

The Changing Face of Law Reform: Challenges and Prospects in the 21st Century

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1.0 INTRODUCTION

Meeting in London in September 2005, the Annual Conference⁸⁵ for the Association of Commonwealth Law Reform Agencies sought to look into the future of law reform process and the agencies. The conference was held against a backdrop of dissolution or downgrading of law reform agencies in a number of Commonwealth countries and Australia. The dissolution or downgrading emanates partly from a general feeling that law reform agencies are not delivering on their mandate.⁸⁶ There is therefore need for law reform agencies to reengineer themselves if they are to remain relevant and compete for meagre public resources in the 21st century. Incidentally the need for systematic law reform is not in issue in all jurisdictions.⁸⁷

This study looks at the theory of law reform process and challenges facing the agencies in the 21st century. In addressing the above concerns, the paper addresses the issue of jurisprudence of law reform; the basic discourse being that law reform is an all-encompassing process and should not be put in a straitjacket of the black letter law. It is further opined that beside a holistic approach to law reform, the agencies must embrace new public management techniques for effective performance.

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⁸⁵ This was the inaugural Commonwealth Association of Law Reform Agencies (CALRAS) conference held in London on Sunday 11th September 2005. CALRAS is a new organization designed to encourage international cooperation in law reform.

⁸⁶ Cardozo, Op. cit.

⁸⁷ Phillips, H. 'A Case for Greater Public Participation in the Legislative Process, (1987) Statute Law Review, 77.

It is acknowledged that immense literature exists on the subject of law reform but most of it addresses the institutional capacity for law reform agencies. Few if any, have addressed the problem of inefficiency and relevance of the agencies. This paper takes a different approach by arguing that in spite of the institutional requirements being met for the agencies, the institutions have remained largely ineffective and thus the need to look afresh at the entire jurisprudence and process of law reform.

2.0 THEORY AND PRACTICE OF LAW REFORM

Law is a social phenomenon and should be moulded in such a way as to serve the societal needs.⁸⁸ The law must be reflective of the reality of the society in which it is to be implemented and used. It must comply with the social, economic and cultural features because a good law is the product of its environment and not one that is imposed that does not fit or meet the requirements of successful implementation. This is necessary in order to resolve the conflicts and challenges for which the law was enacted. Failure by the law to meet these objectives renders it obsolete. Due to the importance of law in society, law reform is normally top of government agenda.⁸⁹ The tragedy is that even if law reform is not undertaken, social evolution proceeds according to its own dynamics with little regard for whether or not the law is able to keep up.⁹⁰ Accordingly, the users of the law are presented daily with increasingly novel problems for which they must find answers.

2.1 Law Reform Defined

Law reform is a large subject whose very meaning is uncertain. It suggests more than a change in the law or mere improvement of the law.

According to Lyon⁹¹, there are two competing views as to what entails law reform.⁹² There is the conservative, which gives law reform a strict interpretation narrowing it to the change of the black letter law. The liberal group on the other hand looks at law reform from a

⁸⁸ Dewey .J. *My philosophy of Law* (1946), p. 76.

⁸⁹ Engle, G. 'The Legislative Process Today, (1987) *Statute Law Review*, 71.

⁹⁰ Lyon, *supra* note 3.

⁹¹ 'Law Reform Needs Reform' (1974) 12 *Osgoode Hall Law Journal* p. 424.

⁹² The definitions picked herein are merely selective for purposes of this essay.

wider perspective covering the reform of the black letter law and the institutions that deal with the law. Taking a liberal approach, Lyon define law reform as the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of optimizing achievement of those standards.⁹³ He gives Law reform a broader conception to cover the whole legal process and not just the written law. The legal process includes written laws, lawyers and legal institutions. This however is a very wide definition of law reform not envisaged in the mandate of law reform agencies.

Michael Kerr, who leans towards conservatism, describes law reform as comprising recommendations for changes and improvements in any part of the law which can appropriately be put forward by a body of lawyers on the basis of legal principle and pragmatic common sense, after due public consultation.⁹⁴ The definition restricts law reform to recommendations but brings out the central aspect of public consultation.

Another conservative, Professor Walker defines law reform as the alteration of the law in some respect with a view to its improvement.⁹⁵ Walker's definition limits law reform to the black letter law and does not capture the approach and processes.

It is however necessary that a proper theoretical understanding of law reform be understood if the agencies involved therein are to be of relevance to the society. A good definition of law reform must capture the content of the law, the process and the outcomes expected. Law reform can thus be defined as the process of updating and modernizing the law with a view to making it responsive to the societal needs and aspirations of a given society at any given time.⁹⁶ It is the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern society and of individual members of that society.⁹⁷ The business of law reform is therefore not just a technical exercise; it is the business of improving society by improving its laws, practices and procedures. This involves a consideration of competing values.⁹⁸

⁹³ Supra, note 3 at 423.

⁹⁴ 'Law Reform in Changing Times' (1980) 96 *Law Quarterly Review*. 515 at 516.

⁹⁵ Walker, D., *The Oxford Companion to Law* (1980) at 729.

⁹⁶ Robertson, B., 'Law Reform: What is our Knitting? How do We Stick It?' Paper presented at the *Association of Law Reform Agencies for East and Southern Africa (ALRESA) Conference* held on 15th-17th March 2005 in Durban, South Africa.

⁹⁷ Section 11(d), *Law Reform Commission Act of Canada*, R.S.C. 1970, c.21 (1st supplement).

The reform of the law has to be seen not only as based on logic, precedent and analogy but also as founded on philosophy, history, custom and social justice in a system where the cause of law is the welfare of society.⁹⁹ In any event the nature of law is such that it goes to the heart of political, economic and social arena.

2.2 Law Reform: Whose Mandate?

The ultimate law reform mandate rests with the government of the day and specifically, Parliament. Indeed as a matter of political theory, legal practice and good governance, law making is a preserve of the peoples elected representatives to wit Parliament. A democracy follows the theory that judges only apply the law; the executive executes the law while the people make law through their elected representatives. Parliament can however delegate its law-making powers but within the ambits permitted by the constitution.

That is not to say that the executive has no role to play in law making; Far from it for majority of the laws considered by Parliament for enactment mainly emanates from the executive. The government of the day has to get its policies implemented and this is effectively done through legislation.¹⁰⁰

Due to the changing nature of society and the need to have modern laws, a democracy requires a principle of growth in law that can help democratic practice coincide with democratic theory. Further, to achieve justice and fairness in society, there is need to have a continuing and systematic review of what the law does, and why it does it, with the results achieved being tested against what ought to be achieved.¹⁰¹ Law reform therefore must

⁹⁸ Kirby, J., chairman of the Australian Law Reform Commission, cited in Michael Zander, *The Law Making Process* (1980), p 303.

⁹⁹ Cardozo. B.N. 'The Nature of the Judicial Process' in *selected writings of Benjamin Nathan Cardozo (1947) Hall (ed) 107*, at 163.

¹⁰⁰ Phillips, *supra* note 3.

¹⁰¹ Sir Kenneth Keith in his paper 'Philosophies of Law Reform' published in (1991) 7 *Otago Law*

create laws which are both accessible and meaningful to all those who are affected. This is a task that parliament may not easily achieve given the dearth of work that parliament supposedly has, neither can the executive do it because of other pressing needs.

The inability of Parliament and the executive to keep pace with social changes and law reform formed catalysed the establishment of law reform agencies as full time permanent bodies mandated to keep under constant review all 'laws' and to advise the government of any reform needs.¹⁰² The agencies deal with areas of law with real practical impact and benefit, and where the law appears to produce unjust or unreasonable results, or to have become unduly restrictive or complex or obscure, or to be out of touch with and inappropriate for modern conditions.¹⁰³

The creation of permanent law reform agencies therefore was based on a qualitative new principle that the whole body of the law required continuous reform to avoid social lag and that a standing body of professional experts were best suited for the task.¹⁰⁴

2.3 The Process of Law Reform

Good law reform process commences with identification of the reform area. The area for review must be appropriate for review and calling for systematic review and development.¹⁰⁵ The subject has to be relevant to societal needs either business wise, political or social welfare. Lord Steyn has rightly observed that good law reform is facilitated by a cooperative effort between the various arms of the State and the people.¹⁰⁶

Review states at p 378 the principles and philosophies of law reform. They include due process, individual responsibility, pragmatism, need to have balanced, coherent & clear legislation, ethical consideration, power and responsibility, right to remedy against right to Peace and quiet among others.

¹⁰² Gardiner, 'Methods of Law Reform' (1968) 13 No.1 *Saint Louis University Law Journal* p.10.

¹⁰³ Scottish Law Commission, 21st *Annual Report* (1985-86) No 101, par 1.4.

¹⁰⁴ Sawyer, "The Legal Theory of Law Reform" (1970) 20 *UTLJ* 183.

¹⁰⁵ Adler, M. *Supra*.

¹⁰⁶ *Supra* note 8.

The law reform commission is then supposed to conduct a thorough study with wider consultations with users of the law. So the process must start with effective and appropriate consultation. This enables citizens to appreciate the need for reform, have opportunity to comment on possible options for reform and be aware of the possible legal changes. Consultation must be given sufficient time and should involve a genuine willingness to receive and consider views.¹⁰⁷

After consultations, the commission has to prepare its final report detailing the recommendations and where possible attach a draft bill. The report is then forwarded to parliament through the relevant ministry for consideration.¹⁰⁸

The process outlined above is elementary and the same varies from one commission to another. The basic idea however is that the process must be transparent and uphold the public interest by taking full account of public and stakeholder views in the decision making process.

3.0 MYTHS ABOUT SUCCESSFUL LAW REFORM

Virtually all writers¹⁰⁹ agree that an effective law reform agency requires institutional autonomy, proper funding, permanence, expertise, public focus, legal experts who are full time with security of tenure and full time technical staff with power to hire and fire. These attributes are essential but they are not an end to themselves. To put this paper into perspective, selected elements considered will be discussed with a view to demonstrating that the structural requirements do not necessarily warrant effective law reform.

¹⁰⁷ Miller, K., 'Legal Change: The Social Dimension, (1998) 3 *Scottish Law and Quarterly practice* 117 at 119.

¹⁰⁸ Drewery, G. 'The Legislative Implementation of Law Reform Proposals (1986) *Statute Law Review* 17.

¹⁰⁹ See Murphy, G. 'Law Reform Agencies' available at <http://www.justice.gc.ca/en/ps/inter/law-reform/page2.html>; Lord Steyn, *supra* note 8; Handford, P. 'The Changing Face of Law Reform' (1999) 73 *Australian Law Journal* p. 503-523.

3.1 Independence

Law reform agencies were established to provide the government with independent legal advice as to the areas of law requiring reform and the proposals made for such reforms.¹¹⁰ The independence of the commissions was supposed to be both from the government and its bureaucracy, pressure groups and any other section of the community. The agencies were expected to consult all the parties involved but the recommendations were supposed to meet the overall constitutional principles and philosophies that govern society for the common good.¹¹¹ The agencies were seen as the voice of reason, an umpire in the world of competing interests in the field of law reform.

Suffice it to say; even with the much-needed independence being granted, most reform agencies have not risen to the challenge of effective law reform. They still face a myriad of challenges and have failed to make an impact, something that has forced the government to look for alternative institutions to reform the law.¹¹²

Most commissions are still pushing for complete autonomy. However, law reform being a mandate that constitutionally belongs to Parliament, it is not possible to grant such autonomy. In a responsible government, there must be a system of checks and balances and thus the commissions must be answerable to a particular body.¹¹³ The agencies are advisory bodies and a servant must not be the master's commander.

Even so, *operational* autonomy is mandatory to enable the agencies carry out their mandate without fear or favour. The autonomy should therefore relate to the operations of the commission including the identification of the areas of law to be researched, methodology applicable, and the stakeholders, the hiring of staff and consultants if any.¹¹⁴ The programmes to be undertaken by the commissions must be approved by Parliament or the Ministry in charge, and at the same time the commission reports must be tabled in Parliament annually. The commissions should work towards having their reports considered by parliament.

¹¹⁰ Scarman, L. 'Law Reform – Lessons from English Experience' (1967) 3 *Manitoba Law Journal* 48.

¹¹¹ Lamer, 'The Path of Law Reform' (1977) 23 *McGill Law Journal* 525.

¹¹² For instance in 1990 the Kenyan government, faced with a myriad of laws that were outdated, was forced to appoint ad hoc bodies famously known as 'Task Forces' to speed up law reform. This happened in spite of the Kenya Law Reform Commission having been established by an Act of Parliament in 1982. Many may argue that the Commission then had been down-graded by the parent Ministry i.e. the Office of the Attorney General, but the truth of the matter was that the Commission did not have much to show for the 20 years it had been in existence.

¹¹³ Parry, H. 'Reflections on the Process of Law Reform' (1959) 12 *Current Legal Problems* 1.

¹¹⁴ Adler, *Supra* note...

3.2 Permanence

The commissions are permanent bodies. Permanency ensures continuity in the projects and enables the agencies to draw experience from earlier projects and has the ability to work on immediate, short-term, medium term and long-term projects.¹¹⁵ This again is an attribute of the Commission's that they have not utilized. Most commissions have shied away from controversial matters on grounds that they do not deal with political and contentious issues.¹¹⁶ This explains why the government, Parliament and the public have no faith in the agencies. If the commissions are set up to look at all aspects of law reform, then it is fool hardy for them to shy away from politically sensitive issues. It is at this time that the entire nation could be looking up to a professional non-partisan body to help in the reform process in situations where sectarian interest is practiced by other organs.

The commission should always come in as an arbiter, guided by the highest principles of the land with the armour of wide consultations, and make sound proposals in law that meet the aspirations of the society.¹¹⁷ An example can be taken from the Kenya Law Reform Commission and how it dealt with a critical and contentious Political Parties Bill.¹¹⁸ The Bill was initially viewed as 'political and contentious', but the Commission gave direction.

3.3 Expertise

There is no gainsaying that law reform commissions develop expertise and experience in law reform matters. Law reform is a complex process requiring skills in research, consultation, negotiation, development of proposals for change, assessment of responses, preparation of reports and assistance with implementation.¹¹⁹ True it may be, but having expertise in the reform of the lawyers' law is not sufficient. The process of law reform must be looked at widely to encompass societal needs and aspirations. This calls for the agencies

¹¹⁵ See Handford, P. *supra* note 18.

¹¹⁶ Arden. D.M., "The work of the Law Commission" (2000) 53 *Current Legal Problems* p.560

¹¹⁷ Parry, H. *Op. Cit.*

¹¹⁸ The Bill seeks regulate the registration, funding and operations of political parties in Kenya. The bill had been on the Commissions work plan for over 10 years. When a new government was elected in 2002, the Commission revived the project and with funding from development Partners, wide consultations were conducted, a bill prepared and it is expected that the Bill will be enacted into law in 2005-2006 parliamentary calendar year.

¹¹⁹ Handford P., 'The Changing Face of Law Reform' (1999) 73 *Australian Law Journal* p.508.

to cast their net widely and bring among their ranks other professionals with social science skills, statisticians, and economists among others.¹²⁰ The agencies must give the reform agenda an holistic approach.

3.4 Public focus

Law reform commissions are supposed to operate in the public domain, making their reports and findings available to the public. Publicity ought to be given central place because input from the public is essential in the law reform process.¹²¹ Various techniques are applied including publications at various stages, stakeholders' fora, and public debates among others. The biggest concern is whether the public have been adequately reached by the commission's consultations. The answer is in the negative. In a recent survey conducted by the Kenya Law Reform Commission,¹²² it showed that the public knew very little about the Law Reform Commission in spite of its existence for 20 years. In Canada it was noted that few members of the public got in touch with the Commission or were interested in its work. The agencies must therefore come up with effective media strategy to ensure wider participation by the public in the reform work. Effective consultations give legitimacy to the agencies' work.

4.0 LAW REFORM FOR THE FUTURE

Having considered the theory and process of law reform today and the institutional structure of the reform agencies, it is manifest that the agencies' problems are more conceptual than institutional. By conceptual is meant failure by the law reform agencies to embrace the wider aspect of law reform, instead holding on to the conservative view of reforming only the black letter law. This conception is no longer tenable in modern society where law is in the heart of human political, economic and social affairs. The agencies must therefore redefine the whole concept of law reform to include economic and social aspects. This calls for redefining the institutional structure of the agencies to accommodate professionals from other disciplines. It also means that the agencies must come up with new ways of doing things. Let us consider the proposals one by one.

¹²⁰ Robertson, B. *supra* note 8.

¹²¹ Kenya Law Reform Commission, Needs Assessment Report, 2005.

¹²² Kenya Law Reform Commission, Needs Assessment Report, 2005.

4.1 Re-definition of the concept of law reform

Law being a social discipline, its reform must be based on societal values and should be an all-inclusive process.¹²³ In the words of Holmes, “For the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics”.¹²⁴ Since lawyers are not repositories of all knowledge, it is essential that other professions be brought to fore in the process of law reform. Reform proposals should be anchored on empirical data for if law reform proposals cannot be based on empirical data and [economic concerns based on other social sciences **this phrase needs re-working**], then law reform agencies will not be of relevance to the society.¹²⁵ Law reform is an interdisciplinary undertaking and this must be appreciated by law reform agencies through the development of synergies with other professions.¹²⁶

4.2 Adoption of new public management techniques

Central to the success of law reform process, is the need for reform agencies to adopt new public management techniques. New public management techniques refer to the transfer of business and market principles and management techniques from the private into the public sector.¹²⁷ In embracing new public management techniques, the agencies have to redefine the concept of ‘client’ by establishing who their clients are. There is no gainsaying that the ultimate client of the agencies is the public¹²⁸ because law exists to serve public interest. Accordingly, having been mandated by the government to spearhead law reform, the agencies must give honest advice to the government and Parliament based on what is best for the society as a whole. In performing their task, the agencies must consult all the parties involved and come up with recommendations and proposals that are sound and meet the aspirations of a people.¹²⁹

Central to embracing new public management techniques is the need for simplification and transparency of the reform process.¹³⁰ The screening pair of simplification and transparency relates to the present complexity and opaqueness of the law reform process done through

¹²³ Lamer ‘The Path of Law Reform’ (1977) 23 *McGill Law Journal* 523.

¹²⁴ Holmes ‘The path of Law Reform’ (1896-97) 10 *Harvard Law Review* 468.

¹²⁵ Ziegler, P ‘Information Collection Techniques for the Evaluation of the Legislative Process, (1988) *Statute Law Review* 163.

¹²⁶ KLRC report

¹²⁷ Dreschler, W. ‘The Rise and Demise of New Public Management’ *Issue No.3 Post-austic Economics Review*, 14th September 2005.

¹²⁸ Allen, L, ‘Law Reformers, Bureaucrats & Politicians; Partners not Rivals, Paper presented at the Commonwealth Law Reform Agencies held in Auckland, on 16th-17th April 1990.

¹²⁹ Phillips, D. Op.cit.

¹³⁰ Drewery, G. ‘The Legislative Implementation of Law Reform Proposals, (1986) *Statute Law Review*, 16.

stakeholders' conferences, patchwork revisions and lengthy consultation and consolidation phases.¹³¹ Simple and transparent structures go a long way in aborting the culture of elite bargaining and polity building by stealth. Openness and clarity in a system facilitate public access, involvement and input.¹³² Indeed law reform agencies must identify as their pillars the five principles of openness, participation, accountability, effectiveness and coherence.¹³³

Embracing new public management techniques also requires effectiveness and efficiency at the institutional level. Institutional efficiency refers to the capacity for making and pushing for implementation of reform proposals.¹³⁴ On the other hand, institutions are effective when they deliver using mechanisms and procedures that translate people's views into workable proposals.¹³⁵ The performance ability of an institution is therefore condensed into effectiveness and efficiency. This is looked at against the background of legitimacy. Legitimacy measures the extent to which the people accept and embrace a proposal for reform.¹³⁶ Accordingly, from a design perspective, reform institutions must have the capacity to make decisions with accountability and represent the client with competence.¹³⁷

The agencies also need to promote competition between themselves and other departments that engage in law reform. Law reform in a jurisdiction cannot be done by one single agency. There are other organs of the government that deal with law reform. It is vital therefore for the permanent law reform agencies to compete with other organs by coming up with sound and pragmatic proposals. It is only by so doing that the agencies can continue justifying their existence. Otherwise if ad hoc bodies deliver within the shortest time possible, then it behoves the government to rely on such bodies to deliver on law reform if the permanent agencies have failed. In delivering efficiently, the agencies should ensure an efficient, cost-effective and conclusive process.¹³⁸ Commissions have to operate within resource and time constraints, maintain the direction and objectives of the project, and keep within their budgets. It is only by so doing that commissions can compete with other agencies for the meagre government resources.

¹³¹ Spichtinger, Op. cit.

¹³² Adler, M. *supra*.

¹³³ Spichtinger, D. *supra* note 54.

¹³⁴ Drewery, *Supra*.

¹³⁵ Spichtinger, D. Civil Society and the European Union available at <http://www.geocities.com/dspichtinger/cs-eu2.pdf>.

¹³⁶ Ulmer, S.S. 'Quantitative Analysis of Judicial Processes; Some Practical and Theoretical Applications, (Winter 1965) *J. Law & Contemporary Problems*, 164.

¹³⁷ Koboyashi, H. *Modeling and Analysis: An Introduction to System Performance Evaluation Methodology*, (19780

¹³⁸ Davies, G.L, 'Why we need to Question Some Basic Assumptions, (2006) 25 *Civil Quarterly Review*, 1-25.

As part of competition, the reform agencies need also to be driven by goals and not rules, as it has been the case in the past.¹³⁹ The agencies should measure performance, focusing not on inputs but outputs. They should develop a full range process of law reform that includes objectives, strategies, and resources, building into the model performance criteria in terms of actual results.¹⁴⁰

5.0 CONCLUSION

The creation of law reform agencies was met with excitement, pomp and expectations. 45 years down the line when law has become the strand in the web of human life, the agencies are in danger of being wiped out. The agencies have refused to reform and be part of the society. It is therefore imperative that the agencies redefine the entire purview of law reform to give it an holistic approach, embrace new public sector management techniques and deliver on their mandate. Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving. This applies to the institutions that reform the law; wake up or die!

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¹³⁹ Maser, C.A. and Kalton, G. 'Survey in Social Investigation, (2nd ed. 1971).

¹⁴⁰ Koboyashi, Supra.

Drechsler, W. 'The Rise and Demise of the New Public Management' (2005) *Issue number 3 Post-austic Economics Review* article 2.

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