TYPES AND TECHNIQUES OF LEGAL RESEARCH FOR EFFECTIVE LAW REFORM IN TANZANIA

By Eleuter G. Mushi[1]

Abstract

This article examines different types and techniques of legal research and how they can facilitate effective law reform in Tanzania. Special attention is given to the Law Reform Commission of Tanzania (LRCT), the only institution entrusted with the function to reform the law in Tanzania. It is argued that, though law reform in Tanzania is research based, the types and techniques that the LRCT employs in research for the purpose of law reform are not clear. This conclusion is drawn from the analysis of the following: the law regulating the LRCT; the laws reformed by the LRCT; Some reports by the LRCT; and the Constitution of the United Republic of Tanzania, 1977. Generally it is argued that, lack of seriousness to abide by the relevant types and techniques of legal research and take the Constitution onboard in the process of research for law reform renders the reformed law ineffective. It is accordingly recommended that, the LRCT should be more transparent in the manner it undertakes legal research and in the techniques it employs in research for law reform. The LRCT must always proceed from the Constitution in its process of law reform and strive to improve the research capacity of its members.

Key words: *Legal research, Research techniques, Law reform*

1.0 Introduction

Research and singularly legal research is unavoidable for effective law reform in any legal system. By research is meant "a systematic process of collecting, analyzing and interpreting data in order to increase our understanding of the phenomenon about which we are interested or concerned."[2] In the discipline of law, this phenomenon is the legal system as a whole and research is important as a source of data not only for the passage of suitable legislation in new areas that need to be regulated by law, but also in areas where the law already exists but such law needs to be reformed to make it function better.

Research in the real world is increasingly becoming important and the government of the United Republic of Tanzania has been promoting research in different socio-economic spheres for the development of the country and her people generally. In response to the emerging challenges both at global and national levels, the government of Tanzania has provided for research in many of the matters in which itself and its institutions are engaged. Various national institutions are now charged with the responsibility of conducting purposive research and advising the government to modify its policies and laws. Some of these institutions include: The National Institute for Medical Research which is established by the National Institute for Medical Research Act[3] to promote medical research; Tanzania Industrial Research and Development Organisation which is established by the Tanzania Industrial Research and

1 Senior Lecturer in the Faculty of Law at Mzumbe University.
2 Paul D. Leedy and Jeanne E. Ormrod, *Practical Research*, 8th edn. (New Jersey: Pearson Education 2005) at 2.
3 [Cap 59, R.E. 2002].

Development Organisation Act[4] to promote Industrial and Technological Research; Tanzania Forestry Research Institute which is established by the Tanzania Forestry Research Institute Act[5] to promote forestry research and; Tropical Pesticides Research Institute which is established by Tropical Pesticides Research Institute Act[6] for the purpose of research and pesticides control.

Though one may note several institutions established for the purpose of research in certain matters, there is no institution for similar purpose in the legal sector of Tanzania. Legal research is open to interested persons (legal and natural) and specific government institutions which have to undertake legal research in order to perform their statutory functions. However, for the government institutions performing statutory functions the power to do legal research is limited to certain aspects only. A good example is the Commission for Human Rights and Good Governance which is established under the Commission for Human Rights and Good Governance Act[7] and which is empowered to conduct research in human rights, administration of justice and good governance issues only and educate the public on such matters. Any research by this institution is only limited to matters specified in this Act. Similarly, the Law Reform Commission of Tanzania (hereinafter to be referred to as the Commission) which is established under section 3 of the Law Reform Commission of Tanzania Act[8] (LRCTA) and which is the focal point in this article is under section 4(1) of the very Act specifically charged with the function to take and keep under review all laws of the United Republic of Tanzania (URT) with a view to their systematic development and reform. This means, therefore, that the mandate to study the dynamics of the legal system of Tanzania and determine whether any change is necessary is entrusted to the Commission. This makes the position and the role of the Commission in the development of the legal system in general and in the development of any law in particular extremely important.

The Commission has an important, if not a leading role, to demonstrate the role of law in development by ensuring practical application of constitutionally entrenched values such as human rights and the rule of law; democracy and good governance; and sustainable social and economic development in Tanzania. Apart from being a key leader in this process, the Commission is also expected to be the key participant in it. For this reason, legal research by the Commission is central in its function of law reform. This means that the Commission needs to be not only well organized in research for the purpose of its statutory functions, but also conversant with the relevant techniques of legal research and invoke them for the purpose of executing such functions.

4 [Cap 159, R.E. 2002].
5 [Cap 277, R.E. 2002].
6 [Cap 161, R.E. 2002].
7 [Cap 391, R.E. 2002].
8 [Cap 171, R.E. 2002].

In the context of law reform, legal research serves as a means of exposing any lacuna or imperfection in the existing laws and usually ends up with suggestions for remedying any detected lacuna or imperfection. What should be noted is that, Lacuna or imperfection is an inevitable feature of any law. The reason is that laws are made by human beings in the name of institutions and that human beings are always prone to mistakes in their daily undertakings. So no law is perfect taking into account the manner of its making; the fluidity of the factors (socio-political and economic) which influence its making, and the dynamic nature of society in which it is intended to function. The imperfection of laws is acknowledged by many authors. Worley observes that "(laws) are not always… intelligible, and if intelligible, are not always intelligently made."[9] Braden also finds that, "even if we accept certain values in our society as sacred, this does not make any particular legal proposition sacred."[10] The laws protecting these values may be rendered ineffective by reason of changes and developments taking place within the society, which may result from either internal or external forces or both. It is only when the legal system is well informed of these changes and developments that it can effectively respond to them. Legal research is the best avenue towards that end.

The dynamic nature of societies as hinted out above is another aspect which shows that laws are never perfect and therefore final. Since societies are dynamic and never static, the stability and effectiveness of laws are constantly affected by changes and developments taking place in society. Laws may be in place as is the case in any legal system but the desired impact of these laws may be far from being realized or, if realized, may not always be to the expected level. This means that laws need to be reviewed from time to time and, where necessary, to be reformed to make them responsive to the reasons behind which they were passed. The idea behind law reform is to make a particular law work better to its expected level. To know that a particular law is working properly is not a matter of impression on such law. It needs legal research, but the type of research in which the right techniques capable of generating relevant data on such law and its surroundings are employed.
This article expounds on the types and techniques of legal research and their potential for effective law reform in Tanzania. It appreciates the value of legal research not only in the development of law, but also in the development of society in which such law functions. In the development of both law and society, it emphasizes the importance of employing the right techniques of legal research if relevant data for effective law reform are to be obtained. By effective law reform the author in this article has in mind a change in law or a legal principle which has the effect of realizing the objectives behind which such law or legal principle was formulated. The article is motivated by the fact that, though the Commission has been doing researches for the purpose of its statutory function of law reform, the following are not clear from its works; the techniques it employs in research to obtain relevant data for effective law reform, and the extent to which the State Constitution is taken on board in law reform based research as the mother law in Tanzania to which all other laws must comply.

9 B.A Worley, 'Some Reflections on Legal Research,' in *Legal Research and Methodology* eds S.K. Verma and M. Afzal Wani , (New Delhi: Indian Law Institute, 2001) 1.
10 George D. Braden, '*Legal Research: A Variation on An Old Lament*' *Ibid*, 22.

As the whole, it is argued that, even if the right types and techniques of legal research are employed in law reform, it is not sufficient to make the reform effective if research for that purpose does not take on board the State Constitution. True law reform must be one which seeks to re-lay the foundations of a healthy state and legal system, and not one in the nature of re-roofing a structure that is constitutionally and legally unsound. It is in this perspective that the situation in Tanzania is examined in relation to the Commission, the only institution which is empowered to reform the laws in Tanzania. However, before doing that let us first see the types and techniques of legal research which set the foundation of our discussion in this article.

2.0 Types and Techniques of Legal Research

McConville and Hong Chui in their learned treatise on 'Research Methods for Law' have stated that legal scholarship has historically followed two broad traditions:

> 'The first, commonly called 'black-letter law,' focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law. Deriving principles and values from decided cases and re-assembling decided cases into a coherent framework in search for order, rationality and theoretical cohesion has been the fodder of traditional legal scholarship.
>
> A second legal tradition which emerged in the late 1960s is referred to as 'law in context' (in which) the starting point is not law but problems in society which are likely to be generalized or generalisable. Here, law itself becomes problematic both in the sense that it may be a contributor to or the cause of the social problem, and in the sense that whilst law may provide a solution or part of a solution, other non-law solutions, including political and social re-arrangement, are not precluded and may indeed be preferred…'[11]

Both traditions have the aim of finding the law for different and varying needs of diverse elements constituting a society. As such, they have significant contribution not only to the formulation of law, but also to the development of law in any legal system. The main difference between them, however, rests on their approach in finding or developing a law. This difference is discussed in more detail in the next sections of this article. It is enough to state here that, in any case, the understanding of research techniques which are encompassed by these traditions and their potential for effective law reform in any legal system in general and in the legal system of Tanzania in particular, is very important. These techniques serve differently in legal research for the purpose of law reform. Hereunder, an attempt is made to explore more on both

11 M. McConville and W. Hong Chui (eds), *Research Methods for Law*, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2010) at 1.

traditions and the research techniques they encompass and the usefulness of these techniques in research for the purpose of law reform in Tanzania.

2.1 Doctrinal Research

Most of the literature on legal research is rooted in doctrinal research or the 'black-letter law' indicating that this type of research is dominant in the discipline of law. By doctrinal research is meant research organized around legal propositions. As Jain puts it, it involves analysis of case law, arranging, ordering and systematizing legal propositions and… creates law through legal reasoning or rational deductions.[12] The law of torts and administrative law are often cited as typical examples of the laws developed by judges through doctrinal research. Legal doctrines are formulated through the analysis of legal rules. The principal technique which is used in this type of research is the study of legal texts such as court judgments and statutes to explain a law. The aim is to discover and develop legal doctrines and, because of this, research questions revolve around the question "what is the law"? in particular contexts. According to Hart[13] who is quoted by Arthurs,[14] doctrinal research is not research about law at all. It is research in law. It does not involve going outside and research the material realities of people's everyday lives.[15] In this context, Chynoweth finds that;

> '…the validity of doctrinal research findings is unaffected by the empirical world…[T]he validity of doctrinal research rests upon developing a consensus within the scholastic community, rather than on an appeal to any external reality.'[16]

So, the aim of doctrinal research may correctly be said to be systematization, rectification or clarification of law on a particular topic through the analysis of authoritative texts. It has nothing to do with the world outside the law. The technique of research in this tradition is different from that of non-doctrinal research. We can briefly look at the main technique of non-doctrinal research so as to understand how the two traditions differ.

2.2 Non-doctrinal Research

As noted above, this tradition emerged in the late 1960s. Under this tradition, the starting point in research is not law as one finds in 'black letter legal research.' The starting point is problems in society. According to McConville and Hong Chui the principal technique here is to study law "in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and humanities."[17] Jain who is cited by

12 Cited in H.N Tewari, *Legal Research Methodology*, (Faridabad: Allahabad Law Agency, 1997) at 11.

13 H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961).

14 H.W. Arthurs, *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa 1983.

15 See P. Hillyard, 'Invoking Indignation: Reflections on Future Directions of Social-Legal Studies,' 29 Journal of Law and Society (2002) 650 cited in M. McConville and W. Hong Chui (eds), *supra*, fn. 11at 4.

16 P. Chynoweth, 'Legal Research,' in *Advanced Research Methods in the Built Environment, eds* Andrew Knight and Les Ruddock , (Oxford: Wiley-Blackwell, 2008) 30.

17 M. McConville and W. Hong Chui (eds), *supra,* fn. 11 at 5.

Tewari finds that, non-doctrinal research seeks to answer such questions as:

> [A]re law and legal institutions meeting the needs of society? Are they suited to the society in which they are operating? What factors influence the decisions of adjudicators (courts or administrative agencies)? It also concerns the identification and creating an awareness of the new problems which need to be tacked through law…'[18]

All these require interdisciplinary approach in legal research to allow more involvement of social policy issues and the understanding of what other disciplines have to offer to the discipline of law to make law more effective. An understanding of this reality by any agency entrusted with the function of law reform is very important. With this in mind, let us briefly examine the way the Commission is organized in research for the purpose of law reform In Tanzania.

3.0 Organization of the Commission in Research for the Purpose of Law Reform

The Commission is administratively organized in several sections for the purpose of its statutory function of law reform. Of the several Sections, however, the following two sections are directly entrusted with research function for the purpose of law reform in Tanzania. These are: the Law Review Section and the Law Research Section. The main objective of the Law Review Section is to review all laws of Tanzania with the view to simplifying, modernizing, and improving the content of law, the law making process, the administration of justice and access to justice; and to remove obsolete or unnecessary laws and eliminate defects in the law, explore why principles of law, legal procedures and legal institutions may have become inadequate or outmoded.[19]

The Law Research Section has, as its main objective, the undertaking of research on any particular branch of law and making recommendations for reform so as to bring the law into accord with current circumstances.[20] To achieve this, the Commission is required under section 10(1) of the LRCTA to obtain views of the greatest possible number of people in Tanzania on the examination of any law or branch of law.

Therefore, judging from the objectives behind the two Sections it is quite clear that each Section has to carry out some form of legal research so as to be able to meet its objectives. Success by each section in research will depend on how well it is organized and equipped for research, and the techniques it employs in research for the purpose of law reform. On the overall, it is submitted that the reform has to have as its footing the State Constitution if it is to become effective. This is because it is in national constitutions that fundamental guides for establishing agreed legal principles are entrenched. As such, no law reform

18 H.N Tewari, *supra,* fn.12 at 17.
19 See URT, *The Law Reform Commission of Tanzania Annual Report*, 2011/2012.
20 *Ibid*.

can be effective if research for that purpose misses the state Constitution in which the justification and rationale for any law are to be found.

Hence, it is observed that, from the objectives of the Law Review and the Law Research sections of the Commission, it is clear that the Commission appreciates the importance of both doctrinal and non-doctrinal legal researches in its law reform function. The approach by the Commission, therefore, has been to combine doctrinal research techniques with non-doctrinal or empirical legal research techniques to mitigate research limitations which may result from placing reliance to the techniques of one tradition only. The combination of doctrinal and non-doctrinal research techniques provides opportunity to the Commission not only to find law, but also to know how the law functions in society. This is very important aspect for the purpose of law reform. We can now see the techniques of legal research for the purpose of law reform in relation to the two research sections of the Commission.

3.1 Research Techniques by the Law Review Section of the Commission

As seen above, the Law Review Section (LRS) of the Commission has, as its objective, the review of all laws of Tanzania in order to simplify and modernize them; remove any obsolete or unnecessary law; and eliminate defects in the law. The LRS is also required to explore why principles of law may have become inadequate or outmoded. To be successful in all these, the LRS has to embark on some type of legal research and employ appropriate techniques in any legal research it does for that purpose. Efforts to find out the techniques the LRS employs in the review of the laws of Tanzania were not successful. However, looking at its objectives, one may correctly conclude that the LRS cannot do without the following techniques of legal research: Techniques for the analysis of decided cases; Techniques for the analysis of statutory law; and techniques for comparative approach to legal problems. These can briefly be explained.

3.1.1 Techniques for the Analysis of Decided Cases

Case law forms an important part of the body of law in Tanzania. It actually appears in two forms: Case law originating from foreign jurisdictions; and Case law originating from Tanzania. All these forms have the same status and effect in their application, but at least one important factor distinguishing them may be pointed out. This is the countries of their origin. Though they all apply in Tanzania, their countries of origin are different. The socio-economic, political and cultural climates of these countries also differ. For this reason, legal research for the purpose of law reform in respect of case law in Tanzania cannot be avoided.

There are several techniques for the analysis of decided cases. The first technique is reading a particular case from different law reports and comparing the same from such reports. This technique is possible where case law reporting is done in more than one volume and court judgments are independently delivered by judges who preside over a case, with the majority judgment being adopted

as the court decision. Comparison helps to explain a specific passage which might appear obscure or out of place in one of the volumes in which the case is reported. It aims at making the law clearer, let alone serving as a source of new ideas or point for the purpose of law reform.

Reading a case in which a specific binding principle of law was formulated also helps to show if there were dissenting or separate opinions of judges. Chatterjee opines:

> As to critical appreciation of the *lex lata*- the current law, the *lex ferenda* – what the future law should be- a researcher should examine the separate and dissenting opinions of judges, if any, in a given case.[21]

Dissenting or separate opinions of judges help to show how different legal issues were dealt with in a case, and how such issues could alternatively have been decided. It also provides an opportunity to know why they were so decided. The pleadings of counsels are also useful. They present a researcher with new ideas which can help to analyze a case. Any sound modification on the principles of the Common law which apply to Tanzania today and which were adopted from England can only be made through this approach. The approach provides an opportunity to modify the Common law to suit local circumstances obtaining to Tanzania as envisaged under section 2(3) of the Judicature and Application of Laws Act.[22]

Unfortunately, there is no evidence in the working of the LRS of the Commission showing how it has been taking advantage of the technique under discussion to improve and, or modify the common law principles which Tanganyika (now Mainland Tanzania) adopted from England before and after her political independence. The only effort which the Commission seems to have made in relation to case law is to review and analyze unreported judgments of the Court of Appeal of Tanzania and extract legal principles from these judgments for inclusion in its website.[23] Certainly there is nothing wrong with this as the research aimed at finding the law. However, there is no evidence showing the efforts that the Commission through its relevant research section has made to trace the developments which courts in England have so far made on specific common law principles which apply to Tanzania and make comparison with developments (if any) which courts in Tanzania have made on the same principles for the purpose of law reform. For instance, though the higher judiciary in Tanzania is yet to come up with purely new principles from decided cases; it has made commendable efforts to expand the horizons for the application of certain common law principles. Examples include: the wider meaning that now courts in Tanzania attach to the concept of "access to justice" (see *Julius Ishengoma Francis Ndyanabo v. Attorney General,*[24]); the expansion of the rules of *locus standi* in public law proceedings as reflected

21 Charles Chatterjee, *Methods of Research in Law*, (Kent: Old Bailey Press, 1997) at 43.
22 [Cap. 358 R. E. 2002].
23 See URT, fn. 19 at 19.
24 Civil Appeal No. 64 of 2001, Court of Appeal of Tanzania, (unreported).

from *Rev. Christopher Mtikila v. Attorney General and Baizi*;[25] and the expansion of the horizons of "irrationality" as one of the grounds for judicial review where courts have added as a mandatory requirement the giving of reasons by a decision maker in his or her decisions (see emphasis on this in *Tanzania Air Services Ltd. v. Minister for Labour, Attorney General and Commissioner for Labour*.[26] So it is quite clear and specifically from the above cited case of *Rev. Christopher Mtikila* that cases may be analyzed to find out if there are problems in the way in which certain parts of a trial are carried out and this may lead to changes in a law.

Judicial activism has certainly helped a lot in the development of law as it concentrates on case analysis. Common law itself, as we learn from Mr. Justice P.N. Bhagwati,[27] is an example of juristic activism. He finds that the doctrine of common employment enunciated in *Priestly v. Fowler* and the concept of negligence in *Donoghue v. Stevenson* are examples of juristic activism. Now, for the developments made by the courts in Tanzania, it may be worth comparing them with the previous judgments and other developments which courts may have made on such judgments to find out the extent to which the previous judgment has been followed or departed from. If the previous judgment is wholly overruled or distinguished from the present one, the reasons for so doing should be found. It is also important to find out if there are conflicting judgments and what might have led to such conflicts. This approach is useful as a source of information for law reform in case law, and may also lead to a legislation requiring departure from the system of precedent.

Another technique is to analyze case law from a historical perspective. This allows researchers to know how a particular law came about and how it has developed through judicial reasoning. In addition to reading relevant cases, journal articles and commentaries should be consulted on such cases. Historical background of a case also helps to know the true ground of, and the policy related to the decision in such case. In this way one may find whether a case law has become obsolete or obscure and what should be done to improve that particular law. This is important because, under the principle of *stare decis*, a decision is treated as binding notwithstanding the passage of time since it was so decided. But we have already noted that neither societies nor laws are static. These developments are not easy to follow under the doctrine of precedent particularly if a case similar to that in which a binding principle was formulated does not arise. It is only where a similar case arises that the court gets the opportunity to examine the case before it in the light of the case to which it is bound. If such opportunity does not arise it is not possible to know the developments which happened in the society and which contributed to the decision to which the court is now bound, or changes which are necessary to such binding law taking into account the developments which have taken place in the society. So reading a case in its historical perspective gives a picture of a particular case from which one may assess the importance of a specific decision in a different era. Likewise, reading a case in its political and

25 Misc. Civil Case No. 5 of 1993, High court at Dodoma (Unreported).
26 (1996) TLR 21.
27 P.N Bhagwati, 'The Role of the Judiciary in the Democratic Process,' *18 Commonwealth Law Bulletin*, (1992).

sociological contexts has the same benefit. Such approaches may shed light as to whether reform of a particular law is necessary or not. As Tewari puts it;

> 'Every development, refinement or improvement has a history. Without a historical base, seldom a new thing emerges. The study of the past gives the researcher an insight for the future work… It helps in finding out the previous law in order to understand the reason behind the existing law and the changes that are compelling for reform.'[28]

The analysis of cases and singularly from a historical perspective deserves special emphasis in Tanzania given the nature and the development of the country's legal system. Principles of law emanating from foreign jurisdictions need to be analyzed taking into account the local conditions to which they are made to apply and, where necessary, modifications should be made to suit local conditions.

3.1.2 Analysis of Statutes

The point of departure in analysing a statute is to find out the purpose or reasons behind its enactment. This helps to show whether the statute is functioning properly or not in the sense of meeting the objects for which it was enacted. Here, reference has to be made to the discussion which took place in the legislature on such statute to ascertain its object and real scope, and the intention of the legislature to pass it. This necessarily involves the examination of a statute at its bill stage to find out the initial proposals and amendments it went through at that level. The difference between the Bill and the Statute versions and the reasons for such difference are useful inputs for the improvement of a statute. Whether a statute is capable of meeting the purpose for which it was enacted such will depend on how such statute is structured and worded, and the internal dynamics of the society in which it applies. In some instances, judicial interpretations of specific words or phrases in a statute (if found) from decided cases are a source of useful ideas in understanding the very statute. If different but reliable authorities on a statute or any related legislation can be found, such may also help to improve such statute.

Historical approach is also useful in analyzing statutes. Ellinger and Keith argue that, there are two main reasons for tracing the historical background of statutory law. The first reason is that,

> '…very few pieces of legislation are original in the sense of being pure innovations of a skilled draftsman. In the majority of cases he (the draftsman) consults and adapts earlier statutes or makes use of principles laid down or proposed in decided cases.'[29]

28 H.N Tewari, *supra,* fn. 12 at 123.

29 E.P Ellinger and K.J. Keith, 'Legal Research: Techniques and Ideas,' in *Legal Research and Methodology* eds. *Supra,* fn.9 at 226.

Tanzania is a good example in this case. The adoption of the Statutes of General Application of the UK through the reception clause and the application of specific Indian statutes in the legal system of Tanzania are typical examples. Another example is the practice by the courts in Tanzania to resort to statutory provisions which are in *pari materia* with some provisions in specific statute books of Tanzania. The second reason they advance is that;

> '…laws are not made in vacuum. They are passed in order to meet some needs of society. While they may not always reflect the true wishes of the people, or even of the ruling group, they reflect…. the historical and political spirit of the day.'[30]

Certainly there is a difference reading cases in their historical context and reading statutes the same way. If a statute is read in its historical context, it is likely to reflect the spirit or political climate of its day than a legal decision which is treated the same. The reason is the process through which statutes come about, and the parliamentary debates which precede them. Again a statute may also result from consolidation or revision of earlier Acts, something which is normally accompanied by reasons.

If a statute has been replaced by the one being analyzed, the two pieces of legislation must be examined together to find out the difference between them and the reasons for such difference. In any case, it is important to determine the extent to which a statute reflects the socio-economic realities of the society in which it is intended to apply, and how it attempts to promote constitutional goals and values to which it relates. If the statute had ever been the subject of criticisms, such criticisms and any comments on them should be examined. For this reason, evidence of criticisms and discontent from different sources such as newspapers, professional publications, magazines, comments and observations of influential and powerful personages such as politicians, trade union leaders, lawyers and judges (both in and out of courts) become a source of useful ideas for the purpose of law reform.[31]

Let us conclude this part by observing that, discovering the political background of the statute which is being considered for reform is also very important. It helps to unearth important ideas which form the basis of such statute from which the determination of its present relevance can be made. The techniques for doing so include the examination of preamble, marginal notes, explanatory note to the Bill and the parliamentary debates.[32] The Preamble and Commentaries on a statute are equally important in ascertaining the object and purpose behind such statute. Where these tools are missing, resort may be made to case law immediately preceding the statute for useful inputs.

30 *Ibid*.

31 See Colin S. Gibson, '*Legal Impact Analysis: The Ideal and the Practicable*,' in *Legal Research and Methodology* eds. *Supra,* fn. 9 at 488.

32 See E.P Ellinger and K.J. Keith, *supra*, fn. 29 at 229.

3.1.3 Comparative Approach

Comparative approach to legal problems is another useful technique through which different ideas may be gathered for the purpose of law reform. If two countries or states have similar legal framework and comparable social, economic and political conditions, the earlier introduction of a new law in one country may provide a researcher in the other country with an opportunity to study its consequences. Through comparison, one may form an opinion on strongly entrenched views on a particular law and come up with different options on specific legal problems. Comparative research has practical contribution to the local national system. It has proved to be very useful in the harmonization of laws between different jurisdictions particularly for the facilitation of trade and business.

However, something needs to be noted in relation to this technique. Though comparative approach is useful, it does not mean that every topic will lend itself to such treatment or the approach will always produce good results. The problem with comparative approach may arise where the researcher fails to record or appreciate an important factor underlying the law of the country to which comparison is made. Again, solution to legal problems differs by reason of the difference of the legal systems of the countries being compared. In any case, however, comparative research helps to bring new ideas into a legal system. These ideas may suggest the need for law reform to address specific legal problems. The institution of Ombudsman which is found in several legal systems in the world is often cited as a classic example of one of the benefits of comparative approach to legal problems.

3.2 Research Techniques by the Law Research Section of the Commission

Judging from its objectives, it leaves no doubt that the type of research envisaged by the Law Research Section of the Commission is non-doctrinal (empirical) research. This means, the Section is required to focus on social and economic problems facing the society as its starting premise in legal research and see how the law can come in to provide solution to specific socio-economic problems. This approach in legal research as noted above emerged in the late 1960s. The approach, therefore, necessarily demands not only familiarity with empirical research skills and techniques to supplement doctrinal research skills and techniques which appear to be dominant in the discipline of law, but also a change of attitude in the legal profession about research approach and the way law can more meaningfully be involved in seeking solution to society problems. This approach, however, is yet to be fully appreciated by the Commission as reflected from its Annual Reports in which the operations of its research sections are reported. Most researches by the Commission originate from references that the law empowers the Attorney-General to make to the Commission.[33] By reason of these references the Commission necessarily finds itself subjected to doctrinal techniques of research as such references demand the analysis of statutory law only.

33 See the Law Reform Commission of Tanzania Act [Cap 171 R.E 2002], section 8(1).

Section 8(1) of the LRCTA imposes a duty on the Attorney-General to refer to the Commission matters which the Commission is empowered to examine, report upon and make recommendations for the reform of the law relating to such matters. Under section 9(1) of the same Act, the Commission may, subject to informing the Attorney General, undertake the examination of any matter without waiting for a reference on it by the Attorney General. Of particular interest here are the references which the Attorney general is empowered to make to the Commission. Under section 8(2), the Attorney-General may refer to the Commission matters connected generally with a specific enactment or category of enactments, implying that the research approach by the Commission has to start with the examination of a law and not the problems of society as the right approach that is expected from non-doctrinal legal research. It is not clear if references from the Attorney–General are founded on actual problems of society upon which further research by the Commission is necessary for the purpose of law reform. This view is further illustrated by the research methodology which is followed by the Law Research Section of the Commission. Through references, it is further not clear how the Commission has been examining the effects of reforms that combine changes in statutory law with changes which are necessary in institutions responsible for enforcing or administering the reformed law.

After receiving references from the Attorney-General, consultation with legal researchers, the general public, stakeholders and experts on the subject in issue follows. The purpose is to determine the existing legal position and identify shortcomings that require reform.[34] Data which is collected through this approach is then used to prepare a paper for presentation in a workshop which the Commission usually organizes. The participants to this workshop are drawn from amongst members of the public and the legal profession and are expected to contribute to the paper to enrich it. After the workshop the paper is administratively processed to a final report containing legal and non-legal recommendations of the Commission. Once the final report is approved through the Commission's own established procedures, the document is submitted to the minister responsible for legal affairs who, under section 15(1) of the LRCTA is required to cause the report to be tabled before the National Assembly and its contents to be brought to the attention of the public. Upon tabling any report before the National Assembly, the Minister may make a statement indicating what action the government proposes to take in respect of the recommendations of the Commission.[35] This being the case, therefore, the difference in approach between the Law Research and the Law Review sections of the Commission is very much blurred. This observation is more illustrated under items 4.0.1 and 4.0.2 below in which the assessment of the approach by both the LRS and the Law Research Sections of the Commission are respectively made. It is enough to state here that, though non-doctrinal legal research and its techniques are necessary for effective law reform in Tanzania, they are yet to be fully appreciated by the Law Research Section of the Commission.

34 See URT, fn. 19 at 10.

35 See the Law Reform Commission of Tanzania Act, [Cap 171 R. E. 2002], section 15(2).

4.0 Assessment of the Approaches by the Law Review and the Law Research Sections of the Commission

A general assessment of the approaches by the two research sections of the Commission is important for the purpose of improving the quality of legal research and making law reform in Tanzania more effective. Briefly, the following may be said on the approaches by the two research sections of the Commission.

4.1 Assessment of the Approach by the LRS of the Commission

Apart from the impression that one may form from the Annual Reports of the Commission that the LRS does employ doctrinal research techniques to meet its objectives, it is not vivid how this section employs the techniques discussed under 3.0.1 and 3.0.2 above for the purpose of law reform in Tanzania. It is the opinion of the author in this article that the LRS of the Commission needs to be more open in its research procedure and the techniques it employs to review the laws of Tanzania. Though the main objective of the LRS is to review all laws of Tanzania with a view to simplifying, modernizing and improving their content, the LRS needs to pay more attention on the actual problems of society which need the attention of law and the role of the state in solving these problems rather than concentrating on the improvement of the content of law. This is yet to be reflected from the works of the LRS. The law reform should be made more of an element of developmental process to help improving state administration and strengthening civil rights. As Howard puts it, "[t]he fundamental issue in reform is not the consistency of law but how the state, with all its ramifications, exercises its immense powers and in whose interest."[36] This means, therefore, that the LRS needs to pay more attention to the problems affecting the administration of a particular law and the policy underpinning such law. The doctrinal research techniques (which we have noted above) may be helpful to understand law but non-doctrinal research is unavoidable if law is to be understood in its broader social and political contexts. If this idea is accepted, it becomes difficult to rationalize the idea by the Commission to keep the research function for the purpose of law reform under two separate research Sections, namely the Law Review and the Law Research Sections.

4.2 Assessment of the Approach by the Law Research Section of the Commission

The approach in research by the Law Research Section of the Commission does not differ much from that of the LRS. The only difference in approach between the two sections is the field work which is introduced by the Law Research Section at some stage in its research process. Though the Section is a reflection of the awareness by the Commission of the importance and the need of non-doctrinal research in the development of law and the legal system in general, the Section has remained largely influenced by doctrinal research techniques in its projects. In most if not all the Annual Reports of the Commission, one

36 Howard Dick, 'Why Law Reform Fails: Indonesia's Anti-corruption Reforms' in *Law Reform in Developing and Transnational States,* Tim Lindsey (USA/ Canada: Routledge, 2007) at 53.

finds that researches by the Law Research Section are mainly on determining the existing legal position of a particular issue and identifying shortcomings that require reform. In this case, therefore, researches by this section also arise from matters that are often presented as purely legal problems with no systematic connection with the larger problems in the society. For example, in the 2011/2012 Annual Report of the Commission, it is reported that the Commission through its Law Research Section continued with the review of pastoral sector laws. The aim was to simplify the laws related to this sector and provide a readily accessible and user friendly tool for ensuring easy reference to the laws. The same treatment was given to the Agricultural sector laws. If it is accepted that problems in the society are the principal concern in empirical research, it means that it is not the pastoral or the agricultural sector laws which would be the starting point in research by the Law Research Section but the problems associated with the pastoral sector or the agricultural sector, with the role of the law in dealing with them in general as well as in particular cases following on.

The law is only effective in terms of solving or ameliorating the problem when the problem is already identified and fully studied through appropriate techniques of legal research. When the starting point in law reform based research is the law with the problem to be solved through such law remaining under-researched and therefore unclear, the reformed law cannot be effective. This can also be clarified from the same example. Only four years after the said pastoral and agricultural laws of Tanzania were reviewed by the Commission, conflict between pastoralists and peasants in many parts of Tanzania has increased and probably intensified with no significant contribution (if any) of the just reviewed laws to ameliorate or even bring the conflict to an end. This means, therefore, that the Law Research Section needs to pay more attention to the variety of contexts in which law is used in society if the objectives behind which a particular law was passed are to be met. This can only be achieved through non-doctrinal legal research of which methodology is different from that in doctrinal research. It is not the purpose of this Article to delve into details about non-doctrinal research methodology and techniques. It is enough to draw our attention to what Colin observes of the Indian situation. He says:

> 'The Law Commission…should not act on impressionistic ideas but on empirical research data. Likewise, legislations may misfire in actual working, the executive or judicial infrastructure may not be operating on the wavelength of the authors of statutes and defects and deformities and lacunae and gaps may be noticed in the working of socio-economic laws. Only by post-audit can these be detected and researchers must focus on law reform where socio-economic goals are not attained as intended. All these add up to new vistas for socio-legal research on an inter-disciplinary basis.'[37]

37 Colin S. Gibson, *supra*, fn. 31 at 498.

Empirical research, therefore, helps to bring into the research process reference not only to the legal means of addressing problems but also non-legal means which may be helpful and which can be combined with or be used to supplement the legal means adopted for the purpose of realizing effective law reform. It provides the best avenue for taking the study of law beyond the formal substantive and procedural law and provides an opportunity to capture other aspects relating to the legal system which may have serious impact not only on a law, but also on community life. What one may wish to observe is that, although the Commission recognizes the importance of non-doctrinal legal research in its task of law reform, the methodologies and techniques of non-doctrinal legal research are not reflected much from the law reform research projects completed by the Commission. It is the emphasis in this Article that always the right approach by the Commission should be to understand the conditions of the society that call for the law reform first and then proceed to see how the intended law reform can effectively address the needs of such society. This can only be achieved through good legal research. According to Agrawala, a "…. good legal research has to be multidimensional and it is not perfect till all the aspects (historical, social, and political) of the issue under enquiry are explored."[38] This means, it is only from empirical legal research that this can be achieved and not from references that the Attorney-General makes to the Commission for the purpose of law reform which may be said to be largely influenced by impressionistic ideas.

5.0 Improvement of Legal Research for Effective Law Reform in Tanzania

We have already seen the importance of legal research and the way the Commission is organized in research for the purpose of law reform. But legal research by the Commission can only be meaningful if it is capable of leading to effective law reform. Hereunder are some of the factors affecting the Commission and, hence, the realization of effective law reform in Tanzania.

5.1 Government Support to Legal Research and Law Reform in Tanzania

For the Commission to be efficient in its functions, it needs government support. Support may be in different forms, but financial support is very important not only for the purpose of discharging its statutory core function, but also for the purpose of training its staff to acquire research skills necessary for effective law reform in Tanzania.

Equally important is the preparedness of the government to act promptly on the reports submitted to it by the Commission. At times it takes too long for the government to respond on the Commission's report, but this is partly a result of some loopholes created by the LRCTA. Section 14 of the LRCTA requires the Commission to prepare a report incorporating recommendations on its definite conclusions and submit the same to the Minister responsible for legal affairs. After receiving the report and within a period of twelve months, the Minister is obliged under section 15(1) to have the report tabled before

38 Agrawala, Rajkumari , 'Indian Legal Research: An Evolutionary and Perspective Analysis,' in *Legal Research and Methodology*, *Supra,* fn. 9 at 145.

the National Assembly and its contents brought to the attention of the public. Paragraph (2) of this section provides that, the Minister, upon tabling the report to the National Assembly within the said period or on a subsequent occasion, may make a statement in the National Assembly indicating the action that the government proposes to take in respect of any of the recommendations that the Commission has made in the report.

However, the provision does not make it mandatory for the Minister to make such statement. The situation is even made worse where the Minister is given discretion to make such statement on a subsequent occasion to determine. The requirement to make the statement should be mandatory and the minister should be duty bound to make such statement to the National Assembly to which his or her political accountability lies. Failure by the law to make it mandatory for the Minister to make such statement partly explains why the government may neglect some recommendations by the Commission or give them late response. The law must protect the advice or recommendations of the Commission from being easily or largely ignored by the government.

There is a need to set a framework through which government departments and the Commission can work together for the purpose of law reform. In the UK, for example, this is achieved through the protocol agreed between the Lord Chancellor (on behalf of the government) and the Law Commission for England and Wales on how ministers of the Crown, government departments and the Law Commission should work together on law reform projects. The protocol sets out roles and responsibilities of the government departments and the Law Commission in projects set out in a Commission programme of law reform, and projects referred to the Commission by ministers. More important is that, after the project the Minister has to give full response to the Commission setting out which recommendations he or she accepts, rejects or intends to implement in modified form. However, if the department is minded either to reject or substantially modify any significant recommendations, it is required to give the Commission the opportunity to discuss and comment on its reasons before finalizing the decision. Actually, the Law Commission Act 2009 of England which amends the Law Commission Act, 1965 provides a statutory basis of this protocol. It also introduces a duty on the Lord Chancellor to report annually to Parliament on the extent to which Law Commission reports have been implemented by government. Much can be borrowed from this protocol to improve the relationship between the Commission and the government in Tanzania about law reform by the former.

5.2 The Independence of the Commission in Research and Law Reform

One unique feature of the Commission is its potential to bring changes in different fields of social life in Tanzania. We have already seen the strategic position it occupies in case changes are aspired in the laws of Tanzania. However, it is important to note that if the Commission is to function efficiently, it needs both institutional and intellectual independence in carrying out its statutory mandate.

Institutional independence refers to the manner in which the Commission is formed and the way it operates, while intellectual independence refers to the willingness of each member of the Commission "to make findings and offer advice and recommendations to government without fear or favour…"[39] It means, therefore, that each member of the Commission should be free from any form of influence which may make him or her unable to come to objective and impartial decisions while performing the functions of the Commission**.** It includes freedom in research and dissemination of research findings for the purpose of law reform. To safeguard this independence, the law establishing the agency should ensure that the appointment of Commissioners is non-political and that the operational relationship between the agency and other stake holders in the process of law reform does not place the agency at a position where it will compromise its statutory independence.

Though the independence of the Commission is provided for under section 12 of the LRCTA, it is unclear from this law as to how this independence is protected. For example, the appointment of Commissioners is still political and the law is also not clear on the protection of the advice or recommendations of the Commission from being easily or largely ignored by the government. Sayers observes:

> 'If law reform is to be successful in modern society, it normally has far better prospects of genuine widespread acceptance if it is produced independently of government and others.'[40]

Independence is important because in reforming a law, the Commission will sometimes have to deal with topics that touch particular values. The topics may also involve important changes in the society. If the independence of the law reform agency is not adequately protected, it becomes difficult for the agency to objectively carry out its functions. The agency must be free not only of political partisanship but also of unnecessary involvement of the other institutions in the legal system in the discharge of its statutory function of law reform. This, however, is yet to be fully achieved in Tanzania. Under section 8(3) (b) the Attorney–General has the power to give directions to the Commission as to the order in which it shall deal with references made by him or her. Actually, under section 8(3) (a) the Attorney-General has the power, not only to prepare terms of reference, but also to modify the terms of any reference for matters referred to the Commission by him or her. Under section 14(2) (b), he can also direct the Commission to submit to the Minister an interim report on its work under the reference. It is not clear why the Attorney-General should prepare terms of reference for the Commission. Through this power, it is possible for the Attorney-General to interfere with the independence of the Commission by preparing terms which are designed to produce a particular outcome.

39 Weisbrot, Professor David, 'The Future of Institutional Law Reform', in *The Promise of Law Reform,* Leichardt, (NSW Australia: Federation Press, 2005) 38.

40 M. Sayers, 'Small States and Law Reform,' 34 *Commonwealth Law Bulletin*, (2008), 127.

5.3 Collaboration between the Commission and Other Institutions in Legal Research and Publication

Though the Commission has continued to build its networks with the general public through various means, it needs to create formal links with other research institutions within and outside the country for the purpose of sharing experience in modern approaches and techniques of legal research. Formal links will facilitate systematic sharing of information and publication, and some expertise in specific fields. In addition to collaboration with research institutions, the Commission also needs to work closely with all higher learning institutions offering legal education in Tanzania particularly in research and publications. A lot of publications by these institutions which would be useful in law reform have been left as mere academic documents in the library shelves of these institutions. At the moment, the Commission does not seem to have any effective method of co-operating with legal or other education institutions for the purpose of law reform, and singularly for the purpose of legal research.

The Commission is empowered under section 4(3) (b) to publish or facilitate the publication of materials relating to law reform in other countries. This has the advantage of raising awareness in Tanzania about development in the legal system of other countries for the improvement of the legal system of Tanzania. However, it is not clear why publication of materials originating from Tanzania relating to law reform is not captured in this provision. Though the Commission is empowered under section 4(3)(c) to convene or facilitate or promote the convention of seminars, workshops, public lectures and other meetings of the public for the purpose of discussing or disseminating information on matters relating to law reform in Tanzania, publication of materials relating to law reform in Tanzania is also very important. It is from such publication that interested members of the public can make meaningful comparison between materials published from other countries and those published in Tanzania for further improvement of a law in Tanzania.

5.4 The Commission's Library

The Commission is yet to have a well equipped library where research information and other materials relating to law reform may be stored and accessed. As the only institution entrusted with the function of law reform in Tanzania, the Commission should have the best law library in the country with not only all the laws of Tanzania, but also the information on researches about different laws in Tanzania and in other countries.

Research reports originating from the Commission projects need to be exhaustive and informative enough. One would be interested to know from any research project completed by the Commission the issues which were involved and the methodology which was followed to deal with them and the specific goal or goals behind such project. All these, though important, are not reflected in any of the completed research projects of the Commission.

5.5 Constitutional Base of the Law Reform in Tanzania

National constitutions accommodate critical issues touching on every citizen of the state concerned and, for this reason; they are fundamental guides for establishing agreed legal principles in any legal system. It is important for any research based on law reform to proceed in the light of the State constitution and end up seeing how the ultimate reform helps to advance the relevant provisions of the State constitution under which it falls. It has to be noted that every law in Tanzania is supposed to have its justification rooted in the State Constitution which is the mother law of the country. In this case, it follows that no law reform agency can claim to have achieved much in its function of law reform if the reform process sidelined the State Constitution.

What one may wish to note from researches on law reform completed by the Commission is that, researches have been carried out without clear consideration of the relationship between the desired reform and the prescriptions of the State Constitution. It is not clearly appreciated how the Constitution can affect development from the general rule of law issues to the more specific statutory provisions relating to aspects touching on the objectives of the Constitution. This can be illustrated. Take an example of the review of business laws in Tanzania (such as the Fair Competition Act,[41] done in 2005/2006) which in effect was an attempt to promote free market economy within the country. Take also the review of legislation relating to Industrial Property and the Transfer of Technology in Tanzania which was done during the same period. How were the reviews done to accommodate the Preamble and Article 9 of the Constitution of the United Republic of Tanzania, 1977 let alone the requirements of section 13(1) of the LRCTA? Article 9 provides that, the objects of this Constitution are to be attained through the pursuit of the policy of Socialism and Self-reliance- i.e. the application of socialist principles while taking into account the conditions prevailing in the United Republic. In this case, State authority and all its agencies are, *inter alia,* obliged under Article 9 to direct their policies and programmes towards ensuring the following: That government activities are conducted in such a way as to ensure that the national wealth and heritage are harnessed, preserved and applied for the common good and also to prevent the exploitation of one person by another; that corruption is eradicated; that the use of national wealth places emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease; that economic activities are not conducted in a manner that may result in the concentration of wealth or the major means of production in the hands of a few individuals and that the country is governed according to the principles of democracy and socialism.

The said section 13(1) provides that, "…the Commission shall take into account the need for having in Tanzania laws which are in accord with, and which facilitate the implementation of the policy of Ujamaa and self-reliance". Certainly, both provisions are critical in the effort to bring about socio-economic changes in Tanzania through different means, law reform inclusive.

41 Act No. 8 of 2003.

But how can a law which is structured to satisfy the free market economy (the policy which is actually in operation in Tanzania) serve, at the same time, the constitutional object of developing the country through the pursuit of the policy of socialism and self-reliance proclaimed under Article 9? Can this law serve to satisfy both ends? Western capitalist world accuses socialist countries of their poor laws and governance structures and claims that such laws and structures are the reasons for their ailing economies. Advocates of free market economy find state intervention to business a serious obstacle to development and social prosperity. Richard Stroup who is quoted by Dorn gives a summary of how the free market system is understood by its advocates. He says:

> '…a free market system, in which individuals can capture the rewards of productive activities but bear the costs of unproductive activities, will spur economic growth as entrepreneurs search for new opportunities to engage in mutually beneficial exchange. In the process, lower income households will benefit as well as higher-income households. Thus…a system of limited government and open markets… can be viewed as both free and fair. Furthermore, experience shows that an economic system characterized by private property rights, freedom of contract, and widespread reliance on voluntary exchange is more likely to meet these criteria of fairness than a politically directed welfare state.'[42]

As such, it is not clear how the law reform influenced by western capitalist world for the purpose of satisfying the free market economy (like the reformed business laws of Tanzania cited above) can also help to meet the object of the Constitution under Article 9 to build a nation of equal and free individuals enjoying freedom, justice, fraternity and concord through the pursuit of the policy of Socialism and Self-Reliance which emphasizes the application of socialist principles. It is difficult in circumstances such as this to see how the law reform can be effective even if it springs from research in which relevant techniques of legal research were employed. Where this fact falls short of being appreciated, the end result is to have reformed laws which are nothing but decorated statute books with minimal influence on social outcomes.

6.0 Conclusion

This article has attempted to explore different types and techniques of legal research and their potential for effective law reform in Tanzania. Generally it has been observed that though the types and techniques of legal research may differ depending on the object behind the desired law reform, law reform based research can only lead to effective law reform if, apart from encompassing the right research techniques, it seriously examines the desired reform in the light of the State constitution. This is important for any country which subscribes to the principle of constitutional supremacy. It is difficult to see how law reform can be effective if it is made in disregard of the fundamental state

42 James A. Dorn, 'Government, The Economy, and The Constitution', 7 *CATO Journal,* 2 (1987), 298.

policy enshrined in the State Constitution which binds the state authority and all its agencies in formulating and implementing their specific policies and programmes. A mismatch between formal laws, the State constitution and social expectations is a recipe for confusion, stagnation and greater uncertainty of law reform outcomes. This has been clarified by drawing a few examples from specific business laws of Tanzania. Actually, many law reforms do fail because of failure to appreciate the inevitable relationship between the reformed law and the State Constitution from which the reformed law derives its strength. It is in this perspective that the Commission is advised to be more transparent in the types and techniques it employs in legal research for the purpose of law reform, and to ensure that any law reform based research sufficiently addresses the state constitution and there is no mismatch between the reformed law and the state policy enshrined in the state constitution. Where necessary, it may be wise to start with the amendment of the relevant constitutional provision before embarking on the reform of specific law which relate to that provision.

There is a need for the government of the United Republic of Tanzania to ensure that the Commission is adequately resourced for research purposes and that its independence is adequately protected by law especially in the way it interacts with the other institutions in the legal system of Tanzania for the purpose of law reform.