

LAW REFORM COMMISSION NEWSLETTER



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ABOUT THE LAW REFORM COMMISSION

The Law Reform Commission of Mauritius is an independent statutory body setup by Parliament, under Act No. 26 of 2005, to review in a systematic way the law of Mauritius, to make proposals for its reform and development, and to ensure the law is understandable and accessible.

Its mission is to -

- keep under review in a systematic way the law of Mauritius;
- make recommendations for the reform and development of the law of Mauritius;
- advise the Attorney General on ways in which the law of Mauritius can be made as understandable and accessible as is practicable.

When making its recommendations, the Commission attaches, where applicable and as far as practicable, a draft Bill to the recommendations.

The Commission prepares and submits to the Attorney General, at the beginning of each calendar year, a program for the review of specific aspects of the law of Mauritius with a view to their reform or development.

The Commission considers our laws should reflect best international practices, meet the exigencies of globalization, and be adapted to the changing needs of the people. The Commission is thus committed to comparative legal research in order to evaluate the merits and demerits of our law in the light of the experience of other jurisdictions. The Commission also holds the view that, where possible, any proposed solution must

be tested against empirical evidence. Consultations with all the relevant stakeholders are regarded as crucial for the performance of the Commission's functions and have invariably been resorted to in order to develop greater awareness of legal issues and contribute to capacity building of those called upon to apply the law.

THE METAMORPHOSIS OF LAW

Laws passed by Parliament, contrarily to the laws of physics, are not eternal and universal. While Newtonian gravitational law will be the same in UK, in Russia, in Pakistan or in Mauritius and whether we are in the 21st century, in the Middle Ages or in the Neolithic, laws regarding homicide, rape, or marriage may change over time and will vary from country to country.

Mauritius, over the past decades, has undergone many economic and cultural changes. The Mauritian citizen of today does not have the same values as those of his grandparents. Globalization has taken place meanwhile, our country has ratified many treaties, and several issues have arisen which were unknown a few years ago, like ecology and global warming.

During the past years, the Commission has strived to address the concerns of people and organizations about the law, legal process and legal institutions.

This newsletter aspires to deliver to those in the legal profession as well to the general public some of the major achievements of the Commission over the past years.

“Even when laws have been written down, they ought not always to remain unaltered.”

- Aristotle

VISION

The Commission's vision is that of just, fair and efficient laws. Laws must reflect and advance the Nation's social and economic interests, in the light of the exigencies of globalization.

VALUES

In discharging its mandate, the Commission puts a particular emphasis on the following values:
Independence: The complete independence afforded to the Commission in reviewing the law and in formulating proposals for necessary reform is rooted in constitutionalism and is the most important factor in ensuring that it fully meets its obligations under its mandate.

Impartiality: The Commission recognises the crucial importance of carrying out its mandate in an impartial and objective way and fully adheres to these principles in all aspects of its work.

High quality research: Research is at the core of the Commission's work. The Commission recognizes the paramount need to have recourse to high quality and committed researchers (inter alia through collaborative arrangements with other law reform agencies), as well as undertaking extensive public consultation. Access to high quality information and technology infrastructure and research resources is essential to the Commission's ability to provide high quality advice.

Effective relationships and communication: The Commission strives to make considerable use of external legal and other experts, which may play an important role in assisting it in examining particular areas of the law. It has ongoing relationships with the Office of the Attorney-General, the Office of Director of Public Prosecutions, other Government Departments and Non Governmental Departments having an interest in the law reform enterprise. The Commission regards the development of effective relationships in areas within its mandate as being of key importance to its work. The Commission is committed to improving the quality and nature of the information and facilities provided on its website.

Performance culture: The Commission firmly believes that a performance culture (accompanied by clear responsibilities and accountabilities), which sets standards of excellence and which constantly seeks to improve the way things are done, should apply to all activities undertaken in pursuance of its mandate.

Good governance: The Commission adheres to best practices in corporate governance.

Building and maintaining our people capability: The Commission recognizes the essential contribution of all staff and other human resources, both administrative

support and legal research cadre, to effective performance. It fully accepts the need to involve all staff on a partnership basis in ongoing activities and to have effective communication arrangements throughout the organization. No effort is spared for continuous training of staff and other human resources.

STRATEGIC DIRECTION

“Commission's studies will explore why principles of law, legal procedures and legal institutions may have become inadequate or outmoded.”

The Commission shall strive to address the concerns of people and organizations about the law, legal process and legal institutions by focusing its research activities and recommendations on the following strategic objectives:

Creativity: The Commission will identify new concepts of and new approaches to law. Commission's studies will explore why principles of law, legal procedures and legal institutions may have become inadequate or outmoded. They will focus on uncovering, elaborating and recommending creative solutions such as the identification and promotion of best practices.

Balance: The Commission will address questions of law through the lens of justice. It will research equal access to and treatment by the law and legal system to see where they do not produce in practice the equality that they proclaim in principle. In seeking to understand the causes of injustice, the Commission will consider the role of disparities in information, in resources and in power. It will advance proposals intended to ensure that the law serves the interests of all Mauritians and strives to meet their aspirations for achieving justice.

Responsiveness: The Commission will examine how to enhance the engagement of Mauritians with the law and public institutions. Studies will investigate measures to make legal institutions more open and accessible, to reduce the cost of justice and improve the responsiveness of administrative agencies and courts. A focus on where the law succeeds in contributing to individual and social well-being will indicate where a lack of responsiveness undermines social trust and citizen involvement. The Commission will make recommendations about governance intended to renew the faith of Mauritians in the law and public institutions.



“The Commission recognises the crucial importance of carrying out its mandate in an impartial and objective way and fully adheres to these principles in all aspects of its work”

KEY RESULTS

The Commission's priorities and strategic objectives

reflect our operating environment and our commitment to work with our stakeholders and other sector agencies to achieve, in particular:

1. More accessible and user-friendly legislation that enhances public awareness, confidence and understanding of the law;
2. Higher quality legislation that facilitates underlying policy objectives, that meets society's contemporary needs and reflects its diverse values;
3. Constitutionally appropriate and consistent law that acknowledges the international human rights instruments and other treaties to which Mauritius is a party; and
4. The development of a legal environment that reflects the increasingly global nature of law and co-operation between legal systems.

PERFORMANCE INDICATORS

At least three reports/papers par semester on the following aspects of the law reviewed: Constitution, Human Rights, Court System & Legal Services, and other Public Law issues; Criminal Justice System and Criminal Law; Civil Justice System and Civil Law; Business Law, Tax Law, and other Law and Development Issues.

LRC CURRENT AND FUTURE PROJECT

CURRENT PROJECTS:

In accordance with its strategic objectives and as highlighted in the **2011 Annual Program of Review, Reform and Development of the Law**, the Commission is currently focusing on the following aspects of the law:

- (1) Constitution, Public Law Framework (incl. laws applicable in Rodrigues) & Mechanisms for Securing Human Rights (including Compliance of laws with provisions in human rights treaties);
- (2) Court Structure and Functioning, Alternative Dispute Resolution Mechanisms, Legal Education and Provision of Legal Services (including Legal Assistance Scheme);
- (3) Criminal Justice System and Criminal Law: Criminal Investigation Framework; Criminal Procedural and Evidential rules; Penal Offences under Criminal Code and other Legislation (including Road Traffic Act);
- (4) Civil Justice System and Civil Law: Code de Procédure Civile and other civil procedural rules (including Public Interest Litigation); Code Civil Mauricien; Conformity of laws with Hague Conventions on Private International Law;
- (5) Business Law (including the Code de Commerce and Legal Framework for Business and Impact of Laws on

Ease of Doing Business);

(6) Other Contemporary Legal Issues.

It has so far submitted its views to Hon. Attorney-General on:

- (a) The Court Ushers (Amendment) Bill, which relates to the liberalization of the profession of court usher;
- (b) Legal Aid/Legal Assistance Reform: The Commission has considered that the current legal aid system is certainly in need of reform [legal aid should include legal advice (and should not be restricted to legal representation) and a Legal Aid Board or Commission should be established] and it has drawn the attention of the Hon. Attorney-General to the key policy issues that have to be addressed in respect of the organization of the legal aid/assistance system;
- (c) The establishment of a Family Court [which would have exclusive original civil and criminal jurisdiction in respect of family affairs] and the Conduct of Family Proceedings [resort to Conciliation for the settlement of family disputes, Counselling Services to be available to parties in proceedings before the Family Court and Family Court to be empowered to secure the services of a medical expert or such other person (including a person professionally engaged in promoting the welfare of the family) for the determination of disputes];
- (d) Whether the the denial of the right of appeal against an order declaring a person as a vexatious litigant and directing him not to initiate/continue proceedings without leave – as provided in the new section 197F of the Courts Act by the Courts (Amendment) Bill No. I of 2011 - conform with the Constitution and its human rights provisions and reflect best international practices;
- (e) The award of costs in criminal cases against the prosecution;
- (f) The commission of attorney (which as a matter of practice is inserted by banks and other financial institutions in loan agreements/notarial deeds): its constitutionality (whether such clause is in breach of section 8 of the Constitution) and whether the law needs to be reformed to put an end to this practice.

The Commission is in the process of finalizing a Background Paper on the "Reform of the Criminal Law" and a Report on "Road Traffic and the Penalty Point System".

The Commission hopes that by the end of the year, it will have finalized Issue Papers on aspects of Code Civil Mauricien (with draft legislation in English and French languages), the Report on Reform of Code de Procédure Civile, the Report on Reform of Code de Commerce (and the Framework for ease of doing business), and a Paper on an aspect of Public Law reviewed.

OVERVIEW OF LRC WORK (2006–2010)

(A) Constitution, Human Rights and Public Law Issues:

- (1) Issue Paper on “Constitutional Protection of Human Rights” [October 2010];
- (2) Discussion Paper on “Judicial Review” [November 2009];
- (3) Report (together with draft Local Government Bill) on “Local Government Reform” [June 2009];
- (4) Issue Paper on “The Office of Director of Public Prosecutions [DPP] and its Operational Autonomy” [March 2009];
- (5) Working Paper on “Reform of Local Government Legislative Framework” [December 2008];
- (6) Issue Paper on “Equality/Anti-Discrimination Legislative Framework (Re Equal Opportunities Bill No. XXXVI of 2008)” [November 2008];
- (7) Report (together with draft Bill) on “Access to Justice and Limitations of Actions against Public Officers and the State” [May 2008];
- (8) Discussion Paper on “Access to Justice and Limitations of Actions against Public Officers and the State” [June 2007].

(B) Court System, ADR and Legal Services:

- (1) Report on “Mediation and Conciliation in Commercial Matters” [November 2010];
- (2) Report (together with draft Bill) on “Opening Mauritius to International Law Firms and Formation of Law Firms/Corporations” [May 2007].

(C) Criminal Justice System and Criminal Law:

- (1) Issue Paper on “Criminal Investigation: Reform of Police Procedures and Practices” [July 2010];
- (2) Issue Paper on “Evidence of Reluctant/Intimidated Witness in criminal Proceedings” Proposal for Reform of the Law” [May 2010];
- (3) Report on “Bail and other Related Issues [together with draft Bail (Amendment) Bill]” [August 2009];
- (4) Discussion Paper on “Forensic Use of DNA” [April 2009];
- (5) Report (together with draft Bill) on “Disclosure in Criminal Proceedings” [December 2008];
- (6) Review Paper on “The Criminal Justice System and The Rights of an Accused Person” [September 2008];
- (7) Discussion Paper on “Law and Practice relating to

Criminal Investigation, Arrest and Bail” [April 2008];

- (8) Issue Paper on “Disclosure in Criminal Proceedings” [December 2007];
- (9) Issue Paper “Commentary on some of the Human Rights dimensions of the Sexual Offences Bill No. VI of 2007” [June 2007].

(D) Civil Justice System & Civil Law:

- (1) Issue Paper “Law as to Publicity for Appointment and Revocation of Agent and Proxy” [November 2010];
- (2) Report on “Prevention of Vexatious Litigation” [October 2010];
- (3) Background Paper on “Reform of Codes” [October 2010];
- (4) Report (together with draft Bill) about “Law on Divorce” [December 2008];
- (5) Report (together with draft Bill) on “Relationship of Children with Grand Parents and Other persons under the Code Civil Mauricien” [June 2007].

(E) Business Law:

- (1) Report on “Review of Aspects of Consumer Protection Law and Proposals for Reform” [October 2010].

(F) Other Contemporary Legal Issues:

- (1) Issue Paper on “Social Partnership Framework” [November 2009];
- (2) Report (together with draft legislation) on “Law relating to NGOs” [November 2008].

REFORM OF THE LEGAL PROFESSION

In the Report on “Opening Mauritius to International Law Firms and Formation of Law Firms/Corporations” [May 2007], the Commission recommended that Law practitioners, who so wish, should be allowed to provide legal services within the legal framework of a corporate entity, be it as an employee or an associate or partner/director/shareholder of the corporate entity [which is to be called law firm/corporation or legal practice corporation]. The Commission also recommended that foreign law firms and foreign lawyers should be permitted to team up with local law firms or law practitioners with a view to establishing a Joint Law Venture.

The Commission was of the opinion that our country and our law professionals must be fully equipped to meet the challenges of globalization. The legal education currently provided to our lawyers must, as a matter of urgency, be revisited with a view to imparting to them the knowledge, skills and attitude required of the new breed of transnational lawyers/global lawyers. Seminars on law

practice management and on the globalization of legal services should be organized for local law practitioners. The Code of Ethics of the branches of the legal profession should be revisited

PUBLIC LAW REFORM

“A Constitution should be short and obscure.”

- Napoleon Bonaparte

(a) Constitutional Protection of Human Rights

The Commission has reflected on the manner in which fundamental rights and freedoms can be further entrenched in the Constitution. In its Issue Paper on “Constitutional Protection of Human Rights” [October 2010], the Commission has expressed the view that there is a need to better safeguard existing rights, to afford constitutional protection to economic, social and cultural rights, and also to guarantee the rights of vulnerable persons.

Strengthening Recognized Rights:

The protection afforded to the Right to Equality by sections 3 and 16 of the Constitution are insufficient. Sections 3 and 16 are self-contained provisions; they prohibit discrimination on specific grounds and are not in line with best international practices in the field. Our international obligation under articles 2 and 26 CCPR [International Covenant on Civil and Political Rights] requires of us that we enact open-ended provisions [whereby discrimination is prohibited on the basis of an indeterminate number of grounds, the grounds mentioned being merely instances of discrimination].

Section 9 of the Constitution affords protection merely to privacy of home and premises. Its ambit should be expanded so as to include respect for private and family life.

The system of freedom of expression, as currently guaranteed by section 12, should be strengthened by also recognizing the right of access to information.

Protection of the Law (section 10) should be better secured by protecting rights to just administrative action and by prescribing as a constitutional norm that slavery (and other related practices) is a crime against humanity.

Affording Constitutional Protection to Economic, Social and Cultural Rights:

In the light of the South African and Indian constitutional experience, and bearing in mind the provisions in the Draft 2006 Constitution of Trinidad & Tobago, it has been considered that the following socio-economic rights can be afforded constitutional protection:

- (1) Right to education;
- (2) Right to language and culture;

- (3) Right to housing;
- (4) Right to basic amenities;
- (5) Right to a healthy and sustainable environment; and
- (6) Right to freedom of trade, occupation and profession.

Guaranteeing the Rights of Vulnerable Persons:

The Commission has considered that the rights of the following vulnerable persons should be afforded constitutional protection:

- (1) The Child;
- (2) The Elderly Person;
- (3) The Person with Disabilities; and
- (4) The Witness in Court Proceedings.

And that Consideration can also be given as to whether the rights of the consumer should be guaranteed in the Constitution.

(b) Equality / Anti-Discrimination Legislative Framework

In the Issue Paper on “Equality/Anti-Discrimination Legislative Framework (Re Equal Opportunities Bill No. XXXVI of 2008)” [November 2008], the Commission reflected on the Structural Dimension of the Equality/Anti-Discrimination provision, the need for Positive Action Measures to foster Equality and for a Public Sector Equality Duty.

(c) Actions against the State and Public Officers

In the Report on “Access to Justice and Limitations of Actions against Public Officers and the State” [May 2008], the Commission has recommended, after reviewing evolution of the law in the Commonwealth and after analysing the constitutional principles at stake, that:

No special protection should be given to public officers or public authorities, by way of a shorter limitation period for actions brought against them as such provisions would be inimical to our democratic state constitutionally based on the rule of law;

“The Constitution is the guide which I never will abandon” - George Washington



Former U.S. First Lady Eleanor Roosevelt, with a post of the United Nations Universal Declaration of Human Rights, 1949.

Section 4 of the public officers Protection Act should be repealed so that actions fall to be governed within the time limit prescribed by the droit commun of the Civil Code;

There is no need for a provision requiring written notice of suit before commencing litigation, nor is there any justification for derogating from the principle of “réparation intégrale du préjudice”.

(d) Judicial Review

In the Discussion Paper on “Judicial Review” [November 2009], the Commission examined the law on judicial review and assessed its effectiveness as a means for controlling governmental action. It considered there is a need for procedural and substantive reform in the area of judicial review of administrative decisions.

(e) Local Government Framework

In the Report on “Local Government Reform” [June 2009], the Commission was of the view that Inclusiveness and Accountability of Local Democratic Institutions are the Two Pillars for Local Community Empowerment and it recommended a new framework for an effective, efficient, inclusive and accountable local government, which would empower local communities so that they can face the challenges of globalization.

(f) Operational Autonomy of Office of Director of Public Prosecutions as a Constitutional Imperative

In the Issue Paper on “The Office of Director of Public Prosecutions [DPP] and its Operational Autonomy” [March 2009], the Commission examined the background to the Office of Director of Public Prosecutions and expressed the view that its operational autonomy is a constitutional requirement, which must be given effect to.

REFORM OF CRIMINAL JUSTICE SYSTEM

(A) CRIMINAL INVESTIGATION

In the Discussion Paper on “Law and Practice relating to Criminal Investigation, Arrest and Bail” [April 2008], the Commission reviewed the law and practice relating to criminal investigation, arrest and bail, and highlighted some of the issues, which stakeholders and interested parties, may wish to discuss: Legal and Ethical Background to Criminal Investigation; Police Powers of Arrest – Cases and Conditions for Permissible Deprivation of Liberty; Rights of Arrested or Detained Persons – Treatment of Detainees; Right to Liberty and Release on Bail; Prohibition against Departure of a Defendant or Detainee as a Permissible Restriction on the Right to Freedom of Movement; Search and Seizure in the Course of an Investigation as Permissible Restrictions on the Right to Privacy and Right to Enjoyment of Possessions; Rights of Special Groups in relation to Criminal Investigation.

In the Issue Paper on “Criminal Investigation: Reform of Police Procedures and Practices [July 2010], the Commission considered the background to UK PACE and its evolution. It also examined police powers and procedures under PACE and their relevance to Reform of the Law of Mauritius: Police Powers to Stop and Search Persons and Vehicles & to Search Premises; Arrest and Detention; and Access to Legal Advice & Police Interviewing.

The Commission has been of the opinion that the adoption of legislation and Codes of Practice for police and other law enforcement officers, on same line as the 1984 UK PACE [Police and Criminal Evidence Act] or Jersey Police Procedures and Criminal Evidence Law 2003, is the way forward for greater professionalism and transparency in the conduct of criminal investigations. Before the adoption of any new legislative scheme, training needs would however have to be assessed so as to minimize resistance, due to unfamiliarity with the new legislation, on the part of the police and other stakeholders. The view has also been taken that empirical research should be carried out to assess the current situation and later on evaluate the impact of the new legislation and its Codes of practice in relation to practices at the different stages of the criminal investigation process.

The Commission has in its Discussion Paper on “Forensic Use of DNA” [April 2009] examined Human Rights Requirements in relation to DNA Sampling/Profiling and the Operation of a DNA Database, and Specific Policy Issues relating to DNA Sampling/Profiling, its Forensic Use and the Operation of a DNA Database. The Commission reckoned that DNA evidence is a powerful tool for criminal investigation but it is not a substitute for proper police investigation. DNA must be used in conjunction with good police intelligence and investigation, including traditional ways of gathering evidence as well as new tools (such as CCTV systems). The Commission has also expressed the view that it is imperative for those involved with the presentation and evaluation of DNA evidence to understand it. Legal education on presentation of DNA evidence ought to be organized for forensic expert witnesses, legal practitioners, as well as judicial officers.



“The view has also been taken that empirical research should be carried out to assess the current situation and later on evaluate the impact of the new legislation and its Codes of practice in relation to practices at the different stages of the criminal investigation process.”

(B) BAIL

Following the release of the Discussion Paper on the “Law and Practice relating to Criminal Investigation, Arrest and

Bail” [April 2008], the Commission held consultations with stakeholders and reported on “Bail and other Related is-sues” [August 2009]. The Commission considered there was a need to strike a proper balance, in accordance with human rights principles, between the right to liberty of the individual and the protection of society. It recommended that:

- (1) Grounds for refusing bail be clearly distinguished from factors/considerations to be taken into account when determining whether or not a defendant or detainee is to be released;
- (2) It be laid down in greater detail the factors to be taken into account by a Court when assessing the risks involved in deciding whether or not to release a defendant or detainee (as these would assist bail decision-makers);
- (3) It be laid down in what circumstances bail would exceptionally be granted;
- (4) Some of the conditions, including curfew and electronic monitoring mechanism, that should or could be imposed by a Court for release on bail be expressly laid down;
- (5) That a person released on bail is liable to be arrested for breach, or anticipated breach, of a bail condition;
- (6) Harsher penalty be imposed for breach of conditions of bail; and
- (7) The time spent in custody prior to sentence, by a person to whom bail has been refused, be fully taken into account when assessing the length of the sentence that is to be served from the date of sentencing.

(C) EVIDENCE OF RELUCTANT/INTIMIDATED WITNESS IN CRIMINAL PROCEEDINGS

In the Issue Paper on “Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law” [May 2010], the Commission has been of the view that in some areas of criminality, such as organized crime, there is an increasing risk that witnesses will be subjected to intimidation and it is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully. The Commission has considered, after reviewing the issue of the admissibility of the previous statement of a witness in criminal proceedings, that there is no constitutional impediment to the previous statement of a witness, given on oath or affirmation, being used in certain circumstances and with the leave of the court as evidence of any fact mentioned in it.

It has been recommended - in accordance with constitutional safeguards laid down by the Supreme Court of Canada - that section 173 of the Courts Act be amended by adding the following new subsections (3) to (5)-

- (3) Notwithstanding subsection (2), in any criminal proceeding, a previous statement made by a witness may, with the leave of the court, be admitted in accordance with subsections (4) and (5) as evidence of any fact mentioned in it if the witness, although available for cross-examination—
 - (a) refuses to give evidence,
 - (b) denies making the statement, or
 - (c) gives evidence which is materially inconsistent with it.
- (4) The statement may be so admitted under subsection (3) if—
 - (a) the witness confirms, or it is proved, that he made it,
 - (b) the court is satisfied—
 - (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
 - (ii) that it was made voluntarily, and
 - (iii) that it is reliable, and
 - (c) the statement was given on oath or affirmation and was video-recorded.
- (5) The statement shall not be admitted in evidence under subsection (3) if the court is of opinion—
 - (a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or
 - (b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

(D) DISCLOSURE IN CRIMINAL PROCEEDINGS

In the Report on Report (together with draft Bill) on “Disclosure in Criminal Proceedings” [December 2008], the Commission recommended that a statutory regime which sets out a staged approach to disclosure must be adopted.

The new legislative scheme would provide as follows:

- (1) There would be a statutory duty on a police officer, or other law enforcement officer, investigating an offence to record and retain information and other material gathered or generated during the investigation;
- (2) The prosecution would be under the obligation to disclose to an accused any prosecution material which it does not intend to use at trial and has not previously been disclosed to the accused, and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused. This is distinct from the obligation on the prosecution to inform the

defence of material which it intends to use at trial. If there is no such material the prosecutor must inform the defence in writing;

- (3) An accused would then have a duty to inform the prosecution of the case upon which he or she will rely at trial and provide a defence statement and a notice of intention to call witnesses. Defence disclosure has two purposes: it assists in the management of the trial by helping to identify the issues in dispute; it also provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage;
- (4) The defence disclosure would trigger off a duty on the part of the prosecution to present further material to the defence: when deciding what to disclose at this stage, the prosecutor will consider the defence statement to see if there is any material not yet disclosed which might be reasonably expected to assist the accused's defence as disclosed by the defence statement;
- (5) There would be a continuing duty on the part of the prosecutor to disclose to the defence any material not yet disclosed, which is capable of undermining its case or assisting the case for the accused;
- (6) The circumstances when (i) there could be an application by accused for disclosure; (ii) the sanctions for non-compliance with disclosure requirements, such as Delay in Disclosure by Prosecutor and Faults in Disclosure by Accused; (iii) there would not be disclosure in the public interest; (iv) the information or material disclosed to be treated with confidentiality;
- (7) A Code of Practice and Guidelines would have to be prepared, which would provide guidance to police officers and other law enforcement officers, inter alia, as to the manner in which an officer investigating an offence shall record and retain information and other material gathered or generated during an investigation, and regarding interview of witnesses notified by accused.

(E) THE CRIMINAL JUSTICE SYSTEM AND HUMAN RIGHTS

In the Review Paper on "The Criminal Justice System and The Rights of an Accused Person" [September 2008], the Commission reviewed the constitutional rights of an accused person and expressed the view that the right to compensation for miscarriage of justice should be expressly provided for in the Constitution. The Commission was also of opinion that the rights of witnesses and victims, as well as the rights of the child in the administration of justice, are not sufficiently safeguarded. There are also no specific standard regarding need for availability of non-custodial measures.

In the Issue Paper "Commentary on some of the Human Rights dimensions of the Sexual Offences Bill No. VI of 2007" [June 2007], the Commission considered that – in accordance with human rights standards- consensual acts of sodomy committed in private by adults should be

decriminalized and that rape includes marital rape.

"The Commission was also of opinion that the rights of witnesses and victims, as well as the rights of the child in the administration of justice, are not sufficiently safeguarded."

REFORM OF CODES

"Laws which are consistent in theory often prove chaotic in practice." - Napoleon

In May 2010, the Hon. Attorney-General has requested the Commission to review the Code Civil Mauricien, the Code de Commerce and the Code de Procédure Civile, recommend reforms thereto, and draft the provisions in those Codes in both English and French languages.

In the Background Paper to the Reform of the Codes [October 2010], the Commission re-viewed the context in which the Codes have evolved over more than two centuries.

The Commission has been of the opinion that the review would have to be carried out from a historical and comparative perspective. Our Codes would be compared with those in France, and in mixed legal systems, such as that of Quebec, Louisiana, and Seychelles. Approaches taken in other jurisdictions on issues covered by our Codes may also be examined the more so as comparative lawyers no longer put emphasis on the differences between the civil law and common law systems, but rather on their commonality and how they are complementary. The historical context in which the Codes in this country have evolved since their promulgation more than two centuries ago, which have led to the development of the Mauritius legal system as a mixed or hybrid legal system, would also have to be borne in mind. The reform options to meet the contemporary challenges would have to be examined in the light of the socio-economic exigencies of our society in the context of globalization. We should always bear in mind that our legislature, even though borrowing rules from a variety of material sources, has always pursued "une finalité mauricienne" thereby developing a distinct corpus of Mauritian law.

The review of the Codes is not a novel exercise for the Commission: it has already submitted Reports on aspects of the Code Civil Mauricien: (a) Report (together with draft Bill) on "Relationship of Children with Grand Parents and Other persons under the Code Civil Mauricien" [June 2007]; (b) Report (together with draft Bill) about "Law on Divorce" [December 2008].

In the Report on "Relationship of Children with Grand Parents and Other persons under the Code Civil Mauricien", it was recommended that the law be amended so that it be expressly provides that "L'enfant a le droit d'entretenir des relations personnelles avec ses ascendants. Seul l'intérêt de l'enfant peut faire obstacle

à l'exercice de ce droit» and that «L'enfant ne doit pas être séparé de ses frères et soeurs, sauf si cela n'est pas possible ou si son intérêt commande une autre solution. Sil y a lieu, le juge statue sur les relations personnelles entre les frères et soeurs».

In the Report on "Law on Divorce", it was recommended that the law on divorce must be adapted to the realities of conjugal life: The concept of "divorce by mutual consent", which had existed in our civil code from 1808 to 1884, should be reintroduced.

REFORM OF CIVIL JUSTICE SYSTEM & DISPUTE RESOLUTION MECHANISM

(A) PREVENTION OF VEXATIOUS LITIGATION

In the Issue Paper on "Prevention of Vexatious Litigation" [October 2010], the Commission reviewed, from a comparative perspective, the law as to restraint on vexatious litigation.

Vexatious litigation is legal action which is brought regardless of its merits, such as the filing of a lawsuit with the knowledge that it has no legal basis (including the continuation of a lawsuit after discovery of the facts shows it has absolutely no merit), with the purpose to bother, annoy, embarrass and cause legal expenses to the defendant(s). Vexatious litigation is regarded by many legal systems as an abuse of the judicial process. In England, for instance, the Attorney-General may, under section 42 of the Senior Courts Act [formerly Supreme Court Act 1981] entitled "Restriction of Vexatious Legal Proceedings", apply to the High Court to declare a litigant as „vexatious". Law Reform Commissions and Agencies in the Commonwealth have during the past years reviewed the law as to the prevention of vexatious litigation. In June 2005, the Law Commission of India, in its 192nd Report on "Prevention of Vexatious Litigation" - after reviewing legislation curbing vexatious litigation in UK, USA, Australia, New Zealand, and Canada - recommended the adoption of the Vexatious Litigation (Prevention) Bill. In April 2006, the Law Reform Commission of Nova Scotia released its Final Report on „Vexatious Litigants. In December 2008, the Parliament of Victoria Law Reform Committee released its Final Report in respect of its „Inquiry into Vexatious Litigants.

The Commission recommended that the Courts Act be amended to enable the Supreme Court, where it is satisfied that a person has persistently started vexatious proceedings or made similar applications in any court, to make an appropriate order so as to restrain the start of such proceedings or the making of such applications. The amendment would have to take into account the practice in other jurisdictions as well as the analysis made by various law reform agencies in the Commonwealth.

(B) MEDIATION AND CONCILIATION IN COMMERCIAL MATTERS

In the Report on "Mediation and Conciliation in Commercial Matters" [November 2010], the Commission examined the concept of "mediation and conciliation", which is used for the resolution of employment relations disputes, and has considered its application - in furtherance of Government Business Facilitation Strategy - for the resolution of commercial disputes. The Commission reviewed developments of this aspect of the law in other jurisdictions, research work carried out by other law reform agencies, as well as the norms evolved by the United Nations Commission on International Trade Law [UNCITRAL]. The main objectives and principles of Alternative dispute resolution [ADR] in connection with mediation and conciliation in commercial matters were also considered.

The Commission acknowledged that ADR has become increasingly topical in the international business community. There is a worldwide trend for parties to turn to one of the processes of ADR, such as mediation and conciliation, when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts, and in a procedure which is the most informal possible. ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute in a private and confidential environment which also preserves good business relations.

The Commission has been of the view that parties involved in commercial disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal "winner v. loser" decision by a court. Parties should be encouraged to have recourse to Mediation Clauses in Contracts for the Settlement of Commercial Disputes. It has also been considered that it is in the interest of the nation that legislation be adopted, now that Mauritius has opened up to international law firms and the foundation has been laid for it to act as a jurisdiction of choice in the field of international arbitration, which would enable the country to emerge both as an "International Arbitration and Mediation Centre" for international commercial disputes. The UNCITRAL Model Law on International Commercial Conciliation (2002) could be incorporated in our law. A system of training and accreditation of arbitrators and mediators/conciliators should be put in place, as well as ethical standards laid down.

(C) LAW AS TO PUBLICITY FOR APPOINTMENT/ REVOCATION OF AGENT / PROXY

In the Issue Paper on "Law as to Publicity for Appointment and Revocation of Agent and Proxy [November 2010], the Commission recommended that section 2(1) of Deposit of Powers of Attorney Act be amended to include publicity in respect of revocation of power of attorney so that notaries practice in the matter becomes a legal requirement.

REFORM OF CONSUMER LAWS

In the Report on “Review of Aspects of Consumer Protection Law and Proposals for Reform” [October 2010], the Commission after reviewing, from an international and comparative perspective, aspects of consumer law - the Consumer Protection Act; the Consumer Protection (Price and Supplies Control) Act; the Essential Commodities Act; the Fair Trading Act; the Hire Purchase and Credit Sale Act; and the Prices & Consumer Protection Advisory Committee Act – considered that the current framework is inadequate.

The provisions as to consumer guarantees in respect of supply of goods and services, as to unfair business practices, are insufficient. There is no provision as to unfair contract terms in consumer agreements. Safety requirements are laid down only in respect of goods. Distance selling, doorstep selling and unsolicited consumer transactions are not regulated. The enforcement framework relating to consumer transactions and agreements needs to be strengthened. The Commission was of opinion that a new Consumer Protection Regime should be put in place. The overall objectives of the new legislation should be to promote and advance the social and economic welfare of consumers by establishing a legal frame-work for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides adequate safeguards to vulnerable consumers.

To that end, legislation needs to be introduced which should make provision for

- (a) Consumer rights, including the freedom of consumers to associate and form groups to advocate and promote their common interests;
- (b) Standards of consumer information so as to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;
- (c) Consumer guarantees in respect of the supply of goods and services;
- (d) The protection of consumers from hazards to their well-being and safety, and product liability;
- (e) The prohibition of unfair terms in consumer contracts;
- (f) The prohibition of unfair business practices;
- (g) The regulation of distance selling, doorstep selling and unsolicited consumer transactions;
- (h) The regulation of consumer credit;
- (i) The establishment and operation of a National Consumer Council, which would encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers;

- (j) An effective enforcement framework relating to consumer transactions and agreements; and
- (k) An accessible, effective and efficient system of redress for consumers, including a mechanism for consensual resolution of disputes arising from consumer transactions.

The consumer law should protect both natural persons and legal entities when goods and services are supplied to them, as well as (a) any user of such goods, or (b) any beneficiary of such services. However, goods acquired or the services availed of must not have been for a commercial purpose.

Cabinet has on 15 April 2011 approved the recommendations of the Law Reform Commission.

It is expected that:

- (a) A Consumer Protection Bill would be drafted which would make provision inter alia for the following matters: Protection of Consumer Rights and Consumer Needs [including protection to be afforded to the consumer against discriminatory practices, the redress mechanisms for the realisation of rights, the responsibilities of the State towards consumers and in respect of consumer education]; Information Standards to be complied with by every supplier of goods and services (including their identification); Standards for Safety of Goods and Services and for securing compliance therewith (including Courts power to grant ancillary relief); Product liability for defective products; Establishment and Operation of a National Consumer Council, which would encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers; Powers to be conferred to Officers of Consumer Protection Unit [to obtain information, search premises and seize incriminating materials, to accept and enforce undertakings, to seek an injunction to restrain a person from engaging in conduct that constitutes or would constitute a breach of consumer law] to enable it to perform its functions effectively and efficiently [including provision that it shall be an offence to “obstruct” an Officer in the performance of his functions, and provision for protection from civil and criminal liability for actions taken in good faith by Officers in the exercise of their powers]; Courts empowered to award compensation and to issue any appropriate order; Alternative Dispute Resolution mechanisms, as well as forms of “collective actions”, by or on behalf of consumers, to be available as redress mechanisms for consumer grievances; Consequential Amendment to the Hire Purchase and Credit Sale Act, regarding “Responsible Lending Conduct”;



Dumb laws:

In Russia, in some areas, all boys must be given the name “Stalin” as one of their middle names.

(b) A Consumer Guarantees Bill would be drafted, which would make provision inter alia for the following matters: Guarantees in respect of Supply of Goods: an implied guarantee as to title; an implied guarantee as to acceptable quality; an implied guarantee as to fitness for a particular purpose, where the consumer makes known, expressly or by implication, to the supplier the purpose for which the goods are being acquired; an implied guarantee that goods comply with description, when they are supplied by description to a consumer; an implied guarantee that goods comply with sample when they are supplied to a consumer by reference to a sample or demonstration model; an implied guarantee as to price (that the consumer shall not be liable to pay to the supplier more than the reasonable price of the goods); an implied guarantee as to repairs and spare parts (that the manufacturer and the supplier will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied, unless the consumer has otherwise been notified); Right of Redress against Suppliers and Manufacturers, when goods fail to comply with the guarantees (including the right to reject the goods); Guarantees in respect of Supply of Services: an implied guarantee that the services will be carried out with reasonable care and skill; an implied guarantee as to fitness for any particular purpose where the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the services, the particular purpose for which the services are required or the result that the consumer desires to achieve; an implied guarantee as to completion within a reasonable time; an implied guarantee as to price (that the consumer shall not be liable to pay to the supplier more than the reasonable price for the services); Right of Redress against Suppliers, where services or product resulting from the services fail to comply with any of the implied guarantees (including right to cancel contract and power of Court to grant ancillary relief);

(c) A Fair Trading Bill would be drafted, which would make provision inter alia for the following matters: Prohibition of unfair contract terms in consumer agreements: contractual terms or conditions which are unfair, unreasonable or unjust, to the consumers to be null and void; Courts vested with sufficient powers for them to ensure fair and just conduct, terms and conditions, in respect of consumer transactions;

Prohibition of unfair business/commercial practices (including misleading commercial practices and marketing/advertising, aggressive commercial practices, referral and pyramid selling); Protection to recipients of unsolicited goods or services and adequate safeguards for vulnerable consumers (agreements with persons lacking legal capacity to be treated as void or voidable); Regulation of distance selling.

Dumb laws:

In France, it is illegal to die unless a cemetery plot has first been bought.

(a) Reform of NGO Law

In the Report on “Law relating to NGOs” [November 2008], the Commission made proposals for the reform of the Legal and Regulatory Framework affecting not-for-profit, non-governmental organizations (NGOs).

The Commission considered there is a need to:

- (a) Affirm the right of informal (non-registered) associations to exist and carry out activities, in accordance with human rights guaranteed by the Constitution and international law;
- (b) Improve the registration process, in compliance with best international regulatory practices;
- (c) Ensure the register of associations is genuinely and speedily accessible;
- (d) Clarify the rights and duties incurred by an association prior to incorporation;
- (e) Ease the operation of associations;
- (f) Improve the process for the transformation of associations;
- (g) Improve the process for the winding up of associations;
- (h) Improve the legal requirements for internal governance, in accordance with best international regulatory practices, by clarifying the duties and liabilities of officers and expressly prohibiting the distribution of profits and benefits, and self-dealing;
- (i) Clarify the duties of officers and committee members;
- (j) Streamline the procedures for reporting and auditing, inspection and monitoring;
- (k) Clarify the concept of “charitable/public benefit status”, the fiscal benefits it gives rise to, the procedure and requirements for obtaining such a status, as well as the accountability standards.

(b) Reform of Social Partnership Framework

In the Issue Paper on “Social Partnership Framework” [November 2009], the Commission recommended the establishment of an institutionalized platform for partnership and dialogue between Government/international donors, the private sector and NGOs, which would help achieve economic progress in a spirit of social inclusiveness.



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ONCE UPON A TIME... THE LAW

1700 BCE: Code of Hammurabi

13th century BCE: Hebraic law

7th century BCE: Draconian constitution

5th Century BCE: law of the twelve tables

Early Middle Ages: Salic law

12th-13th Century: Yassa (code of law created by Genghis Khan)

1215: Magna Carta

1776: United States Declaration of Independence

1787: Constitution of the United States

1789: Declaration of the Rights of Man and of the Citizen

1919: Eighteenth Amendment (prohibition)

1935: Nuremberg laws

1948: Universal Declaration of Human Rights

“ The law will never make men free; it is men who have got to make the law free.”
- Henry David Thoreau

