

IALS Law Reform Project – A LITERATURE REVIEW

Law Reform in Malawi. An Overview

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1. Introduction

From its establishment in 1994, to the appointment of the first Law Commissioner, Justice Elton M. Singini, SC, in 1996, the Malawi Law Commission (the Commission) started its operations fully in 1998¹. It is a member of the Commonwealth Association of Law Reform Agencies (CALRAs) and the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA).

The Commission encourages independent research in law reform or the law in general, such that a publication was initiated by the Commission, *The Law Reformer*, to which officers and individuals from other sectors are encouraged to contribute articles. Nonetheless, there is not much literature on law reform in Malawi despite substantial law reform having taken place over the years, with over 30 Law Commission Reports and over 70 proposed pieces of legislation produced² to date.

This overview presents a background of the Commission, the mandate of the Commission, the independence of the Commission and the law reform process followed by the Commission. Lastly, publications that have borne on the Commission in general are listed.

2. Background of the Commission

The establishment and existence of the Commission is inextricable from the legal, political and constitutional developments in Malawi. The legal history starts from the time Malawi received English law through the 1902 Order-in-Council as a colony of Britain. Although there were customary laws in existence among the indigenous people of Malawi, these were made subordinate to the English law and could only be considered if they were not «repugnant to the principles of justice and morality or inconsistent with any law in force». In general, the law was for the administration of Malawi as a colony and protection of colonial interests of Britain. Much of the law remains on the statute book, despite various changes of constitutions, due to saving provisions that ordinarily accompany new legislation including constitutions³.

In 1964, Malawi attained independence from Britain, and in 1966 became a Republic under a one-party dictatorship. The period between 1964 and 1993 saw further developments on the political and constitutional landscape of Malawi. While independent Malawi now had the opportunity to make legislation to advance its own interests, the one-party dictatorship led to the emergence of repressive laws and relegation of human rights within the legal and constitutional architecture of Malawi under the aegis of the 1966 Constitution of the Republic of Malawi.

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¹ C. Silungwe, 'The Law Commission as a Sovereign Unit: The Textual and Perceptual Mandate', *Law Reformer Magazine* (Malawi Law Commission 2013), pp. 8-11.

² Malawi Law Commission, *Annual Report 2017*; pp. 30-36 ('Status of Completed Law Reform Programmes').

³ F. von Benda-Beckman, *Legal Pluralism in Malawi: Historical development 1858-1970 and emerging issues*, Kachere Series, No. 24, 2007. Available at: <<http://www.asclibrary.nl/docs/398012253.pdf>> (accessed 26 August 2019).

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In 1993, the people of Malawi voted against the one-party dictatorship in a referendum. Multi-party democracy was re-installed, and a new constitution, the Constitution of the Republic of Malawi 1994 (the Constitution) was designed which aimed at, among other things, ensuring the rule of law, democratic governance, and, above all, the promotion and protection of human rights under the Constitution. Within the design, provision was made for constitutional bodies to help entrench, protect and promote good governance, rule of law, and human rights⁴. Thus, provision was made for the establishment of the Commission as one of the bodies with a broad mandate regarding the laws of Malawi.

3. The mandate of the Commission

The mandate of the Commission stems from the Constitution and the Law Commission Act, Laws of Malawi, Chapter 3:09⁵. Under the Constitution, the Commission has the mandate to review and make recommendations relating to the repeal and amendment of laws; to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with the Constitution and applicable international law; to review and make recommendations regarding any matter pertaining to the Constitution; to receive any submissions from any person or body regarding the laws of Malawi or the Constitution; and to report its findings and recommendations to the Minister of Justice⁶. The Constitution also provides that in addition to the mandate under the Constitution, the Commission should exercise any further mandate provided under an Act of Parliament⁷.

Therefore, under the Law Commission Act which came into force in July 1998⁸, the Commission has the following mandate:

- (a) to review the Laws of Malaŵi with a view to the systematic development and reform of the law, including, in particular—
 - (i) the modernization of the laws by bringing them into accord with current national and international conditions and norms;
 - (ii) the elimination from the laws of any defects, whether of a procedural, substantive or policy nature;
 - (iii) the simplification of the laws;
 - (iv) the recommendation of new or more effective methods and procedures for the administration of the laws;
- (b) to make recommendations for the fusion or harmonization of customary law with other laws of Malaŵi⁹;
- (c) to make recommendations for the codification of any branch of the law or of any customary law; and

⁴ P. Mutharika, 'The 1995 Democratic Constitution of Malawi', *Journal of African Law*, Vol. 40, No. 2, 1996, pp. 205-220. Available at: <<https://www.jstor.org/stable/745742>> (accessed 28 August 2019); M. Chigawa, 'The fundamental values of the Republic of Malawi Constitution of 1994', Concept Paper No. 1, Constitutional Review Conference, 2006.

⁵ C. Silungwe (2013).

⁶ Sections 132 and 135 of the Constitution.

⁷ Section 132 of the Constitution.

⁸ Act No. 13 of 1998.

⁹ For example, see L. Mwambene, 'Reconciling African Customary Law with Women's Rights in Malawi: The Proposed Marriage, Divorce and Family Relations Bill', *Malawi Law Journal*, Vol. 1, No. 2, 2007, pp. 113-122.

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(d) to promote awareness of the laws and the Constitution by the public and by departments of the Government and other authorities or bodies¹⁰.

It follows from this that the mandate of the Commission is very broad, and draws from the legal, political and constitutional antecedents.

To execute its mandate, the Commission has a Corporate Services Division and a Legal Services Division¹¹. The Corporate Services Division performs administrative and other support tasks of the Commission. The Legal Services Division is responsible for the organization and execution of the core functions of the Commission. It has two sections, the Legal Section and the Civic Education Section.

The Legal Section comprises qualified legal practitioners, who are appointed by the Law Commissioner and are officers in the public service. The practice has been to involve the Judicial Service Commission in the appointment of the legal officers. They serve as programme officers on the various programmes of the Commission and are responsible for all the tasks involved in the production of working documents for law reform programmes and reports of the Commission, including drafting of proposed legislation from the recommendations of the Commission.

The Civic Education Section comprises individuals well qualified in communication studies, who are also appointed by the Law Commissioner and are officers in the public service. With the assistance of the legal officers, the Civic Education Section is responsible for organizing and executing the mandate of promoting awareness of the laws and the Constitution by the public and by departments of the Government and other authorities or bodies.

4. The independence of the Commission

Independence of the Commission is both textual and functional¹². The textual independence stems from both the Constitution and the Law Commission Act. Section 136 of the Constitution is explicit about the independence of the Commission by stating that the Commission should exercise its functions and powers independent of the direction or interference of any other person or authority. Provision has also been made in several ways to bear on the independence of the Commission under the Law Commission Act. These include:

- (a) that government should adequately fund the Commission to enable it to exercise its powers and perform its duties and functions, and so as to ensure its independence and impartiality¹³;
- (b) that the Commission may receive any donations of funds, materials and any other form of assistance for the purposes of its duties and functions: Provided that no such donation should jeopardize or compromise the independence and impartiality of the Commission¹⁴;

¹⁰ Section 6 of the Law Commission Act.

¹¹ <www.lawcom.gov.mw>

¹² G. Lynn Hiwa, 'The Practice of Independence for Law Reform Agencies'. Available at: <http://www.scotlawcom.gov.uk/files/4314/3030/0631/GLHiwa_Practice_of_Independence_for_LRA.pdf> (accessed 23 September 2019); Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform*, London, 2017, p. 22; R. Croucher AM, 'Law Reform Agencies and Government — Independence, survival and effective law reform?', Commonwealth Association of Law Reform Agencies, 25 March 2017, Available at: <<https://www.alrc.gov.au/news-media/speech-presentation-article/law-reform-agencies-and-government>> (accessed: on 3 June 2019).

¹³ Section 14 (1).

¹⁴ Section 14 (2).

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- (c) making Parliament responsible for approving terms and conditions of service of employees of the Commission¹⁵;
- (d) giving the Commission power to determine its own procedures for carrying out consultations regarding any matter under its consideration and for the general conduct of its work¹⁶;
- (e) allowing the Commission to prepare and publish its own annual programme of work¹⁷; and
- (f) empowering the Commission to do and perform all such things or acts as are necessary or expedient for the implementation of its programmes and the performance or exercise of its functions, duties and powers¹⁸.

The functional independence, also considered as intellectual independence, is in the way the Commission reaches its conclusions in undertaking law reforms¹⁹. Generally, consultations with stakeholders – at the preliminary stage (usually experts or those directly affected by proposed reforms); at the administrative regions of the country when tentative findings are made; or at the national level when tentative recommendations are made – are what inform the final product of the Commission. It does not take any directions from anybody or the government.

This is buttressed by the engagement of experts, provided under section 133 (b) of the Constitution, as members on specific programmes called special Law Commissions. Members of a special Law Commission recognise a collective responsibility (although having no ownership or liability; and not being answerable in any way) for the findings and recommendations of the Commission. Therefore, they endeavour to exhaustively deliberate and consult on issues and reach conclusions by consensus. One special Law Commission can have as many as 18 members²⁰.

5. The law reform process of the Commission²¹

The law reform process involves some ten stages as outlined below, although not necessarily in strict order:

Stage I: Inception of a law reform assignment

The inception of a law reform assignment is a two-tier process. The first tier relates to submissions and the second to the prioritization of the areas for law reform. Submissions can be received from private individuals or institutions, or from public offices or institutions.

The prioritization of areas for law reform is done using several criteria. First, the Law Commission can prioritize an area of law reform through its own initiative in order to ensure conformity with the Constitution; to harmonize the municipal law with international law; or to respond to trends in society.

Second, and based on the submissions received from private or public persons, the Commission may prioritize an area of law reform based on the seriousness of the nature of inconsistency with the

¹⁵ Section 4 (2).

¹⁶ Section 8 (f).

¹⁷ Section 7 (1).

¹⁸ Section 8 (g).

¹⁹ R. Croucher AM (2017).

²⁰ For instance, the special Law Commission on the Review of Electoral Laws. Malawi Law Commission, *Report of the Law Commission on the Review of Electoral Laws* (Law Com No 32, April 2017), pp. 2-4.

²¹ For more details see Malawi Law Commission, *Law Reform Manual*, March, 2011, pp. 6-17.

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Constitution; Government's own priorities under its national policy framework; or the urgency of the social phenomenon that, at the time, commends itself to law reform. Third, the availability of resources is equally critical to the process of prioritization. Finally, consideration is given as to whether the area is suitable for a law reform process.

Stage II: Investigation – The Development of an Issues Paper and a Discussion Paper

Once the programmes in a particular calendar year have been prioritized, each area of law reform is assigned to a programme officer or officers. The programme officer(s) conduct comprehensive research in order to develop an Issues Paper and a Discussion Paper.

The purpose of an Issues Paper is to announce the inception of the law reform assignment; to clarify the aim and scope of the matter under review; to guide the consultation with the general public, the private sector, development partners, and the public sector and the Government generally, in a systematic manner on the issues that will have been identified through the initial comprehensive research; and to enable the Law Commission to solicit further issues for consideration by the special Law Commission.

A Discussion Paper is the main document for the work of a special Law Commission. The Paper forms the basis for discussion of a special Law Commission in plenary. Hence, a Discussion Paper is a comprehensive analysis of the law and policy framework on a matter under review. It expands on the terrain covered in the Issues Paper on the same matter under review.

Stage III: Appointment of experts (special Law Commissioners) as members of a special Law Commission

A special Law Commission comprises individuals appointed by the Law Commissioner in consultation with the Judicial Service Commission to serve as special Law Commissioners on the basis of their expert knowledge of the matter of law under review, or on the basis of their expert knowledge of other matter relating to the matter of law under review. As noted at 4 above, special Law Commissioners are appointed under section 133(b) of the Constitution.

Stage IV: Press Release

The Law Commissioner issues a Press Release announcing the inception of a law reform programme; the announcement of the development of the Issues Paper and Discussion Paper respectively under the programme; the names of the persons appointed as the special Law Commissioners; and calls for submissions to enrich the work of the special Law Commission.

Stage V: Consultations

The Commission's work is largely based on qualitative research and uses a multi-method approach for data collection, management and analysis. Focus group discussions; key informant interviews; and participant workshops are among the methods used. The participant workshops are the dominant method

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of data collection as a style of consultation. As noted at 3 and 4, consultations are a part of the mandate of the Commission and also comprise an aspect of the independence of the Commission.

Stage VI: Special Law Commission Meetings in Plenary

Members of the special Law Commission deliberate on the issues for law reform in plenary. This entails holding a number of meetings over the duration of the programme. The meetings are chaired by a chairperson of the special Law Commission elected by the Commissioners themselves. Co-ordination of the meeting and professional support to commissioners is provided by the programme officer(s) who also attend the meetings.

Stage VII: Report and Draft Bill

The record of the special Law Commission in plenary forms the basis of the Commission's Report. A programme officer circulates to the special Law Commissioners rolling versions of the draft Report that accurately capture the deliberations of the special Law Commission in plenary, and the recommendations that are being made during the plenary. The recommendations form the basis for a draft bill which is developed by the programme officer but is subject to the approval of the special Law Commissioners. The draft bill forms part of the Report. All the special Law Commissioners are required to sign the Report.

Stage VIII: Press Briefing

Once the Report is completed, a programme officer organises, with the support of the Corporate Services Division, a press briefing on the finalization of the law reform programme where the Chairperson of the special Law Commission makes a press statement highlighting the key findings and recommendations contained in the report of the special Law Commission.

Stage IX: Publication and Submission of Report to Parliament

Under section 135(d) of the Constitution, the Commission must report its findings and recommendations to the Minister of Justice who shall then publish and lay the Commission's Report before Parliament. Under section 9 of the Law Commission Act, the Minister of Justice, with the advice of the Commission, is required to publish in the *Gazette* the Commission's Report within sixty days from the date of the Report. Section 7(h) of the Law Commission Act mandates the Law Commission to assist the Minister of Justice with the publication of its Reports. In practice, the Commission is responsible for all logistics around the publication of its Reports.

Stage X: Role of the Commission during Government's consideration of its Report

Technically, a law reform assignment is completed once the Commission has submitted its report and recommendations to the Minister of Justice under section 135(d) of the Constitution. As noted above, in

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practice, the Commission takes charge of the publication of its Reports. The Commission also ensures that the correct number of copies of any Report is available for distribution to members of Parliament when the Minister of Justice is scheduled to lay the particular Report before Parliament.

Further, the Law Commissioner and special Law Commissioners, or in their absence, programme officers, appear before parliamentary committees to present key findings and recommendations of a special Law Commission. They also elaborate to the Committee on any matters in the Report where necessary or if there is a query.

Furthermore, the Commission carries out post-Report work, including: engagement with the electronic and print media through newspaper articles, and television and radio programmes of various formats; community-based focus group discussions; and presentations to targeted key stakeholders to ensure awareness by the public of the reasoning behind the Commission's recommendations.

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