

Reflections on Law Reform in Malawi – Reforming the Reformer

Samuel B. Tembenu

Introduction

The dictionary meaning of the word “reform” is not very different when used in relation to “law reform¹”. Law reform or legal reform has been defined as the process of examining existing laws and advocating and implementing changes in the legal systems, usually with the aim of enhancing justice or efficiency². Bountier’s Law Dictionary defines law reform as the changing of legal rules and institutions to better serve those who are bound to obey the law³. Law reform is said to be a wide term that includes all efforts to improve the nature of the law and legal institutions⁴.

In Malawi, neither the Constitution of the Republic of Malawi nor the Law Commission Act has made any attempt to define law reform. However, both sources leave no doubt as to what the functions of the Law Commission are. The mandate of the Law Commission is very wide both under the Constitution as well as the Law Commission Act⁵. Under the Constitution, it has been given the power to review and make recommendations relating to the repeal and amendment of laws⁶. Additional functions and powers are set out in the Law Commission Act⁷.

In a discussion paper like this one, it is impossible to cover everything that falls within that wide constitutional and statutory mandate of law reform. This paper is designed to be a synoptic reflection of some of those functions and how they have impacted on the current constitutional landscape in Malawi. The themes I have chosen to focus my reflections on are appointment and composition of special law commissions with particular emphasis on inclusion of judges currently serving on the bench; the role of the cabinet in scrutinizing and implementation of proposed legislative reforms; and, lastly, but by no means the least, I have attempted to examine the extent to which the Law Commission has achieved, if all, at least two of its key functions under the Law Commission Act, namely: (a) making recommendations for the fusion and harmonization of customary law with other laws of Malawi; (b) making recommendations for the codification of customary laws.

Ultimately, the question being posed is, if law reform is about the improvement of the efficiency and effectiveness with which legal institutions and legal rules give effect to the goals of the law, how has the whole process in Malawi been shaped by local conditions and circumstances?

¹ Oxford Advanced Learner’s Dictionary defines the word reform as meaning to “improve as system, an organization, a law etc, by making changes to it”.

² <http://wikipedia.org/wiki/Law-reform>.

³ The Wolter-Kluwer, Bouvier Law Dictionary, 2011.

⁴ Ibid

⁵ Cap. 3:09 Laws of Malawi.

⁶ Section 132 of the Constitution.

⁷ Sections 6 and 8, Law Commission Act.

In this paper, the first part attempts to capture the historical background of law reform or revision of laws in Malawi. The background is followed by the existing legal framework. The current legal framework is the mirror against which the reflections mentioned above are made in this paper.

Historical Background

The Law Commission is one of the Constitutional bodies⁸ created by the Constitution of the Republic of Malawi after the dawn of multi-party democracy in Malawi. The powers and functions of the Law Commission are clearly defined and described by the Constitution and supplemented by the enabling statute, namely, the Law Commission Act.

Before 1994, there was no institution or body charged with law reform in Malawi. However, the Revision of Laws Act (RLA)⁹ empowered the Minister of Justice to appoint a Law Revision Commissioner. His duties and functions were very limited. They included preparing and publishing the Laws of Malawi¹⁰; updating and correcting grammatical errors¹¹. He had no power to make any alterations or amendments in the substance of any law¹². However, it seems that few of the functions he was exercising may have found their way into the Law Commission Act¹³. The Revision of Laws Act is still on the statute book but its relevance in the light of the existence of the Law Commission is yet to be seen. One may just surmise that the Law Revision Officer/ Commissioner may still play a role as link between the Minister of Justice and the Law Commission in identifying obsolete pieces of legislation especially having regard to the fact that the Law Commission has the duty to invite the Attorney General on behalf of the Government, or any Minister to refer to the Commission any matter for inclusion in its programme¹⁴. However, the dual existence of the Law Commission and the Law Revision Commissioner does not appear to create any overlaps because their functions and duties are different from each other.

Legal Framework of the Law Commission

The Law Commission being a creature of the constitution, its powers and duties are clearly defined and described by both the Constitution and the Law Commission Act. Under, the Constitution, those powers include:

- (a) reviewing and making recommendations regarding any matter pertaining to the laws of Malawi and their conformity with the Constitution and applicable international law.
- (b) reviewing and making recommendations regarding any matter pertaining the Constitution.

⁸ Section 132.

⁹ Cap. 1:02.

¹⁰ Section 4 – RLA.

¹¹ Section 11(i) and (m) – RLA.

¹² Section 12 – RLA.

¹³ i.e. the duty to act as a repository of the Laws of Malawi.

¹⁴ Section 7(1)(b)

- (c) receiving submissions from any person or body regarding the laws of Malawi or the Constitution and reporting its findings to the Minister for the time being responsible for Justice who shall publish any such report and lay it before Parliament.

The Law Commissioner is appointed by the President on the recommendation of the Judicial Service Commission¹⁵. The Law Commissioner must be a legal practitioner or person qualified to be a Judge. He is the only full-time Commissioner. The other Commissioners are appointed by the Law Commissioner in consultation with the Judicial Service Commission. They serve in what has been described as special law commissions. They are appointed on account of their knowledge of a matter of law being then under review by the Law Commissioner, or on account of their expert knowledge of other matters relating to a legal issue being then under review.

In terms of autonomy the Law Commission is expected to exercise its powers and functions independent of the direction or interference of any other person or authority¹⁶.

The Law Commission Act supplements the constitutional provisions. For purposes of this paper, reference will be made only to two of those functions. Those additional functions appear in Section 6(b) and (c). They are as follows:-

“**Section 6(b)** - to make recommendations for the fusion or harmonization of customary.”

“**Section 6(c)** - to make recommendations for the codification of ... any customary law;”

The above summary of the legal framework forms the basic stratum of my reflections on law reform in Malawi. I will now proceed to examine and analyse each of the themes.

Special Law Reform Commissions: Appointment and Inclusion of serving Judges

At the outset, I wish to observe that the inclusion of serving judicial officers in special law commissions is an anomaly which has distorted the constitutional separation of powers.

Malawi does not have permanent law commissioners apart from the Law Commissioner. Other Commissioners are appointed from time to time by the Law Commissioner in consultation with the Judicial Service Commission. The Law Commissioner has Constitutional powers to make such appointments.

It is understood that the system of having no permanent law commissioners in addition to the Law Commissioner is not peculiar to Malawi. Other law commissions within the Commonwealth are constituted in a similar manner. The advantages or disadvantages of having or not having permanent law commissioners are beyond the scope of this paper.

¹⁵ Section 133(a) of the Law Commission Act

¹⁶ Section 136

However, a perusal of the previous reports by the Malawi Law Commission reveals one clear fact, namely, that serving judges or judicial officers are among the persons appointed to serve in special law commissions from time to time.

The Constitution of Malawi creates a clear separation of powers by assigning separate responsibilities to each of the three arms or branches of Government. The executive has the responsibility of initiating policies and legislation and implementation of laws. The legislature is responsible for the enactment of the laws while the judiciary's responsibility is to interpret, protect and enforce the Constitution.

An examination of the mandate of the Law Commission leaves no doubt that it is an independent constitutional agent or body, aligned to the executive branch or arm of Government. In the opinion of this author, the first criticism that may be levelled on the composition of special law commissions is the involvement of the Judicial Service Commission in the appointment of Commissioners. The law requires that such appointments be made after consultation with the Judicial Service Commission. The reasons for this requirement are not easily discernible. However, if it is for purposes of ensuring or vetting that "real" experts have been identified and nominated, then the judiciary may not have the capacity to determine who the legal experts are in Malawi.

In undertaking law reform, the Law Commission is effectively discharging a public duty. It is required to publish its programmes as well as the names of the persons appointed as Commissioners. If, after such publication, a publicly-spirited Malawian intends, for good cause, to challenge the appointment of any Commissioner, it would create a serious anomaly to the judiciary in hearing and presiding over such a case. The critical question would be whether the fair-minded and informed observer, having considered the facts, would conclude that the judiciary would review that matter with objectivity¹⁷ regard being had to the fact that the appointment being challenged is one to which it added its voice at inception. On this point, others may argue that the judiciary is just discharging its constitutional duties during the appointment as well as when presiding over the case challenging such appointment. In my view, this is a real dilemma for the judiciary especially when one considers that under our legal system, justice must not only be done, but must actually be seen to be done.

The second criticism relates to the inclusion of serving judicial officers in special law commissions. In his contribution to the discourse on judicial independence in Malawi, the former Chief Justice Unyolo opined as follows on the use of judges for extra-judicial purposes:

“Judges are usually called upon to perform extra-judicial functions such as chairing commissions or public inquiries. The Judges have the capability to perform such tasks. However, care must be taken to ensure that independence of the judiciary is not undermined by such use of Judges.

Frequent use of judges to perform tasks outside the courts may weaken the judiciary in that judicial functions may not be efficiently and adequately

¹⁷ The Malawi Judiciary: Judges Conference on Independence, Accountability and Transparency, November 2007.

performed. Again, some of the commissions or inquiries may involve controversial issues of a political nature and the judge may be exposed to unfair criticism by those persons who may disagree with his report. Again use of judges to perform tasks of that kind may expose the judiciary to public criticism that the executive is using the judiciary for its own ends. That may have a negative effect on judicial independence.

Law Commission work may be very demanding and can have a real impact on efficiency and effectiveness of the Judiciary. Hence, the likelihood of efficiency being affected by failure to deliver judgments on time is very high. Lack of efficiency has the potential to erode confidence in the judiciary and that affects judicial independence in turn.

The fears expressed by the former Chief Justice are real and may pose a paradox in a situation where the work of the Law Commission comes into the spotlight for one reason or another. Take for instance the burning issue of Section 46 (amended) of the Penal Code on power of the Minister to ban certain publications not deemed to be in the public interest. The recommendation for that amendment is said to have come from the Law Commission. Two Judges were members of that special commission¹⁸. The issue has been hotly debated and views for and against, formed by the protagonists. Injunctions have been granted and donors have commented on the provision. As an institution, how would the judiciary extricate itself from accusations that it took part in promoting a piece of legislation that has found its way into the statute book?

The issue of extra-judicial functions or discourse for judges is not a new phenomenon¹⁹. However, it is generally agreed that it is easier to deal with a situation where appointment to the bench is preceded by previously held public positions than the situation where sitting judges are involved in or assigned to perform non-judicial functions. It has been said that judges should be allowed the fundamental freedoms like any other citizen²⁰. They should be allowed to engage in academic pursuits; delivering speeches or writing articles and expressing their viewpoints even on policy issues like when they participate in law reform issues.

A further argument for inclusion of judges in law reform work would be that law commissions do not, after all make law; they simply make recommendations which may or may not be implemented into law. As against these assertions, the corollary is that law reform appears to be a comprehensive process of consultation, deliberation and formulation of policy and where necessary draft legislation. Therefore, to involve a sitting judge in policy formulation and origination of legislation is an issue that strikes at the very core of the principle of separation of powers.

It is therefore submitted that the inclusion of judges in Law Commission work straddles or cuts across the constitutionally guaranteed separation of powers. The unforeseen or unintended consequence then is that judicial independence is slowly and subtly being compromised.

¹⁸ See the Law Commission Report on Review of the Penal Code, May 2000.

¹⁹ See Grant Hammond, *Judicial Recusal, Principles Process and Problems*, Hart Publishing 2009

²⁰ *Ibid*

In the Scottish case of **Davidson vs Scottish Ministers**,²¹ the House of Lords upheld an appeal setting aside a decision of the Scottish Court of Session on the ground that those decisions were vitiated by apparent bias and want of objective impartiality on the part of one member of the court. That member of the court previously occupied the position of Lord Advocate and he acted as advisor to the Scottish Government during the passage of the legislation which was then being challenged. **Davidson vs Scottish Ministers** is thus a case where a promoter of legislation and advisor eventually becomes a Judge. It is submitted that there could be greater threats to judicial independence where a sitting judge actively participates in law reform activities. What is at stake then is not simply suspicions of bias but the sanctity of the whole principle of separation of powers. Thus, the use of judges in this manner appears to be incompatible with judicial independence and impartiality because the Judge is required to exercise quasi-executive powers.

The Role of Cabinet in Law Commission Work

Reports of the Law Commission are submitted to the Minister of Justice who has the ultimate responsibility of referring the report to the Cabinet for approval, with or without modification. If approved, any draft legislation made by the Law Commission is published in the Gazette as a Government Bill and then introduced in Parliament as a Government Bill.

There is no doubt that a considerable amount of work is done before coming up with a final report. One would hope that the deliberative and consultative process that precedes a final report represents an acceptable outcome that leads to improvement, correction and removal of apparent defects in the law. However, the fact that Cabinet is not obliged to pass the proposed legislation is a worrying scenario especially where the failure or refusal to do so is done merely on policy or political considerations of the Government in power and it has nothing to do with promoting the common good. The reasons for refusal must be made publicly available. Otherwise, there would always be the suspicion that Government chooses to pass into law what it wants and shelves that which it does not favour.

However, it would be inappropriate to view the role of Cabinet in approving the proposed legislation wholly in the negative sense. There may be good reasons advanced by Government especially where the collective wisdom of the Cabinet underscores the irrelevancy of the Law Commission's proposals in the sense that such proposal may be wholly irrelevant to local conditions and circumstances²². As an initiator of policy, the Executive arm of Government may in such circumstances be justified in deciding whether or not to present the proposed legislation before Parliament.

However, to check against abuse of executive powers, it is suggested that Parliament as the legislator must still be able to consider Law Commission proposals if the executive is unable to advance good reasons for not passing them into law. Under Section 10 of the Law Commission Act, the Minister has an obligation to lay any report of the Commission in Parliament. The duty to lay the report is mandatory. Therefore, Parliament as the organ charged with responsibility to pass legislation should be able to consider such legislation especially if there is a pressing national good to have that law passed.

²¹ [2004] UKHL 34; [2004] HRLR 34

²² A case in point would be the recommendations of the Special Law Commission on the Review of the Laws on Marriage and Divorce, June 2006.

Harmonization of Customary Law with Other Laws and Codification of Customary Law

A renowned English Judge once referred to the common law as an English oak tree. The issue and occasion was the application of the common law “subject to such qualifications as local circumstances render it necessary”²³. The remarks were made in a case from the then British colony now comprising the Republic of Kenya. He said:-

“This provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualifications. Just as an English oak tree, so with the common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law, it has many principles of manifest justice and good sense which could be applied with advantage to peoples of every race and colour the world over. . . it has also many refinements, subtleties and technicalities which are not suited for the other folk. These off-shoots must be cast away because the people must have a law which they understand and respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to judges of these lands. It is a great task which calls for all their wisdom.”

Malawi, like many other countries in Africa largely remains a communal society. Each tribal grouping or community has its own customs. Urbanization and the incidence of intermarriages have not wiped those customs.

One of the functions of the Law Commission is to make recommendations for the harmonization of customary law with other laws of Malawi; and also to make recommendations for the codification of customary law. So far, we are yet to see the Law Commission engage in this exercise. Occasions have previously occurred when codification of some elements of customary law would have been considered. Such occasions as the amendments made to the Wills and Inheritance Act²⁴ as well the review of the laws on marriage and divorce. It is commendable that, for instance, customary law marriages have been recognized and given equal status with what are presently referred to as statutory marriages. However, it is doubtful whether the recommendation to prohibit polygamous marriage has any grass roots support at the communal level. The reasons for the proposed prohibition appear alien to the expectations and wishes of the villager who holds that customary belief that it is his right to have more than one wife²⁵. The report asserts that it is only a minority of chiefs who advocated retention of those customs. But, even if it was only a minority, was the solution a proposal for abolition? That solution smacks of imposition of majoritarian views on the minority.

²³ Lord Denning in *Nyali Limited vs Attorney General* [1956] 1 QB 7, at pp 13-14

²⁴ At custom, the rules on inheritance differ from one tribal grouping to another. How have those amendments taken into account customary law requirements? Criminalizing certain acts may well be tantamount to disinheriting people in some communities.

²⁵ Disclaimer: The author is not advocating or promoting polygamous marriage here

The point being made here is that when it comes to codification of customary law, recourse to precedents from other jurisdictions would be of very little value or use. Globalisation aside, the major consideration should be the local community for whom such laws are being made. Excessive use of or reliance on treaty law or precedents from other jurisdictions would be a betrayal of certain accepted existing norms even though they may appear primitive. We are yet to see if, when the occasion arises to consider customary law codification or harmonization with other laws, the Law Commission will avoid an elitist approach. In that respect, the words of Denning LJ may really afford a practical approach that addresses the needs of society for whom such law would be made. To achieve a good balance would, therefore, require great wisdom on the part of the Law Commission.

Conclusion

The reflections made in this paper encapsulate the author's appreciation of law reform in Malawi. As a vehicle for re-aligning and bringing our laws in conformity with the current constitutional order, the enormity of its task cannot be underestimated. The grey areas mentioned in this paper call for a re-consideration of approach to law reform and it may just be, that the reformer needs reformation of its own. Further, while a concerted approach to law reform is appropriate, we should nonetheless avoid blurring the lines that form the very pillars of our constitutional order. Thus whilst absolute separation of powers still remains an ideal aspired by every democratic society in the World, we would do well to preserve the marked or unmarked boundaries even on issues concerning law reform.

Some of the issues highlighted in this paper may require constitutional reforms. If that be necessary in order to attain the goals of the law, the reformer must not be timid to begin from where it ought to, namely, the Constitution of Malawi²⁶.

²⁶ After all, its mandate also includes looking at matters pertaining to the Constitution.