BY

Honourable Y K J Yeung Sik Yuen, G O S K.,
Chief Justice of Mauritius

VENUE: Sir Harilall Vaghjee Hall ***4 March 2013***

INAUGURAL TALK TO CELEBRATE LAW DAY IN MAURITIUS BY CHIEF JUSTICE ON

4 MARCH 2013 AT SIR HARILALL VAGHJEE HALL

"DEMOCRACY AND THE RULE OF LAW"

What is Law Day?

Ladies and Gentlemen,

I was approached by the Attorney General**, Hon Yatin Varma**, to give an inaugural address on a subject of my choice. I was made to understand that the event would be the start of a yearly tradition in Mauritius: that of celebrating a **Law Day**. I believe this is a landmark initiative in the democratic profile of our country and the enhancement of our legal and judicial system.

Why and what is a **Law Day**? The **World Law Day** is an initiative of the **World Jurist Association** which was founded in 1963, fifty years ago. The **WJA** itself was formed in response to an international call for a free and open forum where judges, lawyers, law professors and other professionals from around the world could meet and harness their efforts with the prime objective of consolidating the domestic and the international Rule of Law and world peace without which humanity was going to slip into the rule of the lawless and into chaos. WJA's members come from over 140 countries in the world. Its seat is in Washington D.C. and its logo is "***Pax Orbis Ex Jure***" meaning World Peace through Law.

The reason for the celebration of a **Law Day** is obvious. We, in Mauritius, share the same ideals. Many of you will remember that the WJA held a very successful conference in Mauritius in 2011.

I did not have to think twice to choose my topic to fit the context, the country and the celebration. I shall address the topic **Democracy and the Rule of Law,** not in the style of a submission before a court of law, but in the observance of the historical development of our constitutional jurisprudence.

The Judiciary is a lonesome institution. It comes out rarely to explain the contribution it has made to the country's development through establishing the rule of law and the inculcation of a culture of democracy. This event at least affords me an opportunity to blow some trumpet!

I hope there are not many of you who assume that democracy and the rule of law are so firmly established in to-day's world that God can quietly rest in His Heavens because everything is under control in this world of ours. Upheavals in societies, even well regulated ones, are too many and recent for us to be disillusioned. Democracy under the rule of law is a problem of concept and application as much today as in the time of Plato or before.

The twentieth century which is not long gone has been an age of unprecedented barbarism. The grossest impunity, untold inhumanity to human beings by human beings and a host of manmade holocausts have plagued that century and will beckon the conscience of mankind for many more generations. Our present century has already had its own dose of man-made calamities. It has witnessed a number of unjustifiable belligerent conducts and actions, sometimes coined and justified as "*pre-emptive actions"* which have been taken" *to attack your enemy before being attacked".* I am sure all the lawyers here present would find a problem reconciling such situations with a fair appraisal of our notion of self defence or even provocation.

On the other hand, ungodly fanaticism leading to Indiscriminate acts of terrorism have been and are still being perpetrated on a scale which has shocked the conscience of every right thinking human being. Today we realize that WJA's mission to promote world peace based on the rule of law is yet to be accomplished.

Mauritius has been fortunate that, all along its constitutional history as an independent and sovereign nation, the legal fraternity, including judges and lawyers present in various spheres , fully assumed its role of nation building along democratic principles and with due respect to the rule of law. Democracy and the rule of law were the prime movers which made us thrive against all the odds that were already inbuilt in a country which happens to be "*multi-everything"*- multi-racial, multi-communal, multi-lingual, multi-cultural, multi-religious, multi-ethnic and probably also prone to be multi-suicidal!

While others constructed elsewhere, the Supreme Court did its bit in the constitutional construction of the country. It made of democracy and the rule of law its capital input for the development of the Mauritian nation. That gave political stability to the country which in turn gave investors the necessary confidence to engage in development and making it a success, as had been suggested by Professor de Smith, the architect of our Constitution.

Today, one section or another of our Constitution is often referred to at all levels of jurisdictions. Such a culture of constitutionalism was not acquired overnight but has the imprint of the higher Judiciary as it built its way over the years through interpreting various sections of the Constitution which came up before it for consideration.

Plan of my Presentation

Time does not permit me to go into details. I propose to give but a glimpse of it from the following core ideas which underlie my presentation. They are as follows:

(1) the ideal of democracy;
(2) the issue of human rights under the Constitution;
(3) separation of powers and independence of the judiciary: a look at Mauritian jurisprudence;
(4) the reverse side of the coin;
(5) civil and political rights versus economic, social and cultural rights;
(6) the Rule of Law and Democracy;
(7) Meaning of the Rule of Law;
(8) Judicial Review and Judicial Activism – the Mauritian brand;
(9) What next in Mauritian constitutionalism.

(1) <u>The Ideal of Democracy</u>

The very first section of our Constitution having as heading: **The State ,** proclaims that

*"Mauritius shall be a sovereign **democratic** State which shall be known as the Republic of Mauritius."*

No definition of "Democratic" or "Democracy" is however given. These are notions which defy any well delimited definition just like other abstract notions like truth, honesty, equality, etc. Did not Pontius Pilate ask Jesus Christ the rather impertinent question: ***"What is truth?"***

At the risk of making many discontented persons among this audience I can hazard to add that *"democracy"* is more than *"government of the people, for the people and by the people"* but it is also respect and observance of human rights; an ideal, a principle of governance to which are attached a cluster of good practices like honesty, fairness, non-discrimination, equality, equal opportunity and the existence of the rule of law. Since the Constitution speaks of democracy in its very first article a reference to other articles of the Constitution is also called for.

Section 2 states that the Constitution is the supreme law of Mauritius and if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void.

In **Vallet v Ramgoolam & The Governor General 1973 MR 29,** the Supreme Court consecrated what has today come to be known as the principle of constitutionality. The question in the case was whether an amendment by way of Regulations under emergency powers to change the date of a by-election was valid or invalid. The Court decided that, in the circumstances it was valid. However, the principle it laid down was important. All must be played on the platform of constitutionality. There is a presumption of constitutionality in the manner in which our system of law functions. Those who allege unconstitutionality should come up and show it. No matter what the Mauritian complexity was in terms of allegiance to race, community, language, culture, religion, and ethnicity, the acid test of the Mauritian citizen's behavior and conduct is constitutionality and nothing less. To the initiated today, this looks so obvious. But the way to this new world was not so obvious just like the voyage of Christopher Columbus.

The principle of constitutionality was confirmed in the case of **Bérenger v. The Governor General 1973 MR 215**, not long after. The question in that case was whether an amendment to section 57 of the Constitution to prolong the mandate of parliament to a date beyond the 5 years was valid or void.

The Supreme Court decided that, a quinquennial parliament is inbuilt in our system of law. However, since the Constitution itself allowed amendments to be brought in a particular manner and that procedure had been followed, one could not say that the amendment was unconstitutional.

Of particular significance here is the fact that since 1991 [Act 48/91], section 57(2) of the Constitution has been "**deeply entrenched**" and can now only be amended in accordance with section 47(3). Any proposed Bill for an amendment of section 57(2) must, pursuant to section 47(3), before its introduction in the national Assembly, be first submitted to a referendum and must have obtained the approval of not less than ¾ of the electorate. After a successful referendum the amendment must then be supported by the votes of all the members of the Assembly. Another section of the Constitution that is "**deeply entrenched"** is indeed section 1.

It is worthy of note that this amendment of our Constitution brings us very close to the doctrine of "*basic structure of the Constitution"* propagated by the Supreme Court of India in the case of **Keshvananda Bharti v State of Kerala AIR 1973 SC 1461** as regards the scope and limit of the amending process under its article 368.

Once our case law had laid down the principle of constitutionality and our thinking mind was directed to the Constitution, the logical outcome was to consider how the several provisions in the Constitution relate to one another. More particularly, our jurisprudence had to capture a global vision, so to speak, on the manner in which it was to work within a democratic system of government, taking into account that the principle of the rule of law within a democracy was primordial and that not only rivulets, but torrents could flow therefrom.

(2) Human Rights under the Constitution:

Chapter II of the Constitution entitled *"Protection of Fundamental Rights and Freedoms of the Individual"* runs from sections 3 to 19. All the civil and political rights known and protected under the major International and regional Human Rights instruments are spelled out therein.

Thus section 3 deals with the fundamental rights and freedoms of the individual, while sections 4 to 16 deal with the *"Protections",* namely:

right to life;
right to personal liberty;
protection from slavery and forced labour;
protection from torture, inhuman treatment and degrading punishment;
guarantees from deprivation of property;
protection of the privacy of home and other property;
equal protection of the law;
freedom of conscience;
freedom of expression;
freedom of assembly and association;
freedom to establish schools;
freedom of movement;
protection against discrimination.

(3) Separation of Powers and Independence of the Judiciary: a look at Mauritian jurisprudence.

Let us now consider a few decisions of the Supreme Court of Mauritius in which the issues of separation of powers and independence of the Judiciary were raised and considered so that we can best understand and appreciate what the Rule of Law means to the Mauritian Judiciary and how it is applied.

In **Mahboob v Government of Mauritius 1982 MR 135**, M had sold an immoveable property to the Rabita-Al-Alam, an alien organization, in circumstances which made the sale null and void (i.e. not having obtained the prior approval of the Prime Minister under the Non-Citizens (Property Restriction) Act. The Supreme Court held that the plaintiff was the legal owner of the property. Parliament subsequently passed an Act which deemed that the sale was valid and that the alien had had a valid title. The Supreme Court held that it is a fundamental disposition of the Constitution that there should be a separation of powers between the Legislature, the Executive and the Judiciary.

Parliament has no more right to pronounce judgments than the Supreme Court has a right to make laws. The enactment was a usurpation of judicial power, and must be struck down. Despite the Act, the plaintiff remained the legal owner of the immoveable property. The Act amounted to a deprivation of property in breach of section 3 of the Constitution and must be struck down.

In **Green v Prime Minister and Minister of Foreign Affairs 1993 MR 209,** the Supreme Court was called upon to decide on the reviewability of a Ministerial decision said to be absolute. The applicant, an alien, had acquired Mauritian residence by marriage. He subsequently divorced his wife. He was informed that in the public interest and pursuant to section 6(1) of the Immigration Act he was to be deprived of his Mauritian residence and that he should leave the country. HELD: although section 6(1) speaks of an absolute discretion in matters of deprivation of residence, the discretion is reviewable. The court cited with approval a passage in **Chung Suan Tze v Minister of Home Affairs 1989 LRC (Const) 683,** a decision of the Court of Appeal of Singapore:

> *"All powers had legal limits and the rule of law required that Courts be able to examine the exercise of discretionary powers; the notion of a subjective or unfettered discretion was contrary to the rule of law. The boundaries of a decision maker's jurisdiction conferred by an Act of Parliament was a question solely for the Courts to decide.* ***Padfield v Mininster of Agriculture 1968 AC 997 HL applied.***

In **Velle Vindron v R 1982 MR 135,** the question of impugning the constitutionality of a law was raised. Section 5(2) of the Forest, Mountain and River Reserves Act provided that : *"any person who…is found in possession of any wood and shall not satisfactorily account for such possession …shall be guilty of an offence."* That section was meant to cover cases of suspicious possession of wood removed from Reserves but the text creating the offence was too wide. It was contended that section 5(2) was unconstitutional as offending the presumption of innocence laid down in section 10(2)(a) of the Constitution. Indeed under that text a person carrying a wooden match stick may be called upon to justify possession.

The Court (Rault J.) held that the enactment does not merely require the accused to prove particular facts but it places upon him the burden of proving a general, unconditional innocence, without even first calling upon the prosecution to prove any suspicious or sinister circumstances. The law was therefore contrary to the Constitution and was struck down.

In ***Police v Fra 1975 MR 157*** a similar situation arose. Section 28(3) of the then Penal Code (Supplementary) Act provided that "*a person shall be deemed to be a rogue and vagabond who is found within any[private] land [not belonging to him] without giving a satisfactory explanation for his presence there."* **Held:** text of a penal law must be precise. It was too vague and was capable of ridiculous interpretation. Must one who enters a shop give explanations that he wants to buy cheese and bread so as not to fall foul of the law? Section 28(3) was repugnant to section 10(2)(a) of the Constitution which provides for the protection of presumption of innocence.

In **Khoyratty v the State 2004 PRV 59** the Judicial Committee upheld a judgment of the Supreme Court which found that section 5(3A) of the Constitution passed to prevent certain persons from applying for bail, namely those arrested for offences related to terrorism and for prescribed drug offences, was contrary to section 1 of the Constitution. Section 1 of the Constitution was not envisaged as an empty general statement, but as a real bastion to protect and perpetuate among other things, the Rule of Law and the existence of an independent judiciary that is independent of the executive and the legislature. These are basic principles which were themselves not expressly spelled out in the Constitution. Granting or refusing bail is a function which is intrinsically within the domain of the Courts and the imperative prohibition imposed on the judiciary to refuse bail pursuant to section 5(3A) of the Constitution was in breach of the principle of separation of powers. Section 5(3A) of the Constitution was passed by a majority of 75% in Parliament but it could not override article 1 which could only be amended after a proposed Bill to do so had been submitted to a referendum and obtained not less than ¾ of the electorate and further obtained the support of all the members of the Assembly.

Khoyratty is a good illustration that even where the legislator has a good cause to defend, it must never overkill. A good case for comparison is the famous or rather notorious*" Loi Toubon" du 4 août 1994 relative à l'emploi de la langue française."* My switching from English to French can be considered as perfectly natural in the context of our multiculturalism and multilingualism. The Supreme Court is noted for its persistent switch from English to French in its judgment writing when French authors, French jurisprudence and sometimes even French maxims are quoted in a judgment delivered in the English language*. Apres tout, c'est dans la nature des choses chez nous.*

The purpose of the "*Loi Toubon"* was to purge anglicisms from the French language. That law made it an offence to use unapproved foreign words on television, the radio and in the press. The French Constitutional Court, the "*Conseil Constitutionnel"* struck down the most sweeping provisions as being in breach of the freedom of expression enshrined in the French Declaration of the Rights of Man of 1789.

The little bilingual Mauritian guy would surely find it amusing that in Quebec a hot dog is called a*" chien chaud"*. Such literal translation may result in some weird and even offensive language, the worst of which was experienced at the women's wing of the model prison at Kingston, Ontario, Canada which Judge Domah and myself visited in the late 1980s. Canada enjoys two official languages and all official publications are done in both French and English. The notice board that caught our attention in that prison, found in an English speaking Canadian province, read as follows*: Female Wardress on Patrol*. We wondered whether the word female was not unnecessary considering that *Wardress* is the feminine of Warden. But the French translation was simply inappropriate. It read: "*Gardienne femelle en patrol".*

Reading down provisions of the law which *ex facie* is unconstitutional

The judicious manner in which the Supreme Court has proceeded with playing its role in the democratic construction of the country is worthy of note. It is open to the Supreme Court to strike down a particular law or section of it as unconstitutional. But this is not what it will do when section 2 of the Constitution can be invoked to read down the offending provisions of the law in order to render it operative while at the same time ensuring compliance with the Constitution. This is what it did in **Philibert and Others v The State (2007) SCJ 274.**

Prior to its amendment by Act 6 of 2007 which came into effect on 18 June 2007, section 41(3) of the Dangerous Drugs Act provided that a person convicted of an offence under section 30 of the DDA who is found to be a trafficker "*shall be sentenced to penal servitude for 45 years".* Following the decision of the Supreme Court in **Philibert** that section was amended to provide for a fine not exceeding 2 million rupees together with penal servitude for a term not exceeding 60 years. Thus the legislator came back to the proper way of legislating, namely, providing for a maximum sentence while leaving it to the appreciation of the courts to decide the appropriate sentence that should be passed in each individual case.

What did **Philibert** decide? The Court of Criminal appeal held that interpreting section 41(3) as it then stood as imposing a mandatory sentence of 45 years indiscriminately in all cases would contravene the principle of proportionality and would amount to inhuman or degrading punishment or such other treatment contrary to section 7(1) of the Constitution. However, section 2 of the Constitution which provides that "*if any other law is inconsistent with this Constitution, that other law shall,* ***to the extent of the inconsistency,*** *be void"* could be invoked. Further, according to section 5(4)(a) of the Interpretation and General Clauses Act, the word "shall" **may be read** as imperative. The Court held that the word "shall" in section 41(3) is not imperative and should be read down –in order to be compatible with section 7(1) of the Constitution- as meaning that the Court before whom the offender is tried has the discretion to pass a sentence of up to a maximum of 45 years. The Court was giving effect to the established principle that when a provision of the law is capable of two interpretations, one of which is compliant with the Constitution while the other is not, the first interpretation making it Constitutional should be adopted. This principle of interpretation can be gleaned from **DPP v Masson (1972) MR 204**. **Philibert** was cited with approval by the Privy Council in **de Boucherville v The State of Mauritius UKPC No 70 of 2007.**

The same principle was applied in **Bhinkah v The State (2009) SCJ 102** in which it was held that the minimum penalty prescribed in respect of an offence falling within the purview of section 301 A of the Criminal Code cannot fetter the discretion of the court to impose a lesser sentence where the imposition of the mandatory minimum term of 5 years would constitute a violation of the principle of proportionality. **Bhinkah** was quoted with approval in **Aubeeluck v The State [2010] UKPC 13.**

In **Malloo v The State [2010] MR 130,** the appellant's right to a fair trial within a reasonable time guaranteed under section 10 of the Constitution had been breached. It was held that section 17(2) of the Constitution empowered the Supreme Court to impose a term less than the 5 year mandatory term prescribed under section 301 A of the Criminal Code where there was a breach of section 10 of the Constitution.

In **Pandoo v The State [2006] MR 323**, a provision of the Value Added Tax Act required the imposition of a fine of Rs. 200,000 or three times the value of the tax due, whichever was the higher. The trial Court stated that it had no alternative but to impose a fine of Rs.200,000. On appeal the Supreme Court held that the relevant sections of the VAT Act were in breach of sections 3(a) [right of the individual to the protection of the law] and section 7 [protection from inhuman treatment] which incorporates in it the principle of proportionality of the sentence provided by law with the seriousness of the offence. There was no difficulty on the proportionality issue that a revenue, customs, or quarantine law makes provision for a sentence of treble the amount of the tax involved in respect of an offence akin to the one provided under the VAT Act. It is only in relation to that aspect of the minimum sentence which cannot be less than Rs 200,000 that the objection of proportionality was justified. Under the Act any failure by a registered person to pay tax, be it a few cents, on, say, the sale of a matchbox, could equally be amenable to prosecution leading to the imposition of a minimal fine of Rs.200,000. That was wrong.

(4) <u>The Reverse side of the Coin:</u>

Our committed adherence to the principle of separation of powers is also well illustrated by a couple of leading cases which relate to disputes of the National Assembly.

In **Lincoln and others v Governor General and others [1973] MR 290** the Supreme Court refused to grant an injunction to restrain (1) the Prime Minister from introducing a Bill in the then Legislative Assembly; (2) the Speaker, from allowing discussion on the Bill; (3) the Governor General from assenting to the Bill. The Court held that this would be interfering with the internal business of Parliament.

A similar decision was reached in **Keetarut v Prime Minister 1992 MR 238**

With the above, we come to the question of the fundamental freedoms and liberties enshrined in Chapter II of the Constitution.

(5) Civil and Political Rights versus Economic, Social and Cultural Rights:

The comment has often been made that the Mauritian Constitution is a Third Generation Constitution except that it does not contain provisions for economic, social and cultural rights like the Constitution of the Republic of South Africa.

Indeed, our Constitution only speaks of the so called first generation human rights: namely, the civil and political rights which are also enshrined in the International Covenant on Civil and Political Rights (ICCPR) which was adopted and opened for signature, ratification and accession in December 1966 and which came into force in March 1976 after the instrument had obtained its 35th ratification and/or accession.

It does not, however, specifically cover the so called second generation rights, namely, the economic, social and cultural rights. Whether the praiseworthy appreciation given to our Constitution is justified or not can best be illustrated by the following facts and figures:

In Mauritius, over 75% of households own their own house; education up to tertiary level is free; so are medical facilities; there exists a universal old age pension scheme and an enhanced pension scheme for the disabled.

Questions have been raised as to

(1) why those rights were not provided in the Constitution initially;

(2) the need for having those rights in the Constitution now when those rights are being enjoyed in reality.

A possible answer to the first question could be that the reason Mauritius chose to stress on the civil and political rights is because it applied the lesson of dependence and independence. Do not provide fish to your people. Teach them to fish. By our civil and political rights we created the conditions so that the community could go fishing and self-help rather than depend on assistance.

A possible answer to question 2 is that, yes there is a need to insert Economic, Social and Cultural [ECOSOC] Rights in the Constitution as the Constitution is the show case document of every democratic state to the international community, and ECOSOC Rights should be reflected therein, the more so since those rights are effectively enjoyed in Mauritius.

Ladies and Gentlemen, let me put you a question. Is there a hierarchy of Human Rights? Let me now give you the answer. There used to be a debate whether civil and political rights are more important than economic, social and cultural rights. I remember when such a question was raised at the then Sub-Commission on the Promotion and Protection of Human Rights, Ambassador Fan Exiang, the distinguished representative of the Peoples' Republic of China exclaimed *"but surely the right to food comes before any civil and political rights?"* But I am happy to say that it is now well settled that all human rights are equally important whether it be freedom of expression or the right of privacy or protection of the law. There is no hierarchy as to which right ranks first or last. We do not have a CPE ranking exercise to carry out! Human Rights Organisations do not hand out any A+ for ranking purposes for any specific human right. All human rights rank first, foremost and with equal importance!

I would wish to close this chapter of protected rights by making reference to the African Charter on Human and Peoples' Rights [African Charter] which Mauritius acceded to in March 2003. Of particular significance is the elaboration of the civil and political rights as well as the economic, social and cultural rights in the Charter. There is also a peculiarity in that Charter in that it not only spells out the rights of the individual but also his duties, as well as the duties of State parties.

It may be of interest for a few of you to know that Mauritius has signed the Protocol to the African Charter on the establishment of an African Court.

Article 5(3) of the Protocol provides for the possibility of instituting cases before the African Court by individuals or by NGOs having observer status with the African Commission on Human and Peoples' Rights (ACHPR), after exhaustion of local remedies, against any State signatory of the Protocol which has made the declaration under article 34(6) accepting the competence of the Court to receive cases under article 5(3). Mauritius has, so far, not made the declaration. The African Court which became operative in 2006 when its first judges were recruited has, however, no restraint to hear cases when the complainant is either a State party or the African Commission. I believe that only some 5 out of the 53 African States have made the declaration accepting the jurisdiction of the African Court as at present. We will have to wait to find out what the future holds for us and whether Mauritius will submit itself to a proposed new regional Court scrutiny.

We know that after Mauritius opened up to scrutiny by the UN Human Rights Committee by adhering to the First Optional Protocol to the ICCPR, Mrs Aumeeruddy- Cziffra was able to question successfully in Geneva two amendments brought to our laws in 1977. The Immigration (Amendment) Act 1977 and The Deportation (Amendment) Act 1977 were passed to restrict the residence of aliens in Mauritius. Prior to the two enactments alien men and women, married to Mauritian nationals, enjoyed the same residence status and had the right to reside in Mauritius with their Mauritian spouse. Under the amended laws, an alien husband of a Mauritian woman lost residence status and had to apply for a "residence permit" which could be refused or removed at any time by the Minister of Interior. An alien husband could be deported by ministerial order which was not subject to judicial review. On 9 April 1981, the Human Rights Committee found the two enactments to be discriminatory of the applicants on the ground of sex. It is appropriate to mention that section 16 of the Constitution which protects the citizen from discrimination did not then specifically prohibit discrimination on the ground of sex. Following the decision of the Human Rights Committee, section 16(3) of the Constitution was amended to include sex. That was done by Act 23 of 1995. Although that is now part of history, I believe the question is still live on the question of the representation of women at elections. But there is nothing in the law which prevents women nowadays in Mauritius from taking a more proactive role in every field of activity in Mauritius.

They have already done well in the legal field and there have been more women recruits than men as magistrates or state law officers lately. I hasten to add that the exercise has been carried out, as always, purely on the basis of merits. So, well done ladies!

Another matter that was brought up before the Human Rights Committee is ***the Rezistans ek Alternative*** case in which the decision was handed down recently and in which the Committee held that the best loser system in our electoral law which was being carried out on the basis of the 1972 census which had not been updated required an explanation and was contrary to article 25 of the ICCPR [right to take part in conduct of public affairs]. But generally, our degree of compliance on the international human rights index is high.

(6) Rule of Law and Democracy

The Supreme Court of India very aptly observed in ***Indira Nehru Gandhi v Raj Narain AIR 1975 SC 2299*** that *"The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence".* A right balance is necessary to resolve the ever shifting problems brought by litigants for the Courts to disentangle. The solution proposed by democratic societies has been through the application of the Rule of Law which has a moral, cultural and constitutional basis. As already alluded to earlier in this paper, it is not the adoption of nicely worded Constitutions proclaiming lofty ideals that matters if the basic spirit of liberty and constitutionalism is lacking. Did not Claudius say in Shakespeare's Hamlet: *"Words without thoughts never to heaven go".*

(7) Meaning of the Rule of Law?

The expression, *The Rule of Law,* is generally associated with **Professor Dicey** who used it in his well- known book, *An Introduction to the Study of the Law of the Constitution*, first published in 1885. The expression was given three meanings:

The first states that "*no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;*

The second is expressed in the following terms: *"We mean….when we speak of the Rule of law,…not only that…no man is above the law , but that ..every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."*

This second meaning was given wider diffusion by Lord Denning in **Gouriet v Union of Post Office Workers [1977]QB 729 at 762** when he quoted Dr. Thomas Fuller, as explained in Lord Bingham's book. The citation is a gem: "*Be you never so high, the Law is above you.*" Lord Bingham considered this principle as the bedrock of civil liberties and viewed the Rule of Law as the nearest rule to a secular religion.

We need not go into the third meaning which is country specific and merely rubs balm on the English judiciary for having done well by slowly and over the years built a case law through the doctrine of precedents without a supporting written constitution.

According to **de Smith** in his book **Judicial Review of Administrative Action,** 5th edition 1995, the Rule of Law which refers to the basic principles which a State must effectively guarantee are as follows:

"that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised."

These five principles are necessary to guarantee the effective existence of the Rule of law.

In his world acclaimed book **"The Rule of Law"**, the late Lord Bingham is more elaborate and considers the core subject under 8 chapters, viz. at chapters 3 to 10. The general definition is broken down into the several constituent parts which bear the following sub-titles: *The Accessibility of the Law; Law not Discretion; Equality before the law; The Exercise of Power; Human Rights; Dispute Resolution; A Fair Trial; The Rule of Law in the International Legal Order.* The book ends with two general topics sub-titled :*Terrorism and the Rule of law,* and *The Rule of Law and the Sovereignty of parliament.*

Be assured that it is not my intention to be that exhaustive at this time. A few topics, as you may have realised, have already been broached. I shall limit myself to areas not yet touched that have more direct interest to us.

(8) <u>Judicial Review and Judicial Activism; The Mauritian Brand.</u>

One of the roles of the Supreme Court in Mauritius has always been to check the excesses of the Executive whenever these occur and are brought before it for consideration. This can happen through laws which do not conform with the provisions of the Constitution.

It can also happen when decisions are taken by public institutions and officials which are *ultra vires* or unreasonable and are in disregard of the general principles of the rule of law where, for example, there has been bad faith, improper motive, substantive unfairness like abuse of power, improper delegation of power, etc. Redress is usually asked by way of judicial review and the Supreme Court has always assumed its role to review administrative decisions when this is called for. I must however forewarn the non-legally trained part of this audience that we are in a domain where there is a high degree of subjectivism since we are here dealing with what is known as the grant of prerogative writs where the maxim that*" justice depends on the length of the Lord Chancellor's [Justice's] feet"* may well appear to apply at times. That has always been the case with human justice over the ages.

Procedure can be a problem as well. Procedure is always a good hand maid but if allowed to become the mistress can lead to injustice. That is why the Judge must be alert to the constraints usually outlined in Court procedures and be prepared now and then to go beyond when it is felt that there is a likelihood that things may not be as they appear at first sight. For example, issues are usually canvassed essentially on the basis of affidavit evidence in judicial review cases. This so because it is a prerogative remedy and the Courts loathe being burdened with oral evidence where sworn affidavit evidence is usually sufficient. But this reticence of the Courts to accept oral evidence, which is known to the legal profession, should not be invariably adhered to since it may end up stifling truth. Oral evidence led and tested in the witness box may often be the only way of finding whether an impugned decision has been flawed by impropriety. One will not normally expect a public officer who serves on a decision making body to come forward on his own bat to side with a party who alleges that there has been administrative foul play. We are here faced with the proverbial need for restraint or "**devoir de reserve**" of the public officer. But if he is summoned as a witness with the leave of the Court and asked questions which could prove that a decision was vitiated because it was imbued with impropriety or marred by undue influence/interference, it would be difficult to invoke office candor to be uncommunicative. Another way of finding the truth is to call for the records so that the court can check for itself the reasons for the decision and perhaps even if the markings have been properly tallied.

This is what happened in **Appadu and 2 others v The Public Service Commission and another, i.p.o 4 co-respondents 2003 SCJ 29** in which the court ordered for the production of all records concerning the filling of the questioned vacancies, including the selection exercise. The court stated that it was making that order in view of the economy of details in the affidavit evidence to explain why the seniority rights of some of the applicants were superseded. The application against two of the four co-respondents was granted following access to the records. I believe that the Supreme Court could entertain motions to hear oral evidence in Judicial Review cases or call for records with more readiness, not with a view to encourage scandal mongering, but to send a clear signal that it will not allow its standard procedures to be abused.

In 2004 I presented a paper entitled *"Judicial Activism and Social Changes"* when Sanjay Bhuckory was the Chairman of the Bar Council and the Mauritian Bar had the great privilege to receive Mr. Soli Sorabjee, former Attorney General of India. I spoke of some of the great things achieved in the name of judicial activism but also of the excesses of liberalism in the line of the famous May 1968 motto "*it is forbidden to forbid"* [**Il est interdit d'interdire**] . According to Robert Bork, a former American judge who passed away last year, judicial activism leads to misdirected constitutional interpretations which result in the protection of everything from obscenity to abortion and the prohibition of everything from prayer in the classroom to all-male military academies. That was said in the1970s and I suppose I must be careful with what I say today, a short 40 years later. Considering my position as a sitting judge you will appreciate that I cannot express my views on controversial topics which have lately turned into hot issues with a number of countries adopting same sex marriage and depenalising sodomy. As a sitting judge I am called upon only to apply the law as I find it and I know what it is in Mauritius. Judge Bork may have had the reputation of being a conservative judge. He was possibly somewhat out of phase with many of the libertarian ideals of his particular society and of his time which he conceived as being mere licentious phenomena which was developing in his country. Whether you agree with his views or not, the choice is yours.

But the Mauritian judge knows that although the law prohibiting sodomy is still very much in our statute book, the prosecution services in this country have never, on their own initiative, initiated any criminal enquiry to frame a Mauritian citizen in his bedroom and elsewhere for the practice of homosexuality which is prohibited by law. Persons who have been prosecuted for sodomy in Mauritius have invariably been as a result of denunciations by victims.

As I am on this topic, I might as well give you an information of jurisprudential interest regarding a decision taken regardless of all the dins and clamors of the NGOs in exercising pressure on the ACHPR in 2010 and 2011 so that the African Commission might espouse their vindication of the "**rights"** of the **LGBTs** (lesbians, gays, bi-sexuals and trans-sexuals), the ACHPR decided that it would not promote those alleged rights which in its view were not consistent with African values and traditions. Value judgments are basically subjective and rest on the individual society at a given time frame. These are not static and can move with time and space..

This brings me to an "*off-the-record*" anecdote of the "***WOG"***, diminutive for a Western Oriental Gentleman who after many years spent in an economically developed society decides finally to pack up and return to his underdeveloped village. Asked by his old friends as to why he made the change, he gave the following explanations:

> "*When I went to that country, homosexuality was tolerated. When I grew up there, it became permissible by law between consenting adults. It is now a way of life. I am leaving before it becomes compulsory."*

I give no other reason than that of a clash of civilizations and cultures within which a Judiciary has sometimes to decide.

(9) <u>What next in Mauritian Constitutionalism?</u>

It cannot be gainsaid that the Mauritian Judiciary has constructed itself and the legal and judicial system of the country on the concept of democracy, the rule of law and the doctrine of the separation of powers.

The Legislature is the Law maker, but the Judiciary is called upon to check the constitutional compliance of all laws whenever these are tested in Court. Judicial activism as applied in certain countries whereby the judiciary is perceived as "making laws" by judicial interpretation is not well considered in Mauritius.

Our Constitution is framed in a language that allows for the dynamics of the law to vision the future with a strong anchorage on the present and the past, whether in principles, doctrines or fundamental rights and freedoms of the citizen. This, by itself provides scope for the judiciary to reason out, by means of some judicious activism such solutions and remedies that become necessary as society and its *mores* change. The Judiciary bears in mind that the Constitution is a living and breathing document which aims to regulate past, present and future generations. There is a perpetual process of change in human affairs. Society evolves on norms and ethics keep changing. The Judiciary must be alive to this dynamism of change and keep pace with it. A wide picture of society must be set so that the law is interpreted and applied to ensure its benefits to Society at large. The law need therefore to be interpreted purposively and not within a fixed or frozen time frame. Whether the present judiciary has achieved these goals and in what measures must be left for history to judge. That process is called "*judging the judges!*"

Ladies and Gentlemen, I hope you enjoyed the lecture as much as I did preparing it. Have a nice evening and thank you for your kind attention.