



LAW REFORM COMMISSION

Issue Paper

Constitutional Protection of Human Rights

[October 2010]

Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL <http://lrc.gov.mu>



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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

Executive Summary

LAW REFORM COMMISSION OF MAURITIUS

Issue Paper

“Constitutional Protection of Human Rights”

[October 2010]

This Issue Paper contains the views of the Commission as to the manner in which fundamental rights and freedoms can be further entrenched in the Constitution. 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.

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.

The following socio-economic rights can be afforded constitutional protection:

- (a) Right to education;
- (b) Right to language and culture;
- (c) Right to housing;
- (d) Right to basic amenities;
- (e) Right to a healthy and sustainable environment; and
- (f) Right to freedom of trade, occupation and profession.

The rights of the following vulnerable persons should be afforded constitutional protection:

- (a) The Child;
- (b) The Elderly Person;
- (c) The Person with Disabilities; and
- (d) The Witness in Court Proceedings.

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

(A)Introductory Note: Background

1. Almost all democratic States have included certain human rights as part of their Constitutions. Their inclusion generally means that they have some degree of priority over the laws enacted by the legislature (and administrative action)¹ and that special requirements must be observed in order to amend them.² Their ‘entrenchment’ in this way clearly has the advantage of protecting them against infringements but it also restricts the will of the majority.

2. In Mauritius, the following fundamental rights and freedoms are entrenched in Chapter Two of the Constitution:
 - the right to life³;
 - the right to personal liberty⁴;
 - the right to freedom from slavery and forced labour⁵;
 - the right to freedom from torture, inhuman or degrading treatment or punishment⁶;
 - the right to protection against deprivation of property⁷;
 - the right to privacy of the home and other property⁸;
 - the right to protection of the law [due process guarantees]⁹;
 - the right to freedom of conscience¹⁰;

¹ Vide section 2 of the Constitution.

² Vide Section 47 of the Constitution.

³ Section 4.

⁴ Section 5.

⁵ Section 6.

⁶ Section 7.

⁷ Sections 3 & 8.

⁸ Section 9.

⁹ Section 10.

- the right to freedom of expression¹¹;
- the right to freedom of assembly and association¹²;
- the right to establish and maintain schools at one's own expense¹³;
- the right to freedom of movement¹⁴;
- the right to freedom from discrimination¹⁵.

3. The Commission has reflected on the manner in which fundamental rights and freedoms can be further entrenched in the Constitution. What follows are our reflections.

(B) Strengthening Recognized Rights

4. We consider 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]. A non-discrimination, or equality provision, which is *open-ended* or indeterminate, as to the possible grounds of discrimination that will engage the right, has one particular significant interpretative result. Determining whether a given distinction violates the non-discrimination principle will never concern whether the given distinction is covered by the non-

¹⁰ Section 11.

¹¹ Section 12.

¹² Section 13.

¹³ Section 14.

¹⁴ Section 15.

¹⁵ Sections 3 & 16.

discrimination provision or not. Every distinction, of any kind, will invoke the non-discrimination or equality principle. History shows that the legislature cannot beforehand foresee all forms of prejudice and discrimination that may crop up in a given society.¹⁶

5. Section 9 of the Constitution affords protection merely to privacy of home and premises. We consider its ambit should be expanded so as to include respect for private and family life.
6. The right to freedom of expression is afforded constitutional protection by section 12 of the Constitution. Freedom of expression is defined as the freedom to hold opinions and to receive and impart ideas and information without interference.

Freedom of expression constitutes one of the essential foundations of a democratic society. It is necessary for the pursuit of truth, individual self-fulfillment, and the democratic process.

The right guaranteed by section 12(1) does not, however, cover access to official information. We consider the system of freedom of expression should be strengthened by also guaranteeing the right of access to information.¹⁷

¹⁶ With the development of science and technology, new forms of discrimination are likely to emerge, such as genetic discrimination: *vide* Australian Law Reform Commission Report No. 96 on ‘Protection of Human Genetic Information’ vol. 1 at pp. 289-318 and vol. 2 at pp. 651 seq.

¹⁷ Consideration can be given as to the inclusion in the Constitution of the following guarantee:

Protection of right of access to information

- (1) Everyone shall have the right of access to –
 - (a) Any information held by the State; and
 - (b) Any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) The law shall give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden of the State.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
 - (a) in the interests of defence, public safety, public order, public morality;
 - (b) for the purpose of protecting the rights or freedoms of other persons;except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.

7. We also consider that Protection of the Law (section 10) should be better secured. This can be achieved by protecting rights to just administrative action¹⁸ and by prescribing as a constitutional norm that slavery (and other related practices) is a crime against humanity.

(C) Affording Constitutional Protection to Economic, Social and Cultural Rights

8. 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, we consider the following socio-economic rights can be afforded constitutional protection:
- (a) Right to education;¹⁹
 - (b) Right to language and culture;²⁰

¹⁸ The following provisions can be included in the constitution:

Protection of rights to just administrative action

- (1) Everyone shall have the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action shall have the right to be given reasons.
- (3) The law shall give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.
- (4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2) to the extent that the law in question makes provision -
 - (a) in the interests of defence, public safety, public order;
 - (b) for the purpose of protecting the rights or freedoms of other persons;except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.

¹⁹ The constitutional guarantee could be drafted in the following manner:

Protection of right to education

- (1) Everyone has the right to -
 - (a) a basic education, including adult basic education; and
 - (b) further education, which the State through reasonable measure shall make progressively available and accessible.
- (2) In order to ensure the effective access to, and implementation of, this right, the State shall consider all reasonable educational alternatives, taking into account various types of education to meet different levels of competencies.

²⁰ The constitutional provisions guaranteeing this right could be drafted as follows:

- (c) Right to housing;²¹
- (d) Right to basic amenities;²²
- (e) Right to a healthy and sustainable environment;²³ and
- (f) Right to freedom of trade, occupation and profession.²⁴

Protection of right to language and culture

Everyone shall have the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of this Constitution or any law enacted under this Constitution.

²¹ The constitutional provisions could be drafted in the following manner:

Protection of right to housing

- (1) Everyone shall have the right to have access to adequate housing.
- (2) The State shall take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of a court of law made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

²² The constitutional guarantee could be framed in the following manner:

Protection of right to basic amenities

- (1) Everyone shall have the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) No one may be refused emergency medical treatment in a public health institution.
- (3) The State shall take reasonable measures, within its available resources, to achieve the progressive realization of each of these rights.

²³ The constitutional guarantee could be drafted as follows:

Protection of right to a healthy and sustainable environment

- (1) Everyone shall have the right to an environment that is not harmful to their health or well-being; and
- (2) Everyone shall have the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

²⁴ The constitutional guarantee could be drafted in the following manner:

Freedom of trade, occupation and profession

Every person shall have the right to choose his trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

(D) Guaranteeing the Rights of Vulnerable persons

9. The rights of the following vulnerable persons should be afforded constitutional protection:

- (a) The Child;²⁵
- (b) The Elderly Person;²⁶
- (c) The Person with Disabilities;²⁷ and

²⁵ The following guarantee can be afforded to the child:

Protection of the rights of the child

- (1) Every child, being a person under the age of eighteen years, shall have the right -
 - (a) to a name and a nationality from birth;
 - (b) to parental care or family care, or, when removed by the State from that environment, to appropriate alternative care;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, sexual abuse or any other form of abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys in relation to freedom and security of the person and in relation to a person being accused, arrested, or detained, the child may be detained only for the shortest appropriate period of time, and shall have the right to be -
 - (i) kept separately from detained persons who are over the age of eighteen years; and
 - (ii) treated in a manner, and kept in conditions, that takes account of the child’s age;
 - (h) to have a legal representative assigned to the child by the State, and at the expense of the State, in civil proceedings affecting the child, if substantial injustice would otherwise result;
 - (i) not to be used directly or indirectly in any form of armed conflict, and to be protected in time of such conflict; and
 - (j) to be protected from any form of sexual trade for the purpose of pornography or any other dehumanizing or illicit purpose.
- (2) A child’s best interests shall be of paramount importance in every matter concerning the child.
- (3) The State shall take reasonable measures, within its available resources, to achieve the progressive realization of these rights, by setting out clearly the criteria for eligibility.

²⁶ On the 16th of December 1991, the *United Nations Principles of Older Persons* was adopted by the UN General Assembly (resolution 46/91). These provide for the protection of the fundamental rights of elderly persons:

- 1. The Right to Independence;
- 2. The Right of Participation;
- 3. The Right to Care;
- 4. The Right to Self-Fulfillment;
- 5. The Right to Dignity.

(d) The Witness in Court Proceedings.²⁸

Consideration can also be given as to whether the rights of the consumer should be guaranteed in the Constitution.²⁹

²⁷ There are eight guiding principles that underline the UN Convention on the Rights of Persons with Disabilities:

- (1) respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (2) non-discrimination;
- (3) full and effective participation and inclusion in society;
- (4) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (5) Equality of opportunity;
- (6) Accessibility;
- (7) Equality between men and women; and
- (8) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

²⁸ The following guarantee can be afforded:

Witness Protection

- (1) The State shall ensure that necessary and reasonable action is taken to protect the safety and welfare of a witness in any proceedings before a court.
- (2) In this section
“witness” includes a person who has made or given a statement in any form or who has given or agreed to give evidence in any proceedings in relation to the commission of an offence;
“proceedings” includes any procedure in relation to an alleged or proven offence, including an inquiry or investigation, or preliminary or final determination of such inquiry or investigation.

²⁹ There are some 27 National Constitutions which contain specific provisions on consumer protection. The countries are: Cambodia, East Timor, Philippines, South Korea, Thailand, Vietnam, South Africa, Republic of Yemen, Republic of Uzbekistan, Republic of Cape Verde, Turkey, Andorra, Bulgaria, Lithuania, Poland, Portugal, Spain, Switzerland, Ukraine, Argentina, Brazil, Colombia, Costa Rica, Ecuador, Paraguay, Peru, and Mexico.

(E) Concluding Remarks

10. It was recently announced in the Presidential Address on Government Program 2010-2015 on 8 June 2010 at paragraphs 5 and 6 that:

The Constitution we inherited from the founding fathers of the nation has served us well. However, no matter how well our institutions may be seen to be functioning, they need to be adjusted to help the country face new challenges. We need a constitutional regime that will strengthen our democracy, promote nation-building and further entrench the fundamental rights and freedom of all Mauritians.

As part of this process of constitutional review, Government will start wide ranging consultations and will appoint a team of constitutional experts which will assess the application of the Constitution since 1968 and consider the appropriate constitutional reforms, including the reform of our electoral system.

We trust our views will help generate some thinking as to the range of human rights worthy of being afforded constitutional protection.