

The Role of Law Reform in Strengthening Legislative Processes: The Malawi Experience

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Abstract

This paper examines the extent to which law reform has contributed to the strengthening of legislative processes in supporting constitutionalism, rule of law and democratic governance, with a particular focus on the Malawi experience.

In the first place, the paper acknowledges the fact that law reform has played a significant role in strengthening constitutionalism, rule of law and democratic governance. In order to understand the impact of law reform, in this regard, the paper briefly examines the functions of the Malawi Law Commission in relation to the legislative processes in the Malawi. To this extent, a critical assessment of the type, nature and number of laws that have been reviewed and developed and their impact on the outcome of legislative processes will be highlighted.

Similarly, the paper also discusses some of the challenges which the law reform process encounters and proposed strategies to address those challenges in order to make meaningful contributions to the legislative processes for the benefit of the populace. Therefore, the paper will attempt to answer the question as to whether law reform initiatives should also facilitate a review of the legal and regulatory frameworks relating to legislative processes in order for law reform to be effective.

In the final analysis, the paper concludes that law reforms plays a very significant role in the legislative processes and that there is a need for law reform to re-strategise in their programmes in order to strengthen the institution of Parliament in the legislative process and for the reinforcement of constitutionalism, rule of law and democratic governance.

Introduction

The importance of law reform in strengthening the legislative processes cannot be over-emphasized. Law reform contributes to the shaping of democracies to suit changing political and legal environments and the benefits are enormous. Most importantly, laws need to be reformed to adapt to societal changes while adhering to constitutional norms and principles. Most countries in Africa inherited their present laws from the colonial masters, hence the bulk of outdated and archaic laws hidden in our statute books. The democratisation processes, however, have exerted pressure on the need for extensive law reform and law development hence, the establishment of relevant constitutional bodies to deal with this aspect. It must also be noted that in examining the role of law reform in legislative processes, it is important to critically examine the terms constitutionalism, rule of law and democratic governance.

This paper, therefore, discusses the role of law reform in strengthening legislative processes within the framework of constitutionalism, rule of law and democratic governance in the Malawian context. The paper highlights the relationship between law reform and legislative processes; how law reform has contributed to the strengthening of legislative processes and the challenges of law reform in relation to legislative processes and proposed strategies for improvement.

The paper concludes by suggesting the programmatic approach that law reform agencies should take in order to ensure that the law reform agenda strengthens legislative processes and, thereby, re-enforcing constitutionalism, rule of law and democratic governance. The paper also makes suggestions for the need to improve the relationship of the institutions of parliament and relevant law reform agencies in order to achieve the above tenets of democracy.

Understanding Constitutionalism, Rule of Law and Democratic Governance

Every democratic government draws its legitimacy from its constitution. National constitutions set the tone, the spirit and the framework from which all other laws and the form of government draw legitimacy. Constitutions guide the nature and type of political and legal systems which national governments embrace in any democratic order. They lay out fundamental principles such as constitutional principles relating to the legal and political authority to govern, the powers to govern and limitations on such powers, conditions for the exercise of the authority to govern, the protection of fundamental rights and freedoms and their limitations and the need to uphold constitutional principles and the rule of law.¹ Further, the fundamental principles relate to policy and legislative measures which the State must adopt and implement in order to promote the welfare and development of the people.² In order for the State to implement the policy and legislative measures, the three organs of the State namely, the Executive, the legislature and the Judiciary must exercise their respective constitutional mandates independently while adhering to principles of democratic governance that include transparency, accountability and rule of law. Therefore, it follows that the notion of constitutionalism embodies various facets of democratic principles, which are interdependent and range from transparency, accountability, rule of law, respect for human rights, all which lead to democratic governance.

It is important to note that all institutions of democratic governance play a critical role in harnessing constitutionalism, rule of law and democratic governance. In the Malawian context, these institutions of democratic governance include the three organs of Government: the Legislature, the Judiciary and the Executive which embraces Government Ministries and Departments and other bodies and agencies located at the core of State power as well as independent constitutional oversight bodies such as the Law Commission, the Human Rights Commission and the office of the Ombudsman. The guiding policy framework for the systematic operation of these institutions is the Malawi Growth and Development Strategy (MGDS).³

The MGDS (2006 – 2011) laid emphasis on the fact that, improving democratic governance is a foundation for poverty reduction and the sustainable development agenda in Malawi. The current MGDS (2011-2016) has embraced improved governance as one of the themes around

¹ See section 12 of the Constitution of the Republic of Malawi

² Section 13, Ibid.

³ MGDS 2011-2016.

which the Strategy is anchored.⁴ (1) It follows, therefore, that Parliament and the Law Commission as democratic governance institutions are key players in matters of constitutionalism, rule of law and democratic governance.

The Relationship between the Legislative Process and Law Reform

The primary responsibility of Parliament or the Legislature in most democracies is the promulgation of legislation. In Malawi, the legal basis for this responsibility is provided for in the Republican Constitution.⁵ It is important to mention at the outset that in general terms, the legislative process entails more than the enactment of new laws or their amendment or repeal. It also relates to the representative and oversight roles performed by Members and Committees of the National Assembly as well as debating and voting on motions relating to any matter before the Assembly. Therefore, for purposes of this discussion, the legislative process should be understood in the context of a plethora of activities pertaining to the law making process, including all aspects that contribute to the completion and outcomes of the law making process in so far as law reform and law development is concerned.

Legislation is the formal expression of a legislative policy, but, before legislation can be drafted and presented to Parliament, the policy sought to be implemented must be determined first. The process of promulgating legislation does not begin in Parliament except in circumstances provided for in the Rules of Procedure of the National Assembly.⁶ Although the legislative policy is settled and determined in the first instance by the Government, and finally by Parliament, the Legislative proposal does not always originate from the government. Generally, the legislative initiative in so far as government bills are concerned is the primary responsibility of the Executive since in most cases, the legislative process begins in government ministries and departments. It may also originate from other public bodies within Government. Such is the case with law reform in Malawi, which is the core mandate of the Malawi Law Commission.

Section 132 of the Constitution gives the Malawi Law Commission a broad mandate to review and make recommendations relating to the repeal and amendment of the laws. The Law Commission has the additional function of reviewing the laws of Malawi with a view to the systematic development and reform of the law. In doing so, the Law Commission embarks on law reform or law development through submissions from Government or other interest groups or through its own initiative. The process of law reform and law development requires extensive consultations with various stakeholders or representatives of various interest groups. This ensures that those affected by the law have made the necessary inputs and that the outcome of the legislative process reflects aspirations of the people.

Despite the vast powers conferred on the Law Commission by the Constitution, the process of law reform ends up as government business since the law requires the Minister of Justice

⁴ Kamanga A. "Rule of Law, Justice and Governance in Malawi: Efforts to Enhance Efficiency and Effectiveness in the Democratic Governance Sector", 6th Professional Seminar, MIM, 2011.

⁵ See section 48, Ibid.

⁶ Standing Orders of the Malawi National Assembly, 2003. For instance, a private member's bill or a bill emanating from a Committee report.

and Constitutional Affairs to publish Law Commission reports and to refer any principal legislation proposed by the Law Commission to Cabinet for consideration and, thereafter, published in the Government *Gazette* and introduced in Parliament as a Government Bill by the Minister responsible for the matter in question.

The Role of Law Reform in Strengthening the Legislative Process in Malawi

To begin with, the rules by which a parliament works, often called Standing Orders or Rules of Procedure, have a significant impact on how effective a Parliament is and how relevant it appears to both Members and to the public. Therefore, parliaments must ensure that their governing rules are up to date and that parliamentary principles are applied successfully to the requirements of today's operations⁷ in order to achieve the desired goals. As stated earlier, a number of Government Bills originate from the Law Commission as part of its published annual law reform programmes.⁸ In this regard, the Law Commission has to date recommended policy changes to the Government, which when adopted by Government, have been presented to and passed into law by Parliament. These are contained in various reports of the Law Commission such as the Reports on the Technical Review of the Constitution (1998), the Review of the Penal Code (2001), the Review of the Domestic Violence Act (2010).

On the other hand, the Government, through the office of the Attorney General, may also refer a proposed policy issue or any matter of law that requires reform or development of new legislation to the Law Commission for consideration and on the basis of the recommendations of the Law Commission, Government may formulate a legislative proposal for appropriate enactment. Such is the case of the Bail Guidelines which the Law Commission proposed for Government's adoption and eventual enactment of the Bail (Guidelines) Act, 2000.

Since its establishment, the Law Commission has completed numerous programmes aimed at law review and law development, some of which reports have been presented to Parliament by the responsible Minister. The Appendix shows a list of law reform programs carried out between 1996 and 2010 and the legislative status of each programme undertaken.

As highlighted in the Appendix, a few of the law reform programmes have taken short periods to complete as far as enactment, some have taken longer periods like 5 years or more. However, it should be noted that some of the Reports are either pending in the Ministry of Justice or before Cabinet and therefore, no proposed legislation has been introduced in Parliament. On the other hand, some proposed legislations already introduced in Parliament have also taken too long to be concluded. This, therefore calls for the question as to how law reform agencies can look at new strategies that aim at improving or, indeed, strengthening the legislative processes. It should be acknowledged that in considering any law reform or law development programme, the Law Commission carries out extensive research into the

⁷ Also see Hon. Karen Gillon (MSP), "The Role of the Commonwealth Parliamentary Association in Strengthening Parliaments in "Presentations at the Orientation Programme for New Members of Parliament, Lilongwe, June 2009.

⁸ Law Commission Annual Report 2010.

concerned area of law review, consults widely with the public and special interest groups at all levels i.e. district, regional and national.

It is noted during the law reform consultation process, Members of the National Assembly are invited to make their contributions towards the recommendations of the Special Law Commission to feed into the proposed legislation.⁹ However, it appears that this process of consultation is only for purposes of soliciting input from the Members as individuals or representatives of Committees of the National Assembly. It would, therefore, be necessary to examine the extent to which law reform process connect deeply with the legislative processes obtaining in Parliament. Does it end at consultations prior processes within Parliament or does it end at the submission and publication of its report to the Minister of Justice or does it end at the enactment of the law itself. It is vital that that law reform agencies develop initiatives and techniques that will enhance or further the role law reform in strengthening the legislative processes. The legislative process being complex and dynamic, in this regard, it is imperative that neither entity should claim an exclusive or unparalleled mandate or sole responsibility for its completion. This process requires that there be a stimulus and collaboration among both sides in order to divide and share legislative responsibilities. *While the Law Commission complements the role of the Executive in initiating legislation or proposing changes to legislative policy which embodies the wishes of the people and promote principles of the Constitution, Parliament, on the other hand, when enacting the law, must reflect in its deliberations the interests of all the people of Malawi and further the values explicit and implicit in the Constitution.*¹⁰

Therefore, in any law reform process, Parliament is placed in a very critical position of acting as a conduit between the Law Commission and the electorate who are the core beneficiary of the outcomes of the legislative process.

Challenges of and Proposed Strategies for Law Reform in the Legislative Processes

There are a number of challenges that the law reform process has encountered in the legislative process in Malawi. In noting these challenges, we are attempting to make some suggestions on how law reform agencies, generally, and the Malawi Law Commission in particular, may devise strategies and mechanisms to address these challenges in order to improve and eventually strengthen the legislative processes.

⁹ Hiwa G. L. "The Role of Law Reform in the Legislative Process", supra fn.7.

¹⁰ See sections 7 and 8 of the Constitution.

CHALLENGES

1. lack of institutional capacity of Parliament to support law reform efforts i.e. professional and technical expertise; capacity of Members of the National Assembly; lack of continuity due to high turn-over during elections; inadequate organisational structure; communication technological gap; inadequate financial resources;
2. delays in enactment of laws following the initiation process;
3. increasing parliamentary workload versus time and resources;
4. defects legal, regulatory and procedural in the legislative framework;
5. uncoordinated consultative and civic education approach on legislative matters
5. lack of understanding and minimal participation in the legislative processes by the stakeholders
6. minimum collaboration between governance institutions and the National Assembly
7. Inadequate or ineffective consultation, sensitisation and lobbying of Members of the National Assembly
8. law reform programme targeting a small group of parliamentarians e.g. specific Committee, individual Members as opposed to all Members of the Assembly
9. inadequate follow up on the law reform process in relation to legislative processes in Parliament
10. lack of strategic linkages between parliamentary processes and law reform processes e.g. strategic planning, civic education or outreach programmes
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PROPOSED STRATEGIES

1. Joint/coordinated legislative programme planning (Committee and special Law Commissions interactive sessions) utilisation of Committee public hearing forums by Law Commission
 - Networking and information exchange forums between law reform officers and parliamentary staff
 - Joint capacity building initiatives for Members
 - Improved ICT strategies and infrastructure e.g. Bungeni and Websites
2. Lobbying Strategies through civic education and parliamentary outreach programmes.
 - Follow-ups
3. Simplification of law reports and proposed legislation
4. Technical support in review of relevant legal framework
5. Develop simple informational manuals on legislative process for Members, Public Officers and the general public
6. Law Reform sensitisations to target a large number if not all Members
7. Share ideas and inform strategic planning in relation to legislative progress e.g. outreach, public hearings, Committee work, sittings of the special Law Commissions.

Conclusion

The role of law reform in strengthening the legislative process cannot be over-emphasized. However, law reform agencies need to do more to support the legislative role of Parliament as part of their law reform and develop programmes. It is crucial that from inception, the proposed programmes are explained, well understood and ultimately owned by parliamentarians who are the elected representatives of the people. Law reform should not only aim at consulting Members on proposed reforms but also ensure that Members are well informed about the views and aspirations of those that they represent. A well informed and reformed Parliament will articulate and support a law reform agenda that will strengthen the legislative processes in order to advance the notions of constitutionalism, rule of law and democratic governance.

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Appendix

List and Status of Completed Law Reform Programme (1996 - 2010) as at 30 October, 2011.

No.	Report Title	Year of Publication	Proposed Legislation	Status
1.	Review of certain laws on Defilement of young girls, Wills and Inheritance, Citizenship, Marriage and Affiliation	October 1996	(1) Penal Code, Defilement of Young Girls, (Amendment) Bill	Enacted in 1997 and 1998
			(2) Wills and Inheritance Act (Amendment) Bill	Enacted in 1997 and 1998
			(3) Citizenship Act (Amendment) Bill	Enacted in 1997 and 1998
			(4) Marriage Act (Amendment) Bill	Enacted in 1997 and 1998
			(5) Affiliation Act, (Amendment) Bill	Enacted in 1997 and 1998
2.	Technical Review of the Constitution	November, 1998	Constitution (Amendment) Bill	Enacted between 2001 and 2010
3.	Criminal Justice Reform on Bail Guidelines	February, 2000	Criminal Procedure and Evidence Code (Amendment) Bill	Enacted in 2010 as Act No. 14 of 2010
4.	Review of the Penal Code	June, 2000	Penal Code (Amendment) Bill	Enacted in 2011 as Act No. 1 of 2011
5.	Review of the Army Act	July, 2001	Defence Force Bill	Enacted in 2004 as Act No. 11 of 2004
6.	Review of Censorship and Control of Entertainment Act	August, 2001	Classification of Public Entertainment and Publications Act	Before Cabinet

7.	Legal Education and Legal Practitioners Act	September, 2002	Legal Education and Legal Practitioners (Amendment) Bill	Enacted in 2004 as Act No. 9 of 2004
8.	Review of the Corrupt Practices Act	November, 2002	Corrupt Practices (Amendment) Bill	Enacted in 2004 as Act No. 17 of 2004
9.	Review of the Police Act	July, 2003	Police Bill	Enacted in 2010 as Act No. 12 of 2010
10.	Review of the Criminal Procedure and Evidence Code	December, 2003	Criminal Procedure and Evidence Code (Amendment) Bill	Enacted in 2010 as Act No. 14 of 2010
11.	Criminal Justice Reform on Conversion of Fines	December, 2003	Fines (Conversion) Bill	Enacted in 2005 as Act No. 10 of 2005
12.	Review of the Wills and Inheritance Act	January, 2004	1. Deceased Estates, (Wills, Inheritance, and Protection) Bill	Enacted in 2011 as Act No. 14 of 2011
			2. Estate duty (Amendment) Bill	
13.	Review of the Legal Aid Act	July, 2005	Legal Aid Bill	Enacted in 2011 as Act No. 7 of 2011
14.	Review of Children and Young Persons Act	October, 2005	Child (Care, Protection and Justice) Bill	Enacted in 2010 as Act No. 22 of 2010
15.	Review of the Land Related Laws	March, 2010	1. Land Bill	Before Cabinet
			2. Customary Land Bill	
			3. Registered Land (Amendment) Bill	
			4. Physical Planning Bill	
			5. Forestry (Amendment) Bill	
			6. Public Roads (Amendment) Bill	
			7. Mines & Minerals (Amendment) Bill	

			8. Land Survey Bill	
			9. Land Acquisition (Amendment) Bill	
			10. Local Government (Amendment) Bill	
			11. Malawi Housing Corporation (Amendment) Bill	
			12. Companies (Amendment) Bill	
16.	Review of the Laws on Marriage and Divorce	June, 2006	1. Marriage, Divorce and Family Relations Bill	Before Parliament
			2. Penal Code (Amendment) Bill	Enacted in 2011 as Act No. 1 of 2011
17.	Review of Traditional Courts Act	September, 2007	Local Courts Bill	Enacted in 2011 as Act No.9 of 2011
18.	Review of the Constitution	September, 2007	(1) Constitution (Amendment) Bill	Before Cabinet
			(2) Constitution (Amendment) (No. 2) Bill	
			(3) Impeachment of President Bill	
			(4) Political Parties Registration and Regulation (Amendment) Bill	
			(5) Electoral Commission (Amendment) Bill	
			(6) Parliamentary and Presidential Elections (Amendment) Bill	
			(7) Courts Act (Amendment) Bill	
			(8) Ombudsman (Amendment) Bill	

19.	Report on the development of Legislation on Declaration of Assets, Liabilities and Business interests by Public and Elected Officers	August, 2008	(1) Public Officers Declaration of Assets, Liabilities and Business Interests Bill	Before Cabinet
			(2) Parliamentary and Presidential Elections (Amendment) Bill	
			(3) Local Government Elections (Amendment) Bill	
20.	Report on Development of HIV & AIDS Legislation	December, 2008	(1) HIV and AIDS (Prevention & Management) Bill	Before Cabinet
			(2) Employment (Amendment) Bill	
21.	Review of Education Act	March, 2010	Education Bill	Before Cabinet
22.	Development of Gender Equality			Before Cabinet
23.	Development of Human Trafficking	February, 2011	1. Trafficking in persons Bill 2. Tourism and Hotels (Amendment) Bill 3. Immigration (Amendment) Bill 4. Penal Code (Amendment) Bill 5. Extradition (Amendment) Bill 6. Child Care, Protection and Justice (Amendment) Bill	Before Cabinet