A CRITICAL ANALYSIS OF WOMEN PARTICIPATION IN THE LAW REFORM PROCESS: A CASE OF THE LAW COMMISSION IN MALAWI

BY

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ABSTRACT

The writer, a law reformer, uses her eight years’ experience in conducting law reform to interrogate the law reform process with regard to women participation in the process. This dissertation explores the extent to which women have participated in the law reform process in Malawi compared to their male counterparts in view of the right to equality and non-discrimination as well as the right to dignity which recognizes the inherent dignity and worth of each human being enshrined under sections 19 and 20 of the Constitution and other international human rights instruments.

The writer briefly discusses the establishment of the Commission, its mandate and functions, the law reform process to contextualize the study and contemporary debates on law reform give insights into what law reform is about and ought to be. Using methodologies such as the Grounded theory and the dung beetle within the Grounded theory, the Women’s Law Approach, sex and gender analysis, actors and structures and the human rights approach the study reveals the interplay of gender in the law reform process. Data collection methods including FGD, key informants, in-depth interviews, participant observations and desk research were used. She shows law reforms’ failure to tap from women’s lived realities and experience in order to adequately address women’s issues and concerns throughout the law reform process.

The study finds that more men than women participate in the law reform process. Participation in the law reform process is gendered since the majority of law reform programmes are dominated by men while only six of them are dominated by women. Also, finds that there are inadequate guidelines to ensure gender equality. Further, that gender neutral laws discriminates against women as it uses the male norm to which women must conform to, for them to benefit from the laws. It reveals dichotomies in participation in the law reform process. It unearths hidden, visible and invisible powers that have an effect on women’s participation as well as identify barriers to women participation in the law reform process.

The study recommends adoption of gender balance, inclusion of a critical mass of women and deliberate measures to ensure that adequate women participate in the law reform process. Also, inclusion of women’s voices which should be recorded separately and that women should be consulted separately from men taking into account the barriers such as the influence of culture and religion as they militate women’s participation. Proposes measures for ensuring substantive equality in the application of gender neutral laws.
DEDICATION

This study is dedicated to:

The LORD God Almighty, My redeemer LORD Jesus Christ, for He has seen me through a troubled childhood still gave me a hope and a future to be where I am now with my education.

The two great grandparents who made great impact in my life;

My great grandmother Elasi Khonje, who brought me up with so much love, care and sacrificed in her old age and taught me to trust in God and to be humble but unfortunately, she never lived to witness the two milestones in my life;

My great grandfather W.F.K. Khonje who made me realize the importance of education and aim high with his words “take education as your mother, father, husband and everything”, after only having a glimpse, unfortunately, has been robbed by death of the opportunity to witness this second milestone in my life.

To my children: Joseph and Watitemwera

and

To my husband, Hope

and

To my sisters and aunties

and

Relatives and friends too many to mention.
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I am so grateful to all my respondents’ for sparing your valuable time. Dr. Ngeyi Kanyongolo, Justice Esmie Chombo and the Honourable Minister of Gender, Mrs. Patricia Kaliati I know that you are so busy but for sparing your time I say thank you in a special way.

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My sincere gratitude to the entire staff of Women’s Law Centre and Basil Fletcher Court I will live to remember you all.

2015-2016 Class, class Representatives Lilian and Alex and everyone, you are wonderful. I wish you all the very best.

And, to the Norwegian government, thank you for funding my studies.
DECLARATION

I declare that this research, “A Critical Analysis of Women Participation in the Law Reform Process: A Case of the Law Commission in Malawi” is my own work and it has not been submitted at any other higher learning institution for the award of certificates or any other form of assessment.

Signed:

Date: 8th April, 2016
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EXECUTIVE SUMMARY

The study was carried out in Malawi in all the three regions of the country, northern, central and southern in the following selected districts; Mzimba, Lilongwe, Dedza, Balaka, Blantyre, Zomba and Mulanje in rural and urban areas. The study aims at interrogating the law reform process with regard to participation of women throughout the process in line with constitutional provisions and international human rights instruments that prohibit discrimination on the basis of sex, and enshrines the right to dignity as the inherent dignity and worth of each human being. Considering that historically women have and continue to suffer oppression, subordination and deprivation this calls for their emancipation through among others, law reform hence the need for them to fully and actively participate in the law reform process.

The study was guided by the following summarized assumptions, that: women do not adequately participate in the law reform process; there are inadequate guidelines to ensure gender equality; women issues and concerns rarely form the basis for law reform; inadequate participation of women leads to enactment of gender neutral laws which discriminate against women; and engendering the law reform process would lead to both formal and substantive equality and that there are barriers to women participation in the law reform process.

My eight years’ experience as a law reformer including the contemporary debates on law reform has shown that more men than women participate in the law reform process. The gendered participation in the law reform process and the purpose of the Women’s Law Approach which entails examining and understanding how women are considered in law and how the law corresponds to women’s realities and needs informed taking women as the starting point, justified using the Women’s Law Approach as the overarching research method. The qualitative research provided a deeper understanding of women’s lived realities and experiences with law reform. The dung beetle method within the Grounded theory which requires starting with preliminary assumptions directed the data collection, collected data when analyzed indicated new direction of the study and new sources of data to satisfy information needs. The sex and gender analysis, actors and structures and the human rights approach complemented the study. Various methods such as FGDs, key informants, individual in depth interviews, desk research, participatory approach, participant observations and passive observations assisted in sourcing the required data for the study.
With the help of the different research methodologies and methods the study unearthed the following; that, men participate more than women in the law reform process both as SLCs and participants in the consultative process; men dominated the majority of law reform programmes while women dominated six law reform programmes as SLCs; there were inadequate guidelines to ensure gender equality; SLCs dominated by women in contrast with those dominated by men were informed by women’s issues and concerns and these dealt with such issues adequately in the law reform process; gender neutral laws uses the male norm to which women must conform; barriers such as culture, religion, poverty, lack of legal awareness and access to information, the commissions resource constraints and lack of implementation of laws militates women’s participation in law reform; and dichotomies including, male and female, private and public spheres, formal and informal structures, educated and uneducated, and rural and urban divide. All this, justify engendering the law reform process to achieve both formal and substantive equality in the participation of women in the law reform process. Since, women suffer exclusion, marginalization and discrimination in participation in the law reform process.

Constitutional provisions and numerous human rights instruments on the right to equality and non-discrimination underscoring full participation of women in all spheres of Malawian society on the basis of equality with men, and women’s right to participation in decision making were used. These are the Constitution, UDHR, ICCPR, ICESCR, Maputo Protocol, SADC Declaration on Gender and Development; the Fourth World Conference on Women Platform for Action, CEDAW, Sustainable Development Goals, 2015 and Committee on the Economic, Social and Cultural Rights, General Comment No. 13. This study makes the following recommendations to enhance women participation in the law reform process:

(a) Appointment of more women in decision making positions; ensure equal representation of men and women as a long term measure; provide for a critical mass of 40% for women as SLCs and participants; develop the gender policy for the Commission and review the LCA to mainstream gender.

(b) Adopt deliberate measures to ensure gender equality in the law reform process, request for more than one name of nominees from each institution for appointment as SLC and record women’s voices separately in the law reform.

(c) Mainstream gender throughout the law reform process.
(d) Provide safeguards aimed at promoting and protecting women’s interests in the application of gender neutral laws.

(e) Government must provide for adequate funding to the Commission; implement the national Gender Policy; spearhead education and awareness raising of laws and gender issues on a continuous basis; prioritize girls education; target women as a special group and consult some of them separately; engender socialization process; provide professional interpreters and sign language facility; provide training on gender for law reformers; consider introduction of a small levy on court costs to fund law reform; and training and education for women to prepare them for new responsibilities.
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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

“Women are important voices in today’s society. Sometimes we are ‘Machista’ and we don’t make room for women. Women are able to see things differently than men, and they ask questions that men just don’t get.”

The Law Commission (hereinafter ‘the Commission’) is established under the Malawi Constitution\(^2\) (hereinafter ‘the Constitution’) mandated to review and make recommendations relating to the repeal and amendment of laws. Special Law Commissioners (hereinafter ‘SLC’) are appointed on the basis of their expertise\(^3\) they meet in plenary to deliberate on the law under review and conduct consultative meeting to hear people’s views before and after coming up with findings and recommendations. Carrying out law reform as usual the issue of ensuring adequate women participation in law reform never crossed my mind.

Women’s Law course with its focus on women’s lived realities and the law, and human rights made me reflect on how best law reform can be used to respond and improve the position of women in my country. It was during the Women, Land and Environmental Resources in particular, a lecture on participation as a human rights principle that guarantee women equal rights with men to participate at all levels of decision making that set my interest in carrying out an in-depth study relating to participation of women in the law reform process.

It reminded me of one case that happened at my institution in 2012. One of the institutions that we requested to nominate a representative for appointment as a SLC sent a woman who did not know how to speak and read English. It was only discovered during the first Commission meeting. English is the official language and working language for the Commission. To ensure that she is included every SLC after making a contribution in English during this Commission meeting used to also translate the information into Chichewa. The first contribution she made was an explanation of how she will ensure that she reads and understands the information provided to her when she reaches her home, she said her children were going to read and interpret the information into Chichewa for her. Realizing the challenge that this scenario would cause for purposes of progress of the review programme as it was donor funded and required

\(^1\) By Pope Francis
\(^2\) Sections 132 to 136 of the Constitution, 1994
\(^3\) Section 133 (b) of the Constitution
strict adherence to time frames, the institution\textsuperscript{4} was asked to replace her with another person who could speak English. They did, fortunately they replaced her with another women who was a retired teacher so the review programme went on as usual.

This incident made me start questioning the reality of the human right principle of equal participation of women with men in all levels of decision making. I thought, if a person cannot read and speak English automatically the levels of governance at which the person can participate is limited. As it happened in this case, the woman was sent back so she missed an opportunity to influence the development of law. I started asking myself what this means for a rural woman who is illiterate but has knowledge and expertise acquired through experience which would be crucial and can inform development of laws that match with majority of women’s lived realities. I wondered whether women’s right to full and equal participation at all levels of governance is only a fallacy considering that in most cases it is only formal education qualification and its accompanying experience that is recognized and not experiential. This being the case then which group of women does it apply to and what of the majority of women to which this woman belonged, uneducated, living in rural areas but are expected to use laws that are being developed through law reform. Lastly, would the right to equality and non-discrimination enshrined under section 20 of the Constitution be of any relevance.

This incident and the reflection on how we carry out law reform in my institution, where we leave it to institutions to choose representatives to be involved in law reform programmes without adequate guidance on gender representation, influenced the choice of the area of study. As someone involved in law reform I thought I could contribute something meaningful to ensuring inclusion of women in the law reform process. I consider the Commission to be an important institution that can be used to ensure women’s voices and lived realities inform the law reform process and development of engendered laws to achieve substantive equality. I hold the view that before we even start to look at the way women interact with the law we should first consider how women can be involved in development of laws.

\textsuperscript{4} Ministry of Local Government and Rural Development also deals with chiefs administration as such they sent this woman chief under the review of the Chiefs Act
1.1 Statement of the problem

There are numerous constitutional provisions, human rights instruments and policy on full and effective participation of women in decision making positions including law reform. Realizing that in most cases what laws and policies provides on paper tend to differ with situations on the ground more specifically, taking into account women’s lived realities and experiences. The state must achieve gender equality for women with men through full participation of women in all spheres of Malawian society on the basis of equality with men; implementation of the principles of non-discrimination and other measures; and implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.\(^5\)

Likewise, the Gender Policy, theme five, on governance and human rights’, whose goal is to attain good governance, realize human rights and equal participation of women, men, girls and boys in national development.\(^6\) Promotion of full and equal participation of women, men, girls and boys in decision-making at all levels is one of the objectives\(^7\): Various international human rights instruments to which Malawi is a party also provide for women’s right to full and equal participation in decision making. Article 25 (a) and (b) of the ICCPR provides for non-discrimination on the basis of sex in the conduct of public affairs, directly or through freely chosen representatives; and to have access, on general terms to equality, to public service in one’s country.

Article 7 of CEDAW obliges States Parties to take all appropriate measures aimed at eliminating discrimination against women in the political and public life and ensure to women the right to participate equally with men in the formulation of government policy and its implementation including holding public office and performing all public functions at all levels of government. It can be argued that women participation in the law reform process is included.

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\(^5\) Section 13 (a) of the Constitution
\(^6\) Gender Policy, 2008
\(^7\) Strategies such as: advocating for legislation and policies to enhance women participation at all levels of governance and decision making; creation and strengthening support systems for women to take an active part in decision making; engendering socialization process for boys and girls to increase equal participation in decision making; promotion of the provision of information to stimulate women to effectively participate in decision making processes at all levels; and lobbying for the appointment of 50% women to decision-making positions.
States Parties are also obliged to take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on the basis of equality of men and women, that they participate in and benefit from rural development and, in particular, to ensure that such women enjoy the right to participate in the elaboration and implementation of development planning at all levels.\textsuperscript{8} This means that it is not only a particular category of women but all groups of women have the right to participate in decision making at all levels. This includes women with disabilities.\textsuperscript{9}

The state has a duty to ensure women’s participation in decision-making processes and to afford an opportunity to women to express their demands. Article 9 (1) (c) of the Maputo Protocol obliges states to take specific positive action to ensure that women are equal partners with men at all levels of development and implementation of state policies and development programmes. It also obliges States Parties to ensure increased and effective representation and participation of women at all levels of decision-making.\textsuperscript{10} As regards the right to sustainable development, states are obliged to take all appropriate measures to ensure participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of development policies and programmes.\textsuperscript{11}

Women’s right to participation extends to all levels of decision-making whether policy-making processes at national level and entails active, free and meaningful participation, and meaningful participation requires knowledge about decision-making processes, and laws and policies to be made in that all these require education and information in order to achieve actual empowerment (Hellum et al, 2015:68). Also, merely counting the number of women present at meetings will not suffice in ensuring that women’s participation is active, free, and meaningful (Hellum et al, 2015).

Participation in the law reform process where both policy and legislative proposals are made is dominated by men as there are many barriers to women participation. Law as a tool for social engineering affects men and women differently. The law represents the environment in which it operates. Laws are made in such a way that they reflect the dominant view of how the world

\textsuperscript{8} Article 14 (2) (a) of CEDAW  
\textsuperscript{9} Article 29 of the CRPD  
\textsuperscript{10} Article 9 (2) of the Maputo Protocol  
\textsuperscript{11} Article 19 (b) of the Maputo Protocol
operates which, in most patriarchal societies like Malawi is the male’s view. It shapes individuals and groups into dichotomies. These dichotomies are gendered. Therefore, there is need to understand how laws are made, ways in which they respond to different issues and concerns and hide the gender bias hidden in them. Failure to include a critical mass of women or their representatives in the law reform process, who can articulate women’s issues and concerns, inclusion of women’s voices and ensuring that such voices informs the development of laws, leads to further marginalization of women both in law and practice which results in discrimination against women.

1.2 Objectives of the study
This study aims at achieving the following objectives,

1. To assess whether women adequately participate in the law reform process at identification of laws for reform, as SLCs and as participants in the consultative process.

2. To investigate whether there are adequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings so that women’s voices are adequately captured in the law reform process.

3. To explore whether women’s issues and concerns form the basis for reforming the law, plenary discussions and content of the draft bill in the law reform process.

4. To examine whether inadequate participation of women in the law reform process leads to enactment of gender neutral laws which result in discrimination against women.

5. To determine the extent to which engendering the law reform process would lead to both formal and substantive equality in the participation of women in decision-making and whether there are barriers to women participation.

1.3 Research assumptions
This research was informed by the following assumptions which were adapted and readapted as the study progressed to match with the information coming to light,

1. Women do not adequately participate in the law reform process at identification of laws for reform, as SLCs and as participants in the consultative process.

2. There are inadequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings as a result of this women’s voices are not adequately captured in the law reform process.
3. Women’s issues and concerns rarely form the basis for reforming the law, plenary discussions and content of the draft bill in the law reform process.

4. Inadequate participation of women in the law reform process leads to enactment of gender neutral laws which result in discrimination against women.

5. Engendering the law reform process would lead to both formal and substantive equality in the participation of women in the law reform process and there are barriers to women participation.

1.4 Research questions
Likewise, the research questions were also adapted to match with the assumptions as the study progressed in the field and the following questions were asked to obtain the information so far collected,

1. Do women adequately participate in the law reform process at identification of laws for reform, as SLCs and as participants in the consultative process?

2. Are there adequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings so that women’s voices are adequately captured in the law reform process?

3. Do women’s issues and concerns rarely form the basis for reforming the law, plenary discussions and content of the draft bill in the law reform process?

4. Does inadequate participation of women in the law reform process lead to enactment of gender neutral laws which result in discrimination against women?

5. Would engendering the law reform process lead to both formal and substantive equality in the participation of women in the law reform process and are there barriers to women participation in the law reform process?

1.5 Conceptualization of issues
Realizing that words have different meaning depending on the context in which they are used, the following words will have the meanings ascribed to them for the purpose of this study.

1.5.1 Women
Article 1 (k) of the Maputo Protocol defines ‘women’ as persons who are of a female gender and includes girls. This study adopts this broad definition of women considering that girls eventually become women. The discrimination that persons of female gender are subjected to as girls tend to continue and is replicated until they become women. This approach takes into account the fact
that women as a class are not a homogenous group as each one of them occupies a subordinate position, is oppressed and suffers depravity both in law and society which differ according to cultural, social, economic and political conditions they find themselves in. With regard to issues of discrimination, it is the intensity of the discrimination that differs. Thus, in this study the word ‘women’ is understood broadly to include girls, thus refers to people of the female gender.

1.5.2 Participation
Participation is defined as the act of taking part in something.\textsuperscript{12} Full participation in societal activities affords a person a sense of dignity and worth thus participation of women in the law reform process connotes both descriptive (numerical) and substantive representation (Report of the Expert Group, 2005: 12). Descriptive representation means that women representing other women are taken as direct participation of women in the law reform process. The woman representative being female is taken as representing a group of women. Counting the number of women participating in the law process without critically examining what the women representatives are actually saying is the focus. Substantive representation is where an individual seeks to advance a particular group’s preference and interest, without necessarily being a member of that group and having the distinctive characteristic, in this case sex. This approach focuses on what the person is actually speaking for that particular group in the law reform process generally. Substantive representation of women, thus goes beyond numbers, it is more than an increase in women representatives. What is important is that both men and women, speak for women’s interests. Therefore, participation in the law reform process in this study means both in terms of numbers and advancements of women’s interests through presentation of view of women by individuals who are women or through representatives and ensuring that such views inform policy and legislative proposals resulting from the law reform process.

1.5.3 Law reform:
Law reform\textsuperscript{13} is defined as,

“A process of streamlining, modernization, or improvements to a body of law or a code governing a specific branch of law, by a commission or expert committee with the aim of formulating proposals for change to improve the operation of law.”

\textsuperscript{12} The Black’s Law Dictionary p.1151
\textsuperscript{13} The Black’s Law Dictionary p.904
This means that a law must already be in existence for it to be the subject for reform. Likewise, law reform may mean development of legal frameworks based on research and review for the attainment of the country’s developmental policies and people’s aspirations.\textsuperscript{14} Law reform aims at making the substance of the law better and improving the form of the law, and codification (Ball, 1928). According to Hughes, law reform does not merely entail changing the law but mean increasing access to justice by ensuring that more people have meaningful access to legal justice institutions and other dispute resolution processes, the legal process, the substance of law and to rights and benefits that are available to everyone by the mechanism of law (Hughes, 2008). These definitions are restricted to seeing law reform as entailing changing laws that are already there without adopting a holistic approach to changing the law and the society as a whole except for the approach adopted by Tanzania. Therefore, in this study, law reform, is conceptualized in its broader sense to mean, an ongoing process where laws are changed, updated, new ones are developed, codified, modernized both in form and substance to reflect the evolving societal values and needs, and also spearheading change in social, economic, political and cultural values and needs in order to ensure that there is equitable distribution of benefits and burdens between men and women in society.

1.6 Delimitation of the Study

Malawi is situated southeast of Africa bordering Zambia, Tanzania and Mozambique and is a landlocked country; it has an estimated population of 17738678 people as of 1\textsuperscript{st} January 2016, representing 50.1% and 49.9% male and female population, respectively.\textsuperscript{15} The Commission is a law reform agency and this study was carried out in Malawi shown on the map below.

Figure 1: Map of Malawi

\textsuperscript{14} The Law Reformer Journal of Tanzania, 2009 p.9
\textsuperscript{15} According to World population Prospects – Global demographic estimates and progressions by the United Nations
The Commission is the only constitutionally mandated institution to carry out law reform by virtue of section 132 of the Constitution. But, law reform in Malawi is done by various institutions, Ministry of Justice, consultants, Judiciary and the Commission. Ministry of Justice has continued to exercise the law reform function e.g. it developed the Pension Act of 2011. A consultant reviewed the Company’s Act. Judges reform the law since judicial decisions are sources of law; the act of interpretation amounts to lawmaking; and judges fill gaps in the law. This means that there are various approaches to law reform as evidenced by these agencies that carry out law reform.

It is to this background that this study is limited to the law reform process followed by the Commission. From identification of an area for reform to compilation of a Report containing findings and recommendations in form of both the narrative and draft bill and its submission to the Minister of Justice. The process that follows from the submission of the Report to the Minister of Justice and Constitutional Affairs (hereinafter “the Minister of Justice”) and enactment into law by Parliament may be the subject of another research.

1.7 Structure of the study
This Chapter provided the background to the study and conceptualization of issues. Chapter 2 will discuss establishment of the Commission, mandate, functions, the law reform process and contemporary arguments about law reform. Chapter 3 contains a discussion on the methodological approaches and data collection methods used in this study in order to reveal the lived realities of women with regard to participation in the law reform process. Chapters 4 to 6 discusses the findings of the study by highlighting barriers to women participation in the law reform process, showing how women have fared compared to men in participation in the law reform process and the dichotomies underlying participation in law reform. Chapter 7 concludes the discussion and proposes recommendations for ensuring full and effective participation of women.
CHAPTER TWO

2.0 THE LAW COMMISSION AND CONTEMPORARY ARGUMENTS
ON LAW REFORM

2.1 Introduction
Almost every society organizes itself through a formal system of rules that governs the
relationship between the state and individuals, and individuals themselves called law. These rules
are intended to be observed and enforced. However, society is not static but dynamic as norms,
customs, aspirations and practices keep on changing to suit changing times. As one respondent
said,

“I feel it is necessary to make new laws and reform laws because times have changed, laws
which were working in the 1920’s can no longer work effectively in the present days, people’s practices have changed.”

2.2 Establishment
Prior to enactment of the 1994 Constitution, law reform was the preserve of the Ministry of
Justice, however with the advent of a multiparty system of government the function of law
reform was institutionalized and the Commission was established under Chapter XII of the
Constitution in particular sections 132 to 136 (Annual Report 2003, 2004). It became operational
in 1996 and is governed by the Constitution and the Law Commission Act (hereinafter “LCA”).

2.3 Mandate and functions
The Commission is an independent institution and provides expert advice to Government relating
to the development of law, law reform and the status of the law\(^ {17}\). The Law Commissioner is the
head of the institution, is appointed by the President on the recommendation of the Judicial
Service Commission (hereinafter “the JSC”), the person must be a legal practitioner or a person
who is qualified to be appointed as a judge.\(^ {18}\) The core mandate is to review and make
recommendations relating to the repeal and amendment of laws and to exercise powers and
functions conferred on it by the Constitution and any Act of Parliament.\(^ {19}\)

\(^{16}\) Senior Chief Kalumbu of Lilongwe, one of Key informants representing traditional leaders.
\(^{17}\) S.136 of the Constitution
\(^{18}\) s. 133 (a) of the Constitution.
\(^{19}\) s.132 of the Constitution
The specific functions of the Commission are stipulated under the Constitution and the LCA. The Commission has the power to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with the Constitution and applicable international law; review and make recommendations regarding any matter pertaining to the Constitution; to receive submission from any person or body regarding the laws of Malawi or the Constitution; report its findings and recommendations to Parliament through the Minister of Justice.20

Section 6 of the LCA elaborate further on the functions of the Commission as follows: (a) to review the laws of Malawi with a view to the systematic development and reform of the law, including (i) modernization of laws to match with current national and international conditions and norms; (ii) elimination of defects whether procedural, substantive or policy; (iii) recommendations of more effective methods and procedures for the administration of laws; (b) making recommendations for the fusion or harmonization of customary law with other laws of Malawi; (c) making recommendations for the codification of any branch of laws, including customary law; and (d) promoting awareness of laws and the Constitution by the public and by departments of Government and other authorities or bodies.

This means the Commission plays a crucial role in the improvement of laws of Malawi on an ongoing basis so as to ensure that the laws and the Constitution are systematically reviewed and developed.

2.4 Law reform process

The law reform process concisely unfolds in five stages.

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20 s.135 of the Constitution
2.4.1 Stage I: Identification of a law reform area

It is done in three ways, a submission is receive by the Commission from an individual or institution i.e. government department or civil society organization (CSO); the Commission may identify an area on its own volition so as to implement Government policies, domesticate international instruments to fulfil the country’s obligation at the international level or sometimes in response to changes happening in the society; and the Attorney General may request the Commission on behalf of Government to reflect on any matter of law that is in dire need of reform or an area that needs development of new legislation (Law Commission Annual Report, 2013).

2.4.2 Stage II: Investigation

Upon determination of a law reform area, programme officers are assigned who carryout preliminary research on the status of the law and identification of gaps which culminates in development of working papers to guide the law reform process such as Research Papers, Consultation Papers, Issues Papers, and Discussion Papers. As a minimum under any law reform
assignment programme officers must conduct a thorough research and develop an Issues Paper and a Discussion Paper taking into account the Constitution, existing statutes, if any; international law; similar foreign legislation and case law; and national policies dealing with the matter under review (Law Reform Manual, 2011:3). The Issues Paper announces the inception of a law reform programme, clarifies the aim and scope of the matter under review, guides consultation with the public and facilitates solicitation of additional issues for consideration whilst a Discussion Paper analyses in a comprehensive matter the law and policy framework, includes tentative recommendations on the direction of the law reform and informs the plenary discussions of a SLC (Law Reform Manual, 2011:3).

2.4.3 Stage III: Appointment of Commissioners

The Law Commissioner in consultation with the JSC appoints SLCs on the basis of their expert knowledge of the matter of law under review or expert knowledge of other matters relating to a legal issue being under review.\(^{21}\) They meet in plenary to discuss and deliberate on issues under consideration, develop terms of reference and agree on the methodology for conducting the law reform assignment, and conducts workshops, field visits and comparative study visits to other jurisdictions.

2.4.4 Stage IV: Consultation

The law reform process is highly consultative in that stakeholders and members of the public are consulted through workshops, focus group discussions, sending of working papers to individuals or institutions for responses and comments and field research. The main purpose for consultations is to solicit views before a law reform assignment starts so as to inform the review and to seek views on the findings and recommendations of the SLC.

2.4.5 Stage V: Report and Draft Bill

The SLC’s findings and recommendations culminates into development of the report which contains the narrative part and the draft proposed legislation which is then submitted to the Minister of Justice for submission to Cabinet for adoption as Government Bill and laying in Parliament for enactment (Law Commission Annual Report, 2013:4).

\(^{21}\) S.133 (b) of the Constitution
2.5 Contemporary arguments on law reform

Writers have discussed law reform from what it is, approaches, processes and what should be the main focus as evidenced by the discussion that follow. Malawi just like many countries in Africa, has different forms of law that regulate people’s lives such as received western, customary and religious laws, these may pose threats to law reform which is based on received laws and relies on western models of law reform (Tsanga, 2011: 202-203). Law reform is understood as a process which is more than simply drafting and enacting new rules (Faundez, 2000). Lyon adds that if law reform is to be viewed as a process, it must be defined as,

“…identifying and clarifying standards of performance for the legal order and of finding and implementing ways of maximizing achievement of those standards.”(Lyon, 1974:429)

Law reform must therefore focus on involving people outside the Commission such as women in order to develop a variety of interventions that deal with numerous problems and failures of the various systems in the society that create injustices. A performance appraisal of both the legal system and the reform process as they affect people using fundamental values of our constitution expressed in the bill of rights chapter e.g. the right to equality and non-discrimination, should be conducted. Law reform should also focus on reforming the law, lawyers and legal institutions (Lyon, 1974:28). It is important to note that Lyon’s approach is concerned with the ideal social equality because he does not analyze the power structures at play within the society.

Ball (1928), states that legislation is made up of what representatives in a particular nation think the nation wants. He also states that law reform, for it to be meaningful must deal with both the substance of the law and its form, codification, must apply legal history and use comparative legislation which may sometimes signal a mere danger. His emphasis on comparative legislation has both pros and cons. Reliance on comparative legislation as it appears on paper without investigating the history behind the enactment, its practical and challenges to its implementation may raise false hopes and result in the other country replicating the mistakes made by country of origin.

From my experience as a law reformer comparative legislation is more beneficial if followed up with a study visit to the country in question to understand the environment and legislative history. For example, some members of the SLC on the review of the Law on Abortion visited

22 Provided for under section 20 of the Constitution
Ethiopia as the Ethiopia abortion law provide for abortion on specific grounds. Its implementation revealed that it is abortion on demand to which implementers admitted. The technical guidelines do not require asking the woman reasons or age for procuring safe abortion for fear of barring women from accessing the service. The background information to its development indicates that the first draft bill provided for abortion on demand which was later changed upon protest from religious leaders to abortion on specific grounds as a compromise. This informed the SLC on the approach to take in reforming the law on abortion in Malawi in that it developed the technical guidelines that matched with the legislative proposals. This is a clear danger of relying on comparative legislation without having much information from the country of origin.

Some writers have argued that law reform does not pay sufficient attention to real lives of those who interact with, and are affected by the law and the legal system (Graycar and Morgan, 2005). They admit that it is inevitable to expect much change in women’s positions without law reform because however little its impact might be in bringing about social change in women’s lives it lays the foundation for achieving greater changes. Law reform gives expression to women’s interests through legal entitlements or rights and women can use such laws at any given time. Women tend to have recourse to law and use it to destabilize and displace the dominant meanings that have been attached to gender. In as much as they observe that law has been used to exclude and discriminate against women they also recognize the potential inherent in the law, that law can be pressed to take account of and answer women’s needs. They propose that law reform commissions should adopt creative means of using the media and other communication strategies. Another writer suggests that law commissions must adopt innovative modes of communication such as talk-back radio, telephone hotlines and the “new” media e.g. blogs or wikis so as to attract different people to engage in its law reform work (Hughes, 2008). They observe that the problem still subsist which is, women are experiencing inequality and this problem cannot be effectively dealt with by coming up with gender neutral laws. They further emphasize the role of empirical research in law reform as it tends to consider who is doing what, to whom and the reasons behind such hence lead to responding to the needs of women. The

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23 Article 551 of the Criminal Code of Ethiopia provides for procuring safe abortion where pregnancy resulting from rape or incest; danger to health or life of the woman or fetus; fetal abnormalities; women with physical and mental disabilities; and minors below 18 years.
danger with empirical evidence is that, it is subject to interpretation, depending on who is interpreting the data or findings and for what purposes, it may be used to justify trivialization of women’s issues.

Hughes links law reform with access to justice, she states that law reform commissions have great potential in contributing to enhancing access to justice, she however defines justice generally to mean bringing about wider societal and cultural change by incorporating views and experiences of people that are affected by law or those who are supposed to access justice (Hughes, 2008). It is argued that law commissions must take into account external body of knowledge such as sociology, psychology because laws do not operate in a vacuum. It is observed that the mandate of law commissions either explicitly or implicitly is to increase access to justice hence must adopt interdisciplinary or multidimensional approaches to problem identification, research and analysis of their work. Thus, the law commission’s approach for destabilizing law must aim at transforming the law to make it more equitable and more responsive to all citizens and to the day to day lives of people. For law to have legitimacy it must match with society’s changing conditions and norms as well as champion such changes.

Hughes (2008) proposes what law reform commissions must do to advance a wider appreciation of access to justice to which I agree totally, that they must understand the social, economic and political dynamics through the processes of consultation, research, analysis by ensuring that citizens participate in the development of the substantive law through meaningful community participation in the law reform process. Public participation must reflect the diversity in experience and knowledge whether academic or experiential in this way meaningful public participation through consultations would distinguish the Commission from other entities that take part in carrying out law reform.

This means that good law reform work pays considerable devotion to how the law functions in practice, including how the law impacts on people’s lives and society in general and how society influences affect law. Since, a good law may be rendered inaccessible due to external influences inter alia religion and culture as this study reveals. A problem may have been couched as legal when in actual fact it is about power relations, economic disadvantage or may be a result of another issue altogether. Thus, the Commissions must be able to make a wide range of recommendations and to different sectors of the society and not only to government. The
approach by the Commission has been to make policy and legislative recommendations to government and it has not targeted much the non-state actors. It may recommend that new legislation be enacted, or an amendment to legislation or sometimes recommending no change to legislation at all. This should be done upon the realization that sometimes changes to the law alone may be unlikely to respond to the needs of many citizens. For example, in Jamaica where participation of women in the workforce was limited to traditional employment e.g. domestic service and low-paying jobs more effort was put on educating and training to prepare women for new responsibilities instead of enacting legislation to deal with the immediate problem of discrimination (Mason, 1986). Therefore, law reform must be able to contextualize the law and determine the root cause of the problem and make recommendations for solving the problem rather than addressing symptoms.

Therefore, for law reform to be inclusive it must be responsive to the social context from which it emerges and into which it speaks: the initial assignment should be to articulate the social context with greater meticulousness so that it is clear what the issue or problem is; followed by identification of how it should be solved, and determining whether legal change is a necessary element; this approach would make it more likely that consultations are inclusive of diverse people’s real life experience; and full inclusiveness would require documenting life at the margins without assuming that experience is the same and identification of structures and practices sustaining marginalization as the ones that must be changed (Armstrong, 2006:169).

2.6 Conclusion

The information on establishment, mandate and functions, and the law reform process is meant to contextualize the study and contemporary debates on law reform give insights into what law reform is about and ought to be. The methodological approaches and data collection methods used in this study are discussed in the next chapter.
CHAPTER THREE

3.0 METHODOLOGICAL APPROACHES AND DATA COLLECTION METHODS

3.1 Introduction

Various methodological approaches were used to collect the necessary data, in the analysis of such data throughout the study and new sources of data were unveiled as will be explained in this Chapter.

3.1.1 Qualitative methods

The study is grounded in qualitative research. I carried out a qualitative study of the law reform process with regard to participation of women in the law reform process. A list of SLCs for each law reform programme including those that are still ongoing, the list has been attached to this study as Appendix 1. This was done to find out how many men and women have participated in the law reform process generally and specifically in each law reform programme. It revealed the gendered dimension in participation of men and women, as some SLC have more men than women while others have more women than men. This formed the starting point for conducting an in depth qualitative study aimed at interrogating and analyzing factors that led to participation of a particular group of men and women, more men than women and more women than men in some law reform programmes.

The qualitative method provides a deeper insight into issues under consideration and the reasons behind such occurrences in that the empirical data collected facilitated location of the root cause of the problem and its possible solutions (Bentzon et al 1998:152-3). In this study the method unearthed structural, social and economic factors that affect women’s participation in the law reform process. As such, various in-depth interviews with key stakeholders were conducted and many women were interviewed to locate women in the law reform process.

3.1.2 Grounded theory

At the research design stage five assumptions and corresponding research questions were developed to guide collection of data. However, having an open mind in conducting interviews played an important role in identifying new sources of data. One of the assumptions was that engendering the law reform process would lead to both formal and substantive equality in
women participation. During the pilot stage of the study most respondents mentioned barriers such as religion, culture, poverty, and education to women participation. Initially I did not realize the importance of identifying barriers to women participation in the law reform process but in view of this revelation this assumption was extended to include an investigation of barriers to women participation as an emerging issue.

As data was collected and analyzed on a daily basis I discovered that most respondents identified religion as a barrier because some churches do not allow women to speak in the presence of men such as the Bible Believers Church. I therefore traced a woman respondent from this church to find out how the religious teachings in this church may amount to a barrier to women participation in the law reform process. The respondent admitted and said due to the internalized teachings which guides her day to day life she is not supposed to talk in the presence of men e.g. in a meeting.

As I engaged in a continuous dialogue and interaction of empirical data collected and theory throughout the study, new directions unfolded and new sources of data were unveiled through the use of the dung beetle method within the grounded theory (Bentzon et al, 1998). This is a method where initial assumptions guides in the collection of data, and when the data collected is analyzed new directions and new sources of data come to light which determines what to collect next so as to meet the needs consequently the collection and analysis continues throughout the study (Bentzon et al, 1998: 18). After a revelation of many barriers to women participation I interviewed the Minister of Gender, Children, Disability and Social Welfare (hereinafter “the Minister of Gender”), as a policy holder and implementer on gender issues, to find out Government interventions. The Minister has been so influential in so many way in ensuring that women’s position change both in law and practice. She has been the Minister of Gender more than once and has advocated for passing of legislations in parliament dealing with women’s issues and concerns. She also interacts with women at the grassroots level as evidenced below.

3.1.3 Women’s law approach
The women’s law approach involves mapping and understanding women’s lived realities in order to ensure real equality and liberation of women both in law and practice (Dahl, 1987:12). It

24 Maria (not her real name) interviewed in Lilongwe on 11/01/16
25 She spearheaded the passing of the GEA in 2012 and Marriage and Divorce in 2015
aims at examining and understanding the status of women in law and how the law tally with women’s lived realities and needs (Dahl, 1987:12).

In order to describe, analyze and improve the position of women in law and society vis-a-vis women participation in the law reform process I took women as a starting point in order to learn from them how their lives and experiences are influenced by law which justifies their inclusion in the law reform process. One of the assumptions was inadequate participation of women in the law reform process leads to enactment of gender neutral laws which results in discrimination against women. To obtain the empirical data on women’s lived realities I interviewed women who had participated in the law reform process and those that have never done so but laws impacts upon their lives. I located them in spaces where they are normally found such as homes, workplaces, rural and urban areas as individuals and in their groups.

In order to assess how law reform responds to women’s lived realities, another assumption was, women’s issues and concerns rarely form the basis for reforming the law, plenary discussion and content of the draft bill in the law reform process. I interrogated the Commission’s reports, international human rights instruments, domestic laws and policies. The women’s law approach unearthed a disconnect between what the law and policies provides relating to women’s rights generally, including women’s right to participate in decision making, and the practice on the ground. The women’s law approach was crucial to raising debate and creating awareness on the need to involve more women in the law reform process as law affects every person’s life in society. This methodology also assisted in educating respondents on the need to ensure that more women adequately participate in the law reform process as one woman stated that she will start to participate in the law reform process.

Although the women’s law approach take women as the starting point I also interviewed men in order to hear their views, perception and attitudes regarding women’s participation in the law reform process. One male respondent said,

“As a Commission we cannot be here to stop women who qualify from being appointed into decision making positions.”

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26 Women’s Forum FGD interviewed on 21/11/15
27 A member of JSC interviewed in on 17/10/15
Some respondents blamed women’s lack of interest in these matters, and that women tend to pull each other down instead of providing supporting to each other.

### 3.1.4 Sex and gender analysis

The assumption that women do not adequately participate in the law reform process at identification of laws for reform, as SLCs and as participants in the consultative process led to a compilation of a list of former and current SLCs on the basis of sex. The study shows that participation in the law reform process is dominated by men. More men than women are initiators of law reform, serve as SLCs and participate in the consultative meetings. Further interrogation shows that in structures where the Commission sources SLCs and participants for consultative meetings are dominated by men. The sex and gender analysis reveals that more men than women are chosen by institutions to participate in the law reform process. Thus, I became aware that men’s and women’s gender roles and stereotypes determines who holds the position of influence between men and women in the society which trickles down to what happens in the public sphere including the law reform process.

The study also shows that there are very few programmes that are dominated by women and these were informed by women issues and concerns, and adequately dealt with such issues than those dominated by men. The laws emanating from these programmes are perceived to be discriminatory and in favour of women by some male respondents. The sex and gender analysis further reveals the need for deliberate actions to ensure gender equal representation in the law reform process in terms of numbers and substantive representation of women. Also, implementation of policies and legislation. In particular, the Commission must adopt deliberate actions and develop a gender policy to ensure that more women participate in law reform.

The sex and gender analysis furthermore reveals that the development of the gender policy for the Commission is of paramount importance to increasing participation of women in the law reform process. This study reveals that there are many barriers to women participation ranging from high illiteracy levels among women, poverty, cultural norms and stereotypes and religious

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28 Balaka District Assembly FGD interviewed on 28/12/15
29 Director of Chiefs Administration and Senior Chief Kalumbu interviewed on 19/11/15 and 27/12/15
30 The list is attached to this study as Appendix I.
31 The Development of the GEA and the review of the Marriage and Divorce Act as per Appendix I shows.
32 Balaka District Assembly FGD and Miliasi Jonas interviewed on 28/12/15 and 15/11/15, respectively
constraints, among others. This leads to a conclusion that without adopting holistic measures to correct the situation by including adequate numbers of women and ensuring their active participation, the genderedness participation in the law reform process will become the order of the day as it will continue to perpetuate the belief that law making in only for men and not women.

In addition, the sex and gender analysis brings to light the influence of legal pluralism in the participation of women in the law reform process in a situation where there is interaction between formal law and other rule enforcing and rule making institutions (Bentzon, 1998:71). Women’s different identities emanating from religion and culture for example, greatly impacts upon their ability to participate in the law reform process and benefit from the formal law. The study shows that most women fail to participate and give their views in the law reform process because of culture and religion. For example, where women are consulted together with men, women tend to leave men to contribute more and agree with whatever men say because they are socialised that men are decision makers, and are taught to keep quite in the presence of men by cultural prescription and sometimes religious teachings. These women’s lived realities underscore the need for law reform to target women as a special group requiring to be consulted separately from men so as to ensure that they give their views and inform policy and legislative proposals. Also, law reform should be able to make recommendations to various institutions in addition to government in order to bring about wider societal and cultural change for a just and equitable society.

The sex and gender analysis also shows that in a society like Malawi where state laws coexist with a lot other more powerful social fields as customary norms or religion, interrogating power relations, understanding power structures as they influence unequal gender relations at family, community and national level may assist to unearth underlying disparities between men and women in their participation in the law reform process. Power has been defined as,

“The ability to act effectively on persons or things, to take or secure favourable decisions which are not of right allocated to the individual or their roles.” (Sanday, 1981:114)

A deeper analysis of power relations sanctions identification of areas of advocacy, policies and laws that are in need of review or reform to ensure equality and inclusion of everyone in the society (Hellum and Katsande, 2015). Four dimensions of power: power to, power with, power
from within, and power over, where power over relates to coercive power exercised by those with power over the less powerful to ensure obedience which includes visible, hidden and invisible powers (Hellum and Katsande, 2015). This study shows how the four dimensions of power manifest in participation in the law reform process by women. The study reveals that law reform as one of the decision making processes that feeds into the legislative, executive and judicial arms of government is an invited space where only those invited participate. Thus, law reform may act as a tool for ensure equal distribution of power in the family and later reflected in the public sphere.

The sex and gender analysis confirms feminist theories of patriarchy which postulates that men tend to more present and dominate the public sphere, this is seen as a major obstacle to women’s equality as women dominate the private sphere. This study investigates patriarchal norms regarding women participation in the law reform process which happens in the public sphere. Also, it identifies crucial roles that men can play to enhance women’s representation and participation e.g. men as allies with women, men can support women’s initiatives and movements aimed at achieving equality, as gatekeepers of policy-making institutions men can pull women into positions of power through direct selection and appointment or by putting pressure on other men (Report of the Expert Group, 2005:14).

Lastly, the sex and gender analysis highlights the radical feminists argument that law and the state are inherently male, oppressive and embody a masculine worldview and norms hence law is male because it is made by men, represents their worldview and interests (Dahl, 1987:13). This study unearths the masculinity factors that leads to the disparities between men and women in their participation in the law reform process and also identifies law as one of the contributing factors. The study reveals that men dominate participation in the law reform process. However, the new dimension unearthed by this study is that women dominate as SLCs in specific law reform assignments dealing with women’s issues. This underscores the need to ensure that women adequately participate in the law reform process so that they can give their views and shape the law to reflect worldviews and interests of both men and women because women are relational beings. Rather than complaining that the law is skewed towards men, approaches must be adopted including engendering the law reform process taking advantage of the ground
breaking human rights norms that recognize the importance of men and women working as equal partners in all spheres of the society.

3.1.5 Actors and Structures

The assumption that there were inadequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings as a result of which women’s voices are not adequately captured in the law reform process made me to interrogate actors and structures. Men and women as actors were targeted to assess whether the new knowledge and living conditions with regard to gender equality has resulted in people’s change of ideas and practices or not (Bentzon 1998).

Officials from the Commission because they are involved in conducting law reform; members of the JSC with their involvement in appointment of SLCs; government officials as they take part in, initiating law reform and nominating persons for appointment as SLCs and sending participants for the consultative process; and official from Civil Society Organization (CSO). Officers from the Commission were interviewed to get firsthand information on how law reform is conducted to ensure women participation in the law reform process, as initiators of law reform, SLCs and participant in the consultative process. More especially what informs a law reform, how selection of SCLs and participants for consultative process is done and whether gender is one of the consideration. The Commission as a structure, how it is set up and the mechanisms in place for ensuring or militating against gender equality and also challenges to inclusion of women in the law reform process.

For the JSC I wanted to know what informs the selection of SLCs, guiding principles and practices and whether gender equality was one of the consideration. The Ministry of Gender as a policy holder and one of the implementers of gender issues. The Ministry of Local Government and Rural Development (hereinafter “the Ministry of Local Government”) as one of the initiator of law reform and a source of SLCs and participants as is the case with CSOs such as Women’s Legal Resource Centre (WOLREC, WLSA-Malawi that I consulted. Traditional leaders (or chiefs) fall under this Ministry of Local Government. These are considered as custodian of culture and tradition hence I wanted to find out whether the knowledge of gender equality had

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33 S.133 (b) of the Constitution
resulted in change of ideas and practice or not and also whether culture is a barrier to women participation in law reform.

The Human Rights Commission because its constitutional primary mandate is protection and investigation of violation of rights and under the GEA it is mandated to enforce the provisions of the GEA. The Judiciary interprets the law and initiates law reform, as such its officers participate as SLCs and participants and the practice at the Commission is that a judge chairs a SLC. Therefore, actors and structures are crucial to this study as they both hold the keys of playing the role of agency for change and gatekeepers to women’s participation in the law reform process.

3.1.6 Rights holders and duty bearers
The assumption that engendering the law reform process would lead to both formal and substantive equality in the participation of women in the law reform process necessitated the use of the human rights approach. Malawi is a party to numerous human rights instruments both internationally and regionally which protects and promote people’s human rights and freedoms including women’s rights. Some instruments have been domesticated into the domestic law including through law reform. These enshrine the right to dignity and equality and non-discrimination under e.g. articles 1 and 2 of the Universal Declaration on Human Rights (UDHR) which has attained the status of customary international law. Human rights standards are tools for curing defects in society’s distribution of benefits and burdens to its people. The human rights approach was used to assess Malawi’s compliance or non-compliance to ensuring inter alia women’s full and effective participation in decision making including law reform. The study examined national law and applicable international human rights instruments relating to participation of women in decision making positions vis-à-vis women’s lived realities.

3.2 Methods of data collection
This study used a selection of methods of data collection except for questionnaire because the pilot field study revealed that many people did not know the Commission and what it does. As such, it was not going to be an effective mode of data collection. Structured interviews guided by

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34 S. 129 to 131 of the Constitution
35 S. 8 to 10 of the GEA
36 Already highlighted in chapter one
specific research questions which were modified depending on the audience was employed throughout the study.

3.2.1 Research population and sampling
In this study I interviewed one hundred and ninety-seven respondents aged between sixteen and seventy-seven, one hundred and forty-three women and fifty-four men, from the three regions of the country: northern, central and southern from the following districts: Mzimba, Lilongwe, Dedza, Balaka, Blantyre, Zomba, and Mulanje. In rural and urban areas, and this enriched the data for the study. The approach adopted in sourcing respondents was for some targeted, use of previous personal contacts, government departments such as district assemblies and Non-Governmental Organizations (NGOs) to provide the link to groups of women and men more especially in rural areas.

Table 1: Respondents by Region, District & Sex

<table>
<thead>
<tr>
<th>Region</th>
<th>District</th>
<th>Female</th>
<th>Male</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central</td>
<td>Lilongwe</td>
<td>66</td>
<td>29</td>
<td>95</td>
</tr>
<tr>
<td></td>
<td>Dedza</td>
<td>6</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Southern</td>
<td>Blantyre</td>
<td>17</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>Balaka</td>
<td>22</td>
<td>18</td>
<td>40</td>
</tr>
<tr>
<td></td>
<td>Mulanje</td>
<td>21</td>
<td>0</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>Zomba</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Northern</td>
<td>Mzimba</td>
<td>10</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>143</strong></td>
<td><strong>54</strong></td>
<td><strong>197</strong></td>
</tr>
</tbody>
</table>

3.2.2 Focus group discussion
During the study, focus group discussions (FGD) became the main mode of data collection as the study was aimed at examining the extent of women participation in the law reform process. A total of twelve FGDs were conducted and provided a worth of information on women participate in the law reform process. In arranging them I used previous personal contacts with some individuals\(^{38}\) and NGOs.\(^{39}\) Some relations\(^{40}\) assisted and one FGD in Lilongwe\(^{41}\) and in Balaka\(^{42}\) I just found a group of people waiting for other members and they accepted to be interviewed.

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\(^{37}\) The location of districts is shown on the Map of Malawi found in chapter 1 of this study

\(^{38}\) Two FGD in Balaka were arranged by the District Commissioner for Balaka and in Mulanje by a Senior Chief, both once served as SLCs under the review of the Chiefs Act and I was one of the programme officers
Table 2: Respondents per FGD by Sex and District

<table>
<thead>
<tr>
<th>No.</th>
<th>Name of FGD</th>
<th>Female</th>
<th>Male</th>
<th>District</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Women’s Forum (ActionAid)</td>
<td>13</td>
<td>0</td>
<td>Lilongwe</td>
</tr>
<tr>
<td>2</td>
<td>Chimoka Village</td>
<td>29</td>
<td>3</td>
<td>Lilongwe</td>
</tr>
<tr>
<td>3</td>
<td>Chimwala Village</td>
<td>9</td>
<td>6</td>
<td>Lilongwe</td>
</tr>
<tr>
<td>4</td>
<td>Senior Chief Kalumbu’s Court</td>
<td>8</td>
<td>3</td>
<td>Lilongwe</td>
</tr>
<tr>
<td>5</td>
<td>Balaka District Assembly</td>
<td>0</td>
<td>11</td>
<td>Balaka</td>
</tr>
<tr>
<td>6</td>
<td>Traditional Authority Amidu</td>
<td>5</td>
<td>4</td>
<td>Balaka</td>
</tr>
<tr>
<td>7</td>
<td>Mlambe Village Bank</td>
<td>17</td>
<td>2</td>
<td>Balaka</td>
</tr>
<tr>
<td>8</td>
<td>Nanzombe Village</td>
<td>16</td>
<td>0</td>
<td>Blantyre</td>
</tr>
<tr>
<td>9</td>
<td>Misesa Primary School (WOLREC)</td>
<td>6</td>
<td>0</td>
<td>Dedza</td>
</tr>
<tr>
<td>10</td>
<td>Senior Chief Chikumbu Area</td>
<td>20</td>
<td>0</td>
<td>Mulanje</td>
</tr>
<tr>
<td>11</td>
<td>Enyezini (Malawi Carer)</td>
<td>10</td>
<td>6</td>
<td>Mzimba</td>
</tr>
<tr>
<td>12</td>
<td>Nyirenda’s</td>
<td>0</td>
<td>4</td>
<td>Lilongwe</td>
</tr>
</tbody>
</table>

Some focus group discussion were of mixed sex, single sex either for only men or women. These provided information and sights into the interaction between the two sexes. Groups with only women, women participated freely and actively than when in mixed sex groups. This gave me the impression of how we assume when carrying out law reform that women can talk freely in the presence of men during meetings. The FGD I conducted at Balaka town revealed the challenge of inclusion of women in law reform if we do not target women as a special group. In making arrangements for the interview I did not specify that I wanted both sexes and all respondents were men, and these came from governments departments and NGOs within the district.

3.2.3 Challenges of the FGD method

In most cases fifteen as the maximum number I set for respondents in a FGD would be exceeded, it was difficult for me to start sending some people away which would defeat the flexibility inherent in the women’s law approach because sometimes the women being sent away may have

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39 Personnel from ActionAid linked me Women’s Forum FGD in Lilongwe, WOLREC officer arranged Dedza FGD and Malawi Carer officer arranged for Mzimba and a chief whom I knew previously arranged Chimwala FGD.

40 My aunt arranged the Chimoka FGD and a brother in-law arranged the Nanzombe Village FGD

41 Nyirenda’s FGD interviewed on 7/12/15

42 Mlambe Village Bank FGD interviewed on 28/12/15
more information for the study. The figure below illustrates this challenge as respondents kept on joining the group.

**Figure 3: Part of Chimoka Village FGD**

It was only in Dedza\(^3\) where the FGD only had six people and this was because some members had gone to the market as it was a market day. This challenge was surmounted, as not all respondents could speak out but mostly three quarters of the people would. If I find that in a mixed sex FGD women are quite I would pose a question to incite reaction from women e.g. is what men are saying true for us women.

### 3.2.4 Key informants

Key informants for this study included women and men generally, officers from the Commission, former SLCs and participants in consultative meetings, officers from institutions that send nominees for appointment as SLCs and participants, traditional leaders and religious leaders. These gave in depth insights into challenges and interventions to women participation in the law reform process.

**Table 3: Key Respondents by Reason, Institution and Sex**

<table>
<thead>
<tr>
<th>Position</th>
<th>Reason</th>
<th>Institution</th>
<th>sex</th>
</tr>
</thead>
</table>

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\(^3\) Misesa Primary School FGD interviewed on 17/11/15
3.2.5 Individual in depth interviews

I conducted in depth interviews with key respondents to hear their experiences with the law reform process, as managers of law reform assignments, as members of the SLC, as participants
in the law reform consultative process, as institutions in selecting and sending persons to take part in the law reform process as well as challenges and opportunities to inclusion of women.

3.2.6 Desk research
The desk research was used to unearth gender imbalances in the law reform process and to triangulate the data collected through interviews. Perusing through the Commission’s reports the gendered nature of participation in the law reform process was unearthed. Various sources of data were also consulted ranging from books, journals, articles, the Commission reports and electronic sources of data to fill in gaps and triangulate the data collected.

3.2.7 The participatory approach
Respondents owned the interview process as it because a learning process on the part of the study as women’s lived realities and experiences were unveiled, and also respondents learnt and became empowered with knowledge about the law reform process and found their own space therein.

3.2.8 Participant observations
Using this method the study was able to reveal the interaction of women and the law vis-a-vis cultural prescriptions. In one FGD women sat on one side and men on the other side, during the discussion respondents stated that in their culture men interact with male children likewise, women with female children explaining to them physical happening and social changes to them. This socialization process determines how women fare compared to men later in their lives. At first women in this group were quiet and when I intervened by asking a provoking question, women started to speak. In another women sat on the floor while there were chairs behind them while men scramble for one chair that was available for them, they all sat on it anyway. This also has a bearing on their participation in the law reform process where both men and women are required to give their views. In contrast, the FGDs that had only women, women actively participated throughout the discussion.

3.2.9 Passive observation
I attended two meetings during the period of study. One on curriculum review organized by the Faculty of Law, Chancellor College of the University of Malawi, where it was revealed that Gender and Law was going to be a core course offered at first year. This is a good development
considering that some law students later joins the Commission in that this course will inculcate in them knowledge of gender issues which can contribute *inter alia* to women participation in the law reform process. Later after the meeting more in depth information was solicited through an interview with one of the organizers. I also attended a sensitization workshop on sexual minority rights in Dedza, one of the presenters\(^4\) made a presentation on how religion influences women’s subordinated position in society, after the meeting I collected the presentation which had specific bible verses that are normally used to justify this.

### 3.3 Challenges and limitations

Some challenges and limitations were encountered in conducting this study as explained below.

#### 3.3.1 Language problem

Most interviews were conducted in vernacular languages except for few key respondents. The narratives were translated into English raising the possibility of minor variations with exactly what the respondents said however I tried my best to accurately interpret respondent’s views since I know Chichewa and Tumbuka languages used by respondents in this study. However, some vernacular words do not have corresponding words in English.

#### 3.3.2 Taking the blame

Being a government officer especially, the Commission and having people blame the institution which includes yourself for their non-participation was a challenge. As one is tempted to defend the institution by giving the excuse of lack of adequate resources which sometimes may stopping people from voicing out their frustrations. Some respondents complained about members of Parliaments’ (MPs) inability to seek their views and grievances which included speculations on government policy changes, and some gave me tasks to take their grievances to government.

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\(4\) A religious leader from Zomba whom I meet on 16/12/15 mentioned, 1 Corinthians 11 v 2 & 7 and 1 Corinthians 14 v 34 as verses that are used to make sure that women occupy a subordinate position. 1 Corinthians 11 verse 2 states “Now I praise you, brethren, that ye remember me in all things, and keep the ordinances as I delivered them to you.” Verse 7 states “For a man indeed ought not to cover his head, forasmuch as he is the image and glory of God: but the woman is the glory of the man.” 1 Corinthians 14 verse 34 states “Let your women keep silence in the churches: for it is not permitted unto them to speak: but they are commanded to be under obedience, as also saith the law.” verse 35 is also interesting as it states “And if they will learn any thing, let them ask their husbands at home: for it is a shame for women to speak in the church.”
3.3.3 **Time factor**

The study was conducting during rainy season, some places were difficult to reach e.g. in Mzimba we used the longer route to the meeting venue due to an impassable bridge thus conducting spontaneous individual interviews was a problem.

3.3.4 **Limitation of the study**

Asking respondent’s age was problematic especially elderly ones thus age range in this study came from few respondents who voluntarily gave their age. Likewise education qualification, the information collected was only used to gauge the illiteracy levels among women. Comprehensive lists of participants in consultative meetings were not available although a new system has been developed thus information on male participants dominating consultative meeting came from observation of respondents who had participated in the law reform process than statistical data.

3.3.5 **Conclusion**

Using methodological approaches and data collection methods discussed above I collected an enormous amount of information that this study may not absorb all due to limitation on words suffice to say I have tried to incorporate as much voices as possible. The next chapter discusses barriers to women participation in the law reform process unearthed in the field as an emerging issue.
CHAPTER FOUR

4.0 BARRIERS TO WOMEN PARTICIPATION IN THE LAW REFORM PROCESS

4.1 Introduction

During the pilot stage of the study an emerging issue was unearthed that there are so many barriers to women participation in the law reform process. This chapter provides a discussion of barriers and these are evident throughout the study however, education is discussed under educated and uneducated dichotomy in chapter six hence will not be discussed under this chapter to avoid repetition.

Figure 4: Barriers to women participation in law reform
4.2 Influence of culture and socialization process

Culture as people’s way of life, its norms and practices including socialization process, gender stereotypes and family responsibilities impacts negatively upon women’s lives. Dahl (1987:12) has adequately expressed this fact,

“As long as we live in a society where men and women have different paths in life, different living conditions, with different needs and opportunities, legal rules will necessarily affect men and women differently. And silence strengthens inequality and injustice, regardless of the legislators’ intentions.”

Society uses culture to construct and maintain people in female and male dichotomies. For women culture is a self-surveillance tool used to check appropriateness of their behaviours or ideas for conformity to the already set standards by those who have power in society. Views of respondents below affirms the impact of culture on women.

“Male superiority embedded in our culture makes women fail to talk in the presence of men because people believe that its only men who can voice out concerns, so women keep quite as long as a man speaks or has spoken.”

In the figure below four men squeezed themselves in one chair available on their side in the room but all women sat on the floor despite some having empty chairs behind them.

Figure 5: Enyezini FGD

45 Director of Chiefs Administration interviewed in Lilongwe on 19/11/15
Family responsibilities bars women from participation as a respondent 46 said,

“Men give and leave us with more children so we fail to participate in decision making positions.”

Maria 47 said,

“Roles and responsibilities that women hold in society e.g. looking after children more especially rural women. If a woman has a small child she cannot take it to the meeting and if she leaves it at home who will care for the child.”

In Mzimba one respondent kept on leaving the meeting room because she came with a small child. Culture influences some actors within structures where the Commission sources SLCs and participants for the consultative process more especially those that are headed by men, to opt for male representative than female ones. In most patriarchal societies like Malawi there is a perception that certain jobs and levels of responsibility are best handled by men than women (Mason, 1986:297). For a woman to be chosen to represent the institution, she must be super – qualified or super-efficient in that these standards do not normally apply to a men (Mason, 1986:297). As such, women tend to be excluded from participation in issues concerning politics and the law because these have culturally been defined as the public sphere (Gopal and Salim, 1998:173). On the part of women, if she is given an opportunity to participate in the law reform process e.g. in consultative meetings as long as men are present, some women fail to give their views because they are socialized to keep silent in the presence of men and they tend to just agree with what men say. During the review of the Law on Abortion 48, at one of the consultative meetings in Mzuzu one woman stated that women were failing to give their views during the meeting because men e.g. chiefs and religious leaders from their communities were present in the meeting room. She suggested that if the SLC wanted to hear women’s view on the issue of abortion it should consult them separately.

It can be argued that women in Malawi continue to suffer discrimination on the basis of sex because of cultural norms, practices and stereotypical roles and responsibilities. The Constitution whoever prohibit discrimination on the basis of sex, among others. 49 Article 1 of CEDAW defines discrimination broadly to include discrimination against women happening in both the

46 Women’s Forum FGD interviewed in Lilongwe on 21/11/15
47 Not her real name, interviewed in Lilongwe on 11/01/16
48 I was present in this meeting as I was one of the programme officers for this law reform programme
49 Section 20
public and private spheres. In drafting CEDAW the framers realized that in most cases customs and practices perpetuate discrimination against women more than formal legislation.\textsuperscript{50} Thus, Malawi is required to modify social and cultural patterns of conduct of men and women and eliminate prejudices and practices based on notions of inferiority and superiority of either sexes,\textsuperscript{51} ensure women participation in formulation of government policy and its implementation, holding of public office and performance of all public functions at all levels of governance.\textsuperscript{52}

The CEDAW Committees Concluding Observation on Malawi’s sixth CEDAW Report identified culture as having negative impacts on women and urged the government to view culture as dynamic and to adopt a goal oriented and time framed comprehensive strategy for modifying and elimination of cultural practices and stereotypes that discriminate against women e.g. designing educational and awareness-raising programmes targeting everyone which should be monitored periodically.\textsuperscript{53} Therefore, government must ensure women are not unnecessarily burdened with roles and responsibilities in the family. The Maputo Protocol guarantees the right of women to participate as equal partners with men at all levels of development and implementation of state policies and development programmes\textsuperscript{54} to positive culture and participation in formulation of cultural policies at all levels.\textsuperscript{55} Women through law reform can participate in the reformulation of culture by identifying and rejecting the bad aspects of custom and tradition that gives men an upper hand in controlling women and resources since women have always used this approach while working within culture (Armstrong, 2000:99). Hughes (2008) states that law reform must act as an agent of cultural change and reflect the evolving culture of the society.

4.3 Influence of religion

Women participation in law reform is also affected by other controlling and normative systems as they regulate people’s lives (Bentzon, 1998). Religion is one of the rule-generating and rule-upholding institution limiting women’s ability to participate in activities such as law reform or

\textsuperscript{50} Article 2 (f) requires states to modify or abolish inter alias customs and practices constituting discrimination against women.
\textsuperscript{51} Article 5 of CEDAW
\textsuperscript{52} Article 7 (c) of CEDAW
\textsuperscript{53} Paragraph 21
\textsuperscript{54} Article 9 (1) (c)
\textsuperscript{55} Article 17 of the Maputo Protocol
seat next to men during prayer services in Malawi.\textsuperscript{56} Maria\textsuperscript{57} a member of the Bible Believers Church stated,

“The bible teaches that a woman must be submissive to her husband and keep silent in church. This belief gives you limits as a woman you know that I can only go this far. A woman like me cannot speak in the midst of men and also if am asked to give my views about punishment of murder which is death because I believe it takes away all chances for the accused person to repent before he dies.”

Evidently, religion just like culture is used to subject women to all forms of inequality. The sad part is as observed by Dahl (1987),

“…a ruling group’s special way of viewing social reality is accepted as normal and as a part of the natural order of things, even by those who are in fact subordinated by it.”

These women’s lived realities and experiences require inclusion of more women in law reform and that in conducting law reform, must guard against paying a blind eye to realities on the ground. Since, many factors affect women’s lives and influence their choices including decisions, and sometimes are forced upon them (Bentzon et al., 1998). Recognizing religion as a barrier to women participation in the law reform process may require that women be targeted for consultation in any law reform assignment and consulted separately from men to ensure their voices are heard and taken into account in the development of laws.

4.4 Social economic status
Social economic status e.g. poverty contributes to inadequate women participation in the law reform process. A male key respondent\textsuperscript{58} singled out poverty as a contributing factor to inadequate women participation in the law reform process, he said,

“Poverty is also a contributing factor, as those who are poor fail to voice out their concerns than those who are rich. Who can listen to a poor woman, no one can do that.”

Maria (not her real name) said,

“Social economic status, some women have no clothes for them to go and attend a meeting, or be found in a group of other women, they fail to do so.”\textsuperscript{59}

Another respondent\textsuperscript{60} stated that,

\textsuperscript{56} Women’s Forum FGD interviewed in Lilongwe on 21/11/15
\textsuperscript{57} Not her real name, interviewed in Lilongwe on 11/01/16
\textsuperscript{58} Director of Chiefs Administration interviewed in Lilongwe on 19/11/15
\textsuperscript{59} Not her real name, interviewed in Lilongwe on 11/01/16
“Law making is not for poor people but well to do only.”

Globally, more than one billion people, women being the most affected, live in poverty which is caused by so many factors including structural ones (Beijing Declaration and Platform of Action, 1995: para. 47). Malawi ranks 173 out of 185 countries on Human Development Index (UNDP Human Development Report for 2015). Thus, majority of Malawians are poor and gender disparities in economic power-sharing have accelerated poverty among women. Understanding economic power as the ability or right to control the distribution of goods, food, or services beyond the household level (Sanday, 1981) is so important to women empowerment. Poverty manifests in so many ways including: inadequate or lack of access to education and other basic resources; and social discrimination and exclusion characterized by lack of participation in decision-making (Beijing Declaration and Platform of Action, 1995: para. 47).

Government is stated to have adopted various interventions to address poverty and improve women’s lives as a key respondent61 said,

“We have so many interventions, e.g. girls’ project, and cash transfer project. Under the cash transfer we are empowering women economically, we give them money to buy food, build houses, and pay school fees, and target each and every house. We are in eighteen districts now. A woman who has six children, is paid something for each child for upkeep and school necessities for primary and secondary school going children.”

Sustainability of such interventions is questionable as it relies on continued political will and donor support and few people benefit as in this case what of people living in other districts not yet reached. Using women’s lived realities regarding poverty, law reform can be used to adequately mainstream gender perspectives in all economic analysis and planning to address structural causes of poverty among women as it makes policy and legislative proposals to government which end up being adopted. Otherwise, it can be argued that participation in law reform is a class issue as those who ‘have’ participate than those who ‘do not have’. The figure below shows the Minister of Gender visiting one of the beneficiaries of the social cash transfer.

Figure 6: Minister of Gender and one of the beneficiary of the Social Cash Transfer

60 Chimoka FGD interviewed in Lilongwe on 18/11/15
61 The Minister of Gender Honourable Patricia Kaliati, interviewed on 6/01/16
4.5 Lack of legal awareness and access to information

Provision of information to members of the public is crucial to their participation in the law reform process from an informed and empowered position. A respondent\(^62\) said,

“The biggest problem is that we do not know the laws for us to adequately give our views.”

A woman respondent\(^63\) said,

“Sometimes when a radio station is airing women issues men switch the radio off so that we do not listen, they say we should only be listening to them as men. If you argue they chase us away from the home saying ‘go away the door is open’.”

Women’s lack of awareness and access to information apart from it emanating from inadequate awareness campaigns also is a result of men’s attitudes and perceptions about the position of women which needs adoption of change of mindset interventions. Legal literacy efforts are generally very low, ordinary men and women do not easily accessing information. The Justice Baseline Survey (2010) discloses that only 6.5 percent of members of the public accessed legal education and awareness campaigns, 58.2 percent accessed legal education through civic

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\(^{62}\) Chief Kalumbu’s FGD interviewed in Mulanje on 18/01/16

\(^{63}\) Chimoka FGD in Lilongwe on 18/11/15
education. Between male and female, 6.5 and 6.4 percent, respectively. On the basis of residence it indicates 6.9 percent in rural and 4.6 percent in the urban accessed legal education and awareness programmes. This means that less than 10 percent of the population have exposure to some form of public legal education. Civic education whatever form it has taken has not achieved its intended purposes hence the need to scale up efforts, adopt appropriate strategies and rethink the nature and form of such programme.

Participation of women in the law reform process can be one way of providing them with legal information because it entails engaging people who suffer exclusion and disempowerment to make them learn and get transformed by the knowledge they acquire and overcome sources of oppression in their lives (Ling, 2010:5). The Commission has the mandate to promote awareness of laws and the Constitution by the public including government departments and other authorities. The Commission has engaged in legal awareness activities but to a limited extent as it is not adequately funded by government.

### 4.6 The Commission and Resource constraint

In most cases, the one who has money controls what and how something should be done. The Government is mandated to adequately fund the Commission in order for it to ably exercise its powers, duties and functions and ensure its independence and impartiality. The Commission has not benefited much from this provision as most of its law reform programmes are donor funded as evidenced by Appendix I. Out of the thirty-five law reform programmes carried out by the Commission, Government has independently funded one law reform programme up to completion, the development of HIV and AIDS legislation. Government committed to funding the review of the Witchcraft Act which commenced in 2009 but stalled for two and a half years before resuming in October 2013 and is still ongoing (Law Commission Annual Report 2013:17). The contributing factor being lack of funds. The Commission has now sort financial assistance from UN Women to conclude the programme.

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64 S.7 (d) of the LCA
65 S.14 of the LCA
Figure 7: Government Funding for the Commission

Although Government seems to be funding PE as estimated but the money that comprise ORT is what is partly used for reform activities such as consultations. Government has never funded the exact amount estimated for ORT and budgeting entails adherence to government budgeting ceiling. It can be argued that government’s lack of commitment to funding law reform programmes partly hinders inclusion of women in the law reform process by the Commission.

4.7 Lack of implementation of laws
Lack of implementation of laws is a huge problem and impacts negatively on women’s position in practice, a respondent said,

“The GEA is not being implemented and we are being discriminated against in so many area of our lives.”

Section 11 of the GEA, provides for appointment of not less than forty and not more than sixty percent of either sex in the public service, if implemented can either be an affirmative action tool for appointing fifty or sixty percent women into decision making positions including law reform,

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66 Information sourced and adapted from the DGSJSSSP 2012-2016 Report
67 Traditional Authority Amidu FGD interviewed in Balaka on 28/12/15
taking into account the exclusion and discrimination that women have historically suffered. Sections 4, 5 and 6 of the GEA prohibits sex discrimination, harmful practices and sexual harassment respectively and criminalizes them but people do them without impunity due to lack of enforcement of laws and because women victims do not report to authorities because of barriers such as culture, lack of economic empowerment. Some respondents referred to instances of discrimination, sexual harassment and harmful practices. Enacting legislation without implementation amounts to taking no action at all.

4.8 Conclusion
These barriers must be addresses holistically otherwise women will continue to suffer exclusion, marginalization and discrimination because of lack of gender mainstreaming resulting into inadequate women participation in the law reform process. The next chapter contains a discussion on the extent to which women have participated throughout the law reform process.

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68 Examples given by three women I interviewed on 18/12/15 at the Lilongwe District Assembly that a woman failed to get a job as a drive due to stereotypical attitude of the employer.
69 Women’s Forum FGD interviewed in Lilongwe on 21/11/15 referred to sexual harassment where a woman would be asked to give sexual favour in order to be employed.
70 Nyirenda’s FGD, interviewed in Lilongwe on 7/12/15 stated that girls enter into early marriages more than boys due to poverty.
71 The SADC Protocol defines it as a process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally.
CHAPTER FIVE

5.0 WOMEN PARTICIPATION IN THE LAW REFORM PROCESS

5.1 Are women adequately participating in the law reform process?

The preceding chapter highlighted barriers to women participation in the law reform process. As such, this chapter assesses whether or not women, in view of these barriers, are adequately participating in the law reform process compared to their male counterpart from inception of law reform programmes, as SLCs and during consultations. It investigates whether there are adequate guidelines for ensuring gender equality, explores the place of women issues and concerns in the law reform process and examines whether inadequate participation of women in the law reform process leads to enactment of gender neutral laws which result in discrimination against women. All this is done taking into account women’s lived realities and experiences.

5.1.1 At inception of a law reform programme

The Commission is mandated to invite or receive submissions from any person or body initiating a law reform or development. This study did not find any submission from an individual woman initiating a law reform but there were submissions from men as individuals. Most of women respondents stated that they have not sent any submission to the Commission.

5.1.2 As SLC

According to Appendix 1, since its establishment the Commission has carried out thirty-five law reform programmes the first one had no SLCs. Thirty-four law reform programmes have a total of two hundred and fifty-nine (259) men and one hundred and twenty (120) women SLCs, as a percentage this represents 68.34% and 31.66% men and women, respectively. This means that men have generally dominated participation in the law reform process as the pie chart below illustrates.

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72 S.7(1) (d) of the LCA.
73 Under the review of the Witchcraft Act there was one submission for a traditional doctor according to an Issues Paper for the programme.
74 All ordinary women respondents stated that they had never participated in the law reform process including sending submissions to the Commission except for some key respondents who stated that they has participated as members of SLCs.
It must be noted that participation in the law reform process is gendered in that majority of law reform assignments have been dominated by men while only six were dominated by women. These are the, review of the Wills and Inheritance Act (WIA); review of the Laws on Marriage and Divorce (MDA); development of HIV and Aids Legislation (HAL); development of the Gender Equality Act (GEA); technical review of the Prevention of Domestic Violence Act (PDVA); and review of the Public Health Act (PHA).

Figure 8: Special Law Commissioners by Sex

![Pie chart showing SLC by sex]

Figure 9: Illustrates SLCs Dominated by Men and by Women

![Pie chart showing SLC dominated by men and by women]
Initiation of SLCs dominated by women was informed by women’s lived realities and have quite extensively dealt with women’s issues and concerns compared to those dominated by men. For example, the SLC on the review of the MDA has set the minimum age of marriage at 18 years and prohibited polygamy in civil marriage under sections 14 and 18, respectively. This is a clear departure to the approach adopted by the SLC on the review of the Constitution which was dominated by men, as it only increased the age of marriage with parental consent from 15 years to 16 years on the basis of culture and religion, contrary to submissions made by delegates to the Second National Workshop that the minimum age of marriage be increased to 18 years (Law Commission Report, 2007:28). One of the woman key respondent who participated in both had this to say,

“The MDA is skewed towards women. In plenary discussions men would argue against something that would benefit women but as women we would come up strongly stressing the need to level the playing field for the two sexes. Under the review of the Constitution women insisted that the minimum marriage age be increased to 18 years to allow girls continue with their education…, some male prominent members of the SLC insisted that in the village girls marry as young as 13 years. They queried which men would be interested in marrying a girl who is 30 years old and delayed getting married because of education.”

This shows that where women are in majority they are able to achieve solidarity of purpose to represent women’s interests. Increasing the minimum age of marriage is crucial to women empowerment and may enhance women’s capacity to participate in the law reform process. Although section 22 (7) of the Constitution is couched in gender neutral language it is more girls than boys who are forced into early marriage before the age of 18 on the basis of culture and religion. In 2010, Malawi with a national average of fifty percent ranked number seven among the ten counties with the highest rates of child marriages in the world.

It is arguable though whether the minimum age of marriage under the MDA will achieve its intended purpose of curbing early child marriages as section 22 (7) of the Constitution is still in force and the Constitution being the supreme law of the land. Section 5 of the Constitution states that any Act or action of Government that is inconsistent with the Constitution shall to the extent of the inconsistency be invalid. It can be argued that the MDA since it provides for eighteen

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75 A full-time Commissioner for the Human Rights Commission interviewed in Lilongwe on 1/02/16
76 UNDP Report, 2010 states that girls are mostly affected due to social and cultural norms, girls living in rural areas suffer twice as much as those in the urban areas…those with no education account for 66%, primary education 62% and 16% is for women with secondary or higher education, and the Report identified law reform as one of the strategy to ending child marriages in Malawi.
years as a minimum age of marriage contrary to fifteen years as provided for under the Constitution is invalid and therefore not applicable. It is such a scenario that underscores the need to ensure that more women participate in the law reform process because it is clear from this study that if more women participated under the review of the Constitution, it would have provides for eighteen years.

Despite women dominating the six law reform programmes mentioned above, women must participate in adequate numbers in all law reform programmes rather than restricting their participation to a few. Considering that almost each and every law reform assignment has women issues and concerns that must be taken into account and requires more women’s voices to be solicited and heard failure to do that leads to further marginalization of women in the law reform process. The SLC on the review of the Army Act had only men, it can be argued that women were not given a chance to represent women’s voices at that higher level and to ensure that they were heard and taken into consideration in the decisions regarding public safety, security and integrity. Although they might have participated as participants in the consultative process their influence is at this level minimal. This study confirms that women do not adequately participate in the law reform process. Therefore, there is need to unearth other underlying factors to this situation.

5.2 Are there adequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings?

Realizing that apart from barriers highlighted in chapter four, there might be other factors contributing to inadequate participation of women in the law reform process. One of the objective of the study was to investigate whether there are adequate guidelines to ensure gender equality in the appointment of SLCs and participants for consultative meetings so that women’s voices are adequately captured in the law reform process.

5.2.1 Investigation

The Commission is guided by the Constitution77 and the LCA. Once submissions have been received and areas for law reform that comprise the programme of work in a specific calendar year have been prioritized, programme officer(s) are assigned to a law reform assignment.

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77 Sections 132-136
Programme officers’ carry out comprehensive research on the law reform assignment and develop an Issues Paper and a Discussion Paper as already discussed in chapter two. When I asked whether the Commission had adequate guidelines to ensure gender equality in the law reform process, one key respondent from the Commission had this to say,

“Law reform does not only depend on SLCs themselves, we also do consultations and have professional officers who looks at issues objectively and include women issues and voices….”

The Democratic Governance Sector-Justice Sub Sector: Capacity Assessment and Development Strategic Plan Report, 2012-2016 (hereinafter ‘the DGSJSSSP, 2012-2016’) indicates that the pool of lawyers at the Commission lacks focused expertise in human rights, governance, including the research component. It can be argued that they also lack expertise in gender issues to adequately mainstream gender in the law reform process. This knowledge gap is reflected in the appointment of SLCs at the Commission.

5.2.2 Appointment of Commissioners

The Commission Law Reform Manual (2011) provides an elaborate process for appointment of SLCs as follows. Upon inclusion of a law reform assignment under a programme of work in a calendar year, the Law Commissioner invites relevant private or public bodies to nominate a person to serve as a SLC on the basis of expertise in a matter under review under the assignment. Every name of a nominee is accompanied by a detailed Curriculum Vitae (CV). The nominee qualifies as an expert envisaged under section 133 (b) of the Constitution if he holds a doctorate degree obtained on merit from a recognized institution or has ten years’ experience in the field of his purported expertise. Where the nominee is in the civil or public service he must be an officer at P4 Grade or above. The Law Commissioner forwards the names of nominees and their detailed CVs to the JSC as part of the process of formal appointment of SLCs. Also, in making the appointment the Law Commissioner on his or her own volition, or in consultation with the JSC, may take into account gender equity, personal integrity, capability to work in a team and the person’s commitment to work. The Democratic Governance Sector Institutional Gender Needs Assessment Report of 2012 (hereinafter “Gender Needs Assessment Report”) found that

78 Assistant Chief Law Reform Officer interviewed in Lilongwe on 17/10/15
79 page 71
80 Law Reform Manual, 2011 at p.6 -7
81 Underlined for emphasis
although most institutions address gender issues in their activities they do not have institutional gender policy\textsuperscript{82}: the Commission\textsuperscript{83} is not an exception. One of the key respondents from the Commission\textsuperscript{84} said,

“Personally I have not seen guidelines that ensure gender equality in law reform but when requesting institutions to nominate a person to serve as a SLC if, in civil or public service we say the person should be of P4 Grade or above.”

Another key respondent from the Commission\textsuperscript{85} said,

“Indeed there are no guidelines to ensure gender equality but we should also ask ourselves what increasing the number of women participation in law reform will achieve, is it mere numbers or is it meant to add valued to the work?”

A member of the JSC\textsuperscript{86} said,

“When considering nominations the JSC looks at the nominee’s experience, qualification and knowledge in terms of what the person has been through in his or her life....There are no guidelines for the JSC to consider when vetting nominees for appointment as members of SLC. We look at CVs of the people before us. Sometimes we consider the constitutional provisions for us to assess whether the person qualifies or not...we do not look at the GEA or Malawi Gender Policy. The JSC does not take gender as an issue for consideration....”

Another member of the JSC\textsuperscript{87} said,

“...Gender is considered as the last thing, it is not the number one consideration I have not seen any guidelines for appointment of SLC but we first consider knowledge i.e. what the person knows and how much the person can contribute to the review process of a particular law.”

These findings confirms the assumption that there are inadequate guidelines for ensuring gender equality in the law reform process. Starting from the Commission to the JSC the glaring effects of inadequate guidelines for ensuring gender equality in the law reform process is evident. Despite there being a requirement for consideration of gender equity by the Commission, the GEA and the Gender Policy providing guidance for women participation in decision making, these instruments are not being used. As such, women may be said to suffer indirect, systematic and structural discrimination. Since, rules determining expertise of a person are based on very

\textsuperscript{82} page 28
\textsuperscript{83} The DGSJSSSP Report, 2012-2016 states that although the Commission’s work requires strong gender analytical skills in order to mainstream gender, it does not have a gender policy.at p.73.
\textsuperscript{84} Assistant Law Reform Officer interviewed at the Commission in Lilongwe on 17/10/15
\textsuperscript{85} Assistant Chief Law Reform Officer interviewed at the Commission in Lilongwe on 17/10/15
\textsuperscript{86} Director of Programmes and a member of the JSC interviewed in Lilongwe on 17/10/15
\textsuperscript{87} A magistrate and a member of the JSC interviewed at the Lilongwe High Court offices on 2/12/15
high educational qualification and the majority of women in Malawi lack documented experience thus are excluded from participating in the law reform process as SLCs. As will be highlighted in chapter six most women are illiterate and uneducated for them to hold a doctorate degree or ten years’ experience so as to qualify as experts, do not occupy high positions as P4 Grade or above but lower Grades. Additionally, most women’s experience is experiential and undocumented in e.g. CVs. While these requirements may be seen as advantageous to law reform we must not lose sight of the fact that legislative proposals are meant to benefit and improve lives of everyone in society including groups that are being excluded from participating in the law reform process such as women. Men and women’s interests are different and sometimes conflicting therefore participation of adequate women is needed in law reform to articulate the interests of women.

Respondents suggested various interventions for inclusion of women in the law reform process. Some respondents\textsuperscript{88} were of the view that the Commission should be requesting for and sending at least two nominees from each institution, a man and a woman, to widen the selection base for the JSC of persons to serve as SLCs. A key respondent\textsuperscript{89} said,

“If we engender the law reform process we will make sure that the Commission has forty and sixty representation of female and men, are doing gender analysis through and through and also monitoring and evaluating the law reform process. Start with the numbers and enforce the law of forty and sixty percent, you would wish it was fifty and fifty percent according to the SADC Protocol.”

There is also need for gender budgeting and costing of bills and laws, awareness-raising, consciouitising people about the laws so that they can know them and start using the law.\textsuperscript{90}

5.2.3 Consultation

The Commission’s work is largely based on qualitative methodology and uses a multi-method approach to collection of data, management and analysis, the data itself may be qualitative and quantitative, both primary and secondary sources such as law reform reports and a wide range of multidisciplinary literature, are consulted; it uses the following data collection methods: desk research (through library, internet and searching archives); FGDs; key informant interviews; participant workshops and, in rare cases observation (Law Reform Manual, 2011:7-8). The dominant data collection method for consultations is participant workshops. Sampling and

\textsuperscript{88} Such as Justice E. Chombo interviewed at Lilongwe High Court on 21/12/15

\textsuperscript{89} The Dean of the Faculty of Law interviewed in Lilongwe at Sunbird Capital Hotel on 11/01/16

\textsuperscript{90} Ibid.
selection of participants is based on the subject area under study and is extremely targeted due to
Relevant private or public bodies are invited to nominate participants in consultative workshops.
Inclusion of women must start with the Commission by putting in place mechanisms for ensuring
gender balance and mainstreaming for example, a gender policy with specific provisions on
women participation in the law reform process at all levels. This would form the basis for
providing proper guidance to other institutions. A respondent 91 said,

“Programme officers are sometimes creative and may indicate the need for more women
than men not as a dictate or following particular guidelines that are in place for the
Commission.”

Another respondent 92 said,

“At consultation level sometimes we deliberately invite women who are known to
articulate or conversant with women issues but generally we have no guidelines to ensure
gender equality in participation in the law reform process.”

Respondents outside the Commission stated that the Commission does not give adequate
guidelines to institutions when nominating SLCs and participants for the consultative process
since letters do not specify whether the person should be male or female. A key respondent93 said,

“There are no guidelines to ensure gender equality in consultation meetings because two
letters I have so far received from the Commission are general letters that do not give
guidance for consideration of gender of nominees to such workshops.”

Appendix 2, provides a sample of letters sent to an institution requesting for a representative to
participate in a consultative meeting and confirms lack of guidance to ensure gender equality.
Where institutions are not adequately guided they use their own criteria in choosing who should
attend a consultative meeting this is detrimental to women’s participation as a respondent in
Lilongwe94 said,

“… if you do not specify whether you want a man or woman then it is either the District
Commissioner (DC) who will attend or he would choose his most preferred boy. We
consider the sector dealing with the law being reformed or a person’s knowledge. P4 and
above we have more men than women … we do not have a woman DC. The DC is P2,
directors are P5, P6 no woman. P7 have 2 women.”

91 Law Reform Officer interviewed on 16/11/15
92 Assistant Chief Law Reform Officer interviewed on 17/11/15
93 National Director of WILSA-Malawi interviewed in Blantyre on 11/11/15
94 Director of Planning and Development (DPD) interviewed in Lilongwe on 18/12/15
Another respondent also stressed the need to be specific on gender when requesting institutions to nominate participations for consultative meetings considering that the criteria varies said,

“We consider who has expertise in the area of law without looking at the sex of the person.”

A respondent in Balaka stated that the lack of guidance result in more men than women participating in the consultative meetings e.g. a meeting would have thirty participants and only seven would be women. This problem is exacerbated by the lack of adequate women in formal institutions which makes it difficult for some institutions to send a woman representative for consultative meetings. It also lead to increased participation of people found in offices and not those who live in rural areas. The problem of inadequate women participation in the law reform process again emanate from women themselves, where they are targeted in their environments they fail to give their views by remaining mute during meetings due to cultural beliefs that women must not talk in the presence of men and internalized subordinate position that makes them to merely agree with what men say. Some proposed solutions were that invitations sent to institutions to choose a representative must be specifying whether the person should be male or female. This study therefore reveals that the problem of inadequate women participation in the law reform process trickles down to participation in consultative meetings where women still are underrepresented compared to men. Where women are present during such meetings they fail to contribute in the presence of men because of cultural prescriptions. Thus, increasing women participation in the law reform process will require more that changing rules to ensure inclusion. There might be need for unsilencing women through,

“Consciousness raising which is a process whereby women become aware, through discussion and debate of their own and others’ situations and the disabilities which are imposed by society and law.” (Barnett, 1998:19)

95 Paralegal from WOLREC interviewed in Blantyre on 19/01/16
96 The DC had served as a member of the SLC under the review of the Chiefs Act
97 Director of Chiefs Administration interviewed in Lilongwe at the Ministry of Local Government offices on 19/11/15
98 Chimoka FGD in Lilongwe interviewed on 18/11/15
99 Justice E. Chombo who was the chairperson for this programme and took part in district consultation observed that during district consultations under the review of the Law on Abortion, in Chiradzulu there were many women but these were mute, they did not contribute due to cultural beliefs that women do not talk in the presence of men. In Zomba, women kept on saying that they have agreed with what men has said instead of giving their views as such more men spoke than women meaning that women may be there but with no voice.
100 DPD interviewed in Lilongwe on 18/12/15
This should be done to raise awareness of women that what they accept as natural ordering of society is in fact the result of societal forces that places people in categories known as class which brings about class domination. Unless women are made aware of how their inferior position is thoroughly continued and justifiable they will not put pressure for change of the status quo (Barnett, 1998:20). It can be argued that inadequate guidelines in the law reform process leads to further marginalization and exclusion of women and results in discrimination against women as one respondent\textsuperscript{101} said,

“Considering that the Commission does not have a gender policy already there is discrimination.”

Majority of women suffer indirect discrimination because they lack education, occupy lower positions and, social and cultural patterns, practices, prejudices and imbalances in power relations since men are considered superior and decision makers whilst women are generally, inferior and excluded from decision making. Actors and structures can play an important role in ensuring women participation in law reform if properly guided and exposed to gender equality. A key respondent stated that,

“To ensure gender equality, mostly when the invitation letter requests for more than one participant I send two men and five women to ensure more women have exposure. Sometimes I send women only to encourage them that they can also improve their decision making capacities, unfortunately its men who are in majority in those positions.”\textsuperscript{102}

5.3 Women issues and concerns in the law reform process

One of the assumption is that women’s issues and concerns rarely form the basis for reforming the law, plenary discussion and content of the draft bill in the law reform process. Some respondents were of the view that women’s issues and concerns are not adequately taken into account in the law reform process while others said they are. A key respondent\textsuperscript{103} said,

“In some cases women’s issues and concerns have been taken into account e.g. the review of WIA since upon the death of the husband the woman and children benefit first before the deceased relatives in the distribution of the property which was not the case before the review.”

Another respondent\textsuperscript{104} said,

\textsuperscript{101} Full-time Commissioner at Human Rights Commission interviewed in Lilongwe on 1/2/16
\textsuperscript{102} Justice E. Chombo interviewed at Lilongwe High Court on 21/12/15
\textsuperscript{103} Justice E. Chombo interviewed in Lilongwe on 21/12/15
\textsuperscript{104} Law Reform Officer interviewed on 16/11/15
“Women issues are considered... probably it is because men’s perspective may not be similar to women’s in articulating women’s issues. The SLC on the review of the PHA considered the impact on women of chasing people who sell items along the streets because women are in majority and went on to hold FGD on the issue.... Law reform tries to take into account women issues but may be there might be indeed gaps because some programmes have more men as SLCs than women.”

Also another respondent\textsuperscript{105} said,

“It has been area specific e.g. review of the WIA was informed by women issues as the old law was disadvantageous to women hence women issues formed the basis for reforming the law. The Review of the Sheriffs Act on the other hand was not influenced by women issues.... Under the Review of the Prisons Act women were categorized as prisoners with special needs i.e. women who are breastfeeding and considered facilities that women prisoners should have. All these issues were discussed in plenary and have been reflected in the draft bill.”

\textit{Appendix 1} also shows various reasons for initiating a law reform programme. For example, the review of the Land Related Laws was initiated so as to formulate a new legislative framework for land matters in order to articulate the principles of the Malawi National Land Policy which includes registration of customary landholdings as private customary estates for the entire communities, families or individuals.\textsuperscript{106} Terms of reference for this SLC did not include a consideration of women’s rights to own, control and access land. Consequently, gender specific issues and concerns relating to women were not adequately discussed by the SLC in plenary discussions and consultations. This inadequacy is reflected in the content of the draft bills which have been couched in gender neutral terms despite the existence of cultural norms, stereotypes and practices that makes practical implementation of gender neutral laws to be gender specific skewed towards men thereby hindering women from owning land in the Malawi society. Land allocation, use, transfer, inheritance, and land dispute resolution in Malawi is governed by customary laws where inheritance (52\%) and marriage (18\%) are the main methods of accessing land under the two customary systems of marriage, matrilineal and patrilineal (USAID Country Profile, 2010:7). Land is handed down through the female line under matrilineal in that a husband who moves to the wife’s village because of marriage generally loses his rights to use land upon divorce or death of the wife and under patrilineal where the woman moves to her husband’s village she often loose her rights to use household land upon divorce or death of her

\textsuperscript{105} Assistant Law Reform Officer interviewed on 17/11/15
\textsuperscript{106} According to the submission received from the Ministry of Lands, Physical Planning and Surveys (hereinafter “the Ministry of Lands”) requesting for the review of existing land legislation as stated in the Report of the law Commission on the Review of the Land-Related Laws. p.7
husband since from fathers, land is transferred to sons (USAID Country Profile, 2010:7). However, women tend to be naïve of their insecure land rights when household and community relations are stable, women’s disadvantage often occurs at divorce or widowhood or because of their lack of power in social negotiation since they lack voice in rural decision-making (Whitehead and Tsikata, 2003). If gender mainstreaming was considered at initiation, plenary discussions and throughout the law reform process for this programme adequate provision would have been made for ensuring women’s right to own, control and access land including protection of existing rights.

It can be argued that the SLC on the review of Land-Related Laws uncritically adopted the notion that land is a commodity that requires redistribution, acquisition or investment. The SLC consequently, developed a Customary Land Bill which provides for allocation of a customary estate by a land committee under section 19 (2) to a citizen or a family of citizens. It can observed that this was done without thoroughly assessing whether the approach upholds rights of women and men whose identities and well-being depends on the land (Verma, 2014:57). Some study show that formalization of land rights in situations of legal pluralism strengthens men’s position as outright owners of land and continues to perpetrate gender biases that make women lose use, access, ownership rights to men and powerfully positioned women (Verma, 2014:57). As a safeguard for protecting women’s land rights in scenarios like these, the law may require that a spouse should seek consent to the other spouse before entering into any transaction involving the property in this case, land.

5.4 Gender neutral laws and discrimination against women

One of the best practices in legislative drafting is the use of gender neutral language in order to avoid reflecting male dominance in the legislative sentence (Appiah, 2007). Sometimes the law may provide that words and expression importing the masculine gender includes females and vice versa.\textsuperscript{107} One of the objectives of the study was to examine whether inadequate participation of women in the law reform process leads to enactment of gender neutral laws which result in discrimination against women.

\textsuperscript{107} Section 2(2) of the General Interpretation Act, Cap. 1:01 of the Law of Malawi
5.4.1 Section 11 of the GEA

By way of example, the GEA was developed through the law reform process with the aim of *inter alia* promoting gender balance in public employment and gender equality in access to opportunities and benefits at all levels. Section 11, provides that not less than forty percent and no more than sixty percent of either sex should be appointed in any department in the public service. This provision is gender neutral but most people understand it to mean, forty percent women and sixty percent men. A key respondent\(^{108}\) said,

“At the University of Malawi everybody talks about 40 and 60 percent provided for under the GEA, they have even increased selection to 50-50 percent since last year and the other year ….Even at the Faculty of Law when we were selecting students we were saying 40 and 60 percent, we were even counting the numbers.”

Another key respondent\(^{109}\) said,

“Section 11 of the GEA provides that there should be 40 and 60 percent in appointment of persons in the public positions, chances are we will employ more men than women, it would have been better if it provided for sixty percent women and forty percent men but I feel the law should have come clearly by saying fifty percent women and fifty percent men. The way the law is, men already have an upper hand since more men are educated than women.”

Some respondents were of the view that it does not apply to law reform. One respondent from the Commission\(^{110}\) said,

“About section 11 of the GEA, to say that it also applies to the appointment of SLC is arguable and that it does apply to law reform is subject to interpretation because we consider expertise more.”

Another respondent\(^{111}\) clarified the effect of section 11 of the GEA with regard to law reform,

“Now with the GEA, it means the Commission will be faulted if it does not adopt the forty and sixty percent.”

It can be argued that in addition to hiding gender biases in society, gender neutral laws’ interpretation reflect people’s attitudes and practices that are skewed to favouring men than women thereby further marginalizes, excludes and discriminate against women in their

\(^{108}\) The Dean of the Faculty of Law interviewed in Lilongwe on 11/01/16

\(^{109}\) National Director WLSA-Malawi interviewed in Blantyre on 11/11/15

\(^{110}\) Law Reform Officer interviewed at the Commission in Lilongwe on 16/11/15

\(^{111}\) The Dean of the Faculty of Law interviewed in Lilongwe on 11/01/16
application. Equality of opportunities which aims at removing barriers at the entry point does not guarantee that women will make use of the opportunities made available to them and does not transform structures that made women suffer inequality in the first place (Fredman, 2013).

### 5.4.2 Other gender neutral laws

Respondents stated that the EA does not provide for provision of sanitary towels to girls but the GEA provides for such issues.\(^{112}\) Some said,

> “When reviewing the Education Act they should have considered the issue of girls getting pregnant early which lead to school dropout.”\(^{113}\)

This SLC was dominated by men, its terms of reference did not provide for a consideration of gender and women specific issues in education and there is no discussion on such issues but has provided for promotion of equality of education opportunity by identification and removal of barriers to achievement. This is inadequate considering that girls face many barriers to accessing education which needed to be highlighted and recommendations made to various stakeholders.

Some respondents cited discrimination in employment\(^{114}\),

> “My friend is a driver, she came first in an interview at Road Traffic but was not offered the job instead a man was employed because the male boss preferred a man to a woman as he claimed that women give a lot of excuses.”

Another shared her own experience that,

> “Although section 20 of the Constitution prohibits discrimination we are still being discriminated against… I lost a job as a fuel attendant at a filling station in Kawale because they preferred men saying robbers target filling stations hence it was not safe for a woman.”\(^ {115}\)

Also, another respondent\(^ {116}\) said,

> “If discrimination is happening women are not informing us so that they can be assisted. If women were reporting what they are passing through the law would take its course.”

Some said gender neutral laws are in order.\(^ {117}\) Discrimination refers to differential treatment so, sex discrimination mean differential treatment on the basis of sex e.g. where rules and actions

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\(^{112}\) Assistant Law Reform Officer and section 14 (2) (e) provides for the same, interviewed in Lilongwe on 17/11/15

\(^{113}\) Misesa Primary School FGD interviewed in Dedza on 17/12/15

\(^{114}\) One of the three women I interviewed at the Lilongwe District Assembly on 18/12/15

\(^{115}\) Women’s Forum FGD interviewed on 21/11/15

\(^{116}\) Minister of Gender Honourable Patricia Kaliati interviewed in Lilongwe on 6/01/16
treat women and men different because of their sex (Dahl, 1987:37). Discrimination can also happen among women especially where some women who live lives similar to men acquire the best rights and privileges compared to those who live traditional sex role lives thus the latter being more affected by discrimination (Dahl, 1987:39).

Discrimination with regard to gender neutral law is more evident in implementation of such laws rather than on the face of it, taking into account women’s social and economic barriers to enjoyment of rights and privileges, substantive rules function to their detriment (Dahl, 1987:51). In examples given above women are facing discrimination because application of gender neutral laws differ with women’s lived realities hence instead of correcting evils in society arising from gender stereotypes, culture, male oriented institutions and social structures it reinforces the status quo. In a society like Malawi where inter alia poverty disproportionately affects women; women suffer gender based violence such as forced marriage, marital abuse, sexual abuse at work due to ineffective legal systems and persistent cultural and imbalances in power relations; and barriers to girls education. These factors limits the effectiveness of laws based on formal equality as gender neutral laws are. First, they use a male norm to which women must conform and does not challenge and transform male oriented institutions and social structures. Second, formal equality treats everyone on merit irrespective of gender dimensions at play. Third, formal equality works better where individuals are similarly situated in society. Thus, instead of focusing on form equality, law reform should also focus on achieving substantive equality by recognizing inequalities, transforming existing male-oriented institutions and social structures, adopting affirmative action for the benefit of women and also must hear more voices of women and respond to them instead of imposing top-down decisions. The inherent properties of substantive equality are as follows: (i) it goes beyond the male norm, instead of requiring individuals e.g. women to conform to male oriented institutions and social structures it transforms them; (ii) it takes into account existing power structures and the interplay of gender within them i.e. it takes into account gender in addressing inequalities in society by recognizing

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117 Balaka District Assembly FGD and the DPD interviewed in Balaka and Lilongwe on 28/12/15 and 18/12/15
118 The GEA in prohibiting sex discrimination under section 4
119 Section 22 (7) of the Constitution
120 Nanzombo Village FGD said, their husband would take away money from them when they are doing business, stop buying food and stop them from assisting their parents or buying cloths for children and them.
121 Women’s Forum FGD said, “most bosses are men… when a woman is looking for a job they want to sleep with you first before giving you a job”
differences between the sexes and treats women differently from men so as to achieve equality of outcomes; (iv) it pays much attention to the outcome of rules and actions (Fredman, 2013:225). For example, in addition to drafting the legislation in gender neutral language the Matrimonial Property of Kenya, provides for a spouse’s beneficial interest towards matrimonial property acquires during the subsistence of the marriage. As to whether such an approach in reality brings about substantive equality in its application may require conducting another study however it can be shown that a step further was taken to ensure protection of women’s rights and interests. These findings confirms the assumption that inadequate participation of women in the law reform process leads to enactment of gender neutral laws which result in discrimination against women.

5.5 The concept of representation in law reform

Respondents expressed different opinions about the concept of representation that the Commission uses in carrying out law reform. Each SLC represents different constituencies and also participants in consultative meetings represent various institutions. A respondent122 said,

“The model of law reform that the Commission follows is based on representation and not participation of people at the grassroots. We do not involve everyone.”

Another respondent123 said,

“… People do not understand what representing a particular constituent means e.g. chiefs represent people in the law reform process but they do not take people’s views.”

Some respondents124 said,

“…these representatives should seek people’s views. Those who represent us as SLCs should first seek our views.”

While it is impossible to hear views of each and everyone in the society on a particular issue it is important that the majority of people’s views should be heard and taken into account. According to Hughes (2008) the law reform mandate has an either explicit or implied aim of enhancing access to justice as such there is need to cast the net wide if law reform is to receive the legitimacy it deserve. Normally there is an assumption that what the representative in law reform say represents views of people at the grassroots which might not be the case. There is need to

122 Law Reform Officer interviewed in Lilongwe on 16/11/15
123 Balaka District Assembly FGD interviewed on 28/12/15
124 Chimwala Village FGD interviewed in Lilongwe on 7/12/15
recognize the limits of the concept of representation with regard to women participation since institutions involved in law reform prefer men representatives than women. The Commission is required to afford the fullest protection to the rights and views of all individuals, groups including women.\footnote{Section 11 (iv) of the Constitution}

5.6 Lack of Knowledge about the Commission and law reform process

Most respondents expressed ignorance about the existence of the Commission, its functions and the law reform process except for those previously involved in the law reform process. A respondent in Lilongwe\footnote{Chimoka Village FGD} where the Commission has its office said,

“It is an organization that gives loans to people to be doing business.”

Another \footnote{One of the three women interviewed at Area 25 Nzungwi Mango Market} said,

“I do not know about the Commission. I have never heard of the Commission.”

Where some expressed knowledge of the Commission through radio or reading books they would fail to give more details.\footnote{Senior Chief Chikumbu FGD in Mulanje.} This lack of information limits people’s ability to participate in law reform and more so for women who lack interest in seeking information. Hughes observe that public consultations in as much as it may be intended to get input from members of the communities that are affected by the law under review, it may also serve other purposes, such as, correcting errors, forcing government to respond to the law commission’s report, and provide an arena where the public may vent out issues to build consensus or defuse lingering tensions around the issues (Hughes, 2008). Consultations should also include those people who are marginalized and do not participate in the development of policy’s such as women to ensure that the law is accessible to them. Hughes also states that the primary role of a law reform commission should be to educate and empower citizens to assume their role as law-makers and stop people from viewing rules as those enacted by government but as emanating from the relationships and interactions of people in the society (Hughes, 2008).

5.7 Conclusion

Looking at the imbalances in power relations in the society which is reflected in participation in the law reform process, law reform may be used for weakening and transferring of power so that
both men and women enjoy substantive equality where dignity, equality of purpose and equality of outcome reigns as underlying principles for distribution of goods and burdens among people. The next chapter explores whether participation is a human rights issue and discusses the dichotomies created and maintained in society by among others law as they directly impacts on participation in law reform.
CHAPTER SIX

6.0 DO WOMEN HAVE THE RIGHT TO PARTICIPATE IN THE LAW REFORM PROCESS

6.1 Introduction

Women participation in the law reform process is crucial for the following reasons: first, legislation may bring about the desired change faster than litigation as the court decision may only apply to parties to the case concerned. Most women are the poorest in Malawi, it is unlikely that they can meet the expenses of enforcing their rights through the courts. It would be more beneficial for them if legislations clearly and adequately provides for their rights. Second, once legislation is enacted it binds the courts and is applicable. Third, if a law is enacted it becomes difficult to change. The fifth assumption is that engendering the law reform process would lead to both formal and substantive equality therefore, women participation in the law reform process cannot be overemphasized.

6.2 Is participation a human rights issue?

Participation is a tool for social change and allows the excluded and disempowered groups of people to be involved in decision making processes. Generally, participation is not a right *perse* but a prerequisite to enjoyment of other rights. The right to participate is therefore important to the attainment of other rights, whether civil and political rights or economic, social and cultural rights.

The United Nations adopted the right to development through a resolution in 1986, this right and the right to participation are contested because the powerful actors at the international level think it will impose at obligation on them to assist developing countries to develop. (Ling, 2010). However, participation is now one of the basic principles in the human rights framework which protects civil, political, economic, social and cultural rights. This means that people have a right to participate in making decisions concerning protection of their rights and contribute to government decision about rights.

With regard to women, there are numerous provisions ensuring their right to participation in decision making in all spheres both at national and international levels. At the national level, section 13 (a) of the Constitution on Principles of National policy which are binding on the state,
mandates it to progressively adopt and implement policies and legislation aimed at achieving among others, gender equality for women with men through full participation of women in all spheres of the Malawian society on the basis of equality with men. This includes ensuring that women fully participate in the law reform process on an equal basis with men. Women have the right to full and equal protection by the law and the right not to be discriminated against on the basis of gender or marital status and legislation must be enacted to eliminate cultural practices that discriminates against women including discrimination in public affairs.\textsuperscript{129} In reality cultural practices and attitudes continue to perpetuate unequal power relations and gender discrimination in all spheres of the Malawi society. Section 20 of the Constitution prohibit discrimination on the basis of sex.\textsuperscript{130} A woman respondent in Dedza\textsuperscript{131} stated that as women, they are being discriminated against including participation in developmental activities.

It can be argued that despite elaborate provisions being there to ensure that women participate fully in decision making, women continue to suffer discrimination including, participation in the law reform process considering that more men than women participate. Implementation of the right to development which shows a relationship with the right to participation requires that women \textit{inter alia} receive special consideration and the state must introduce reforms to eradicate social injustices and inequalities.\textsuperscript{132} The fact that there are so many barriers to women participation in the law reform process as has been discussed in chapter four in this study means government is failing to eradicate social injustices and inequalities to ensure that women’s right to participate in decision making such as law reform, is realized. The Commission as a public institution can assist government to address gender inequality in the society through the promotion of gender equality and women’s interests through law reform by among others, adopting holistic measures aimed at increasing women participation and ensuring that there is gender mainstreaming in the law reform process.

\textsuperscript{129} S. 24 (1) and (2) of the Constitution
\textsuperscript{130} And right to equality and State mandated to pass legislation to address inequalities and prohibit discriminatory practices and its propagation by rendering them criminally punishable by the courts.
\textsuperscript{131} Misesa Primary School FGD
\textsuperscript{132} S.30 (1) & (3) of the Constitution
At the regional level, Malawi has committed itself to ensuring that women participate in
decision-making processes and to afford women the opportunity to express their demands. Article 9(1) (c) of the Maputo Protocol obliges the government to take specific positive steps to ensure that women are equal partners with men at all levels of development and implementation of state policies and development programmes. Under article 9(2) of the Maputo Protocol it must ensure increased and effective representation and participation of women at all levels of decision-making. The right to sustainable development under article 19 (b) of the Maputo Protocol requires that government take all appropriate measures to ensure participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of development policies and programmes. In addition, in 1997 the SADC heads of state and government which included Malawi committed themselves to take measures in order to ensure 30% representation of women in all political decision-making structures by 2005. The SADC Protocol on Gender and Development obliged Malawi to achieve by 2015 at least fifty percent representation of women in decision-making position both in public and private sectors through adoption of affirmative action measures among others.\footnote{Article 12 (1)} It also mandates Malawi to back legislative and other measures with public awareness campaigns that establish the link between equal representation and participation of women and men in decision making, democracy, good governance and citizen participation.\footnote{Article 12 (2)} Also, to adopt policies, strategies and programmes for ensuring equal participation of men and women in decision making including changing discriminatory attitudes and norms of decision making structures and procedures.\footnote{Article 13 (2) (d)} It can be argued that this justifies gender equal representation of women and men in the law reform process.

At the international level, the Sustainable Development Goals,\footnote{Adopted on 25th September, 2015 by countries at the United Nations Sustainable Development Summit} Goal 5 aims at achieving gender equality and empowering all women and girls by ensuring them equal representation in political and economic decision-making process as this is hoped to lead to sustainable economies that benefit societies and the human race as a whole. One of the targets is ensuring women’s full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life. The other feature common to international human rights
instruments with regard to participation of women is the right to equality and non-discrimination on the basis of sex to which states including Malawi are obliged to.\textsuperscript{137} Therefore, women’s right to participate in decision making including, law reform has been widely recognized hence it can be argued that inadequate participation of women in the law reform process amount to discrimination against women on the basis of sex hence the need to engender the law reform process. This is equally important because of existence of dichotomies in participation of men and women in the law reform process.

6.3 The impact of dichotomies in participation of women in law reform

This part discusses dichotomies that are at play in participation in the law reform process and influence participation and non-participation of women thereby militating the right of women to participate in decision making including, law reform.

6.3.1 Male and female dichotomy

Every term or concept in language has a binary opposite. Female is the opposite of male. Male is used as a standard for defining who a female person is, according to one writer

“She is defined and differentiated with reference to man and not he in reference to her, she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the other.” (Barnet, 1998:15)

Feminists’ argue that ‘woman’ is socially constructed as she is treated as being different from a man, weak, and her identity is determined in relation to man who is the reference point (Barnet, 1998:15). Categorization of women as ‘other’ also means that they are not involved much in all spheres of the society including, law reform process. Law as it reflect the society, assumes the social construction of male and female and converts it into legal norms.

Since participation in the law reform process is largely dominated by men, this reflects the male and female dichotomy at play in the society thereby reinforcing the subordination, oppression and deprivation of women. Enactment of gender-neutral legislations confirms the use of the male norm to which women must conform, to benefit from the law and the society generally. It also means that women’s issues and concerns are not adequately captured in the law reform process because it is only women who can express them better and influence development of laws that

\textsuperscript{137} Art.2 of UDHR, Art.2 & 26 of ICCPR, Art 2(2) and art. 3 of ICESCR, Art. 1, 2(d),(e)&(f), 3,4 & 24 of CEDAW
take into account women’s lived realities and to inform the implementation of such laws in practice.

It is to this background that I argue that the Commission through the law reform process is guilty of perpetuating the male and female dichotomy to the detriment of women’s interests and rights. Thus, there is need to engender the law reform process if it is to take into account women’s lived realities by among others, requiring that women be adequately represented throughout the law reform process and that their views be recorded separately so as to achieve equality between men and women.

6.3.2 Law reform as a power issue

Participation in the law reform process is a power issue and entails exercise of power by different social actors in the spaces that have been created for interaction between citizens and authorities. Government institutions like the Commission control structures and the process for participation by defining which spaces, actors, agendas, and procedures to be followed, this approach can pose a barrier to effective engagement with citizens (Gaventa and Valderrama, 1999).

At inception of a law reform programme the Commission may *inter alia* invite any person or body to make a submission relating to law reform or development. Invitations are normally made to government institutions thus few ordinary persons have made submissions to the Commission initiating law reform. Almost all respondents who are ordinary men and women from the grassroots stated that they had never made any submission to the Commission nor participated in the law reform process. A key respondent said,

“Participation in the law reform is a power issue, it is men who have power as such they influence what goes into the law.”

Women respondents in Dedza said,

“When we are in a group men have more power than us women, if a woman speaks they do not listen to us. When a woman gives an idea men insists that theirs should stand.”

People who have power participate and influence decisions in the law reform process than those who do not have power, the majority being women, this starts from the local level. Therefore, in

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138 Section 7 (b) of the LCA
139 Women’s Forum FGD interviewed on 21/11/15
140 The National Director of WILSA-Malawi interviewed in Blantyre on 11/11/15
141 Misesa primary school FGD interviewed on 17/12/15
addressing participation of women in the law reform process gender and power relations must be considered. Interrogating how power affects citizens in particular women in terms of actions and participation in the law reform process is crucial to understanding the position of women both in law and society. Without understanding the different ways power comes to play in the law reform process and recognizing that without transforming power relations among citizens as rights holders and the state as a duty bearer as well as in society generally it would be difficult to realize rights and sustain changes through law reform. There are visible, hidden and invisible powers in law reform with regard to women participation.

6.3.2.1 Visible powers
The law reform process is assumed to be accessible to everyone, a neutral playing field where everyone, man and woman, with issues to raise may engage freely. Actors such as women are assumed to be conscious and aware of the process, have the means in terms of resources and support to make their voices heard. In reality most women are uneducated, poor, dominate informal structures, lack legal awareness and access to information, and are negatively influenced by culture and religion as has been discussed in chapter four. These are the hidden and invisible powers to women participation in the law reform process.

6.3.2.2 Hidden powers
The hidden powers tend to limit alternative choices, excludes less powerful people such as women. Law reform agendas and rules for participating in the law reform are biased against certain people and issues. Section 133 (b) of the Constitution requires that for a person to participate as a SLC must have expert knowledge of a matter of law under review or expert knowledge of other matters relating to a legal issue under review. Its interpretation means, the person must hold a doctorate degree obtained on merit or must have ten or more years of experience in the field of expertise; if he is in government service must be of P4 Grade and above, except for a traditional leader (Law Reform Manual, 2011: 6-7). The JSC selects SLCs on the basis of information on CVs and looks for formal experience, knowledge and qualification to determine whether the person qualifies or not.\(^{142}\) Most public consultations take place in hotels only those invited participate in consultations e.g. workshops, meaning that law reform is an invited space. It may be argued that such rules and approaches excludes most women from

\(^{142}\) Stated by two respondents from the JSC interviewed in Lilongwe on 17/11.15 and 02/12/15
participating in the law reform process considering that most women’s expertise and knowledge is experiential, undocumented on CVs, dominate the private and not public spheres, and do not know much about the law reform process and how they can take part to ensure that their lived realities inform the policy or legislative proposals emanating from law reform.

6.3.2.3 Invisible powers
Relatively powerless groups such as women adopt dominating ideologies, values and forms of behaviours which veils the knowledge of their rights and interest commonly referred to as “internalized powerlessness” (Ling, 2010). Women may become aware of their rights but their potential to speak out may be hindered because they perceive numerous forms of power or domination over them as ‘natural’ or unchangeable and therefore unquestionable these include, poor men and women, rural men and women, women belonging to various religious grouping such as Maria. Strategies that can be adopted to challenge the invisible powers may include, creating awareness of women’s rights, provision of adult education about e.g. training in gender, carrying out participatory research, using media and other popular means of communication to challenge gender and other stereotypes; and changing school teaching approaches and socialization process. Therefore, engendering the law reform process should deal with power imbalances between men and women.

6.4 What of the private and public sphere dichotomy?
Feminist legal scholars advances that the legal system assist in constructing and supporting the public and the private dichotomy by its failure to adequately regulate the private sphere by among others, not providing for marital rape (Morgan, 1987). The Commission considered the issue of marital rape under the review of the Laws on Marriage and Divorce and decided not to criminalize it despite recognizing it as an undesirable evil (Law Commission Report on the Review of the Laws on Marriage and Divorce, 2006:46). The Commission instead provided for instances upon which a spouse may deny another the right to consummation on reasonable grounds. In reality this does not offer adequate protection to women more especially considering the power imbalances that exist between men and women in the family due to patriarchal norms of male dominance.

143 Not her real name and be discussed in chapter 6.
144 Senior Chief Kalumbu’s FGD identified lack of education on gender issues as a contributing factor
145 Including, poor health; post-natal recuperation; or for purposes of reasonable respect of custom.
Likewise, the Constitution under section 24 (1) (b) provides for women’s full and equal protection by the law including, upon dissolution of marriage, the right to a fair disposition of property that is held jointly with the husband. The SLC on the review of the Constitution maintained the status quo despite having received oral and written submissions from women’s lobby group asking for an amendment to the provision (Law Commission Report on the review of the Constitution, 2007:40). The suggestion was to provide for fair distribution of property held in common, taking into account that women are disadvantaged by the present law since most of them are not bread winners. Even this proposal would only benefit a few women who have adopted male roles.

Law reform happens in the public sphere which is dominated by men hence there is male domination in the law reform process. The law thus reflects men’s worldview and interests since, women dominate the private sphere as wives, child bearers and rearing and unpaid workers in the home. Therefore, when carrying out law reform there is need to surpass the public-private divide by recognizing that imbalances in power in the family reinforce power imbalances in the public sphere (Fredman, 2013: 227). Thus, the focus must be on achieving substantive equality, through transformation of male-oriented institutions and social structures rather than demanding that women should conform to the male norms and accommodating dissimilarities among women.

6.5 Informal and formal structures

People in formal structures are participating more in the law reform process than those in informal structures. There are so many women’s groups in informal sectors whose members have never participated in the law reform process. The women’s group I interviewed in Lilongwe\(^{146}\) is under ActionAid which empowers women economically by giving soft loans and training them as paralegals. One woman\(^{147}\) said

> “Before interaction with ActionAid I did not know how to help women victims of domestic violence but now I know laws e.g. PDVA. Initially I thought it was the responsibility of chiefs only.”

This group was livelier throughout the discussion and seemed to understand issues faster because of the exposure they had to laws and legal issues. Another woman said,

\(^{146}\) Women’s Forum FGD on 21/11/15
\(^{147}\) Women’s Forum FGD on 21/11/15
“Teach us and involve us in decision making whether it is in making wrong or right decisions we should be participating and involve us in our groups.”

This group was more active during the interview due to the knowledge about law that they had acquired through paralegal trainings. This means that for women to get involved in decision making such as law reform they need to be sensitized on laws in the country and they will be able to identify the shortcomings of laws in practice. Consequently, they may start to write submissions to the Commission initiating law reform and even giving their views in the consultative process.

In Dedza the women’s group I interviewed was created by WOLREC, which according to a paralegal officer said,

“WOLREC is a women’s rights organization whose main purpose is to increase access to justice for women and girls. It has three components social, economic and legal justice. One group would have 40 members, 25 women and 15 men, we want women to dominate in these groups.”

In Mzimba the group I interviewed was created by Malawi Carer and had more women than men. Therefore, if in conducting law reform such groups are targeted more especially during consultative process more women may participate in the law reform process and women’s lived realities and experiences would inform law reform in the development of policy or legislative proposals that takes into account the specific needs of women.

Out of the twelve FGDs I conducted respondents had never participated in the law reform process except for one group in Balaka which comprised officers in government departments and civil society organizations. This group only had males and, two members of the group had participated in law reform, one in a consultative meeting under the review of the Law on Abortion, and another the development of the Sentencing Guidelines. This confirms that informal structures are not targeted compared to the formal ones. Realizing that women dominate

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148 Misesa Primary School FGD interviewed on 17/12/15
149 Chimwemwe Livata interviewed on 19/01/16
150 Enyezini FGD interviewed on 25/01.16
151 Balaka District Assembly FGD interviewed on 28/12/15
152 Respondents came from Judiciary, police, National Registration Bureau, Social Welfare, Treasury cashier, Office of the president and Cabinet and Community Development.
153 These included PASI, YONECO,
154 Magistrate
informal structures while men formal ones, law reform must consider inclusion of informal structures.

The judiciary provides a good example for male dominating the formal structures. A key respondent\(^{155}\) said,

> “Most institutions are dominated by men than women. The Judiciary, in the Supreme Court of Malawi (SCM) one female Justice against nine (9) male Justices, in the High Court seven (7) female Judges against nineteen (19) male Judges.”

The Justice Baseline Survey of 2010 confirms male domination as shown in the table below.

**Table 4: Judicial Officer by Position and Sex, 2006-2010**

<table>
<thead>
<tr>
<th>Status</th>
<th>Unit</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice</td>
<td>F</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
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<tr>
<td></td>
<td>M</td>
<td>8</td>
<td>8</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Judges</td>
<td>F</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
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<td></td>
<td>M</td>
<td>16</td>
<td>17</td>
<td>20</td>
<td>24</td>
<td>23</td>
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<tr>
<td>Magistrate</td>
<td>F</td>
<td>51</td>
<td>49</td>
<td>55</td>
<td>69</td>
<td>69</td>
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<tr>
<td></td>
<td>M</td>
<td>128</td>
<td>120</td>
<td>143</td>
<td>204</td>
<td>143</td>
</tr>
</tbody>
</table>

Men dominate both top and lower positions. This is the case, even when the state is mandated to ensure that there is equal representation of women *inter alia* in the judiciary\(^{156}\). This information is important to law reform for two reasons: firstly, as a practice at the Commission a judge serves as a chairperson of a SLC; and secondly, for each consultative meeting especially workshops the judiciary is represented. The judiciary interprets and applies the law hence its involvement in law reform.

\(^{155}\) Justice Chombo interviewed in Lilongwe on 21/12/15

\(^{156}\) Article 8 (e) of the Maputo Protocol
6.6 Educated and uneducated

Education determines participation in the law reform process because the language of communication for the Commission is English and also education plays an important role in the selection of persons to serve as SLCs as already discussed above that the JSC considers education meaning that without formal education one cannot participate at that level. The UNESCO UIS Report indicates that in 2010, 3,100,000 men and women were illiterate and women represents 63.9% in Malawi. In Mulanje I observed that three women were not writing their names by themselves and when I asked why, they said that they did not know how to write their names because they never went to school. In Balaka respondents said,

“Not many women and men are educated here. Most of the people here have never been in a school class. Our parents used to stop us from attending school, saying they were going to make us eat rats and schools were very far. Girls fail to continue with school because of school fees.”

This highlights gender disparities between men and women in accessing education and clearly reflect women’s lived realities relating to participation in law reform. Many males access education due to patriarchal notions that prefer educating a boy than a girl and the influence of religious teaching. At consultative meeting level, English is the mode of communication thus bars some people from giving their views as one respondent in Balaka said,

“Once the opening remarks are made in English at a meeting where people would have felt comfortable to express themselves in vernacular languages, people close up they can hear but do not want to talk. The problem is we are sticking to a foreign language. The communication barrier must be addressed.”

The right to education is enshrined under the Constitution. Section 13 of EA provides for free tuition and compulsory primary education for every child below eighteen years; promotion of education for all without discrimination on the basis of gender and other discriminatory characteristics; and identification and removal of barriers to achievement. Malawi as a State

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157 It states that literacy rate for both male and female between 15 years and older was 61.3%, 72.1% male and 51.3% women, among the youth 15 to 24 years was 72.1%, 74.3% males and 70% females and 846,000 youths were illiterate and females accounted for 53.6%
158 Senior Chief Chikumbu FGD in Mulanje interviewed on 18/01/16
159 Mlambe Village Bank FGD interviewed on 28/12/16
160 Balaka District Assembly FGD interviewed on 28/12/16
161 Section 25 of the Constitution of Malawi.
162 S.13 of EA
163 S.5(2) of EA
Party to *inter alia* the ICESCR\textsuperscript{164} and the Maputo Protocol\textsuperscript{165} thus has an obligation to respect, protect and fulfil the right to education which include promotion of literacy among women, enrolment and retention of girls in schools and coming up with programmes to accommodate women who left school prematurely. The obligation to protect requires Government to *inter alia* prevent and ensure that third parties, including parents, do not prevent girls from accessing or going to school.

Education is recognize as both a human right and a key to the realization of other human rights, and an empowering right, a primary vehicle that economically and socially marginalized adults and children may use to lift themselves out of poverty and obtain the means to participate fully in their community (CESCR GC No.13, para.1). Education plays a vital role *inter alia* in empowering women, states are encourage to consider education as one of the best financial investment that they can make (CESCR GC No.13, para.1).

In view of high illiteracy levels among women the education and uneducated dichotomy must be permeated as laws emanating from law reform apply to everyone without distinction based on education. Law reform is a technical area education should be fairly used as a criteria for selection of SLCs and not participants in the consultative process. Occasionally, there have been attempts to ask participants to speak in their vernacular languages such as Chichewa and Tumbuka. There are other languages than these two, other interventions such as provision of interpreters and sign language facilities for persons with disabilities must be considered to ensure that everyone is included and is able to give his or her views in the law reform process. In addition, GoM should prioritize education in particular women education, to deal with the problem of illiteracy among women and to empower them to participate in law reform. In Mzimba\textsuperscript{166} a woman said,

“Even though us rural women are taken as people who cannot take part in the law reform process since those who take part are able to read and write English we can be able to understand and contribute to law reform. We take issues to court, we speak in our language and they speak in English but they are able to assist us. …if you insist on school you will leave out many women, I can speak in my vernacular language during the meeting and people like you who understand me can take my views and write them in English.”

\textsuperscript{164} Article 13  
\textsuperscript{165} Article 12 (2) (a) & (c)  
\textsuperscript{166} Enyezini FGD interviewed on 25/01/16
I believe it is indeed unfair to fail to involve someone on the basis of education or inability to speak English when laws that are made apply to everyone.

6.7 Rural and urban divide

More men and women in rural areas are not participating in law reform compared to those in urban areas. In Dedza, Lilongwe, Balaka, Mulanje, Mzimba and Blantyre both men and women stated they have never participated in the law reform process but in Balaka which is an urban area some men had participated in the law reform process. Also, most of the key respondents who had participated in the law reform process were from the urban areas except for two, male and female traditional leaders who live in the rural areas but participated because of their position as traditional leaders. One respondent said,

“We are not involved in making new laws thus are burdened by the new laws, to us people in the rural areas…you are the first to come here as an official from the Commission. Consultations should also target the rural areas…”

Another respondent said,

“…we are discriminated against even in development activities sometimes they tell us not to take part and if we insist they chase us saying it is only for us men.”

Malawi being a State Party to CEDAW is requires to take into account the particular problems faced by rural women and eliminate discrimination against women in rural areas to ensure they participate in and benefit from rural development on the basis of equality with men, by ensuring that rural women participate in the elaboration and implementation of development planning at all levels. This includes ensuring that rural women participate in the law reform process where legislative including policy proposals are made with the expressed or implicit aim of improving people’s lives.

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167 Misesa Primary School FGD
168 Senior Chief Kalumbu’s Court.
169 Mlambe Village Bank and Traditional Authority Amidu’s FGD comprising traditional leaders only.
170 Senior Chief Chikumbu FGD
171 Enyezini FGD
172 Nanzombe Village FGD
173 Balaka District Assembly FGD
174 Senior Chief Kalumbu FGD interviewed on 27/12/15
175 Misesa Primary School FGD interviewed on 17/12/15
176 Article 14 (1)
177 Article 14 (2) (a) of CEDAW and underlined part for emphasis.
Ensuring that rural women participate in the law reform process is important as living in the rural areas tend to increase women’s socio-economic disadvantages because of lack of access to services including health, education, water, sanitation, and transport (Banda, 2012). If rural women participate in the law reform process they can be able to articulate their lived realities and share their experiences than any person can do. This may inform development of laws and policies that deals with rural women specific issues and concerns thus law reform must specifically target people in rural areas especially women as they tend to suffer double discrimination as people living in the rural areas and as women.

6.8 Conclusion

Therefore, if law reform is to be meaningful to many women these dichotomies constructed and maintained by law on paper and in its implementation must be permeated otherwise law reform can be said to be part of the continuum for reinforcing such dichotomies instead of challenging and transforming them for the benefit of women. Thus, law reform must be engendered to achieve both formal and substantive equality of both men and women. Chapter seven concludes the discussion in this study.
CHAPTER SEVEN

7.0 CONCLUSIONS AND RECOMMENDATIONS

One of the objective was to determine the extent to which engendering the law reform process would bring about both formal and substantive equality in the participation of women. Women’s Law as it has been used in examining and understanding women participation in the law reform process in this study necessitates drawing conclusions on the findings and making recommendations. This is what this chapter is all about.

7.3.1 Conclusions

From the findings discussed in this study the following conclusions can be drawn:

1. That generally women are not adequately participating in the law reform process because men participate more and have more voices compared to women hence it amounts to discrimination against women on the basis of sex. The fact that women have dominated six women specific law reform programmes is not enough to amount to adequate participation of women in the law reform process because this reinforces the gender stereotypes existing in the institutions and social structures.

2. That inadequate participation of women in the law reform process is a result of inadequate guidelines for ensuring gender equality in the appointment of SLCs and participants for consultative meetings. Thus, women’s voices are not adequately captured in the law reform process. Women suffer indirect and structural discrimination because section 133(b) of the Constitution requiring expert for a person to be appointed as a SLC has been interpreted to the detriment of women as the standard is too high and does not take into account informal education and experiential knowledge acquired outside the formal education. Most institutions are dominated by men, choose and opt for men rather than women to participate in the law reform process. This is exacerbated by the Commission’s inability to provide adequate guidelines to ensure gender equality in the law reform process leading to further marginalization and exclusion of women.

3. That some few law reform programmes have been informed by women’s issues and concerns and SLCs dominated by women have discussed such issues adequately in plenary and incorporated them in the draft bills more than those dominated by men thus women’s issues and concerns have rarely been dealt with in the law reform process this
justifies the need to include a critical mass of women or their representatives in the law reform programme.

4. That gender neutral laws use the male norm to which women are required to conform as such they hide the gender biases in them and are interpreted to the detriment of women. Therefore, inadequate participation of women in the law reform process leads to enactment of gender neutral laws which reinforce the gender stereotypes, prejudices and discriminates against women in their application e.g. section 22 (7) of Constitution and section 11 of the GEA.

5. That dichotomies in participation are gendered as such some men and women, educated but not uneducated, living in urban areas compared to those in rural areas, found in the formal structures and not those in informal structures, and those with power are participating more in the law reform process than ordinary women and men in rural areas. Also, that there are barriers to women participation in the law reform process such as culture, religion, poverty, lack of awareness and access to information, the Commission’s resource constraints and lack of implementation of laws. If law reform is to be meaningful to women these barriers must be addressed holistically to stop women from suffering exclusion, marginalization and discrimination. Hence, the need to engender the law reform process in order to achieve both formal and substantive equality.

7.3.2 Recommendations
Form the above conclusions the following recommendations are made.

7.3.2.1 Ensuring adequate participation of women in the law reform process
(a) Government must appoint more women in senior positions to set an example e.g. Judiciary in the SCM and HC as law reform will benefit as well because as a practice at the Commission a representative of the judiciary chairs a SLC. It should also appoint many women into decision making positions such as the Commission where the Law Commissioner is a woman and a permanent SLC in that if the review of the Army Act which carried out during her tenure it would have somehow filled the gender gap.

(b) The Commission must ensure that women are adequately represented throughout the law reform process through equal representation of men and women that is 50 to 50 percent as a long term measure considering that there may be presently inadequate pool of
women to choose from. Where women are not adequately available to satisfy equal representation, as a short term measure women should comprise 40% of SLCs and participants for each law reform programme as a minimum by virtue of section 11 of the GEA.

(a) The Commission must develop a gender policy for mainstreaming gender throughout the law reform process which should inform development of guidelines for use by the JSC in appointing SLCs. The LCA should be reviewed to include provisions on gender equality and mainstreaming.

7.3.2.2 Adequate guidelines for ensuring gender equality
(a) Take deliberate measures to include adequate women in law reform by requesting for more than one nominees for appointment as SLCs, two men and two women from each institution. Where there is no pool of women some institutions should be requested to nominate women only while others men only. This should also apply to requests for participants for consultative meetings.
(b) Women should be targeted as a special group to ensure inclusiveness, women’s views in each law reform assignment should be recorded separately, taken into account and must inform development of policy and legislative proposals. Even consulting them in their environment.
(c) To ensure wide consultation and inclusion of people at the grassroots, the Commission should constitute groups including women’s groups in rural and urban areas and train them on law reform and awareness raising on laws, these should educate people in their communities and should provide a contact point for the Commission’s activities such as consultations and civic education.

7.3.2.3 Incorporation of women’s issues and concerns
(a) The Commission must ensure an investigation of women issues and concerns at the initiation of every law reform programme, discussion and incorporation of such issues in the draft bill.
(b) The Human Rights Commission should take an active role in ensuring that there are submissions from women initiating and contributing to law reform. Represent women and women’s interest in the law reform process, enforce the GEA and create awareness.
Every SLC must have a representative from the Human Rights Commission in particular the Gender section. Women organizations should work together with women in government to improve women’s position and coordination of women’s issues including in the law reform process.

7.3.2.4 Gender neutral laws and discrimination against women

(a) To ensure substantive equality, before drafting gender neutral laws there must be a consideration of women’s issues and concerns likely to impact upon women negatively in the application of such laws. Thus, in drafting gender neutral laws safeguards must be put in place to promote and protect women’s interests.

(b) To ensure that the application of gender neutral laws does not disadvantage women education and training should be intensified targeting those involved in the implementation of such laws and everyone so as to create awareness of gender issues underlying the said law.

7.3.2.5 Engendering law reform process and barriers to women participation

(b) Government must adequately fund the Commission for it to discharge it mandate effectively and efficiently through the inclusion of adequate women in the law reform process rather than leaving it to donors as these are scaling down on providing funding. Also, law reform has assisted in improving the country’s image internationally through domestication of most of its international obligations since Parliament has not taken its mandate under section 211 (1) of the Constitution seriously.

(c) Implement policies e.g. Gender Policy and laws to ensure gender equality between men and women because non implementation of laws greatly affect marginalized groups including women. Provide adequate funding to the Ministry of Gender to effectively implement its mandate; and the Human Rights Commission to increase protection and investigation of rights violations and for enforcing the GEA

(d) Spearhead education and awareness raising of laws and gender issues rather than leaving it to NGOs who sometimes dance to the tune of donors at the expense of interests of Malawians. On a continuance basis the Commission should carryout intensive awareness raising about the institution and laws of Malawi generally to all members of the public. Engage with other players in creating awareness of laws e.g. approaching mobile network providers to be sending messages about the institution, law reform process and laws generally as a social responsibility for free to improve its visibility.
(e) Prioritize education for girls by repealing laws that hinder girls education, establishing a fund from which every needy girl or those coming from poor families may access money for their education and strive to provide for free or subsidized fees for girls from secondary to tertiary level as CRECOM an NGO did and am one of the beneficiary of that intervention.

(f) Critically reconsider change of policy as there are speculations of reintroduction of fees in primary school in view of high levels of poverty and under international law once a country introduce free primary school it cannot backtrack and start charging fees.

(g) In view of barriers to women participation in law reform resulting from culture and religion women should be consulted separately from men in some sessions of the consultative process and their views must be taken into account. The socialization process must be engendered parents more especially women as child rears must promote girls’ education in the families provision of moral, physical and economic support to children especially girls. School curriculum must be engendered to teach children from the younger age about gender equality.

(h) Provision of professional interpreters and sign language to ensure inclusiveness of all people belonging to special groups e.g. people from rural areas and persons with disability and allow for people to contribute in their vernacular languages.

(i) Every law reform officer must be adequately trained in gender issues, analysis, gender mainstreaming, and gender budgeting and costing of bills, monitoring and evaluation.

(j) Explore charging a small levy on court cost for law reform. Conduct training workshops for members of the public and government officers on laws at a cost to help raise and supplements funds for law reform.

(k) Make women should be trained and educated so as to prepare them for the new responsibilities and as women we be available and utilize opportunities opened up for women to contribute to the empowerment of every woman in the country. Role modeling.
BIBIOGRAPHY


## APPENDICES

### Appendix 1: List of Law Reform Programmes, SLCs by Sex, Initiator of programme,

<table>
<thead>
<tr>
<th>No.</th>
<th>Law Reform Programme</th>
<th>Members of the special Law Commission</th>
<th>Total</th>
<th>Who initiated review or reform of the Law</th>
<th>Funding</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Male</td>
<td>Female</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Review of Certain Laws on Defilement of Young Girls, Wills and Inheritance, Citizenship, Marriage and Affiliation</td>
<td></td>
<td></td>
<td>Government</td>
<td>UN Women NORAD</td>
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<tr>
<td>2</td>
<td>Technical Review of the Constitution</td>
<td>19</td>
<td>3</td>
<td>22</td>
<td>Law Commission</td>
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<tr>
<td>3</td>
<td>Criminal Justice Reform on Bail Guidelines</td>
<td>8</td>
<td>2</td>
<td>10</td>
<td>Workshop (1995) recommendations resulted in the formation of a Task Force to review the criminal justice process from police investigation to trial. The Task Force made recommendations to the Government to develop guidelines on the granting of bail to ensure that there is justice and promote better delivery of criminal justice. It also identified several statutes that were in need of reform.</td>
</tr>
<tr>
<td>4</td>
<td>Review of the Penal Code</td>
<td>8</td>
<td>2</td>
<td>10</td>
<td>• Based on the recommendations of the Task Force.</td>
</tr>
<tr>
<td>5</td>
<td>Review of the Army Act</td>
<td>7</td>
<td>0</td>
<td>7</td>
<td>• Defense and Security Committee of the National Assembly</td>
</tr>
<tr>
<td>6</td>
<td>Review of Censorship and Control of Entertainment Act</td>
<td>9</td>
<td>3</td>
<td>12</td>
<td>• Several submissions were received from the media fraternity recommending</td>
</tr>
<tr>
<td>Review of the Legal Education and Legal Practitioners Act</td>
<td>5</td>
<td>3</td>
<td>8</td>
<td>A submission from two Malawians acting on behalf of several others trained in the former Soviet Union requesting that certain provisions of the LELPA be amended on the ground that these discriminated against persons who were qualified in jurisdiction other than those listed in the first schedule to the Act. Another submission came from Lawyers who had studied law in Roman – Dutch jurisdiction such as Botswana. The Law Commission also received submissions from persons who had qualified as lawyer in foreign jurisdiction and qualified as Barristers without having practiced the law in those foreign jurisdictions.</td>
<td>European Union</td>
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<td>Review of the Corrupt Practices Act</td>
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<td>2</td>
<td>12</td>
<td>The submission came from the Anti-Corruption Bureau.</td>
<td>DFID</td>
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<tr>
<td>Review of the Police Act</td>
<td>9</td>
<td>2</td>
<td>11</td>
<td>Submission came from the Ministry of Home Affairs</td>
<td>Royal Danish Government through</td>
</tr>
<tr>
<td>No.</td>
<td>Review of the</td>
<td>Year</td>
<td>Month</td>
<td>Date</td>
<td>Recommendations and Initiators</td>
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<tr>
<td>10</td>
<td>Criminal Procedure and Evidence Code</td>
<td>9</td>
<td>1</td>
<td>10</td>
<td>Based on recommendations of a Task Force</td>
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<td>11</td>
<td>Criminal Justice Reform on Development of Legislation on Conversion of Fines</td>
<td>8</td>
<td>1</td>
<td>9</td>
<td>The need was identified by the special Law Commission on the review of the Penal Code</td>
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<td>12</td>
<td>Wills and Inheritance Act</td>
<td>4</td>
<td>8</td>
<td>12</td>
<td>Initiated by the Law Commission</td>
</tr>
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<td></td>
<td>*</td>
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<td></td>
<td>Norwegian Agency for Development (NORAD) of The Royal Norwegian Government</td>
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<td>13</td>
<td>Legal Aid Act</td>
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<td>3</td>
<td>13</td>
<td>Submission received from the Legal Aid Department in the Ministry of Justice requesting urgent review of the existing Legal Aid Act.</td>
</tr>
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<td></td>
<td>* Cobtainer</td>
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<td>5</td>
<td>11</td>
<td>Based on the recommendations of a Task Force.</td>
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<td></td>
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<td>Submission from the Ministry of Land</td>
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<td>* Cobtainer</td>
<td>4</td>
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<td>13</td>
<td>Initiated by the Law Commission</td>
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<td>Laws on Marriage and Divorce</td>
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<td>Government of Britain through the Department for International Development (DFID)</td>
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<td>* Cobtainer</td>
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<td>9</td>
<td>13</td>
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Norway and Sweden through Norwegian Agency for Development (NORAD) and Swedish International Development Agency (SIDA) administered by NORAD Through Embassy of the Government of the Kingdom Of Norway to Malawi UNICEF funded regional consultations

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<td>Review of the Traditional Courts Act</td>
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<td>• Based on the recommendations made by the Task Force on legal and Judicial reforms report of 1996, which Although focused on criminal justice reforms concluded that an effective and efficient court system is a prerequisite to any reforms to the justice system • Report emphasized the need to review all statutes regulating the administration of the courts</td>
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<td>18</td>
<td>Review of the Constitution</td>
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<td>• Initiated by the Law Commission as it proposed to government the need to carry out review of Constitution, to which Government gave its approval</td>
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<td>Report on the Development of legislation on Declaration of Assets, Liabilities and Business Interests by Public and Elected Officers</td>
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<td>Report on Development of HIV and AIDS legislation</td>
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<td>Review of Education Act</td>
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<td>Review of Trade Marks Act</td>
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<td>Subsequent funding was provided by the European Union and the Global Fund Round 5 funded the final part of the programme and funds were administered by the National Aids Commission (NAC)</td>
<td>The European Union under the Rule of Law and Civic Education Programme and the Government of Malawi. Submission from Ministry of Home Affairs and Internal Security (as it was then) on the basis that legislation was outdated and in urgent need of review in order to address contemporary security challenges.</td>
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<td>4</td>
<td>European Union, The Government of Malawi and Institute Of Security Studies based in Pretoria, South Africa</td>
<td>Submission from Ministry of Home Affairs and Internal Security (as it was then) on the basis that legislation was outdated and in urgent need of review in order to address contemporary security challenges. Subsequent funding was provided by the European Union and the Global Fund Round 5 funded the final part of the programme and funds were administered by the National Aids Commission (NAC).</td>
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<td>Review of Witchcraft Act</td>
<td>7</td>
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<td>Criminal Justice Reform Programme</td>
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<td>Review of Public Health Act</td>
<td>4</td>
<td>5</td>
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Appendix 2: A sample letter sent to an institution requesting it to send a representative to a Regional Consultative Workshop

Ref. No.: LC/01/62

30th July, 2012

90
The Secretary for Tourism and Culture  
Private Bag 326  
Capital City  
**Lilongwe 3**

Dear Sir,

**REGIONAL CONSULTATIVE WORKSHOP ON THE REVIEW OF THE CHIEFS ACT**

The special Law Commission on the Review of the Chiefs Act will be holding a consultative workshop in Lilongwe on 9th August, 2012 starting from 9.00 a.m. at Pacific Hotel. The objective of the workshop is to consult stakeholders on a number of issues pertaining to the Review of the Chiefs Act.

Noting the important role that your Ministry plays through the Department of Culture in chieftaincy matters, the Commission requests your office to nominate one officer from the Department of Culture in your Ministry to attend the workshop.

Only participants coming from outside Lilongwe will be accommodated at the venue of the workshop, to check in on Wednesday, 8th August, 2012 and to check out on Friday, 10th August, 2012. Participants will also be reimbursed transport expenses and be paid a modest per diem. Participants are also requested to bring with them this letter and all relevant receipts to enable them claim transport expenses.

Kindly confirm your attendance at the workshop by contacting Ms. T. Kalinga on 01 773 858 or 0888 367 506 and on tkalinga@lawcom.mw, so as to enable us make necessary arrangements.

Yours sincerely,

E. Chavula (Mrs.)  
**Law Reform Officer**  
For: **LAW COMMISSIONER**