matters are kept internal and no member of the public would have access to them. The judgments on revenue matters are also private documents and where they are made public only matters of law and procedure can be included. This promotes lack of awareness. The complainants do not participate in the dispute resolution mechanisms because of need to pay duty before one can access a tribunal. Courts have also hindered public participation as they reinforce the exclusions of the members of the public from participating in adjudicative functions. In *Siku Transport Limited v Malawi Revenue Authority*, the court did not grant leave to the applicants.

#### **4.4.5 Gender Considerations in Public Participation**

Public participation in rule making processes can only be effective and serve the public interest if and only if it seeks views of all interested parties and affected parties and recognize the pluralistic sentiments of the community and open space for the ‘marginal’, the ‘different’ and the ‘other’. Most of the times public participation processes have failed to address issues which impede women participation. Few women are in positions of authority and women are often represented in token numbers in influential positions<sup>106</sup>. This emphasizes on the need to scrutinize public participation processes in how they ensure that women are incorporated and meaningfully contribute in rule making processes. Gender issues was said not to be a big issue to MRA when coming up with tax laws, rules and policies. It was said that tax policies are supposed to apply equally across the board and as such they do not have deliberate policies to incorporate gender issues in the policies or laws. The agency

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<sup>106</sup> Lyster, 1998.

said that if they were to be approached by institutions such as NABW may be they would be gender specific. It was said that there was no room to favour particular groups such as women groups as fiscal incentives provided by the government do treat everyone equally. It was pointed out that in Malawi's tax history, there used to be a minimum tax on males which they said was very discriminatory against men. Women therefore, are not particularly targeted in rule making processes. However, it was mentioned that certain areas of taxation have more women players than men and vice versa whilst other sectors are mixed. Thus the sectors themselves determine whether there is a gender dimension but the agency does not deliberately look for gender issues. An example was given where when the agency was about to introduce the Simplified Trade Regime (STR) women needs were considered. This was by simplifying the form which was being used at border posts to make it less complicated and involving as it was noted that due to the complexity people and women in particular used to shun the borders.

#### **4.5 The Role and Impact of Judicial Review on the functions of Malawi Revenue Authority**

The Malawi Revenue Authority has been sued in judicial review proceedings concerning matters that relate to the decisions and orders of the Commissioner General on tax assessments and decisions made by the various adjudicative bodies under tax laws. On the adjudication procedures and appeals provided by revenue laws, in the *Siku Transport Limited v Malawi Revenue Authority*<sup>107</sup>, leave was sought by the applicant for judicial review of the decision of the Commissioner with respect VAT assessments and an order of garnishee issued against the applicant. The Malawi Revenue Authority argued that the applicant had not exhausted the dispute resolution mechanisms provided for under section 44 the VAT Act. The court held that the decision of the Commissioner General on the VAT assessments could not be subject to judicial review until the appeal processes provided by the VAT Act were exhausted.

However, in the *State, Commissioner General of Malawi Revenue Authority Ex-parte Bosco Ezekia Matala*,<sup>108</sup> the High Court in Mzuzu held that a party aggrieved by the decision of the

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<sup>107</sup> Commercial Case No 112 of 2013

<sup>108</sup> Civil Cause No. 92 of 2012

Commissioner General may move the High Court directly as the court has unlimited original jurisdiction according to section 108(1) of the Constitution and that section 46(2) of the Constitution of Malawi grants access to courts to any person who claims that their right has been violated. The court allowed the applicant to move the court for judicial review even though the appeal procedures as laid down under sections 120 and 121 of the Customs and Excise Act were not exhausted. In *Malawi Revenue Authority v Abdul Karim Batatawala and other*<sup>109</sup>, the court held an application for release of documents by the Malawi Revenue Authority which documents were seized under a search warrant. MRA raised an objection contending that the court had no jurisdiction as there was a judicial review matter before the High Court arising from the same facts. The court proceeded to hear the application and held that the appeal procedures laid down under the law are not stayed by mere commencement of judicial review proceedings. Thus, it will be noticed that the cases on judicial review have focused on the decision that has been made by the Commissioner General and the lack of adherence to the dispute resolution mechanisms placed by the tax laws. The judicial review cases do not relate generally to a challenge on the propriety of the rules or regulations made for purposes of efficient tax administration.

The research made an inquiry on role and impact of judicial review on the conduct of the functions of MRA. It was observed that the Inland Revenue Officers, Border Station Offices and the lower ranking officials, despite being implementers of revenue laws, are not aware of the decisions that have been made in judicial review. The situation exist despite the fact that the decision are shared on the monthly bulletin's circulated within MRA but the actual court judgments are not shared with all relevant departments. The Customs Division and the Domestic Tax Division further stated that the judgments from the court, not just on judicial review, do not reflect a proper understanding of the revenue laws. The Malawi Revenue Authority's Legal Affairs Department handles cases on Judicial Review. The department is fully aware of the decisions made by the court but their interactions with other departments within MRA are limited. Other departments within the institution faulted the Legal Department for failing to appreciate complexities in revenue laws. The analysis evidences that that judicial review did not have a positive impact nor improve the quality of decision making within MRA.

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<sup>109</sup> Miscellaneous Application Number. 298 of 2013

## 5. Summary of Key Findings and Recommendation

The purpose of the study was to determine how the Malawi Revenue Authority makes rules, apply rules and adjudicate disputes. Further the study wanted establishes the nature and forms of public participation in rule making and application and adjudication of disputes. Finally the study aimed at determining the role and impact of judicial review, parliamentary and presidential oversight on agency functions. This section highlights the key findings of the study as follows:

### 5.1 Rule-Making

- The actors that are involves in revenue law making are the Ministry of Finance and the Malawi Revenue Authority- Headquarters and these have been empowered under the law to propose amendments to revenue laws in order to facilitate efficient administration of tax. It is noted that the members of the organised society such as professional bodies and NGO do participate in the law making processes. However, public or citizen participation in law making is limited as no mechanisms have been put in place to ensure that the ordinary and indigent citizens in Malawi participate in revenue law making. The Malawi Revenue Authority exclusively conducts the revenue rule making functions without engaging the general populace
- There is a multiplicity of law/rule making processes and mechanisms and that does not further public participation, openness, accountability and good governance.
- There is further technocratic autonomy in rule making due to complexity of tax laws and the general citizenry is assumed to be technically incompetent to effectively participate in revenue matters
- There is over deference to the Ministry of Finance in revenue law making and parliamentary oversight is ineffective to cure defects that occur in revenue law making and this affects the legitimacy of revenue laws
- There are political interferences in revenue law-making hence the taking into account of irrelevant factors in revenue making and that does not further good governance.

## 5.2 Rule Application

- The complexity of tax laws have led to difficulties in implementation and resultantly, the extent of citizen participation in revenue rule/law implementation is minimal.
- The Commissioner General has been given vast powers under revenue laws to make decisions. However, there is lack of judicious exercise of discretion as the Commissioner General has made decisions that are influenced by political and executive. Further, decision-making that is politically influenced makes other categories of the citizenry to be above the law. The malpractice does not further good governance.
- There several actors are involved in rule application and the same have been mandated by law. Of concern are the Clearing Agents who are essentially a link between the general citizenry and the MRA officials. Clearing Agents have furthered malpractices such as corruption and fraud.

## 5.3 Adjudication

- There is a multiplicity of actors and processes in revenue adjudication and some of the bodies are not available and accessible in practice. The situation does not further democratic governance.
- The Committees that mainly hear disputes on behalf of the Controller of Customs and Commissioner of Taxes and whose decision is then confirmed by the Commissioner General have no legal basis under the law.
- The revenue laws embody principles procedure fairness to larger extent as a tax payer is given an opportunity to adduce evidence, to be represented by a legal practitioner and to be heard in the conduct of the case.
- In practice, the right to be heard is not accorded to a tax payer. Tax payers at the border or Inland Revenue officers who lodge complaints are mandated to do so in writing and they are not present during the actual determination of their case. Appeals Committees that are set up at MRA adjudicate on matters and these are not sanctioned by revenue laws.

- The rule against bias is also violated under the law as the Commissioner or Controller may sit on appeals when a decision being challenged was essentially made on their behalf by their delegates.
- The revenue laws do not allow for public participation in adjudication and the records on appeals are kept confidential. The situation does not further transparency, openness and accountability in revenue decision making.
- Adjudicators have also been given wide discretion to adopt their own rules of procedure. The same have not taken into account principles of procedural fairness.

#### **5.4 Public Participation**

- There is administrative autonomy in revenue matters and that impedes on meaningful engagement with the general populace
- MRA adopts indirect participation as professional bodies and NGO represent the interest of the citizens and pluralism is also evident where consultations are done by dealing with several sectors but separately.
- Gender is not a key consideration in revenue decision making.