Report on CPD lecture delivered on 27 June 2019 by Mr S Boolell (SC), DPP

Mauritian Constitution: A Modified Version of the Westminster Model?

The Institute for Judicial and Legal Studies organised on 27 June 2019 a lecture under the continuing professional development programme entitled 'Mauritian Constitution: A Modified Version of the Westminster Model?', which was delivered by the Director of Public Prosecutions, Mr Satyajit Boolell SC. The large number of 105 attendees to this event is an indication of the keen interest among members of the legal profession to learn about the constitutional history of Mauritius through the prism of myriad events which shaped its constitutional landscape and reflect on where our Constitution is heading in the present day.

Commonwealth Constitutions

The DPP opened his intervention by giving a brief evolution of our Constitution. He quoted the eminent scholar Professor Stanley Alexander de Smith, who, in his seminal work *The New Commonwealth and its Constitutions* (1964) propounded the thesis that Mauritius was a late player in acquiring its independence by virtue of its unusual domestic features. As Prof de Smith noted in another work: 'The constitutional structure of Mauritius is directly attributable to communal and political divisions in the period immediately preceding independence.'[1]
The DPP was of the view that these relics of the past have been inscribed in our Constitution; best exemplified by the Best Loser System as a distinctive feature of our electoral system. He stated that this is a continuing concern inasmuch as 'politicians are still caught in a time warp.' This culture of communalism has been elaborated in *Duval v Commissioner of Police*:

> One other factor which must be noticed when dealing with the ill-effects of communal rivalry in Mauritius is that, for political and electoral purposes, communalism is a reality not only recognised but also likely to be perpetuated by our Constitution. Those responsible for the framing of the Constitution have willed it so. It is part of our history that the comparting of the population for electoral purposes was founded on the expressed fear that minorities might not otherwise be adequately represented in the Legislature and their interests, as a result, be inefficaciously indicated.[2]

As has also been observed in *Duval v Francois*, our Constitution 'further recognises the existence of four main communities in that it expressly requires every candidate, whether independent or not, to declare in his nomination paper which of the four communities he belongs to. There was clearly deliberate purpose behind the constitutional recognition of political parties and, if this purpose is properly perceived, it would shed light on the rights of political parties as such and those of the officials, in particular, the leader of a political party whom the Constitution also recognises.'[3]

The term 'constitution' has been defined in different ways. Lord Hoffman in *Matadeen v Pointu* defined the Constitution as 'An attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values.'[4] It could also be defined as 'an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the

association and all its members is prescribed.'[5] *A fortiori*, it is the expression of the sovereign will of the people. Whatever definition is to be ascribed to the term constitution, Mr Boolell advanced that there is a basic template for all the constitutions of the world, including for example the entrenchment of the separation of powers between the three branches of government (legislature, executive and judiciary) and the incorporation of a bill of rights.

The constitutional history of Mauritius

The DPP then went on to give an account of the constitutional history of Mauritius. The story begins with French colonisation in 1710 which enabled the legal transplant of the Napoleonic Codes in Mauritius at the start of the subsequent century. The British then took over the island in 1810. The period from 1810 up to 1948 is marked by the 1814 Treaty of Paris transferring the sovereignty of Mauritius to the British, and the establishment of a legislative council in 1948 as a first step towards a representative system of government. In 1885 the slaves were emancipated. About this time, the first Indian indentured labourers were brought in to work on the sugar estates. Most of the labourers were prevailed upon or chose to make their homes in Mauritius, and by 1861 two-thirds of the population were of Indian origin. In 1875, a Royal Commission of Enquiry was set up and it highlighted the fact that the indentured labourers were working under inhumane conditions insofar as they were not made aware that they could 'suffer in the shape of fines, forfeiture, or imprisonment, for any breach of the engagement to work for five years.' 1885 saw the adoption of a new Constitution. A new Council of Government was created, consisting of the Governor, 8 ex-officio members, 9 nominated members (of whom at least three were to be non-officials), and 10 other members elected on a narrow franchise. The Governor retained wide executive powers exercisable in his personal discretion. Nevertheless, the Constitution was a liberal one for a Crown colony.

According to de Smith, for more than 60 years Mauritius was governed under the 1885 Constitution; the only significant amendment was made in 1988, when the proportion of nominated non-officials was increased from one-third to two thirds. But immediately after the Second World War came a major reform. Under the Constitution of 1947 the unofficial majority in the Legislature became an elected majority; and the franchise was broadened so that the electorate increased six fold. The consequences were dramatic. For the first time the Indo-Mauritians emerged as a real political force; 11 out of the 19 elected seats were won by Hindus, seven by Creoles and one by a Franco-Mauritian. The results produced alarm and despondency not only among Franco-Mauritians but also among many Creoles who, having been effectively excluded for so long from the political influence to which their numbers had entitled them, now found themselves outnumbered by Hindu voters. The radical Mauritius Labour Party had been founded by Creoles; now it had become a predominantly Hindu party, and there began that alienation of Creoles from Hindus which has been the most regrettable feature of modern Mauritian politics.

The Mauritius Labour Party would have nothing to do with the proportional representation scheme, and a further series of meetings was convened in London. The outcome was the London Agreement of 1957. Under this Agreement, a ministerial system of government was introduced. An independent Boundary Commission would be appointed to see whether Mauritius could be divided into forty single-member constituencies, which would give 'each main section of the

population . . . adequate opportunity to secure representation corresponding to its own number in the community as a whole.' Failing this, elections would be held according to the party list system of proportional representation. In addition, the Governor would be enabled to nominate, in his personal discretion after consultation with members of the Legislative Council, up to 12 other members. Nomination was not to be used to frustrate the results of the elections- the 1948 precedent was not to be followed but would be used '(to ensure representation of special interests or those who had no chance of obtaining representation through election.' The proposal for the election of members of the Executive Council by proportional representation was dropped; instead, the Governor was to invite 9 members of all elements in the Legislative Council, to be represented as nearly as possible in relation to party strengths.

In 1958, the Trustram Eve Boundary Commission succeeded in devising 40 single-member constituencies by what may be described as 'honest gerrymandering'; its proposals were accepted and implemented. At the General Election of 1959, held under a new Constitution and on the basis of universal suffrage, the Labour Party won a large majority of seats, campaigning in harness with its new ally, the overtly communal Muslim Committee of Action; the Independent Forward Bloc, then a Hindu party of the sans-culottes, made headway; the Parti Mauricien, a conservative party representing Franco-Mauritians and middle-class Creoles, fared poorly. Under-represented minorities were allocated nominated seats. The new Government, formed in accordance with the principles laid down in the London Agreement, was a coalition, and not a majority party Government.

A somewhat uneasy equilibrium was thus established, and the way ahead was obscure. The United Kingdom Government was anxious not to exacerbate communal tensions or to imperil a vulnerable economy by forcing the pace towards full internal self-government. At a Constitutional Review Conference held in 1961 the only significant change proposed was the creation of the office of Chief Minister; further changes, still falling short of internal self-government, would be deferred till after the next General Election; after that, Mauritius might move forward to full internal self-government, 'if all goes well and it seems generally desirable.' A visit by the Constitutional Commissioner might be arranged in due course. At the General Election of 1963 the Mauritius Labour Party lost its absolute majority, winning 19 out of the 40 elected seats; the Parti Mauricien, having attracted a larger body of Creole support in the urban belt, improved to 8 seats; the Independent Forward Bloc won 7, the Muslim Committee of Action 4, and Independents 2. The nomination of the 12 additional members proved burdensome both to the Governor and to some of the party leaders; the outcome left the balance of political forces much as it had been, but gave the General Population a slightly stronger representation than before. A complicating factor in the process of nomination had been the assurance previously given to the leaders of the Muslim Committee of Action that prior consideration would be given to Muslim 'best losers' candidates who had been narrowly defeated at the General Election. Apart from the embarrassing problems created between and within the parties over the selection of candidates for nomination, there were differences in interpretation over the meaning of a Muslim 'best loser'. But the idea that best losers had special claims to membership - an idea that would be unacceptable in most countries - was to take root in Mauritius.

The decisive Constitutional Conference on Mauritius took place in London in September 1965. Although the island had yet to achieve full internal self-government, the central issues facing the

conference were the determination of ultimate status and the constitutional framework to be adopted for self-government and the next and final step forward. The Banwell Commission, which reported early in 1966, showed that the resources of human ingenuity had not yet been exhausted. The basic structure of the Commission's proposals was simple enough: 20 constituencies in Mauritius formed by amalgamating the existing constituencies in pairs, each returning 3 members, with block voting under the first-past-the-post system; and 2 members with full voting rights for Rodrigues. There were to be no communally reserved seats. In order to safeguard under-represented minorities, two 'correctives' were proposed. In the first place, if a party obtained more than 25 per cent of the votes cast but less than 25 per cent of the seats, additional seats should be allocated to that party's 'best losers' to bring its representation just above the 25 per cent level; this device was conceived mainly for the purpose of giving the Opposition a 'blocking quarter' in the process of constitutional amendment under a new constitution. In the second place, there would in any case be 5 extra seats to be allocated to 'best losers' from under-represented parties and communities by means of a complex formula introducing an element of proportional representation; no party would be entitled to such a seat unless it had obtained at least 10 per cent of the total vote and at least one directly elected member and unless it had a defeated candidate belonging to the community entitled to the seat to be allocated.

The Westminster model

In the second part of his lecture, the DPP elaborated on the Westminster model as a continuation of the link with former colonies of the defunct British empire. A cardinal feature of this model of Constitution is the separation of powers between the different branches of the state. In *Hinds v The Queen*, the Privy Council held that part of the Gun Court Act of Jamaica which purported to transfer sentencing power away from the judiciary to an executive body was void to the extent that the 'structure of the Constitution shows that it was based on the principle of the separation of powers and that it was intended to preserve basic institutions and principles in existence before the Constitution came into force.'[6] In effect, the various constitutions of the commonwealth have been cast in the same mould with the guiding thread of the UK model. The Mauritian Constitution shares similar characteristics with the Westminster model Constitution inasmuch as the separation of powers is enshrined; there is a parliamentary system with a Prime Minister; government is formed from a majority party; and international treaties can be given effect domestically only if they are incorporated through the national legislative machinery.

However, the organising principle of the Mauritian Constitution remains the rule of law insofar as the Constitution itself is a legal instrument which takes primacy over any other law enacted by the legislature. Section 2 of the Constitution is pellucid in stating that the Constitution is the supreme law of Mauritius, and if any other law is inconsistent with the Constitution it shall be deemed to be void to the extent of its inconsistency. Some provisions of the Constitution such as Sections 1 and 57 are super-entrenched to the degree that they cannot by amended notwithstanding the prerogative of the legislature which 'is empowered to make any law so long as that law is not inconsistent with the Constitution. It can even alter the Constitution in accordance with the procedure laid down therein.'[7] This means that the Constitution itself places certain provisions out of reach of being overthrown by a majority decision. And it is the

role of the judiciary to ensure that the supremacy of the Westminster model Constitution is being safeguarded.

Accordingly, the judiciary is empowered under the Constitution to issue writs and orders in order to protect the supremacy of the Constitution. It is clearly established in *Ahnee v DPP* that the judiciary has the authority to provide constitutional redress by way of orders and directions 'as it may consider appropriate for the purpose of enforcing or securing the enforcement.'[8] The judiciary has two main interpretive powers when it comes to constitutional review. First, a law enacted by parliament will be presumed and interpreted to be consistent with the Constitution unless it is shown that it is unconstitutional. The reverse is not true since the meaning of a Constitution cannot vary according to the laws which a legislature may enact. Second, the Constitution must be given a generous and purposive interpretation. The jurisprudence of the European Court of Human Rights must be taken into account inasmuch as our fundamental charter of rights has been closely modelled on that of the European Convention on Human Rights. The interpretation must thus be in accordance with international standards. In essence, the Constitution is regarded as a living instrument. The DPP referred to other features of the Westminster model such as the Fundamental Rights Chapter, separation of powers, parliamentary powers and procedures, and savings clauses. He ended his lecture by giving an overview of what the unusual features are found in the Mauritian constitution. Not all features of the Westminster model have been incorporated by the founders of our Constitution. The DPP provided examples of the difference between bicameralism and unicameralism that are seen in UK and Mauritius respectively. Other salient features include the safeguards in electoral process, the role of the Governor General; service commissions; the singular process in the dissolution of parliament; special features relating to fundamental rights; the role of the Ombudsman and that of the Office of the DPP.

The constitutional history of Mauritius remains a topic of fascination inasmuch as the Constitution is commensurate with the legal anchoring of the way Mauritian society is still organised today.

The CPD course was hugely appreciated by the audience as it provided members of the legal profession an extensive overview from a historical perspective of the political and legal developments leading to the adoption of the Mauritian Constitution in 1968.

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