

THE LAW REFORM COMMISSION
1998
ANNUAL REPORT
ON
THE ACTIVITIES OF THE LAW REFORM COMMISSION

The Commission finds it necessary to refer to its report for the year 1997 and notes with regret that its request for a proper structure within which it could perform its public duty has not been considered up to now. The Commission still functions on an adhoc basis without a permanent staff, proper premises and research assistants. Despite the best of will of its members, this is simply not good enough and the Commission cannot be expected to do any serious research or consultation in those makeshift circumstances. The Chairman has had the opportunity of conferring with Dame Justice Arden D.B.E, the Chairwoman of the Law Commission of England, at the premises of the Law Commission, in London. He was able to ascertain for himself that the premises were fully equipped with offices for the Chairwoman herself, the Secretary of the Commission and the supporting staff, including two young lawyers devoted to research. The Chairwoman herself is functioning on a full time basis as is the Secretary. The research workers also work on a full time but temporary basis and, I understand, are replaced regularly. The place is literally littered with books overspilling from the shelves. In fact, Dame Arden volunteered to supply the Law Reform Commission of Mauritius with all extra books which the Law Reform Commission of England had in its possession, more particularly all the immediately past edition of all the law text books. On the suggestion of Dame Arden, the Chairman also conferred with the Commonwealth Secretariat. The latter indicated to the Chairman its willingness to assist the Mauritian Commission in its task.

In the circumstances, we strongly urge Government to properly equip and support the Commission so that it may be in a position to perform its duties and provide effective assistance in the elaboration of the laws of Mauritius, after due consultation with lawyers and non lawyers alike. Short of this, and

despite the goodwill and knowledge of its individual members, the Commission will not be doing justice to the task with which it is entrusted.

As you are aware, the Commission has already submitted its recommendations relating to the Reform of the Administrative Law relating to Judicial Review and the Law of Evidence. The Commission has received no response in relation to the recommendations made by it nor have those recommendations been made public. The Commission urges that its recommendations and report be made public so as to raise public awareness to those problems and hopefully activate public debate thereon, the whole to the greater benefit of law reform in Mauritius.

In the early part of the year, 1998, the Commission was particularly busy with assisting the Mackay Commission with the elaboration of its recommendations. The Law Reform Commission notes with satisfaction that the Mackay Commission has taken on board most, if not all, its Recommendations. Members of the Law Reform Commission were particularly active in elaborating and finalising the text of the proposed rules of the Supreme Court. Those rules were initially prepared by a joint committee of the Law Reform Commission and the Rules Committee, and submitted to the MacKay Commission. That Commission worked on those draft Rules, accepted the principles embodied therein and fine tuned the text and annexed it to its own report. The Mackay Commission also recommended that those rules be incorporated in an Act of Parliament and be promulgated. The Commission strongly urges that this be done at the first available opportunity. The Commission believes that such an opportunity exists with the Administration of Justice Bill which has obtained its first reading in Parliament. The Commission urges that the Bill be amended so that the draft Rules be annexed to the Bill and be promulgated together with the Act. It goes without saying that later amendments to the Rules themselves will be made, in accordance with the time honoured practice, by the Judges of the Supreme Court collectively.

The Commission noticed that the Recommendations of the Mackay Commission relating to the composition of the Judicial and Legal Service Commission have not yet found their way to the statute book. The Commission believes that such a reform is already too long delayed. It addresses the concern raised concerning the appointments and discipline of the lawyers in public service. The reform will not only strengthen the Judicial and Legal Service Commission but also create the necessary transparency to restore public confidence in the Judicial System. It will certainly dispel the belief that such appointments are made arbitrarily by less than a handful of Judges; the casting vote of the Chairman reducing that number further.

The Commission also notes that the reforms relating to the setting up of a Court of Appeal Division and a High Court Division of the Supreme Court is not contained in the Administration of Justice Bill. Here again, this long awaited reform can and should be urgently introduced. It will also expedite the administration of justice, give the judicial officers the opportunity to obtain much needed specialist knowledge and create public confidence in the system by isolating the Judges sitting on appeal from the Trial Judges. It also creates the possibility of having at least one appeal instance in Mauritius itself in all cases, including matters where more than one Judge sit at first instance. The Commission urges that such a reform be incorporated in the Administration of Justice Bill presently before the Parliament.

The Commission welcomes the introduction of the Administration of Justice Bill and believes that with the incorporation of the two matters hereinbefore referred to, i.e, the Rules of the Supreme Court and the new system under which the Supreme Court is to function, will enhance the image and credibility of the Judicial System. Those reforms will not involve great expenditure or greater human resources than is already available. No cogent ground has yet been raised for deferring those reforms which are not only urgent but which have acquired public endorsement and support.

In the latter half of the year, the Commission has mostly been waiting for action which is proposed to be taken for implementation of the Recommendations of the Mackay Report.

It has further considered reforms of a more minor nature, to wit:

1. In an age of modernisation and globalisation of trade, in a country where services and industry are being strongly encouraged, the Commission finds that it is anachronistic that our Trade Marks Act still refuses to acknowledge and sanction Service Marks. Such Service Marks are urgently required to protect all the service industries and more particularly the hotels and the services cognate to tourism. The Commission therefore recommends that the Trade Marks Act be amended so as to include recognition for and protection of Service Marks.
2. Recent events and perceived abuses in relation to the appointment and functioning of Receiver Managers have created an immense public distrust in our insolvency institutions both in Mauritius and abroad. Foreign investors and embassies believe that the institution of Receiver Managers is one by which the charge-holders and their cronies can fleece unfortunate investors and expropriate their industries and assets with impunity. In order to restore the credibility of Mauritius as a safe place for investment, it is indispensable that the Companies Act be reformed, hopefully into several distinct Acts relating to, firstly, securities, and secondly insolvency over and above the traditional rules relating to incorporation and management of a company.
3. Relating to the Intellectual Property Act, the Commission views with concern that a print out or other electronically produced document be taken to be as evidence of that fact without being verified by evidence under oath. While such may be the presumption in relation to matters of public records, such a presumption does not necessarily hold true in matters of private record. It is a known fact

that electronically produced documents may be manipulated. The Commission recommends that the genuineness and purport of all such documents be verified by evidence under oath.

4. Doubts have been raised as to whether the provisions of article 2202/3 of the Civil Code are not too restrictive and whether that article extends to all the different types of banking facilities which are granted by bankers to their customers in the normal course of business, e.g. bank guarantees, etc. It is therefore recommended that the words “et toute facilité bancaire” be inserted between the words – “d’un paiement” and “consenti”.

5. A further curious anomaly has now arisen. Ushers were historically and by tradition independent professionals to whom the public could have direct access to perform the several duties which they are called upon to perform. Some time in 1952, by Ordinance No. 31 of 1952, ushers were no longer authorised to remain in private practice and were compelled to become public officers under the control of the Supreme Court. Thereafter, the services of Ushers were obtained on application to the relevant officer of the Supreme Court. Gradually, the system has become more and more rigid and ushers feel that they cannot perform an extra judicial act such as a constat without an order of a Judge. Some Judges feel that they have no jurisdiction to make such an order unless expressly empowered to do so by law. This leads to a frustration of the rights of the public. It is therefore recommended that the recommendations of the Mackay Commission that a number of Ushers be allowed to resume private practice be implemented as a matter of urgency.