



# LAW REFORM COMMISSION

## **ALRAESA**

*[Association of Law Reform Agencies in Eastern and Southern Africa]*

## **CONFERENCE**

*“Role of Law Reform in Development”*

## **REPORT**

**[Inter-Continental Hotel, Balaclava, Mauritius, 29 & 30 June 2017]**

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## **CONFERENCE REPORT**

1. The ALRAESA (Association of Law Reform Agencies of Eastern and Southern Africa) Conference on “The Role of Law Reform in Development” took place on the 29<sup>th</sup> and 30<sup>th</sup> June 2017 at the Intercontinental Hotel, Balaclava, Mauritius, and was hosted by the Law Reform Commission of Mauritius.
2. Eleven countries were represented at the Conference, namely: Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania (Zanzibar), Uganda, Zimbabwe and Mauritius.

### **❖ DAY 1**

#### **➤ Opening Ceremony**

3. The ALRAESA Conference started at 9:30 on 29<sup>th</sup> June with Mr. Pierre Rosario DOMINGUE, CEO of the Law Reform Commission of Mauritius, welcoming the participants of the Conference. Mr. DOMINGUE reminded the audience that it was the first ALRAESA Conference which was being organized in Mauritius. He then introduced the Chairperson of the Law Reform Commission of Mauritius, Mr. Raouf GULBUL, a barrister of long standing.
4. Mr. Raouf GULBUL then took the floor. He welcomed the participants at the Conference and expressed his pleasure that LRC Mauritius is hosting the ALRAESA conference. Mr.

GULBUL talked about the role of a Law Commission in society. He underlined the fact that it has to be independent, and that the projects of a Law Commission have to be original and new. According to the Chairperson of the Mauritius Law Reform Commission, this Conference should contribute to exchange experiences and to discuss the best practices pertaining to law reform. He also explained the objectives of the ALRAESA (e.g. harmonization of methodology) and reflected on the need of the development of good methodology within Law Reform agencies and on the role of Law Reform agencies, which might be different in small and big states. He also expressed his attachment to the concepts of Human rights, of Rule of law as well as to the protection afforded by the Constitution, which are all core values underlining Law Reform Agencies. He added that there is also one important objective, which is gender equality and that there will be a session during the Conference dedicated to it. During the other sessions of the Conference, various topics would be addressed he said, such as business and consumer protection, and law of evidence. Mr. GULBUL went on to talk about the British origin of the rule of evidence and about the necessity to reform. Finally, he concluded on the importance of regional cooperation.

5. Mrs. Rukimirana Vastina NSANZE, Chairperson of ALRAESA, then addressed the audience. She reflected, first of all, on the importance of cooperation of Law Reform agencies in the region and gave to the participants a recap on the ALRAESA (that is on its establishment in 2003 in Namibia, the countries involved in it, and the main objectives which are human rights and good governance). She reminded the audience of the need to share experiences. Several ALRAESA conferences have already been held, she said, and the expectations of the participants are to highlight the key issues on the road of development, and to discuss, in order to get good ideas about the way in which the

reforms could be carried out. She then thanked the Mauritius Law Reform Commission and all the participants.

6. Mr. DOMINGUE then apprised the participants that it is thanks to the support of the Hon. Attorney-General that LRC Mauritius has been able to organize this Conference.

➤ **Keynote Address by Attorney-General of Mauritius**

7. The Attorney General of Mauritius, Hon. Mr. Ravi YERRIGADOO, expressed the view that the development of the law is always a challenge, and that there exist numerous ways of defining policies, e. g. in the field of criminal law. He spoke about the LRC’s reports on Evidence issues and issues regarding child protection, and about how much it is important to make sure that the laws reflect values of society and are not cut off from reality. Law Reform Agencies, he said, should be given necessary resources and discussion Papers of different LRAs should be shared. He also spoke about the role of the Law Reform Commission of Mauritius, whose existence is very important regarding good governance and human rights protection. The modernization of the civil justice system and the Police and Criminal Evidence Bill are examples of how difficult sometimes it may be to reform, because it is the mindset which has to be changed. He then apprised the participants on the composition of the Mauritian LRC, on the hybrid legal system which currently exists in the country, on the need for business facilitation. He also gave examples of implementation of LRC’s recommendations (divorce, child-grand-parent relationship, Code civil (*crédit-bail*), etc.). He also underlined the importance of the reflection carried out by the LRC. Reform is an ongoing process he said and one need always keep an open mind. He also reminded everyone of how vital is

cooperation amongst agencies and that we should learn from our own experiences and mistakes. He finally wished to the participants a fruitful deliberation.

➤ **Session 1: Value & Usefulness of Law Reform Agencies to Legal Policy Development**

8. The first Session was devoted to “Value and Usefulness of Law Reform Agencies to Legal Policy Development” and was chaired by Ms. Yvonne DAUSAB, Chairperson of the Namibian Law Reform and Development Commission. The latter asked herself what kind of law is wanted in a country and whether it is the law which tends to stimulate investment, or is it the law protecting the local population.
  
9. The first person to intervene during the session was Mrs. Segametsi MOTHIBATSELA, Representative of the Commonwealth Secretariat and Legal Advisor at the Law and Development Section. She said that the Commonwealth Secretariat recognizes the work of Law Reform Agencies and that the majority of the 52 members in the Commonwealth are small countries. The role of Secretariat, she went on to say, is to be a reliable partner to member countries. The Secretariat, she informed the audience, helps the countries who decide to set up Law Reform agencies and it also aims at building up an exchange program to help those countries wishing to set up a Law Reform agency. Thus, for example, the Secretariat could help a country wishing to develop a LRC to send the officers for training in Mauritius, and vice versa.

She moreover said that there are various challenges to face and even if some countries have Law Reform Agencies, they lack the necessary capacity to deal with issues they have to deal with.

She informed the participants that the Secretariat is currently preparing a Law Reform Guide. The Secretariat also helps countries to develop law reform policy, for example in the area of broadcasting in Swaziland. In Botswana, it helped in the field of cybercrime. In other 13 countries assistance is being provided regarding domestic violence. She also spoke about the importance of consultation with the relevant stakeholders. The Commonwealth Secretariat is assisting Mauritius regarding the preparation of a Police and Criminal Evidence Act.

10. The next person to address the floor during that session was Mrs. Eddah CHAVULA, representative of the Malawi Law Commission. She spoke on the role of Law Reform Agencies, by examining the case of the Malawi Law Commission. She provided the background of the establishment of the Law Commission in Malawi, and apprised the audience that most of the laws were inherited from the UK.

Law reform, she went on to say, is a mechanism used to improve the substantive law, and to make it compliant with the social background. The mission of the Law Commission of Malawi is to review and recommend changes to the law. According to section 6 of the Law Commission Act, the main function of the Commission is to ensure the systematic development and reform of law.

She also described the Law Reform Process in Malawi, which is as follows:

First Stage - Identification of a law reform area, reception of submissions from individuals and various bodies;

Second Stage – Investigation. Officers are assigned, development of working papers;

Third Stage - Appointment of Commissioners (section 133 of the Constitution) (in Malawi this is a temporary function);

Fourth Stage– Consultation. It can take several forms (interviews, workshops, etc.);

Fifth Stage – Recommendations: In the form of reports submitted to the Minister of Justice.

So far, 35 law reform programs have been carried out. The Law Commission in Malawi has influenced different areas of the law:

- Criminal Justice System – creation of new offences in Penal Code, prohibition of sexual activities for commercial purposes (in order to combat human trafficking);
- Criminal Procedure and Evidence – to better protect individual rights, to close gaps in the pre-trial procedure and the trial procedure also, to ensure the justice system is efficient and accessible to all;
- Gender Related Laws – the Law Commission has contributed to the legal policy development protecting women and their rights. The rights of orphans and vulnerable children were also better protected in the Wills Act of 2004. There is also a Gender Equality Bill of 2013 which tends to promote Gender Equality;
- Marriage, Divorce and Family Relations – the Marriage, Divorce and Family Relations Act enacted in 2015 brought in new developments in the legal policy of the country. Its aim is to reform the statutory and customary laws on family relations in order to address the imbalances existing in the laws and to afford better protection to women and children;

- Domestic Violence – The Prevention of Domestic Violence Act enacted in 2006 to protect men, women and children in abusive domestic relationships. Its implementation has been marred by challenges and a technical review of the Act has been done by the Commission. The Commission has so far made recommendations, for example, relating to the expansion of the definition of domestic violence to include none criminal acts;
- Children Related Laws – the best interest of the child is now the supreme criterion, as per section 23 of the Constitution. The protection of children has been enhanced, the responsibilities of parents towards children have been defined;
- The Trafficking in Persons has also been regulated, a Board addressing this issue has been created;
- A Land Bill has been prepared under the supervision of the Commission, there exists a concept of Customary Land whose regime is specific.

In her Conclusion, Mrs. CHAVULA asserted that the Law Commission has greatly contributed to the development of access to justice and to the development of law polices in Malawi. The task was done through empirical approaches, comparative studies, elaboration of communication strategies, etc.

➤ **Session 2: Challenges of Law Reform in Small States**

11. The Second Session was chaired by Mr. Joel ZOWA, Deputy Chairperson of the Zimbabwe Law Development Commission.



12. Mr. Pierre Rosario DOMINGUE, CEO of the Law Reform Commission of Mauritius, was the first speaker for this session. Small States, he said, are defined by their limited human and financial resources. He also underlined the fact that one of the problems faced in small States is the lack of local expertise. Furthermore, in small States in particular, we should pay extreme attention to the nature of social relationship: while in large jurisdictions, one can live his life anonymously, in small States, this is not the case.

Mr. DOMINGUE stressed there must be an environment conducive to law reform and that it is of paramount importance to sense when it is the right time to make a recommendation.

Although a Law Commission in a small State would be committed to comparative legal research in order to evaluate the merits and demerits of its law in the light of the experience of other jurisdictions (laws should reflect best international practices), legal transplants must be made to adapt to the local context: laws must reflect and advance a country’s social and economic interests. A Law Commission would also have to be mindful to avoid importing “models” and transplanting laws that are inconsistent with national legal, customary and socio-economic norms.

In some instances, Law Commissions are also requested, when making recommendations for reform, to prepare draft legislation. This may ensure that if Government wants to take the law reform to the next level, it can easily refer the draft law to the Attorney General’s Office to be finalized for referral to Cabinet before reaching Parliament.

He moreover informed the audience about the composition of the Mauritian Law Reform Commission, and spoke about the Board and the Officers. The way of appointment of the

members of the Board is such as to guarantee the independence of the Commission. The most important thing is to optimize the resources.

13. The next person to address the floor for that session was Justice Ali BAKARI, Chairperson of the Law Review Commission of Zanzibar. He spoke about the history of Zanzibar and about the courts structure there. Due to the social, political, economic and cultural changes that took place in Zanzibar, since revolution 1964, the Revolutionary Government of Zanzibar established the Commission as an independent body (Section 3 of the Law Review Commission of Zanzibar Act No: 16 of 1986).

Within the Commission, there are five Commissioners, a Secretary and other staff. The law of Zanzibar does not give it the power to review the laws of the Union. The Law Review Commission of Zanzibar does its best to be very effective.

The nature of social relationship, from the point of view of legal reforms, was also highlighted by this presenter. There are not many crimes there in Zanzibar he said, with few exceptions such as drugs, sex offences, etc.

The funds assigned to the Commission are insufficient according to him, but the strategic plan is good. They manage well their resources, both human and financial.

The ministries are allowed to review their laws without consultations with the LRC of Zanzibar. The LRC of Zanzibar has already reviewed 17 legislations. A total of 6 projects are in progress and are expected to be submitted at the end of this financial year, June 2017.

➤ **Session 3: Constitutional Reform**

14. The third and last session of the day revolved around Constitutional reform and was chaired by Mr. Raouf GULBUL, Chairperson of the Law Reform Commission of Mauritius. The latter highlighted the fact that the Constitution is the supreme law of the land, it protects human rights and ensures good governance. He informed the participants about the Mauritius LRC’s Issue Papers on Constitutional Law. In 2010, there was an Issue Paper on “Constitutional Protection of Human Rights”. The Commission 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.

15. Ms. Doreen Nkatha MUTHAURA, Vice Chairperson of the Kenya Law Reform Commission [KLRC] then addressed the floor concerning the 2010 Kenyan Constitution which replaced the 1963 Independence Constitution. KLRC was identified as one of the agencies to prepare legislation to implement the Constitution. Kenya’s Constitution has been hailed by the World Bank as transformative and ambitious she first said. The new Constitution introduced 47 County governments, each having their own cabinet and own legislative assemblies. Moreover, they now have an independent DPP and an Attorney General who is not a member of parliament, as well a very elaborate and liberal Bill of Rights.

In Kenya, there is no influence at all from the Executive towards the LRC. She spoke also about the composition of the LRC of Kenya and about its functions. There has to be conformity of the LRC’s proposals with the Constitution. Moreover, the Commission has to vet that a bill is in conformity with the Constitution. The Commission interacts with

the stakeholders. There is currently over 700 Acts of Parliament in Kenya. The statute book had to be amended after the change of the Constitution and it is still an ongoing process. In Kenya, the LRC is allowed to give advice on the reform of a law to county governments.

The main challenges concern the cooperation between several departments.

She also underlined the role of academia. More helpful research work on that level could be done.

Medias, she thinks, can also play an important role in the preservation of the separation of powers.

Moreover, she insisted on the question of “inclusivity” and the need for all the communities to feel included. Ms. MUTHAURA also stressed the fact that policy and administrative measures must not only comply with the letter of the Constitution but also with its spirit.

16. Her intervention concluded the first day of the ALRAESA Conference.

The EXCO Meeting then took place in the afternoon.

## ❖ **DAY 2**

### ➤ **Session 4: Business and Consumer Law Reform**

17. The first session of the second day of the ALRAESA Conference (Session 4) was about Business and Consumer Law Reform and was chaired by Mrs. Rukimirana Vastina NSANZE, Chairperson of the Uganda Law Reform Commission.

18. Mrs. Khursheed ROSSENKHAN, representative of the Attorney-General’s Office in Botswana, was the first to intervene. She said that in Botswana, since 2011, much effort has been put towards improving the Doing Business environment. The objectives are the Promotion of investor-friendly climate, and Promoting the efficiency and effectiveness of Government processes and procedures. The Doing Business Reform Action Plan and Roadmap provides for both legal and administrative reforms. She also enumerated some challenges to be faced, namely, Small and developing countries slow pace of reforms, Ministries slow to generate instructions, lack of expertise, lack of resources, Ministries operating with silo mentality and Legislative Drafting Division being inundated with numerous instructions.

19. Mr. Dinay REETOO, Principal State Counsel at the Attorney General’s Office of Mauritius, was the second speaker during this session. He first of all said that “Business Law Reform” is construed as reforms connected to enhancing the business environment in Mauritius. His presentation examined legislative changes which have contributed to the enhancement of business facilitation in Mauritius and he also examined the contribution of the Law Reform Commission of Mauritius in the context of business law reform in Mauritius.

He highlighted that the Business Registration Act was amended to enhance exchange of information and to provide for the Registrar of Companies to be able to issue business registration card electronically. Also, the Financial Services Act was amended to provide for the setting up and administration of an online centralized Know Your Customer (KYC) database for the non-banking financial services sector.

He also apprised the audience of the Regulatory Sandbox Licence. The Regulatory Sandbox Licence exists in countries like the UK, Singapore and Australia. These countries have applied the concept of a Regulatory Sandbox Licence (RSL) which allows

companies to invest in innovative projects within an agreed set of terms and conditions, even in the absence of a formal licencing framework. This can be an effective mechanism to speed up strategic investments. The Board of Investment (BOI) has, by way of the Finance (Miscellaneous Provisions) Act 2016, been empowered to issue approvals, permits and licences to start an innovative project after consulting relevant ministries.

He also talked about the Business Facilitation (Miscellaneous Provisions) Bill 2007. The object of this Bill is to provide for amendments to the legislative framework that are necessary for the removal of constraints in relation to permits, licences, authorizations and clearances to further facilitate the doing of business, and for related matters.

Finally, he talked about the contribution of the Law Reform Commission of Mauritius to Business Law Reform. The Commission has thus considered it would be appropriate to incorporate the concept of “*fonds de commerce*”, which exists as far back as 1909 in France, with some adaptation, as it would ease the doing of business by facilitating access to credit. Moreover, since the release of the Issue Paper on “Timeshare (*Droits de Séjour à Temps Partagé*)”, the Commission, after consultation with stakeholders, formed the opinion that, given the peculiar features of our mixed legal system and the need to provide choice to operators, both legal techniques [“*société d'attribution d'immeubles en jouissance à temps partagé*” in France and the trust] could be incorporated in our law. The Commission, he went on to say, has considered the proposed legal framework for “timeshare” would provide the enabling environment for this new economic activity to develop in the tourism sector. Also, in the Paper on « Legislative Framework for the Regulation of the Activities of Real Estate Agents » [February 2016], the Commission recommended that the regulation of the activities of estate agents could be done either by the adoption of a new statute [the Real Estates Agents Act] or through an amendment to the Code de Commerce. The Real Estate Agents Bill is modelled on the New Zealand Real Estate Agents Act of 2008, whereas the amendment to the Code de Commerce is

inspired by the French “*Loi no. 70-9 du 2 janvier 1970 réglementant les conditions d’exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce*”.

➤ **Session 5: Reform related to Gender-based Violence**

20. The fifth session of this two-days’ conference was devoted to reform related to Gender-based Violence and was chaired by Mrs. Gertrude Lynn HIWA, SC, Law Commissioner of the Malawi Law Commission. The latter stressed the fact that gender-based violence destabilizes society as a whole and that there is a gap between having good laws and reality of actually curbing domestic violence.

21. Ms. GAWACHAB, of the Namibian LRDC, then gave a presentation of the reform of the law on domestic violence in her country, where the reform process began in 1996, when at the time, domestic violence was restrictively defined. She said that Domestic Violence has been considered an offence that erodes the moral fabric of society by subjecting victims to abuse. The effects of domestic violence are so broad, not only affecting families but ripples into a dysfunctional society, she said. Ms. GAWACHAB also remarked that the LRDC received technical and financial assistance from the Legal Capacity Building Programme, implemented jointly by the Ministry of Justice and the *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ) as the implementing agency for technical co-operation of German Federal Ministry of Economic Co-operation and Development (BMZ). In 2016, a new study was conducted in Namibia which reviewed the definition of “domestic relationship” and they are in the process of finalizing amendments to the Domestic Violence Act.

She concluded by saying that there is need to redefine and eliminate stereotypes relating to the role of women in society.

22. Mr. Tshisamphiri Nelson MATIBE, Secretary of the South Africa Law Reform Commission (SALRC) was the second speaker in this session. He gratified us with a thorough presentation on the reform of the law on stalking in the context of the Protection from Harassment Act. The Protection from Harassment Act, he said, was the outcome of the SALRC investigation on Stalking (Project 130). Stalking was originally identified in both the investigations into domestic violence and sexual offences.

He remarked that harassment may consist of various acts which, when considered on their own, may not be regarded as an offence or a delict, but the sum total of which may amount to a serious infringement of the rights of a person. The court weighs up all relevant factors and then decides if certain conduct, which falls within the definition, amounts to harassment.

Mr. MATIBE also talked about cyberstalking, which causes 475 000 online victims per annum. Moreover, online stalking can lead to real-life stalking, for example paedophiles/online sexual predators.

23. In the discussions which followed, it was said that there is no legal definition of stalking in Swaziland, because it is an accepted behavior. It was also revealed that in Botswana, there is a law in this area, but there are still many issues.

➤ **Session 6: Reform of Law of Evidence**

24. The sixth and last session of this two-days’ ALRAESA Conference concerned reform of Law of Evidence and was chaired by Justice Narandran KOLLAPEN, Chairperson of the



South African Law Commission. Truth, Justice KOLLAPEN said, is an elusive concept, which explains the importance of the reliability on the law of Evidence.

25. Mr. Satyajit BOOLELL, SC, the Director of Public Prosecutions of Mauritius, addressed the audience on the need for changes to the Law of Evidence.

Law of evidence, he said, is at heart of the justice system and it is important to keep challenging the law of evidence.

The tradition was to exclude relevant evidence such as hearsay, evidence of character, opinion evidence of non-experts. But with time, he added, many jurisdictions came with statutory reform, and this under the influence of human rights. And the main question which then arose, was how to rationalize and clarify the law, so as to enhance the discretionary powers of the judge.

He highlighted the fact that one of the areas which was most subject to debate is the rule against hearsay. And the trend was then to allow the judge discretion to admit hearsay, as is witnessed in the UK Criminal Justice Act or the Australian Evidence Act.

The DPP also insisted on the importance of the notion of fair hearing which must prevail at all costs.

He also warned against the risk linked with DNA evidence as experts could be usurping the role of the jury.

He also examined the distinction which is made in our law between child witness and child victim. He concluded by saying that whilst it is important for the administration of justice to ensure that children give a truthful account of events they have witnessed in connection with a case, it is equally important that these children’s voices be given due importance without imposing upon them additional burdens which adults themselves do not have whilst testifying.

26. Mrs. MASUKU, from the Zimbabwe Law Development Commission, then intervened on the subject of “Advancing Justice through Technology: DNA and Electronic Evidence”. She spoke about how new emerging technologies could further the quest for justice, with the examples of the use of electronic evidence and DNA. She regretted the fact that the Criminal Procedure and Evidence Act is silent on DNA Evidence, while the Civil Evidence Act only provides for the admissibility of medical reports. These Acts have no express provisions on the collection of DNA samples, their management and subsequent admissibility as evidence in the courts. Moreover, she deplored the fact that in Zimbabwe Courts, DNA has not been used in cases where sexual offences would have been solved due to lack of suitable legislative framework to make DNA Evidence admissible. Thus, with proposed law reform in Zimbabwe, the use of DNA Evidence would be admissible in courts based on guidelines that would be provided by Statutes and as a result, one’s innocence or guilt could be easily established.

27. Finally, Mrs. NSANZE, Chairperson of the Uganda Law Reform Commission, made a presentation on the Uganda’s experience of reform of the law on Evidence. She enlightened the audience more particularly concerning the gaps and anomalies in the Ugandan Evidence Act and related laws and how to bring the law in conformity with the changing technological circumstances and further address other emerging issues. She recommended that the Evidence Act should expressly provide for electronic evidence. The law should also provide comprehensive and flexible definition of terms like document, data, electronic records and electronic record system, among others, to cover the present and any future advances in technology. There is moreover need for guidelines that highlight key principles for determining the reliability of electronic evidence. Furthermore, there is also need for detailed provisions relating to security,

functionality of the computer from which electronic evidence is generated, and generally setting rules governing the admissibility of electronic records.

➤ **Conference Round-Up**

28. Mr. Sabir KADEL, Senior Law Reform Officer at the Law Reform Commission of Mauritius, then did the Conference Round-up, summarizing the various issues which had been addressed during this two-days’ Conference.

➤ **Closing Ceremony**

29. Mr. Raouf GULBUL, Chairperson of the Law Reform Commission of Mauritius, invited the Chairperson of the ALRAESA, Mrs. NSANZE, to make her remarks. The latter, on behalf of ALRAESA and on her own behalf, thanked LRC Mauritius for organizing this Conference. She also thanked the participants for making this Conference very exciting. She also expressed her thanks to the Chairpersons of the Sessions and the presenters which made the discussions intellectually challenging. She moreover thanked the Attorney-General of Mauritius for having been present at the Conference, as well as the DPP of Mauritius for attending this Conference. She addressed her thanks also to Mr. Jacques Tsang Man Kin, Chairperson of the Bar Council, for having been present. She concluded by saying that Mauritius was truly “Paradise”. As they prepare to go back to their respective countries, she said, each and every one should also take back the lessons learned from this Conference and see what they can pick and apply in their various agencies.

30. Mr. GULBUL thanked Mrs. NSANZE for her speech. He thanked all the delegates who made the trip from their respective countries to attend this Conference. He said the theme of the Conference was very fitting and that the two days’ Conference was thought provocative and was a very enriching intellectual exercise. He expressed his deepest thanks to the CEO of the Law Reform Commission of Mauritius, Mr. DOMINGUE, the Legal Researchers and all the Staff of the LRC, for making this Conference a success. He thanked everyone present and officially closed the Conference.