



LAW REFORM COMMISSION

Opinion Paper

Attorney's Commission

[April 2011]

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>



LAW REFORM COMMISSION

Chairperson : Mr. Guy OLLIVRY, QC, GOSK

Chief Executive Officer : Mr. Pierre Rosario DOMINGUE [Barrister]

Members : Mr. Satyajit BOOLELL, SC [Director of Public Prosecutions]

Mrs. Aruna D. NARAIN [Ag. Parliamentary Counsel]

Mrs. Rita TEELock [Judge, Supreme Court]

Mr. Rashad DAUREEAWO, SC [Barrister]

Mr. Pazhany RANGASAMY [Attorney]

Mr. Roland CONSTANTIN [Notary]

Ms. Odile LIM TUNG [Law Academic (UoM)]

Mrs. Daisy Rani BRIGEMOHANE [Civil Society]

Mr. Navin GUNNASAYA [Civil Society]

Secretary : Mrs. Saroj BUNDHUN

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.

Opinion as to Constitutionality & Harshness of Attorney’s Commission

1. The Commission has considered at the request of a member of the public, one Mr. VC, the law on “Attorney’s Commission”. Mr. V.C. claims that “*the harsh commission of attorney of 10% which is usually claimed by them to the court is in breach of section 8 of the Constitution of Mauritius*”.

2. As a matter of practice, banks and other financial institutions require the following clause to be inserted in loan agreements/notarial deeds:

“Qu’en cas de recouvrement de tout ou partie du montant du prêt, de ses intérêts ou de tous autres accessoires, par le ministère d’un avoué, l’acquéreur/emprunteur sous peine d’exigibilité immédiate et de plein droit du montant du prêt ou de ce qui en restera s’oblige à rembourser immédiatement à la banque créancière la commission d’usage que cette dernière aura versé au dit avoué; laquelle commission ne pouvant en aucun cas excéder dix pour cent de la somme recouvrée par le dit avoué, ainsi que toute taxe sur la valeur ajoutée; laquelle commission sera considérée en cas de recouvrement par l’acquéreur/emprunteur comme accessoire du dit prêt et comme telle sera garantie par l’inscription qui sera prise lors de la transcription du présent contrat pour conservation du privilège résultant du paiement par la dite compagnie créancière ...”

3. Section 8(1) of the Constitution provides that “no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired”.

4. Subsection 4(a)(iii) of section 8, however, is to the effect that

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property –

(i) ...;

(ii) ...;

(iii) as an incident of a lease, tenancy, mortgage, charge, sale, pledge or contract ...

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”.

5. The Commission is of the view that such a contractual obligation is in conformity with section 8(1) of the Constitution as “the commission payable to the attorney as an ‘accessoire du dit prêt’ appears as an incident of a charge foreseen [by subsection (4)(a)(iii)] which is authorized by law.

Article 1134 of the Code Civil Mauricien provides that “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.”

The clause passes the test of ‘being reasonably justifiable in a democratic society’ in that it stipulates that “la commission ne pouvant en aucun cas excéder dix pour cent”: the interference with property rights is proportionate to the aim pursued [it’s not 10% but up to 10% of the sum].

6. The Commission wishes nonetheless to refer to the views expressed by the Commission of Inquiry on Sale by Levy, chaired by Sir Victor Glover, GOSK, which addressed the unfairness of this practice permitted by law. This is what the Commission had to say in its 2004 Report at para. 47-50:

“E. Payments to attorneys

47. *Much has been said and written about the commission of 10% which is payable to an attorney on amounts recovered by him. There is of course nothing in the law which prevents a person in whose favour X subscribes an obligation (which may not necessarily be a loan) from requiring X to agree beforehand that, if the person has to have recourse to an attorney to recover any sum due, he (i.e. X) will, in addition, pay to the attorney 10% of the sum recovered. Incidentally, since the law requires VAT to be paid*

on the amount of the commission by the attorney at 15%, the commission is in fact 11.5% of the sum recovered. And the Supreme Court has, more than once, held that there was nothing wrong with the execution of such contractual obligation.

48. *We are not happy with this for 3 reasons. The first is that the obligee has no choice but to agree to such a stipulation and this assumes all its importance in the several cases where, in the case of a loan, the borrower gets into a problem through no fault of his because he loses his job or he falls seriously ill. The second is that this may be responsible for the fact that certain attorneys to whom creditors refer cases of non-performing loans will be inclined to collect part-payments from borrowers who clearly have no hope of saving their property from being sold. As one “victim” put it quite neatly: “The attorney should not have taken Rs 50,000 and then Rs 65,000 from me as he knew my property was going to be sold”. The third is that, in nearly every case, since the debtor has no money, the commission has to be paid by the person who purchases the property at the Bar.*
49. *The question of part-payments brings us to the oft-repeated allegation that certain attorneys exact money from debtors in exchange for a postponement at the Master’s Court. The fact is that, after acceding to a request for an adjournment of the sale on two or three occasions, any Master will normally only countenance a further request where he is satisfied that the debtor has made, and is likely to further make, an effort to repay at least the arrears due. It is therefore natural for the creditor’s attorney to ask the debtor for a part-payment if he wants a further postponement. It is therefore probably equally natural that many “victims” became convinced that “bizin donne la monnaie avoué pou gagne renvoi”. However, we have had no hesitation in disbelieving the few allegations to the effect that the attorney asked the debtor to give money for the purpose of bribing the Master, or the clerks or the ushers to get a postponement.*
50. *Moreover the manner in which certain attorneys label the receipts given by them is not calculated to improve their image. We reproduce here a copy of a typewritten receipt issued on behalf of an attorney -*

“This 29th May, 1996.

Received from Mr. ... paying for Mrs. ..., the sum of FIFTY THOUSAND RUPEES Rs : 50,000.- as part payment on capital, interest and attorney’s commission (interest to be imputed first) on account of Mrs. ..., with reserves as to the capital, interests, attorney’s commission and costs of seizure, and without novation or derogation as to the seizure and sale by levy which will be proceeded with unless the whole amount of capital, interests, attorney’s commission and costs of seizure be paid before the date of sale”.

What follows is a copy of a hand-written receipt issued on behalf of an attorney -

“This is to certify that Mr. ... Notary public has on the 12th day of December, 2000, paid a sum of thirty thousand rupees Rs 30,000/- as agreed costs of seizure and attorney’s commission in the matter of”

The first receipt gives a wealth of information which is meaningless to anyone but the person who drafted it, while the second tells us little of what one would expect it to tell us.”

7. The Commission of Inquiry in unequivocal terms considered the law should be reformed (at para. 81 and 86).

“81. No person shall be permitted to bind a person who enters into an obligation with him to pay to the creditor’s attorney, in case of a dispute or litigation, any sum of money, by way of commission or otherwise, other than the costs lawfully incurred ...

86. ... The compulsory payment of a commission by a debtor to the creditor’s attorney is open to criticism ... An obligee should not be required to effect any payment including commission to the obligor’s attorney other than lawful costs.”

8. The Law Reform Commission considers that, as recommended by the Commission of Inquiry on Sale by Levy chaired by Sir Victor at para. 81 and 86 of its Report, the law should be amended to prohibit this unfair practice.