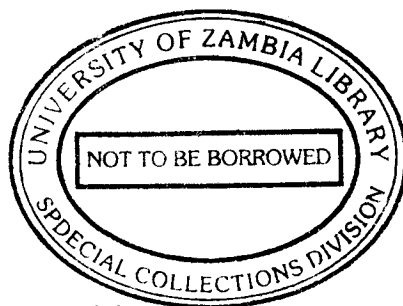


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I recommend that this obligatory essay prepared under my supervision

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(20038933)

Entitled

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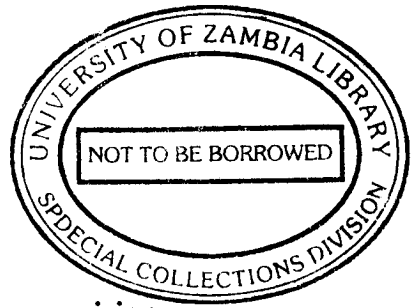
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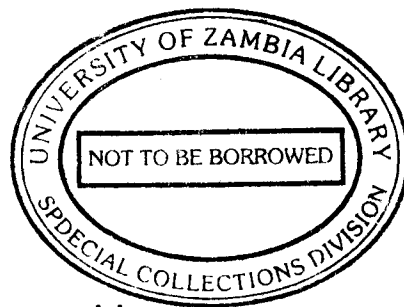
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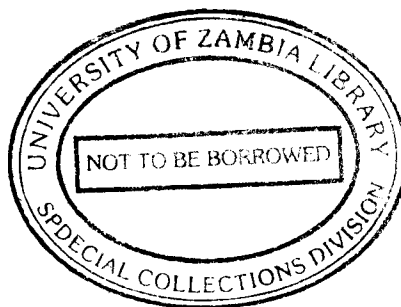
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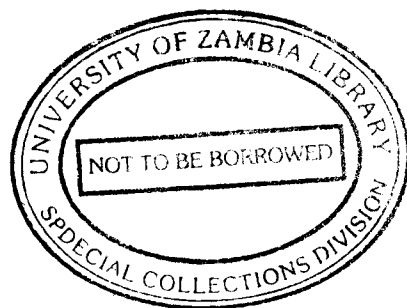
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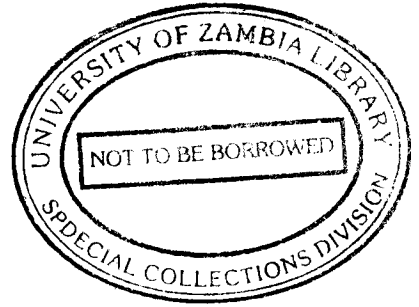
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CHAPTER ONE:

**THE THEORETICAL BASIS OF LAW AND SOCIETY AND THE
DEVELOPMENT OF THE ZAMBIA LAW DEVELOPMENT COMMISSION**

1.0 INTRODUCTION

“Law is perhaps the most important of all instruments of social order because without it the whole structure of society can but inevitably collapse. Law regulates society and human activity within society. It determines the rights and duties of the individual in relation to other individuals and to society as a whole. It is the means by which order within society is maintained and society itself preserved.”¹

It need not be overemphasised that a good legal system is one which, inter alia, keeps pace with societal changes. The most crucial aspect, however, is the vehicle through which the law is changed to suit the needs of the time. In this light the three organs of government, namely; the Executive, Legislature and Judiciary play a very important role in developing the law. Far and above these institutions, several governments across the world have put in place specialised bodies to specifically deal with the issue of law reforms. In Zambia, this task has been placed upon the Zambia Law Development Commission (ZLDC), established as a body corporate in 1996 through an Act of Parliament.²

¹ The Functions of a Lawyer in Zambia Today: Vol. 3 & 4 Zambia Law Journal, p 1 (1971/72).

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The essence of this essay is to assess the impact of the ZLDC on law reforms in Zambia since its establishment. In this regard, chapter one will be dedicated to discussing the definition of law as envisaged by the sociological school of Jurisprudence vis a vis the need to reform the law in light of the needs of society. A general introduction and overview of the work of the ZLDC will be discussed in chapter one, wherein also the objective of the essay will be discussed.

In chapter two there will be discussed practical instances of how the ZLDC has from time to time failed to meet some of its objectives and effectively carry out its functions as provided in the ZLDC Act. The chapter will also assess parts of the ZLDC Act in relation to what is obtaining in the actual operations of the ZLDC. Chapter three will be dedicated to a comparative study of the ZLDC and selected law development commissions within the commonwealth. Finally, chapter four will draw the work to a conclusion and recommendations or solutions to the problem will be suggested.

1.1 LAW AND SOCIETY: A THEORETICAL PERSPECTIVE

As pointed out in the introduction to this essay, the main theme is not only to assess the impact of the ZLDC on law reform in Zambia, but also to determine whether such reform has incorporated the needs of society. Society is dynamic in that it keeps changing with time; hence the mandate of the ZLDC is not only to reform law, but to keep it abreast with current social changes. Social change is not simply changes in values, but also in the

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way in which groups of people relate to each other in the social system.³ This aspect brings to the fore the desire to plan social life in a rational way, that is, embracing law as an integral part of society. This leads to the question: “what is the role of law in society”?

The relationship between law and society formed an early subject of inquiry by many jurists through the ages. One such group of jurists commonly referred to as the sociological school of thought asserts that law is a social phenomenon existing because of the needs of human beings, functioning as an organised, but changing system and embodying within itself substantive rules and fundamental principles incorporating the values of society.⁴ In other words, the essence of law is expressed in its purpose, which is the protection of the interests of society and the individual by coordinating those interests, thus minimising circumstances likely to lead to conflict. The functionalist school adds that law is an instrument for serving the needs of society. In society there is an inevitable conflict between the social interests of man and each individual’s selfish interest. Therefore, the success of the legal process is to be measured by the degree to which it achieves a proper balance between competing social and individual interests.⁵ It is worth noting that there are several schools of thought, but only those touching on law and society are considered herein.

It is not apparent to many people that legal institutions have an important place in social change in general and economic development in particular. One reason for this lack of

³ K. Bentsi-Enchill, “ A Theoretical Nexus,” Vol 3 & 4 Zambia Law Journal (1971/2), p 24.

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In light of the foregoing, the challenge to the ZLDC is not just to review and reform various obsolete pieces of legislation, but to explore new areas requiring law development, vis a vis the problems of the Zambian society, in view of the multi-party democracy reverted to in 1991 and the embracing of capitalist economic policies by the Zambian government. These developments have obviously had an impact on the Zambian society. On a positive note, enhancement of various rights and freedoms, (which were almost non-existent under the one party-state) has taken centre stage especially through the advocacy of numerous non governmental organisations. On the other hand, however, due to the mishandling of the privatisation programme, many Zambians are faced with the challenges of disease, poverty, unemployment and crime. These are the areas which the ZLDC ought to address, through the use of law as an instrument of change in society.

The study of law and development is in part an effort to free law from those limited functions, in order that we may be able to harness its optimum potential as a social institution. In other words, it is in part a consideration of the relevant function of law in social change. Since, however, what a society can accomplish is also a function of the entire range of constraints imposed on that society, including its own social

⁶ Supra note 3 p 20

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1.2 AN INTRODUCTION TO THE ZLDC AND ITS WORK

1996 marked the beginning of an autonomous Zambia Law Development Commission, which came into effect through an Act of Parliament and commenced on 27th June, 1996 through statutory instrument No. 108 of 1996.

Prior to this, its predecessor, the Law Development Commission and Institute of Legislative Drafting, was a department in the Ministry of Legal Affairs⁸. The department was dogged by numerous problems, viz: limited financial resources which ultimately lead to red-tape, inability to effectively plan its research programmes and low salaries for staff.⁹

The circumstances prevailing then were properly put to parliament by the then Minister of Legal Affairs Dr. Remmy Mushota, who emphasised the fact that so long as the commission remained a government department, there would be no meaningful impact on law reforms in Zambia. He further added that the establishment of the ZLDC was aimed at creating an effective institution which was to be the centre of research into our laws,

⁷ supra note 6 p 21

⁸ The Ministry of Legal affairs is now known as the Ministry of Justice and is under the Minister of Justice

⁹ Nawa, Mutumweno. The Beacon of Law Reform, a paper produced by the Public Relations Unit of the ZLDC, pp 2-3, (2004).

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and where the Commission may not have the expertise in a particular field of law, it would be free to sub-contract from the Universities and private legal sector, something not easy to achieve under the civil service machinery.¹⁰ On this account, the ZLDC bill came into effect on 27th June 1996 and became operational the following year.

1.3 THE OBJECTIVES AND FUNCTIONS OF THE ZLDC VIS A VIS LAW REFORMS IN ZAMBIA

The main objective of the ZLDC is perhaps what is captured in its mission statement as: “to reform and develop the law to meet the changing needs of society.” The general objectives however are set out as follows: to efficiently and effectively reform and develop the law in accordance with the needs of society; to codify unwritten laws in order to ensure accessibility; to provide advisory and consultancy services in law reform and development in order to meet client needs; to establish and maintain an efficient and effective consultative, coordination and collaborative mechanism to enhance communication with stakeholders; and to promote co-operation between the Commission and relevant regional and international law reform institutions in order to exchange ideas and keep abreast with new developments.¹¹

These objectives have found expression in the functions of the ZLDC as provided in the ZLDC Act. The functions are contained in section 4 which mandates the Commission to research and make recommendation on:

¹⁰ Ibid.

¹¹ The ZLDC: Objectives & Statutory functions, p 2 (2000).

the socio-political values of the Zambian people that should be incorporated into legislation; the anomalies that should be eliminated in the statute book; new and more effective methods of administration of the law and the dispensation of justice that should be adopted and legislated; new areas of the law that should be developed which are responsive to the changing needs of Zambian society; and the removal of archaic pieces of legislation from the statute book. Further, the Commission is required to: revise and reform the law in Zambia; codify unwritten laws in Zambia; review and consider proposals for law reform referred to the Commission by the Minister or the members of public; hold seminars and conferences on legal issues; translate any piece of legislation into local languages; encourage international co-operation in the performance of its functions and do all such things incidental or conducive to the attainment of the functions of the Commission.

1.4 STATEMENT OF THE PROBLEM

From the functions as set out above, the main reason why the ZLDC was established can be summed up as: to develop, revise and reform the law in an effective and efficient manner taking into consideration the position and the needs of society. Be that as it may, it is submitted that the ZLDC has more often than not failed to realize its fundamental goals due to the following reasons set out below.

Firstly, it is worth noting that for most of its operations the ZLDC relies on government grants, the grants have been inadequate and the monthly funding has also been very

erratic ever since the ZLDC was established. For instance, in 1996 itself a total of K232,510,000 was allocated to the ZLDC, but only a paltry K62,691,700 was actually released.¹² This state of affairs was not peculiar to 1996 alone but has been recurring almost every year.¹³ And notwithstanding the Commission's transformation into a grant aided institution, funding is inadequate and untimely; therefore the Commission has not been able to effectively manage its resources to enable prompt execution of its programmes.¹⁴

Having been in existence for almost nine years now, one would expect that the ZLDC financial crisis would by now have been addressed. However, the operations of the Commission are still being severely affected due to lack of funds. This has also affected the quality of research staff recruited by the Commission. The Commission seriously lacks adequately skilled and experienced personnel to undertake law reform and development. Because of the poor conditions of service that have persisted over time, the Commission has had to recruit research staff who are not sufficiently qualified and experienced in legal research. This has contributed to the sub-standard output the Commission has produced in the past.¹⁵ Its operations such as organisation of workshops and seminars have also been affected. Moreover, due to these financial constraints, the Commission has suffered from inadequate material resources, transport and office equipment.¹⁶ For any organisation to successfully realise its mission and objectives as

¹² The ZLDC Annual Report, p 9 (1996).

¹³ Ibid.

¹⁴ Republic of Zambia: Strategic Plan for ZLDC, p 12 (2001-2005).

¹⁵ Ibid, p 13.

¹⁶ Ibid.

well as effectively satisfy the needs of its clients, there is need for adequate material resources and logistical support.

According to section 15 of the ZLDC Act, the Commission’s source of funding is not only limited to money appropriated by the National Assembly and government grants paid to the Commission, but the Commission may accept money from other sources (for instance donors), or may raise money by way of loans. However, this can only be done subject to the approval of the Minister of Justice.¹⁷ The rationale for seeking the Minister’s approval is not stated anywhere, but it not only stands in conflict with the spirit of establishing an autonomous body as was envisaged prior to the formation of the ZLDC, but also compounds the financial crisis in which the Commission often finds itself in. As a matter of fact, this problem is further exacerbated by the current practice whereby funding to the Commission approved by Parliament, still passes through the Ministry of Justice.¹⁸

Another problem closely related to the foregoing has emanated from the administration of the ZLDC. This problem is largely due to the financial crisis highlighted above but can also be alluded to unmotivated staff, lack of support from the government and limitations within the ZLDC Act. (This latter aspect will be explored in chapter two)

Under section 12 of the ZLDC Act there is established the directorate of the Commission which is responsible for management and administration of the Commission and the

¹⁷ See S. 15(2) (a) & S. 15(2) (b)

¹⁸ *supra* note 16, p 29.

implementation of the decisions of the Commission. The composition of the Commission is provided in section 5.

In light of the financial problems alluded to earlier, it is apparent that the directorate fails to effectively fulfil its responsibilities. However, some of its responsibilities require little or no money at all, such that the failure to compile annual reports as required by law¹⁹ is not warranted. It is sad to note that since the year 1999, there is yet to be another annual report to be submitted to the Minister of Justice. The annual reports are meant to sensitize government on the successes and failures of the Commission so that appropriate measures are taken to assist the Commission in its work and ultimately enabling it to achieve its objectives.

Another administrative problem which the Commission has experienced has been a failure to carry out independent audits pursuant to section 17(2) of the ZLDC Act. According to the 1999 ZLDC annual report, the Commission failed to implement any proper audit as required by the Act, from 1997 when the Commission started operating as a body corporate up to the end of 1999.²⁰

In order to address some of its administrative problems and increase its output in terms of its mandate, the ZLDC has established several strategic departments and units, most of which became fully operational in 2005. The Research department is mainly responsible for desk and field research as well as compiling reports at various stages of a law reform

¹⁹ Pursuant to section 18, the Commission is mandated to submit Annual reports to the Minister concerning its activities every financial year.

²⁰ The ZLDC Annual report, p 14 (1999).

project. However, this department is functioning at less than full capacity and only has junior staff effectively doing all the research.²¹

The other department is the Library unit, whose main objective is to effectively manage and develop the Commission's resource materials that will promote the operations of the Commission and ensure that there is information storage and retrieval.²² The Administration department on the other hand, is mandated to provide support services and the availability of human and material resources needed to enable the Commission efficiently meet its statutory mandate.²³ Under Administration, is an Accounts unit, which carries out different accounting duties some of which are to prepare timely management and financial reports.²⁴ Finally, there is a Public Relations department whose ultimate aim is to develop a philosophy that will strengthen public confidence and goodwill; contribute to the success of the organisation by projecting a good image; and create awareness of the Commission's activities through comprehensive and results-oriented publicity programmes.²⁵

It is sad to note however, that just like the Research department; all the other units are unable to operate at full capacity due to limited financial resources.²⁶ As a result, the ZLDC has remained almost static with respect to realising its main objectives and

²¹ ZLDC: Operational Plan, p 8 (2005).

²² Ibid, p 16.

²³ Ibid, p 18.

²⁴ Ibid, p 23.

²⁵ Ibid, p 25.

²⁶ Ibid, p 27.

attaining an effective management structure to guide its operations and to be in constant communication with its clients.

Another weakness of the ZLDC vis a vis its ineffective operations, is that it is highly centralised to the extent of inhibiting easy access by the general public to its operations and services.²⁷ Further, the ZLDC has not made significant effort to educate its stakeholders and the general public on its role and functions. This is evidenced by the fact that when government Ministries and agencies see the need to reform or review their various statutes, there is never any direct attempt to consult the Commission.²⁸

Lastly but not least, the work of the ZLDC is undermined due to the overlapping of functions between the ZLDC and the Legislative Drafting and Law Revision section in the Ministry of Justice. After government restructuring of the Ministry of Justice, the above mentioned department was created with some functions that replicate those of the ZLDC. As a result, more often than not, there has been an overlap of functions between the two institutions resulting in the undermining of the role of the ZLDC.²⁹

1.5 SUMMARY

Having highlighted the relationship between law and society and having also explored the essence of the ZLDC, the conclusions to be drawn from this chapter are as follows:

²⁷ *supra* note 18, p 15.

²⁸ *Ibid*, p 13.

²⁹ *Ibid*, p 17.

Owing to the dynamism of society, the law should be employed in such a way that it not only maintains order, but it should also address those challenges that come with societal changes with a view of meeting the needs of the people that live in that society.

Further, the ZLDC as a law development institution has not done much in so far as its mandate is concerned. This is attributed to poor funding which has adversely affected its law development projects, operations, management and administration of the ZLDC directorate. In addition, there is no guarantee whatsoever that the Commission’s findings and recommendations can ever be effected as law. In other words, the ZLDC lacks power to ensure that most of its recommendations are enacted as law.

CHAPTER TWO:

THE EFFICACY OF LAW REFORM PROCESS IN ZAMBIA, AUTONOMY OF THE ZLDC AND ITS PURPOSE IN THE ZAMBIAN ENVIRONMENT

2.0 THE PROCESS OF LAW REFORM

Since its establishment, the ZLDC has embarked on several law reform projects. Admittedly, some of the projects have successfully been completed by way of drafting a draft bill. On the other hand, quite a number of the projects have remained at preliminary stage for a long time mainly due to insufficient funds. This chapter will, inter alia, analyse the process of law reform in Zambia, with a view to assessing whether or not, the process has enhanced law reform in Zambia.

It is worth noting from the outset that in pursuance of its objectives, the ZLDC is basically moved in three ways. In other words, it gets its terms of reference for a law reform project, from three sources, namely: the Minister of Justice and other government agencies; members of the public; and projects initiated by the Commission itself.³⁰

It is the duty of the ZLDC to identify topics that are relevant and necessary for law reform. Once the Commission has defined its research project on a given area of the law, it sets out the methodology to be followed. It is important to know that any project on law

³⁰ The ZLDC Annual Report, p 2 (1996)

reform must involve social inquiry and broad community-based consultation³¹ and identification of all important issues at the inception of a law reform project.

The actual process of law reform, therefore, begins with the analysing of existing law, to highlight its defects and limitations and to find out what has been done in other jurisdictions to correct such defects and to remove such limitations. This obviously involves desk research and comparative studies of different pieces of legislation in foreign countries, which have a background of common law tradition.³² Further, a research project proposal based on literature review is formulated. This preliminary research may indicate the necessity of consultations with a number of selected stakeholders both in urban and rural areas even at this early stage. If this were the case, an issue paper is prepared analyzing issues to be covered in the project.³³ As a quality control measure, the project proposal and the issue paper are presented to a committee of experts which is peculiar to each project.³⁴

The second step is to undertake an upcountry research programme with a view to collecting opinions from the community. What is critical at this stage is to make sure that people who are knowledgeable and conversant with the subject of inquiry are approached and given an opportunity to express their views³⁵. For example, in customary law matters, people like headmen, chiefs, and local court justices may be included on the list of

³¹ Social inquiry and community consultation in law reform process is a fundamental objective of the ZLDC

³² The National Assembly of Zambia, *The Process of Law Reform*, p 3 (2000).

³³ The ZLDC: Operational Plan, p 14 (2005).

³⁴ Ibid, p 15.

³⁵ supra note 32.

persons to be interviewed. After this, internal workshops, which are another internal quality control measure, are held. These internal workshops are constituted by researchers on the project and members of the committee of experts, whose main task is to critically analyse the report on preliminary findings based on research conducted by the research team.³⁶

The third step involves compilation of a working paper which contains views of various sections of the community and from whence the recommendations are made with regard to what should be the proposed legislation. Fourthly, the working paper is circulated to various stakeholders for comments and proposals, after which several meetings are convened to discuss the contents of the working paper.³⁷

The final stage is the compilation and release of a final report and draft bill. The recommendations in the final report are a result of consultations with people country wide. The final report and draft bill are approved by the commissioners and submitted to the Minister of Justice with a view to considering originating the necessary cabinet memorandum for the enactment of a new law.³⁸

2.1 ASSESSMENT OF LAW REFORM PROCESS IN ZAMBIA

Having outlined the process of law reform, it is imperative to assess the extent to which this process has enhanced law reforms in Zambia.

³⁶ The ZLDC: Operational Plan, p 15, (2005).
³⁷ The National Assembly of Zambia: The Process of Law Reform, p 4 (2000).
³⁸ Ibid.

It is worth noting that most of those stages through which the process of law reform goes through, require funding. For example, up-country researches and interviews, compilation of working papers and holding of seminars with the various stakeholders require money in order to be effected. It goes without saying, therefore, that in view of the serious financial constraints faced by the ZLDC, most of the processes are hampered. Furthermore, the Commission lacks a systematic methodology to adequately facilitate its research activities. This has resulted in the Commission copying existing laws from other countries to propose and adopt them to the Zambian situation, which has at times not been possible as such laws have been incompatible with the situation in Zambia.³⁹

Be that as it may, of itself the process of law reform is largely not defective. This is evidenced by the idea of engaging as many people as possible in the initial stages of law reform, a requirement which is in unison with the objectives of the ZLDC. Further, after the compilation of a working people, various stakeholders are engaged through seminars and workshops with a view of fine tuning the Commission's findings.

2.2 AUTONOMY OF THE ZLDC

It has already been alluded to in the previous chapter that the year 1996 marked the beginning of an autonomous Zambia Law Development Commission. The ZLDC was established with a view to obviate the problems of its predecessor the Law Development Commission and Institute of Legislative Drafting, which was a department under the Ministry of Legal Affairs. These problems included, inter alia, failure to effectively plan

³⁹ Republic of Zambia: Strategic Plan for ZLDC, P 14 (2001-2005).

research programmes, lack of control over its resources and recruitment or appointment of its staff⁴⁰. These concerns as already highlighted herein were presented to Parliament with the emphasis that as long as the Commission remained a department under the Ministry of Legal Affairs, no change in the directors of the Commission would create any impact; hence the need for the creation of the ZLDC as an autonomous corporate body.⁴¹ Consequently, the ZLDC was granted the status of an autonomous body through Act number 11 of 1996. This status is ideally supposed to give the Commission the opportunity to chart a new course for its future without undue influence from any external body.⁴² Further, this enabling Act has given authority to the ZLDC to undertake law reform and development in an efficient and effective manner and without fear or favour.⁴³

The question as to whether the ZLDC is an autonomous body was addressed in part in chapter one, with respect only, to the finances of the commission. It was shown therein by citing some provisions of the ZLDC Act that most, if not all, of the funding to the ZLDC is approved by the Minister of Justice irrespective of the source. This obviously contradicts the belief that the ZLDC is an autonomous body capable of managing its own financial resources. In addition, the mere fact that the State has some control over the Commission's finances, has the potential of compromising the quality of work of the Commission, in the sense that certain projects (especially those perceived as opposing the government) may deliberately not be funded.

⁴⁰ The ZLDC Annual Report, p 1 (1996).

⁴¹ Ibid

⁴² *supra* note 39, p 12.

⁴³ Ibid, p 15.

It is interesting to note that the powers of the Minister over the Commission extend to appointment of members of the Commission as well. According to section 5(4) of the ZLDC Act, the Minister has power to appoint all the members of the ZLDC notwithstanding their nomination by various interest groups. This also has the potential of compromising the quality of the members in the sense that they may fail to effectively carry out their functions for fear of reprisals and intimidation from the appointing authority. Consequently, the principle of transparency in government through an effective system of checks and balances is eroded because in a democratic society such as Zambia, institutions such as the ZLDC, are also meant to provide checks on the exercise of authority by various government departments, which may abuse some of their power owing to lacuna in the law. The desire by the Government to control the Commission is further evidenced by resistance of the Commission's autonomous status by the Ministry of Justice. As a matter of fact, both Commissioners and management of the Commission have observed that the government through the Ministry of Justice has continued to want to direct the internal operations of the Commission, a trend, which has persisted since the inception of the ZLDC.⁴⁴

It is further submitted that the handing over of the final report and the draft bill, to the Minister of Justice contradicts the spirit of establishing an autonomous body. Autonomy entails being able to operate independently or without influence from an outside force, and to have sufficient power to actualise one's objectives. While the ZLDC is obliged to submit its final report and draft bill to the Minister, there is no legal obligation on the part of the Minister to ensure that the draft bill is presented before Parliament. For instance,

⁴⁴ Ibid, p 18.

between 1996 and 1999, of all the projects which the Commission worked on from its three sources, only those submitted to it from the Ministry of Justice and other government Ministries were given priority in terms of initiating the necessary cabinet memorandum seeking the enactment of new legislation.⁴⁵ It is also common knowledge that the position of Minister of Justice is held by a politician usually from the party in power. The experience through out the history of Zambian politics is that more often than not, politicians will tend to safeguard their personal and party interests rather than enhance the people's interests. Accordingly, the likelihood of the Minister supporting legislation, which is perceived to interfere with government's hold on power, is almost non-existent.

It is worth noting that the main contention here is not that the government should completely detach itself from the issues of law reform. The government or the state should ideally play a general supervisory and supportive role to ensure that the research findings and recommendations of the Commission are implemented. This is attainable especially if there is political will on the part of those in power to let institutions such as the ZLDC run without any interference.

2.3 LAW REFORMS IN THE CURRENT SOCIO-POLITICAL AND ECONOMIC ENVIRONMENT IN ZAMBIA

The Zambia Law Development Commission, just like any other public service organisation in Zambia, has operated under two significantly different socio-political and

⁴⁵ The ZLDC Annual Report (1999) pp 6-7

economic systems, namely, a commandist economy under one party state, and now a liberalized market economy under a multi-party democratic political system.⁴⁶

The political changes have obviously brought about critical challenges that border on the need for revision, and in some cases repealing of certain archaic pieces of legislation. As more and more people have become aware of their civil liberties, there has been increased pressure on the government from different stakeholders, to remove from the statute books those laws considered to be incompatible with democratic ideals.⁴⁷

Economically, Zambia has witnessed massive privatisation of state controlled companies and increased foreign direct investment. This has unfortunately led to massive redundancies and retrenchments on the part of Zambian employees. Furthermore, some investors have closed their companies and pulled out after exhausting their tax holidays, which the Zambian government has been granting at the expense of local investors. This has negatively impacted the social wellbeing of most Zambians leading to unemployment, disease, and increased poverty and crime levels.⁴⁸

The brief account given above obviously raises serious legal challenges, which inevitably fall on the ZLDC. In accordance with its core objective, the ZLDC is expected, in liaison and co-operation with various stake holders, to explore new areas of the law with a view

⁴⁶ Republic of Zambia: Strategic Plan for ZLDC, p 7 (2001-2005).

⁴⁷ Some notable democratic ideals are: the rule of law, separation of powers, transparency in governance, regularly held free & fair elections, press freedom, etc.

⁴⁸ The Post Newspaper, issue No. 3116, p 24 (April 29, 2005).

to reforming it thereby addressing some of the problems highlighted above. Put simply, the ZLDC is supposed to have a clear understanding of its clients and their needs.

In order to address some of the challenges that have emanated from the above changes, the ZLDC has embarked upon a number of projects that have quite advanced. Notable among these are: HIV/AIDS legislation, Insolvency legislation and the Matrimonial causes legislation, which all have been drafted into bills and presented to the Minister of Justice.⁴⁹ It is unfortunate, however, that the ZLDC is always constrained to handover its final reports to the Minister who is not legally compelled to present the same to Parliament. As a result, some of the Commission's work is a mere academic exercise. This is evidenced from the fact that Zambia's socio-political and economic situations have continued to deteriorate notwithstanding the drastic political and economic changes of 1991.

2.4 SUMMARY

In bringing this chapter to a close, it is concluded thus; firstly, the process of law reform in Zambia as adopted by the ZLDC is not in itself defective. However, it is not efficacious mainly due to insufficient funds required to finance the whole process, especially at the stage of field research and stakeholders workshops.

Secondly, the autonomy of the ZLDC has not been fully realized as envisaged by the ZLDC Act, because apart from the Minister having power to appoint and remove

⁴⁹ The ZLDC: Operation Plan, pp 8-12 (2005).

Commissioners, the State through the Ministry of Justice has continued to control funding to the commission, as well as seeking to interfere in the internal operations of the Commission.

Finally, and as a result of the foregoing, the ZLDC has to a great extent failed to rise up to the challenges facing the Zambian society today, by initiating law reforms that will help in addressing the myriad problems currently obtaining.

CHAPTER THREE:

LAW DEVELOPMENT COMMISSIONS AND THEIR ACTIVITIES IN SELECTED COMMONWEALTH JURISDICTIONS: A LESSON FOR ZAMBIA

3.0 INTRODUCTION:

This chapter will bring to the fore some of the most important activities and processes of law reform from the following commonwealth jurisdictions: England; Australia; South Africa and Malawi. The said jurisdictions have been strategically selected in order to derive from them some lessons that might be of significant help to the situation currently obtaining in Zambia.

Apart from being Zambia's former colonial master, England has made significant strides in law reforms by repealing numerous statutes, some of which are still applicable in Zambia. Moreover, the Law Commission of the UK is one of the world's most successful law development agencies, which boasts of over 2000 statutory repeals since its establishment in 1965.⁵⁰ This, and several other positive statistics, need to be given a careful consideration with a view to analysing, which areas might be important to Zambia.

The common law systems of Zambia and Australia are quite similar to each other, yet Australia's efforts towards reforming its laws are by far more advanced than Zambia's.

⁵⁰ The Law Commission (England and Wales), Annual Report, p 37 (2004-05).

This, therefore, makes Australia an important case study with respect to law reforms in the commonwealth. Further, it is often said that South Africa is one of the fastest growing democracies in Africa. South Africa, not only has one of the best constitutions on the continent of Africa, but has made tremendous progress in modernising its laws to suite the post-Apartheid era. Despite it having a different common law system from Zambia, it is important to have regard to this fast emerging democratic state with a view to picking up some lessons vis a vis law reforms.

The Republic of Malawi is similar to Zambia in so many ways. Apart from both countries having once been British colonies and members of the Federation of Rhodesia and Nyasaland, both countries gained their independence almost at the same time, with the former attaining hers in 1963 and the latter in 1964. After independence both states were subjected to a one party dictatorship for over two decades before reverting to plural politics. In the recent past the countries' immediate past Presidents have attempted to manipulate their constitutions with a view to making provision for a third Presidential term. Economically, both Malawi and Zambia have pursued generally the same policies characterised by capitalist inclinations like privatisation. This has unfortunately led to massive job losses and shut-down of state owned companies, ultimately resulting in high rates of poverty; crime; disease; as well as infant and maternal mortality. On this account, it is imperative to assess how Malawi, and particularly its law development agency, has responded to these challenges bearing in mind the need to take into account the needs of society in the process of law reform.

3.1 A BRIEF ASSESSMENT OF THE LAW COMMISSION OF ENGLAND

The Law Commission (L.C) is established under the Law Commissions Act of 1965, for the purpose of reforming the law. Its main task is to review areas of the law and to make recommendations for change.⁵¹ In pursuance of its objective, the L.C seeks to ensure that the law is as simple, accessible, fair, modern and cost-effective. Further, the L.C is made up of five Commissioners who are appointed by the Secretary of State for Constitutional Affairs and Lord Chancellor.⁵² The Commissioners are supported by a Chief Executive, and about 20 members of the government legal service, Parliamentary counsel (who draft the bills to reform and consolidate the law), and some 15 research assistantants (usually recently qualified law graduates), as well as a librarian and a corporative services team.⁵³

Pursuant to sections 2 and 3 of the Law Commissions Act 1965, the persons appointed to be Commissioners shall be persons qualified enough to hold judicial office, or by being a teacher of law in a university. Their appointment shall be for such term (not exceeding five years) and subject to such conditions as may be determined by the Lord Chancellor. Although they are appointed on a permanent basis, they may at any time resign their office, but still remain eligible for reappointment.

The process of law reform in England is generally simple and straight forward, but effective. Most projects start with a consultation paper which describes the present law and its shortcomings and sets out possible options for reform. The views expressed in

⁵¹ Ibid, p 1.

⁵² Ibid.

⁵³ Ibid.

response by consultees are analysed and considered very carefully, and are compiled in a report marking the end of a law reform project. The Commission's final recommendations as set out in a report are appended with a draft bill to give effect to those recommendations. The report will be laid before Parliament and it is then for the Government to decide whether, and if so how, to implement the recommendations.⁵⁴ Recommendations may be implemented by primary legislation (an Act of Parliament), or by secondary legislation (a statutory instrument). It is also sometimes possible for recommendations to be implemented by the courts.⁵⁵

It is important to note that the work of the L.C is based on thorough research and analysis of the following: case law; legislation; academic and other writing; law reports and other relevant sources of information both in the United Kingdom and overseas. It takes full account of the European Convention on Human Rights and of other European Law and acts in consultation with the Scottish Law Commission.⁵⁶

It is important to note that unlike its Zambian counterpart, the L.C has power to present its reports to Parliament. This enables the Commission to lobby Members of Parliament so that they can support the enactment or amendment of the necessary law. Another point to note is that sometimes, implementation of the recommendations can be effected by the courts. This presents a wider avenue through which implementation can be done, thereby enhancing efficiency in law reform process. In addition, owing to the fact that the courts are an independent arm of government, implementation thereof carries an equal force of

⁵⁴ Ibid, p 9.

⁵⁵ Ibid.

⁵⁶ Ibid.

law as enactments through Parliament, hence boosting the peoples' confidence in the work of the Commission. The L.C is also alive to the importance of observing Human Rights, so that any subsequent changes to the law conform to international human rights standards. These aspects have made the Law Commission to be an effective tool in the process of law reforms in England.

In order to effectively and efficiently implement its mandate, the L.C is divided into five specialised teams, each tasked with a specific mandate within its scope of specialisation. The five law teams are: the Commercial and Common law team; Criminal law, Evidence and Procedure team; Property and Trust law team; Public law team, and the Statute law team. These divisions have over the years worked effectively with respect to getting government to accept and implement the recommendations made by the L.C, mainly due to the vast specialised experience of individuals on the teams.⁵⁷ Additionally, the Commission often uses socio-legal, economic and empirical research to ensure that its recommendations to government are thoroughly considered with sound evidence. Apart from existing research, the L.C may also use the services of external researchers.⁵⁸

The success of the L.C can also be attributed to support given to it by the government. There is political will by the government to give the Commission's recommendations sufficient consideration. This is seen from the productive relationships, which the Commission enjoys with Ministers and officials in government departments, especially

⁵⁷ Ibid, p 4.

⁵⁸ Ibid, pp 42-43.

the Department for Constitutional Affairs (DCA), which is its sponsor.⁵⁹ The DCA provides most of the resources to the L.C in accordance with the Law Commissions Act 1965. Be that as it may, the L.C still maintains considerable control over those resources and has complete control over contributions from other departments and institutions.⁶⁰ As a result, the L.C enjoys sufficient autonomy and, can be said to be independent of any undue influence from government wings. This in turn motivates the Commissioners to work freely without any fear of any reprisals.

The other aspects of the L.C that not only deserve mention but are also responsible for its success are: the provision for consolidation of statutes and the provision for corporate services to the Commission.

Consolidation consists of drawing together different enactments on the same subject matter to form a rational structure of making more intelligible the cumulative effect of different layers of amendments. The aim is to make the statute law more comprehensible, both to those who have to operate it and those who are affected by it.⁶¹ The need in all legal systems, to have laws that are accessible and easy to understand, need not be over emphasised. Over the years, there have been a lot of pieces of legislation enacted, but addressing the same subject. This obviously leads to a lot of confusion on the part of the common man. In England, the Law Commission has undertaken to consolidate laws touching on the same subject, into one simple piece of legislation. In so doing the L.C does not just identify amendments that have been made to the enactments being

⁵⁹ Ibid, p 38.

⁶⁰ Ibid, p 52.

⁶¹ Ibid, p 35.

consolidated, but takes into account changes elsewhere in the statute books, in European law, or resulting from decisions from the courts, and puts them in one consolidating Act. Ultimately, the society benefits in the sense that it is easier to read one consolidated piece of legislation than several Acts, which all address one subject.

The L.C has a small Corporate Services team (CST) of administrative staff. The CST is responsible for accommodation, communications, health and safety, human resources, information technology, programme management, publishing, records management, resource accounting, secretarial assistance and security.⁶² By providing or taking care of these services, the CST helps the Commissioners and researchers, to concentrate on their work and not to worry about their personal needs. This ensures that the work of the L.C proceeds without any unnecessary disruptions. Furthermore, the CST developed a new programme management in 2004. The system has been designed to bring together information relevant to all ongoing law Commission projects. It provides the Commission with an overview of its entire programme and with the ability to monitor progress against each individual project. The benefits of this system are obvious, suffice to say that it enables the Commission to gather all the relevant information on its projects and work effectively within a stipulated period of time.

3.2 AN OVERVIEW OF THE AUSTRALIA LAW REFORM COMMISSION

⁶² Ibid, p 45.

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3.2 AN OVERVIEW OF THE AUSTRALIA LAW REFORM COMMISSION

⁶² Ibid, p 45.

The Australia Law Reform Commission (ALRC) was formed in 1975 with the prime mandate of development, modernisation and simplification of the law. Its mandate also extends to improving access to justice and the removal of defects in the legal system. The ALRC also aims to ensure that the laws under review and proposals in relation to those laws do not trespass on Australia's international human rights obligations.⁶³

With respect to the process of law reform, the ALRC receives most of its processes or references from the Attorney General who also appoints the Commissioners.⁶⁴ The ALRC also believes in broad based community involvement in the law reform process. In fact, community consultation is the cornerstone of the ALRC's strategy to develop effective, practical recommendations for law reform.⁶⁵ Accordingly, at the commencement of every law reform project, the ALRC will produce consultation papers, which are disseminated widely and are free of charge for the life of the inquiry. Consultation papers include background papers, issues papers and discussion papers, and are made available in the form of: hardcopy, CD and on the ALRC web site. The consultation papers are also made available in a range of accessible formats for people with disabilities, for example brail for blind people.⁶⁶

Prior to dissemination of consultation papers, the ALRC establishes a broad-based expert Advisory Committee (AC) for each inquiry it conducts. The AC helps the ALRC to identify the main issues in each inquiry and to determine priorities and comments on draft

⁶³ The ALRC: Annual Report, p 1 (2004-05).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid, p 3.

publications, proposals and final recommendations.⁶⁷ Members of the AC are selected for their ability to provide the ALRC with a wide range of experience, and generally consist of experts in the particular field under review, as well as representatives from agencies or industries that are likely to be affected by reform proposals.⁶⁸

After the forgoing procedures are finalised, the ALRC receives submissions from a cross section of the community. Submissions are not restricted to written submissions alone, but may be in the form of: online comments, e-mail submissions and oral submissions either in discussion meetings or by telephone.⁶⁹

After submissions are made, the ALRC schedules meetings with relevant individuals and organisations, who, *inter alia*, include: the Judiciary, state and territory Attorneys, representatives of the legal profession and academicians.⁷⁰ The meetings are meant for scrutinising all the information gathered from diverse sources prior to compilation of a final report. During the reporting period, further consultation meetings are held within or among the members of the ALRC for purposes of fine tuning the final report and recommendations, which are submitted to the government.⁷¹

The ALRC submits its recommendations to the government through the Attorney General. The Commission has no direct role in implementing its recommendations and there is no requirement for the government to respond formally to ALRC reports.

⁶⁷ Ibid, p 2.

⁶⁸ Ibid.

⁶⁹ Ibid, p 3.

⁷⁰ Ibid, p 4.

⁷¹ Ibid.

Therefore, it is not uncommon for implementation to occur some years after the completion of a report.⁷²

It is believed, however; by the ALRC that implementation by government is not the sole measure of the success of a report. Increasingly, the ALRC makes recommendations aimed at other bodies, including the courts, regulators, other government instrumentalities, the legal profession, educators and other professions and industries. Thus, monitoring implementation involves consideration of the actions of all these bodies and not merely the enactment of legislation.⁷³

It is apparent from the foregoing facts about the ALRC that its success is mainly due to broad community and professional consultations carried out during the process of law reform. The ALRC has put in place mechanisms to enable it capture as much information as possible from the community. The ALRC publicises its work widely for purposes of building confidence among members of the community. It issues media releases and supplementary media background papers, if required, at key stages in each inquiry. Media releases are broadcast to the mass media generally, as well as to individuals or organisations that have expressed a specific interest in receiving information from the ALRC.⁷⁴

Another significant public awareness output is the twice-yearly publication of the ALRC's reform journal. The journal provides quality discussion of law reform issues for

⁷² Ibid, p 10.

⁷³ Ibid.

⁷⁴ Ibid, p 17.

a general audience, together with an update on the work of the ALRC and an overview of reform work being undertaken throughout Australia and internationally. The journal's editorial committee, which consists of academics, legal practitioners, journalists, judicial officers and education officials, meets regularly to develop themes for upcoming issues.⁷⁵ Further, the ALRC contributes articles to external journals on a wide range of issues. For example it has a regular column in the Victoria University Law Institute journal, as well as specialised publications such as the journal of the Australian Institute of Professional Intelligence officers.⁷⁶

On account of the forgoing, it is submitted that the ALRC is an effective tool in law reforms in Australia because it promotes public debate on issues or subjects of its inquiry and on law reform generally. It also monitors public discourse by keeping a register of media reports, journal articles, conference papers and Parliamentary debates concerning issues raised by current and past inquiries. And notwithstanding its failure to directly implement its recommendations, the ALRC still makes recommendations aimed at other bodies such as the courts. Moreover the ALRC considers that a report is substantially implemented when the majority of the report's recommendations, including key recommendations, have been implemented by those to whom the recommendations are directed.⁷⁷

⁷⁵ Ibid p 18.

⁷⁶ Ibid

⁷⁷ Ibid p 11

3.3 AN OVERVIEW OF THE SOUTH AFRICAN LAW COMMISSION

The South African Law Commission (SALC) was established by the SALC Act number 19 of 1973. the main objectives of the SALC are: doing research with reference to all branches of the law of the Republic and to study and investigate all such branches, in order to make recommendations for the development, improvement, modernisation or reform thereof,⁷⁸ including: the repeal of obsolete provisions; the removal of anomalies; the bringing about of uniformity in the law in force in the various parts of the Republic; the codification of any branch of the law; and taking steps aimed at making the common law more readily available. In short, the Commission is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.⁷⁹

The main objectives of the SALC are to a great extent similar to those of its *Zambian* counterpart. However, unlike the ZLDC, whose Commissioners are appointed by the Minister of Justice, the SALC Commissioners are appointed by the President of South Africa.⁸⁰

In order to enhance effectiveness in law reforms, the SALC has created committees in accordance with the enabling Act. These committees are in two categories: committees appointed by the Commission and consisting of members of the Commission only; and committees consisting of members of the Commission and persons who are not members. Committees of the Commission perform the activities assigned to them by the

⁷⁸ The SALC: Annual Report, P 19 (2001-02).

⁷⁹ Ibid.

⁸⁰ Ibid.

Commission and are subject to the Commission's directives. The latter are appointed by the Minister for Justice and constitutional Development. The object of the second category of committees is to utilise the expertise of persons outside the Commission and to ensure direct community involvement in the activities of the Commission.⁸¹ It is important to note that activities performed by committees are deemed to be performed by the Commission and for the purposes of remuneration, members of the committees are deemed to be members of the Commission.⁸²

Under the first category of committees, the Commission has established a working committee, which may be considered the executive committee of the Commission. In accordance with the directives of the Commission, the committee attends on a continuous basis to routine matters and other matters that require urgent attention. The working committee may exercise all the functions of the Commission excluding the approval of reports. The committee also considers the inclusion of new investigations in the Commission's programme. Furthermore, the committee plans and manages the activities of the Commission's secretariat.⁸³ In a nutshell, the working committee is a replica of the corporate services team under the LC, which cushions the commissioners and researchers so that they concentrate on substantive work.

Additionally, the SALC has an establishment of project committees under the second category of committees. These consist of experts to assist with investigations and to advise the Commission if a specific investigation in the Commission's programme so

⁸¹ Ibid, p 21.

⁸² Ibid.

⁸³ Ibid.

requires. Furthermore, the Commission is assisted in its task by a full-time secretariat consisting of officials on the establishment of the Department of Justice and constitutional Development. The secretariat consists of an administrative component and a professional component.⁸⁴

The process of law reform in South Africa is quite similar to what obtains in Zambia. Like its Zambian counterpart, the SALC receives law reform projects from three sources, namely: the Minister, or any person or body who submits proposals for law reform, or indeed the Commission can move on its own accord. What ever the source might be, the Commission's projects or programme are subject to the Minister's approval.⁸⁵

After approval is obtained from the Minister, research is done to determine authoritatively the existing legal position and to identify shortcomings of deficiencies that need to be rectified. Consultation takes place between the researcher and project committee and interested parties with particular knowledge concerning the matter under investigation. Comparative studies are also carried out in order to enable the Commission to benefit from experiences elsewhere in the world.⁸⁶ In order to involve the community at an early stage, the Commission publishes issue papers for appropriate investigations as first steps in the consultation process. The purpose of an issue paper is to announce an investigation, to clarify the aim and extent of the investigation, and to suggest the options available for solving existing problems.⁸⁷

⁸⁴ Ibid, p 22.

⁸⁵ Ibid, p 25.

⁸⁶ Ibid.

⁸⁷ Ibid, p 27.

The next stage involves the issuance of discussion papers. These contain essential information on the investigation and the Commission's tentative proposals for reform. In particular, a discussion paper will include a statement of the existing legal position and its deficiencies, a comparative survey, a range of possible solutions, and may include a draft Bill. Members of the public are informed of the availability of discussion papers by notices in the government gazette, press releases and press conferences. In addition, copies are distributed to organisations and, sometimes, individuals whose views on the subject, the Commission wishes to canvass. The responses to the provisional proposals are carefully studied before final decisions are made. The Commission also hears oral evidence in appropriate cases. Its recommendations are embodied in comprehensive reports which are submitted to the Minister for Justice and Constitutional Development.⁸⁸ In other words, the SALC Act requires the Commission to prepare a full report on any matter investigated by it and to submit such report together with the draft legislation, to the Minister.

The submission of the SALC's final report to the Minister, *prima facie* suggests a compromise of the autonomy of the Commission and perhaps a probable refusal by the government to enact a new law. Fortunately, however, there is immense political will on the part of the South African government to ensure that the laws of South Africa do not lag behind but are alive to socio-political and economic changes that affect the South Africans.⁸⁹ Accordingly, funds for the SALC are provided in the vote of the department

⁸⁸ Ibid

⁸⁹ Ibid p 29.

of justice and constitutional development under the law reform sub programme, in consultation with the secretariat of the SALC. Further, the Commission's resources are supplemented by funding and technical assistance from foreign and local donors for specific projects, over which the Commission has complete control.⁹⁰

3.4 A BRIEF ACCOUNT OF THE MALAWI LAW COMMISSION

As already stated hereinbefore, the political histories of Zambia and Malawi are similar to a great extent. However, the Malawi Law Commission (MLC) unlike its Zambian counterpart is established pursuant to section 132 of the Malawi Constitution. Its broad mandate is to review the laws of Malawi and make recommendations relating to the repeal, amendment and development of laws and to exercise other powers conferred on it by the Constitution or by an Act of Parliament.⁹¹

The specific functions of the MLC as provided in section 135 of the Constitution are: 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 submissions from any person or body regarding the laws of Malawi or the Constitution and to report its findings and recommendations to Parliament through the Minister of Justice.

⁹⁰ Ibid, p 25.

⁹¹ See section 132 of the Malawi Constitution.

It is interesting to note that unlike all the Law commissions considered above, the MLC is created by the constitution, which is the supreme law. Moreover, section 136 of the Constitution of Malawi guarantees the MLC independence. It provides that “the Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority.” This is significant in so far as limiting unwarranted interference with the Commission is concerned, owing to the fact that all wings of government are subject to the constitution. However, this is only an ideal realisable where there is political will, otherwise in reality the tendency is that most African governments seek to control almost all government agencies even those created by the Constitution.

The other functions of the MLC are stipulated in the MLC Act as: modernisation of the laws; removal of anomalies and defects from the laws; simplification of the laws; recommendation of more effective methods of administration of the law; recommendations for the codification of any law; harmonisation of customary law with other laws of Malawi and to promote public awareness of the laws and the Constitution.⁹²

It is apparent that the MLC has a very broad mandate mainly because it extends to the Constitution itself. This becomes very important especially during constitutional reforms where more often than not the majority of citizens might be aware of the exercise but unaware of its implications.

⁹² The MLC: Annual Report, pp 5-6 (2002).

Structurally, the MLC secretariat comprises a salaried Law Commissioner as the head of the institution and other professional, technical and administrative staff subordinate to the Law Commissioner. The Law Commissioner is appointed by the President on recommendation of the Judicial Service Commission for a term of five years, which is renewable.⁹³ The Constitution, on the other hand, empowers the Law Commissioner, in consultation with the Judicial Service Commission, to appoint such number of persons as are required on account of their expert knowledge, to constitute the special law Commission on a matter under review. These persons are appointed for such period of time as they are required and they are called Commissioners.⁹⁴

With respect to the process of law reform, the MLC has adopted a procedure similar to that of Zambia. However, under the Malawi system the Minister has an obligation to table the MLC's recommendations before Parliament, which has the mandate to enact laws. It is therefore, entirely up to Parliament to accept or reject the recommendations of the MLC, otherwise the process is quite effective in the sense that the final report is guaranteed of at least being tabled in Parliament.

In an effort to build confidence in the citizens about its work, the MLC organises a number of workshops and press briefings relating to law reform and also to publicise its work. The Commission also organises phone in radio programmes inviting comments from the public about its work.⁹⁵ Further, the Commission, in conjunction with other democratic institutions such as the ombudsman and the Human Rights Commission

⁹³ Ibid

⁹⁴ Ibid.

⁹⁵ Ibid, pp 12-13.

organises a number of civic awareness activities including publication of civic education newsletters.⁹⁶

Like many other government institutions in the developing world, the MLC main challenge is sustainability of funding support for law reform projects. As a result and just like in the Zambian case, the MLC has sometimes failed to successfully carry out its operations and attract the right calibre of researchers. Be that as it may, the MLC has managed to win public trust and confidence evidenced by increasing demand for its services by government agencies and sections of the public with stakeholder interest in the reform or development of any law.⁹⁷

3.5 SUMMARY

The essence of this chapter has been to highlight different aspects of Law reform Commissions from selected commonwealth jurisdictions, with a view to “picking-up” essential lessons that might be of help to the development of the ZLDC and enhancement of law reforms in Zambia. It is noted that the general mandate of Law Commissions is basically the same, however, the approach to carrying out work related to law reforms varies from one jurisdiction to the other. The legal frameworks under which these institutions exist and the challenges thereof are also different, nevertheless, different measures have been implemented to overcome any difficulties that might hinder the processes of law reform. On this account, it is suggested that the lessons derived herein

⁹⁶ Ibid p 16.

⁹⁷ Ibid p 20.

will be considered in the last chapter as a way of making recommendations for the ZLDC.

CHAPTER FOUR:

RECOMMENDATIONS FOR THE ENHANCEMENT OF THE ZLDC's IMPACT ON LAW REFORMS AND THE CONCLUSION

4.0 RECOMMENDATIONS

The essence of this essay has been to highlight the work of the ZLDC vis a vis its impact on law reform in Zambia. Furthermore, the paper has discussed the operations of other law reform agencies within the commonwealth, with a view to bringing to the fore some of their achievements from which Zambia might benefit. On account of the arguments herein, it is submitted that the ZLDC has, to a great extent failed to make any meaningful impact on law reforms in Zambia. It will be recalled from the first chapter that law does not exist in a vacuum, but in society where it affects the lives of its people. In other words law is an instrument of change whereby, the needs of the society wherein it exists are addressed. On the other hand, institutions such as the ZLDC are the vehicle through which such needs are actualised, firstly, by undertaking research and consultation with stakeholders to a particular problem, and finally, implementing the outcome of such a study. On this score, however, the ZLDC has done very little, mainly due to insufficient funds to sustain its programmes.

In light of the foregoing, the question that inevitably arises is: what should be done to the ZLDC to enhance its work with respect to law reform? Below are some recommendations

as to what should be done to the ZLDC and how it can improve its operations, so that it can rightfully claim its position as the engine of law reform in Zambia.

It is common knowledge that most of the operational and organisational problems being experienced by the ZLDC are as a result of poor funding to the institution. The solution to this problem partly depends on increasing government grants to the institution. There should be a realisation on the part of government that there is a connection between good laws and economic emancipation. Once the laws of the land effectively address issues such as corruption, transparency in public institutions, protection of workers and local investors' interests etc, it can be asserted that the economy of that country is likely to make meaningful economic improvement.⁹⁸

The other part of the solution depends upon the ZLDC it self. The Commission must work towards building confidence in both local and international donors that might wish to assist financially or materially. This aspect has succeeded in both England and Malawi, mainly due to heavy campaigns and publicity of the work of both the LC and the MLC. In addition, both these institutions have internal auditors who present their accounts reports to, inter alia, their respective donors. This gives an opportunity to the donors to assess how their money is being used, hence gaining more confidence in the institution.

In Zambia however, the ZLDC is shielded by the ZLDC Act from any control of donor funds. It is therefore, recommended that the Act should be amended to allow the ZLDC have complete control over resources given to it, either by government, or local and

⁹⁸ The Post Newspapers, issue No. 3116, p 24 (April, 29 2005).

international donors. This will in turn spur the ZLDC to be accountable to its donors by way of internal audits, which will ultimately lead to boosting confidence, as is the case in other jurisdictions. It is further recommended that the ZLDC should endeavour to publicise, both the fact of its existence and its operations through its public relations department. Very few Zambians are enlightened about the role of the ZLDC or even its existence. To overcome this state of affairs, the ZLDC may consider emulating the other Law Commission agencies considered hereinbefore, by having a column in one of the daily Newspapers or submitting topics for publication to established journals such as the Zambia Law Journal at the University of Zambia. Ultimately, after sufficient funds have been sourced, the ZLDC may consider publicising its own journal, which would be published twice or thrice a year. It is hoped that like in other jurisdictions, such consistent publications can arouse sufficient interest in the work of the Commission, from both the government and the community at large.

It has already been alluded to above that the ZLDC should have control of its funds irrespective of the source, so that it can retain its autonomy. It is recommended also that the ZLDC, like the Human Rights and Electoral Commissions, should be established under the constitution and its independence declared therein, as is the case in Malawi. This will guarantee full autonomy of the Commission by virtue of the constitution being the supreme law. Further, in order to safeguard the independence of the Commissioners and protection from any political reprisals, the Commissioners should be appointed on permanent basis by the President on the recommendation of the Judicial service Commission. Their removal from office, should as well be by the President on the

recommendation of the Judicial Service Commission, specifying that such a Commissioner is incompetent or incapacitated so as to be unable to perform the functions of his or her office. Furthermore, the role of both the ZLDC and the Department of Legislative Drafting in the Ministry of Justice, should be defined clearly to avoid overlapping of functions, which has caused the former being undermined.

In the same vein as the foregoing, the ZLDC should be empowered by the Act to present its final reports and recommendations to Parliament through a select Committee, (since 'strangers' to the house can not be heard). This will enable the Commission to lobby Members of Parliament so that they can support the enactment or amendment of the necessary law. Once this is achieved, it is quite certain that the impact of the ZLDC on law reforms in Zambia will definitely be enhanced.

In order to achieve most of the above recommendations, sufficient political will needs to be developed among those in power. The pursuit of personal goals among Zambian politicians is common place. This has more often than not, led to suboptimal decisions being taken by those in leadership positions at the expense of the ordinary Zambians. There is therefore, need to develop a national spirit of selflessness among those in power and ensure that their service to the people is done with 'heart and soul'. In a nutshell, the government should have the will to fund the ZLDC without any conditions attached, recognise and support its autonomy and give it the necessary support in relation to submission of its recommendations to Parliament.

4.1 CONCLUSION

Having elaborated on the role of law in society and the work of the ZLDC, and having outlined the challenges of the ZLDC and how these challenges may be addressed, it is worth concluding that law reform agencies, notwithstanding the society in which they exist, must ideally form the backbone of law reform in that society. Accordingly, the Zambia Law Development Commission and the government of Zambia must of necessity work hand in hand, in pursuance of a well developed legal system and ensure that the law is simplified, accessible and abreast with current societal needs.

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