



Modernising the Electoral System

“Electoral systems are rarely designed, they are born kicking and screaming into the world out of a messy, incremental compromise between contending factions battling for survival, determined by power politics”.

Professor Pippa Norris, Harvard University

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Foreword

It has been forty-six years since our Constitution, along with its electoral system, was settled at Independence. This Constitution has undoubtedly been the bedrock of political and social stability in our country.

However, it is time that we look at it again.

We must bequeath to the next generations of Mauritians a system that is fit for the 21st century, that reflects the changes which have taken place since nearly half a century, which corresponds to the aspirations of younger generations, and whose firm foundations will endure at least as long as those our founding fathers gave to us.

This document sets out Government's stance on electoral reform as a first step towards constitutional reform.

Government is publishing this document after careful reflection and study over the last several months.

There have been seven Reports and Commissions that have looked into the electoral system of Mauritius, four of which date since 2000.

Government has sought further expert advice and tested its preliminary conclusions against the principles which it believes should drive the reform of our electoral system.

This document does not seek to rehearse the valuable work already set out in the previous Reports and Commissions.

Instead it draws and builds on their findings.

Government believes that if we want to move ahead, there is no need to re-open the whole debate on every issue which has been canvassed in the past. We should instead focus on the issues where there is no general agreement, look at the different options and address them.

It is a fact that there is no perfect electoral system and therefore, there never will be total agreement.

What we need to strive for is broad agreement in order to modernise our Constitution and our electoral system.

What is common to the post 2000 Reports and Commissions is the agreement on the need for reform and the search for a system that produces stable, responsive and fairly representative governments.

Reform of the electoral system should, as I have been saying for many years now, reflect the aspirations of our citizens for unity and our unflinching faith in a single Mauritian identity. It should also create conditions conducive for more women to participate actively in public life.

Any reform of our electoral system should maintain and reinforce the existing tendency to produce diverse and broad representation of all, including women.

And it should do all this while preserving the cardinal merits of the existing system – namely stability and simplicity.

It is crucial that after the votes are counted, a Government emerges which can be effective, decisive and stable.

In other words, Government which emerges from a general election should be able to govern for the betterment of the nation.

Government believes that the proposals set out in this document constitute a pragmatic and solid foundation for the evolutionary reform that Mauritius needs at this junction in its history.

This document starts by providing a brief overview of public debates on Constitutional and electoral reforms since 1956.

Government trusts that this historical background will promote an informed debate on the issues that remain to be addressed.

The proposals for reform are designed and built on the foundations established by the founding fathers of our nation.

They offer a unique and practical solution, conceived and tailor-made for our specific realities. It was in this spirit that the fathers of our plural society crafted the Constitution that has served us well on our journey from Independence into mature nationhood.

However, 46 years after our Independence, our Constitution and electoral system need to evolve to adapt to the changes which have taken place since then.

The purpose of this document is precisely to create and foster a better understanding of Government's intention to build consensus as far as possible and to provide opportunity for informed comments prior to the introduction of legislation to reform our electoral system, as a first step towards modernizing our Constitution.

*Dr the Hon Navinchandra Ramgoolam, GCSK, FRCP
Prime Minister*

24 March 2014

INTRODUCTION

There is general agreement that, 46 years after our Constitution along with its electoral system was bequeathed to us, it is time to review it.

The purpose of this Consultation Paper is to set out the outline of proposals for electoral reform but instead of inviting views yet again on all the proposals discussed so far, Government has decided to narrow down the issues in contention, make firm proposals and to seek views only on specific options where there is no broad agreement prior to introducing legislation, within a fixed time frame.

The electoral system

The electoral system of Mauritius was created in its current form at the time of Independence. It is, primarily, a multi-member cluster vote system whereby MPs are elected in accordance with the First-Past-the-Post System. Once the votes are counted, a unique mechanism called the Best Loser System is applied to seek to balance the votes with the numbers of electors from the four prescribed communities, in order that all the four communities are adequately represented without changing the

outcome of the election under the First-Past-the-Post System.

Reports and Commissions

There have been seven reports and commissions that have considered the electoral system of Mauritius. Three pre-date the Best Loser System while the other four have been written since 2000. What is common to each of the latter is the agreement on the need for reform while providing greater fairness in the outcomes of general elections without putting at risk stability and governability.

A modern, equitable electoral system

The fact that the issues set out in this Consultation Paper do not fully concur with any of the last four reports does not mean that these previous efforts have been wasted. On the contrary, it was important that the available alternative routes were explored, debated and considered exhaustively, and the nation owes their authors a considerable debt of gratitude.

Government believes that the issues set out in this Consultation Paper are intended to reflect not what is, in the abstract, the "ideal" electoral system but

rather Government's view as to what needs to be discussed in relation to electoral reform in Mauritius and what is likely to win consensus.

This document which is intended to be the precursor to legislation, if consensus can be reached, will be the first of several that will be published setting out Government's vision of renewing democracy and the Constitution of Mauritius. Other issues that need to be looked at include the funding of political parties. Government will publish its thinking on these issues in due course.

The evolutionary reform of our electoral system should not be the end of constitutional renewal. Government believes that there is a window of opportunity to modernise the Constitution of Mauritius further, and that it should be embraced.

This consultation document will first summarise in broad terms the historical context of the existing system and the significant steps taken so far on the road to reform. It is against this background that Government's proposals and options must be seen and considered.

Furthermore, Mauritius has always striven to comply with its international

obligations. Following the observations of the UNHRC and given the absence of a rationale for the existing constitutional provisions since the amendments of 1982, we must either resume gathering ethnic and community data as part of the official census or find a basis for reform.

There is general agreement that restarting the process of collecting ethnic data would be divisive and not conducive to nation building. Further, the Supreme Court has made clear that individuals cannot be compelled to declare to which community they belong to.

Government had clearly indicated, before the UNHRC observations, that it was for the modernisation of the electoral system which would include subsuming the existing requirements of the Best Loser System with a modern, more equitable electoral system that ensures fair representation of all, including women.

As will be seen, Government takes the view that there is already wide agreement on a great deal of the essential components of reform.

However, no electoral reform would be acceptable to Government if all the constituents of our rainbow nation were

not assured of fair representation in Parliament.

Origins of Universal Adult Suffrage in Mauritius and Pre-Independence Constitutional Developments

Chapter 1 explains the origins of universal suffrage in Mauritius, formal discussions in respect of which began at the London Conference in 1956. The Trustram Eve Electoral Boundary Commission of 1958 recommended elections should be held in forty single-member constituencies, with a rider that the "proper proportions" of the three main communities, deemed to exist in the population at that time, should be reflected in the number of seats in the Legislative Council either by election and/or the Governor's appointments. These recommendations were implemented in 1959 for the first elections in Mauritius based on the principle of universal suffrage.

The Constitutional Commissioner

As Mauritius continued its steady march towards independence, Professor de Smith sought to find a substitute for the Governor's powers. This is dealt with in Chapter 2. In November 1964, the Commissioner made two alternative

recommendations for an electoral system. Neither was implemented.

The Banwell Commission

Following further discussions at the 1965 Constitutional Conference in London, the Secretary of State proposed that a Commission should recommend an electoral system and constituency boundaries. That Commission was chaired by Sir George Harold Banwell and its report is discussed at Chapter 3. It reported on 22 February 1966 recommending two correctives to help deal with the questions of inducements to political parties to seek inter-communal support, the representation of all communities, and safeguards against severe under-representation. However, there was a wide rejection of the Banwell Commission's two correctives by the Labour Party, the Independent Forward Block and the "Comité d'Action Musulman". After further consultations in place of those correctives, the Best Loser System was agreed upon in 1966.

Independence

That set the conditions for the historic general election of 7 August 1967, following which Mauritius became independent. Those electoral principles

forged in the 1950s and 1960s were used for nine further elections since 1967.

However, in 1982, the new Government decided that there would be no more gathering of ethnic data in the official census. It is clear that from that time, the Best Loser System, which depends for its effectiveness on accurate data concerning the proportions of each "constitutional community", was existing on borrowed time. As the recent decision of the UNHRC has shown, the rationale of such a system can only logically be sustained with an up-to-date picture of the composition of the population of Mauritius.

The most recent impetus for change arises out of the commitments made this new century, by both major political parties, to reform. This Government has repeatedly stated the need to find an evolutionary solution that will withstand the twin tests of stability and fair representation without explicit ethnic labelling.

The Sachs Commission

Chapter 4 deals with the Sachs Commission of 2001/2002, which was intended to redress the imbalances caused by the First-Past-the-Post system that were thought to be only inadequately compensated for by the Best Loser

System. The recommendation was for 30 additional proportional representation seats to be chosen on the basis of lists provided by parties receiving 10% or more of the national vote. The Commission suggested a process of reform in respect of the Best Loser System.

The 2002 Select Committee

Chapter 5 leads on to the 2002 Select Committee that sought to advance the electoral reform recommendations made by the Sachs Commission. Recommendations for implementation were made, albeit one member of the Committee put forward another formula for the allocation of additional seats. However, that other formula would not have rebalanced the National Assembly seats in line with the votes cast.

After much debate, even though the two parties in Government, the MMM and the MSM had the required majority no Bill was presented as there was no agreement between them.

The Carcassonne Report

Chapter 6 summarises the Carcassonne Report of December 2011. The drastic reform recommended by the Report was for the abolition of the First-Past-the-Post altogether while subsuming the Best Loser

system and the creation of new constituencies that would elect members on the basis of proportional representation. This was rejected outright by the main political parties.

The Sithanen Report

At Chapter 7, Dr Sithanen's report gives a uniquely Mauritian perspective on the subject of electoral reform from the point of view of not only an expert political scientist but also from a formerly practising senior politician of immense experience. He considered that the Carcassonne Report recommendations risked throwing the baby out with the bathwater - a conclusion that Government endorsed. As an alternative to the Best Loser System, the January 2012 "Sithanen Report" proposes a formula to elect a further 20 "list-tier" MPs on the basis of the votes of unreturned candidates. As this Consultation Paper explains, Government substantially accepts Dr Sithanen's reasoning and approach, with some modification, as a basis for moving forward.

The Best Loser System

An integral part of the electoral system in Mauritius, the Best Loser System, is summarised in Chapter 8. In parallel with the recommendations for reform of the

system made by the Sachs Commission, Carcassonne Report and Sithanen Report, the Supreme Court, The Judicial Committee of the Privy Council and the United Nations Human Rights Committee have clearly articulated the need for reform, as set out in that Chapter. In 1991 the Supreme Court expressed concern that the Best Loser System was based on a 1972 census; something the Human Rights Committee concluded was "arbitrary" in 2012.

As recognised by the Judicial Committee of the Privy Council, it is plainly better to decide these issues as a result of political debate and, if necessary, constitutional reform than through the courts. Such a political solution can only be reached through a "national dialogue" taking into consideration all of the work done so far and the voices of all components of the Mauritian nation.

The need for reform

It is in this spirit that reform of the system is outlined at Chapter 9. In the decades since independence Mauritius has changed beyond recognition. It has developed political institutions and systems that have proved themselves able to a very great degree to ensure the representation of interests of all sections

of society in Parliament. The system is by no means perfect but has reached a level of maturity that compels the recognition that ethnic considerations can no longer find a place in the electoral process.

Recommendations for informed debate on reform

From the privileged position of now being able to look back at all the thoughts and views expressed on reform, a modified version of Dr Sithanen's proposal is set out in Chapter 10. By subsuming the Best Loser System, it would create at least 16 additional seats to be allocated according to closed party lists or an alternative formulae using the "unreturned votes elect" formula, and with provision to ensure that candidates of both genders are encouraged. The political parties will have responsibility and the electoral incentive, to facilitate diversity on the party lists.

Consultation process and propositions

In Chapter 10, this Paper sets out final propositions where there is broad agreement. It also spells out, with appropriate analysis, issues which require further discussion. Government consequently the views of stakeholders on the outstanding issues that need to be resolved. Annex A sets out some detailed

provisions in respect of the consultation process.

Underpinning Government's recommendations is the modernization of the electoral system to ensure that it continues to provide stable, responsive and fairly representative government in line with the evolution and aspirations of our nation. The process towards reform has been a long and considered one. But we cannot achieve our vision for change without unifying faith in a single Mauritian identity that is becoming ever stronger. We must grasp the historic opportunity to make this ambitious reform a reality.

CHAPTER 1: ORIGINS OF UNIVERSAL ADULT SUFFRAGE IN MAURITIUS AND PRE-INDEPENDENCE CONSTITUTIONAL DEVELOPMENTS

The London Conference

The formal discussions regarding the introduction of universal suffrage in Mauritius commenced in 1956 with the London Conference.

Consensus was reached amongst all those taking part at that conference, including a delegation from Mauritius, Ministers, and officials from the Colonial Office and the Governor, in respect of universal suffrage.

In his despatch of 10 February 1956, the Secretary of State had proposed the system of proportional representation with the single transferrable vote to replace the block vote system. However, various possible alternative electoral systems were considered at the First London Conference.

In reply to a letter from the Secretary of State for the Colonies, Mr Guy Forget, President of the Mauritius Labour Party wrote in a letter dated 25 October 1956, "It is further the conviction of the Parliamentary Group that Proportional

Representation in the local context will prevent the normal political development of the country on the basis of a Mauritian entity, aggravate and perpetuate divisions among Mauritians on racial and religious lines and thus we and our fellow-members of the Labour Party consider it our duty to prevent, in so far as it lies within our power to do so".

The London Agreement

The resulting London Agreement of March 1957 set out the following three principles for any proposed election system, which principles underlay the subsequent work of the Commission: *"whatever system of voting was introduced should be on the basis of universal adult suffrage, and should provide an adequate opportunity for all the main sections of opinion in Mauritius to elect their representatives to the Legislative Council in numbers broadly corresponding to their own weight in the community. It was also common ground that the system of voting should be such as to facilitate the development of voting*

*on grounds of political principle and party rather than on race or religion”.*¹

It was agreed that the Secretary of State for the Colonies, Rt Hon Mr Lennox-Boyd, would appoint a Commission to consider the possibility of creating up to forty single-member constituencies with minimum electors of 5,000, subject to each having reasonable boundaries capable of enduring, with the primary objective that, "each main section of the population in Mauritius shall have adequate opportunity to secure representation in the Legislative Council corresponding to its own number in the community as a whole".² If that were not possible, the Commission was instructed to demarcate boundaries for eleven three-member constituencies. The Secretary of State recognised, however, that small single-member constituencies were likely to be based on communal considerations, therefore tending

¹ HC Deb Vol 566 Col 115w (8 March 1957); Mr Lennox-Boyd

² HC Deb Vol 566 Col 116w (8 March 1957); Mr Lennox-Boyd. Note there were some changes of phraseology between the wording of principle 2 and the primary objective of the terms of reference for the Commission. However, the Trustram Eve Electoral and Boundary Commission concluded that the changes in phraseology resulted in no significant change in meaning and that in essence the terms of reference were no different to principle 2.

towards the hardening and perpetuating of communal divisions.³

The Governor’s power of appointment

The London Agreement also recognised that, in accordance with the proposals in the Secretary of State's despatch of 10 February 1956, the Governor of Mauritius would have the power to appoint members⁴ to the Legislative Council if desirable to assist in the workings of Government, so long as the power would not be used to frustrate the results of the elections and, "it would be used where appropriate to ensure representation of special interests of those who had no chance of obtaining representation through election".⁵

³ HC Deb Vol 566 Col 116w (8 March 1957); Mr Lennox-Boyd

⁴ The Mauritius (Constitution) Order in Council 1958 stated at section 17 that the Governor had the power to nominate up to twelve members to the Legislative Council. The Mauritius (Constitution) Order 1964 set out at Schedule 2, section 27(2)(d) of the Constitution which provided for the Governor to be able to nominate up to fifteen members of the Legislative Council.

⁵ HC Deb Vol 566 Col 117w (8 March 1957); Mr Lennox-Boyd. Under section 17 of the Mauritius (Constitution) Order in Council 1958, in addition to the forty elected members and up to twelve nominated members, there was to be a Speaker and three *ex officio* members. Although the limit on nominated members went up to 15 under section 27(2)(d) of the Constitution (Mauritius (Constitution) Order 1964, Schedule 2), the number of *ex officio* members dropped to allow only for the Chief Secretary *ex officio* under section 27(2)(b) of the Constitution (Mauritius (Constitution) Order 1964, Schedule 2)

The Trustram Eve Commission

The Commission was chaired by Sir Malcolm Trustram Eve (later Baron Silsoe), Mr Beloe and Mr Sudbury and the Secretary, Mr IS Wheatley. Following their appointment on 15 July 1957, Messrs Beloe, Sudbury and Wheatley spent five weeks from 3 August touring the island, meeting Ministers, senior officials and party leaders and considering various representations. Sir Malcolm Trustram Eve arrived on 8 September when those who wished to give their views in public were heard. Improved versions of draft maps were published and the Commission's work in Mauritius was completed on 6 October. The report was completed in January 1958.

Boundary delineations

In respect of the boundary delineations, the Commission found no difficulty dividing Mauritius into 40 single-member constituencies of approximately equal voting strength on the basis of universal adult suffrage. At that time the constituencies had an average of about 7000 electors and were considered to be "reasonable geographical boundaries". These were expected to endure for at least three general elections.

The primary objective

The remainder of the report dealt with the primary objective, requiring the Commission to:

- (1) estimate the number of electors and divide them into groups, which would become the "sections" of the population;
- (2) decide whether each section from a practical electoral point of view was large enough to be treated as a "main" section; and
- (3) consider whether each main section would have an adequate opportunity for a reasonable future period, namely three general elections, to secure election to the Legislative Council in numbers broadly corresponding to its proportion of the total electorate.

Three main sections of the population

The total electors were estimated at about 277,500, out of a population of about 600,000, sub-divided according to the 1952 population census into five groups: Indo-Mauritian Hindu, Indo-Mauritian Muslim, Indo-Mauritian Christian, General Population and Sino-Mauritian. Ultimately the Commission concluded that there were "three main sections" of the population, namely the

Indo-Mauritian Hindu, Indo-Mauritian Muslim, and General Population sections.

Adequate opportunity of securing representation

The next task was for the Commission to satisfy itself whether, by a number of single-member constituencies not exceeding 40, each of the three main sections of the population would have an adequate opportunity of securing representation in the Legislative Council by election in numbers broadly corresponding to their proportion of the total electorate.

The only safeguard

The Commission considered that the only safeguard, "against the possibility of an election resulting in disproportionate representation in the Legislative Council lay in the Governor's power provided for in the London Agreement to nominate up to 12 extra members".

No less than 40 constituencies

Ultimately the Commission decided that the three main sections of the population could not be given an adequate opportunity of securing representation in the Legislative Council by election in numbers broadly corresponding to their proportion of the total electorate if there

was less than about 40 constituencies of approximately equal voting strength.

Recommendations

The Trustram Eve Electoral Boundary Commission recommended that elections be held in forty single-member constituencies. It further concluded that, "Reading the London Agreement as a whole, we feel that the intention was that for, say, the next three elections there should be a certainty that the proper proportions were obtained in the Legislative Council by election or, failing that, by election plus the Governor's appointments." This interpretation met with disapproval subsequently.⁶

Exercise of the Governor's power

Accordingly the Governor's power of appointment became central to the Commission's recommendations. The Secretary of State subsequently gave a public assurance in the House of Commons as to how the Governor would exercise that power. This assurance was in similar but not identical terms to the Secretary of State's despatch of 10 February 1956, namely that the Governor would use his power of appointment to the Legislative Council, subject to the

⁶ Report of the Constitutional Commissioner, November 1964, Sessional Paper No 2 of 1965 of the Mauritius Legislative Assembly at [13]

conditions that he did not thereby frustrate the election results; and that, as finally constituted, the Legislative Council "contains representatives of the main sections of opinion in numbers as nearly proportionate as possible to their numbers in the population as a whole".⁷

However, the Commission had not been entirely satisfied with the extant conditions on the Governor's power. At the request of the Commission, the Governor gave the following further assurances in a despatch to the Secretary of State, namely that his power of appointment would only be used for those candidates who, though they failed to be elected, showed that they had a reasonable following, as well as those who had not stood as candidates; and that any of the three identified sections of the population may well contain important differences of opinion which should be recognised.⁸ On the instruction of the Secretary of State, the Governor subsequently gave an assurance that he would give prior consideration to "good losers", although he was not prepared to give an assurance that only good losers

⁷ HC Deb Vol 583, Cols 28-9w (25 February 1958); Mr Lennox-Boyd

⁸ Despatch from the Secretary of State to the Governor, 5 February 1958

would be nominated,⁹ which appears to have been what the Commission sought. The recommendations were implemented in time for the general election of 1959:¹⁰ the first elections in Mauritius to be held on the basis of universal suffrage.

Out of the 40 seats, the Labour Party won 26 seats, its ally the CAM 5 seats, the IFB 6 seats and the PMSD 3 seats.

Constitutional Review Conference

A Constitutional Review Conference was held in the summer of 1961. Paragraph 4 of the Communiqué following the 1961 Conference envisaged two stages of constitutional advance towards a greater measure of internal self-government. At the first stage only small changes would be made with the principal innovation being the creation of the office of Chief Minister, whilst the major changes would only take effect at the second stage if the Chief Minister so recommended following a resolution of the Legislative Council after the subsequent general election. The first stage was brought into effect at the end of 1961, whilst the general election

⁹ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [14]

¹⁰ Mauritius (Constitution) Order in Council 1958. In 1964 the number of members that a Governor might nominate was increased to 15: Mauritius (Constitution) Order 1964.

took place in October 1963 following which the second stage changes were effected by the Mauritius (Constitution) Order 1964.¹¹

¹¹ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [2]

CHAPTER 2: REPORT OF THE CONSTITUTIONAL COMMISSIONER

Terms of reference

Professor de Smith was appointed Constitutional Commissioner in 1961. The Professor was invited by the Rt Hon Duncan Sandys, Secretary of State for the Colonies, to visit Mauritius in 1964 with the following terms of reference, "Having regard to the conclusions of the 1961 constitutional review talks, especially paragraphs 4, 12 and 13 of the Communiqué of July 8, 1961, and to subsequent constitutional developments in Mauritius, to examine in greater detail, in consultation with Government of Mauritius, the constitutional requirements of the broad conclusion of the talks and to consider particular constitutional matters which did not come within their scope."¹² Paragraph 4 of the 1961 Communiqué said that during, "the period between the next two General Elections, or what has been called the second stage, if all goes well and if it seems generally desirable, Mauritius should be able to move towards full internal self-

¹² Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [1]

government."¹³ Paragraphs 12 and 13 of the 1961 Communiqué respectively referred to the need to give further study to setting up a "Council of State" or a "High Powered Tribunal" and to consideration of whether a visit by the Constitutional Commissioner might be valuable.¹⁴

Visit to Mauritius

The Constitutional Commissioner visited Mauritius between 20 July and 10 August 1964 with the purposes of meeting the Governor and political leaders, becoming more fully conversant with the local political situation and to give him the opportunity of suggesting lines of constitutional development that might not otherwise have been considered.¹⁵ The final report followed in November 1964.

Constitutional hurdles to independence

The de Smith report deals with the constitutional hurdles which the

¹³ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [2]

¹⁴ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [3]

¹⁵ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [1], [4]

Constitutional Commissioner believed had to be surmounted before the longer-term alternatives of independence or some form of association with Britain could be considered.

In essence, Professor de Smith's report sought to find a substitute for the Governor's powers in the event of Mauritius becoming independent. The Governor's powers, particularly that of appointment to the Legislative Assembly, were used for the overriding purpose of reconciling the conflicting interests of communities in Mauritius, in respect of which there were two fundamentally different approaches. One was to provide constitutional and other safeguards for communities identified as such, whilst the other was to make boundary and electoral arrangements whereby political groups and individuals could reasonably hope to secure adequate political and other safeguards without being legally identified as part of a community. Professor de Smith came down strongly in favour of the latter approach, favouring an attempt to secure the development of Mauritius into a single nation where any divisions amongst sections of the population were softened with the hope that in time they would disappear.

Options for reform

Many different options for electoral reform were proposed and considered against the background of a general dissatisfaction in Mauritius with the single-member constituency system introduced in 1958. Those options included multi-member constituencies and communal electoral rolls.¹⁶

Communalism in politics

Professor de Smith was himself trenchant about the effect of communalism in politics,

“Some of the proponents of communal representation sought to show that this would discourage communalism and strengthen tendencies to vote along party lines; others conceded that it would encourage communalism but asserted that communalism was in any event an ineluctable fact of life in Mauritius. My own belief is that the immediate effect of the introduction of communal representation in any form would be to intensify communalism by endowing it with the accolade of legitimacy, that candidates in an electoral campaign would experience irresistible temptations to appeal to the narrower communal

¹⁶ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [17]–[19]

prejudices, that there would be increasing demands for communal representation in other walks of private life, and that the long-term effects would be deleterious both to the minorities which now think of it as a safeguard and to the general welfare of the island".¹⁷

Implications of a corrective

De Smith noted that the extant system of Governor's nominations would have to be superseded on the attainment of full internal self-government. Although there was strong opposition in many quarters to communal electoral rolls, there was not the same level of opposition to a corrective to the main elections that would reserve for the main sections of the population a number of seats proportionate to their strength in the population as a whole.¹⁸ Nonetheless the report presciently identifies some of the implications of such a corrective, *each candidate would have to proclaim his communal affiliation when he was nominated, so that a communal score-sheet would be available for the allocation of seats. Some might well find this a distasteful procedure, and in any event*

¹⁷ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [19]

¹⁸ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [20]

one would expect it to inject a new element of communalism into the campaign. I imagine, moreover, that it would be difficult to agree upon the constitutional definitions of a Hindu and a member of the General Population.¹⁹

A guarantee to the main communities of a fixed proportion of elected members of the legislature could be regarded in the then extant social and political climate in Mauritius as the least of evils, but Professor de Smith believed it to be, *an evil nonetheless, and one which may seriously inhibit the growth of national consciousness over the years. Because I view with misgivings the prospect of a constitutional consecration of communities, I have looked for alternative methods of representation which will afford reasonable opportunities to minorities without encouraging communal attitudes in public life.²⁰*

Alternative electoral systems

Professor de Smith put forward two alternative electoral systems to replace

¹⁹ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [25]

²⁰ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [27]

the extant electoral arrangements. These were:

(i) 20 three-member constituencies with each voter to have three votes, which he is obliged to cast for three candidates. There would be up to three members nominated by the Governor as representatives of special interests, which were not adequately represented by elected members. Ten members would be elected simultaneously at an island-wide election, where each elector would have six votes, in order to give minorities a better opportunity of securing representation. Each voter would be obliged to cast all his votes in the island-wide election and up to three of those might be used for any given individual candidate.²¹

(ii) 20 two-member constituencies. Each voter would have two votes, which he must cast for two candidates. Up to three members would be nominated by the Governor. 16 members would be elected in 4 four-member constituencies formed by grouping the other constituencies in fives, with the party list system of proportional representation. The intention behind this proposal was to

give a rather better opportunity to significant minority parties.²²

²¹ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [28(a)]

²² Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [28(b)]

CHAPTER 3: THE BANWELL COMMISSION

Following the publication of Professor de Smith's report, the final questions surrounding Independence were debated at the Constitutional Conference on Mauritius that took place in London in September 1965.

A brief prepared for the Secretary of State for the Colonies in view of the meeting scheduled for September 16th, officials advised:

The main issue to be decided at the Conference is the future status of Mauritius independence with safeguard for minorities or some form of association... Though the Mauritius Labour Party led by Sir Seewoosagur Ramgoolam, the largest single party, is pressing for independence and maintains that this has the support of the majority of the inhabitants of Mauritius, solid evidence for this support has so far not been produced and the Parti Mauricien have put forward a strong case for believing that there might not be a majority for independence if the point were put impartially to the test.

The Secretary of State could say whereas the Labour Party have argued that they

have a mandate for independence, he has been faced at the Conference with insistent statements that the majority of the people are against independence. On the evidence of the views of the various parties it would certainly be difficult for the British Government to conclude that the reverse was in fact the case. Have the Labour Party any concrete evidence to suggest that a majority do support independence?

It is clear that even at that stage it was by no means a foregone conclusion that Mauritius should become independent.

The main opposition party, the Parti Mauricien was opposed to independence and wanted a form of "association" with the UK.

At a meeting with members of the Parti Mauricien in the afternoon of 9 September, the British delegation drew attention to the fact that "such an arrangement (i.e association) might not prove acceptable to the United Nations and might cause unrest in Mauritius if, as might be the case, certain African nationalists decided to demand that

Mauritius should be granted independence.

The Parti Mauricien argued that independence would cause greater unrest than "Association".

One major issue at the 1965 conference was how the future constitutional status of the country should be decided.

During the debate over whether the future constitutional status should be decided by referendum or by a general election, Hon J Koenig argued:

A general election would give a distorted result because of the large number of votes "wasted" on independent candidates and three-cornered fights. Winning candidates in different constituencies would be returned with differing majorities. Moreover it was beyond the means of the Parti Mauricien to provide a candidate in each constituency.

However the Labour Party was opposed to a referendum which would be very divisive and instead argued that the future constitutional status should be decided through a general election.

In a brief prepared for the Secretary of State for the meeting scheduled for

September 15th, the Secretary was advised as follows:

The Secretary of State could also refer to the need for a referendum and could ask the Labour Party why, given that this would be a thoroughly democratic procedure likely to satisfy opinion in Britain and in the world at large, they resist it?

Although universal adult suffrage for persons over the age of 21 was first introduced in Mauritius at the general elections held in 1959, Sir S Ramgoolam had already proposed at the 1965 constitutional conference that the voting age should be reduced to 18. However this was opposed by the then Governor, Sir John Rennie.

"The Mauritius Labour Party wanted independence within the Commonwealth, a Governor-General, a Parliament elected by universal suffrage of persons aged eighteen and over in twenty multimember constituencies which would return three members each, and adequate safeguards for minority groups".

(Statement by Sir Seewoosagur Ramgoolam at meeting held on 8 September 1965).

At its meeting of 9 September the Secretary of State asked Sir S Ramgoolam about his party's proposals to lower the voting age to 18, pointing out that this might be regarded as a means of increasing the Labour Party vote. Sir S Ramgoolam said that his party put forward this proposal because it thought that youth, which was maturing earlier today, should take its responsibility in society, and the reduction in the voting age should help to integrate society more quickly, Sir John Rennie felt that such a proposal was dangerous in that it would bring politics into the schools....

(Record of the meeting of 9 September 1965).

It was only in 1975 that Sir S Ramgoolam managed to get through the Mauritius Legislative Assembly, a constitutional amendment that enabled the country to have universal suffrage for all persons aged 18 and over.

Recommendation for a Commission

At the 1965 Constitutional Conference, the Rt Hon Mr Greenwood concluded that a Commission should be appointed to make recommendations on:

(i) the electoral system and the method of allocating seats in the

legislature most appropriate for Mauritius; and

(ii) the boundaries of electoral constituencies.²³

Guiding principles

The Commission was to be guided by the following principles:

- (a) the system should be based primarily on multi-member constituencies;
- (b) voters should be registered on a common roll, there should be no communal electoral rolls;
- (c) the system should give the main sections of the population an opportunity of securing fair representation of their interests, if necessary by the reservation of seats;
- (d) no encouragement should be afforded to the multiplication of small parties;
- (e) there should be no provision for the nomination of members to seats in the legislature; and
- (f) provision should be made for the representation of Rodrigues.²⁴

²³ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362, p 3

²⁴ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [1]

Appointment

The Commission was formally appointed on 30 December 1965 by the Rt Hon The Earl of Longford PC, Secretary of State for the Colonies. The Commission consisted of the Chairman, Sir George Harold Banwell, Mr TG Randall CBE, Professor CH Leys and Mr Seller as the Secretary of the Commission. Mr Seller arrived in Mauritius on 28 December 1965 and the members followed on 3 January 1966. Professor Leys visited Rodrigues whilst the Chairman and Mr Randall toured Mauritius. During January there was a wide-ranging consultation process, both public hearings and private talks were held with the main political parties and other interested persons. The Banwell Commission reported on 22 February 1966.

Vital issue of Independence

It was very important for the Commission to have regard to the fact that any electoral system it would propose would be used for a general election, in which the vital issue of Independence or some form of association with the United Kingdom was bound to play a central role. One of the main objectives of the Banwell Commission was to devise an electoral system that reduced the communal divides and risks of community

marginalisation. In this regard the Commission concluded that, *no electoral system for Mauritius can of itself prevent or eliminate the tendency to communal politics. An electoral system — such as communal electoral registers — may certainly aggravate such a tendency; but none is capable of reversing it. The best that can be hoped for is that the electoral system will allow political leaders and voters to organise on non-communal lines, and offer as much encouragement as possible to them to do so.*²⁵

The central problem

The central problem, in the view of the Banwell Commission, lay in the apparent conflict between two of the principles by which it was to be guided. Under the then existing system of single-member constituencies, the candidate having the largest number of votes was elected. The Commission noted the tendency of that system to over-represent the party securing the largest share of the vote, and to under-represent other parties. However, if the constituencies became multi-member constituencies, the tendency to over- and under-

²⁵ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [16]

representation might considerably increase.²⁶

The Commission considered the balance between fair representation and the desire for a system based on multi-member constituencies rests upon giving a party which based itself purely on the support of a minority section of the population and that got more than 25% of the vote, then it should not get less than 25% of the seats. Then it could rely on the entrenched provisions of the Constitution to “remove the vast fears aroused by the possible under-representation of minority parties”. If such a party aspired to become a majority party, then it would need to appeal to the other sections of the population, were it to succeed in doing this, it will not necessarily be under-represented.²⁷

On this key issue the Commission summed up by saying,
“the fundamental character of the electoral system should as far as possible not prejudge the issue of whether parties will seek and find support across

²⁶ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [18]

²⁷ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [21]

*community lines by assuming that they will not; but it must try to provide some insurance against the failure of the parties to do so, by removing the fear that the electoral system will so magnify the power of majorities as to jeopardise entrenched constitutional rights”.*²⁸

Plainly with the prospect of independence in view, it would have been undesirable for any part of the population to have felt that its political aspirations were being frustrated. On the other hand, the Commission stated, “We do not, however, think that legitimate aspirations should include a mathematically exact representation of communal groups in the Assembly, still less one secured by reservation.”

Three further criteria

The Commission listed three further criteria that it considered an electoral system ought to satisfy:

- (a) the system of voting should be simple, and close to that to which the electors have been accustomed;
- (b) the method of allocating seats should also be easy to understand; and
- (c) the constituencies adopted should

²⁸ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [22]

give no reasonable grounds for any feeling that electoral prospects have been adversely or favourably affected by the way in which the boundaries are drawn.²⁹

Alternative voting systems

Five major alternative voting systems were considered, namely the single transferrable vote, party-list proportional representation, limited vote, multi-member constituencies with election by simple majority and various possible mixed systems.³⁰

Recommendations

The Commission recommended that there should be multi-member block voting on a First-Past-the-Post system for three members in each of the new 20 constituencies, each of which would be created by combining two of the existing constituencies, and one further constituency with two members only in Rodrigues.

Electors would be required to cast all three of their votes so as to make it less easy for the supporter of a particular party to give his support only to the

candidate or candidates of his party who happen to be drawn from his own community.³¹

In order to deal with the questions of inducements to all political parties to seek inter-communal support, the representation of smaller communities, and safeguards against severe under-representation, the Banwell Commission recommended two correctives.

The constant corrective

A “constant corrective” consisting of five further seats in the Assembly was intended to deal with the first two questions.³² Each of the seats would in turn be filled by the “best loser”, being the one whose party and community were, as a result of the poll, least well represented in relation to his party’s share of the total vote cast and his community’s share of the total population. The calculations necessary to allocate the additional five seats were recommended to take place at the close of the poll by the Electoral Commissioner. It was thought “undesirable” to require candidates to declare their communities at the time of

²⁹ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [28]

³⁰ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [29]

³¹ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [39]

³² Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [42]

nomination.³³ Any dispute was to be resolved by requiring the candidate to make a solemn affirmation. It was thought that there would only need to be a limited number of these additional seats to benefit under-represented parties and communities, but the number of additional seats was large enough to encourage any party to seek support outside the geographical areas on the strength of a single community.

The Commission was clear that the “constant corrective” did not and should not promise complete proportionality. It is one thing for a party to, “seek inter-communal support by the assiduous fostering of separatism” and quite another “to seek that basis of support by campaigning on issues which transcend community interests”.³⁴

So as to abide by the principle not to encourage a multiplication of small parties, the Commission recommended the “constant corrective” apply only to parties with at least 10% of the vote and which returned at least one member. So as to discourage parties that do not

sponsor candidates from all communities, each corrective seat would be allocated to the party entitled to it, only if that party had a defeated candidate of the community, which was entitled to that seat.³⁵ Given the lack of a direct mandate from the electorate for those members who obtained a seat through the constant corrective, vacancies caused by the death or resignation of such members should be filled by lot drawn by the Speaker from the names of qualified people from the same community as the member who is to be replaced.³⁶

Appendix D to the Commission’s report provides a hypothetical example of how the “constant corrective” would operate. As a reminder of the different circumstances in which the Commission was reporting, the example is based on 200,000 total votes out of a population of 681,619.

Variable corrective

To allay the fears of under-representation by a minority party which draws its support from the minorities – the Commission proposed yet another corrective –

³³ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [43]

³⁴ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [45]

³⁵ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [47]

³⁶ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [51]

“the variable corrective”, that if a party acquired more than 25% of the vote but less than 25% of the seats, even after any adjustment by virtue of the “constant corrective”, that party should be allocated further seats to its “best losers”, regardless of community, so as to increase its representation to the nearest whole number exceeding 25% enabling it thereby to block constitutional amendments.³⁷

Rodrigues

Contrary to the view of Professor de Smith,³⁸ the Commission saw no alternative to recommending Rodrigues be represented by elected members of the Assembly on the same basis as in mainland Mauritius. Accordingly the Commission recommended that Rodrigues become a single constituency electing two members to the Assembly, with the inhabitants of St Brandon and Agalega perhaps being represented by the members for Rodrigues.³⁹

³⁷ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [50]

³⁸ Report of the Constitutional Commissioner, November 1964, Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly at [30]

³⁹ Mauritius, Report of the Banwell Commission on the Electoral System (London, HMSO, 1966) Colonial No 362 at [53] – [56]

Bitter controversy

The Banwell Commission’s proposals attracted bitter controversy, with some quarters attacking the Imperial conviction that Mauritian voters were beholden only to communal affiliation, which would stifle the creation of a single Mauritian identity.⁴⁰

The Leader of the Labour Party, Sir S Ramgoolam said “the Banwell Commission had devised an algebraical formula known as the constant corrective and as if that was not enough, we have been assured that the funeral is complete with a variable corrective”.

He described the proposals of the Commission as “a diabolical and Machiavellian innovation” and “a political rape of democracy”.

The Leader of the IFB, Mr Bissoondoyal said “The Commissioners have thought that they can write a revised version of ‘Alice in Wonderland’”.

Mr A R Mohamed, Leader of the CAM said the two correctives were a disguised way to introduce full proportional repre-

⁴⁰ D Sutton, “The Political Consecration of Community in Mauritius, 1948-68” (2007) 35 The Journal of Imperial and Commonwealth History 239, 256

sentation in order that a majority party becomes a minority party.

Mr Guy Forget, Deputy Leader of the Labour Party was also critical of the two correctives which were based on erroneous conclusions because of wrong interpretations on which party represented the “minorities”. In fact, he argued that we did not need the correctives.

Thus the parties represented in Government of Mauritius rejected the Banwell Commission’s two proposals that would supposedly protect the interests of minority communities and parties. The constant corrective carried the real risk that the outcome of a general election might be overturned by the result of the allocation in the name of communal proportionality.⁴¹ It meant that the majority party could never receive a best loser seat. The variable corrective simply awarded a party seats it had not been able to win in the election, regardless of community, so as to form a blocking minority for any proposed constitutional amendment and would have required the total number of seats in the Assembly to be expanded.

⁴¹ S Mozaffar, “Negotiating Independence in Mauritius” (2005) 10 International Negotiation 263, 285

The Rt Hon Mr John Stonehouse

Following the rejection of the Banwell recommendations by the Labour Party, the CAM and the IFB, the Secretary of State sent the Parliamentary Under-Secretary for the Colonies, the Rt Hon Mr John Stonehouse, to Mauritius. After detailed discussions with the leaders of all the main parties, he returned to London to discuss the possible options, with Professor de Smith who had studied the intricacies of our electoral system as Commissioner. Finally an agreement was reached over a proposal that dropped the variable corrective and radically revised the constant corrective.

Two important changes were made to the Banwell recommendations so that party alliances, as well as parties, would be permitted to qualify for the "best loser" seats and there would be no requirement for a minimum result in the constituency elections to qualify for the additional seats.⁴² This consensus ultimately led to the Best Loser System currently in place in Schedule 1 of the Constitution.

The Best Loser System that was originally enacted did not include the Rt Hon

⁴² HC Deb Vol 731 Col 93w (7 July 1966); Mr Frederick-Lee

Mr Stonehouse's recommendation that if no best loser belonging to the most appropriate community (in the case of the first four seats) or to the most appropriate community and party or party alliance (in the case of the remaining four seats) were available for any particular best loser seat, then the seat would be allocated (in the case of the first four seats) to the best loser of the community next most appropriate or in the case of the remaining four seats, to the best loser of that community and party or party alliance next most appropriate.⁴³

The constitutional amendment introduced by Act 48 of 1991 amended the procedure in so far as the second four seats are concerned so that those seats may still be allocated to the most successful party even if there is no unreturned candidate of the appropriate community available, so as not to disturb the result of the election.

Mauritius and the society of nations

As a result, the present electoral system of 20 three-member constituencies, and a two-member constituency for Rodrigues, with eight best loser seats was accepted by all parties in Mauritius. It was on these

⁴³ *Ex parte Electoral Supervisory Commission* (1991) MR 166

principles that the historic general election took place on 7 August 1967, giving Government the mandate to make Mauritius independent, the Independence Party (LP, CAM & IFB) having obtained 54.13% of the votes and 39 seats while the PMSD obtained 43.99% of the votes and 23 seats.

The 8 seats of Best Loser System, which came into play for the first time, resulted in equal distribution between the two protagonists, i.e.:

4 for the Independence Party, and
4 for the PMSD.

On 12 March 1968 the Constitution came into force.⁴⁴ "Thus", observed Professor de Smith, "was Mauritius to move forward into the society of nations".⁴⁵

⁴⁴ Section 4(1) of the Mauritius Independence Order 1968. See also the Mauritius Independence Act 1968 (UK)

⁴⁵ De Smith, *Mauritius Constitutionalism in a Modern Society* (1968) 31 MLR 601, 610

CHAPTER 4: THE SACHS COMMISSION

Over thirty years after independence, the Alliance between the Mouvement Militant Mauricien (MMM) and Mouvement Socialiste Militant (MSM), which won the 2000 general election, gave a commitment in its electoral manifesto, in the light of the fact that there existed widespread agreement in public opinion and amongst the main political parties that the electoral system should be reformed, to implement some form of proportional representation.⁴⁶ However, by the time the general elections were called in 2005, that promise remained unfulfilled.

Composition of the Commission

The Government of Mauritius established the Commission as an independent body to help consolidate and advance constitutional democracy in Mauritius. The Commission was chaired by Mr Justice Albie Sachs, a judge of the Constitutional Court of South Africa. Messrs BB Tandon, Election Commissioner of India, and Robert Ahnee, a former

Judge of the Supreme Court of Mauritius, were members of the Commission.

The Commission's remit

The Sachs Commission considered various reforms to both the Constitution and electoral system and recommended the introduction of a dose of proportional representation.

Introducing proportionality into the system

The purpose of introducing proportionality into the system was to correct what were regarded as imbalances created by the First-Past-the-Post system that were only marginally compensated for by the Best Loser System. Five models were considered.

PR Model C

Ultimately the Sachs Commission preferred its "PR Model C", which limited the number of additional proportional representation seats to 30 members chosen on the basis of lists provided by parties receiving at least 10% of the national vote. The objective of the proposed lists would be to introduce a measure of compensation in the outcome

⁴⁶ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [9]

of elections so as to make the final total of seats held by the different parties reflect more accurately the support that the parties received in the country at large.

The Sachs Commission mooted the possibility that there could be requirements binding on all parties, or internal party statutes, to ensure that the party lists provide adequate gender balance and, "help establish an appropriately balanced and representative 'rainbow' character for the party slate that ends up in Parliament." Indeed there was widespread support for establishing mechanisms that will subsume the Best Loser System and further its underlying affirmative objectives without perpetuating its anachronistic and divisive aspects.⁴⁷

The fate of the Best Loser System

One of the questions repeatedly raised with the Commission was what would happen to the Best Loser System if proportional representation were to be introduced. The Sachs Commission made it plain that it did not regard it as central to the introduction of proportional representation that the Best Loser System be either retained or abolished: the case

⁴⁷ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [50]

for proportional representation was regarded as overwhelming and not to be jeopardised by the controversy over the Best Loser System.⁴⁸

In a succinct summary of the views expressed about the Best Loser System, the Sachs Commission stated,

No issue before us aroused more intense comment. The great majority of deponents criticized the BLS vehemently. They pointed out that it formally introduced elements of communalism into the Constitution and violated the very essence of developing Mauritian citizenship; that it was based on four communities identified nearly forty years ago on an arbitrary basis with no underlying present-day sociological rationale; that calculations for the appointment of BLS were based on 1972 figures which were completely out of date; that results in individual cases have turned out to be irrational and paradoxical. The defenders of the BLS, far fewer in number, for the most part said they did not like BLS in principle but were reluctant to abolish it because it had become integrated into Mauritian electoral practice and provided

⁴⁸ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [60]

a degree of reassurance that was meaningful to one or more communities.

Only one group of deponents supported BLS without reservation, though they too acknowledged that it presented difficulties.⁴⁹

The Sachs Commission noted that the main argument in favour of keeping the system with all its manifest defects is simply not to rock the boat. Over the 40 years since independence, the system has achieved a symbolic significance, which is considered in some quarters to be an integral part of the compact that led to independence. The system demonstrates a constitutional concern for certain communities.⁵⁰

The Sachs Report went on to describe the Best Loser System as “a unique and novel electoral device that increasingly divided Mauritians and baffled visitors to the country. It went on to repeat the warning that Professor de Smith had given in 1964 and quoted in this document at pages 18 and 19. The degree of reassurance it provides is more of a symbolical and emotional nature than a practical one.

⁴⁹ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [61]

⁵⁰ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [63] – [64]

Such comfort as it offers comes at the price of it appearing as odd and anachronistic to the very security it was designed to offer.

It carries with it the real danger of marginalizing from the rest of society those identified with it so that what started off as intended to be a protection could end up becoming an impediment”.

The Sachs Commission concluded that a process should be established that would within an agreed framework of principles “find ways and means of assimilating the BLS into the new dispensation without prejudicing the status of the community or communities concerned and without keeping alive features which are widely considered to be anachronistic and offensive”.⁵¹

Importance of block voting

The Commission found that in practice it is the multi-member block voting that has encouraged parties to straddle political and community divides, since parties are less likely to succeed in the diverse nation of Mauritius by fielding three candidates from the same community in each constituency as opposed to putting

⁵¹ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [70]

forward a balanced ticket that is more appealing to voters. It is the result of this multi-member block voting that no community is left out and the Best Loser System, which was always meant to be a correctional instrument to be applied after the seats were distributed pursuant to the primary vote, is reduced to a tangential measure. The report described the Best Loser System as, "isolated and stranded as an uncomfortable relic of an earlier era"⁵² instituted before the development of a strong pan-Mauritius political sentiment.

It should also be pointed out that when the Best Loser System was introduced, it was meant to be a "temporary solution" to last for 3 elections. Yet it has continued to live on after 10 elections !

Impact of human rights law

Drawing specifically on the Chairperson's experience as a constitutional judge in South Africa, the Sachs Commission noted that international human rights law does not give minority groups the right to receive special treatment in terms of laws concerning the enjoyment of citizenship, in contradistinction to affirmative action to overcome the effects of past

⁵² Report of the Commission on Constitutional and Electoral Reform 2001/02 at [65]

discrimination: "State generosity for language, cultural or religious groups reduces rather than enhances their claims for special and particularised treatment in the political system".⁵³

Internationally there is a general move away from electoral arrangements based upon direct representation of groups in the legislature. As one of several comparative examples, as the Sachs Commission pointed out, "despite South Africa's intense and historic minority group concerns, the electoral system is completely free of an express reference to race or ethnicity". The Best Loser System jars even by reference to the Constitution of Mauritius itself, since the Constitution enshrines political rights in a manner not referable to race, religion or community.⁵⁴

Reform of the Best Loser System

The Sachs Commission's opinion was that the Best Loser System, "has outlived its original purpose and in fact is increasingly becoming counter-productive". The report recommended that the Best Loser System should be subsumed into the other recommended changes to the Constitution to be accompanied by a

⁵³ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [68]

⁵⁴ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [66] – [67]

process of explanation and negotiation with those who might feel that their rights are being diminished.⁵⁵

⁵⁵ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [69]

CHAPTER 5: THE SELECT COMMITTEE REPORT

On 23 April 2002, a motion was passed by the National Assembly appointing a Select Committee of the Assembly in light of the Sachs Commission's report.

Implementing Sachs

The Committee was tasked with recommending how to implement the Sachs Commission's recommendation of 30 proportional representation seats, but was specifically constrained from any implementation that might prejudice the Best Loser System.⁵⁶

The party list

The party list, from which proportional representation candidates would be selected, would include within the first twelve people on the list, six women and six men.⁵⁷ Save for party leaders, candidates would not be entitled to stand as candidates in constituencies as well as on the party list.⁵⁸ The Select Committee

proposed detailed requirements for the party lists of not more than 30 persons, in order of preference, including that the party or alliance fielded at least twelve candidates at constituency level.⁵⁹

Casting two ballots

On the day of the poll, a voter would complete two ballots, one to indicate his or her choice of three candidates in the constituency, as is currently the practice, and one to indicate his or her choice of party to determine allocation of the additional 30 seats. All parties that poll 10% or more of the total votes cast would be entitled to consideration. The total number of votes polled by each party having polled 10% or more of the total votes cast would be divided by the sum of 1 plus the number of candidates that party had returned in any of the 21 constituencies (the PR figure). The higher the PR figure, the greater is the under-representation of that party. The party with the highest figure would be entitled to the first additional seat, after which the

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<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at [6]

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<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at [90]

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<http://www.gov.mu/portal/goc/assemblysite/file/>

[Report%20on%20Proportional%20Representation.pdf](http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf) at [93] – [94]

⁵⁹

<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at [95] – [96]

PR figure would have to be recalculated to factor in the additional seat that that party acquired through the party list. Such a process would continue until all 30 additional seats were filled.⁶⁰

The parallel formula

A divergence of views emerged in the Select Committee which included members of opposition parties. However, the divergence was not between the ruling alliance and the opposition, rather between two members of the alliance itself.⁶¹

One member of the Select Committee suggested an alternative system based on a proposal rejected by the Sachs Commission.⁶² The essence of the proposal was that a political party or party alliance, which nominated one or more candidates in a general election and polled in respect of the candidates in aggregate 10% or more of the total number of votes cast at the general election, would be allocated proportionately elected members. The

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<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at [97] – [104]

⁶¹ L Amédée Darga, *Mauritius Electoral Reform Process* (2004) EISA Occasional Paper 24 at p10

⁶²

<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at [115]

Sachs Commission criticised this proposal on the basis that it, "would hardly touch on the disproportionality emanating from the present system".⁶³

The Select Committee included the alternative "parallel formula" in an annex to the report, which formula would allocate 30 seats by multiplying 30 by the total number of valid votes cast in favour of the candidates nominated by a given party, and dividing that figure by the total number of valid votes cast at the election, to give the number of proportionately elected members that the given party should be entitled to.⁶⁴

The essential difference between the parallel formula and the Sachs Commission's preferred compensatory model is that parallel proportional representation allocates seats to parties in proportion to their votes without taking into account the constituency seats they have already won. It therefore does not rebalance the seats in line with the votes. On the other hand, the Sachs Commission's preferred model takes into account constituency seats and aims to

⁶³ Report of the Commission on Constitutional and Electoral Reform 2001/02 at [37]

⁶⁴

<http://www.gov.mu/portal/goc/assemblysite/file/Report%20on%20Proportional%20Representation.pdf> at annex B

align the total seats won by a party with its proportion of the total vote.⁶⁵

⁶⁵ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 56

CHAPTER 6: THE CARCASSONNE REPORT

The next step in the process of consideration of reform was the commissioning in 2011, by the Prime Minister, of the Carcassonne Report.

Appointment

Following a request by the Prime Minister on 14 September 2011, Professor Guy Carcassonne (Paris West University Nanterre La Defense, who has sadly passed away recently), Professor Pere Vilanova (University of Barcelona) and Professor Vernon Bogdanor (King's College, London), together produced the report on the reform of the electoral system on the 5th December 2011.

Views

The authors concluded that the Mauritian election system was outdated for three principal reasons. Firstly, the election results tend to be unbalanced with the victor having a disproportionate number of seats. Secondly, the Best Loser System is questionable in a modern democracy because it returns candidates who failed to achieve the required number of votes and had been defeated. Thirdly, the election system requires candidates to declare not only their political persuasions

but also their ethnic origins, which impedes the development of a national identity.

30 additional seats unnecessary

The Carcassonne Report had the advantage of considering the recommendations of the Sachs Commission, but decided not to follow them. The creation of 30 new seats was believed to be unnecessary in a country with a high proportion of National Assembly members to its population, namely about 1:18,500, as compared with 1:132,000 in Spain, 1:91,000 in the UK and 1:112,000 in France. The Carcassonne Report concluded that Sachs' proposed additional 30 seats would likely fall to the major parties, which would not be a significant or fruitful progression from the status quo.

Main proposal

The main proposal made by the Carcassonne Report was to abolish the existing First-Past-the-Post and Best Loser systems, replacing them with new constituencies that would elect between four and seven members on a proportional representation basis from a

closed party list, in a similar system to that which obtains in Spain. The electoral boundaries would need to be re-drawn, resulting in a reduced number of larger constituencies, with each returning between four and seven members in proportion to the constituencies' populations, save for Rodrigues where there would be two members. In total there would be about 68 to 70 seats, to allow for population movements. The process of re-drawing the constituencies would be entrusted to the President of the Electoral Supervisory Commission, the Electoral Commissioner, the Director of the Central Statistics Office and possibly two others. Only a two thirds' majority of the National Assembly would be able to reject the re-drawn constituencies under the proposal.

Party lists

The Report anticipated that parties would have to design inclusive lists fairly representative of communities in the area in order to succeed. Further, there could be a legal requirement that the first two candidates on the party list be of a different gender. The Carcassonne Report suggested proxy voting and a deterrent against "crossing the floor" to facilitate a smooth transition to a proportional representation electoral system. The

Carcassonne Report also made proposals regarding ministers being appointed from outside the ranks of the National Assembly, the formation of Government and the dissolution of the National Assembly.

Best Loser System

The late Professor Carcassonne proposed the replacement of the current Best Loser System by an alternative formula which would keep its underlying objectives without ethnic reference.⁶⁶

⁶⁶ "Attention, il ne s'agit pas de supprimer le Best Loser sans trouver un substitut qui garantisse à chaque communauté qu'elle sera normalement représentée. Des substituts, on peut en imaginer. Le droit constitutionnel et la science politique ont fait, depuis 50 ans, des progrès phénoménaux. Nous avons dans la boîte à outils un nombre d'instruments incomparables avec ceux de nos prédécesseurs" - quoted in R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 43

CHAPTER 7: THE SITHANEN REPORT

Very soon after the publication of the Carcassonne Report, Dr Rama Sithanen published his latest report documenting proposed changes to the voting system in Mauritius. Dr Sithanen was the Minister of Finance of Mauritius between 1991 and 1995 and the Vice-Prime Minister and Minister of Finance and Economic Development between 2005 and 2010. Having taken an interest in reform of the electoral system in Mauritius for many years, Dr Sithanen was able to draw on his deep understanding and produce a detailed and comprehensive report in excess of 100 pages, which unlike any of the preceding reports tests the effect of its proposals using extensive polling data from previous elections.

*The effects of different proposed electoral systems may not be fully understood by those involved, but reforms need to be understood with regard to the relevant contextual and temporal factors.*⁶⁷

⁶⁷ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 23

Problems with the Carcassonne Report

Despite regarding the Carcassonne Report as having proposed a novel idea, the Sithanen Report concluded that it created too many practical problems and had too many unintended consequences. In particular, the Sithanen Report perceived the following to be weaknesses of Carcassonne's proposal:

- (1) radical changes to the current First-Past-the-Post system that has been widely accepted in Mauritius for many years;
- (2) absence of well defined boundaries for the multi-member constituencies, the redrawing of which would probably result in deep division and bitter disagreement;
- (3) risk that no clear majority will emerge by reference to elections in Spain since the restoration of democracy in 1977, which would result in minority governments necessitating the support of many small parties to govern, despite Carcassonne's proposed measures to strengthen the system by, for example, proxy voting and making it more difficult to dislodge a sitting Prime Minister;

- (4) danger of not meeting the criteria of diversity and inclusiveness at the constituency level, albeit that concern may be ameliorated at a national level;
- (5) disenfranchisement of the electorate by allowing the political parties to decide who goes on the list and in what order; and
- (6) weakening of the link between the elected representatives and their constituents as it currently exists in a First-Past-the-Post system.⁶⁸

No need to throw away the baby with the bathwater

In respect of the Carcassonne Report, Dr Sithanen commented that there is, "absolutely no need to throw away the baby with the bath water".⁶⁹ Mauritius had on various occasions considered the possibility of a fully proportional representation system, even as early as the First London Conference in 1956. However, Mauritius had decided upon the existing system as striking the correct balance between stability of government and fairness.⁷⁰

⁶⁸ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p xiii

⁶⁹ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 3

⁷⁰ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) pp 4-5

Dr Sithanen created what he termed an "extremely bold attempt" at testing the Carcassonne model using some realistic assumptions about constituency boundaries, geographical support of the two main parties and the likelihood of a third political formation fragmenting votes in few constituencies.⁷¹ The model he tested appeared to show that Carcassonne's proposals would not lead to a majority, despite the leading party capturing 49% of the vote. These concerns about a system that would not yield stable governments weighed heavily against the Carcassonne recommendations.

First-Past-the-Post and stability

The main difference between the first-past-the-post system and the proportional representation system is that the former prioritises a stable government at the expense of fair representation, whilst the latter tends towards a fair representation of the votes in Parliament at the expense of stability. Dr Sithanen believed that the existing system needed reform to remedy the distortion between the percentage of votes achieved and the percentage of seats those votes translated into, without

⁷¹ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) pp 15-16

unduly upsetting the stability of governments.⁷²

The proposal

The essence of the system proposed was, firstly, the retention of the three-member electoral constituencies, coupled with the maintenance of electoral boundaries and the acceptance of unequal distribution of voters across constituencies, and, secondly, an additional tier of 20 MPs combined with a closed, rank-based party list to return these MPs on the basis of otherwise wasted votes, subject to a threshold for eligibility, and the provision of double candidacies.⁷³ Accordingly Parliament would have 82 MPs under the new proposal.

The under-representation of women in Parliament was a concern, which Dr Sithanen recommended be reformed by requiring parties to select no more than two candidates of the same sex in each of the twenty First-Past-the-Post constituencies in Mauritius, and if there are to be party lists, there should be one

⁷² R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p xiv

⁷³ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p xv

person of a different gender out of every three sequential candidates.⁷⁴

Dr Sithanen grounded his proposals in what he saw as the six core values in a plural society such as Mauritius: (1) government stability; (2) party fairness; (3) broad-based socio-demographic inclusion; (4) gender representation; (5) accountability; and (6) avoidance of communal parties.⁷⁵ Although it would be almost impossible for a single electoral formula to attain all these attributes, it was intended that the proposals would address the disproportionality between seats won and votes polled in Mauritius, not undermine the stability of the system, promote equal representation of the sexes, and find a viable alternative to the Best Loser System that ensures all sections of the population are adequately represented.⁷⁶

⁷⁴ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) pp xiv and 34

⁷⁵ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) pp 26-27

⁷⁶ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) pp 27-28

Four special features ensuring representation of all segments of the population

Obviously a major factor that influenced the design of the proposals was the inclusion of different racial, ethnic, religious, linguistic and cultural groups in the electoral process. Dr Sithanen regarded the Mauritian electoral system as containing four special features that guaranteed the political representation of all the main segments of the population:

- (1) specially drawn constituencies, following an intelligent pairing of Sir Malcolm Trustram Eve's forty districts into twenty constituencies, to ensure broad representation;
- (2) unequal distribution of populations across electoral districts to encourage diversity and plurality, especially for groups dispersed across the country;
- (3) three-member constituencies with a mandatory three votes per elector, recognised by the Sachs Commission as encouraging parties to straddle community divides when nominating candidates due to the political advantages of a broadly based ticket; and
- (4) the Best Loser System.

It was in that context of other safeguards being available to protect the interests of

all sections of society that Dr Sithanen felt able to recommend substantial reform of the Best Loser System.⁷⁷

Dr Sithanen recognised that, while there is a historical and symbolic dimension to the Best Loser System, the specially drawn constituencies, unequal voters per constituency and three-member electoral districts all had a much more pronounced impact on the parliamentary representation of some components of the population than did the Best Loser System.

Problems of the Best Loser System

The Sithanen Report highlighted some of the main problems with the Best Loser System including that it is anachronistic, being based on the 1972 census; that it relies on a complex two-tiered system; that history is littered with what seem to be erratic results when a candidate with more votes than a colleague in the same community is rejected for not being in the "appropriate party"; there is scope for abuse where candidates claim that they belong to the General Population in order to position themselves for a best loser

⁷⁷ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p xv

seat⁷⁸; and that it often does not result in all eight best loser seats being filled.⁷⁹

Unreturned Votes Elect

Rather than using the parallel system referred to by the Select Committee which would not address the imbalance of votes and seats, or the compensatory mode of allocating proportional representation seats favoured by the Sachs Commission, which converts the system into a proportional one in many circumstances with the attendant risks of instability, Sithanen proposed the “unreturned votes elect” formula to elect the 20 list tier MPs, i.e. the use of votes of candidates who had polled well but had not been elected.⁸⁰ The votes of unelected candidates of all parties are taken into account in all 21 constituencies. The votes are aggregated and the parties are allocated seats according to their share of votes of unreturned candidates nationally.⁸¹

⁷⁸ See the judgment of Seetulsingh J in *Carrimkhan v. Lew Chin and others* (2000) MR 145

⁷⁹ R Sithanen, “Roadmap for a better balance between stability and fairness in the voting formula” (January 2012) pp 51-55

⁸⁰ R Sithanen, “Roadmap for a better balance between stability and fairness in the voting formula” (January 2012) p 60

⁸¹ R Sithanen, “Roadmap for a better balance between stability and fairness in the voting formula” (January 2012) p 86

Simulations

Various simulations were conducted by Dr Sithanen to test how the various systems might have operated in past elections. A good summary of some of those analyses is provided where Dr Sithanen writes,

As expected, the FPTP produces the largest majority in all elections. It ranges from 14 seats in 2005 to 54 seats in 1982 and 1995. Sachs Model C lowers considerably the majority in 5 elections; it varies from no majority in 1987, to a majority of 2 seats, 4 seats, 4 seats and 8 seats in 1987, 1983, 2005, 2010 and 1967 respectively. The UVE formula sits between FPTP and Sachs Model C (closer to the latter) in the five hotly contested elections of 1967, 1983, 1987, 2005 and 2010 with a majority varying from 10 seats in 1967 and 2005, 12 seats in 1983 and 2010 and 8 seats in 1987. Essentially it gives a working margin to the winner. In 1995, it delivers all 20 seats to the MSM while Sachs operates slightly differently. The 1976 elections delivered a hung Parliament in all three modes.⁸²

⁸² R Sithanen, “Roadmap for a better balance between stability and fairness in the voting formula” (January 2012) p 95

CHAPTER 8: THE BEST LOSER SYSTEM

Upon Independence in 1968, Mauritius developed a form of governance based on the Westminster model that was deliberately structured in a modified "consociational" fashion.⁸³

Tempering the effect of communal considerations

The Best Loser System was to operate as a reassurance and safety valve to correct any imbalances in respect of fairness and adequate representation of all communities. As the Supreme Court has noted, "The purpose [of the Best Loser System] was to temper as far as possible the deleterious effect which the acceptance of communal considerations was bound to have on stable government and on the political and social life of this country. Its purpose was also to weaken the inhibitions which acceptance of these considerations was bound to produce on nation building in a country which aspired to be sovereign."⁸⁴

⁸³ D Brautigam, "Institutions, Economic Reform, and Democratic Consolidation in Mauritius" (1997) 30 *Comparative Politics* 45, 53. See also "Consociational Democracy" in A Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice* (2008, Routledge, Oxford) at 25.

⁸⁴ *Sir Gaëtan Duval v. François* (1982) MR 84

The Constitution

62 of the possible 70 members of the National Assembly are elected in constituency polls.⁸⁵ The remaining eight seats are dealt with pursuant to Best Loser System. Paragraph 5(1) of the First Schedule of the Constitution states, *In order to ensure a fair and adequate representation of each community, there shall be eight seats in the Assembly, additional to the sixty-two seats for members representing constituencies, which shall so far as is possible be allocated to persons (of any) belonging to parties who have stood as candidates for election as members at the general election but have not been returned as members to represent constituencies.* The reference to "belonging to parties" has been interpreted as preventing inde-

⁸⁵ Section 31(2) of the Constitution of Mauritius states, "The Assembly shall consist of persons elected in accordance with Schedule I to this Constitution, which makes provision for the election of seventy members." Paragraph 1(1) of the First Schedule sets out that, "There shall be sixty-two seats in the Assembly for members representing constituencies and accordingly each constituency shall return three members to the Assembly in such manner as may be prescribed, except Rodrigues, which shall so return two members."

pendent candidates from benefiting under the Best Loser System.⁸⁶

Community declaration

For the purposes of working the Best Loser System, every candidate for election at any general election is required to declare which community he or she belongs to, albeit such a declaration will not be stated on any ballot paper.⁸⁷ Regulation 12(4)(c) of the National Assembly Elections Regulations 1968 requires every candidate to make and subscribe on his or her nomination a declaration as to which of the four communities he or she belongs, which in turn is reflected in paragraph 5 of Part II of the model nomination form appended to the 1968 Regulations which reads, "I hereby declare that I am a member of the community within the meaning of paragraph 3(4) of Schedule 1 to the Constitution."

Paragraph 3(4) of the First Schedule to the Constitution states that the population of Mauritius is regarded as including a Hindu community, a Muslim community and a

⁸⁶ *Roussetty v. Electoral Supervisory Commissioner and Director of Public Prosecutions* (1982) MR 208. See also *Electoral Supervisory Commission v. The Honourable Attorney-General* (2005) MR 43 at 49.

⁸⁷ Paragraphs 3(1) and 3(3) of the First Schedule of the Constitution.

Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those three communities is regarded as belonging to the General Population, which is itself regarded as a fourth community. If the candidate fails to make the declaration, the nomination paper submitted to the Returning Officer will be invalidated.⁸⁸

The process of allocation

The process of allocation has been clearly explained by Dr Sithanen. The electoral system of Mauritius provides for the appointment of eight best losers to mitigate communal under-representation in Parliament. To ensure that the allotment of these Best Loser seats do not alter the results from the twenty

⁸⁸ In *Devianand Narrain and others v. The Electoral Commissioner and others* (2005) SCJ 159 Balancy J ordered the Returning Officers to accept eleven individuals' nomination forms, despite them not having made the declaration as to which community they belonged to. Given the very few votes the individuals obtained in the election, their inclusion did not affect and was not relevant to the allocation of the best loser seats in the 2005 general election. In the end, Balancy J was overruled by the judgment of the Supreme Court in *Electoral Supervisory Commission v. The Honourable Attorney-General* (2005) MR 42 where it was held that it was mandatory for a prospective general election candidate to declare and indicate in writing which community he or she belongs to.

constituencies, they are divided into two sets of four seats each as follows:

- the first four Best Loser seats go to appropriate (under-represented) communities irrespective of party, provided the candidates belong to a party;
- the second set of four seats are then distributed on the basis of both appropriate party and under-represented communities with a view to redressing any imbalance caused by the allocation of the first four seats.

The emphasis in the attribution of the second set of four seats is on the party and then on the appropriate community. This two-tiered allotment of Best Loser seats guarantees that the will of the people is not frustrated by the distribution of the eight supplementary seats and that a losing party is not transformed into a winner. Under normal circumstances, the winning party is guaranteed to have at least 4 of the eight Best Loser seats.

A constitutional amendment was made in 1992 to ensure that a party restores the balance in respect of the second set of four seats, irrespective of community, should candidates from the appropriate (under-represented) community be unavailable. As a result of this amendment,

two Hindus, Ramdass and Yeerigadoo, were appointed Best Loser MPs in the 2000 elections for the MSM/MMM alliance even if Hindus were not statistically under-represented. They were chosen as there was no candidate from either the Muslim or the General Population or the Chinese community to appoint with a view to restoring the balance. All GP and Chinese candidates of the MSM/MMM alliance were elected while the two defeated Muslim candidates from that alliance were already appointed Best Losers. Had it not been for the 1992 amendment, the two Hindus would not have been designated Best Losers, as was the case in the 1991 elections when the three losing candidates of the MSM/MMM alliance, all Hindus, did not enter Parliament as Best Losers.

How Best Loser seats are allotted?

For the purpose of designating Best Losers, the Mauritian population is divided into the following four communities: Hindu, Muslim, Chinese and General Population. All candidates standing for elections have to declare the community they belong to. The statistics used to measure under-representation are those of the population census of 1972.

The first four seats are distributed to the 'most successful unreturned' candidates from the appropriate community, irrespective of party. The number of persons in each group from the 1972 survey is divided into the number of elected MPs from that community plus one. The community with the highest quotient is entitled to the first Best Loser seat. The defeated candidate from that community having polled the highest percentage of votes gets the seat. The exercise is repeated until the first set of four seats is distributed, while adjusting for the Best Loser seat already won by an under-represented community before allotting the next one.

To ensure that the allocation of these seats does not reverse the choice of the electorate, the second set of four Best Loser seats corrects for any imbalance caused by the distribution of the first four. Thus, the party of the under-represented community is also taken into account in the allotment of these four seats. For instance, if none of the first four seats has gone to the party that has won the elections, the formula guarantees that it obtains the remaining four seats so as to restore the balance as it was prior to the appointment of Best Losers.

Allotment of Best Losers (1967 elections)

Appointment of Best Losers				
	Ethnicity	Name	% votes	Party
1 st	GP	Bussier	48.85	PMSD
2 nd	GP	Maingard	48.38	PMSD
3 rd	GP	Balancy	46.3	IP
4 th	GP	Rima	45.72	PMSD
5 th	GP	Forget	45.2	IP
6 th	GP	François	43.45	IP
7 th	Muslim	Mohamed	47.98	IP
8 th	Hindu	Narainen	48.55	PMSD

Source: Electoral Commission Office, Mauritius

The above Table illustrates how the Best Loser seats were allotted in the 1967 elections. The percentage of elected MPs of the four eligible communities is computed and compared to the respective share of these communities, as per the official population census, to ascertain the extent of under-representation. In the above example, with 16 MPs out of a total of 62, the General Population is the most under-represented ethnic group; it constituted 31.73 per cent of the population but had only 25.8 per cent of MPs. Applying the mathematical formula (respective share of population of each of the four communities divided into the number of elected representatives plus one) to compute the level of under-

representation, one reaches a figure of 13,097 for GP, 10,047 for Muslims, 9,854 for Hindus and 7,853 for Chinese. Therefore the first appointed Best Loser must come from the General Population, irrespective of political parties. Bussier with the highest percentage of votes (48.85 per cent) was appointed as the first best loser. The General Population was still under-represented after the allotment of the first seat. The new level of under-representation is indicated by the figure of 12,370 which is higher than that of 10,047 for the Muslim. In fact, the General Population was so under-represented at these elections that its members obtained the first four Best Loser seats. Three were from the PMSD while one belonged to the Independence Party.

The second set is designed to correct any imbalance that may have occurred in the allotment of the first four Best Losers. As the PMSD had gained three out of the four seats, it was necessary to restore the balance by appointing under-represented communities from the other party. Because the General Population was still under-represented, the fifth and sixth seats went to members of that community belonging to the Independence Party. After the attribution of the sixth seat, it was the Muslim community

that became under-represented (10,047 compared with 9,854 for the Hindus and 9,681 for the GP). The seventh seat therefore went to that community while the eighth best loser member hailed from the Hindu Community. At the end, six best loser MPs were appointed from the General Population and one each from the Muslim and the Hindu communities. However the balance between the two parties was maintained with each being entitled to four Best Losers. Thus, the will of the people was not frustrated while under-represented communities were adequately compensated.

The Best Loser System and the Courts

Before and after publication of the Sachs Commission's report, there have been several judicial statements, both locally and internationally, touching upon reform of the Best Loser System.

Ex parte Electoral Supervisory Commission (1991)

In *Ex parte Electoral Supervisory Commission* the Supreme Court said, *The question also arises as to whether now or in the years to come paragraph 5(1) [of the First Schedule of the Constitution] could properly be implemented. The purpose of 5(1) is to ensure "fair and adequate" representation of each*

community. This exercise can only be done on the basis of the latest official census, as originally envisaged in the 1966 Constitution. In 1982, however, by way of a curiously worded amendment, paragraph 5(8) of the First Schedule to the Constitution was altered to replace the phrase "the results of the latest published official census" by "the results of the published 1972 official census". We understand this was done because people are no longer required to indicate on the census form the community to which they belong.

But would it be possible, one may ask, to effect any representation which is "fair and adequate" when it is based on a figure which may not reflect present reality but the reality of 20 years ago? All these, however, are problems for the legislator, and not for us, to solve.⁸⁹

Carrimkhan v. Lew Chin and others (2000)

In modern times, with an ever strengthening national identity amongst the people of Mauritius, the difficulties of applying the requirement for a candidate to declare his or herself as being one of four communities have become more acute. They are highlighted in the

⁸⁹ (1991) MR 166 at 171-172. See also *Joomun v. Government of Mauritius* (2000) SCJ 234

Supreme Court case of *Carrimkhan v. Lew Chin and others*⁹⁰ where the Applicant brought a challenge under paragraph 3(2) of the First Schedule to the Constitution against the declaration by each of 26 candidates for the elections as to their respective communities. The touchstone for determining a person's community is their "way of life".⁹¹ The problems of dividing the population according to the four categories are highlighted where the Supreme Court states, *Way of life may depend on a series of factors - the way one dresses, the food one eats, the religion one practises, the music one listens to, the films one watches. External appearance and the name one bears are also pointers as to the community to which one may belong. The expression "way of life" used in the First Schedule has never been put to the test and some 33 years after the Constitution was drafted one cannot escape the fact that a common way of Mauritian life has gradually and steadily developed in Mauritius which cuts across communal barriers. This makes it still more difficult for a judge of the Supreme Court, whose*

⁹⁰ (2000) SCJ 264. See also the preceding judgment of Seetulsingh J in *Carrimkhan v. Lew Chin and others* (2000) MR 145.

⁹¹ Paragraph 3(4) of the First Schedule to the Constitution

*decision is not subject to appeal, to determine whether somebody belongs to a particular community by looking at his way of life. The issue further arises as to how the judge can determine the way of life of a citizen unless he becomes like Big Brother in G. Orwell's novel 1984 and watches how a citizen leads his private life. One may also change one's way of life from one election to the other. Our attention was drawn to the fact that a way of life can also be dependent on class distinction, for a rich Hindu and a rich Sino-Mauritian may have a similar way of life, depending on their financial means, whereas a rich Hindu and a poor Hindu may lead altogether different ways of life.*⁹²

The Respondents refused to provide details about their "way of life" and the Judge ultimately concluded, *in view of the stand taken by the Respondents, it has not been possible for me to look objectively at the way of life of the Respondents to determine their community, I have to confess that our Constitution is lacking in those respects and that this has to be remedied. We understand that a project of electoral reform is on the cards and hope that*

⁹² (2000) SCJ 264, p 9 per Seetulsingh J

*these defects would be remedied in the near future.*⁹³

Narrain and others v. The Electoral Commissioner and others (2005)

About five years later Balancy J held that a candidate was not prevented from standing even though he or she had not provided a declaration as to which of the four communities he or she belonged to.⁹⁴

In respect of Seetulsingh J's judgment in *Carrimkhan*, Balancy J said,

*I accordingly fully endorse the conclusion of the learned Judge in the Carrimkhan case that the Constitution contained in that respect a shortcoming which had to be remedied. It is really unfortunate that the learned Judge's hope, as at 8 September 2000, that the 'defects would be remedied in the near future' having regard to the 'project of electoral reform' which was 'on the cards' has remained a pious wish and no improvement has, up to now, been brought about.*⁹⁵

Electoral Supervisory Commission v. The Honourable Attorney-General (2005)

Balancy J's conclusion, that the requirement for a candidate to declare his or her community was unconstitutional,

⁹³ (2000) SCJ 264, pp 17-18 per Seetulsingh J

⁹⁴ *Narrain and others v. The Electoral Commissioner and others* (2005) MR 99

⁹⁵ *Narrain and others v. The Electoral Commissioner and others* (2005) MR 99, p 105

was not upheld by the Full Bench of the Supreme Court in *Electoral Supervisory Commission v. The Honourable Attorney-General*. The Supreme Court pointed out that, the declaration of community was "at the heart of the Best Loser System" in that, "in order to determine to which community a seat is to be allocated in turn, it is essential to ascertain the number of persons of that community who have been returned as successful candidates, irrespective of the party to which those persons belong..." Therefore, "In the absence of the declaration of the community of a successful candidate, irrespective of whether he belongs to a party or not, the whole exercise will be stultified, thereby rendering nugatory the allocation of the eight additional seats."⁹⁶

The Supreme Court urged the National Assembly to act,
No doubt there are certain problems inherent in the Best Loser System which have already been referred to by this Court namely (a) the 'consecration of communal considerations in constitutional terms' [see Sir Gaetan Duval v. Francois (1982) MR 84], (b) the difficulty of the Court in determining the way of

⁹⁶ (2005) MR 42, p 49

life of members of the Hindu, Muslim and Sino-Mauritian communities [see Carrimkhan v. Lew Chin and others (2000) SCJ 264] and (c) the 'fair and adequate representation' of communities which is unrealistically based on the 1972 official census [Ex parte Electoral Supervisory Commission (1991) MR 166 and Joomun v. Government of Mauritius (2000) SCJ 234], but these problems can only be solved by the legislator and not by the judiciary, as this Court has already stated in the two last mentioned cases.⁹⁷

Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others (2010)

In the consolidated case of *Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others*⁹⁸ 60 members of a political alliance called Platform Pou Enn Nouvo Konstitisyon: Sitwayennte, Egalite et

⁹⁷ (2005) MR 42, p 49. The Applicants in *Narrain and others v. The Electoral Commissioner and others* (2005) MR 99 subsequently applied by way of "tierce opposition" for an order that the judgment in the case of *Electoral Supervisory Commission v. The Honourable Attorney-General* (2005) MR 42, to which they had not been a party albeit they had participated as 'amicus curiae', be declared null and void. Their application was dismissed in *Narrain and 11 others v. The Electoral Supervisory Commission and others* (2006) SCJ 214.

⁹⁸ (2010) SCJ 138

Ekolozi and several persons proposing to stand as independent candidates in the May 2010 general elections applied for their names be included on the candidates list (although they did not want to be considered for best loser seats) despite not having completed the declaration as to which community they belonged to. Mungly-Gulbul J was inclined to agree with the judgment of Balancy J saying,

*the extent to which the exercise of the allocation of eight additional seats — a supplementary and ancillary electoral process — would be disrupted is, in my view, quite uncertain and debatable. In any event, we are here talking about some degree of disruption, the effect of which is, in my view, equally debatable. On the other hand, we are concerned with the much more certain disruption of the main electoral process at the heart of the democratic system by preventing otherwise fully qualified candidates, duly nominated by equally qualified electors, from standing as candidates and potentially becoming the representatives of the people in accordance with the wish of the majority of the population.*⁹⁹

⁹⁹ (2010) SCJ 138, pp13-14

The Judge, however, considered herself bound by the doctrine of precedent and followed the decision of the Full Bench in *Electoral Supervisory Commission v. The Honourable Attorney-General*.¹⁰⁰

Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others (2011)

The May 2010 election took place without any of the Applicants, Dany Sylvie Marie and Dhojaven Vencadsamy and others, being candidates. The Applicants decided to take their fight to the Judicial Committee of the Privy Council seeking special leave to appeal.¹⁰¹ The Judicial Committee concluded that the Constitution provided if not expressly, then by necessary intendment, that it had no jurisdiction to grant special leave to appeal from a determination by the Supreme Court under paragraph 4(4) of the First Schedule. The Judicial Committee's judgment does, however, make clear that it will not prevent a constitutional challenge being brought

¹⁰⁰ (2005) MR 42

¹⁰¹ *Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others* [2011] UKPC 45. It was not possible for the applicants to appeal against the refusal by Mungly-Gulbul J because paragraph 4(4) of the First Schedule to the Constitution provides that in such a case “the determination of the Judge shall not be subject to appeal”.

against the Best Loser System in the future.¹⁰² Accordingly, it was not necessary for the Board to deal with the merits. Lord Clarke did, however, have this to say,

It has been plain to the Board from the argument that the question whether the Best Loser System should be retained has given rise to much political and perhaps legal debate over the years. It is now some years since Seetulsingh J said that he understood that a project of electoral reform was on the cards. The Board was told much the same. It is perhaps obvious that it would be much better for these issues to be decided as a result of political debate and, if necessary, constitutional reform than through the courts.

There is undoubted force in the submissions made on behalf of the respondents that the applicants' real concern is not with the Regulations but with the Best Loser System set out in the First Schedule. The Board well understands the applicants' concerns, especially for example the amendment to paragraph 5(8) of the First Schedule which introduced a reference to the 1972 census as the basis of an important part of the calculation

¹⁰² *Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others* [2011] UKPC 45 at [57] per Lord Clarke

necessary to operate the system: see Annex A, First Schedule, paragraph 5(8), note 1 below. It is said that a system based on figures now nearly forty years old makes no sense. However, whatever the merits of the opposing arguments, the Board is unable to express a view upon them now.

*The Board understands that the applicants wish to say that their existing constitutional rights have been infringed but does not think it right to reach any firm conclusions on the merits. It appreciates that, if the issues cannot be resolved politically, they may be raised before the Judicial Committee in the future.*¹⁰³

Devianand Narrain and others v. Mauritius (2012)

Most recently a communication was made by nine individuals to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.¹⁰⁴ The authors of the complaint

¹⁰³ *Dany Sylvie Marie and Dhojaven Vencadsamy and others v. The Electoral Commissioner and others* [2011] UKPC 45 at [62] – [64]

¹⁰⁴ *Devianand Narrain and others v. Mauritius*, CCPR/C/105/D/1744/2007, Views adopted on 27 July 2012. An earlier communication about the Best Loser System was dismissed due to the delay

were the same members of a registered political party named Rezistans Ek Alternativ, whose candidacies for the 2005 general election were initially refused on the basis that they had not provided a declaration as to their respective appropriate communities, but were then reinstated by order of Balancy J in *Narrain and others v. The Electoral Commissioner and others*.¹⁰⁵ None of them were successfully returned or eligible to be considered under the Best Loser System. The Supreme Court reversed the decision of Balancy J, after the election.

The Applicants submitted that regulation 12(5) of the National Assembly Elections Regulations 1968, to the extent that it invalidates the nomination of a candidate to a general election who does not declare to which of the Hindu, Muslim, Sino-Mauritian or General Population communities he or she allegedly belongs, violates article 25 of the Covenant, which includes the right to stand for election.

of about five years in bringing the complaint: *Gobin v. Mauritius* CCPR/C/72/D/787/1997, Views adopted on 16 July 2001.

¹⁰⁵ (2005) MR 99

The Committee found there had been a violation of the Covenant stating, *According to the First Schedule to the Constitution, the additional eight seats under the Best Loser System are allocated giving regard to the "appropriate community", with reliance on population figures of the 1972 census. However, the Committee notes that community affiliation has not been the subject of a census since 1972. The Committee therefore finds, taking into account the State party's failure to provide an adequate justification in this regard and without expressing a view as to the appropriate form of the State party's or any other electoral system, that the continued maintenance of the requirement of mandatory classification of a candidate for general elections without the corresponding updated figures of the community affiliation of the population in general would appear to be arbitrary and therefore violates article 25 (b) of the Covenant.*¹⁰⁶

The Committee observed that Mauritius is under an obligation to provide the authors with an effective remedy, including compensation for legal expenses, to update the 1972 census with regard to

¹⁰⁶ *Devianand Narrain and others v. Mauritius*, CCPR/C/105/D/1744/2007, Views adopted on 27 July 2012 at [15.5]

community affiliation, to reconsider whether the community-based electoral system is still necessary and to avoid similar violations in the future.¹⁰⁷

¹⁰⁷ *Devianand Narrain and others v. Mauritius*, CCPR/C/105/D/1744/2007, Views adopted on 27 July 2012 at [17]

CHAPTER 9: THE NEED FOR REFORM

Nine general elections have been held under the electoral system outlined above since 1967. During that time, there have been regular changes of government. There has been widespread acceptance of the validity of the outcomes of the elections and Mauritius has established itself as a vigorous and stable parliamentary democracy.

However, the First-Past-the-Post system, while ensuring stability, has been criticized as insufficiently proportionate to the share of votes secured by the political parties. For example, in 1982, the Labour led alliance polled over 25.78% of the national vote, yet obtain no constituency seats in the Legislative Assembly. The allocation of seats pursuant to the Best Loser System gave it only 2 seats. In 1995, the MSM–RMM alliance garnered 19.7% of the national vote but obtained no constituency seats. It received no seats under the Best Loser System. In 2000, the main opposition party won 36.7% of the national vote but only 6 of the 62 elected seats; it received 2 additional seats under the BLS. In 2010, the main opposition party took 42.9% of the national vote but obtained

only 29% of the FPTP seats and was allocated 2 additional seats through the BLS. These results show that the electoral system can produce parliamentary outcomes that are, at times, so dramatically misaligned to the share of votes cast for the respective parties that they call for alleviation. They also show that the Best Loser System, which was designed for a different purpose, is inadequate to perform this task.

Pre-independence concerns about the Best Loser System

The Best Loser System was conceived in the years before Independence. However, even then there were serious concerns about it. The 1957 London Agreement set out the principles for any proposed electoral system, to include voting methods that facilitate the development of voting on grounds of political principle and party. Transforming the Governor's power of nomination into a corrective to the voting system risked the "consecration of communal considerations in constitutional terms". Despite any advantages it would have in terms of

ensuring adequate representation, in 1964 the Constitutional Commissioner, Prof. De Smith, regarded it as an "evil nonetheless, and one which may seriously inhibit the growth of national consciousness over the years". Even the 1966 Banwell Commission thought it "undesirable" to require candidates to declare their communities at the time of nomination.

The case for change

Mauritius' fortunes have dramatically improved since the Best Loser System was introduced at Independence in 1968.

The case for reform of the Best Loser System has now been made by many voices from civil society, by constitutional experts, by the Supreme Court of Mauritius, the Judicial Committee of the Privy Council and the United Nations Human Rights Committee. In 1991, the Supreme Court sounded a note of concern about the Best Loser System being based on an out of date 1972 census. There has been considerable debate about the appropriateness of the constitutional classifications. In any event, constitutional entrenchment of ethnic groups and determining individuals' "ways of life", have all proved highly contentious.

Moreover, cultural differences between groups are tending to reduce with the rise in social mobility and the emergence of common patterns of consumption, of material culture and attitudes.¹⁰⁸

The Best Loser System depends for its validity on an accurate and up to date census of the number in the population of each constitutionally prescribed community. As the UNHRC has now observed, the System cannot be sustained as consistent with the International Covenant on Civil and Political Rights unless that data gathering resumes, something which the main political parties agree is unacceptable. Together, the views of the UN Human Rights Committee and the lack of desire to update the 1972 community-based population census, make clear that the, "ethnic balance in Parliament cannot be underpinned by constitutional design. It has to be driven by the political parties' natural strategies and their continued imperative to play what has been called the 'balancing game'".¹⁰⁹

¹⁰⁸ A Jahangeer-Chojoo, "From Minority to Mainstream Politics: the Case of Mauritius Muslims" (2010) J Soc Sci 121, 126

¹⁰⁹ Dr Sithanen, 26 June 2013, L'Express

The process of change

Consideration of reform of the system has been around for over a decade. The Sachs Commission 2001/2002 recommended reform by creating 30 additional proportional representation seats to be chosen on the basis of lists provided by parties receiving more than 10% of the national vote. The 2002 Select Committee suggested a form of implementation for the new seats. In 2011 Carcassonne recommended a complete proportional representation system. In 2012 Dr Sithanen proposed the "unreturned votes elect" formula to elect 20 proportional representation MPs by using the votes of candidates who had polled well but had not been elected.

Other safeguards in the system

As commentators such as Dr Sithanen have observed the Best Loser System is not the only or even the major safeguard for ensuring diversity in the National Assembly. This has been confirmed by all the constitutional experts consulted. The mechanisms include the need for political parties to select candidates so as to produce broad electoral appeal.

Hopes and aspirations for the future

An electoral system does not simply reflect voter preferences and existing

divisions in society, it should also signal the values and preferences of the future. As Mauritius develops as a nation, it cannot continue to rely on a system based on old statistics, 42 years old, that no longer reflects the changes in society.

Women

The hopes and aspirations of our people also include those of one half of our population who have historically been under-represented in our National Assembly and whose potential contribution to our political culture and society is not being maximised - women.

The parliamentary representation of women rose from just 5.7% in 1983 to 17.1% in 2005 and to 18.8% in 2010.¹¹⁰ Despite an acknowledgment of the under-representation, only modest advances have been made. All parties agree we should do better.

In addition to the above judicial decisions and statements and the pronouncement of the UNHCR, the Sachs Commission, the Carcassonne Report and the Sithanen Report all expressed the view that the Best Loser System had "outlived its

¹¹⁰ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 31

original purpose" and must be "subsumed" in a reformed electoral system.

In a paper published in 1999 two-respected Mauritian personalities, the late Sir Marc David, QC and Mr Pierre Dinan wrote "Le Best Loser System est archaïque et anachronique. Il réclame de tout candidat aux élections générales de déclarer son appartenance ethnique alors que depuis 1982 la Constitution empêche toute référence à celle-ci lors des recensements démographiques."

When the BLS was introduced, it was meant to be a temporary device to last for three elections. It has now survived ten elections. Besides, apart from negating nation-building, it is a system with many inherent problems, as we have seen:

(1) It is anachronistic since it is based on an outdated census of 1972.

At the next general elections in 2015, it will be 43 years old.

In the meantime, the size of the voting population has changed in the various constituencies.

The ethnicity, on which the BLS is based, has also evolved. It is never static in any country.

To illustrate this point at the general elections of 1976 – the 1972 census was used.

But if the 1972 census were to be applied to the 1967 elections, the allocation of Best Loser seats would have been different both in terms of communities and individuals.

(2) The formula for the allocation of the BLS is very complex:

- It starts with the appropriate community which is under-represented;
- Then it has to look at the appropriate party with the appropriate community; and
- Then it has to ensure that the majority of the winning party or alliance is not reduced, as far as possible.

And the final result can be arbitrary, for example a small party with a low percentage of votes may secure a Best Loser seat while a larger party with a greater percentage of votes does not.

For example In 1995, the MSM-RMM with 19.7% of the votes got no BL seat while a very small party secured two such seats.

(3) The allocation of seats can be erratic.

For example, in the 1983 elections, Mr Nawoor (MSM/LP) with 16.2% of the votes (1,684) was allocated a seat, while Mr Kasenally (MMM) with 47% of the votes (9,695) was not.

Yet both belonged to the same community that was under-represented. Similarly in the 1987 elections, Mr Finette (PMSD) with 47.4% of the votes (13,541) was allocated a seat. While, Mr Bérenger (MMM/MTD/FTS) with 48.7% of the votes (15,332) was not.

What is worse, in the case of Mr Bérenger, was when the seat had to be allocated to the General population – the community under-represented, Mr Bérenger was in the appropriate community but not to the appropriate party.

However, when another seat was to go to the MMM, then Mr Bérenger was in the appropriate party (MMM) but not in the appropriate community (General population) and instead Mr Peerun (MMM/MTD/FTS) who had polled 44% of the votes (12,999) was selected.

These examples speak for themselves.

(4) It can also appear illogical and irrational –

For example In the 1983 elections – there were 2 candidates belonging to the same community and to the same alliance – Mr Malherbes and Mr Candahoo. Mr Malherbes polled 44.9% of the votes and Mr Candahoo polled 43.3% of the votes.

Yet it was Mr Candahoo who was selected.

The reason was although they were both in the same alliance (MSM/LP/PMSD) they had different electoral symbols on their ballot papers.

Mr Malherbes had the PMSD symbol (the cockerel) while Mr Candahoo had the MSM/LP symbol (the sun and the key).

This was done to avoid three symbols on the ballot paper.

(5) The Constituencies in Mauritius do not have the same number of electors - they vary considerably.

Yet a candidate belonging to the same community and the same party but with fewer votes can be allocated a seat while the one with more votes not.

For example in the 1967 elections:

Mr Koenig (PMSD) obtained 6,851 votes and Mr Rima (PMSD) obtained 6,596 votes.

Both belonged to the PMSD and to the same community, but Mr Rima stood in a smaller Constituency and therefore, had a higher percentage of votes.

Similarly in the 2000 general elections:

Mr Leopold obtained 7,732 votes in Rodrigues and his party had 1% of the national vote.

While, Mr Petit polled 14,626 votes (nearly double), he was not allocated a best loser seat.

(6) The BLS can also be unpredictable as it was in 1982, 1991 and 1995 – where only 4 Best Loser seats were allotted because the winning party did not have any unreturned eligible candidate. We ended up with a Parliament with 66 Members instead of 70.

Similarly in the 2010 general elections, only 7 Best Loser seats were allocated.

(7) There is a real possibility, and it has happened, that a candidate decides to choose a different community for different reasons.

For example in the 2010 elections, Mr Yeung Sik Yuen opted to stand as a member of the General Population although he could have chosen Sino-Mauritian.

Had he done so, he would not have been allocated a Best Loser seat.

In a previous judgment, Judge Seetulsingh had found that it is perfectly Constitutional for this to be done and he was in no position to decide on the way of life of any individual.

This raises serious questions about the enforceability of the BLS.

(8) In case of a vacancy of Best Loser seat, the next unreturned candidate could well have switched sides and therefore again this could pervert the system.

It is therefore, abundantly clear that there are now compelling reasons to subsume the Best Loser System into the new electoral reforms being proposed.

CHAPTER 10: PROPOSALS FOR REFORM

The long and detailed process of reports, views of constitutional experts and debates on electoral reform in Mauritius enables Government to make its own firm proposals on issues where there is broad agreement, and to discuss various options where there is no broad consensus yet.

As mentioned in the Foreword, there is no need to re-open the whole debate on every issue that has already been canvassed.

We need to move forward.

Guidance for a plural society

In setting out the issues that need to be addressed, Government is guided by the following widely accepted criteria of a good electoral system for a plural society such as Mauritius, namely one that:

- (1) Ensures Government stability: the electoral system must provide for stable, effective and decisive Government.
- (2) Promotes party fairness: to ensure increased correspondence between the share of votes and the share of seats won.

- (3) Fosters broad based socio-demographic inclusion: all the components of our rainbow nation must secure adequate Parliamentary representation.

- (4) Promotes fair gender representation: the system should encourage the involvement of women in the political process and their enhanced presence in Parliament.

- (5) Provides for accountability: the electoral system should maintain and indeed strengthen the link between MP's and their constituents.

- (6) Discourage communal parties: the voting formula should not exacerbate divisions in a multi-ethnic society like ours.

- (7) Enhance transparency: the voters must know for whom they are casting their votes beforehand.

There is no perfect electoral system. It is almost impossible for one voting formula to satisfy all these attributes. In fact some of them are mutually exclusive and often it is possible to achieve one particular objective (stability) only at the expense of another (fairness). As a result an electoral system must necessarily balance various

objectives and values. Specialists differ on which criteria matter most when choosing an appropriate electoral system as the exercise involves many trade-offs and a careful balancing act.

The most appropriate voting system for a country is not one that satisfies only one criterion completely, but one that provides a fair balance amongst the attributes.

The most compelling consideration facing reformers of electoral systems is how to strike the right balance between stable, decisive, effective, responsive and accountable government that are considered the strengths of FPTP systems and fairness and representation which are the main attributes of proportional representation formulae. Often, these two sets of criteria move in opposite directions.

These are the Government's firm proposals:

(1) Retention of the compulsory three votes in the 20 constituencies in the island of Mauritius and the compulsory two votes in Rodrigues

The electorate will, as before, have to vote for 3 candidates in the 20

constituencies in the Island of Mauritius and for 2 candidates in Rodrigues.

Therefore there is no change in the current FPTP system.

(2) Rodrigues

Consideration would then have to be given to the position of Rodrigues. Essentially there are two options. One would treat Rodrigues in the same way as any other constituency, with the votes of the unelected parties being aggregated and counted at the national level. Another would be to have a specific formula for the votes in Rodrigues.

On the one hand it could be argued that special measures are not necessary for Rodrigues which already has two MPs on the FPTP election and representation through the Regional Assembly. On the other hand there is a view that its votes should be aggregated equally with other constituencies.

Government is in favour of maintaining the current FPTP system with respect to the National Assembly.

(3) Accept unequal constituency size

Although there is quite a variation between constituency size and the number of voters per constituency,

Government believes that adjusting the number of electors per constituency will create more problems than it solves.

Government is well aware that since constituency size is not equal, this creates a distortion on the number of constituents per MP and this will also have a bearing on the wasted votes or UVE (Unreturned Votes Elect) which will be addressed later.

The next proposals are areas where there is no broad agreement, but nevertheless this document discusses the options and gives a view on Government's position.

(4) "Subsuming the Best Loser System: Promote Inclusion, Foster Nationhood"

Government firmly believes that any new system must meet the aspirations of Mauritians who wish to see that the composition of Parliament reflects the diversity of the population.

The question as to how this could best be achieved was addressed by Dr Sithanen in the following terms,

Plural societies need policies and institutions that foster accommodation and encourage cooperation among different groups. They also require an electoral system that is inclusive from both a socio-demographic and a gender perspective. The key challenge is whether

this should form part of a social compact, a consociational convention or it should be embedded in the constitution or another legislation.¹¹¹

The proposed electoral system may indeed assist in reflecting the plurality and diversity of the Mauritian nation in the legislature. As Dr Sithanen said, the one difference will be that, instead of these seats being *constitutionally entrenched, it will now form part of a social compact, a consociational arrangement where the responsibility rests with political parties especially their leaders. And it has to work because of the self-interest of political parties. All the major parties have a long tradition and practice of presenting a balanced slate to appeal to all segments of voters.*¹¹²

We have a clear choice before us: either we resume the system of population census, which was abolished in 1982 or else we find a system which obviates the need for candidates to declare their ethnic origin.

To do so, we must find a way to subsume the Best Loser System as its

¹¹¹ R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 33

¹¹² R Sithanen, "Roadmap for a better balance between stability and fairness in the voting formula" (January 2012) p 47

operationalisation depends on an up-to-date population census.

The census is at the heart of the Best Loser System. Without an up-to-date census, the Best Loser System becomes irrational and anachronistic as the courts have repeatedly said.

The main parties agree that to resume a new census would be divisive, more than ever and will be a retrograde step.

We want to unify our people around a single Mauritian identity not a system that will raise the ugly head of division and sub-division.

(5) How many PR seats ?

One should acknowledge the rationale for the PR seats and also the constraints. In our case, they purport to achieve four important objectives:

- (i) lower the vote/seat disproportionality by creating a fairer balance between the share of votes polled and the share of seats obtained;
 - (ii) avoid the infamous 60-0 by ensuring that a party that polls a relative high percentage of seats does not end up with no parliamentary representation at all;
 - (iii) ensure gender fairness by providing for a significant share of seats to women;
- and

(iv) subsume the 8 Best Loser seats within the new dispensation so as to comply with the pronouncement of the UNHRC whilst at the same time ensuring that all components of the population are fairly represented.

There is a balance to be struck.

We need to determine how many additional PR seats are required to satisfy our need for stability and fairness while subsuming the Best Loser System.

If there are too many PR seats, the stability of the system is likely to be challenged and it might be difficult either to have a clear winner or for the winner to govern effectively and efficiently for the duration of the mandate. However, if there are too few PR seats, it might be very hard to lower the disproportionality of the FPTP mode, to avoid near 60-0, to subsume the Best Loser System and to ensure gender fairness.

Sachs had proposed an additional 30 PR seats, which will mean a Parliament of 92 MP's.

The MMM/MSM alliance are proposing 28, which will mean a Parliament of 90 MP's.

Dr Sithanen has proposed 20 which will mean a Parliament of 82.

After careful consideration, Government proposes at least 16 additional seats to complement the 62 FPTP MPs. The final number will be determined after consultation / discussions with the various stakeholders.

Already, as mentioned, in Chapter 6, we have a higher number of MP's per inhabitant.

In Spain the ratio is 1:132,000

In France the ratio is 1:112,000

In UK the ratio is 1:91,000

In Mauritius the ratio is 1: 18,500

Government feels that stability and governability are essential prerequisites for our democracy.

(6) Eligibility threshold to obtain PR seats

The choice of a given threshold will depend on the level of political fragmentation on communal and religious exacerbations we want to tolerate. The lower the threshold, the easier it is for small parties to cross the line and obtain Parliamentary representation. However there are two dangers with a low threshold. There would be a proliferation of small parties than can affect the stability of the system and there are real

risks to national cohesion with the rise of ethnic-based parties.

We recommend a threshold of 10 % of votes to reduce the danger of too much factionalism, to lower the likelihood of ethnically based parties from emerging, to preserve the system of strong and broadly representative parties and to prevent government instability.

(7) Formula to allot PR seats

There are three options. The parallel formula was found by all experts to be very insignificant in correcting the unfairness emanating from the FPTP system as it leaves huge distortion between seats and votes. The presence of the Opposition will be symbolical only and it will not be able to play a meaningful role in Parliament.

However, the compensatory mode of allocating PR seats could convert the electoral system into a proportional one in many cases and thus make it more difficult to have effective and decisive government.

Hence our recommendation to adopt the innovative formula proposed by Dr Sithanen to apportion PR seats on the basis of votes obtained by unreturned

candidates. It is a hybrid between the parallel and the compensatory formulae.

(8) How should the PR MP's be chosen ?

There are two alternatives which need to be considered:

The first one is a closed, rank-based PR list as recommended by Sachs, Carcassonne, Collendavelloo and Sithanen. The panel of UK experts including Professor Curtice from the UK also proposed a closed list in order of priority.

The list would be in order of priority and has to be submitted to the Electoral Supervisory Commission on Nomination Day.

The reasoning is that the voters have a fundamental right to know for whom specifically they are casting their ballot.

This is also best international practice.

However, a second alternative is a closed unranked PR list published in alphabetical order and not necessarily in order of priority to be submitted at latest on Nomination Day to the Electoral Commissioner. And MPs will be chosen from that list by Party leaders after the elections depending on the number of PR seats allocated to their parties.

A third option is a combination of the two i.e. a closed rank list complemented by a

number of candidates in alphabetical order.

As there is an ongoing discussion on how to return PR MPs, we leave the final choice to an enlightened debate and an informed discussion among the various parties.

(9) Crossing the Floor and PR members vacating their seats

Government sees an important difference between MPs elected on a FPTP system and those additional members who would be elected on a proportional representation basis. The latter members' mandate would stem from affiliation to the party. Accordingly, if a proportional representation MP chooses to cross the floor or passes away or resigns his seat, Government proposes that the next candidate on the party list should be appointed. This proposal would not apply to MPs directly elected in the multi-member constituencies.

(10) Gender fairness

Women represent around 50.5 % of the population. Significant progress has been made in many fields by women. However their representation in Parliament remains low. Gender fairness therefore matters significantly and empirical

evidence suggests that the critical mass is at least 30 % of women in Parliament.

We therefore propose a simple gender neutral formula that respects the equality between men and women in politics along the following model:

- (i) to provide that at least one third of the total number of candidates from the FPTP constituencies be of either gender;
- (ii) to ensure on the Party list that neither gender represents less than 33 % of candidates,
- (iii) to have at least one person of a different gender out of every 3 sequential candidates on the PR list; and
- (iv) in case the second alternative is adopted, at least one third of the PR lists chosen by party leaders should be of either gender.

(11) Double candidacies

If candidates are allowed to stand in both the constituency and on the list, then the names of candidates who succeed in being elected as constituency candidates would be deleted from the list and the seat they otherwise would have won would be assigned to the next candidate remaining on the list.

Double candidacies will provide candidates with a second chance similar to what exists currently under the BLS.

We therefore recommend to allow the flexibility for parties to decide whether they would field the same candidate in both FPTP and PR modes. It is not mandatory. Parties will be free to decide on whether to use double candidacies.

CHAPTER 11: CONCLUDING REMARKS

Choosing the right electoral system in a plural society is a very difficult process as it is never neutral. It has very clear implications on the political development of the country. Historical, political, social, cultural, contextual and temporal factors have to be taken into account as the system and any reform do not take place in a vacuum. The exercise is complicated by the fact that electoral systems are not disinterested in their translation of votes into seats. At the end of the day, it depends on the willingness and the desire of political actors to compromise in order to reach an acceptable and a sustainable consensus.

Mauritius needs an electoral system that ensures government stability, guarantees equity to parties, promotes gender fairness, fosters broad socio-demographic representation, encourages accountable government, maintains constituency links between MPs and their constituents, shuns overtly communal parties and enhances transparency. It is not easy to have all these desired attributes in any electoral system, especially as all do not point in the same direction. There is an absolute need to balance one feature against another.

There is bound to be some trade off between these values, especially between stability and fairness. It is the nature and the extent of such trade-off that should constitute the basis of the discussions with a view to having a broad consensus.

The new system should be robust and sustainable. It is equally imperative, in the exercise, to acknowledge the disadvantages of alternative systems in addition to their presumed virtues. And we must assess whether it is possible to avoid the drawbacks of the current system without introducing undesirable features and consequences in the new formula.

Never has the country been so close to reaching an agreement on reforming the electoral rules. All concur on the need for reform. It is plain that where there is no broad agreement yet, there should be further discussions. As in other countries that have embarked on the path of changing the voting formula, compromises must be made to reach an acceptable reform.

As Professor Norris of Harvard University has famously argued:

“electoral systems are rarely designed, they are born kicking and screaming into the world out of a messy, incremental compromise between contending factions battling for survival, determined by power politics”.

In the case of Mauritius it is clear that it will have to be a combination of some ‘design’ and some ‘compromise’ between political parties. One can only hope that reason, informed judgement and long term national interest will prevail.

We must at all times ensure that whatever system we agree upon echoes the aspirations of our citizens. Together, we have to chart out a system that unifies the nation and provides for stable, responsible, fairly responsive and representative governments for the betterment of the nation.

This consultation paper precisely provides the opportunity for informed comments as Government strives to reach broad based agreement in order to modernise our electoral system as a first step towards modernising our constitution in line with the evolution and expectations of our nation.

Together, we have built a modern nation !
Let us now together build a modern society !

CONSULTATION PROCESS

Government invites the views of all interested parties on this Consultation Paper.

Please send your proposals/comments/suggestions at latest by 05 May 2014.

Submissions may be made in writing to:

The Electoral Reform Unit

Prime Minister's Office

Ex-Treasury Building

Port Louis

Or by-email to electoralreform@mail.gov.mu

24 March 2014