MAURITIUS LABOUR PARTY

POSITION PAPER No. 1
Legal Commission

1. **Constitutional Amendment Bill**
2. **The Good Governance and Integrity Reporting Bill**
3. **The Asset Recovery (Amendment) Bill**

"ENHANCING AND ENLIGHTENING THE DEBATE IN THE INTERESTS OF THE REPUBLIC"

November 2015

"*No punishment may be inflicted other than for a breach of the law…irrespective of rank and status all are equal under the law…rights and freedoms are best protected under the common law" – AV DICEY*

WHAT IS A POSITION PAPER?

It is simply a tool to enhance debate on a parliamentary subject in order for the Republic to come to the right conclusion

CAUTION: A position paper is not a document which is anchored in partisan politics.

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THE CONSTITUTION (AMENDMENT) BILL

1. 'A Constitution is a thing *antecedent* to a government, and a government is only the creature of a Constitution … A Constitution is not the Act of a government, but of a

people constituting a government, and government without a Constitution, is power without a right.'[1]

2. A Constitution has been referred to as the document, which has special legal sanctity that in turn outlines the legal framework and the principle functions of the organs of government within the State, and declares the principles by which those organs must operate. The Constitution, therefore, governs the relationship among the various organs of the State, circumscribe the powers of the various organisations and distribute the powers among them. It regulates the relationship among the different organs of the State and the individuals while it also lays down the fundamental rights of the citizens.

3. Since the first Constitutional Conference of Mauritius in 1831, it was only in 1936 that for the first time the Mauritius Labour Party, founded by Dr Maurice Cure and supported by E. Anquetil and Pandit Sahadeo, fought for the working class people to be represented in Parliament and that was the first time in the Constitutional history of Mauritius that the issue of class-struggle crept in Mauritian politics.

4. Followed the elections of 1967 that were won by the Independence Party (spearheaded by the Labour Party and strongly supported by the Muslim Action Committee and the Independent Forward Block).

5. The Mauritius Independence Order 1968 came into force on 12th March 1968 and Mauritius became independent and a Sovereign Democratic State with its Constitution as its Supreme law.

6. The present government has proposed to amend Section 8 of the Constitution as per the provisions of The Constitution (Amendment) Bill (No. XXIX of 2015).

7. Section 8 of the Constitution (under Chapter II – Protection of Fundamental Rights and Freedoms of the Individual) provides;

Section 8- Protection from deprivation of property:

(1) 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, except where –

(a) The taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilization of any property in such a manner as to promote the public benefit or the social and economic well-being of the people of Mauritius; and

(b) There is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) Provision is made by law applicable to that taking of possession or acquisition-

(i) For the payment of adequate compensation; and

(ii) Securing for any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or an appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining payment of that compensation.

(2) No person who is entitled to compensation under this section, other than a resident of Mauritius, shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction), charge or tax made or levied in respect of its remission) to any country of his choice outside Mauritius.

(3) 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 authorizes-

(a) The attachment, by order of a Court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a Court or pending the determination of civil proceedings to which he is a party;

(b) The imposition of reasonable restrictions on the manner in which any amount of compensation is to be remitted; or

(c) The imposition of any deduction, charge or tax that is made or levied generally in respect of the remission of money from Mauritius and that is not discriminatory within the meaning of section 16 (3).

(4) 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) In satisfaction of any tax, rate or due;

(ii) By way of penalty for breach of the law or forfeiture in consequence of a breach of the law or inconsequence of the inability of a drug-trafficker or a person who has enriched

himself by fraudulent and/or corrupt means to show that he has acquired the property by lawful means;

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

(iv) In the execution of judgments or orders of Courts;

(v) By reason of its being in a dangerous state or injurious to the health of human beings, animals, trees, or plants;

(vi) In consequence of any law with respect to the limitations of actions or acquisitive prescription;

(vii) For so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out on it-

(A) Of work of soil conservation or the conservation of other natural resources; or
(B) Of agricultural development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out.

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; or

(b) To the extent that the law in question makes provision for the taking of possession or acquisition of-
(i) Enemy property;
(ii) Property of a person who has died or is unable, by reason of legal incapacity, to administer it himself, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest in it;
(iii) Property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
(iv) Property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a Court or, by order of a Court, for the purpose of giving effect to the trust; or

(c) To the extent that the law in question –
(i) Makes provision for the payment of the amount for which the property is to be compulsorily taken possession of, together with interest at the legal rate in equal yearly instalments, within a period not exceeding 10 years;
(ii) Fixes the amount for which the property is to be compulsorily taken possession of or acquired or makes provision for the determination of that amount in accordance with such principles as may be prescribed.

(4A) (a) Notwithstanding subsection (1) (c), section 17 or any other provision of the Constitution, no law relating to the compulsory acquisition or taking of possession of any property shall be called in question in any Court if it has been supported at the final voting in the Assembly by the votes of not less than three quarters of all members of the Assembly.

(b) No law under paragraph (a) shall be amended or repealed otherwise than by a Bill which has been supported at the final voting in the Assembly by the votes of not less than three quarters of all members of the Assembly.

(5) Nothing in this section shall affect the making or operation of any law so far as it provides for the vesting in the State of the ownership of underground water or unextracted minerals.

(6) Nothing in this section shall affect the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes, in which no money has been invested other than money provided from public funds.

(S. 8 amended by Act 14 of 1983; Act 33 of 1986; Act 48 of 1991)

8. The proposed amendment of The Constitution (Amendment) Bill (No. XXIX of 2015) provides;

A BILL To amend the Constitution ENACTED by the Parliament of Mauritius, as follows –

1. Short title This Act may be cited as the Constitution (Amendment) Act 2015.

2. Section 8 of Constitution amended Section 8 of the Constitution is amended, in subsection (4), by inserting,

after paragraph (a), the following new paragraph –

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

. *(i) under the ownership of a person to an extent which is disproportionate to his emoluments and other income;*

. *(ii) the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of the property; or*

. *(iii) held by a person for another person to an extent which is disproportionate to the emoluments or other income of that other person,*

by way of confiscation; or

9. However, The above proposed amendment carries, *inter alia,* fundamental social, economic, political and most importantly legal consequences. The more so in the case of **Duval v. Commissioner of Police 1974 MR 131** the Court observed, "… It is implied in every administrative power conferred upon any law that the person shall exercise that power without contravening the provisions of the Constitution, especially those protecting fundamental rights and freedom of the citizen.

10. *A priori* it must be clear that the Constitution is legally amendable provided the provisions of Section 47 of the Constitution is strictly followed and Section 47 of the Constitution provides;

Section 47-Alteration of Constitution

(1) Subject to this section, Parliament may alter this Constitution.

(2) A Bill for an Act of Parliament to alter any of the following provisions of this Constitution-

(a) This section;

(b) Sections 28 to 31, 37 to 46, 56 to 58, other than 57 (2), 64,65,71,72, and 108;

(c) Chapters II, VII, VIII and IX;

(d) The First Schedule; and

(e) Chapter XI, to the extent that it relates to any of the provisions specified in paragraphs (a) to (d)

Shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than three quarters of all the members of the Assembly.

(3) A bill for an Act of Parliament to alter the provisions of section 1 or 57 (2) shall not be passed by the Assembly unless-

(a) The proposed Bill has before its introduction in the Assembly been submitted, by referendum, to the electorate of Mauritius and has been approved by the votes of not less than three quarters of the electorate;

(b) It is supported at the final voting in the Assembly by the votes of all the members of the Assembly.

(4) A Bill for an Act of Parliament to alter any provision of this Constitution (but which does not alter any of the provisions of this Constitution as specified in subsection (2) shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than two thirds of all members of the Assembly.

(5) In this section, references to altering this Constitution or any part of this Constitution include references to-

(a) Revoking it, with or without re-enactment or the making of different or inserting additional provisions in it or otherwise; and

(b) Suspending its operation for any period, or termination any such suspension.

(S. 47 amended by Act 2 of 1982; Act 48 of 1991)

11. Section 8 as quoted above is embodied under Chapter II of the Constitution and Chapter II in turn embodies the protection of all the Fundamental Rights of an individual.

12. In order to be able to legally amend any of the provisions of Chapter II it is paramount that the government must take into considerations the implications not only of the wordings and the tenor of the provisions of Chapter II but also the importance that the provisions of Chapter II of the Constitution has *vis-a-vis* the other provisions of the Constitution and the implications of the provisions of Section 1 of the Constitution over all the provisions of the Constitution.

13. The Privy Council judgment in the case of **State v. Khoyratty Abdool Rachid 2004 PRV 59** is considered in as much as the ratio of the decision of the Board of the Privy Council is fully relevant and applicable to the present proposed amendment of Section 8 of the Constitution.

14. The Board stated that in '1986 by ordinary legislation Parliament passed the Dangerous Drugs Act (Act No 32 of 1986) which contained a prohibition on the grant of bail in respect of specific offences. *In Noordally v Attorney General* [1986] MR 204 the Supreme Court held that this statute was inconsistent with the Constitution. **The court observed that the trial of persons charged with criminal offences and all incidental or preliminary matters pertaining thereto are to be dealt with by an independent judiciary. [Addressing the matter of bail], the court concluded (at p 208) that it was not in accord with the letter or spirit of the Constitution**, *as it then stood*, to legislate so as to enable the executive to overstep or bypass the judiciary in its essential roles […]'.

15. The Board noted that 'subsequently an attempt was made to curtail the jurisdiction of the court to grant or withhold bail. It was sought to be accomplished by a two-fold legislative method viz an amendment to the Constitution made in 1994 and a re-

enactment of the Dangerous Drugs Act in 2000.' And the Board explained that the 'constitutional amendment was contained in section 5(3A) of the Constitution, as inserted by section 2 of the Constitution of Mauritius (Amendment) Act 1994 (Act No 26 of 1994). The setting of section 5(3A) was the existing section 5(3) which reads:

"(3) Any person who is arrested or detained

(a) for the purpose of bringing him before a court in execution of the order of a court;

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence; or

(c) upon reasonable suspicion of his being likely to commit breaches of the peace, and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial; and if any person arrested or detained as mentioned in paragraph (c) is not brought before a court within a reasonable time in order that the court may decide whether to order him to give security for his good behaviour, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally."

16. The Board then considered the proposed amendment and stated the 'new section 5(3A)(a) and (b) as amended by section 2 of the Constitution of Mauritius (Amendment) Act 2002 (Act No 4 of 2002) reads:

"(3A)(a) Notwithstanding subsection (3), where a person is arrested or detained for an offence related to terrorism or a drug offence, he shall not, in relation to such offences related to terrorism or drug offences as may be prescribed by an Act of Parliament, be admitted to bail until the final determination of the proceedings brought against him, where-

(i) he has already been convicted of an offence related to terrorism or a drug offence; or

(ii) he is arrested or detained for an offence relating to terrorism or a drug offence during the period that he has been released on bail after he has been charged with having committed an offence relating to terrorism or a drug offence.

(b) A Bill for an Act of Parliament to prescribe the offences relating to terrorism or drug offences under paragraph (a) or to amend or repeal such an Act shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than three quarters of all the members of the Assembly."

17. Then Section 32 of the Dangerous Drugs Act 2000 (Act No 41 of 2000) was considered and the Board found that it 'contains a restriction of bail in certain classes of cases. It provides:

"(1) Notwithstanding any other enactment, where a person is arrested or detained for an offence under sections 30, 33, 35, 36 or 39 of this Act, he shall not be admitted to bail until the final determination of the proceedings brought against him where-
(a) he has already been convicted of any drug offence; or
(b) he is arrested or detained whilst on bail in relation to a drug offence.
(2) For the purposes of this section, 'drug offences' includes an offence under the Dangerous Drugs Act.

18. Following a provisional information lodged against the respondent under the Dangerous Drugs Act 2000 as amended by the Dangerous Drugs Act (Amendment) Act 2003, a motion for bail was lodged with the District Court. The police objected to bail on the ground that under the new dispensation the court had no power to grant bail. A District Magistrate took the view that questions of constitutional interpretation under section 84 of the Constitution had been raised and he therefore referred the following questions to the Supreme Court:

"(a) whether by amending section 5 of the Constitution through the addition of the new sub-section 5(3A) Parliament in its constituent capacity has not altered the fundamental tenet of the Constitution; the Separation of Powers, to wit: the check

and balance aspect?

(b) by what majority can Parliament in its constituent capacity alter the separation of powers; the argument being that if a Constitutional (Amendment) Act is not supported at the final voting by the prescribed majority of votes, then it cannot be read as one with the Constitution; the alteration it purports to make cannot become part of the Supreme Law and that Act is void to all intents and purposes;

(c) is it constitutional to allow the Executive to detain a citizen indefinitely on a provisional charge of 'drug dealing' for instance without the judiciary being in a position to control the Executive and afford protection to the citizen as regards his personal liberty and his fundamental human right of being protected from inhuman or degrading or other such treatment as prohibited by section 7 of the Constitution?"

19. The Board then stated that the principle questions posed were whether the new regime was consistent with section 1 and section 7 of the Constitution and it considered the Judgment of the Supreme Court of Mauritius where the Board stated, 'after a careful review the Supreme Court came to the following conclusions:
"In the particular context of our Constitution, more specially in the light of our notion of democracy as is contained in section 1, we are of the opinion that section 5(3A), although it is compliant with section 47(2), [having admittedly been voted with three-quarters majority] is in breach of section 1 since the imperative prohibition imposed on the judiciary to refuse bail in the circumstances outlined therein amounts to interference by the legislature into functions which are intrinsically within the domain of the judiciary […]. Where the Court made the following order; "We declare that section 32 of the DDA and section 5(3A) of the Constitution, insofar as regards drug offences, are void since they infringe sections 1 and 7 of the Constitution […]."

20. The State challenged the decision of the Supreme Court before the Privy Council and the issues were; '**The Privy Council must consider whether section 5(3A) of the Constitution and section 32 of the Dangerous Drugs Act 2000 are consistent with sections 1 and/or 7 of the Constitution. The Board designedly uses the inelegant expression "and/or". The reason is that it must not be assumed in advance of analysis, that the two questions can be treated entirely**

separately […]'. The Board proposed in the first instance to examine the impact of section 1 of the Constitution, interpreted in context.

21. Before the issue could be directly addressed the Board deemed it 'necessary to set out the constitutional background in more detail. That can conveniently be done by citing the decision of the Privy Council in ***Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 302-303'**, when the Board concluded that 'the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.'

22. The Board stated that '**while the judgment in *Ahnee* does not afford the answer to the question under consideration it is relevant in emphasizing from it that (a) that Mauritius is a democratic state based on the rule of law; (b) that the principle of separation of powers is entrenched; and (c) that one branch of government may not trespass on the province of any other in conflict with the principle of separation of power.'**

23. The Board proposed to 'analyse the question in a number of steps. The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. **Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary.** Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.'

24. The Board considered the case of ***Public Prosecutions of Jamaica v Mollinson* [2003] 2 AC 411** where Lord Bingham of Cornhill examined the separation of powers under a Westminster constitution, viz the Jamaican Constitution. In a unanimous judgement of the Board Lord Bingham observed [at para 13]; "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, **the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is**

total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50."

25. Lord Steyn stated that 'the observation cited from *Anderson* was expanded in my judgement in that decision. I observed [at para 50];"In *R v Trade Practices Tribunal, Ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 Windeyer J explained the difficulty of defining the judicial function as follows; 'The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.'

26. He said, '**nevertheless it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the courts**: G F K Santow, 'Mandatory Sentencing: A Matter For The High Court?' (2000) 74 ALJ 298, 300 […]. It has been said that 'the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive': *Deaton v Attorney General and Revenue Comrs* [1963] IR 170, 183: see also *In re Tracey; Ex p Ryan* (1989) 166 CLR 518, 580; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27; *Nicholas v The Queen* (1998) 193 CLR 173, 186-187, per Brennan CJ. The underlying idea, based on the rule of law, is a characteristic feature of democracies."

27. Lord Steyn went on to say, 'the third case on the general approach to be adopted is even more important. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham gave the leading judgment. He stated at para 42; ". . . It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself […]. "

28. Lord Steyn admittedly said, **'while not conclusive of the issue presently before the Board, these decisions give important colour to the words of section 1 of the Constitution, viz that Mauritius *shall* be a democratic state'.**

29. He stated, '**these factors are however, transcended in importance by two special features. First, section 1 of the Constitution is not a mere preamble**. It is not simply a guide to interpretation. In this respect it is to be distinguished from many other constitutional provisions. **It is of the first importance that the provision that Mauritius "shall be . . . a democratic State" is an operative and binding provision. Its very subject matter and place at the very beginning of the Constitution underlies its importance.** And the Constitution provides that any law inconsistent with the Constitution is *pro tanto* void: section 2.'

30. He said, 'secondly, as already pointed out, in 1991 section 47(3) of the Constitution was amended (by Act No 48 of 1991) to make provision for a deep entrenchment of sections 1 and 57(2). It reads as follows; "A Bill for an Act of Parliament to alter the provisions of section 1 or 57(2) shall not be passed by the Assembly unless-
"(a) the proposed Bill has before its introduction in the Assembly been submitted, by referendum, to the electorate of Mauritius and has been approved by the votes of not less than three quarters of the electorate;
(b) it is supported at the final voting in the Assembly by the votes of all the members of the Assembly."

31. Lord Steyn thenn pointed out that, '**these are two of the most fundamental provisions of the Constitution, respectively making provision that Mauritius shall be a democratic state and for quinquennial Parliaments. This is an exceptional degree of entrenchment. By its clear intendment it militates against a right to bail, qualified as it is, being abolished by ordinary legislation or by a constitutional provision which does not comply with the requirement of deep entrenchment of section 1.'**

32. He went further to consider the Parliamentary debate which preceded the enactment of section 1and he said, 'it may also be permissible to have regard to the mischief to which the deeply entrenched section 1 was directed. The overriding purpose was made crystal clear in the Parliamentary debates as reported in *Hansard* on 9 December 1991. The Prime Minister, Sir Anerood Jugnauth stated [Col 1363]; "Mr Speaker, Sir, the opportunity has also been taken to make some other amendments to the Constitution. Members of the House will recall that a number of legislative measures have been introduced over the past twelve months in order to consolidate the democratic foundations of our society. Today, we are taking that exercise a little further. . . the present Government also wants to establish firmly the democratic

basis of our Constitution by making it practically impossible to amend Section 1 of the Constitution. Let it not therefore be said that this Government does not cherish democratic principles."

33. He even considered what the Attorney General and Minister of Justice, Mr Alan Ganoo stated [Cols 1487-1488], "Mr Speaker, Sir, I will now come to a last point of my intervention. It concerns the first section of the Constitution, Sir. If the prospect of acceding to the status of Republic arouses, as I just said, a feeling of pride and dignity in all of us today. I think the thought of amending section 1 of our Constitution to render this clause practically unamendable should rejoice all of us who are true democrats in this House. On a philosophical level, Sir, and globally, if you look at all the proposed amendments, you will see that the common feature, the thread which ties most of those principal amendments to our Constitution today is the consolidation of the democratic foundation of our country. Now, as regards section 1 of our Constitution, Sir, it will mean that to amend that section, it will necessitate a referendum and it will mean that there should be no dissentient voice in the Assembly. I should perhaps congratulate the Prime Minister for that very bold decision, Sir. I think that there are very few countries in the Third World with a written Constitution like ours which have achieved what we are achieving, Sir. We are deciding that to amend the democratic nature of the State, you will need a referendum and you will need the approval of all the Members of the House. I do not know of any other country which has done this!"

34. He said, 'if necessary the objective mischief as spelt out in the debates reinforces the fundamental nature of the entrenchment of section 1. […]Cumulatively, all these factors compel the conclusion that the Constitution could only have been amended in the manner provided by section 47(3). The failure to comply with this deeply entrenched provision renders section 5(3A) and section 32 of the Dangerous Drugs Act void.'
35. Lord Rodger in turn concurred with the judgment of Lord Steyn but he made some pertinent observations. He said, ' because of the importance of the constitutional issue, however, I wish to spell out the reasoning which has led me to the same conclusion.'

36. He said, 'on 12 March 1968 Mauritius became an independent constitutional monarchy. The independence Constitution, which was on the familiar Westminster-style model, was set out in the Schedule to the Mauritius Independence Order 1968. At that time section 1 of the Constitution provided that "Mauritius shall be a sovereign

democratic State." Section 3 recognised and declared certain fundamental rights and freedoms, including the right of the individual to life, liberty and security of the person and to the protection of the law. Section 5(3) was in the form set out in Lord Steyn's judgment. Section 47 prescribed the way in which provisions of the Constitution could be amended. In 1982 Parliament passed, in due form, the Constitution of Mauritius (Amendment) Act 1982, section 3 of which amended section 47 in several respects. These included the insertion of a new subsection (3) which provided that an Act of Parliament for the amendment of section 57(2) (providing for quinquennial Parliaments) was not to be passed unless the proposed Bill had first been approved by three-quarters of the electorate in a referendum and had then been supported at the final voting in the Assembly by all the members of the Assembly. In terms of subsection (4) of section 47 as then amended, section 1 of the Constitution could be altered by a vote of two-thirds of the members of the Assembly but, by virtue of section 47(2)(c), amendment of section 5 required a vote of not less than three-quarters of all the members of the Assembly.'

37. He added, 'in 1991 the Assembly passed the Constitution of Mauritius (Amendment No 3) Act 1991 ("the 1991 Act") which made extensive changes to the Constitution. There is no challenge to the validity of any of these changes which took effect from 12 March 1992. Prominent among them was the change from a constitutional monarchy to a republic. In consequence, section 1 was altered. As amended by section 3 of the 1991 Act, section 1 of the Constitution now provides; "The State of Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius."

38. 'At the same time, by section 9 of the 1991 Act, the Assembly amended section 47(3) of the Constitution by inserting a reference to section 1. Thus amended, section 47(3) now provides that section 1 can be amended only if the proposed Bill has first been approved by three-quarters of the electorate in a referendum and has been supported at the final voting in the Assembly by all the members of the Assembly. The effect is to entrench section 1 very deeply indeed […].'

39. He stated that the 'critical question is whether, by purporting to insert section 5(3A) into the Constitution, section 2 of the 1994 Act had in substance sought not only to amend section 5, […] but also to alter the form of democratic state guaranteed by section 1 of the Constitution. Admittedly, the 1994 Act had been passed in a manner which would allow the amendment of section 5. But section 1 can be amended only after the proposed Bill has been approved by three-quarters of the voters in a

referendum and supported by a unanimous vote of the members of the Assembly […].' More particularly, it was designed to alter one of the well-understood components of a democratic state as envisaged in section 1, viz the separation of executive and judicial powers. Since, however, section 2 of the 1994 Act had not been passed by the necessary special mechanism, the guarantee in section 1 stood unamended. **Section 2 of the 1994 Act sought to introduce a provision which was inconsistent with the concept of a democratic society as guaranteed in section 1 of the Constitution[…]**.'

40. He stated, 'giving content to the term "democratic state" in section 1 is part of the task of judges who are called upon to interpret the Constitution. Garrioch SPJ, giving the judgment of the Supreme Court recognised this, for instance, in *Vallet v Ramgoolam* [1973] MR 29, 40. Having regard, in particular, to the specially entrenched status of section 1, in my view it would be wrong to say that the concept of the democratic state to be found there means nothing more than the sum of the provisions in the rest of the Constitution, whatever they may be at any given moment. Rather, section 1 contains a separate, substantial, guarantee. On the other hand, what matters is the content of the concept of a democratic state as that term as used in section 1 and not just generally. That said, the Constitution is not to be interpreted in a vacuum, without any regard to thinking in other countries sharing similar values. Equally, experience in Mauritius is likely to prove of value to courts elsewhere. Therefore, the decisions cited by Lord Steyn do indeed "help to give important colour" to the guarantee that Mauritius is to be a democratic state. In particular, it is a hallmark of the modern idea of a democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the other […].'

41. Before dismissing the appeal he stated; 'of the Constitution and the idea of a democratic state which it contains remain unamended. Section 2 of the 1994 purported to introduce a provision for bypassing the courts which violated the separation of powers guarantee that is one of the hallmarks of that concept of a democratic state. To that extent section 2 of the 1994 Act was inconsistent with section 1 of the Constitution and, accordingly, void. It follows that section 5 of the Constitution remains unamended […]'.

42. Lord Mance also concurred with the reasoning of Lord Steyn and lord Rodger while

he added that, '[…] The present issue concerns the nature and extent of the inroad which must occur into such principles to infringe the entrenched provision that Mauritius shall be a "democratic" State.'

43. Lord Mance said, 'on the one hand, the Attorney General and Minister of Justice made clear that chapter 2 (sections 3 to 19) of the Constitution was not in the same situation as chapter 1 (sections 1 and 2). This is evident from the confined nature of the entrenchment achieved by section 47(3). So many amendments of the "fundamental rights and freedoms" of the individual spelled out in detail in chapter 2 of the Constitution are possible with a two-thirds majority of the Assembly. On the other hand, the Attorney General and Minister of Justice also made clear that section 1 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 inter alia the executive and legislature. These are basic principles themselves not expressly spelled out elsewhere in the Constitution.'

44. And he finally added, 'it was these basic principles that were in my opinion infringed, even though only in a limited sphere, by the purported constitutional amendment in 1994 of section 5 to insert subsection (3A)(a). The effect was to remove from the judiciary any responsibility for and power in respect of the liberty of any individual, prior to any trial for a prescribed drug offence upon reasonable suspicion of which the prosecuting authorities might arrest and detain him. The scheme of section 5 prior to such amendment permitted a person to be arrested upon reasonable suspicion, and then required him or her to be brought without delay before a court, for remand in custody or on bail pending trial as the court determined. To remove the court's role - and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed drug offence - is not merely to amend section 5, it is to introduce an entirely different scheme. The new scheme contradicts the basic democratic principle of the rule of law and separation of judicial and executive powers which serves as a primary protection of individual liberty and is entrenched by the combination of sections 1 and 47(3).'

45. In line with the above reasoning and the conclusions of the Board it is, therefore, argued that by virtue of section 1 of the Constitution Mauritius is a democratic State.

Chapter 2 of our Constitution which provides for fundamental rights is based on the provisions of the European Convention on Human Rights (EC). The Supreme Court has always resorted to the jurisprudence of the European Court of Human Rights (ECHR).

46. Among the fundamental rights protected in Chapter 2 of the Constitution there are the presumption of innocence (section 10(2)(a)) and the right against self-incrimination (section 10(7)). The other important concept is that the burden of proof in a criminal offence rests on the prosecution though that burden may be shifted to an accused but this proposition rests on the premise that some facts are first proved by the prosecution as there cannot be a presumption of guilt. In the case of Velle Vindron in 1973 the Supreme Court held that section 5(2) of the Forest Mountain and River Reserve Act that requires an accused to prove particular facts by placing on him the burden of proving a general, conditional innocence without first calling on the prosecution to prove any suspicious or sinister circumstances was contrary to the Constitution. The ECHR has also held 6thgat the public interest cannot be invoked to justify the use of answers compulsorily obtained in an investigation to incriminate an individual.

47. Section 8 of the Constitution deals with the protection of property and an individual can only be deprived of property in limited circumstances. Seizure by the revenue authority or by the State is permissible so long as the power is reasonable in a democratic society and so long as that seizure is the result, in the case of a n offence, of a conviction. It cannot permissible in a democratic society for the State to deprive an individual of property on the mere allegation of a whistleblower that that individual has illegally amassed wealth for which he has to explain.

48. Moreover an amendment of Section 8 of the Constitution cannot be considered independent of Section 3 of the Constitution which provides;

3. Fundamental rights and freedoms of individual

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms –

(a) The right of the individual to life, liberty, security of the person and the protection of the law;

(b) Freedom of conscience, of expression, of assembly and

(c) association and freedom to establish schools; and

(d) The right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

And the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

49. As regards the provision in the Good Governance Bill that requires an individual to explain the provenance of his property on the mere report of one of the persons listed in section 9 of the Bill, this simply amounts to an administrative finding of guilt as opposed to a judicial finding of guilt. This encroaches dangerously on the powers of the courts which alone are vested with the power to convict. In the case of Norton v PSC the Privy Council held that the PSC had no power to impose a fine on a civil servant as this power under the PSC Regulations was unconstitutional. This provision is also a dangerous incursion on the concept of separation of powers between the executive and the judiciary.

50. When there is an allegation that an individual has allegedly amassed wealth illegally this is an offence. When an offence is committed the machinery of the criminal justice is set in motion. Such machinery clearly delineates the powers of the investigators, that is the police as well the rights of the suspect. By just putting the burden on an individual suspected of possessing alleged ill-acquired wealth to explain on pain of seizure of his property without a court decision, presumption of innocence that is guaranteed by the Constitution is being replaced by presumption of guilt. In the case of DPP v Kohealle in 1999 the Supreme Court held that the presumption created by section 188 of the Road Traffic Act to the effect that a conveyance of persons in motor vehicle is for reward, in the absence of any evidence of sinister or suspicious conduct by the accused offended the constitutional presumption of innocence. A suspect must be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he is guilty. The presumption of innocence requires that even a court should not start with the preconceived idea that the accused has committed the offence charged. There should be no judicial pronouncement of his guilt prior to a finding of guilt by a court. What the Good Governance Bill is seeking to do is to come to a finding of guilt

behind the back of the courts of law by putting the burden of proving innocence on an individual.

51. In the green paper published in 2006 the European Communities had this to say "The presumption of innocence includes the privilege against self-incrimination which is made up of the right of silence and not to be compelled to produce inculpating evidence. The maxim *nemo tenetur prodere seipsum* , ("no person is to be compelled to accuse himself") applies. The accused may refuse to answer questions and to produce evidence. The ECHR inthe case Heaney and McGuiness v. Ireland in 2000 held that, although not specifically mentioned in the ECHR, the privilege against self-incrimination is a generally recognised international standard which lies "at the heart of the notion of a fair procedure". It protects the accused against improper compulsion by the authorities, thus reducing the risk of miscarriages of justice and embodying the equality of arms principle. The prosecution must prove its case without resort to evidence obtained through coercion or oppression. Security and public order cannot justify the suppression of these rights[Heaney and McGuiness v. Ireland in 2000 .They are linked rights, any compulsion to produce incriminating evidence being an infringement of the right of silence. The State infringed an accused's right of silence when it sought to compel him to produce bank statements to customs investigators [Funke v France 1993)]. Coercion to co-operate with the authorities in the pre-trial process may infringe the privilege against self-incrimination and jeopardise the fairness of any subsequent hearing.

52. The offence of possession of illegal wealth is predicated on offences like corruption, money laundering, trafficking in illicit drugs or weapons and the like. When there is suspicion that an individual has acquired illegal wealth the prosecution must prove beyond any reasonable doubt that the provenance of the wealth is illegal and not for the suspect to prove that he acquired that wealth lawfully. By shifting the burden of proof on a suspect the Bill is aiming at destroying the whole fabric of the rule of law that is the hallmark of our democracy.

CONCLUSION OF THE ABOVE FINDINGS

- The present government is proposing to amend Section 8 of the Constitution as per Bill No. XXIX of 2015 (as quoted above).

- Section 8 of the Constitution cannot be considered independent of the provisions of Section 3 of the Constitution and accordingly Section 8 cannot be amended without considering Section 3 of the Constitution.

- Following the above proposed amendment and the implications of the *Good Governance and Integrity Bill* the provisions of Section 10 of the Constitution in as much as the fundamental rights of an individual pertaining to the presumption of innocence and the right to silence without incrimination are directly impeached upon.

- Furthermore, it is argued Section 8 of the Constitution cannot be amended by a mere two third majority of the members of the parliament in as much as it is a fundamental right of an individual under Chapter II of the Constitution and it has direct implications upon the provisions of Section 1 of the Constitution and, in line with the full bench opinion of the Privy Council in the case of Khoyratty (as cited above), a proposed amendment of Section 8 must take into consideration the provisions of Section 1 of the Constitution.

- The proposed amendment of Section 8 has direct implication upon Section 3 of the Constitution and in turn the implications of the other Bills proposed by the government in this connection will have serious implications upon the provisions of Section 10 of the Constitution; thus expressly and impliedly impeaching upon the very fundamentals of the rights of an individual protected under the Constitution and such extensive implications calls into question the provisions of Section 1 of the Constitution which has to be invoked and duly amended as per the provisions of Section 47(3) of the Constitution in order to be able to carry out the amendment of Section 8, Section 3 and in turn Section 10 of the Constitution.

CHECKS AND BALANCES UNDER OUR EXISTING LAWS

International law – Relevant Treaties signed by Mauritius

Through the international initiatives to combat the laundering of the proceeds of illegal activities (esp. Drug Trafficking), the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention) was adopted on 19 December 1988 and Mauritius signed that Convention on 20 December 1988 and ratified it on 6 March 2001, without any reservations.

Subsequently, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("Strasbourg Convention"). It is to be noted that the term "proceeds" is defined in Article 1 of the Strasbourg Convention as "any economic advantage, derived from or obtained, directly or indirectly, from criminal offences".

The Strasbourg Convention was followed by an ECC Council Directive on June 1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC) – "money laundering" is thus defined as:

> *"the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation is such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action, the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,*
>
> *the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,*
>
> *participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs".*

Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Domestic law

FIAMLA

In our domestic law, the offence of "money laundering" is provided for under Section 3 of the FIAMLA 2002:

(1) Any person who –

(a) engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime; or

(b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime,
where he suspects or has reasonable grounds for suspecting that the property is derived or realized, in whole or in part, directly or indirectly from any crime, shall commit an offence.

(2) A bank, financial institution, cash dealer or member of a relevant profession or occupation that fails to take such measures as are reasonably necessary to ensure that neither it nor any service offered by it, is capable of being used by a person to commit or to facilitate the commission of a money laundering offence shall commit an offence.

FIAMLA also provides for the offence of "conspiracy" in relation to money laundering.

One of the leading international authority on the prosecution of money laundering offences is the case of ***R v Saik [2006] UKHL 18****. Applying the reasoning of* ***Saik*** *and other authorities :-*

a) The property subject matter of money laundering must be the proceeds of a crime. This "safeguard" is provided for under Section 3 of FIAMLA and ALSO UNDER THE TREATIES mentioned above – To hold otherwise would be tantamount to a "significant departure from what had been asked for by the international instruments: ***R v Montila & Other [2004] UKHL 50****"*

b) The "criminal provenance" of the property is a fact necessary for the commission of the offence of money laundering

c) The purpose must achieve or attempt to achieve one or more of the following: engaging engaging; possessing; concealing; disguising; transferring; converting; disposing of; removing from or bringing into Mauritius the property that is the proceeds of a crime partly or wholly, directly or wholly. ***Montila:*** *converting or transferring property which a defendant has reasonable grounds to suspect represents another person's proceeds of crime is not an offence, unless it is also proved that that the property is the proceeds of crime".*

MRA Act

By virtue of Section 15 of the MRA Act, the Director-General or any officer assigned to the Fiscal Investigations Department of the MRA, may, for the purposes of ascertaining the tax liability of a person…

(a) make such enquiries as he thinks necessary;

(b) require any person to produce any record, bank statement or other document or article or provide any information orally or in writing relating to his business and, for that purpose, at all reasonable times, enter any premises where such business is carried out;

(c) make a similar request to an agent or employee of a person referred to in paragraph (b) or to a person found on any premises referred to in paragraph (b) who appears to be involved in the business

(d) make a copy of any record, bank statement or other document found on any such premises;

(e) retain or seize any record, bank statement or other document or article; or

(f) by written notice require any person referred to in paragraph (b) or (c) to appear before him.

The powers of the MRA to investigate into the assets (and the "unexplained wealth") of an individual is wide-ranging and information and particulars sought by the MRA include, inter alia:

a) Statement of Assets and Liabilities –
b) Bank statements/passbooks, deposit certificates or any other documentary evidence in respect of all bank accounts (including those held abroad); fived deposit, current/savings accounts including credit cards account held either solely or jointly with any other person
c) Cheque stubs for the period under which the person in being investigated/assessed
d) Details of all loans taken and the interest payable, and security offered
e) Overseas Travelling, including those of the spouse and children – countries visited and cost of air ticket and amount spent abroad for each trip.
*f) Immovable Properties – **Source of finance** enabling the acquisition of each property*
g) If self-employed and/or VAT registered – Listing of input tax claimed for the period under review, supported by VAT Invoices; and listing of supplies together with VAT Invoice in support thereof.

Moreover, it is a criminal offence (Section 25 of MRA Act) for any person who refuses to give information orally or in writing, or gives any false or misleading information to an MRA officer entitled to require such information under Section 15 [see para. 7] or in any manner obstructs an officer in the performance of his duties – Rs 200,000 fine and imprisonment for a term not exceeding 5 years.

POCA 2002

POCA was enacted in 2002 and albeit the ambit of the Act is to curb "corruption", "money laundering" and tackle other related offences which may be committed by "public officials", the Act already provides for wide-ranging powers to track "unexplained wealth"…of public officials AND non-public officials (i.e, any other persons.

Section 2 of POCA: "act of corruption"

> *"act of corruption" -*
> *(a) means an act which constitutes a corruption offence; and*
>
> *(b) includes -*
>
> > *(i) any conduct whereby, in return for a gratification, a person does or neglects from doing an act in contravention of his public duties;*
> >
> > *(ii) the offer, promise, soliciting or receipt of a gratification as an inducement or reward to a person to do or not to do any act, with a corrupt intention;*
> >
> > *(iii) the abuse of a public or private office for private gain;*
> >
> > *(iv) an agreement between 2 or more persons to act or refrain from acting in violation of a person's duties in the private or public sector for profit or gain;*
> >
> > *(v) any conduct whereby a person accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification for inducing a public official, by corrupt or illegal means, or by the exercise of personal influence, to do or abstain from doing an act in the exercise of his duties to show favour or disfavour to any person;*

Sections 43-45 provides for:

a) Notification of corruption offences
b) Duty to report acts of corruption
c) Referrals to the commission

Section 46: Investigation by the Commission

(1) (a) Where, under sections 43, 44 or 45 or on its own initiative, the Commission becomes aware that a corruption offence or a money laundering offence may have been committed, it shall notwithstanding the Financial Intelligence and Anti-Money Laundering Act 2002 and subject to subsection (4), refer the matter to the Director of the Corruption Investigation Division who shall
forthwith make a preliminary investigation of the matter.

(b) The Director of the Corruption Investigation Division shall, within 21 days of a referral under paragraph (a) or within such other period as the Commission may direct, report to the Commission on the matter.

(2) The Director of the Investigation Division shall, within 14 days of a referral to him of an information referred to the Commission by the FIU under section 13 of the Financial Intelligence and Anti-Money Laundering Act 2002, investigate and report to the Commission on the matter.

(3) Upon receipt of a report under subsection (1)(b) or 2, the Commission shall -
(a) proceed with further investigations; or
(b) discontinue the investigation.

(4) The Commission shall forthwith notify the FIU of the nature of every case relating to a money laundering offence investigated on its own initiative.

Note: Section 47 provides for "further investigation by the Commission"

Section 50 of POCA: Powers of the Commission to examine person

(1) Where the Commission decides to proceed with further investigations under section 46 or 47, the Director-General may -
(a) order any person to attend before him for the purpose of being examined orally in relation to any matter;
(b) order any person to produce before him any book, document, record or article;
(c) order that information which is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, be communicated in a form in which it can be taken away and which is visible and legible;
(d) by written notice, order a person to furnish a statement in writing made on oath or affirmation setting out all information which may be required under the notice.

(2) A person on whom an order under subsection (1) has been served shall -
(a) comply with the order;
(b) attend before the Director-General in accordance with the terms of the order;
(c) continue to attend on such other days as the Director-General may direct until the examination is completed; and
(d) subject to subsection (3), answer questions and furnish all information, documents, records or statements, including certified copies thereof as ordered by the Director-General.

(2A) Where the Director-General has reasonable grounds to believe that any book, document, record or article produced under subsection (1)(b) may provide evidence relevant to an investigation being conducted by the Commission, he may –
(a) where the book, document, record or article is not reasonably required for the purpose of performing any duty under any enactment, retain the book, document, record or article, as the casemay be, until its production in Court or until such earlier time as may be required; or
(b) make certified copies of, or take records from, the book, document or record.

(3) A person may refuse to answer a question put to him or refuse to furnish information, documents, records or statements where the answer to the question or the production of the document or class of documents might tend to incriminate him.
(Note: the safeguard against "self-incrimination")

(4) Subsection (3) shall not apply where the Director-General, after consultation with the Director of Public Prosecutions, gives an undertaking in writing to a person that any answer given or document or class of document produced will not be used in evidence in any criminal proceedings against him for an offence other than proceedings for perjury.

(5) Where an undertaking has been given under subsection (4), no court of law shall admit the answer or document or class of documents referred to in the undertaking in any criminal proceedings against the person to whom the undertaking was given, except in proceedings for perjury. (Note: another safeguard)

(6) A person who after having been served with an order under subsection (1) -
(a) fails, without reasonable excuse, to comply with any of the terms of the order;
(b) conceals, destroys, alters, tampers with, removes from the place where it is habitually kept, or otherwise disposes of, a book, document, record or article referred to in the order, shall commit an offence and shall, on conviction, be liable to a term of imprisonment not exceeding 5 years.

Section 51 of POCA: Order to search premises

(1) Subject to subsections (3) and (4), where, upon notification or after consultation with the FIU, the Commission has reasonable grounds to believe that –

(a) a bank, financial institution or cash dealer has failed to keep a business transaction record as required under section 17 of the Financial Intelligence and Anti-Money Laundering Act 2002;

(b) a bank, financial institution, cash dealer or a member of a relevant profession or occupation, has failed to report any suspicious transaction as required under section 14 of the Financial Intelligence and Anti-Money Laundering Act 2002; or

(c) a bank, financial institution, cash dealer or a member of a relevant profession or occupation is in possession of documents, books or records or other information which may assist the Commission in an investigation, the Commission may apply to

a Judge in Chambers for an order allowing the Commission, or any officer delegated by it, to enter premises belonging to, or in the possession or control of, the bank, financial institution, cash dealer or member of a relevant profession or occupation and to search the premises and remove therefrom any document or material.

(2) An application under subsection (1) shall be supported by an affidavit by the Director-General disclosing the reason why an order is sought under this section.

(3) No order shall issue under subsection (1) with respect to a law practitioner unless the Judge is satisfied that, having regard to the need to protect legal professional privilege, it is in the public interest that the order be made without requiring the law practitioner to show cause why the order should not be made.

Section 52 of POCA: Power of entry and search

(1) Where the Commission has reasonable ground to believe that there is, on specified premises or in any place of business, evidence which may assist it in its investigation, it may issue a warrant to an officer authorising him to enter and search, at all reasonable times, the said premises or place of business and remove therefrom any document or material which may provide evidence relevant to an investigation being conducted by the Commission.

(2) A search under subsection (1) shall, so far as is practicable, be conducted in the presence of the occupier of the premises or his duly authorised agent.

(3) Prior to a search under subsection (1), the Officer shall deliver a photocopy of the warrant to the occupier of the premises or his duly authorised agent against receipt acknowledged by a signature on the original of the warrant.

(4) Where a search is effected under subsection (1), the officer effecting the search may -

(a) seize and take possession of any book, document, computer disk or other article;
(b) inspect, make copies of, or take extracts from, any book, record or document;
(c) search any person who is on the premises, detain him for the purpose of the search, and seize any article found on such person;
(d) break open, examine, and search any article, safe, container or receptacle.

Powers of arrest

(1) Where the Director-General is satisfied that a person who may assist him in his investigation -
(a) is about to leave Mauritius;
(b) has interfered with a potential witness; or
(c) intends to destroy documentary evidence which is in his possession and which he has refused to give to the Commission, the Commission may, in writing, direct an officer to arrest that person

(2) Where a person is arrested under subsection (1), he shall-
(a) forthwith be brought to the office of the Commission;
(b) be explained his constitutional rights and given the right to contact his lawyer;
(c) be allowed prompt access to his lawyer;
(d) not be questioned unless a video recording is made of the proceedings;
(e) unless the Commission is satisfied that it is necessary that his detention be prolonged, be released immediately upon furnishing such surety in a reasonable amount as the Director-General may determine; and
(f) be brought before a Magistrate, who may impose such conditions as he considers necessary for his release.

Section 54: Property tracking and monitoring order

(1) Where, for the purposes of an investigation under section 46, the Commission -
(a) needs to determine whether any property belongs to, is in the possession or under the control of, a person; or

(b) has reasonable ground for suspecting that a person has committed, is committing, or is about to commit an offence which the Commission has power to investigate, the Commission may issue a directive under subsection (2) to the Director of the Corruption Investigation Division.

(2) A directive under subsection (1) may direct-
(a) that any document relevant to the -
(i) identification, location or quantification of any property; or
(ii) identification or location of any document necessary for the transfer of any property, belonging to, or in the possession or under the control of, the person named in the directive be delivered forthwith to the Director of the Corruption Investigation Division;

(b) that a bank, financial institution, cash dealer or member of a relevant profession or occupation forthwith produces to the Director of the Corruption Investigation Division, all information obtained by it about any business transaction conducted by or for that person with it during such period before or after the date of the order as the Judge may direct.

Section 55: Enforcement of property tracking and monitoring order

A Judge in Chambers may, on good cause shown by the Commission that any person is failing to comply with, is delaying or is otherwise obstructing a directive made in accordance with section 54, order that the Commission or any officer authorised by it may enter any premises of the bank, financial institution, cash dealer or member of a relevant profession or occupation, search the premises and remove any document, material or other thing therein for the purposes of executing such order.

Section 56: Application of Attachment order

(1) Notwithstanding any other enactment, where a Judge in Chambers, on an application by the Commission, is satisfied that the Commission has reasonable ground to suspect that a person has committed an offence under this Act or the

Financial Intelligence and Anti-Money Laundering Act 2002, he may make an attachment order under this section.(Note: Section is not limited to public officials)

(2) An order under this section shall-
(a) attach in the hands of any person named in the order, whether that person is himself the suspect or not, all money and other property due or owing or belonging to or held on behalf of the suspect;
(b) require the person named in the order to declare in writing to the Commission, within 48 hours of service of the order, the nature and source of all moneys and other property so attached;
(c) prohibit the person from transferring, pledging no or otherwise disposing of any money or other property so attached except in such manner as may be specified in the order.

(3) Where an order is make under this section, the Commission shall -
(a) cause notice of the order to be published in the next issue of the Gazette and in at least 2 daily newspapers published and circulated in Mauritius; and
(b) give notice of the order to -
(i) all notaries;
(ii) all banks, financial institutions and cash dealers; and
(iii) any other person who may hold or be vested with property belonging to or held on behalf of the suspect.

Section 58: Seizure of moveable property

(1) Where in the course of an investigation under this act, the Director-General is satisfied that movable property is the subject-matter of or relates to an offence under this Act, the Director-General may seize that property.

(2) The Director-General shall keep a record of property seized under subsection (1) and shall cause a copy of that record to be served on the person from whom the property was seized.

(3) A seizure effected under subsection (1) shall be effected by placing the property seized under the custody of such person and at such place as the Director-General may determine.

(4) Notwithstanding subsection (3), where the Director-General considers that it is not practicable to remove the property, he may leave it at the premises on which it is found under the custody of such person as he may direct for that purpose.

(5) Where movable property seized under subsection (1) is under the custody of a third party, the Director-General may direct that third party not to dispose of the property without his consent in writing.

Section 84: Possession of unexplained wealth

(1) The Commission may -
(a) order any public official or any person suspected of having committed a corruption offence to make a statement under oath of all his assets and liabilities and of those of his relatives and associates;
(b) investigate whether any public official or any person suspected of having committed a corruption offence -
(i) has a standard of living which is commensurate with his emoluments or other income;
(ii) owns, or is in control of, property to an extent which is disproportionate to his emoluments or other income; or
(iii) is able to give a satisfactory account as to how he came into ownership, possession, custody or control of any property.

(2) Where, in proceedings for an offence under this Act, it is established that the accused -
(a) was maintaining a standard of living which was not commensurate with his emoluments or other income;
(b) was in control of property to an extent which is disproportionate to his emoluments or other income;

(c) held property for which he, his relative or associate, is unable to give a satisfactory account as to how he came into its ownership, possession, custody or control, that evidence shall be admissible to corroborate other evidence relating to the commission of the offence.

Asset Recovery Act 2011

Under the ARA, there are 2 "agencies", namely the Enforcement and the Investigative agency, both falling under the ambit of the DPP office – Sections 4 & 5.

Definitions under the ARA:

- "instrumentality" means any property used or intended to be used in any manner in connection with an unlawful activity;

- "property" –
(a) means an asset of any kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired;
(b) includes a legal document or instrument in any form, including electronic or digital, evidencing title to or interest in such asset, including but not limited to currency, bank credits, deposits and other financial resources, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, wherever situated; and
(c) includes a real or equitable interest, whether full or partial, in any such asset;

Part III of the ARA makes provision for "Conviction-based asset recovery" and Section 9 stipulates that:

Where a person has been charged with or convicted of an offence or a criminal enquiry is ongoing, the Enforcement Authority may apply to a Judge for a Restraining Order in

order to protect –
(a) property that is reasonably believed to be proceeds or an instrumentality of the offence, or terrorist property; or
(b) any other property in which the person has an interest other than a lawful interest.

The Act also makes provision for granting a "Restraining Order" (from a Judge) and likewise contains several safeguards – Section 10:

(1) Where the Enforcement Authority applies to a Judge for a Restraining Order, and the Judge is satisfied, having regard to any relevant evidence, that there is reasonable ground to believe that –

(a) the alleged offender is the subject of a criminal enquiry or has been charged with or convicted of an offence; and

(b) the property the subject of the application is proceeds or an instrumentality or terrorist property, or the alleged offender derived a benefit from the commission of an offence and has an interest in that property,

the Judge may order that –
(i) the property shall not be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances as are specified in the Order;

(ii) the property, or such part of the property as is specified in the Order, shall be seized, taken into possession, delivered up for safekeeping or otherwise secured by a named law enforcement agent; or

(iii) a Trustee shall be appointed to take custody of and manage the property in accordance with any direction from the Judge.

(2) Where a Judge makes a Restraining Order, the Enforcement Authority shall, within 21 days of the making of the Order, or such other period as the Judge may

direct, give notice of the Order to every person known to the Enforcement Authority to have an interest in the property and to such other person as the Judge may direct.

So as to prevent undue prejudice to a person whose property is the subject of a Restraining order, by virtue of Section 16, a judge (upon an application made by the offender) may discharge a Restraining Order if the alleged offender is not charged with that offence within 12 months of the date on which the said order was made.

The Act also provides for a civil "device" by which a trustee (as per the meaning to trustee under the Act) may "preserve and protect" a property subject matter of a Restraining Order – Section 11: Powers of Trustee:

(1) Subject to subsection (2), a Trustee may do anything which he considers reasonably necessary or appropriate to preserve or protect the property to which the Restraining Order applies and its value, and may, in particular –
(a) become a party to any civil proceedings that affect the property;
(b) ensure that the property is insured;
(c) realise or otherwise deal with the property if it is perishable, subject to wasting or other forms of loss, its value is volatile or the cost of its storage or maintenance is likely to exceed its value;
(d) with a Judge's approval, incur any necessary capital expenditure in respect of the property;
(e) where the property consists of a trade or business –
(i) employ persons in the business or terminate their employment;
(ii) do any other thing that is necessary or convenient for carrying on the trade or business on a sound commercial basis; and
(iii) with the Judge's approval, sell, liquidate or wind up the trade or business if it is not a viable, going concern or it is otherwise commercially advantageous to do so; or
(f) where the property includes shares in a company, exercise rights attaching to the shares as if he was the registered holder of the shares.

Confiscation Order *under Section 17 of ARA:*

(1) (a) Where a person is convicted of an offence, or from any other unlawful activity which the Court finds to be sufficiently related to that offence the Enforcement Authority may apply to the Court for a Confiscation Order in respect of the benefit derived or likely to be derived by the person from that offence.

Under Section 19 (1):

Where the Enforcement Authority makes an application under section 17, and the Court is satisfied that the defendant has benefited from an offence or any other unlawful activity which the Court finds to be sufficiently related to that offence, it shall, subject to section 21, make a Confiscation Order, ordering him to pay to the State, within such time as it may determine, an amount equal to the value of his benefit.

ARA also makes provision for "Civil Asset Recovery" - Section 27:

(1) (a) Where property is reasonably believed by the Enforcement Authority to be recoverable under Sub-Part B of this Part and to be proceeds or an instrumentality or terrorist property, it may apply to a Judge for a Restriction Order in respect of that property.

(b) It shall be sufficient for the purposes of paragraph (a) for the Enforcement Authority to show that the property is proceeds or an instrumentality or terrorist property, without having to show that the property was derived directly or indirectly from a particular offence or that any person has been charged in relation to such an offence.

(c) The Enforcement Authority may make an application under paragraph (a) even where the act which is the subject of the application was committed by a person who is deceased at the time of the application.

(d) Where the Enforcement Authority is of opinion that, for any reason, it is necessary to appoint an Asset Manager in respect of the property, it shall state the reason in its application and nominate a suitably qualified person for appointment.

(2) The Judge shall, where he is satisfied that there are reasonable grounds to believe that the property referred to in the application is proceeds or an instrumentality or terrorist property, make a Restriction Order which may –
(a) authorise, require or secure the delivery up, seizure, detention or custody of the property; or
(b) appoint an Asset Manager who shall be authorised or required to take –
(i) custody and control of the property and to manage or otherwise deal with it as the Judge may direct; or
(ii) steps which the Judge considers appropriate to secure the detention, custody or preservation of the property or for any other purpose.

(3) The Judge may make a Restriction Order where a person is not in Mauritius or was acquitted of the offence, the charge was withdrawn before a verdict was returned or the proceedings were stayed.

(3A) Notwithstanding subsections (1) and (2), the Enforcement Authority may apply to the Judge for an order that, instead of appointing an Asset Manager, the person in whose possession the property is found shall exercise the powers referred to in subsection (2)(b).

Recovery Order, under Section 34 of ARA:

Where any property has come to the notice of the Enforcement Authority, or property is found by a law enforcement agent to be in the possession of any person, and the property is reasonably believed by the Enforcement Authority to be worth more than 500,000 rupees and to be proceeds, an instrumentality or terrorist property, the Enforcement Authority may, unless it would not be in the interests of justice, make an application to the Court for the grant of a Recovery Order in respect of the property.

1. *Tracing of Asset – Under Section 40:*

(1) Subject to section 42, where any property which constitutes proceeds or an instrumentality or terrorist property has been disposed of since it was used or obtained in connection with the commission of an offence, it is recoverable pursuant to Sub-Part A or B of this Part if it is held by a person into whose hands it may be followed in accordance with subsection (2).

(2) Property may be followed into the hands of a person obtaining it on a disposal by -

(a) the person who used or intended to use the property as an instrumentality or through the offence obtained the property or terrorist property; or

(b) a person into whose hands it may, by virtue of this subsection, be followed.

Search and Seizure Order under Section 46 of ARA:

(1) A Judge may, on the application of the Enforcement Authority, make a Search and Seizure Order which authorises a law enforcement agent to –
(a) search for, examine or seize any property or other material referred to in subsection (2); and
(b) for the purposes of paragraph (a), enter any premises in which he has reasonable ground to believe the property or material may be found.

(2) (a) Property to which subsection (1) applies is any property which –
(i) Repealed by [Act No. 24 of 2012]
(ii) is the subject of an Investigation; or
(iii) is reasonably believed by the Enforcement Authority to be proceeds, an instrumentality or terrorist property.

Section 47 – Power to require production or disclosure

(1) The Enforcement Authority may, by written notice, require any person to produce or disclose any information or material, other than privileged material or customer information, where there is reasonable ground for suspecting that —

(a) any property in the possession or under the control of a person is proceeds, an instrumentality or terrorist property or the person has derived a benefit from any unlawful activity;

(b) the person is in possession of the material which is required to be produced or disclosed;

(c) the material is likely to be of substantial value to an application or an Investigation; and

(d) it is in the public interest that the material be produced or disclosed.

International co-operation – Under Section 53 and 54:

53. International co-operation agreements

The Attorney-General or the Enforcement Authority may enter into an agreement with any Ministry, Department, public authority or body outside Mauritius for the collection, use or disclosure of information, including personal information, for the purpose of exchanging or sharing information outside Mauritius or for any other purpose under this Act.

54. Foreign request in connection with civil asset recovery

(1) Where a foreign State requests the Enforcement Authority to obtain the issue of an order against property believed to be proceeds, an instrumentality or terrorist property which is located in Mauritius, the Enforcement Authority may apply to a Judge for a Restriction Order under section 27.

ANALYSIS OF THE MAJOR CLAUSES OF GOOD GOVERNANCE AND INTEGRITY REPORTING BILL

1. The main objects of the Bill are to:

   (a) Promote a culture of good governance and integrity reporting in Mauritius.
   (b) Stimulate integrity reporting in the public and private sectors.
   (c) Encourage positive reports of acts of good governance and integrity.
   (d) Disclose malpractices and recover unexplained wealth.
   (e) Protect and reward persons making disclosures and reports

2. Objects (a), (b) and (c) have no link to the Bill. Apart from the fact that the Integrity Reporting Services Agency, hereinafter referred to as the "Agency", shall act as the focal point for receiving reports and disclosures of positive acts of good governance and integrity, acts of malpractices and unexplained wealth, and evaluating, and processing any such report, and disclosure – *vide part 11 Clause 4 of the Bill*.

3. Note that there is no mechanism which has been set up to require the Government or the private sector to report on acts of good governance and integrity. How will the Agency be aware of acts of malpractices within the private sector if no mechanism is set up for the Auditor to inform the Agency of acts of malpractices which necessitate corrective actions?

4. The Bill also does not cater for acts of good governance and integrity apart from the fact that, as per Clause 10, the Agency will make a report to the Board and recommend a reward if it is of the opinion of the Agency that a public of private body has stimulated integrity reporting or encouraged a culture of good governance and integrity reporting in Mauritius.

5. Furthermore, there is no proposed amendment to the Companies Act. There is no amendment to the Companies Act. Such amendments should have been included in the Bill to impose mandatory duties on the Directors and Auditors to report annually on acts of good governance and integrity; how they are promoting a culture of good governance and integrity and what is being done to stimulate integrity reporting with a view to promote a culture of good governance, and what malpractices, which are alien to the objects of the Bill, have been addressed.

6. Moreover, Clause 11 does not in any way whatsoever encourage local and foreign investors to report any malpractice or any act which jeopardizes the integrity of Mauritius. This reporting would have been of much help to make Mauritius a centre of excellence of unimpeachable integrity.

7. The short title does not reflect the thrust of the Act which is about "Unexplained Wealth Order" and in fact the aim of the Bill could be misleading in as much as it addresses only the issue of promotion of a culture of good governance and integrity reporting whereas the main plank of Unexplained Wealth Order is under the umbrella of "related matters".

<u>Clause 2</u>

8. We note with concern that the following key words are not defined:

(a) Good governance.
(b) Integrity.
(c) Property.
(d) Integrity reporting.
(e) Positive reports of acts of good governance and integrity.
(f) Malpractices.
(g) Protect.
(h) Disclosures.

Clause 3

9. The Bill shall apply only to citizens of the Republic of Mauritius which is quite baffling as all the laws of good governance and integrity reporting have as main aim to combat organized crime, be it human trafficking, arms trafficking, drug trafficking, money laundering and have chosen the strategy of seizing proceeds of crime as a way to deter 'would be' criminals and to curtail organized crimes.

10. The Bill, by limiting it only to the citizens of Mauritius, we have failed to take into consideration: (a) *The Palermo/United Nations Conventions Against Transnational Organized Crimes And The Protocols Thereto*, more particularly Article 7 of Palermo; (b) *The United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances* signed in 1998 in Vienna: Article 7 and; (c) *The United Nations Convention Against Corruption (UNCAC)*, more importantly Article 20, establishing illicit enrichment when committed intentionally. Illicit enrichment is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.
11. Clause 3(6) of the Bill – "This Act shall apply to any property acquired at any time not more than 7 years before the commencement of this Act. What is the rationale of "7 years"?

12. The rationale for "7 years" is based on Section 66 of the Bank of Mauritius Act which stipulates that "every record of the Bank shall be kept in written form, or on microfilm, magnetic tape, optical disk or any form of mechanical or electronic data storage and retrieval mechanism for a period of at least 7 years after the completion of the transaction to which it relates or the record, as the case may be.

13. Furthermore a Notary's right of action to recover fees due to him shall be barred after 7 years.

14. "Not more than 7 years before the commencement of this Act". The Act shall come into operation on the 1st of January 2016. Seven years as per the Interpretation and General clauses Act will have as starting time the 1st of January 2008.

15. So the Act shall be in the future in relation to unexplained wealth at least deemed to have started on the 1st of January 2008.

16. So in 2028, the Inquiry will still hold good for any property acquired as from 1st of January 2008. More than twenty years and so on. So the rational of Bank of Mauritius does not hold water.

17. Clause 3(6) is retrospective.

Retrospective Laws

18. Retrospective laws are simply laws that prosecute people for an offence which were not laws at the time of the alleged offence.

19. The English common law on retrospective law making was markedly influenced by the Roman law.

20. The Magna Carta of 1215 also mirrors the Roman Law against retrospective legislation. CL 39 of the Magna Carta prohibited imprisonment or prosecution of a person "except by the lawful judgment of his peers and by the law of the land". However some authors have a different view on that Clause of the Magna Carta which they believe is more to do with placing limits on the exercise of executive power. (see Ben Juratowitch – Retroactive and The Common Law – Bloomsburg 2008)

21. In Leviathan (1651), Thomas Hobbes wrote that "Harm inflicted for a fact done before there was a law that forbade it, is not punishment. But an Act of Hostility: For the law there is no transgression of the law".

22. For laws to be effective, they must be certain. Retrospective laws make the law less certain and therefore unreliable. Lord Diplock said in Black Clawson International Ltd v Papierweke Valdhof Aschaffenburg (1975) AC 591 that "the acceptance of the Rule of Law as a Constitutional principle requires that a citizen before committing himself to any course of action should be able to know in advance what are the legal consequences that will flow from it".

23. In his Book the Rule of Law, Lord Bingham wrote: "Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely that you could have been punished at the time of the offence".

24. It is clear that the criminal law should be certain and its reach ascertainable by those who are subject to it.

25. Bennion on Statutory Interpretation was quoted approvingly in the case of the ***DPP v Keating (2013) 248 CLR 459***: "A law that is altered retrospectively cannot be predicted. If the alteration is substantive, it is therefore likely to be unjust. It is presumed that Parliament does not intend to Act unjustly".

26. The big question is; is the "Good Governance and Integrity Reporting" a criminal law or a civil law matter? Is it not a law that expropriates property obtained prior to the passing of the law? What are the effects?

27. A man, when he is prosecuted and is convicted, will face the sentence in person. Surely his family will be affected. But the deprivation of his liberty will be limited to himself and any other consequences on his family will be the result of the deprivation of that liberty, and the Magistrate or the Judge when sentencing, does take into consideration the effect of a custodial sentence upon the family. Whenever a Magistrate or a Judge allows more time for a convicted person to pay his fine, he does take into consideration the effect that the fine will have on the family ***(section 90. District and Intermediate Courts, (Criminal Jurisdiction) Act 1888)***. But one can say that if a person is suddenly deprived of all his property, is it not a criminal offence?

28. A person whose house and property inside the house have been confiscated will not be the only one to suffer. What about his wife or/and kids who were in no way whatsoever involved in his alleged shady business? What happens if in a given situation, the spouse or the kids who have benefitted from the ill gotten gains of husband and/or the father, had invested and fructified same?

29. In a small country like ours we shall see that the said spouse and/or children will considered as outcasts in the event the relevant property is confiscated.

30. Therefore the Bill, in our opinions, has criminal ramifications and can be qualified as quasi criminal.

31. Article 15 of the International Covention on Civil and Political Rights ICCPR provides:

"

a. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

b. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community or nations.*

"

32. In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. There are prohibitions on the creation of offences that are applied retrospectively as in the United States, the United Kingdom, Canada and New Zealand. For example, the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right "*not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations*."

33. The right not to be charged with a retrospective offence is also protected in the Victorian and human rights statutes. Same is protected under the laws in Mauritius.

34. Section 10(4) of the Constitution of Mauritius deals with the provisions to secure protection of law and states the following: "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed".

35. But the argument which is used by proponents of the Bill is that it does not create a criminal offence and the present bill creates a civil liability towards the State. But when one is facing the risk of losing one's property.

36. A mere change in the classification cannot change the characteristics of the "creature".

37. Therefore creating restrospective criminal offences and in the present bill a quasi criminal offence is more difficult to justify than other retrospective laws. In all other countries where the "UWO" has been introduced the aim was to combat organized crimes.

38. In Mauritius the target is (the way of life) of any person and the state does not have to make a minimal linkage with crime.

39. So the retrospectivity of the law cause much to law abiding citizen who has been careless in keeping any record of any property he has acquired.

40. The clause as it is drafted will show surely cause untold harm to many Mauritians even in the absence of malice by the agency.

41. It is apposite to note what was written by Maurice Lemoine in ***"Maniere de Voir" No. 130 (August –September 2013) Le monde diplomatique:***

Rien de nouveau souls le soleil? Des organisations hors la loi existait déjà dans l'Antiquité, au Moyen Age, durant L'Ancien Régime et les décennies passes. Mais, depuis la fin du XXe siècle, les abandons de souveraineté et la mondialisation libérale ont permis aux capitaux de circuler sans frein d'un bout à l'autre de la planète. Et favorisé ainsi l'explosion d'un marché de la finance hors de contrôle, auquel s'est connectée cette grande truanderie.

COMPARISON CHART

	CIVIL LAW	CRIMINAL LAW
DEFINITITON	Disputes between: (2) two persons Or group compensation	Deal with : Crime Punishment Fine Prison
PURPOSE	Between : Individuals Or Organisations	To maintain the Stability of : The State and Nation Punish & Deter
CASE FILE BY	Private Parts	State Mainly lodged by DPP
STANDARD OF PROOF	Balance of Probabilities	Beyond reasonable doubt
TYPE OF PUNISHMENT	Damages Or Order to Rectify or Do	Guilty: Imprisonment Fine Suspended Sentence C.S.O
JURY TRIAL	NO	YES

		In very serious case like : Murder Manslaughter

THE LIMITS OF CRIMINAL LAW

Many countries (including Australia [during these last 25 years there have been tremendous developments in different states/territories/federal/commonwealth], Italy, Ireland and United Kingdom) have come to the conclusion not to rely solely on conviction based on forfeiture schemes.

The features of non-conviction measures are:

- They don't operate along the principles of criminal law more particularly-
  - Burden of proof which is the cardinal principle that it is that State which has to prove its case.
  - Standard of proof which is in criminal cases beyond reasonable doubt.
  - Presumption of innocence which is also a universal principle today as enshrined in all major international conventions and Constitutions.
- Old models have not provided effective answers and the international organised crime has become more powerful than many well established states, and in so doing undermines the rule of law.
- For many the criminal justice system is not adequate to secure the conviction of organised crime. See Maniere de Voir, "Trafics en tous genres", No. 130, Aout - Septembre 2013 :

  "Cosa Nostra, « French connection », triades chinoises, yakuzas japonais… Les formes mafieuses de production et la criminalité organisée remontent certes à des temps parfois très anciens. Mais d'autres apparaissent, plus contemporaines, comme les groupes délictueux nés de la dislocation de l'ancien empire soviétique ou des Balkans. Partout dans le monde, par ailleurs, la crise de l'Etat-providence et la libéralisation à outrance ont favorisé le développement des trafics les plus variés. De la drogue aux armes et aux matières radioactives, des métaux aux œuvres d'art, de la prostitution à la contrebande et à la contrefaçon (même de médicaments), les organisations

criminelles, des plus rustiques aux plus sophistiquées, n'ont jamais connu un essor aussi généralisé."

- It has been put forward by Lusty (see D. Lusty, Civil Forfeiture of Proceeds of Crime in Australia (2002) 5 Journal of Money Laundering Control 345 at 351), "less than one per cent of the billions derived or laundered by criminals within their borders each year" are confiscated.

Why is that so?

Traditionally police and other state agencies investigate crimes with the objective to prove the element of the offence.

Summary of Asset Recovery in Mauritius			
	Conviction based forfeiture	**Civil Forfeiture**	**Unexplained Wealth**
Test or Standard	Beyond Reasonable Doubt	On a Balance of Probabilities	On a Balance of Probabilities
Onus	State	State	Respondent
	Requires Criminal conviction	Does not require criminal conviction	Does not require criminal conviction

Principal Agent	DPP : as per section 72 of the Constitution	DPP - as per new law of Minister	Agency
Jurisdiction	All (Open Court)	Supreme Court (Open Court)	Judge in Chambers (closed doors)

42. Article 7 of *The United Nations Convention Against Transnational Organized Crimes And The Protocols Thereto* is as follows:

"***Article 7. Measures to combat money-laundering***

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report

the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering."

43. Article 7 of *The United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances* is as follows:

"***Article 7. MUTUAL LEGAL ASSISTANCE***

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

a) Taking evidence or statements from persons;
b) Effecting service of judicial documents;
c) Executing searches and seizures;
d) Examining objects and sites;
e) Providing information and evidentiary items;
f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;
g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

10. A request for mutual legal assistance shall contain:

a) The identity of the authority making the request;

b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;
c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;
d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;
e) Where possible, the identity, location and nationality of any person concerned;
f) The purpose for which the evidence, information or action is sought.

11. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

14. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

15. Mutual legal assistance may be refused: a) If the request is not made in conformity with the provisions of this article; b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests; c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction; d) If it

would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

16. Reasons shall be given for any refusal of mutual legal assistance.

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.

20. The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article."

44. Article 20 of *The United Nations Convention Against Corruption (UNCAC)* is as follows:

"***Article 20. Illicit enrichment***

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."

45. Even though Clause 3(3)(a) of the application of the Bill covers Chapter 9 of the Constitution, it is to be noted that it is misconceived in as much as the Ombudsman, as per Section 97 of the Constitution, investigates any action taken by any officer or authority in any case in which a member of the public claims to have sustained injustice in consequence of maladministration in connection with the action so taken by any officer or authority. Clearly, maladministration cannot be equated with malpractice which shows the confusion in the head of the legislator.

46. Further, it is otiose to say that the Bill is not in derogation of Chapter 9 of the Constitution as a (simple) Act can't be interrogation of the Constitution.

Clause 4

16. The post of director of the agency will be that of a political nominee in as much as he will be appointed by the minister of good governance with the rubber stamp approval of the Prime Minister. Moreover, the Minister of good governance will appoint the two other members of the Board.

17. Furthermore, the ministry of good governance with the approval of the minister may delegate an officer of the ministry to assist the agency. Again, this will amount to a direct political interference from the minister of good governance.
What is the purpose of having an independent service provider to set up the national integrity website and a hotline? Again, this will amount to political interference even at that level.

18. Clause 4 creates a monster by the name of Agency which will be headed by a political nominee nominated through the whims and caprices of the minister.

19. Under clause 9, a member of the judiciary from the Chief Justice to any other judicial officer, Magistrate of the District Court, the Ombudsman, Director of Audit (constitutional posts), Director of FIU, Director General of ICAC, Director of Mauritius Post Authority, will have to report to the political nominee of the Minister (it will be mandatory to report).

All employees of the Agency will be recruited on a contractual basis and under direct control of the Director, thus under the immediate control of the Minister.

20. Clause 4(3) of the Bill makes mention of the following: – "The Agency shall operate as the Focal Point … ...".
21. In law what is focal point?

    - Centre of Activity.
    - Centre of Focus.
    - Centre of Attraction.

22. We have become accustomed with the term since 2012 when the Secretary General of the United Nations Organisations designated the UN Department of Peacekeeping Operations (DPKO) and when the UNDP implemented a business model focused on joint United Nations operational country support in conflict and crisis meetings. The set up by the UN Organisations is known as Global Focal Point for the Police, Justice and Corrections Areas in the Rule of Law in Post Conflicts and other Crisis Situation.

23. Focal Point will centralize therefore all agencies. The Agency will (i) respond quickly, (ii) mobilizes and channels more resources and, (iii) increases leverage. In theory, at least, the Agency will be "evaluating" and will be "processing". So all reports as per the Bill will be duly "evaluated" and "processed", thus meaning that the Agency will use the "Disclosure Order" as per Clause 13 of the Bill in order to prepare any report any report for the board. The report will always be two folds: (a) to lay the basis for an affidavit for an application for "Unexplained Wealth Order"; (b) to reward any person/group/body.

24. The "Focal Point" shall also be read in conjunction with the functions of the Board as per Clause 8(2) of the Bill. In other words, the other enforcement authorities shall liaise with the Board.

25. The direct effect will be that other enforcement authorities will surely shy away from any case as they know that the "file" will be taken away from them. For example, the link between the MCIT (Major Crimes Investigation Team), the CCID (Central Criminal Investigation Department) and the CID (Criminal Investigation Department).

26. Clause 4(4) of the Bill is quite vague. Does it mean only to set up? If it is only "setting up" why must Clause 4(4) forms part of the Bill? Is it also to manage? If it is to set up and to manage then it is very worrisome in as much as the employee/contractor/independent service provider is not covered by Clause 21 of the Bill which deals with the issue of "Confidentiality".

27. Clause 21(1) states that the Oath which will be prescribed by the Minister covers only the Director, member, employee and consultant who are thereby concerned. In relation to the setting up of a hotline to receive reports and disclosures, since the Agency will have the power to act "Proprio Motu", we do not see the necessity of the existence of a hotline.

28. Can the Agency act on the reports of the hotline? If yes, that what if the person has made a false, malicious or vexatious disclosure to the agency? How will the Agency be able to know who gave the information of the call was from an anonymous person? Will the Agency surrender its duties to act reasonable by hiding behind the informer? Contrary to the Police who act on "allegations" in cases of drugs, will the Agency recommend to the Board on mere "allegations"?

29. In relation to Clause 4(5) of the Bill, it is to be noted that the years of experience/standing of the lawyer/accountant is not included. There is mention of "with substantial post qualifications". However "substantial" is vague and can mean anything.

30. Note for the job at the apex of the Agency, there is provision for an open competition and the best candidate will be selected.

31. In relation to Clause 4(6) of the Bill, it is to be noted that all "employees" and "consultants" will be on contractual terms. It is clear that the Board which is controlled by the Minister will have the full power to fire & hire. The "employees" and "consultants" will be at the whims and fancies of the Minister. It is evident that there is no security of tenure and that the Agency will control the conditions of work.

32. With regards to Clause 4(7) of the Bill, same makes mention of "officer", "Ministry" and "with the approval of the Minister". That means that the "Minister" to whom the responsibility for the subject of good governance is assigned. It is to be noted that "Ministry" is not defined and it can safely be interpreted as meaning the "Ministry under the responsibility of the Minister". "Officer of the Ministry" means an officer of the Ministry of Good Governance. As per the Interpretation and General Clauses Act, an "officer" in singular can also mean "officers". So at the beginning, there will

be a host of "officers" who will be "seconded" at the Agency neither with the approval of the Permanent Secretary nor with the approval of the Secretary to Cabinet nor with the approval of the Public Services Commission but with the approval of the "Minister". As was the case for ICAC whereby seconded Police Officers were better remunerated. Where will lie the loyalty? The "officer of the Ministry" is not an employee of the Agency and as he/she is there to assist, where is the Clause in the Bill for him/her to take any Oath of Confidentiality.

Clause 5

33. Clause 5(1) gives very wide powers to the Agency as it can act on its own initiative to require any person to explain the source of any funds or funds which have been used for the acquisition of property. The "belief" here is not reasonable. Hence in a hazy quest to "clean", one can require any person to explain the source of any funds.

34. Require in writing. In writing, will the person be served on his last personal address? If yes, will it be through post. What guarantee will one have that there person has received the notice/letter in person? Is it not better to make use of a Private Usher and the clock will start ticking once it has been served personally on the person.

35. As for Clause 5(1)(b) of the Bill – For convenience sake, 21 days can be very short. The Agency will be clogged whereas depending of the value of the property and time of acquisition, the Director must be given more leeway in terms of time so as not to be accountable to any delay.

36. For Clause 5(2) of the Bill, the question which is in need to be asked is whether the subject of inquiry and its report will be communicated to the person concerned prior to any case being logged.

37. As we are dealing with the property of a person, will it not be more just to give the chance to respond to the conclusion of the inquiry before the application for an "Unexplained Wealth Order" is lodged? In so doing we will avoid embarrassment to the person or/and taxing the time of the Court. The Agency/Board can be satisfied after having confronted the person with the conclusion of the inquiry. It is like the "charging process" in a criminal matter. Why must we not avail ourself of that mechanism? That mechanism can also boil down issues, thus saving time to all parties.

38. The requirement under clause 5 is for any person to explain in writing within 21 days the source of any funds which that person owns, possesses, has custody or control of, which are believed to have been used in the acquisition of any property.

39. Failure to comply with the mentioned delay will amount to the commission of an offence and upon conviction; provision is being made for a fine not exceeding Rs 50,000 and to a term of imprisonment not exceeding one year.
That clause is quasi criminal in nature because it carries with it the stigma of unexplained wealth with the innuendo of ill gotten gains.

40. By lowering the standard of proof to a civil one, by a stroke of pen, we are putting the individual in the claws of the minister.

Clause 6

41. The clause itself is divided in two parts:

1. Local institutions
2. International institutions or agencies

42. All public Agency will have a duty after an agreement has been reached to provide the agency with confidential information.

43. Up to now in Mauritius, no one has seen in the press, information concerning tax returns of any individual or any company.

44. With the centralisation of all confidential information, there is the risk of leakage or hacking of information.

45. It is clear that when many agencies are monitoring the same information imparted to different agencies, there will be abuse of different kinds, for example, a person after having his property seized may still face different enquiries and prosecutions.

46. The person may of course raise abuse of process before a court of law, but the issue is that the person would have already been jeopardised already.

47. Furthermore, property has not been defined in the bill and therefore reference should be made to the definition of property in the interpretation and general clauses act.

48. Definition of property in the IGCA *'property means any kind of property, whether moveable or immoveable, active or passive, inanimate or animate and includes every obligation and every description of interest and profit, present or future, vested or contingent, arising out of or incident to property'*.

49. Note that the agency may enter into an agreement or arrangement and as per the oxford dictionary, arrangement means the action, process, or result of arranging, or a plan for a future event.

Clause 7

50. The Board shall be composed of three members, namely one appointed by the Prime Minister – The Chairperson and two other members appointed by the Minister of Good Governance. What is striking is that the mechanism for taking decision is not covered by the Bill. When the Chairperson is sick/not in Mauritius; we are not enlightened by the Bill. The issue of quorum is also not addressed.

51 .In cases of misbehavior or other reasons, we are not told what we can expect. The only conclusion is that the Prime Minister and the Minister of Good Governance can dismiss them.

51. Will the contract be made public?

52. Will there be a code of conduct for members of the Board?

53. Will there be a declaration of assets by members of the Board?

54. What should have been done?

55. Instead of "*notwithstanding any other enactment, the Board shall (… … …) prevail*" (vide Clause 8(2)(a)), there should have been a real brain storming with all the other enforcement authorities so as to streamline the areas of responsibilities.

56. The Republic of Mauritius can't afford the luxury of having many organizations inquiring and then withdrawing because another institution is getting involved.

57. If yes, which institution will be the guardian of the Declaration of Assets?

58. Will it be made public?

59. Clause 7(2) of the Bill – why? The meeting place will be determined by the Chairperson. Why not at the seat of the Agency?

60. Under this clause, no need to be rocket scientist to infer that the board will be controlled by the two nominees of the minister.
61. The quorum required by the board has not been defined in the legislation and hence the reading of the proposed bill as it is tends to suggest that those two assessors will hold more power in the decision making process of the board and may at any time out number the chairperson.

62. It is alarming to note that contrary to the Mauritian practice of appointing any person responsible of important institutions after consultation with the leader of the opposition, in the present matter, it is limited to the minister and prime minister.

63. The disclosure of interest will have to be made to the minister of good governance.

Clause 8

64. Clauses 8(2)(3)(4) of the Bill: These sub Clauses are clearly of hegemonic nature and will in our opinion stifle any inquiry by other enforcement.

65. The "Ghost Clause" – Clause 8(4)(a) of the Bill: "Where an enforcement authority has already instituted any proceedings in connection with the confiscation of property, the Board may, after consultation with the enforcement authority – request the enforcement authority to stay action."

66. "Stay Action" – So in simple words the Board can request the MRA to stay action. Is "After Consultation" an enough safeguard? The answer is no as consultation can be very cosmetic. This is why above all we have underlined the need to "Brainstorm" and to "Streamline" the law as we can't afford that luxury.

67. Clause 8(5)(b) of the Bill: "Where the Board determined that the report submitted by the Agency discloses reliable evidence of underlining criminal activity, it shall refer the matter to the relevant enforcement authority. Enforcement authority is defined under Clause 2 as being the Asset Recovery Agency, the Mauritius Revenue Authority, the Independent Commission Against Corruption, the Financial Intelligence Unit or such other body as may be prescribed."

68. "Such other body as may be prescribed" – Prescribed by whom? According to Clause 23(2)(b) of the Bill, the Minister will have the powers to put under the umbrella of the Bill a Constitutional authority which is under the authority of the Prime Minister.

69. Clause 8(5)(c) of the Bill makes it clear that if the Agency will initiate complaint, no further action shall be taken by other enforcement authority. What will happen if the Board decides not to proceed with the complaint? Can other enforcement authority take over? Is it a catch 22?

70. Clause 8 gives the power to the board after consultation with the enforcement authority to request the enforcement authority to stay action or direct the agency to institute action for the confiscation of property pursuant to this act.

71. This will again be a political tool whereby a political appointee will be able to stay action.

Clause 9

72. Clause 9(1) of the Bill – The judicial officer; The Ombudsman; The Director of Audit; The Director of the Financial Intelligence Unit; The Director-General of Independent Commission Against Corruption; The Director-General of the Mauritius Revenue Authority; The Governor of the Bank of Mauritius; The integrity reporting officer nominated by a public interest entity; or The officer of a statutory corporation, or body corporate, in the exercise of his functions has reasonable grounds to suspect that a person has acquired unexplained wealth, he shall make a written report of the matter to the Agency. Shall is mandatory. What happen if he/she fails in reporting despite having reasonable grounds? Apart from potential administrative actions, there is no offence under the Bill.

73. Clause 9(2) of the Bill is for other person but here it is not mandatory. Note again that there is no offence for doing so.

74. The Bill insists on written report and furthermore a duty to assist the Director in any inquiry.

75. Is Clause 9(3) not self defeating?

Clause 10

76. Clause 10 of the Bill recommends a reward to the public body – body corporate or any other person. Who will recommend a reward? The Agency through a report to the Board? And who will decide whether the persons – public body – body corporate deserved a reward? Is it the Board? Who will decide on the Quantum? Is it the Board? (*Vide Clause 8(c) of the Bill*).

77. The minister will decide whom to shame and whom to reward.

Clause 11

It is again an example of blatant interference by the minister where he will even control good governance and integrity reporting campaigns.

Clause 12

We note with concern that even before any enquiry is done, a privilege can be put on a property.

Clause 14 and 15

It is clearly an infringement on the powers of the judiciary. It is drafted in such a way that the judge might find himself in a difficult position to postpone issuing the order. It is clear that the judge will be in a very embarrassing position where the person has good reasons to tender to the court why he was not present in court. For example, death of close relative, accident supported by proof, illness supported by medical certificate, service not personal.

3. ASSET RECOVERY (AMENDMENT) BILL - BRIEF ANALYSIS

The decision to replace the DPP by the FIU is flawed. The decision to have the DPP as enforcement authority was taken after wide ranging consultation. The IMF, World Bank, the Commonwealth Secretariat, the three limbs of the legal profession, the ICAC, FIU, DPP's Office, the police, members of the then opposition and other stakeholders were consulted in that process.

To have the DPP who holds a constitutional post replaced by a political appointee is irrational and defeats all logic.

The Asset Recovery Act and the Asset Recovery(Amendment) Act were both piloted by the Attorney General. Having the Minister of Good Governance to pilot this bill shows a tendency to have an overall control.

There will be a strong perception that the Asset Recovery Unit will be controlled politically and used as a persecution tool.

PROPOSALS :

- Labour Party is fully committed to supporting the fight against crime and to adopting exceptional measures in relation to the proceeds of serious criminal activities.

The Party is also committed to ensuring that the legal framework for fighting crime should be consistent with the protection of fundamental rights guaranteed under our Constitution

and under international conventions on human rights. This framework must also contain procedural safeguards in line with our democratic values and the Rule of Law.

The Labour Party supports the consolidation of the legal framework to fight crime and strongly believes that existing law and in particular the Asset Recovery Act can be perfected to achieve better results.

The LABOUR Party therefore recommends that Existing legislation and institutions empowered to initiate action regarding seizure of assets should be given additional powers in certain specified circumstances and procedural rules including rules of evidence could also be reviewed in relation to these circumstances.

The Labour Part therefore recommends that a Select Committee of Parliament should after wide consultations with the public at large, the legal profession and civil society, review the existing legal framework and come up with cross-party proposals on consolidation of the law to address specific crimes and the proceeds thereof.

In doing so, the Select Committee should consider and consult on the following aspects of the proposed Bills relating to UWO and see to what extent these or any of these could be included in the amendment to existing legislation

What is of crucial importance is that persons responsible for implementing or enforcing the law are not only independent and impartial but are seen to be independent and impartial. It is therefore imperative that the appointment of these persons should not be in the hands of politicians and these persons should in no way be accountable to, or under the administrative control of a politician. Under present law, officials involved in the process leading up to seizure of assets are appointed by the Judicial and Legal Services Commission and any attempt to transfer similar powers to political appointees would be a retrograde step for our democracy.

a. Any law relating to UWO must not apply only against Mauritian Citizens.
b. The realisation of assets must not be done by liquidator but by a Judicial Officer by the Master ad Registrar through public auction on the first Saturday at the Supreme Court after the property in question has been duly advertised.
c. Property must be defined and a minimum threshold of the value of property must be included after consultation.
d. The law must provide that in deciding whether to issue the Order the Judge must consider if it is in the public interest to issue the Unexplained Wealth Order.
e. Legal Aid or a sum of money to be excluded from the property in issue must be allowed for legal expenses.
f. Any loss or non-recovery of document from public bodies must be interpreted in favour of
Respondent.
g. The onus shall be on the applicant for a UWO to prove on a balance of probabilities that the property in possession of the Respondent cannot be explained.
h. The relevant provisions of the new law must l must include a limitation period and not a starting off date.
i. The time to challenge/appeal must be longer than normal civil cases.
j. All monies recovered from the realisation of assets by liquidation must be credited to the Consolidated Fund. Examples GRA, MRA
k. The inscription of a privilege or lien in favour of the Government pending any case in front of the Supreme Court must not be unlimited or left at the discretion of the party applying for an UWO . We propose a maximum period of 6 months.
l. So as to avoid any "polluting" of any institution by the reward system, a new system must be set up which is transparent and clearly understood by one and all.
m. The party applying for an UWO shall not have powers to determine the quantum of reward.
n. All agreements/arrangements for exchange of information with a public sector agency, foreign supervisory institution, a law enforcement agency or an international organisation must be approved by the Cabinet of Ministers.
o. So as to avoid unnecessary litigation and postponement of cases before the Judge in Chambers, the Rules Committee of the Supreme Court shall codify the procedures to follow. The Judiciary must not lose its discretionary powers and inherent powers to regulate its own affairs.
p. The Minister must not have powers provided under Clause 23 of the present GGIR Bill to amend "Enforcement Authority" and "Reward" (Vide Clause 2 of the Bill).

q. In case there is a mechanism other than that provided under the Asset Recovery Act then the appointment of members must be done through the Judicial and Legal Service Commission.
r. Members must have a security of tenure.
s. Employees/consultants, full-timers/part-timers recruitment must be done by the PSC after the posts have been duly advertised.
t. The Judge will have power to award punitive costs against the Applicant in cases which have been entered with a view to destroy one's reputation or on unreasonable grounds.

u. The DPP must be party to the case and will have a duty to see the validity??? of actions entered.
v. There shall be a code of conduct for members of any new body being set up and all persons employed in any way whatsoever by that body.
w. All members of that body and all persons employed in anyway whatsoever must declare their assets to the Speaker of the Assembly who shall cause same to be laid on the table of the Assembly.

- The Bill, as it is, must be circulated followed by a wide debate on all its direct and unintended consequences which are explained to the nation at large.

- The Bill must not be debated before the National Assembly before any extensive debate.

- The Bill cannot stand without the amendment to the constitution and our reading is that the only way is to go through a referendum.

CONCLUSIVE NOTE :

THE LEGAL COMMISSION OF THE LABOUR PARTY BELIEVES THAT THE DEBATE AROUND THE PRESENT BILLS IS TOO IMPORTANT TO BE LEFT TO THE POLITICIANS ALONE…

MAURITIUS LABOUR PARTY
November 2015