

# Romancing Constitutionalism through Law Reform: The Malawi Experience\*

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*“the law has always been the mirror of society... the law must change to reflect the needs of the changing times and conditions.”*<sup>1</sup>

## Introduction

Of all the reforms or innovations which the “second wind of change” that has taken place in Africa in the 1990’s has sought to achieve, one appears to have rooted itself with particular success. It is the adoption of largely liberal democratic Constitutions. These Constitutions valorizes the superiority of the individual, place emphasis on human rights, the rule of law and democratic governance. This, to a certain extent, gives hope for the ultimate consolidation of constitutionalism and democracy in Africa. The assertions of rights, some vociferous (such as injunctions against Government), others more subtle – appear as the most indisputable fruits of constitutionalism and democratic governance.

Although there is certainly cause to celebrate this conspicuous change in many African polities, critical social analysis cannot take such assertions for granted. To do so would be to claim the mere adoption of liberal Constitutions that supposedly provide checks and balances on the three arms of government, namely, the Executive, the Judiciary and the Legislature as adequate to guarantee the enjoyment of the various rights and freedoms by the individual.

This paper focuses on the practices and functioning of the three arms of Government as agents of law reform in order to show the gaps that institutionalized law reform can fill. The paper shows, in particular, that there is an enlarged space to be taken up by institutionalised law reform, making it critical for law reform to be innovative and forward looking. Accordingly, this paper’s plea is for an appreciation of the relevance of institutionalized law reform in contemporary society, and for a certain resistance against the legalistic conceptualization of law reform.

Law reform is largely concerned with the systematic development and reform of the law. This quest involves the codification of the law; the elimination of defects in the law; the repeal of obsolete and unnecessary statutes; the consolidation of statutes; the promotion of new or more effective methods and procedures for administration of law; and generally the simplification and modernization of the law.<sup>2</sup> In short, law reform is a tool that is used to make the law simpler, fairer, more modern and cheaper to use.<sup>3</sup> It is this ambitious quest that renders law reform better suited to deal with the broader, more complex social-legal issues which arise in contemporary society.

Since the end of colonization, society in Africa has been changing at a great pace in terms of systems of government, social attitudes, national cultures, economic life and also in the world of

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<sup>1</sup> Crabbe, V., *Legislative Drafting*, London: Cavendish Publishing, 1993, p. 201.

<sup>2</sup> See section 6 of Law Commission Act, Cap. 3:09 of the Laws of Malawi.

<sup>3</sup> See (1993) Law Commission of England and Wales Report No. 210 paras 1.13-1.15.

technology. Too often the law has lagged behind these developments resulting in situations where the law is unfair, out of date, uncertain and even expensive. These problems necessitate the examination of the law to determine whether change is appropriate. If this is not done, the law itself may fall into disrespect. An example of a statute that has fallen into this category is the Africans on Private Estates Act<sup>4</sup>. The Act seeks to regulate the conditions on which Africans may reside on Private Estates and the orderly development of Agricultural land. The absurdness of having this law on the statute book is obvious.

The great pace at which society is changing and the need to resolve the broader, more complex social legal issues creates a high demand for institutionalized law reform. This is because institutionalized law reform presents itself as the only avenue capable of ensuring thorough and thoughtful research and analysis of legislation, case law, international instruments, academic and other writing; and engaging the general public including the commissioning or use of empirical research. The advantages of having institutionalized law reform are therefore manifold.

For example, if a law reform agency is established under the Constitution or an Act of Parliament with guaranteed independence it is able to form objective and impartial views about the way in which the law should be reformed. This independence together with its practice of wide public consultation and the use of empirical research, enhances the credibility of its work.

Second, a law reform agency has a single central purpose: promoting the reform of law. This ensures that an agency can concentrate its energy, time and resources on this single purpose and is saved from the distractions and interruptions faced by Government departments such as the office of the legislative council in the Ministry of Justice<sup>5</sup>. The concentration of law reform in one institution also reduces duplicity.

Third, a law reform agency may gradually build up a fund of knowledge, expertise and expert contacts in both the law and law reform. This is made possible by the statutory requirement to appoint Commissioners and staff who are well suited for the particular purpose of law reform. For example, Section 133 (b) of the Constitution of Malawi requires the Law Commissioner in consultation with the Judicial Service Commission to appoint persons as Commissioners “on account of their expert knowledge of a matter of law being then under review”; or “on account of their expert knowledge of other matters relating to a legal issue being under review”. Apart from enhancing expertise in a law reform agency, this requirement also allows the appointment of Commissioners who, though lacking in legal background, are experts in their own disciplines that are the concern of a law reform programme. This approach has two advantages. It ensures the avoidance of a legalistic approach and promotes a multi disciplinary approach to law reform. This is in recognition of the indispensable role of law reform as a tool for tackling broader, complex and social-legal issues which legal training alone is inadequate to satisfy. Consequently, the independence and reputation of a Commission may promote the attraction of Commissioners and staff of considerable ability.

These aspects of institutionalized law reform do not themselves ensure consolidation of constitutionalism nor do they guarantee rule of law and democratic governance. However, the

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<sup>4</sup> Cap 33:01 of the Laws of Malawi.

<sup>5</sup> See Law Commission of England and Wales, Sixth Programme of Law Reform, Law Com No. 234, p. 8.

absence of law reform in this manner may limit severely that possibility, and can at worse, impede the achievement of these aspirations.

## **Law Reform and Constitutionalism: Practices on the ground**

Constitutionalism is understood as a system of Government in which power is distributed and limited by a system of laws that must be obeyed by both rulers and the citizenry. In an ideal constitutional set up, the three arms of Government provide checks and balances over each other. These arms are in turn watched over by a fourth arm, namely civil society including a free press.

### **The Judiciary as an agent of law reform**

In Malawi, as is the normal practice everywhere, the judiciary is entrusted with the responsibility of interpreting, protecting and enforcing the Constitution and all laws in an independent and impartial manner<sup>6</sup>. In carrying out this mandate the Judiciary implicitly carries out law reform. The courts engage in the development of the law by adapting it to changing circumstances and through the appellate process, by reconsidering established doctrines with a view to their modification. Yet despite this responsibility and the activities of the Judiciary, there is still a vital role for institutionalized law reform. Courts can only implement law reform in a piecemeal way since their primary function is the adjudication of disputes between individuals. Further, Judicial law reform, indeed can only be systematic over a long period of time. The appeal process itself is expensive and not readily available to the common person, so that some questions in the law may remain permanently unresolved. Others have also questioned the appropriateness of the Judiciary to implement law reform. Justice Mason, former Chief Justice of High Court of Australia had this to say in 1979 -

“Responsibility [of the courts] is to decide cases by applying the law to the facts as found. The courts facilities, techniques and procedures are adapted to their responsibility. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, reexamine, submission from groups and individuals who may be initially interested in the making of changes to the law. *In short, the court cannot, and does not, engage in the wide ranging enquiries and assessments which are made by law reform agencies as a desirable, if not essential preliminary to the enactment of legislation by an elected legislature.*”<sup>7</sup> (Emphasis added).

These limitations show the vital role that institutionalized law reform can play in filling this gap in the constitutional set up. It is not surprising that the current practice in the Judiciary is gradually underscoring the importance of institutionalized law reform. For example, Judges make themselves readily available to work with the Law Commission under specialized law reform programmes. Since the establishment of the Law Commission in 1996, its law reform programmes have benefited from the involvement of over twenty judges either in a charring capacity or as special Law Commissioners in special Law Commission work. The involvement of judges in the law reform process helps judges understand the policy and legislative history behind the laws under review. As a consequence, such involvement subconsciously influences their decisions when adjudicating matters involving these laws. This is where law reform in Malawi is forward looking because the involvement of judges in law reform programmes is not

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<sup>6</sup> See section 9 of the Constitution.

<sup>7</sup> [http://www.lawlink/lrc//\\_lrc.nsf/pages/LRC-role4#fn3](http://www.lawlink/lrc//_lrc.nsf/pages/LRC-role4#fn3) visited on 28 October, 2011.

only based on their expertise relating to the law under review but also is in recognition of their judicial role as agents of law reform.

It is also becoming the norm that counsel may use Law Commission Reports in arguments before Courts. For example, in the case of *The Registered Trustees of the Public Affairs Committee vs Attorney General and the Speaker of the National Assembly*,<sup>8</sup> the Attorney General argued that the challenged amendment to section 65 (1) of the Constitution regarding the issue of crossing the floor was a product of the Law Commission Report on the Technical Review of the Constitution published in November, 1998.<sup>9</sup>

Further, Judicial citation and discussion of law reform reports for purposes such as the clarification of the purport of proposed amendments to law; the recognition of such reports as an accurate summary of the current law; and a source of criticism of the content of the law is also a trend that is gradually taking root<sup>10</sup>. In other jurisdictions such as Australia, judicial citation is also used for purposes of a discussion of the policies promoted by the law.

### **The legislature as an agent of law reform**

While Parliament is ultimately responsible for most law reform through enactment of legislation, the reforms initiated within it are almost zero. For example, since 1994, when the Malawi Constitution was adopted, only four private members bills (PMBs) have been introduced in Parliament. The first one was introduced in 1996 and sought an amendment to the Reserve Bank of Malawi Act to require that the currency of Malawi shall bear politically neutral features. This bill was not tabled. The second one was introduced in 2002 and sought to amend section 83 (3) of the Constitution to remove the limitation on the number of terms that a President may serve in that office. The Bill was tabled and defeated. The third one was introduced in June 2005 and sought to amend section 65 (1) of the Constitution to empower the Speaker of the National Assembly to declare vacant the seat of any Member of Parliament (MP) elected under a particular status who chooses to alter his or her political status during the life of Parliament. The Bill was tabled and defeated. The final one was introduced in October 2005. It sought to amend section 83 of the Constitution to make provision for a National Governing Council as an interim body in the event of the impeachment of a president. This Bill was not tabled.

A number of observations could be made. First, out of the four bills, only two were tabled in Parliament and that both bills were defeated on the floor. One could therefore conclude that since the adoption of the liberal constitution in Malawi in 1994, Parliament has not initiated any law reform. Second, it is also important to note that all the four PMBs introduced in Parliament were focused on political issues rather than complex social issues affecting the common person in Malawi leading one to conclude that it is not safe to rely on Parliament, in its present manifestation, as an agent of law reform concerned with the complex social-legal issues affecting the citizenry.

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<sup>8</sup> Civil Cause No. 1861 of 2003.

<sup>9</sup> Note however that the High Court did not agree with the allegation made by the Attorney General and found that Government had tampered with the recommendation from the Law Commission.

<sup>10</sup> See *The Registered Trustees of the Public Affairs Committee* case, note 8.

Third, it is clear by the absurd number of PMBs introduced in Parliament over a period of almost 18 years that there is lukewarm effort to initiate law reform in Parliament. The explanation given in this regard is that the expense attached to the process of initiating a PMB is exorbitant, in particular the printing costs of documents, which remains the responsibility of the MP introducing the bill in Parliament. Consequently, practice has developed where MPs resort to moving motions in the House with the hope that Government may take up the issues raised. This has meant that the ability of MPs to introduce PMB's to address the broad, complex social legal issues affecting the country is limited. This scenario therefore creates an enlarged space for institutionalized law reform to step in.

### **The Executive as an agent of law reform**

Officers within the Executive arm of Government have the primary task of implementing Government policy. Many law reform tasks of both a technical and a broad social policy nature fall within their purview. However, there is a tendency by departments under this arm to concentrate on areas considered to have immediate political significance. Reforms which are complex and specialized, requiring long deliberation are neglected on the basis of financial and human constraints or irrelevance to prevailing political priorities. In Malawi, this has translated into focusing on legislation that aim to address political issues; promote the collection of revenue by government; and legislation that facilitate the accessing of multilateral or bilateral loans by government. For example, out of the twenty six Acts of Parliament enacted in 2011, (Index attached as Appendix), sixteen are money bills ranging from loan authorization Acts to those regulating revenue in Malawi.<sup>11</sup> Six statutes constitute substantive law reforms initiated by government through the Ministry of Justice. These cover areas such as the establishment of the Lilongwe University of Agriculture and Natural Resources; Atomic energy; Council for Higher Education; Civil Procedure Suits by or Against the Government or Public Officers and Pension. These mostly seek to implement government policy in higher education and energy.

The remaining statutes which are also substantive but aim to address the broader, complex social-legal issues, that are close to the heart of the common person, originated from the Law Commission. These include the Penal Code (Amendment) Act, 2011 that has introduced, among other things, new offences to punish new forms and ways that have emerged of committing certain crimes in the area of sexual offences; new crimes in the area of monetary transactions; and reviewed the general principles for establishing criminal responsibility, among other things. The Legal Aid Act, 2011 is another statute emanating from the Law Commission. It provides a legal framework to regulate provision of legal aid in line with the Constitutional right of access to justice for the poor through a legal aid regime that is practical and effective. The other statute is the Local Courts Act, 2011; which seeks to promote an accessible, effective and efficient justice system for the common person, particularly in rural areas. And, the fourth is the Deceased Estates (Wills, Inheritance and Protection) Act, 2011 a law that is largely concerned with issues of the administration of deceased estates and in particular aims to address the evil practice of property grabbing rampant in Malawian society.

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<sup>11</sup> These include the Value Added Tax (Amendment) Act 2011; Taxation (Amendment) Act, 2011; Reserve Bank of Malawi (Amendment) Act; Customs and Exercise 2011; (Amendment) Act, 2011; Financial Cooperatives Act, 2011.

It is interesting to note that the Index to 2010 Acts exhibits the same pattern in terms of the focus area of the executive arm of Government. It is therefore imperative that institutionalized law reform be innovative to balance up the legislative programme of the Executive arm.

The other challenge impinging on the implementation of effective law reform by the Executive is the mode of operation for government departments which is essentially confidential. This prevents the involvement of stakeholders, who are well versed with issues and challenges relating to implementation of laws under review by the Executive. Further, the departments concerned with law reform do not have a high public profile and may have limited contact with the legal profession and the Judiciary, which are the groups most aware of the law in need of reform. Again, these limitations highlight the vital role for law reform to fill the gap.

### **Other Agents of law reform**

Another important agent of law reform is a law society. In this sense, a law society is perceived as part of civil society in the broadest sense. Law societies have long traditions of involvement in attempts to improve the legal system. Despite this commitment, they are impeded by resources available to them and particularly the fact that their members are already heavily committed to the practice of the law. It has indeed been a challenge for the Law Commission to adequately engage legal practitioners to work on law reform programmes due to time constraints on their part.

The faculty of law of the University of Malawi is another institution that has embraced institutionalized law reform. This has manifested in the participation of lecturers in law reform work and the use of Law commission reports, including issues and discussion papers, in teaching mainly for purposes of deducing common perceptions about deficiencies of particular laws and suggested improvements.

### **Key Impediments to Effective Law Reform**

It is not sufficient to point out the vital role that law reform can contribute to the consolidation of constitutionalism and democracy in Malawi if the recommendations from a law reform agency are not taken on board by government. The experience in Malawi is that there has been either inordinate delay by Government in adopting recommendations from the Law Commission or that the adoption of recommendations has been sporadic. Sporadic adoption of recommendations is counter productive in particular where the aim of law reform is to promote the systematic development of the law in a particular area. A case in point is the comprehensive programme on the review of the criminal justice system implemented by the Law Commission between 1998 and 2007 that targeted a number of statutes. The recommended reforms were aimed at modernizing the criminal justice system in order to make it current with constitutional and human rights norms. Only those reforms that coincided with Government's agenda in terms of priorities were taken on board expeditiously. These included the Bail (Guidelines) Act, 2000, The Corrupt Practices (Amendment) Act, 2004 and the Fines (Conversion) Act, 2005. Amendments to fundamental statutes such as the Criminal Procedure and Evidence Code and the Penal Code took seven and eleven years respectively to be enacted by Parliament. The Table below illustrates the extent of delays encountered respecting the various statutes reviewed pursuant to the Criminal Justice Programme.

**Table I****Statutes Under the Criminal Justice Reform Programme**

<b>Law Under Review</b>	<b>Bill and Year of Publication</b>	<b>Year of Enactment</b>
Bail Guidelines	Bail Guidelines Bill 2000	2000 as Act No. 8
Criminal Procedure and Evidence Code	Criminal Procedure and Evidence (Amendment) Bill 2003	2010 as Act No. 14
Penal Code	Penal Code (Amendment) Bill 2000	2011 as Act No. 8
Corrupt Practices Act	Corrupt Practices (Amendment) Bill 2002	2004 as Act No. 17
Police Act	Police Bill 2003	2010 as Act No. 12
Conversion of Fines	Fines (Conversion) Bill, 2003	2005 as Act. No. 10
Legal Aid Act	Legal Aid Bill, 2005	2011 as Act No. 7
Children and Young Persons Act	Child (Care, Protection and Justice) Bill 2005	2010 as Act No. 22
Traditional Courts Act	Local Courts Bill, 2007	2011 as Act No. 9

Ancillary to inordinate delays is the issue of dissonance between some of the recommendations made by the Law commission and the legislation that gets enacted in the wake of the recommendations. Though section 13 of the Law Commission Act has provided an avenue for ensuring the avoidance of such discrepancies, it is never utilized. The section empowers the Law commission to receive comments, opinions and views made by cabinet on draft principal legislation or made by the responsible Minister or other authority on any draft subsidiary legislation contained in its reports and to reconsider its draft legislation “taking due and reasonable account” of such comments, opinions and views and make new findings and recommendations in response thereto. The fact that the Law Commission has no say in what happens to its reports that are submitted to Cabinet and Parliament, unless approached, poses a challenge for law reform. It is clear therefore that the degree to which law reform recommendations are adopted by Government, including the consistency, speed and adherence to original recommendations, are some of the indicators that can be used to measure the contribution of law reform to constitutionalism. This discussion however is beyond the scope of this paper.

The other key impediment is the lack of adequate resources, financial and human, available for law reform. In developing nations such as Malawi, where institutionalized law reform is a by-product of the liberal democratic constitution, law reform is a multi-task and is onerous. Law reform is required to address the legal aspects of social problems; to reform most of the

autocratic and archaic laws still dominating the statute books; and to promote awareness of the laws and the constitution. This involves systematic development of the law, cleansing the statute books and civic education which is a crucial aspect of law reform in view of high illiteracy levels in Malawi. All these tasks demand considerable financial and human resources. There is therefore a need for a law reform agency to continuously engage government and development partners on the need for adequate funding for institutionalized law reform. These constraints equally challenges a law reform agency to determine law reform priorities in a transparent manner based on “constitutional principles, national interest, level of public interest in the submissions, and availability of funds”<sup>12</sup> to gain public confidence in the fulfillment of its mandate.

### **What of the future?**

This paper has demonstrated that the need for institutionalized law reform cannot be overstated in Malawi. Such law reform has the vital role of complementing and filling the gaps created by the practices and functioning of the three arms of government in their role as agents of law reform in the constitutional set up. It is clear that there is an enlarged space to be taken up by institutionalized law reform making it critical for law reform to be innovative and forward looking. This task demands that law reform should go beyond “the cleansing of statute books.”<sup>13</sup> Consequently, the future of institutionalized law reform is contingent upon demonstration by law reform agencies of their value and their role in constitutionalism. This may be fulfilled by the adoption of procedures and methods that promote the participation of all interested parties and groups in law reform projects to ensure law reform that is relevant and “reflect the needs of the changing times”; and the engagement of appropriate expertise to ensure thorough and thoughtful consideration of issues. It also requires law reform agencies to closely collaborate with other agencies and institutions charged with the review and reform of aspects of the legal system.

This, notwithstanding, the value of thoroughness, scholarship, intellectual rigour, attention to detail, adequate consultation needs to be reiterated. It is only the composition and methods of a law reform agency that facilitates the fulfillment of these attributes and render such agencies better able to deal with the legal aspects of social problems. The question, therefore, confronting contemporary society in Africa is no longer what vital role should institutionalized law reform play in constitutionalism but rather how should institutionalized law reform satisfy its vital role in constitutionalism?

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<sup>12</sup> See Banda, J.L. “Smaller Law Reform Agencies: Prospects and challenges,” *Commonwealth Law Bulletin* vol. 32 No 4, 595-600, p. 600, December, 2006.

<sup>13</sup> *Id.*