

# The Practice of Independence for Law Reform Agencies

Gertrude Lynn Hiwa, SC  
*Law Commissioner  
(Malawi)*

# 1.0 Introduction

- Law reform contributes towards governance.
- One of the main features of democratic government is the system of checks and balances which ensures that political power is disposed and decentralized.
- Change is a constant, law reform is necessary to ensure that the law is up to date and addresses changing values and concerns of society.

## Cont'd

- Law reform is undertaken either by specially established agencies or a department of government.
- Independence of a law reform agency is important.

## 2.0 Independence

- Definition:

“state or condition of being free from dependence, subjection or control”.

“Commission’s intellectual independence, i.e. the willingness to make findings and offer non-partisan advice and recommendations to government without fear or favour” - KLRC.

# *Value of independence*

- makes a LRA different from a ministerial office or a government department.
- demonstrates that views of LRAs are objective and impartial.
- ability to provide specialist advice in planning and formulation of laws.
- no preconceptions and no inbuilt bias.

## Cont'd

- enhances the credibility of its work with all stakeholders, including politicians from all parties.
- makes LRAs more vibrant, innovative and authoritative.
- able to make findings, offer advice and recommendations to governments without fear or favour.

# *Can public institutions truly be independent?*

- LRAs are government agencies – advisory in nature and function and depend on government resources.
- Other matters which mar the independence of LRAs:
  - (a) arrangements pertaining to finances;
  - (b) appointment and recruitment of Commissioners and staff;
  - (c) determination of programmes; and
  - (d) reporting and accountability issues.

# *So is independence of LRAs just a matter of fiction?*

“LRAs will only be effective in enhancing deliberate democracy, if they and are seen to be separate from Government and if their advice is insulated from political process” - Neil Rees.



## Cont'd

To ensure independence of LRAs:

- (a) appointment of Commissioners should be non-political and free from conflict of interest;
- (b) the terms of reference for law reform projects should not be designed to produce any particular outcome; and
- (c) absence of government or other external pressure to produce any particular recommendations;

## *Cont'd*

(d) establishment of an LRA by statute in order to achieve separate existence of the LRA from government.

- Independence can be perceived as fictitious on the basis of some arrangements between the LRA and government.

## *Functional Independence vs Institutional Independence*

- Most LRAs enjoy functional independence other than institutional independence.
- FI:
  - Intellectual autonomy;
  - Choice of programmes;
  - Objectivity of outcomes.
- II:
  - Illusory as heavy reliance on government;
  - Advisory in nature;
  - Appointment and recruitment of staff.

# Why should LRAs be independent?

- To bolster and maintain the confidence of its stakeholders and the public at large, the work of an LRA is or ought to be:
  - objective;
  - non partisan;
  - professional; and
  - free from any influence or interference.

# Conclusion

- That independence of an LRA is important is beyond debate.
- Independence must therefore be real and demonstrable.
- Independence must be entrenched, nurtured and guarded jealously.
- Independence should be balanced against the boundaries of accountability and to operate within the boundaries defined by their constituting legislation.



**THANK YOU FOR YOUR  
ATTENTION**