**SESSION 3 – Constitutional Reform**

**SESSION CHAIR Mr. A. Raouf GULBUL, Chairperson LRC Mauritius**

This is our third session for this afternoon, it’s one on Constitutional Reform, something which interests and should interest all of us. You’ll record in the morning, in my welcome address, I said the Constitution is the supreme law of the land and should remain the supreme law of the land. A vibrant democracy, a country which respects the rule of law, which applies the rule of law, which respects human rights and good governance, is undoubtedly a country where the law of the Constitution prevails. A Constitution, as we will hear from our speaker later, is the very embodiment of all the fundamental rights, human rights, that one can imagine. It should be like this.

Now, before I give the floor to our speaker, it is perhaps important that I go through some of the papers that the Mauritius Law Reform Commission has in the past, and until very recently prepared and submitted, as by law we have to, to the Attorney-General’s Office. We call it Issue Papers here. Our Law Reform Commission has been set up ten years ago, and we have submitted various papers on important issues and on subjects that are of great public interest. And as I said, we have also submitted papers on Constitutional projects.

There was in 2010, an Issue Paper on Constitutional reform on human rights. It is, and it should be, an essential embodiment in any Constitution, the protection of human rights. The Law Reform Commission has expressed the wish, the view, that there is the need to better safeguard existing rights in our country. We have in Chapter 2, fundamental rights, right to liberty, to privacy, to education, against discrimination and other fundamental rights. They are entrenched provisions, these can only be amended by a three-quarter vote in the National Assembly.

But at the Law Reform Commission, we have suggested that there should be protection of economic, social and cultural rights. They are not part of our Constitution, but we would wish that this be so. It is perhaps also of note that next year, next March, 2018, Mauritius will be celebrating the 50th anniversary of the Constitution. Our constitution which we obtained on independence from the United Kingdom. We also asked that there should be guarantee on the rights of vulnerable persons. This is an issue these days, because we want to have equality everywhere, someone who is vulnerable needs protection, he needs it, and this should be a constitutional right.

In the Constitution of Mauritius, we have Section 1 which states that Mauritius is a sovereign democratic State known as the Republic of Mauritius. And this has been interpreted by our Court. My learned friend, Mr. Rosario Domingue referred to that in the morning. I argued before the Supreme Court the importance of Section 1 in our Constitution and what it embodies. The judicial interpretation on the provision that Mauritius shall be a sovereign democratic State is that this includes all the principles that we normally have in a democracy, including the rule of law and the separation of powers. They are within that Section, and I am glad to say that the Privy Council in London agreed with that interpretation. This can only be amended in Mauritius, Section 1 can only be amended if we have all the members in the National Assembly that vote to amend it, and before that vote is accepted, there must be a referendum of which 75% of the electorate approve the amendment. This shows how deeply entrenched that Section is, so that it is, and I make no exaggeration in saying, that it is impossible to amend that Section.

This is the importance of having constitutional protection. To go back on the issue paper of the Law Reform Commission, we have considered that protection should be afforded to the right to equality. Because we are of the view that Section 3 to 16, the provisions of Chapter 2 which protects fundamental rights, they are to a certain extent not sufficient because in those days when we had it, 50 years ago, these were not factors, rights, which we were talking about, which are of relevance today. We are saying there should be prohibition against discrimination on specific grounds. We also are of the view that when our constitution provides for privacy of home and premises, it should be expanded to include respect for private and family life. There is privacy of home but at times we can see it, we can see it, although we have remedies for defamation or whatever, these come much later, but respect for private and family life, is not observed by certain quarters, this should be recognized by the Constitution so that everyone is ensured that his private life is protected. We want the system of freedom of expression, which is presently guaranteed, to be strengthened to recognize the right of access to information and the Freedom of Information Act to be part of our Constitution. Entrenched, everyone will have this right, the right of access to information, because when we speak of Section 1, a sovereign democratic State, we also mean in it that there must be accountability, there must be transparency, there must be a right to know what is going on, the right of access to information.

We also, at the Law Reform Commission, are of the view that although our Constitution provides for protection of the law, we cannot deny that right except by due process. This should be better secured, by protecting rights to just administrative actions. Administrative actions should be just, and should be a constitutional norm, because we want to have it recognized. Prescribing also as a constitutional norm, that slavery and any related practices, is a crime against humanity. There are calls in some quarters that we should have protection to economic, social and cultural rights, and my colleague from South Africa later will perhaps tell us more about this, in the light of the South African experience on that issue. The Indian Constitutional experience is again something we should bear in mind, on economic, social, cultural rights.

At the Law Commission, we feel that there should be socio-economic rights which should be afforded Constitutional protection. The right to education, the right to language, culture, the right to housing, the right to basic amenities, the right to a healthy and sustainable environment, very fashionable these days, and we hear it, all must be eco-friendly. We remember about the Greenhouse effect. We know the effect of global warming. The right to healthy and sustainable environment. The right to freedom of trade, occupation and profession. I spoke earlier on the rights of vulnerable people. We consider that vulnerable people should be afforded the right to constitutional protection. Children, elderly persons and persons with disabilities.

There is one aspect which we all lawyers know, witnesses that come to court. Any system of justice cannot operate fairly and squarely unless we have witnesses coming to court. Because, the right to fair trial gives everybody the right to look at the witness in the eyes, challenge them, cross-examine them. But these people also need protection. Witnesses’ rights. The system of justice as we know it is based upon, the evidence of those who have witnessed crimes. Witnesses should be protected so they can do so, testify without fear or favour.

The Mauritius Law Reform Commission has also prepared a Paper on aspects of electoral reform. You know there was issue in the last general elections whether we should keep the Best Loser System. We have a system in Mauritius where 62 members of the Assembly are elected, then, in order to compensate for communities’ representation, we have a system where the best losers from the parties in the elections are nominated. We’ve done that.

Perhaps I won’t be too long. We have also said when we spoke about the right to justice, which is an important aspect in Mauritius and is a constitutional right, we need to see the establishment of a Court of Appeal. Perhaps very briefly I can say, we have in Mauritius the Supreme Court, where the Judges, the Puisne Judges, the Senior Puisne Judges and the Chief Justice sit. The Puisne Judges hear cases at first instance and whenever there is an appeal against a judgment of a Judge at first instance, the appeal is heard by the other Puisne Judges of the Supreme Court. So we are in a situation where one day the Puisne Judge is sitting at first instance, his other brother Judges are sitting on cases at first instance. Two days later he will have a brief where he will be sitting on appeal on the case of his other brothers where they sat at first instance. We want to see a separate Court of Appeal. The composition of the Judicial and Legal Service Commission and those who form part of it should be members of the judiciary. So that we exclude external influence that will not be conducive to the independence of the judiciary.

I have also before dealing with that subject gone through a bit of what have taken place in other jurisdictions of our members. There is a South African Law Reform Commission, I am sure we will have questions, we will have your views on it. We have the Malawi Law Reform Commission who as well may have submitted their reports on various issues and one of importance which I have come across is the 2007 Report of the Law Reform Commission on the review of the Constitution in Malawi where they recommended that the official language of the Republic of Malawi is English, the national language being Chichewa. And they also enacted, they recommended that all men and women may marry and found a family and that marriage must be celebrated between a man and a woman. Kenya, we’ll be hearing you on this. The Uganda Law Reform Commission also is very active in preparation of reports and papers on aspects of development of Constitutional reform. Namibia Law Reform has dealt with very important issues on the Constitution.

For this afternoon, we have a speaker, a very able lady whom I had the great advantage of meeting in Melbourne, the great city of Melbourne where we met this year for the Commonwealth Law Conference. We participated in the debate on the rule of law. Very enlightening, I’m sure we all learnt a lot from it. And our speaker is Mrs. Muthaura Doreen Nkatha, I’m informed that Ms. Muthaura is since 2013 till today, the vice-chairperson of the Kenya Law Reform Commission. She’s an advocate of the High Court in Kenya since 2004, she’s also a legislator drafting and policy formulation expert. The Commissioner for the implementation of the Constitution 2010-2013, and was at the Attorney-General’s Office legislative drafting from 2005 to 2010. Concerning your academic qualifications, I note that you read for the Master’s degree LLM Advance Legislative studies at the University of London 2009. It reminds me of my student’s days in London where I read law and reminds me also of what our Chief Executive my learned friend Domingue was saying on legal scholar’s views of jurisprudence. In those days, in my days, when I read law in London, it was a compulsory subject to sit for the jurisprudence paper and if you fail in that paper you’re not admitted to the degree. I don’t know how it is these days but I certainly go along with my good friend Domingue that emphasis should be laid on studies of Jurisprudence. We know of the American realism, the Scandinavian realism, we know of great authors like Hart, Bentham, Austin and other great philosophers who taught us about legal thoughts, which is why I share the same view on the debate of the law as it is, compared with the law as it ought to be. Because we, lawyers, have no other considerations when we look at the law. We want it to befit a modern society.

So, this is where you read law, you also have an M.A in conflict management, I’m sure this is of great help in your career at Nairobi, 2011. You obtained your LLB as well at Moi University. You have a wide range of experience in law reform concerning the Constitution Implementation Commission in Kenya and at the Attorney-General’s Chambers as legislative drafter.

Ladies and gentlemen, may I ask you all to welcome our friend Mrs. Muthaura to deliver her speech.